U.S. Customs and Border Protection

Slip Op. 13–34

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.

PUBLIC VERSION
Before: Donald C. Pogue,
Chief Judge
Consol. Court No. 11–00408

[affirming in part and remanding in part the Department of Commerce's final results of antidumping duty administrative review]

Dated: March 19, 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, Master Packaging, Inc., and Inteplast Group, 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, Trial Attorney, 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:

This consolidated action seeks review of five determinations by the United States Department of Commerce ("Commerce") in the sixth administrative review of the antidumping duty order on polyethylene retail carrier bags from Thailand.[1] Specifically, Plaintiffs Thai Plastic

[1] *See Polyethylene Retail Carrier Bags from Thailand*, 76 Fed. Reg. 59,999 (Dep't Commerce Sept. 28, 2011) (final results of antidumping duty administrative review), *amended by* 76 Fed. Reg. 68,137 (Dep't Commerce Nov. 3, 2011) (amended final results of antidumping duty administrative review), *amended by* 76 Fed. Reg. 70,965 (Dep't Commerce Nov. 16, 2011) (correction to the amended final results of antidumping duty administrative review) (collectively the "*Final Results*") and accompanying Issues & Decision Mem., A-549–821, ARP 09–10 (Sept. 21, 2011) ("*I & D Mem.*").

Bags Industries Company, Limited ("TPBI") – a respondent in this review – and two importers of subject merchandise who participated in this review – Master Packaging, Incorporated, and Inteplast Group, Limited (collectively the "Importers") – challenge 1) Commerce's zeroing of, rather than deducting, negative normal-to-export price comparisons in the calculation of respondents' dumping margins; and 2) Commerce's decision, when calculating TPBI's general and administrative expenses, not to deduct income received from an export-conditional government rebate.[2] In addition, Plaintiffs Polyethylene Retail Carrier Bag Committee, Hilex Poly Company, LLC, and Superbag Corporation – members of the domestic like product industry who participated in this review (collectively the "Domestic Producers") – challenge 3) Commerce's decision, when calculating TPBI's general and administrative expenses, to include a particular gain from TPBI's sale of assets; 4) Commerce's adjustment of the surrogate financial statements used to construct respondent Landblue (Thailand) Company, Limited ("Landblue")'s normal value to reduce the reported selling expenses in proportion to Landblue's own direct to indirect selling expense ratio for export sales; and 5) Commerce's decision, when calculating Landblue's constructed profit, to use publicly available surrogate financial statements, rather than confidential information from TPBI.[3]

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006) and 28 U.S.C. § 1581(c) (2006).

As explained below, Commerce's *Final Results* are sustained with respect to both of TPBI and the Importers' challenges. With regard to the Domestic Producers' challenges, Commerce's calculation of a constructed profit based on publicly available surrogate financial statements is sustained, but Commerce's adjustment of these surrogate financial statements' direct selling expense ratio is remanded. In addition, Commerce's inclusion of TPBI's asset sale gain in TPBI's general and administrative expense calculation is also remanded.

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). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as ad-

[2] *See* Pls.' Rule 56.2 Mem. of L. in Supp. of Mot. for J. on the Agency R., ECF No. 48 ("TPBI & Importers' Br.").

[3] *See* Rule 56.2 Br. of the Polyethylene Retail Carrier Bag Comm., Hilex Poly Co., LLC, and Superbag Corp. in Supp. of their Mot. for J. on the Agency R., ECF No. 49 ("Domestic Producers' Br.").

equate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (defining "substantial evidence")). Moreover, the substantiality of evidence is evaluated "on the record as a whole, including [any evidence that] fairly detracts from its weight." *Target Corp. v. United States*, 609 F.3d 1352, 1358 (Fed. Cir. 2010) (internal quotation marks and citation omitted). The "substantial evidence" standard of review can be roughly translated to mean "is the determination unreasonable?" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (internal quotation and alteration marks, as well as citation, omitted).

DISCUSSION

I. *Zeroing*

In their request for review of Commerce's decision to zero negative normal-to-export price comparisons in the calculation of respondents' dumping margins, TPBI and the Importers make substantially the same arguments here as TPBI made in the preceding review. *Compare* TPBI & Importers' Br. at 13–17 *with Thai Plastic Bags Indus. v. United States*, __ CIT __, __ F. Supp. 2d __, No. 11–00086, 2013 WL 491520 (CIT Feb. 11, 2013) ("*Thai Plastic Bags II*") (adjudicating TPBI's challenge to Commerce's decision to zero negative price comparisons in the preceding review). Commerce similarly provides the same explanation for its decision as that upheld by this Court in response to TPBI's challenge in that preceding review. *Compare I & D Mem.* cmt. 6 at 17–18 *with Thai Plastic Bags II*, __ CIT at __, __ F. Supp. 2d at __, 2013 WL 491520 at *3–4. As the record of this review is not materially different from that of the preceding review, Commerce's decision 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) is affirmed on the grounds stated in *Thai Plastic Bags II*. *See Thai Plastic Bags II*, __ CIT at __, __ F. Supp. 2d at __, 2013 WL 491520 at *3–4.

II. *TPBI's Export-Conditional Government Rebate Revenue*

When calculating TPBI's cost of production ("COP") in this administrative review,[4] Commerce rejected TPBI's argument that its gen-

[4] *See* 19 U.S.C. § 1677b(b)(1) ("Whenever [Commerce] has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product, [Commerce] shall determine whether, in fact, such sales were made at less than the cost of production. If [Commerce] determines that sales made at less than the cost

eral and administrative ("G&A") expenses[5] should be reduced by the value of a rebate that TPBI received from the Thai government (referred to as the "Blue Corner Rebate" or "BCR revenue"). *See I & D Mem*. cmt. 1 at 2, 5. TPBI and the Importers claim that this decision was not supported by a reasonable reading of the evidence in the record. TPBI & Importers' Br. at 9–13.

But in its decision, Commerce explained that it did not deduct TPBI's BCR revenue from the COP calculation because the BCR revenue – which TPBI described as rebates received "upon export of TPBI's finished bags"[6] – "is related to export sales rather than the COP" and thus "adjusting production costs (or any component of the COP) with the BCR revenue [was] not appropriate." *I & D Mem*. cmt. 1 at 5. More generally, Commerce reasonably concluded that the COP calculation concerns the respondent's home market,[7] whereas export-conditional rebates by definition are not available when the foreign like product is sold domestically. Accordingly, Commerce properly excluded the export-conditional BCR revenue from the COP calculation when determining TPBI's normal value, consistent with Commerce's treatment of Thai BCR rebates in other proceedings.[8] *Cf. Saha Thai Steel Pipe (Public) Co. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011) ("[P]roducers remain subject to [an export-

of production[] (A) have been made within an extended period of time in substantial quantities, and (B) were not at prices which permit recovery of all costs within a reasonable period of time, such sales may be disregarded in the determination of normal value. . . ."); *Polyethylene Retail Carrier Bags from Thailand*, 76 Fed. Reg. 30,102, 30,104 (Dep't Commerce May 24, 2011) (preliminary results of antidumping duty administrative review) (explaining that Commerce had "reasonable grounds to believe or suspect" that TPBI's Thai sales of foreign like product may have been made at prices below COP because Commerce found that TPBI made below-cost Thai sales in the most recent prior administrative review) (unchanged in the *Final Results*).

[5] *See* 19 U.S.C. § 1677b(b)(3)(B) (providing that the cost of production includes, *inter alia*, "an amount for selling, general, and administrative expenses").

[6] Case Brief of [TPBI] (June 23, 2011), Admin. R. Con. Doc. 45 [Pub. Doc. 88] ("*TPBI's Case Br.*") at 1 (citation omitted); *see also id*. at 1–2 ("The Thai Government pays these BCR rebates to refund import duties incurred in the manufacture of resin used to produce plastic bags for export.") & n.2 (explaining that the export-conditional BCR revenue refunded a fee charged to TPBI "by its domestic resin suppliers for the import duties the resin suppliers themselves incurred to produce the resin sold to TPBI").

[7] *See* 19 U.S.C. §§ 1677b(b)(1) (COP is calculated for "sales of the foreign like product under consideration for the determination of normal value"); 1677b(a)(1) (normal value is preferably the price at which foreign like product is sold in the exporting country).

[8] *See, e.g.*, *Polyethylene Retail Carrier Bags from Thailand*, 75 Fed. Reg. 53,953, 53,955 (Dep't Commerce Sept. 2, 2010) (preliminary results of antidumping duty administrative review) ("We adjusted TPBI's reported [cost of manufacturing] to remove an offset claimed by TPBI for revenue associated with the Government of Thailand's Blue Corner Rebate program.") (unchanged in the final results, 76 Fed. Reg. 12,700 (Dep't Commerce Mar. 8, 2011)).

conditional] import duty when they sell the subject merchandise domestically, which increases home market sales prices and thereby increases [normal value].").[9]

Because the record reasonably supports Commerce's finding that TPBI's BCR revenue was conditioned upon exportation,[10] this finding is supported by substantial evidence. *See Consol. Edison*, 305 U.S. at 229. And because rebates conditional upon exportation are not applicable to merchandise sold in the respondent's home market, Commerce reasonably determined that TPBI's export-conditional BCR revenue was not relevant to TPBI's COP when calculating normal value for TPBI's merchandise. *Cf. Saha Thai Steel Pipe*, 635 F.3d at 1338. Commerce's decision not to deduct TPBI's BCR revenue from the COP calculation is therefore affirmed.

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[9] Commerce noted that TPBI could have a sought an export price adjustment for the BCR revenue, pursuant to the duty drawback provision. *See I & D Mem.* cmt. 1 at 5; 19 U.S.C. § 1677a(c)(1)(B) ("The price used to establish export price and constructed export price shall be . . . increased by . . . the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States[.]"); *Saha Thai Steel Pipe*, 635 F.3d at 1338 ("[W]hen a duty drawback is granted only for exported inputs, the cost of the duty is reflected in [normal value] but not in [export price]. The statute corrects this imbalance, which could otherwise lead to an inaccurately high dumping margin, by increasing [export price] to the level it likely would be absent the duty drawback.") (citations omitted).

TPBI did not claim such adjustment and Commerce determined that the record did not support a finding that the BCR revenue satisfied the relevant criteria. *I & D Mem.* cmt. 1 at 5; *see Wheatland Tube Co. v. United States*, 30 CIT 42, 47, 414 F. Supp. 2d 1271, 1276 (2006) ("Commerce explains that it has a long-standing practice of evaluating claims for a duty drawback adjustment . . . using a two-pronged test . . . requir[ing] the respondent to establish that (1) the import duties and rebates are directly linked to and are dependent upon one another, and (2) there are sufficient imports of raw materials to account for the duty drawback received on exports of the manufactured product.") (citation omitted), *rev'd on other grounds*, 495 F.3d 1355 (Fed. Cir. 2007). *Cf. Polyethylene Retail Carrier Bags from Thailand*, Issues & Decision Mem., A-549–821, ARP 08–09 (Mar. 1, 2011) cmt. 3 at 20 ("TPBI's costs include a 'compensation fee' charged by resin suppliers to account for import duties in recognition of the fact that TPBI will be rebated the duties upon export of the finished bag sunder the BCR program. In other words, BCR revenues are import duties imposed by Thailand which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise. Thus, BCR revenues are analogous to duty-drawback revenues with the variant that there are three parties involved (the input supplier, the producer/exporter, and the foreign government) whereas, in a typical duty-drawback situation, there are only two parties involved (the producer/exporter and the foreign government).") (footnote and citation omitted) (denying duty drawback adjustment for BCR revenues because TPBI failed to establish entitlement under the two-pronged test); *see also Circular Welded Carbon Steel Pipe sand Tubes from Thailand*, 77 Fed. Reg. 20,782, 20,784 (Dep't Commerce Apr. 6, 2012) (preliminary results of antidumping duty administrative review) (same).

[10] *See supra* note 6.

III. *TPBI's Gain From the Sale of Assets*

Next, the Domestic Producers challenge Commerce's decision to offset TPBI's G&A expenses[11] with the value of a particular gain from the sale of assets that was reflected in TPBI's financial statements. Domestic Producers' Br. at 7–10; *see I & D Mem.* cmt. 1 at 5–6.[12] It is Commerce's practice to include in the G&A expense calculation gains or losses incurred on the routine disposition of fixed assets but to exclude nonrecurring income or losses that are not part of a company's normal production-related business operations.[13] Here, Commerce decided to include TPBI's asset sale gain in the G&A expense calculation because Commerce found that this gain was attributable to "the routine disposition of assets." *I & D Mem.* cmt. 1 at 5–6. As discussed below, however, this decision is not supported by substantial evidence because Commerce did not address record evidence that fairly detracts from its conclusion. *See Tudor v. Dep't of Treasury*, 639 F.3d 1362, 1366 (Fed. Cir. 2011) (quoting *Univ. Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.")).

As the Domestic Producers point out, "TPBI provided no information regarding the type of assets sold, and it made no claim or representation that sales of such assets were 'routine' or otherwise related to normal production operations." Domestic Producers' Br. at 8; *TPBI's Case Br.*, Admin. R. Con. Doc. 45 [Pub. Doc. 88], at 4 (providing no detail regarding these asset sales beyond the general description of a certain gain "on the sale of assets"). Thus Commerce's conclusion that these sales were routine production-related dispositions was not supported by substantial evidence because it was based on speculation. Cf. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327 (Fed. Cir. 2009) ("It is well established that speculation does not constitute 'substantial evidence.'") (internal quotation marks and citation omitted).

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[11] *See supra* notes 4–5.

[12] *See also TPBI's Case Br.*, Admin. R. Con. Doc. 45 [Pub. Doc. 88], at 4 (claiming that "TPBI's 2010 financial statements demonstrate a gain of [[ ]] baht on the sale of assets") (citing Ex. S3ABCD-1 to TPBI's Submission of 2010 Financial Statements, A-549–821, ARP 09–10 (June 15, 2011), Admin. R. Con. Doc. 40 [Pub. Doc. 79] ("*TPBI's Financial Stmts.*") at 6 (showing [[ ]] baht next to [[ ]])).

[13] *See, e.g., Stainless Steel Sheet and Strip in Coils from Mexico*, Issues & Decision Mem., A-201–822, ARP 07–08 (Feb. 3, 2010) ("*SSSS from Mexico*") cmt. 8 at 44. Commerce considers the nature, significance and relationship of an activity to the general operations of the company when determining whether or not it is part of a company's normal production-related business operations. *Id.*

Moreover, Commerce unreasonably concluded, without explanation, that there was "no evidence on the record to suggest that gains on the sales of assets reported in TPBI's audited financial statements are attributable to anything other than the routine disposition of assets." *I & D Mem.* cmt. 1 at 5–6. On the contrary, the Domestic Producers present a reading of the information contained in TPBI's (confidential) financial statements that fairly detracts from Commerce's conclusion that these asset sales were routine production-related dispositions.[14] Commerce's explanation that TPBI's asset sale gain was properly included in the G&A expense calculation because the record contains no evidence to suggest that these sales were unrelated to general manufacturing operations does not adequately address the evidence emphasized by the Domestic Producers. *See* I & D *Mem.* cmt. 1 at 5–6.[15] Accordingly, Commerce's explanation fails to take into account evidence that fairly detracts from the reasonableness of its conclusion; it is therefore not supported by substantial evidence. *See* Univ. Camera, 340 U.S. at 488.

Because Commerce's decision to include TPBI's asset sale gain in the G&A expense calculation (based on a finding that this gain was attributable to the routine disposition of production-related assets)

[14] Specifically, the size of the gain suggests it was not from operating assets. TPBI's financial statements list both [[ ]] and [[ ]]. *TPBI's Financial Stmts.*, Admin. R. Con. Doc. 40 [Pub. Doc. 79], at 3, 18–19. The statements show that [[ ]] in 2010. *Id.* at 3, 18–19. With regard to [[ ]], the statements show that [[ ]]. *Id.* at 18. With regard to [[ ]] *Id.* at 19. Given these facts, Commerce's conclusion that TPBI's asset sale gain was entirely attributable to the routine disposition of production-related assets implies that TPBI sold assets at a price nearly [[ ]] the cost that it initially paid for them, generating a gain of more than [[ ]] times the assets' depreciated book value. *See* Reply Br. of [the Domestic Producers] in Supp. of their Mot. for J. on the Agency R., ECF No. 75, at 5–7. As the Domestic Producers suggest, the reasonableness of this conclusion is fairly undermined by the greater likelihood that the [[ ]] baht gain was generated almost entirely from the sale of [[ ]]. *See id.* As Commerce has previously explained, gains on sales of assets that do not correspond to a company's manufacturing or selling capabilities – such as gains or losses from the sale of land or other investments – are not included in the G&A expense calculation. *See, e.g.*, *Polyethylene Terephthalate Film, Sheet, and Strip from Korea*, Issues & Decision Mem., A-580–807, ARP 08–09 (Nov. 19, 2010) cmt. 3 at 6.

[15] As this gain was not included in the G&A expense calculation prior to the filing of administrative case briefs below, both Commerce and the Domestic Producers were first apprised of TPBI's request to include this gain from TPBI's case brief. *See TPBI's Case Br.*, Admin. R. Con. Doc. 45 [Pub. Doc. 88], at 4. Thus this issue may have been under-developed in the administrative proceeding below.

was not supported by substantial evidence, it is remanded for further consideration, consistent with this opinion.

IV. *Landblue's Constructed Selling Expenses*

The Domestic Producers also object to Commerce's selling expense calculation when constructing a normal value for Landblue, another respondent in this review. Domestic Producers' Br. at 10–15.[16] Specifically, although the surrogate financial statements used to construct Landblue's selling expenses did not separately report direct and indirect selling expenses, Commerce decided to treat these surrogate statements as though they were comprised of the same ratio of direct to indirect selling expenses as Landblue's actual experience. *I & D Mem.* cmt. 5 at 14.[17]

Relying on its "longstanding practice not to make adjustments that may introduce unintended distortions into the data rather than achieving greater accuracy,"[18] Commerce concluded that disaggregating and excluding a presumed portion of the surrogate's expenses from Landblue's selling expense calculation would avoid distortion

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[16] Because Commerce found that Landblue had no viable home or third-country market, *see I & D Mem*. cmt. 5 at 13, Commerce constructed a normal value for Landblue's merchandise. *See id.* ; 19 U.S.C. §§ 1677b(a)(4), 1677b(e). When constructing normal value pursuant to Section 1677b(e), Commerce includes, *inter alia*, an amount for selling expenses "in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country." 19 U.S.C. § 1677b(e)(2)(A). Where, as here, actual data with respect to this amount are not available, Commerce is authorized to use (i) the respondent's selling expenses in connection with the production and sale of "merchandise that is in the same general category of products as the subject merchandise"; (ii) "the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review"; or (iii) "the amounts incurred and realized for selling . . . expenses . . . based on any other reasonable method." *Id*. at § 1677b(e)(2)(B). Here, Commerce decided to use selling expense data derived from another company's publicly available financial statements. *I & D Mem.* cmt. 5 at 13.

[17] *See I & D Mem.* cmt. 5 at 13 ("[I]t is [Commerce]'s practice to exclude direct selling expenses in the calculation of selling expenses [when constructing normal value]."); *Oil Country Tubular Goods ('OCTG'), Other Than Drill Pipe, from Korea*, Issues & Decision Mem., A-580–825, ARP 03–04 (Feb. 27, 2007) cmt. 2 at 7 (excluding surrogate's freight and "various types of movement expenses" from a respondent's constructed selling expenses because these direct expenses "are incurred after [the merchandise] leaves the factory") (relying on 19 U.S.C. § 1677b(e)(3)).

[18] *I & D Mem.* cmt. 5 at 14 (relying on *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China*, Issues & Decision Mem., A-570–924, ARP 08–09 (Feb. 14, 2011) ("*Film from the PRC*") cmt. 1). *See also Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, Issues & Decision Mem., A-570–912, ARP 08–09 (Apr. 18, 2011) cmt 11 at 23 ("Because [Commerce] cannot go behind line-items in the surrogate financial statements, it is [Commerce]'s longstanding practice not to make adjustments that may introduce unintended distortions into the data rather than achieving greater accuracy . . . .").

and thereby achieve greater accuracy. *See I & D Mem.* cmt. 5 at 13–14.[19] Commerce decided that it was reasonable to assume that the nature and proportion of the surrogate's direct and indirect selling expenses were similar to Landblue's simply because the surrogate ("Thantawan") was "a Thai producer of similar merchandise, has a similar customer base, and operated with a profit." *Id.* at 14.

Landblue, however, exported all of its merchandise during the period of review, whereas no evidence suggests that the same is true of Thantawan. *See I & D Mem.* cmt. 5 at 13–14. Because Landblue exported all of its merchandise, its actual direct selling costs (e.g., freight) are likely to be significantly higher than those of a company selling largely within its home market.[20] And as "Thantawan's total selling expenses do not provide details on whether the expenses are direct or indirect in nature," *I & D Mem.* cmt. 5 at 14, Commerce merely presumed – based solely on the possibility that some (unknown) portion of Thantawan's selling expenses may have been comprised of direct expenses – that introducing Landblue's (export-based) direct expense ratio into the calculation of constructed value was more likely to result in greater accuracy than further distortion. *See id.*[21]

Because unfounded assumptions are not evidence, Commerce's decision that adjusting Thantawan's selling expenses to reflect Landblue's own direct expense ratio would avoid distortion and achieve greater accuracy is not supported by a reasonable reading of the evidence in the record. This matter is therefore remanded for further consideration, consistent with this opinion.

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[19] *See supra* note 17.

[20] *See* Domestic Producers' Br. at 11 (emphasizing that "Landblue's direct selling expenses [were] comprised [[ ]]") (citing Ex. 2 to Landblue's Supp. Financial Submission (June 22, 2011), Admin. R. Con. Doc. 43 [Pub. Doc. 82]). Commerce's vague explanation – that Thantawan's direct selling expense ratio was likely to be similar to Landblue's because Thantawan was "a Thai producer of similar merchandise, ha[d] a similar customer base, and operated with a profit", *I & D Mem.* cmt. 5 at 14 – neither addresses this argument nor refers to any evidence to the contrary. *See id.*

[21] *Compare with Coated Free Sheet Paper from Peoples Republic of China*, Issues & Decision Mem., A-570–906, Investigation (Oct. 17, 2007) cmt. 4 at 28 ("[B]ecause [Commerce] does not know all of the components that contribute to the costs of a surrogate producer, it cannot be certain of the individual components which comprise the various line items in surrogate financial statements. Therefore, adjusting those statements may not make them any more accurate and indeed may only provide the illusion of precision.") (citation omitted). *See also Film from the PRC* cmt. 1 (relied on in *I & D Mem.* cmt. 5 at 14) at 7 ("[Commerce]'s practice is to not make adjustments to [surrogate] financial statements data, as doing so may introduce unintended distortions into the data rather than achieving greater accuracy.") (internal quotation marks and citation omitted).

V. *Landblue's Constructed Profit*

Finally, the Domestic Producers claim that Commerce improperly constructed Landblue's profit[22] from publicly available Thai surrogate information, rather than using TPBI's confidential information. *See* Domestic Producers' Br. at 15–16 (emphasizing that, unlike TPBI's financial statements, the surrogate financial statements used to construct Landblue's profit did not disaggregate profits attributable specifically to sales of foreign like product in Thailand). But because TPBI was the sole other respondent selected for individual examination in this review,[23] Commerce could not have relied on TPBI's financial statements without revealing TPBI's business-proprietary information in contravention of the administrative protective order. *Cf. Polyethylene Retail Carrier Bags from Thailand*, Issues & Decision Mem., A-549–821, Investigation (June 18, 2004) ("*Bags from Thailand Investigation*") cmt. 4 at 21 ("[B]ecause there is only one other respondent in this case, [Commerce] could not calculate . . . profit based on [actual amounts realized by the other respondent] because [doing so] would reveal the business-proprietary information of the other respondent . . . ."). Accordingly, Commerce reasonably determined that relying on TPBI's profit information was not an available alternative.[24] *See Geum Poong Corp. v. United States*, 25 CIT 1089, 1092, 163 F. Supp. 2d 669, 674 (2001) (holding that Commerce properly determined that an alternative was unavailable where it would impermissibly reveal a respondent's proprietary profit ratio). This determination is therefore affirmed. *See id.*

CONCLUSION

For all of the foregoing reasons, Commerce's *Final Results* are sustained except with regard to 1) Commerce's decision to include TPBI's asset sale gain in the calculation of TPBI's G&A expenses; and 2) Commerce's adjustment of the surrogate financial statements used

[22] *See supra* note 16. When constructing normal value pursuant to Section 1677b(e), Commerce includes, *inter alia*, an amount for "profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country." 19 U.S.C. § 1677b(e)(2)(A).

[23] *See Final Results*, 76 Fed. Reg. at 60,000.

[24] Although Commerce acknowledged that the Domestic Producers "reiterate[d] their argument that [Commerce] should base the profit ratio for Landblue on the profit rate it calculate[d] for TPBI," *I & D Mem*. cmt. 4 at 11, the agency did not specifically address this argument in explaining its decision to continue to base Landblue's profit calculation on publicly available information from a Thai surrogate. *See id*. at 12. As this argument was considered and addressed in detail in the underlying investigation, however, *see Bags from Thailand Investigation* cmt. 4 at 21, it is reasonable to infer that Commerce based its decision in this review on the same reasoning as that supporting its decision regarding the same issue in the prior proceeding.

to construct Landblue's selling expenses to reflect Landblue's own direct to indirect selling expense ratio. As explained above, these issues are remanded for further consideration, consistent with this opinion. Commerce shall have until May 20, 2013, to complete and file its remand results. Plaintiffs and Defendant-Intervenors shall have until June 3, 2013, to file comments. The parties shall have until June 10, 2013, to file any reply.

It is SO ORDERED.

Dated: March 19, 2013
New York, NY

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

Slip Op. 13–46

DONGGUAN SUNRISE FURNITURE CO., LTD., TAICANG SUNRISE WOOD INDUSTRY CO., LTD., TAICANG FAIRMONT DESIGNS FURNITURE CO., LTD., and MEIZHOU SUNRISE FURNITURE CO., LTD., Plaintiffs, LONGRANGE FURNITURE CO., LTD., Consolidated Plaintiff, COASTER COMPANY OF AMERICA, COE LTD., LANGFANG TIANCHENG FURNITURE CO., LTD., and TRADE MASTERS OF TEXAS, INC., Intervenor Plaintiffs, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE, and VAUGHAN-BASSETT FURNITURE COMPANY, INC., Intervenor Defendants.

Before: Jane A. Restani, Judge
Consol. Court No. 10–00254

[Antidumping Remand Results Remanded to Commerce.]

Dated: April 5, 2013

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Joseph W. Dorn, *Daniel L. Schneiderman*, *J. Michael Taylor*, and *Mark T. Wasden*, King & Spalding, LLP, of Washington, DC, for intervenor defendants.

OPINION AND ORDER

Restani, Judge:

This matter comes before the court following the court's decision in *Dongguan Sunrise Furniture Co. v. United States*, 865 F. Supp. 2d 1216, 1223 (CIT 2012) ("*Dongguan*"), in which the court remanded *Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part*, 75 Fed. Reg. 50,992, 50,992 (Dep't Commerce Aug. 18, 2010) ("*Final Results*") to the U.S. Department of Commerce ("Commerce"). For the reasons stated below, the court finds that Commerce complied with the court's remand instructions with regard to the calculation of the wage rate and has provided a reasonable explanation for its zeroing methodology. *See Amended Final Results of Redetermination Pursuant to Court Order* (Dep't Commerce Oct. 26, 2012) (Docket No. 125) ("*Remand Results*"). Commerce has not provided substantial evidence for its calculation of the partial adverse facts available ("AFA") rates or the use of Insular Rattan and Native Products Corp.'s ("Insular Rattan") financial statement. Thus, Commerce's *Remand Results* are sustained in part and remanded in part.

BACKGROUND

The facts of this case have been documented in the court's previous opinion. *See Dongguan*, 865 F. Supp. 2d at 1224–25. The court presumes familiarity with that decision but briefly summarizes the facts relevant to this opinion.

Plaintiffs Dongguan Sunrise Furniture Co., Ltd., Taicang Sunrise Wood Industry Co., Ltd., Taicang Fairmont Designs Furniture Co., Ltd., and Meizhou Sunrise Furniture Co., Ltd. (collectively "Fairmont"); Intervenor Plaintiffs Coaster Company of America, COE Ltd., Langfang Tiancheng Furniture Co., Ltd., and Trade Masters of Texas, Inc. (collectively "Coaster"); and Intervenor Defendants American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc. (collectively "AFMC") challenged the *Final Results* of the administrative review of the antidumping duty ("AD") order on wooden bedroom furniture from the People's Republic of China. *See Dongguan*, 865 F. Supp. 2d at 1223 & n.1. Upon consideration of the parties' motions for judgment on the agency record, the court held, *inter alia*, that substantial evidence did not support Fairmont's assigned partial AFA rate of 216.01%. *Id.* at 1232–34. The court remanded for Commerce to reconsider: (1) Fairmont's partial AFA rate; (2) the calculation of the wage rate; (3) the use of Insular Rattan's financial statement; and (4) Commerce's zeroing methodology. *See id.* at 1253.

On remand, Commerce: (1) calculated four new partial AFA rates for Fairmont based on data from Fairmont's reported sales; (2) calculated the wage rate using industry-specific data;[1] (3) continued to rely on Insular Rattan's financial statement; and (4) provided an explanation for its zeroing methodology. *Remand Results* at 2. To calculate the partial AFA rates, Commerce grouped the unreported sales into four categories based on product type: armoires, dressers without mirrors, nightstands, and drawer chests/other chests. *Id.* at 5. Commerce then determined a margin for each product type by selecting the single highest CONNUM-specific margin below 216.01% for a corresponding reported product type. *Id.* at 5, Chart A. The resulting AFA dumping margin rates are 182.15% for armoires, 215.51% for chests, 134.42% for nightstands, and 183.52% for dressers. *Id.* at 31 n.61.

Fairmont challenges the selected partial AFA rates and requests that the court stay proceedings until the Federal Circuit addresses Commerce's zeroing methodology. Corrected Pl. Fairmont Comment on Remand Results ("Fairmont Cmts."). AFMC challenges Commerce's continued use of Insular Rattan's financial statements. AFMC's Comments Concerning Commerce's Final Results of Redetermination Pursuant to Court Remand ("AFMC Cmts."). Defendant United States asks the court to sustain the *Remand Results*. Def.'s Resp. to AFMC's and Fairmont's Remand Comments ("Def.'s Resp.").

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 AD 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).

[1] In *Dongguan*, the court held that Commerce's use of economy-wide manufacturing sector data and its reliance on data from India, which may have been distorted by a wage cap, were not supported by substantial evidence. 865 F. Supp. 2d at 1235–39. On remand, Commerce relied on industry-specific data to recalculate the surrogate wage rate. *Remand Results* at 8–12. The industry-specific data did not include data from India and thus, Commerce did not need to reach the issue of whether Indian data were distorted by a wage cap. *Id.* at 12. No party contests Commerce's determination on remand related to the calculation of the wage rate, and the court may reasonably infer that the parties concur in the resolution of those issues, as set forth in the *Remand Results*. *See JTEKT Corp. v. United States*, 780 F. Supp. 2d 1357, 1367 (CIT 2011). Accordingly, the court sustains Commerce's determinations on remand related to the calculation of the wage rate.

DISCUSSION

I. Fairmont's AFA Rates

Fairmont argues that the partial AFA rates are not supported by substantial evidence because they are aberrantly high, they are based on sales with unusually low prices and high freight costs, and they are based on a de minimis quantity of sales. Fairmont Cmts. 2–5. Defendant argues that the partial AFA rates are supported by substantial evidence because they are based on Fairmont's own data, they were calculated with a larger percentage of total sales than were used in *Ta Chen* and *PAM*,[2] and some of Fairmont's reported sales were dumped at margins above the selected margins. Def.'s Resp. 4–5. Fairmont's claim has merit.

If an interested party has failed to cooperate in not providing valid data from which Commerce can calculate an AD rate, Commerce may calculate a rate using inferences which are "adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). In doing so, Commerce may rely on information derived from the petition, a final determination in the investigation, any previous review, or any other information placed on the record. *Id.* Because Commerce has selected AFA rates based on data obtained during the course of the current review, strict corroboration pursuant to 19 U.S.C. § 1677e(c) may not be required. In any case, the rate selected by Commerce must be supported by substantial evidence.

"An AFA rate must be 'a *reasonably accurate estimate* of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.'" *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (emphasis in original) (quoting *F.lii De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)). "Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." *Id.* An AFA rate must not be aberrant or punitive, and it should bear a rational relationship to respondent's commercial reality. *See KYD, Inc. v. United States*, 607 F.3d 760, 767–68 (Fed. Cir. 2010).

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[2] *PAM, S.p.A. v. United States*, 582 F.3d 1336 (Fed. Cir. 2009); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330 (Fed. Cir. 2002).

Here, Commerce has based Fairmont's AFA rates on impermissibly small percentages of sales.[3] Some of the margins Commerce selected were based on one or two transactions and some were based on a percentage of sales smaller than the percentages accepted in *Ta Chen* and *PAM*.[4] *Compare Final Analysis Memorandum* at Attach. 4 (selected rate of 183.52% for dressers based on 0.007% (by quantity) of total dresser sales) *with Ta Chen*, 298 F.3d at 1339 (finding that 0.04% of respondent's sales reflected a partial AFA rate of 30.95% where actual sales data was "reflective of some, albeit a small portion, of [respondent's] actual sales") *and PAM*, 582 F.3d at 1340 (finding that 0.5% of non-cooperative respondent's sales supported AFA rate of 45.49%). The use of Fairmont's own data and Commerce's reliance on case law does not obviate the necessity of Commerce to provide substantial evidence to demonstrate a rational relationship between the AFA rates chosen and a reasonably accurate estimate of Fairmont's actual rate. *See Gallant Ocean*, 602 F.3d at 1325 ("Substantial evidence requires Commerce to show some relationship between the AFA rate and the actual dumping margin."). Cases such as *Ta Chen* and *PAM* lie at the outer reach of an acceptable percentage of sales upon which to base an AFA rate and did not involve margins ranging from 130% to over 200%. *See Gallant Ocean*, 602 F.3d at 1324 (finding transaction-specific margins insufficient for corroboration where "Commerce did not identify any relationship between the small number of unusually high dumping transactions with [respondent's] actual rate"); *F.lii De Cecco*, 216 F.3d at 1032 (invalidating the 46.67% AFA rate imposed by Commerce because, *inter alia*, it "was many times higher than [respondent's] actual dumping margin"). Generally, a larger percentage of a party's sales is needed to support a very high

[3] The AFA rate for dressers was based on 0.007% (by quantity) of total reported dresser without mirror sales; the rate for chests was based on 0.015% of chests; the rate for armoires was based on 0.208% of total armoire sales; and the rate for nightstands was based on 0.379% of nightstand sales. *Analysis Memorandum for the Final Results of Redetermination Pursuant to Court Remand* (Sept. 19, 2012), P.R. 19 at Attach. 4 (INT_094957) ("*Final Analysis Memorandum*") Fairmont no longer considers this data business proprietary information. Fairmont Cmts. 3 n.4.

[4] If all of the sales from each product type are considered together, the margins are based on 0.1327% of total reported sales by quantity and 0.0592% by value. *See Final Analysis Memorandum* at Attach. 4; Fairmont Br. 3. Contrary to Defendant's interpretation of the data, none of the margins are based on a percentage of sales that exceeds the percentage relied on in *PAM*, and only two of the margins are based on percentages that exceed the percentages used in *Ta Chen*. Regardless of how close these percentages are to *Ta Chen* and *PAM*, the percentages of sales relied on are insufficient to link the rates to a reasonably accurate estimate of Fairmont's actual dumping margin. Moreover, AFA rate cases are fact-specific, and attempts to reduce precedent to a calculated rate or percentage of sales are likely oversimplifications. *See Qingdao Taifa Grp. Co. v. United States*, 780 F. Supp. 2d 1342, 1350 n.8 (CIT 2011) ("*Taifa IV*").

margin in order for Commerce to be able to demonstrate that the sales relied on are representative of the respondent's commercial reality. *Taifa IV*, 780 F. Supp. 2d at 1350 (finding Commerce provided substantial evidence for an AFA rate of 145.90% where Commerce relied on 36% of the non-cooperative respondent's verified sales data from the last year in which it cooperated). Cherry-picking the highest possible margins below 216.01% does not satisfy Commerce's burden, and reference to the abnormally minuscule percentages of specific transactions allowed in *Ta Chen* and *PAM* does not give a court confidence in Commerce's choice.

The record evidence in the instant case demonstrates that the selected margins, ranging from 134% to 215%, do not reflect Fairmont's commercial reality and are not reasonably accurate estimates of Fairmont's actual dumping rate for the unreported sales. Fairmont cooperated by reporting data for the vast majority of its sales of subject merchandise during the period of review and received a rate for its reported sales in the range of 34%. *See Dongguan*, 865 F. Supp. 2d at 1234; *Remand Results* at 31. A calculated rate of 34% for Fairmont's reported sales suggests that rates ranging from 134% to over 215% are not reflective of Fairmont's commercial reality, especially when there is no indication that Fairmont failed to report certain sales for strategic reasons. *See Gallant Ocean*, 602 F.3d at 1325 (stating that "the record showed a large body of reliable information suggesting the application of a much lower margin"). Commerce has provided no evidence explaining why the selected margins are reasonable when they are multiples of the rate calculated based on Fairmont's unchallenged data.[5] Thus, because the selected margins are based on a minuscule percentage of sales that are insufficient to link the high margins to Fairmont's commercial reality and because the vast majority of the data on the record indicates a significantly lower margin, Commerce's choice is not supported by substantial evidence.[6]

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[5] Not only did Commerce fail to provide substantial evidence to support the difference between the margins for the reported sales and the unreported sales, but Commerce failed to comply with the court's remand instructions on this same issue. *See Dongguan*, 865 F. Supp. 2d at 1234 (finding that Commerce had not "provided record evidence to justify the difference between the rate for the reported sales and 216.01% rate for the unreported sales").

[6] Defendant is correct that Fairmont should not benefit from its failure to report some of its sales of subject merchandise by obtaining a more favorable rate than if it had cooperated fully. Commerce, however, is not permitted to overreach in its application of AFA rates, and it is not permitted to select "unreasonably high rates having no relationship to the respondent's actual dumping margin." *Gallant Ocean*, 602 F.3d at 1323 (citing *F.lii De Cecco*, 216 F.3d at 1032). Absent substantial evidence demonstrating a relationship between the high rates selected here and Fairmont's actual dumping margin, the court cannot find that

Moreover, Commerce has failed to comply with other aspects of the court's remand instructions. In *Dongguan*, Commerce unsuccessfully attempted to support a 216.01% rate by noting that 1.2% of Fairmont's total reported sales were dumped at margins above 216%. *Dongguan*, 865 F. Supp. 2d at 1233 & n.20. In rejecting this statistic as insufficient to support the selected margin, the court stated that Commerce had failed to explain "why a small percentage of Fairmont's sales can be considered relevant and reliable for Fairmont's unreported sales." *Id.* at 1233. The court also noted that the diversity in product and prices of Fairmont's sales "suggests using some broader base to derive a partial AFA rate." *Id.* at 1234. Here, Defendant argues that the selected margins reflect Fairmont's commercial reality because between 1.2% of total reported sales are dumped at margins above the margin selected for chests, 1.4% of sales are dumped at margins above the margins selected for armoires and dressers, and 3.2% of sales are dumped at margins above the margin selected for nightstands. Def.'s Resp. 5; *Remand Results* Chart A. Commerce also notes that 2.39% of total sales are within 10% below the selected margins. *Remand Results* Chart B. Such small percentages of sales have already been rejected as adequate support in *Dongguan*, and Commerce again has failed to explain why a small percentages of total sales can be considered relevant and reliable for the unreported sales, especially given the diversity in Fairmont's products and prices. Additionally, Commerce has not explained, given all the other data undermining its decision, how its choice of margins is substantially supported based on 2.39% of total sales that are dumped at margins 10% below the high margins that were selected. Whether or not this new "test" is useful for other situations, it does not appear helpful here.

II. Insular Rattan's Financial Statement

AFMC argues that Commerce failed to supply substantial evidence for its decision to use Insular Rattan's financial statement because the statement cannot be considered complete and reliable when it is missing a tax line, and Commerce lacks substantial evidence for its assumption that the company did not receive subsidies. AFMC Cmts. 2–5. Defendant argues that even though the statement is missing a tax line, the statement is nevertheless complete and reliable because it contains an unqualified opinion from the auditor that the statement is consistent with the applicable Philippine accounting stan-

Commerce complied with the Federal Circuit's directives in *Gallant Ocean*. Commerce has not attempted to support its margins by suggesting the high rates incorporate a built-in increase for non-compliance, and Commerce has not provided evidence to suggest that the selected margins are necessary to deter non-compliance.

dards. Def.'s Resp. 6–7. Defendant explains that the auditor's unqualified opinion indicates that there must be an acceptable explanation for the missing tax line and that taxes must have been properly accounted for in some other line item. *Id.* at 7. Defendant also argues that because the auditor attested that the statement was consistent with Philippine accounting standards, which require the disclosure of subsidies, and because no subsidies were disclosed, there is no evidence that the statement is distorted by subsidies. *Id.* at 10–11.

In valuing the factors of production, Commerce must rely on the best available information from the surrogate country. 19 U.S.C. § 1677b(c)(1)(B). In selecting the best available information, Commerce looks to "specificity, contemporaneity, and quality of the data." *Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China*, A-570–890, POR 1/1/08–12/31/08, at 72 (Aug. 11, 2010) ("*Issues and Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/PRC/2010–20499–1.pdf (last visited Mar. 29, 2013). Commerce selects financial statements based on whether the company: "(1) manufactured wooden bedroom furniture; (2) had contemporaneous financial statements on the record; (3) received no subsidies found by the Department to be countervailable; (4) did not maintain significant retail operations outside of the factory; (5) provided sufficient data for the Department to calculate surrogate factory overhead, SG&A and profit ratios; and (6) had an operating profit in 2008." *Id.* at 83–84.

In *Dongguan*, the court held that Commerce's explanation that there may have been a tax holiday or some other reason for the lack of a tax line in Insular Rattan's statement was speculation and could not constitute substantial evidence. 865 F. Supp. 2d at 1243. Commerce's explanation on remand that Insular Rattan must have supplied a reason for the tax line and the auditor must have accepted it as legitimate is again speculation. The record indicates that the applicable accounting standards require the disclosure of tax expenses. *See* Statement of Financial Accounting Standards No. 1 (revised 2000), App. to the AFMC's Cmts. Concerning Commerce's Final Results of Redetermination Pursuant to Ct. Remand ("AFMC App."), Tab 2 at Attach. 1, at 21 ¶ 75 ("As a minimum, the face of the income statement should include line items which present the following amounts: . . . [t]ax expense"). Commerce recognizes that tax expenses are a relevant line item that may affect a company's profit and thus, distort the resulting financial ratio. *See Remand Results* at 44 (noting that important elements of the statement, such as profit, would be affected by income tax expenses); *Issues and Decision Memorandum* at 83–84 (stating Commerce relies on profits and receipt of subsidies when selecting among financial statements).

Because Insular Rattan's statement lacks a tax line item, the statement, as it appears on the record, is incomplete and is not consistent with Philippine accounting standards. Moreover, the same auditor's unqualified opinion was present on Insular Rattan's 2007 financial statement, which Commerce found to be incomplete according to the Philippine accountings standards because it was missing notes and accounting policies. *See Lifestyle Enter., Inc. v. United States*, 768 F. Supp. 2d 1286, 1310–11 (CIT 2011) (sustaining Commerce's rejection of Insular Rattan's 2007 financial statement); AFMC App. Tab 2 at Attach. 2 (Insular Rattan's 2007 statement with unqualified opinion from same auditor). These facts substantially detract from the significance and reliability of the auditor's unqualified opinion. It is unreasonable for Commerce to conclude that the existence of the auditor's unqualified opinion, which conflicts with the record and which has not been accurate in the past, can stand-in for the missing tax line item. Thus, Commerce's conclusion that Insular Rattan's financial statement can be considered complete and reliable, even though it is missing a required and relevant line item, is not supported by substantial evidence.

Commerce found that there was no distortion in either profit or subsidies as reported in Insular Rattan's statement because if the company had received a subsidy, it would have reported it. Commere's assumption that the company would comply with any rule requiring the reporting of subsidies is unreasonable given that the statement did not comply with all reporting requirements when it omitted the tax line item. Furthermore, Commerce has not provided evidence to show that Insular Rattan was required to report subsidies in its 2008 financial statement. Commerce's evidence on the record is limited to a proposed International Accounting Standard ("IAS 20") that was issued on January 1, 2012. *Remand Results* at 14 n.23 (citing *Final Analysis Memorandum* at Attach. 9 (INT_094966)). Commerce has not presented evidence to demonstrate that IAS 20, or any similar accounting standard, was applicable to Insular Rattan's 2008 statement.[7]

[7] Defendant argues that AFMC cannot challenge the applicability of IAS 20 or whether the reporting of subsidies is required because AFMC did not raise these issue below and thus, failed to exhaust its administrative remedies. Def.'s Resp. 9. The applicable date of IAS 20 is readily apparent from the record. *See Final Analysis Memorandum* at Attach. 9 (INT_094966). Regardless of exhaustion on this particular issue, Commerce's determination to rely on Insular Rattan's financial statement is not supported by substantial evidence, and it cannot stand.

Other financial statements have been found reliable, and Commerce is not without information necessary to calculate surrogate financial ratios. Further, given the missing tax line item, and its impact on the overall reliability of the statement, including its profit line item and the possibility of subsidies, Commerce's conclusion that Insular Rattan's statement is the best available information is not supported by substantial evidence.

III. Zeroing

Fairmont requests that the court stay consideration of zeroing here because the issue of zeroing is currently pending before the Federal Circuit in a different case. Fairmont Ctms. 5. When and how to stay proceedings is within the sound discretion of the court. *Cherokee Nation v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citing *Landis v. N. Am. Co.*, 299 U.S. 248 (1936)). A pending appeal in a different case is not always a good reason to issue a stay, and Fairmont has not identified any other reason to delay moving this case to its conclusion. *See Gerald Metals, Inc. v. United States*, 22 C.I.T. 1009, 1012 (1998) (declining to stay proceedings pending an appeal on the same issue in a different case because the court cannot speculate as to what might happen on appeal). Thus, Fairmont's request is denied.

In *Dongguan*, the court granted Defendant's request for a voluntary remand to supply an explanation for its zeroing methodology. 865 F. Supp. 2d at 1224. In the *Remand Results*, Commerce justified its zeroing methodology by, *inter alia*, noting the inherent differences between average-to-transaction comparisons in administrative reviews and average-to-average comparisons in investigations. *Remand Results* at 16–27. As no party has challenged Commerce's explanation on remand and as Commerce's explanation here is in line with the explanation sustained in *Far E. New Century Corp. v. United States*, 867 F. Supp. 2d 1309, 1312 (CIT 2012), *Grobest & I-Mei Indus. (Viet.) Co. v. United States*, 853 F. Supp. 2d 1352, 1362 (CIT 2012), and *Union Steel v. United States*, 823 F. Supp. 2d 1346 (CIT 2012), the court sustains Commerce's explanation for its zeroing methodology.

CONCLUSION

For the foregoing reasons, Commerce's *Remand Results* are remanded for Commerce to reconsider the determination of Fairmont's partial AFA rate and for Commerce to reconsider its decision to rely on Insular Rattan's financial statement in calculating surrogate financial ratios. If Commerce calculates a different separate rate for Fairmont, Commerce shall make appropriate adjustments to the separate rates of the parties before the court in this litigation.

In all other respects, the *Remand Results* are sustained. Commerce shall file its remand determination with the court by May 20, 2013. The parties have until June 10, 2013 to file objections, and the Government has until June 20, 2013 to file a response.

Dated: April 5, 2013
New York, NY

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

Slip Op. 13–48

ESSAR STEEL LIMITED, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, Defendant-Intervenor.

Before: Judith M. Barzilay, Senior Judge
Court No. 09–00197

[Commerce's AFA rate calculation is sustained.]

Dated: April 9, 2013

Dentons US LLP (*Mark P. Lunn*) for Plaintiff Essar Steel Limited.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David D'Alessandris*) for Defendant United States; *Deborah King*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Skadden, Arps, Slate, Meagher, and Flom, LLP (*Robert E. Lighthizer, Jeffrey D. Gerrish, Stephen J. Narkin,* and *Nathaniel B. Bolin*) for Defendant-Intervenor United States Steel Corporation.

OPINION

BARZILAY, Senior Judge:

This matter returns to the court following remand to the U.S. Department of Commerce ("Commerce") to address the issue of corroboration within the context of the adverse facts available ("AFA") rate applied to Plaintiff Essar Steel Limited ("Essar") in the countervailing duty ("CVD") administrative review on certain hot-rolled carbon steel flat products from India covering the January 1, 2007, through December 31, 2007 period of review.

See Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results and Partial Rescission of Countervailing Duty Administrative Review, 74 Fed. Reg. 20,923 (Dep't Commerce May 6, 2009).[1] Specifically, the court instructed Commerce to explain how it corrobo-

[1] Familiarity with prior judicial decisions in this action is presumed. *See Essar Steel Limited v. United States*, 678 F.3d 1268 (Fed. Cir. 2012); *Essar Steel Limited v. United*

rated the AFA rate assigned to Essar for its participation in the State Government of Chahattisgarh Industrial Policy ("CIP") or why corroboration was not practicable. *See Essar Steel Ltd. v. United States*, 36 CIT __, 880 F. Supp. 2d 1327 (2012). Commerce, in turn, filed its remand results explaining how it corroborated, to the extent practicable, the AFA rate assigned to Essar given that both Essar and the Indian government failed to cooperate during the administrative review. *See Results of Redetermination Pursuant to Court Remand* (Jan. 10, 2013) ("*Remand Results*"). Essar contends that Commerce's AFA rate is not a reasonably accurate estimate of its actual rate. The court has jurisdiction pursuant to 28 U.S.C. 1581(c). For the reasons set forth below, Commerce's AFA rate calculation is sustained.

I. STANDARD OF REVIEW

When reviewing Commerce's countervailing duty determinations under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), the U.S. Court of International Trade sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is "reasonable and supported by the record as a whole." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal quotations and citation omitted). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Dupont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

II. DISCUSSION

In applying total adverse facts available, Commerce typically cannot calculate a rate for an uncooperative respondent because the information required for such a calculation has not been provided. As a substitute, Commerce relies on various "secondary" sources of information, 19 U.S.C. § 1677e(b) & (c), to select a proxy that should be

States, 35 CIT __, 2011 WL 238657 (Jan. 25, 2011); *Essar Steel Limited v. United States*, 34 CIT __, 721 F. Supp. 2d 1285 (2010).

a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco*"). When selecting an appropriate total AFA proxy, "Commerce must balance the statutory objectives of finding an accurate dumping margin and inducing compliance. . . ." *Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004). The proxy's purpose "is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." *De Cecco*, 216 F.3d at 1032. Although a higher AFA rate creates a stronger incentive to cooperate, "Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (citing *De Cecco*). "Commerce must select secondary information that has some grounding in commercial reality." *Id.* at 1324.

As *De Cecco* explained, these requirements are logical outgrowths of the statute's corroboration requirement, 19 U.S.C. § 1677e(c), which mandates that Commerce, to the extent practicable, corroborate secondary information. *See De Cecco*, 216 F.3d at 1032. In practice "corroboration" involves confirming that secondary information has "probative value," 19 C.F.R. § 351.308(d), by examining its "reliability and relevance." *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734, 491 F. Supp. 2d 1273, 1278 (2007) (citing *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 70 Fed. Reg. 54,711, 54,712–13 (Dep't Commerce Sept. 16, 2005) (final results)). More simply, to corroborate the selection of a total AFA rate, Commerce must (to the extent practicable), "demonstrate that the rate is reliable and relevant to the particular respondent." *Yantai Xinke Steel Structure Co. v. United States*, 36 CIT__, __ 2012 WL 2930182 at *15 (July 18, 2012).

In the CVD context, Commerce follows a hierarchy when selecting a proxy subsidy rate for an uncooperative respondent because "[u]nlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs." *Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China, Final Affirmative Countervailing Duty Determination*, 74 Fed. Reg. 4,936 (Dep't Commerce January 28, 2009) and accompanying Issues and Decision Memorandum at Comment 12 III.B, *available at* http://ia.ita.doc.gov/frn/summary/PRC/E91829–1.pdf (last visited Apr. 9, 2013). To select an AFA subsidy rate, Commerce first attempts to apply the highest, above *de minimis* subsidy rate calculated for the identical program from any segment of the proceeding. *See Remand Results* at 5. Absent a calculated above *de minimis* subsidy rate from an identical program, the Department then seeks a subsidy rate calculated for a similar program. *Id.* Absent such a rate, the Department then resorts to the third step in its hierarchy, an above *de minimis* calculated subsidy rate for any program from any CVD proceeding involving the country in which the subject merchandise is produced, so long as the producer of the subject merchandise or the industry to which it belongs could have used the program for which the rates were calculated. *Id.*

In this case, Commerce did not apply the first step in the hierarchy and instead calculated Essar's AFA rate by aggregating nine calculated subsidy rates from programs deemed similar to the nine subprograms identified under the CIP. *See Remand Results* at 5. For each of the four subprograms identified as providing indirect tax benefits, Commerce assigned a net subsidy rate of 3.09% *ad valorem*, which was the rate calculated for Essar under the Gujarat Tax Incentives program during the second administrative review of the underlying proceeding. *Id.* at 6. On remand, Commerce explained that the Gujarat tax program is an indirect tax program that is similar to the CIP tax program, "reflecting the government of India's behavior in terms of implementing an indirect tax program." *Id*. For each of the four subprograms identified as providing benefits in the form of a grant, Commerce assigned a net subsidy rate of 6.06% *ad valorem*, which was the rate calculated for the Steel Authority of India, Ltd. under a grant program identified during the investigation. *Id.* On remand, Commerce explained that the grant program identified in the investigation is similar to the CIP grant program, "reflecting the government of India's behavior in terms of implementing a grant program." *Id.* at 6–7. For the subprogram identified as providing land for less than adequate remuneration ("LTAR"), Commerce assigned a net subsidy rate of 18.08% *ad valorem*, which was the subsidy rate calculated for a program involving the captive mining of iron ore from the fourth administrative review of the underlying proceeding. *Id.* at 7. The captive mining program involved the provision of goods for LTAR. *Id.* On remand, Commerce explained that the captive mining program is similar to the CIP provision of land program, "reflecting the government of India's behavior in terms of providing a good for LTAR." *Id.* at 7. The sum of the nine subsidy rates from similar programs is 54.68%, the AFA rate assigned to Essar for its participation in the nine CIP programs.

Essar argues that the *Remand Results* explain Commerce's AFA subsidy rate methodology but fail to corroborate the actual rate assigned to Essar. Pl. Comments 2–3. Essar contends that Commerce did not explain how it determines whether a given subsidy program is "similar" under its hierarchy, thereby leaving the parties without sufficient information to evaluate and challenge that determination. Pl. Comments 5. Essar also argues that Commerce should have included in its AFA calculation information from the 2006 administrative review demonstrating that Essar did not receive benefits under the CIP programs. Pl. Comments 8–9. Essar then raises several new arguments that it failed to raise during the remand. For example, Essar argues that Commerce (1) improperly applied the subsidy rate to the entire value of the finished merchandise; (2) failed to consider whether Essar could simultaneously have benefitted from all the programs at issue; (3) failed to consider that Essar was found to benefit from two programs that purportedly have mutually exclusive eligibility criteria; and (4) failed to consider the purported maximum benefits for certain subsidy programs. Pl. Comments 3–7.

Essar unfortunately did not present these arguments to Commerce when it had the opportunity. Def. App'x Tab B (Essar's Comments on Draft Remand Results). The time for Essar to raise them was in its comments before the agency on remand. *See Mittal Steel Point Lisas v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008). "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred *against objection made at the time appropriate under its practice*." *Id.* at 1383–84 (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (internal quotation marks omitted) (emphasis in original)). "[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Id.* (quoting *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (internal quotation marks omitted)). Essar failed to raise these issues at the appropriate time on remand and therefore abandoned its arguments by failing to exhaust its administrative remedies before Commerce. *See id.* The court will therefore treat those arguments as waived.

On the issue of corroboration, Commerce did corroborate Essar's AFA rate to the extent practicable under 19 U.S.C. § 1677e(c). Essar (the only respondent) did not cooperate in the administrative review, where it might have provided company-specific information concerning the extent to which it received benefits under the CIP programs. The Indian government also did not cooperate with Commerce's requests for information about the CIP programs. Given that Commerce did not calculate CVD rates for those specific programs in a prior proceeding, Commerce had limited available data (from any proceeding) about the CIP programs. To select a rate, therefore, Commerce followed its practice of identifying calculated subsidy rates from "similar" programs. The AFA methodology Commerce applies in CVD proceedings "relies on the premise that the behavior of the government . . . with regard to companies investigated in another segment of a same proceeding, or alternatively with regard to companies in another proceeding, provides a reasonable estimate of the level of subsidization provided by the government in the case at issue. Moreover, where possible, we base this principal of our CVD AFA methodology on the type of benefit provided under the subsidy programs at issue." *Remand Results* at 11. Commerce explained that it identified programs involving the same type of subsidy activity by the Indian government, *i.e.*, programs involving indirect tax, grants, and LTAR. *Id.* Commerce maintains that this satisfies the corroboration requirement because each proxy rate had been calculated for a respondent (reliable) and derived from the same type of program (relevant). *Id.*

Essar, though, claims that Commerce must better explain its methodology for selecting an AFA subsidy rate and demonstrate how the 54.68% rate reflects commercial reality. The court is not persuaded that this is necessary. There is no company-specific data available on the record concerning Essar's participation in the CIP programs. The limited data are largely due to Essar's lack of cooperation during the review. *See Essar Steel Limited*, 678 F.3d at 1277 ("It is Essar's burden to create an accurate record during Commerce's investigation. Commerce must consider all information timely filed by interested parties. The trial court then reviews the record, which consists of a copy of all information presented to or obtained by [Commerce] during the course of the administrative proceeding. The record on review did not include Essar's request for benefits under the CIP, nor the government of Chhattisgarh's denial of those benefits. The record on review included Essar's repeated dishonest denials of a facility in Chhattisgarh, as well as Commerce's questionnaire including a press release contradicting those statements.") (internal citations and quotation marks omitted). Essar cannot now claim that it is entitled to a more probative rate when it is responsible for the lack of company-specific information that might have yielded such a rate. This, along with the Indian government's lack of cooperation, left Commerce little choice but to select rates from "similar" programs identified in prior proceedings. The rates selected are from programs that generally provide the same type of benefits (*i.e.*, indirect tax, grants, and LTAR) and may therefore be deemed "similar" to the programs provided under the CIP. Commerce reasonably inferred that the benefits received for similar programs by other Indian producers (including Essar) of hot-rolled carbon steel approximated the benefits received by Essar for the CIP programs. Therefore, the rates selected are reliable (derived from calculated rates) and relevant (derived from the same type of programs). The aggregated rate (*i.e.*, the sum of the highest above *de minimis* rates for similar programs) is a reasonable approximation of Essar's actual benefit (albeit with some built-in increase to deter non-compliance) given the limited choices available to Commerce in this review.

Essar, for its part, has not offered an alternative rate that would be more probative of its actual benefit. Instead, Essar continues to urge Commerce to consider information from the previous administrative review, which indicates that it applied for and was denied benefits under the CIP programs (suggesting a 0% benefit). Def Comments 9. This information, however, surfaced during the course of a remand (involving the prior review) several months *after* Commerce completed this review. Commerce determined, and the Federal Circuit agreed, that it was not appropriate to reopen the record to include information that Essar could have timely filed during this review. *See Essar*, 678 F.3d at 1276–77. The information cited by Essar is not a potential source of secondary information in this case because it came to light long after the administrative review had been completed. Accordingly, Commerce corroborated Essar's AFA rate to the extent practicable by utilizing calculated benefits from similar subsidy programs identified in this CVD proceeding. *See* 19 U.S.C. § 1677e(c). Indeed, the Federal Circuit (albeit in dicta) has already signaled that Commerce's AFA calculation is reasonable. *See Essar*, 678 F.3d at 1276 ("[T]he countervailing duty imposed for Essar's participation in the CIP was on par with similar subsidy programs and therefore not punitive.").

III. CONCLUSION

For these reasons, Commerce's *Remand Results* are sustained. Judgment will be entered accordingly.

Dated: April 9, 2013
New York, New York

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, SENIOR JUDGE

Slip Op. 13–49

CHANG CHUN PETROCHEMICAL CO. LTD., Plaintiff, v. UNITED STATES, Defendant, and SEKISUI SPECIALTY CHEMICALS AMERICA, LLC, Defendant-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 11–00095

[Commerce's final determination is sustained in part, remanded in part]

Dated: April 10, 2013

Edmund W. Sim, Kelly A. Slater, and Jay Y. Nee, Appleton Luff Pte Ltd., of Washington, DC, for Plaintiff.

Melissa M. Devine and L. Misha Preheim, Trial Attorneys, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. With them on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Jonathan M. Zielinski*, Senior Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce.

Daniel J. Plaine, Thomas M. Johnson, Jr., Andrea F. Farr, and James F. Doody, Gibson Dunn & Crutcher, LLP, of Washington, DC, for Defendant-Intervenor.

OPINION & ORDER

CARMAN, JUDGE:

Plaintiff Chang Chun Petrochemical Company Limited ("Plaintiff" or "CCPC") contests the final determination by the United States Department of Commerce ("Defendant" or "Commerce") in the investigation of an antidumping duty order on polyvinyl alcohol ("PVA") from Taiwan. *See Polyvinyl Alcohol from Taiwan,* 76 Fed. Reg. 5,562 (Dep't of Commerce Feb. 1, 2011) (final determination of sales at less than fair value) ("*Final Determination*"), P.R.[1] 157, and accompanying Issues and Decision Memorandum, A-583–841 (Jan. 26, 2011) ("I&D Memo"), P.R. 153. Pursuant to its motion for judgment on the agency record challenging Commerce's *Final Determination*, Plaintiff seeks a remand to the agency for reconsideration of Commerce's decision to apply the targeted dumping methodology to CCPC's sales. Mot. for J. on the Agency R. 56.2, ECF No. 23.

Upon review of the underlying record and motion papers, the Court sustains in part and remands in part Commerce's *Final Determination*. Commerce did not provide an explanation of why the transaction-to-transaction method cannot be used in this investigation as required by the regulation at issue. Commerce also did not

[1] "P.R." stands for "Public Record."

provide an explanation of why it declined to limit its application of the targeted dumping methodology in this particular case as required by the regulation at issue.

PROCEDURAL HISTORY

This case has a long procedural history, whereby the issues in the instant case arose from the timing of the interrupted investigation. Therefore, an outline of the relevant dates and corresponding events will contextualize the current issues. The subject product is polyvinyl alcohol ("PVA"), which is a water-soluble synthetic polymer, from the Republic of China ("Taiwan").

In 1997, Commerce promulgated a targeted dumping regulation which supplemented the targeted dumping statute. *See* 19 C.F.R. § 351.414(f) (2004)[2] (hereinafter referred to as the "2004 Regulation").[3]

In September of 2004, Celanese Chemicals America, LLC ("Celanese")—now known as Sekisui Speciality Chemicals America LLC ("Sekisui"), defendant-intervenor in this case, and a domestic producer of PVA—filed a petition against PVA from Taiwan that is the underlying administrative proceeding at issue. Celanese alleged all three types of targeted dumping[4]—for customer, region and time period—concerning CCPC,plaintiff in this case and the only known producer of PVA in Taiwan during the period of investigation from July 2003 to June 2004. On October 4, 2004, Commerce initiated a

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[2] All references to Title 19 of the Code of Federal Regulations refer to the 2004 edition, unless otherwise stated. The provision at issue in the instant case, 19 C.F.R. § 351.414(f), did not change between its promulgation in 1997 and the initiation of this investigation in 2004.

[3] The targeted dumping provision, codified at 19 C.F.R. § 351.414(f) in 1997 and revoked in 2008, stated:

> (f) *Targeted dumping*—(1) *In general*. Notwithstanding paragraph (c)(1) of this section, the Secretary may apply the average-to-transaction method, as described in paragraph (e) of this section, in an antidumping investigation if:
>
> (i) As determined through the use of, among other things, standard and appropriate statistical techniques, there is targeted dumping in the form of a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time; and
>
> (ii) The Secretary determines that such differences cannot be taken into account using the average-to-average method or the transaction-to-transaction method and explains the basis for that determination.
>
> (2) *Limitation of average-to-transaction method to targeted dumping*. Where the criteria for identifying targeted dumping under paragraph (f)(1) of this section are satisfied, the Secretary normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping under paragraph (f)(1)(i) of this section.

[4] Targeted dumping "occurs when a seller is providing lower prices to only certain United States purchasers, in certain regions, or during certain periods of time, to manipulate the dumping margin calculated during an investigation." Def.'s Mem. in Opp'n to Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. ("Def.'s Opp'n") at 10, ECF No. 32.

less than fair value investigation on PVA from Taiwan. *Polyvinyl Alcohol from Taiwan*, 69 Fed. Reg. 59,204 (Dep't of Commerce Oct. 4, 2004) (initiation of antidumping duty investigation), P.R. 28.

On October 22, 2004, the International Trade Commission ("ITC" or "Commission") preliminarily determined that the domestic PVA industry was not materially injured or threatened with material injury. *Polyvinyl Alcohol from Taiwan*, 69 Fed. Reg. 63,177 (Int'l Trade Comm'n Oct. 29, 2004) (preliminary determination). Consequently, Commerce terminated its investigation. Petitioner timely appealed the Commission's negative injury determination to this court.[5]

In January of 2007, the court issued a decision in *PVC Case I* and remanded it to the Commission for reconsideration. *See Celanese Chems. Ltd. v. United States*, 31 C.I.T. 279 (2007) ("*PVC Decision I*").[6] Three months later, the Commission reversed its negative injury determination on remand. In November of 2008, the court sustained the Commission's remand results. *Celanese Chems. Ltd. v. United States*, 32 C.I.T. 1250 (2008) ("*PVC Decision II*").[7] Defendant and defendant-intervenors timely appealed the court's affirmation of the Commission's remand results, but the appeals court upheld *PVC Decision II* without opinion. *Celanese Chems. Ltd. v. United States*, 358 Fed. Appx 174 (Fed. Cir. 2009).

In March of 2010, the Commission notified Commerce of the affirmative preliminary injury determination, and accordingly, Commerce resumed its investigation. *See* Letter from Commission to Commerce, Re: Polyvinyl from Taiwan: Investigation No. 731-TA-1088 (Preliminary) (Remand), dated Mar. 25, 2010, P.R. 54. In September of 2010, Commerce issued its preliminary determination of dumping, *Polyvinyl Alcohol from Taiwan*, 75 Fed. Reg. 55,552 (Dep't of Commerce Sept. 13, 2010) (preliminary determination of sales at less than fair value and postponement of final determination) ("*Preliminary Determination*"), P.R. 127, and five months later its final determination of dumping, *Final Determination*, 76 Fed. Reg. at 5,562. The antidumping order was published in mid-March. *Polyvinyl Alcohol from Taiwan*, 76 Fed. Reg. 13,982 (Dep't of Commerce Mar. 15, 2011) (antidumping order)("*AD Order*"), P.R. 162.

In December of 2008, during the time that the injury determination was being litigated and the administrative investigation was on hold,

[5] The appeal of the Commission's negative injury determination was a related case, with which familiarity is presumed, notwithstanding that it was decided by a different judge. *See* Court No. 04–00594. For ease of reference, this first case litigating injury will be referred to as *PVC Case I*.

[6] *PVC Decision I* is the first opinion in *PVC Case I*.

[7] *PVC Decision II* is the second opinion in *PVC Case I*.

Commerce issued an interim final rule[8] which removed the targeted dumping regulation—19 C.F.R. § 351.414(f)—that had been in effect at the time the PVA investigation was initiated in 2004.

At the heart of this case is whether Commerce properly applied the proper regulation. Plaintiff brings this action seeking review of Commerce's lack of explanation regarding its application of the targeted dumping regulation.

STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006).[9] The Court sustains determinations, findings or conclusions of an agency unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Courts "look for a reasoned analysis or explanation for an agency's decision as a way to determine whether a particular decision is arbitrary, capricious or an abuse of discretion." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998).

DISCUSSION

Plaintiff's challenges can be boiled down to two issues. The first issue is whether Commerce applied the proper regulation to the instant investigation. Specifically, which regulation was applied—the regulation in effect at the time the investigation was initiated (the "2004 Regulation") or the regulation in effect at the time the investigation was concluded (the "2011 Regulation")? The second issue is whether Commerce properly applied the regulation to the instant investigation. Specifically, was Commerce's determination to apply the average to transaction methodology to all of CCPC's sales rather than just to the targeted sales supported by substantial evidence on the record or otherwise in accordance with law?

I. Statutory & Regulatory Framework

A. Statutory Framework

The dumping statute authorizes three methods[10] to determine "whether the subject merchandise is being sold in the United States

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[8] *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930 (Dep't of Commerce Dec. 10, 2008) (interim final rule) (hereinafter referred to as "Withdrawal Notice").

[9] All references to the United States Code refer to the 2006 edition, unless otherwise stated.

[10] The Court refers to Commerce's regulatory shorthand for the three statutory methods—average-to-average, transaction-to-transaction, average-to-transaction—in order to render this opinion less cumbersome. The regulatory description of the three methods is as follows:

at less than fair value" in an investigation: average-to-average, transaction-to-transaction, and average-to-transaction. *See* 19 U.S.C. § 1677f-1(d)(1).[11] The statutory framework instructs that Commerce "shall" generally use one of the two methods described in subsection (A): either the average-to-average or the transaction-to-transaction. However, the statute provides an "exception" where Commerce "may" use the average-to-transaction method described in subsection (B) if two prerequisites are met: (1) there is a finding of targeted dumping; and (2) Commerce explains why such differences cannot be taken into account using either the average-to-average or transaction-to-transaction method. 19 U.S.C. § 1677f-1(d)(1)(B).

The first statutory requirement is for Commerce to find targeted dumping in at least one of three ways: to a customer, in a region or during a period of time. *See id.* The second statutory requirement is for Commerce to provide an explanation why the two general methodologies—average-to-average or transaction-to-

(b) *Description of methods of comparison* —(1) *Average-to-average method*. The "average-to-average" method involves a comparison of the weighted average of the normal values with the weighted average of the export prices (and constructed export prices) for comparable merchandise.

(2) *Transaction-to-transaction method*. The "transaction-to-transaction" method involves a comparison of the normal values of individual transactions with the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(3) *Average-to-transaction method*. The "average-to-transaction" method involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

19 C.F.R. § 351.414(b).

[11] The relevant statute, 19 U.S.C. § 1677f-1(d), in its entirety provides:

(d) Determination of less than fair value

(1) Investigations

(A) In general

In an investigation under part II of this subtitle, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value –

(i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or

(ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(B) Exception

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if –

(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) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

transaction—are insufficient. While the statute prefers the two general methodologies over the exception methodology, it is silent as to when to apply the general two methodologies. *See id.* Further, the statute is also silent as to the body of sales to which Commerce will apply the exception methodology. When a statute is silent, Commerce is "entitled to formulate policy and make rules 'to fill any gap left, implicitly or explicitly, by Congress.'" *SKF USA Inc. v. United States*, 254 F.3d 1022, 1030 (Fed. Cir. 2001) (*quoting Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (internal quotations omitted)).

B. Regulatory Framework

In May of 1997, exercising its gap-filling authority, Commerce promulgated a targeted dumping regulation. First, to fill the statutory gap, Commerce listed preferences between the general comparison methodologies in investigations, using the average-to-average "normally" and using the transaction-to-transaction "only in unusual situations." *See* 19 C.F.R. 351.414(c)(1).[12] Regarding targeted dumping, Commerce essentially mimicked the statute in subsection (f)(1) by requiring a finding of targeted dumping and explaining why the general methods are insufficient, if Commerce chooses to use the exception method. *See* 19 C.F.R. § 351.414(f)(1), *supra* n.3. However, Commerce filled the statutory gap with subsection (f)(2) by limiting the application of the exception method to only the targeted sales. *See id.* Citing its "lack of experience" with the targeted dumping statute, Commerce refused to create any bright line rules in its application of the average-to-transaction method, explaining that its practice would evolve as it gained experience with targeted dumping. *Antidumping Duties; Countervailing Duties: Notice for proposed rulemaking and request for Public Comments*, 61 Fed. Reg. 7,308, 7,350 (Dep't of Commerce Feb. 27, 1996) ("*Proposed Rules*"); *see also Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,374–75 (Dep't of Commerce May 19, 1997) ("*Final Rule*").[13] Commerce notably rejected one commentator's suggestion to apply the average-to-

[12] The preference provision provides:

> (c) *Preferences*. (1) In an investigation, the Secretary normally will use the average-to-average method. The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.

19 C.F.R. § 351.414(c)(1).

[13] "In the preamble to the proposed regulations, [Commerce] specifically avoided the adoption of any *per se* rules on targeted dumping due to [its] limited experience administering this provision of the Act. However, [Commerce] recognizes the need to establish guidance in this area and thus will issue policy bulletins setting forth more specific criteria as [it] develops its practice in this area." *Final Rule*, 62 Fed. Reg. at 27,374.

transaction to all of a firm's sales if targeted dumping is found, stating that "in many instances such an approach would be unreasonable and unduly punitive." *Proposed Rules*, 61 Fed. Reg. at 7,350. Commerce identified, however, two examples of when it would be appropriate to apply the average-to-transaction method to all of a firm's sales: "where the targeted dumping practice is so widespread it may be administratively impractical to segregate targeted dumping pricing from the normal pricing behavior of a company" or "where a firm engages extensively in the practice of targeted dumping." *Final Rule*, 62 Fed. Reg. at 27,375; s*ee also* Def.'s Opp'n at 15 ("In the past, when applying [the 2004 Regulation], Commerce would use the average-to-transaction comparison methodology to all sales only when it was impracticable to segregate the targeted sales or when the targeting was extensive.").[14]

II. Contentions of the Parties

A. Plaintiff's Contentions

Plaintiff CCPC contends that Commerce did not properly apply the 2004 Regulation to this investigation but rather impermissibly retroactively applied the 2011 Regulation, ignoring "temporal limitations" to apply new policies to CCPC. *See* Mem. of Points and Authorities in Supp. of Pl. Chang Chun Petrochemical Co. Ltd.'s C.I.T. Rule 56.2 Mot. for J. Upon the Agency R. ("Pl.'s Mot.") at 8–9, ECF No. 24. CCPC avers that Commerce improperly applied a later-developed standard to this investigation when it applied the average-to-transaction methodology to all of the sales, instead of only to the targeted sales. *See* Pl.'s Mot. at 20. While conceding that "the term 'normally' does confer some discretion," CCPC asserts that "[t]he term 'normally' imposes a limitation on the discretion of Commerce, a limitation that Commerce itself recognized when it went to the

[14] On December 10, 2008, Commerce repealed its targeted dumping regulation. *See* Withdrawal Notice, 73 Fed. Reg. 74,930. Commerce decided to remove the targeted dumping provision from the regulation, "returning to a case-by-case adjudication" in which Commerce would be able to "exercise the discretion intended by the statute." *Id.* at 74,931; *see* Less-Than-Fair-Value Investigation on Polyvinyl Alcohol from Taiwan: Targeted Dumping - Chang Chun Petrochemical Co., Ltd., A-583–841 (Sept. 7, 2010) ("Targeted Dumping Memo") at 7, P.R. 125. Then in March of 2010, Commerce articulated a new policy regarding targeted dumping: it would apply the average-to-transaction method to all sales, regardless of whether the sales were targeted or not, whenever a firm was found to have engaged in targeted dumping. *See* Def.'s Opp'n at 14. Commerce "explained that, when it has chosen a comparison methodology under 19 U.S.C. § 1677f-1(d)(1)(A), it applies that methodology uniformly. . . . [T]o be consistent, Commerce [applies] the average-to-transaction methodology uniformly to sales." *Id*. While all parties agree that the 2004 Regulation applies to the instant investigation, the Withdrawal Notice is important because it provides insight into Commerce's actions and the arguments in this case.

trouble of issuing the [Withdrawal Notice] to remove the regulations and the [word] 'normally' . . . contained therein." Reply Br. in Supp. of Pl. Chang Chun Petrochemical Co. Ltd.'s Mot. for J. Upon the Agency R. ("Pl.'s Reply") at 7, ECF No.36.

Plaintiff proffers that "[a] review of all Commerce proceedings between early 1996 and late 2008 in which targeted dumping was found reveals that Commerce's normal practice was to limit the application of the average-to-transaction methodology *only* to those sales that constitute targeted dumping," and accordingly went against its own precedent in this case. *Id*. at 22 (emphasis in original). Thus, Plaintiff postulates that Commerce bootstrapped its post-Withdrawal Notice policy in the instant investigation "to negate the limitation contained" in the 2004 Regulation. *Id*. at 20. Finally, CCPC contends that Commerce "provided no explanation of why the level of targeted dumping in CCPC's case warranted this treatment [to all sales]," Pl.'s Reply at 12, and therefore Commerce did not provide a rational basis for deviating from the normal application of 19 C.F.R. § 351.414(f)(2), Pl.'s Mot. at 24–5.

B. Defendant's Contentions

Defendant Commerce contends that it properly applied the 2004 Regulation to this investigation. *See* Def.'s Opp'n at 14–5. Commerce argues that it interprets its own regulation to provide itself with discretion to apply the average-to-transaction method to all sales and not only to targeted sales, "when appropriate." *Id.* at 5, 15–6. Commerce explains that "the word 'normally' contained in [19 C.F.R. § 351.414(f)(2)] allows [Commerce] substantial discretion in the application of the regulation on a context-specific basis" and that the targeted dumping provision of the 2004 Regulation does "not limit the circumstances in which [Commerce] may deviate from applying the average-to-transaction comparison methodology to only the targeted sales. Thus, [Commerce] has the discretion to determine when it is appropriate to deviate from this limitation in any particular case." *Id*. at 18.

Further, Commerce elucidates that the Withdrawal Notice "did not promulgate any new regulations to replace subsection (f), and did not adopt any new methodologies to be applied in targeted dumping situations." *Id*. at 21. Defendant avers that it did apply the 2004 Regulation when determining which sales should be compared using the average-to-transaction comparison methodology, *id.* at 19, and "provided more than adequate explanation for its decision to apply average-to-transaction comparisons" to all of CCPC's U.S. sales, *id*. at 25. Commerce advances that "this was not a retroactive application of a new rule, but rather, the contemporaneous application of a current practice that is consistent with the applicable regulation." *Id*. at 24; *see also*, I&D Memo at 7. Accordingly, "Commerce reasonably determined that it was appropriate to follow its current practice, which is based upon statutory interpretation and policy goals." Def.'s Opp'n at 24.

C. Defendant-Intervenor's Contentions

Defendant-Intervenor Sekisui Specialty Chemicals America, LLC sets forth essentially the same contentions as the Defendant. Sekisui reiterates that Commerce acted within its sound discretion, as provided by the 2004 Regulation, in applying the average-to-transaction methodology to all of CCPC's U.S. sales, and "did not apply the regulatory guidance set forth in the Withdrawal Notice, retrospectively or otherwise." Resp. Br. of Sekisui Specialty Chemicals America, LLC in Opp'n to Chang Chun Petrochemical Co. Ltd.'s Mot. for J. Upon the Agency R. ("Def.-Int.'s Opp'n") at 16, ECF No. 30.

III. Application of the Regulations

The regulation in effect at the time this investigation was initiated included the targeted dumping provision, 19 C.F.R. § 351.414(f). During the time that the ITC's injury determination—*PVC Case I* —was being litigated and Commerce's investigation was interrupted, Commerce issued a final interim rule which removed the targeted dumping provision. *See* Withdrawal Notice, 73 Fed. Reg. at 74,930. It is undisputed that the 2004 Regulation, which was in effect when this investigation was initiated in 2004, comprises part of the law governing Commerce's determination. At issue is whether Commerce properly applied the 2004 Regulation to this investigation.

When analyzing proper application of the statutory and regulatory framework to an investigation, the Court operates within its statutorily mandated standard of review. The Court is obligated to sustain determinations, findings or conclusions of Commerce unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). The court "look[s] for a reasoned analysis or explanation for an agency's decision as a way to determine whether a particular decision is arbitrary, capricious or an abuse of discretion." *Wheatland Tube*, 161 F.3d at 1369. Under the substantial evidence standard, "[f]ailure of the decision-maker to provide the court with the basis of its determination" is impermissible. *A. Hirsch, Inc. v. United States*, 729 F. Supp. 1360, 1362, 14 C.I.T. 23, 25 (1990) (internal quotations omitted). Although an agency "is allowed wide latitude in its decision-making, . . . it is not exempt from articulating its reasoning." *Id*.

A. Did Commerce Apply the Proper Regulation

The first issue for the Court to address is whether Commerce applied the proper regulation to this investigation. Specifically, was the 2004 Regulation or the 2011 Regulation applied? Plaintiff contends that the 2011 Regulation was impermissibly retroactively applied to the investigation rather than the 2004 Regulation. Pl.'s Mot. at 8–9. The investigation was originally initiated in 2004, while the 2004 Regulation was still in effect, then placed on hold during the litigation of a separate issue, and finally resumed and decided in 2010, when the 2011 Regulation had become effective. All parties agree that the 2004 Regulation should have been applied to this investigation, but Plaintiff complains that Commerce instead improperly applied the 2011 Regulation and that corresponding policy. *See* Pl.'s Reply at 2, 4; Def.'s Opp'n at 6, Def.-Int.'s Opp'n at 18.

There is ample evidence on the record that Commerce was aware that the regulation had changed during the course of the investigation and applied to this investigation the regulation in effect at the time the investigation was initiated—the 2004 Regulation—rather than the regulation that was in effect at the time the investigation was concluded—the 2011 Regulation. *See* Def.'s Opp'n at 14–15, Targeted Dumping Memo at 7–8, I&D Memo at 1–7. The petition alleged all three types of targeted dumping—customer, region, and time period—which triggered the targeted dumping provision in the 2004 Regulation. *See* Targeted Dumping Memo at 4. Upon review of the record, the Court finds that Commerce applied the proper regulation—the 2004 Regulation—to the instant investigation.

B. Did Commerce Properly Apply the Regulation

The more involved issue for the Court to address is whether Commerce *properly* applied the 2004 Regulation. Specifically, was Commerce's determination to apply the average-to-transaction methodology to all of CCPC's sales, rather than to just the targeted sales, supported by substantial evidence on the record or otherwise in accordance with law? As discussed above, because the petition alleged three types of targeted dumping, 19 C.F.R. § 351.414(f) was triggered and Commerce applied the targeted dumping test. *See* Targeted Dumping Memo at 4–7. The targeted dumping regulation is applied in sequential order, starting with subsection (f)(1).

1. 19 C.F.R. § 351.414(f)(1)

Commerce satisfied the first requirement of this subsection, 19 C.F.R. § 351.414(f)(1)(i), when it found two types of targeted dumping, by customer (to one customer) and by time period (during a time period of two months). *See id.*; *see also* Def.'s Opp'n at 5, *Preliminary Determination*, 75 Fed. Reg. at 55,554. Commerce partially satisfied the second requirement of this subsection, 19 C.F.R. § 351.414(f)(1)(ii), by explaining that "differences in the patterns of [export prices] cannot be taken into account using the average-to-average methodology" because it "conceals differences in the patterns of prices between targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group." Targeted Dumping Memo at 7. However, the second provision under subsection (f)(1)(ii) requires not only an explanation of why the average-to-average methodology is insufficient but also an explanation of why the transaction-to-transaction methodology is also insufficient. *See* 19 C.F.R. § 351.414(f)(1)(ii) (requiring that Commerce "determines that such differences cannot be taken into account using the average-to-average method *or the transaction-to-transaction method* and explains the basis for that determination") (emphasis added).[15] Upon review of the record, Commerce provides no explanation why the transaction-to-transaction method cannot be used in this case.

The Court recognizes that in an investigation, the regulations list a preference for the average-to-average method and that the transaction-to-transaction method will be used "only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made." 19 C.F.R. § 351.414(c)(1). The Court notes that it is not its role to decide if the transaction-to-transaction method could have been applied in this case. Commerce has the expertise to analyze the facts and make such a decision, and as long as its decision is supported by substantial evidence on the record and is otherwise in accordance with law, this Court will uphold that decision. However, the Court has combed the record and cannot find the requisite reasoning or explanation as to why the transaction-to-transaction method is insufficient for this investigation. Thus, the Court finds that Commerce's *Final Determination* is not in accordance with law because it lacks an explanation regarding the insufficiency of using

[15] This is not only a regulatory requirement but also a statutory requirement: before using the average-to-transaction method, Commerce must explain why the average-to-average or the transaction-to-transaction methods cannot be used. 19 U.S.C. § 1677f-1(d)(1)(B).

the transaction-to-transaction method in this investigation. Accordingly, the Court remands this issue to Commerce.

2. 19 C.F.R. § 351.414(f)(2)

Only after 19 C.F.R. § 351.414(f)(1) is satisfied can Commerce get to 19 C.F.R. § 351.414(f)(2). Even then, subsection (f)(2) contains a caveat: it "normally" limits the application of the average-to-transaction method to only the targeted sales in the U.S. 19 C.F.R. § 351.414(f)(2). Citing the regulatory limitation language of subsection (f)(2), Plaintiff argued that application of the average-to-transaction methodology should be "strictly limited" to the dumped sales rather than applied to all sales. Pl.'s Mot. at 24. Commerce, however, counter-argued that it "has the discretion to depart from that limitation when appropriate." Def.'s Opp'n at 16. Commerce justified its decision to apply the average-to-transaction methodology to all CCPC's sales by stating that the targeted dumping regulation gave it "the discretion to depart from limiting the application of the average-to-transaction methodology to those sales that constitute targeted dumping" and by explaining that "because we have developed a practice which better reflects Congressional intent, it is appropriate to apply the average-totransaction methodology to all U.S. sales that CCPC reported." Targeted Dumping Memo at 8. Commerce applied its post-Withdrawal Notice policy, explaining that "[o]nce we determine that the customer, regional or time-period pattern-of-price differences are significant, our recent practice has been to apply the average-totransaction methodology to all sales regardless of whether they are targeted." *Id*. at 7. The crux of this issue, then, turns on two considerations: the permissible range of discretion Commerce may exercise due to the presence of the word "normally" in 19 C.F.R. § 351.414(f)(2), and the timing of Commerce's change in policy regarding the application of the average-to-transaction method.

i. Normally Requires Reasoning

The Court will first consider Plaintiff's argument regarding the permissible discretion afforded by the word "normally" in the targeted dumping regulation. A regulation differs from a policy because it is binding on an agency. Commerce is granted "due deference for its reasonable interpretation of its own regulations." *Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1262, 1270, 30 C.I.T. 1671, 1678 (2006). However, Commerce's "wide latitude in its decision-making" does not exempt Commerce from "articulating its reasoning." *A. Hirsch*, 729 F. Supp. at 1362. "Failure of the decision-maker to provide the court with the basis of its determination precludes the court from fulfilling its statutory obligation on review," and such a failure is contrary to law. *Id*. at 1362, 1365.

With these principles in mind, the Court gives deference to Commerce's decision while also requiring Commerce to comply with its own regulatory language limiting application of the average-to-transaction method to all sales only in non-normal situations. In order to determine whether Commerce's decision was supported by substantial evidence, the Court looks on the record for a reasoned analysis or explanation for Commerce's decision as to why this case was not normal and thus justified universal application of the average-to-transaction method to all of Plaintiff's sales. The record, however, appears to be void of this requisite reasoned analysis or explanation.

In the case at hand, Commerce proclaimed that:

> The use of the qualifier "normally" in 19 C.F.R. § 351.414(f)(2) (2004) indicates that we have the discretion to depart from limiting the application of the average-to-transaction methodology to those sales that constitute targeted dumping if we find it appropriate. We preliminarily determine that such a departure is appropriate in this investigation. After this investigation was initiated, we withdrew this regulation because we recognized that the regulation may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping, contrary to Congressional intent. . . . Since the publication of the *Withdrawal Notice,* . . . we have refined our practice in cases involving targeted dumping to better reflect Congressional intent. Specifically, if the criteria of [the targeted dumping statute] are satisfied, [Commerce] will apply average-to-transaction comparisons for all sales in calculating the weighted average dumping margin.

Targeted Dumping Memo at 6–7 (internal citations omitted). Immediately following its declaration that departure from the norm is warranted in this investigation, Commerce explains its new policy of universal application of the average-to-transaction method to all sales. This is not an explanation of why this case in particular is not normal and therefore requires Commerce to disregard the limitation. Commerce's rationale on the record is flawed because it does not provide an explanation from within the context of the old regulation that should be applied to this proceeding. This cannot and does not satisfy the 2004 Regulation.

Commerce made a determination that was crucial to Plaintiff's dumping margin, which requires Commerce to support its determination with substantial evidence on the record and to articulate its reasoning so the Court can meaningfully review Plaintiff's challenge. Because Commerce has not provided a reasoned analysis or explanation for its decision that this situation requires a departure from the norm, the Court cannot review whether Commerce's decision was reasonable. Accordingly, the Court holds that Commerce's lack of reasoned analysis or explanation regarding why this investigation does not constitute a normal situation means that its determination is not in accordance with law. The Court therefore remands this case to Commerce to properly apply the 2004 Regulation, including the limitation on targeted dumping methodology, and to fully explain the manner in which it applies the regulation based on the record and the law applicable at the time the investigation was initiated.

ii. Policy Is Not Binding

The Court will next address Plaintiff's policy argument. During the promulgation of the targeted dumping regulation, as discussed above, Commerce offered two examples of what it did not consider "normal" situations, and when the average-to-transaction method would thus be applied to all sales: when "targeted dumping by a firm is so pervasive that the average-to-transaction method becomes the best benchmark for gauging the fairness of that firm's pricing practices," *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. at 7,350, and when "the targeted dumping practice is so widespread it may be administratively impractical to segregate targeted dumping pricing from the normal pricing behavior of a company," *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,375. These two examples formed Commerce's average-to-transaction application policy under the 2004 Regulation, which was the policy in place at the time the investigation was initiated. Commerce explains that "[i]n the past, when applying [19 C.F.R. § 351.414(f)(2)], Commerce would use the average-to-transaction comparison methodology to all sales *only when* it was impracticable to segregate the targeted sales or when the targeting was extensive." Def.'s Opp'n at 15 (emphasis added).

In March of 2010, Commerce articulated its new policy shift, from its old policy of limiting the application of the average-to-transaction methodology to only targeted sales to its new policy of expanding the application of the average-to-transaction methodology to all U.S. sales whenever it found targeted dumping. Commerce claimed that it will "now apply the average-to-transaction methodology to *all* sales regardless of whether the sales are targeted . . .. [because] application of the average-totransaction method to all sales . . . is a reasonable [interpretation of the statute] and is more consistent with [Commerce's] approach to selection of the appropriate comparison method under [19 U.S.C. § 1677f-1(d)(1)(B)] more generally." Def.'s Opp'n at 3–4 (emphasis in original). Commerce did not establish an effective date for this new policy. *See id.* at 4. This is the policy that was in place at the time the *Final Determination* was published in 2011.

Plaintiff asserts that Commerce improperly applied this later-developed new policy, formed in 2010, to the instant investigation, rather than properly applying the old policy. *See* Pl.'s Mot. at 20–25. By its own admission, it appears that Commerce applied its new policy to the instant investigation. *See* Targeted Dumping Memo at 7–8. However, unlike a statute or regulations promulgated through notice and comment procedures, an agency's policy is not binding on itself. An agency's policy is merely an announcement of how an agency will exercise its discretion and can be changed at any time. The body of law that comes from *Chevron* and its progeny allows an agency to change its policy. Under *Chevron*, Commerce is "allowed to assess the wisdom of its policy on a continuing basis." *SKF USA Inc.*, 254 F.3d at 1030 (internal citations and quotations omitted). It is well-established that "the *Chevron* doctrine contemplates that agencies can and will abandon existing policies and substitute new approaches." *Tung Mung Dev. Co., Ltd. v. United States*, 354 F.3d 1371,1379 (Fed. Cir. 2004). The Court of Appeals for the Federal Circuit has repeatedly applied this principle, stating in a recent case:

> [t]he fact that Commerce changed its policy is irrelevant, as Commerce is entitled to change its views, and a new administrative policy based on a reasonable statutory interpretation is nonetheless entitled to *Chevron* deference.

Saha Thai Steel Pipe (Public) Co., Ltd. v. United States, 635 F. 3d 1335, 1342 (Fed. Cir. 2011) (*citing Rust. v. Sullivan*, 500 U.S. 173, 186–87 (1991)); *see also U.S. Steel Corp. v. United States,* 621 F.3d 1351 (Fed. Cir. 2010) (upholding Commerce's methodological change with respect to investigations because it supplied a reasonable explanation for its new interpretation). Regardless of Commerce's flexibility to adopt a new policy, it was required to make a decision in this case pursuant to the regulation that was in place at the time the case originated. Although Plaintiff challenges Commerce's shift in policy, case law does not support relief on that ground.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that this case is remanded to Commerce to provide an explanation, pursuant to 19 C.F.R. § 351.414(f)(1)(ii), as to why the transaction-to-transaction method cannot account for the differences in Plaintiff's U.S. sales prices; and it is further

ORDERED that this case is remanded to Commerce to provide a reasoned analysis or explanation, pursuant to 19 C.F.R. 19 C.F.R. § 351.414(f)(2), as to why the specific circumstances of this case are such that the normal limitation on application of the average-to-transaction method is inappropriate to employ here; and it is further

ORDERED that the stay entered by the Court on Plaintiff's motion for oral argument (ECF No. 40) is hereby lifted; and it is further

ORDERED that Plaintiff's motion for oral argument (ECF No. 37) is hereby denied; and it is further

ORDERED that the results of the redetermination on remand shall be filed no later than **Thursday, May 30, 2013**; and it is further

ORDERED that Plaintiff may file comments on such remand results, not to exceed 20 pages, and that such comments shall be filed no later than **Thursday, June 27, 2013**; and it is further

ORDERED that Defendant and Defendant-Intervenor may file replies to Plaintiff's comments, not to exceed 15 pages, and that such replies shall be filed no later than **Thursday, July 25, 2013.**

Dated: April 10, 2013
New York, New York

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

Slip Op. 13–50

UNITED STATES, Plaintiff, v. ADAPTIVE MICROSYSTEMS, LLC, AMS CHAPTER 128, LLC, AND AMS HOLDINGS CHAPTER 128, INC., Defendants.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 12–00122

Held: Defendant Adaptive MicroSystems, LLC's motion for summary judgment is granted in part and denied in part. Defendant's motion for sanctions is denied.

Dated: April 10, 2013

Stuart F. Delery, Principal Deputy Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Civil Division, United States Department of Justice, (*Daniel B. Volk*, *J. Hunter Bennett*, *Nelson Ryan Richards*); *Brian M. Holt*, Of Counsel, Office of the Associate Chief Counsel, United States Customs and Border Protection, for the United States, Plaintiff.

Reinhart Boerner Van Deuren, s.c., (*David G. Peterson*) for Adaptive MicroSystems, LLC, Defendant.

OPINION AND ORDER

TSOUCALAS, Senior Judge:

Defendant Adaptive MicroSystems, LLC ("New AMS") moves for summary judgment pursuant to USCIT Rule 56 on plaintiff United States Department of Homeland Security, Customs and Border Protection's ("Customs") claim for unpaid import duties and penalties under sections 592(c) and (d) of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1592(c), (d) (2006). New AMS's Mem. Supp. Mot. Summ. J. 2 ("New AMS's Mem."). New AMS also moves to impose sanctions under USCIT Rule 11, alleging Customs acted unreasonably in filing and continuing to pursue this action. New AMS's Mem. Supp. Mot. Sanctions 4 ("New AMS's Sanctions Mem."). Customs opposes both motions, and no other party joins in the motions or opposition.

BACKGROUND

New AMS seeks summary judgment on Customs's allegation that it is responsible for the debts of a now-defunct Wisconsin company named Adaptive MicroSystems, LLC ("Old AMS"). Customs avers that Old AMS intentionally or negligently misclassified imports of light emitting diode display panels and related components ("LED panels") from Malaysia under duty-free tarriff headings from July 2005 until April 2010. Pl.'s Compl. 2 & Ex. A; *see* Answer of Michael S. Polsky to Pl.'s Compl. 3. During all or some of that time, Thomas Mandler ("Mr. Mandler") owned a 15.8% share of another Wisconsin company called Adaptive MicroSystems Holdings, Inc. ("Old AMS Holdings"), which in turn owned 95% of Old AMS. Thums Aff. 1st Ex. 6 at 2, 5. Mr. Mandler was also an Old AMS officer during that period, serving as its executive vice president. Thums Aff. 2d at 2.

On April 20, 2011, US Bank National Association ("US Bank") initiated a receivership action against Old AMS and Old AMS Holdings pursuant to Chapter 128 of the Wisconsin Statutes.[1] Complaint, *US Bank Nat'l Assoc. v. AMS Chapter 128 LLC*, 2011CV005894 (Wis. Cir. Ct. Milwaukee Cnty. Apr. 20, 2011). The Milwaukee County Circuit Court (the "Milwaukee Court") appointed Michael S. Polsky ("the Receiver") as the receiver for Old AMS and Old AMS Holdings six days later. Thums Aff. 2d Ex. 1 at 1–2. Customs acknowledges that the Receiver provided notice of his appointment and the existence of the receivership action on May 5, 2011. Pl.'s Resp. New AMS's Mem. Ex. A at 1 ("Pl.'s Resp.").

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[1] New AMS describes receivership under Chapter 128 as "the Wisconsin State functional equivalent of a federal Chapter 7 bankruptcy." New AMS's Mem. at 2.

Customs chose not intervene in the receivership action due to its priority creditor status under 31 U.S.C. § 3713, *see* Pl.'s Resp. Ex. A at 2, leaving US Bank as the creditor with highest priority among those participating. Thums Aff. 2d Ex. 1 at 2. On June 9, 2011 — more than one month after Old AMS entered receivership — Customs issued a pre-penalty notice of unpaid duties to Old AMS describing the same alleged misconduct at issue in this suit. Pl.'s Resp. Ex. A at 1. Having apparently received no response from Old AMS, Old AMS Holdings, or the Receiver, Customs issued a penalty notice on July 27, 2011 demanding payment of outstanding duties and penalties totaling about $6.8 million. *Id.* at 1–2.

At the Milwaukee Court's direction, the Receiver conducted an auction on August 2, 2011 in an attempt to sell Old AMS's assets. Thums Aff. 2d Ex. 1 at 2. The auction produced three bids inconsistent with the auction terms and no bids at or above the estimated liquidation value of the assets. *Id.* US Bank refused to consent to any of the bids, leading the Receiver to decline acceptance of each. *Id.*

On August 9, 2011, the Receiver entered into a purchase agreement with a Wisconsin company named AMS Acquisition, LLC ("AMS Acquisition"), *id.* at 2–3, whereby AMS Acquisition would "operate the business of [Old AMS] and its affiliates." *Id.* Ex. 3 at § 1.1. The court-approved sale transferred most of Old AMS's assets[2] to AMS Acquisition at a price above their estimated liquidation value. *Id.* Ex. 1 at 2–3. The deal also required AMS Acquisition to hire a substantial number of Old AMS's employees in their old positions, including the appointment of Mr. Mandler as executive vice president. Thums Aff. 1st Ex. 3 at 10. The record is unclear as to whether any officers besides Mr. Mandler retained their positions. *See id.*; Thums Aff. 2d Ex. 3 at §§ 6.9(a), (g).

The Milwaukee Court described the sale as "the product of good faith negotiations at arm's length and without collusion." Thums Aff. 2d Ex. 1 at 3. However, the Milwaukee Court did not address Customs's potential claim in its order, providing no indication as to whether it was aware of the penalty notice when it approved the

[2] AMS Acquisition purchased all of Old AMS's tangible and intangible property except: stock in Thai and German subsidiaries, cash, potential legal claims, insurance policies, leased equipment, and certain real estate holdings in Wisconsin. Thums Aff. 1st Ex. 3 at 3; Thums Aff. 2d Ex. 1 at 2–3. AMS Acquisition also agreed to rent Old AMS's office space in Milwaukee, Thums Aff. 1st Ex. 3 at 4–5, which New AMS thereafter bought in a court-approved sale on September 20, 2012. Thums Aff. 2d at Ex. 2.

sale.[3] *See id.* Exs. 1, 2. In this context, the court approved of a provision exonerating AMS Acquisition from all liability, "whether absolute or contingent, known or unknown" that may be looming against Old AMS, and held specifically that the sale transferred the assets "free and clear of all security interest, liens, claims, encumbrances, or interests of any kind or nature." *Id.* Ex. 1 at 4 (emphasis and strikethrough omitted).

Old AMS, Old AMS Holdings, and AMS Acquisition all changed their corporate names after completing the sale. Thums Aff. 1st at 1–2. Old AMS and Old AMS Holdings became AMS Chapter 128, LLC and AMS Holdings Chapter 128, Inc., respectively, while AMS Acquisition assumed the "Adaptive MicroSystems, LLC" trade name to become New AMS. *Id.* New AMS is owned by a Wisconsin company named AMS Holdings, LLC, which at the time of the receivership sale had no relationship whatsoever with Old AMS or Old AMS Holdings. *Id.* at 2–4.

After the sale, however, New AMS transferred 400 shares of class B stock to Mr. Mandler, entitling him to 2% of New AMS's profits but no voting rights. Thums Aff. 2d Ex. 4 at 1–2. The stock vests 100 shares at a time for each year Mr. Mandler remains employed with New AMS, beginning on October 1, 2011. At present, 200 of Mr. Mandler's 400 shares have vested. *Id.* at 5.

On May 3, 2012, Customs initiated the present action against New AMS, Old AMS, and Old AMS Holdings, alleging that "[u]pon information and belief, New [AMS] purchased some portion of Old [AMS] out of receivership and is liable for Old [AMS]'s debts." Pl.'s Compl. 2. New AMS now moves for summary judgment and sanctions, arguing that it "did not succeed to Old [AMS]'s alleged liability for unpaid duties and penalties" and that "[t]he facts . . . are undisputed as they relate to New [AMS]'s purchase of Old [AMS]'s assets and non-assumption of liabilities." New AMS's Mem. at 7; *see* New AMS's Sanctions Mem. at 4. In response, Customs insists that the facts demonstrate, "at the very least," the existence of a genuine issue of

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[3] New AMS asserts that "the [Milwaukee Court] had all the facts before it." New AMS's Mem. at 11. However, New AMS cites no record evidence in support of this claim and the court is unable to find any on its own. Neither the pre-penalty notice nor the penalty notice appear on the Milwaukee Court docket, and there are no entries showing conclusively that Customs's potential claim was raised at all in the receivership action. *US Bank Nat'l Assoc.*, 2011CV005894, Nos. 1–215. The docket does include one entry for a "CONTINUED HEARING AS TO FEDERAL PRIORITY" after the sale on September 22, 2011, but the entry contains no further specification as to whether it refers to a potential United States government claim, and if so, whether the claimant is Customs, the Internal Revenue Service, or some other federal entity. *Id.* No. 146.

material fact as to whether New AMS falls into one of the four common law exceptions to the Wisconsin general rule against successor liability. [4]Pl.'s Resp. at 4–5.

JURISDICTION and STANDARD OF REVIEW

When reviewing a motion for summary judgment, "the Court evaluates 'the pleadings, the discovery and disclosure materials on file, and any affidavits' in order to determine whether there is any 'genuine issue as to any material fact' and, if none exists, whether the 'movant is entitled to judgment as a matter of law.'" *United States v. Trek Leather, Inc.*, 35 CIT __, __, 781 F. Supp. 2d 1306, 1310 (2011) (quoting USCIT R. 56(c)); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). An issue of fact is material "if it could affect the outcome of the suit under the governing law." *Trek Leather, Inc.*, 35 CIT at __, 781 F. Supp. 2d at 1310 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "The non-moving party is 'entitled to have both the evidence viewed in the light most favorable to it and all doubts resolved in its favor.'" *Mazak Corp. v. United States*, 33 CIT __, __, 659 F. Supp. 2d 1352, 1356 (2009) (quoting *Guess? Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991)).

ANALYSIS

I. Comity

As a preliminary matter, New AMS argues that the court "should respect the Order from the Chapter 128 proceedings under the principle of comity." New AMS's Mem. at 7 n.5. New AMS is presumably referring to the Milwaukee Court's "conclusion[] of law" that New AMS "shall not be liable for any of the Receiver's, [Old AMS Holdings]'s or [Old AMS]'s debts, liabilities or obligations, except those expressly assumed" in the asset purchase agreement. Thums Aff. 2d Ex. 1 at 4 (emphasis omitted).

"When there is parallel state and federal litigation . . . [c]omity or abstention doctrines may, in various circumstances, permit or require the federal court to stay or dismiss the federal action in favor of the state-court litigation." *Exxon Mobil Corp.v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 281–82 (2005). Other than cursory references to the interest of comity, New AMS does not articulate any legal standard that counsels or obliges the court to defer judgment in this matter. *See* New AMS's Mem. at 7 n.5, 11; New AMS's Reply Supp. M. Summ. J. 7 ("New AMS's Reply").[5] The Milwaukee Court did not have an op-

[4] The parties agree that Wisconsin substantive law governs the successor liability issue.

[5] Without explanation, New AMS cites to one case with a passing reference to comity in dicta. *See* New AMS's Mem. at 7 n.5, 11 (citing *Washington Int'l Ins. Co. v. United States*, 25

portunity to consider the transfer of New AMS shares to Mr. Mandler because the shares did not change hands until after it issued the order. Thums Aff. 2d Ex. 4 at 1–2. Furthermore, the Milwaukee Court apparently did not consider any potential claim Customs may have held on the estate of Old AMS at the time of the sale. *See id.* at Exs. 1, 2; *US Bank Nat'l Assoc.*, 2011CV005894, at Nos. 1–215. Lastly, Customs was not a party to the Milwaukee Court proceeding and therefore did not have a full opportunity to be heard on the asset sale or any successor liability issues.

As the court sees little reason to defer to a state court judgment rendered before significant facts emerged and in the absence of a party asserting a claim in this action, it declines to rule in New AMS's favor on the basis of comity alone.

II. Successor Liability

"In Wisconsin, the general rule is a corporation who purchases the assets of another corporation does not succeed to the liability of the selling corporation."[6] *Compuware Corp. v. Innovatec Commc'ns, LLC*, No. 03-C-429, 2005 WL 2076717 at *14 (E.D. Wis. Aug. 24, 2005) (citing *Columbia Propane, L.P. v. Wis. Gas Co.*, 661 N.W.2d 776, 784 (Wis. 2003)). "Important policies underlie the general rule," including consistency with "the fundamental principle[s] of justice and fairness" and the promotion of "free alienability of corporate assets." *Gallenberg Equip., Inc. v. Agromac Intern., Inc.*, 10 F. Supp. 2d 1050, 1053 (E.D. Wis. 1998), *aff'd*, 191 F.3d 456 (7th Cir. 1999) (quoting *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977)) (internal quotation marks omitted). Nevertheless, there are four exceptions to the general rule. A purchasing corporation succeeds to the selling corporation's liabilities (1) when the purchaser expressly or impliedly agrees to assume the seller's liability; (2) when the transaction amounts to a consolidation or merger; (3) when the purchaser is a "mere continuation" of the selling corporation; or (4) when the transaction is a fraudulent attempt to escape liability for such obligations. *Id.* Customs argues that summary judgment is not proper as material issues remain as to the second and third exceptions.[7] Pl.'s Resp. at 4–5.

CIT 207, 218, 138 F. Supp. 2d 1314, 1326 (2001)); New AMS's Reply at 7 (citing *Washington Int'l Ins. Co.*, 25 CIT at 218, 138 F. Supp. 2d at 1326).

[6] Although many of the entities involved here are limited liability companies, not corporations, "the [successor liability] rule and its exceptions are applicable[] irrespective of whether a prior organization was a corporation or a different form of business organization." *Tift v. Forage King Indus., Inc.*, 322 N.W.2d 14, 16 (Wis. 1982).

[7] Because the parties have conducted minimal discovery at this stage, the court recognizes that new facts may emerge later in the action that present a triable issue of fact on these

"Exceptions (2) and (3) are tests of identity under which the substance and effect of business transformations are examined 'to determine whether the original organization continues to have life or identity in a subsequent and existing organization . . . .'" *Parson v. Roper Whitney, Inc.*, 586 F. Supp. 1447, 1449 (W.D. Wis. 1984) (quoting *Tift*, 322 N.W.2d at 17). These exceptions target business realities as they exist notwithstanding formalistic differences between the buying and selling entities. *See Leannais*, 565 F.2d at 439–40. "A court merely need determine that the [buyer], despite business transformations, is substantially the same as the original [entity]." *Fish v. Amsted Indus., Inc.*, 376 N.W.2d 820, 824 (Wis. 1985) (quoting *Tift*, 322 N.W.2d at 17).

A. De Facto Merger

Customs does not dispute that the transfer at issue fails to meet the traditional definitions of merger and consolidation. Pl.'s Resp. at 5; *see Leannais*, 565 F.2d at 439–40 (defining merger and consolidation). Instead, it argues that the present circumstances give rise to an issue of material fact as to whether the transaction "amounts to a merger." *Sedbrook v. Zimmerman Design Group, Ltd.*, 526 N.W.2d 758, 760 (Wis. Ct. App. 1994) (emphasis omitted); *see* Pl.'s Resp. at 5. New AMS counters that the transaction did not amount to a merger because it acquired Old AMS's assets using cash rather than stock. New AMS's Reply at 2.

Wisconsin courts employ a four-factor analysis to determine whether a transaction is a "de facto merger" within the merger-consolidation exception:

> (1) the assets of the seller corporation are acquired with shares of stock in the buyer corporation, resulting in a continuity of shareholders; (2) the seller ceases operations and dissolves soon after the sale; (3) the buyer continues the enterprise of the seller corporation so that there is a continuity of management, employees, and business location, assets, and general business operations; and (4) the buyer assumes those liabilities of the seller necessary for the uninterrupted continuation of normal business operations.

Smith v. Meadows Mills, Inc., 60 F. Supp. 2d 911, 917 (E.D. Wis. 1999) (quoting *Sedbrook*, 526 N.W.2d at 760–61). Courts describe the stock transfer factor as the "key" feature of a de facto merger. *Sedbrook*, 526

or other matters. *See Whitford v. Boglino*, 63 F.3d 527, 530 (7th Cir. 1995) (A "district court may, in its discretion, allow a party to renew a previously denied summary judgment motion or file successive motions, particularly if good reasons exist.").

N.W.2d at 760–62; *see Leannais*, 565 F.2d at 439–40 ("[A] 'de facto merger' may be found if the consideration given by the [buyer] be shares of its own stock.").

Customs argues that New AMS's relationship to Old AMS is sufficient to satisfy the stock transfer factor because, "although New [AMS] purchased Old [AMS]'s assets with cash rather than shares of stock," it is undisputed "that there is at least some continuity of shareholders." Pl.'s Resp. at 6. Further, Customs asserts that Wisconsin courts have only rejected the de facto merger exception in cases where there was *no* shared ownership between buying and selling corporations. *Id.* Customs also argues that there is no legal authority explicitly stating that non-voting shares or a delay in exchanging shares "are irrelevant for successor liability purposes." *Id.* at 7.

Courts interpreting Wisconsin law consistently refuse to apply the de facto merger exception when no shares have changed hands, regardless of the extent to which the other factors may be satisfied. *E.g.*, *Smith*, 60 F. Supp. 2d 911 (no de facto merger despite substantial continuity of business operations between buyer and seller because buyer paid in cash). Once some stock is exchanged, however, Wisconsin law is less clear on how much the second, third, and fourth factors may counterbalance an incomplete stock transfer. *See Sedbrook*, 526 N.W.2d at 762 & n.3 (transfer of minority stock interest can be sufficient to establish the presence of a de facto merger, depending on other factors); *Schawk, Inc. v. City Brewing Co.*, 662 N.W.2d 679, 2003 WL 1563767 at *4 (Wis. Ct. App. 2003) (unpublished opinion noting that "not every factor need be present").

Even assuming Wisconsin law is as expansive as Customs insists, the uncontroverted facts demonstrate that Mr. Mandler did not receive his shares as consideration for the receivership sale. *See* Restatement 2d of Contracts, § 71 (2012) (defining consideration as a "bargained for" exchange). The sale of assets in Chapter 128 receivership is an exchange between the assigned receiver and the purchaser, *see* Wis. Stat. § 128.02(3)(b) (2013); Thums Aff. 1st at Ex. 1, and there is no evidence to suggest that the Receiver sought stock for Mr. Mandler's personal portfolio as a condition of sale. Indeed, New AMS president Dennis Thums states that "there were no plans or agreements in place to allow [Mr. Mandler] to become a shareholder" at the time of the asset purchase. Thums Aff. 2d at 2. Customs acknowledges that Mr. Mandler received his ownership stake six months after the Wisconsin court approved the asset sale, Pl.'s Resp. at 7, indicating that the stock exchange was unrelated to the negotiation of the deal itself. Lastly, Customs does not present any evidence that contravenes record evidence characterizing Mr. Mandler's stock as a deferred employment package unrelated to the asset purchase. *See* Thums Aff. 2d at 2.

Because the undisputed facts are insufficient as a matter of law to support a conclusion that New AMS offered Mr. Mandler shares in consideration to the Receiver for Old AMS's assets, the de facto merger exception cannot apply. Accordingly, New AMS's motion for summary judgment is granted with respect to the de facto merger exception.

B. Mere Continuation

New AMS argues that it is "not a mere continuation of [Old AMS]" because it has a somewhat different business model than Old AMS, has a new president who was never affiliated with Old AMS, and has a completely different set of directors and shareholders — the only exception being Mr. Mandler, who acquired his shares six months after the asset purchase agreement. New AMS's Mem. at 8–9. Customs, on the other hand, argues that New AMS is a mere continuation of Old AMS because there is "significant overlap" between the two companies, specifically in that New AMS hired "substantially all" of Old AMS's employees, continued operating under a "similar business" model, and most importantly, retained Mr. Mandler as both an owner and officer. Pl.'s Resp. at 11–12. As these differences constitute a genuine issue of fact material to whether New AMS can be considered a mere continuation of Old AMS, New AMS's motion must be denied insofar as it relates to this exception.

"The key element of a continuation is a common identity of the officers, directors and stockholders in the selling and purchasing corporations." *Parson*, 586 F. Supp. at 1450 (quoting *Leannais*, 565 F.2d at 441) (internal quotation marks omitted). Thus, the test is not whether the business operations continue, but whether the purchaser is simply a "continuation of the corporate entity" of the seller. *Id.* The Wisconsin Supreme Court unambiguously rejected "modified theories of continuity crafted by other courts," including the product line and continuity of enterprise exceptions. *Smith*, 60 F. Supp. 2d at 918. Nevertheless, Wisconsin courts will consider factors like continued enterprise if there is overlap in ownership and control. *See Gallenberg*, 10 F. Supp. 2d at 1053–54.

New AMS insists that Wisconsin law requires an "*identity* of officers, directors *and* stockholders." New AMS's Reply at 6 (emphasis in original). This phrasing implies that New AMS is arguing that the mere continuation exception only applies where buyers share at least one officer, one director, and one stockholder with their sellers. *See id.* at 6–7. Accordingly, New AMS concludes that the lack of overlap between directors and the lack of overlap between ownership interests at the time of the asset sale indicates that there is no issue of material fact as to the mere continuation exception. *Id.*

New AMS's interpretation of Wisconsin law is not persuasive. Wisconsin courts do not require absolute identity betwee n controlling forces in the buying and selling corporation. *See, e.g.*, *Home Indem. Co v. Farm House Foods Corp.*, 770 F. Supp. 1339 (E.D. Wis. 1991) (applying the mere continuation exception where predecessor and successor companies shared a "majority" of officers, directors, and shareholders); *Nelson v. Hebert Const. Co.*, 482 N.W.2d 670 (Wis. Ct. App. 1992) (unpublished opinion finding lack of "substantial identity" in a situation with slight overlap between predecessor and potential successor company). Further, the crux of the mere continuation analysis is not in measuring the specific numbers of shared officers, directors, and stockholders as New AMS suggests — rather, it is in determining whether the combined effect of some shared control and ownership,[8] along with other considerations, establish that the selling corporation is merely "changing hats" through the sale. *See Gallenberg*, 10 F. Supp. 2d at 1054. Though neither party identifies authority directly on point, these two settled aspects of Wisconsin law render it unlikely that a Wisconsin court would require at least one officer, director, and owner in common between the buying and selling companies as a prerequisite for applying the mere continuation exception. *See Smith*, 60 F. Supp. 2d at 918 (treating "management and control" as characteristics distinct from "continuity of ownership" for purposes of the mere continuation exception); *cf. IGL-Wisc. Awning, Tent & Trailer Co. v. Greater Milwaukee Air & Water Show, Inc.*, 520 N.W.2d 279, 280–81 (Wis. Ct. App. 1994) (affirming trial court finding of "identity of management and control" under mere continuation exception where director and vice president of prior non-profit company was one of several founders of the successor non-profit company).

Here, one owner of Old AMS, Mr. Mandler, now holds a class B ownership interest in New AMS. Thums Aff. 2d Ex. 4 at 1–3. Although New AMS does have a different set of directors than Old AMS, a reasonable interpretation of meeting minutes on the record show Mr. Mandler playing an active and influential role in guiding New AMS's

[8] Wisconsin courts will not apply the mere continuation exception "in the *complete* absence of continuity in stockholders, directors and officers." *Parson*, 586. F. Supp. at 1450–52 (emphasis added); *see Sedbrook*, 526 N.W.2d at 761.

board of directors. *See id.* at 4–6. New AMS employs "substantially all" of same people as Old AMS to carry out those business operations, including Mr. Mandler and possibly other Old AMS officers. *See* Thums Aff. 1st Ex. 3 at 10; New AMS's Mem. at 8–9 (mentioning directors and owners, but not officers). Furthermore, New AMS acquired substantially all of Old AMS's assets, Thums Aff. 2d Ex. 1 at 2–3, and operates a similar business under the same trade name out of some of the same physical addresses. New AMS's Mem. at 4; Thums Aff. 1st Ex. 3 at 4–5. On these facts, a reasonable jury could find that Mr. Mandler's ownership share and influence on New AMS's board — coupled with the otherwise substantial overlap between Old AMS and New AMS — outweighs his non-voting status and the lack of shared directors in defining New AMS's corporate identity. *See Mazak*, 33 CIT at __, 659 F. Supp. 2d at 1356 (quoting *Guess? Inc.*, 944 F.2d at 858).

Although new undisputed facts may emerge through additional discovery showing that Mr. Mandler has a de minimis influence on New AMS's corporate identity, the record is insufficient at present to support that conclusion as a matter of law. *See id.* ; *Whitford*, 63 F.3d at 530. Consequently, New AMS's motion for summary judgment must be denied as to the mere continuation exception.

III. SANCTIONS

Eleven days after Customs filed its response to the motion for summary judgment, New AMS moved to impose USCIT Rule 11 sanctions. New AMS asserts that "[d]espite repeated requests to dismiss, and despite conclusive proof that New [AMS] bears no liability in this lawsuit and [Customs's] claims against it are baseless, [Customs] has continued to pursue its claims against New [AMS]." New AMS's Sanctions Mem. at 4. New AMS further alleges that Customs should be sanctioned because "[i]t appears that [Customs's] pre-filing investigation was insufficient." *Id.* at 6.[9]

USCIT Rule 11 "is identical to Federal Rule of Civil Procedure Rule 11[,] . . . and it therefore is appropriate to look to decisions under the latter in interpreting and applying" the former. *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1353 (Fed. Cir. 2003)

[9] New AMS also "wonders at [Customs's] motives for including New [AMS] in this suit," alleging that "[t]o the extent that [Customs] sued New [AMS] . . . in hopes that New [AMS] might pay to be dismissed from this litigation, the claims against New [AMS] were brought for an improper purpose." New AMS's Sanctions Mem. at 7. New AMS provides no legal or factual support for this additional charge other than its own insistence that it cannot be held liable for Old AMS's debts. *See id.* The court will not impose sanctions solely on the basis of New AMS's confidence and speculation.

(quoting *A. Hirsh, Inc. v. United States*, 948 F.2d 1240, 1246 (Fed. Cir. 1991)) (internal quotation marks omitted). "In general, 'the standard for triggering the award of fees under Rule 11 is objective unreasonableness." *Murray v. Town of N. Hempstead*, 853 F. Supp. 2d 247, 276 (E.D.N.Y. 2012) (quoting *Margo v. Weiss*, 213 F.3d 55, 65 (2d Cir. 2000)). "To determine whether an attorney's prefiling inquiry was reasonable, a court must consider all the circumstances of a case." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990); *see View Eng'g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 984–87 (Fed. Cir. 2000) (discussing reasonableness of prefiling inquiry in the context of a patent dispute).

Contrary to New AMS's assertions, Customs is *not* pursuing a baseless or frivolous claim. As described above, the complex procedural posture and unsettled legal and factual backdrop of this case demonstrate that, at a minimum, Customs raises issues of material fact at this stage. Furthermore, Customs presents evidence showing that New AMS holds itself out to the public as *the same* entity as Old AMS, boasting "Over 30 Years of Building Business with Indoor and Outdoor LED Displays!" on its website, and claiming to have been established in 1978 in an online job posting. Pl.'s Resp. New AMS's Sanctions Mem. Exs. A, E ("Pl.'s Sanctions Resp."). When investigating New AMS, counsel for Customs contacted New AMS president Dennis Thums, who insisted that New AMS had "NO common ownership" with Old AMS, *id.* Ex. B at 2, even though he knew that Mr. Mandler owned a portion of both. Thums Aff. 2d at Ex. 4. Customs also presents evidence showing that it offered to dismiss the action against New AMS "if [New AMS] could establish that [its] owners . . . had no connection to Old [AMS]," Pl.'s Sanctions Resp. at 6, which New AMS ultimately could not on account of Mr. Mandler's ownership interest. *Id.* Exs. B, C. Customs therefore acted reasonably in deciding to lodge and to pursue its claim against New AMS.

Parties cannot be expected to bend at the threat of sanctions based solely on opposing counsel's confidence in its own position. *See Cooter & Gell*, 496 U.S. at 399 ("Rule 11 sanctions are not tied to the outcome of litigation; the relevant inquiry is whether a specific filing was, if not successful, at least well founded."). The requirement of zealous representation means that parties should at least have the discretion to pursue a claim based on complex facts and unsettled law — including the present action — even if that claim ultimately fails on the merits. Therefore, New AMS's motion for sanctions must be denied in its entirety.

CONCLUSION

New AMS's motion for summary judgment is granted in part. As it has failed to demonstrate that it is entitled to judgment as a matter of law on the "mere continuation" exception to the general rule against corporate successor liability under Wisconsin law, however, New AMS's motion for summary judgment must also be denied in part. Furthermore, New AMS's USCIT Rule 11 motion to impose sanctions is denied in its entirety because it fails to raise any viable basis on which to sanction Customs for filing and continuing to pursue this action.

ORDER

In accordance with the foregoing, it is hereby

ORDERED that defendant Adaptive MicroSystem LLC's motion for summary judgment is DENIED with respect to the mere continuation exception to the general rule against successor liability; and

ORDERED that defendant Adaptive MicroSystem LLC's motion for summary judgment is GRANTED in all other respects; and

ORDERED that defendant Adaptive MicroSystem LLC's motion for sanctions is DENIED in its entirety.

Dated: April 10, 2013
New York, New York

/s/NICHOLAS TSOUCALAS

NICHOLAS TSOUCALAS SENIOR JUDGE