U.S. Court of International Trade

Slip Op. 20–24

BIO-LAB, INC. et al., Plaintiffs, v. UNITED STATES, Defendant, and JUANCHENG KANGTAI CHEMICAL CO., LTD. and HEZE HUAYI CHEMICAL CO., LTD., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 18–00051
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce's remand redetermination in the 2015–2016 administrative review of the antidumping duty order on chlorinated isocyanurates from the People's Republic of China.]

Dated: February 26, 2020

James R. Cannon, Jr., *Jonathan M. Zielinski*, and *Ulrika K. Swanson*, Cassidy LevyKent (USA) LLP, of Washington, D.C., for plaintiffs Bio-Lab, Inc., Clearon Corporation, and Occidental Chemical Corporation.

Joseph H. Hunt, Assistant Attorney General, Commercial Litigation Branch, Civil Division, U.S. 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 *Sonia M. Orfield*, Trial Attorney. Of Counsel on the brief was *Jessica Link*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Gregory S. Menegaz, J. Kevin Horgan, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, for defendant-intervenors Heze Huayi Chemical Co., Ltd. and Juancheng Kangtai Chemical Co., Ltd., of Washington, D.C.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce" or "Department") remand redetermination filed pursuant to the court's order in *Bio-Lab, Inc. v. United States*, 43 CIT __, 392 F. Supp. 3d 1264 (2019) ("*Bio-Lab I*"). *See also* Redetermination Pursuant to Ct. Remand Order, Oct. 11, 2019, ECF No. 75 ("*Remand Results*"). In *Bio-Lab I*, the court sustained in part and remanded in part Commerce's final determination in the 2015–2016 administrative review of the antidumping duty ("ADD") order on chlorinated isocyanurates from the People's Republic of China ("PRC"). *See Chlorinated Isocyanurates From the [PRC]*, 83 Fed. Reg. 5,243 (Dep't Commerce Feb. 6, 2018) (final results of [ADD] administrative review; 2015–2016) ("*Final Results*") and accompanying Decision Memo. for the Final Results of [ADD] Administrative Review: Chlo-

rinated Isocyanurates from [the PRC]; 2015–2016, A-570–898, Jan. 29, 2018, ECF No. 25–5 ("Final Decision Memo").

Plaintiffs Bio-Lab, Inc., Clearon Corporation, and Occidental Chemical Corporation (collectively "Plaintiffs") challenge Commerce's remand redetermination as unsupported by substantial evidence. *See* Pls.' Cmts. Opp'n Commerce's Remand Results at 1–6, Nov. 12, 2019, ECF No. 77 ("Pls.' Br."). Defendant and Defendant-Intervenors Juancheng Kangtai Chemical Co., Ltd. ("Kangtai") and Heze Huayi Chemical Co., Ltd. (collectively, "Defendant-Intervenors") request the court to uphold the *Remand Results. See* Def.'s Resp. [Pls.' Br.], Dec. 12, 2019, ECF No. 81 ("Def.'s Br."); Def.-Intervenors' Reply Cmts. Supp. Commerce's Remand Redetermination, Dec. 12, 2019, ECF No. 83 ("Def.-Intervenors' Br."). For the following reasons, the court sustains Commerce's *Remand Results*.

BACKGROUND

The court assumes familiarity with the facts of this case, as set out in the previous opinion, *see Bio-Lab I*, 43 CIT at __, 392 F. Supp. 3d at 1266–67, and recounts those relevant to the court's review of the *Remand Results*. In the final results of this administrative review of the ADD order on chlorinated isocyanurates,[1] Commerce relied on Kangtai's sales to Customer X,[2] a purchaser operating in a third-country, as export price ("EP") sales. *See* Final Decision Memo. at 4. Commerce found that Kangtai's sales were the first sales made to an unaffiliated party outside of the United States. *Id.* To reach this conclusion, Commerce evaluated factors that signpost the existence of a principal-agent relationship ("affiliation"). *See id.* at 5. Commerce focused its analysis on Kangtai's statements that it was not affiliated with Customer X pursuant to 19 U.S.C. § 1677(33) and record evidence supporting that position. *See id.* at 4–5.

In *Bio-Lab I*, the court ordered Commerce to reconsider or further explain its reliance on Kangtai's sales to Customer X as EP sales, because Commerce failed to consider all relevant factors bearing on an affiliation determination, to adequately analyze the record evidence, and ultimately to support its determination with substantial evidence. *See* 43 CIT at __, 392 F. Supp. 3d at 1267–72, 1276. Specifically, the court faulted Commerce for exclusively relying on two factors in reaching its determination, and, further, for not considering detracting evidence in its analysis of those factors. *See id.*, 43 CIT at __, 392 F. Supp. 3d at 1269–71. Therefore, given that Commerce had

[1] This administrative review covers the period June 1, 2015 through May 31, 2016. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 53,121, 53,122 (Dep't Commerce Aug. 11, 2016).

[2] Customer X is [[ ]].

not analyzed all relevant factors or considered detracting evidence, the court concluded that "[w]ithout more evidence supporting its determination, or an explanation after at least considering all relevant factors," Commerce's finding that the two entities were unaffiliated was unreasonable. *Id*. 43 CIT at __, 392 F. Supp. 3d at 1271. On remand, Commerce continues to find no principal-agent relationship exists between Kangtai and Customer X and treats Kangtai's sales as EP sales in the calculation of normal value. *See Remand Results* at 1–2.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012),[3] which grant the court authority to review actions contesting the final determination in an administrative review of an ADD 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

Plaintiffs challenge as unsupported by substantial evidence Commerce's decision on remand to rely on Kangtai's sales to Customer X as EP sales, because necessary evidence is missing from the record for Commerce to conclude Kangtai and Customer X are unaffiliated. *See* Pls.' Br. at 5–14. Plaintiffs contend that Commerce's determination is unreasonable because Commerce did not collect more information and does not offer new substantive explanations on remand. *See id.* at 1–5. Defendant and Defendant-Intervenors respond that Commerce complied with the court's order by re-examining the relationship between Kangtai and Customer X based on all factors that signpost the existence of a principal-agent relationship, and, in doing so, Commerce reasonably finds that the record evidence indicates an absence of a principal-agent relationship. *See* Def.'s Br. at 5–15; Def.-Intervenors' Br. at 1–11. For the reasons that follow, Commerce reasonably concludes that Kangtai and Customer X were not in a principal-agent relationship.

[3] 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.

To calculate a respondent's dumping margin, Commerce determines the "amount by which the normal value exceeds the [EP] (or constructed export price) for the merchandise." 19 U.S.C. § 1673. Export price is the price at which the subject merchandise is sold "outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States." *Id.* at § 1677a(a). Thus, Commerce may use sales to a purchaser operating in a third country as EP sales, so long as the purchaser is unaffiliated with the exporter and the purchase is for exportation to the United States. Otherwise, if that purchaser and exporter are affiliated, Commerce determines a constructed EP using the price at which the subject merchandise is first sold in the United States to a purchaser not affiliated with the producer or exporter. *See id.* at § 1677a(b).

A purchaser is affiliated with the producer if, inter alia, the producer controls the purchaser. *See* 19 U.S.C. § 1677(33)(G). The statute provides that one party controls the other if it "is legally or operationally in a position to exercise restraint or direction over the other" party. *Id.* Commerce has found control where a principal-agent relationship exists between the foreign producer and purchaser. *See, e.g., Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan*, 62 Fed. Reg. 24,394, 24,403 (Dep't Commerce May 5, 1997) (notice of final determination of sales at less than fair value) ("*Engineered Process Gas*"). In determining whether a principal-agent relationship exists, no bright line test exists, *id.*, and Commerce will consider the totality of the circumstances. *See Remand Results* at 18.

To do so, Commerce considers a variety of factors, probative of a foreign producer's interaction with downstream U.S. customers and the purchaser's control over merchandise, that guide an analysis of whether the foreign producer, as a principal, restrains or directs the purchaser, as its agent. Those factors include: (1) the foreign producer's role in negotiating prices with the downstream U.S. customers, (2) the extent to which the foreign producer interacts with such downstream customers, (3) the extent to which the purchaser maintains inventory of the product, (4) whether the purchaser takes title to goods, (5) the extent to which the purchaser further processes the goods or adds value, (6) the methods of marketing a product by the producer to the U.S. customer in the pre-sale period, and (7) whether identification of the producer on the sales documentation implies an agency relationship during the transactions (collectively, "*India Threaded Rod* factors" or "factors"). *See Steel Threaded Rod from India*, 79 Fed. Reg. 9,164 (Dep't Commerce Feb. 18, 2014) (prelim.

determination of sales at less than fair value, affirmative prelim. determination of critical circumstances, in part, and postponement of final determination) and accompanying Decision Memo. for the Prelim. Determination of the [ADD] Investigation of Steel Threaded Rod from India at 14–15, A-533–855, (Feb. 10, 2014), *available at* https://enforcement.trade.gov/frn/summary/india/2014–03483–1.pdf (last visited Feb. 21, 2020) ("India Threaded Rod Decision Memo."). Commerce's analysis focuses on "whether it is agreed that the agent is to act primarily for the benefit of the principal, not for itself." *Engineered Process Gas*, 62 Fed. Reg. at 24,403.

On remand, Commerce reasonably determines that Kangtai and Customer X were unaffiliated. In *Bio-Lab I*, the court ordered Commerce to reconsider or further explain its reliance on Kangtai's sales to Customer X as EP sales, because Commerce failed to adequately analyze the record evidence and support its determination. *See* 43 CIT at __, 392 F. Supp. 3d at 1267–72, 1276. Although Commerce could have reopened the record on remand, Commerce declined to do so, and makes its determination by analyzing the same record evidence and by offering further explanation. *Remand Results* at 20–22. Commerce recounts in detail why, in consideration of each of the seven *India Threaded Rod* factors, it continues to find a principal-agent relationship absent, from the totality of the circumstances. *See id.* at 5–19.

Although Commerce evaluates each *India Threaded Rod* factor sequentially, its analysis focused, in large part, on four factors that are probative of whether, and the extent to which, Kangtai interacted with downstream U.S. customers.[4] Unlike its analysis in the *Final Results*, Commerce, on remand, specifically considers record evidence concerning price negotiations, methods of marketing, and sales that corroborated Customer X's and Kangtai's statements that Kangtai's interactions with Customer X do not extend to the downstream U.S. customers of Customer X.[5] *See Remand Results* at

[4] The four *India Threaded Rod* factors that examine a foreign producer's relationship with downstream U.S. customers are: the foreign producer's role in negotiating prices with the downstream U.S. customers, the extent to which the foreign producer interacts with such downstream customers, the methods of marketing a product by the producer to the U.S. customer in the pre-sale period, and whether identification of the producer on the sales documentation implies an agency relationship during the transactions. *See Remand Results* at 6–15.

[5] Commerce refers to Customer X's statement that it negotiates prices [[ ]] with Kangtai based on [[ ]] and Kangtai's statement that it "does not determine the ultimate customer or market." *See Remand Results* at 7 n.33 (citing Kangtai SQRA at 14, Ex. A-4; Kangtai Supp. Questionnaire Resp. at 2, CD 58–61, barcodes 3563243–01–04 (Apr. 14, 2017) (internal quotations omitted).

6–14.[6] Commerce examines Kangtai's sales trace and accounting documents, provided by Kangtai in its questionnaire and verification responses, which revealed how Customer X requests a price quote from Kangtai and then negotiates with Kangtai to reach a mutually agreed price. *Id.* at 8 (citing Kangtai's Verification Report at VE-6–8, VE-11, CD 135, bar code 3642610–01 (Nov. 17, 2017) ("Kangtai Verification Report); Kangtai Section A Questionnaire Response at Ex. A-8, CD 8–10, bar codes 3523067–01–03 (Nov. 16, 2016) ("Kangtai SQRA")). Commerce reasons that such negotiations would be unnecessary if Kangtai were, as a principal, dictating the sales terms to Customer X, its agent. *See id.* at 10.[7] Commerce notes that the sales trace documents between Kangtai and Customer X—i.e., purchase orders, sales contracts, and invoices—reflect documentation typical of independently negotiated sales. *Id.* at 15–16. Further, the sales contracts and invoices do not refer to Customer X as an agent, indicate a commission, or reference sales revenue from Kangtai's downstream U.S. customers. *Id.* Although the sales documents provided to the downstream U.S. customer, specifically the bill of lading, identified Kangtai as the producer, Commerce explains that the identity of a producer on such documents does not, taken alone, indicate a principal-agent relationship.[8] *See id.* at 15 (citing India Threaded Rod Decision Memo. at 57). In consideration of the sales documents

[6] By contrast, in its Final Decision Memo., Commerce did not engage with the record evidence and stated, without further explanation, that its "examination of the Kangtai's [sic] financial statements, sales contract, bill of lading, and payment records during verification[] confirmed that Kangtai played no role in communicating with the ultimate downstream customers of Customer X." *See* Final Decision Memo. at 5. Similarly, Commerce noted that its "examination during verification of Kangtai's sales traces and accounting and sales records all identified Customer X as the importer of record that took title to the products upon importation and made payments to Kangtai for these U.S. sales." *Id.* Given the paucity of analysis, this court observed that Commerce appeared to have taken Kangtai's statements of non-affiliation at "face value despite record evidence potentially detracting from this conclusion." *Bio-Lab I*, 43 CIT at __, 392 F. Supp. 3d at 1270.

[7] By contrast, in *India Threaded Rod*, Commerce found a principal-agent relationship existed because the foreign producer negotiated directly with downstream U.S. customers and limited the purchaser's price negotiations. *See* India Threaded Rod Decision Memo at 17. Similarly, in *Engineered Process Gas*, Commerce determined that the foreign producer controlled the price, and other terms of sale, of the purchaser's transactions with downstream U.S. customers, by communicating with the downstream customer. *See id.*, 62 Fed. Reg. at 24,403. Here, by contrast, Commerce did not find a "paper trail" reflecting a principal-agent relationship between Kangtai and Customer X. *See Remand Results* at 22.

[8] Specifically, the [[ ]] identifies Kangtai as the [[ ]], Customer X as the [[ ]], and another customer as [[ ]]. Given that Customer X made its sales on an [[ ]] basis, meaning that Customer X [[ ]], *Remand Results* at 13, [[ ]] would arrange shipping. Therefore, the inclusion of another customer supports Commerce's inference that the sales documents do not suggest that Kangtai acts on Customer X's behalf. *See Remand Results* at 15–16.

between Kangtai and Customer X as well as between Customer X and its downstream U.S. customer, Commerce reasonably infers that Kangtai did not direct, restrain, or control Customer X in its interactions with and sales to downstream U.S. customers. *Id.*[9]

In addition, Commerce addresses the court's concern that Kangtai's U.S. customers encompassed Customer X's customers in its analysis of record evidence. *See Bio-Lab I*, 43 CIT at __, 392 F. Supp. 3d at 1270–71. Even though Kangtai had attended U.S. trade shows,[10] where customers of Customer X were also likely present, Commerce finds that by comparing Kangtai's questionnaire responses listing its U.S. customers[11] with certain sales documentation identifying the ultimate shipment recipient, Kangtai's customers were not also the U.S. customers of Customer X.[12] *Id.* at 8–9. Therefore, the record evidence corroborates Kangtai's statement that it had no contact with Customer X's downstream U.S. customers.[13] *See Remand Results* at 7–9 (citing Kangtai Supp. Questionnaire Resp. at 2, CD 58–61, barcodes 3563243–01–04 (Apr. 14, 2017)). Commerce's review of the record evidence reasonably supports its inference that Kangtai did not play a role in, or direct, Customer X's identification of downstream U.S. customers or direct the terms of sale. *See id.* at 8.

[9] Commerce considers that this factor "strongly weighs in favor" of finding no affiliation between Kangtai and Customer X. *Remand Results* at 10. Unlike *India Threaded Rod* and *Engineered Process Gas*, Commerce explains there was no evidence that Kangtai negotiated prices with downstream customers or that Kangtai controlled the prices Customer X charged to downstream customers. *See Remand Results* at 11 (citing India Threaded Rod Decision Memo. at 15; *Engineered Process Gas*, 62 Fed. Reg. at 24,403).

[10] Kangtai explained that it had met Customer X at a trade show in [[ ]] and began selling to Customer X in [[ ]], during the POR. *See* Kangtai Verification Report at 2.

[11] Kangtai reported [[ ]] other U.S. customers for the POR, [[ ]]. *See* Kangtai Sec. C & D Questionnaire Response at 8, CD 15, barcode 3528720–01 (Dec. 9, 2016).

[12] Commerce notes that sales documentation on the record identified [[ ]] as a customer of Customer X. *Remand Results* at 9 (citing Kangtai SQRA at Ex. A-8; Kangtai Verification Report at VE-11). However, Kangtai did not list [[ ]] as a U.S. customer in its questionnaire responses. *Id.*

[13] Plaintiffs assert that Commerce does not address the *India Threaded Rod* factor concerning the foreign producer's role in negotiating price and other terms of sale, because Commerce focused on the definition of "U.S. customer." *See* Pls.' Br. at 6–7. However, Plaintiffs' argument elides the context in which Commerce discussed this term and discounts Commerce's further analysis. In the *Remand Results*, Commerce points to Kangtai's verification report, where Commerce confirmed with Kangtai how it had defined "U.S. Customer," namely as a customer for sale for exportation to the United States, not a customer located in the United States. *Remand Results* at 9 (citing Kangtai Verification Report at Ex. VE-9). Commerce notes that irrespective of Kangtai's definition, it would not necessarily agree with that characterization, if there were contrary evidence. *Id.* at 10. Moreover, Commerce refers to record evidence—beyond the characterization of U.S. customer—discussed above, indicating that Kangtai did not direct or restrain Customer X in its price negotiations or terms of sale to Customer X's downstream U.S. customers. See Remand Results at 7–11.

Commerce also considers the remaining three *India Threaded Rod* factors, which are probative of whether Customer X exercised control over merchandise.[14] Based on sales records, Commerce finds that Customer X takes title to merchandise before it leaves Kangtai's factory.[15] *Remand Results* at 13, n.53 (citing Kangtai SQRA at Exs. 8, 14). However, Commerce observes that Customer X does not maintain inventory of Kangtai's products[16] and, further, does not process or add value to that merchandise. *See Remand Results* at 13–14. Although, as Commerce acknowledges, a lack of inventory may indicate that Customer X is an agent of Kangtai, Commerce explains that a lack of inventory could also evince a foreign producer-middle man relationship. *See id.* at 27. Commerce notes that not all foreign producers can find customers and negotiate sales abroad; instead, a foreign producer may sell to a middle man with its own customers. *See id.* Therefore, a middleman may elect to ship directly to its customers, without incurring the extra costs of warehousing goods. *Id.* As Commerce notes, it does not necessarily follow from such an arrangement that the price a middle man charges to its customers is one directed by the foreign producer. *Id.* In consideration of the totality of the circumstances, Commerce reasonably determines that its analysis of all *India Threaded Rod* factors and the record evidence weigh in favor of finding that Kangtai and Customer X were not

---

[14] The remaining factors are: whether the purchaser takes title to goods, the extent to which the purchaser maintains inventory of the product, and the extent to which the purchaser further processes the goods or adds value. *See Remand Results* at 13–14.

[15] Plaintiffs allege that Commerce fails to explain why payment was not tied to downstream delivery, when, of the two sales traces on record, Customer X had paid for one sale on time yet another sale [[ ]] later. *See* Pls.' Br. at 10. However, Commerce in its *Remand Results* does not consider the gap between delivery and payment dates to be significant. *See Remand Results* at 29. Commerce notes that the sales documents identified Customer X as the consignee, or the owner of the consignment to which title transfers. *Id.* Commerce also explains that, because sales were made [[ ]], title transfers to the consignee when the merchandise is claimed for delivery at Kangtai's factory. Id. at 28. Commerce therefore infers that the payment terms, under such an [[ ]] sale, required Customer X to pay within 30 days after the merchandise was picked up at Kangtai's factory. *Id.* In Commerce's view, this sales structure further suggests that Customer X was not a "go-through" of Kangtai, because it "owned" merchandise until delivery to its downstream customer. *Id.*

[16] Commerce also addresses the court's concern that the record "contains no evidence concerning when Customer X takes title or when title is transferred[.]" *Bio-Lab I*, 43 CIT at __, 392 F. Supp. 3d at 1269. On remand, Commerce explains that, although the sales contract between Kangtai and Customer X requires payment [[ ]], the sales contract, along with the bill of lading, also indicates that the sales were made [[ ]], where Kangtai is responsible to make the merchandise available for pick-up by Customer X. *See Remand Results* at 16–17 (citing Kangtai Verification Report at Ex. VE-11; Kangtai SQRA at 5).Therefore, Commerce reasonably concludes that Customer X received merchandise, even if it did not physically take inventory, and paid for the merchandise after received, i.e., shipped. *See id.* at 16.

affiliated. *See id.* at 18–19. The court cannot say this conclusion is unreasonable.[17]

Commerce considers evidence that indicated Customer X's independence from Kangtai, such as the sales trace and accounting documents, as well as detracting evidence, namely that the U.S. downstream customer was included on the bill of lading and that Kangtai attended trade shows, where Customer X's U.S. customers may have been in attendance. *See id.* at 18–19.[18] However, on review of this detracting evidence, Commerce "s[aw] no reason to infer" that Kangtai was involved in setting prices or other terms of downstream sales or that Kangtai directed Customer X. *Id.* at 19. Commerce also weighs its findings that Customer X does not maintain or take physical custody of the product and does not further process that product. *See id.* at 18–19. However, given that the record evidence provides no indication that Kangtai directed prices Customer X charged to downstream U.S. customers or effected other terms of sale, Commerce concludes, from the totality of the circumstances, that Kangtai and Customer X were not principal and agent. *Id.* at 19.

According to Plaintiffs, however, the record is inadequate to support Commerce's determination of non-affiliation, and, even, "as-is," the record does not support that finding. *See* Pls.' Br. at 1–5. Plaintiffs' arguments are unavailing. Plaintiffs contend Commerce cannot cure a "fundamentally inadequate" administrative record by "rewriting its

---

[17] Plaintiffs' contention that Commerce erroneously assigned certain *India Threaded Rod* factors less weight than others, and ignored others altogether, in its evaluation of the totality of the circumstances lacks merit. *See* Pls.' Br. 14. Commerce's task, to determine the existence of a principal-agent relationship, necessitates an accounting of all circumstances, that taken together, weigh in favor of one conclusion. Commerce, here, analyzes each factor individually and then discussed why, in view of all circumstances, including detracting evidence, the record supported a finding that Kangtai and Customer X were not affiliated. *See Remand Results* at 18–19. It is not the role of the court to reweigh facts and substitute its judgment as to the relative weight of facts for that of Commerce. *See Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1376 (Fed. Cir. 2015).

[18] Commerce further addresses whether the fact that the majority of Kangtai's sales were made to Customer X, i.e., [[ ]], established a close supplier relationship. *See Bio-Lab I*, 43 CIT at __, 392 F. Supp. 3d at 1270. By regulation, Commerce considers a close supplier relationship, or a relationship that is significant and not easily replaced, in a finding of affiliation based on control. *See* 19 C.F.R. 351.102(b)(3) (2013); *see also Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Final Results of [ADD] Administrative Reviews*, 62 Fed. Reg. 18,404, 18,417 (Dep't Commerce Apr. 15, 1997); Issues and Decision Memo. for the Final Determination in the [ADD] Investigation of Multilayered Wood Flooring from the [PRC] at 83, A-570–970, (Oct. 11, 2011), *available at* https://enforcement.trade.gov/frn/summary/prc/2011–26932–1.pdf (last visited Feb. 21, 2020). Commerce explains that Kangtai entered into business with Customer X only during the POR, and the relationship terminated in 2016, after Kangtai received a high cash deposit rate in the 2014–2015 administrative review. *See Remand Results* at 17–18. Commerce further notes that there was no evidence that Customer X sourced all or the majority of merchandise from Kangtai during the POR. *Id.* at 18. Therefore, Commerce reasonably concludes that neither was reliant on one another, irrespective of the level of sales. *Id.* at 17–18.

rationale." Pls.' Br. at 4. However, the court in *Bio-Lab I* explained that Commerce's determination was unreasonable "[w]ithout more evidence supporting its determination, or an explanation after at least considering all the relevant factors[.]" 43 CIT at __, 392 F. Supp. 3d at 1271. Here, Commerce elected to further explain the basis for its finding, *see Remand Results* at 20, and, for the reasons discussed above, reasonably determined that the record was sufficient to make its affiliation determination. Therefore, contrary to Plaintiffs' allegation, even if Commerce's elaboration of its initial finding could be characterized as a "rewrit[ing]," "offer[] [of] a somewhat different rationale," or "repackag[ing]", Commerce followed the court's remand order to reconsider or further explain the basis of its initial findings. Pls.' Br. at 2–4. Further, Plaintiffs, in arguing that the record evidence does not support Commerce's finding of non-affiliation, contest Commerce's interpretation of the record. Pls.' Br. at 5–14. However, "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). It is not the court's role to reweigh evidence. *See Downhole Pipe*, 776 F.3d at 1376.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's *Remand Results* is sustained. Judgment will enter accordingly.

Dated: February 26, 2020
New York, New York

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

Slip Op. 20–26

BEBITZ FLANGES WORKS PRIVATE LIMITED, Plaintiff, v. UNITED STATES, Defendant, and COALITION OF AMERICAN FLANGE PRODUCERS, Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Court No. 18–00224
Public Version

[Sustaining the U.S. Department of Commerce's final determination in the countervailing duty investigation of stainless steel flanges from India.]

Dated: March 2, 2020

Peter J. Koenig, Squire Patton Boggs (US) LLP, of Washington, DC, for Plaintiff Bebitz Flanges Works Private Limited.

Geoffrey M. Long, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Daniel B. Pickard, Stephanie M. Bell, and *Cynthia C. Galvez*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Coalition of American Flange Producers.

OPINION AND ORDER

Barnett, Judge:

This action is before the court on Plaintiff Bebitz Flanges Works Private Limited's ("Bebitz") motion for judgment on the agency record challenging the U.S. Department of Commerce's ("Commerce" or "the agency") final determination in the countervailing duty ("CVD") investigation of stainless steel flanges from India.[1] *See Stainless Steel Flanges From India*, 83 Fed. Reg. 40,748 (Dep't Commerce Aug. 16, 2018) (final affirmative [CVD] determination and final affirmative determination of critical circumstances) ("*Final Determination*"), ECF No. 20–4, and accompanying Issues and Decision Mem., C-533–878 (Aug. 10, 2018) ("I&D Mem."), PR 315.

Bebitz challenges Commerce's failure to grant Bebitz's extension requests in full; rejection of Bebitz's supplemental CVD questionnaire response as untimely; and use of total adverse facts available ("AFA") to determine Bebitz's CVD rate. *See generally* Bebitz Opening Br. ("Bebitz's Mem."), ECF No. 29. Defendant United States ("the Government") and Defendant-Intervenor Coalition of American Flange Producers ("CAFP") each filed responses in support of Commerce's determination. *See* Def.'s Resp. to Pl.'s Mot. for J. on the Agency R. ("Gov't Resp."), ECF No. 34; Resp. Br. of Def.-Int. Coalition of American Flange Producers ("CAFP's Resp."), ECF No. 35.

For the reasons discussed below, the court denies Bebitz's motion and sustains Commerce's *Final Determination*.

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)

[1] The administrative record for this case is divided into a Public Administrative Record ("PR"), ECF No. 20–2, and a Confidential Administrative Record ("CR"), ECF No. 20–3. Parties submitted joint public and confidential appendices containing record documents cited in their briefs. *See* Public R.A. of Documents, ECF No. 38, and Am. Public R.A. of Documents, ECF No. 45; Confidential R.A., ECF No. 44. The court references the confidential version of the relevant record documents, unless otherwise specified.

(2012),[2] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

BACKGROUND

In August 2017, Commerce received a countervailing duty petition from CAFP regarding stainless steel flanges from India and, shortly thereafter, timely initiated a CVD investigation. *See Stainless Steel Flanges from India and the People's Republic of China*, 82 Fed. Reg. 42,654, 42,655 (Dep't Commerce Sept. 11, 2017) (initiation of CVD investigations), PR 44. The period of investigation was calendar year 2016. *Id*.

On October 3, 2017, Commerce selected Bebitz as a mandatory respondent in the investigation. *See* Respondent Selection Mem. (Oct. 3, 2017) at 2, 4–5, CR 23, PR 83. On October 4, 2017, Commerce issued a CVD questionnaire to Bebitz. *See* CVD Questionnaire (Oct. 4, 2017) ("Initial Questionnaire"), PR 84.

In section III of the questionnaire, Commerce instructed Bebitz to identify companies with which it is affiliated pursuant to 19 U.S.C. § 1677(33) and to "describe in detail the nature of the relationship between [Bebitz] and [its affiliates]." *Id*. § III, p. 1. Commerce further instructed Bebitz to provide a complete questionnaire response for affiliates that are cross-owned and produce the subject merchandise. *Id*. § III, p. 2. Commerce explained that "cross-ownership exists between two or more corporations whe[n] one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets." *Id*. (citing 19 C.F.R. § 351.525(b)(6)(vi)). Commerce advised Bebitz that it was "responsible for identifying all cross-owned affiliates" and if Bebitz was "unclear as to which companies must be included in [Bebitz's] response," then Bebitz "must notify [Commerce] in writing within 14 days of the date of th[e] questionnaire." *Id*. § III, pp. 2–3. Commerce set October 18, 2017, as the deadline for Bebitz's identification of its affiliates and November 17, 2017, as the deadline for the remainder of the questionnaire response (including the response of any cross-owned affiliates). *Id*. (cover page).

---

[2] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are generally to the 2012 edition. However, the Trade Preferences Extension Act ("TPEA"), Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015), made several amendments to the antidumping and countervailing duty laws. Section 502 of the TPEA amended 19 U.S.C. § 1677e. *See* TPEA § 502. The TPEA amendments affect all antidumping duty determinations made on or after August 6, 2015. *See* Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015, 80 Fed. Reg. 46,793 (Dep't Commerce Aug 6, 2015). Accordingly, all references to 19 U.S.C. § 1677e are to the amended version of the statute.

Bebitz timely requested an extension to October 25, 2017, to respond to the portion of the Initial Questionnaire regarding Bebitz's affiliates. Bebitz Ext. Request to Answer Cross-Owned Questionnaire (Oct. 17, 2017), PR 91. Commerce partially granted the extension to October 23, 2017. Affiliated Cos. Resp. Deadline Ext. (Oct. 17, 2017), PR 92. On October 23, 2017, Bebitz submitted its response. *See generally* Bebitz Resp. to Sec. III Cross-Owned Questionnaire (Oct. 23, 2017) ("Bebitz's Affiliation Resp."), CR 28, PR 95. Therein, Bebitz asserted that it had no cross-owned affiliates. *Id.* at 1–2. In that same response, Bebitz acknowledged that Viraj Profiles Limited ("Viraj") was part of a "Personal Family Grouping" and a "[p]roducer of subject merchandise." *Id.*, Ex. 1.

On November 7, 2017, CAFP filed comments arguing that Bebitz's response was deficient because, in relevant part, Bebitz failed to adequately explain why it did not report Viraj as a cross-owned affiliate in light of information to the contrary.[3] CAFP's Affiliation Cmts. at 2–5. CAFP suggested that Commerce "should direct Bebitz to provide a full questionnaire response for Viraj" and additional information regarding "each affiliated party." *Id.* at 5. Bebitz did not respond to CAFP's Affiliation Comments.

On November 16, 2017, Bebitz submitted its Initial Questionnaire Response that included several exhibits but did not include a response on behalf of Viraj as a cross-owned company. *See generally* Ltr. To Sec'y from Bebitz (Nov. 16, 2017), ECF No. 46. One exhibit contained Bebitz's financial statements, note 34 of which provided "[[ ]]" and part A(b) therein identified "[[ ]]." *Id.*, Annex. 3, p. 42. Identified on that list is [[ ]]. *Id.*

Note 34, part B, further lists the value of related party transactions during the fiscal year, indicating that Bebitz purchased [[ ]] Indian rupees in goods and materials from [[ ]]. *Id.*, Annex. 3, p. 43. This value represents more than [[ ]] percent of the total cost of materials Bebitz consumed during that year ([[ ]] Indian rupees). *Id.*, Annex. 3, p. 36.

Four days later, on November 20, 2017, Commerce instructed Bebitz to (1) provide a "complete questionnaire response for Viraj" and "a detailed description of the nature of [each affiliate's] business"; (2)

[3] Specifically, CAFP cited evidence of the family and business relationships between the two companies presented in a U.S. International Trade Commission investigation, two articles discussing the connections between Bebitz and Viraj, and Bebitz's own reporting identifying Viraj as part of a "Personal Family Grouping" and a producer of subject merchandise. *See* Pet'rs' Cmts. on Bebitz's Affiliated Cos. Questionnaire Resp. (Nov. 6, 2017) ("CAFP's Affiliation Cmts.") at 3–5, CR 32, PR 100.

"identify the owners (direct and indirect), directors, board members, and managers for each [affiliate] and for Bebitz"; and (3) describe in detail Bebitz's relationship with each affiliate. *See* Suppl. Questionnaire for Affiliation Questionnaire Resp. (Nov. 20, 2017) ("Suppl. Questionnaire") at 3, PR 133. If Bebitz claimed "that an [affiliate] is not cross owned," then Bebitz was to "provide a detailed description of why such treatment is appropriate." *Id*. Commerce set a deadline of November 27, 2017, for Bebitz's response. *Id*. at 1–2.

On November 22, 2017, Bebitz submitted its first request for an extension of time, to December 11, 2017, to respond to the Supplemental Questionnaire. *See* Bebitz Ext. Request to Answer Cross-Owned Questionnaire (Nov. 22, 2017), PR 135. Commerce granted Bebitz's request, in part, extending the deadline to November 30, 2017. First Suppl. Questionnaire of Affiliated Cos. Resp. Deadline Ext. (Nov. 22, 2017), PR 137. On November 26, 2017, Bebitz made a second request for an extension to December 11, 2017. Bebitz Ltr. to Commerce as to Bebitz Suppl. QR Ext. Request (Nov. 26, 2017), PR 144. Commerce granted this request, in part, further extending the deadline to December 4, 2017. First Suppl. Questionnaire of Affiliated Cos. Resp. Second Deadline Ext. (Nov. 27, 2017) ("Second Ext."), PR 145. On December 1, 2017, Bebitz filed a third request for an extension, this time to December 19, 2017. Bebitz Ltr. to Commerce as to Bebitz Suppl. QR Ext. Request (Dec. 1, 2017), PR 152. Commerce denied Bebitz's third extension request. First Suppl. Questionnaire of Affiliated Cos. Resp. Third Deadline Ext. Req. (Dec. 1, 2017), PR 153.

On December 4, 2017, at 4:40 p.m. (20 minutes before the 5:00 p.m. deadline), Bebitz filed a fourth extension request, asking that the deadline be extended until the next day, December 5, 2017. Bebitz Ltr. to Commerce as to Bebitz Suppl. Q/R Ext. Request (Dec. 4, 2017), PR 155. That next day, on December 5, 2017, beginning at 10:24 a.m., Bebitz submitted its response to the Supplemental Questionnaire. Rejection of Suppl. Resp. (Dec. 6, 2017) ("Suppl. Questionnaire Resp. Determination") at 1, PR 157.

Commerce rejected Bebitz's December 5, 2017, submission, explaining that Commerce did not respond to Bebitz's fourth extension request because it "was filed shortly before the deadline" and Commerce "did not have sufficient time to consider the request." *Id*. Commerce further explained that because Bebitz filed its extension request without allowing sufficient time for the agency to respond before the deadline, Bebitz's submission was due by 8:30 a.m. on December 5, 2017, and Bebitz failed to meet that deadline. *Id*. at 1–2. Thus, pursuant to sections 351.302 and 351.104 of Commerce's regulations,

the agency rejected Bebitz's submission as untimely and did not retain a copy in the record.[4] *Id.* at 2.

On December 7, 2017, Bebitz requested that Commerce reconsider its rejection of the submission. First Recons. Req. On December 12, 2017, Commerce rejected Bebitz's request and its assertion that the agency had not afforded Bebitz sufficient time to provide the requested information. *See* Resp. to First Recons. Req. at 2. Commerce noted that Bebitz had 42 days to respond to the Initial Questionnaire (37 days plus a five-day extension) and 14 additional days to answer the Supplemental Questionnaire. *Id.* Commerce explained that Bebitz was "fully aware of the consequences of untimely submissions." *Id.* Finally, Commerce noted that although Bebitz requested that Commerce accept its untimely submission, Bebitz had not demonstrated that it met the "extraordinary circumstances" standard for an untimely extension as provided in 19 C.F.R. § 351.302(c). *Id.* at 3.

Just over a month later, on January 16, 2018, Commerce issued its preliminary determination. *See generally Stainless Steel Flanges From India*, 83 Fed. Reg. 3,118 (Dep't Commerce Jan. 23, 2018) (prelim. affirmative CVD determination, prelim. affirmative and alignment of final determination with final antidumping duty determination) ("*Prelim. Determination*"), PR 236; Decision Mem. for the Prelim. Determination in the CVD Investigation for Stainless Steel Flanges from India (Jan. 16, 2018) ("Prelim. Decision Mem."), PR 228. Therein, Commerce preliminarily found that it did not have a "complete and accurate depiction of the company's corporate structure" and Bebitz did not identify "which companies it is providing responses for in its response." Prelim. Decision Mem. at 5. Commerce also preliminarily found that Viraj was cross-owned with Bebitz and Viraj is a producer of subject merchandise "that exercises significant influence over Bebitz." *Id.* at 8. Pointing to its rejection of Bebitz's late submission and its denial of Bebitz's request for reconsideration, Commerce found that necessary information was not on the record and Bebitz had withheld requested information. *Id.* at 12–13.

[4] Commerce also stated that it rejected the submission as incomplete because the submission referenced 29 exhibits, "none of which were included in the filing." Suppl. Questionnaire Resp. Determination at 2. Bebitz argued that it had submitted all 29 exhibits. *See* Bebitz Ltr. to Commerce as to Bebitz Resp. to Rejection Ltr. (Dec. 7, 2017) ("First Recons. Req.") ¶ 7, PR 161. Commerce also said that Bebitz failed to submit a public version of its submission. *See* Resp. to Recons. Req. (Dec. 12, 2017) ("Resp. to First Recons. Req.") at 2, PR 166. Bebitz claimed that, pursuant to the "one-day lag rule," Commerce had already rejected the submission before the public version was due. Bebitz Reply to Petitioner and Commerce Ltrs. (Jan. 8, 2018) at 2, PR 210 (citing 19 C.F.R. § 351.303(c)). Commerce did not rely on missing exhibits or the lack of a public version in the Issues and Decision Memorandum, *see* I&D Mem. at 12–15, and the parties have not raised these issues before the court.

Commerce further found that Bebitz failed to cooperate to the best of its ability such that an adverse inference was warranted. *Id*. Based on these preliminary findings, Commerce assigned Bebitz a preliminary CVD rate of 239.61 percent using adverse facts available. *Prelim. Determination*, 83 Fed. Reg. at 3,119.

Interested parties filed comments with Commerce regarding the preliminary determination. *See generally* CAFP's Rebuttal Br. (July 9, 2018), CR 146, PR 300; Bebitz's Case Br. (July 2, 2018) ("Bebitz's Case Br."), PR 295. Bebitz argued that Commerce erred in denying its extension request and using AFA to determine its preliminary CVD rate. Bebitz's Case Br. at 1–7.

In its *Final Determination*, Commerce confirmed its preliminary decision to use AFA to determine Bebitz's CVD rate. I&D Mem. at 14. Commerce again found "that Viraj is a subject merchandise producer[] that is cross-owned with Bebitz since Viraj exercises significant influence over Bebitz." *Id*. at 12 (internal quotation marks omitted) (citing Prelim. Decision Mem. at 8). Because Bebitz did not respond timely to the Supplemental Questionnaire, Commerce found that the record lacked accurate and reliable information regarding Bebitz's affiliates and, thus, Commerce applied facts available to determine "which other potential cross-owned companies, if any, should have been reported" and "which subsidy programs were utilized." *Id*. at 13. Commerce found that an adverse inference was warranted because "Bebitz failed to cooperate by not acting to the best of its ability to comply with [the agency's] requests for necessary information." *Id*. at 15. As a result, Commerce inferred (1) that Bebitz and Viraj benefited from the programs subject to Commerce's investigation "with the exception of certain newly alleged subsidies programs for which Bebitz and Viraj provided timely and complete responses," *id*. at 14; and (2) that the benefit to Bebitz from the income tax reduction programs was the difference between no income tax and the standard income tax rate for corporations, *i.e*., 30 percent for the combined income tax programs, *id*. at 4; see also Prelim. Decision Mem. at 15.[5] As a result of adjustments made from the *Preliminary Determination*, Commerce assigned a final CVD rate to Bebitz of 256.16 percent, based on AFA.[6] *See Final Determination*, 83 Fed. Reg. at 40,749; I&D Mem. at 5, 34.

---

[5] Commerce incorporated its AFA findings from the Preliminary Decision Memorandum into the final Issues and Decision Memorandum. *See* I&D Mem. at 4.

[6] Bebitz is not challenging the AFA rate itself or the manner in which Commerce determined that rate (other than the reliance on an adverse inference).

DISCUSSION

I. Commerce's Denial of an Extension of Time

A. Legal Framework

As relevant to this case, Commerce's regulations provide that if a party requests an extension of time before the pertinent deadline expires, the agency may extend that deadline unless expressly precluded by statute upon a showing of "good cause." 19 C.F.R. § 351.302(b). If a party files an extension request after the expiration of the deadline, the request "will not be considered unless the party demonstrates that an extraordinary circumstance exists." *Id.* § 351.302(c). If a party fails to comply with the time limits set by Commerce, then the agency "will not consider or retain in the official record of the proceeding" the untimely submitted material. *Id.* § 351.302(d). When a party submits an extension request without allowing sufficient time for Commerce to respond before the deadline, the submission must be filed by 8:30 a.m. the following work day. *Extension of Time Limits*, 78 Fed. Reg. 57,790, 57,792 (Dep't Commerce Sept. 20, 2013) (final rule).

"[A]bsent constitutional constraints or extremely compelling circumstances," the court "will defer to the judgment of [the] agency regarding the development of the agency record." *Dongtai Peak Honey Indus. v. United States*, 777 F.3d 1343, 1351 (Fed. Cir. 2015) (citations omitted). Additionally, "[i]n order for Commerce to fulfill its mandate to administer" the CVD law, "it must be permitted to enforce the time frame provided in its regulations." *Id.* (quoting *Yantai Timken Co. v. United States*, 31 CIT 1741, 1754, 521 F. Supp. 2d 1356, 1371 (2007), *aff'd*, 300 F. App'x 934 (Fed. Cir. 2008)).

B. Parties' Contentions

Bebitz contends that Commerce abused its discretion by failing to accept the company's late filing or grant its extension requests in full. *See* Bebitz's Mem. at 5–8. Bebitz submits that "[t]he obligation and clock for Bebitz to answer as to Viraj did not begin [to run] until Commerce specifically asked Viraj in particular to answer" and the standard for cross-ownership or control as provided in the Initial Questionnaire is ambiguous. *Id.* at 6–7; *see also* Pl. Bebitz Reply Br. ("Bebitz's Reply") at 6, ECF No. 37.[7] Bebitz also contends that Commerce should have accepted its submission because the need for an accurate CVD rate outweighs the need to strictly adhere to the statu-

---

[7] Bebitz's Reply is not paginated and, thus, the page numbers with respect to Bebitz's Reply refer to the ECF page numbers.

tory deadlines for the investigation. Bebitz's Mem. at 7–8; *see also* Bebitz's Reply at 4 (claiming that Commerce's purported delay in issuing the Supplemental Questionnaire indicates that "Commerce was not concerned about statutory deadlines").

The Government responds that Bebitz had sufficient time to provide the requested information. Gov't Resp. at 11–12; *see also* CAFP's Resp. at 13–19. The Government submits that Commerce must be allowed to enforce its deadlines and determinations with respect to extension requests. Gov't Resp. at 12; *see also* CAFP's Resp. at 8 ("Commerce is under no obligation to permit companies to provide questionnaire responses on a timeline of their own choosing."). The Government contends that Bebitz was made aware of its obligation to provide information regarding Viraj in the Initial Questionnaire, which unambiguously states that Bebitz "is responsible for identifying all cross-owned affiliates." Gov't Resp. at 10–11 (quoting Initial Questionnaire § III, pp. 2–3); *see also* CAFP's Resp. at 11–13.

C. Substantial Evidence Supports Commerce's Rejection of Bebitz's Untimely Submission

Bebitz contends that in rejecting its untimely submission, Commerce abused its discretion by prioritizing the need for finality over the agency's obligation to determine the most accurate CVD margin. Bebitz's Mem. at 8 (citing *Wuhu Fenglian Co. v. United States*, 36 CIT 642, 648, F. Supp. 2d 1398, 1403 (2012)). The record indicates otherwise. Commerce granted Bebitz multiple extensions, I&D Mem. at 12–13, and had advised Bebitz of the potential consequences of failing to meet the agency's deadlines, Initial Questionnaire § I, p. 9.

Bebitz failed to timely comply with Commerce's instructions, which resulted in Commerce rejecting the untimely submission. *See* I&D Mem. at 12–13. Furthermore, the court is not persuaded that Commerce was required to accept Bebitz's untimely filing on the basis that the agency did not issue its *Preliminary Determination* until January 16, 2018.[8] *See* Bebitz's Mem. at 8. It is not for Bebitz "to establish Commerce's deadlines or dictate to Commerce whether and when Commerce actually needs the requested information."[9] *Dongtai Peak Honey*, 777 F.3d at 1352.

[8] Bebitz incorrectly indicates that the *Preliminary Determination* was issued on "January 23, 2019." Bebitz's Mem. at 8.

[9] The court rejects Bebitz's contention that Commerce's Antidumping Manual demonstrates that Commerce acted unreasonably in requiring Bebitz to respond to the Supplemental Questionnaire in 14 days. *See* Bebitz's Mem. at 6 (citing Antidumping Manual, U.S. Dep't of Commerce, Int'l Trade Admin. ("Antidumping Manual") (2015), *available at* https://web.archive.org/web/20180417165209/https://enforcement.trade.gov/admanual/index.html (last visited Feb. 26, 2020)). The passage Bebitz cites refers to Commerce's guidelines

Bebitz's broader claim that it was not afforded a reasonable opportunity to provide the requested information is similarly unpersuasive. *See* Bebitz's Mem. at 5–6. Again, when Commerce issued the Initial Questionnaire, Commerce requested information concerning and from cross-owned affiliates. Initial Questionnaire § III, p. 2. Bebitz provided certain information about its relationship with Viraj but took the position that the companies were not cross-owned and did not, then, respond to Commerce's questions with respect to Viraj. *See* I&D Mem. at 13–14. Commerce provided Bebitz a second opportunity to provide relevant information with respect to Viraj; however, as discussed, Bebitz did not provide a timely response even after receiving multiple extensions.[10] *See id*. at 12–13.

Bebitz's argument that Commerce should have granted its extension requests in full lacks merit. *See* Bebitz's Mem. at 7. Commerce's regulation, 19 C.F.R. § 351.302(b) and (c), provides the agency with substantial discretion whether to grant or deny an extension request and, particularly in light of the multiple extensions Commerce did provide, Bebitz fails to establish that Commerce abused its discretion or otherwise acted unlawfully in denying Bebitz's requests for additional extensions.[11] *See Yantai Timken*, 31 CIT at 1754–55, 521 F. Supp. 2d at 1371–72.

concerning *issuing* supplemental questionnaires in *antidumping* cases, Antidumping Manual at ch. 4, p. 17; it does not speak to the amount of time Commerce affords a respondent to *respond* to a supplemental questionnaire in a *CVD* investigation. Bebitz fails to take into account, among other things, that CVD investigations are governed by distinct statutory deadlines which are generally shorter than the deadlines governing antidumping investigations.

[10] Even if the court construed Bebitz's argument as asserting that "good cause" or "extraordinary circumstances" merited granting an extension of time, Bebitz has not identified an error in Commerce's consideration of these issues.

[11] In rejecting Bebitz's December 5, 2017 submission, Commerce attached a November 24, 2014 memorandum from an unrelated antidumping duty administrative review, memorializing a meeting between Commerce officials and Mr. Koenig of Squire Patton Boggs (US) LLP, counsel to Bebitz in this investigation. Suppl. Questionnaire Resp. Determination at Attach. II (Mem. Re. Antidumping Duty Admin. Review of Solid Urea from the Russian Federation: Ex Parte Meeting with Rep. from Squire Patton Boggs LLP, Counsel to Respondent MCC EuroChem ("*Russia Urea Mem.*")). The meeting was to discuss counsel's "history of late filings . . . and stress the need to adhere strictly to submission deadlines" and the action "a party must take when it is unable to comply with the electronic filing requirement." *Russia Urea* Mem. at 1. Commerce advised Mr. Koenig that, "from this point forward, all late submissions by Squire Patton in this or any other proceeding before the [agency] would be rejected" unless counsel complied with Commerce's procedures for requesting extensions. *Id*. at 2. While Commerce referred to this memorandum and counsel's history of late filings in the memorandum rejecting Bebitz's untimely submission, Commerce's rejection was reasonably based on the facts in this investigation, including Bebitz's failure to meet the extended deadline. Suppl. Questionnaire Resp. Determination at 2. Nevertheless, the court would encourage Commerce to maintain a clear distinction between its efforts to address a responden't failure to cooperate in a proceeding and its efforts to discipline counsel for their actions distinct from the actions of their clients.

Bebitz asserts that it was not responsible for reporting information from Viraj in response to the Initial Questionnaire because the questionnaire did not "explicitly" request that information. Bebitz's Mem. at 6–7; Bebitz's Reply at 6. The purpose of the questionnaire is to allow Commerce to gather information from the respondent. Commerce does this by asking questions and providing the criteria for responding. Commerce provided criteria for identifying affiliated and cross-owned companies and required Bebitz to identify those companies that met the criteria. Initial Questionnaire § III, p. 2. Commerce also instructed Bebitz to request further guidance if it was unclear as to which companies to include. *Id.* § III, pp. 2–3. As the party in possession of the necessary information, the burden is on Bebitz to develop the record, not Commerce. *See, e.g., NTN Bearing Corp. of Am. v. United States*, 997 F.2d 1453, 1458 (Fed. Cir. 1993) (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993)). "Intentional obtuseness on the part of [a] respondent does not obviate Commerce's" clear request "for the relevant information." *See Hyundai Heavy Indus., Co. v. United States*, 42 CIT __, __, 332 F. Supp. 3d 1331, 1341–42 (2018).

Bebitz seeks to rely on *Ta Chen Stainless Steel Pipe v. United States*, 23 CIT 804 (1999), and *Böwe-Passat v. United States*, 17 CIT 335 (1993), in support of its claim that it lacked notice regarding the need to provide information concerning Viraj until Commerce issued the Supplemental Questionnaire. *See* Bebitz's Mem. at 6–7. However, in *Ta Chen*, the court found that Commerce had told the respondent that it had not determined how to classify the sales at issue and, thus, had not confirmed the need for the information in question. 23 CIT at 818–19. Similarly, in *Böwe-Passat*, Commerce's supplemental request for information appeared to the court to focus on information distinct from that which Commerce later found to be deficient. 17 CIT at 340. Neither case supports Bebitz's position here. Moreover, to the extent that Bebitz intended to suggest that Commerce failed to provide Bebitz an opportunity to remedy a deficient response, as provided in 19 U.S.C. § 1677m(d), Commerce's Supplemental Questionnaire satisfied that requirement.

For these reasons, substantial evidence supports Commerce's decision to reject Bebitz's untimely submission.

II. Commerce's Use of an Adverse Inference

A. Legal Framework

When necessary information is not available on the record, or an interested party withholds information requested by Commerce, fails to provide requested information by the submission deadlines, sig-

nificantly impedes a proceeding, or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall . . . use the facts otherwise available." 19 U.S.C. § 1677e(a). Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(d). *Id.* Pursuant to section 1677m(d), if Commerce determines that a respondent has not complied with a request for information, it must promptly inform that respondent of the nature of the deficiency and, to the extent practicable in light of statutory deadlines, provide "an opportunity to remedy or explain the deficiency."

If Commerce determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b). "Compliance with the 'best of its ability' standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Commerce uses total adverse facts available when "none of the reported data is reliable or usable," such as when all of the "submitted data exhibit pervasive and persistent deficiencies that cut across all aspects of the data." *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (citing *Steel Auth. of India, Ltd. v. United States*, 25 CIT 482, 487, 149 F. Supp. 2d 921, 928–29 (2001)).

B. Parties' Contentions

Bebitz argues that Commerce's use of AFA was not warranted because (1) Commerce may not draw an adverse inference merely from a failure to respond to a questionnaire; and (2) Commerce set "an impossible deadline" for responses to the Supplemental Questionnaire.[12] Bebitz's Mem. at 8–9; Bebitz's Reply at 7–9. The Government contends that Bebitz was afforded multiple opportunities to comply with Commerce's information requests but failed to provide timely responses, warranting a finding that it did not comply to the best of its ability. *See* Gov'ts Resp. at 15–16; *see also* CAFP's Resp. at 19–20.

[12] Bebitz does not contest that if Commerce properly rejected Bebitz's untimely submission then Commerce properly resorted to facts available. *See* Bebitz's Mem. at 8–9; *see generally* 19 U.S.C. § 1677e(a). Bebitz only contests whether Commerce was permitted to draw an adverse inference. *See* Bebitz's Mem. at 8–9.

C. Commerce's Use of an Adverse Inference is Supported by Substantial Evidence and In Accordance with Law

Substantial evidence supports Commerce's finding that Bebitz did not act to the best of its ability to comply with the agency's information requests and that finding is otherwise in accordance with law.[13]

In response to the Initial Questionnaire, Bebitz reported that none of its affiliates were cross-owned. *See* Bebitz's Affiliation Resp. Bebitz then failed to provide a timely response to Commerce's Supplemental Questionnaire despite receiving multiple extensions. *See* I&D Mem. at 12-13, 14-15 (describing the extensions); Suppl. Questionnaire Resp. Determination.

"To avoid the risk of an adverse inference, respondents must take reasonable steps . . . and put forth maximum effort to investigate and obtain all requested information." *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1306 (Fed. Cir. 2014). Bebitz's failure to do so in this case supports Commerce's conclusion that Bebitz failed to cooperate to the best of its ability. *Id.; see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1275-76 (Fed. Cir. 2012) (finding that Commerce appropriately relied on AFA because the respondent withheld key documents and provided contradictory information).

Commerce explained that the information at issue was key to its investigation and Commerce could not accurately calculate Bebitz's CVD rate without it. *See* I&D Mem. at 15. Commerce explained that Bebitz's failure to provide this information warranted an adverse inference. *Id*. at 14. The court finds no error in this finding. *See Essar Steel*, 678 F.3d at 1276 ("[F]ailing to produce key documents unequivocally demonstrate that Essar did not put forth its maximum effort.").

Bebitz's argument that an adverse inference was not warranted because Commerce set "an impossible deadline" for responding to the Supplemental Questionnaire is unavailing. *See* Bebitz's Mem. at 9. Bebitz's failure to adequately respond to the Initial Questionnaire prompted Commerce to issue the Supplemental Questionnaire; thus, the resulting deadline owes to Bebitz's failure to be more forthcoming

---

[13] While Bebitz asserts that the record lacks substantial evidence that it is cross-owned with Viraj, *see* Bebitz's Mem. at 6, any gap in the evidentiary record is a result of Bebitz failing to provide a timely response to Commerce's Supplemental Questionnaire. Nevertheless, record evidence does support Commerce's conclusion that Viraj is a producer of subject merchandise and exercises significant influence over Bebitz such that Bebitz and Viraj are cross-owned. *See* Prelim. Decision Mem. at 8 & nn.38–40 (citations omitted).

in its initial response. *See* I&D Mem. at 12–13. Indeed, counting from Commerce's initial request for information, Bebitz had a total of 61 days until its response to the Supplemental Questionnaire was due.[14] *See* I&D Mem. at 13 ("Commerce gave Bebitz multiple opportunities and has provided Bebitz two months to provide the responses.")

Even if Bebitz's untimely submission was otherwise responsive, the fact that Bebitz put forth *some* effort is not inconsistent with Commerce's conclusion that Bebitz failed to act "to *the best* of its ability." *See* I&D Mem. at 14 (emphasis added); *Nippon Steel*, 337 F.3d at 1383 (finding that an adverse inference is appropriate when "it is reasonable for Commerce to expect that a more forthcoming response should have been given"). The purpose of the adverse inference provision is to provide an incentive for respondents to cooperate with Commerce's investigations and ensure that a party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. See Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"),[15] H.R. Doc. No. 103–316, vol. 1, at 870 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199; *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014). Commerce's application of an adverse inference in this case is consistent with that purpose because it ensures that Bebitz does not obtain a more favorable rate by failing to disclose the full extent of its relationship with Viraj.

For these reasons, the court finds that Commerce's reliance on total AFA is supported by substantial evidence and otherwise in accordance with law.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Determination* is sustained. Judgment will enter accordingly.

Dated: March 2, 2020
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, JUDGE

[14] Commerce issued the Initial Questionnaire on October 4, 2017, *see generally* Initial Questionnaire, and the extended deadline for responding to the Supplemental Questionnaire was December 4, 2017, *see generally* Second Ext.

[15] The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements Act." 19 U.S.C. §3512(d).

Slip Op. 20–30

Jiangsu Zhongji Lamination Materials Co., (HK) Ltd., Jiangsu Zhongji Lamination Materials Co., Ltd., Jiangsu Zhongji Lamination Materials Stock Co., Ltd. and Jiangsu Huafeng Aluminium Industry Co., Ltd., Plaintiffs, v. United States, Defendant, and Aluminium Association Trade Enforcement Working Group and its Individual Members, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 18–00091

[The court sustains Commerce's Remand Results.]

Dated: March 9, 2020

Jeffrey S. Grimson, Jill A. Cramer, Sarah M. Wyss, and *James C. Beaty*, Mowry & Grimson, PLLC, of Washington, DC, for plaintiffs.

Aimee Lee, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Vania Wang*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

John H. Herrmann and *Joshua R. Morey*, Kelley Drye & Warren, LLP, of Washington, DC, for defendant-intervenors.

OPINION

Katzmann, Judge:

The court returns to a case in which aluminum foil exporters—Jiangsu Zhongji Lamination Materials Co. (HK) Ltd., Jiangsu Zhongi Lamination Materials Co., Ltd., Jiangsu Zhongji Lamination Materials Stock Co., Ltd., and Jiangsu Huafeng Aluminum Industry Co., Ltd., (collectively, "Plaintiffs")—brought an action against the United States ("the Government") to challenge the Department of Commerce's ("Commerce") selection of surrogate values for exports in a nonmarket economy in an antidumping duty investigation on aluminum foil from the People's Republic of China ("PRC"). *Jiangsu Zhongji Lamination Materials Co., (HK) v. United States*, 43 CIT __, 396 F. Supp. 3d 1334 (2019). The court found unpersuasive Plaintiffs' challenges to Commerce's determination on several grounds but granted Commerce's request for a remand to recalculate the irrevocable value-added tax ("VAT")[1] adjustment using a different sale

[1] A VAT is "a consumption tax placed on a product whenever value is added at each stage of the supply chain, from production to the point of sale. The amount of VAT that the user pays is on the cost of the product, less any of the costs of materials used in the product that have already been taxed." *Value-Added Tax*, Investopedia (March 3, 2020, 10:58 AM), https://www.investopedia.com/terms/v/valueaddedtax.asp.

price. *Id.* at 1357. Before the court now is Commerce's *Final Results of Redetermination Pursuant to Court Remand* (Dep't Commerce Nov. 13, 2019), ECF No. 69 ("*Remand Results*"). The Government, as well as the Aluminum Association Trade Enforcement Working Group and its individual members ("Defendant-Intervenors"), ask the court to sustain the *Remand Results*. Def.'s Resp. to Comments on Remand Results at 3, Dec. 23, 2019, ECF No. 74 ("Def.'s Resp."); Def.-Inters.' Letter in Lieu of Responsive Comments Addressing Pls.' Comments on Def.'s Final Results of Redetermination at 2, Dec. 20, 2019, ECF No. 72 ("Def-Inter.'s Br."). Plaintiffs request that the court narrowly sustain the resulting VAT recalculation but argue that other statements by Commerce in the *Remand Results* went beyond the scope of the court's order in *Jiangsu Zhongji*, 396 F. Supp. 3d at 1337. Pls.' Comments on the Dep't of Commerce Final Results of Redetermination Pursuant to Ct. Remand at 3, Dec. 13, 2019, ECF No. 71 ("Pls.' Br."). The court sustains Commerce's *Remand Results*.

BACKGROUND

The relevant legal and factual background of the proceedings involving Plaintiffs has been set forth in greater detail in *Jiangsu Zhongji*, 396 F. Supp. 3d at 1340–46. Information pertinent to the *Remand Results* now before the court is set forth below.

In March 2017, Defendant-Intervenors submitted to Commerce an antidumping petition concerning imports of certain aluminum foil from the PRC. Letter on Behalf of Petitioners to the Dep't re: Petitioners for the Imposition of Antidumping and Countervailing Duties (Mar. 9, 2017), P.R. 1–11. Commerce commenced an antidumping investigation, *Certain Aluminum Foil from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation*, 82 Fed. Reg. 15,691 (Dep't Commerce Mar. 30), P.R. 35, and selected Plaintiffs as a mandatory respondent, Mem. Re: Resp't Selection (May 22, 2017), P.R. 177.

Commerce issued its final determination on March 5, 2018, in which it (1) used South Africa as the primary surrogate country; (2) valued ocean freight using data from Descartes; (3) used Harmonized Tariff Schedule ("HTS") subheading 7602.00 for aluminum waste and scrap instead of subheading 7601.20 for unwrought aluminum; (4) based the VAT adjustment on the reseller's price, rather than the price from the producer to the reseller; and (5) rejected Plaintiffs' claims that deferral beyond the deadline voided the preliminary determination. *See Certain Aluminum Foil from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 83 Fed.

Reg. 9,282 (Dep't Commerce Mar. 5, 2018), P.R. 454 ("*Final Determination*"), and accompanying issues and decision memorandum at 7–8 (Dep't Commerce Feb. 26, 2018), P.R. 451 ("IDM").

Plaintiffs filed a complaint to challenge the *Final Determination* on May 7, 2018. ECF No. 8. They argued that Commerce had (1) selected the wrong primary surrogate country; (2) used inferior data to value international freight; (3) used the incorrect HTS classification; (4) calculated the VAT adjustment based on the wrong transaction; and (5) deferred its preliminary determination beyond the statutory deadline. *Id.* at 8–10. After briefing by the parties, the court held oral argument on July 16, 2019. ECF No. 61. As noted, the court sustained Commerce's determinations for all but its VAT calculation, which the court remanded on Commerce's request. *Jiangsu Zhongji*, 396 F. Supp. 3d at 1357. Commerce released the draft of its remand results, in which it recalculated the VAT adjustment, on October 15, 2019. *Remand Results* at 3. Plaintiffs provided comments on the draft remand results on October 22, 2019. *Id.* The Government then filed Commerce's *Remand Results* on November 13, 2019 and the administrative record on November 20, 2019. ECF Nos. 69–70. Plaintiffs filed comments on the *Remand Results* on December 13, 2019. Pls.' Br. Defendant-Intervenors filed a letter with the court in lieu of comments on December 20, 2019. Def-Inters.' Br. The Government filed its response to Plaintiffs' comments on December 23, 2019. Def.'s Resp.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i). The standard of review in antidumping duty proceedings is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): "[t]he Court shall hold unlawful any determination, finding, or conclusion" of Commerce that is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." "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

Commerce's *Remand Results* are consistent with the court's remand order and previous opinion. *See Jiangsu Zhongji*, 396 F. Supp. 3d

1334. In the *Final Determination*, Commerce based its VAT calculation on the U.S. price of Zhongji's merchandise on resale by its affiliate, Zhongji HK. The Government acknowledged that this methodology was inconsistent with its ultimate methodology deployed in *Fine Furniture (Shanghai) Ltd. v. United States*, 42 CIT __, __, 321 F. Supp. 3d 1282, 1288 (2018), where it was determined on remand that the tax neutrality of the dumping margin calculation required that Commerce base the VAT calculation on the sale by the producer to the affiliated reseller. Def.'s Resp. to Mot. for J. Upon the Agency R. at 39–40, Feb. 25, 2019, ECF Nos. 33–34. Accordingly, here, the court granted the Government's request for a remand. *Jiangsu Zhongji*, 396 F. Supp. 3d at 1357. *See SFK USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (where the agency requests a remand, "the reviewing court has discretion over whether to remand").

On remand, Commerce instead based its VAT calculation on the price at which Zhongji sold the merchandise to its affiliated reseller, Zhongji HK, consistent with its methodology in *Fine Furniture*. *Remand Results* at 5. The VAT calculation is based on the sale price between the affiliated entities because there is no VAT markup between Zhongji and Zhongki HK. *Id.* at 8. As Commerce explained, therefore, this "means the Chinese government bases its final assessment of Zhongji's VAT on its selling price to Zhongji HK." *Id.* Using the correct sales price as the basis for the VAT adjustment, Commerce decreased Plaintiffs' dumping margin for the period of investigation from 48.64 percent to 48.30 percent. *Remand Results* at 10. Plaintiffs and Defendant-Intervenors agree that Commerce made the appropriate adjustment. Pls.' Br. at 1 ("Defendant has complied with the [c]ourt's order with respect to the recalculation and made the appropriate adjustment."); Def.-Inters.' Br. at 2 ("Defendant-Intervenors agree that Defendant's *Remand Results* effectuate this [c]ourt's remand instructions."). The court is likewise persuaded that, in accordance with this court's order and opinion, Commerce "recalculate[d] [Plaintiffs'] VAT adjustment using the correct sale price," and correctly adjusted the dumping margin. *Jiangsu Zhongji*, 396 F. Supp. 3d at 1346.

Although Plaintiffs agree with Commerce's recalculation, they take issue with Commerce's statement in the *Remand Results* that:

> This cost, therefore, functions as an "export tax, duty, or other charge," because the firm does not incur it but for exportation of the subject merchandise, and under Chinese law must be recorded as a cost of exported goods. It is for this "export tax, duty, or other charge" that Commerce makes a downward adjustment to U.S. price under section 772(c) of the [Tariff] Act [of 1930].

Pls.' Br. at 2 (quoting *Remand Results* at 7). According to Plaintiffs, "this [c]ourt did not reach the merits of the statutory authority for Commerce to make a VAT adjustment and it was not part of the [c]ourt's remand." *Id.* at 2. Plaintiffs note that the court did not reach the lawfulness of the irrevocable VAT adjustment in its order and opinion because it concluded that Plaintiffs had not exhausted available remedies. *Id.* at 2–3 (citing *Jiangsu Zhongji*, 396 F. Supp. 3d at 1354, n.7).

The Government counters that, in the above passage, "Commerce described the foundational basis of Commerce's current and most up-to-date VAT practice, consistent with the remand order" because Commerce "found it appropriate to explain how the recalculation and [*Fine Furniture*, 321 F. Supp. 3d 1282,] fits within Commerce's current VAT practice." Def.'s Resp. at 5.

The issue of whether Commerce has accurately interpreted the statute and whether the irrecoverable VAT adjustment is itself unlawful is not before the court. The court made clear in its order and opinion that Plaintiffs had not properly raised their challenge to the lawfulness of the VAT adjustment in the administrative proceedings below. *Jiangsu Zhongji*, 396 F. Supp. 3d at 1354, n.7.[2] Nor have Plaintiffs properly raised a challenge to the legality of the VAT adjustment in the remand proceedings. The exhaustion doctrine, applied previously by the court in its opinion and order, extends to remand proceedings. *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375 (Fed. Cir. 2008) (applying the exhaustion doctrine to remand proceedings). "The prescribed avenue for challenging remand results requires that a party first file comments on the draft results at the administrative level, setting forth the party's objections." *Taian-Ziyang Food Co. v. United States*, 37 CIT __, __, 918 F. Supp. 2d 1345, 1361 (2013) (citing *Mittal Steel*, 548 F.3d at 1383–84). *See also ArcelorMittal USA LLC v. United States*, 43 CIT __, __, 399 F. Supp. 3d 1271, 1282–83 (2019). While Plaintiffs noted the possibility of future objections in the comments on the draft remand results, they failed to set forth arguments with any specificity such that Commerce could alter the language of the draft remand results prior to issuing the final *Remand Results*.[3]

[2] The court concluded that Plaintiffs had "failed to exhaust [] available remedies with respect to the validity of the VAT deduction, [and] the court is poorly situated to address arguments that Commerce did not consider and that the parties discussed in only cursory fashion in their briefs and at oral argument." *Jiangsu Zhongji*, 396 F. Supp. 3d at 1354, n.7.

[3] In its comments on the draft remand results, Plaintiffs stated that "Commerce has complied with the [c]ourt's directive and has relied on the price field that is consistent with Commerce's stated methodology," but in a footnote asserted that they "reserve[] the right for

The court interprets Commerce's statement merely as an explanation of its position on its current practice, in line with that of *Fine Furniture*. The court remains no better situated now than in its prior opinion "to address arguments that Commerce did not consider and that the parties discussed in only cursory fashion" regarding the lawfulness of the irrevocable VAT adjustment. *Jiangsu Zhongji*, 396 F. Supp. 3d at 1354, n.7. In short, the court affirms the *Remand Results* without reaching matters not properly preserved for consideration.

CONCLUSION

The court sustains Commerce's *Remand Results*.

SO ORDERED.

Dated: March 9, 2020
New York, New York

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

Slip Op. 20–31

JIANGSU SENMAO BAMBOO and WOOD INDUSTRY CO., LTD., et al., Plaintiffs, and GUANGDONG YIHUA TIMBER INDUSTRY CO., LTD., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and COALITION FOR AMERICAN HARDWOOD PARITY, et al., Defendant-Intervenors.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 15–00225

[Remanding to the agency for correction a determination issued upon remand in an antidumping duty proceeding involving certain multilayered wood flooring from the People's Republic of China]

Dated: March 11, 2020

Jeffrey S. Neeley, Husch Blackwell LLP, of Washington, D.C., argued for plaintiffs and defendant-intervenors Jiangsu Senmao Bamboo and Wood Industry Co., Ltd., Baishan Huafeng Wooden Product Co., Ltd., Changbai Mountain Development and Protection Zone Hongtu Wood Industrial Co., Ltd., Chinafloors Timber (China) Co., Ltd., Dalian Kemian Wood Industry Co., Ltd., Dalian Qianqiu Wooden Product Co., Ltd., Dasso Industrial Group Co., Ltd., Dongtai Fuan Universal Dynamics, LLC., Dun Hua Sen Tai Wood Co., Ltd., Dunhua City Wanrong Wood Industry Co., Ltd., Fusong Jinlong Wooden Group Co., Ltd., Fusong Jinqiu Wooden Product Co., Ltd., Fusong Qianqiu Wooden Product Co., Ltd., Guangzhou Panyu Kangda Board Co., Ltd., Hunchun Forest Wolf Wooden Industry Co., Ltd., Jiafeng Wood (Suzhou) Co., Ltd., Jiangsu Guyu International Trading Co., Ltd., Jiangsu Kentier Wood Co., Ltd., Jiangsu Mingle Flooring Co., Ltd., Jiangsu Simba Flooring Co., Ltd., Jiashan HuiJiaLe Decoration

further argument related to the lawfulness of the irrecoverable VAT deduction in any subsequent proceedings that may occur." Comments of Jiangsu Zhongji Lamination Materials Co., (HK) Ltd. et al. on Draft Remand Results of Redetermination Pursuant to Ct. Order, Oct. 22, 2019, P.R. 14.

Material Co., Ltd., Jilin Forest Industry Jinqiao Flooring Group Co., Ltd., Kemian Wood Industry (Kunshan) Co., Ltd., Nanjing Minglin Wooden Industry Co., Ltd., Puli Trading Limited, Shanghai Lizhong Wood Products Co., Ltd./The Lizhong Wood Industry Limited Company of Shanghai/Linyi Youyou Wood Co., Ltd., Suzhou Dongda Wood Co., Ltd., Tongxiang Jisheng Import And Export Co., Ltd., Zhejiang Fudeli Timber Industry Co., Ltd., and Zhejiang Shiyou Timber Co., Ltd.

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, D.C., for plaintiffs Dunhua City Jisen Wood Industry Co., Ltd. and Yingyi-Nature (Kunshan) Wood Industry Co., Ltd. With him on the brief were *Alexandra H. Salzman*, *James K. Horgan*, and *Judith L. Holdsworth*.

Jill A. Cramer, Mowry & Grimson, PLLC, of Washington, D.C., argued for plaintiff, plaintiff-intervenor, and defendant-intervenor Fine Furniture (Shanghai) Limited. With her on the brief were *Kristin H. Mowry*, *Jeffrey S. Grimson*, and *Sarah M. Wyss*.

H. Deen Kaplan, Hogan Lovells US LLP, of Washington, D.C., for plaintiffs Armstrong Wood Products (Kunshan) Co., Ltd. and Armstrong Flooring, Inc. With him on the brief was *Craig A. Lewis*.

Mark R. Ludwikowski, Clark Hill PLC, of Washington, D.C., for plaintiff and plaintiff-intervenor Lumber Liquidators Services, LLC.

Ronald M. Wisla, Fox Rothschild LLP, of Washington, D.C., argued for plaintiffs, plaintiff-intervenors, and defendant-intervenors BR Custom Surface, CDC Distributors, Inc., CLBY Inc., *doing business as* D&M Flooring, Custom Wholesale Floors, Inc., Dalian Penghong Floor Products Co., Ltd., Doma Source LLC, Dunhua City Hongyuan Wooden Products Co., Ltd., Galleher Corporation, HaiLin LinJing Wooden Products, Ltd., Hangzhou Hanje Tec Co., Ltd., Hangzhou Zhengtian Industrial Co., Ltd., Huzhou Chenghang Wood Co., Ltd., Huzhou Fulinmen Imp. & Exp. Co., Ltd., Metropolitan Hardwood Floors, Inc., Mudanjiang Bosen Wood Industry Co., Ltd., Nakahiro Jyou Sei Furniture (Dalian) Co., Ltd., Pinnacle Interior Elements, Ltd., Real Wood Floors, LLC, Shanghai Eswell Timber Co., Ltd., Shanghai Shenlin Corporation, Shenyang Haobainian Wooden Co., Ltd., Shenzhenshi Huanwei Woods Co., Ltd., Swiff Train Co., Timeless Design Import LCC, V.A.L. Floors, Inc., Wego Chemical & Mineral Corp., Xuzhou Shenghe Wood Co., Ltd., Zhejiang Dadongwu Greenhome Wood Co., Ltd., Zhejiang Fuma Warm Technology Co., Ltd., Zhejiang Longsen Lumbering Co., Ltd., and Zhejiang Tianzhen Bamboo & Wood Development Co., Ltd. (collectively, the "Penghong Plaintiffs"). With him on the brief was *Lizbeth R. Levinson*.

John R. Magnus, Tradewins LLC, of Washington, D.C., for plaintiff, plaintiff-intervenor, and defendant-intervenor Old Master Products, Inc. With him on the brief was *Sheridan S. McKinney*.

Jonathan M. Zielinski, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for plaintiff-intervenor Guangdong Yihua Timber Industry Co., Ltd. With him on the brief was *Thomas M. Beline*.

Jeffrey S. Levin, Levin Trade Law, P.C., of Bethesda, MD, for plaintiff and defendant-intervenor Coalition for American Hardwood Parity.

Tara K. Hogan, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., argued for defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director. Of counsel was *Rachel A. Bogdan*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce. Of counsel on the brief was *Mercedes C. Morno*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Stanceu, Chief Judge:

Before the court is the decision (the "First Remand Redetermination") the International Trade Administration, U.S. Department of Commerce ("Commerce," or the "Department") issued in response to

the court's order in *Jiangsu Senmao Bamboo & Wood Indus. Co., Ltd. v. United States*, 42 CIT __, 322 F. Supp. 3d 1308 (2018) ("*Senmao I*"). Final Results of Redetermination Pursuant to Ct. Order (June 3, 2019), ECF No. 145 ("*First Remand Redetermination*").

The court's order in *Senmao I*, 42 CIT at __, 322 F. Supp. 3d at 1350, ordered Commerce to reconsider several decisions made in a published determination concluding an antidumping duty proceeding (the "Final Results"). *Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Results of New Shipper Review; 2012–2013*, 80 Fed. Reg. 41,476 (Int'l Trade Admin. July 15, 2015) ("*Final Results*"). The Final Results concluded the second periodic administrative review of an antidumping duty order on multilayered wood flooring from the People's Republic of China (the "Order"), which applied to the period of December 1, 2012 through November 30, 2013 (the "period of review").

Because the court sets aside as unlawful one of the decisions in the First Remand Redetermination—the decision to adjust downward the export price of subject merchandise to account for what Commerce considered to be irrecoverable value-added tax—the court remands the First Remand Redetermination to Commerce for correction.

I. BACKGROUND

Background on this consolidated case is presented in the court's previous opinion and is supplemented herein. *See Senmao I*, 42 CIT at __, 322 F. Supp. 3d at 1313–16.

In the Final Results, Commerce assigned individually determined weighted-average dumping margins to two Chinese respondents who produced and exported multilayered wood flooring (the "subject merchandise"): Dalian Dajen Wood Co., Ltd., to which it assigned a zero margin, and Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. ("Senmao"), to which it assigned a margin of 13.74%. *Final Results*, 80 Fed. Reg. at 41,478.

Commerce assigned the 13.74% rate determined for Senmao to numerous "separate-rate" respondents (i.e., respondents that Commerce considered to have established their independence from the government of the People's Republic of China ("China")) that were not selected for individual examination (the "non-selected companies"). *Id.*; *see also Senmao I*, 42 CIT at __, 322 F. Supp. 3d at 1314. Senmao and numerous non-selected companies are plaintiffs in this consolidated case, as is the Coalition for American Hardwood Parity (the "Coalition"), an association of U.S. producers of multilayered wood flooring. *See Senmao I*, 42 CIT at __, 322 F. Supp. 3d at 1315.

The changes Commerce made to the Final Results in the First Remand Redetermination reduced the dumping margin Commerce calculated for Senmao from 13.74% to 6.55%. *First Remand Redetermination* 30. Specifically, Commerce, in response to the court's order in *Senmao I*, reconsidered and revised the surrogate values it applied to overlaying glue (one of Senmao's production inputs), *id.* at 11–14, and to Senmao's cost for inland freight, *id.* at 14–17. Commerce reconsidered, but left unchanged, its surrogate value for another of Senmao's production inputs, plywood. *Id.* at 2–11. Commerce assigned the 6.55% rate to 46 non-selected companies in the First Remand Redetermination. *Id.* at 32–34.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), under which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (the "Tariff Act"), *as amended*, 19 U.S.C. § 1516a, including an action contesting a final determination concluding an administrative review of an antidumping duty order. *See* 19 U.S.C. § 1516a(a)(2)(B)(iii).[1] In reviewing a final determination, including a determination made upon remand, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i). In addition, the court considers whether the Department's decisions in the Remand Redetermination comply with the court's order in *Senmao I*.

B. Contested and Uncontested Decisions in the First Remand Redetermination

No party commented to the court in opposition to the decisions Commerce made in the First Remand Redetermination pertaining to the surrogate values for overlaying glue, inland freight, and plywood. Concluding that they comply with the order in *Senmao I*, the court sustains these decisions.

Parties contested two decisions in the First Remand Redetermination. The first is the Department's decision not to address the issue of whether Fine Furniture (Shanghai) Limited ("Fine Furniture"), an unexamined separate rate respondent, should have been examined individually as a "voluntary respondent" in the administrative review

[1] Except where otherwise indicated, citations to the United States Code herein are to the 2012 edition.

culminating in the Final Results. Fine Furniture commented in opposition to this decision. Pl.-Int. Fine Furniture (Shanghai) Ltd.'s Comments on June 3, 2019 Final Results of Redetermination Pursuant to Ct. Order (July 3, 2019), ECF No. 148 ("Fine Furniture's Comments"). The second is the Department's decision to maintain certain deductions from the prices used to calculate the "export price" of Senmao's subject merchandise. Commerce made these deductions in the Final Results to account for Chinese value-added tax ("VAT"). Several parties commented in opposition to these deductions. *E.g.*, Senmao Pls.' Comments on Results of Redetermination Pursuant to Ct. Order from Slip Op. 18–67 2–7 (July 3, 2019), ECF No. 147 ("Senmao's Comments"); Fine Furniture's Comments 4; Pl.-Ints.' Comments on Results of Remand Redetermination (July 3, 2019), ECF No. 149 ("Pl.-Ints.' Comments"). Below, the court addresses the two issues that remain to be decided in this litigation.

C. Voluntary Respondent Status for Fine Furniture

In *Senmao I*, the court reviewed the Department's decision in the Final Results to deny voluntary respondent status to Fine Furniture, held that this decision was contrary to law, and directed Commerce to reconsider it. *Senmao I*, 42 CIT at __, 322 F. Supp. 3d at 1334–40. In the First Remand Redetermination, Commerce deemed Fine Furniture's claim to be moot because Fine Furniture has been excluded from the antidumping duty order in response to the decision of this Court in *Changzhou Hawd Flooring Co. v. United States*, 42 CIT __, 324 F. Supp. 3d 1317 (2018) ("*Changzhou Hawd*"), and, for this reason, concluded that it "is unable to calculate an individual weighted-average dumping margin for Fine Furniture." *First Remand Redetermination* 18–19. Commerce did not assign a rate to Fine Furniture in the First Remand Redetermination.

Fine Furniture commented in opposition to the Department's disposition of its voluntary respondent claim, arguing that *Changzhou Hawd* was not a final court action because an appeal remained pending. Fine Furniture argues that the court should "direct Commerce to revisit Fine Furniture's voluntary respondent status *if* the ongoing appeal of *Changzhou Hawd* results in Fine Furniture being brought back under the antidumping order." Fine Furniture's Comments 3. Defendant replies that "if Fine Furniture is revived as a respondent subject to the order, Commerce intends to comply with whatever court orders are needed to effectuate the holding of *Changzhou Hawd*." Def.'s Reply to Comments on Remand Redetermination 12 (July 18, 2019), ECF No. 150 ("Def.'s Reply"). Defendant adds that "[a]s a practical matter, this might require that the Court hold the judgment

in this case in abeyance pending the final disposition of *Changzhou Hawd*, so that the Court can retain jurisdiction and issue any necessary orders." *Id.* at 12 n.2.

The Court of Appeals issued an opinion in *Changzhou Hawd* on January 20, 2020, in which it affirmed the decision of this Court excluding Fine Furniture from the Order. *Changzhou Hawd Flooring Co. v. United States*, 947 F.3d 781, 794 (Fed. Cir. 2020). The period in which a petition for certiorari may be filed will end on April 19, 2020. Because the court is ordering Commerce to prepare a second remand redetermination to address the value-added tax issue, as discussed below, the court will be issuing a further decision in this litigation. Therefore, the court will hold in abeyance any decision on the disposition of Fine Furniture's claim pending further proceedings in this case.

D. The Downward Adjustments Made in Determining the Export Price of Senmao's Subject Merchandise to Account for Chinese Value-Added Tax Were Contrary to Law

Section 731 of the Tariff Act, 19 U.S.C. § 1673, provides that an antidumping duty shall be imposed "in an amount equal to the amount by which the normal value exceeds the export price [("EP")] (or the constructed export price [("CEP")] for the merchandise."[2] 19 U.S.C. § 1673. Section 772 of the Tariff Act, 19 U.S.C. § 1677a, determines EP (or, where applicable, CEP) by making certain specified adjustments, upward and downward, to "[t]he price used to establish export price and constructed export price." *Id.* § 1677a(c). In its regulations, Commerce refers to this unadjusted price for determining EP and CEP as the "starting price."[3] 19 C.F.R. § 351.402(a).

The issue pertaining to Chinese VAT arose from the Department's decision in the Final Results to apply one of the statutory adjustments to Senmao's starting prices. Specifically, Commerce invoked section 772(c)(2)(B) of the Tariff Act, 19 U.S.C. § 1677a(c)(2)(B) (the "export tax" provision), in calculating Senmao's weighted average

---

[2] "Export price" ("EP"), which formerly was known as "purchase price," and "constructed export price" ("CEP"), which formerly was known as "exporter's sale price," previously were described by the umbrella term "United States price" or "U.S. price." The term "U.S. price" is still used to refer generally to either EP or CEP, both of which are calculated for comparison to normal value when Commerce determines a dumping margin.

[3] The starting price for determining EP is "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a). The starting price for determining CEP is "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter." *Id.* § 1677a(b).

dumping margin. The export tax provision effects a downward adjustment to the starting price used to determine EP or CEP, and thus increases a dumping margin, in certain specified circumstances. The export tax provision directs Commerce to reduce the EP or CEP starting price by "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 1677(6)(C) of this title."[4] 19 U.S.C. § 1677a(c)(2)(B).

Commerce made the downward adjustments to the starting prices used to determine the export price of Senmao's subject merchandise to account for what it considered to be amounts of Chinese value-added tax that were not rebated ("recovered") by reason of the exportation of the merchandise. Commerce considered "irrecoverable VAT" to be an "export tax, duty, or other charge" that China imposed on Senmao's subject merchandise, reasoning that "input VAT" (or "VAT-in"), a VAT present in the prices paid to Senmao's suppliers of materials used in domestic production of the subject merchandise, "amounts to a tax, duty, or other charge imposed on exports" to the extent it is "irrecoverable," i.e., not refunded upon exportation. *See Senmao I*, 42 CIT at __, 322 F. Supp. 3d at 1342. Commerce adjusted the starting prices downward by 8% of the free-on-board ("FOB") price in the sale for export, which Commerce considered to be the amount of irrecoverable VAT. *Id.* at __, 322 F. Supp. 3d at 1341.

Seven plaintiffs and groups of plaintiffs[5] challenged the downward adjustments Commerce made in the Final Results. In *Senmao I*, the court granted relief on the plaintiffs' claims, holding that record evidence did not support the Department's finding, for purposes of the export tax provision, that China imposed "an export tax, duty or other charge," in the amount of 8%, or in any other amount, "on the exportation" of Senmao's subject merchandise to the United States. *See id.* at __, 322 F. Supp. 3d at 1340–45.

In the First Remand Redetermination, Commerce maintained the 8% downward adjustments it made in the Final Results for what it

---

[4] An export tax, duty, or other charge described in 19 U.S.C. § 1677(6)(C) is an export tax, duty, or other charge "levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received." 19 U.S.C. § 1677(6)(C). A related provision reduces the dumping margin by adding a countervailing duty to the U.S. price. *Id.* § 1677a(c)(1)(C). No party claims these "offset" provisions are relevant in this case.

[5] The plaintiffs and groups of plaintiffs contesting the Department's downward adjustment to Senmao's starting prices to account for irrecoverable value-added tax ("VAT") are Yingyi Nature, Jisen Wood, Armstrong, Old Master, Yihua, Fine Furniture, and the Penghong Plaintiffs. *Jiangsu Senmao Bamboo & Wood Indus. Co., Ltd. v. United States*, 42 CIT __, __, 322 F. Supp. 3d 1308, 1340 (2018) ("*Senmao I*").

termed "irrecoverable" VAT. *First Remand Redetermination* 28–30. Upon reviewing the First Remand Redetermination, comments thereon, defendant's reply to the comments, and the administrative record, the court holds that Commerce misinterpreted the antidumping statute when it used these downward adjustments in calculating the export price of Senmao's exported subject merchandise. The downward adjustments were unauthorized by the statute and resulted in the assignment of erroneous margins to Senmao and the non-selected companies.

1. The Court's Decision on Value-Added Tax in *Senmao I*

In *Senmao I*, the court concluded that the Department's decision to make the deductions from the EP starting prices based on input VAT was factually deficient in several respects.

First, as to the statutory requirement that the "export" tax, duty, or other charge be "imposed by the exporting country on the exportation of the subject merchandise," one factual problem was that, according to uncontradicted record evidence, "input VAT" was not a tax, duty, or charge paid on the exported merchandise to the government of China by the exporter, Senmao. Rather, it occurred as amounts present in the prices of materials Senmao purchased from its suppliers, who paid the VAT on the materials they supplied. As the court noted, "Senmao's questionnaire response explained that it was subject to value-added tax liability on sales of its finished products (whether sold in the domestic market or for export) but did not pay to the tax authority a VAT on materials it used in producing its goods." *Senmao I*, 42 CIT at __, 322 F. Supp. 3d at 1342. The court added that "Senmao further explained that the VAT of 17% on the materials was included in the prices it paid for those materials and was available as a deduction from the liability to the tax authority for 'VAT-out' (output VAT) on the combined sales, both domestic and export, of the finished products." *Id.* The court summarized, "[i]n other words, the 17% VAT applicable to materials Senmao used in production was VAT paid to its material suppliers and passed on to Senmao." *Id.* Commerce did not convince the court that a tax on value added that is present in the prices of materials used in all production of the subject merchandise (i.e., both for domestic sale and export sale) was, as a factual matter, an "*export* tax, duty, or other charge" or that it was "*imposed by the exporting country* on *the exportation* of the subject merchandise to the United States," as required for an adjustment under 19 U.S.C. § 1677a(c)(2)(B). 19 U.S.C. § 1677a(c)(2)(B) (emphasis added); *Senmao I*, 42 CIT at __, 322 F. Supp. 3d at 1344.

The court concluded that one factual finding in particular, a finding essential to the Department's decision, lacked any evidentiary support in the record. The finding in question was that under the Chinese VAT scheme, irrecoverable VAT "amounts to" a tax, duty, or other charge that is not imposed on domestic sales. *Senmao I*, 42 CIT at __, 322 F. Supp. 3d at 1342. The uncontradicted record evidence was that China's VAT *is* imposed on domestic sales, and there was no evidence as to these sales that it was rebated, avoided, or otherwise "recovered." *See id*. The court reasoned that "an input VAT incurred upon the purchase of materials for use in production of goods both for export sale and domestic sale cannot correctly be found to be a tax, duty, or charge that is not imposed on domestic sales." *Id.* at __, 322 F. Supp. 3d at 1344. The court continued, "[t]here is no record evidence from which Commerce could find that Senmao's export sales incurred a 'tax duty, or other charge' that its domestic sales avoided" and that "[u]nder the Chinese VAT system as shown by the evidence placed on the record by Senmao, export sales were not treated less favorably than were domestic sales (and in fact were treated more favorably)." *Id.* at __, 322 F. Supp. 3d at 1345.

Responding to the Department's rationale that input VAT that is incurred on materials used in producing goods in China and not refunded upon exportation of those goods "amounts to" an export, tax, duty, or other charge on the exportation of the goods, the court said that "[s]imply stated, input VAT incurred on materials used in domestic production that is not rebated or refunded upon the sale of the good (whether domestically or to an export market) made from those materials cannot, as a factual matter, 'amount to' something it is not." *Id. Senmao I* stated that "the Department's decision to make the deductions from Senmao's EP starting prices for 'irrecoverable' input VAT was erroneous because it was based on a critical finding of fact, i.e., that irrecoverable input VAT did not occur on domestic sales, that was unsupported by record evidence and illogical." *Id.* The court added, "[o]n remand, Commerce must reach a new determination that does not have these deficiencies." *Id.*

2. Plaintiffs Are Not Precluded from Challenging the Methodology by which Commerce Applied the Export Tax Provision in the Review

Plaintiffs commenting on the First Remand Redetermination argue, *inter alia*, that Commerce failed to address the issue of whether the Department's methodology is lawful under the statute, arguing that the methodology is inconsistent with certain decisions of this Court holding that the export tax provision of 19 U.S.C. § 1677a(c)(2)(B) does not apply to value-added taxes such as the one at

issue in this case. Senmao's Comments 2–7; Fine Furniture's Comments 4; Pl.-Ints.' Comments. Defendant replies that Commerce did not err by declining to address the issue of the validity of the statutory interpretation under which Commerce made the downward adjustments to Senmao's starting prices for VAT. Arguing that the original claim as to the VAT deduction was a claim relating to a lack of substantial evidence and that "the error identified in the Court's remand order was that the conclusion reached was not supported by the factual record," defendant submits that "Commerce cannot be faulted for declining to address an entirely new argument that was neither raised by the parties nor specifically directed by the remand order." Def.'s Reply 14.

The court does not agree with defendant's argument that the commenters are precluded from objecting to the interpretation of 19 U.S.C. § 1677a(c)(2)(B) upon which Commerce based its VAT decision. For judicial review purposes, the First Remand Redetermination is a new agency decision, distinct from the Final Results, and the parties are free to challenge it according to the standard of review, under which the court determines whether the new determination is supported by substantial evidence on the record *and* is otherwise in accordance with law. What is more, in its VAT decision in the First Remand Redetermination, Commerce interpreted § 1677a(c)(2)(B). *First Remand Redetermination* 23 ("[T]he amount of irrecoverable VAT is a positive quantity that increases the company's VAT payable to the government and, thus, constitutes a cost borne by the exporter. Thus, *the amount of irrecoverable VAT is, effectively, 'an export tax, duty, or other charge' under section 772(c) of the Act* [19 U.S.C. § 1677a(c)(2)(B)], and it, therefore, warrants an adjustment to U.S. price." (emphasis added)); *id.* at 24 (characterizing irrecoverable VAT-in as "a cost or expense Senmao incurred by reason of its exports and, therefore, a cost *that constitutes an export tax or other charge under section 772(c) of the Act*" (emphasis added)). The parties commenting on the First Remand Redetermination, therefore, are not precluded from objecting that the Department's interpretation of the export tax provision was contrary to law.

3. China's VAT System as Applied to Producers of Multilayered Wood Flooring, Such as Senmao

The tax-related issue presented in this case requires the court to consider the treatment the Tariff Act accords to different types of taxes imposed by the exporting country that potentially affect the determination of a weighted-average dumping margin. The tax specifically at issue is a value-added tax that China imposed on sales of multilayered wood flooring made in China, whether sold into the

domestic market or for export. The relevant facts, which pertain to the characteristics of this tax and how it was imposed on Senmao, as an individually-examined respondent, are essentially uncontested between the parties and are readily apparent from uncontradicted evidence on the record. The court will summarize the material, uncontested facts in a somewhat simplified form, but in detail sufficient for resolution of the issue presented.

Under the Chinese VAT system in effect during the period of review, the VAT liability of a producer such as Senmao was calculated by combining the "output VAT" (or "VAT-out") as calculated for domestic sales and the output VAT as calculated for export sales, and then deducting from that sum the total input VAT incurred in the purchase prices of all materials used in the combined production (i.e., for domestic or export sale).[6] The output VAT on sales of multilayered wood flooring into the domestic market was calculated at a rate of 17% of the sales value. The output VAT on sales for export was calculated at a preferential rate of 8% of the FOB sales value (with the difference between the two rates sometimes described as the "rebate rate").

Senmao was entitled to credit the input VAT that it incurred in the purchase of materials (which typically amounted to 17% of the sale price of the materials) used in all production toward the output VAT calculated on its combined sales (i.e., the domestic and the export sales) and carry forward to future periods credits arising if the input VAT incurred in the materials purchased exceeded the output VAT as calculated on its own sales.

4. The Tariff Act Prohibits Downward Adjustments to EP or CEP Starting Prices for Home Market Taxes such as the Value-Added Tax at Issue in this Litigation

This is not the first time the Department's treatment of Chinese VAT has come before this Court. *China Manufacturers Alliance, LLC v. United States*, 43 CIT __, __, 357 F. Supp. 3d 1364, 1370–75 (2019)

[6] In *Senmao I*, the court reviewed the record evidence on Senmao's calculation of its output VAT (or "VAT-out") liability, on which Commerce based its finding that irrecoverable input VAT (or "VAT-in") was an export tax that China imposed on the exportation of Senmao's subject merchandise. *Senmao I*, 42 CIT at __, 322 F. Supp. 3d at 1343. As applied to Senmao, that calculation was as follows: VAT payable = VAT-out of domestic sales (calculated as 17% of the sales value) + VAT-out on export sales (calculated as 8% of the free-on-board price of export sales) – the total value of VAT-in on all materials used in production. *Id.* In the First Remand Redetermination, Commerce does not dispute that this formula is correct and, to the contrary, acknowledges that, as applied to Senmao, it is "the same as" the equation from a governmental notice of VAT issued in 2012 (on which Commerce relies for its finding that Senmao incurred irrecoverable VAT-in by reason of its exports). *First Remand Redetermination* 21.

(“*China Manufacturers*”), held that the Department’s interpreting the export tax provision, 19 U.S.C. § 1677a(c)(2)(B), to apply to Chinese value-added tax contravened plain meaning and failed to consider related provisions of the Tariff Act. *Qingdao Qihang Tyre Co. v. United States*, 42 CIT __, __, 308 F. Supp. 3d 1329, 1338–47 (2018) (“*Qingdao Qihang*”) employed a similar analysis, holding that the Department’s interpretation of the export tax provision was impermissible under step one of an analysis conducted under *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”). Upon analyzing plain meaning and the statutory and legislative history, *Qingdao Qihang* concluded that “‘Congress had an intention on the precise question at issue’ that ‘must be given effect.’” *Qingdao Qihang*, 42 CIT at __, 308 F. Supp. 3d at 1339 (quoting *Chevron*, 467 U.S. at 843 n.9). “Congress intended that a domestic tax, such as a value-added tax, imposed by the foreign country on a good or the materials used to produce that good, would *not* result in a downward adjustment to the EP and CEP starting prices under § 1677a(c)(2)(B).” *Id.*

Certain other decisions of this Court, on which defendant relies in part for its argument supporting the Department’s interpretation, interpret the export tax provision differently than did *China Manufacturers* and *Qingdao Qihang* and reach different results. Because these other decisions raise significant issues, the court takes this opportunity to reconsider the statutory interpretation question presented in *China Manufacturers* and *Qingdao Qihang* and considered again in this case. As the court explains later in this Opinion and Order, the decisions reaching a different result than *China Manufacturers* and *Qingdao Qihang* relied upon reasoning grounded in step two of a *Chevron* analysis, holding that Commerce reasonably interpreted an ambiguous export tax provision to include within its scope Chinese value-added tax. The court grounds the present analysis in *Chevron* step one.

China Manufacturers and *Qingdao Qihang* correctly applied a *Chevron* step one analysis to hold that Congress had an intent on the narrow question presented that is binding on the court as well as Commerce. Congress addressed home-market taxes of the exporting country, such as value-added taxes, in a different statutory provision than the export tax provision. Under the statutory scheme, such a home-market tax potentially will reduce a dumping margin if “recoverable,” i.e., if rebated or avoided upon exportation. The statutory scheme, interpreted according to plain meaning, purpose, and statutory and legislative history, reveals that Congress could not have intended that such a tax, whether or not recoverable, would also fall

within the scope of the export tax provision so as to increase a dumping margin. In this case, the Tariff Act prohibited Commerce from deducting value-added tax from the Senmao starting prices that were used to determine export price.

a. The Treatment the Tariff Act Accords to Various Taxes of the Exporting Country

The narrow question presented is whether the export tax provision of the Tariff Act, 19 U.S.C. § 1677a(c)(2)(B), includes within its scope the Chinese value-added tax described above. The court concludes that it does not.

Any valid interpretation begins with a careful and thorough reading of the statute.[7] The export tax provision names only "export" taxes, duties, and other charges, mentioning no other type of tax. It is expressly limited to taxes, duties, and other charges "imposed on the exportation" of the subject merchandise. The limiting terms of the export tax provision, even when the provision is read in isolation, cast doubt on the Department's interpretation.

A thorough analysis also must consider the export tax provision in the context of related provisions in the Tariff Act. The Tariff Act addresses other categories of taxes in provisions outside of the export tax provision. These other categories of taxes also might be present in the starting price for determining EP or CEP but are treated differently than export taxes. They include value-added taxes of the type at issue in this case, and they have certain characteristics in common. They may be described as "domestic" or "home-market" taxes in that they apply to domestic merchandise and potentially affect sales of merchandise for export as well; for this reason, they are of a type of tax that is capable of being rebated, or not collected (i.e., avoided), by reason of exportation of the subject merchandise, whether or not they are rebated or avoided in a particular instance. Unlike the export tax provision, these other provisions do not increase a dumping margin; instead, they potentially reduce one.

As *China Manufacturers* explained, the Tariff Act makes certain adjustments to U.S. price (whether calculated by EP or CEP), and to normal value, to achieve a "tax neutral" comparison between U.S. price and normal value. For example, the statute upwardly adjusts U.S. price, and thereby reduces a dumping margin, "to account for import duties imposed by the country of exportation that have been rebated (i.e., through duty drawback), or not collected, by reason of

[7] Mr. Justice Frankfurter famously expressed the first three rules of statutory interpretation: "(1) Read the statute; (2) read the statute; (3) read the statute!" Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in* Felix Frankfurter the Judge (Walter Mendelson ed., 1964), *reprinted in* Henry Friendly, Benchmarks 196, 202 (1967).

the exportation of the merchandise to the United States." *China Manufacturers*, 43 CIT at __, 357 F. Supp. 3d. at 1370 (citing 19 U.S.C. § 1677a(c)(1)(B)).[8] "Such duties are added to the U.S. price to allow a tax-neutral comparison with the home market price of the foreign like product, which presumably includes import duties, such as duties on materials used in production in the exporting country." *Id.* The opinion further explained that "[i]f the import duties are 'irrecoverable,' i.e., not rebated or avoided by reason of the exportation, the duties presumably are included in the U.S. price, and no upward adjustment or downward adjustment is made, the price comparison already being tax-neutral." *Id.* Accordingly, the Tariff Act does not provide that irrecoverable import duties present in the EP or CEP starting price will increase a dumping margin.

Other domestic taxes in the exporting country to which the exported subject merchandise, or the materials used to produce it, have been subjected, such as value-added taxes, are treated in much the same way as import duties. *See id.* These may reduce, but do not increase, a dumping margin. Like an import duty, a value-added tax imposed domestically by the exporting country may reduce a dumping margin to the extent it is rebated or avoided upon exportation. Specifically, under the "home-market" tax provision, home-market taxes, such as value-added taxes, that are present in the prices of the foreign like product are presumed not to be included in U.S. price to the extent they have rebated, or not collected, on the exported subject merchandise. To achieve a tax-neutral comparison between U.S. price and normal value, these "recoverable" value-added taxes are removed from the calculation of normal value, and thus reduce a dumping margin, to the extent they are added to or included in the price of the foreign like product (which, after adjustment, is compared to the U.S. price (either EP or CEP).[9]

Another provision in the Tariff Act accomplishes the same purpose of reducing normal value, and thus of reducing a dumping margin, to achieve a tax-neutral comparison with U.S. price, where normal value is determined according to constructed value. *See* 19 U.S.C. § 1677b(e) ("the cost of materials shall be determined without regard to

---

[8] The import duties provision increases U.S. price, and thereby reduces a dumping margin, 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." 19 U.S.C. § 1677a(c)(1)(B).

[9] Specifically, the home-market tax provision, set forth in section 773(a)(6)(B)(iii) of the Tariff Act, excludes from the calculation of normal value, and thus reduces a dumping margin, for "the amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product." 19 U.S.C. § 1677b(a)(6)(B)(iii).

any internal tax in the exporting country imposed on such materials or their disposition that is remitted or refunded upon exportation of the subject merchandise produced from such materials")[10]; *see also* 19 U.S.C. § 1677b(a) ("a fair comparison shall be made between the export price or constructed export price and normal value").

The export tax provision of section 772(c)(2)(B) of the Tariff Act, 19 U.S.C. § 1677a(c)(2)(B), is the opposite of the import duty, home-market tax, and constructed value provisions discussed above. Rather than potentially reduce a dumping margin, as those provisions do, it potentially increases a dumping margin. The provision has the specific limitations highlighted previously: a tax subject to it must be an "export" tax, duty, or other charge, and it must be imposed by the exporting country "on the exportation of the subject merchandise to the United States." Because a tax falling within the export tax provision is one that is imposed *on* exportation, by definition it cannot be an internal, domestic tax. For the same reason, it is one that is not present in the home-market price of the foreign like product. Removal from the EP or CEP starting price, therefore, allows a tax-neutral comparison between U.S. price and normal value. In these respects, the statute distinguishes a tax subject to the export tax provision from an import duty and from a tax that is imposed on value added within the exporting country.

b. Statutory and Legislative History

The statutory history of the home-market tax provision and export tax provision confirms that Congress never intended for the export tax provision to apply to domestic value-added taxes such as the one at issue here. As discussed in *Qingdao Qihang, see* 42 CIT at __, 308 F. Supp. 3d at 1340–43, and *China Manufacturers, see* 43 CIT at __, 357 F. Supp. 3d at 1372–73, the home-market tax provision in current law is derived from a similar provision in an earlier version of the statute, enacted as part of the Trade Agreements Act of 1979 ("TAA"), Pub. L. No. 96–39, 93 Stat. 144, which also potentially lowered a dumping margin for recoverable home market taxes (including value-added tax), but it did so by increasing U.S. price rather than by reducing normal value. This earlier version of the home-market tax provision stood alongside the import duty provision and the export tax provision in 19 U.S.C. § 1677a. In the TAA version of the statute existing prior to amendment by the Uruguay Round Agreements Act

[10] A 2015 technical amendment made a non-substantive change to the text of this provision, substituting the words "that is" for the words "which are." Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362.

of 1994 (“URAA”), Pub. L. No. 103–465, 108 Stat. 4809, section 772(d) of the Tariff Act, 19 U.S.C. § 1677a(d), read, in pertinent part, as follows:

> The purchase price [now called “export price”] and the exporter’s sales price [now called “constructed export price”] shall be adjusted by being—
>
> (1) increased by—
>
> * * *
>
> (B) 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 merchandise to the United States;
>
> (C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation;
>
> * * *
>
> and
>
> * * *
>
> (2) reduced by—
>
> * * *
>
> (B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the country of exportation on the exportation of the merchandise to the United States other than an export tax, duty, or other charge described in section 1677(6)(C) of this title.

19 U.S.C. § 1677a(d) (1982). It was well established that the home-market tax provision as set forth in the TAA version of the Tariff Act included within its terms an internal, domestic VAT that was imposed on the exported subject merchandise (or components thereof) by the country of exportation, and that it had the potential to adjust the dumping margin downward to the extent the domestic VAT was rebated or not collected by reason of exportation. *See Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1576 (Fed. Cir. 1995) (“*Federal-*

Mogul"); *Daewoo Electronics Co. v. Int'l Union of Electronic, Electrical, Technical, Salaried & Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1514 (Fed. Cir. 1993). The Court of Appeals for the Federal Circuit has referred to the provision as the "adjustment for Home market (HM) taxes." *Federal-Mogul*, 63 F.3d at 1574. Because Congress, in the home-market tax provision, addressed domestic taxes such as value-added taxes, i.e., "taxes imposed in the country of exportation directly upon the exported merchandise or components thereof," it is contrary to reason to presume that Congress intended to address them again in the export tax provision.

It is also contrary to plain meaning. Congress used different language in the TAA version of the statute to distinguish export taxes from import duties and the taxes potentially coming within the scope of the home-market tax provision. While various types of taxes, including value-added taxes, that were "imposed in the country of exportation directly upon the exported merchandise or components thereof," 19 U.S.C. § 1677a(d)(1)(C) (1982), could fall within the home-market tax provision of the TAA, a tax subject to the TAA's export tax provision was an "export" tax, duty, or other charge and was imposed "on the *exportation* of the merchandise." Having used different language to describe these categories, Congress must be presumed to have had a different intent as to each. Moreover, Congress provided for opposite results: a home-market tax such as a VAT potentially would lower a dumping margin (as would, potentially, an import duty), and an export tax potentially would raise one. Reading the two provisions as overlapping not only would be contrary to logic and plain meaning but also would lead to an absurd result: the same home-market tax, if recoverable in part by reason of exportation, could simultaneously raise and lower a dumping margin. In summary, under any reasonable interpretation of 19 U.S.C. § 1677a as it existed following enactment of the TAA, the export tax provision and the home-market tax provision were intended to be mutually exclusive. Specifically, a tax within the scope of the home-market tax provision, including a value-added tax of the type at issue in this case, could not also be within the scope of the export tax provision.

Taxes described by the home-market tax provision and the import duty provision of the TAA differed in another way from the export taxes, duties, and other charges that fell within the scope of the export tax provision. Home-market taxes and import duties were ones that were *capable* of being rebated or avoided by reason of exportation of the merchandise subject to the antidumping duty order, i.e., the subject merchandise, even if they were not rebated or

avoided in fact. *See* 19 U.S.C. §§ 1677a(d)(1)(B) (import duty provision), 1677a(d)(1)(C) (home-market tax provision), 1677b(e)(1)(A) (constructed value provision) (1982). These were, necessarily, "domestic" taxes of the exporting country that also potentially affected merchandise sold for export. On the other hand, a tax falling within the scope of the export tax provision would not appear to be one that could have been rebated or avoided by reason of exportation. That is, a tax imposed "*on* the exportation of the subject merchandise to the United States," 19 U.S.C. § 1677a(d)(2)(B), would not be rebated or avoided *by reason of* exportation of that same merchandise. Because only a home-market domestic tax that also falls upon sales for export can be "recoverable" upon exportation, under the TAA version of the Tariff Act there was no such thing as a "recoverable" export tax, duty, or other charge.

Notably, Congress used language in the TAA home-market tax provision (and in the import duty provision as well) indicating its familiarity with the concepts of recoverable and irrecoverable taxes. While providing that recoverable import duties and recoverable home-market taxes potentially would lower a dumping margin, it made no provision under which an irrecoverable portion of such a tax or duty would raise one.

In summary, the TAA version of the Tariff Act placed home-market taxes (such as value-added taxes) in a different category than it placed export taxes, duties and other charges. As discussed below, that distinction continues in the current statute.

In the URAA, Congress converted the home-market tax provision from one that allows an upward adjustment to U.S. price to one that allows a downward adjustment to normal value.[11] URAA § 224. In

[11] An issue concerning the "multiplier effect" arose concerning the TAA version of the home-market tax provision. This issue, and the Department's attempts to respond to it to achieve a tax-neutral comparison, is provided in *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1576–78 (Fed. Cir. 1995); *see also Zenith Electronics Corp. v. United States*, 988 F.2d 1573, 1578 (Fed. Cir. 1993). Although it does not mention the multiplier effect, the Statement of Administrative Action for the URAA explained as follows the reason for another change from the TAA version to the URAA version:

> The deduction from normal value for indirect taxes constitutes a change from the existing statute. The change is intended to ensure that dumping margins will be tax-neutral. The requirement that the home-market consumption taxes in question be "added to or included in the price" of the foreign like product is intended to insure that such taxes actually have been charged and paid on the home market sales used to calculate normal value, rather than charged on sales of such merchandise in the home market generally. It would be inappropriate to reduce a foreign price by the amount of the tax, unless a tax liability had actually been incurred on that sale.

Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, Vol 1. at 157 (1994) ("SAA"), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4166. The TAA version of the home market tax provision required for a margin-reducing adjustment that the taxes be "added to or included in the price of such or similar merchandise when sold in the country of exportation." 19 U.S.C. § 1677a(d)(1)(C) (1982).

making this change to the home-market tax provision, Congress intended that there be no change to the scope of the export tax provision, which was left materially unchanged.[12] The Statement of Administrative Action accompanying the URAA confirms this point.[13] In summary, Congress intended in the TAA version of the Tariff Act that the export tax provision would not apply to value-added taxes imposed on production of a good within the country of exportation, whether or not recoverable upon exportation. As the language of the statute and the legislative history make clear, that same intent was carried over to the URAA version, which is in effect today.

The margin-reducing adjustment to normal value provided for in the current home-market tax provision, which resulted from the URAA amendments, is not available where normal value is determined otherwise than according to the price at which the foreign like product is sold in the comparison market (normally, the home-market of the exporting country). That is the situation in the review at issue in this case, which involved goods exported from China. Considering China to be a non-market economy country, Commerce determined normal value according to the "surrogate value" factors-of-production procedures of 19 U.S.C. § 1677b(c). Under these procedures, according to which normal value is not determined by the price of the foreign like product, no margin-reducing, downward adjustment to normal value for recoverable VAT can be available. This does not mean Commerce was free to invoke the export tax provision to make an *upward* adjustment to Senmao's dumping margin for a Chinese VAT, whether or not Commerce found that tax to be irrecoverable. Congress, having understood that home-market taxes such as value-added taxes (like import duties) could be either recoverable or irrecoverable upon exportation, provided certain tax-related adjustments to prices but did not provide or intend that home-market taxes on value added to the subject merchandise in the exporting country, whether or not recoverable, would increase a dumping margin.

The fact that VAT might be present in the EP or CEP starting price does not alter the court's conclusion. Commerce is no more empowered by the statute to increase a dumping margin for Chinese VAT present in the EP or CEP starting price than it would be to increase a dumping margin for import duties, excise taxes, or any other types of domestic taxes that Commerce might find to be present in that

[12] The URAA made non-substantive changes to the export tax provision, substituting the term "exporting country" for the term "country of exportation" and inserting the word "subject" before the word "merchandise" (the latter change occurring throughout § 1677a).

[13] SAA at 822–23, 1994 U.S.C.C.A.N. at 4163 (instructing, as to the export tax provision and the other adjustments related to U.S. price that were carried over to the URAA, that "[t]hese adjustments have not changed from current law").

price. Only an "export" charge that is "imposed on the exportation of the subject merchandise to the United States" may be the subject of such a margin increase under the export tax provision.[14]

c. Relevant Characteristics of China's Value-Added Tax

On the uncontradicted facts in the record, including those acknowledged by Commerce itself, the Chinese value-added tax at issue in this case is a tax imposed on Chinese domestic production and subsequent sale of a good, regardless of whether the sale is into domestic commerce or for export. As Commerce recognized in the First Remand Redetermination, and as the court discussed previously, a Chinese producer incurs potential liability for Chinese VAT according to a formula in which total input VAT incurred in the prices of the total materials used in all domestic production (i.e., for domestic sale or for export) is applied as a credit against total output VAT, which is the sum of the output VAT as calculated on the sales for the domestic market and the output VAT calculated on export sales. *See First Remand Redetermination* 21–22. Thus, VAT-in and VAT-out are elements in the unitary calculation of the total VAT owed by a Chinese domestic producer, whether or not that producer is also an exporter. Because Chinese VAT is a home-market tax applying to domestic production of a good, it is one that, by definition (and in contrast to an export tax), is *capable* of being rebated or avoided by reason of exportation of that good (regardless of whether, under the product-specific tax provision applicable to that good, it actually is rebated or avoided by reason of exportation).[15]

---

[14] Commerce justified its interpretation of the export tax provision on the ground that deducting irrecoverable VAT from the EP and CEP starting prices achieved a tax-neutral dumping margin, normal value having been calculated on a tax-free basis in this non-market economy country proceeding. *First Remand Redetermination* 30. Later in this Opinion and Order, the court addresses this rationale, explaining that under the Tariff Act, the determination of EP or CEP in general, and the application of the export tax provision in particular, is not affected by the manner in which Commerce calculates normal value.

[15] As applied to production in China of multilayered wood flooring, Chinese VAT actually *is* rebated or avoided, in whole or in part, by reason of exportation. This is apparent from the Chinese VAT formula as Commerce presented it. *See First Remand Redetermination* 21–22. Output VAT on the domestic sales of this good was calculated at 17% of the price, and the output VAT on the sales for export was calculated at a preferential rate of 8% of the price. Under the VAT formula, a producer that exports a sufficiently large portion of its production might have incurred sufficient input VAT in the prices of its materials (incurred at rates higher than 8%, such as the 17% found applicable in this case) so as to have no VAT liability to the government of China. In this instance, Commerce acknowledged that Senmao's net VAT payable was negative for the POR. *Id.* at 23.

d. The Department's Interpretation of the Export Tax Provision, as Explained in the First Remand Redetermination, Cannot Be Sustained

In the First Remand Redetermination, Commerce gave three reasons in support of the deductions it made from Senmao's EP and CEP starting prices. The court does not find these reasons convincing.

Commerce concluded, generally, that "the amount of irrecoverable VAT is, effectively, an 'export tax, duty, or other charge' under section 772(c) of the Act, and it, therefore, warrants an adjustment to U.S. price." *First Remand Redetermination* 23. Commerce explained, second, that "[h]ere, although Senmao reported a negative VAT payable to the government during the POR, the resultant tax credit it could carry forward under Chinese law and apply against future VAT payable to the government was unambiguously reduced by irrecoverable VAT-in—a cost or expense Senmao *incurred by reason of its exports*—and therefore constitutes an export tax or other charge under section 772(c) of the Act." *Id.* at 29–30 (emphasis added). Finally, Commerce reasoned that "its adjustment of EP/CEP for irrecoverable VAT is reasonable and provides for a tax-neutral dumping margin." *Id.* at 30.

Commerce erred first in reasoning that "irrecoverable VAT" is an "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States." As the court has explained, Congress addressed value-added taxes in the home-market tax provision and did not intend that a value-added tax also could fall within the scope of the export tax provision, the two provisions being mutually exclusive. Moreover, the home-market tax provision, both as set forth in the TAA and URAA versions of the Tariff Act, demonstrates congressional awareness of the concepts of recoverable and irrecoverable value-added tax. Thus, the value-added tax China imposed on exports of multilayered wood flooring does not fall within the scope of the export tax provision regardless of the extent to which Commerce regards it as "recoverable" or "irrecoverable."

The Department's rationale that irrecoverable VAT "constitutes an export tax or other charge under section 772 of the Act" because it is "a cost or expense Senmao incurred by reason of its exports" is unconvincing as well. As the uncontested facts demonstrate, and Commerce recognized, a Chinese exporter of multilayered wood flooring incurs potential liability for output VAT on all sales. Export sales did not incur output VAT liability from which domestic sales are exempt (and, in this instance, export sales received preferential tax treatment). Commerce views an irrecoverable value-added tax as a "cost" because it does not reduce potential tax liability in the way a

recoverable value-added tax does. That does not make the irrecoverable portion of a value-added tax an "export" tax imposed on "exportation." The Tariff Act treats an irrecoverable VAT (and an irrecoverable import duty) as a domestic tax that does not potentially reduce a dumping margin, as a recoverable VAT potentially does (and as a recoverable import duty does). The Tariff Act does not treat irrecoverable VAT as an export tax simply because it is irrecoverable.

In support of its rationale that Chinese input VAT is subject to the export tax provision because it is a cost borne by the exporter, Commerce quoted *Aristocraft of Am. LLC v. United States*, 43 CIT __, 380 F. Supp. 3d 1324 (2019) ("*Aristocraft II*"). *First Remand Redetermination* 30 ("[I]n *Aristocraft* [*II*], the CIT found that: 'Commerce reasonably found that subject merchandise EP and CEP must be directly reduced by the irrecoverable VAT because irrecoverable VAT, as set forth in Chinese law, reduces the input VAT offset that serves to limit Shanghai Wells' overall VAT liability.'"). The opinion defendant cites does not discuss the statutory construction issue of whether the export tax provision is reasonably interpreted to increase a dumping margin for a value-added tax imposed by the exporting country. An earlier decision in the same litigation, issued in 2017, applying step two of an analysis under *Chevron*, found reasonable the Department's methodology treating Chinese irrecoverable VAT as the basis for a margin-increasing adjustment under the export tax provision. *Aristocraft of Am., LLC v. United States*, 41 CIT __, __, 269 F. Supp. 3d 1316, 1321–26 (2017) ("*Aristocraft I*"). *Aristocraft I* predated the previously-discussed opinions in *Qingdao Qihang* and *China Manufacturers* and, therefore, does not address the grounds upon which those opinions held the Department's statutory interpretation impermissible. It relies principally upon two earlier decisions of this Court, *Jacobi Carbons AB v. United States*, 41 CIT __, 222 F. Supp. 3d 1159 (2017) ("*Jacobi AR7 I*")[16] and *Juangcheng Kangtai Chem. Co. v. United States*, No. 17–3, 2017 WL 218910 (Ct. Int'l Trade 2017), and on a Federal Register notice published in 2012, in which Commerce announced that it would "implement a methodological change to reduce export price or constructed export price in certain non-market economy ('NME') antidumping proceedings by the amount of export tax, duty, or other charge, pursuant to section 772(c)(2)(B) of the

[16] "AR" stands for "administrative review" and the number next to "AR" indicates which administrative review the case concerns. Therefore, *Jacobi Carbons AB v. United States*, 41 CIT __, 222 F. Supp. 3d 1159 (2017) ("*Jacobi AR7 I*") and *Jacobi Carbons AB v. United States*, 43 CIT __, 365 F. Supp. 3d 1323 (2019) ("*Jacobi AR7 II*") both stem from an action regarding the seventh administrative review. *Jacobi Carbons AB v. United States*, 43 CIT __, 365 F. Supp. 3d 1344 (2019) ("*Jacobi AR8*"), discussed *infra*, is a decision concerning the eighth administrative review of the same order. *Jacobi AR7 II* and *Jacobi AR8* applied identical reasoning to the issue of Chinese VAT.

Tariff Act of 1930, as amended ('the Act')," *Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, in Certain Non-Market Economy Antidumping Duty Proceedings*, 77 Fed. Reg. 36,481–82 (June 19, 2012) ("*Methodological Change*"). *See Aristocraft I*, 41 CIT at __, 269 F. Supp. 3d at 1321–26.

In *Jacobi AR7 I*, this Court stated that "[t]he ordinary meaning of the term 'imposed' [as used in the export tax provision] demonstrates the reasonableness of Commerce's interpretation. Because the Chinese VAT is refunded in the context of domestic sales but not exports, it constitutes a 'penalty' that is 'applied,' and with which Jacobi is forever 'burdened,' at the time of exportation." *Jacobi AR7 I*, 41 CIT at __, 222 F. Supp. 3d at 1188. The finding that "Chinese VAT is refunded in the context of domestic sales but not exports" is a finding that could not be supported on the record of this case. In any event, a subsequent opinion in the *Jacobi* litigation clarified the relevant factual circumstances of China's VAT system as applied to activated carbon; that opinion did not rest on a finding or inference that export sales of activated carbon were burdened by the VAT system in a way that domestic sales were not. To the contrary, the case involved "output VAT" of 17% that "is equally applicable to domestic and export sales." *Jacobi Carbons AB v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1323, 1339 (2019) ("*Jacobi AR7 II*").

As *Juangcheng Kangtai* and *Jacobi AR7 I* predate *Qingdao Qihang* and *China Manufacturers Alliance*, they do not address the grounds upon which those later opinions held the Department's statutory interpretation impermissible. *Juangcheng Kangtai* and *Aristocraft I*, in applying *Chevron* deference, emphasized the words "export tax, duty, *or other charge*"as used in the export tax provision, concluding that the "other charge" reference is broad enough to encompass the irrecoverable VAT in question. *See Aristocraft I*, 41 CIT at __, 269 F. Supp. 3d at 1322–23. But the question has never been whether China's value-added tax is a "tax." As the uncontradicted facts in this case show, it is just that: a tax imposed on value added to goods produced in China that does not treat export sales less favorably than domestic sales. The term "other charge" is not permissibly read in isolation, as the tax or other charge must be an "*export* tax, duty, or other charge," and it must be imposed "*on* the exportation of the subject merchandise," in order to come within the bounds of the export tax provision. It is not enough that the charge be merely a cost that arises as the result of export sales. Moreover, the relevant tax-related adjustment provisions in the Tariff Act, when read together, and read in consideration of the statutory and legislative history,

cause the court to disagree with the conclusion, as stated in *Aristocraft I*, that “Congress has not expressed an unambiguous intent on how Commerce should resolve this issue.” *Id.* at __, 269 F. Supp. 3d at 1322.

Methodological Change fails to persuade the court that the First Remand Redetermination is lawful, for a straightforward reason: in treating irrecoverable VAT as an export tax, it is contrary to the Tariff Act. Specifically, the notice concludes, without plausible legal reasoning, that VAT not rebated upon exportation of the subject merchandise is, *per se*, an “export tax, duty, or other charge” within the scope of the export tax provision. *See Methodological Change*, 77 Fed. Reg. at 36,482 (announcing that Commerce, in non-market economy antidumping duty proceedings, will apply the export tax provision to “VAT that is not fully refunded upon exportation”).[17] The notice fails to put forth an analytically sound statutory interpretation of the export tax provision that addresses plain meaning, statutory history, and legislative history, and it ignores congressional intent that a dumping margin, although possibly reduced for recoverable value-added taxes, would *not* be increased for value-added taxes that are irrecoverable.

Also unconvincing is the Department’s rationale that reducing Senmao’s U.S. price for what it regarded as “irrecoverable VAT” is reasonable because it resulted in a tax-neutral calculation of the dumping margin. In support of this rationale, Commerce cited *Jacobi Carbons AB v. United States*, 43 CIT __, 365 F. Supp. 3d 1344 (2019) (“*Jacobi AR8*”). Commerce stated that “[i]n *Jacobi* [*AR8*], the CIT found that ‘...adjusting EP/CEP for VAT imposed on export sales allows Commerce to calculate a tax-neutral dumping margin when normal value is calculated exclusive of VAT.’” *First Remand Redetermination* 30 (quoting *Jacobi AR8*, 43 CIT at __, 365 F. Supp. 3d at 1361).

Jacobi AR8 involved an “output VAT” of 17% that Commerce found to have been imposed on both export sales and sales to the Chinese domestic market of activated carbon and, as applied to the export sales, determined to be subject to the export tax provision. The opinion describes the statutory interpretation issue presented in the case as “whether Commerce may apply the statute, 19 U.S.C. § 1677a(c)(2)(B), to a VAT that is equally applicable to domestic and

[17] The rationale for the scope of the notice is not fully explained. Even though maintaining that an irrecoverable VAT is, by reason of being irrecoverable, within the scope of the export tax provision, Commerce confined the reach of *Methodological Change* to exports from two non-market economy countries, China and Vietnam. There is no express finding that these are the only two countries in which VAT is irrecoverable upon exportation of the merchandise.

export sales." *Jacobi AR8*, 43 CIT at __, 365 F. Supp. 3d at 1359. The opinion holds that the export tax provision, by referring to "export tax[es], dut[ies], or other charge[s] imposed by the exporting country on the exportation of the subject merchandise," 19 U.S.C. § 1677a(c)(2)(B) [the export tax provision], "is ambiguous as to whether the statute applies to such assessments imposed *solely* upon export sales or assessments imposed upon sales *at the time of export*, regardless of whether the assessment is also applied to domestic sales." *Id.* The opinion concludes that it was reasonable for Commerce to adopt the latter interpretation, i.e., it was reasonable for Commerce to interpret the export tax provision as applying to assessments imposed at the time of export—specifically, output VAT—regardless of whether domestic sales were also subject to it.[18] Id.

Having found the export tax provision ambiguous, the opinion in *Jacobi AR8* concluded that the Department's interpretation of the export tax provision was reasonable because "Commerce interpreted section 1677a(c)(2)(B) to permit a reduction to EP/CEP in order to achieve a tax neutral comparison between EP/CEP and normal value." *Id.* at __, 365 F. Supp. 3d at 1360. The opinion reasons that "here, normal value is *not* based on home-market (i.e., domestic) sales prices, but is based on the respondent's factors of production and corresponding surrogate values, which are determined on a tax-exclusive basis." *Id.* The opinion adds that "[i]n such a case, the principle that dumping margin calculations should be tax-neutral supports Commerce's adjustment." *Id.* It states, further, that "[i]n this case, . . . the constructed export price reported by Jacobi includes 17 percent output VAT imposed by the Chinese government, whereas the normal value, to which it is to be compared, is determined using surrogate values that are tax-exclusive." *Id.* at __, 365 F. Supp. 3d at 1361–62.

The court is unable to agree that the interpretation Commerce placed upon the export tax provision, as ruled upon in *Jacobi AR8*, was a permissible one, even under a review conducted according to step two of a *Chevron* analysis. The premise that the statute is ambiguous "as to whether the statute applies to such assessments imposed *solely* upon export sales or assessments imposed upon sales *at the time of export*, regardless of whether the assessment is also

[18] In agreeing with this particular aspect of the Department's analysis, the opinion in *Jacobi AR8* found support in jurisprudence of the U.S. Supreme Court on the Export Clause in the United States Constitution. This is an interesting approach to the issue, but, after considering it, the court applies a different analysis in this case. Because the question presented in this case is one of *statutory* interpretation, the court conducted the analysis presented in this Opinion and Order according to the plain meaning, congressional intent, statutory history, and legislative history of the relevant provisions of the Tariff Act.

applied to domestic sales," *id.* at __, 365 F. Supp. 3d at 1359, addresses only the language of the export tax provision without considering the other tax-related provisions in the Tariff Act that lend the export tax provision meaning and context. "[A] reviewing court should not confine itself to examining a particular statutory provision in isolation." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

Even if it were presumed, *arguendo*, that the export tax provision is ambiguous in the way described in *Jacobi AR8*, the Department's interpretation of the export tax provision as reviewed in that decision still would be impermissible, for two reasons.

First, as the court discussed previously in this Opinion and Order, the home-market tax provision contemplates that home-market taxes can be imposed on exported subject merchandise (and possibly rebated), and no reasonable interpretation of the TAA would place the same tax within the ambit of that home-market tax provision and also within the ambit of the export tax provision, the scope of which was not enlarged upon enactment of the URAA. Because the output VAT rate for sales to the domestic market and the output VAT rate for sales for export were the same in the calculation of VAT owed by the producer to the Chinese government, the VAT scheme as applied in *Jacobi AR8* neither promoted exportation of the subject merchandise nor penalized it. In carefully chosen language, Congress took pains to distinguish such a tax from a tax on exportation itself, which disadvantages export sales. Under the scheme Congress established in the Tariff Act (both before and after enactment of the URAA), a tax such as the one at issue in *Jacobi AR8* would not reduce a dumping margin, but, being outside the intended scope of the export tax provision, neither would it increase one. The Department's interpretation was, therefore, unreasonable in that respect.

Second, the basis upon which *Jacobi AR8* found the Department's statutory interpretation to be reasonable was that doing so achieved a tax-neutral comparison with normal value, which Commerce, according to its practice, determined by valuing factors of production on a tax-free basis. *Jacobi AR8*, 43 CIT at __, 365 F. Supp. 3d at 1361–62. Under the Tariff Act, this was not a valid rationale. Commerce, in the interest of achieving what it considers to be a tax-neutral comparison between U.S. price and normal value, is not free to make any margin-increasing (or margin-reducing) adjustment to U.S. price that it chooses to make. Instead, Commerce must confine itself to adjustments the statute provides. *See Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398, 403

(Fed. Cir. 1994); *Vicentin S.A.I.C. v. United States*, 43 CIT __, __, 404 F. Supp. 3d 1323, 1333–34 (2019). Here, as elsewhere, Commerce must conform its methodologies to the statutory directives.

Under 19 U.S.C. § 1677a, the adjustments made to the starting price for determining EP or CEP in general, and any adjustment to these prices made according to the export tax provision in particular, do not vary according to the method by which Commerce determines normal value. In applying the adjustment for export taxes, Commerce must decide whether a tax or other charge imposed by an exporting country either *is*, or *is not*, within the scope of the export tax provision. The decision must be made according to the express terms of paragraph (c)(2)(B) of that section. It cannot depend instead on how Commerce is required to determine, or chooses to determine, normal value—a topic nowhere mentioned in the export tax provision. Instead, Commerce is to determine whether the charge at issue is, for purposes of 19 U.S.C. § 1677a(c)(2)(B), an "*export* tax, duty, or other charge" that is imposed by the exporting country and whether the exporting country imposed it "*on* the exportation of the subject merchandise." These necessarily depend on the characteristics of the foreign tax. How normal value is determined for purposes of U.S. law is irrelevant to the inquiry. Were it otherwise, the export tax provision could be given one meaning when the exporting country is found by Commerce to be a non-market economy country and a contrary one when it is not. The statutory issue before the court is a question of law, and Commerce is not free to give the same provision inconsistent meanings in different factual situations.

As the court has noted, Commerce is not free, for example, to increase a dumping margin for irrecoverable import duties or irrecoverable home-market taxes that Commerce may find to be present in the EP or CEP starting price, even though the Department's normal value calculation, based on factors of production and surrogate values, might not include these taxes or duties. Yet, under the rationale for the Department's statutory interpretation as described in *Jacobi AR8*, Commerce could shoehorn practically any type of tax, duty, or other charge affecting both domestic and export sales into the export tax provision—and, thereby, use it as a justification for increasing a dumping margin—so long as the tax or charge is assessed at the time of exportation and is found to be included in the EP or CEP starting price, and so long as Commerce considers the exporting country to be a non-market economy country. Congress intended otherwise.

In summary, the Department's interpretation of the export tax provision is inconsistent with the plain language of the provision

when interpreted in concert with other tax-related provisions in the Tariff Act that are relevant to the statutory interpretation issue before the court. The Department's interpretation is inconsistent with statutory and legislative history and cannot be justified as a reasonable method of achieving a tax-neutral dumping margin. Congress had a clear intent on the narrow question presented: a home-market value-added tax, although potentially reducing a dumping margin in certain circumstances (not present here), would not increase one.[19]

III. CONCLUSION

The Department's decision in the First Remand Redetermination to maintain its adjustments under 19 U.S.C. § 1677a(c)(2)(B) to the starting prices used to determine export price was contrary to law in relying upon an invalid interpretation of the Tariff Act, which does not permit those deductions. Commerce, therefore, must issue a new determination that does not commit this error.

Therefore, upon consideration of the First Remand Redetermination and all papers and proceedings in this action, and upon due deliberation, it is hereby

ORDERED that the First Remand Redetermination be, and hereby is, set aside as unlawful with respect to the decision by Commerce to maintain deductions from the starting prices under 19 U.S.C. § 1677a(c)(2)(B) for value-added tax; it is further

ORDERED that Commerce, within 60 days of the issuance of this Opinion and Order, shall submit a Second Remand Redetermination that corrects the error the court has identified; it is further

ORDERED that plaintiffs, plaintiff-intervenors, and defendant-intervenors may file comments on the Second Remand Redetermination within 30 days from the date on which the Second Remand Redetermination is filed with the court; and it is further

ORDERED that defendant may file a response to the comment submissions within 15 days from the date on which the last of any such comments is filed with the court.

Dated: March 11, 2020
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, CHIEF JUDGE

---

[19] In reaching this conclusion, the court does not hold broadly that a VAT could never be so structured as to fall within the scope of the export tax provision. A VAT directed solely to exports (if such a thing actually exists anywhere) would not be a home-market tax and would raise an issue this case does not present. In contrast, the VAT giving rise to this dispute, as shown by the formula for the calculation of VAT owed, applies to sales for domestic consumption and to sales for export (in this case, at a preferential, lower rate).