Slip Op. 20–32

CAN THO IMPORT-EXPORT JOINT STOCK COMPANY, Plaintiff, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 16–00071
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce's remand redetermination in the eleventh administrative review of the antidumping duty order covering certain frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: March 12, 2020

Andrew T. Schutz, *Andrew B. Schroth*, and *Jordan C. Kahn*, of Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., for plaintiff Can Tho Import-Export Joint Stock Company.

Joseph H. Hunt, Assistant Attorney General, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C, for defendant. With him on the brief were *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Kara M. Westercamp*, Trial Counsel. Of counsel was *Ian McInerney*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

James R. Cannon, Jr. and *Jonathan M. Zielinski*, of Cassidy Levy Kent (USA) LLP, of Washington, D.C., for defendant-intervenors Catfish Farmers of America; America's Catch; Alabama Catfish Inc. d/b/a Harvest Select Catfish, Inc.; HeartlandCatfish Company; Magnolia Processing, Inc. d/b/a Pride of the Pond; and, Simmons Farm Raised Catfish, Inc.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Department" or "Commerce") second remand redetermination in the eleventh administrative review[1] of the antidumping duty ("ADD") order covering certain frozen fish fillets from the Socialist Republic of Vietnam ("Vietnam"), filed pursuant to the court's order in *Can Tho Import-Export Joint Stock Company v. United States*, 43 CIT __, 415 F. Supp. 3d 1187 (2019) ("*Can Tho I*"). *See* Final Results of Redetermination Pursuant to Court Remand Order [in *Can Tho I*], Dec. 16, 2019, ECF No. 82 ("*Second Remand Results*"); *see also Certain Frozen Fish Fillets from [Vietnam]*, 81 Fed. Reg. 17,435 (Dep't Commerce

[1] The eleventh administrative review covers the period dating August 1, 2013 through July 31, 2014 ("POR"). *See* Final Decision Memo. at 1.

March 29, 2016) (final results and partial rescission of [ADD] admin. review; 2013–2014) and accompanying Issues and Decision Memo. for the Final Results of the Eleventh [ADD] Admin. Review; 2013–2014, A-552–801, (Mar. 18, 2016), ECF No. 22–3 ("Final Decision Memo."). In *Can Tho I*, the court remanded for further consideration Commerce's decision to deny a separate rate to Can Tho Import-Export Joint Stock Company ("Caseamex" or "Plaintiff"). *See Can Tho I*, 43 CIT at __, 415 F. Supp. 3d at 1195. Commerce determined, under protest, that Caseamex was entitled to a separate rate, because no further evidence exists beyond what it had reviewed in the final determination and first remand redetermination.[2] *See Second Remand Results* at 1–2, 4. Defendant-Intervenors Catfish Farmers of America et al. allege that Commerce overlooked record evidence that bears on whether the minority government shareholder may exert control over Caseamex and request the court to again remand the separate rate issue. *See* Def.-Intervenors' Opp'n Second Remand Results at 1–5, Jan. 15, 2020, ECF No. 90 ("Def.-Intervenors' Br."). Defendant and Plaintiff disagree and request the court to sustain the *Second Remand Results*. *See* Def.'s Resp. [Def.-Intervenors' Br.] at 1, 4–5, Jan. 30, 2020, ECF No. 97 ("Def.'s Br."); *see also* Pl.'s Reply [Def.-Intervenors' Br.] at 1–4, Jan. 30, 2020, ECF No. 94 ("Pl.'s Br."). For the reasons that follow, the court sustains Commerce's *Second Remand Results*.

BACKGROUND

The court assumes familiarity with the facts as set forth in its previous opinion, *see Can Tho I*, 43 CIT at __, 415 F. Supp. 3d at 1189–90, and recounts those relevant to the court's review of the *Second Remand Results*. In the eleventh administrative review, Caseamex submitted a separate rate application ("SRA"). *See* Final Decision Memo. at 28; *see also* Resp. Grunfeld Desiderio Lebowitz Silverman Klestadt, LLP to Sec. of Commerce Pertaining to Caseamex [SRA], CD 34–36, bar codes 3244388–01–03 (Dec. 1, 2014) ("Caseamex's SRA").[3] Commerce denied Caseamex's SRA, based on findings made in the tenth administrative review. *See* Final Decision Memo. at 28–30. Given that the court remanded Caseamex's separate

[2] By adopting a position forced upon it by the Court "under protest," Commerce preserves its right to appeal. *See Viraj Grp., Ltd. v. United States*, 343 F. 3d 1371, 1376 (Fed. Cir. 2003).

[3] On June 20, 2016, Defendant filed on the docket the indices to the public and confidential administrative records of this review at ECF Nos. 22–4–5. Subsequently, on April 15, 2019, Defendant filed indices to the public and confidential first remand record at ECF Nos. 53–2–3, and on January 3, 2020, Defendant also filed indices to the public and confidential second remand record at ECF No. 88–2–3. All further references to documents from the administrative records are identified by the numbers assigned by Commerce in these indices.

rate in the tenth administrative review in *An Giang Fisheries Import and Export Joint Stock Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1256, 1294–95 (2017), Commerce sought a remand in the eleventh administrative review, *see* Joint Status Report & Proposed Br. Sched., Oct. 12, 2018, ECF No. 41, which this court granted. *See* Order, Oct. 15, 2018, ECF No. 42. On remand and in consideration of record evidence, including Caseamex's 2012 Articles of Association ("AoA"), Commerce found that the minority government shareholder[4] retained potential influence over the selection of management and Caseamex's day-to-day operations. *See Final Results of Redetermination Pursuant to Ct. Remand* at 7–20, Apr. 4, 2019, ECF No. 51 ("*First Remand Results*"). As a result, Commerce determined that Caseamex failed to demonstrate autonomy and did not qualify for a separate rate. *See generally id.*

In *Can Tho I*, the court concluded that the record evidence did not support Commerce's view that the minority government shareholder could circumvent the restrictions and limitations imposed by the AoA. *Can Tho I*, 43 CIT at __, 415 F. Supp. 3d at 1192–95. The court explained that Commerce erroneously assumed that, because Mr. X[5] was appointed General Director of Caseamex by the minority government shareholder prior to the POR, he remained beholden to that minority government shareholder throughout the POR. *Can Tho I*, 43 CIT at __, 415 F. Supp. 3d at 1193–95. The court faulted Commerce for failing to consider the record evidence, namely the AoA, which establishes that a minority shareholder, such as the minority government shareholder, has no power to effectuate change. *Can Tho I*, 43 CIT at __, 415 F. Supp. 3d at 1193–94. Further, on review of the AoA and the share allocations of Mr. X, the minority government shareholder, and Caseamex employees, the court noted that Mr. X and his employees, to the extent they are beholden to him, could block appointments of managers and directors by preventing the minority government shareholder from reaching the 65% share threshold required for approval. *Id.* Given that Commerce "offer[ed] no explanation why it is reasonable to conclude that Mr. X[] was beholden the government, when the AoA precludes the minority government shareholder from exercising any independent influence on the Board of Directors or any manager of Caseamex, including Mr. X[,]" the court remanded for further consideration and explanation Commerce's de-

[4] The minority government shareholder is the [[ ]]. Caseamex's SRA at 13.

[5] Mr. X refers to [[ ]]. *See First Remand Results* at 8; *see also* Caseamex's SRA at Ex. 1.

nial of Caseamex's separate rate. *Can Tho I*, 43 CIT at __, 415 F. Supp. 3d at 1195.

Commerce filed its *Second Remand Results* under respectful protest, as it disagrees with the court's holding in *Can Tho I* that the record evidence did not support Commerce's determination denying Caseamex a separate rate. *See id*. at 7. Nonetheless, Commerce finds that there is no further evidence than what it had reviewed in the *First Remand Results* to show how the minority government shareholder was in a position to control, or to potentially control, Caseamex. *Id.* at 1–2. Therefore, Commerce assigned Caseamex a separate rate. *Id.* at 2.

JURISDICTION AND STANDARD OF REVIEW

The court continues to have jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii), and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an ADD order.[6] The court will sustain Commerce's final determinations if they are supported by substantial evidence and are in accordance with law. *See* 19 U.S.C. § 1561a(b)(1)(B)(i).

DISCUSSION

Defendant-Intervenors challenge Commerce's *Second Remand Results* as unsupported by substantial evidence.[7] *See* Def.-Intervenors' Br. at 1–5.[8] Specifically, Defendant-Intervenors contend that Commerce failed to address record evidence that demonstrates the minority government shareholder was directly involved in the daily operations of Caseamex through a Member of the Board of Management ("BOM"), Ms. Y.[9] *See id.* at 1–4. Defendant and Plaintiff counter that Commerce reasonably rejected this argument in the underlying ad-

[6] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[7] The court reviews the substantiality of the evidence "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)) (internal quotes omitted).

[8] Defendant-Intervenors also state that Commerce's *Second Remand Results* are not in accordance with law, *see* Def.-Intervenors' Br. at 5; however, they do not elaborate on that claim of error.

[9] Ms. Y refers to [[ ]], and she is the [[ ]]. Caseamex's SRA at Exs. 9, 18.

ministrative proceeding. *See* Def.'s Br. at 4–5; Pl.'s Br. at 1–4. For the reasons that follow, Commerce reasonably determined that the minority government shareholder could not influence the appointment of managers and directors and the day-to-day operations of Caseamex through Ms. Y.

When Commerce investigates subject merchandise from a nonmarket economy ("NME"), such as Vietnam, Commerce presumes that the government controls export-related decision-making of all companies operating within that NME. Import Admin., [Commerce], Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving [NME] Countries, Pol'y Bulletin 05.1 at 1 (Apr. 5, 2005), *available at* http://enforcement.trade.gov/policy/bull05–1.pdf (last visited Mar. 4, 2020) ("Policy Bulletin 05.1"); *see also Antidumping Methodologies in Proceedings Involving [NME] Countries: Surrogate Country Selection and Separate Rates*, 72 Fed. Reg. 13,246, 13,247 (Dep't Commerce Mar. 21, 2007) (background) (stating the Department's policy of presuming control for companies operating within NME countries); *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997) (approving Commerce's use of the presumption). Commerce assigns an NME-wide rate, unless a company successfully demonstrates an absence of government control, both in law (de jure) and in fact (de facto).[10] Policy Bulletin 05.1 at 1–2.[11]

Relevant here, Commerce considers government ownership share in assessing de facto control. Commerce views government majority ownership as actual control, regardless of whether that control is exercised. *See, e.g.*, 1,1,1,2-Tetrafluoroethane from the People's Republic of China [("PRC")]: Issues and Decision Memo. for the Final Determination of Sales at Less than Fair Value [ADD] Investigation at 8, A-570–998, (Oct. 14, 2014), *available at* https://enforcement.trade.gov/frn/summary/prc/2014–24903–1.pdf (last visited Mar. 4, 2020); Decision Memo. for the Prelim. Determination of the [ADD] Investigation of Carbon and Certain Alloy Steel Wire

[10] Respondents seeking to rebut the presumption of government control submit a separate rate application. Policy Bulletin 05.1 at 3–4.

[11] Commerce examines the following factors to evaluate de facto control: "whether the export prices are set by, or subject to the approval of, a governmental authority;" "whether the respondent has authority to negotiate and sign contracts and other agreements;" "whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management;" and, "whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses." Policy Bulletin 05.1 at 2. With respect to de jure control, Commerce considers three factors: "an absence of restrictive stipulations associated with an individual exporter's business and export licenses;" "any legislative enactments decentralizing control ofcompanies;" and, "any other formal measures by the government decentralizing control of companies." *Id.*

Rod from the [PRC] at 6–7, A-570–012 (Aug. 29, 2014), *available at* https://enforcement.trade.gov/frn/summary/prc/2014–21335–1.pdf ("Steel Wire Rod Decision Memo.") (last visited Mar. 4, 2020); *see also An Giang Fisheries Import and Export Joint Stock Co. v. United States*, 42 CIT __, __, 284 F. Supp. 3d 1350, 1359 (2018) ("Where a majority shareholder has potential control that control is, for all intents and purposes, actual control."). In cases of minority government ownership, Commerce requires additional indicia of control prior to concluding that a respondent company cannot rebut the presumption of de facto control. *See, e.g.*, 53-Foot Domestic Dry Containers from the [PRC]: Issues and Decision Memo. for the Final Determination of Sales at Less Than Fair Value at 48–50, A-570–014, (Apr. 10, 2014), *available at* https://enforcement.trade.gov/frn/summary/prc/2015–08903–1.pdf (last visited Mar. 4, 2020) ("Containers Decision Memo.") (finding de facto control where two government-owned minority shareholders, together, made the government a controlling shareholder according to the respondent company's Articles of Association). Commerce considers the totality of the circumstances for a given period of review and may draw reasonable inferences that the respondent company does not control its export activities. *See, e.g.*, Steel Wire Rod Decision Memo. at 5; *see also* Containers Decision Memo. at 46–53.

Here, Commerce, after reexamining the record, reasonably determines that there is no evidence indicating that the minority government shareholder controlled, or had the potential to control, Caseamex. Commerce specifically examines whether the minority government shareholder, through Ms. Y, could influence the appointment of managers and directors as well as the day-to-day operations of Caseamex. *See Second Remand Results* at 6–7. First, Commerce finds that the AoA constrains any influence Ms. Y could exert on the appointment of, for example, Mr. X as General Director, and members to the Board of Directors. *Id.* at 6.[12] Even though Ms. Y, as a Member of the BOM participates in the selection of members to the Board of

[12] Defendant-Intervenors point to the reappointment of Mr. X as Caseamex's General Director during the POR by the BOM as evidence of the minority government shareholder's influence over Caseamex. *See* Def.-Intervenors' Br. at 3 (citing Caseamex's Supp. Resp. at Ex. S3–8, First Rem. CD 2–6, bar codes 3782005–01–05 (June 6, 2014)). Although Ms. Y, as a member of the BOM, was one of the people tasked with that decision, it was not her decision to make alone. Rather, the [[ ]]-member BOM—but not including Mr. X—appoints the General Director by [[ ]]. *See* Caseamex's SRA at Exs. 9, 10 ([[ ]]). Further, even though [[ ]] of the AoA provides that [[ ]], the appointment of the General Director is subject to shareholder approval. *See* id. at Ex. 10 ([[ ]].

In addition, Defendant-Intervenors do not persuade that because [[ ]], Ms. Y has "considerable sway in either retaining or

Directors, any appointment is subject to shareholder approval. *See id.* Therefore, Commerce reasonably concludes that "just as the [AoA] mitigate the government's potential influence in selecting board members through its status as a minority shareholder, they similarly constrain such decisions by the Management Board." *Id.* at 6. Second, Commerce does not consider that Ms. Y's position on the BOM would enable the minority government shareholder to control, or to potentially control, the day-to-day operations of Caseamex. *See id.* at 6–7. Referring to *Can Tho I*, Commerce explains that Mr. X, not Ms. Y, plays an integral role in Caseamex's operations. *Id.* at 6. Notably, the AoA charges the BOM with long-term and strategic decision-making as well as supervision of the General Director,[13] who, unlike the BOM, oversees Caseamex's daily operations.[14] Moreover, the AoA constrains whatever power Ms. Y may potentially wield over Caseamex's operations. Decisions of the BOM are taken by [[ ]], and Ms. Y, as one member of a [[ ]] BOM, including Mr. X, could not surpass the vote threshold to direct decisions of the BOM. *See* Caseamex's SRA at Exs. 9, 10 ([[ ]]). Commerce reasonably determines that the AoA constrains Ms. Y in her role as a member of the BOM, just as the AoA constrains the minority government shareholder from exercising any control over Caseamex through the Board of Directors or any manager, including Mr. X. *Cf. Can Tho I*, 43 CIT at __, 415 F. Supp. 3d at 1194–95.

CONCLUSION

For the foregoing reasons, the *Second Remand Results* are supported by substantial evidence and comply with the court's order in *Can Tho I*, and, therefore, are sustained. Judgment will enter accordingly.

Dated: March 12, 2020
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

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dismissing [Mr. X]." *See* Def.-Intervenors' Br. at 5. They do not point to record evidence to suggest that the [[ ]] other members of the BOM would follow her voting prerogatives. Rather, by the terms of [[ ]], Ms. Y's vote to retain could be overruled by [[ ]] votes to dismiss. *See* Caseamex's SRA at Ex. 10.

[13] [[ ]] of the AoA assigns, inter alia, the following rights and obligations to the BOM: [[ ]]. Further, [[ ]] requires BOM approval for, inter alia: [[ ]]. *See* Caseamex's SRA at Ex. 10.

[14] Under [[ ]], the General Director, inter alia, [[ ]]. *See* Caseamex's SRA at Ex. 10.

Slip Op. 20–36

TRENDIUM POOL PRODUCTS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 18–00132

[The court sustains Commerce's *Remand Results*.]

Dated: March 19, 2020

Kristen Smith, Mark Tallo and *Sara E. Yuskaitis*, Sandler Travis & Rosenberg, P.A., of Washington, DC, for plaintiff.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara Hogan*, Assistant Director. Of counsel was *Rachel Bogdan*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Katzmann, Judge:

The court returns to the question of whether the scope of the United States Department of Commerce's ("Commerce") antidumping and countervailing duty orders on corrosion resistant steel ("CORE" or "CORES") from Italy and the People's Republic of China ("China") cover pool kits and pool walls (collectively, "pool walls"). Before the court now is Commerce's *Final Results of Redetermination Pursuant to Court Remand* (Dep't Commerce Nov. 17, 2019), ECF No. 57 ("*Remand Results*"), which the court ordered in *Trendium Pool Products, Inc. v. United States*, 43 CIT __, 399 F. Supp. 3d 1335 (2019). Under protest, Commerce found that the CORES components in Trendium Pool Products Inc.'s ("Trendium") pool walls were outside the scope of *Certain Corrosion-Resistant Steel Products from India, Italy, the People's Republic of China, the Republic of Korea and Taiwan: Amended Final Affirmative Antidumping Determination for India and Taiwan, and Antidumping Duty Orders*, 81 Fed. Reg. 48,390 (July 25, 2016); *Certain Corrosion-Resistant Steel Products from India, Italy, the Republic of Korea and the People's Republic of China: Countervailing Duty Order*, 81 Fed. Reg. 48,387 (July 25, 2016) (collectively, "*Orders*"). Trendium and the United States ("the Government") request that the court sustain the *Remand Results*. The court sustains the *Remand Results*.

BACKGROUND AND DISCUSSION

The relevant legal and factual background of the proceedings involving Trendium has been set forth in greater detail in *Trendium*

Pool Products, 399 F. Supp. 3d at 1337–41. Information pertinent to the instant matter is set forth below.

1. On May 10, 2018, Commerce determined in a final scope ruling that Trendium's pool walls fell within the scope of antidumping and countervailing duty orders covering CORES from Italy and China. Memo from Commerce, Re: Transfer of Scope Ruling Request (May 10, 2018), P.R. 15 ("*Final Scope Ruling*"). In that scope ruling, Commerce evaluated the CORES included in the pool walls to determine whether the potentially subject merchandise included in a larger product item fell within the literal terms of the antidumping and/or countervailing order. *See Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013). *See also Final Scope Ruling* at 6–9. Commerce then concluded that "the individual components of Trendium's finished pool kits that were fabricated from Chinese- and Italian-origin CORE fell within the plain language of the scope of the *Orders*." *See Final Scope Ruling* at 7–8. Commerce next analyzed "whether the component's inclusion in a larger product should, nonetheless, result in the component's exclusion from the scope of the order(s) based on the criteria listed in 19 CFR 351.225(k)(1)" and concluded that the incorporation of CORES into larger products would not take it outside the scope of the *Orders*. *Id.* at 8–9.

Trendium appealed the *Final Scope Ruling* to the court, arguing that finished products, including Trendium's pool walls, were never considered during the investigation into CORES and not covered by the plain language of the scope of the *Orders*. Pl.'s Mot. for J. on the Agency R. at 9, Jan. 7, 2019, ECF No. 37. The court held that Commerce erred in its analysis because it failed to make a threshold inquiry: "whether the item as imported in its assembled condition qualifies as a mixed-media item in the first instance." *Trendium Pool Products*, 399 F. Supp. 3d at 1343 n.3. In answering this inquiry, the court concluded that the pool walls were unitary items because "the CORES lo[st] its identity as a raw input and can only be used for practical purposes as an above ground pool." *Id.* at 1346. The court thus found that the plain language of the *Orders* was unambiguous, did not include downstream products, and thus did not cover Trendium's finished pool walls. *Id.* The court concluded that Commerce's scope determination was neither supported by substantial evidence nor in accordance with law. *Id.* Accordingly, the court ordered Commerce to redetermine the scope of the *Orders* on remand. *Id.*

2. Commerce issued its draft remand results, in which, under protest, it "redetermine[d] that the Chinese- and Italian-origin CORE components in Trendium's pool kits and pool walls fall outside of the

scope of the *Orders*." Draft Results of Redetermination Pursuant to Court Remand at 2 (Dep't Commerce Oct. 16, 2019), ECF No. 58. Trendium commented on the draft results, finding them "consistent" with the court's order. Mem. re: Trendium Pool Products, Inc.'s Comments on Draft Remand Determination in CIT 18–00132 at 2, Oct. 25, 2019, ECF No. 58. Commerce published the final *Remand Results* and filed them with the court on November 18, 2019. In the *Remand Results*, Commerce again, under protest, "redetermined that the Chinese- and Italian-origin CORE components in Trendium's pool kits and pool walls fall outside of the scope of the *Orders*." *Remand Results* at 2. Trendium filed its comments on the *Remand Results* with the court on December 18, 2019. Pl.'s Comments in Support of Commerce's Remand Results, ECF No. 59 ("Pl.'s Comments"). The Government filed its response to Trendium's comments on January 15, 2020. Def.'s Resp. Comments on the Remand Redetermination and Proposed Order, ECF Nos. 60–62 ("Def.'s Resp.").

3. Commerce's *Remand Results* are consistent with the court's remand order and previous opinion. In the *Remand Results*, Commerce concluded that the pool walls were not covered by the plain language of the *Orders*. Commerce noted that because the court determined that the subject merchandise fell outside of the scope of plain language of the *Orders*, Commerce need not proceed to further analysis under 19 C.F.R. §§ 351.225(k)(1) or k(2). The Government, moreover, stated in its comments that "Commerce has now complied with the instructions in the [c]ourt's remand order" by "determin[ing], under protest, that the Chinese- and Italian-origin CORE components in Trendium's pool kits and pool walls are not covered by the Orders." Def.'s Resp. at 2. Trendium agreed in its comments, stating that "Commerce directly complied with this [c]ourt's ruling," and now "requests that this [c]ourt affirm Commerce's Remand as compliant with" this court's remand order and opinion. Pl.'s Comments at 1–2. The court finds that the *Remand Results* complied with the court's order and opinion and thus concludes that the *Remand Results* are supported by substantial evidence and in accordance with law.

CONCLUSION

The court sustains Commerce's *Remand Results*.

SO ORDERED.

Dated: March 19, 2020
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 20–37

MACAO COMMERCIAL AND INDUSTRIAL SPRING MATTRESS MANUFACTURER, Plaintiff, v. UNITED STATES, Defendant, and LEGGETT & PLATT, INC., Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Court No. 19–00005

[Commerce's *Final Determination* sustained.]

Dated: March 20, 2020

Susan Kohn Ross and *Alesha M. Dominique*, Mitchell Silberberg & Knupp LLP of Los Angeles, CA and Washington, DC for Plaintiff Macao Commercial and Industrial Spring Mattress Manufacturer.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, for Defendant United States. With her on brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director. Of counsel was *Elio Gonzalez*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Yohai Baisburd, *Jeffery B. Denning*, and *Chase J. Dunn*, Cassidy Levy Kent (USA) LLP of Washington, DC for Defendant-Intervenor Leggett & Platt, Inc.

OPINION

Gordon, Judge:

This action involves the U.S. Department of Commerce's ("Commerce") final affirmative determination that Plaintiff Macao Commercial and Industrial Spring Mattress Manufacturer ("Plaintiff" or "Macao Commercial") circumvented the antidumping duty ("AD") order on uncovered innerspring units ("innersprings" or "innerspring units") from the People's Republic of China ("PRC"). *See Uncovered Innerspring Units from the People's Republic of China*, 83 Fed. Reg. 65,626 (Dep't of Commerce Dec. 21, 2018) (final affirm. determ. of circumvention of the AD Order) ("*Final Determination*"), and the accompanying Issues and Decision Memorandum (Dep't of Commerce Dec. 14, 2018), *available at* https://enforcement.trade.gov/frn/summary/prc/2018–27677–1.pdf (last visited this date) ("*Decision Memorandum*"); *see also Uncovered Innerspring Units from the People's Republic of China*, 74 Fed. Reg. 7,661 (Dep't of Commerce Feb. 19, 2009) ("*Order*").

Before the court is Plaintiff's motion for judgment on the agency record under USCIT Rule 56.2. *See* Pl.'s Mot. for J. on the Agency R., ECF No. 29[1] ("Pl.'s Br."); *see also* Def.'s Resp. to Pl.'s Mot. for J. on the Agency R., ECF No. 34 ("Def.'s Resp."); Def.-Intervenor Leggett &

[1] All citations to parties' briefs and the agency record are to their confidential versions unless otherwise noted.

Platt, Inc.'s Resp. Opp. Pl.'s Mot. for J. on the Agency R., ECF No. 36; Pl.'s Reply in Supp. Of Mot. for J. on the Agency R., ECF No. 38 ("Pl.'s Reply"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2012),[2] and 28 U.S.C. § 1581(c) (2012). For the reasons set forth below, the court sustains Commerce's *Final Determination*.

I. Background

Macao Commercial is a foreign producer and exporter of uncovered innerspring units made from Chinese-origin materials. *See Decision Memorandum* at 4. During the course of the sixth administrative review of the *Order*, Commerce selected Macao Commercial as one of the two mandatory respondents subject to individual examination during the review. Following Macao Commercial's responses to Commerce's original and supplemental questionnaires, Commerce explained that it intended to evaluate whether self-initiation of an anti-circumvention inquiry would be warranted based upon the information submitted by Macao Commercial during the review. *See Uncovered Innerspring Units from the People's Republic of China*, 81 Fed. Reg. 62,729 (Dep't of Commerce Sept. 12, 2016) (final results AD admin rev.), and accompanying Issues and Decision Memorandum at cmt. 1 (Dep't of Commerce Sept. 6, 2016), *available at* https://enforcement.trade.gov/frn/summary/prc/2016–21859–1.pdf (last visited this date).

Pursuant to 19 U.S.C. § 1677j(b), in order to prevent circumvention of an antidumping duty order, Commerce is empowered to find certain merchandise to be within the scope of the order if "before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise [that is subject to an existing antidumping duty order]." 19 U.S.C. § 1677j(b)(1)(B). Commerce proceeded to self-initiate an anti-circumvention inquiry to determine whether innersprings manufactured by Macao Commercial in Macau from raw materials originating in China, including uncoiled steel wire, nonwoven fabric, and glue, and exported to the United States from Macau are circumventing the *Order*. *See Uncovered Innerspring Units from the People's Republic of China*, 81 Fed. Reg. 83,801 (Dep't of Commerce Nov. 22, 2016) (initiation of anticircumvention inquiry on *Order*).

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

After gathering additional information from Macao Commercial by issuing supplemental questionnaires and conducting public and closed hearings, Commerce determined that Macao Commercial had failed to provide necessary, requested cost reconciliations. *See Decision Memorandum* at 9–12. Commerce also found that there were discrepancies and unexplained differences with respect to Macao Commercial's financial statements. *Id.* Finding that Macao Commercial failed to cooperate to the best of its ability, Commerce determined that the application of facts available with an adverse inference ("AFA") was appropriate in part. *Id.* at 12. Consequently, Commerce concluded that Macao Commercial's merchandise was subject to the *Order* pursuant to 19 U.S.C. § 1677j(b). *See Final Determination*.

II. Standard of Review

The court 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 given the record as a whole. *Nippon Steel Corp v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). 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 evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting a reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2019). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2019).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the Tariff Act.

See United States v. Eurodif S.A., 555 U.S. 305, 316 (2009) (An agency's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

III. Discussion

Pursuant to 19 U.S.C. § 1677j(b)(1)(B), Commerce may determine that merchandise is circumventing an AD order where, "before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which— (i) is subject to such order or finding, or (ii) is produced in the foreign country with respect to which such order or finding applies." 19 U.S.C. § 1677j(b)(1)(B). The subsequent subsections of the statute provide factors to guide Commerce's anti-circumvention determinations. *See* 19 U.S.C. § 1677j(b)(1)(C)–(E) (providing Commerce must assess the significance of the "process of assembly or completion in the foreign country" and "the value of the merchandise produced in the foreign country").

A. Completion or Assembly Under 19 U.S.C. § 1677j(b)(1)(B)

Plaintiff's initial challenge focuses on 19 U.S.C. § 1677j(b)(1)(B), which Commerce applied in determining that Macao Commercial circumvented the *Order* as described above. Plaintiff highlights that Commerce occasionally described Macao Commercial's production process as "manufacturing" instead of solely using the precise terms "completion" or "assembly" as provided in the statute. Pl.'s Br. at 7–12. Commerce rejected Plaintiff's argument that that Macao Commercial's "manufacturing" activities fell outside the scope of § 1677j(b)(1)(B), explaining that "Macao Commercial attempts to use semantics to draw a difference between manufacturing, on the one hand, versus completion or assembly on the other. However, neither the statute nor the legislative history contemplate a distinction between manufacturing and completion or assembly." *Decision Memorandum* at 13 (citing Omnibus Trade Act, Report of the Senate Finance Committee, S. Rep. No. 100–71, at 99–101 (1987), and the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H. Doc. No. 103–316 (1994), at 892–95). Plaintiff maintains that Commerce erroneously interpreted § 1677j(b)(1)(B) by concluding that the "assembly or completion" language in the statute covered Macao Commercial's "manufacturing" process. *Id.* at 11–12.

Plaintiff notably fails to explain why it should prevail under the *Chevron* framework that this Court uses to assess arguments

challenging Commerce's interpretation of statutes. Rather, Plaintiff merely notes that the term "manufacturing" is absent from the language of the statute and its legislative history. *See* Pl.'s Br. at 11–12. Plaintiff does not contend that the statute unambiguously supports its position, nor does it explain how Commerce's interpretation of the statute is unreasonable. *Id.* (contending, without any supporting citations, that "Commerce's inconsistent language underscores its misapplication of the statute and is further evidence of a continuing misunderstanding of Macao Commercial's manufacturing process. ... As such, Commerce's conclusion is contrary to law."). Plaintiff is correct that neither the statute, nor its legislative history, refer to the term "manufacturing;" however, Commerce relies on legislative history for the conclusion that Congress intended the agency to have broad discretion in interpreting and applying the anti-circumvention statute. *See Decision Memorandum* at 13 (citing Omnibus Trade Act, Report of the Senate Finance Committee, S. Rep. No. 100–71, at 99–101 (1987)). Specifically, the cited Senate Committee Report states:

> [T]hese subsections grant the Commerce department substantial discretion in interpreting these terms, and invoking these measures, so as to allow it flexibility to apply the provisions in an appropriate manner, the Committee expects the Commerce Department to use this authority to the fullest extent possible to combat diversion and circumvention of the antidumping and countervailing duty laws.

S. Rep. No. 100–71, at 100. Given this, Commerce reasonably rejected Plaintiff's attempt to elevate the agency's use of the term "manufacturing" to escape the scope of § 1677j(b)(1)(B) based on nothing more than semantics.

Plaintiff also contends that Commerce's application of the statute is "not supported by substantial evidence because the record evidence established that Macao Commercial's innersprings are not produced by a process of assembly; rather, they are made using a sophisticated, technology-driven manufacturing process." Pl.'s Br. at 2, 7–11. In its preliminary determination, Commerce cited to Macao Commercial's questionnaire response as the basis for the agency's affirmative finding under § 1677j(b)(1)(B), noting that:

> Macao Commercial acknowledged throughout this proceeding that it sources materials and/or components from China, which it uses to assemble innerspring units in Macau. As such, the distinction Macao Commercial seems to make between components and raw materials is not relevant. Therefore, in accordance with section 781(b)(1)(B) of the Act, we preliminarily find

> that innerspring units are assembled in Macau by Macao Commercial from Chinese-origin materials and/or components prior to importation into the United States.

See Uncovered Innerspring Units from the People's Republic of China, 83 Fed. Reg. 42,254 (Dep't of Commerce Aug. 21, 2018) (prelim affirm. determ. of circumvention of *Order*) ("*Preliminary Determination*"), and the accompanying Issues and Decision Memorandum at 14 (Dep't of Commerce Aug. 9, 2018), *available at* https://enforcement.trade.gov/frn/summary/prc/2018–17784–1.pdf (last visited this date) ("*Preliminary Decision Memorandum*"). Plaintiff maintains that "[i]n finding the process is an 'assembly,' Commerce ignored record evidence demonstrating that Macao Commercial does not use any components such as spring coils, border rods or border wires to make its innersprings." Pl.'s Br. at 10. The court disagrees. It is Plaintiff, not Commerce, that appears to be ignoring record evidence in its argumentation. Commerce cited directly to Macao Commercial's initial questionnaire response that confirmed that "Macao Commercial manufactures the innersprings it makes in Macao from raw materials and consumables it receives from China." *See Preliminary Decision Memorandum* at 14 n.71 (quoting Macao Commercial's initial questionnaire response). Plaintiff highlights other evidence in the record that suggests that Macao Commercial does not "assemble" Chinese innerspring components; however, Plaintiff fails to demonstrate that Commerce acted unreasonably in finding that Macao Commercial's innerspring units are "completed or assembled in Macau using Chinese-origin materials and/or components prior to importation into the United States" based on the plain language of Macao Commercial's questionnaire response. *See Decision Memorandum* at 5 (citing *Preliminary Decision Memorandum* at 14); *see also Tianjin Wanhua Co. v. United States*, 40 CIT ___, ___, 179 F. Supp. 3d 1062, 1071 (2016) (noting that plaintiff must demonstrate that its preferred evidentiary finding is "the one and only reasonable" outcome on the administrative record, "not simply that [its preferred finding] may have constituted another possible reasonable choice."). Accordingly, the court sustains as reasonable Commerce's determination that "the merchandise subject to this anticircumvention inquiry was completed or assembled in Macau using Chinese-origin materials and/or components prior to importation into the United States." *Decision Memorandum* at 5.

B. Application of Partial AFA as to 19 U.S.C. §§ 1677j(b)(1)(D) & 1677j(b)(2)(E)

19 U.S.C. § 1677m(d) provides that, prior to disregarding respondent submissions found to be deficient and applying adverse facts available ("AFA"), Commerce must: "promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle." 19 U.S.C. § 1677m(d). Plaintiff argues that Commerce did not notify Macao Commercial of any deficiencies in its questionnaire responses until the agency issued the *Preliminary Determination*. *See* Pl.'s Br. at 12–24. As a consequence, Plaintiff challenges Commerce's determination to apply partial AFA in its assessments under §§ 1677j(b)(1)(D) & 1677j(b)(2)(E) due to Macao Commercial's failure to submit cost reconciliations despite Commerce's repeated requests.

Commerce explained that it had requested cost reconciliation information from Plaintiff since the issuance of the initial questionnaire. *See Decision Memorandum* at 9 (quoting initial questionnaire's request that respondents "provide complete and fully translated documentation and worksheets supporting the quantification of the costs to complete the production of innersprings at each stage of processing"). In response to Commerce's initial request, Macao Commercial provided only "an overall narrative description and self-selected one set of production records for one shipment to use as an example. ... Moreover, while it did provide some source documents (some of which were not completely translated), it did not provide any accounting ledgers into which these flowed, much less demonstrate how the information from the source documents flowed into its accounting records." *Id.* Commerce then "pointed out Macao Commercial's deficient response and provided more explicit guidance" by issuing a supplemental questionnaire. *See id.* Lastly, Commerce provided Macao Commercial with additional extensions of time and clarification as to the nature of the cost reconciliation information the agency expected to receive; however, "Macao Commercial never provided the requested reconciliations and stated that no such reconciliations exist in its normal books and records." *Id.*

The court cannot see any merit in Plaintiff's argument that it did not receive "prompt notice" of the deficiencies of its questionnaire response. Plaintiff even acknowledges that "[i]n Question 23 of the Supplemental Questionnaire, Commerce explained that Macao Commercial's response to Question 28 of the Initial Questionnaire was 'materially deficient and incomplete,' and repeated its request for cost

information, among other information....” Pl.’s Br. at 17. Moreover, Plaintiff notes that its counsel engaged in telephone discussions with Commerce to fully understand Commerce’s expectations for Plaintiff’s responses to the Supplemental Questionnaire. *Id.* at 17–21. However, despite repeated clarifications and extensions from Commerce, Plaintiff only provides excuses as to why “Macao Commercial was not able to provide the sort of reconciliation the Commerce described.” *Id.* at 22. Even though Plaintiff concedes that it did not provide information requested by Commerce in the form and manner expressly sought by the agency, Plaintiff maintains that it “was completely unaware that its responses were deemed deficient until Commerce issued its Preliminary Determination.” *Id.* at 22–23.

Commerce explained that it “expects companies to be able to produce a reconciliation of their accounting records based on their normal books and records, upon request.” *Decision Memorandum* at 9–10. Commerce further notes that it directed Plaintiff that “if Macao Commercial does not have a cost accounting system, that it reconcile the general ledger or trial balance to the books and records normally kept by the company which were used to derive the reported quantity of each input consumed in the production of merchandise covered by the scope of the antidumping duty order.” *Id.* at 10. Commerce fully described why the cost reconciliations it sought were vital for its anti-circumvention determinations and why the agency could not accept Plaintiff’s claimed inability to comply with Commerce’s request for cost reconciliations:

> Reconciliations are vital to our ability to conduct a anticircumvention inquiry, particularly verification of the cost information relating to our analysis of the factors under sections 781(b)(2)(E) and (b)(1)(D) of the Act. Although the format of the reconciliation of submitted costs to actual financial statement costs depends greatly on the nature of the accounting records maintained by the respondent, the reconciliation represents the starting point of a cost verification because it assures Commerce that the respondent has accounted for all costs before allocating those costs to individual products. The cost reconciliations, along with their supporting documents, show and explain the link between the information the respondent provides in its questionnaire responses and the books and records it maintains in the ordinary course of business, which are critical to ascertain the accuracy of data submitted to address the factors under sections 781(b)(2)(E) and (b)(1)(D) of the Act. Whether or not Macao Commercial has a sophisticated, fully-integrated accounting system is immaterial; Commerce regularly investigates and re-

> views small companies such as Macao Commercial in its antidumping cases, requesting and obtaining the same kind of reconciliation that Macao Commercial failed to produce. ... However, Macao Commercial continuously failed to provide the required cost reconciliation necessary for Commerce to analyze the statutory circumvention criteria and conduct a verification.

Decision Memorandum at 11. Given the record and Commerce's explanation, Plaintiff's argument that it was "completely unaware" of the deficiency of its submissions begs credulity.

"[T]he burden of creating an adequate record lies with interested parties and not with Commerce." *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011); *see also Nan Ya Plastics Corp. v. United States*, 40 CIT ___, ___, 810 F.3d 1333, 1337–38 (2016). Macao Commercial's failure to build an adequate record by providing full responses to Commerce's requests resulted in the absence of critical information on the record, and as a result Commerce reasonably applied partial facts available pursuant to 19 U.S.C. § 1677e(a).

Plaintiff next contends that even if Commerce properly found that it was appropriate to rely on partial facts available under 19 U.S.C. § 1677e(a), an adverse inference was not warranted under § 1677e(b) because Macao Commercial complied with Commerce's requests to "the best of its ability." *See* Pl.'s Br. at 24–30. Plaintiff maintains that "Commerce applied partial AFA based *solely* on its conclusion that Macao Commercial 'did not provide the requested cost reconciliations.'" *Id.* at 26 (quoting *Decision Memorandum* at 12) (emphasis added). Plaintiff's argument, however, selectively quotes Commerce's explanation for its finding under § 1677e(b), which states in full: "Macao Commercial failed to cooperate to the best of its ability to comply with the requests for information because it did not provide the requested cost reconciliations, *despite receiving multiple opportunities and several extensions of time*." *Decision Memorandum* at 12 (emphasis added). The omitted explanatory language is critical, as it demonstrates that Commerce's conclusion that Plaintiff did not act to the "best of its ability" was not merely due to the failure to submit the requested cost reconciliation information. Rather, Commerce's conclusion was based not only on the importance of the specific cost reconciliation information but also on the fact that the agency had provided Plaintiff with additional time and guidance to provide this information in the form and manner that would suit the agency's need, but Plaintiff nonetheless refused to provide this crucial information. *See Decision Memorandum* at 11–12 (detailing "vital" nature of cost reconciliation information and noting that Commerce's cost reconciliation expectations can be met by small, unsophisticated re-

spondents like Plaintiff); *see also Sidenor Indus. SL v. United States*, 33 CIT 1660, 1668–69, 664 F. Supp. 2d 1349, 1356–59 (2009) (sustaining, in context of administrative review, Commerce's application of AFA due to respondent's failure to provide requested cost reconciliations). Given this explanation, the court sustains as reasonable Commerce's finding that Macao Commercial did not act to the "best of its ability" under § 1677e(b).[3]

C. Macao Commercial's Manufacturing Process as "Minor or Insignificant" under 19 U.S.C. §§ 1677j(b)(1)(C) & 1677j(b)(2)

Commerce found that Macao Commercial's manufacturing process is "minor or insignificant" under §§ 1677j(b)(1)(C) & 1677j(b)(2). *See* Pl.'s Br. at 30–43. In making its anti-circumvention inquiry Commerce must determine whether "the process of assembly or completion in the foreign country ... is minor or insignificant." 19 U.S.C. § 1677j(b)(1)(C). The statute provides five factors that Commerce must consider in reaching its determination under § 1677j(b)(1)(C): (A) "the level of investment," (B) "the level of research and development," (C) "the nature of the production process," (D) "the extent of production facilities," and (E) "the value of the processing performed" in the foreign country. *See* 19 U.S.C. § 1677j(b)(2).

Commerce found that the record demonstrated that Macao Commercial had made a "significant" level of investment in Macau under the first factor, § 1677j(b)(2)(A). Nevertheless, Commerce determined that Plaintiff had failed to provide enough evidence on the record to obtain favorable findings as to the other four factors. *See Decision Memorandum* at 5–6. Plaintiff now challenges the reasonableness of Commerce's findings as to the remaining four factors, §§ 1677j(b)(2)(B)–(E). *See* Pl.'s Br. at 30–37.

Respecting Commerce's finding under the second factor that Macao Commercial "has not provided evidence of a significant level of R&D expenditures in Macau to assemble and complete innersprings," Plaintiff argues that Commerce unreasonably ignored "the substantial investment [Macao Commercial] made in continually upgrading [its] machinery." *Id.* at 31; *see also Decision Memorandum* at 13–14. Commerce considered Plaintiff's argument under § 1677j(b)(2)(B) re-

[3] Plaintiff also argues that Commerce's decision to apply partial AFA was unlawful because Commerce failed to "conduct a separate analysis" under § 1677e(b). *See* Pl.'s Br. at 27–29 (arguing that Commerce's AFA determination was improperly based on its "singular analysis" that Macao Commercial "did not provide the requested cost reconciliations"). This argument rests on the same faulty premise as Plaintiff's substantial evidence argument (*i.e.*, that Commerce found Plaintiff did not comply to the best of its ability "solely" due to the failure to provide cost reconciliations). *Id.* Because Plaintiff's argument hinges on an erroneous characterization of Commerce's finding and explanation, the court rejects Plaintiff's legal argument that Commerce failed to conduct a separate analysis under § 1677e(b).

garding Macao Commercial's machinery-related investments; Commerce, however, disagreed with Plaintiff, concluding that the agency "had already accounted for such purchases under" § 1677j(b)(2)(A) and determined that Macao Commercial "was essentially trying to double-count its machinery purchases under two separate criteria." *Decision Memorandum* at 14. Plaintiff maintains that Commerce should have considered Plaintiff's machinery purchases, and its affiliation with a machine production company heavily involved with research and development of technologies to improve the production efficiency of innerspring-making machinery, as evidence that Plaintiff had a significant "level of research and development in the foreign country" under § 1677j(b)(2)(B). *See* Pl.'s Br. at 30–33. The court disagrees.

As Commerce explained, it accounted for Macao Commercial's investment in high-tech machinery purchases under § 1677j(b)(2)(A). Commerce reasonably found that considering those same purchases as evidence of Plaintiff's investment in "research and development" under § 1677j(b)(2)(B) would essentially "double-count" Plaintiff's machinery purchases in Commerce's § 1677j(b)(2) evaluation. *See Decision Memorandum* at 14. Plaintiff contends that "Commerce's conclusion is wholly unsubstantiated," arguing that "Commerce failed to provide a reasoned analysis or explanation, much less any authority whatsoever, for its conclusion that the evidence presented in response to a circumvention inquiry can be used to analyze only one, rather than multiple, factors under § 1677j(b)(2)." Pl.'s Br. at 33. Plaintiff's argument misapprehends Commerce's obligations under the statute and the standard of review. Plaintiff is correct that the statute does not expressly prohibit using the same evidence to analyze multiple factors under § 1677j(b)(2); however, Plaintiff cannot identify any statutory or regulatory guidance indicating that Commerce cannot account for such "double-counting" in its analysis of each factor. Accordingly, Commerce reasonably refused to double-count Plaintiff's investments in machinery in evaluating Macao Commercial's level of investment under § 1677j(b)(2)(A) and its level of "research and development" under § 1677j(b)(2)(B).

With respect to the third and fourth factors, § 1677j(b)(2)(C) and § 1677j(b)(2)(D), Commerce found that "the nature of the production process in Macau is minor and Macao Commercial's production facility is not extensive." *See Decision Memorandum* at 13. Commerce explained that its finding was consistent with its analysis in the *Preliminary Determination*, and Commerce noted that the information on the record "indicated that Macao Commercial uses a minimal number of upstream material inputs and a very small workforce in a

production facility of limited size." *Id.* While Commerce acknowledged that Macao Commercial's production process was automated due to significant investments in machinery (as the agency had found under § 1677j(b)(2)(A)), Commerce emphasized that "a greater degree of automation does not change the fact that the production process for manufacturing innersprings using imported raw materials, as described by Macao Commercial, involves a limited number of both workers and inputs in a small production area." *Id.*

Plaintiff maintains that these findings are unreasonable considering "the substantial evidence which clearly demonstrated that the nature of the innerspring-making process is significant, and the extent of the production facilities in Macau are extensive." Pl.'s Br. at 33. Plaintiff highlights various aspects of the record supporting its contention that its "sophisticated technology-driven innerspring-making process" is significant under § 1677j(b)(2)(C). *Id.* at 34–36. Similarly, Plaintiff describes the information on the record indicating the significant cost and value of its production facilities to support its position under § 1677j(b)(2)(D). *Id.* at 36–37. At most, the information cited by Plaintiff indicates that Commerce *could* have reasonably found that the nature of Plaintiff's production process in Macau is significant and Macao Commercial's production facility is extensive. Plaintiff's arguments, however, fail to establish that the information on the record supported one, and only one, reasonable conclusion (*i.e.*, that its production process in Macau is significant and that its production facility is extensive). *See Tianjin Wanhua Co. v. United States*, 40 CIT ___, ___, 179 F. Supp. 3d 1062, 1071 (2016) (noting that plaintiff must demonstrate that its preferred evidentiary finding is "the one and only reasonable" outcome on the administrative record, "not simply that [its preferred finding] may have constituted another possible reasonable choice."). Accordingly, the court sustains Commerce's findings under § 1677j(b)(2)(C) and § 1677j(b)(2)(D) that the nature of Plaintiff's production process in Macau is minor and that its production facility is not extensive.

D. The Value of Macao Commercial's Processing under 19 U.S.C. §§ 1677j(b)(1)(D) & 1677j(b)(2)(E)

Lastly, Plaintiff contends that Commerce improperly found that the value of the processing performed in Macau "represents a small proportion of the value of the merchandise imported into the United States" pursuant to the fifth factor, § 1677j(b)(2)(E). *See* Pl.'s Br. at 37–43. Plaintiff specifically argues that Commerce "failed to conduct a qualitative analysis" in reaching its determination under § 1677j(b)(2)(E), and further maintains that Commerce improperly applied partial AFA in reaching its § 1677j(b)(2)(E) finding by relying on

facts from *Uncovered Innerspring Units from the People's Republic of China*, 79 Fed. Reg. 78,794 (Dep't of Commerce Dec. 31, 2014) ("*Goldon*"). Pl.'s Br. at 39. Plaintiff repeats these same arguments in challenging Commerce's "determination that the value of the Chinese-origin raw materials used by Macao Commercial to manufacture in Macau innersprings exported to the United States represents a significant portion of the total value of the merchandise exported to the United States" pursuant to § 1677j(b)(1)(D). *See id.* at 43–45 (noting "Commerce's decision to resort to partial AFA and to rely on the facts of Goldon was improper for all the reasons set forth *supra*"). Defendant, however, points out that Plaintiff failed to raise these issues in its case brief before Commerce and thus failed to exhaust its administrative remedies. *See* Def.'s Resp. at 26, 28. While Plaintiff notes that it made a *general* challenge to Commerce's value determinations under §§ 1677j(b)(1)(D) & 1677j(b)(2)(E) in its administrative case brief, Plaintiff cannot dispute that it failed to raise the specific arguments challenging Commerce's failure to conduct a qualitative analysis and Commerce's reliance on *Goldon*. *See generally* Macao Commercial Case Brief at 4–5, 12–16, PD[4] 274 at barcode 3753511–01, CD 304 at barcode 3753509–01. Instead, Plaintiff attempts to rely on certain language from the court's scheduling order as a basis for avoiding the consequences of its failure to exhaust its administrative remedies. *See* Pl.'s Reply at 13–14 n.3 (citing Scheduling Order at 2, ECF No. 26). The Scheduling Order states: "Please do not merely cut-and-paste arguments from administrative case briefs, and think anew about the issues against the operative standards of review the court must apply." *See* Scheduling Order at 2. Plaintiff cites the court's encouragement for parties to "think anew about the issues" as providing apparent permission for Plaintiff to raise new arguments that it failed to make to Commerce in the administrative proceeding. *See* Pl.'s Reply at 14 n.3.

However, Plaintiff's understanding is misplaced, as the very next sentence in the scheduling order states: "Likewise, please make sure you have exhausted your administrative remedies and raised the issues by presenting your arguments to the agency in the first instance." Scheduling Order at 2. Simply put, Plaintiff failed to present to Commerce the specific arguments challenging Commerce's determination under §§ 1677j(b)(1)(D) & 1677j(b)(2)(E) that it now raises before the court. The court therefore will disregard Plaintiff's arguments on these issues due to a failure to exhaust its administrative

[4] "PD" refers to a document contained in the public administrative record. "CD" refers to a document contained in the confidential record.

remedies as to these arguments. *See Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1374 (Fed. Cir. 2014).

IV. Conclusion

For the foregoing reasons, the court sustains the *Final Determination*. Judgment will be entered accordingly.

Dated: March 20, 2020
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 20–38

STUPP CORPORATION et al., Plaintiffs and Consolidated Plaintiffs, and MAVERICK TUBE CORPORATION et al., Plaintiff-Intervenor and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SEAH STEEL CORPORATION et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00334

[Sustaining the U.S. Department of Commerce's second remand redetermination in the less than fair value investigation of welded line pipe from the Republic of Korea.]

Dated: March 24, 2020

Paul Wright Jameson, Schagrin Associates, of Washington, DC, for plaintiffs, consolidated plaintiff intervenors, and consolidated defendant intervenors Stupp Corporation, a Division of Stupp Bros., Inc. and Welspun Tubular LLC USA. With him was *Roger Brian Schagrin*.

Gregory James Spak, White & Case LLP, of Washington, DC, for plaintiff intervenor Maverick Tube Corporation, and for plaintiff, consolidated plaintiff intervenor, and defendant intervenor IPSCO Tubulars Inc. With him were *Frank J. Schweitzer, Kristina Zissis, Luca Bertazzo*, and *Matthew W. Solomon*.

Elizabeth Anne Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her were *Claudia Burke*, Assistant Director, *Jeanne E. Davidson*, Director, and *Joseph H. Hunt*, Acting Assistant Attorney General. Of Counsel was *Reza Karamloo*, SeniorAttorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Jeffrey Michael Winton, Law Office of Jeffrey M. Winton PLLC, of Washington, DC, for defendant intervenor, consolidated plaintiff, and consolidated defendant intervenor SeAH Steel Corporation.

Jaehong David Park, Arnold & Porter LLP, of Washington, DC, for Hyundai Steel Company. With him was *Henry D. Almond, Daniel Robert Wilson*, and *Kang Woo Lee*. Of counsel was *Phyllis L. Derrick*.

OPINION AND ORDER

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Department" or "Commerce") second remand redetermination filed pursuant to the court's order in *Stupp Corp. v. United States*, 43 CIT __, __, 413 F. Supp. 3d 1326, 1334 (2019) ("*Stupp II*"). *See also* Final Results of Redetermination Pursuant to Second Ct. Remand [*in Stupp II*], Jan. 15, 2020, ECF No. 168 ("*Second Remand Redetermination*"). In *Stupp II*, the court remanded Commerce's redetermination in the less-than-fair-value ("LTFV") investigation of imports of welded line pipe from the Republic of Korea ("Korea") for the period of October 1, 2013, through September 30, 2014. *See Stupp II*, 43 CIT at __; 413 F. Supp. 3d at 1329, 1334; *see also Welded Line Pipe From [Korea]*, 80 Fed. Reg. 61,366 (Dep't Commerce Oct. 13, 2015) (final determination of sales at [LTFV]), as amended by *Welded Line Pipe From [Korea]*, 80 Fed. Reg. 69,637 (Dep't Commerce Nov. 10, 2015) (amended final determination of sales at [LTFV]) ("*Amended Final Determination*") and accompanying Issues & Decisions Memo for the Final Affirmative Determination in the [LTFV] Investigation of Welded Line Pipe from [Korea], A-580–876, (Oct. 5, 2015), ECF No. 30–3 ("Final Decision Memo"); *Welded Line Pipe From [Korea] and the Republic of Turkey*, 80 Fed. Reg. 75,056, 75,057 (Dep't Commerce Dec. 1, 2015) (antidumping duty orders). Specifically, the court ordered Commerce to reconsider or further explain its refusal to reassess Hyundai HYSCO's ("HYSCO") home market viability in light of its decision to remove certain challenged local sales from HYSCO's home market database. *See Stupp II*, 43 CIT at __, 413 F. Supp. 3d at 1329, 1334.

For its second remand, Commerce explained that it continues to rely on the remaining quantity of HYSCO's home market sales. *Second Remand Redetermination* at 6. The parties have not filed any comments challenging the results below, and Defendant requests that this court sustain its determination. *See* Def.'s Notice No Parties Filed Cmts. on [*Second Remand Redetermination*] & Req. to Sustain, Feb. 21, 2020, ECF No. 180 ("Def.'s Req."). For the following reasons, the court sustains Commerce's *Second Remand Redetermination*.

BACKGROUND

The court presumes familiarity with the facts of this case, as set out in the previous two opinions ordering remand to Commerce, and now recounts the facts relevant to the court's review of the *Second Remand Redetermination*. *See Stupp Corp. v. United States*, 43 CIT __,

__, 359 F. Supp. 3d 1293, 1296–1300 (2019) ("*Stupp I*"); *see also Stupp II*, 43 CIT at __, 413 F. Supp. 3d at 1329–30. On November 4, 2015, Commerce published its amended final determination pursuant to its antidumping duty ("ADD") investigation of welded line pipe from Korea. *See generally Amended Final Determination*. Commerce calculated weighted-average dumping margins of 6.23 percent for HYSCO, 2.53 percent for SeAH Steel Corporation ("SeAH"), and 4.38 percent for the all-others rate. *See Amended Final Determination*, 80 Fed. Reg. at 69,638. Pursuant to USCIT R. 56.2, Stupp Corporation, a division of Stupp Bros., Inc., IPSCO Tubulars Inc., and Welspun Tubular LLC USA (collectively "Stupp et al." or "Plaintiffs"), SeAH, and Maverick Tube Corporation ("Maverick") brought a consolidated action on several motions for judgment on the agency record before this court, challenging various aspects of Commerce's final determination. *See* Pls. [Stupp et al.'s] Mot. J. [Agency] R. Pursuant Rule 56.2, July 5, 2016, ECF No. 39; Mot. Pl. SeAH [ ] J. Agency R., July 5, 2016, ECF No. 40; Pl.-Intervenor [Maverick]'s Rule 56.2 Mot. J. Agency R., July 5, 2016, ECF No. 41.

The court sustained several aspects of Commerce's initial determination, but remanded Commerce's decision to include certain challenged local sales in HYSCO's home market sales database. *See Stupp I*, 43 CIT at __, 359 F. Supp. 3d at 1297–98. The court also ruled that Commerce "abused its discretion by rejecting Maverick's supplemental case brief" on the issue of HYSCO's revisions to its sales databases. *Id.* at __, 359 F. Supp. at 1297–98, 1311–1313. On remand, Commerce excluded the challenged sales, resulting in a revised margin of 6.22 percent. *See* Final Results of Redetermination Pursuant to Ct. Remand Order [in *Stupp I*] Confidential Version at 13–14, May 2, 2019, ECF No. 134 ("*Remand Redetermination*") ("*Remand Redetermination*").[1] However, Commerce declined to consider whether the exclusion of the challenged sales rendered the home market not viable for purposes of calculating normal value. *See Remand Redetermination* at 13. The court remanded the issue of HYSCO's home market viability to Commerce for reconsideration. *See Stupp II*, 43 CIT at __, 413 F. Supp. 3d at 1334.

On remand, Commerce considered HYSCO's home market viability. *See Second Remand Redetermination* at 3–6. Commerce explained that it found HYSCO's remaining home market sales to be viable because it found that the remaining quantity of sales were "large enough to serve as a robust pool of sales for calculating [normal value] for comparison to U.S. Sales . . . without resorting to [constructed value.]" *Second Remand Redetermination* at 6.

[1] The all-others rate remained at 4.38 percent. *See Remand Redetermination* at 13–14.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)[2] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an investigation of an antidumping duty order. The court will uphold Commerce's determination unless 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). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

In Commerce's *Second Remand Redetermination*, Commerce explains that it continues to find HYSCO's remaining sales viable because it found that the remaining quantity of sales were "large enough to serve as a robust pool of sales for calculating [normal value] for comparison to U.S. Sales . . . without resorting to [constructed value.]" *Second Remand Redetermination* at 6. Specifically, Commerce found that the remaining above cost market sales "provide identical or similar matches to all of Hyundai HYSCO's U.S. sales, without resort to [constructed value.]" *Id.* at 6 (citing Remand Calc. Memo, CD 4, bar code 3803670–01 (Mar. 12, 2019)).[3] Commerce's explanation is reasonable and in compliance with this court's order in *Stupp II*. As this court explained in its previous opinion, when the aggregate quantity of home market sales falls below a level that would normally suffice to permit a proper comparison between export price and normal value, Commerce must explain its decision to continue relying on those sales. *See Stupp II*, 43 CIT at __, 413 F. Supp. 3d at 1333–34; *see also* 19 U.S.C. §§ 1677b(a)(1)(C), 1516a(b)(1)(B)(i); 19 C.F.R. § 351.404(b)(2) (2014). Commerce continues to assert that given how far into the proceeding the allegation concerning the viability of Hyundai HYSCO's home market arose, it would have lacked sufficient time to analyze alternate normal value sources before the preliminary determination. Importantly though, here, Commerce ex-

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[3] On May 20, 2019, Defendant filed indices to the public and confidential administrative records underlying Commerce's remand determination, on the docket, at ECF No. 137. This citation refers to that index.

plains that information on the record was sufficient to allow Commerce to engage a proper comparison and Commerce had a reasonable basis to deviate from its normal practice. The parties below did not file comments on Commerce's redetermination. *See generally* Def.'s Req. The court sustains Commerce's *Second Remand Redetermination*.

CONCLUSION

Judgment will be issued accordingly.

Dated: March 24, 2020
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

Slip Op. 20–39

JIANGSU ZHONGJI LAMINATION MATERIALS CO., LTD., SHANTOU WANSHUN PACKAGE MATERIAL STOCK CO., LTD., JIANGSU HUAFENG ALUMINUM INDUSTRY CO., LTD., and JIANGSU ZHONGJI LAMINATION MATERIALS CO., (HK) LTD., Plaintiffs, v. UNITED STATES, Defendant, and ALUMINUM ASSOCIATION TRADE ENFORCEMENT WORKING GROUP and its individual members, JW ALUMINUM COMPANY, NOVELIS CORPORATION, and REYNOLDS CONSUMER PRODUCTS LLC, Defendant-Intervenors.

Before: Jane A. Restani, Judge
Court No. 18–00089

[Commerce's Final Results of Redetermination Pursuant to Court Order are sustained. Judgment entered.]

Dated: March 24, 2020

Jeffrey S. Grimson, Bryan P. Cenko, James C. Beaty, Jill A. Cramer, Kristin H. Mowry, and *Sarah M. Wyss*, Mowry & Grimson, PLLC, of Washington, D.C., for Plaintiffs Jiangsu Zhongji Lamination Materials Co., Ltd., Shanton Wanshun Package Material Stock Co., Ltd., Jiangsu Huafeng Aluminum Industry Co., Ltd., and Jiangsu Zhongji Lamination Materials Co., (HK) Ltd.

Aimee Lee, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for the defendant. Of counsel was *Paul K. Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

John M. Herrmann, II, Grace W. Kim, Joshua R. Morey, Kathleen W. Cannon, and *Paul C. Rosenthal*, Kelley Drye & Warren, LLP, of Washington, D.C., for Defendant-Intervenors Aluminum Association Trade Enforcement Working Group and its Individual Members, JW Aluminum Company, Novelis Corporation, and Reynolds Consumer Products LLC.

OPINION

Restani, Judge:

This matter is before the court following a remand to the Department of Commerce ("Commerce") in *Jiangsu Zhongji Lamination Materials Co., Ltd. v. United States*, 405 F. Supp. 3d 1317 (CIT 2019) ("*Jiangsu*"), with which familiarity is presumed. In *Jiangsu*, the court upheld Commerce's determination that Plaintiff Jiangsu Zhongji Lamination Materials Co., Ltd. ("Zhongji") and its affiliated companies, Plaintiffs Shantou Wanshun Package Material Stock Co., Ltd. ("Shantou Wanshun"), Jiangsu Huafeng Aluminum Industry Co., Ltd. ("Jiangsu Huafeng"), and Jiangsu Zhongji Lamination Materials Co., (HK) Ltd. ("Zhongji HK") received a countervailable electricity subsidy as supported by substantial evidence; concluded that Commerce's selection and calculation of the electricity benchmark was consistent with its regulations and in accordance with law; and that substantial evidence supported Commerce's (1) application of an adverse inference based upon facts otherwise available ("AFA") to find that the Government of China's ("GOC") electricity program is specific, (2) decision to calculate an ocean freight benchmark based solely on actual price quotes sourced from Maersk, (3) application of AFA to countervail Zhongji's self-reported "other subsidies," and (4) determination that Zhongji received a countervailable subsidy pursuant to certain of its reported policy loans from state owned commercial banks ("SOCBs"). *See Jiangsu*, 405 F. Supp. 3d at 1334–45. The court remanded to Commerce for further explanation of its determinations that Zhongji is not entitled to an Entered Value Adjustment ("EVA") and that Zhongji did not establish non-use of the Export-Import Bank of China's ("Ex-Im Bank") Export Buyer's Credit Program ("EBCP"). *See id.* at 1345.

a. *Entered Value Adjustment*

In *Jiangsu*, the court concluded that Commerce's denial of Zhongji's request for an EVA was unsupported by substantial evidence. *Id.* at 1331. The court held that although Commerce preliminarily determined that Zhongji's sales to the United States met each of Commerce's six criteria to qualify for an EVA, it failed to explain adequately its final determination that Zhongji failed to satisfy one criterion; specifically, that Zhongji HK did not ship the subject merchandise directly to the United States. *Id.* at 1327–28 (citing *Ball Bearings and Parts Thereof from Thailand: Final Results of Countervailing Duty Administrative Review*, 57 Fed. Reg. 26,646 (Dep't Commerce June 15, 1992)). On remand, Commerce has granted Zhongji's

EVA request without protest. *See Final Results of Redetermination Pursuant to Court* Order, ECF No. 50–1 at 8 (Jan. 1, 2020) ("*Remand Results*"). Commerce concedes that "since [it] made an adjustment to all of Zhongji's export sales in the *Preliminary Determination*, it is not clear why Zhongji's failure to identify its U.S. sales is grounds for denying the adjustment." *Id.* at 6. Commerce suggests that there may have been a miscommunication between the parties between the preliminary and final determinations. *Id.* at 8. Commerce maintains that the way it made the adjustment in the *Preliminary Determination* was incorrect, but it reconsidered the EVA methodology between the preliminary and final determinations. *Id.* at 7–8. Apparently, Commerce accepts responsibility for not adequately communicating the change to Zhongji. *Id.* at 8. Commerce has sufficiently complied with the court's remand order and no party challenges Commerce's decision to grant Zhongji's request for an EVA.

b. *Export Buyer's Credit Program*

In *Jiangsu*, the court concluded that Commerce's explanations for applying AFA to find that Zhongji benefitted from the EBCP failed to satisfy Commerce's statutory investigative requirements. *Jiangsu*, 405 F. Supp. 3d at 1334. The court found Commerce's application of AFA to find that Zhongji, a mandatory cooperating party that submitted uncontroverted affiliate and customer certifications of non-use, benefitted from the EBCP based on the GOC's failure to cooperate to be unsupported by substantial evidence and contrary to law, because Commerce did not explain why a complete understanding of the EBCP's operation is necessary to verify non-use of the program. *Id.* at 1333.

On remand, Commerce has accepted Zhongji's and its customers' claims of non-use of the EBCP as sufficient evidence that Zhongji does not benefit from the EBCP. *Id.* at 13–14. Commerce makes this concession "under respectful protest." *Id.* at 14 & n.45 (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371 (Fed. Cir. 2003)). Unlike *Viraj*, however, this matter does not involve a "contrary position forced upon it by the court," *see* 343 F.3d at 1376, although it may require procedures that would lead to such a position. Nor does this case involve a remand order "with instructions that dictate a certain outcome that is contrary to how Commerce would otherwise find." *Meridian Prods., LLC v. United States*, 890 F.3d 1272, 1276 n.3 (Fed. Cir. 2018).

As this court has repeatedly explained, where Commerce applies AFA to determine that a cooperating party benefits from the use of the EBCP solely on the basis of the GOC's failure to provide the requested

information pursuant to 19 U.S.C. §§ 1677e(a)(2)(B) or 1677e(b), as it did here, Commerce must (1) identify the gap in the record, (2) establish how the withheld information creates the gap (*e.g.*, by explaining why the withheld information is necessary to verify the cooperating party's claims of non-use), and (3) demonstrate that only the withheld information can fill the gap by explaining why the record evidence, or other information accessible by respondents, is insufficient or impossible to verify. *See Jiangsu*, 405 F. Supp. 3d at 1333 (collecting cases). The court, therefore, ordered Commerce to "consider what information could be verified that would show non-use." *Id.* at 1334. The court also ordered *all* parties "to contemplate a solution to the impasse and to confer." *Id.*

Commerce insists that it still does not know what information "it should look for in attempting to determine whether a loan is traceable to the China Ex-Im Bank" for purposes of ascertaining Zhongji's claimed non-use of the EBCP. *Remand Results*, at 13. Commerce acknowledges that, during remand, Zhongji "proposed three questions that Commerce could ask the GOC to find a path forward to verification," and that Zhongji additionally suggested five questions "that Commerce should issue to Zhongji's customers relating to the customer's loans and lenders," the answers to which Commerce could verify.[1, 2] *Id.* at 9–10. Notwithstanding Zhongji's apparent good-faith efforts to comply with the court's remand order, Commerce maintains that none of Zhongji's proposed questions remedies "Commerce's concerns regarding its inability to verify statements of non-use by Zhongji and its customers." *Id.* at 10. In Commerce's view, "verification under the circumstances" of this case would be unproductive, and it is wholly at a loss absent the GOC's cooperation. *Id.* at 13. The court's order, however, was not for Commerce to verify Zhongji's non-use of the EBCP, but rather for Commerce to "explain why a complete understanding of the operation of the program is necessary to verify non-use of the program" and for all parties to attempt to identify an alternative verification procedure. *Jiangsu*, 405 F. Supp. 3d at 1333. Part of Commerce's task on remand was to collaborate and

[1] Presumably, if the customers did not cooperate, Commerce would have the lack of data allowing it to proceed to fill in the blanks with data of its choosing. *See* 19 U.S.C. §§ 1677e(a)–(b). Commerce did not comment on the efficacy of the specific questions that Zhongji proposed that Commerce ask its customers.

[2] The court accepts that Commerce is not required to send new questions to the GOC, as Commerce has reasonably determined that it has not shown full cooperation, having unilaterally decided that some of Commerce's questions were irrelevant. *See* Decision Mem. for the Final Determination in the Countervailing Duty Investigation of Certain Aluminum Foil from the People's Republic of China, C-570–054, POR 1/1/2016–12/31/2016 at 29–31 (Dep't Commerce Feb. 26, 2018) ("*I&D Memo*").

confer with Zhongji to ascertain relevant queries, *id.* at 1334, in aid of identifying what information, if any, is either "not available on the record," being withheld, or not verifiable. 19 U.S.C. § 1677e(a). Apparently, it has not attempted to do so.

At best, Commerce's current position is that because Zhongji's customer declarations "do not cover all of its U.S. sales," the record is incomplete,[3] so that "Zhongji's claimed non-use of the EBCP" is necessarily unverifiable. *Remand Results*, at 13. But customer declarations are not the present issue. Zhongji's questions go well beyond such declarations. Apparently, Commerce's true position is that it wishes to rely solely on GOC's failures. It recognized that the court does not accept that position and, thus, has in various cases lately interposed non-verifiability or incompleteness as reasons to maintain the EBCP as contributing to the CVD rates, without much to back up such stances. Nevertheless, Commerce has now lowered Zhongji's positive CVD cash deposit rate by 10.54 percentage points by eliminating the EBCP subsidy portion of the CVD rate. *See Remand Results*, at 14.

Commerce has chosen not to continue this matter by giving respondent a fair opportunity to prove its case under Commerce's new view of the program, but rather has simply granted the relief sought as if compelled to do so by the court. As indicated, the court did not direct this result; Commerce chose it. The respondent party has filed no comments and apparently has concluded that this is the most expedient way to finally obtain relief. The domestic parties have also remained silent. At this point, the court sees no purpose in forcing further action upon parties that do not desire it.

CONCLUSION

For the foregoing reasons, Commerce's *Remand Results* are SUSTAINED. Judgment will issue accordingly.

Dated: March 24, 2020
New York, New York

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

[3] The declarations cover close to all of Zhongji's U.S. sales. *See* Mem. of P. & A. in Supp. of Rule 56.2 Mot. for J. on the Agency R. by Pls. Jiangsu Zhongji Lamination Materials Co., Ltd. *et al.*, ECF No. 27 at 18 (Dec. 19, 2018) (citing Section III of Zhongji's Questionnaire Responses, vol. I § III, Ex. 12, C.R. 58, 64 (June 12, 2017)). The high percentage of response could constitute substantial evidence.