

**Clearon Corp. and Occidental Chemical Corp., et. al., v. United States**  
**Court of International Trade Consolidated Court No. 13-00073**

**FINAL RESULTS OF REDETERMINATION  
PURSUANT TO REMAND**

**A. Summary**

The Department of Commerce (Department) prepared these final results of redetermination (Final Remand Results) pursuant to the decision and remand order of the U.S. Court of International Trade (Court) issued on July 24, 2014, in *Chloro Isos 6<sup>th</sup> Final Results*.<sup>1</sup> These Final Remand Results concern the Department's final results of an administrative review under the antidumping duty (AD) order on chlorinated isocyanurates from the People's Republic of China (PRC).<sup>2</sup> For these Final Remand Results, the Department continues to find that the sales of Juangcheng Kangtai Chemical Co. Ltd. (Kangtai), and Hebei Jiheng Chemical Co., Ltd. (Jiheng) during the period of review (POR) were made for less than normal value (NV).

**B. Background**

On January 22, 2013, the Department published the *Chloro Isos 6<sup>th</sup> Final Results*, which covered Kangtai and Jiheng, along with other exporters.<sup>3</sup> The POR covers June 1, 2010, through May 31, 2011. Following our non-market economy (NME) methodology, we selected the Philippines over India as the primary surrogate country because, based on gross national income (GNI) statistics for the POR, we found that India is not as economically comparable to the PRC; India was not listed as a surrogate country on the Surrogate Country Memorandum.<sup>4</sup> Based on

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<sup>1</sup> See *Clearon Corp., and Occidental Chemical Corp., et. al. v. United States*, Slip Op. 14-88, Consolidated Court No. 13-00073 (CIT 2014) (*Clearon Remand*); see also *Chlorinated Isocyanurates From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 FR 4386 (January 22, 2013) (*Chloro Isos 6th Final Results*).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See Memorandum, "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," (September 9, 2011) (Surrogate Country Memorandum).

the Philippine company's financial statements that we selected, we adjusted the financial ratios to account for any overlap that existed between the financial statements and the International Labor Organization (ILO) wage rate we selected to value the labor factor of production (FOP). We also valued the intermediate goods' transportation costs between factories as part of the raw materials build up and adjusted the by-product offset calculation for one by-product to account for its build up costs for the first time in the *Chloro Isos 6<sup>th</sup> Final Results*.

In its July 24, 2014 opinion, the Court remanded the final results to the Department regarding our primary surrogate country selection as follows: (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 the Department believes India's GNI does not, if that continues to be our determination, qualify it as an economically comparable country, and (2) place the data on the record that the Department relied upon to make our determination. The Court also accepted the Department's request for a voluntary remand of the final results with the following instructions to: (1) reconsider whether the ILO wage rate used to value the labor FOP includes labor, retirement, and employee benefit expenses, and whether these expenses are double counted if the Department does not adjust the financial ratio to correctly reflect overlapping expenses in the financial statements; (2) explain the Department's change in methodology for calculating intra-company transportation costs by collecting additional information if necessary and to provide parties an opportunity to comment on any new additional information; and (3) explain our change in the calculation of our by-product methodology and to request additional information if necessary, and to provide parties an opportunity to comment on any new additional information.

Pursuant to these instructions, in our Draft Remand Results,<sup>5</sup> we provided further explanations and addressed the deficiencies identified by the Court in the *Chloro Isos 6<sup>th</sup> Final Results*. We placed additional information on the record and provided parties an opportunity to comment on the information.<sup>6</sup> On August 20, 2014, Clearon Corp., and Occidental Chemical Corp. (Petitioners), and Kangtai submitted comments.<sup>7</sup> The Department also issued questionnaires to Jiheng and Kangtai on August 11, 2014, requesting additional information on intra-company transport of goods and by-product offsets. In addition, we adjusted our NV calculation by recalculating the transportation cost of intermediate goods between factories (for Jiheng), and recalculating the by-product offset using company specific information (for Jiheng and Kangtai). In response to comments received on the Draft Remand Results, we revised the by-product calculation made to the Draft Remand Results calculations. We also clarified certain sentences in our explanation of our decision not to adjust our financial ratios to account for benefits included in the ILO surrogate value for labor. Besides minor grammatical and formatting changes, the Final Remand Results below contain no other revisions to the Draft Remand Results. Our responses to all comments received are addressed below following the Final Remand Results. As a result of these changes, we determine a weighted-average dumping margin of 31.22 percent for Jiheng and 34.21 percent for Kangtai.

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<sup>5</sup> See Memorandum, “Draft Remand Redetermination: Chlorinated Isocyanurates from the People’s Republic of China,” September 16, 2014 (Draft Remand Results).

<sup>6</sup> See Letter to all Interested Parties, “Remand of the 2010-2011 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People’s Republic of China: Placing Data on the Record and Deadline for Comments,” August 13, 2014 (Remand Data Memorandum).

<sup>7</sup> See Letter from Petitioners, “Remand of the 2010-2011 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People’s Republic of China: Comments Regarding New Data Placed on the Record,” August 20, 2014 (Petitioners Remand Comments); see also Letter from Kangtai, “Certain Chlorinated Isocyanurates from the People’s Republic of China Rebuttal Information,” August 20, 2014 (Kangtai Rebuttal Information).

## C. Final Analysis

### 1) Surrogate Country Selection

The Court determined that the Department'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 an economically comparable country is not supported by a reasonable analysis and record evidence. For these reasons, the Court remanded this issue to the Department 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 the Department'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.

#### *Surrogate Country Selection Policy*

Section 773(c)(4)(A) of the Tariff Act of 1930, as amended (the Act) states that the Department should "to the extent possible" utilize the prices or costs of FOPs in one or more market economy countries that are, *inter alia*, "at a level of economic development comparable to that of the nonmarket economy country." The statute is silent with respect to how or on what basis the Department may make this determination, but it is the Department's long-standing practice to use as an indicator of level of economic development *per capita* GNI data reported in the World Bank's *World Development Report*.<sup>8</sup>

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<sup>8</sup> See, e.g., *Preliminary Determination of Sales at Less Than Fair Value: Steel Wire Garment Hangers from the People's Republic of China*, 73 FR 15726, 15728 (March 25 2008), unchanged in *Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 47587 (August 14, 2008); *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 56158 (September 12, 2011), and accompanying Issues and Decision Memorandum, at Comment 1; *Fresh Garlic From the People's Republic of China, Final Results and Partial Rescission of the 18<sup>th</sup> Antidumping Duty Administrative Review; 2011-2012*, 79 FR 36721 (June 30, 2014), and accompanying Issues and Decision Memorandum, at Comment 1.

The statute does not require that the Department use a surrogate country that is at a level of economic development *most* comparable to the NME country and that is the *most* significant producer of comparable merchandise.<sup>9</sup> The statute requires only that the Department use a surrogate market economy country that is at a level of economic development comparable to that of the NME country and that is a significant producer of comparable merchandise. Even these requirements are not binding, as the statute requires that they be met *only to the extent possible*.

As explained in the Department's *Policy Bulletin*, "{t}he surrogate countries on the {(non-exhaustive) surrogate country} list are not ranked."<sup>10</sup> This lack of ranking reflects the Department's long-standing practice that, for the purpose of surrogate country selection, the countries on the list "should be considered equivalent" from the standpoint of their level of economic development, based on *per capita* GNI, as compared to the PRC's level of economic development.<sup>11</sup> This also recognizes that the "level" in an economic development context necessarily implies a range of *per capita* GNI, not a specific *per capita* GNI.<sup>12</sup> The Department's long-standing practice of selecting, if possible, a surrogate country from a non-exhaustive list of countries at the same level of economic development as the NME country, or another country at the same level of economic development, fulfills the statutory requirement to value FOPs using data from "one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country..."<sup>13</sup> In this regard, "countries that are at a level of economic development comparable to that of the NME

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<sup>9</sup> See the Department's Policy Bulletin No. 04.1, "Non-Market Economy Surrogate Country Selection Process," (March 1, 2004) (Policy Bulletin 04.1), available on the Department's Web site at <http://enforcement.trade.gov/policy/bull04-1.html>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See section 773(c)(4) of the Act.

country” *necessarily includes* any countries that are at the same level of economic development as the NME country.

Because the non-exhaustive list is only a *starting point* for the surrogate country selection process, the Department also considers other countries at the same level of economic development that interested parties propose, as well as other countries that are not at the same level of economic development as the NME country, but nevertheless still at a level comparable to that of the NME country. As a general rule, the Department selects a surrogate country that is at the same level of economic development as the NME unless it is determined that none of the countries are viable options because (a) they either are not significant producers of comparable merchandise, (b) do not provide sufficient reliable sources of publicly available surrogate value (SV) data, or (c) are not suitable for use based on other reasons.<sup>14</sup> Surrogate countries that are not at the same level of economic development as the NME country, but still at a level of economic development comparable to the NME country, are selected only to the extent that data considerations outweigh the difference in levels of economic development.<sup>15</sup>

#### *Reasonableness of the Income Range the Department Selected*

In the Court’s remand decision, it directed the Department to “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.” Before examining the

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<sup>14</sup> See, e.g., *Chlorinated Isocyanurates From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 4386 (January 22, 2013) and the accompanying Issues and Decision Memorandum at Comment 2; *Certain Steel Threaded Rod From the People’s Republic of China: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review; 2010-2011*, 77 FR 67332 (November 9, 2012) and the accompanying Issues and Decision Memorandum at Comment 1; *Certain Steel Wheels From the People’s Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination*, 76 FR 67703, 67708 (November 2, 2011), unchanged in *Certain Steel Wheels From the People’s Republic of China: Notice of Final Determination of Sales at Less Than Fair Value and Partial Affirmative Final Determination of Critical Circumstances*, 77 FR 17021 (March 23, 2012).

<sup>15</sup> See Surrogate Country Memorandum.

specific GNI range of this record, it is important to recall the two basic objectives that underlie the generation of the surrogate country list. The first objective is to provide a consistent starting point for all proceedings involving the same NME country, in this case the PRC.<sup>16</sup> The second objective is to provide a reasonably predictable process so that, in any proceeding involving an NME country, interested parties understand the process and methodology that the Department follows.<sup>17</sup>

At the same time, however, as noted and upheld by the Court, the Department's longstanding practice is to treat each segment of an AD proceeding, including the AD investigation and the administrative reviews that may follow, as independent proceedings with separate records and which lead to independent determinations.<sup>18</sup> In each segment of a proceeding, parties are given opportunities to present and comment on all aspects of surrogate country selection. Because of this, the Department must attempt to balance the need for consistency and predictability with the need to retain a certain degree of flexibility in order to make case-specific determinations in response to parties' comments, as well as satisfy the statute's requirement to use the best available information.

While the methodology of evaluating surrogate countries has remained consistent over the years, the process of generating the list itself has developed in response to a number of different factors, including (1) the PRC's rapid economic growth; (2) issues and arguments that arise in the context of specific proceedings; (3) the quality and availability of SV data; and (4) litigation or further guidance provided by the Courts.

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<sup>16</sup> The Court notes that the Surrogate Country Memorandum puts parties on notice early in the process, so that they are "presumed aware of the possible countries that may be selected." *See Clearon Remand*, at 29.

<sup>17</sup> The Court notes that "as a participant in previous administrative reviews it is aware of the process and methodology Commerce follows." *See Clearon Remand*, at 30.

<sup>18</sup> *See Clearon Remand* at footnote 42.

With respect to the fourth factor, the Court and the U.S. Court of Appeals for the Federal Circuit (CAFC) ruled on the question of the level of economic development in various litigation.<sup>19</sup> In May 2010, the CAFC invalidated the regression methodology used for labor values, in part, because the Department relied on countries that were not at a level of economic development comparable to the PRC. In that context, the CAFC noted that the Department could rely on market economy countries on the case record that were between half of the PRC's GNI and between one to two times the PRC's GNI.<sup>20</sup> While the Department's surrogate country lists do not employ, or endorse, this particular ratio or bright-line, we observe that the GNIs of surrogate countries selected for the PRC's surrogate country list fall within or near the range that the CAFC identified in 2010.<sup>21</sup>

Court decisions subsequent to the *Dorbest* decision provided further guidance with regard to countries selected for the surrogate country list.<sup>22</sup> In February 2011, for example, the Court faulted the Department for not selecting any surrogate countries with GNIs *higher* than the PRC, and suggested that the Department develop “a more balanced range of countries” so that the range is not “arbitrarily biased towards the low end of the *per capita* GNI.”<sup>23</sup> Subsequent Court decisions, such as the *Dongguan* litigation, also seemed to find merit in surrogate country lists

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<sup>19</sup> The Department notes that the Surrogate Country Memorandum issued for this record in September 9, 2011, was based on a list that was developed for an administrative review of sodium hexametaphosphate from the People's Republic of China proceeding and issued in May 25, 2011.

<sup>20</sup> See *Dorbest Ltd., et al. v. United State*, 604 F. 3d 1363, 1372 (Fed. Cir. 2010) (*Dorbest* CAFC) (“Here, there were five market-economy countries with gross national incomes less than that of China and an additional eleven countries with gross national incomes between one and two times that of China. Although we need not resolve which of these countries, or which additional countries, could properly be considered economically comparable to China, some subset of these countries must surely fit the bill”). The Department notes that Pakistan (one of the five market economy countries below the PRC) and the PRC have a *per capita* GNI of \$420 and \$960, respectively. That implies a lower GNI range of 56.25 percent in relative terms. For the purposes of this remand redetermination, we relied on 50 percent as the lower threshold herein to illustrate the growing separation between India and the PRC over time.

<sup>21</sup> See Chart 1 below.

<sup>22</sup> We acknowledge that these decisions involved the labor methodology. However, these decisions did factor heavily into the Department's consideration of future surrogate country lists.

<sup>23</sup> See *Dorbest Ltd. v. United States*, 755 F. Supp. 2d 1291, \*1297-98, fn 17 (CIT 2011)(*Dorbest*).



with GNI ranges that are “evenly distributed around the PRC’s GNI.”<sup>24</sup> In creating such lists, however, the Court acknowledged that the Department “does not have to achieve mathematical perfection” when selecting the upper and lower GNI range.<sup>25</sup>

*General Methodology for Selecting Surrogates for the List*

The annual release of the *World Bank Development Report*, which includes the latest *per capita* GNI data, initiates the process of revising the surrogate country list. The Department examines the new *per capita* GNI data for the PRC and the change in *per capita* GNI from the year before, and compares the change in the PRC’s *per capita* GNI to the respective changes in *per capita* GNIs of the existing set of surrogate countries. Next, we determine whether it is necessary to re-center the GNI range in light of the year-to-year GNI changes. Due to the PRC’s rapid GNI growth rate, it is almost always the case that the GNI range relied on in the previous year may need to be reset or re-centered. Over the last nine years leading up to this proceeding, the PRC’s GNI quadrupled, from \$890 to \$3,590. Accordingly, in each year, the Department reevaluated the GNI range and expanded it at roughly the same rate.<sup>26</sup>

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<sup>24</sup> See *Dongguan Sunrise Furniture Co. Ltd. v. United States*, 865 F. Supp. 2d 1216, 1238 (CIT 2012).

<sup>25</sup> See *Dorbest*, 755 F. Supp. 2d at 1298.

<sup>26</sup> See Table 1.

**Table 1: Per Capita GNI Range (2001-2009)**

<b>GNI Range</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>Change (%)</b>
PRC's GNI	890	940	1,100	1,290	1,740	2,010	2,360	2,940	3,590	303%
Highest GNI country on the Surrogate List	1,050	1,470	1,390	1,310	1,740	2,990	3,450	3,990	5,770	370%
Lowest GNI country on the Surrogate List	420	710	530	620	720	820	950	1,070	1,790	326%
Implied GNI range (difference between highest and lowest country on the list)	630	760	860	690	1,020	2,170	2,500	2,920	3,980	398%

Moreover, we also find that the implied GNI range relied on in this proceeding is a reasonable basis for determining whether countries are proximate to the PRC – in other words, that they are at the same level of economic development as the PRC. It is generally accepted that the *per capita* GNI range associable with a given “level” of economic development increases (in dollar terms) for higher levels of economic development. The World Bank, for example, places all countries into one of four income groups based on *per capita* GNI: low income (\$995 or less), lower middle income (\$996 to \$3,945), upper middle income (\$3,946 to \$12,195), and high income (\$12,196 and higher).<sup>27</sup> For low income countries, only one thousand dollars separates

<sup>27</sup> See Remand Data Memorandum at 343 of the “World Development Report 2011.”

the countries within that group,<sup>28</sup> whereas for high income countries, tens of thousands of dollars separate countries at the same group.<sup>29</sup> For example, Hungary (\$12,980) and Switzerland (\$56,370) are considered to be both within the same income group, whereas India (\$1,180) and Kenya (\$770) are not.<sup>30</sup> The *per capita* GNI range that the PRC occupies as a lower middle income country, \$2,949 using the World Bank’s range, is roughly consistent with the implied *per capita* GNI range that the Department used \$3,140 (as measured from the highest GNI country to the lowest *per capita* GNI country on the surrogate country list).

The analysis of the World Bank income groups above is meant to illustrate the reasonableness of the *per capita* GNI range that the Department selected in 2009. It is not meant to imply that the Department relies on these income ranges to develop the surrogate country list. As a matter of policy, the Department decided not to adopt the World Bank income groups as is for the purpose of defining a “level of economic development” under section 773(c)(4)(A) of the Act. One of the primary reasons is that these income groups are not sufficiently “centered” on the NME countries that are subject to our AD proceedings. For example, the PRC (\$3,590) is very close to the upper end of the lower middle income group cut-off (\$3,945); so, if the World Bank’s lower middle income group were adopted “off-the-shelf,” this would eliminate a number of potential surrogate countries that are close to the PRC on the upper range. The PRC (\$3,590) and Albania (\$3,950), for instance, would not be at the same “level” within the meaning of section 773(c)(4)(A) of the Act despite their relative proximity; whereas, Nicaragua (\$1,000) and the PRC would be at the same level. Nevertheless, the World Bank’s general premise of more expansive income ranges for higher *per capita* income countries is informative to the Department’s analysis, even if the exact definitions are not necessarily appropriate for the

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

context here of determining which set of countries are at the PRC's "level" of economic development under section 773(c)(4)(A) of the Act.

Once the *per capita* GNI range is preliminary determined using the latest data, the Department then searches for countries within that range which are suitable candidates for inclusion on the list. For example, based on the 2009 data, the Department selected a new candidate country, South Africa (\$5,770), to take the place of Peru (\$3,990), and removed India from the list (explained in greater detail below). Consistent with the judicial guidance, as described above, the Department, in more recent periods, placed more emphasis on achieving a degree of "balance" in the GNI range represented by the list. We also try to preserve the same number of surrogate countries above and below the PRC (often three countries with *per capita* GNIs higher/lower than the PRC, for a total of six). On some occasions, a surrogate country may change from having a higher *per capita* GNI than the PRC, to having a lower *per capita* GNI than the PRC, or vice versa. When this happens, the Department may consider whether it is appropriate to "rebalance" the list in order to maintain the same number of surrogate countries above and below the PRC. Using 2007 *per capita* GNI data, for example, Thailand's *per capita* GNI was higher than the PRC's but this relationship reversed in 2008, and, then reverted back again using 2009 data. This interchange is more likely to occur with surrogate countries in close proximity to the PRC than it is for those surrogate countries whose *per capita* GNIs are further away.

It is often the case that several of the existing surrogate countries sufficiently track the PRC and are found to be actively used – and advocated for by interested parties – in on-going proceedings. For countries such as these, there is a strong inclination to continue relying on them, so long as the *per capita* GNIs are within the Surrogate Country Memorandum's implied

income range. In other instances, however, countries on the list are periodically evaluated if they are not selected over time and sometimes replaced. For example, the Department selected Peru for the surrogate country list for two years (2007 and 2008 *per capita* GNI data), but ultimately removed it because no interested party proposed, and the Department did not consider, Peru for selection as the primary surrogate country.

When changes, such as those described above, warrant consideration of adding or removing countries from the list, the Department considers a range of factors, including the SV requirements for the existing products under investigation, the data quality and availability of alternative surrogate countries, economic diversity of the manufacturing sector in the alternative countries, and the degree of specificity in the import data relied on to value the FOP. For example, with 2009 data, there were several market economy countries in close proximity to the PRC (\$3,590) when looking at the *per capita* GNI metric alone, such as Belize (\$3,740) and the Maldives (\$3,870). But, we do not consider these smaller and less diversified economies as viable surrogate countries for use across all PRC cases when measured against the factors outlined above, *e.g.*, the data quality and availability of alternative surrogate countries, economic diversity of the manufacturing sector in the alternative countries.

During the process of selecting the surrogate countries, the Department relies on its case experience and professional judgment to develop this list of surrogate countries. But, it is critical to note that the list is non-exhaustive. When an interested party, therefore, identifies another alternative surrogate country that is within the *per capita* GNI range of surrogates on the list, the Department accords that surrogate country the same consideration as given to those identified by

the Department.<sup>31</sup> As noted above, the Department also considers surrogate countries on the record that are outside the implied *per capita* GNI range of the list, but selection of such a country as the primary surrogate requires that data or significant producer considerations outweigh *per capita* GNI proximity concerns.

Taken in this context, the implied *per capita* GNI range of countries on the list represents a guideline for interested parties consistent with the statutory factors under section 773(c)(4)(A) of the Act and 19 CFR 351.408(b). It is intended to initiate a process whereby parties can focus their attention on a manageable set of potential surrogate countries. To initiate the process of evaluating countries for the primary surrogate country, a range of *per capita* GNI, as reflected by potential surrogate countries on the list, is provided to parties as a starting point. One benefit of this is interested parties do not end up expending their resources focusing on potential surrogate countries that are not at a level of economic development comparable to the PRC.

#### *Proximity of India Compared to the PRC*

In the second part of the remand, the Court directed the Department to explain “why it believes India’s GNI does not, if that continues to be the Department’s determination, qualify it as an economically comparable country.” In the underlying proceeding, the Department stated:

The list is comprised of countries that are proximate to the PRC in terms of GNI, and the Department considers all countries on the list to be equal in terms of economic comparability for purposes of evaluating their suitability for use as a surrogate country. The list did not include India because India’s per capita GNI did not fall within the range of countries proximate to the PRC....However, as noted, India did not qualify as one of the economically comparable countries identified in this review. As such, the Department considers India to be less economically comparable to the PRC than the countries included in the Surrogate Country Memorandum, and will only resort to using Indian data sources when no other data from these economically comparable countries are available.

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<sup>31</sup> See *Hardwood and Decorative Plywood From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 58273 (September 23, 2013), and accompanying Issues and Decision Memorandum at Comment 7.

Based on 2009 data, we continue to find that India is at a level of economic development less comparable than the PRC. This does not mean India is beyond consideration as a surrogate country and it does not mean that India fails to “qualify” under the economic comparability factor of the statute. In order for the Department to select India, however, the data quality and availability from India must outweigh its *per capita* GNI disparity with respect to the PRC in order for the Department to select it over one of the other countries which are at the *same* level of economic development as the PRC. In other words, as the *per capita* GNI disparity increases, the Department can no longer discount this fact when selecting among competing surrogate countries. From the perspective of valuing FOPs, we believe that once countries fall within a certain *per capita* GNI range – as reflected by the Surrogate Country Memorandum – data quality and availability considerations are more predominant factors than *per capita* GNI differences.

It is also important to note that India did not suddenly drop-off the list. In January 2010, the Department put interested parties on notice that we were concerned with the growing *per capita* GNI disparity:

While we recognize that India is not as close to China as the other surrogate countries in the list, relative to all countries and GNI levels worldwide, India still remains sufficiently close to China in terms of per capita GNI to be considered economically comparable. Moreover, like China, India has a broad and diverse production base. In addition, India has been the primary surrogate in many of the Department’s past NME proceedings involving China, and has a robust set of well-developed and reliable data sources. However, we note that the disparity in per capita GNI between India and China has consistently grown in recent years and, should this trend continue, the Department may determine in the future that the two countries are no longer “at a comparable level of economic development” within the meaning of the statute.<sup>32</sup>

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<sup>32</sup> See Remand Data Memorandum, specifically the attachment, “Request for a List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on 1-Hydroxyethylidene-1, 1-Diphosphonic Acid (“HEDP Acid”) from the People’s Republic of China (“PRC”),” October 28, 2010.

In January 2010, the *per capita* GNI difference between the PRC and India was \$1,870, and that increased in the following year’s data to \$2,410.<sup>33</sup> This difference translates into approximately 17 market economy countries that fall between India and the PRC.<sup>34</sup> The growing distance between India and the PRC was part of a long-term divergence.<sup>35</sup> As the trend below makes clear, it was only a matter of time before the PRC – regardless of whatever “bright line” or range is used to define a level of economic development under section 774(c)(4)(A) of the Act – would eventually move into a different level of economic development than India.

**Table 2: Comparison of the PRC and India’s *per capita* GNIs (2001-2009)**

	2001	2002	2003	2004	2005	2006	2007	2008	2009
PRC	890	940	1,100	1,290	1,740	2,010	2,360	2,940	3,590
India	460	480	530	620	720	820	950	1,070	1,180

Using the *Dorbest* guideline of half of the PRC’s *per capita* GNI, we note that India actually crossed below that “threshold” sometime between calendar years 2004 and 2005 (based on 2002 and 2003 year GNI data which is lagged two years).<sup>36</sup> According to Chart 1, *infra*, illustrates that distance grew even more pronounced in the 2007 and 2008 data. And, it was only with the ultimate removal of India from the surrogate country list with the 2009 data, that the lower *per capita* GNI range kept a more reasonable track with the PRC’s income growth. Finally, the Department notes that it also examined this divergence relying on a *per capita* GNI metric that removes the differences in inflation across time, confirming the real growth differentials between

<sup>33</sup> In 2008, India and the PRC’s GNIs were \$1,070 and \$2,940, respectively. In 2009, India and the PRC’s GNIs were \$1,180 and \$3,590, respectively. See Remand Data Memorandum.

<sup>34</sup> Determined from the Table 1 of the 2011 World Bank Development Report and removing NME countries, see Remand Data Memorandum.

<sup>35</sup> See Chart 2, *infra*, and Table 2.

<sup>36</sup> See footnote 19 above. If the 56.25 percent implied lower range from *Dorbest CAFC* decision were used instead, that would mean that India crossed below the guideline two years later (calendar years 2006 to 2007 based on 2004 to 2005 GNI data) as compared to the 50 percent threshold. Regardless of which particular threshold is selected, however, the broader point remains that India would have eventually crossed below it prior to this proceeding.



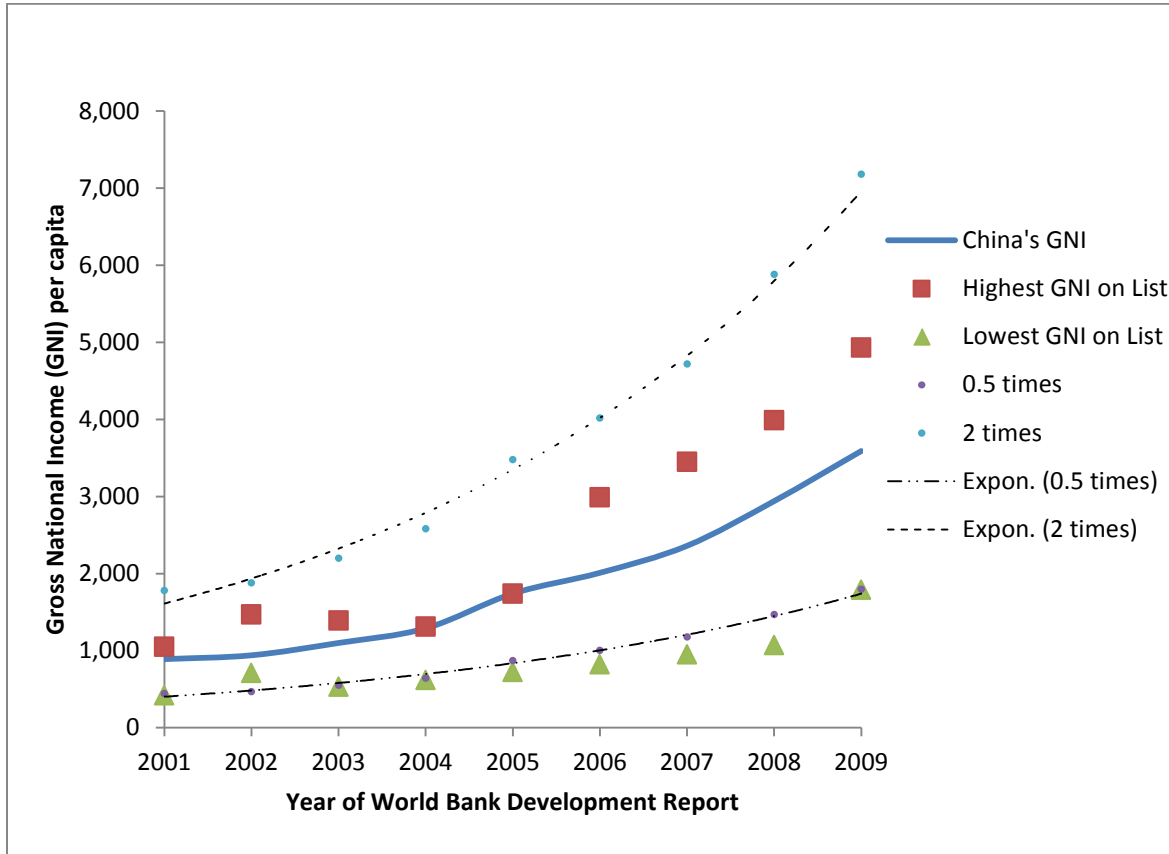
India and the PRC.<sup>37</sup> Based on all of the above, we continue to find that, irrespective of the particular metric used, that India remains at a less comparable level of economic development than the PRC.

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<sup>37</sup> See Chart 2.

Chart 1

Range of *per capita* GNIs for the PRC on the Surrogate Country List Compared to the *per capita* GNI Range Suggested by the CAFC<sup>38</sup>

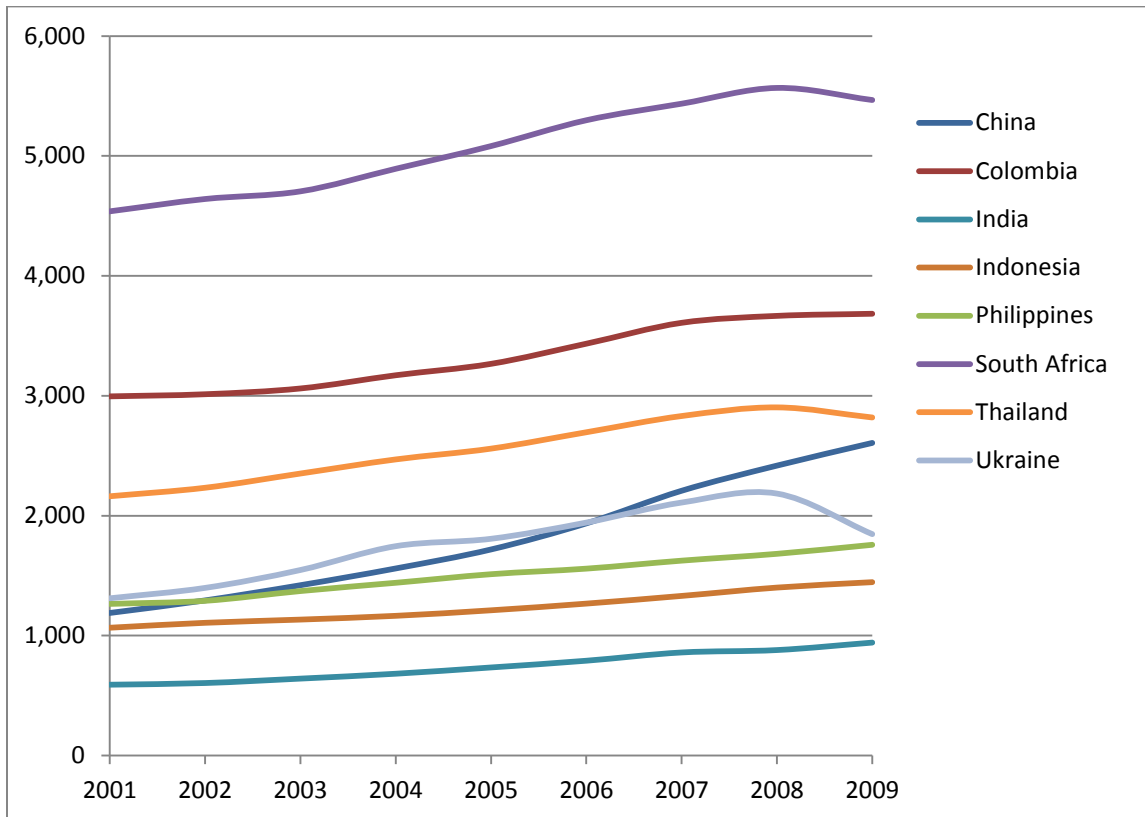


<sup>38</sup> See footnote 19 above.

Chart 2

X-Axis: Year of World Bank Data  
Y-Axis: Constant Dollar *per capita* GNI data

Using the Surrogate Countries Selected in this Proceeding



## 2) Calculation of Financial Ratio

In the *Preliminary Results*, we selected South Africa as the surrogate country,<sup>39</sup> but after receiving comments from parties, we changed the primary surrogate country for the final results.<sup>40</sup> Jiheng argued that if we used the 2010 annual report of Mabuhay Vinyl Corporation (MVC), a Philippine producer of sodium hypochlorite, we should exclude the “employee benefits/retirement benefits” line items from the selling, general and administrative (SG&A) expense financial ratio calculation because the line item expenses were already captured in the labor SV.<sup>41</sup> In the *Chloro Isos 6<sup>th</sup> Final Results*, we determined that employee benefits/retirement benefits were classified by MVC as period costs, and noted that “[p]eriod costs (classified here as operating expenses) are expensed in full in the period in which these costs are incurred. Period costs do not relate to the production of any specific product and are not capitalized, nor do they go through inventory. In this case, we consider it reasonable to assume that the employee and retirement benefits, repairs and maintenance and rent, light and water classified as period costs relate to the selling and administrative expenses of the company. This is precisely why these costs are recognized as incurred during the year, and are not associated with the production of any specific products that were initially inventoried and subsequently sold” (cites omitted).<sup>42</sup>

Because employee benefits/retirement benefits are period costs, we categorized them under the SG&A financial ratio in the final results. Parties now argue to the Court that the ILO wage rate we used to value the labor SV already includes labor, retirement, and employee benefit expenses, and that these expenses will be double counted if we do not adjust the SG&A financial

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<sup>39</sup> See *Chlorinated Isocyanurates From the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 77 FR 41746 (July 26, 2012) (*Preliminary Results*).

<sup>40</sup> See *Chloro Isos 6<sup>th</sup> Final Results*, and accompanying Issues and Decision Memorandum at Comment 2.

<sup>41</sup> See *Chloro Isos 6<sup>th</sup> Final Results*, and accompanying Issues and Decision Memorandum at Comment 13.

<sup>42</sup> *Id.*

ratio to correctly reflect the financial statements (*i.e.*, exclude employee benefits/retirement benefits line items from the SG&A financial ratio).

As a result of the change in the primary surrogate country from the *Preliminary Results* to the final results, parties did not have an opportunity to comment on the specific calculation based on Philippine financial statements, and the Department did not have the opportunity to respond to any comments for the final results. The Court accepted the Department's voluntary remand request to address these arguments raised by the parties.

On August 13, 2014, we opened the record and placed information concerning "whether the SG&A financial ratio should be recalculated due to alleged overstatements of labor in the normal value calculation," and provided an opportunity for parties to comment on this information.<sup>43</sup> We specifically included the ILO's definition of labor cost and compensation of employees. On August 20, 2014, Petitioners, and Kangtai submitted comments.

As noted by Petitioners, the ILO definition placed on the record by the Department for this remand does not explicitly indicate that employee benefits/retirement benefits are included in the ILO labor cost.<sup>44</sup> According to the ILO, the labor cost data rely on national surveys of employers, which generally exclude "persons working from home, directors paid by fees, persons paid by commissions only and working proprietors." Assuming that MVC conforms to the generally accepted accounting principles used by employers in the Philippines, Petitioners argue that there is "no basis to assume that the ILO labor cost data would include employee and retirement benefits associated with direct production workers, but that the same employee and retirement benefits would be reported as operating expenses rather than costs of sales."

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<sup>43</sup> See Remand Data Memorandum.

<sup>44</sup> See Petitioners Remand Comments.

The ILO defines the compensation of employees (which is the category selected in the final results as the SV for labor), as comprising “all payments by producers of wages and salaries to their employees, in kind as well as in cash, and of contributions in respect of their employees to social security and to private pension, casualty insurance, life insurance and similar schemes.”<sup>45</sup> While the surveys for compensation of employees do include salaried employees, the surveys themselves, “{i}n general, only aggregate estimates are required, so that data are not usually compiled separately on the various components of compensation of employees, nor on the different characteristics of employees.”<sup>46</sup> Additionally, the ILO notes that “{w}hile the level and composition of labour cost tend to vary between wage earners and salaried employees, in many cases it is not possible to distinguish between labour costs for these two groups of employees. Therefore, with a few exceptions, the figures cover all paid employees, that is, wage earners and salaried employees, of both sexes, without distinction as to age, occupation, experience, level of skill, etc.”<sup>47</sup>

We note in *Labor Methodology*, that “when the surrogate financial statements include disaggregated overhead and selling, general and administrative expense items that are already included in the ILO’s definition of Chapter 6A data, the Department will remove these identifiable costs items.”<sup>48</sup> In the final results, we categorized two items in MVC’s financial statements as “*Direct*” Labor: “Direct Labor” (note 16 of the statements) and “Supervisor and Indirect Labor” (also note 16 of the statements).<sup>49</sup> In other words, these items were excluded from the numerators of our financial ratio calculations. We did this to avoid double counting the

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<sup>45</sup> See Remand Data Memorandum.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 FR 36092 (June 21, 2011) (*Labor Methodology*).

<sup>49</sup> Our worksheet uses the term “direct” labor, but, as noted, it includes by direct and indirect production labor (*i.e.*, factory workers).

labor accounted for by Jiheng in its labor FOPs (it reported an FOP for direct labor and an FOP for indirect labor). Thus we have already adjusted the SG&A financial ratio to avoid any overstatement of the compensation of direct or indirect production labor. If the employee benefits/retirement benefits line item were instead categorized under cost of sales (*i.e.*, under note 16 of MVC's financial statements instead of note 17), we would consider these costs as part of direct and indirect labor because they would be costs associated with production workers – not administrative workers.<sup>50</sup> In that case, the benefits would be accounted for by the application of the ILO SV to the FOPs for direct and indirect labor.

Thus, including MVC's employee benefits/retirement benefits in the SG&A ratio, does not lead to any double counting because these line items are costs associated with non-production, administrative workers, who are not accounted for by either the direct or indirect labor FOP.<sup>51</sup> In the initial questionnaire, we describe direct labor as:

Report the direct labor hours required to produce a unit of the merchandise under consideration. Note that these should be the actual direct labor hours worked, not standard labor times. Direct labor should include all production workers, inspection/testing workers, relief workers, and any other workers directly involved in producing the merchandise. In addition, your reported direct labor hours should include the hours worked by any contract labor hired by your company to assist in the production of the merchandise.<sup>52</sup>

We describe indirect labor as:

Report the indirect labor hours required to produce a unit of the merchandise under consideration. Indirect labor includes all workers not previously reported who are indirectly involved in the production of the merchandise under consideration.<sup>53</sup>

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<sup>50</sup> See Letter from Jiheng, "Chlorinated Isocyanurates from China (Sixth Administrative Review) – Pre-Preliminary Surrogate Value Information," January 8, 2012 (Jiheng SV Data), at tab 4, page 34.

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., Letter from Jiheng, "Chlorinated Isocyanurates from China (Sixth Administrative Review) -- Jiheng Chemical Response to Sections C and D," November 29, 2011 (Jiheng Section D), at D-23.

<sup>53</sup> *Id.* at D-25.

Therefore, when we apply the ILO labor SV to the direct and indirect labor FOP, we are capturing the employee and retirement benefits to production labor, not to general management or administration.

In contrast, the benefits indicated in the MVC financial statements Jiheng refers to are for higher level management and administration. We know this to be the case because these benefits are classified under “operating expenses” (*i.e.*, “general and administrative expenses” or G&A) in the financial statements along with other no manufacturing items such as “rent, light and water,” “taxes and licenses,” “entertainment, amusement and recreation,” *etc.*<sup>54</sup> Moreover, as noted in the *Chloro Isos 6<sup>th</sup> Final Results*, generally accepted accounting principles treat “operating expenses” as period costs, in that they “do not relate to the production of any specific product and are not capitalized, nor do they go through inventory.”<sup>55</sup> By contrast, we explained, “[i]t is expected that the manufacturing costs allocated to each product include all factory related repairs and maintenance and labor cost *including benefits*” (emphasis added).

Parties note that the details regarding retirement benefits in note 19 explain that retirement benefits include “regular employees.” The financial statements, however, do not define “regular employees” as all full time employees including production and non-production workers. Without further details, we assume that MVC followed generally accepted accounting principles, and line items falling under operating expenses apply to non-production employees. Because employee benefit/retirement benefits were classified by MVC as operating expenses, and because there were no further details about these line items in the financial statements indicating these operating expenses are directly related to the production of goods, they were

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<sup>54</sup> See Jiheng SV Data, at tab 4, page 34.

<sup>55</sup> See *Chloro Isos 6<sup>th</sup> Final Results*, and accompanying Issues and Decision Memorandum at 22.



appropriately classified under “SG&A and Interest” for the financial ratio calculation in the *Chloro Isos 6<sup>th</sup> Final Results*. Therefore, no additional adjustments are necessary.

### **3) Calculation of Intra-Company Transportation of Intermediate Products**

Jiheng reported an affiliated company, Hebei Jiheng Baikang Chemical Industry Co., Ltd. (Baikang), for the first time in the underlying review. Jiheng reported that Baikang produced subject merchandise, but did not export directly to the United States. Additionally, in order to produce subject merchandise, Baikang was supplied with three intermediate products from Jiheng.<sup>56</sup> Jiheng reported that these intermediate products (*i.e.*, caustic soda, chlorine gas and cyanuric acid) were transported via truck from Jiheng to Baikang (a distance of 162 kilometers), and that Baikang paid for these movement expenses.<sup>57</sup> For the *Preliminary Results*, we found that “Jiheng did not report this intermediate product it received from Baikang in the FOP database. Therefore, the Department calculated an FOP input value for the merchandise Baikang provided to Jiheng that was further processed by Jiheng.”<sup>58</sup>

However, we carefully analyzed Jiheng’s consolidated FOP calculations during verification, including for its production of intermediate products. We noted that “{f}or each product, Jiheng provided the relevant ledger of semi-finished goods, and showed the amount of the product produced during one month of the POR. The Department also examined the workshop records and daily reports of the products, as well as meter readings, to tie one month’s worth of production of every finished product. Jiheng prepared worksheets for the Department to review, but the Department asked to review additional documentation for the amounts of

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<sup>56</sup> See Letter from Jiheng, “Chlorinated Isocyanurates from China (Sixth Administrative Review) - Jiheng Chemical Response to Section A,” November 10, 2011, at A-41.

<sup>57</sup> See Letter from Jiheng, “Chlorinated Isocyanurates from China (Sixth Administrative Review) – Jiheng Chemical’s Response to First Supplemental Questionnaire,” March 19, 2012, at 18.

<sup>58</sup> See Memorandum, “Analysis for the Final Results of the 2010-2011 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People’s Republic of China: Hebei Jiheng Chemical Company Ltd.,” January 14, 2013 (Jiheng Final Analysis Memorandum).

products produced in various months and at different locations (*i.e.*, Baikang). The Department tied the consolidated production quantities of each of the final products to Jiheng's FOP database, and found no discrepancies."<sup>59</sup> During this careful analysis, we also found that "not only were the transportation costs for the semi-finished goods not included anywhere in Jiheng's FOP build-up, but also that the costs of transporting intermediate inputs from one factory location to another were absent from the FOP build-ups."<sup>60</sup> We noted that no evidence was provided from Jiheng supporting its contention that these expenses were part of overhead.<sup>61</sup> In cases where intermediate goods are transported between factories (in this case, a distance of 162 kilometers), it is the Department's practice to calculate the freight costs for these inputs as part of the cost of raw materials.<sup>62</sup> We stated our policy that, if the NME producer of subject merchandise is integrated, such that it self-produces a material input used in the manufacture of subject merchandise, the Department will take into account the factors utilized in each stage of the production process of that material input.<sup>63</sup> This explanation is analogous to the calculations we did in the underlying review. We found in the *Preliminary Results* that Jiheng was an integrated producer, and that it was transporting intermediate inputs to affiliates. During verification, which took place after the *Preliminary Results*, we found that while Jiheng properly reported its consolidated factors for intermediate products, it had neglected to include a factor for transporting the intermediate products between factories anywhere in its databases.<sup>64</sup> Following

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<sup>59</sup> See Memorandum, "Verification of the Sales and Factors Response of Hebei Jiheng Chemical Company Ltd. in the Antidumping Review of Chlorinated Isocyanurates from the People's Republic of China," November 20, 2012 (Jiheng Verification Report), at 27.

<sup>60</sup> See *Chloro Isos 6<sup>th</sup> Final Results*, and accompanying Issues and Decision Memorandum at Comment 16.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* The Department's practice with regard to transportation costs for inputs that are moved within a single facility is to treat them as overhead. Additionally, Jiheng, following its standard reporting practice, considered the cost of transporting these inputs as part of overhead, see Jiheng Verification Report at 3.

<sup>63</sup> See *Sinopec Remand: Notice of Final Determination of Sales at Less than Fair Value: Tetrahydrofurfuryl Alcohol from the People's Republic of China*, 69 FR 34130 (June 18, 2004).

<sup>64</sup> See Jiheng Verification Report at 3.

our policy, we needed to account for all factors utilized in each stage of the production process. As discussed above, Baikang did pay for the transportation of these intermediate goods, but this cost was not yet factored in, and based on our policy, all factors used for each stage of the production process must be accounted for. For the *Chloro Isos 6<sup>th</sup> Final Results*, we added a freight cost for the transportation of intermediate goods to the raw materials cost, consistent with our practice, rather than assuming such freight costs were part of overhead.

Because we did not know how much of intermediate products were transported between the locations, we calculated a proxy using the inputs into the production of intermediate products, multiplying this amount by a freight FOP, and adding this freight expense to the raw materials cost for the *Chloro Isos 6<sup>th</sup> Final Results*.<sup>65</sup>

Parties argue that they were not given an opportunity to provide the information required by the Department to apply this methodology that was employed in the underlying review. Based on the record of this underlying review as explained above, we did not apply a new methodology, but merely employed a standard practice to account for all costs for the first time in the underlying review at the final results, based on findings from our verification, which did not allow time for parties to comment. As part of the Department's voluntary remand request, we issued a questionnaire to Jiheng requesting this information on August 11, 2014. Jiheng timely provided the requested information. Consistent with the methodology employed in the subsequent review of this order, we added the actual freight costs of transporting intermediate products between factories to raw material cost, and have revised our calculations accordingly.<sup>66</sup>

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<sup>65</sup> See Jiheng Final Analysis Memorandum at 2-3.

<sup>66</sup> See Memorandum, "Analysis for the Remand of the Final Results of the 2010-2011 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China: Hebei Jiheng Chemical Company Ltd.," September 16, 2014 (Jiheng Analysis Memorandum).

#### 4) By-Product Valuation Methodology

In past reviews of this order and in the *Preliminary Results*, we determined Jiheng’s and Kangtai’s by-products of ammonia gas and sulfuric acid by starting with the amount of ammonium sulfate and calculating the amount of the two by-products chemically required to produce that amount of ammonium sulfate. We then applied SV’s for ammonia gas and sulfuric acid to the two by-products. We stated in the *Chloro Isos 6<sup>th</sup> Final Results* that, at that time, we were “adjusting the manner in which we calculate the by-product offsets for both Jiheng and Kangtai to conform to the Department’s recent practice.”<sup>67</sup> We stated that it was still the Department’s practice to first start with the value of the downstream product (*i.e.*, ammonium sulfate) that was actually sold by the respondents and produced during the POR. In a departure from our previous method in this case, we sought to deduct any costs associated with converting the by-product into the downstream product, such as labor and electricity, using an FOP and SV cost methodology. For the *Chloro Isos 6<sup>th</sup> Final Results*, we did not have the FOPs to deduct, so we used the full value of the ammonium sulfate as the full value of the two by-products combined as the by-product offset.<sup>68</sup> We modified the methodology we used in the *Chloro Isos 6<sup>th</sup> Final Results* to avoid overstating the value of the by-product offsets and (as with the intra-company transport issue discussed above) to bring the calculation into conformity with agency-wide policy. To do this, we must grant an offset equal to the amount of value a company actually receives, less any processing costs, and not a hypothetical value that is unrelated to a

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<sup>67</sup> See *Chloro Isos 6<sup>th</sup> Final Results*, and accompanying *Issues and Decision Memorandum* at Comment 14; see also *Glycine from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 FR 64100 (October 18, 2012), and accompanying *Issues and Decision Memorandum* at Comment 5 (where we note that a by-product offset should be granted because the company properly accounted for the costs for its by product production: “given that it properly reported its by-product factors of production and the Department verified the period-of-review sales of the by-products, there is no factual basis upon which to deny their offsets”).

<sup>68</sup> *Id.*

company's financial books and records.<sup>69</sup> It is clear from the underlying review that ammonium sulfate is the product actually sold by the companies.<sup>70</sup> Reviews under separate orders provide examples of the policy employed in this underlying review:

As citric acid and dry high protein scrap are the *saleable products* that result closest to the split-off point, we started with SVs from the selected surrogate country, for these products, then reduced the values by the cost of further processing each product after the split-off point. The further processing costs were calculated based on RZBC's reported FOPs after the split-off point and the respective SVs from the selected surrogate country for each FOP. This analysis demonstrated that the net realizable value (NRV) of high protein scrap at the split-off point is significant as compared to that of the liquefied liquid.<sup>71</sup>

In other words, to derive the NRV of each by-product, the Department obtains a reasonable market value for each by-product, as close to the split-off point as possible. To do so, the Department starts with the value of the *saleable products* that result closest to the split-off point and then reduces this value by the cost of further processing each by-product after the split-off point. For the *Chloro Isos 6<sup>th</sup> Final Results*, we did not elaborate on this methodological change for the final results, or why we felt it was warranted, given the record facts.<sup>72</sup> However, this policy is evident from our boilerplate questionnaire, used in the underlying review, which asks parties to report the FOPs required to process the by-products into the saleable downstream product.<sup>73</sup>

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<sup>69</sup> See *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 73 FR 52642 (September 10, 2008), and accompanying Issues and Decision Memorandum at Comment 1.B and C (where we discuss the valuation of factors, "this method keeps the value allocated to chlorine tied to a real world price and avoids the distortion of tying the value of chlorine to the profits earned on titanium").

<sup>70</sup> See Jiheng Verification Report at 32.

<sup>71</sup> See *Citric Acid and Certain Citrate Salts From the People's Republic of China; Final Results of Antidumping Duty Administrative Review*; 2011-2012, 79 FR 101 (January 2, 2014), and accompanying Issues and Decision Memorandum at 12 (emphasis added).

<sup>72</sup> Petitioners noted in their case brief that "The values assigned to the byproducts under this methodology were patently unreasonable in that the byproducts were assigned higher values than the inputs used to produce the byproduct," see Letter from Petitioners, "Chlorinated Isocyanurates from China – Sixth Administrative Review: Case Brief of Petitioners Clearon Corp. and Occidental Chemical Corporation," December 3, 2012, at 38.

<sup>73</sup> See Letter to Jiheng, "2010-2011 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China," October 6, 2011, at D-9.

We specifically requested this cost information in other cases where parties did not provide the details in their initial questionnaire response,<sup>74</sup> but given the time frame in the underlying review, we did not have an opportunity to follow up with parties and request this company specific information for the *Chloro Isos 6<sup>th</sup> Final Results*.

Parties argue that they were not given an opportunity to provide the information required by the Department to calculate by-product offsets for this new methodology. As part of the Department's voluntary remand request, we issued a questionnaire to Jiheng and Kangtai requesting this information on August 11, 2014. Jiheng and Kangtai timely provided the requested information. We revised the by-product offset calculation for both companies consistent with the Department's recent practice.<sup>75</sup>

#### **D. Comments on Draft Remand Results**

##### **Comment 1: Surrogate Country Selection**

###### *Kangtai Comments*

- The Draft Remand Results were the first time Kangtai was made aware of the policy considerations in the surrogate country selection process as the Department did not vet this change with the trade bar, nor did it give advanced warning to exporters.
- There is no consistency and predictability from review to review - both in terms of the GNI band itself and the countries on the surrogate country list.
- The Department erred in its calculation in Table 1 of the Draft Remand Results, "Implied GNI range (difference between highest and lowest country on the list)," which should be corrected for the Final Remand Results.
- India is a major economically important industrial country. The Department has not addressed the true economic comparability of India to the PRC nor the data that suggest India is the most economically comparable country to the PRC, and more comparable than the Philippines to the PRC.
- The Department admits that the surrogate country list and the GNI band are a moveable concept. To select a country not on the surrogate country list, the Department must consider whether the data quality and availability from India outweighs India's per capita GNI discrepancy with the PRC. The Department never conducted this analysis.

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<sup>74</sup> See *Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China*, 72 FR 9508 (March 2, 2007), and accompanying Issues and Decision Memorandum at Comment 9.

<sup>75</sup> See Jiheng Analysis Memorandum; see also Memorandum, "Analysis for the Remand of the Final Results of the 2010-2011 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China: Juancheng Kangtai Chemical Co., Ltd.," September 16, 2014.

- Analysis would show that due to the variant nature of imports of certain chemical inputs, India's developed chemical market is the only quality source of information for these inputs on the record.
- The Department should reinstate India on the surrogate country list for this review and consider it economically comparable to the PRC.

**Department's Position:** The Department is continuing to use the Philippines as the primary surrogate country for these Final Remand Results. Kangtai argues that the Department should have provided the trade bar with notice that India was being removed from the surrogate country list, and allowed parties to fully vet this issue. The statute provides that in each review involving goods from an NME country that the Department shall select a surrogate country in which to value the factors of production based on the statutory criteria that the country be at a level of economic development comparable to the NME under review and that the surrogate country be a significant producer of comparable merchandise.<sup>76</sup> During the review, Kangtai was provided with the opportunity to comment on the surrogate country selection, and it did not do so. India's removal from the list merely reflects its growing separation from the PRC in view of the statute's requirement to determine that a country is at a level of economic development comparable to the NME country.<sup>77</sup> The Department provided all of the notice required by law. Kangtai's claim that the Department is required to generally put the trade bar on notice of a change in the surrogate country lists is found nowhere in the statute or regulations. Moreover, taking Kangtai's argument to its logical conclusion, the Department would be required to ignore changes in the level of economic development of countries over time and simply rely on the surrogate country used in the past unless the trade bar is generally put on notice. The determination of which surrogate country to select is a fact-specific determination made in each segment of the proceeding on the administrative record of each segment. The statute does not

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<sup>76</sup> See section 773(c)(4) of the Act.

<sup>77</sup> *Id.*

require the Department to construct special notification to the trade bar in general before establishing the potential surrogate country list in a particular review based on the record in that review.

Kangtai states that “{o}nce the Department changes the list based on a more recent per capita GNI ranking, consistency is lost.” Kangtai misconstrues the concept of consistency in an attempt to claim that the Department, in updating the list of potential surrogate countries from review to review, is somehow being inconsistent. However, as explained above, the statute and regulations do not contemplate that the surrogate country list should be the same from review to review, but instead the selection of a surrogate country must be based on the facts on the record of the review evaluated under the statutory criteria. The consistency we refer to in the Draft Remand Results is to have a consistent methodology for selecting the primary surrogate country across all cases. It would be completely unrealistic and contrary to law to expect that the list itself must be “consistent” across time. That would produce an absurd result of the list never changing, irrespective of the changes in the underlying facts regarding countries’ economic growth and production over time. In the CIT’s remand of this underlying review, the Court stated:

{T}he Department 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 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. {cites omitted}. 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.<sup>78</sup>

The Department clearly strives for a predictable process, as the Court notes above, that is consistent across all AD cases involving that NME country for a given set of GNI data. Our stated policy does not include, nor require us to maintain, a consistent set of surrogate countries across the years.

Kangtai's argument that the GNI band also is not consistent fails to recognize that *per capita* GNI changes over time. Countries' different growth rates will necessarily change the composition of the list and affect the surrogates that represent the upper and lower end of the implied GNI range represented by the list. Kangtai is correct that the Department's GNI band and the countries it selects from year to year are not "consistent"; however, the surrogate country list is predictable using the methodology explained by the Department. Further, Kangtai overlooks the fact that, regardless of where one draws the implied GNI range, India would have fallen into a "less comparable" level of economic development. We would obtain the same result using the range considered appropriate by CAFC in *Dorbest*.

Kangtai correctly noted a mistake the Department made on the last year of Table 1, above. The correct "Implied GNI range (difference between highest and lowest country on the list)" should be 3,980 for 2009.<sup>79</sup> Kangtai acknowledges that our point is NOT to show any mathematical equivalency in the growth of the implied GNI band versus the PRC. Our point is that you cannot keep the same implied GNI range across time, as demonstrated by Table 1.

There must be some recognition that the PRC's GNI changed considerably over time and the

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<sup>78</sup> *Id.*, at \*45.

<sup>79</sup> We have corrected Table 1 above. South Africa had the highest GNI on the list in 2009, but we mistakenly did not use it as such in Table 1 in the Draft Remand Results. We corrected the "highest" value to South Africa's GNI, which then led to a difference between the highest and lowest country's GNI of 3,980.

surrogate country list should be updated to reflect the economic reality of different GNI growth rates over time.

We agree with Kangtai that India is a major economically important industrial country. However, Kangtai's only affirmative argument that addresses India's level of economic development involve factors that have been discounted by the Department and the Court and are entirely unrelated to the applicable regulatory standard. In *Jiaying Brother*, for example, the plaintiff proposed seven different economic variables.<sup>80</sup> Kangtai never explains why their economic factors are more relevant than the statutory or regulatory standard used by the Department. The CIT has upheld that the *per capita* GNI is a "consistent, transparent, and objective metric to identify and compare a country's level of economic development."<sup>81</sup> We further believe the Court has already dismissed this laundry list of economic variables before, not only on substantive reasons, but in light of the difficulty of actually trying to implement a multi-variable weighing of these across all NME cases:

The court wonders how such an approach could possibly be administrable across all NME cases. Commerce must efficiently identify a primary surrogate country early in the proceeding, and Plaintiffs' approach makes that difficult if not impossible. Commerce's method, on the other hand, has established a consistent, transparent, and objective measure to determine economic comparability. Commerce's use of per capita GNI as the measure of economic comparability (as opposed to some other assortment of metrics that account for the specific features of relevant industries in potential surrogate countries) is a reasonable interpretation of the statutory mandate to identify and select a primary surrogate country at a "level of economic development comparable" to the nonmarket economy country. 19 U.S.C. § 1677b(c)(4)(A). Accordingly, the court must defer to Commerce's permissible construction of the statute.<sup>82</sup>

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<sup>80</sup> See *Jiaying Brother Fastener Co., Ltd., v United States*, 916 F. Supp. 2d 1323, 1330 (CIT 2014) (*Jiaying Brother*) (These include: (1) GDP; (2) GNI; (3) World Bank 'Doing Business' Report ranking; (4) Unemployment; (5) Investment; (6) Industrial Production Growth Rate; (7) Household Income by Percentage Share).

<sup>81</sup> *Id.*, at 1330.

<sup>82</sup> See *Jiaying Brother*, 961 F.Supp. 2d at 1323.

The *Jiaxing Brother* decision is persuasive on this issue and the Department's use of GNI as a measure of economic comparability in the instant review is a reasonable interpretation of the statute and is in accordance with law.

Kangtai argues that despite its earlier acknowledgment that the surrogate country list is a non-exhaustive list, and that the GNI band is a moveable concept, the Department has not explained its selection of the countries on the surrogate country list itself, nor does the Department conduct analysis to determine if we should select countries proposed by interested parties that are not on the surrogate country list. As we enumerated in the Draft Remand Results, the surrogate country list is a non-exhaustive starting point for the Department's analysis. The inclusion or exclusion from the list is not the final word. The list itself simply defines what implied GNI range constitutes a level of economic development comparable to the NME country. Parties are entitled to submit data and argue for any other surrogate country they want to, and we consider those countries and arguments to the extent that they meet the statutory and regulatory criteria. For example, the Ukraine, which falls within the implied GNI range during the POR, but was not on the surrogate country list, would be given the same treatment as listed countries if parties identified the Ukraine as a potential surrogate country that was not originally on the surrogate country list and provided the data and arguments supporting selecting a country not on the list over countries on the list. Countries outside the implied GNI range are also considered, and are selected *only* to the extent that the data considerations outweigh the level of economic development factor (as indicated by disparate GNIs).

As we stated in the Surrogate Value Memorandum, we conducted the above analysis for the Philippines, and found that "the Philippines has reliable and usable data to value a majority

of the inputs, including labor and financial ratios.”<sup>83</sup> Kangtai argues that the data from India is better; however, “better” on its own does not necessarily overcome the disparate GNI between India and the PRC. In contrast we found that the Philippines, a country at the same level of economic development as China, had reliable and usable data to value the inputs. When considered in light of the level of economic development statutory criteria, India’s data is not “better” because it is not from a country that is at a level of economic development comparable to the PRC, whereas the Philippines data is. Barring some other extraordinary situation in which, for example, record based data reliability concerns arose, the Department correctly prefers to use data from a surrogate country that is at a comparable level of economic development rather than data from a country that is at a less comparable level of economic development.

Kangtai specifically argues that India has better data to value chlorine (*i.e.*, an Indian domestic price), an input that composes 25 percent of its raw material cost, and that the Philippines has an insignificant quantity of chlorine imports. As stated in the underlying review, “even if import volumes are small, parties must submit information illustrating that the data is aberrational, such as import values from other economically comparable countries.”<sup>84</sup> Kangtai did not provide evidence that the Philippine chlorine data was aberrational in the underlying review, nor in its draft remand comments. While the Philippines data source may represent less chlorine than the Indian data source, this is not a factor the Department considers in its data analysis. The Department’s clearly stated practice is, “[i]n assessing data and data sources, it is the Department’s stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are

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<sup>83</sup> See Memorandum, “Final Results Surrogate Value Memorandum,” January 14, 2013 (Surrogate Value Memorandum), at 2.

<sup>84</sup> See *Chloro Isos 6<sup>th</sup> Final Results*, and accompanying Issues and Decision Memorandum at 15.

contemporaneous with the period of investigation or review, and publicly available data.”<sup>85</sup> The Department was able to use surrogate values from countries listed in the Surrogate Country Memorandum that met our standard practice. Kangtai has not provided any evidence of a serious deficiency in the Philippines data that would cause us in the underlying review or in these Final Remand Results, to conclude that the Philippines is not economically comparable to the PRC or that the data we selected was deficient. More importantly, while the Department did review data from India, and acknowledge that the record in the underlying reviews shows that India does provide adequate quality and availability of data to value the FOPs, because we have a country on the surrogate country list that also has adequate data as well, the fact that India has sufficient data does not overcome the fact that India is at a less comparable level of economic development as represented by the disparate GNI between India and the PRC than the Philippines, which is at a level of economic comparability to the PRC. Indeed the CIT has recently upheld this analytical framework in a separate proceeding, explaining that

Plaintiffs argue that Commerce erred by not selecting India as the primary surrogate country. India, though, had a *per capita* GNI of \$1,340, whereas the PRC had a *per capita* GNI of \$4,260. Given that disparity, as well as the availability of surrogate value data from two other economically comparable countries, Commerce’s decision to not select India appears reasonable; it is difficult to envision how India would have been a reasonable or defensible choice on this administrative record.<sup>86</sup>

The facts in this underlying review are similar to the ones relied on by the CIT in this decision, namely that given the *per capita* GNI disparity between the PRC and India, the fact that the Department had available surrogate value data from a country at the same level of economic development as the PRC, and selected the Philippines as the surrogate country over India is

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<sup>85</sup> See the Department’s Policy Bulletin No. 04.1, “Non-Market Economy Surrogate Country Selection Process,” (March 1, 2004) (Policy Bulletin 04.1), available on the Department’s Web site at <http://enforcement.trade.gov/policy/bull04-1.html>.

<sup>86</sup> See *Jiaying Brother Fastener Co., Ltd., v United States*, 916 F. Supp. 2d 1323 (CIT 2014) (*Jiaying Brother*).

reasonable. The Department has not ignored the fact that parties have placed Indian data on the record. But because the Philippines, a country listed on the surrogate country list, had quality data to value the FOPs, the Department was not required to conduct an extensive analysis on data from India. If India was still within the GNI band, or if the Philippines did not have quality data, further analysis of the Indian data would have been the logical next step in determining the appropriate surrogate country. However, this scenario is not what the Department was facing in the underlying review.

Additionally, while India may have a significant chemical industry comparable to the PRC, as claimed by Kangtai, the significance of the chemical industry is irrelevant to the Department's analysis of the level of economic development. This argument goes to another factor entirely, that is of significant producer. Kangtai suggests that instead of using *per capita* GNI to measure economic comparability, the Department 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."<sup>87</sup> The Court has twice already found against Kangtai on very similar industry sensitive proposals stating that the metric proffered by Kangtai only addresses the second prong of the surrogate country criteria which require a country be a "significant producer of comparable merchandise" without addressing economic comparability.<sup>88</sup> If a country is a significant producer of comparable merchandise, then the economy of the surrogate country is developed enough to support an industry in the comparable merchandise. This ensures that the surrogate country has a market in which the

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<sup>87</sup> See *Clearon Remand* at \*34-37 and *Jiaying Brother*, *supra*, Slip Op 14-12 at 9-10.

<sup>88</sup> *Id.*

comparable merchandise is actually produced from to get appropriate market based values for the NME respondent's FOPs.

For these reasons, the Department is continuing to use the Philippines as the surrogate country.

## **Comment 2: Calculation of Financial Ratio**

### *Kangtai Comments*

- According to the Department's *Labor Methodology*, the SG&A labor expenses are captured in the ILO labor rate.
- The numerous surveys and descriptions Kangtai placed on the record demonstrate that the ILO chapter 6A labor data covers all types of employment.
- To avoid double-counting, the Department must adjust the SG&A financial ratio by the employee benefits found in MVC's financial statements.

### *Jiheng Comments*

- The record evidence demonstrates that the labor information provided by the Philippines to the ILO includes both production workers and other employees and all retirement benefits. The Department should conclude that employee benefits/retirement benefits are included in the surrogate value selected for the *Chloro Isos 6th Final Results*.
- According to the Department's stated practice, an adjustment for the SG&A expenses is required in instances in which identifiable indirect labor costs were included as a line item under SG&A (as is the case here). This also means that the Department must recognize that expenses it categorizes as indirect labor expenses may well be reported as part of SG&A expenses on an income statement.
- The record establishes that MVC pays retirement benefits to all its permanent employees including the "rank and file" production workers and that all expenses related to those benefits are included in the line item "retirement benefits" reported under "operating expenses" in the income statement.

**Department's Position:** The Department is not adjusting the SG&A ratio for these Final Remand Results. The bulk of Kangtai's arguments center around its belief that the "ILO Philippines labor cost explanation states that earnings, wages, and salaries include all paid employees and specifically mentions 'managers, executive and supervisors.'"<sup>89</sup> However, Kangtai is mistaken. The ILO data for Philippine labor identifies several surveys as the source

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<sup>89</sup> See Letter from Kangtai, "Certain Chlorinated Isocyanurates from the People's Republic of China Comments on Draft Remand," September 23, 2014 (Kangtai Draft Remand Comments), at 17.

for different labor data. The two surveys are the “Labour-related establishment survey,” and “Industrial/commercial survey.” The SV labor data we used was taken from the latter survey.<sup>90</sup> While Kangtai did put information on the record regarding this second survey, there is nothing in the background or definitions of this survey that specifically mentions covering managers, executives, or supervisors. Kangtai cites to the first survey, the labour-related establishment survey, to argue that the SV we used covers managers. However, that survey was not the source of labor data we used in the underlying review or draft remand results. Nowhere in the industrial/commercial survey, which is the survey relied upon by the Department, does it specifically mention that managers, executives, or supervisors are included in the labor cost calculations. We find that, even after reviewing the preliminary results of the industrial/commercial survey,<sup>91</sup> there is no evidence that support’s Kangtai’s statement that the ILO survey underlying the Chapter 6A labor cost in manufacturing includes managers, supervisors, and executives.

Jiheng argues that the Department must make an adjustment for “employee benefits” included in the administrative expenses of the surrogate financial statement under the Department’s *Labor Methodology*. Jiheng claims that these employee benefits apply to both production labor and administrative labor. In other words, Jiheng is claiming that the surrogate company incorrectly accounted for production labor employee benefits in the administrative labor accounts. However, Jiheng is incorrect. The record evidence does not support a finding that the surrogate company misallocated its employee benefits.

While Jiheng cites to the Department’s *Labor Methodology* as the source of the authority for an adjustment, the *Labor Methodology* does not apply to these circumstances. The *Labor*

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<sup>90</sup> See Surrogate Value Memorandum, at Appendix III.44; see also Kangtai Rebuttal Information at exhibit 7.

<sup>91</sup> *Id.*



*Methodology* applies to circumstances in which it is demonstrated on the basis of record evidence that the SV labor rate may be overstating the production labor rate, such as when the SV labor rate includes both production labor data and administrative labor data.<sup>92</sup> If the record supports such a finding, under *Labor Methodology*, the Department, to the extent the surrogate financial statements break out the various types of labor data with specificity, may make an adjustment to compensate for the overstatement in the SV labor wage rate.<sup>93</sup>

What Jiheng is arguing about is an alleged misallocation of labor expenses within the surrogate financial statements. Jiheng is claiming that the employee benefits listed in the administrative cost section of the surrogate financial statement includes employees' benefits for factory labor, instead of only administrative labor. This is not a *Labor Methodology* issue but simply a factual issue of what the record indicates with regard to what the data in the financial statements reflect.

Jiheng questions the Department's interpretation of a "regular employee." Jiheng argues that, "{i}n its filing with the Philippine SEC authorities, MVC stated 'The company has a registered, non-contributory retirement plan. *All regular employees are covered from the President down to the rank and file.*'"<sup>94</sup> Our conclusion on the definition of a regular employee is simply based on the Department's understanding of the Philippines generally accepted accounting principles.<sup>95</sup> As noted by Petitioner, pointing out this incongruity, "there is no basis to assume that the ILO labor cost data would include employee and retirement benefits associated with direct production workers, but that the same employee and retirement benefits

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<sup>92</sup> See *Labor Methodology*, 76 FR at 36094.

<sup>93</sup> *Id.*

<sup>94</sup> See Jiheng Draft Remand Comments.

<sup>95</sup> See Letter from Petitioner, "Remand of the 2010-2011 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China: Comments Regarding New Data Placed on the Record," August 20, 2014.

would be reported as operating expenses rather than costs of sales.”<sup>96</sup> In other words, there is no reason to assume MVC would record benefits for production workers under operating expenses, when the companies surveyed by the ILO record benefits for such employees under manufacturing costs. Petitioner here is noting, as the Department stated in the underlying review, that benefits listed under the operating expenses category do not relate to production labor. This does not mean that the Department considers all “regular” employees to be SG&A employees. Rather, it means benefits for that subset of regular employees that are SG&A employees are recorded under operating expenses, whereas benefits for that subset of regular employees that are production employees are recorded under manufacturing costs. Because these benefits are listed under “operating expenses,” we are not adjusting the SG&A financial ratio for these Final Remand Results.

To the extent Jiheng is claiming that the ILO data includes SG&A type labor for which an adjustment to the financial data is necessary, like Kangtai’s argument, Jiheng has also failed to demonstrate that such labor is included in the ILO data. For the reasons stated above, we find that no adjustment is warranted.

Kangtai cites to a recent case where it claims we “eliminated all delineated labor categories from the financial statements to avoid double counting.”<sup>97</sup> In that case however, we specifically noted that the “wage” line item was included under a “staff expense” and therefore related “to direct labor as the company included a separate line item for SGA type labor, that being ‘Salary.’”<sup>98</sup> In this underlying review, record evidence establishes that the benefits in question fall under operating expenses, *i.e.*, SG&A labor. Consistent with *Steel Nails*, we have

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<sup>96</sup> *Id.*

<sup>97</sup> See Kangtai Draft Remand Comments at 20.

<sup>98</sup> See *Certain Steel Nails From the People’s Republic of China: Final Results of the Fourth Antidumping Duty Administrative Review*, 79 FR 19316 (April 8, 2014) (*Steel Nails*), and accompanying Issues and Decision Memorandum at comment 2.B.

not excluded benefits that are listed under an operating expense or other SG&A header in the notes to the financial statements.

### **Comment 3: Calculation of Intra-Company Transportation of Intermediate Products**

#### *Jiheng Comments*

- The Department has not provided a reasoned explanation for its change in practice for calculating an intra-company transport expense. The underlying review, the sixth review of this order, was the first time the Department employed this practice.

**Department's Position:** The Department is continuing to include a freight expense for the transportation of intermediate products for Jiheng. As noted by the Department, we requested to take a voluntary remand on this issue to explain our methodology, to allow parties to comment on this methodology, and to permit parties time to submit company-specific information to value this expense.

In the Draft Remand Results, we explained our policy regarding transportation of intermediate products.<sup>99</sup> No party questioned the methodology itself. However, Jiheng continues to argue that this is the first time in this order's history that we are including such an expense, despite verification of its company numerous times in previous reviews. While Jiheng is correct that this was the first time to include such an expense as a separate FOP, Jiheng fails to acknowledge the new factual circumstances presented in this review justify the change in treatment. Jiheng fails to acknowledge the fact that in the underlying review, a new factory producing subject merchandise was reported for the first time in the order's history, which was not within the old factory compound. Based on this new fact, the Department had to evaluate the production factors associated with this new factory. After analyzing the FOP responses provided by Jiheng in the underlying review, we discussed this freight expense with Jiheng at verification. After gaining a fuller understanding of the facts of Jiheng's production process and

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<sup>99</sup> See part C.3, above.

transportation of intermediate goods between separately situated factories, we properly treated the transportation costs between factories not in the same compound as a separate FOP rather than overhead.

As stated in the verification report, the Issues and Decision Memorandum, and the Draft Remand Results, Jiheng has not provided any evidence that this freight expense is included in its reported FOPs. The fact that the Department did not include this expense in previous administrative reviews does not preclude us from addressing the different facts regarding this expense in the underlying review. The underlying review simply has a different fact pattern from previous reviews.

Jiheng further argued that the Department has an inconsistent practice with handling freight expenses, and that the Department has not provided any case precedent. The Department notes that the methodology employed in this underlying review properly captures all costs used to produce subject merchandise. Jiheng did not demonstrate, despite being presented with several opportunities to do so, any documentation that this expense was already captured in its FOPs, or that it would be reflected in the financial ratios calculated from MVC's financial statements. Nor did Jiheng present an alternative method for the Department to use to capture this expense. Contrary to Jiheng's claim, the Department was able to provide case precedent in both the underlying review and the Draft Remand Results supporting this methodology.<sup>100</sup> Regardless, the Department has explained the factual basis for treating the intermediate product transportation as a separate FOP rather than overhead in the underlying review (because of the new, separately situated factory reported for the first time in the underlying review), and we have explained the methodology itself in the Draft Remand Results.

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<sup>100</sup> See, *infra*, at note 53.

#### **Comment 4: By-Product Valuation Methodology**

##### *Jiheng Comments*

- The Department has previously stated that because Jiheng's by-products do not require further refining to have commercial value, the downstream byproduct methodology did not apply to Jiheng's by-products.
- The Department's practice is to determine whether the by-product has commercial value through either sales or the reintroduction into the production of the same or other products. The Department has ignored these factors in its determination of the commercial value of the by-products.

##### *Kangtai Comments*

- The Department has not explained why it changed its practice from previous reviews or why the new practice is more reasonable.
- Ammonia gas and sulfuric acid clearly have commercial value, as supported by the record.
- This new methodology overcomplicates the by-product methodology by measuring a downstream product, which could distort NV.
- If the Department continues to use this new methodology for Kangtai, it should not deduct the cost of bags from the downstream by-product.

##### *Petitioner's Comments*

- Jiheng's ammonium sulfate by-product, sulfuric acid, labor and energy inputs should first be allocated to the production of cyanuric acid, the production process in which the by-product is generated from. The resulting per-ton amount should then be allocated to the appropriate subject merchandise, as done in the underlying review.
- The Department should adjust Jiheng's by-product offset to avoid over counting the value.
- Kangtai's by-product offset should be denied because it does not record income from these sales in its accounting records.
- Alternatively, if Kangtai is granted a by-product offset, the Department should adjust the inputs used to produce the by-product as reported by Kangtai to avoid double counting.

**Department's Position:** For these Final Remand Results, we are continuing to use the methodology from the underlying review to value the by-product offset, but are incorporating company-specific information provided by Jiheng and Kangtai. We are also recalculating several of the by-product inputs to capture more accurate costs.

Jiheng argues that the Department's by-product methodology requires the product to have a commercial value, not to be a saleable product. According to Jiheng, the Department's practice acknowledges two different ways a company can demonstrate commercial value: (1) sales or (2)

reintroduction into production of the same or other (non-subject) products. Additionally, because Jiheng's by-products do not require further refining to have commercial value, the Department declared previously that the downstream by-product methodology did not apply to Jiheng's by-products.<sup>101</sup> In spite of our explanation of the by-product methodology used in the underlying review, Jiheng argues that the method is a departure from the Department's standard practice and is not justified. We first note that Jiheng provided no substantive comments on the methodology we used in and of itself, just that it does not believe it is the current practice. Kangtai also takes issue with the Department's Draft Remand Results, noting that the Department did not explain why it changed from its prior practice, and why the new practice is more reasonable. Kangtai argues that the new practice over complicates the process, and that the most accurate way to measure the cost of the actual subject merchandise is to measure the cost of its production minus the value of immediate by-products.

In response to respondents' criticisms that the Department did not satisfactorily explain why we changed methods and why the new method is more reasonable, the Department disagrees. In the Draft Remand Results, we stated that "we modified the methodology we used in the *Chloro Isos 6<sup>th</sup> Final Results* to avoid overstating the value of the by-product offsets." Indeed, we re-evaluated the methodology we used in the underlying review due to concerns raised in Petitioner's case brief. The issue of the appropriate by-product valuation was not mentioned until the briefing stage of the review (after the preliminary results). While parties were not on notice at the time of the *Chloro Isos 6th Final Results*, parties have now had an opportunity to present their arguments regarding this new methodology, and we again note that no party has taken substantive issue with the methodology itself, but merely questioned why the Department changed its methodology.

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<sup>101</sup> See Jiheng Draft Remand Comments at 12.

Petitioner noted in its case brief that:

The record includes surrogate value data for ammonia gas, sulfuric acid, and ammonium sulfate in the Philippines. From Philippine import data, the value of ammonia gas is 17.36 PhP/kg, the value of sulfuric acid is 13.71 PhP/kg, and the value of ammonium sulfate is 11.59 PhP/kg. Applying the surrogate values from the Preliminary Results leads to the counterintuitive conclusion that respondents are combining two high-value byproducts (anhydrous ammonia and...sulfuric acid) in order to produce a significantly lower value byproduct in ammonium sulfate. In reality, of course, no company would combine pure anhydrous ammonia and...sulfuric acid to make a lower-value ammonium sulfate product.<sup>102</sup>

Petitioner further suggested that “the Department should value these byproducts using a surrogate value derived from ammonium sulfate, the product that is actually sold by respondents. The value of ammonium sulfate reflects the actual economic value of the byproducts generated through the respondents’ cyanuric acid production process and is accordingly an appropriate source to value the byproducts that are combined to produce ammonium sulfate.”<sup>103</sup> Thus the Department’s methodology reflects the actual value that the company receives for the by-products which are contained in the downstream product which Kangtai and Jiheng actually sell. Indeed, Kangtai itself, in its initial questionnaire response, reported ammonium sulfate as its by-product.<sup>104</sup> Based on these record facts, we reviewed the methodology we used in the preliminary results, and agreed with Petitioners that that methodology led to results that did not reflect the actual value received by Kangtai and Jiheng for the ammonia gas and sulfuric acid by-products. We continue to believe the more appropriate methodology, in the underlying review, is to value the downstream products and subtract the costs of the respondents to turn the two by-products into ammonia sulfate to arrive at the actual value that the respondents receive for the by-products. Reverting to the previous practice would lead to illogical conclusions that do not

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<sup>102</sup> See Letter from Petitioner, “Chlorinated Isocyanurates from China – Sixth Administrative Review: Case Brief of Petitioners Clearon Corp. and Occidental Chemical Corporation,” December 3, 2014, at 41-42.

<sup>103</sup> *Id.*

<sup>104</sup> See Kangtai Section D QR Response at 17.

match the real world experience of Jiheng and Kangtai. The facts of the underlying review regarding the valuation of by-products departed from the facts from previous reviews. The Department must consider in each individual review the appropriate method given the facts on hand as we have done in this case. Given the underlying review facts, we had to re-evaluate the best methodology to use,<sup>105</sup> which is what we did in the *Chloro Isos 6th Final Results*, and what we have explained in these Draft Remand Results.

Kangtai argues that its packing expense was double counted in the Draft Remand Results. The Department deducted the cost of bags from the ammonium sulfate by-product offset, but charged Kangtai the full price for urea, which includes the cost of the bags Kangtai recycles and uses to package ammonium sulfate. Kangtai states that if “the Department is going to allocate the cost of the bag downstream to the by-product, then the Department must deduct/remove the cost of the bag from cost of the urea to avoid double-counting this cost.”<sup>106</sup> As Kangtai also notes, it paid for these bags when it paid for the urea, and the surrogate value of urea must include the bags/packaging it came in. We agree that the surrogate value used for urea, as well as for ammonium sulfate (both from Global Trade Atlas), includes the price for packaging the products. Since the urea surrogate value we used includes packaging, we agree with Kangtai that we have double counted its costs. We have, therefore, adjusted Kangtai’s ammonium sulfate by-product and not deducted packaging from its offset.<sup>107</sup>

We are changing certain allocations in how we calculated the by-product offset in the Draft Remand Results to follow the calculations employed in the underlying review. In the underlying review, we allocated the ammonium sulfate by-product first to the production of

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<sup>105</sup> See, *infra*, at note 57.

<sup>106</sup> See Kangtai Draft Remand Comments at 21-22.

<sup>107</sup> See Memorandum, “Analysis for the Remand of the Final Results of the 2010-2011 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People’s Republic of China: Juancheng Kangtai Chemical Co., Ltd.,” December 11, 2014.



cyanuric acid, and then to the total amount of subject merchandise produced.<sup>108</sup> As noted by Petitioner, we did not use this same process for the Draft Remand Results. Due to this oversight in the Draft Remand Results, we have used the allocation calculations employed in the underlying review, with the company-specific data provided by Jiheng earlier in this remand proceeding, for these Final Remand Results.<sup>109</sup>

Petitioner raised concerns in its comments on the Draft Remand Results that because Kangtai was unable to demonstrate in a subsequent review that the sale of its by-products was recorded in its books and records, and Kangtai did not note any significant accounting changes from previous years, we should assume that Kangtai did not record its sales of by-products in the books and records for the POR. Regardless of what Kangtai has been able to demonstrate in subsequent reviews, we have no information on the record of the review underlying this remand that indicates Kangtai did not record sales of its by-products in the books and records for this review period. Therefore there is no basis to deny the offset for lack of sales.

Petitioner requests that we adjust the amounts reported for several inputs into the production of ammonium sulfate. First, Petitioner argues that Kangtai's allocation of sulfuric acid consumption in the production of ammonium sulfate and cyanuric acid is not a best estimate. However, based on the facts and experiences presented by Kangtai, Petitioner did not provide information that this best estimate is unreasonable. The Department finds that the method Kangtai followed to report the by-product FOPs was logical, is consistent with the level of detail

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<sup>108</sup> See Letter from Petitioner, "Chlorinated Isocyanurates from the People's Republic of China: Comments on the Draft Results of Redetermination Pursuant to Court Order, Clearon Corp. and Occidental Chemical Corp. v. United States, Court No. 13-00073, Slip Op.," September 23, 2014, at exhibit 1.  
14-88 (July 24, 2014)

<sup>109</sup> See Memorandum, "Analysis for the Remand of the Final Results of the 2010-2011 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China: Hebei Jiheng Chemical Company Ltd.," December 11, 2014.

provided in its books and records, and is therefore the best information on the record concerning the actual allocation of sulfuric acid between ammonium sulfate and cyanuric acid.

Petitioner also commented that the Department should continue to treat all electricity and labor consumed in the cyanuric acid workshop as direct inputs into the production of cyanuric acid, and not allocate these FOPs by production quantity of cyanuric acid and ammonium sulfate. In its questionnaire response, Kangtai explained that “For electricity and labor, Kangtai did not separately capture the consumption for CYA {cyanuric acid} or ammonium sulfate production in its normal business operations. Kangtai allocated total electricity KWH and labor hours by the production quantity of CYA and ammonium sulfate as a reasonable allocation methodology.”<sup>110</sup> Kangtai argues that there are three important production processes to produce cyanuric acid, and that only one of those steps would require sufficient amounts of electricity. Ammonium sulfate, which Kangtai argues has only two main production steps, only has one production step that involves a large amount of electricity. Therefore, allocating electricity between the production quantity of cyanuric acid and ammonium sulfate is a reasonable method, according to Kangtai. Kangtai also notes that a similar level of labor is used to produce both outputs. However, after explaining this allocation methodology, Kangtai states that if “the Department does not agree with Kangtai’s allocation methodology as described above, the Department should simply award the by-product offset with no additional by-product FOPs and with the Direct Material FOPs as previously reported at Exhibit D-7 of Section D response dated November 28, 2011, where Kangtai attributed all and total consumption to the CYA production.”<sup>111</sup> Based on proprietary concerns raised by Petitioner, we find that given the production experience of Kangtai, and the fact that it does not separately track these inputs for the different production process, the labor

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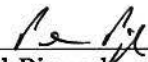
<sup>110</sup> See Letter from Kangtai, “Certain Chlorinated Isocyanurates from the People’s Republic of China - Remand Questionnaire Response,” August 18, 2014, at 3-4.

<sup>111</sup> *Id.*

and electricity allocation method used by Kangtai is not supported by the record. For these Final Remand Results, we are continuing to grant a by-product offset to Kangtai, but will treat all electricity and labor consumed in the cyanuric acid workshop as direct inputs into the production of cyanuric acid, and not deduct these inputs from the ammonium sulfate by-product.

**E. Final Remand Results**

Per the Court's instructions, we provided further explanations supporting the determinations of the *Chloro Isos 6<sup>th</sup> Final Results*. In addition, we adjusted our NV calculation by recalculating the transportation cost of intermediate goods between factories (for Jiheng), and recalculating the by-product offset using company specific information (for Jiheng and Kangtai). As a result of these changes, we determine a weighted-average dumping margin of 31.22 percent for Jiheng and 34.21 percent for Kangtai.

  
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Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

11 DECEMBER 2014  
(date)