

UNITED STATES COURT OF INTERNATIONAL TRADE

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CLEARON CORPORATION and	:
OCCIDENTAL CHEMICAL	:
CORPORATION,	:
	:
Plaintiffs,	:
	:
v.	:
	Before: Richard K. Eaton, Judge
UNITED STATES,	:
	Court No. 08-00364
Defendant,	:
	<b>Public Version</b>
and	:
ARCH CHEMICALS, INC.,	:
	:
Defendant-Intervenor.	:
	:

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OPINION AND ORDER

[The Final Results are remanded.]

Dated: November 18, 2011

*Gibson, Dunn, & Crutcher LLP (Daniel J. Plaine, J. Christopher Wood, Andrea F. Farr, and Zia C. Oatley), for plaintiffs Clearon Corporation and Occidental Chemical Corporation.*

*Tony West, Assistant Attorney General; Jeanne E. Davidson, Director, Franklin E. White, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (David F. D'Alessandris); Office of Chief Counsel for Import Administration, United States Department of Commerce (Brian Soiset), of counsel, for defendant United States.*

*Blank Rome LLP (Peggy A. Clarke and Roberta Kienast Daghir), for defendant-intervenor Arch Chemicals, Inc.*

Eaton, Judge: This action is before the court on the motion of Clearon Corporation and Occidental Chemical Corporation (collectively, "plaintiffs") for judgment on the agency record pursuant to USCIT Rule 56.2.<sup>1</sup> The motion challenges certain aspects of the United States Department of Commerce's ("Commerce" or the "Department") Final Results of the Second Administrative Review of the antidumping duty order on chlorinated isocyanurates<sup>2</sup> from the People's Republic of China ("PRC"), in which Commerce assigned dumping margins to Chinese respondents Hebei Jiheng Chemical Corporation, Ltd. ("Jiheng") and Nanning Chemical Industry Co. Ltd. ("Nanning")<sup>3</sup> of 0.80% and 53.67%, respectively. See Chlorinated Isocyanurates from the PRC, 73 Fed. Reg. 52,645 (Dep't of Commerce Sept. 10, 2008) (notice of final results); Chlorinated Isocyanurates from the PRC, 73 Fed. Reg. 62,249 (Dep't of Commerce Oct. 20, 2008) (notice of amended final results) (collectively, the "Final Results").

The Final Results cover the period of review ("POR") June 1,

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<sup>1</sup> Plaintiffs are domestic producers of chlorinated isocyanurates.

<sup>2</sup> "Chlorinated isocyanurates are derivatives of cyanuric acid, described as chlorinated s-triazine triones. . . . [They are] available in powder, granular, and tableted forms.'" *Arch Chems., Inc. v. United States*, 33 CIT \_\_, \_\_, Slip Op. 09-71 at 3 n.1 (July 13, 2009) (not reported in the Federal Supplement) (citation omitted).

<sup>3</sup> Jiheng and Nanning are Chinese producers and exporters of chlorinated isocyanurates.

2006 through May 31, 2007, and incorporate by reference the Department's Issues and Decision Memorandum. See Issues and Decision Mem. for the 2006-2007 Admin. Review of Chlorinated Isocyanurates from the PRC (Dep't of Commerce Sept. 5, 2008) (the "Issues & Dec. Mem."). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006).

For the reasons that follow, the Final Results are remanded.

#### BACKGROUND

Plaintiffs' motion challenges three aspects of the Final Results: (1) the selection of surrogate values for urea; (2) the selection of surrogate values for steam coal; and (3) the valuation of the waste ammonia gas as a by-product. Defendant-intervenor Arch Chemicals, Inc.<sup>4</sup> fully supports the Final Results and asks the court to deny plaintiffs' motion. For its part, the Department seeks a voluntary remand on the valuation of the waste ammonia gas by-product, but asks the court to sustain its Final Results on the first two issues raised by plaintiffs. Aspects of plaintiffs' motion were addressed by this Court when considering the First Administrative Review in *Arch*

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<sup>4</sup> Arch Chemicals, Inc. is an importer of subject merchandise and participated in the underlying administrative review. See Def.-Int.'s Mot. to Intervene 1, Dec. 8, 2008.

*Chemicals, Inc. v. United States*, 33 CIT \_\_, Slip Op. 09-71 (July 13, 2009) (not reported in the Federal Supplement).

On December 14, 2009, the Department filed a motion to dismiss certain counts in plaintiffs' complaint. According to Commerce, plaintiffs' failure to serve their injunction on named government officials at Commerce and United States Customs and Border Protection rendered the injunction incapable of preventing a deemed liquidation. As a result, the Department insisted that the court dismiss portions of plaintiffs' complaint as moot because all entries of the subject merchandise had been liquidated pursuant to the deemed liquidation provisions of 19 U.S.C. § 1504(d), and because the cash deposit rates at issue in this litigation had been supplanted by those resulting from the Third Administrative Review. Def's Mot. to Dismiss in Part as Moot 1, Dec. 14, 2009.

On January 15, 2010, the court stayed further action on the Rule 56.2 motion for judgment on the agency record until the motion to dismiss was resolved. The court then denied the motion to dismiss in *Clearon Corp. v. United States*, 34 CIT \_\_, 717 F. Supp. 2d 1366 (2010), based on the "intent of the parties" holding laid out in *Agro Dutch Industries Ltd. v. United States*, 589 F.3d 1187 (Fed. Cir. 2009).

The court now returns to the Rule 56.2 motion for judgment on the agency record.

## DISCUSSION

### I. Surrogate Valuation of Urea

#### A. Legal Framework

The United States imposes duties on foreign-produced goods that are sold in the United States at less than fair value. If the price of a good in the home market ("normal value") is higher than the price for the same good in the United States ("export price"), then the comparison produces a positive number that indicates that dumping has occurred, and the magnitude of the number determines the dumping margin.

In determining whether the subject merchandise is being, or is likely to be, sold at less than fair value, 19 U.S.C. § 1677b(a) requires Commerce to make "a fair comparison . . . between the export price<sup>5</sup> or constructed export price<sup>6</sup> and normal value." When merchandise that is the subject of an antidumping

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<sup>5</sup> The "export price" is "the price at which the subject merchandise is first sold . . . by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States" as adjusted. 19 U.S.C. § 1677a(a).

<sup>6</sup> The "constructed export price" is "the price at which the subject merchandise is first sold . . . in the United States . . . by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter" as adjusted. 19 U.S.C. § 1677a(b).

investigation is exported from a nonmarket economy country,<sup>7</sup> such as the PRC, Commerce, under most circumstances, determines normal value by valuing the factors of production (the "FOPs") used in producing the merchandise by employing surrogate data.<sup>8</sup> The statute directs Commerce to value the FOPs "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the [Department]." 19 U.S.C. § 1677b(c)(1). Specifically, Commerce's task in a nonmarket economy review is to determine, using surrogate costs, what a producer's costs would be if the inputs were valued at market prices. See *Tianjin Mach. Imp. & Ex. Corp. v. United States*, 16 CIT 931, 940, 806 F. Supp. 1008,

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<sup>7</sup> A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004). Therefore, because the subject merchandise comes from the PRC, Commerce constructed normal value by valuing the factors of production using surrogate data from India. See 19 U.S.C. § 1677b(c)(4).

<sup>8</sup> Section 1677b(c)(4)(A) requires that Commerce "in valuing factors of production, shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . . at a level of economic development comparable to that of the nonmarket economy country."

1018 (1992).

B. Surrogate Data for Urea Valuation

1. Philippine Data

As it did in the First Administrative Review, Commerce calculated the surrogate value for the input urea using the weighted-average unit value of urea imports into India found in the World Trade Atlas ("WTA"), concluding that the data represents an average non-export value, and was contemporaneous with the POR, product specific, and tax exclusive. See Issues & Dec. Mem. at 8.

Plaintiffs object to this methodology claiming that: (1) Commerce failed to make the legally required comparison between the WTA data and the Philippine data they placed on the record; and (2) the WTA data contained prices that were not set by market forces. According to plaintiffs:

With respect to the surrogate value for urea, Commerce made two basic errors. First, Commerce misinterpreted 19 U.S.C. § 1677b to permit selection of a source of surrogate value data without comparing it to other sources on the record to determine which is the "best available information." In this administrative review, two sources of urea price data were available on the record: Indian import data and Philippine domestic price data. Instead of comparing both sources to determine which was the "best available information," Commerce restricted its evaluation to the adequacy of the Indian import data.

Pls.' Mem. in Supp. of Mot. for J. on Agency R. ("Pls.' Mem.") 3.

As to plaintiffs' second argument, they maintain that Commerce erred by "failing to exclude from the Indian import data prices for urea imports from Oman that were not set by market forces." Pls.' Mem. 3.

As noted, plaintiffs contend that Commerce valued the input urea using Indian import data without first assessing the relative merits of the Indian and the Philippine data. Pls.' Mem. 9. Therefore, the domestic producers describe Commerce's selection process as limited to a determination of whether the Indian import data (1) satisfied the minimum requirements for use as surrogate data, and (2) met the agency regulation that it "normally will value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2) (2011). Plaintiffs characterize this selection process as "foreclos[ing] any objective comparison of the merits of the Indian and Philippine data sets." Pls.' Mem. 9.

In making their argument, plaintiffs claim that the phrase "best available information" means Commerce "must compare the relative merits of alternative sources of surrogate values on the record." Pls.' Mem. 19. Thus, they insist that Commerce did not comply with the statute when it failed to address any of their substantive arguments or conduct an express comparison between the Indian and Philippine data when making its determination. Pls.' Reply Br. in Supp. of Mot. for J. on Agency R. ("Pls.'

Reply") 1. Looking at the single sentence offered by the Department to explain its decision not to select the Philippine data, plaintiffs found nothing "evaluating both data sets with respect to objective criteria for accuracy or reliability." Pls.' Reply 1; see also Pls.' Mem. 10.

Commerce's sentence, justifying its decision not to select the Philippine data, states that the Department found "the domestic Philippine prices for urea not to be the best available information on the record of this review because these prices are for urea used as fertilizer and sold in 50-kg bags which are not product specific to the urea used by the respondents in this review." Issues & Dec. Mem. at 8. For plaintiffs, this explanation is mistaken in two "critical respects,"<sup>9</sup> i.e., it assumes (1) that urea used in agriculture and urea used for industrial processes are sold in separate markets, and (2) that the packaging of urea is a material consideration, indicating a difference between urea used for agriculture and industrial grade urea used for chemical feedstock. Pls.' Mem. 10.

The domestic producers further maintain that Commerce

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<sup>9</sup> First, plaintiffs argue that "there is no record evidence . . . that 'urea used as fertilizer' can be differentiated from urea used for chemical production" and, in fact,

Mem. 10. Second,

. Pls.' Mem. 10.

limited its actual analysis to testing the Indian data for "basic indicia of adequacy" and, therefore, "failed to take into account any of the significant differences in the quality and reliability of the Indian and Philippine urea prices." Pls.' Mem. 21. They believe that the Philippine data is "clearly superior," and question why Commerce "failed to consider whether a urea price obtained from an uncontrolled, tax-free, *laissez-faire* urea market in the Philippines might not be a preferable source of market-based surrogate values." Pls.' Mem. 26, 22.

Plaintiffs, therefore, see Commerce's methodology as elevating "adequate" or "sufficient" sources of surrogate values in a primary surrogate country over "superior sources of information that may exist in alternative surrogate countries," thereby creating an "irreconcilable conflict with the plain terms of the statute." Pls.' Mem. 22, 23 ("The statutory command to use the 'best available information' . . . cannot be interpreted to permit use of information from a primary surrogate country when objectively superior data exist in a secondary surrogate country."). They insist, then, that "Commerce's passing reference to the Philippine price data plainly did not satisfy its obligation." Pls.' Mem. 24.

The Department<sup>10</sup> explains that it used weighted-average unit values for Indian imports of urea as listed in the WTA, finding that the data was "the best available information because they are average, non-export values, contemporaneous with the period of review, product specific, tax exclusive, and in-line with import values from other potential surrogate countries." Def.'s Opp. to Pls.' Mot. for J. on Agency R. ("Def.'s Mem.") 8. Moreover, using the Indian data conformed with Commerce's preference to value all factors within a single surrogate country. Def.'s Mem. 9. See 19 C.F.R. § 351.408(c)(2) ("[T]he [Department] normally will value all factors in a single surrogate country.").

Responding to plaintiffs' argument that its analysis of the Indian and Philippine data was inadequate, the Department claims that it did consider the merits of Philippine domestic pricing data, and determined that the data "were not product specific to the large-scale industrial usage of chemical feedstock urea reported by Chinese respondents in the present case and was therefore not the best available information." Def.'s Mem. 14. In making its argument, the agency quotes defendant-intervenor's comment that purchase of urea in small bags, as it is sold in the

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<sup>10</sup> Defendant-intervenor's arguments are substantially similar to the Department's. Thus, only Commerce's arguments are summarized below.

Philippines, would be "ludicrous" for the purpose of making the subject merchandise. Def.'s Mem. 15.

Commerce further explains that Philippine domestic pricing data exclusively represents urea used as fertilizer, while the record evidence establishes there are distinct markets for urea used in agriculture versus industrial processes. The Department points to plaintiffs' submission from a chemical industry website stating that "[a]n estimated 10-15% of urea manufactured is used in industrial processes . . . . The balance is used in agriculture." Pls.' Submission to Commerce Regarding Surrogate Values for FOPs, Ex. 14, May 27, 2008 (C.R. 834) ("Pls.' Surrogate Value Subm."). The Department, then, concluded that the WTA data "represent a broad category of urea," and "better captures the industrial grade urea reported by respondents." Def.'s Mem. 15.

## 2. Commerce's Conclusions Were Reached Without the Required Analysis

While the Department's analysis indicates some examination of the disadvantages of the Philippine data, at the very least, "selecting the surrogate value data that yield the most accurate dumping margin necessarily requires Commerce to conduct a fair comparison of the data sets on the record." *Allied Pacific Food (Dalian) Co. Ltd. v. United States*, 30 CIT 736, 757, 435 F. Supp. 2d 1295, 1313–14 (2006). In addition, the Supreme Court has

"frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Commerce's analysis of the input urea violates both of these principles.<sup>11</sup>

Here, the Department subjected the Philippine data to none of the tests it used to justify its use of the Indian data, e.g., whether it is from a public source or contemporaneous with the POR. Nor did Commerce compare the relative merits of the two urea sources or explain how it reached its conclusions about the Philippine data. That is, here the Department took steps necessary to demonstrate that urea from India met the minimum standards for use as a surrogate value, but failed to (1) perform an analysis of the Philippine data using these same standards; (2) compare the Indian data with the Philippine data in order to determine which was the "best available information;" or (3)

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<sup>11</sup> First, "the fact that strongly suggests that no such distinctions [between urea purchased for fertilizer and industrial uses] exist." Pls. Reply 4. Second, [i]f packaging size does matter in valuing urea, then Commerce

explain its conclusions with respect to product specificity or the sale of urea in bags, and detail how these conclusions were reached. 19 U.S.C. § 1677b(c)(1); see also *Peer Bearing Co.-Changshan v. United States*, 35 CIT \_\_, \_\_, 752 F. Supp. 2d 1353, 1373 (2011) ("[T]he statute requires Commerce to compare the chosen data set with other data sets on the record and thereby determine what is the best available information."); *Globe Metallurgical, Inc. v. United States*, 28 CIT 1608, 1622 (2004), 350 F. Supp. 2d 1148, 1160 ("Commerce must compare the reliability of each potential surrogate country's values to determine which values are most reliable."); *Olympia Indus., Inc. v. United States*, 22 CIT 387, 390, 7 F. Supp. 2d 997, 1000-01 (1998) ("From the statute, it is clear that Commerce must identify and use the best information available when it values the factors of production. . . . [Therefore,] Commerce has an obligation to review all data and then determine what constitutes the best information available or, alternatively, to explain why a particular data set is not methodologically reliable.") (citation omitted).

Thus, the court finds that Commerce's explanation for its decision to disregard the Philippine data does not comply with the unfair trade laws, and that its failure to adequately support its conclusions with reasoning based on the record evidence reveals that these conclusions were not supported by substantial

evidence.

### 3. Omani Prices

Plaintiffs' primary argument with respect to the inclusion of the Omani prices in the WTA data is that because one hundred percent of the Oman India Fertiliser Company ("OMIFCO") output is sold to the Indian government at predetermined prices, the prices are necessarily not set by the market. Indeed, the "prices for the Omani imports do not involve typical competitive forces of supply and demand that characterize arm's-length market transactions among buyers and sellers." Pls.' Mem. 27. Similar arguments were advanced in *Arch Chemicals* where the Court addressed this issue and found that Commerce's decision to include the Omani prices was supported by substantial evidence:

Here, the WTA data is from a publicly available source for the POR. Additionally, Commerce analyzed that data to ensure that "value for imports from Oman to India was not aberrational, and was comparable to imports from other market economy countries." Def.'s Br. 11 (citation omitted). As has been seen, the Omani value was within the range of values examined, though at the low end, and was close to the average value, i.e., 6.99 rupees/KG for Oman and 8.83 rupees/KG for the average of all data sets. . . . In addition, Commerce acted reasonably in concluding that "economies of scale is one factor contributing to OMIFCO's price [being lower than that of other urea imports into India], given the quantity of imports from Oman into India." See I&D Mem. at Comment 1; Def.'s Br. 12 (noting that "the quantity of Omani imports of urea was higher than the quantity of all other Indian imports of urea combined"). Thus, having found that the OMIFCO data was "within the normal range" and taking into consideration the large quantity of OMIFCO imports, it cannot be said that Commerce was unreasonable in using this information.

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

*Arch Chems.*, 33 CIT at \_\_\_, Slip Op. 09-71 at 28-30.

Here, however, the facts are not precisely the same as in the First Administrative Review that was the subject of *Arch Chemicals*. There, it was significant that the Omani import data was "within the range of values examined" when compared to other imports of urea into India, and there was also one urea source priced lower than the Omani value. *Id.* at \_\_\_, Slip Op. 09-71 at 29. In this Second Review, it appears that the Omani data no longer fall within this range. In fact, the Government of India noted that the "fixed price of imported urea from Oman is much cheaper than the present prevailing international prices." Pls.' Rebuttal Comments on Surrogate Values for FOPs, Ex. 4 at 11, Nov. 13, 2007 (P.R. 692). An examination of a table of the prices confirms this observation. See Prelim. Surrogate Value Mem., Attach. 3, Apr. 29, 2008 (P.R. 820) ("Surrogate Value Mem.") (adopted by Issues & Dec. Mem. 6).

<b>Country</b>	<b>Quantity (KG)</b>	<b>Average Value (Rupees/KG)</b>
Oman	1,500,193,218	7.87
Liberia	26,451,000	11.49
Bahrain	24,003,000	11.58
Egypt	99,887,000	11.63
Russia	118,252,000	11.67
Saudi Arabia	100,085,000	11.70
Ukraine	1,036,565,024	11.73
Malaysia	69,397,000	11.74
Romania	44,000,000	11.76
Kuwait	94,831,700	11.78
Bangladesh	116,260,000	11.78
United Arab Emirates	250,283,278	11.81
Libya	141,291,921	11.87
Qatar	220,282,807	12.18
Germany	5,000,200	15.35
<b>Total</b>	<b>3,846,783,148</b>	<b>10.26</b>

As has been noted, in *Arch Chemicals*, the Omani value was at the low end of sales prices, at 6.99 rupees per kilogram. Although this price was less than the average unit value of 8.83 rupees per kilogram for all data sets for imports into India, it was not outside the range of all values because urea sourced from the United Kingdom was priced at 6.67 rupees per kilogram, while that from Germany was priced at 30.26 rupees per kilogram. *Arch Chems.*, 33 CIT at \_\_, Slip Op. 09-71 at 29. In this Second Review, though, the Omani value, at 7.87 rupees per kilogram, was

the lowest value considered, and was 30% lower than the average unit value of 10.26 rupees per kilogram for all data sets. See Surrogate Value Mem., Attach. III. In fact, the next lowest value that was considered, that for Liberia, was 46% higher than the Omani value, and the remaining values ranged from 47% to 95% more than the Omani value. Surrogate Value Mem., Attach. III. This change from the First Administrative Review is significant and eliminates one of the two important factors upon which the Court relied in *Arch Chemicals*, because in this review it cannot be said that "the Omani value is within the range of values examined." *Arch Chems.*, 33 CIT at \_\_, Slip Op. 09-71 at 29.

Furthermore, the *Arch Chemicals* Court found it significant that "'the quantity of Omani imports of urea was higher than the quantity of all other Indian imports of urea combined'" in finding that Commerce reasonably concluded that "'economies of scale [was] one factor contributing'" to the low Omani value. *Arch Chems.*, 33 CIT at \_\_, Slip Op. 09-71 at 29. By contrast, here the correlation between quantity and price is less pronounced. In this Second Review, the Omani inputs comprise less than 40% of the total during the POR, and, while Ukraine's export quantity was the second highest after Oman, its prices fell about midway down the list of values. Similarly, the United Arab Emirates had the third largest export quantity, but its prices fell within the top four highest among those considered.

See Surrogate Value Mem., Attach. III. All of this being the case, the court cannot conclude that Commerce's "economies of scale" explanation is supported by substantial evidence in this Second Review.

One factor in this Second Review, however, remains consistent with the First Review. In *Arch Chemicals*, the Court found that there was no evidence that the data was "tainted by reason of government involvement." *Arch Chems.*, 33 CIT at \_\_\_, Slip Op. 09-71 at 30. That is, the fact that "a product is sold to a single purchaser pursuant to a long-term contract . . . does not necessarily make the price anomalous." *Id.* Similarly, here, there does not appear to be any evidence on the record that demonstrates how India's long-term contract with Oman tainted the sale prices of urea.

The court is aware that its task is not to "reweigh the evidence or substitute its own judgment for that of the agency," *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272, (2004), but rather to determine whether Commerce's determinations are supported "by substantial evidence on the record." 19 U.S.C. § 1516a(b)(1)(B)(I); see also *Hoogovens Staal Bv v. United States*, 24 CIT 242, 247, 93 F. Supp. 2d 1303, 1307 (2000) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1996)) ("In reviewing agency determinations, the court declines to reweigh or reinterpret the evidence of record."). Indeed,

"when reviewing substantial evidence challenges to Commerce's actions, the court assesses whether the agency action is 'unreasonable' given the record as a whole." *Catfish Farmers of Am. v. United States*, 33 CIT \_\_, \_\_, 641 F. Supp. 2d 1362, 1366 (2009) (citing *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350-51 (Fed. Cir. 2006)). Here, given the data on the record, and in light of its differences from the data used in *Arch Chemicals*, the court finds that Commerce's explanation for the inclusion of the Omani data is not supported by substantial evidence, as the Omani data no longer falls within the range of values considered, and this price discrepancy cannot be attributed to the quantity of urea imported from Oman.

## II. Surrogate Valuation of Steam Coal

Next, in the Final Results, Commerce valued steam coal using the prices listed in the Tata Energy Research Institute ("TERI") Data Directory and Yearbook. Plaintiffs argue that a producer of chlorinated isocyanurates in India could not purchase steam coal at these prices. They insist that only purchasers in certain "core sectors" could buy coal at the prices listed in the TERI data, while purchasers in non-core industries could purchase domestic coal only at significantly higher prices from the monopoly supplier, Coal India, or would have been required to use imported coal. Pls.' Mem. 30-31. Plaintiffs argue that although

the coal sector may have been deregulated in name, in practice, non-core sector buyers in India cannot purchase coal at TERI prices. Pls.' Reply 10 n.3. Plaintiffs therefore urge the use of the WTA Indian import data. Pls.' Mem. 30.

According to plaintiffs, the record includes an express identification of precisely which industries are "core sector," and this list plainly shows the chemical industry is not a member. Pls.' Mem. 31. Indeed, they insist that "every piece of evidence on the record demonstrates that the chemical industry is not part of the core sector in India." Pls.' Mem. 32. Thus, plaintiffs argue that "[i]t makes no sense for Commerce to choose as the 'best available information' for valuing steam coal a surrogate value that would be *unavailable* to a hypothetical free-market producer of chlorinated isocyanurates operating in the structure of the Indian market." Pls.' Mem. 32.

In response, the Department asserts that it used the TERI data, rather than WTA import data as proposed by plaintiffs, "because the TERI data are more product specific to [defendant-intervenor's] reported coal input." Def.'s Mem. 17. As Commerce explains, TERI data is categorized by the major types of coal products, while WTA import data simply lists "steam coal" without further specificity. Def.'s Mem. 17.

With respect to plaintiffs' argument that a producer of chlorinated isocyanurates could not purchase steam coal at the

prices listed in the TERI data, the Department contends that the record evidence regarding the "core sector" was "inconclusive," with no clear evidence that purported to classify the Indian chemical industry as either a core or non-core industry. Def.'s Mem. 18. In addition, Commerce stresses that it has repeatedly found the use of TERI data to be the best available information for steam coal prices in India, a conclusion that has been affirmed by this court. Def.'s Mem. 18.

In *Arch Chemicals*, which decided the appeal of the First Administrative Review, this Court held that "Commerce acted reasonably in using the TERI data to value steam coal." *Arch Chems.*, 33 CIT at \_\_\_, Slip Op. 09-71 at 41. The Court found that Commerce was reasonable in determining that "the TERI data was the most 'product specific' surrogate available, and therefore the most representative of Jiheng's actual coal input." *Id.* In reaching this conclusion, the Court noted Commerce's observation that "'TERI Data are categorized by major types of coal and UHV value whereas WTA import data are listed under 'steam coal' without further specificity.'" *Id.* (citation omitted).

In addition, the *Arch Chemicals* Court found that the evidence indicated that Commerce was reasonable in concluding that coal was available to the chemical industry at TERI prices. In reaching this conclusion, the Court cited to record evidence that "revealed that deregulation occurred in 1996 and that the

coal used by Jiheng has been sold at market prices since 2000."

*Id.* The Court also observed that one source referenced by plaintiffs (defendant-intervenors in that action) on the "core sector" point was "at best equivocal," "while the other article appear[ed] to support Commerce's position." *Id.* at \_\_, Slip Op. 09-71 at 42. The first source noted that "'customers in the non-core sector are of three types - linked customers, non-linked customers, and small and tiny industries,'" while the second referenced companies "being 'in the core sector like power, steel and chemicals.'" *Id.* Thus, the Court concluded:

The court finds that the evidence cited by Commerce meets the substantial evidence test. Put another way, the Department has shown that: (1) the TERI data represents most closely the coal actually used by Jiheng, and (2) Clearon and OxyChem's claim that TERI data prices were unavailable to chemical manufacturers like Jiheng is, at best, subject to conflicting interpretations of the record evidence. . . . Accordingly, the court finds the Department's explanation to be reasonable and sustains Commerce's surrogate value calculation for steam coal.

*Id.* at \_\_, Slip Op. 09-71 at 43 (citation omitted).

Although the *Arch Chemicals* Court found that Commerce's use of the TERI data to value steam coal was supported by substantial evidence in the First Administrative Review, the record in this Second Review directs a different result. Plaintiffs emphasize that the "record includes an express identification of precisely which industries are 'core sector' industries, and this list plainly shows that the chemical industry is not a member of the

core sector." Pls.' Mem. 31. Among the exhibits placed on the record by plaintiffs are a listing of core sector industries from Coal India's website, an interview with Coal India's Marketing Director that occurred during the POR, a decision from the Supreme Court of India, and various industry articles. Pls.' Mem. 13; Pls.' Surrogate Value Subm., Ex. 17, 32, 35. The list on Coal India's website includes the following "Core Sector Consumers": power, defense, railways, fertilizer, steel and other metallurgical industries, cement, aluminum, paper, public sector undertakings, and coal exports. Pls.' Mem. 14; Pls.' Surrogate Value Subm., Ex. 17.

Additionally, Coal India's Marketing Director stated in his interview that Coal India "has basically two sets of consumers - the core sector and the non-core sector. The core sector consists of power, cement, steel, paper, aluminum, and fertilizer manufacturing units, and Central public sector undertakings." Pls.' Mem. 31-32; Pls.' Surrogate Value Subm., Ex. 35. Plaintiffs emphasize that none of the lists of core sectors on the record include the chemical industry. Pls.' Mem. 31. Finally, a January 2006 Supreme Court of India decision provided by plaintiffs characterizes the domestic coal market in India as follows:

"[A]fter nationalization, coal consumers were categorized into two main sectors, namely, core sector and non-core sector. The core sector consumers include the vital sections of national economy related to infrastructural development as for example, power, steel, cement, defence, fertilizer, railway, paper, aluminum, export, central public sector undertaking etc. All other remaining industries/consumers constituted non-core sector."

Pls.' Mem. 31; Pls.' Surrogate Value Subm., Ex. 17.

Having provided these various examples, plaintiffs believe that Commerce's determination that, "because there was 'no conclusive record evidence identifying the chemical industry as a non-core industry' the Department would assume that it was in the 'core sector,'" is "a quintessential example of a decision that is not supported by substantial evidence on the record." Pls.' Mem. 31 (quoting Issues & Dec. Mem. 11).

Despite the presence of this record evidence, Commerce determined that "we find no conclusive record evidence identifying the chemical industry as a non-core industry. While the record evidence lists examples of 'core' industries, this list is not exhaustive, and there is no listing positively identifying the chemical industry as a non-core industry."

Issues & Dec. Mem. 11. Defendant therefore argues that plaintiffs "failed to demonstrate that the chemical industry is a non-core industry," and thus "Commerce properly concluded that the record evidence on this issue was inconclusive." Def.'s Mem. 18. Defendant also asserts that "Commerce has found consistently

in recent cases that the TERI data are the most appropriate source for steam coal prices in India." Def.'s Mem. 18; Issues & Dec. Mem. 11. Finally, defendant argues that Commerce used the TERI data because it is "more product specific" to the type of coal used by Jiheng as the "TERI data are categorized by major types of coal," while the WTA import data simply list "'steam coal' without further specificity." Def.'s Mem. 17. Thus, because the TERI data represent the most product-specific prices, defendant argues that the data constitute the best available information.

While defendant maintains that "there is no listing positively identifying the chemical industry as a non-core industry," Issues & Dec. Mem. 11., it is equally apparent that there is no list that identifies the chemical industry as a core sector industry. Nor, for that matter, does the record contain any evidence that would lead the court to conclude, as it did in *Arch Chemicals*, that the evidence is subject to "conflicting interpretations." That is, absent from this record is the evidence this Court found important in *Arch Chemicals*, i.e., the Coal India documents that "'clearly specified that the type of coal used by Jiheng had been deregulated in 1996 and has been sold at market prices since 2000,'" and the BioLab submission that referenced companies being "'in the core sector like power,

steel and chemicals.'" *Arch Chems.*, 33 CIT at \_\_\_, Slip Op. 09-71 at 40, 42 (citations omitted).

While Commerce concludes that the lists of core sector industries provided by plaintiffs were "not exhaustive," it does not discuss the record evidence that supports this conclusion, or explain how it reached this finding. It also fails to address the record evidence from the Supreme Court of India's decision that listed several industries, not including the chemical industry, and stated that "[a]ll other remaining industries/consumers constitute[] non-core sector." Pls.' Mem. 31; Pls.' Surrogate Value Subm., Ex. 17. In other words, the Department fails to address a court decision that certainly appears to be definitive.

Although Commerce's conclusion with respect to the specificity of coal types reported in the WTA and TERI data is important, so are its conclusions with respect to core industries. As these conclusions are not fully explained, and there appears to be no record evidence to support the conclusion that the chemical industry is a core sector industry, the court finds that the surrogate value calculation for steam coal must be remanded as not supported by substantial evidence. On remand, Commerce "must explain its rationale . . . such that a court may follow and review its line of analysis, its reasonable

assumptions, and other relevant considerations." *Allegheny Ludlum Corp. v. United States*, 29 CIT 157, 168, 358 F. Supp. 2d 1334, 1344 (2005). Its conclusions should be supported by substantial evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

### III. Surrogate Valuation of Waste Ammonia Gas By-Product Offset

The Department generally grants an offset to normal value for sales of by-products, generated during the production of subject merchandise, if the respondent can demonstrate that the by-product is either resold or has commercial value, and reenters the respondent's production process. See *Arch Chems. v. United States (Arch Chems. II)*, 35 CIT \_\_, \_\_, Slip Op. 11-41 at 5-6 (Apr. 15, 2011) (not reported in the Federal Supplement). In valuing by-product offsets in nonmarket economy proceedings, Commerce uses surrogate values, as it does for other factors of production. See *QVD Food Co. v. United States*, 34 CIT \_\_, \_\_, 721 F. Supp. 2d 1311, 1318 (2010).

By their motion, plaintiffs challenge the Department's decision to value the waste ammonia gas by-product, claimed by Jiheng, using import prices for anhydrous ammonia. Plaintiffs

contend that "there was no reasonable source of surrogate value on the record for the waste ammonia gas by[-]product of Jiheng's cyanuric acid production" because "Jiheng's waste ammonia gas plainly did not consist of such anhydrous ammonia." Pls.' Mem. 33, 34. For plaintiffs, "[b]ecause Jiheng's waste ammonia gas is not comparable to anhydrous ammonia and Jiheng provided no other sources of surrogate values, Commerce should have denied the offset." Pls.' Mem. 34.

While defendant-intervenor argues this choice is supported by substantial evidence, the Department itself "request[s] a remand to permit Commerce to reconsider and explain its selection of anhydrous ammonia to value Jiheng's ammonia gas by-product offset." Def.'s Mem. 19. After reexamining the record, "Commerce has determined that it has not fully explained its reasons for selecting anhydrous ammonia to value Jiheng's ammonia gas by-product offset and that it should therefore reconsider and give further explanation for its decision." Def.'s Mem. 19. Notably, plaintiffs do not object to this offer in their reply brief.

"[I]f the agency's concern is substantial and legitimate," granting a voluntary remand request "is usually appropriate." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). The court, therefore, grants Commerce's request for a

voluntary remand to reconsider and explain its selection of anhydrous ammonia to value Jiheng's ammonia gas by-product offset.

#### CONCLUSION AND ORDER

For the reasons stated, it is hereby  
ORDERED that plaintiffs' Rule 56.2 motion is GRANTED, in part, and defendant's motion is GRANTED, in part, and the matter is REMANDED; it is further

ORDERED that Commerce issue, upon remand, a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that Commerce, in preparing the Remand Redetermination, shall reexamine its determination with respect to (1) whether urea used for agricultural purposes can be differentiated from urea used for chemical production, and (2) any reason urea sold in fifty kilogram bags cannot be the source of a surrogate price in this case; it is further

ORDERED that Commerce fully analyze the evidence presented by both sides in reviewing its decision to exclude the Philippine data, further examine the Philippine data using the same criteria

it employed in selecting the Indian data, provide a complete comparison of the two data sets, and adequately explain how it has come to its final determination; it is further

ORDERED that Commerce shall revisit its determination with respect to the Omani prices, fully analyze the evidence regarding the Omani data, and fully explain and support with substantial evidence its determination of whether or not to include the Omani data in the WTA data; it is further

ORDERED that Commerce revisit its determination with respect to its surrogate valuation of steam coal, and fully analyze the use of the TERI data, including whether the chemical industry would be considered a core sector industry, and whether the use of this data is supported by substantial evidence; it is further

ORDERED that Commerce's request for a voluntary remand to reconsider and explain its selection of anhydrous ammonia to value the ammonia gas by-product offset is GRANTED, and Commerce shall, on remand, reconsider and fully explain its decision and its reasons for selecting anhydrous ammonia; it is further

ORDERED that Commerce shall fully explain why the data it has selected for all remanded issues constitutes the best available information, demonstrating that each of its conclusions are supported by substantial evidence, and may reopen the record if it finds that the existing record is inadequate; it is further

ORDERED that Commerce file the remand results on or before March 19, 2012; it is further

ORDERED that plaintiffs file any comments thereon on or before May 3, 2012; it is further

ORDERED that defendant file any rebuttal to such comments on or before May 18, 2012.

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/s/ Richard K. Eaton  
Richard K. Eaton

Dated: November 18, 2011  
New York, New York