U.S. Customs and Border Protection

Slip Op. 13–19

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

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

[In anti-dumping duty matter, Plaintiffs' motion for judgment on the agency record granted in part and denied in part.]

Dated: February 7, 2013

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Stuart F. Delery, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *David F. D'Alessandris*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for the Defendant. Of counsel on the brief was *Whitney Rolig*, Attorney, U.S. Department of Commerce, of Washington, D.C.

David J. Craven, David A. Riggle, and Saichang Xu, Riggle and Craven, of Chicago, IL, for the Intervenor Defendants.

OPINION AND ORDER

Restani, Judge:

This matter is before the court on plaintiffs DuPont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc.'s (collectively "Plaintiffs") motion for judgment on the agency record pursuant to USCIT Rule 56.2. Plaintiffs challenge certain findings in the U.S. Department of Commerce's ("Commerce") final results rendered in the second anti-dumping review of polyethylene terephthalate film, sheet, and strip ("PET film") from the People's Republic of China ("PRC"). *See Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of the 2009–2010 Antidumping Duty Review of the Antidumping Duty Order*, 77 Fed. Reg. 14,493 (Dep't Commerce Mar. 12, 2012) ("*Final Results*"). Specifically, Plaintiffs argue that Commerce erred in selecting India as the surrogate country and in using JBF Industries Ltd.'s

financial statement to calculate surrogate financial ratios. Pls.' Rule 56.2 Br. in Supp. of Mot. for J. on the Agency R. ("Pls.' Br.") 1 2. Defendant and Intervenor Defendants oppose Plaintiffs' motion. *See* Def.'s Resp. to Pls.' Rule 56.2 Mot. of J. on the Agency R. ("Def.'s Br."); Resp. of Def.-Intrvns to the Mot. for J. on the Agency R. Submitted by Pls. For the reasons stated below, the court remands in part and sustains in part the *Final Results*.

BACKGROUND

In November 2008, Commerce published an anti-dumping duty order on PET film from the PRC. *See Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, the People's Republic of China and the United Arab Emirates: Antidumping Duty Orders*, 73 Fed. Reg. 66,595 (Dep't Commerce Nov. 10, 2008). In November 2010, Plaintiffs and others requested an administrative review of certain PRC companies exporting PET film to the United States between November 1, 2009 through October 31, 2010, thereby triggering the second administrative review of PET film from the PRC. *See Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Preliminary Results of the 2009–2010 Antidumping Duty Administrative Review*, 76 Fed. Reg. 68,140, 68,140 (Dep't Commerce Nov. 3, 2011) ("*Preliminary Results*"). Commerce selected Intervenor Defendants Tianjin Wanhua Co., Ltd ("Wanhua") and Sichuan Dongfang Insulating Material Co., Ltd. ("Dongfang") as mandatory respondents. *Id.* at 68,141.

In April 2011, Commerce placed on the record a list of six countries (India, Indonesia, Peru, Philippines, Thailand, and Ukraine) that Commerce's Office of Policy had found to be economically comparable to the PRC. *See Office of Policy Memorandum of April 7, 2011*, P.R. 2/34 (Int_035634) at Attach. 1 at 2. The report was based on the World Bank's *World Development Report 2010*, which reported 2008 per capita gross national income ("GNI"). *Id.* The *Office of Policy Memorandum* noted that "the disparity in per capita GNI between India and China has consistently grown in recent years and, should this trend continue, the Department may determine in the future that the two countries are no longer 'at a comparable level of economic development' within the meaning of the statute." *Id.* at Attach. 1 at 1.

On October 3, 2011, Plaintiffs timely submitted pre-preliminary determination comments and placed on the record 2009 per capita GNI data from the World Bank's *World Development Report of 2011* (the "2009 GNI data"). *Pet'rs' Pre-Preliminary Cmts.* (Oct. 3, 2011), C.R. 2/Ext_030752 at 3. Plaintiffs noted that the 2009 GNI data had been available since the third week of April 2011 and argued that it

was the best available information. *Id.* at 3. Plaintiffs also argued that the 2009 GNI data demonstrated that India was no longer economically comparable with the PRC and that Commerce therefore should select Thailand as the surrogate country. *Id.* at 3 4; *see Preliminary Results*, 76 Fed. Reg. at 68,142.

On October 27, 2011, Commerce selected India as the primary surrogate country. *Selection of a Surrogate Country Memorandum* (Oct. 27, 2011), P.R. 2/34 (INT_035634) at 1. Commerce concluded that India was economically comparable under the statute because its Office of Policy, relying on 2008 GNI data, had determined that India was economically comparable to the PRC. *Selection of a Surrogate Country Memorandum* 7. Commerce noted that both India and Thailand were economically comparable and were significant producers of comparable merchandise but selected India because the record contained at least one usable financial statement from an Indian company. *Preliminary Results*, 76 Fed. Reg. at 68,142.[1]

After selecting India as the surrogate country, Commerce turned to the available evidence from Indian companies in order to calculate surrogate financial ratios. The record contained the financial statements of two Indian companies: JBF Industries Limited ("JBF") and Polyplex Corporation Ltd. ("Polyplex"). *Preliminary Results*, 76 Fed. Reg. at 68,146. In the *Preliminary Results*, Commerce relied on the financial statement of Polyplex and declined to use the statement from JBF. *Id.* Commerce noted that both financial statements referenced a countervailable subsidy program and thus, contained evidence of the receipt of subsidies, but Polyplex's statement was preferable because it produced identical merchandise whereas JBF produced comparable merchandise. *Id.*

Before the *Final Results*, Respondents submitted additional Indian financial statements from Garware Polyester Ltd. ("Garware"), Ester Industries Ltd. ("Ester"), Jindal Poly Films Ltd. ("Jindal"), and JBF's 2010 financial statement[2], resulting in a total of six Indian financial

[1] Commerce found that the single financial statement on the record from an Thai company did not apportion raw material costs and consumable costs and thus, could not be used to calculate surrogate financial ratios. *Preliminary Results*, 76 Fed. Reg. at 68,142. No party has challenged this finding. What steps Commerce takes to deal with insufficient record data from economically comparable countries is a separate issue from the initial finding of economic comparability.

[2] Commerce found that JBF's 2010–2011 statement was preferable to the 2009–2010 statement because it was more contemporaneous with the period of review. *Issues and Decision Memorandum* 6. No party contests this selection. The relevant language is the same in JBF's 2009 2010 and 2010 2011 financial statements. *See* P.R. 1/121 at Ex. SV-3 at 30 (JBF 20092010); *Pet'rs' Submission of Publically Available Information to Value Factors of Production* ("*Pet'rs' Factors of Production Submission*") (May 6, 2011), Def.'s App. Tab 7, P.R. 2/59 (JBF 2010–2011) at 31.

statements from five different companies. *Issues and Decision Memorandum for the Final Results of the 2009–2010 Administrative Review*, A-570–924, ARP 11/1/2009–10/31/2010, at 7 (Mar. 2, 2012) ("*Issues and Decision Memorandum*"), *available at* App. to Def.'s Resp. to Pls.' Rule 56.2 Mot. for J. on the Agency R. ("Def.'s App."), Tab. 8, P.R. 2/105. In the *Final Results*, Commerce stated that upon closer inspection, the JBF statement did not include evidence of the receipt of a subsidy whereas Garware, Ester, Jindal, and Polyplex all indicated the receipt of a countervailable subsidy from the Duty Entitlement Passbook ("DEPB") scheme.[3] 77 Fed. Reg. at 14,494; *Issues and Decision Memorandum* 7. Accordingly, Commerce relied on the 2010–2011 financial statement of JBF only. *See Final Results*, 77 Fed. Reg. at 14,494.

Wanhua and Dongfang received rates of 8.42% and 10.87%, respectively. *Final Results*, 77 Fed. Reg. at 14,494. Fuwei Films (Shandong) Co., Ltd. received a rate of 8.48%. *Id.*

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

I. Surrogate Country Selection

Plaintiffs argue that Commerce lacks substantial evidence for its selection of India as the surrogate country because the economic comparability determination was undermined by the newly available 2009 GNI data. Pls.' Br. 11. Plaintiffs also argue that Commerce's attempt to downplay the significance of the 2009 data is belied by Commerce's treatment of that data in other reviews. Pls.' Br. 13 14. The Government argues that Commerce reasonably determined that India and the PRC were economically comparable based on the 2008 data and that the change in the World Bank data from 2008 to 2009 was not significant enough to demonstrate that India was not economically comparable. Def.'s Br. 10 11. Plaintiffs' argument has merit.

In non-market economy ("NME") reviews, Commerce must select a surrogate country that is "at a level of economic development comparable to that of the nonmarket economy country" and is a significant

[3] Commerce has found the DEPB scheme to be a countervailable subsidy. *See Preliminary Results*, 76 Fed. Reg. at 68,146.

producer of comparable merchandise. 19 U.S.C. § 1677b(c)(4). In practice, Commerce employs a four-step process to select the primary surrogate country. First, Commerce's Office of Policy ("OP") develops a list of potential surrogate countries that are at a comparable level of economic development based on "per capita gross national income, as reported in the most current annual issue of the *World Development Report* (The World Bank)." Policy Bulletin 04.1, *Non-Market Economy Surrogate Country Selection Process* (April 8, 2011), P.R. 1/93 at Attach. 2 at 2. Commerce then narrows the OP list down to a single surrogate country by identifying which countries contain producers of comparable merchandise, which countries contain "significant" producers of comparable merchandise, and finally, which country has the best available data. *Id.* at 2 4. Although the OP's list is not exhaustive and parties may request that Commerce select a country not on the list, Commerce generally selects a surrogate country from the OP list unless all of the listed countries lack sufficient data. *See id.* at 4; *see also Issues and Decision Memorandum for the Final Results of the Second Administrative Review of Certain Steel Threaded Rod from the People's Republic of China*, A-570–932, at 4 (Dep't Commerce Nov. 5, 2012), *available at* http://ia.ita.doc.gov/frn/summary/PRC/2012–27438–1.pdf (last visited Feb. 4, 2013) ("[W]hen selecting a primary surrogate country, the Department will normally look first to the list of countries included in the surrogate country memo . . . .").

Here, Commerce's selection of India as the surrogate country is not supported by substantial evidence because Commerce based its decision on 2008 data, even though 2009 GNI data were available on the record, and because Commerce failed to provide a reasoned explanation for disregarding the 2009 data. The 2009 GNI data were placed on the record before Commerce made its surrogate country selection and Commerce has not suggested that it lacked sufficient time to evaluate the 2009 data.[4] Accordingly, both data sets were on the record and equally available to Commerce. The 2009 GNI data, however, were partially contemporaneous with the period of review ("POR"), unlike the 2008 data. Commerce has not explained why it

[4] The same issue of whether Commerce may disregard updated World Bank data issued after Commerce begins its surrogate country selection process but before the surrogate country is selected was raised in *Fujian Lianfu Forestry Co. v. United States*, 638 F. Supp. 2d 1325, 1349 (CIT 2009). In *Fujian*, Commerce did not rely on the updated data, stating that it had been issued too late for consideration. *Id.* The court did not decide whether this was a reasonable explanation because it found that plaintiffs had failed to make a developed argument in its brief contesting Commerce's decision, and thus, had waived any objection. *Id.*

preferred to rely on the 2008 data when data partially contemporaneous with the POR were available.

Commerce justified its decision to disregard the 2009 GNI data by noting that the change in disparity between India's and the PRC's GNI between 2008 and 2009 was not significant enough to render India not economically comparable to the PRC. *Issues and Decision Memorandum* 3 (noting its determination was not significantly affected by the 2009 data because there was "only a small change in the proportionality of the per capita GNI of India in relation to that of the PRC between 2008 and 2010.").[5] Implicit in this explanation is Commerce's conclusion that even if the 2009 data were used, India and the PRC would remain economically comparable. *See id.* at 3 4 ("[T]he disparity in per capital GNI between India and the PRC did not grow so significantly *during the POR* that the two countries cannot be considered economically comparable for the purposes of this administrative review.") (emphasis added).

Commerce did not provide any explanation as to why the change in proportionality was too "small" to warrant consideration or affect the economic comparability analysis, why Commerce chose to rely on a

[5] The change in GNI between 2008 and 2009 for the PRC and India is:

	2008 GNI data ($)	2009 GNI data ($)
PRC	2,940	3,590
India	1,070	1,180

Sources: *Office of Policy Memorandum*, P.R. 2/34 (INT_035634) at Attach. 1 at 2; World Bank, *World Development Report of 2011*, *available at Pet'rs' Pre-Preliminary Cmts.*, C.R. 2/Ext_031388 at Ex. 1.

Plaintiffs argue that the change in GNIs cannot reasonably be considered small because there was a 28.9% growth in the absolute disparity between the two countries. Pls.' Br. 18. Defendant argues that Commerce's conclusion that the change between 2008 and 2009 data was "small" is reasonable because India's GNI was 36.39% of China's in 2008 and only dropped to 32.87% in 2009 and because both countries fall within the range of "lower middle income" countries on the World Bank's list. Def.'s Br. 8. Defendant's explanation still fails to explain why change in proportionality is the appropriate measure. Regardless, these explanations were not provided by Commerce and cannot support its determination.

The court is not in a position to make determinations in the first instance as to what constitutes a significant change in GNIs among countries and how that change should be measured, either by change in proportionality or change in disparity. It is for this reason that Commerce must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotations omitted). Here, Commerce has failed to articulate an explanation for its finding that the change in GNIs was insignificant or that India and the PRC would remain economically comparable under the 2009 GNI data.

change in proportionality between two countries, or how Commerce determines what is an acceptable change in proportionality of GNI. Commerce has previously warned that there is a point at which the disparity between India's and the PRC's GNI will be too great for India to be considered economically comparable to the PRC. *See Office of Policy Memorandum*, P.R. 2/34 (INT_035634) at Attach. 1 at 1. Commerce has not, however, provided any explanation as to why the change in disparity between the 2008 and 2009 data either does or does not rise to such a level.[6] Commerce merely stated, without further explanation, that the change in disparity was not significant. *Issues and Decision Memorandum* 3. Additionally, because the Office of Policy did not consider the 2009 GNI data, there is no OP list on which Commerce can base its conclusion that India and the PRC remain economically comparable even if 2009 data were considered. Because it remains unclear whether India and the PRC are economially comparable based on the 2009 data, Commerce's explanation that the 2009 GNI data represented only a small change and did not have a significant affect on its analysis is conclusory and unsupported.

Moreover, Commerce failed to address record evidence that undermines Commerce's conclusion that the change in the disparity between India's and the PRC's GNI was too insignificant to affect the economic comparability analysis. When Plaintiffs placed the 2009 data on the record, Plaintiffs also included an OP list that relied on the 2009 data, issued one month after the OP list issued for this review. *See Office of Policy Memorandum of May 25, 2011* in *Sodium Hexametaphosphate from the PRC* ("*Sodium Hex Review*"), *available at Pet'rs' Pre-Preliminary Cmts.*, C.R. 2/EXT_031388 at Ex. 2 at Attach. 1. The Office of Policy in the *Sodium Hex Review* did not include India on the list of countries that were economically comparable to the PRC. *Id.* A country may be excluded from the OP's list for reasons other than a lack of economic comparability, such as a lack of available data or because the country is an NME. As Plaintiffs note, however, India has been the surrogate country of choice for the PRC for years because there is generally sufficient, usable information available. The exclusion of India from the OP list is, therefore, probative evidence as to whether the 2009 data has a significant effect on Commerce's economic comparability analysis.[7] It may not be defini-

[6] Defendant argues that Commerce concluded that even though the disparity between India and China's GNI was large, the two countries' GNI were comparable within the context of global data. Def.'s Br. 7 8. Commerce's conclusion that the countries remain comparable was based on 2008 data, not 2009 data, and thus, this conclusion cannot serve to explain why the 2009 data could be disregarded as representing an insignificant change.

[7] The parties disagree as to whether Commerce has continued to use India as the surrogate country for the PRC since the 2009 data became available in April 2011. Although not on the

tive evidence that the two countries are no longer economically comparable, but it is record evidence that detracts from Commerce's conclusion that the 2009 data represented an insignificant change that did not affect Commerce's determination here.[8]

Defendant argues that the exclusion of India from the OP list in the *Sodium Hex Review* is irrelevant because the list is not exhaustive, and thus, India and the PRC may remain economically comparable even though India is not on the OP list. Def.'s Br. 7 8. At the outset, the court notes that this explanation was not provided by Commerce and thus, cannot support its determination. Defendant's argument is also conclusory because it, like Commerce in its determination, has no support for its statement that India and the PRC could remain economically comparable under the 2009 GNI data. Furthermore, the exclusion of India from the list is relevant not only to whether India remains economically comparable to the PRC, but also to whether Commerce's chosen procedures will result in the selection of India as the surrogate country because Commerce generally selects a surrogate country from the OP list. Thus, even if India and the PRC remain economically comparable under some unknown methodology based on the 2009 data, the *Sodium Hex Review* suggests that Commerce's chosen method for determining economic comparability is unlikely to result in the selection of India. Because the record suggests that the use of 2009 GNI data may result in the selection of a surrogate country other than India, Commerce's conclusion that the 2009 data did not present a significant enough change to affect its analysis is unreasonable.[9]

record before Commerce, the court notes that since the 2009 data became available, the Office of Policy has not included India on the list of potential surrogate countries for the PRC. *See, e.g.*, *Issues and Decision Memorandum for the Final Results of the Second Administrative Review of Certain Steel Threaded Rod from the People's Republic of China*, A-570–932, at 3 (Dep't Commerce Nov. 5, 2012), *available at* http://ia.ita.doc.gov/frn/summary/PRC/2012–27438–1.pdf (last visited Feb. 4, 2013) (stating that OP list, dated Nov. 18, 2011, did not include India "because India's per capita GNI did not fall within the range of countries proximate to the PRC."); *Certain Activated Carbon From the People's Republic of China: Preliminary Results of the Fourth Antidumping Duty Administrative Review, and Intent to Rescind in Part*, 77 Fed. Reg. 26,496, 26,498 (Dep't Commerce May 4, 2012) (OP list, dated July 25, 2011, does not include India).

[8] This is not to say that Commerce was somehow "bound" by the *Sodium Hex Review* or that the exclusion of India from the OP list constituted a finding that India and the PRC are not economically comparable. The exclusion is, however, evidence that the disparity between India and the PRC's GNI has reached a level of disparity sufficient to render the countries not economically comparable, contrary to Commerce's conclusion here.

[9] Defendant argues that because Commerce has yet to make a formal finding that India and the PRC are not economically comparable or that the disparity is too large, it is reasonable for Commerce to select India as the surrogate country here. Def.'s Br. 10. The absence of a finding that a country is not economically comparable does not qualify as substantial evidence to show that the countries are in fact economically comparable.

The court remands this issue for Commerce to either provide a reasoned explanation as to why it may disregard the 2009 GNI data or, in the alternative, make a surrogate country selection with the benefit of the 2009 data.

II. JBF's Financial Statement[10]

Plaintiffs argue that JBF's financial statement indicates that it may have benefitted from a countervailable subsidy and thus, Commerce should not have relied on it to calculate financial ratios. Pls.' Br. 20. Defendant argues that Commerce's decision is supported by substantial evidence because even though JBF had a policy for accounting for countervailable subsidies, there was no indication that JBF received any benefit from the subsidy scheme. Def.'s Br. 13.

In NME reviews, Commerce determines normal value by using the "best available information" from the surrogate country to value the factors of production. 19 U.S.C. § 1677b(c)(1). Commerce uses surrogate financial ratios to value the factors of production, and calculates those ratios based on publicly available information from producers of identical or comparable merchandise in the surrogate country. *See* 19 C.F.R. § 351.408(c)(4). It is Commerce's policy, however, to reject financial statements of companies Commerce "has reason to believe or suspect may have benefitted from countervailable subsidies, particularly when other sufficient, reliable, and representative data are available for calculating surrogate financial ratios." *Selection of a Surrogate Country Memorandum* 9.

The relevant language in JBF's financial statement is contained in two accounting notes. *See Pet'rs' Factors of Production Submission*, Def.'s App. Tab 7, P.R. 2/59 at 31. Accounting note Q states: "Benefit on account of entitlement to Import duty free materials under the 'Duty Exemption pass book Scheme/Focus Market Scheme/Focus Product scheme' is recognized as and when right to receive are established as per the terms of the scheme." *Id.* Accounting Note N states "Turnover includes sale of goods, waste, export Incentive and excise duty and are net of sales tax, value added tax, discounts and claims." *Id.* In the *Final Results*, Commerce reversed its position and stated that upon closer inspection, the above language did not indicate participation in the DEPB scheme. 77 Fed. Reg. at 14,494; *Issues and Decision Memorandum* 7. Commerce concluded that the language

[10] Whether JBF's statement was the best available information may become moot depending on Commerce's surrogate country selection on remand. The court reaches this issue in the event that India remains the surrogate country. Moreover, whether JBF's statement is distorted by subsidies is a relevant question on remand, especially when Commerce has rejected all of the other Indian financial statements, because Commerce considers the extent of available data when making the surrogate country selection among comparable economies.

indicated how a benefit from the DEPB scheme would be accounted for but did not indicate that any benefit had been received and thus, there was insufficient reason to reject JBF's financial statement. *Issues and Decision Memorandum* 7.

There are two distinct issues here. First, is Commerce's conclusion that JBF's statement was the best available information supported by substantial evidence? Second, is Commerce's conclusion that JBF's statement does not give rise to a belief or suspicious that JBF may have benefitted from countervailable subsidies supported by the record? These two issues are distinct because even if JBF's statement indicated that it may have benefitted from countervailable subsidies, Commerce could have reasonably concluded that it would be the best available information if the other financial statements on the record were even more distorted. *See* 19 U.S.C. § 1677b(c) (requiring Commerce to use the "best available information"); *see also Selection of a Surrogate Country Memorandum* 9 (stating it is Commerce's policy to reject such financial statements particularly when other sufficient, reliable, and representative data are available).

As to the first issue, Commerce's finding that JBF's statement is the best available information is supported by the record because the other financial statements clearly state that a countervailable subsidy was received and accounted for in a specific line item. *Resp'ts' Submission of Surrogate Value and Other Factual Information for Prelim. Determination* ("*Resp'ts' Surrogate Value Submission*") (Nov. 28, 2011), P.R. 2/57 (Ext_040739) at Ex. SV-3 at 40 (Jindal) ("Export Incentive under [DEPB] amount to Rs. 152,977,025 . . . has been credited in the account of raw material."); *Id.* at Ex. SV-2 at 27 (Garware) ("Export Benefits / Incentives are accounted on accrual basis. Accordingly, net estimated benefit aggregating to Rs. 510.21 Lakhs . . . against export effected during the period has been credited to Export Benefits earned account which has been included in sales."); *Id.* at Ex. SV-1 at 57, 63 (Ester) (line item for "DEPB provision written back" totaling Rs. 14.65 Lacs and stating export benefits under DEPB "have been credited to Raw material and Chemical Consumption Account."); *Pet'rs' Factors of Production Submission*, P.R. 1/118 at Ex. 27 at 62 (Polyplex) ("Import duty benefit under [DEPB] Scheme and profit/loss on sale of DEPB aggregating to Rs.105.70 Lacs . . . are accounted for on accrual basis and have been credited to Raw Materials Consumed."). This language demonstrates that Jindal, Garware, Ester, and Polyplex received countervailable subsidies and credited those subsidies to the raw material account or other line items. In contrast, the language in JBF's statement does not state that a benefit from a countervailable subsidy has been

credited to any account or provide a specific amount of any subsidy benefit. Instead, JBF's financial statement merely indicates that export benefits from the DEPB scheme will be credited "as and when" they are received. *Pet'rs' Factors of Production Submission*, Def.'s App. Tab 7, P.R. 2/59 at 31. Thus, Commerce's determination that JBF's statement is the best available information is supported by substantial evidence because it is the financial statement least likely to have been affected by countervailable subsidies.

The second issue of whether JBF's financial statement gives rise to a belief or suspicion that JBF may have benefitted from a countervailable subsidy is less clear. Plaintiffs argue that the mere mention of a countervailable subsidy scheme is sufficient to indicate that JBF may have benefitted from a subsidy. Pls.' Br. 24. Defendant argues that it was reasonable for Commerce to interpret JBF's statement as indicating an accounting policy for recording exports incentives, and because no such export incentives were recorded, there is nothing to suggest that JBF may have benefitted from a countervailable subsidy. Def.'s Br. 13 14.

Commerce's finding in the *Final Results* that JBF's financial statement does not suggest that a benefit from a countervailable subsidy may have been received is supported by substantial evidence. Although the statement mentions how countervailable subsidies would be accounted for, the statement does not indicate that any benefit was received in the 2010–2011 fiscal year. The notes state that a benefit will be recorded "as and when" such a benefit is received, but no benefit attributed to the DEPB scheme is recorded in the financial statement. *See Pet'rs' Factors of Production Submission*, Def.'s App. Tab 7, P.R. 2/59 at 31. The lack of a benefit recorded, when the company has a specific policy for recording such benefits, supports Commerce's position. Moreover, it is reasonable for Commerce not to reject financial statements that include a policy for accounting for subsidies because the receipt of a subsidy, and not the policy itself, causes the distortion in the financial statement that impacts the calculation of surrogate financial ratios.

Ultimately, Plaintiffs' argument fails because it requires the court to choose between two reasonable interpretations of the financial statement. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence"). Reading accounting notes Q and N together, it may be reasonable to find that Turnover, as listed on the financial statement, has been calculated to include export incentives, and because the DEPB scheme is mentioned under export

incentives, Turnover includes export incentives from the DEPB scheme. It is also reasonable, however, for Commerce to read notes Q and N as boilerplate accounting policies that merely indicate when and how a DEPB benefit would be recorded, and thus, do not indicate that a DEPB benefit was included in the financial statement calculations such that it could distort the financial ratio calculations.

Plaintiffs also argue that Commerce's position in the *Final Results* is inconsistent with Commerce's treatment of Garware's 2008 financial statement in the first administrative review of PET film and Commerce's position in *Tires from China*. Pls.' Br. 23 24. Plaintiffs' arguments are not availing. Garware's 2008 financial statement includes a general policy on how to account for subsidies, but, unlike JBF's statement, Garware's statement also included the actual dollar amount of the subsidies received.[11] *See* P.R. 2/18 (EXT_030843) at Ex. 3 at 31. Thus, Garware's 2008 statement indicates a receipt of a subsidy whereas JBF's does not, and Commerce was justified in treating the two statements differently.

In *Tires from China*, Commerce rejected the financial statements of Balkrishna and Apollo because the financial statements indicated that the raw material line item had been calculated by including income earned pursuant to the DEPB scheme. *Issues and Decision Memorandum for the Antidumping Investigation of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, ("*Tires from China Issues and Decision Memorandum*"), A-570–912, POR: 10/1/2006–3/31/2007 (July 7, 2008) at 38 39, *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–16156–1.pdf (last visited Feb. 4, 2013). Commerce relied on the following language from Balkrishna's financial statement:

> Consumption of Raw Materials is arrived at after adjusting the difference between the costs of indigenous/duty paid imported raw materials and international cost of raw materials entitled to be imported/imported under Duty Exemption Scheme of the

[11] Plaintiffs' argument is based on the fact that Commerce, in the first administrative review, cited to the page of Garware's statement that contained the general accounting notes only and failed to cite to the page referencing the actual dollar amount of subsidies received from the DEPB scheme. In this review, Commerce explained that this failure was due to an oversight and that Garware's financial statement was rejected because of evidence indicating the actual receipt of a benefit. *Issues and Decision Memorandum* 7 n.19. The mere oversight of a page citation is not sufficient to demonstrate an inconsistent application of policy by Commerce. The record demonstrates that Garware's 2008 statement includes a specific line item of a DEPB benefit received whereas JBF's does not. *See* P.R. 2/18 (EXT_030843) at Ex. 3 at 31 ("Export Benefits / Incentives are accounted on accrual basis. Accordingly, net estimated benefit aggregating to Rs. 752.27 Lakhs (Previous period Rs. 1,746.51 Lakhs) against export effected during the year has been credited to Export Benefits earned account which has been included in sales."). Thus, Garware's 2008 statement indicates the receipt of a countervailable subsidy whereas JBF's statement does not.

> Government of India against direct/indirect exports made/to be made by the Company during the year.

Id. at 39. The Apollo statement noted "Export Incentive in the form of Advance Licenses / credit earned and Duty Entitlement Pass Book Scheme are treated as income in the year of export . . . and are credited to the Raw Material Consumption account." *Id.* at 38. As noted by Commerce, these financial statements indicate that the raw material line item had been adjusted to account for benefits obtained through the DEPB scheme. There is no indication in JBF's statement that the raw material, or any other line item, has been adjusted to include benefits from the DEPB scheme. Also in *Tires from China*, Commerce relied on the financial statement of companies that mentioned the DEPB scheme but that did not indicate the receipt of any benefit from the scheme. *See Tires from China Issues and Decision Memorandum* 40 (finding insufficient evidence to reject financial statement that referenced DEPB scheme but indicated zero revenue had been received from the scheme). Here, Commerce's approach of relying on JBF's statement is consistent with *Tires from China* because although the DEPB scheme is mentioned, the statement does not indicate that JBF benefitted from the scheme. Thus, Commerce's interpretation of JBF's statement is consistent with Commerce's policy and supported by substantial evidence.

CONCLUSION

The court remands for Commerce to provide a reasoned explanation for disregarding the 2009 World Bank GNI data or, in the alterative, to make a surrogate country selection with the benefit of the 2009 data. The court sustains Commerce's finding that JBF's statement was the best available information and that JBF's financial statement should not be excluded based on the receipt of a countervailable DEPB subsidy.

Commerce shall file its remand determination with the court within 60 days of this date. The parties shall have 30 days thereafter to file objections, and the Government will have 15 days thereafter to file its response.

Dated: February 7, 2013
New York, New York

/s/ Jane A. Restani
Jane A. Restani
Judge

Slip Op. 13–20

HUBBELL POWER SYSTEMS, INC., Plaintiff, GEM YEAR INDUSTRIAL CO., LTD., Consolidated Plaintiff, v. UNITED STATES, Defendant, and VULCAN THREADED PRODUCTS INC., Intervenor Defendant.

Before: Jane A. Restani, Judge
Consol. Court No. 11–00474

JUDGMENT

Upon consideration of the remand results filed by the United States Department of Commerce, plaintiffs' and intervenor defendant's comments, defendant's response, and all other pertinent papers, and in the absence of any substantive challenges to the remand results, it is hereby

ORDERED, ADJUDGED and DECREED that the determination on remand of the United States Department of Commerce in this action is SUSTAINED.

Dated: February 7, 2013
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI

Slip Op. 13–21

THAI PLASTIC BAGS INDUSTRIES CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and POLYETHYLENE RETAIL CARRIER BAG COMMITTEE, HILEX POLY CO., LLC, and SUPERBAG CORPORATION, Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Consol. Court No. 11–00086

[agency's determination on remand affirmed]

Dated: February 11, 2013

Irene H. Chen, Chen Law Group LLC, of Rockville, MD, and *Mark B. Lehnardt*, Lehnardt & Lehnardt, LLC, of Liberty, MO, for Thai Plastic Bags Industries, Co., Ltd.

Joseph W. Dorn, *Stephen A. Jones*, and *Daniel L. Schneiderman*, King & Spalding LLP, of Washington, DC, for Polyethylene Retail Carrier Bag Committee, Hilex Poly Co., LLC, and Superbag Corporation.

Vincent D. Phillips and *Ryan M. Majerus*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. Also on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Scott D. McBride*, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

OPINION

Pogue, Chief Judge:

Before the court is a determination by the United States Department of Commerce ("Commerce") in response to a previously ordered remand.[1] In prior proceedings, the court granted Commerce's request for a voluntary remand on two grounds: 1) to allow Commerce to provide additional explanation for its decision to assign a dumping margin of zero to all U.S. sales where export price was greater than normal value (referred to as "zeroing") when calculating respondents' weighted-average dumping margins during the antidumping duty review at issue; and 2) to allow Commerce to consider the parties' comments and to review Commerce's application of the "transactions disregarded" cost adjustment when constructing a normal value in this review. *Thai Plastic Bags I*, __ CIT at __, 853 F. Supp. 2d at 1277–79.

For the reasons below, Commerce's *Remand Results* will be affirmed.

STANDARD OF REVIEW

This court will uphold Commerce's antidumping determinations if they are in accordance with law and supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). Where the antidumping statute does not directly specify a method for its application, the court will defer to Commerce's statutory construction if it is reasonable. *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (relying on *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

DISCUSSION

I. Zeroing

When comparing respondents' export prices to the merchandise's normal value in this review, Commerce treated sales made at or above normal value as not dumped; Commerce therefore did not aggregate the (negative) normal-to-export price differences of such sales with the (positive) normal-to-export price differences of the dumped sales

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[1] *See* Results of Redetermination Pursuant to Court Remand, ECF No. 92 ("*Remand Results*"); *Thai Plastic Bags Indus. Co. v. United States*, __ CIT __, 853 F. Supp. 2d 1267 (2012) ("*Thai Plastic Bags I*") (remanding *Polyethylene Retail Carrier Bags from Thailand*, 76 Fed. Reg. 12,700 (Dep't Commerce Mar. 8, 2011) (final results of antidumping duty administrative review) and accompanying Issues & Decision Mem., A-549–821, ARP 08–09 (Mar. 1, 2011) ("*I & D Mem.*")).

made at prices below normal value. *I & D Mem.* cmt. 4 at 21.[2] Plaintiff Thai Plastic Bags Industries Company, Limited ("TPBI"), a respondent in this review, argued that Commerce acted contrary to law as articulated in the jurisprudence of the World Trade Organization ("WTO"). *See id.* at 20–21. Commerce rejected TPBI's WTO-based challenge on the ground that WTO jurisprudence *per se* is not a source of legal authority in the United States unless and until specifically implemented pursuant to the procedures established by the Uruguay Round Agreements Act. *Id.* at 22 (citing *NSK Ltd. v. United States*, 510 F.3d 1375, [1380] (Fed. Cir. 2007); *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007); *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1347–49 (Fed. Cir. 2005)).[3]

In this action, TPBI argued for remand because Commerce's refusal to aggregate *all* of the normal-to-export price differences of TPBI's U.S. sales, regardless of whether normal value exceeded the individual export prices, was inconsistent with Commerce's approach to aggregating price differences when calculating weighted-average dumping margins in initial dumping investigations. *Thai Plastic Bags I*, __ CIT at __, 853 F. Supp. 2d at 1277. Commerce requested a voluntary remand to explain its reasoning. *Id.* Noting two recent Court of Appeals decisions requiring further explanation for Commerce's apparently inconsistent application of the antidumping law in initial dumping investigations and subsequent administrative reviews, the court granted Commerce's request for a voluntary remand

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[2] To determine whether merchandise is being "dumped," 19 U.S.C. § 1677(34) (defining "dumped" and "dumping" as "the sale or likely sale of goods at less than fair value"), Commerce must make "a fair comparison" between the export price (which is sometimes constructed, *see id.* at § 1677a(b)) and the merchandise's "normal value." *Id.* at § 1677b(a) (providing instructions for calculating "normal value" that seek to "achieve a fair comparison with the export price or constructed export price"). The amount by which the normal value exceeds the export price is known as the "dumping margin." *Id.* at § 1677(35)(A). Commerce generally aggregates the various dumping margins determined for a given exporter or producer and divides this aggregate by the aggregate export prices of such exporter or producer to arrive at the weighted average dumping margin that will form the basis for antidumping duty assessment. *See id.* at §§ 1677(35)(B), 1673d(c)(1)(B)(i); *see also id.* at §§ 1673, 1673e(a)(1), 1673e(c)(3) (providing that antidumping duties are assessed in an amount equal to the amount by which the normal value exceeds the export price for the merchandise).

[3] *See, e.g.*, *Corus Staal*, 395 F.3d at 1348 ("WTO decisions are not binding on the United States, much less this court.") (internal quotation marks and citation omitted); *id.* at 1349 ("[Congress] has authorized the United States Trade Representative, an arm of the Executive Branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation.") (citing 19 U.S.C. §§ 3533(f)-(g), 3538); *id.* ("[The court will not] overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.").

of this issue. *Id*. at n.17 (citing *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1372–73 (Fed. Cir. 2011); *JTEKT Corp. v. United States*, 642 F.3d 1378, 1384 (Fed. Cir. 2011)).

In its *Remand Results*, Commerce has provided additional explanation for its determination not to aggregate the negative price margins of TPBI's non-dumped sales with the dumping margins of TPBI's dumped sales, notwithstanding the agency's approach to calculating weighted-average dumping margins in initial investigations. *Remand Results* at 2–13. TPBI continues to object to this determination. [TPBI]'s Comments on the Results of Redetermination Pursuant to Ct. Remand, ECF No. 98 ("TPBI's Br.") at 1–10. As explained below, however, Commerce has provided an explanation that comports with a reasonable reading of its statutory authority. Accordingly, the *Remand Results* will be affirmed on this issue.

A. Background

Respondents in antidumping proceedings have long sought – and, until recently, Commerce has long declined – to offset the dumping margins of sales at less than fair value ("LTFV") with the negative normal-to-export price margins of non-dumped sales. *See, e.g.*, *Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce*, 11 CIT 866, 873–74, 675 F. Supp. 1354, 136061 (1987) (addressing this claim and holding that "[a] plain reading of the [antidumping] statute discloses no provision for Commerce to offset sales made at LTFV with sales made at fair value" and that Commerce's interpretation of the statute "to prevent a foreign producer from masking its dumping with more profitable sales" was reasonable). Rather than offset the dumping margins of sales made at LTFV with the negative normal-to-export price margins of non-dumped sales, Commerce historically has interpreted "dumping" to mean that any sale *not* made at LTFV was not "dumped" and therefore had a "dumping margin" of zero. *See id.* ; 19 U.S.C. §§ 1677(34) (defining "dumped" and "dumping" to "refer to the sale or likely sale of goods at less than fair value"), 1677(35)(A) (defining "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise"). Commerce's policy of not permitting the dumping margins of dumped sales to be offset or negated by the negative normal-to-export price differences of non-dumped sales has accordingly come to be known, perhaps misleadingly, as zeroing.[4]

[4] This label may be misleading because it suggests that non-dumped sales are entirely zeroed out and have no effect upon ultimate antidumping duty assessment rates. But "the weighted-average margin will reflect any non-dumped merchandise examined during the [period of review] [because] the value of such sales is included in the denominator of the

Responding to certain recommendations made by the WTO's Dispute Settlement Body,[5] however, Commerce determined that, in certain contexts, it will begin to aggregate all normal-to-export price comparisons, including the results of price comparisons for sales

weighted-average dumping margin while no dumping amount for non-dumped merchandise is included in the numerator[,] [such that] a greater amount of non-dumped merchandise results in a lower weighted-average margin." *I & D Mem*. cmt. 4 at 21.

[5] Seventeen disputes concerning the practice of zeroing – fifteen of them filed against the United States – have been adjudicated to date in the WTO. World Trade Organization, Index of Disputes by Issue, http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#selected_subject (last visited Feb. 7, 2013) (listing seventeen disputes under the topic "zeroing").

The heart of the dispute is definitional. The U.S. Trade Representative argued in the WTO, as Commerce does in its *Remand Results* here, that when dumping analysis is performed on a transaction-specific basis, any normal-to-export price comparison that yields a negative result indicates that the transaction in question was not a dumped sale; to treat the amount by which the export price of such a transaction exceeded normal value as a negative dumping margin, and to permit this negative dumping margin to offset the dumping margins of dumped transactions, is contrary to the definition of dumping as selling at prices below normal value. *See, e.g.*, Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶¶ 32–33, 35, 46–47, WT/DS294/AB/R (Apr. 18, 2006); *Remand Results* at 12.

For the WTO's Dispute Settlement Body, on the other hand, dumping analysis by definition cannot be performed on a transaction-specific basis, and necessarily examines an exporter's pricing behavior over a certain period of time; by this definition of dumping as selling at *aggregate* prices below normal value, negative normal-to-export price comparisons are not negative dumping margins but relevant pricing behavior for determining overall dumping margins. *See, e.g.*, Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel From Mexico*, ¶ 113, WT/DS344/AB/R (Apr. 30, 2008) ("*United States – Stainless Steel from Mexico*") ("In our view, it is not correct to say that . . . an 'offset' is provided for the so-called 'non-dumped' transactions. A margin of dumping is properly calculated under the Anti-Dumping Agreement only if all transactions are taken into account, including those where the export prices exceed the normal value.").

Although "[i]t is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties," *United States – Stainless Steel from Mexico* at ¶ 158 (citation and footnote omitted), the Appellate Body has expressed "deep concern" regarding any departure from "well-established [WTO] jurisprudence," *id*. at ¶ 162, which has reached "a definitive outcome" with respect to the definition of dumping and the practice of zeroing as such. Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, ¶ 312, WT/DS350/AB/R (Feb. 4, 2009) (concurring opinion); *see also United States – Stainless Steel from Mexico* at ¶ 112 ("[W]hatever methodology is followed for assessment and collection of anti-dumping duties, . . . the total amount of dumping found in all the sales made by the exporter concerned [must be] calculated according to the margin of dumping established for that exporter without zeroing. . . . [T]he terms 'dumping' and 'margin of dumping' cannot be interpreted as applying at an individual transaction level, as the United States suggests.") (citations omitted). *Compare with Timken*, 354 F.3d at 1342 ("Commerce calculates dumping duties on an entry-by-entry basis. Its practice of zeroing negative dumping margins . . . neutralizes dumped sales and has no effect on fair-value sales.") (citing 19 U.S.C. § 1675(a)(2)); *Dongbu*, 635 F.3d at 1365 ("This court has opined that the statutory text. . . is sufficiently ambiguous to defer to Commerce's decision of whether or not to use zeroing in both [antidumping investigations and administrative reviews].") (citations omitted).

made at prices above normal value.[6] Due to its expressly limited applicability, one effect of this modification was that Commerce was now aggregating negative normal-to-export price comparisons in some contexts but not others. *See Dongbu*, 635 F.3d at 1365. In *Dongbu* and *JTEKT*, the Court of Appeals held that the reasonableness of interpreting the antidumping statute to allow for such distinctions required more explanation than Commerce had then provided. *Dongbu*, 635 F.3d at 1373; *JTEKT*, 642 F.3d at 1384–85.

B. Analysis

In a number of decisions post-dating *Dongbu* and *JTEKT*, this Court has affirmed Commerce's decision to include both positive and negative normal-to-export price differences when calculating weighted average dumping margins in initial dumping investigations but not when doing so in administrative reviews.[7] These holdings addressed Commerce's explanation regarding the inherent differences between the nature and goals of initial investigations and subsequent administrative reviews.[8] Here, Commerce clarifies that the reasonableness of its current practice is additionally supported by the distinction between the various comparison methods that Commerce may employ when comparing normal values and export prices to calculate dumping margins. *See Remand Results* at 10–13.

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[6] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 Fed. Reg. 77,722, 77,722 (Dep't Commerce Dec. 27, 2006) (final modification); *see U.S. Steel Corp. v. United States*,__ CIT __, 637 F. Supp. 2d 1199, 1210–16 (2009) (affirming the modification), *aff'd*, 621 F.3d 1351 (Fed. Cir. 2010).

[7] *Fischer S.A. Comercio, Industria & Agricultura v. United States*, __ CIT __, __ F. Supp. 2d __, 2012 WL 6062563, at *10–11 (Dec. 6, 2012); *Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, __ CIT __, 880 F. Supp. 2d 1348, 1354–55 (2012); *Far E. New Century Corp. v. United States*, __ CIT __, 867 F. Supp. 2d 1309, 1312 (2012); *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, __ CIT __, 853 F. Supp. 2d 1352,1361 (2012); *Union Steel v. United States*, __ CIT __, 823 F. Supp. 2d 1346, 1358–59 (2012). A number of additional actions challenging Commerce's practice in this regard have been stayed pending the outcome of appeal in *Union Steel*. *See, e.g.*, *Papierfabrik August Koehler AG v. United States*, No. 11–00147, 2012 WL 6136890, at *5 (CIT Dec. 10, 2012); *Home Meridian Int'l, Inc. v. United States*, __ CIT __, 865 F. Supp. 2d 1311, 1331 n.33 (2012) (collecting cases).

[8] *See, e.g.*, *Union Steel*, __ CIT at __, 823 F. Supp. 2d at 1359 ("[T]he court concludes that when it comes to reviews, which are intended to more accurately reflect commercial reality, Commerce is permitted to unmask dumping behavior in a way that is not necessary at the investigation stage."); *Grobest*, __ CIT at __, 853 F. Supp. 2d at 1361 (concluding that "Commerce has offered a reasonable basis for treating investigations and reviews differently"). *See also JTEKT*, 642 F.3d at 1384 (characterizing the "relevant question" as "why is it a reasonable interpretation of the statute to zero in administrative reviews, but not in investigations?"); *Dongbu*, 635 F.3d at 1370 (characterizing the issue presented as "the reasonableness of interpreting 19 U.S.C. § 1677(35) in different ways depending on whether the proceeding is an investigation or an administrative review").

The antidumping statute contemplates three distinct methods that Commerce may employ when comparing normal values and export prices to calculate dumping margins. *See* 19 U.S.C. § 1677f-1(d). Commerce may 1) compare the weighted average of the normal values found during the relevant time period with the weighted average of contemporaneous export prices (the "average-to-average" comparison method), *id*. at § 1677f-1(d)(1)(A)(i); 2) compare the normal values of individual transactions to the export prices of individual transactions (the "transaction-to-transaction" comparison method), *id*. at § 1677f-1(d)(1)(A)(ii); or 3) compare the weighted average of the normal values to the export prices of individual transactions (the "average-to-transaction" comparison method), *id*. at §§ 1677f-1(d)(1)(B), 1677f-1(d)(2). Commerce's recent policy modification is limited to the average-to-average comparison method.[9]

Commerce explains that when using the average-to-average comparison method, Commerce "does not determine dumping on the basis of individual, transaction-specific, U.S. prices, but rather makes the determination 'on average' for the averaging group [groupings are made by model and level of trade] within which higher prices and lower prices offset each other." *Remand Results* at 11. Commerce then "aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter[,] [and] . . . by permitting offsets in the aggregation stage, [Commerce] determines an 'on average' aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio, consistent with the manner in which [Commerce] determined the comparison results being aggregated." *Id*.

When using the average-to-transaction comparison method, however, rather than analyzing overall pricing behavior, Commerce examines each export transaction individually. *Id*. Commerce "determines the amount of dumping on the basis of individual, transaction-specific, U.S. sales prices[,] . . . compar[ing] the export price or

[9] *Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 Fed. Reg. at 77,722 ("[Commerce] will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons."); *see also Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 77 Fed. Reg. 8101, 8101 (Dep't Commerce Feb. 14, 2012) (final modification) ("[Commerce] will calculate weighted-average margins of dumping and antidumping duty assessment rates in a manner which provides offsets for non-dumped comparisons while using monthly average-to-average [] comparisons in reviews . . . ."). The modification for administrative reviews was not yet in effect at the time of the review at issue here. In any event, Commerce did not employ the average-to-average comparison method in this review. *See Remand Results* at 11 (noting that Commerce used the average-to-transaction method in this review).

constructed export price for a particular U.S. transaction with the average normal value for the comparable model of foreign like product at the same or most similar level of trade." *Id.* at 11–12. "The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise into the U.S. market at a price which is less than its normal value[,] [and] . . . [t]o the extent that the average normal value does not exceed the individual export price or constructed export price of a particular U.S. sale, [Commerce] does not calculate a dumping margin for that comparison, or include an amount of dumping for that comparison result in its aggregation of transaction-specific dumping margins." *Id.* at 12.[10]

Thus Commerce "has interpreted the application of average-to-average comparisons to contemplate a dumping analysis that examines the overall pricing behavior of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison method[] [Commerce] continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions." *Remand Results* at 12–13. Beyond providing for certain discrete limitations on the use of the average-to-transaction comparison method,[11] the statute is silent as to the particulars of when or how Commerce should apply one or another of the different comparison methods. *See* 19 U.S.C. at § 1677f-1(d). Commerce's approach to, and explanation for, distinguishing among these comparison methods – based on the differences between an analysis of overall pricing behavior and an analysis of individual export transactions – is reasonable. Commerce has thus sufficiently supported its policy of including negative-value price comparisons in calculations based on the average-to-average comparison method while disallowing offsets for non-dumped sales when using the average-to-transaction or the transaction-to-transaction comparison methods.

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[10] Non-dumped sales remain relevant and accounted for because "[t]he value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator[,] [so] a greater amount of non-dumped transactions results in a lower weighted-average dumping margin." *Id.* at n.26.

[11] Commerce may employ this method in dumping investigations only if "(i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and (ii) [Commerce] explains why such differences cannot be taken into account using [either the average-to-average or the transaction-to-transaction method]." 19 U.S.C. § 1677f-1(d)(1)(B). When employing this comparison method in administrative reviews, Commerce must "limit its averaging of [normal value] prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale." *Id.* at § 1677f-1(d)(2).

Accordingly, because Commerce's determination not to aggregate the price differences of TPBI's above-normal value sales with the dumping margins of TPBI's dumped sales (while employing the average-to-transaction comparison method in this review) comports with a reasonable interpretation of the statute, this determination is affirmed. *See Timken*, 354 F.3d at 1342.

II. Transactions Disregarded Rule

When constructing normal value for TPBI's merchandise, Commerce *sua sponte* changed its application of the "transactions disregarded rule" [12] in the interim between the preliminary draft and the final results of this review. *Thai Plastic Bags I*, __ CIT at __, 853 F. Supp. 2d at 1278. The court granted Commerce's request for voluntary remand to allow Commerce to review its application of this rule and provide the parties with an opportunity to comment on this question. *Id.* at 1278–79. In doing so, the court noted that while no provision directly addresses how to apply the transactions disregarded rule (beyond requiring a cost adjustment for materials purchased from an affiliated supplier below market price), Commerce's application of the rule in the final results of this review appeared contrary to the agency's past practice. *Id.* at 1279 n.23. [13]

On remand, Commerce determined that its application of the transactions disregarded rule in both the preliminary and the final results of this review was contrary to past agency practice, resulting in inaccurate dumping margins. *Remand Results* at 18. Commerce therefore decided to apply the rule in a manner that is consistent with agency practice. *Id.*[14] Specifically, when constructing TPBI's normal

[12] *See* 19 U.S.C. § 1677b(f)(2). When Commerce determines that the circumstances do not permit normal value to be calculated pursuant to 19 U.S.C. § 1677b(a)(1), normal value may be constructed based on the costs of producing the subject merchandise. *Id.* at §§ 1677b(a)(4), 1677b(e). When analyzing respondents' costs of production while constructing normal value under 19 U.S.C. § 1677b(e), Commerce may disregard below-marketvalue transactions between affiliated parties. *See id.* at § 1677b(f)(2) (the "transactions disregarded rule").

[13] (citing *Certain Pasta from Italy*, 69 Fed. Reg. 6255 (Dep't Commerce Feb. 10, 2004) (notice of final results of the sixth administrative review of the antidumping duty order and determination not to revoke in part) and accompanying Issues and Decision Mem., A-475–818, ARP 01–02 (Feb. 3, 2004) at cmt. 32).

[14] TPBI argues that Commerce fails to cite to any relevant prior practice because it refers to proceedings where Commerce applied the major input rule, 19 U.S.C. § 1677b(f)(3), rather than the transactions disregarded rule, *id.* at § 1677b(f)(2). TPBI's Br. at 13 n.2. But TPBI is incorrect. As Commerce correctly emphasizes, *Remand Results* at 17, the material difference between the major input rule and the transactions disregarded rule is that the major input rule applies to purchases from an affiliated input *producer*, whereas the transactions disregarded rule applies when the affiliated party did not produce the materials being sold. Aside from this distinction, both rules allow Commerce to make a cost

value in both the preliminary and the final results of this review, Commerce applied a single adjustment equally across all models of TPBI's merchandise (regardless of the type of resin used in producing the various models), even though Commerce found that only one of the three types of materially different resin inputs purchased by TPBI during the period of review was purchased from an affiliate below market value. *See id.* at 29.

In the *Remand Results*, on the other hand, Commerce determined that, because "the amount and type of inputs that are used to produce a [plastic] bag have a direct impact on the ultimate cost to produce that bag, and the ultimate price paid to purchase that bag," id. at 28, and because "the inputs were used by TPBI in significantly varying quantities in producing different types of bags during the period of review," id., it was more accurate to adjust each model's cost data based on each model's consumption of the one type of resin found to have been acquired below market value, consistent with past agency practice. Id. at 30 (explaining that "[t]his analysis is more accurate and specific than that applied in either the Preliminary Results or the Final Results, and is consistent with [Commerce]'s practice in applying the transactions disregarded rule to products with significant inputs where these significant inputs are consumed in disproportionate quantities in the production of the different products subject to review").[15]

TPBI objects to Commerce's application of the transactions disregarded rule in the *Remand Results*, arguing that "Commerce has deprived TPBI of a fair and reasonable opportunity to present its views on Commerce's analysis in the *Final Results*." TPBI's Br. at 12.[16] But Commerce presented its reasoning with regard to this issue in its proposed draft remand determination, which the agency released for the parties' consideration prior to finalizing the *Remand Results*. Nothing prevented TPBI, when commenting on the draft

adjustment for undervalued purchases from affiliates when constructing normal value and, for both rules, the statute is equally silent with regard to the manner in which the resulting cost adjustment is to be applied when constructing normal value for subject merchandise comprised of multiple models consuming varying amounts of the input in question. *Compare* 19 U.S.C. § 1677b(f)(2) *with id*. at § 1677b(f)(3). Here, Commerce applied the transactions disregarded rule rather than the major input rule because TPBI's affiliate did not produce the resin sold in the transactions at issue. *Remand Results* at 14 n.28.

[15] To effectuate this application of the transactions disregarded rule, Commerce requested additional information from TPBI, which TPBI promptly provided. *Id*. at 15–16.

[16] (citing *Zenith Elecs. Corp. v. United States*, 12 CIT 932,699 F. Supp. 296 (1988) (preliminarily enjoining Commerce from altering instructions concerning the cash deposits of estimated antidumping duties pending litigation of the final results of an antidumping proceeding)).

remand determination, from arguing that Commerce's approach in the preliminary or final results of this review was superior to that proposed in the draft remand determination. *See Remand Results* at 27. TPBI made no such arguments. *Id*.

TPBI also objects to Commerce's request of additional information from TPBI during the remand proceeding. TPBI's Br. at 12–13. TPBI argues that, by requesting this information, Commerce violated the court's remand order. *Id.* at 13. The court's remand order granted Commerce's request for a voluntary remand "to reconsider its position" with regard to its application of the transactions disregarded rule in this review.[17] Having obtained the court's permission to reconsider its application of the transactions disregarded rule, Commerce exercised its inherent discretion to request additional information within TPBI's possession that was reasonably necessary to permit the agency to apply the rule with greater accuracy and consistency. *See Remand Results* at 15–16, 30; *NSK Corp. v. United States*, __ CIT __, 774 F. Supp. 2d 1296, 1298 n.4 (2011) (noting that agencies have "inherent discretion to reopen the record" with respect to issues remanded for reconsideration); *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, __ CIT __, 625 F. Supp. 2d 1339, 1356 n.18 (2009) (noting that, "[a]lthough Commerce is not being expressly required to reopen the administrative record [with regard to the remanded issue], the agency clearly has the discretion to do so if appropriate").

Commerce's explanation for applying 19 U.S.C. § 1677b(f)(2) more precisely on remand, resulting in greater accuracy and consistency with prior agency practice, is reasonable. Accordingly, the *Remand Results* are affirmed on this issue.

CONCLUSION

For all of the foregoing reasons, Commerce's *Remand Results* are affirmed. Judgment will be entered accordingly.

Dated: February 11, 2013
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE, CHIEF JUDGE

[17] *Thai Plastic Bags I*, __ CIT at __, 853 F. Supp. 2d at 1278–79 ("As an agency may request a remand *to reconsider its position*, the court will remand this issue . . . .") (emphasis added) (citing *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001)); *see also* Def.'s Resp. in Opp'n to Pls.' Rule 56.2 Mots. for J. Upon the Agency R., ECF No. 67, at 43 (requesting a voluntary remand to, *inter alia*, "reconsider [Commerce's] analysis in applying the transactions disregarded rule").