

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 August 20, 2015, in *Chloro Isos 6th Final Results*.¹ These Final Remand Results concern the Department's final results of an administrative review of the antidumping duty (AD) order on chlorinated isocyanurates (chloro isos) from the People's Republic of China (PRC), and the results of the first redetermination pursuant to remand.² 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 6th Final Results*, which covered Kangtai and Jiheng, along with other exporters.³ The POR covers June 1, 2010, through May 31, 2011. Following non-market economy (NME) methodology, we selected the

¹ See *Clearon Corp., and Occidental Chemical Corp., et. al. v. United States*, Slip Op. 15-91, Consolidated Court No. 13-00073 (CIT 2015) (*Clearon 2015 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*).

² *Id.*; see also *Clearon Corp., and Occidental Chemical Corp., et. al. v. United States*, Final Results of Redetermination Pursuant to Remand, December 11, 2014 (First Remand Results).

³ *Id.*

Philippines as the primary surrogate country for the first time in the history of this AD order.⁴ In the *Chloro Isos 6th Final Results*, we selected the financial statements from Mabuhay Vinyl Corporation (MVC), a Philippine producer of comparable merchandise, to calculate the financial ratios. We adjusted the financial ratios to account for any overlap that existed between MVC's financial statements and the International Labor Organization (ILO) wage rate we selected to value the labor factor of production (FOP). We made no changes to the financial ratios in the First Remand Results. We also treated ammonium sulfate as the by-product for the first time in the *Chloro Isos 6th Final Results*, and in the First Remand Results, we adjusted the by-product offset calculated for ammonium sulfate to account for further processing costs. We also used Philippine import data from Global Trade Atlas (GTA) as the surrogate value (SV) for urea, hydrogen, and chlorine in the *Chloro Isos 6th Final Results*. The SV for these FOPs was not addressed in the First Remand Results.

In its August 20, 2015 opinion, the Court remanded the *Chloro Isos 6th Final Results* and First Remand Results to the Department as follows: (1) to either remove the labor items identified among the selling, general and administrative (SG&A) expenses of the financial statements from MVC or explain why adhering to the Department's *Labor Methodology* policy is inappropriate in this instance;⁵ (2) to either supply valid reasons to support changing the by-product methodology in this proceeding which amounts to a "sufficient, reasoned analysis," supported by substantial evidence, or to revert to the "former" methodology, with any appropriate modification (*e.g.*, capping) to avoid illogical conclusions that do not match the real

⁴ 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).

⁵ See *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 FR 36092 (June 21, 2011) (*Labor Methodology*).

world experience of the respondents; (3) to value urea using Philippine domestic pricing data or explain why GTA import data is superior to the domestic pricing data on the record; and (4) to select the best SVs for hydrogen and chlorine that reflect a full consideration of the interested parties' comments and how these inputs were valued in prior administrative reviews.

Pursuant to these instructions, we are providing further explanations and addressed the deficiencies identified by the Court in the *Chloro Isos 6th Final Results* and the First Remand Results below. 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 on the Draft Remand Results are addressed below following the Final Remand Results. We determine a weighted-average dumping margin of 31.22 percent for Jiheng and 34.21 percent for Kangtai.

C. Final Analysis

1) Calculation of Financial Ratio

In the *Preliminary Results*, we selected South Africa as the surrogate country.⁶ After receiving comments from parties, we changed the primary surrogate country for the final results,⁷ and selected the Philippines as the primary surrogate country for the first time in the history of this AD order.⁸ Jiheng argued that if we used the 2010 annual report of MVC, a Philippine producer of sodium hypochlorite, we should exclude the “employee benefits/retirement benefits” line items from the SG&A expenses in the surrogate financial ratio

⁶ 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*).

⁷ See *Chloro Isos 6th Final Results*, and accompanying Issues and Decision Memorandum at Comment 2.

⁸ See Memorandum, “Final Results Surrogate Value Memorandum,” January 14, 2013 (Surrogate Value Memorandum).

calculations because the expenses were already captured in the labor SV.⁹ In the *Chloro Isos 6th Final Results*, we determined that employee benefits/retirement benefits were classified by MVC as period costs, not as cost of sales (COS), 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. Therefore, 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).¹⁰

Because employee benefits/retirement benefits were presented on MVC’s financial statements as period costs, we classified the entire amount as SG&A expenses in the surrogate financial ratios in the *Chloro Isos 6th Final Results*. Parties continue to 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 ratio to correctly reflect the financial statements (*i.e.*, exclude employee benefits/retirement benefits line items from the SG&A financial ratio).

In the First Remand Results, we considered arguments from Jiheng and Kangtai, but concluded that we would continue to include these benefits that are listed under an operating expense (*i.e.*, SG&A expenses) in the notes to the financial statements in the SG&A financial ratio.

⁹ See *Chloro Isos 6th Final Results*, and accompanying Issues and Decision Memorandum at Comment 13.

¹⁰ *Id.*

In the Court’s current remand decision, it states that “insofar as the court could discern, by its own examination of Philippine generally accepted accounting standards in existence in 2010-11, the ‘proper’ accounting treatment of employee retirement and other benefits, as those relate to accounting for cost of goods sold, is not as clear-cut as Commerce assumes, except to the extent that they must be accounted for and reported.”¹¹ The Court further states that “{n}ote 19 of the Financial Statement provides detail, including the exact calculation of year 2010’s retirement benefit costs. Note 17 also itemizes ‘employee benefits,’ although it does not provide as much information on these expenses as for the retirement benefits.”¹² The Court therefore concluded that the Department “apparently failed to interpret the record correctly, thereby inadvertently violating its *Labor Methodology* policy without adequate justification” and that the Department must “either remove the labor items identified among MVC’s SG&A expenses or explain why adhering to its *Labor Methodology* policy is inappropriate in this instance.”¹³

Because of the Court’s instruction, we are adjusting the SG&A financial ratio as follows. We are treating MVC’s retirement benefits as applying to all labor – direct labor, which is part of COS, and non-production labor, which is part of SG&A. However, for employee benefits, we continue to find that the record supports treating these costs as non-production labor and are including them in their entirety in the SG&A financial ratio.

In the First Remand Results, the Department explained that MVC classified the line items “employee benefits and retirement benefits” as period costs unrelated to the production of any specific product, and thus, they were not captured by the ILO’s labor cost. We found that the ILO defines the labor cost as comprising “all payments by producers of wages and salaries to

¹¹ See *Clearon 2015 Remand* at 45.

¹² *Id.*

¹³ *Id.*

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.”¹⁴ Consistent with this definition, and our stated policy outlined in the *Labor Methodology*, we excluded MVC’s line items for “direct” labor and “supervisor and indirect” labor classified as COS and associated with production personnel to avoid double counting the labor included in ILO’s wage rate, but we did not exclude MVC’s employee benefits and retirement benefits because they were classified as “operating expenses.” Because we believe such expenses are costs associated with non-production, administrative workers, the Department determined at that time that they are not accounted for by either the direct or the indirect labor FOP and the corresponding SV.

The Court’s reading of the Philippines Financial Reporting Standards (*i.e.*, Philippines GAAP) in existence during the underlying administrative review is that the “‘proper’ accounting treatment of employee retirement and other benefits, as those relate to accounting for cost of goods sold, is not as clear-cut as Commerce assumes.”¹⁵ The Court’s analysis and record evidence show that “retirement benefits” apply to regular, *i.e.*, all, employees. Specifically, note 19 of the financial statements states that these retirement benefits apply to regular employees. Therefore, for this redetermination, we are allocating the retirement benefits to all employees. Specifically, we allocated the retirement benefits between the direct labor employees (under “Cost of Sales”) and the administrative employees, *i.e.*, “salaries and wages” (under “Operating Expenses”), based on the relative percentage that each labor cost (*i.e.*, direct labor costs and operating salaries and wages) represents of the total labor costs. We then excluded the amount

¹⁴ See First Remand Results at 22.

¹⁵ See *Clearon 2015 Remand* at 44.

allocated to the direct labor employees, *i.e.*, “Cost of Sales,” from the SG&A expenses and included the amount as direct labor cost, whereby we increased the denominator of surrogate financial ratio calculations in order to avoid double counting the labor included in ILO’s wage rate. Likewise, we continued to include the portion allocated to administrative employees, *i.e.*, “Operating Expenses” in the SG&A expenses. As a result, the surrogate financial ratios for overhead, and SG&A and interest decreased, from 24.58 percent and 13.28 percent, to 24.37 percent and 12.47 percent, respectively.

However, the “employee benefits” line item under MVC’s operating expenses does not have any such note indicating that the benefits apply to all or regular employees. The Court’s opinion also indicated that the “{MVC’s financial statements} does not provide as much information on these {employee benefits} as for retirement benefits.”¹⁶ Specifically, nowhere in the financial statements is there any definite indication that these benefits apply to “regular” employees as there is in the notes for retirement benefits. Because the record provides no further details on these employee benefits, and because these benefits are presented on the face of the financial statements as “Operating Expenses,” we are continuing to treat this line item as part of SG&A expenses.

2) **By-Product Valuation Methodology**

In past reviews of this order and in the *Preliminary Results*, we determined Jiheng’s and Kangtai’s by-product offset for ammonia gas and sulfuric acid by first calculating the amount of the two by-products produced during the review period. To calculate the quantity of the two by-products produced we relied on what was chemically required as inputs of the two by-products to produce the quantity of the downstream product (*i.e.*, ammonium sulfate) produced during the

¹⁶ See *Clearon 2015 Remand* at 45.

review period. We then applied SVs to the calculated quantity of ammonia gas and sulfuric acid produced to determine the offset to the reported costs of subject merchandise for the two by-products. We stated in the *Chloro Isos 6th 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.”¹⁷ We modified the methodology we used in the *Chloro Isos 6th Final Results* to avoid overstating the value of the by-product offsets. We stated at that time that it was 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, and deduct the further processing costs incurred to produce the downstream product. Thus, in a departure from our previous methodology in this case, we attempted to calculate the by-product offset by deducting from the downstream product (*i.e.*, ammonium sulfate) value any costs associated with converting the by-products into the downstream product, such as labor and electricity, using the FOPs and SVs in calculating the further processing costs. However, for the *Chloro Isos 6th Final Results*, we did not have the FOPs for these costs to deduct the further processing, so we used the full value of the ammonium sulfate produced (*i.e.*, quantity produced and SV of ammonium sulfate) as the by-product offset for the two by-products combined.¹⁸ In the First Remand Results, we opened the record, and Jiheng and Kangtai provided the costs associated with converting the ammonia gas and sulfuric acid to ammonium sulfate. We deducted these costs from the ammonium sulfate by-product to obtain our by-product offset.

¹⁷ See *Chloro Isos 6th 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”).

¹⁸ *Id.*

To clarify, the Department has not changed its practice regarding joint products and its associated by-product methodology. The Department's long standing practice of valuing by-products is to value the products as close to the split-off point as possible (in this case, that would be ammonia gas and sulfuric acid).¹⁹ However, in the underlying review, we stated, "we are adjusting the manner in which we calculate the by-product offsets for both Jiheng and Kangtai to conform to the Department's recent practice."²⁰ We did not explain why we were making this adjustment, and how this adjustment was consistent with our normal by-product methodology. One of the Department's concerns regarding this issue is neither respondent during the period of review could measure and keep records of the actual amount of waste ammonia gas and sulfuric acid which was being produced. As a result, we were forced to go to the downstream product production records to obtain the data to derive the amounts of ammonia gas and sulfuric acid. Therefore the first point at which the Department could determine the amount of by-product produced was from the companies' books and records on the downstream product production. Another concern raised by parties, and supported by the record, is that if we valued the by-products as close to the split off point as possible in this proceeding, as we had done in all prior reviews and the investigation of this case, then the amount of the by-product offset would result in an illogical outcome because the value of the ammonia gas and sulfuric acid (the immediate by-products) would be higher than the value of the ammonium sulfate (the by-product that is actually sold).²¹ In reality, as pointed out by the Court, in general no company

¹⁹ See, e.g., *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 76 FR 56396 (September 13, 2011), and accompanying Issues and Decision Memorandum at Comment 1a.

²⁰ See *Chloro Isos 6th Final Results*, and accompanying Issues and Decision Memorandum at Comment 14.

²¹ See, e.g., Memoranda, "Analysis for the Second 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.," and "Analysis for the Second 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

would combine two inputs, and incur additional processing costs, in order to make a lower-valued ammonium sulfate by-product. This was a clear indication that applying our methodology in the normal manner was not appropriate.

Because the Department's normal methodology, to value the by-products as close to the split-off point as possible, resulted in illogical results and could not be directly obtained from the respondents books and record but only from their books and records on the production of the downstream product, we calculated the by-product offset for ammonia gas and sulfuric acid using the POR production quantity and SV for ammonium sulfate, the downstream product produced, and reduced that value by the further processing costs incurred to convert the ammonia gas and sulfuric acid by-products to ammonium sulfate. We called this next step an "adjustment" in the *Chloro Isos 6th Final Results*. Following our normal methodology, for this redetermination, we are calculating the by-product offset for ammonia gas and sulfuric acid using the value of ammonium sulfate production, less the further manufacturing costs necessary to produce ammonium sulfate. The net value of the ammonium sulfate reflects the product closest to the split-off point that does not result in the illogical outcome when we value the ammonia gas and sulfuric acid generated at the split-off point.

Furthermore, we are not making any changes to Kangtai's by-product offset. The Department correctly acknowledged that production of ammonium sulfate involves a large amount of electricity. However, Kangtai does not separately record the FOPs used to convert the by-products (*i.e.*, ammonia gas and sulfuric acid) into the downstream product, ammonium

China: Juancheng Kangtai Chemical Co., Ltd.," dated concurrently with this final remand (collectively, Final Remand Analysis Memoranda).

sulfate.²² Therefore, in the by-product methodology used in the First Remand Results, we followed Kangtai's own suggestion, that the Department should simply allow the by-product offset Kangtai previously reported at Exhibit D-7 of its Section D response dated November 30, 2011, and not deduct the further processing costs because Kangtai allocated all the further processing costs to the cyanuric acid production.²³ Therefore, as the Court states, "since the remand results are apparently in accordance with what Kangtai itself argues, they are therefore not unreasonable to that extent."²⁴

3) Urea Surrogate Value

In the *Chloro Isos 6th Final Results*, we used GTA data from the Philippines to value the urea FOP. We used this data because we found at that time that urea was not produced domestically in the Philippines. However, as the Court points out, the Department later stated that the record evidence does indicate there is production of urea in the Philippines. The Court requested that the Department reconsider its SV for urea given that the Department has refuted its own previous basis for not selecting domestic Philippine data to value urea.

We have reviewed the record in the underlying review, specifically the Philippines' Bureau of Agricultural Statistics (BAS) "Updates on Fertilizer Prices" submitted by Petitioner for all months of the POR.²⁵ As we stated in the *Chloro Isos 6th Final Results*, we found that the BAS data is "from the Philippines, publicly available, contemporaneous with the POR, and

²² See Letter from Kangtai, "Certain Chlorinated Isocyanurates from the People's Republic of China - Remand Questionnaire Response," August 18, 2014, at 5-6.

²³ *Id.*

²⁴ See *Clearon 2015 Remand* at 61.

²⁵ See Letter from Petitioner, "Chlorinated Isocyanurates from the People's Republic of China (6th Antidumping Administrative Review): Petitioners' Submission of Rebuttal Information Regarding Surrogate Values for Factors of Production," January 17, 2012, at exhibit 1.

appear to be free of taxes.”²⁶ Our concern with the BAS data was that “there is record evidence that urea is not produced in the Philippines.”²⁷ During litigation, we contradicted this administrative finding, but we raised a second concern with the Court about the market representativeness of domestic production of urea in the Philippines. Petitioner is challenging this assertion that the evidence of domestic prices is not representative of a broad market average of Philippine production and that there is no production of urea in the Philippines.

Jiheng provided background information on the fertilizer market in the Philippines, including “The Business Monitor Report,” which indicates that 92 percent of the total supply of fertilizers (which include urea, as well as other fertilizers such as potash) were imported.²⁸ In the underlying review, we used this fact as part of the basis to conclude there was no production of urea in the Philippines. However, while the record indicates that 92 percent of Philippine fertilizers, including urea, are imported, our definitive assertion that there is no urea production in the Philippines is not supported by this or any other record facts. There is nothing on the record saying 100 percent of urea is imported, or that fertilizers, including urea, are not domestically produced. Indeed, the record indicates that there is domestic production of fertilizer, although it does not indicate urea production specifically.²⁹ We are using the BAS data because, as the Court concludes, our prior statements regarding domestic production are not supported by the record, and because, all else being equal (public availability, contemporaneity,

²⁶ See *Chloro Isos 6th Final Results* and accompanying Issues and Decision Memorandum at Comment 5.

²⁷ *Id.*

²⁸ See Letter from Jiheng, “Chlorinated Isocyanurates from China (Sixth Administrative Review) – Hebei Jiheng Chemical Company, Ltd. Resubmission of Surrogate Value Information for Factors of Production,” September 5, 2012 (Jiheng SV Submission), at Attachment 2.

²⁹ *Id.*

etc.), the BAS data, which represents dealer prices in the Philippines, is the preferred source over the GTA data used in the underlying review.

Our statement that the BAS data is not really representative of the domestic price of urea because domestic production had dropped significantly over time also is not borne out by a re-examination of the complete record. As Petitioner notes, we have analyzed BAS data in the past, and specifically found that the BAS data “(i) ‘represent broad market-average retail prices,’ (ii) ‘are specific to the urea input,’ (iii) ‘are exclusive of value added taxes,’ and (iv) ‘are publicly available from BAS or the Fertilizer and Pesticide Authority of the Philippines.’”³⁰ Thus, we are now concluding that the BAS data is representative of the domestic price of urea. First, while the underlying data does note that fertilizer production had decreased in the Philippines, there are no specific statistics about the decrease of urea production itself, and there is no indication that this trend is significant. Second, while the record indicates that the domestic price of urea had slightly decreased from the previous year (the smallest decrease in price compared to other fertilizers), the “The Business Monitor Report” article explains that the import price for fertilizers is sensitive to oil prices (because many of the fertilizers, such as urea, are by-products of oil).³¹ The article specifically noted that high oil prices in the international market could cause fertilizer prices to spike.³² Thus, changes in domestic prices can be explained by changes in relevant market factors rather than by aberrationally small domestic production. Finally, as explained in detail in our discussion of the surrogate values for chlorine and hydrogen and of the selection of the primary surrogate country, the Department does not take economies of scale into

³⁰ See *Final Results of Redetermination Pursuant to Court Remand, Court No. 08-00364, Slip Op. 11-142* (March 19, 2012), at 7-8.

³¹ See Jiheng SV Submission, at Attachment 2.

³² *Id.*

consideration when choosing a surrogate value. As explained in those discussions, the Department only examines quantities in an effort to root out misclassifications, sample transactions, and other values that do not appear to be representative of commercial transactions for the input in question.

Therefore, we are changing the SV for urea, and are valuing it using BAS data provided by Petitioner.

4) Process of Selecting the Primary Surrogate Country

As discussed below, the Department has determined that, in order to comply with the Court's remand, it must value chlorine and hydrogen with Indian data, a country not on the list of economically comparable countries. The Court leaves open the question of the proper surrogate country for the remaining FOPs, suggesting the Department may wish to reconsider India in light of the Court's instructions regarding chlorine and hydrogen. In so doing, the Court noted: "While it is reasonable for Commerce to prefer to use data from a surrogate country that is at a comparable level of economic development over one that is at a less comparable level of development, when presented with a 'less economically comparable' country off the list it must still provide an analysis of how the data from the less comparable country presented does not outweigh its economic disparity."³³ The Court continued by explaining such a "full comparative evaluation of the data quality" is not necessary unless the party proposing a non-listed country demonstrates "that no country on the surrogate country list provides the scope of 'quality' data that it requires in order to make a primary surrogate country selection;" *i.e.*, the party proposing to go off the list has the burden of demonstrating quality data is not available from countries on

³³ See *Clearon 2015 Remand* at 9.

the list.³⁴ Only then, if that “threshold” is not met, must the Department “consider the quality of the data on the country not on the list that a party proposes.”³⁵

Upon remand, the Department continues to conclude that the Philippines is a source of quality data for all FOPs besides chlorine and hydrogen and, thus, we see no reason to choose a primary surrogate country “off the list.” As the Court notes, “Commerce’s selection of the Philippines as the primary surrogate country from the Surrogate Country List has general support in the record.”³⁶ While the Court suggests the choice of surrogate country turns largely on the source for valuing chlorine and hydrogen, the use of Indian data for two factors does not change the conclusion that the selection of the Philippines is supported by the record. Chloro isos requires more than 40 FOPs, depending on the producer’s level of integration.³⁷ Aside from dozens of chemical inputs, packing materials, electricity, labor, overhead, selling, general, and administrative expenses, and profit must also be valued. In fact, as explained in the Draft Remand Analysis Memoranda, chlorine and hydrogen are not so critical as to warrant switching to India as the primary surrogate country, at the expense of quality data for all other factors chosen from a country at the same level of economic development.³⁸

When we emphasized the importance of chlorine and hydrogen in considering the choice between the Philippines and Thailand, we were looking at two countries on the list of economically comparable countries. All else being equal, including economic comparability, it makes sense to choose the country with better data for chlorine and hydrogen, as it would make sense to choose the country with better data for any other FOP, all else being equal. By

³⁴ See *Clearon 2015 Remand* at 10-11.

³⁵ *Id.*

³⁶ *Id.*, at 12.

³⁷ See, e.g., Draft Remand Analysis Memoranda at Attachment 2.

³⁸ *Id.*

definition, all else is not equal when choosing between a country at the same level of economic development and one that is less comparable. Data from a less comparable country is automatically at a disadvantage to data from a country at the same level of economic development. Data from countries at the same level of economic development reflect an overall economic environment similar to the one of the country under investigation, including general labor and professional wages, interest rates, the availability of financing, the sophistication of infrastructure, etc.

Importantly, “economic comparability” is not an industry-focused analysis. Section 773(c) of the Act refers to a comparison of “countries,” not industries, in choosing the best surrogate. Such a focus, in the view of the Department, is necessary to take into consideration an overall economic environment. A focus on industry similarity, which Kangtai appears to propose in its emphasis on the scale of India’s chemical industry, ignores the statutory “country”/macro considerations in favor of non-statutory “industry”/micro considerations. Undoubtedly, the PRC and India both have large-scale chemical industries, as does the United States, but this similarity does not mean all three countries enjoy similar financing expenses, overhead, labor rates, natural resources, legal and taxation regimes, government policies, etc. The United States could not be considered economically comparable to the PRC and the use of U.S. SVs would not normally be appropriate unless there was no other evidence on the record; the same is true for less comparable countries.

Thus, to view industry similarity as a factor in choosing a surrogate country arguably results in reading Congress’ focus on country economic similarity out of the statute. Since India, with its large population and high GNI (aggregate, not per-capita GNI) has many large-scale

industries, an industry-specific focus could result in the Department routinely choosing India (a less economically comparable country), in direct contradiction of the Act, and the SVs chosen would not reflect the higher demands of a comparable economy. For similar reasons, the Department noted in the *Chloro Isos 6th Final Results* that it does not take the aggregate size of an economy, aggregate GDP, and workforce population into consideration in determining economic comparability. Instead, the Department looks at per-capita GNI.

Finally, choosing a surrogate country by comparing the size of the industry in the potential surrogate country to the size of the industry in the country under examination is incorrect because, by definition in an NME proceeding, the economy of the country under examination does not adhere to market principals. While the PRC's chemical industry may match that of India's in terms of size, the size of the PRC's chemical industry may be due to non-market distortions inherent in the PRC's economy. However, in determining a dumping margin, the Department seeks to determine what the NV of the product would be if the economy of the country under examination were free of such distortions. In effect, that the PRC's chemical industry might more closely resemble, in terms of size, that of India than of a comparable economy like the Philippines might well be the result of non-market distortions. Dumping of the product under examination may be another factor leading to the industry under examination being larger than it might be otherwise because dumping may lead to a larger export market for the dumped produce and, correspondingly, a larger foreign industry. Thus, non-market distortions in the PRC and the pricing behavior of the Chinese industry are both potential factors explaining the large size of the Chinese chloro isos industry, and it is not necessary to conclude

that the similarity of the Chinese and Indian industries in terms of size is proof of economic comparability between the two countries.

For all these reasons, the Department would not choose a less economically comparable country as the primary surrogate country because of two factors accounting for only a fraction of NV when there is quality data available for the remaining factors. The only reason the Department is relying on India even for those two factors is because, given the Court's findings regarding Philippine GTA data, there is no quality data available from countries at the same level of economic development on the record. As the Court notes, such a choice would be made only when "no country on the surrogate country list provides the scope of 'quality' data that it requires in order to make a primary surrogate country selection,"³⁹ not simply because data from an off-list country might appear to be better at first glance (because it is from a large-scale chemical producing country).

Although the Department did place emphasis in the First Remand Results on these two chemicals when discussing the possibility of India as a surrogate country, that is simply because the issue was first raised by Kangtai. Kangtai argued that chlorine and hydrogen were best valued in India and that therefore, for that reason among others, the Department should choose India as the primary surrogate country. When the Department responded with the position that adequate Philippine data was available, we did not intend to concede the point that the lack of data for two chemicals would justify replacing the Philippines with India as the surrogate country. Furthermore, the Court notes that the "relevant regulation, 19 C.F.R. §351.408(c)(2), expresses leeway in providing that Commerce '*normally* will value all factors in a single

³⁹ See *Clearon 2015 Remand* at 11.

surrogate country’.”⁴⁰ As the Court’s emphasis indicates, this regulation does not require that the Department value all factors in a single surrogate country. We must consider this regulation in the context of each proceeding, and in light of our surrogate country selection methodology, which places emphasis on the level of economic development of the surrogate country. Thus, it is the Department’s preference to value all the factors of production in a single surrogate country. However, in this proceeding, there is no single country that is both at the same level of economic development as the PRC and provides the data to value all FOPs. We must balance our regulatory preference and statutory directives in selecting surrogate countries. None of the potential surrogate countries (those at the same level of economic development as the PRC) contain data to value all of the FOPs. However, we keep our regulatory preference in mind, and have been able to value nearly all of the FOPs in a single economically comparable surrogate country, the Philippines. The statute and the Department consider it preferable to value most of the factors in an economically comparable country than switching to data from a less economically comparable country because the data from the less economically comparable country is just that – less comparable – and does not fulfill the purpose of the statute to value the FOPs, to the extent practicable, in a country at the same level of economic development.

Finally, the Department wishes to clarify the following statement made in the First Remand Results, noted by the Court in footnote 10: “{i}f 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.”⁴¹ The Court asks whether this means a country without comparable GNI cannot be a significant producer of comparable merchandise or

⁴⁰ See *Clearon 2015 Remand* at 25.

⁴¹ *Id.*, at 10, referring to First Remand Results at 38.

whether it means a country with significant production of comparable merchandise must be economically comparable and thus an appropriate source of SVs. The Department, in fact, considers these two statutory factors (economic comparability and significant production) to be independent of each other. A finding regarding one does not imply a finding regarding the other. Moreover, both factors are threshold; they are either met or they are not: “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.”⁴² Thus, “significant” is not measured in comparison to the respondent’s own level of production or the scale of the industry in the NME country under investigation. As explained above, requiring a match between the scale of the industry in the NME country and the scale of the industry in the surrogate country would undermine the statute’s focus on the country’s overall economic environment. Thus the key word in the sentence is “support;” “{i}f 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.”⁴³ In other words, a country is a suitable surrogate if it is able to produce comparable merchandise in a similar economic environment, a conclusion reached through examination of economic comparability and, separately, examination of evidence of actual production of comparable merchandise, even though it may be on a much smaller scale than that of the respondents or the NME under examination. As for matching a respondent’s production, the statute requires the Department to use the FOPs of the respondent. It is through this method of NV calculation that

⁴² See First Remand Results at 4.

⁴³ *Id.*, at 38.

the respondent's production is represented and again nothing about the scale of production is included in the FOPs provision.

5) Hydrogen and Chlorine Surrogate Values

The Court remanded the Department's selection of SVs for hydrogen and chlorine, stating that the rationale in the underlying review "does not reflect a full consideration of the parties' arguments, {but} instead reflects inconsistent logic as compared with Commerce's treatment of the chlorine surrogate value in the *Preliminary Results* and prior reviews."⁴⁴ Additionally, the Court stated that the Department's findings do not approximate a surrogate country with comparable production experience to the respondents.

In the *Chloro Isos 6th Final Results*, we changed the SV for hydrogen and chlorine from domestic production data found in financial statements from Indian producers of the inputs (used in the *Preliminary Results*) to GTA import data from the Philippines for the respective inputs. The Court's opinion notes that the Department is required to use the best available information in choosing SVs.

In prior reviews, to which both respondents were a party, the Department made specific findings regarding the nature of hydrogen and chlorine; the higher transportation and packaging costs associated with movement of these chemicals are exacerbated over longer distances, greatly adding to the cost of the inputs. Therefore, the Department found that GTA data does not provide the best SV for these inputs in prior reviews and in the *Preliminary Results*.⁴⁵ The Court states that the Department provided no record evidence overcoming this prior finding on the nature of these two inputs. Further, the Court states that "{r}ather than abide by its previous

⁴⁴ See *Clearon 2015 Remand* at 27.

⁴⁵ See Memorandum, "Preliminary Results Surrogate Value Memorandum," June 29, 2012, at 4.

statements concerning the ‘nature’ of hydrogen gas and chlorine, Commerce also shifts the burden onto Clearon and Kangtai to provide proof for the record thereof. Hence, whether substantial evidence of record moots the points Clearon and Kangtai raise, thereby rendering Commerce’s improper burden-shifting harmless error, depends upon the validity of Commerce’s ultimate conclusion” (citation omitted).⁴⁶ The Department reviewed the underlying record, and found no evidence indicating that the nature of transporting these two inputs had changed from the previous review. While the Department may re-examine in future reviews the nature of these products, the possibility that improvements in transportation methods have increased their trade internationally, and evidence that trade volumes have in practice increased, such evidence is not on the record of this review.

Furthermore, Petitioner and Kangtai maintain it is irrational for the Department to consider import data for hydrogen gas and chlorine as “reasonable” SVs, in part due to the very small quantities represented by the GTA import data. In fact, one Philippine producer of chlorine produced more chlorine by itself than the reported imported quantity over the POR.⁴⁷ The import data for chlorine contained a wide range of average unit values across countries, and the Court agreed with Kangtai that “the IDM’s reasoning for finding the average unit value of the Philippines GTA data reliable as a surrogate for the chlorine input is undercut by a lack of consideration of the apparent extraordinarily wide range of Philippine import values in light of the fact that the Department used such a variation to explain why, in part, it was opting for Indian domestic data in the prior review, therefore requiring remand.”⁴⁸ Upon reconsideration pursuant

⁴⁶ See *Clearon 2015 Remand* at 15.

⁴⁷ See Letter from Jiheng, “Chlorinated Isocyanurates from China (Sixth Administrative Review) – Pre-Preliminary Surrogate Value Information,” January 9, 2012, at tab 4.

⁴⁸ See *Clearon 2015 Remand* at 23-24.

to the Court's findings,⁴⁹ and based on the record of this proceeding,⁵⁰ because of the hazardous and unstable nature of hydrogen and chlorine, the variation in the import data,⁵¹ and the relatively small quantity of imports of the two chemicals into the Philippines,⁵² the Philippine GTA data does not represent the best possible source for a SV for hydrogen and chlorine.

The only remaining source of evidence available on the record is from Indian financial statements for companies that produce hydrogen and chlorine. As this is the only remaining record evidence, we are relying on these financial statements in this remand to value hydrogen and chlorine. We have used these financial statements in prior reviews.⁵³ However, we note that while we are using data from India in this instance, as the best (and only remaining) record evidence to value hydrogen and chlorine, this selection does not undermine our finding that the Philippines is the primary surrogate country. This issue is discussed in detail above.

We note that Kangtai argues that some of the 2010-2011 financial statements provided by Petitioner contain alleged subsidies, and should therefore not be used to value hydrogen and chlorine. However, the Department's practice is to only exclude financial statements that contain a subsidy that the Department has found countervailable in the past from serving as surrogate financial statements from which to derive surrogate financial ratios.⁵⁴ A careful review of the financial statements indicates that these companies did not receive a countervailable subsidy. The subsidies cited by Kangtai are either too vague⁵⁵ to tie to a previously

⁴⁹ See *Clearon 2015 Remand* at 23-24.

⁵⁰ See Memorandum, "Preliminary Results Surrogate Value Memorandum," June 29, 2012.

⁵¹ See Memorandum, "Final Results Surrogate Value Memorandum," January 14, 2013.

⁵² *Id.*

⁵³ See *Chlorinated Isocyanurates From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 76 FR 70957 (November 16, 2011).

⁵⁴ *Id.*

⁵⁵ See Letter from Kangtai, "Certain Chlorinated Isocyanurates from the People's Republic of China Rebuttal Brief by Juancheng Kangtai," December 10, 2012, at 14 (which listed supposed subsidies as follows: "investment

countervailed subsidy, or are for disbursements the Department has not previously countervailed as a subsidy.⁵⁶ Therefore, we are using the 2010-2011 financial statements from several Indian producers to value hydrogen and chlorine.⁵⁷

Finally, the Department respectfully disagrees with the Court's statements made in the context of its discussion of chlorine and hydrogen seeming to indicate SVs must be chosen from countries that produce the input in quantities comparable to – or higher than – the respondents' consumption or that produce the subject merchandise in quantities comparable to the NME under investigation. For example, the Court notes that the Philippine import data for chlorine "does not approximate a surrogate country with comparable production or Kangtai's actual production experience."⁵⁸ While the Department does consider, in certain circumstances, the volume of import data for an particular input, we have no statutory directive or policy requiring a surrogate country's imports or production of an input (*i.e.*, a factor consumed in the production of subject merchandise) to be equal or comparable to the respondents' actual consumption. Moreover, we do not even require that imports or production of the input be "significant." Our past review of import volumes of chlorine and other inputs has been solely for purposes of identifying "aberrational data," and corroborating the claim that, for example, chlorine and hydrogen are not

incentive," "export incentives," "incentives receivable," and benefits under the countervailable "DEBP" scheme (while the Department has countervailed benefits from the DEBP scheme, in this case, Kangtai refers to a note in the accounting policies which states that "export incentives such as Duty Entitlement Pass Book (DEPB) license are taken into account on the basis of eligible export FOB value," implying that DEBP benefits would be just one of the benefits listed in this line item. However, it is not clear from the financial statements or in the notes that the listed "export incentives" actually include benefits from the DEBP scheme or from any other specific countervailable program) and concessions/subsidies on "traded Phosphatic and Potassic fertilisers").

⁵⁶ *Id.*

⁵⁷ For a list of the financial statements used to value hydrogen and chlorine *see* Draft Remand Analysis Memoranda.

⁵⁸ *See Clearon 2015 Remand* at 27.

traded internationally.⁵⁹ As explained at length above in the context of discussing the process of selecting a surrogate country, the Act does not require that the Department take the respondents' actual consumption experience into account in selecting SVs, and, in the Department's view, taking such respondent-specific factors into account could undermine the Act's requirement to choose data from an economically comparable country. Data from a country at the same level of economic development is inherently superior to data from a less comparable country (also explained in detail above) and the Department only relies on data from a less comparable country when, as is the case here for chlorine and hydrogen, there is no quality data available from a country at the same level of economic development.⁶⁰

D. Comments on Draft Remand Results

Comment 1: Calculation of Financial Ratio

Kangtai Comments

- The Department's procedure for calculating the financial ratios is that if the financial statements delineate any labor items that ILO 6A covers, the Department must remove those line items from the SG&A numerator to avoid double-counting labor costs.⁶¹
- The retirement benefits and operating expenses employee benefits are covered by the ILO 6A and must be included in the labor column of the financial ratio calculations.⁶²
- If the Department no longer finds *Labor Methodology* and its assumptions are best, then the proper venue to change the methodology is not in an individual case on remand but through notice and comment for future application.⁶³

⁵⁹ In fact, often there would be no "volume" data to examine. For example, besides import data, the Department has relied on price quotes government published price indices as SVs, which frequently have no associated volumes.

⁶⁰ Other examples involve crawfish (*see, e.g., Freshwater Crawfish Tail Meat From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission; 2010-2011, 78 FR 22228* (April 15, 2013), and accompanying Issues and Decision Memorandum at Comment 1), and garlic (*see, e.g., Fresh Garlic From the People's Republic of China: Final Results of the Semiannual Antidumping Duty New Shipper Review of Jinxiang Merry Vegetable Co., Ltd. and Cangshan Qingshui Vegetable Foods Co., Ltd.; 2012-2013, 79 FR 62103* (October 16, 2014), and accompanying Issues and Decision Memorandum at Comment 1). In all these instances, the Department used data from less comparable countries only because data for the same species of crawfish, and garlic was unavailable for countries with the same level of economic development. In all three instances, the Department first determined that distinctions among species were significant (*i.e.*, not all garlic bulbs are alike).

⁶¹ *See* Letter from Kangtai, "Certain Chlorinated Isocyanurates from the People's Republic of China – Comments on Second Draft Remand," February 5, 2016 (Kangtai Comments), at 17-18.

⁶² *Id.*

⁶³ *Id.*

Department’s Position: The Department is not adjusting the SG&A ratio further for these Final Remand Results. As Kangtai states, the Department’s policy is to remove any labor items from the SG&A numerator to avoid double-counting labor costs. However, Kangtai appears to misconstrue the word “any” with the word “all.” The Department’s methodology only removes from manufacturing overhead and SG&A those labor charges that conflict with what is already accounted for by ILO 6A, *as applied to the direct and indirect labor factors*. It does not remove all labor charges from SG&A automatically. Kangtai misconstrues the Department’s “published findings” when it states that “ILO 6A data covers all types of employees-production and non-production.”⁶⁴ There is no suggestion in either *Labor Methodology Request for Comments*,⁶⁵ or in *Labor Methodology* that the methodology should be applied to non-production labor (*i.e.*, to selling, general, and administrative labor). Rather, the methodology (and the related surrogate value) is applied only to direct and indirect production labor. The Department states in the *Labor Methodology Request for Comments* that:

The ILO defines Chapter 6A data to include:

The cost incurred by the employer in the employment of labour. The statistical concept of labour cost comprises remuneration for work performed, payments in respect of time paid for but not worked, bonuses and gratuities, the cost of food, drink and other payments in kind, cost of workers’ housing borne by employers, employers’ social security expenditures, cost to the employer for vocational training, welfare services and miscellaneous items, such as transport of workers, work clothes and recruitment, together with taxes regarded as labour cost.

The ILO Chapter 6A data include all costs related to labor including wages, benefits, housing, training, etc. *To the extent that Chapter 6A data includes some of the expenses that may already be captured in the surrogate financial ratios, there is a possibility that*

⁶⁴ See Kangtai Comments at 18.

⁶⁵ See *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor; Request for Comment*, 76 FR 9544 (February 18, 2011) (*Labor Methodology Request for Comments*).

the use of Chapter 6A data may overstate the cost of labor in certain cases. The Department's ability to identify and adjust for such individual labor costs is fact-specific in nature and subject to the available information on the record of the specific proceeding. There will be some cases where information is available to make such adjustments, but there will be other cases where the Department cannot make such an adjustment due to a lack of available data. However, if the Department does not use an all inclusive data source, such as the ILO Chapter 6A data, the NME producer's total labor cost will be understated in cases where the surrogate financial statements do not include certain indirect labor costs that are also excluded from ILO Chapter 5B data.⁶⁶

The language emphasized in the paragraph above clearly indicates that the Department intended to exclude only labor expenses from overhead and SG&A that *might* be double counted (*i.e.*, may already be captured in the surrogate financial ratios) and conflict with ILO 6A (as applied to the direct and indirect labor factors), not all labor expenses.

In *Labor Methodology*, the Department further states:

The Department also adjusts, when possible, the calculated factory overhead ratio to reflect all indirect labor costs (*e.g.*, employee pension benefits, worker training) itemized in the company's financial statement. While the Department's ability to identify and adjust for indirect labor costs depends on the information available on the record of the specific proceeding, when the Department is able to make the necessary adjustments, both direct and indirect labor costs are accounted for...the Department has decided to change to the use of Chapter 6A data, on the rebuttable presumption that Chapter 6A data better accounts for all direct and indirect labor costs. In their comments, MOFCOM and VASEP argue that use of ILO Chapter 6A would result in overstating labor costs. To address this concern, the Department will adjust the surrogate financial ratios *when the available record information—in the form of itemized indirect labor costs— demonstrates that labor costs are overstated.*⁶⁷

Once again, the emphasized language indicates that the Department's intent when issuing the new methodology was that only in certain circumstances would the financial ratios need to be adjusted to avoid conflicts with ILO 6A and the labor factors, not in every instance where a labor item appears in a financial statement. The distinction between production and non-production

⁶⁶ See *Labor Methodology Request for Comments* (cites omitted) (emphasis added).

⁶⁷ See *Labor Methodology* at 76 FR at 36093-36094 (emphasis added).

factors is not limited solely to labor. The entire NME methodology recognizes a distinction between factors of production, used to account for “inputs” (*e.g.*, raw materials, packaging, direct and indirect production labor, certain energy expenses), on the one hand, and overhead, selling, general, and administrative expenses, and profit, on the other. The former is valued with surrogate values and the latter with financial ratios. It would be impossible for a respondent to calculate factors of production for *all* expenses; FOPs by their nature are tied to marginal costs and vary according to production volumes. SG&A and profit, by contrast, do not necessarily vary in direct correspondence to production volumes and are accounted for on a company-wide basis. Direct and indirect labor factors do not attempt to account for *all* labor expenses, but only production labor expenses (wages, benefits, housing, training, etc. of factory workers and their supervisors). SG&A labor expenses (wages, benefits, housing, training, etc. of sales personnel, accountants, executives) are not accounted for by factors and SVs, but by overhead and SG&A surrogate financial ratios.

Thus, when the Department states that ILO 6A includes all costs related to labor including wages, benefits, housing, training, etc., that statement is correct. However, the SV calculated from ILO 6A is only being applied to factors of production that account for direct and indirect *production* labor. Multiplying that SV by the hours indicated in the two production labor factors results in a per-unit value for production labor that is in no way related to overhead, selling, general, and administrative labor. To phrase things differently, a fully loaded ILO 6A SV does not account for all labor expenses; it only accounts for all production labor expenses, because the SV is only being applied to a FOP that accounts for production labor. Therefore, the only time the Department would adjust the SG&A ratio would be when – unexpectedly – it

includes expenses related to production labor, already accounted for by the SV, as applied to the two labor factors.

We agree with the Court and with the parties that the retirement benefits previously categorized under the SG&A ratio include labor costs that are captured by the ILO 6A surrogate value as applied to the direct and indirect labor factors. However, as stated in our *Labor Methodology*, we look at the financial statements on a case by case basis. In this instance, retirement costs apply to “regular employees,” which, according to the Court, include production labor (*i.e.*, “direct” labor and “supervisor and indirect” labor classified as COS) as well as non-production labor (*i.e.*, SG&A labor). Because we have these detailed line items in the financial statements, we must carefully consider how to attribute retirement costs to the production labor and non-production labor in the financial ratios. Otherwise, if the costs are only attributed to non-production labor, labor costs would be overstated (*i.e.*, retirement expenses for production labor already captured in the factors of production would be double counted by being left in the financial ratios); however, if the costs are only attributed to production labor, the labor costs would be understated (*i.e.*, retirement expenses for non-production labor would not be captured in the factors of production). Therefore, for the portion of retirement costs that are associated with production labor, we agree with parties that this cost should be allocated to the “labor column” in the worksheet calculating the financial ratios. The labor column represents expenses already accounted for by the ILO 6A surrogate value and the two labor factors. However, we are then left with some of the retirement costs that cover the remaining employees, *i.e.*, not the production labor. Based on the record, the Court’s reading of the Philippines Financial Reporting Standards, and the Department’s *Labor Methodology*, the rest of the retirement costs

can reasonably be allocated to the administrative employees, *i.e.*, “salaries and wages” (under “Operating Expenses,” which after all is where this expense is recorded), and left as part of the expenses used to calculate the SG&A ratio numerator.

Contrary to Kangtai’s assertion, we are consistent with our methodology given the case-specific facts of this proceeding. Kangtai points to no record evidence indicating that “regular” employees apply only to production labor. Therefore, we have allocated the retirement benefits between the direct and indirect production labor employees and the selling, general, and administrative employees (*i.e.*, non-production labor), based on the relative percentage that each labor cost (*i.e.*, direct and indirect production labor costs and “operating expenses, salaries and wages”) represents of the total labor costs.

Kangtai argues that the Court has called this “tortured analysis” that is “all beside the point.”⁶⁸ However, the Court requested that the Department “either remove the labor items identified among MVC’s SG&A expenses or explain why adhering to its *Labor Methodology* policy is inappropriate in this instance.”⁶⁹ We have removed certain labor items as requested by the Court, and explained why our analysis in this case follows *Labor Methodology*. MVC’s financial statements provided unique facts that the Department analyzed in the context of *Labor Methodology*. Regarding the retirement benefits, consistent with our methodology, we have removed from the SG&A numerator a portion of those costs reasonably attributable to production labor. Regarding the employee benefits, because they are not identified as being tied

⁶⁸ See Kangtai Comments at 18.

⁶⁹ See *Clearon 2015 Remand* at 45.

to production labor, either in a note or by classification under COS,⁷⁰ as required in *Labor Methodology* and discussed above, it is not appropriate to exclude these costs from SG&A expenses when they are clearly identified as “Operating Expenses.” As stipulated by our *Labor Methodology*, we are continuing to treat this line item as part of SG&A expenses.

Comment 2: By-Product Valuation Methodology

Jiheng Comments

- The one case cited by the Department to support its “recent” by-product methodology explanation did not employ the by-product methodology at issue in this case.⁷¹
- The Department’s explanations are inconsistent with the remand order issued by the Court. They do not address the concerns raised by the Court with respect to the reasonableness or accuracy of the methodology employed by the Department, nor does the Department explain how the new methodology is more accurate than the previous methodology, especially in light of the use of SVs at each stage of the calculation.⁷²
- The Department fails to answer the Court’s question of why any concerns over the value to be applied to ammonia gas and sulfuric acid could not have been addressed through “capping” the SV used.⁷³
- The Department made CONNUM-specific adjustments – although it did not mention that in the analysis memorandum or in the Draft Remand Results. There appear to be numerous problems with the Department’s CONNUM-specific by-product offset calculation.⁷⁴

Kangtai Comments

- The Department did not attempt to explain why respondents did not have a right to rely on the former by-product methodology.⁷⁵
- The Department did not attempt to address any of the parties’ concerns about notice and comment regarding this new methodology.⁷⁶

⁷⁰ Consistent with *Steel Nails*, with the exception of the retirement benefit allocation already discussed, we have not excluded benefits that are listed under an operating expense or other SG&A header in the notes to the financial statements.

⁷¹ See Letter from Jiheng, “*Clearon Corp. and Occidental Chemical Corp. et al., v. United States*, Consol. Ct. No. 13-00073 – *Arch Chemicals, Inc. and Hebei Jiheng Chemical Co., Ltd., Comments on Draft 2nd Remand Results*,” February 5, 2016 (Jiheng Comments), at 5-13.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Kangtai Comments at 19-21.

⁷⁶ *Id.*

Department’s Position: For these Final Remand Results, we are continuing to use the methodology from the underlying review and First Remand Results to value the by-product offset.

Jiheng places great emphasis on the fact that the Department cited to just one case, *Magnesium Metal from Russia*, to support the Department’s statement that the change used in the underlying review was done to conform to the Department’s recent practice.⁷⁷ However, the Department cited to *Magnesium Metal from Russia* not to support the by-product adjustments made, but to explain our normal by-product methodology. As we stated above,

The Department’s long standing practice of valuing by-products is to value the products as close to the split-off point as possible (in this case, that would be ammonia gas and sulfuric acid).⁷⁸ However, in the underlying review, we stated, “we are adjusting the manner in which we calculate the by-product offsets for both Jiheng and Kangtai to conform to the Department’s recent practice.”⁷⁹ We did not explain why we were making this adjustment, and how this adjustment was consistent with our normal by-product methodology.

As is clear from this passage, *Magnesium Metal from Russia* was cited to explain that, consistent with Jiheng and Kangtai’s arguments in this remand, the Department normally values the by-products as close to the split off point as possible, which in this case, would lead us to value ammonia gas and sulfuric acid as by-products. It had become apparent that we needed to clarify what the Department’s by-product methodology normally is, and then again reiterate to parties why we were diverting from this practice for this redetermination. *Magnesium Metal from Russia* was not referenced to support our adjustments, but merely to establish the baseline normal by-product methodology. It appears Jiheng agrees that this is our normal practice, *i.e.*,

⁷⁷ See Jiheng Comments at 5-8.

⁷⁸ See, *e.g.*, *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 76 FR 56396 (September 13, 2011), and accompanying Issues and Decision Memorandum at Comment 1a.

⁷⁹ See *Chloro Isos 6th Final Results*, and accompanying Issues and Decision Memorandum at Comment 14.

treating ammonia gas and sulfuric acid as the by-products, and therefore agrees with the method explained in *Magnesium Metal from Russia*. From this, the Department then explained again why it was deviating from this normal practice of valuing the by-products as close to the split-off point as possible.

Kangtai's commented that regarding this methodology, the Court noted it was unclear:

whether Commerce in this matter is granting an offset to each respondent for the full amount of the ammonia gas and sulfuric acid claimed as produced during the POR, in accordance with Commerce's general by-products practice, as opposed to limiting the offset to the value of the amount of those by-products as embodied in the amount of ammonium sulfate actually sold during the POR... if Commerce is only granting an offset based on the amount of ammonium sulfate that was actually sold during the POR...then the new methodology is actually a "net realized value" standard (based upon the values of the ammonia gas and sulfuric acid by-products in actual sales of the downstream product that occur during a period of review), not a "net realizable value" standard, which would therefore be at odds both with the generally accepted accounting principles' cost accounting concerns for income and inventory valuations as well as at odds with Commerce's allegedly still-existing policy of determining whether or not the by-product has commercial value by proof of sales or reintroduction into production.⁸⁰

To be clear, even in the by-product adjustment we made in this proceeding, we used the amount of ammonium sulfate that was produced during the POR as the by-product offset, as evident from the calculations.⁸¹ Therefore, we are not at odds with the generally accepted accounting principles or with our by-product methodology.

In response to respondents' criticisms that the Department did not satisfactorily explain why the new method is more reasonable and accurate than the previous methodology, the Department disagrees. We again note that no party has taken substantive issue with the

⁸⁰ See *Clearon 2015 Remand* at 55-56.

⁸¹ See Memoranda, "Final Analysis for the Second 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.," and "Final Analysis for the Second 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.," dated concurrently with this remand (collectively, Final Remand Analysis Memoranda).

methodology itself, but merely questioned why the Department made adjustments to its methodology. In the Draft Remand Results, we stated we had two concerns with the methodology and that the latter of these two concerns especially led us to an adjustment that is more reasonable and one that more accurately captures the by-product offset.

Our first concern was that “neither respondent during the period of review could measure and keep records of the actual amount of waste ammonia gas and sulfuric acid which was being produced. As a result, we were forced to go to the downstream product production records to obtain the data to derive the amounts of ammonia gas and sulfuric acid. Therefore the first point at which the Department could determine the amount of by-product produced was from the companies’ books and records on the downstream product production.”⁸² Jiheng argues that the Department’s concern about Jiheng’s books and records, namely that because the ammonia gas is too hot and too caustic to measure, Jiheng does not maintain direct records of the amount of ammonia gas produced, is a *post hoc* rationalization. Jiheng argues that this explanation must fail because while these underlying facts have not changed since the investigation, the Draft Remand Results were the first time the Department raised these concerns. However, the Department’s consideration of this matter on remand is just that, a consideration of the matter anew, and thus it cannot constitute a *post hoc* rationalization.

The second concern raised by parties, and supported by the record, is:

{I}f we valued the by-products as close to the split off point as possible in this proceeding, as we had done in all prior reviews and the investigation of this case, then the amount of the by-product offset would result in an illogical outcome because the value of the ammonia gas and sulfuric acid (the immediate by-products) would be higher than the value of the ammonium sulfate (the by-product that is actually sold). In reality, as pointed out by the Court, in general no company would combine two inputs, and incur additional processing costs, in

⁸² See *infra*, at 9.

order to make a lower-valued ammonium sulfate by-product. This was a clear indication that applying our methodology in the normal manner was not appropriate.⁸³

We noted in the First Remand Results that 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). 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.⁸⁴

Petitioner further suggested that "the Department should value these by-products using a surrogate value derived from ammonium sulfate, the product that is actually sold by respondents. Indeed, Kangtai itself, in its initial questionnaire response, reported ammonium sulfate as its by-product."⁸⁵ Based on these record facts, we reviewed the methodology we used in the preliminary results, and agreed with Petitioner that that methodology led to results that did not reflect the actual value that Kangtai or Jiheng would have received in a market economy.

Kangtai argues that it was not given any notice or chance to comment on this adjusted by-product methodology. However, as noted above, Petitioner raised this by-product concern in its

⁸³ See *infra* at 9.

⁸⁴ 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.

⁸⁵ See Letter from Kangtai, "Certain Chlorinated Isocyanurates from the People's Republic of China *Section C and D Questionnaire Response*," November 30, 2011, Appendix IV at 17.

case brief. Kangtai at that point was made aware that there was a concern facing the Department on how to value by-products in the instant proceeding. Kangtai was given an opportunity to address the concerns raised by Petitioner, and suggest alternative options for the Department to consider in its rebuttal case brief. That Kangtai did not avail itself of this opportunity was Kangtai's choice. In the First Remand Results, Kangtai was again provided with an opportunity to comment on the Department's by-product methodology, but again Kangtai provided no substantive comments on the methodology for the Department to consider.

We continue to believe an adjustment to our methodology, *i.e.*, 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, is a more accurate and reasonable calculation. Using our current practice – unadjusted – would lead to illogical conclusions that do not match the real world experience of Jiheng and Kangtai, *i.e.*, in general no company would combine inputs, and incur additional processing costs, in order to make a lower-valued by-product.

Jiheng further points out that the Department did not address the Court's question of "why any concerns over the value to be applied to ammonia gas and sulfuric acid could not have been addressed through 'capping' the surrogate value used."⁸⁶ Essentially however, the adjustment we are doing is a capping-methodology. Namely, we are capping the value of ammonia gas and sulfuric acid at the value of ammonium sulfate, less the inputs needed to further produce ammonium sulfate from ammonia gas and sulfuric acid. The Court did not request that the Department apply any specific cap.

⁸⁶ See Jiheng Comments at 11.

Jiheng's claim that in this remand, the Department changed its by-product methodology and neglected to inform any party, and that the numbers applied were unknown to Jiheng, misrepresents the facts of the underlying proceeding. Indeed, one simply must review the First Remand Results to ascertain the origin of these calculations. We relied on information requested from and provided by Jiheng regarding the inputs needed to produce ammonium sulfate from ammonia gas and sulfuric acid. We also relied on information provided by Jiheng to allocate the ammonium sulfate. As we specifically noted in the First Remand Results:

In the underlying review, we allocated the ammonium sulfate by-product first to the production of cyanuric acid, and then to the total amount of subject merchandise produced. 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.⁸⁷

We continued to apply the calculations used in the First Remand Results in this instant proceeding to be consistent with our stated methodology. Jiheng argues that it did not provide CONNUM-specific adjustments in its August 25, 2014 remand questionnaire. While this is correct, the Department used the values reported by Jiheng in that questionnaire, as well as the CONNUM-specific calculations submitted by Jiheng in the underlying review to calculate CONNUM-specific by-product adjustments, as discussed in the First Remand Results. For ease, we are including the proprietary calculation details from Jiheng's Analysis Memorandum released by the Department with the First Remand Results on December 11, 2014, in Jiheng's Analysis Memorandum for these Final Remand Results.

⁸⁷ See First Remand Results at 49 (citations omitted).

Comment 3: Urea Surrogate Value

Jiheng Comments

- There is no production of urea in the Philippines during the POR, as supported by articles placed on the record of the underlying review.⁸⁸
- The Department must use Philippine import data to value urea since there is no domestic production of urea, and therefore no domestic prices.⁸⁹

Kangtai Comments

- The Department stated there was evidence of domestic production of urea and referenced the *Business Monitor Report*, but the article gives no support to this finding.⁹⁰
- The Department cannot rely on a so-called “domestic” price when there is no market. The only reliable value for urea in the Philippines is the import value.⁹¹

Department’s Position: The Department is continuing to use the BAS data to value urea. The Department, however, is now revising its position on this issue. Initially, relying on three articles placed on the record of the administrative review, we concluded there was no domestic production of urea in the Philippines. During litigation, as the Court notes, we conceded such a position was incorrect. The information at issue does not indicate that urea *is not* produced in the Philippines. However, it also does not indicate that urea *is* produced in the Philippines. Rather, the information in the articles is inconclusive regarding this question. The three articles state:

- “92% of PHL fertilizer requirements are imported,” and goes on to discuss how the price of urea would be effected due to farmers reliance on imported fertilizer (*Business Mirror*);⁹²
- “In 2004, the Philippines bought an aggregate volume of 8.8M tons of various fertilizer grades, with urea accounting for 30% and ammonium sulfate for 24%” (*The Philippine Fertilize Industry*);⁹³ and

⁸⁸ See Jiheng Comments at 1-5.

⁸⁹ *Id.*

⁹⁰ See Kangtai Comments at 19-20.

⁹¹ *Id.*

⁹² See Jiheng Comments at 2.

- “Urea, potash, and half of the ammonium sulfate are imported while all the phosphatic grades (NP/NPK) and the rest of the ammonium sulfate are produced locally” (SPIK’s - the Philippine chemicals industry association - website discussing the “Agrichemicals and Fertilizers Industry”).⁹⁴

While these articles support the contention that urea is imported (a fact the Department is not contesting), they offer a somewhat vague picture of the market and industry specific to urea and do not state that 100 percent of urea is imported, or that there is no domestic production.

Without any such statements, we cannot conclude the price represents 100 percent imports. The Department does not as a matter of course conduct a query into whether an apparently domestic price (*e.g.*, a price published by a government agency involved in domestic policy, such as an agricultural agency) is, in fact, based on domestic market sales. Clearly, if presented with evidence that the price was solely an import price (*e.g.*, a price published by a customs authority or a footnote indicating the price was based solely on imports), we would consider that evidence. In this case, however, there is no such evidence.

The evidence implies that a large portion of urea is imported, but it does not preclude the possibility that urea is also domestically produced, albeit in small quantities, just as similar fertilizers are. Therefore we continue to rely on the BAS data as the SV for urea for this final remand redetermination.

Comment 4: Surrogate Country Selection

Kangtai Comments

- The Department in this case has created an insurmountable threshold of the economic comparability aspect of its surrogate country selection. The Department considers three criteria in its surrogate country selection: (1) economic comparability, (2) significant

⁹³ See Jiheng Comments at 3.

⁹⁴ *Id.*

production, and (3) quality and availability of data. While it is logical for the Department to decide to approach this comparison sequentially, an absolute threshold is not supported by the statute or the case law interpreting the statute.

- When forced by the Court to consider the data quality of India, the Department resorted to only considering how economic comparability impacted the quality of data. The Department bypassed a true consideration of the quality of data in relation to its surrogate country selection. As such, the Department's approach to country selection was contrary to law.

Department's Position: The Department is continuing to use the Philippines as the primary surrogate country for these Final Remand Results. We agree with Kangtai that we must consider three factors when selecting a surrogate country. However, we disagree that the three factors must be "weighed" together in the evaluation of competing surrogate countries. Data quality, for example, would not outweigh or compensate for a potential surrogate country's lack of economic comparability, unless no "quality data" was available from an economically comparable country. Because the Philippines is economically comparable, we relied on data from the Philippines for the vast majority of factors, because there is quality data for valuing those factors. Thus, we do not even consider relying on Indian data to value those factors, regardless of some subjective inference that data from India might be "better" than data from the Philippines. (As explained in detail in the remand above, and as further discussed below, we do not believe the conclusions of Kangtai and the Court that Indian data is better than Philippine data are applicable within the context of selecting SVs.) However, despite the fact that the Philippines is economically comparable, we did not rely on data from the Philippines for chlorine and hydrogen, because there was no quality data for valuing those two factors.⁹⁵ This discussion makes clear that the

⁹⁵ "Quality data" refers to data that represents commercial value: values determined through competitive market exchanges for the type of input used by the respondent; not values for samples, not values that might likely be the result of the misclassification of customs data or some type of transcription error, not values for inputs that cannot reasonably be considered comparable to the type of input used by the respondent, not values that likely reflect

Department considers all three factors in deciding on the primary surrogate country. With all else being equal, the Department will consider data quality to be a tie breaker in choosing between multiple countries that are on the Surrogate Country List and that are significant producers of subject merchandise; such tie breakers come down to whether one country has data readily available for more inputs than the others (*i.e.*, the tie breaker is more a matter of data “quantity” than an attempt to compare data “quality” for specific inputs). For example, in the underlying review, we chose the Philippines over Thailand because useable financial statements were available for the former country, but not the latter. We thus concluded the Philippines had better data quality than Thailand.

As explained above, the Department is not required by statute to judge the quality of data in terms of the “commercial reality” of the underlying quantities (*i.e.*, whether they match the quantities consumed by the respondents), or in terms of whether the data reflects industries on the same scale as industries in the PRC. Kangtai states that “the Department has found the Indian chlorine and hydrogen values are superior to the Philippine data, but has decided all other Indian data is less quality for the sole reason it is from a country that is less economically comparable.”⁹⁶ As we carefully explained above, we are *not* finding that the Indian chlorine and hydrogen values are “superior” to the Philippine data. Rather, we find that import data, from the Philippines or other countries, including India, cannot be used to value these two inputs due to their volatile, hazardous nature and high international transportation costs. Therefore, we turned to the record to find another source to value these two inputs. The only other source on the record to value chlorine and hydrogen was from India. We did not “weigh” various variables to

special packaging or transportation costs that would not be incurred by the respondent (*e.g.*, the import data for chlorine and hydrogen).

⁹⁶ See Kangtai Comments at 12.

compare the Philippines import data with the Indian domestic data to determine which source was “superior;” we chose the only useable values.

Second, Kangtai argues that the “Department must follow the Court’s instruction, as guided by policy, practice, and statute, and actually examine the extent of the quality of the Indian data irrespective of its per capita GNI.”⁹⁷ We disagree that this analysis is necessary. As explained above, the Court stated clearly that such analysis was only necessary if the Department concluded “that no country on the surrogate country list provides the scope of ‘quality’ data that it requires in order to make a primary surrogate country selection.” As we have explained at length, “quality data,” as that term is properly defined, exists from the Philippines for all factors of production, except chlorine and hydrogen, and there are more than 40 factors of production, depending on the producer’s level of integration.

Regarding the quality of the Philippines data, Kangtai questions the financial statements from MVC, for the first time arguing that they contain countervailable subsidies, despite the fact that it could have raised these arguments in the administrative review. The record clearly shows that MVC’s financial statements are suitable to be used to calculate financial ratios. Kangtai noted six possible countervailable subsidies, stating that “these programs very closely match programs the Department found are countervailable in the Philippines...MVC’s statements do not provide the precise BOI program numbers; nonetheless, the same types of programs have been found countervailable and the Department is instructed not to conduct a ‘formal investigation’ into such matters and does not engage in such investigations-reason to suspect is enough.”⁹⁸

⁹⁷ See Kangtai Comments.

⁹⁸ *Id.* at 14.

As discussed above, the Department's practice is only to exclude financial statements that contain a subsidy that the Department has found countervailable in the past.⁹⁹ The six programs cited by Kangtai are all tax programs to which MVC is entitled, but Kangtai did not provide any indication from MVC's financial statements that the company actually received any of these tax incentives.¹⁰⁰ Furthermore, the tax incentive references are either too vague to tie to a previously countervailed subsidy,¹⁰¹ or are for disbursements the Department has not previously countervailed as a subsidy. We continue to find that MVC's financial statements are usable to determine financial ratios, and that the Philippines has the "scope" of quality data to continue relying on it as the primary surrogate country.

Kangtai lastly takes issue with the third criteria, significant production, and argues that the Philippines is not a significant producer:

Because this tariff classification is a basket category, the Department also looks to exports under 2828.90. The Philippines had no exports under this tariff in 2010 or 2011. While the record did not contain export statistics for India, the Department has found India is a significant exporter and producer of comparable products in past reviews. Record information, including the continued production seen in the financial statements and information on the robust Indian chemical export industry, support a finding that

⁹⁹ See *infra* at 23.

¹⁰⁰ See *DuPont Teijin Films et al v. United States*, 896 F. Supp. 2d at 1312-13 (upholding the Department's determination that the "reason to believe or suspect" standard was not satisfied when the surrogate company's financial statements included line items to account for specific subsidies, but showed no actual dollar amount of the subsidies received); see also *Catfish Farmers of America v. United States*, 641 F. Supp. 2d at 1380 (affirming the Department's determination that the "reason to believe or suspect" standard was not satisfied when petitioners identified a subsidy without additional substantiating evidence of countervailability).

¹⁰¹ See Kangtai Comments at 13 ("As a registered enterprise, the Company is entitled to certain tax incentives which include, among others: (a) income tax holiday (ITH) for six (6) years from June 2008 or actual start of commercial operations, whichever is earlier; (b) extension of the ITH for a maximum of two years (bonus years), subject to certain conditions; (c) for the first five (5) years from the date of registration, additional deduction from taxable income of 50% of the wages arising from additional workers hired, provided that it is not simultaneously availed with the ITH; (d) tax credit for taxes and duties on raw materials for its export product; (e) exemption from wharfage dues, any export tax, duty, imposts and fees for ten (10) years from the date of registration; and, (f) may qualify for zero-duty import of capital equipment, spare parts and accessories from the date of registration up to June 16, 2011, pursuant to E.O. 528 and its Implementing Rules and Regulations").

India continues to be a significant producer and exporter of comparable products-much more so than the Philippines.¹⁰²

Kangtai also notes two chemical industry reports that do not reference the Philippines in their analysis, supporting the contention that the Philippines is not a significant producer or that, at the very least, India is a “more significant producer.” However, in the underlying administrative review, the Department found, based on record evidence, that the Philippines is a significant producer of comparable merchandise. Our finding did not rely on export data. Instead we relied on information from a Philippines Securities and Exchange Commission Management Report that states MVC (the company whose financial statements we used for our financial ratios) has a sodium hypochlorite production capacity of 30,000 metric tons per year.¹⁰³ We also determined sodium hypochlorite is a comparable product. This is direct evidence from a reliable source (a Philippine government authority) that a comparable product is produced in the Philippines. By contrast, the reports cited by Kangtai provide only an indirect suggestion that the Philippines is not a significant producer of comparable merchandise (*i.e.*, one could infer from the fact that the Philippines is not discussed in the reports that it is not a significant producer of any chemical, including chemicals comparable to subject merchandise). The fact that these two publications do not mention the Philippines, however, does not overcome the affirmative evidence that the Philippines is, in fact, a significant producer of comparable merchandise. The absence of evidence is not evidence of absence.

Moreover, as stated previously, there are not degrees of significant production. Either a potential surrogate country is a significant producer or not. While the reports cited by Kangtai might suggest that both India and China have much larger chemical industries than the

¹⁰² See Kangtai Comments at 15.

¹⁰³ See *Chloro Isos 6th Final Results*, and accompanying Issues and Decision Memorandum at Comment 2.

Philippines, that fact is irrelevant. As already explained above and in the first remand, the Department does not seek to weigh degrees of production in order to choose the most significant producer. Nor do we attempt to choose a surrogate with an industry comparable in size to that of the country under investigation. As explained, attempting to do so is not required by the statute and would, in the Department's view, undermine the statute's requirement that we pick an economically comparable surrogate. As discussed in the *Chloro Isos 6th Final Results*, "Policy Bulletin 04.1 states that 'a country producing comparable merchandise is sufficient in selecting a surrogate country.' Thus, the Department now has production data on the record demonstrating that the Philippines is a significant producer of comparable merchandise."¹⁰⁴ Therefore, for the reasons explained in *Chloro Isos 6th Final Results*, we continue to find that the Philippines satisfies the significant producer criteria.

Kangtai appears to be claiming that India is a "more" significant producer. Without conceding this point, even if India was a "more" significant producer, that fact does not call into question that the Philippines meets the Department's requirements of being a significant producer. Additionally, Kangtai makes the assertions, without any support or citation, that any "development of the Chinese chemical industry attributable to non-market forces could not reasonably be significant enough to bring the Chinese industry down to such a level that it would be comparable to the Philippine market."¹⁰⁵ Kangtai is missing the crux of the argument on this point, namely that we do not know the impact of non-market forces on these countries industries, and therefore, we cannot make any assumptions or comparisons to other markets.

¹⁰⁴ See *Chloro Isos 6th Final Results*, and accompanying Issues and Decision Memorandum at 7 (citations omitted).

¹⁰⁵ See Kangtai Comments at 16.

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

Comment 5: Hydrogen Surrogate Value

Jiheng Comments

- The Department should uphold its preference for domestic prices when all else is equal. The fact that the domestic price for hydrogen is not in the primary surrogate country means that all else is not equal, there is no such preference and hydrogen should be valued using Philippine import prices.¹⁰⁶
- Deciding which SV to use solely on the basis of concern over transportation costs would ignore the Department's normal practice of not adjusting surrogate values for packaging and transportation costs.¹⁰⁷

Department's Position: The Department is continuing to use Indian domestic prices to value hydrogen. If the record only contained the Philippine import price for hydrogen and an Indian domestic price for hydrogen, the Department would normally choose the former, for the very reasons explained by Jiheng.

However, we must contend with the fact that the "Department has previously determined that the GTA does not provide the best representative surrogate value for hydrogen because hydrogen, like chlorine, is not frequently traded on an international basis, and incurs special transport costs over long distances."¹⁰⁸ Jiheng offers two reasons for overturning this prior finding. First, Jiheng contends that the record shows that over a three-year period, there were imports of hydrogen into the Philippines. As the Court notes, however, "all parties acknowledge that there is some degree of international trade in chlorine and hydrogen gas."¹⁰⁹ It has not been the Department's contention in past cases that trade in either chlorine or hydrogen is impossible or non-existent. Rather, based on evidence examined in prior reviews of chloro isos and glycine,

¹⁰⁶ See Jiheng Comments at 13-17.

¹⁰⁷ *Id.*

¹⁰⁸ See Memorandum, "Preliminary Results Surrogate Value Memorandum," June 29, 2012, at 13.

¹⁰⁹ See *Clearon 2015 Remand* at 17.

we have concluded that the hazardous nature of chlorine and hydrogen and special transportation and packaging requirements make shipment expensive and import data an unreliable surrogate value for either chemical.¹¹⁰ The small individual shipment volumes and wide variation in average unit values we have seen across import data corroborate the conclusion that import data is not a reliable surrogate value for chlorine.¹¹¹ Thus, Jiheng's references to imports of hydrogen add nothing new to the issue. Second, Jiheng's statement that the Department's normal practice of not adjusting SVs for packaging and transportation costs misses the mark. We agree that we do not normally make any adjustments for packaging and freight. Typically, we would expect the respondent to incur the same packaging and freight expenses that are imbedded in the SV. However, in this instance, the international transportation of hydrogen requires additional packaging and transportation expenses that render prices for imported hydrogen incompatible with prices for hydrogen purchased domestically.¹¹² Internationally shipped hydrogen is essentially a different product than domestic hydrogen.

As discussed above, the Department prefers to use SVs in one primary surrogate country; if one is not available, the Department next turns to SVs from other economically comparable countries. In the instant case, however, the only other price on the record is from a country not on the Surrogate Country List. As this is the only non-aberrant source available for the Department to use to value hydrogen, we continue to rely on this price to value hydrogen. We will reconsider the hazardous nature of and costs associated with transporting hydrogen internationally in future reviews, if relevant information is placed on the record indicating the Department's prior findings regarding hydrogen and import statistics are no longer valid.

¹¹⁰ See Preliminary Surrogate Value Memorandum at 4; see also *Clearon 2015 Remand* at 12-13.

¹¹¹ *Id.*

¹¹² *Id.*

E. Final Remand Results

Per the Court's instructions, we provided further explanations supporting the determinations of the *Chloro Isos 6th Final Results*. We determine a weighted-average dumping margin of 31.22 percent for Jiheng and 34.21 percent for Kangtai.



Paul Piquado
Assistant Secretary
for Enforcement and Compliance



(date)