U.S. Court of International Trade

Slip Op. 16–54

MEXICHEM FLUOR INC., & E.I. DUPONT DE NEMOURS & CO., Plaintiffs, v. UNITED STATES, Defendant.

PUBLIC VERSION
Before: Leo M. Gordon, Judge
Consol. Court No. 15–00004

[Final negative injury determination sustained.]

Dated: June 6, 2016

Paul W. Jameson, Schagrin Associates of Washington, DC, argued for Plaintiff Mexichem Fluor Inc. With him on the brief was *Roger B. Schagrin*.

James R. Cannon, Jr., Cassidy Levy Kent (USA) LLP of Washington, DC, argued for Plaintiff-Intervenor E.I. DuPont de Nemours & Company. With him on the brief were *John D. Greenwald* and *Jonathan M. Zielinkski.*

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Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP of New York, NY, argued for Defendant-Intervenors Sinochem Environmental Protection Chemicals (Taicang) Co., Ltd, Zhejiang Quhua Fluor-Chemistry Co., Ltd. and Zhejiang Sanmei Chemical Industry Co., Ltd. With him on the brief were *Max F. Schutzman* and *Kavita Mohan*.

OPINION

Gordon, Judge:

This consolidated action involves the final determination of the U.S. International Trade Commission (“Commission” or “ITC”) that an industry in the United States is not materially injured or threatened with material injury by reason of imports of 1,1,1,2–Tetrafluoroethane (“R-134a”) from China. *1,1,1,2–Tetrafluoroethane from China*, 79 Fed. Reg. 73,102 (Int’l Trade Comm’n Dec. 9, 2014) (final neg. determ.) (“*Final Determination*”); *see also Views of the Commission*, Inv. Nos. 701-TA-509 and 731-TA-1244 (Final), USITC Pub. 4503 (Dec.

2014) ("*Views*").[1] Before the court are the motions for judgment on the agency record of Plaintiff Mexichem Fluor Inc. and the Chemours Company, successor-in-interest to Consolidated Plaintiff E.I. DuPont de Nemours & Co. *See* Mot. of Pl. Mexichem Fluor Inc. for J. on the R. Pursuant to R. 56.2 (July 31, 2015), ECF No. 30 ("Mexichem Br."); The Chemours Co.'s (Successor-in-Interest to E.I. DuPont de Nemours & Co.) R. 56.2 Mot. for J. on the Agency R. (July 31, 2015), ECF No. 32 ("Chemours Br."); *see also* Def. Int'l Trade Comm'n's Opp'n to Pls.' Mots. for J. on the Agency R. (Nov. 13, 2015), ECF No. 38 ("Def.'s Resp."); Def.-Intervenors' Resp. to Pls.' R. 56.2 Mots. for J. upon the Agency R. (Nov. 13, 2015), ECF No. 40. The court has jurisdiction pursuant to Section 516A(a)(2)(A)(i)(I) and (B)(ii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(I), (B)(ii) (2012),[2] and 28 U.S.C. § 1581(c) (2012).

For the reasons set forth below, the court sustains the *Final Determination* on each of the issues raised.

I. Standard of Review

The court sustains the Commission's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2015). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the

[1] All citations to the *Views* and to the agency record are to their confidential versions.

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

whole record." 8A *West's Fed. Forms, National Courts* § 3:6 (5th ed. 2015).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of the Commission's interpretation of the Tariff Act. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (An agency's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

II. Discussion

Two separate, but parallel, provisions of the Tariff Act of 1930, as amended, provide for the Commission to determine whether a domestic industry is materially injured, or threatened with material injury, by reason of unfairly subsidized or dumped imports. *See* 19 U.S.C. §§ 1671d(b), 1673d(b). The Commission will issue an affirmative determination if it finds "present material injury or a threat thereof" and makes a "finding of causation." *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1210, 431 F. Supp. 2d 1302, 1306 (2006) (citation and quotation marks omitted). In making a material injury determination, the Commission evaluates "(1) the volume of subject imports; (2) the price effects of subject imports on domestic like products; and (3) the impact of subject imports on the domestic producers of domestic like products." *Id.* (citing 19 U.S.C. § 1677(7)(B)(i)(I)-(III)). The Commission may also consider "'such other economic factors as are relevant in the determination.'" *Id.* at 1210, 431 F. Supp. 2d at 1306 (quoting 19 U.S.C. § 1677(7)(B)(ii)).

A. Volume

In performing its volume analysis, the Commission must "'consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.'" *Shandong TTCA Biochemistry Co. v. United States*, 35 CIT ___, ___, 774 F. Supp. 2d 1317, 1322 (2011) (quoting 19 U.S.C. § 1677(7)(C)(i)).

The Commission found that subject import volume and market share was "significant in absolute terms and relative to consumption." *Views* at 24. The Commission also noted an increase in subject imports between 2011 and 2012. *Id.* Nevertheless, the Commission determined that the volume of subject imports did not cause adverse effects to the domestic industry. The Commission reasoned that a domestic supply shortage beginning in 2010 and persisting "at least through the end of 2011" caused certain purchasers to turn to subject

imports. *Views* at 21–23. As the shortage eased, "the market stabilized in 2012," and subject imports declined "on both a relative and absolute basis" in 2013. *Id.* at 23.

1. Subject Import Volume Data Source

i. Contentions

Mexichem argues that the Commission should have evaluated subject import volume on a quarterly basis rather than an annual basis. Mexichem Br. at 21–22. Mexichem contends that the Commission "ignored" the increase in subject import volume in the fourth quarter of 2012, which in turn undermines the Commission's finding that the 2011 supply shortage caused the increase. *Id.* at 22. According to Mexichem, increased subject import volume in the fourth quarter of 2012 could not have resulted from the domestic shortage. *Id.* at 21–22.

Chemours argues that the Commission should have measured subject import market share using U.S. shipments of subject imports that importers reported rather than official import statistics. Chemours Br. at 22. Chemours insists that imports of R-134a are kept in inventory and delivered as demand for air conditioning, which is weather dependent, dictates, and that imports held in inventories do not have market effects. Chemours also argues that shipment data are "essential" to calculate market share shifts on an "apples-to-apples basis." *Id.*

ii. Analysis

The court does not agree with Mexichem that the Commission's evaluation of subject import volume on an annual rather than quarterly basis was unreasonable. The Commission followed its long-standing practice of assessing subject import volume and market share on an annual basis. As the Commission explained, the quarterly data that Mexichem prefers is less reliable than the annual data. *Views* at 4 n.4. Specifically, the quarterly data are limited to official import statistics covering imports entered under HTSUS subheading 2903.39.2020, *see* Mexichem Br. at 21, which cannot account for R-134a misclassified under other HTSUS provisions. *Views* at 4 n.4; *1,1,1,2–Tetrafluoroethane from China*, Inv. Nos. 701-TA-509 and 731-TA-1244 (final), at IV-1 n.4 (Int'l Trade Comm'n Oct. 31, 2014) (final staff report) (confidential version) ("Conf. Rep."). To address this problem, the Commission combined the official import statistics for HTSUS subheading 2903.39.2020 with data for R-134a imported under other HTSUS provisions, which the Commission requested and

obtained from importers directly. *Views* at 4 n.4. Because Mexichem's proposed methodology omits these misclassified imports, the Commission reasonably chose its traditional methodology to analyze subject import volume. Furthermore, the Commission does not appear to have overlooked increased import volume due to its methodology selection: the Commission explicitly recognized that subject import volume increased between 2011 and 2012.[3] *Views* at 21.

The court also does not agree with Chemours that the Commission should have measured subject import market share using U.S. shipments. The Commission's typical practice is to use subject import volume to calculate subject import market share when accurate data on U.S. shipments of subject imports are unavailable. *See BIC Corp. v. United States*, 21 CIT 448, 461, 964 F. Supp. 391, 404 (1997) (sustaining the Commission's use of import data where questionnaires from importers were "incomplete"). Here, the Commission applied this practice because of reliability issues with the responding importers' U.S. shipment data. Specifically, certain importers,[4] accounting for a significant percentage of all subject imports,[5] reported that they did not track shipments by supplier or country of origin, meaning they had to either estimate their U.S. shipments of subject imports or else report U.S. shipments that included some amount of domestically-produced R-134a. *See* Conf. Rep. at Table IV-1; Importers' Questionnaire Responses at Questions II-5, II-10. The Commission therefore reasonably relied on official import data to measure subject import market share instead of U.S. shipment data. Conf. Rep. at Table IV-6.

2. Subject Import Volume Increase

i. Contentions

Mexichem challenges the Commission's finding that the domestic supply shortage caused the increased volume of subject imports. Mexichem Br. at 18–26, 28–35. Mexichem asserts that the shortage ended in 2011, *id.* at 27, and contends that the Commission's finding is unreasonable because purchasers "bought even more imported R-134a in 2012 than they had in 2011." *Id.* at 29. Mexichem also challenges the Commission's conclusion that the market "stabilized" in 2012 because "imports continued to increase and prices continued

[3] Subject import volume increased by **[[ ]]** short tons. *Views* at 21.

[4] **[[ ]]**.

[5] **[[ ]]** %. Conf. Rep. at Table IV-1.

to fall" in that year. *Id.* at 27–28. Mexichem points to quarterly and annual subject import volume data and purchasers' responses in support of its arguments.

Chemours argues that the Commission failed to consider market share gains by subject imports and domestic excess capacity in finding that the supply shortage caused the increased volume of subject imports. Chemours Br. at 20–22. Chemours insists that capacity utilization decreased and remained at that lowered level while subject imports increased. *Id.* at 21–22. Chemours asserts that domestic producers would have been able to increase sales volume and market share "but for" subject imports. *Id.* at 22.

ii. Analysis

The court does not agree with Mexichem that subject import volumes in 2012 undermine the reasonableness of the Commission's finding that the domestic supply shortage caused the subject import volume increase. As the Commission reasonably explained, confidential correspondence indicates that purchasers were warned that the supply shortage would continue *into* 2012.[6] *Views* at 22 & nn.93, 95. The Commission also explained that "purchasers were aware" that a domestic producer[7] "had scheduled a plant shutdown in 2012 for maintenance, further decreasing the available supply of domestically produced R-134a in 2012." *Id.* at 22–23. Moreover, the Commission explained that purchasers typically place orders in the fall for delivery through the winter months. *Id.* at 23. These facts support the Commission's reasonable finding that "the duration of the supply shortage was *uncertain* at the time it was occurring," which caused "purchasers [that] wanted to ensure a stable supply of R134a" to "turn to China as a reliable source . . . both during the shortage *and as the shortage began to dissipate*." *Id.* (emphasis added). In the court's view, 2012 subject import volumes are consistent with the Commission's conclusion.

The court also does not agree with Mexichem that the Commission's finding that the market "stabilized" in 2012 was unreasonable. In terms of subject import volumes as a share of the U.S. market, the Commission noted the increase between 2011 and 2012, but a decline

[6] Specifically, in February 2012 [[ ]] warned of "[[ ]]."*Views* at 22 (emphasis added). Furthermore, [[ ]] notified its customers that [[ ]]. *Id.*

[7] [[ ]]. *Views* at 22–23.

between 2012 and 2013.[8] *Id.* Likewise, the Commission observed a decline in U.S. producers' U.S. shipments as a share of the market between 2011 and 2012, but an increase from 2012 to 2013.[9] *Id.* at 23–24. Subject import volumes appear to have stabilized as the supply shortage eased, just as the Commission described. *Id.*

The court is also not persuaded by Chemours's argument regarding the domestic industry's unused capacity. Chemours believes domestic producers would have increased output "but for" subject imports, but fails to account for the numerous documents indicating that domestic producers were *unable or unwilling* to meet demand because of the shortage. *See id.* at 21–23 & nn.92–95 (quoting sources).

Consequently, the Commission reasonably found that the increase in the volume of subject imports between 2011 and 2012 was a result of the domestic supply shortage.

B. Pricing

The Commission must evaluate whether:

> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii).

The Commission observed mixed instances of underselling and overselling.[10] *Views* at 25. As with its volume analysis, however, the Commission tied this pricing pattern back to the domestic supply shortage. The Commission explained that domestic prices declined during the period of investigation ("POI") due to cessation of the shortage, which had temporarily inflated prices. *Id.* at 28 & n.117. Because the shortage had been most acute in the automotive aftermarket segment, the Commission explained, prices in that segment were inflated the most and declined more than prices in other seg-

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[8] Specifically, [[ ]] % in 2011, [[ ]]% in 2012, and [[ ]] % in 2013. *Views* at 23. Subject imports also constituted a [[ ]] % share in interim 2013, and a [[ ]] % share in interim 2014. *Views* at 23 n.103.

[9] Specifically, [[ ]] % in 2011, [[ ]] % in 2012, and [[ ]] % in 2013. *Views* at 23–24.

[10] Subject imports oversold the domestic like product in 35 of 66 quarterly price comparisons, but the volume of undersold subject imports was [[ ]] larger than the volume of oversold subject imports. *Views* at 26.

ments after the shortage ended. *Id.* at 28. Additionally, the Commission observed that domestic prices declined on all pricing products[11] after the shortage ended, regardless of whether subject imports undersold or oversold a particular pricing product. *Id.* at 29. The Commission also noted an increase in the domestic industry's cost of goods sold ("COGS") to net sales ratio over the POI, but explained that the increase resulted from the cessation of the supply shortage, which caused prices (and, consequently, net sales value) to decline. *Id.* at 30.

The Commission ultimately determined that subject imports "did not have significant price effects" because: (1) they "did not have the effect of depressing prices or preventing price increases that would otherwise have occurred to a significant degree"; (2) "the observed underselling did not lead to significant shifts in market share;" and (3) instances of confirmed lost sales and revenues "do not outweigh the other data in the record which, taken as a whole, show the lack of significant price effects." *Id.* at 31.

1. Methodology Choice

i. Contentions

Mexichem challenges the Commission's underselling methodology choice. According to Mexichem, the Commission's analysis compared U.S. and subject import prices at different levels of trade. Mexichem's Br. at 33–34. Mexichem asserts that the Commission's preferred import prices reflected differing levels of trade because they are generally higher than direct import prices. *See id.* at 32–34.

Similarly, Chemours contends that the Commission should have collected and used direct import pricing data. According to Chemours, the average unit values ("AUVs") of direct imports from China by four large repackagers[12] were generally lower than the AUVs of domestic producer sales to those same repackagers. Chemours Br. at 18–19. Chemours argues the Commission's methodology choice led it to ignore the price effects of bulk imports by these four large repackagers. *Id.* at 17–18.

ii. Analysis

Here, the Commission reasonably chose its typical underselling methodology. "[W]hile the statute requires the Commission to analyze underselling . . . the statute does not stipulate how the Commission is

[11] "Pricing products" refers to the seven different R-134a products for which the Commission sought pricing data. Conf. Rep. at V-5.

[12] [[ ]]. Chemours Br. at 18–19.

to calculate the price of the imported merchandise or the domestic like product," leaving it to the Commission "to choose the manner in which it calculates the prices, and how it compares them." *Celanese Chems., Ltd. v. United States*, 31 CIT 279, 294 (2007). Applying its usual approach here, the Commission based its price analysis on seven representative products, accounting "for approximately 60.5 percent of U.S. producers' U.S. commercial shipments and 65.9 percent of U.S. importers' U.S. commercial shipments of imports from China during the POI," *Views* at 25, and explained that the "pricing data on the record provides relatively high coverage of both the domestic like product and subject imports." *Id.* at 29, n.122. These two data sets have the added advantage of covering the same sales activities (shipments to unrelated U.S. customers), which enabled the Commission to make an apples-to-apples comparison between the price of imported merchandise and the price of domestic like products. *See id.* at 26–29. The Commission also reasonably explained that its "usual practice is not to rely heavily on AUV data because changes in AUV data over time can be a result of changes in product mix." *Id.* at 29 n.125.

Mexichem observes that prices of U.S. importers' U.S. shipments are higher than direct import prices. As the Commission reasonably explained, however, U.S. importers' U.S. shipments include "any sales markup that would typically be made by an importer selling R-134a in the U.S. market," such as transportation from the port to their facility, warehousing costs, and profit margins, among other things. *See Views* at 29 n.122. That U.S. importers' U.S. shipments are priced higher than direct import prices is therefore neither surprising nor remarkable on this record.

The court also does not agree with Chemours's arguments. While Chemours would have preferred that the Commission collect and use direct import prices, "there is no minimum standard set by Congress to measure the thoroughness of an investigation by the Commission." *Diamond Sawblades Mfrs. Coalition v. United States*, 32 CIT 134, 148 (2008). As the Commission explained, direct import prices would not provide as accurate a picture of subject import underselling because domestic producers compete with direct import prices *plus* the costs associated with direct importation. *See Views* at 29 n.122. Likewise, the Commission considered the price data reported by the four large repackagers mentioned in Chemours's brief, which covered sales of pricing products derived from the R-134a they directly imported and repackaged into smaller containers.[13]

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[13] *See* Importers' Questionnaire Responses of [[ ]] at Questions II-5, III-2 ([[ ]]).

In the end, "Plaintiffs' preference for their own [underselling] methodology is understandable," but "'the focal point . . . is not what methodology [Plaintiffs] would prefer, but on whether the methodology actually used by the Commission was reasonable.'" *Shandong*, 35 CIT at ___, 774 F. Supp. 2d at 1329 (citation omitted); *see also JMC Steel Group v. United States*, 38 CIT ___, ___, 24 F. Supp. 3d 1290, 1300 (2014). Accordingly, the Commission in this case reasonably applied its usual methodology in analyzing subject import underselling.

2. Correlation Between Underselling and Market Share

i. Contentions

Both Plaintiffs challenge the Commission's analysis of the relationship between underselling and changes in market share on legal grounds. Specifically, Chemours argues that the Commission was precluded as a matter of law from finding no adverse price effects "simply because" there was no correlation between subject import underselling and market share. *See* Chemours Br. at 15–17; *see also* 19 U.S.C. § 1677(7)(B)-(C) (describing "volume" separately from" price" as factors the Commission "shall consider" in each case). Mexichem argues that the Commission unlawfully failed to perform a market segmentation analysis when it found no correlation between underselling and market share changes. Mexichem insists that the Commission was required to perform a market segmentation analysis because the Commission considered the effects of the supply shortage on separate segments of the domestic market. Pl. Mexichem Fluor Inc. Reply's Br. at 16–18 (Jan. 21, 2016), ECF No. 49; *see* Mexichem Br. at 23–25, 29–31.

Plaintiffs also argue that the only reasonable conclusion on this record is that subject import underselling is in fact correlated with increased subject import market share. *See id.* at 23–25; Chemours Br. at 29. Plaintiffs contend that the Commission ignored what they view as a clear correlation between subject import underselling and market share in the automotive aftermarket segment. *See* Mexichem Br. at 23–25, 29–31; Chemours Br. at 29. Mexichem in particular argues that the correlation between subject import underselling and market share was clear from the purchasing patterns of certain importer/purchasers, [14] which according to Mexichem increased their purchases and imports of R-134a from China due to lower prices. Mexichem Br. at 29–31.

[14] [[ ]]. Mexichem Br. at 29–31.

ii. Analysis

The court does not agree that the Commission violated 19 U.S.C. § 1677(7)(B)(ii) when it considered the connection between subject import underselling and volume. As Chemours correctly asserts, the statute "does not require" any link between subject import underselling and volume, and that subject imports may depress or suppress domestic prices without increasing in volume or market share. Chemours Br. at 16; *see* 19 U.S.C. § 1677(7)(B)(ii). The statute also does not, however, *preclude* the Commission from considering whether subject import underselling correlates with increased subject import volume or market share, as would be expected if underselling is driving increased purchases of subject imports. In fact, the statute provides that the Commission "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of subject imports." 19 U.S.C. § 1677(7)(B)(ii). The Commission therefore reasonably analyzed the correlation between subject import trends and domestic industry performance, including the correlation between subject import volume and price effects, as an economic factor relevant to the price effects of subject imports. *See JMC*, 38 CIT at ___, 24 F. Supp. 3d at 1300 ("A correlation analysis entails tracking subject import trends in relation to trends in the domestic industry's performance and the court has approved its use to assess the price effects of subject imports.") (citing *Comm. for Fair Coke Trade v. United States*, 28 CIT 1140, 1168 (2004)).

The court also does not agree with Mexichem that the statute required the Commission to conduct a market segmentation analysis. "[T]he [Commission] bears no obligation to perform a market segmentation analysis" and "d[oes] not err in basing its determination on data representing the experience of the domestic industry as a whole, rather than on the experience of [different segments of the industry] separately.'" *NSK Corp. v. United States*, 32 CIT 966, 983, 577 F. Supp. 2d 1322, 1340 (2008) (quoting *Tropicana Prods., Inc. v. United States*, 31 CIT 548, 559–60, 484 F. Supp. 2d 1330, 1341 (2007)) (brackets in original); *see also* 19 U.S.C. § 1677(4)(A) ("The term 'industry' means the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."). During the investigation, Plaintiffs advocated a single domestic like product and industry, and did not request the collection of segment-specific performance data. The Commission defined a single domestic like product co-extensive with the scope of the investigations, encompassing all R-134a, and thus a single domestic in-

dustry comprised of all producers of R-134a. *See Views* at 8–9. The Commission therefore reasonably based its analysis of subject import underselling and market share trends on the market as a whole, while also considering the magnified effects of the supply shortage on the automotive sector as relevant to that analysis. *Id.* at 17–19, 27.

In any event, the Commission's correlation finding was but one of several findings supporting its conclusion that subject imports had no significant price effects. In addition to finding no correlation between subject import underselling and market share, *Views* at 27, the Commission also found a mixed pattern of subject import underselling and overselling, with overselling in a majority of quarterly comparisons. *Id.* at 26. The Commission found that cessation of the shortage explained the decline in domestic prices during the POI as well as the industry's increasing COGS to net sales ratio. *Id.* at 28, 30. The Commission found that domestic prices declined at a similar rate *regardless* of whether subject imports undersold or oversold a particular pricing product. *Id.* at 29. Taken as a whole, the Commission reasonably evaluated the relationship between subject import prices and other relevant economic factors and concluded that subject imports had no significant price effects.

The court is not persuaded that the Commission ignored subject import underselling in the automotive aftermarket segment. *See* Mexichem Br. at 23–25, 29–31; Chemours Br. at 29. The Commission found as a condition of competition that domestic producers maintained long term contracts with original equipment manufacturers but supplied the automotive aftermarket segment on a spot basis. The Commission explained that domestic producers chose to fulfill their long term contractual obligations before serving aftermarket purchasers in the spot market, which in turn concentrated the effects of the supply shortage on the automotive aftermarket segment. *Views* at 19. The Commission recognized that most subject imports were sold in the automotive aftermarket because that was the segment that experienced the greatest shortage of R-134a, *id.* at 23, and that the domestic industry lost market share in the aftermarket segment between 2011 and 2013. *Id.* at 33. In so finding, the Commission recognized that most underselling would have occurred in the automotive aftermarket segment. *Id.* at 18, 25; Conf. Rep. at Table IV-7. As the Commission explained, however, the domestic industry "*gained* market share in the 'other refrigerants' application in which it faced competition from subject imports" during the period so that its overall market share in 2013 was only "slightly" lower than in 2011.[15] *Views* at 33.

[15] [[ ]] % in 2013 as compared to [[ ]]% in 2011. *Views* at 33.

The court also does not agree with Mexichem that the correlation between subject import underselling and market share was clear from the purchasing patterns of certain importer/purchasers. The Commission reasonably analyzed the relationship between subject import underselling and market share by using pricing data reported by *all responding importers*, covering 65.9 percent of their U.S. commercial shipments of subject imports, and market share data covering the market as a whole. *Views* at 27 (citing Conf. Rep. at Tables IV-6, V-6). By contrast, Mexichem's analysis focuses on only three of 40 responding importers, accounting for a smaller share[16] of reported subject import volume. Conf. Rep. at Table IV-1. Moreover, Mexichem compares the AUV of four of these importers' direct imports to the AUV of Mexichem's sales of product 1 alone. *See* Mexichem Br. at 29–31. When compared to the AUV of *all* domestic producer sales of product 1, it turns out that direct import prices were *higher* than domestic prices in most[17] annual comparisons during 2011 and 2012. Conf. Rep. at Table V-3.

Finally, the court is not convinced that the only reasonable conclusion on this record is that subject import underselling is correlated with increased subject import market share. As the Commission pointed out, the domestic industry partly made up for its declining market share in the aftermarket segment with increased market share in the "other refrigerants" segment, resulting in little change to the industry's overall market share. *Views* at 27 n.114, 33. Plaintiffs rely heavily on the automotive aftermarket segment, which as the Commission explained experienced the greatest increase in subject import volume and the greatest decline in domestic prices as the shortage eased because the shortage impacted that segment most acutely. *Id.* at 23, 28. The Commission also explicitly found a "mixed" pattern of subject import underselling and overselling during the POI. *Id.* at 26. Plaintiffs' alternative interpretations of the same evidence do not, in the court's view, undermine the reasonableness of the Commission's findings here.

3. The Domestic Supply Shortage

i. Contentions

Plaintiffs challenge the Commission's finding that domestic prices declined from levels inflated by the shortage as the domestic supply situation normalized in 2012. Mexichem argues that the Commission overlooked the quantity of subject imported pricing product that

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[16] [[ ]]%. Conf. Rep. at Table IV-1.

[17] Specifically, [[ ]] annual comparisons. Conf. Rep. at Table V-3.

undersold domestic like product during the POI. Mexichem Br. at 31. Chemours asserts that the Commission's finding violates "basic principles of economics." Chemours Br. at 24–25. Chemours insists that the Commission actually "affirm[ed] the link" between domestic price levels and rising subject imports when it attributed the decline in prices during the POI to cessation of the supply shortage. *Id.* at 26. Chemours further argues that the Commission ignored evidence indicating that prices declined more for pricing products facing subject import competition than for the one product with no subject import competition. *Id.* at 30–31. Chemours insists that the share by volume of subject import underselling[18] "actually show[s]" that "underselling was pervasive." *Id.* Finally, Chemours contends that the Commission attached insufficient weight to confirmed lost sales and revenue allegations. *Id.* at 31.

ii. Analysis

In arguing that the Commission should have measured the degree of subject import underselling based on volume rather than quarters of underselling, Mexichem essentially challenges the Commission's methodological choice. The Commission has historically measured the degree of subject import underselling by comparing the number of quarterly price comparisons in which subject import underselling occurred to the number of quarterly comparisons in which subject import overselling occurred. The court has sustained this approach in the past. *Nucor Corp. v. United States*, 28 CIT 188, 246, 318 F. Supp. 2d 1207, 1257 ("[T]he [ITC] is not obligated to conduct a price comparison analysis that accounts for variations in sales volumes.") (quoting *Nippon Steel*, 182 F. Supp. 2d at 1341); *see also Shandong*, 35 CIT at ___, 774 F. Supp. 2d at 1327–29; *Coal. of Gulf Shrimp Indus.*, 39 CIT ___, ___, 71 F. Supp. 3d 1356, 1365–66 (2015).

Applying this methodology here, the Commission found that prices of domestically-produced pricing products declined at a similar rate regardless of the degree of subject import underselling. Specifically, domestic prices declined at a similar rate for product 1, which subject import oversold in most comparisons; product 4, which subject imports undersold in most comparisons; and products 5, 6, and 7, which had mixed patterns of quarterly underselling and overselling. *Views* at 29. Although Mexichem identifies an alternative methodology that supports its preferred outcome, the Commission here applied its traditional methodology for assessing underselling and found that domestic prices declined at a similar rate whether subject imports

[18] [[ ]] %. Chemours Br. at 30.

undersold or oversold particular products. *Id.* at 24–29. This finding, in turn, reasonably supports the Commission's conclusion that prices dropped in response to the improved domestic supply situation rather than subject import underselling. *Id.* at 31.

The court does not agree with Chemours that the Commission violated "elementary" economic principles in finding no correlation between subject imports and declining prices. CB at 24–25. "[U]nderselling combined with increasing import volumes does not '*necessarily* indicate[] injury due to pricing in cases involving fungible products.'" *JMC*, 38 CIT at ___, 24 F. Supp. 3d at 1303 (quoting *Coal. for Pres. of Am. Brake Drum & Rotor Aftermkt. Mfrs. v. United States*, 22 CIT 520, 527–28, 15 F. Supp. 2d 918, 925 (1998)) (emphasis added). The Commission recognized that subject imports were highly substitutable for the domestic like product and that price was an important factor in purchasing decisions. *Views* at 19–20. Nevertheless, as the Commission explained, domestic prices for products 1, 4, 5, 6, and 7 dropped at similar rates regardless of whether (and how much) subject imports undersold, oversold, or even competed with those products. *Id.* at 29. The supply shortage, on the other hand, accounts for these widespread price reductions as well as many other market conditions outlined in the record. *See id.* at 17–19, 21–30. The Commission therefore reasonably concluded that the cessation of the shortage rather than subject import underselling accounted for the decline in domestic prices during the POI. *Id.* at 28–29; *see also* Statement of Administrative Action for the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1 at 851–52 (1994) (explaining that the Commission must "ensure that it is not attributing injury from *other sources* to the subject imports" (emphasis added)).

The court is also not convinced that the Commission ignored evidence that prices declined more for pricing products facing subject import competition than for the one product with no subject import competition. The Commission explicitly recognized that "price declines occurred whether subject imports oversold or undersold the domestic like product *and regardless of whether subject imports were present in the market* for a particular pricing product." *Views* at 29 (emphasis added). It appears that Chemours simply disagrees with the Commission's reasonable finding that the supply shortage, rather than subject import underselling, caused the decline in prices. *See id.* at 28–29.

The court also is not persuaded that the Commission attached insufficient weight to evidence that a certain percent[19] of reported subject import sales volume undersold the domestic like product. As

[19] [[ ]] %. Chemours Br. at 30.

discussed above, the Commission used its traditional methodology of assessing underselling on a quarterly basis and was "not obligated to conduct a price comparison analysis that accounts for variations in sales volumes." *Nucor*, 28 CIT at 246, 318 F. Supp. 2d at 1257 (citation omitted). The Commission expressly recognized that the quantity of undersold subject imports was larger than the quantity of oversold subject imports. *Views* at 26. The Commission explained, however, that the volume of subject imports that undersold the domestic like product did not correlate to subject import market share shifts. *Id.* at 27. Instead, the Commission found that the only gain in subject import market share occurred between 2011 and 2012 as a result of the domestic supply shortage. *Id.* In the court's view, the Commission reasonably weighed the evidence of underselling in concluding that subject imports did not cause the observed price declines.

Finally, the Court does not agree with Chemours's arguments about confirmed lost sales and lost revenue allegations. Chemours overstates confirmed lost sales and revenues by comparing them to industry sales and operating income in 2013 alone, even though lost sales and revenues allegations were spread across the POI. *See* Conf. Rep. at Tables V-13–14. Compared to the whole POI, lost sales and revenue allegations[20] amounted to a small percent of domestic industry sales[21] and were substantially lower than the industry's operating income in 2011 and 2012.[22] *Id.* at Table D-1. Most of the confirmed lost sales and lost revenues occurred during and immediately following the supply shortage in 2011 and 2012.[23] *See id.* at Tables V-13–14.

In any event, "the Commission must determine whether lost sales, *together with other factors*, indicate a causal nexus between the imports at less than fair value and material injury to the domestic industry.'" *GEO Specialty Chems., Inc. v. United States*, 33 CIT 125, 132–22 (2009) (quoting *Maverick Tube Corp. v. United States*, 12 CIT 444, 449, 687 F. Supp. 1569, 1575 (1988)) (emphasis added). Here, the Commission considered confirmed lost sales and revenues and found that they did "not outweigh the other data in the record which, taken as a whole, show the lack of significant price effects." *Views* at 31 n.132. As the Commission explained, subject import underselling was mixed and did not correlate with subject import market share shifts; domestic prices declined due to cessation of the shortage, and regardless of underselling, overselling, or even competition from subject

[20] $[[ ]]. Conf. Rep. Table D-1.

[21] [[ ]] % of $[[ ]]. Conf. Rep. Table D-1.

[22] $[[ ]] and $[[ ]] , respectively. Conf. Rep. Table D-1.

[23] Specifically, [[ ]]% of confirmed lost sales and [[ ]] % of confirmed lost revenues. Conf. Rep. at Tables V-13 to -14.

imports; and declining prices from cessation of the shortage caused the industry's COGS to net sales ratio to increase, notwithstanding the industry's stable COGS. *See id.* at 25–30. The Commission therefore reasonably found that other evidence outweighed the confirmed lost sales and revenue allegations.

C. Impact

In evaluating the impact of subject imports on the domestic industry, the Commission evaluates "all relevant economic factors which have a bearing on the state of the industry," including, but not limited to:

> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices,
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
>
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (V) in a proceeding [concerning the imposition of antidumping duties], the magnitude of the margin of dumping.

19 U.S.C. § 1677(7)(C)(iii). The Commission must analyze these factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Id.*

The Commission found that largely stable demand during the POI was reflected in the relatively stable performance of the domestic industry according to most measures, including capacity, capacity utilization, production, U.S. shipments, market share, employment, wages paid, hours worked, productivity, and net sales quantity. *Views* at 32–34. The industry's market share was only slightly lower in 2013 than in 2011, the Commission explained, because the industry offset market share lost in the aftermarket segment with market share gains in the "other refrigerants" application, despite subject import competition. *Id.* at 33.

The Commission recognized that the domestic industry suffered a severe decline in operating income during the POI, as the domestic industry's net sales revenues declined more rapidly than the indus-

try's COGS. *Id.* at 34–35. The Commission explained, however, the industry's financial performance declined during the POI when prices that were anomalously high due to the shortage in 2010 and 2011 began to return to pre-shortage levels as the market stabilized in 2012 and 2013. *Id.* at 36. The Commission observed that subject imports had no significant price effects, and found no correlation between the domestic industry's declining financial performance and subject import volume and market share. *Id.*

1. The Domestic Supply Shortage

i. Contentions

Mexichem argues that the Commission unlawfully ignored the increase in the domestic industry's COGS to net sales ratio between 2010 and interim 2014, which in its view showed injury by reason of subject imports. Mexichem Br. at 18–20, 36–38. Similarly, Chemours argues that the Commission erred in finding that domestic prices returned "to normal" in 2013 because, in its view, the decline in domestic prices to below cost by interim 2014 could not be considered normal. Chemours Br. at 27.

ii. Analysis

In the court's view, the Commission lawfully focused on 2011–13 data for its analysis of trends in the domestic industry's COGS to net sales ratio. *Views* at 30, 34. "The statute does not expressly command the Commission to examine a particular period of time." *Kenda Rubber Indus. Co. v. United States*, 10 CIT 120, 126–27, 630 F. Supp. 354, 359 (1986); *see also Nitrogen Solutions Fair Trade Comm. v. United States*, 29 CIT 86, 97, 358 F. Supp. 2d 1314, 1325 (2005) ("[T]he ITC's broad discretion in choosing the time frame for its investigation and analysis has consistently been upheld . . . ."). The Commission here applied its normal practice in defining the POI for the final phase of its investigations as 2011–13 and the first halves of 2013 and 2014. Mexichem did not challenge this decision below by requesting that the Commission expand the POI to include 2010 and to collect data covering 2010. *See* Mexichem's Comments (1–69). Just because Mexichem now identifies a different methodology that might support its own narrative does not mean that the Commission's normal practice is unlawful.

Here, the Commission reasonably analyzed trends in the domestic industry's COGS to net sales ratio. *Views* at 30, 40. The Commission explained that domestic prices were inflated by the supply shortage in both 2010 and 2011, meaning that the AUV of the domestic indus-

try's net sales in 2010 was much higher, and the industry's COGS to net sales ratio much lower, than it would have been in the absence of the shortage. *Views* at 18, 28 & n.117, 36. More broadly, given the absence of any correlation between subject import underselling and either market share shifts or domestic price declines, *id.* at 27–29, and the inflated domestic prices that resulted from the shortage, *id.* at 28 & nn.117–18, the Commission concluded that the domestic industry's declining operating income during the POI resulted from resolution of the shortage rather than subject imports. *Id.* at 36. Mexichem's argument that these data establish material injury by reason of subject imports is an invitation for the court to reweigh this same evidence. *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004) (The CIT "may not reweigh the evidence or substitute its own judgment for that of the agency."). This the court will not do.

The court also does not agree with Chemours that the Commission unreasonably found that "falling prices in 2013 represented a return to 'normal.'" Chemours Br. at 27. The Commission expressly declined Plaintiffs' invitation to speculate as to whether prices were returning to their "natural equilibrium." *Views* at 30 n.130. As the Commission explained, "we have not purported to compute such prices" because "the statute does not refer to 'equilibrium' prices" but rather "directs [the Commission] to ascertain whether the effect of subject imports is to depress prices to a significant degree." *Id.* at 30 n.130 (citing 19 U.S.C. § 1677(7)(C)(ii)(II)). Chemours's argument is therefore not responsive to the Commission's finding that domestic "price declines occurred because prices were anomalously high at the beginning of the POI . . . and began to return to their pre-shortage levels as the market stabilized in 2012 and 2013." *Id.* at 36.

2. Fixed Costs

i. Contentions

Mexichem argues that the Commission unlawfully failed "to mention the high fixed costs and safety issues that are distinctive to the R-134a market." Mexichem Br. at 39

ii. Analysis

The court does not agree. The statute directs the Commission to "evaluate all *relevant* economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii). Mexichem does not explain in its brief why "high fixed cost and safety issues" are relevant

to the impact subject imports have on the state of the industry or how "mention[ing]" these factors would affect the Commission's impact analysis. *See* Mexichem Br. at 39. The court therefore deems this issue waived. *United States v. Great Am. Ins. Co.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013); *see also Zhejiang Sanhua Co. v. United States*, 39 CIT ___, ___, 61 F. Supp. 3d 1350, 1357–58 (2015) (explaining waiver).

3. Subject Import Inventories

i. Contentions

Chemours argues that the Commission failed to analyze subject import inventories, which in its view caused an "inventory overhang" that depressed domestic prices. *See* Chemours Br. at 23–24. Chemours identifies two previous determinations in which the Commission found that an "inventory overhang" adversely affected domestic prices. Chemours Br. at 23–24 (citing *Certain Steel Grating from China*, Inv. Nos. 701-TA465 and 731-TA-1161 (Final), USITC Pub. 4168 (July 2010) ("*Steel Grating from China*"); *Certain Orange Juice from Brazil*, Inv. No. No. 731-TA-1089 (Final), USITC Pub. 3838 (Mar. 2006) ("*Orange Juice from Brazil*")).

ii. Analysis

The court does not agree that the Commission failed to analyze the effects subject import inventories. The Commission expressly noted that "U.S. inventories of subject merchandise did increase" from 2011 to 2013, but explained that "[t]he available data indicate that any inventory buildup did not persist after the end of 2013." *Views* at 40. The Commission also considered whether "abnormally high inventories" in interim 2014 resulted in "record low" subject import prices. *See id.* at 35 n.148. As the Commission explained, pricing data on the record actually showed that, "with one exception, subject import prices *increased* during interim 2014." *Id.* (emphasis added).

The court is also not convinced that the "inventory overhang" issues discussed in *Steel Grating from China* or *Orange Juice from Brazil* compel a different outcome here. Each Commission determination is *sui generis*, "involving a unique combination and interaction of many variables, and therefore a prior administrative determination is not legally binding on other reviews before this court." *U.S. Steel Corp. v. United States*, 33 CIT 984, 1003, 637 F. Supp. 2d 1199, 1218 (2009) (citing *Nucor Corp.*, 414 F.3d at 1340); *see also Cleo Inc. v. United States*, 501 F.3d 1291, 1299 (Fed. Cir. 2007) ("[P]rior determinations by the Commission with regard to one industry typically provide little guidance for later determinations with regard to different industries.").

D. Threat

i. Contentions

Chemours challenges the Commission's finding that there was "no link between the dumped imports and that falling price levels in the U.S. market" as unreasonable for the same reasons Chemours challenged that finding in the material injury context. Chemours Br. at 33–34.

ii. Analysis

Chemours does not identify any specific flaw in the Commission's threat analysis. *See* Chemours Br. at 33–34. The court therefore sustains the Commission's threat analysis as well. 28 U.S.C. § 2639(a)(1) (the Commission's determinations are presumed to be correct and the burden is on the party challenging the determination to demonstrate otherwise).

III. Conclusion

For the foregoing reasons, the court sustains the *Final Determination* for each of the issues Mexichem and Chemours have challenged in their motions for judgment on the agency record. Judgment will be entered accordingly.

Dated: June 6, 2016
New York, New York

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

Slip Op. 16–57

THE COALITION FOR FAIR TRADE OF HARDWOOD PLYWOOD, Plaintiff, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendant, AMERICAN ALLIANCE FOR HARDWOOD PLYWOOD, et al., Defendant-Intervenors, AND CHINA NATIONAL FOREST PRODUCTS INDUSTRY ASSOCIATION AND MEMBERS, Defendant-Intervenors.

Before: Richard K. Eaton
Court No. 14–00013
PUBLIC VERSION

[The United States International Trade Commission's final negative material injury determination is remanded.]

Dated: June 8, 2016

Jeffrey S. Levin, Levin Trade Law, P.C., of Bethesda, MD, argued for plaintiff.

Charles A. St. Charles, Attorney-Advisor, Office of General Counsel, United States International Trade Commission, of Washington, DC, argued for defendant. With him on the brief were *Rhonda M. Hughes*, Attorney-Advisor, *Dominic L. Bianchi*, General Counsel, and *Robin L. Turner*, Acting Assistant General Counsel for Litigation.

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, DC, argued for defendant-intervenors American Alliance for Hardwood Plywood et al. With him on the brief were *Kristin H. Mowry*, *Jill A. Cramer*, *Sarah M. Wyss*, and *Daniel R. Wilson*.

Jeffrey S. Neeley, Husch Blackwell LLP, of Washington, DC, argued for defendant-intervenors China National Forest Products Industry Association and its members. With him on the brief was *Michael S. Holton*.

OPINION

EATON, Judge:

Before the court is the motion for judgment on the agency record, pursuant to USCIT Rule 56.2, of the Coalition for Fair Trade of Hardwood Plywood ("plaintiff" or the "Coalition"), an association of domestic hardwood plywood manufacturers. *See* Pl.'s Rule 56.2 Mem. in Supp. for J. Upon the Agency R. (ECF Dkt. No. 42–1) ("Pl.'s Br."). By its motion, plaintiff contests the final negative material injury and threat of material injury determinations of the United States International Trade Commission ("ITC" or the "Commission") in its antidumping and countervailing duty investigations of hardwood plywood from the People's Republic of China ("China"). *See Hardwood Plywood From China*, 78 Fed. Reg. 76,857 (Int'l Trade Comm'n Dec. 19, 2013) (determinations) ("Final Determinations").

The Commission opposes plaintiff's motion, asking the court to sustain its determinations. Def. ITC's Opp'n to Pl.'s Mot. for J. on the Agency R. (ECF Dkt. No. 49) ("Def.'s Br."). Defendant-intervenors, the China National Forest Products Industry Association and its individual members[1] (the "Chinese defendant-intervenors"), all of which are Chinese producers and exporters of hardwood plywood, and the American Alliance for Hardwood Plywood and other American hardwood plywood importers[2] (the "American defendant-intervenors")

[1] The association members include Shanghai Futuwood Trading Co., Ltd., Lianyungang Yuantai International Trade Co., Ltd., Cosco Star International Co., Ltd., Suzhou Oriental Dragon Import and Export Co., Ltd., Linyi City Dongfang Jinxin Economic & Trade Co., Ltd., Linyi Evergreen Wood Co., Ltd., Highland Industries Inc. (Hanlin Timber Products Co., Ltd.), Linyi Huasheng Yongbin Wood Corporation, Xuzhou Longyuan Wood Industry Co., Ltd., Qufu Shengfu Wood Work Co., Ltd., Xuzhou Zhongyuan Wood Co., Ltd. (Xuzhou Hansun Import & Export Co., Ltd.), Shandong Anxin Timber Co., Ltd., Zhejiang Dehua TB Import & Export Co., Ltd., Qingdao Top P&Q International Corp., Shanghai MaiLin International Trade Co., Ltd., Xuzhou Shenghe Wood Co., Ltd., Linyi San Fortune Wood Co. Ltd., Pingyi Jinniu Wood Co. Ltd., Langfang Baomujie Wood Co. Ltd., Yinhe Machinery Chemical Limited of Shandong Province, and Xuzhou Pinlin International Trade Co. Ltd.

[2] The American defendant-intervenors are American Alliance for Hardwood Plywood, American Pacific Plywood Inc., Canusa Wood Products Limited, Concannon Corp., Inc. (doing business as Concannon Lumber Co.), Far East American, Inc., Hardwoods Specialty

join the Government in opposing plaintiff's motion. *See* Chinese Def.-Ints.' Resp. in Opp'n to the Coalition's Mot. for J. on the Agency R. (ECF Dkt. No. 55) ("Chinese Def.-Ints.' Br."); Def.-Ints. Am. Alliance for Hardwood Plywood's Resp. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R (ECF Dkt. No. 53) ("Am. Def.-Ints.' Br."). For the reasons discussed herein, the Final Determinations are remanded.

BACKGROUND

The antidumping and countervailing duty investigations at issue involved hardwood plywood from China ("subject imports"). "Hardwood plywood is a wood panel product made by gluing two or more layers of wood veneer[3] to a core that may itself be composed of veneers or other types of wood material such as medium density fiberboard[,] . . . particleboard, lumber, or oriented strand board." Views of the Commission (Final) at 8, CD 343 at bar code 522998 (Int'l Trade Comm'n Nov. 25, 2013) (ECF Dkt. No. 28–1) ("Views"). It is manufactured in a variety of thicknesses and is typically used in "furniture, kitchen cabinets, architectural woodwork, wall paneling, manufactured homes, and recreational vehicles." *Id.* at 9. "Hardwood plywood products are differentiated by species, quality of veneer, thickness, number of plies, type of core (veneer, particleboard, [medium density fiberboard], or other), and the type of adhesive used in the manufacturing process." *Id.*

On September 27, 2012, members of the Coalition filed an antidumping and countervailing duty petition with the United States Department of Commerce ("Commerce") and the ITC. Petition for the Imposition of Antidumping and Countervailing Duties, Inv. Nos. 701TA-490 and 731-TA-1204 (Final) CD 1 at bar code 491972 (Sept. 27, 2012) ("the Petition"). Thereafter, Commerce and the ITC initiated antidumping and countervailing duty investigations of imports of hardwood plywood from China. *See Hardwood and Decorative Plywood From China*, 77 Fed. Reg. 65,172 (Dep't of Commerce Oct. 25, 2012) (initiation of antidumping duty investigation); *Hardwood and Decorative Plywood From China*, 77 Fed. Reg. 64,955 (Dep't of Commerce Oct. 24, 2012) (initiation of countervailing duty investigation). Commerce sought to determine whether hardwood and decora-

Products USLP, Holland Southwest International Inc., Kitchen Cabinet Manufacturers Association, Liberty Woods International, Inc., McCorry & Co. Ltd, Northwest Hardwoods, Inc., Patriot Timber Products, Inc., USPLY LLC, Red Tide International (doing business as Wood Brokerage International), and Benchmark International, LLC.

[3] "A 'veneer' is a thin slice of wood which is rotary cut, sliced or sawed from a log, bolt or flitch." Views of the Commission (Final) at 6, CD 343 at bar code 522998 (Int'l Trade Comm'n Nov. 25, 2013) (ECF Dkt. No. 28–1) ("Views"). Although the term "veneer" is used in portions of this opinion in reference to the face veneer of plywood, a veneer can also comprise the core material of plywood. Views at 6, 8.

tive plywood from China was being sold at less than fair value, and whether the industry was receiving countervailable subsidies.

On September 23, 2013, Commerce found that subject merchandise was indeed being sold at less than fair value, and determined final dumping margins ranging from 55.76 percent to 121.65 percent. *Hardwood and Decorative Plywood From China*, 78 Fed. Reg. 58,273, 58,276–82 (Dep't of Commerce Sept. 23, 2013) (final determination of sales at less than fair value). Commerce also made an affirmative countervailing duty determination, finding all but three mandatory respondents were receiving subsidies, and determining countervailing duty rates ranging from 13.58 percent to 27.16 percent. *Hardwood and Decorative Plywood from China*, 78 Fed. Reg. 58,283, 58,283–84 (Dep't of Commerce Sept. 23, 2013) (final affirmative countervailing duty determination).

The ITC simultaneously conducted an investigation to determine whether a domestic industry was materially injured or threatened with material injury by reason of imports of subject merchandise. The Commission's period of investigation ("POI") was January 1, 2010 through June 30, 2013, extending back two years prior to the Coalition's filing of the Petition. Views at 4. During the Commission's investigation, domestic industry data was collected from the questionnaire responses of eight domestic producers that produced nearly all of the U.S. hardwood plywood in 2012. *See* Views at 4; Final Staff Report, Inv. Nos. 701-TA-490 and 731TA-1204 (Final) at III-2, CD 337 at bar code 520495 (Oct. 25, 2013) (ECF Dkt. No. 28–2) ("Final Staff Report"). U.S. import information was based on Commerce's import statistics and the questionnaire responses of forty-two U.S. importers of hardwood plywood from China, representing 66.3 percent of total imports from China. Views at 4; Final Staff Report at IV-1. The Views of the Commission were also based on questionnaire responses from eighty-nine foreign producers that collectively produced approximately 52.4 percent of hardwood plywood imported into the United States from China in 2012. Views at 4; Final Staff Report at VII-3.

On November 13, 2012, the ITC issued a unanimous preliminary affirmative material injury determination. *See Hardwood Plywood From China*, 77 Fed. Reg. 71,017, 71,017 (Int'l Trade Comm'n Nov. 28, 2012) (preliminary determination) ("On the basis of the record developed in the subject investigations, the [Commission] determines . . . there is a reasonable indication that a [United States] industry is materially injured by reason of imports of hardwood plywood from China that are allegedly subsidized and sold in the United States at less than fair value . . . ."). Prior to making its final material injury determination, the ITC held a public hearing on September 19, 2013,

and the interested parties submitted pre- and post-hearing briefs. Final Phase Hearing Transcript, Inv. Nos.701-TA-490 and 731-TA-1204 (Final) PD 173 at bar code 518726 (Sept. 20, 2013) (ECF Dkt. Nos. 58–2, 58–3) ("Final Phase Hearing Tr."); Pl.'s Pre-Hearing Br., Inv. Nos.701-TA-490 and 731-TA-1204 (Final) PD 152 at bar code518098 (Sept. 12, 2013) (ECF Dkt. No. 58–1) ("Pl.'s Pre-Hearing Br."); Am. Def.-Ints.' Pre-Hearing Br., Inv. Nos. 701-TA-490 and 731-TA-1204 (Final) CD 322 at bar code 518031 (Sept. 11, 2013) (ECF Dkt. No. 58–1) ("Am. Def.-Ints.' Pre-Hearing Br."); Pl.'s Post-Hearing Br-.,Inv. Nos. 701-TA490 and 731-TA-1204 (Final) CD 329 at bar code 519156 (Sept. 25, 2013)(ECF Dkt. No. 44 Tab 3) ("Pl.'s Post-Hearing Br."); Am. Def.-Ints.' Post-Hearing Br.,Inv. Nos. 701-TA-490 and 731-TA-1204 (Final) CD 325 at bar code 519112 (Sept. 25, 2013) (ECF Dkt. No. 58–3) ("Am. Def.-Ints.' Post-Hearing Br."); Chinese Def.-Ints.' Post-Hearing Br., Inv. Nos. 701-TA-490 and 731-TA-1204 (Final) CD 326 at bar code 519113 (Sept. 25, 2013) (ECF Dkt. No. 61 Tab 2) ("Chinese Def.-Ints.' Post-Hearing Br."). The Commission issued its Final Staff Report on October 25, 2013. *See* Final Staff Report.

On November 5, 2013, the ITC reversed course and determined that the plywood industry in the United States was not materially injured or threatened by material injury by reason of hardwood plywood imports from China. *See Final Determinations*, 78 Fed. Reg. at 76,857 ("On the basis of the record developed in the subject investigations, the [Commission] determines . . . that an industry in the United States is not materially injured or threatened with material injury."). Plaintiff contests the Commission's final negative material injury and threat of material injury determinations before this court.

This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012).

STANDARD OF REVIEW

When reviewing the Commission's material injury determinations, "[t]he 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." 19 U.S.C. § 1516a(b)(1)(B)(i) (2012). "Substantial evidence is defined as 'more than a mere scintilla,' as well as evidence that a 'reasonable mind might accept as adequate to support a conclusion.'" *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1306 (Fed. Cir. 2014) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

I. LEGAL FRAMEWORK

In an unfair trade proceeding, the Department of Commerce determines whether the subject merchandise was sold at less than fair value in the United States and/or whether the subject merchandise has benefited from countervailing subsidies. If the goods are sold at less than fair value, Commerce will calculate an antidumping duty rate. *See* 19 U.S.C. § 1673 ("If [Commerce] determines that a class or kind of foreign merchandise is . . . sold in the United States at less than its fair value, and the Commission determines that an industry in the United States is materially injured, or is threatened with material injury . . . by reason of imports of that merchandise . . . then there shall be imposed upon such merchandise an antidumping duty."). If the subject goods are found to be unlawfully subsidized by a foreign government, Commerce will calculate a countervailing duty rate. *See id.* § 1671(a) ("If [Commerce] determines that the government of a country . . . is providing . . . a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported . . . into the United States, and . . . the Commission determines that an industry in the United States is materially injured, or threatened with material injury . . . by reason of imports of that merchandise . . . then there shall be imposed upon such merchandise a countervailing duty.").

The Commission's role is to determine whether the subject merchandise that was sold at less than fair value, or benefited from countervailing subsidies, materially injured or threatens to materially injure a domestic industry. *Swiff-Train Co. v. United States*, 793 F.3d 1355, 1359 (Fed. Cir. 2015). When making an affirmative material injury determination, "the Commission must find: (1) a 'present material injury or a threat thereof,' and (2) causation of such harm by reason of subject imports." *Tropicana Prods., Inc. v. United States*, 31 CIT 548, 550, 484 F. Supp. 2d 1330, 1333 (2007) (quoting *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1210, 431 F. Supp. 2d 1302, 1306 (2006)). To determine whether a domestic industry is materially injured or threatened by material injury by reason of subject imports, the Commission must consider "(I) the *volume* of imports of the subject merchandise, (II) the effect of imports of that merchandise on *prices* . . . for domestic like products, and (III) the *impact* of imports of such merchandise on domestic producers of domestic like products . . . in the context of production operations within the United States." 19 U.S.C. § 1677(7)(B)(i)(I)–(III) (emphases added). The statute further provides that the ITC "may consider

such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports," and "shall . . . *identify each factor* . . . and *explain in full its relevance* to the determination." *Id.* § 1677(7)(B)(ii) (emphases added).

When analyzing material injury, "substitutability is one factor in the evaluation of volume and price." *R-M Indus., Inc. v. United States*, 18 CIT 219, 226 n.9, 848 F. Supp. 204, 210 n.9 (1994) ("Analysis of substitutability varies according to the context of its application.").[4] Importantly, the Commission is required to evaluate the impact of the imports "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii)(V); *Gen. Motors Corp. v. United States*, 17 CIT 697, 707, 827 F. Supp. 774, 784 (1993) (finding that price effects were not significant because "competition in the [domestic] industry was more a matter of features than price," and "when products are highly differentiated, price is less likely to determine product selection."); *see generally Feldspar Corp. v. United States*, 17 CIT 617, 622, 825 F. Supp. 1095, 1099 (1993).

II. THE COMMISSION'S MODERATE SUBSTITUTABILITY DETERMINATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

In its Final Determinations, the Commission determined the domestic hardwood plywood industry was neither materially injured nor threatened by material injury by reason of the subject imports. Views at 3. As part of its determinations, the Commission evaluated several "conditions of competition," and in particular substitutability. Views at 21, 23; *see* 19 U.S.C. § 1677(7)(C)(iii)(V).

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[4] As this court has noted, in *R-M Industries, Inc.*, the term "substitutability" has different meanings in different contexts. *R-M Indus.*, 18 CIT at 226 n.9, 848 F. Supp. at 210 n.9. For example, Commerce determines the "substitutability" of a product when it defines "domestic like product." 19 U.S.C. § 1677(10) (A "domestic like product" is "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation."); *R-M Indus.*, 18 CIT at 226 n.9, 848 F. Supp. at 210 n.9 ("For the purposes of defining 'like product' as described in 19 U.S.C. § 1677[ ], it is not necessary that like products be completely substitutable, only that the like product be 'like, or in the absence of like, most similar in characteristics and uses.'" (citation omitted)); *Changzhou Trina Solar Energy Co. v. U.S. Int'l Trade Comm'n*, 39 CIT __, __, 100 F. Supp. 3d 1314, 1320 (2015) (defining a domestic like product is a factual finding made by the Commission).

The term "substitutability" is also used when the Commission is to decide whether to "cumulatively assess the volume and effect of imports of the subject merchandise" from other countries where there were petitions filed or investigations initiated. 19 U.S.C. § 1677(G); *R-M Indus.*, 18 CIT at 226 n.9, 848 F. Supp. at 210 n.9 ("For purposes of cumulation, the analysis of substitutability is also not stringent, as only a 'reasonable overlap' in competition is required where like product imports 'compete with each other and with like products of the domestic industry.'").

According to the Commission, the record indicated that the domestic product and the subject imports often have different end uses, and imports of Chinese plywood are largely used in the lower-end of the market. Def.'s Br. 1; Views at 26 ("[S]ubstitutability between the domestic like product and subject imports is limited because of variations in various product characteristics, resulting in reports by importers and purchasers that the domestic like product and the subject imports are often used for different applications."). The Commission argues that it took into account overall thickness, core material, and face veneer thickness, as well as the views of U.S. producers, importers, and purchasers when reaching its findings. Def.'s Br. 16–21. Specifically, defendant notes that in addition to overall thickness, core material, and face veneer thickness, it analyzed the producers', importers', and purchasers' questionnaire responses regarding specific physical characteristics of the hardwood plywood. This included lengths and widths, wood species, core construction, face and back veneer thickness, panel strength, tolerances for moisture content, glues, quality, and availability, which led to the ITC's ultimate finding that the subject merchandise is only moderately substitutable with the domestic product. Def.'s Br. 16; Views at 26. The Commission concluded that, although a finding of substitutability was supported by its findings that pricing was an important factor in purchasing decisions and there was some overlap in the products' panel thicknesses, these factors were outweighed by product differences in core material, face veneer thickness, and overall quality. Def.'s Br. 17; Final Staff Report at II-37 ("Substitutability is enhanced by the fact that price was a very important factor in purchasing, but is constrained by quality being the most important factor for more purchasers. Also, there are clear differences in face thickness and core material between U.S.-produced product and subject imports from China."). In other words, even though the Commission found that the overall thicknesses of the two products overlapped in some instances, it found the two products were not highly substitutable because of the domestic and Chinese products other differentiating physical characteristics, variations in quality, and different end-use applications.

Plaintiff's primary argument is that, while the Chinese plywood is not directly substitutable in all cases, the products are similar enough that U.S. purchasers buy the lower-priced and lower-quality Chinese plywood in place of the more expensive, higher-quality U.S. plywood—making price, not physical characteristics, the most important substitutability consideration. *See* Pl.'s Br. 7, 16; Pl.'s Post-Hearing Br. 4 ("Petitioners believe that many purchasers make similar calculations for many end-uses, seeking out the lowest-priced

product that meets the requirements of the application, and finding that the Chinese product is that lowest-price product.”). Put another way, for the Coalition, while the Chinese plywood may not be suitable for decorative applications requiring sanding or other modifications, the Chinese plywood has displaced the U.S. produced plywood in the remaining areas of the market, i.e. non-decorative applications. Importantly, to plaintiff, had the ITC concluded the goods were directly substitutable, its subsequent conclusions regarding volume, effect of imports on price, and impact of imports on domestic producers would have led to a different conclusion, i.e., that Chinese products caused material injury to the domestic industry. *See* Pl.’s Br. 17.

A. The Commission’s Selection of Cabinetry as the End-Use Analyzed to Determine Substitutability Is Supported by Substantial Evidence

As an initial matter, the Coalition objects to the Commission’s reliance on only the plywood that is used to make cabinets, and argues for an analysis that examines the rest of the plywood market. Pl.’s Reply to Def. & Def.-Ints.’ Resps. in Opp’n to Pl.’s Rule 56.2 Mot. for J. Upon the Agency R. 7 n.7 (ECF Dkt. No. 64) (“Pl.’s Reply Br.”) (“[A]s acknowledged by the Commission, no more than one-third of imported hardwood plywood (and 30 percent of domestically-manufactured hardwood plywood) is used for cabinetry. That leaves a substantial portion of the end-use markets—representing the majority of the hardwood plywood in the commercial market—unaddressed.” (citation omitted)). Plaintiff further contends that the issue of cabinetry comprising only 30 percent of domestically-manufactured hardwood plywood is similar to the issue that “was central to the Federal Circuit’s affirmation of this Court’s remand to the Commission for further discussion and evaluation in *Diamond Sawblades Manufacturers Coalition v. United States*.” Pl.’s Reply Br. 7 n.7; *see Diamond Sawblades Mfrs. Coal. v. United States*, 612 F.3d 1348, 1359 (Fed. Cir. 2010) (“[T]he [C]ourt pointed out that the data to which the Commission cited in support of its finding that ‘nearly half’ of the subject shipments were in smaller sized blades . . . also showed that the other half of both subject and domestic imports were concentrated in the two middle diameter ranges,” and, therefore, the Court’s remand of the ITC’s “confusing and potentially incorrect analysis was not an abuse of discretion” (citation omitted)).

The court finds that the Commission reasonably based its substitutability analysis on the cabinetry market, and its finding is supported by substantial evidence in the record. *See* Views at 21; Final Staff Report at II-9 (“Petitioners and respondents indicate that cabinets are the largest end use for both domestic and imported products.

Many producers, importers, and purchasers reported that this end use was among their top three end uses.”). The Commission further found that “cabinets [are] the largest market segment in which imported hardwood plywood is used and the second largest in which U.S. produced [hardwood plywood] is used.”Def.’s Br. 17; Final Staff Report at II-10 fig. II-1. The ITC’s discussion is particularly reasonable considering the fragmentation of the remainder of the hardwood plywood market.[5] The only application that approximates cabinets in terms of consumption of domestic hardwood plywood is that for retail fixtures (i.e., shop displays), which comprises 35 percent of the U.S. market. No other application comprises more than 13 percent of the market. The ITC based its analysis on the finding that 30 percent of U.S. hardwood plywood is used in cabinetry and 34 percent of imported Chinese hardwood plywood is used in cabinetry. *See id.* That is, the data reflect that the U.S. cabinet market was the largest segment of the market where the domestic and Chinese products overlapped, and, accordingly, the Commission reasonably relied on information from this segment of the market to determine substitutability.

In *Diamond Sawblades*, the Federal Circuit affirmed this Court’s finding that the Commission’s explanation “that ‘nearly half’ of the domestic shipments were in smaller sized blades, while ‘nearly half’ of domestic shipments were of larger sized blades” did not justify its limited competition finding. *See Diamond Sawblades*, 612 F.3d at 1359. Hence, the Federal Circuit affirmed the CIT’s decision to remand, finding that, in addition to blade size, “neither blade type nor manufacturing process significantly limited competition.” *See id.* Unlike in *Diamond Sawblades*, here, the Commission has explained, in detail, and supported with substantial evidence, the physical differ-

[5] Domestic producers’ hardwood plywood is also used in other applications, including retail fixtures (35 percent), architectural work (13 percent), furniture (10 percent), RVs and mobile homes (4 percent), miscellaneous applications (5 percent), and underlayment (3 percent). Final Staff Report at II-10 fig. II-1. Imported hardwood plywood is used in underlayment (18 percent), RVs and mobile homes (12 percent), furniture (12 percent), general use (17 percent), and store fixtures (7 percent). *Id.* Testimony at the hearing explained how plywood is used in cabinets. *See* Final Phase Hearing Tr. 188 (“We use Chinese plywood exclusively for our plywood cabinet interiors and some drawer parts. We use domestic for all exterior surfaces, primarily being doors, finished ends, finished backs, and cabinet interiors that need to match the exterior.”). Retail fixtures are the largest market segment of the domestic hardwood plywood industry, and are typically of a higher “display quality” than those produced in China. Am. Def.-Ints.’ Pre-Hearing Br. 63. In other words, “[t]his ‘display quality’ end use is a segment of the market that is predominantly served by the domestic market and is not in competition with Chinese plywood.” *Id.* According to the American defendant-intervenors, “[t]here are two segments of the market, a high-end one where the beauty of the wood is paramount, and a lower-end one where a laminated product will suffice.” *Id.* at 64.

ences and purchasing considerations that distinguish the two products from one another. Using the cabinet industry as a lens to view these distinctions was reasonable because it was the largest overlapping market segment of both the domestic and imported products, and it was a market in which the Chinese hardwood plywood was focused. *See* Views at 21 ("The largest market segment for U.S. importers of hardwood plywood, and one of the largest for U.S. producers as well, is cabinetry.").

B. The Commission's Findings as to Overall Thickness Are Supported by Substantial Evidence

When comparing the physical characteristics of U.S. and Chinese hardwood plywood, the Commission found that the domestically-produced plywood is generally thicker (at least 16 mm in overall thickness) than the imported product and is used for cabinet fronts and sides, whereas the Chinese hardwood plywood is generally thinner (less than 6.5 mm in overall thickness) and is used for "interiors, backs, and drawer bottoms of cabinets." Views at 25; *see* Final Staff Report at D-6 tbl. D-4. In its overall thickness finding, the Commission compared the percentage of domestic production of hardwood plywood of various thicknesses to the percentage of imported subject merchandise of various thicknesses to determine the degree of overlap in thicknesses. Views at 25. In its findings, the Commission acknowledged there was some overlap in thicknesses between the two products, but found that any overlap in thickness was outweighed by other distinguishing factors between the two products. Def.'s Br. 17 ("'[S]ome overlap in panel thickness does suggest substitutability between U.S.-produced product and imports from China, [however], this is moderated by the higher importance of quality and importance and differences in veneer thickness and core material.'" (quoting Final Staff Report at II-37–38) (emphasis omitted)); *see also* Final Staff Report at D-6 tbl. D-4 (reflecting U.S. producers', U.S. importers', and Chinese producers' commercial shipments by overall thickness of the plywood).

The ITC found that thickness, in particular, was important in determining the end use of the plywood. Although the overall thicknesses of plywood ranged from 6.5 mm or less to 20 mm or more, the Commission's analysis focused on thicknesses of 6.5 mm or less and 16 mm or more. This was based on its conclusion that the Chinese product is predominately produced with a thickness of 6.5 mm, while U.S. producers predominately produce plywood of 16 mm. *See* Views at 25; Final Staff Report at D-6 tbl. D-4. Thus, the Commission concluded that different overall thicknesses led to different end uses, and these different end uses were concentrated in different areas of

the market: "thicker plywood is used in cabinet fronts and sides, while thinner plywood is used for cabinet backs, drawer bottoms, paneling, and underlayment." Views at 25.

The Commission supported its finding of moderate substitutability by considering questionnaire responses that reflected that thickness largely dictates end use. *See id.* The responses relied upon by the Commission were those of U.S. importers,[6] Chinese producers of subject U.S. imports, and domestic producers. *Id.* at 4. For example, for the 2012 calendar year, the Commission compared total U.S. production of 16 mm plywood, which constituted 58 percent of production, to the total percentage of U.S. importers' commercial shipments of Chinese plywood of that same thickness, which was 21 percent of total imports. *Id.* at 25; Final Staff Report at D-6 tbl. D-4. The Commission also found the data reflected that "U.S. producers' shipments of thin plywood (less than 6.5 mm) accounted for 21 percent of their total shipments in 2012, as compared to 45 percent of U.S. importers' commercial shipments of [Chinese plywood]." Views at 25; Final Staff Report at D-6 tbl. D-4. For the Commission, because only 21 percent of U.S. production had a thickness of 6.5 mm or less, production of thin plywood only slightly overlapped with U.S. importers' commercial shipments of Chinese plywood.[7] *See* Views at 26.

Additionally, the Commission's undisputed finding that the U.S. and Chinese products have different end uses based on overall thickness was based on surveys of U.S. purchasers. *See* Final Staff Report at E-3–E-6 tbl. E-1; Pl.'s Pre-Hearing Br. 17 ("Petitioners acknowledge that there may be a subset of end-use applications for which there is a functional or other non-price reason for a U.S. purchaser to purchase plywood with . . . a particular overall thickness, and that in certain of these cases the required product may be available only from Chinese sources."). In other words, at least with respect to cabinetry, the parties agree that the plywood's overall thickness largely determines how and where the plywood will be used in the market.

The parties disagree, however, about the weight that the Commission assigned to the Chinese producers' production of thicker plywood, and the U.S. producers' production of thinner plywood. Pl.'s Br.

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[6] In its Views, the Commission states that for U.S. import data it relied on questionnaire responses and official U.S. import statistics; however, the chart relating to overall thickness provided in the Final Staff Report reflects that the data compiled for overall thickness was derived from questionnaire responses. *See* Views at 4; Final Staff Report at D-6 tbl. D-4.

[7] Why Chinese producers reported that 45 percent of their exports of subject merchandise were of the thinner plywood, while U.S. importers of Chinese plywood reported that only 33 percent of their Chinese imports were of the thinner variety, remains a bit of a mystery. *See* Final Staff Report at D-5 tbl. D-4. One explanation may be that not all producers or importers answered the questionnaires, and so the experience of the individuals may not give an accurate picture of the entire universe of producers or exporters.

12–13. Specifically, the Coalition argues that thickness is the most important physical characteristic of hardwood plywood, and the overlap in overall thickness, recognized by the Commission, should have been enough for the Commission to find that the goods were substitutable. Pl.'s Br. 12–13. The Coalition further argues that the data relied on by the Commission shows there is a more significant overlap in production of certain thicknesses between the domestic product and the subject imports than the Commission acknowledges. Pl.'s Br. 13.

> In 2012, more of U.S. producers' commercial shipments (58 percent) were reported to be of thicker plywood (at least 16 mm) than were U.S. importers' commercial shipments of subject Chinese imports (21 percent) and Chinese producers' U.S. exports (42 percent). U.S. producers' shipments of thin plywood (less than 6.5 mm) accounted for 21 percent of their total shipments in 2012, as compared to 45 percent of U.S. importers' commercial shipments of subject imports and 33 percent of Chinese producers' U.S. exports to the United States.

Views at 25.

Although seemingly accepting the percentages cited by the ITC, the Coalition disputes the idea that the numbers indicate only a moderate overlap of plywood by thickness. For the Coalition, "the percentages cited do not support the subsidiary finding that domestically-manufactured hardwood plywood is geared toward thicker products, while subject imports are predominant in thinner plywood." Pl.'s Br. 12. Thus, the Coalition contends that a proper analysis of this data requires that the U.S. producers' total production be compared with the Chinese producers' total U.S. exports, not the U.S. importers' imports. Pl.'s Br. 12–13 ("[It] comes down to the difference between 58 percent versus 42 percent for 'thicker' plywood, and 21 percent versus 33 percent for 'thinner' plywood."); Pl.'s Pre-Hearing Br. 15 (arguing both parties possess a "significant 'market share' in each segment"); Final Phase Hearing Tr. at 61 ("Even for products where either the domestic industry or subject imports are relatively more concentrated, the other has a substantial presence. For example, in thicknesses 20 millimeters and above, despite a relatively high domestic concentration, subject imports still supplied 19.8 percent of the volume over the POI."). Thus, interpreting the same data, the Coalition argues the degree of overlap is more significant than the Commission's findings reflect, and this significant overlap suggests a greater degree of substitutability.

The court finds that the ITC's thickness conclusion used in its substitutability findings was supported by substantial evidence. *See* Views at 26 ("[S]ubstitutability between the domestic like product and subject imports is limited because of variations in various product characteristics, resulting in reports by importers and purchasers that the domestic like product and the subject imports are often used for different applications."). Initially, the Commission and plaintiff agree that there is some overlap with regard to the thickness of the domestic and Chinese product, such that both producers supply the United States with products of similar thicknesses. Additionally, both parties agree that depending on the plywood's overall thickness, these products potentially have different end uses. After considering the information in the questionnaire responses, the ITC found that, while both U.S. and Chinese producers make products of various thicknesses, each country generally concentrated production on different thicknesses of plywood. In other words, even though 21 percent of the domestically-produced plywood had an overall thickness of 6.5 mm and below, over half of the domestic plywood production was greater than 16 mm. This finding was borne out by the data. Moreover, it was reasonable for the ITC to rely on data comparing the domestic producers' overall production to official U.S. import data, rather than the Chinese producers' overall production. This information gives a more accurate picture of the subject merchandise in the U.S. market. Even taking into account plaintiff's view of the information, it is clear that domestic U.S. production is concentrated toward the higher-end of the thickness range, while imports were concentrated toward to the thinner end. *See* Final Staff Report at D-6 tbl. D-4 (table reporting percentages of overall thicknesses from U.S. purchasers, U.S. importers, and Chinese producers).

Accordingly, while recognizing some overlap in plywood thickness, it is clear that U.S. production is concentrated in plywood with greater thicknesses, Chinese imports are concentrated in the thinner product, and overall thickness dictates end use. Therefore, as to overall thickness, the ITC has supported with substantial evidence its conclusion that "substitutability between the domestic like product and subject imports is limited because of variations in various product characteristics," but that "there is some overlap between the domestic like product and the subject imports across many of these product characteristics." *See* Views at 26.

C. The Commission's Findings as to Core Material Composition Are Supported by Substantial Evidence

The Commission found that the two product's core material composition is a distinguishing characteristic because the Chinese product's core material is composed of different types of wood, and is manufactured differently from the domestic product. Views at 23–24. The Commission further found that the core material affects end-use applications and appropriate thicknesses of face veneers. *Id.* ("[For the Chinese product,] smaller logs are typically utilized to manufacture veneer for the plywood core, and the quality of veneer is typically lower than for the domestically produced product. The Chinese product is typically manufactured utilizing more labor and less automation . . . . Depending on the market segment in which hardwood plywood is used, various attributes may be preferable or required."). Based on these observations, the ITC found that core composition also tended to support a finding of limited substitutability. *Id.* at 25–26.

First, the Commission found that the core materials directly differ.[8] *Id.* at 25; Def.'s Br. 18–19 ("The record also indicates that type of core (veneer, particleboard, [medium density fiberboard], or other material) is one of the ways in which [hardwood plywood] products are differentiated."). It found that domestic plywood core tended to be softwood plywood, where the Chinese plywood core is generally hardwood.[9] Views at 25. The ITC further found that differences in core material direct different end use applications.[10] *Id.*; Final Staff Report at II35 ("Three purchasers pointed to differences in the core material and/or the thinner veneer face of the subject product that make it[ ] more suitable for applications not requiring sanding and finishing."). In its Views, the Commission relied on the testimony from an importer that indicated that the Chinese product consistently lacked core quality, resulting in plywood of lower quality that easily breaks and warps. Views at 24 n.83.

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[8] The different types of wood used for the core material also yield different qualities of wood. For example, "[p]etitioners indicated that approximately half or more of a log peeled for veneer in the United States will yield C grade or below ([about] 45–60 percent), with the yield of A grade veneer in the range of 9–14 percent, and the balance in B grade material." Final Staff Report at I-12. Respondents also "indicated that fast-growing species of the kind used to manufacture subject imports, such as poplar and eucalyptus, are smaller and yield a much higher percentage of lower grade veneers." *Id.* at I-12–I-13.

[9] Data showed U.S. producers use a softwood core two-thirds of the time, and one-third of the time they use other alternatives, while Chinese producers almost always use hardwood as the core material. Final Staff Report at II-33–34, D-3 tbl. D-1.

[10] "The different raw material species available for the Chinese product lead to different plywood veneer cores, and thus different performance capabilities and, ultimately, different end uses. The different varieties of core material between domestic product and Chinese imports limit the substitutability of the products." Am. Def.-Ints.' Pre-Hearing Br. 10.

Second, the Commission found the Chinese and domestic product's core is manufactured differently, and this manufacturing impacts core material composition. *Id.* at 23 ("The Chinese product is typically manufactured utilizing more labor and less automation, particularly for repairing defects, preparing veneers, and laying up veneer sheets for pressing."); Final Staff Report at I-15–I-16 ("Smaller logs are typically utilized to manufacture veneer for the plywood core and the quality of veneer is typically lower."); Final Phase Hearing Tr. at 179 (testimony of Greg Simon, Vice President of Far East American, Inc.) ("Simon Testimony") ("[T]he Chinese product uses a large number of thinner layers of veneer. The domestic core veneer layers are much thicker and there are fewer of them.").

Significantly, hearing testimony relied on in the Final Staff Report shows that producers of the subject imports use a two-step process that involves manually piecing the core together, and then running the plywood through a calibration sander. Simon Testimony at 175–76; Final Phase Hearing Tr. at 224. The domestic producers, on the other hand, use a one-step process employing core composing machines. Simon Testimony at 176–77. The Commission further found that the use of different types of wood and different manufacturing processes partially determines whether the product has a thick or thin face veneer. Views at 25.

Defendant-intervenor's argument further draws a correlation between core material composition and face veneer thickness: "The domestic producers utilizing softwood for core veneers are limited to thicker plies which lead to a core platform that is not smooth enough to use a thin-gauge face veneer. This difference in the raw material used to make the core translates directly into differences in the manner in which the finished products can be used . . . ." Am. Def.-Ints.' Pre-Hearing Br. 11–12. Further, for the American defendant-intervenors, the record supports that differences in core composition, i.e. how the core is manufactured, determines the face veneer thickness. *See* Am. Def.-Ints.' Pre-Hearing Br. 13–16. Therefore, according to the American defendant-intervenors, the type of core favored by U.S. manufacturers requires application of a thick face veneer, the kind of veneer better suited for sanding and finishing, and hence is used in higher-end applications.

The Coalition asserts there is no evidence demonstrating that core material is significant in purchasing decisions. Pl.'s Br. 13. Put another way, for plaintiff, the differences in core material and the manufacturing processes do not impact how the imported and domestic products are used, and do not cause a purchaser to buy the Chinese product rather than the domestic product. Specifically, plaintiff ar-

gues that only one-third of respondents ranked core material as "very important." Pl.'s Pre-Hearing Br. 17. Plaintiff also asserts that fifteen out of thirty-one purchasers reported comparable core material between the domestic and Chinese products. Pl.'s Pre-Hearing Br. 17. Last, the Coalition argues that although the Commission pointed to differences in core material composition between the two products, it failed to show how these differences affect end use. Pl.'s Br. 13; Final Staff Report at E-3–E-6 tbl. E-1 (stating that "core thickness" can determine whether to use the product as cabinet fronts, not specifically mentioning core material, and reiterating that overall thickness is the most determinative physical characteristic for end use).

The court finds that the Commission's consideration of core material composition as a factor limiting substitutability is supported by substantial evidence. The record demonstrates that the types of wood used for the core material in U.S. and Chinese plywood are different. Views at 25. In 2012, core material data showed 68.1 percent of domestically-produced hardwood plywood was reported to have a softwood veneer core, compared with only 8.3 percent of Chinese hardwood plywood. *Id.* Likewise, only 3.8 percent of domestically-produced hardwood plywood was reported to have a hardwood veneer core, compared with 88.4 percent of Chinese hardwood plywood. *Id.* The evidence also reflects that different softwood and hardwood core material have different advantages; for example, "Chinese plywood cores [have] several advantages over typical domestic softwood cores, including: less weight; increased strength; greater bending strength; and greater screw withdrawal ability." Am. Def.-Ints.' Pre-Hearing Br. 10–11.

In addition, as will be discussed, the record further supports the Commission's finding that differences in core composition, and how the core is manufactured, determine the plywood's face veneer thickness, thus limiting substitutability. *Cf.* Views at 25 ("Some purchasers pointed to differences in the core material/quality and/or the thinner veneer face of the subject product as making it more suitable for applications not requiring sanding and finishing or for laminated applications."). Thus, because it is better suited for sanding and finishing, the thicker face veneer required for the type of core preferred by the U.S. market makes the product better suited for the exterior of cabinets.

Further, hearing testimony reflects that the two products are manufactured differently. Simon Testimony at 175–77. The record supports that the differences in manufacturing processes of the core material is a reason why U.S. plywood has a thicker face veneer and Chinese plywood has a thinner face veneer. Am. Def.-Ints.' Pre-

Hearing Br. Ex. 4, Aff. of George Simon ¶ 11 (“Simon Aff.”). As a result of the two manufacturing processes and face veneer thicknesses, core material imperfections are not a concern for the domestic producers because their plywood has a thick face veneer, allowing for repair of any imperfections. Simon Testimony at 177.

Finally, the record demonstrates that this difference in core material composition matters to purchasers. Data in the record shows only three U.S. purchasers ranked core material composition as not important, nineteen ranked it as “very important,” and eighteen ranked it as “somewhat important.” Final Staff Report at II-19 tbl. II-7, II-37 (“Core material species was a very important factor to just under one-half of responding purchasers and at least a somewhat important factor to all but three purchasers.”). Moreover, the record reflects that “[i]mporters and purchasers reported that interchangeability between various sources including domestic and Chinese hardwood plywood is limited by . . . differing characteristics such as wood species [and] core construction.” *Id.* at II-28.

Accordingly, the Commission’s findings that the two products used different types of wood for the core material, that this difference in material together with differences in manufacturing processes lead to different face veneer thicknesses, and that the resulting products are preferred for different end-uses, are supported by substantial evidence.

D. The Commission’s Finding as to Face Veneer Thickness Limiting Substitutability Is Supported by Substantial Evidence

As noted, the Commission found that face veneer thickness is a distinguishing characteristic and a significant purchasing factor between domestic and Chinese hardwood plywood. The Commission’s findings reflect that the Chinese product’s face veneer is almost always thinner than the domestic product’s face veneer, which makes the Chinese product better for laminating applications and the domestic product more suitable for decorative applications. Views at 24–25 (“[D]omestic and Chinese hardwood plywood[ ] is limited by factors that include . . . face and back veneer thicknesses,” and “the thinner veneer face of the subject product [makes] it more suitable for applications not requiring sanding and finishing or for laminated applications.”).

First, the Commission argues that its finding was supported by substantial evidence because the data shows that face veneer thickness is “very important” or “somewhat important” for every U.S. purchaser surveyed. Final Staff Report at II-19 tbl. II-7 (Twenty-five respondents answering “very important” and fourteen respondents

answering "somewhat important.").[11] In addition, although the basic steps in the manufacturing process were similar, the Commission found there were some differences in manufacturing with regard to the face and back veneers. Views at 23 ("[T]he record shows that Chinese manufacturers use thinner face and back veneers that are laid up moist or wet to prevent splitting or breaking prior to being pressed. . . . The Chinese product is typically manufactured utilizing more labor and less automation, particularly for repairing defects, preparing veneers, and laying up veneer sheets for pressing.").

It is end use, however, that most distinguishes products having thick and thin face veneers. For the Commission, substantial evidence in the record, having to do with how the domestic versus the Chinese product is employed, demonstrated that face veneer thickness is a determinative factor in end-use applications. That is, thicker face veneers are used in higher-end products and thinner face veneers are used in lower-end products.[12] Views at 25; Final Staff Report at II-35, E-3 tbl. E-1; Def.'s Br. 19 ("Because of the differences between the domestically produced product and subject imports, including core material/quality and/or thinner veneer face of the subject product, some purchasers indicated that the two products are often used for different components of the same end product, particularly in cabinets.").

For example, because of the thin face veneer and core construction, the Chinese product is "ideal for applying a UV clear-coat, vinyl overlays, and other laminating processes. Final Phase Hearing Tr. 189 (Bill Weaver, CEO of Canyon Creek Cabinet Company) ("Weaver Testimony") (noting, by way of contrast, that the domestic product is superior, and preferable for finishing processes that include sanding, staining, and further cosmetic work); Views at 25 ("Some purchasers pointed to differences in the . . . thinner veneer face of the subject product as making it more suitable for applications not requiring sanding and finishing or for laminated applications.").

The Coalition argues that face veneer thickness is not a distinguishing factor in purchasing decisions, and that overall thickness is determinative for substitutability. Plaintiff points to the fact that "31 of 37 purchasers indicated that panel thickness is a very important

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[11] The court notes that the information in the Department's table does not correspond to the number of purchasers surveyed, totaling forty. *See* Final Staff Report at II-19 tbl. II-7.

[12] "Hardwood plywood is also used in some construction-related applications where structural strength and moisture resistance is a requirement, such as for providing a flat, stable underlayment for a finished flooring product." Final Staff Report at I-11. Defendant also argues that applications such as underlayment are more suitable for plywood with a thinner face veneer. Only "[t]hree percent of U.S. produced [plywood] . . . is used for underlayment, while 18 percent of imported [plywood] is used in that market segment." Def.'s Br. 20 n.13.

factor in their purchases." Pl.'s Pre-Hearing Br. 14 (internal quotation marks omitted); Final Staff Report at II-19 tbl. II-7 (responses of U.S. purchasers reflected thirty-three out of forty purchasers ranked panel thickness as "very important," seven out of forty ranked panel thickness as "somewhat important," but only twenty-five out of forty ranked veneer thickness as "very important," and fourteen out of forty ranked it as "somewhat important"). Moreover, for the Coalition, the overall functionality of hardwood plywood depends on its overall thickness, not face veneer thicknesses. Pl.'s Pre-Hearing Br. 14–15, 30. Plaintiff, in support of its argument, quotes a portion of the hearing transcript stating "[a] thin-faced veneer is acceptable in certain instances."[13] Pl.'s Post-Hearing Br. 5 (quoting Weaver Testimony at 237); Final Phase Hearing Tr. at 54 (The "face veneer thickness assertion is simply a red herring. You buy it because of the look and the thickness. This is U.S.-made, less than .4 [mm] of veneer thickness; Chinese made, .4 [mm] veneer thickness. You can't tell the difference. You're buying the look."); Final Phase Hearing Tr. 55–56 ("I've never seen a label on a Chinese hardwood plywood that specified a thin-faced veneer. [For example,] [t]his hardwood plywood is .4 millimeter or .3 millimeter face. . . . What I do *see* are nominal thicknesses designated three-quarter inch, 23/32ns, half-inch, et cetera, or in millimeters, 5.0, 5.5, 9.0, 15.").

The court finds that the Commission's conclusion that face veneer thickness is a determinative physical characteristic for substitutability is supported by substantial evidence. Questionnaire responses report that "the [imported] subject product is better suited for laminated applications," which makes the plywood more suitable for cabinet interiors. Final Staff Report at II-35.

> While domestically produced plywood may be sufficient in many applications, there are just as many areas where U.S. produced product is over engineered. Where thick face is not required to achieve the same end result. In many cases domestically produced products with thicker face veneer[s] are used in highly visible areas of the finished product, where the manufacturer will need to do more sanding and surface preparation prior to finishing.[ ] Imported products from China will normally be used in interiors of cabinets where there is less emphasis on veneer

[13] The full language from the transcript is: "I do not think that the thickness, the thinness of the face veneer on the Chinese panel is what gives the product from China the superior quality. It's what is underneath that. . . . A thin-faced veneer is acceptable in certain instances." Final Phase Hearing Tr. 236–37. Defendant responds to the Coalition's assertion that face veneer thickness is not important, arguing that the language "certain instances" is unclear, and these "certain instances" may be exactly what was highlighted in the questionnaire responses, i.e., a thin face veneer is appropriate when it does not need to be sanded or altered for decorative purposes. Def.'s Br. 20.

> preparation. These interior parts may also be prefinished, so no additional preparation is required . . . .

Final Staff Report at E-4 tbl. E-1 ("[The] Chin[ese] product is used for laminating paper. [The] U.S. product is for finished veneer."; "Chinese plywood is preferred in lamination applications as the overall thickness consistency tends to be better. For face applications, the two countries offer different advantages. . . . Thicker face veneer offers higher repair functionality as more veneer to sand. Either can be used, however the impact on process costs are very different."); Simon Testimony at 78 ("Domestic hardwood plywood manufacturers do not peel or slice veneer as thin as they do in China because it would deprive them of their main value-added product attribute, the ability for end users to sand and stain the product for decorative applications."); Final Phase Hearing Tr. 200 ("[T]he face veneers are substantially thicker, permitting appropriate sanding for the best finished surface on the completed cabinet. It's this great appearance on the outside that attracts customers.").

The record supports the assertion that U.S. plywood is more suitable for decorative uses that are visible because it can be sanded and painted, while Chinese plywood is a lesser quality product which is suitable for lamination, or for the interior or non-visible part of a product. The evidence cited by the Coalition simply does not overcome, or seriously call into question, the ITC's finding that plywood of thicker face veneer is more suitable for certain applications than that of thinner face veneer. Thus, the record supports the conclusion that face veneer thickness is a distinguishing characteristic between domestic and Chinese plywood.

Next, as has been noted, the ITC's conclusions on differences in the manufacturing process are supported by substantial evidence in the record. The hearing testimony described that the different manufacturing processes of the core material require the Chinese product's face veneer to be manufactured differently, making the Chinese product better equipped for laminating applications, and the domestic product more suitable for decorative applications. *See* Simon Testimony at 176–77. According to this testimony, because the Chinese product's core is manufactured differently, the product's face veneer is put on differently too. *Id.*; Am. Def.-Ints.' Pre-Hearing Br. 18 ("[F]or technical reasons, there is a hard line at 0.4 mm veneer thickness that differentiates two very different production processes and that yields hardwood plywood faces and backs that are very different and that have different end uses. For veneer that is rotary cut or plain sliced to 0.4mm's and above, a manufacturer can use an automated

composer machine to stitch together the pieces of veneers in a dry lay up. For face and back veneers that are rotary cut or plain sliced below 0.4mm, the veneer pieces must be combined by hand using a wet veneer lay up. . . . For veneer thicknesses below 0.4mm, it would be impossible to use a machine composer. The domestic industry uses the machine-composer and therefore must cut veneer at thicknesses above 0.4mm." (quoting Simon Aff. ¶ 11)).

Moreover, information on the record also shows that U.S. producers did not manufacture hardwood plywood with a face veneer thickness below 0.4 mm during 2010 through interim[14] 2013, while on average, 94 percent of U.S. imports of the Chinese plywood had face veneer thicknesses below 0.4 mm. *See* Final Staff Report at D-5 tbl. D-3. In other words, the record supports the finding that the face veneer manufacturing processes of the domestic and Chinese plywood differed, and because of these different processes, the domestic and Chinese producers were producing physically distinguishable products.

The Commission's findings were based on questionnaire responses and hearing testimony reflecting that face veneer thickness determines whether the plywood is appropriate for sanding or finishing, or conversely, laminating and painting. Further, the production of different face veneer thicknesses differs between domestic and Chinese producers. For these reasons, the Commission's conclusion that face veneer thickness is a distinguishing factor in its substitutability determination is supported by substantial evidence.

E. The Commission's Finding that Other Purchasing Factors Outweighed Price-Driven Substitutability Is Supported by Substantial Evidence

In its Views, the Commission found that "[a]lthough price is an important factor in purchasing decisions, quality and availability[15] are other top factors." Views at 27. This finding was the result of only six out of forty surveyed purchasers responding that price was the

[14] In this context, "interim" means the months of January through June of a given year. *See* Views at 14.

[15] The Commission found that seven out of forty respondents indicated that availability was the most important purchasing factor, but only six out of the forty respondents indicated that price was the most important. Views at 27. Based on questionnaire responses, the ITC concluded in its Final Staff Report that "[w]hile price and quality were cited most frequently as being top factors in their purchase decisions, other factors such as availability, product consistency, and reliability of supply were cited just as often as being very important purchasing factors." Final Staff Report at II-18. In the Commission's consideration of change in purchasing patterns, it found that purchasers stopped purchasing or purchased less hardwood plywood from suppliers "because of price and/or quality, but some purchasers also cited reasons such as availability." *Id.* at II-24.

most important factor. *Id.*; *see* Final Staff Report at II-19 tbl. II-6. The Commission found, however, that "[s]ubject imports undersold the domestic like product in 83 of 84 price comparisons, with margins of underselling ranging from 0.9 to 56.5 percent." Views at 30.

The Coalition argues that the Commission should have compared the pricing data during the POI and after the Petition was filed in its substitutability finding, and that this comparison reflects a post-petition decrease in Chinese imports, which demonstrates purchasers' sensitivity to price. Pl.'s Pre-Hearing Br. 17–19. In other words, for plaintiff, the importance of price as a purchasing factor is demonstrated by the increased volume of Chinese products during the first part of the POI resulting from the Chinese producers' low prices, followed by a decrease in volume following the filing of the Petition, because of the well understood potential for price increases for the Chinese product resulting from antidumping duties. Notably, plaintiff acknowledges that there may be instances where "there is a functional or other non-price reason for a U.S. purchaser to purchase plywood with, for example, a thin face veneer, or a core made from a particular material, or a particular overall thickness" from Chinese producers. Pl.'s Pre-Hearing Br. 17. The Coalition insists, however, that this "niche" purchasing cannot explain the increase in volume of imports of Chinese products during the beginning of the POI, and the observed decrease after the filing of the Petition, but that the differences in price can. Pl.'s Pre-Hearing Br. 17–18.

For the Coalition, "if demand for Chinese hardwood plywood was driven not by price but by demand in niche applications such [as] those that require thin-veneered plywood as a functional characteristic, then the volume of U.S. imports of the subject merchandise would not have dropped so precipitously" after the Petition was filed. *Id.* at 18–19; *see also id.* at 24 ("Subject import volume declined by 27 percent in Q4 2012 (after the filing of the case in Q3), another 21 percent in Q1 2013, and yet another 26 percent in Q2 2013 (after the announcement of the Preliminary Commerce margins). . . . If Chinese producers truly offered a differentiated product unavailable (or even largely unavailable) from domestic and other sources, they would have continued to ship it to the U.S. market, and customers would have continued to purchase it."). In making its argument, the Coalition claims that this data demonstrates price, not any physical characteristic of the plywood, is the most important purchasing factor and should have been given significant weight by the Commission in its substitutability analysis.

In its papers, plaintiff also presents testimony from the hearing that it claims illustrates that the U.S. producers have the capability and the capacity to produce the same products as the Chinese, but argues that they cannot compete with Chinese prices.[16] *See* Final Phase Hearing Tr. 34 ("Domestic producers can make the exact same product as the Chinese, but not at the same price. Come to our mills and *see* for yourself. The samples on the table that we have provided are just examples to prove that point."), 37 ("[T]he importers of Chinese hardwood plywood have not found a new use or a new application of their plywood. On the contrary, it's just cheaper. Regretfully, in these especially tough economic times cheap wins."), 39 ("We can and do manufacture thin plywood every day and can do it with thin faced veneers."), 47 ("[Thin face veneers] cannot be sourced from domestic they say. This is a false statement. American hardwood plywood mills and veneer manufacturers have the tools, the technology[,] and the workforce to produce plywood."). Put another way, the Coalition argues the only reason domestic products are more concentrated in the higher-end of the market is because it is the only market segment in which they can compete with Chinese prices. The domestic industry, however, plaintiff insists, has the capacity to manufacture thinner products as well.

It is apparent that the ITC has supported with substantial evidence its conclusion that the importance of price as a purchasing factor is outweighed by other purchasing factors such as quality, availability, and end-use. The ITC considered price as a condition of competition and found that it was an important purchasing consideration. Views at 27. It also found, however, that its importance was mitigated by other factors. *Id.*; Final Staff Report at II-37 ("Substitutability is enhanced by the fact that price was a very important factor in purchasing, but is constrained by quality being the most important factor for more purchasers."). The data reflected that "[o]nly six of [forty] responding purchasers indicated price was the most important factor." Views at 27.

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[16] Specifically, Michael Clausen, Vice President of Sales for the Timber Products Company, stated "[t]he total U.S. production in thousand square feet of birch plywood from 2003 to 2012 declined by 49 percent, and during that same period the total cubic meters of Chinese plywood imported into the U.S. increased by 55 percent." Final Phase Hearing Tr. at 36 (testimony of Michael Clausen, Vice President of Sales for Timber Products Company) ("Clausen Testimony"). From his experience as both an importer and producer, Clausen testified that the customer base is the same for both products, and the U.S. industry has the same capabilities to make all of the same products as the Chinese producers. *Id.* at 35–37, 39 ("Regretfully, we don't often get the opportunity to quote or bid these panels because the customer knows that we cannot come close to compete on the price of Chinese panels."); *see also* Final Phase Hearing Tr. at 48 (testimony stating domestic producers cannot compete with price points of Chinese hardwood plywood). It is worth noting that the POI was June 30, 2010 through June 30, 2013, after the dates specified in Clausen's testimony.

Further, the Commission found that other purchasing considerations were more significant than price. *Id.* at 24 ("More than two-thirds of responding importers and purchasers, but less than one-half of U.S. producers, found that differences other than price between U.S. and Chinese hardwood plywood were always or frequently significant."). For example, the ITC notes that every single purchaser ranked availability as "very important" or "somewhat important," and twenty-three purchasers ranked availability as one of its top three purchasing factors. Final Staff Report at II-19 tbls. II-6 & II-7. As to quality, thirty-three purchasers ranked quality as among the top three purchasing considerations, and thirty-five out of forty purchasers ranked "[q]uality exceed[ing] industry standards" as "very important" or "somewhat important." *Id.* In addition, "[m]ore than two-thirds of responding importers and purchasers, but less than half of U.S. producers ([three] of [seven]), found that differences other than price between U.S. and Chinese hardwood plywood were 'always' or 'frequently significant.'" *Id.* at II-31.

The Commission's finding that price was outweighed by other purchasing decisions such as quality and availability is supported by substantial evidence. As part of its investigation, the ITC found that "[t]he price of hardwood plywood products is a function of the panel size, face species, quality, thickness, and finish." *Id.* at I-20. The record also reflects that the domestic product was superior in terms of other identified important purchasing considerations, namely quality (and hence end-use) and availability. *Id.* at E-4 tbl. E-1 ("We have used both [products], have experienced significant issues with Chinese plywood, it was used in the same applications as we use domestic now. The quality is superior and the amount of re-work is far less."); *id.* at E-4 tbl. E-1 ("Domestic quality tends to go on visible areas. Imports tends [sic] to go in framework and box construction."). In its evaluation of purchasing decisions, the Commission found "[q]uality was most frequently cited by purchasers as their top factor in purchasing plywood, and 33 of 40 purchasers indicated that quality was one of the three most important factors." *Id.* at II-18. Because other factors such as quality and availability are also important considerations, and the record reflects that the domestic product was superior in quality and availability, the Commission reasonably considered the role of price in purchasing considerations and found these other factors outweighed any price factors.

Accordingly, the Commission's finding that other purchasing factors outweighed price-driven substitutability is supported by substantial evidence.

F. Conclusion

The court holds that the Commission's finding of moderate substitutability is supported by substantial evidence, as it was reasonably based on survey and questionnaire responses from importers,[17] and domestic[18] and Chinese producers,[19] evaluating both purchasing decisions and differences in physical characteristics. Views at 4. The U.S. and Chinese plywood products physically differ to a degree limiting substitutability. Overall thickness generally differed between U.S. plywood and Chinese products, which contributed to different end uses. The record also reflects that the domestic product and Chinese product's cores are composed of different types of wood, and the manufacturing processes for each type of plywood differ extensively. Further, these core material manufacturing processes make the plywood more suitable for different face veneer thicknesses, contributing to different end uses. Moreover, the products face veneer thicknesses significantly differ, due in part to the plywood's core material composition. Distinctions between face veneer thickness determine whether the plywood is more suitable for decorative uses or laminate end uses—the major separation between the two products.

As to price, the Commission considered price as another "condition of competition," and found that while price was an important purchasing factor, other factors such as quality and availability were also important. Plaintiff has failed to demonstrate that price is such an important purchasing factor that it outweighs the differing physical characteristics and other purchasing considerations between the domestic and Chinese plywood. Specifically, plaintiff has failed to show that, even though the products are not exactly the same, they are similar enough to support substitutability such that price is the primary motivation among purchasers. Importantly, when, as here, there is not an apples-to-apples comparison of the two products, it is not unusual that the products should be priced differently. Price alone, without a connection between the price and substitutability,

[17] U.S. import statistics were based on questionnaire responses from forty-two U.S. importers. Views at 4. This group of importers accounted for 70 percent of subject imports from China for the year 2012. *Id.*

[18] Questionnaire responses were received from eight domestic producers accounting for nearly all of U.S. production of hardwood plywood in 2012. Views at 4.

[19] Information about Chinese production was based on questionnaire responses from eighty-nine foreign producers, which accounted for about 52 percent of U.S. imports of hardwood plywood during 2012. Views at 4. It may well be that in the year prior to the POI, Chinese plywood competed more directly with the U.S. product and that, because it was cheaper and could be substituted for some uses, it displaced the U.S. product. *Id.* During the POI, however, it is apparent that the ITC's moderate substitutability finding is supported by substantial evidence. *Id.*

does not establish that price differences are the reason purchasers choose Chinese plywood over U.S. plywood.

The Commission's substitutability holding is significant because the degree of overlap of domestic and Chinese products will affect the Commission's evaluation of impact in its material injury and threat of material injury determinations. As stated, "substitutability is one factor in the evaluation of volume and price." *R-M Indus.*, 18 CIT at 226 n.9, 848 F. Supp. at 210 n.9. Although not always the case, in some instances where two products are not directly comparable or interchangeable, there will likely be a weaker connection between the domestic and foreign products. *See* 19 U.S.C. § 1677(7)(C)(iii)(V) ("The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry."). This lack of interchangeability surfaces in the Commission's impact analysis with respect to volume and price effects. Therefore, evaluating substitutability as a condition of competition has a direct impact on the Commission's later considerations. That being said, here, the Commission has supported its limited substitutability finding with substantial evidence and it is in accordance with law.

III. THE COMMISSION'S MATERIAL INJURY DETERMINATION IS NOT IN ACCORDANCE WITH LAW

To determine whether a domestic industry is materially injured or threatened by material injury, the Commission must consider "(I) the volume of imports of the subject merchandise, (II) the effect of imports of that merchandise on prices . . . for domestic like products, and (III) the impact of imports of such merchandise on domestic producers of domestic like products . . . in the context of production operations within the United States." 19 U.S.C. § 1677(7)(B)(i)(I)–(III). Here, the court finds that, because the Commission failed to consider properly the magnitude of the dumping margins, its analysis of the statutory factors leading to its negative injury determination, is unsupported by substantial evidence and is not in accordance with law.

A. The Commission's Significant Import Volume Finding Is Supported by Substantial Evidence

In accordance with the statute, to evaluate the volume of subject imports, "the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." *Id.* § 1677(7)(C)(i).

Through its investigation, the ITC identified significant subject import volume. Views at 29. According to the ITC, subject imports increased from 1.4 billion square feet in 2010, to 1.5 billion square feet in 2011, and to 1.7 billion square feet in 2012. *Id.* at 28. The Commission found, however, this increase in subject imports was at the expense of nonsubject imports, rather than domestic like products, and in fact, the volume of production of domestic like products rose during the 2010 to 2012 portion of the POI. *Id.* at 29–30 ("[W]e find the volume of subject imports to be significant in absolute terms and relative to consumption in the United States. However, for the reasons we discuss [in our price effects analysis], we do not find significant adverse price effects or a significant adverse impact on the domestic industry by reason of subject imports."). Nonsubject imports were from Brazil, Chile, Canada, Indonesia, Malaysia, Romania, Russia, Uruguay, and Vietnam. *Id.* at 23.

Moreover, in 2010 domestic shipments totaled 565.5 million square feet, rising in 2011 to 594.7 million square feet, and again rising in 2012 to 642.2 million square feet. *Id.* at 29. Importantly, during the POI, the market share of the domestic product rose, while the market share of the nonsubject imports declined. *Id.* Further, the 7.1 percent decline in nonsubject imports exceeded the Chinese products' 6 percent gain in market share. *Id.*; Final Staff Report at IV-6 tbl. IV-3 (The nonsubject imports composed 40.8 percent of the total market share in 2010, 36.4 percent in 2011, and 33.7 percent in 2012, 36.7 percent in the 2012 interim, and 44.1 percent in the 2013 interim. The U.S. imports of subject merchandise from China composed 41.9 percent in 2010, 45.8 percent in 2011, 47.9 percent in 2012, and 44.2 percent during the 2012 interim, and 33.2 percent during the 2013 interim). At the same time U.S. market share increased from 17.2 percent in 2010, to 17.8 percent in 2011, 18.4 percent in 2012, 19.1 percent in the 2012 interim, and 22.7 percent in the 2013 interim. Final Staff Report at IV-6 tbl. IV-3. Put another way, the Commission found that any gain in market share realized by the Chinese product was a result of losses of market share by other foreign exporters.

Plaintiff agrees with the ITC that the volume of subject imports was significant, but maintains that, despite imports from other countries possessing a substantial part of the total market, the volume of Chinese products dominated the market over both nonsubject imports and domestic plywood in sales. Pl.'s Pre-Hearing Br. 26–27 ("Between 2010 and 2012 subject import market share was not only larger than any single country source, but larger than all other sources combined."). Additionally, plaintiff asserts that, once the Pe-

tition was filed, the Chinese product's market share significantly dropped, showing that the high volume of Chinese merchandise during the POI were largely due to underselling. *See* Pl.'s Br. 19–22.

Here, the parties agree that import volume was significant. As noted, Chinese plywood imports ranged from 33.2 to 47.9 percent of the market during the POI. Final Staff Report at IV6 tbl. IV-3. Subject import volumes also increased by 0.1 and 0.2 billion square feet during the POI. Views at 28. Further, the Commission found that increases in volume of Chinese plywood during the POI were at the expense of foreign imports, not domestic plywood. *Id.* at 29. Based on this information, the ITC's finding that Chinese import volume was significant within the meaning of 19 U.S.C. § 1677(7)(C)(i) is supported by substantial evidence.

B. The Commission's Finding that the Significant Import Volume Did Not Significantly Depress or Suppress Prices Is Supported by Substantial Evidence

As to price effects, the statute requires the Commission to consider whether—

> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii).

The ITC concluded that there was significant price underselling of Chinese plywood, but that this underselling did not depress or suppress prices to a significant degree. Views at 30–33. The Commission found that the lack of price effects could be explained, at least in part, by the goods not being directly substitutable. *Id.* at 33 n.123 (The ITC also "note[d] the lack of price effects, despite significant subject import volume and underselling, may be due in some degree to differences in product characteristics between domestic product and subject imports.").[20] In determining the price effects of subject imports, the Commission's finding was influenced by its conclusion that non-

[20] As discussed previously, the Commission found, "[a]lthough price is an important factor in purchasing decisions, quality and availability are other top factors," and "[o]nly six of [forty] responding purchasers indicated that price was the most important factor." Views at 27. Again, as noted, the Commission found that purchasing decisions between the two products largely hinged on end use.

price differences, such as quality, availability, veneer thickness, and core quality, explained why the significant volume of Chinese imports failed to have a significant price effect. *See id.* at 30.

As to underselling, the Commission found there was "significant price underselling by the imported merchandise as compared with the price of the domestic like product." *See* 19 U.S.C. § 1677(7)(C)(ii); *see also* Views at 30 ("Subject imports undersold the domestic like product in 83 of the 84 price comparisons, with margins of underselling ranging from 0.9 to 56.5 percent."). Because of the prevalence of underselling and large margins of many of the sales, the Commission concluded that underselling was "significant" within the meaning of the statute. *Id.* at 30–31.

Thus, while the ITC found significant underselling, it did not find an adverse effect on prices of domestically-manufactured hardwood plywood. *See id.* The Commission based this conclusion on pricing data for six products,[21] which "differed in characteristics such as panel thickness, wood species, and grade," and "accounted for [7] percent of U.S. producers' shipments of hardwood plywood and 16 percent of U.S. shipments of subject imports from January 2010 through June 2013."[22] *Id.* at 30 n.106. Based on this pricing data, the ITC concluded there was no "significant correlation between subject import prices and the domestic industry's prices or shipment volumes," because "[p]rices for the subject imports trended upward throughout the [POI] for all six of the products," as well as "for most domestically produced products." *Id.* at 31 (citing Final Staff Report at V-6–V-11 tbls. V-3–V-8). Thus, because three of six products showed an increase in domestic price during the POI, and one was approximately the same throughout the POI, the Commission concluded that prices had not "been depressed to a significant degree by subject imports." *Id.* at 32. In other words, despite subject import's underselling of the domestic like product, the ITC concluded the data indicated that domestic producers were not required to decrease prices or unable to increase prices.

[21] Notably, plaintiff selected five of the six products on which the ITC based these conclusions. Views at 30 n.106.

[22] The ITC's findings with respect to the six products indicated that:

> Domestic prices increased from January–March 2010 to April–June 2013 for pricing products 1, 3, and 4 by 3.0 percent, 11.9 percent, and [[ ]] percent, respectively. The price for product 2 [[ ]] in April–June 2013 as in January–March 2010 (it was 1.2 percent lower). For product 5, the price fluctuated, ending 4.0 percent lower in April–June 2013 compared to January–March 2010. The price for product 6 fluctuated as well, ending 16.4 percent lower in April–June 2013 compared to January–March 2010.

Views at 31 (citing Final Staff Report at V-6–V-11 tbls. V-3–V-8).

Moreover, the Commission found no domestic price suppression as a result of subject imports because "[t]he domestic industry's [cost of goods sold ('COGS')]/net sales ratio was generally flat throughout most of the [POI]." *Id.* at 33. The cost of goods sold is the "price of buying or making an item that is sold"; generally in the manufacturing context, this "includes direct material, direct labor, and factory overhead associated with producing it." Joel G. Siegel & Jae K. Shim, Dictionary of Accounting Terms 101 (2d ed. 1995). Net sales are the "gross sales less sales returns and allowances and sale discounts." *Id.* at 273. Here, this ratio was determined by evaluating operations of U.S. producers, by firm, during the years 2010 through 2012. Final Staff Report at VI-6 tbl. VI-2. Here, the COGS/net sales ratio "was 90.1 percent in 2010, 90.6 percent in 2011 and 90.7 percent in 2012. It was 90.6 percent in interim 2012 and 88.8 percent in interim 2013." Views at 33. Put another way, "[t]hese data tell the story, and the Commission reasonably found that the domestic industry was able to raise prices consistent with rising production costs, and the significant volume of lower-priced subject imports did not have significant price-suppressing effects." Def.'s Br. 26 (citation omitted).

Relatedly, during the POI, the Commission found that there was no evidence of a shift in volume from the domestic industry to the subject imports or a loss of market share. Views at 32. Indeed, "[t]he market share of the domestic like product rose steadily from 17.2 percent in 2010 to 17.8 percent in 2011 and 18.4 percent in 2012; it was 19.1 percent in interim 2012 and 22.7 percent in interim 2013." *Id.* at 29. As to profits, although "[t]he industry's operating margin was low throughout the [POI]," the ITC found it "declined only slightly," and thus there was no "significant negative correlation between subject imports and the industry's condition, much less a causal relationship." *Id.* at 36. The Commission's conclusion that "underselling did not cause a shift in volume from the domestic like product to the subject imports"[23] during the POI was based on data showing "quarterly shipments of domestically produced hardwood plywood were greater in 2012 when total subject import volume was at its peak, than in 2010."[24] *Id.* at 32. Thus, the Commission concluded that during the POI, there was no indication that subject imports had an

[23] In further support that underselling did not cause a shift in volume, the Commission also surveyed U.S. purchasers who reported switching from buying domestic plywood to the imported product in 2009 because the Chinese product's physical characteristics were more suitable to their end uses. Final Staff Report at V-25 tbl. V-12 ("The U.S. produced material is a higher face veneer thickness than is required for our application and is thus overpriced."); *id.* at V-24 tbl. V-12 ("[W]e [p]urchase what our customers want to buy. Some want domestic, some want imports.").

[24] The tables reflect the weighted average of prices and quantities of the six domestic and imported products, and show that the volume of both domestic and Chinese products

impact on the price or volume of the domestic product because both products' market shares and prices increased at the same time.

In preparing its Final Staff Report, the Commission asked U.S. plywood producers to report lost sales or revenue since January 1, 2009.[25] Final Staff Report at V-21. In response to the ITC's requests surveying purchasers from 2009 through 2011, "[f]ive out of the eight responding U.S. producers reported that they had to reduce prices, but only one . . . reported having to roll back announced price increases." *Id.* As part of this inquiry, three of the five purchasers who shifted to Chinese plywood in 2009 stated they began purchasing Chinese plywood because of price. *Id.* at V-22. The Commission concluded, however, that despite lost sales since 2009, before the POI, these "[lost sales] do[] not outweigh other data in the record showing the lack of significant price effects" during the POI. Views at 33.

As for plaintiff, it claims there was evidence before the Commission indicating subject imports had an adverse effect on prices of domestically manufactured hardwood plywood.[26] *See* Pl.'s Br. 18. Although the parties agree that there was significant underselling, plaintiff emphasizes that "[a]ll five responding purchasers 'reported that they had shifted purchases of hardwood plywood from U.S. producers to subject imports since 2009; three of these purchasers reported that price was the reason for the shift.'" Pl.'s Br. 18 (quoting Final Staff Report at V22).[27] The Coalition argues that "[d]omestic producers reported a combination of lost sales and instances where they had to reduce prices in response to import competition," amounting to "nearly $45 million and involved 36 million square feet of hardwood

increased at the same time. *See* Final Staff Report at V-6–V-11 tbls. V-3–V-8. For example, in 2012 for Product 1, the domestic product's volume was at its highest at the same time the Chinese product's volume was at its highest; specifically, in 2012 domestic producers' annual volume was 8,827,000 square feet compared to 2010, when domestic producers' volume was only 5,034,000 square feet. Similarly, the subject imports volume in 2012 was 45,529,000 square feet and in 2010, the annual subject import volume was 33,828,000 square feet. *See* Final Staff Report at V-6 tbl. V-3. Further, even though the domestic producers increased Product 4's prices, sales of the product remained constant. Views at 31–32 n.114.

[25] Three producers alleged specific lost sales, which involved nine purchasers. Final Staff Report at V-21. These lost sales allegations amounted to $44.6 million, but only five of these allegations were verified by the Commission. *See id.* Further, "no firm reported lost revenue allegations." *Id.*

[26] In support of its argument regarding adverse price effects, plaintiff points to Clausen's testimony. Pl.'s Br. 18–19 (citing Clausen Testimony at 157–58) ("That market today is almost entirely owned by the Chinese market. . . . [T]hat market is almost totally gone for the domestic manufacturer because of price, and it's the same product. It's exactly the same product.").

[27] Plaintiff "detailed a lengthy series of responses to the Commission's Purchasers' questionnaire, which clearly reflect the fundamental importance of price in purchasing decisions." Pl.'s Br. 18 (citing Pl.'s Pre-Hearing Br. 20–23).

plywood."[28] Pl.'s Pre-Hearing Br. 37. For plaintiff, the underselling caused purchasers to shift from domestic plywood to Chinese plywood, and had significant price effects on the domestic industry.

Relatedly, where the ITC found steady margins and profits, the Coalition sees stagnation. That is, because "*all* subject imports were found to be unfairly traded,"[29] "the domestic industry's operating margin remained at anemic levels throughout [the POI], rising only when subject imports strongly abated after the filing of the [P]etition." Pl.'s Br. 18. For plaintiff, the effect of the underselling is further shown by Commerce's September 2013 determination that Chinese plywood was being sold at less than fair value, and its selection of dumping margins for Chinese imports ranging from 55.76 to 121.65 percent. *Final Determination*, 78 Fed. Reg. at 58,276–82. In other words, plaintiff argues that, due to the low cost at which subject imports were sold in the United States, the domestic industry's operating margins were forced to remain low during the POI, and rose only after preliminary duties were imposed at the beginning of the ITC's investigation. *See* Pl.'s Br. 18. Viewing the facts from this perspective, plaintiff argues that the ITC's finding of no adverse price effects by reason of subject imports is not supported by substantial evidence. *Id.*

Plaintiff also points to the effects on price after the Petition was filed. Pl.'s Br. 22 ("The tangible, beneficial effects of the Petition were also apparent in increased domestic industry prices."). After the Petition was filed, and as part of its investigation, the Commission looked at subject import volumes during the POI spanning the years 2010 through the 2013 interim. *Id.* The Commission found that prior to the filing of the Petition, which could potentially lead to the imposition of duties on Chinese plywood, the subject imports from China were growing significantly, by 21.5 percent during the years 2010 to 2012. Pl.'s Pre-Hearing Br. 26–27. Plaintiff insists it is meaningful that, despite all market indicators for plywood showing upward trends, after the Petition was filed, "subject import volume dropped by 29 percent between [the] first half of 2012 and [the] first half of 2013." Pl.'s Pre-Hearing Br. 27. Plaintiff presumes, in the context of a market generally, the filing of a petition indicates to importers the potential for imposition of duties on the merchandise, leading to an increase in the cost of the product importers hope to sell in the United

[28] Plaintiff also asserts that "[s]taff reported that all responding purchasers reported that they had shifted purchasers of hardwood plywood from U.S. producers to subject imports since 2009, with price reported as the reason for the shift by the majority of those purchasers." Pl.'s Pre-Hearing Br. 37.

[29] By "unfairly traded," it appears plaintiff means that Commerce had found the goods were sold at less than fair value and were subsidized. *See* Pl.'s Br. 18.

States. For plaintiff, the importers' reaction to the filing of the Petition highlights their sensitivity to price and further supports the Coalition's assertion "that purchasing decisions are largely based on price." Pl.'s Br. 19. Put another way, because the subject imports were being sold, at least in some cases, at materially lower prices than the domestic like product, when importers learned that the Chinese product might end up being more expensive, they stopped importing it, demonstrating the choice between products was largely dependent on price. *See* Pl.'s Br. 18, 22–23. Moreover, after the Petition was filed, prices increased.[30] Pl.'s Br. 22–23 ("[A]verage unit net sales value increased from $1.14 to $1.16 per square foot between interim 2012 and 2013 [(i.e., after the Petition was filed)]. This may seem like a small improvement, but given that domestic producers' unit cost of goods sold remained flat at $1.03 between the interim periods, these increased prices flowed through directly to the domestic industry bottom line, leading to improved operating income.").[31]

The court finds the Commission's conclusion that the effects of imports did not significantly depress or suppress prices is supported by substantial evidence. *See* Views at 33; *see also* 19 U.S.C. § 1677(7)(C)(ii). The Commission reached its conclusion based on pricing data from six products, half of which experienced an upward trend in domestic prices during the POI, and the remainder of which stayed approximately the same or decreased only slightly. *See* Views at 31; *see also* Final Staff Report at V-6–V-11 tbls. V-3–V-8. In addition, there was no shift in volume from domestically-produced hardwood plywood to subject imports, there was no loss in market share for the domestic industry, and the COGS/net sales ratio for the domestic industry did not fluctuate materially during the POI. *See* Views at 32–33. In fact, the record indicates that during the POI "quarterly shipments of domestically produced hardwood plywood were greater in 2012 when total subject import volume was at its peak, than in 2010," and "[t]o the extent that subject imports gained market share, they did so at the expense of nonsubject imports and

[30] During the administrative proceedings, plaintiff asserted:

> Domestic prices generally rose in the early half of 2013, but subject import prices rose even faster, thereby increasing the incentive for purchasers to buy domestic rather than importing from China. The U.S. market share rose, the Chinese market share fell. Gross profit and average operating income per unit experienced by domestic producers consequently rose sharply in 2013 as this case proceeded. The drop in the domestic industry's COGS to sales ratio from 90.6 percent to 88.8 percent between the partial-year periods, after being flat between 2010 and 2012, is strong evidence that domestic prices were suppressed by subject imports prior to the filing of the Petition.

Pl.'s Pre-Hearing Br. 38.

[31] During the 2013 interim, "[o]perating income increased by 142 percent." Pl.'s Br. 23.

without depressing domestic prices." Views at 32–33. Therefore, it was reasonable for the ITC to conclude subject imports caused no adverse price effects on the domestic like product because domestic prices experienced an upward trend during the POI. Financial indicators, such as volume, market share, and profit margins of the domestic industry, do not support a contrary conclusion.

Even were the court to credit some of plaintiff's claims, its holding that the ITC's findings were supported by substantial evidence would not change. As to plaintiff's claim that purchasers shifted their purchases of hardwood plywood from U.S. producers to subject imports, the court finds this does not appear to have adversely affected the price of domestically-manufactured hardwood plywood. Despite confirmed lost sales since 2009, the Commission reasonably concluded "this factor does not outweigh other data in the record showing the lack of significant price effects." *See* Views at 33; *see also GEO Specialty Chems., Inc. v. United States*, 33 CIT 125, 132–33, Slip Op. 09–13, at 5 (2009) ("'[L]ost sales alone do not mandate an affirmative finding of injury; rather the Commission must determine whether lost sales, together with other factors, indicate a causal nexus between the imports at less than fair value and material injury to the domestic industry.'" (quoting *Maverick Tube Corp. v. United States*, 12 CIT 444, 449, 687 F. Supp. 1569, 1575 (1988))). As noted, prices for domestic plywood remained steady during the POI, and for three products prices actually increased, while Chinese prices also increased. Moreover, the volume of domestic shipments, both as a percentage of the market share and in absolute terms, actually increased. Thus, even crediting the evidence of lost sales, the Commission's conclusion that the pricing of the subject merchandise did not adversely affect the domestic industry's prices is supported by substantial evidence.

Finally, the court finds the Commission reasonably concluded that the filing of the Petition did not fully explain the domestic price increases. *See* Views at 36 ("We note that some indicators improved in interim 2013 after the [P]etition[ ] [was] filed. However, the domestic industry's . . . prices were improving before the [P]etition[ ] [was] filed and before preliminary duties were imposed."). As will be discussed, after evaluating the other statutory factors, the Commission concluded the filing of the Petition could not explain the domestic industry's improvement because "while the Petition[ ] may have had some beneficial effect on the industry, we do not find that the pendency of these investigations fully explains the improvement in the industry's condition in interim 2013." *Id.* at 36. This conclusion, based solely on the effect of the filing of the Petition, was reasonable because prices

were increasing prior to the filing of the Petition, and because there was an overall lack of correlation between the significant volume of Chinese imports and the price effects on the domestic product.

In sum, the court finds the Commission's conclusion that, although the volume of subject imports was significant, there were no significant adverse price effects on the domestic like product caused by the subject imports, is supported by substantial evidence.

C. The Commission's Finding That There Was No Adverse Impact on the Domestic Industry by Reason of Subject Imports Is Not in Accordance with Law

As part of its material injury determination, the Commission must also consider "the impact of imports of such merchandise on domestic producers of domestic like products . . . in the context of production operations within the United States." 19 U.S.C. § 1677(7)(B)(i)(III). In doing so,

> the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices,
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
>
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (V) in [antidumping proceedings], the *magnitude of the margin of dumping*.

Id.§ 1677(7)(C)(iii) (emphasis added). The statute "propounds a nonexhaustive list of 'relevant economic factors' the ITC must consider in its impact analysis," and these factors must be weighed "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Hynix Semiconductor*, 30 CIT at 1221, 431 F. Supp. 2d at 1315; 19 U.S.C. § 1677(7)(C)(iii). In its Final Determinations, the Commission found "the subject imports ha[d] not had a significant impact on the domestic industry" primarily based on

economic indicators that improved during the POI. *See* Views at 36.

As to the first factor, "actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity," the Commission found: "[t]he domestic industry's U.S. shipments increased steadily from 2010 to 2012 and were higher in interim 2013 than in interim 2012"; "domestic producers' production increased steadily throughout the [POI] as well"; capacity utilization was steady throughout the POI, despite a decrease during interim 2013; and productivity improved. *Id.* at 34–35. The Commission also found, however, that "the industry's financial indicators were somewhat less positive," because the domestic industry's operating income and operating income margin declined during 2011 and 2012. *Id.* at 35.

Next, the Commission must consider "factors affecting domestic prices." As noted in its price effects findings, the Commission did not find that subject imports had suppressed domestic prices to a significant degree. *See* Views at 33. The Commission must also consider "actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment." *Id.* § 1677(7)(C)(iii). As to these considerations, the ITC found that "the number of production and related workers rose steadily from 2010 to 2012, and there were more workers in interim 2013 than in interim 2012"; that there was an increase in wages paid; and that "[m]ost of the industry's trade and employment indicators improved during the [POI], including in interim 2013 as the industry continued to recover from the recession." *Id.* at 34–35. Some indicators, however, went the other way. For instance, the Commission found that the industry's "operating income margin declined from 2010 to 2012." *Id.* at 35, 35 n.136.

Another factor to be considered is the "actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product." 19 U.S.C. § 1677(7)(C)(iii)(IV). As to this factor, the Commission found that U.S. research and development expenses only slightly declined.[32] Views at 35 n.138.

The Commission, however, gave short shrift to the last statutory factor, "the magnitude of the margin of dumping," by addressing it only in a footnote, merely noting "Commerce found antidumping duty

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[32] U.S. research and development expenses declined from [[ ]] in 2010 to [[ ]] in 2011 and 2012. Views at 35 n.138. During the interim periods, research and development expenses fell from [[ ]] to [[ ]]. *Id.*

margins ranging from 55.76 percent to 121.65 percent for imports of hardwood plywood from China" in its less-than-fair-value determination. *Id.* at 33 n.124.

In the end the ITC concluded, based on this information, that "despite a significant volume of subject imports and significant underselling," the U.S. plywood industry grew during the POI, and therefore, it did "not find that the record shows a significant negative correlation between subject imports and the industry's condition, much less a causal relationship." *Id.* at 35–36.

For the reasons stated above, the court finds the Commission's determinations as to volume and price effects are supported by substantial evidence and in accordance with law. Furthermore, with the exception of the previously-noted failure of the ITC to consider seriously the magnitude of the dumping margins, the Commission's remaining impact findings are supported by substantial evidence and are in accordance with law. As with its conclusions relating to volume and price effects, the ITC's finding of no adverse impact was based on data showing that financial and employment indicators improved during the POI. Although some financial indicators were less positive for the domestic industry, as a whole, the industry's financial position was improving. For instance, the volume of "U.S. shipments rose from 565.5 million square feet in 2010 to 594.7 million square feet in 2011 and 642.2 million square feet in 2012. They were 323.8 million square feet in interim 2012 and 366.2 million square feet in interim 2013." *Id.* at 34 n.126. In addition, U.S. production[33] and capacity utilization[34] increased, the number of workers and the hours worked increased,[35] as did wages[36] and productivity.[37] Additionally, net income increased at the beginning of the POI, although it declined at the end

[33] "Production increased from 587.7 million square feet in 2010 to 619.8 million square feet in 2011 and 669.3 million square feet in 2012. It was 338.1 million square feet in interim 2012 and 383.3 million square feet in interim 2013." Views at 34 n.127.

[34] "Capacity utilization [rose] from 44.3 percent in 2010 to 46.7 percent in 2011 and 51.1 percent in 2012. It was 51.4 percent in interim 2012 and 59.4 percent in interim 2013." Views at 34 n.128.

[35] "The number of production and related workers increased from 1,753 in 2010 to 1,799 in 2011 and 1,868 in 2012. It was 1,829 in interim 2012 and 1,944 in interim 2013." Views at 35 n.130. In addition, the "[h]ours worked climbed from 3.8 million hours in 2010 to 3.9 million hours in 2011 and 4.1 [million] hours in 2012. They totaled 2.1 million hours in interim 2012 and 2.2 million hours in interim 2013." *Id.* at 35 n.131.

[36] "Wages paid rose from $65.1 million in 2010 to $66.2 million in 2011 and $72.2 million in 2012. They totaled $35.6 million in interim 2012 and $39.0 million in interim 2013." Views at 35 n.132.

[37] "Productivity increased from 156.0 square feet per hour in 2010 to 157.4 square feet per hour in 2011, then to 163.2 square feet per hour in 2012. It was 162.1 square feet per hour in interim 2012 and 174.1 square feet per hour in interim 2013." Views at 35 n.133.

of the period.[38] While the operating income margin declined from 2010 to 2012,[39] it only declined slightly and then increased between interims 2012 and 2013. Despite U.S. research and development expenses decreasing, indicating a downward trend in innovation investment,[40] capital expenditures increased[41] showing domestic industry growth.

The court finds unconvincing plaintiff's argument that the post-petition improvements in the domestic industry are evidence that underselling of subject imports had an adverse impact on the domestic industry in its production operations. Financial and employment indicators were steadily improving prior to the filing of the Petition, and therefore it was reasonable for the Commission to conclude that post-petition improvements in the domestic industry were not attributable to the filing of the Petition or imposition of preliminary duties. The Commission collected and evaluated the industry's pre- and post-Petition data, reflecting that the domestic industry's financial indicators showed improvement even before the Petition was filed. *See* Views at 36 ("Thus, while the [P]etition[ ] may have had some beneficial effect on the industry, we do not find the pendency of these investigations fully explains the improvement in the industry's condition . . . or supports a conclusion that subject imports were having an injurious impact on the domestic industry prior to the filing of the [P]etition[ ]."). Despite plaintiff's reliance on post-Petition improvements in the domestic industry for its assertion that subject imports had a significant adverse impact during the POI, the Commission reasonably concluded that any post-Petition improvements in the domestic industry were a continuation of an upward trend, rather than a result of the filing of the Petition or the imposition of preliminary duties.

Moreover, it is worth noting the role the statute provides for post-petition data. Specifically, 19 U.S.C. § 1677(7)(I) provides, in relevant part:

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[38] "Net income rose from $5.4 million in 2010 to $8.3 million in 2011 and fell to $6.9 million in 2012. It totaled $5.7 million in interim 2012 and $17.6 million in interim 2013." Views at 35 n.135.

[39] "Operating income declined from $12.5 million in 2010 to $10.4 million in 2011 and increased to $11.0 million in 2012. It was $8.2 million in interim 2012 and $19.8 million in interim 2013." Views at 35 n.134. "The operating income margin was 2.1 percent in 2010 and 1.6 percent in 2011 and 2012. It was 2.3 percent in interim 2012 and 4.8 percent in interim 2013." *Id.* at 35 n.136.

[40] "Research and development expenses fell from [[ ]] in 2010 to [[ ]] in 2011 and 2012. They totaled [[ ]] in interim 2012 and [[ ]] in interim 2013." Views at 35 n.138.

[41] "Capital expenditures increased from $4.1 million in 2010 to $7.3 million in 2011 and $7.4 million in 2012. They totaled $2.7 million in interim 2012 and $8.8 million in interim 2013." Views at 35 n.137.

> The Commission shall consider whether any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition in an investigation . . . is related to the pendency of the investigation and, if so, the Commission *may reduce the weight* accorded to the data for the period after the filing of the petition in making its determination.

19 U.S.C. § 1677(7)(I) (emphasis added). Thus, while plaintiff suggests the Commission should increase the weight it accorded to the post-Petition data, the statute provides the opposite: the Commission "may reduce the weight" it accords to post-petition data. *See id.*; *see also Nucor Corp. v. United States*, 414 F.3d 1331, 1341 (Fed. Cir. 2005); *JMC Steel Grp. v. United States*, 38 CIT __, __, 24 F. Supp. 3d 1290, 1313 (2014) ("The statute gives the Commission ample discretion to decide whether to discount evidence due to petition-induced volume changes. In this case, the agency provided a reasonable explanation for its decision not to discount the interim 2012 data.").

When it comes to the final mandated factor to be considered, however, the Commission's findings are not in accordance with law. In making its material injury determination, the Commission is directed to consider the "impact of imports . . . on domestic producers of domestic like products" by evaluating "all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to . . . [in a dumping proceeding], the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii). The Coalition argues, that pursuant to the statute, the ITC is required to "consider" the "magnitude of the [dumping margins]," and that the mere recitation of the dumping margins in a footnote does not amount to sufficient consideration under the statute. *See* Pl.'s Br. 24–25.

Specifically, the Coalition contends "the ITC's 'consideration' of this statutory factor amounted to no more than a simple recitation of the final dumping margins, relegated to only a footnote in the Views." Pl.'s Br. 8–9. The dumping margins are significant for plaintiff because they "speak directly and consequently to the pronounced price advantage evidence by subject imports." Pl's. Br. 26; *see also* Pl.'s Br. 9 ("This analytical omission was particularly significant since . . . subject imports account for the largest supply source for the subject merchandise in the U.S. market during the [POI], and [coincides] with the substantial margins of underselling found by the Commission.").

According to plaintiff, while the ITC may have in fact considered the dumping margins, there is no way to evaluate whether and how they affected the Commission's Final Determinations since no explanation was provided. *See* Pl.'s Br. 25. In support of its position, the Coalition cites *Altx, Inc. v. United States*, for the proposition that the ITC "must address evidence that 'seriously undermines its reasoning and conclusions.'" Pl.'s Br. 26 (quoting *Altx, Inc. v. United States* (*Altx I*), 25 CIT 1100, 1117–18, 167 F. Supp. 2d 1353, 1374 (2001)). To plaintiff, the dumping margins are significant and "constitute a direct barrier against the domestic industry's ability to compete for sales in a fair and open market." Pl.'s Br. 26. Therefore, according to the Coalition, because the Commission failed to evaluate adequately the dumping margins in its Views, its determination is not supported by substantial evidence and is not in accordance with law. *See* Pl.'s Br. 26–27.

The "dumping margin" is the difference between normal value (home market price) and export price (U.S. price). 19 U.S.C. § 1677(35)(A). While the magnitude of the margin is important for Commerce when it is determining an antidumping duty rate, in recent years it has not been seriously considered by the ITC when making injury determinations. *See Consol. Fibers, Inc. v. United States*, 32 CIT 855, 862–63, 574 F. Supp. 2d 1371, 1379–80 (2008); *Asociacion de Productores de Salmon y Trucha de Chile AG v. U.S. Int'l Trade Comm'n*, 26 CIT 29, 44–45, 180 F. Supp. 2d 1360, 1376 (2002); *Comm. of Domestic Steel Wire Rope & Specialty Cable Mfrs. v. United States*, 26 CIT 403, 418–20, 201 F. Supp. 2d 1287, 1302–04 (2002) (finding that the Commission's underlying use of the COMPAS model,[42] when evaluating the data, constitutes consideration under the statute). Indeed, since the Commission abandoned its use of the COMPAS model, it appears to have concluded dumping margins are no longer relevant to an injury determination. This may be because, in an underselling inquiry, the ITC looks at the amount that the foreign product undersells the domestic product in the U.S. market, not the difference in sales price of the foreign product in its home market and its price in the United States.

[42] The Commercial Policy Analysis System (the "COMPAS" model), which is no longer used by the Commission, is an economic model that examines "the health of the domestic industry." *Altx, Inc. v. United States* (*Altx III*), 370 F.3d 1108, 1112 (Fed. Cir. 2004); *see id.* at 1122 n.11 ("The COMPAS model incorporates the dumping margin as part of its analysis. The operation of the model is such that a high dumping margin can control the outcome, outweighing the value contributed by other variables."). The use of the COMPAS methodology indicated that the Commission had evaluated the magnitude of the dumping margins because the COMPAS model relied upon "dumping margins[ ] to measure the economic effects of the subject imports on the domestic industry." *Comm. of Domestic Steel Wire Rope*, 26 CIT at 419, 201 F. Supp. 2d at 1302.

Even so, this Court has cautioned that "explicit discussion of the rol[e] of the dumping margin in injury determinations would better serve the statute," and in the absence of such a discussion, whether the Commission considered the magnitude of the dumping margins depends on the facts and circumstances of a specific case. *See Comm. of Domestic Steel Wire Rope*, 26 CIT at 421 n.12, 201 F. Supp. 2d at 1304 n.12. The Federal Circuit has characterized the material injury statutory factors, including the magnitude of the dumping margins, as a "Congressionally mandated 'minimum analysis,' which must be undertaken." *Trent Tube Div., Crucible Materials Corp. v. United States*, 975 F.2d 807, 814 (Fed. Cir. 1992) ("[Section 1677(7)(C)(iii)] list[s] factors which the Commission 'shall,' not may, consider and evaluate in determining the effect on the domestic industry. Depending on the circumstances, the Commission may not need or be able to consider each listed factor; it may also consider other relevant factors, such as the intent of the importer or the effect on competition. However, the Commission cannot ignore or bypass the core factors directed by the statute.").

The Commission insists that it gave the magnitude of the dumping margins adequate consideration. The ITC relies upon *Altx II*, as affirmed by the Federal Circuit in *Altx III*, to support its contention that mentioning the dumping margins in a footnote constitutes sufficient consideration under the statute. Def.'s Br. 35 ("The Court stated in [*Altx II*] that 'while the ITC has a statutory obligation to consider the dumping margin, it has little significance if there is no connection between the pricing of the foreign product and the condition of the domestic industry.'" (quoting *Altx, Inc. v. United States* (*Altx II*), 26 CIT 1425, 1432, Slip Op. 02–154, at 6 (2002), *aff'd*, *Altx, Inc. v. United States* (*Altx III*), 370 F.3d 1108 (Fed. Cir. 2004)). To defendant, because the *Altx II* Court noted that under the facts of that case, the dumping margins "ha[d] little significance" because the Commission had found "no adverse price effects or impact by reason of subject imports," it is necessarily true in the present case that "the dumping margins were of little consequence." Def.'s Br. 35 (citing *Altx II*, 26 CIT at 1432, Slip Op. 02–154, at 6). In other words, defendant insists that, because the Commission concluded there was no adverse impact as a result of subject imports, based on its conclusion that despite significant subject import volume there was no sign of significant adverse price effects, the Commission's mention of Commerce's dumping margins was all that the law required.

The Commission, however, has misread these opinions. The facts of the *Altx* cases show: (1) the dumping margins for the steel products at issue were assigned using adverse facts available ("AFA")[43] because the respondents failed to answer the questionnaires, and (2) the ITC explicitly noted that the high margins resulting from the application of AFA skewed the results when used in conjunction with the COMPAS model. *See Altx II*, 26 CIT at 1432–33, Slip Op. 02–154, at 6–7; *Altx III*, 370 F.3d at 1122–23 n.11. Thus, the Commission's determination in *Altx* explicitly considered the magnitude of the dumping margins. *See Altx III*, 370 F.3d at 1123 ("Here, the Commission fully complied with its statutory duty by at least 'consider[ing] . . . the magnitude of the margin of dumping.'"). These cases do not stand for the proposition that the Commission may satisfy the statute, in every instance, by noting the magnitude of the margins in a footnote. Rather, they hold that the importance of the magnitude of the margins can be enhanced or discounted based upon the specific facts, but in all cases, the role of the magnitude of the margins must be evaluated.

Congress added the consideration of "the magnitude of the dumping margins" in the impact portion of the Commission's injury determinationsin 1994. While the addition of the magnitude of the dumping margin was new to the statute in 1994, it was not new to the law. Indeed, use of dumping margins in injury determinations has quite a history.[44] First, dumping margins were frequently considered,

[43] "If Commerce finds that a respondent has 'failed to cooperate by not acting to the best of its ability to comply with a request for information,' the statute permits the agency to draw adverse inferences commonly known as 'adverse facts available' when selecting from among the available facts." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1338 (Fed. Cir. 2016) (quoting 19 U.S.C. § 1677e(b) (2006)).

[44] Congress added the directive to the ITC to evaluate "the magnitude of the margin of dumping" in its impact determinations when it enacted the Uruguay Round Agreements Act ("the Act"). Uruguay Round Agreements Act, Pub. L. No. 103–465, § 222(b)(1)(B), 108 Stat. 4809, 4870 (1994) (codified as 19 U.S.C. § 3501 et seq.). The ITC's consideration of dumping margins, however, was a feature of the law before its explicit addition to the statute. As early as 1921 and continuing until 1979, the ITC (and its predecessor the Tariff Commission) regularly, if not consistently, used dumping margins when making injury determinations. The use of dumping margins varied from investigation to investigation and review to review, but the ITC, in making injury determinations, took the magnitude of the dumping margins into account in many proceedings. N. David Palmeter, *Countervailing Subsidized Imports: The International Trade Commission Goes Astray*, 2 Pac. Basin L.J. 1, 6–9 (1983).

In 1979, Congress enacted the Trade Agreements Act of 1979. As noted in the Ways and Means Committee Report, the 1979 Act was designed to "implement multilateral trade negotiations which were anticipated internationally with the signing of the Tokyo Declaration in September 1973." H.R. Rep. No. 103–826, at 66–67 (1994). Although the 1979 Act did not mention the use of dumping margins in injury determinations, it did mark a change in their use by the Commission. Specifically, following the 1979 Act, the ITC began to move away from using dumping margins in injury determinations. *Cf. Copperweld Corp. v.*

despite a lack of a statutory requirement. *Copperweld Corp. v. United States*, 12 CIT 148, 154–59, 682 F. Supp. 552, 560–64 (1988). Second, there was a gradual move by the Commissioners to abandon the practice of considering dumping margins. And third, Congress added the provision requiring the Commission to consider the magnitude of the dumping margins in its material injury determinations. The addition of this requirement after the practice had been abandoned, moreover, serves to underscore the mandatory nature of Congress's action. Here, the Commission's consideration of this factor amounts

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United States, 12 CIT 148, 154–59, 682 F. Supp. 552, 560–64 (1988); *Hyundai Pipe Co. v. U.S. Int'l Trade Comm'n*, 11 CIT 117, 121–23, 670 F. Supp. 357, 360–62 (1987). Indeed, a majority of Commissioners seem to have abandoned the practice by 1984. As to the use of dumping margins in injury determinations, when the provision was added to the law in 1994, the Report of the Committee on Ways and Means states:

> *Present law*
>
> Under current law, the Commission is neither required to nor prevented from considering the margin of dumping in its analysis of material injury by reason of imports. *See Copperweld Corp v. United States*, 682 F. Supp. 552, 564 (Ct. Int'l Trade 1988).
>
> *Explanation of provision*
>
> Section 222(b)(1)(B) of H.R. 5110 amends section 771(7)(C)(iii) [(19 U.S.C § 1677(7)(C)(iii))] of the Act by adding the magnitude of the margin of dumping to the list of factors the Commission considers in determining the impact of imports of subject merchandise on domestic producers of like products.
>
> *Reason for change*
>
> The amendment is necessary to conform U.S. law to the [Uruguay Round] Agreement.

H.R. Rep. No. 103–826, at 66–67 (1994). Moreover, the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act ("SAA") gives some direction as to how the ITC's evaluation is to be conducted:

> [T]he Antidumping Agreement requires the consideration of the magnitude of the dumping margin in determining whether there is material injury by reason of the dumped imports. In preliminary injury determinations, where Commerce has not yet calculated a dumping margin, the Commission will use the dumping margins published in Commerce's notice of initiation. In final injury determinations, the Commission will use the dumping margins most recently published by Commerce before the record in the Commission investigation has closed. These may be either the margins published in Commerce's final determination, or if no final determination has been made, in its preliminary determination.

SAA, H.R. Doc. No. 103–316, at 849, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4182–83. Further,

> In addition to the factors listed in the 1979 Code that national authorities must examine in determining the impact of dumped imports on the domestic industry, Article 3.4 adds a requirement to consider the magnitude of the margin of dumping. As with the 1979 Code, however, the list of factors is not exhaustive, and no one or several of the factors necessarily gives decisive guidance.

Id. at 811, 1994 U.S.C.C.A.N. at 4154.

to nothing more than the recitation of the dumping margins found by Commerce in a footnote. Taking into account the long history of the use of dumping margins in injury determinations, coupled with Congress's explicit inclusion of the "magnitude of the margin of dumping" as a factor to be considered, this is clearly insufficient.

While the ITC reasonably determined that substitutability was limited between the domestically-produced hardwood plywood and subject imports, in evaluating the impact of subject imports on the domestic market, it failed to evaluate the magnitude of the dumping margins. *See* 19 U.S.C. § 1677(7)(E)(ii).

For the foregoing reasons, the Commission's determination is remanded to consider "the magnitude of the margin of dumping," as it may or may not affect its analysis of the subject imports' "impact" on the domestic industry.

IV. THE COMMISSION'S THREAT OF MATERIAL INJURY DETERMINATION IS NOT IN ACCORDANCE WITH LAW

When "determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise, the Commission shall consider, among other relevant economic factors": the nature of the subsidy; the production capacity likely to result in significant increases in subject imports; the increase in market penetration of subject imports; the likelihood that imports of subject merchandise will have significant depressing or suppressing domestic price effects; increases in inventories of subject merchandise; potential for product shifting in the foreign country; domestic development efforts; and any other "demonstrable adverse trends."[45] 19 U.S.C. § 1677(7)(F)(i).

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[45] Specifically, 19 U.S.C. § 1677(7)(F)(i) provides:

In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise, the Commission shall consider, among other relevant economic factors—

(I) if a countervailable subsidy is involved, such information as may be presented to it by [Commerce] as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement [of the General Agreement on Tariff and Trade ('GATT') concerning export subsidies and targeted export subsidies]), and whether imports of the subject merchandise are likely to increase,

(II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,

(III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,

The list of statutory considerations is not exclusive, and the ITC's findings must be based on the entire administrative record. *See Dastech Int'l, Inc. v. U.S. Int'l Trade Comm'n*, 21 CIT 469, 472, 963 F. Supp. 1220, 1224 (1997). "In making a determination of threat of material injury, ITC must weigh industry views and views of other interested parties, together with all other relevant economic factors as appropriate under the record of each particular investigation." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 984 (Fed. Cir. 1994). Furthermore, the Commission "may use its sound discretion in determining the weight to afford these and all other factors, but [it] cannot ignore them."[46] *Id.*

As to the first statutory factor, the nature of the countervailable subsidy, Commerce found the Chinese producers of hardwood plywood from China received a countervailable subsidy for the provision of electricity for less than adequate remuneration. Views at 38 n.142; *see* 19 U.S.C. § 1677(7)(F)(i)(I) (The statute requires that "if a countervailable subsidy is involved" the Commission must analyze "the nature of the subsidy . . . and whether imports of the subject merchandise are likely to increase.").

Next, as to the second factor, the ITC did not find a likelihood of a substantial increase in subject imports in the future based on excess production capacity in China. Views at 39. The excess capacity data reflect that "[s]ubject Chinese capacity utilization was 83.1 percent in

(IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,

(V) inventories of the subject merchandise,

(VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products

. . . .

(VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

19 U.S.C. § 1677(7)(F)(i).

[46] The Federal Circuit has also clearly stated that "the standard of assessing a 'threat of material injury' is different" than that for material injury because the threat of material injury statute "directs that [the] ITC 'shall' consider all relevant economic factors in a threat investigation." *Suramerica*, 44 F.3d at 984. In *Suramerica*, the Federal Circuit affirmed the CIT's decision to remand the case to the ITC because it failed to consider relevant information. *Id.* In other words, unlike in a material injury determination, where the Commission has discretion whether to consider other factors beyond the mandated statutory factors, in a threat of material injury determination, the Commission "must not disregard any relevant economic factor." *Id.*

2010, 86.9 percent in 2011 and 87.9 percent in 2012. It was 70.5 percent in interim 2012 and 80.2 percent in interim 2013. Subject Chinese capacity utilization is projected to be at 85.7 percent in 2013 and increase to 88.9 percent in 2014." *Id.* at 39 n.149. The Commission drew this conclusion because: (1) "Chinese producers' capacity increased only 5.3[47] percent between 2010 and 2012";[48] and (2) "even if subject imports from China [were to] increase somewhat, we do not find that any such increase would likely threaten material injury to the domestic industry given the lack of causal nexus between the significant volume of subject imports and any injury to the domestic industry over the [POI]." *Id.* at 39–40.

In further support that the Chinese producers' unused capacity would not threaten the U.S. plywood industry, the Commission found Chinese plywood home market shipments were increasing during the POI, and exports to countries other than the United States were expected to remain steady. Views at 40, 40 nn.155–56. Again, as was the case in its injury determination, the Commission found that any increase in volume of subject imports to the United States was at the expense of nonsubject imports,[49] not the domestic product. *Id.* at 38.

As to the third factor, "significant rate of increase of the volume or market penetration . . . indicating the likelihood of substantially increased imports," the Commission found that "the increase in subject import volume and market share during the [POI] does not indicate a likelihood that any increase in subject import volume in the imminent future would result in declines in the domestic industry's output or market share." *Id.* This is consistent with the ITC's volume and price effects findings in its injury determination, where it concluded that there was no material injury despite significant import

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[47] The data indicate that this number is in fact 4.8 percent. *See* Final Staff Report at VII-5 tbl. VII-1. This, however, does not alter the court's conclusions.

[48] For example, in 2010 Chinese producers' capacity utilization was 83.1 percent, in 2011 it was 86.9 percent, in 2012 it was 87.9 percent, in the interim 2012 period it was 70.5, and in the interim 2013 period it was 80.2. Final Staff Report at VII-5 tbl. VII-1. Moreover, "[r]esponding subject foreign producers reported excess capacity of 243.4 million square feet in 2012, which represents 8 percent of total apparent U.S. consumption in that year." Views at 39 (citation omitted). In other words, even if all of the excess capacity were employed, the result would be a fraction of the U.S. market.

[49] "The market share of subject imports was 41.9 percent in [2010], 45.8 percent in 2011, and 47.9 percent in 2012; it was 44.2 percent in interim 2012 and 33.2 percent in interim 2013." Views at 28–29; *see* Final Staff Report at IV-6 tbl. IV-3. "Nonsubject sources included Brazil, Chile, Canada, Indonesia, Malaysia, Romania, Russia, Uruguay, and Vietnam. Nonsubject import market share was 40.8 percent in 2010, 36.4 percent in 2011, and 33.7 percent in 2012; it was 36.7 percent in interim 2012 and 44.1 percent in interim 2013." Views at 23 (citation omitted). "The 7.1 percentage points in market share that nonsubject imports lost from 2010 to 2012 exceeded the 6.0 percentage points in market share that subject imports gained during that period." *Id.* at 29.

volume and significant underselling. *Id.* Like its injury determination, when considering the threat of material injury, the ITC found it unlikely that any increase in volume and market share posed a threat of material injury because the previously-observed increases in volume during the POI were not found to have injured the domestic industry. *Id.* ("Increases in subject imports resulted in declines in the volume of nonsubject imports, rather than of domestic product."). Additionally, the ITC found "U.S. demand is expected to continue to increase in the near future," based on information during the POI showing "[t]he domestic industry has increased its production and market share." *Id.* (citation omitted).

As has been discussed, the Commission concluded in its material injury determination that there was a lack of significant adverse price effects despite significant underselling. As part of its threat determination, the Commission's consideration of the fourth factor, "imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices," was largely based on its previous findings. *See id.* ("As discussed above, the domestic industry's performance generally improved during the [POI] . . . . [T]he domestic industry was able to increase its market share in a growing U.S. market and to increase prices overall for its hardwood plywood products."). In addition, the Commission found that "despite increasing inventories of low-priced subject imports," overall, "the condition of the domestic industry improved during the [POI]." *Id.* at 41–42.

These findings are in line with the ITC's material injury price and volume analyses, where it found there were significant import volumes of Chinese plywood during the POI, but this significant import volume entering the United States did not materially injure the domestic industry. *Id.* at 29–30, 42. Here, in its threat analysis, the ITC found that even if subject import volume were to increase, any such increase would not threaten the domestic industry. *Id.* at 40. Because the Commission observed that during the POI, the significant volume of Chinese imports did not injure the domestic industry, it concluded any future increase in volume would likewise not pose a threat to the domestic industry. *Id.* ("[E]ven if subject exports from China do increase somewhat, we do not find that any such increase would likely threaten material injury to the domestic industry given the lack of a causal nexus between the significant volume of subject imports and any injury to the domestic industry over the [POI].").

When evaluating "inventories of the subject merchandise," the Commission found such inventories would not cause "significant price

effects or an adverse impact on the domestic industry in the imminent future" because "the domestic industry's market share and condition improved over the [POI]." *Id.* at 41, 41 n.157. This improvement in the domestic industry's market share occurred "despite increasing inventories of low-priced subject imports." *Id.* at 41. The Commission also found that "subject import inventories have recently fallen, and demand is expected to increase." *Id.* Based on these findings, the Commission concluded these inventory increases would not "cause significant price effects or an adverse impact on the domestic industry in the imminent future." *Id.*

Examining the "potential for product-shifting," the ITC found "there is no indication in the record that the subject imports, which are heavily concentrated in the lower end of the U.S. market, will enter the higher-end of the market . . . in significant quantities in the imminent future or at prices that are likely to depress or suppress domestic prices." *Id.* at 41. The Commission "acknowledge[d] that petitioners offered statements that subject imports are moving into higher grades," but found these statements unsupported by the record. *Id.* at 26 n.88. For the ITC, the "data show[ed] that subject Chinese producers' and U.S. importers' shares of thicker grade product remained relatively flat over the [POI]." *Id.* at 42. When considering the conflict in information between the purchasers' comments and the data, the Commission concluded there was no potential for product-shifting to the higher-end of the market. *See id.* at 41–42.

Finally, the Commission considered the antidumping investigations and duty orders of other countries imposed on subject imports, and whether they might lead to an increase in volume of subject imports to the United States. *See id.* at 40; *see also* 19 U.S.C. § 1677(7)(F)(i)(IX) ("[A]ny other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports."). According to the Commission, the European Union, Turkey, Israel, and South Korea have imposed antidumping duties on imports of plywood from China. Views at 40 n.156. Colombia and Argentina have also initiated investigations of hardwood plywood from China. *Id.* The ITC found, however, even if these orders and investigations inhibited import volume and pricing in other countries, there was nothing in the record demonstrating they would encourage an increase in subject imports to the United States, thereby threatening the domestic industry. *Id.* at 40. In support of this conclusion, the Commission reiterated the Chinese defendant-intervenors' contention that

> the antidumping duty orders on Chinese plywood in the [European Union], Turkey and Israel do not serve as a significant

> barrier to Chinese exports, because Turkey and Israel are insignificant markets and the order in the [European Union] covers only one specific type of plywood, which is an insignificant percentage of total Chinese production.

Id. at 40 n.156.

As stated, in its Final Determinations, the Commission concluded that an industry in the United States is not threatened with material injury by reason of subject imports. This determination was based on the previously-mentioned findings that: (1) "excess capacity in China does not indicate the likelihood of substantially increased imports of the subject merchandise"; (2) "the increase in subject import volume and market share during the [POI] d[id] not indicate a likelihood that any increase in subject import volume in the imminent future would result in declines in the domestic industry's output or market share"; (3) "imports of subject merchandise are not entering at prices that are likely to have significant depressing or suppressing effect[s] on domestic prices"; (4) "the domestic industry's share and condition improved over the [POI], despite increasing inventories of low-priced subject imports"; (5) there was "no indication in the record that the subject imports . . . [would] enter the higher end of the market"; and (6) "subject imports have had no significant actual or potential negative effects on the existing development and production efforts of the domestic industry." *Id.* at 38–39, 41–42 (citation omitted). In its Views, the Commission relied on its volume, price, and impact analysis, detailed in its material injury discussion, to further support its threat of material injury determination findings. *Id.* at 37 n.141, 38.

With respect to volume and market share, plaintiff takes issue with the data on which the ITC relied, claiming it "marginalized the ability of Chinese . . . producers to significantly increase exports of [hardwood plywood] to the U.S. market." Pl.'s Br. 29; *see* Views at 39 n.147 ("[T]he data obtained from the Chinese foreign producers accounted for approximately 52.4 percent of U.S. imports of hardwood plywood from China in 2012, and constitute the facts available on the record."). For plaintiff, the data reports only a portion of the industry in China, accounting for a slight majority of U.S. imports in 2012, and include "the responses of only 89 of a total of 350 companies to which the Commission's Foreign Producers' questionnaire w[as] emailed or faxed." Pl.'s Br. 29 n.13 (citing Views at 39 n.147). In other words, because the Commission did not use a comprehensive data set, plaintiff asserts the data do not accurately represent the excess capacity of the Chinese producers.

Additionally, the Coalition argues that "the industry in China is export-oriented, focused on the U.S. market, has substantial alternate markets that can be used to increase exports of [hardwood plywood] to the U.S., and has a demonstrated ability to shift sales from one market to another." Pl.'s Br. 29. Specifically, plaintiff asserts:

> Chinese producers' export shipments to the United States represented the fastest-growing segment of all shipments during 2010–2012 (increasing by 40.3 percent (252 million square feet) versus 13.9 percent (91 million square feet) for home market shipments and 16.1 percent (73 million square feet) for all other export shipments), and in 2012 surpassed the volume of home market shipments to become the highest-volume category of shipments at 875 million square feet.

Pl.'s Pre-Hearing Br. 59. Plaintiff maintains this information suggests that subject import volume directed at the U.S. market will continue to increase significantly.

Plaintiff further argues the Commission's discussion of the antidumping orders in foreign countries is legally flawed and lacking support. Pl.'s Br. 30. According to the Coalition, the Commission improperly relied on Chinese defendant-intervenors' pre- and post-hearing briefs for the proposition that "'Turkey and Israel are insignificant markets for plywood,' and the antidumping order issued by the European Union 'covers only a specific type of plywood, okoume plywood, which is an insignificant percentage of total Chinese production." Pl.'s Br. 30–31 (quoting Chinese Def.-Ints.' Pre-Hearing Br. 26). Plaintiff points out that no independent record evidence was provided to support this assertion, and claims the Commission failed to address the antidumping investigations in Argentina, Colombia, and South Korea. Pl.'s Br. 31.

Plaintiff next asserts the Commission "improperly discounted" its argument that the Chinese product is entering the higher-end of the hardwood plywood market. Pl.'s Br. 31. Specifically, according to plaintiff, the "overall quality and range of products provided by Chinese producers has continually improved, and that the manufacturers in China are supplying higher-value portions of the U.S. [hardwood plywood] market," thereby posing a future threat. Pl.'s Br. 31. That is, the Coalition argues the ITC ignored significant evidence demonstrating "the movement of subject imports up the value chain over recent years," including affidavits and hearing testimony suggesting "that subject imports will enter—indeed, have entered—the 'high end of the market.'" Pl.'s Br. 32, 35.

On this subject, the Coalition points to affidavits discussing "the movement of subject imports up the value chain over recent years." Pl.'s Br. 32. These affidavits state that "the Chinese producers begin competing at the low end and then graduate up the value chain towards higher end products as they improve their manufacturing capabilities and gain market acceptance in the United States."[50] Pl.'s Post-Hearing Br. Ex. 1 ¶ 3. Plaintiff's argument is that, although it is a concern that lower quality Chinese products are entering the market and replacing the need for higher-quality domestic products, Chinese producers are now also producing the same higher quality product as domestic producers. The Coalition states "[i]n light of these very detailed sworn statements by persons with a long history in, and extensive knowledge of, the U.S. [hardwood plywood] market," the Commission improperly "concluded that 'there is no indication in the record that the subject imports . . . will enter the high[er] end of the market.'" Pl.'s Br. 34 (quoting Views at 41). For the Coalition, the entrance of the Chinese product into the higher end and domestically-controlled sector, enhances the substitutability and competition between the two products. Pl.'s Br. 32–34.

As to plaintiff's argument that the Commission underestimated the ability of Chinese producers to increase exports, the court finds the Commission reasonably concluded, based on industry data showing a lack of injury during the POI, that this was unlikely to change in the near future.[51] *See* Views at 38–39. The ITC found that any potential increase in volume and market share, as well as China's producers' excess capacity, would not pose a threat to the domestic industry. *See id.* For the ITC, any excess capacity possessed by the Chinese producers during the POI did not cause material injury to the domestic industry, and therefore the ITC concluded such excess capacity would not threaten injury to the domestic industry going forward. *See id.* at 40 ("[S]ignificantly increased imports of the subject merchandise into the United States are not imminently likely," because "Chinese producers' increased shipments to [its] home market and exports to other

[50] "The Chinese product first took over our birch market using the nearby resource of the birch forests in Russia, but has graduated even further up the supply chain to attack these decorative hardwood plywood panels in species originating exclusively in North America and in plywood grades (B and higher) and thicknesses (1/2" and thicker)." Pl.'s Post-Hearing Br. Ex. 1 ¶ 4. "[[ ]] is made with face veneers of North American species. This is not the thin, utility application plywood I first encountered in the late 1990's. This is maple, cherry and red oak made with hardwood veneers that originate in North America." Pl.'s Post-Hearing Br. Ex. 1 ¶ 4.

[51] This does not mean that the ITC's impact analysis in its material injury determination is complete. Instead, the information relied upon for its impact finding that despite significant volume and underselling, the Commission found that the domestic industry's financial indicators remained essentially the same throughout the POI.

countries.”). Indeed, the record evidence shows the Chinese producers’ capacity only increased 5.3 percent during the POI, and that excess capacity was projected to decrease during 2014. *Id.* at 39; *see* Final Staff Report at VII-5 tbl. VII-1. Thus, the Commission reasonably concluded that significant import volume and excess capacity did not pose a threat of material injury to the domestic industry.

With respect to the Coalition’s argument regarding antidumping investigations in other countries, the court finds this argument unconvincing. The Commission addressed the antidumping proceedings in other countries when it noted South Korea reportedly imposed preliminary duties, while Argentina and Colombia had initiated investigations. *See* Views at 40 n.156 (“In 2013, South Korea reportedly imposed preliminary antidumping duties on plywood imports from China, and Argentina and Colombia initiated investigations on imports of Chinese plywood.”). The Commission considered these investigations and reasonably concluded they would not have an impact on the domestic industry in the imminent future. *See id.* at 40 (“Even if these orders have some disciplining effect on the volume and prices of subject Chinese exports to certain markets in the imminent future, the record does not indicate that they will significantly restrict China’s exports generally and they will not deter the growth of home market shipments.”). Although the ITC cited the Chinese defendant-intervenors’ pre- and post-hearing briefs in its Views, it did so in an effort to “recognize that there are outstanding antidumping duty orders or investigations on hardwood plywood from China in other countries.”[52] *Id.* Plaintiff, although disputing the Commission’s reliance on this source, has not pointed to any evidence contradicting the Commission’s finding.

In addition, the record shows that the antidumping duties imposed by the European Union were, in fact, only for imports of okoumé plywood from China. *See* Final Staff Report at VII-6 n.4 (“[T]he definitive anti-dumping duty on Chinese imports of okoumé plywood followed a review of the original investigation that imposed the duties in 2004.”). Further, the record indicates that the hardwood plywood markets in Argentina, Colombia, Israel, and Turkey do not represent a large percentage of the total Chinese hardwood plywood market.

[52] The Chinese defendant-intervenors point to information in the record supporting their assertions that the outstanding dumping orders will not have an impact on the domestic industry. *See, e.g.*, Chinese Def.-Ints.’ Br. 11 (“For the [European Union], the record shows that the dumping order is only on one sub-category of plywood, okoume,” and furthermore, “[t]he Turkish dumping order was in place for over three years before the [POI] . . . . The dumping order in Israel was removed in 2012 and therefore plainly cannot affect exports of plywood from China going forward.”), 12 (“Record information on the South Korean case indicates that the Chinese companies have dumping margins as low as 3.75 percent.”).

See Final Staff Report at VII-6–VII-8 (data reflects that, during the POI, 34.2 percent to 41.5 percent of Chinese plywood was consumed by the home market, while 23.5 percent to 27.9 percent was sold in markets other than the United States). Thus, the Commission reasonably determined that "the record does not indicate that [these dumping orders] will significantly restrict China's exports generally and they will not deter the growth of home market shipments." Views at 40.

Next, the court finds meritless the Coalition's argument that the Commission ignored evidence indicating subject imports were moving into the higher-end of the market, thereby posing a threat of material injury to the domestic industry. The ITC considered this argument, but found it was "not borne out by the record, given importer and purchaser statements to the contrary and data showing that subject Chinese producers' and U.S. importers' shares of thicker grade product remained relatively flat over the [POI]."[53] *Id.* at 42. Therefore, the court finds substantial evidence in the record supports the Commission's finding that it is unlikely subject imports will enter the higher-end of the market in significant quantities in the imminent future.

The Coalition further asserts the Commission did not properly consider Commerce's countervailing duty determination, which concluded electricity was provided to Chinese producers for less than adequate remuneration. *See* Pl.'s Br. 28. The Coalition's argument is that, where countervailable subsidies are present, the ITC is required to consider "whether imports of the subject merchandise are likely to increase."[54] 19 U.S.C. § 1677(7)(F)(i)(I). For plaintiff, a subsidy mar-

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[53] The Coalition asserts the Commission "conflates (and, perhaps, confuses) the terms 'higher-grade' and 'thicker grade,' reading these two distinct product characteristics as synonymous." Pl.'s Br. 34–35. Plaintiff, in its own filings, however, suggests a correlation between the thickness of hardwood plywood and its quality. *See* Pl.'s Post-Hearing Br. Ex. ¶ 4 (suggesting that, in an attempt to move products into the higher-end of the market, subject imports are being produced "in plywood grades (B and higher) and thicknesses (1/2" and higher) to target high end cabinetry, furniture and fixtures"); Pl.'s Post-Hearing Br. Ex. 8 (Chinese-produced hardwood plywood is entering the higher-end of the market by "gaining both total market share across all grades and types of hardwood plywood based on thickness. Because hardwood plywood is a decorative interior product, species, grades and thickness are the three primary determinants of the applications for these materials."); Hearing Tr. at 54 ("You buy [hardwood plywood] because of the look and the thickness.").

[54] The statute provides, in pertinent part:

> In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise, the Commission shall consider, among other relevant economic factors—(I) if a countervailable subsidy is involved, such information as may be presented to it by [Commerce] as to the nature of the subsidy . . . , and whether imports of the subject merchandise are likely to increase.

19 U.S.C. § 1677(7)(F)(i)(I).

gin of "13.58 or 27.16 percent for all but three Chinese producers/ exporters of hardwood plywood" is significant. Pl.'s Br. 28. Therefore, the Coalition argues, the subsidy should have been analyzed in the Commission's determination because it has a direct impact on the prospective underselling of subject merchandise. Pl.'s Br. 28. Put another way, for plaintiff, this subsidy affects the health of the domestic industry, "the pricing practices of subject imports, and by derivation, . . . the domestic industry's ability to compete on a fair basis in the U.S. market." Pl.'s Br. 28. This argument is much the same as the Coalition's earlier argument that there was "legal error inherent in [the ITC's] 'consideration' of the magnitude of the dumping margins in its material injury analysis." *See* Pl.'s Br. 28.

The ITC responds that its findings include the consideration of the countervailable subsidy, thereby satisfying its obligations under the statute. Def.'s Br. 37. In its entirety, the countervailing duty determination appears in a footnote appended to the Commission's subsection B "Analysis" heading: "In its final affirmative countervailing duty determination on hardwood plywood from China, Commerce found one subsidy program to be countervailable. The program determined to be countervailable is the provision of electricity to Chinese producers for less than adequate remuneration." *See* Views 38 n.142 (citation omitted).

The Commission asserts that, since it discussed "whether imports of the subject merchandise are likely to increase," it fulfilled its statutory obligation to consider countervailable subsidies. Specifically, in its papers, the Commission points to its finding that the increase in subject import volume and market share during the POI "did not indicate a likelihood that any increase in subject import volume in the imminent future would result in declines in the domestic industry's output or market share" satisfies its statutory obligation. *See* Def.'s Br. 37. In further support of its view that it sufficiently took the subsidies into account, the ITC argues it also found "there was no indication that subject imports would enter the higher-end of the market, in which the domestic industry's sales are focused, in significant quantities in the imminent future or at prices that are likely to depress or suppress domestic prices." *Id.*

It is clear that the ITC did not sufficiently consider the likely effects of the subsidies. In reaching this conclusion the court has found that the development of the statute, and particularly of 19 U.S.C. § 1677(7)(F)(i)(I) and (7)(E)(i), to be instructive. First, a subsidy exists when a government or public entity of a country provides a financial, income, or other funding mechanism that creates a financial contri-

bution or benefit to a person. *Id.* § 1677(5)(B). As to the consideration of such subsidies in a threat of material injury determination, subsection (7)(E)(i) states:

> In determining whether there is a threat of material injury, the Commission shall consider information provided to it by [Commerce] regarding the nature of the countervailable subsidy granted by a foreign country (particularly whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement)[55] and *the effects likely to be caused by the countervailable subsidy*.

Id. § 1677(E)(i) (emphasis added). Similarly, subsection (F)(i)[56] provides:

> [T]he Commission shall consider, among other relevant economic factors . . . if a countervailable subsidy is involved, such information as may be presented to it by [Commerce] as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement), and *whether imports of the subject merchandise are likely to increase*.

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[55] Article 3 and 6.1 of the Subsidies Agreement of the General Agreement on Tariff and Trade ("GATT") concern export subsidies and targeted export subsidies. Article 3 of the Subsidies Agreement provides:

> [T]he following subsidies, within the meaning of Article 1, shall be prohibited:
> (a) subsidies contingent, in law or fact, whether solely or as one of several other conditions, upon export performance . . . ;
> (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

Article 6.1 states:

> Serious prejudice in the sense of paragraph (c) of article 5 shall be deemed to exist in the case of:
> (a) total ad valorem subsidization of a product exceeding 5 per cent;
> (b) subsidies to cover operating losses sustained by an industry;
> (c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;
> (d) direct debt forgiveness of debt, i.e. forgiveness of government-held debt, and grants cover debt repayment.

Agreement on Subsidies and Countervailing Measures arts. 3, 6.1 (World Trade Org.), *available at* https://www.wto.org/english/docs_e/legal_e/24-scm.pdf.

[56] As noted, the statute states that countervailable subsidies must be considered in two ways. Subsection E requires the Commission to consider "the effects likely to be caused by the countervailable subsidy." 19 U.S.C. § 1677(E)(i). Subsection (F)(i)(I), however, requires the Commission to consider "whether imports of the subject merchandise are likely to increase." *Id.* § 1677(7)(F)(i)(I).

Id. § 1677(F)(i)(I) (emphasis added).

As discussed, the Trade Agreements Act of 1979 implemented the international agreements reached during the Multilateral Trade Negotiations by amending the Tariff Act of 1930. As part of these 1979 amendments, Congress, for the first time, added the requirement that the ITC consider the nature of any countervailing subsidies in its threat of material injury analysis.[57] In 1984, Congress again amended the statute, adding new subsection F, which provides other factors to be considered in the ITC's threat of material injury analysis. *See* H.R. Rep. No. 98–725, at 38, *reprinted in* 1984 U.S.C.C.A.N. 5127, 5165 (1984) ("In determining whether there is a threat of material injury in countervailing duty investigations, the ITC must consider such information as may be presented by [Commerce] on the nature of the subsidy . . . and the effects likely to be caused by the subsidy. Legislative history states that export subsidies are inherently more likely to threaten injury than other subsidies.[58] There are no other factors specified in present law for determining the threat of material injury.").

Specifically, the amendments included a requirement that the Commission consider the "nature of the subsidy . . . and whether imports of the subject merchandise are likely to increase."[59] *Id.* § 1677(7)(F)(i)(I) (1984). It also required the Commission to consider:

[57] As part of Congress's discussion of the Commission's role in a threat of material injury determination, Congress explained that the ITC "must satisfy itself that, in light of all the information presented, there is a sufficient causal link between subsidization and the requisite injury. The determination of the ITC with respect to causation is . . . complex and difficult, and it's a matter of judgment of the ITC." S. Rep. No. 249, Trade Agreements Act of 1979, Pub. L. 96–39, 89, *reprinted in* 1979 U.S.C.C.A.N. 475 (1979). Specifically, "[i]n making a material injury determination with respect to threat of material injury in countervailing duty investigations, the ITC may consider the nature of a subsidy practice and whether an adverse impact on a domestic industry is more likely to be associated with such a subsidy practice as opposed to what would be the case with another type of subsidy." S. Rep. No. 249, Trade Agreements Act of 1979, Pub. L. 96–39, 89, *reprinted in* 1979 U.S.C-.C.A.N. 475 ("This is particularly relevant with respect to export subsidies inconsistent with the Agreement on Subsidies and Countervailing Measures, which are inherently more likely to threaten injury than are other subsidies.").

[58] The court notes that the legislative history reflects Congress intended for the Commission to pay special attention to export and targeting subsidies. *See* H.R. Rep. No. 98725, at 39, *reprinted in* 1984 U.S.C.C.A.N. at 5166; *see also* 19 U.S.C. § 1677(7)(F)(i)(I) ("[P]articularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement."). Congress stated, however, that "the actual standards for determining threat of material injury would be the same as in cases not involving export targeting practices." H.R. Rep. No. 98–725, at 39, *reprinted in*1984 U.S.C.C.A.N. at 5166.

[59] Prior to the amendment, there was "no statutory guidance as to the factors, other than the nature of any subsidy." H.R. Rep. No. 98–725, at 38, *reprinted in* 1984 U.S.C.C.A.N. at 5165. The Ways and Means Committee went on to observe that "the absence of such criteria has created uncertainty and confusion within the Commission and court challenges on what standards should apply; partly for this reason there have been relatively few cases decided

the exporter's production capacity; increased volume of subject imports; adverse price effects on the domestic industry; inventories of subject merchandise; the potential for product-shifting in the foreign country; whether the subject merchandise was a "raw agricultural product"; the "actual and potential negative effects of existing development and production efforts of the domestic industry"; and "any other demonstrable adverse trends." *Id.* § 1677(7)(F)(i)(II)–(IX).

After the list of factors was added in subsection F of the statute, the requirement to consider "the nature of the subsidy" in the Commission's threat determination was provided for in two separate parts of the statute, subsection E and subsection F. The provision sets out two separate requirements: (1) to consider the countervailable subsidy and "the effects likely to be caused by the countervailable subsidy," *id.* § 1677(7)(E)(i); and (2) to consider the subsidy and determine "whether imports of the subject merchandise are likely to increase," *id.* § 1677(7)(F)(i)(I).

Not long after the 1984 amendments, the Court of International Trade began to recognize that the ITC's failure to consider a statutorily mandated factor in its threat determinations was not in accordance with law. *See, e.g.*, *Yuasa-Gen. Battery Corp. v. United States*, 11 CIT 382, 392, 661 F. Supp. 1214, 1222 (1987), *aff'd on reconsideration*, 12 CIT 624, 688 F. Supp. 1551 (1988) ("[T]he economic factors in section 1677(7)(F)(i) are set forth in the conjunctive, which requires consideration of all of them, at a minimum. To the extent the ITC failed to consider factor IV in the context of threat of injury or factors VII and VIII at all, that failure was not in accordance with law."); *Nat'l Pork Producers Council v. United States*, 11 CIT 398, 407, 661 F. Supp. 633, 641 (1987) (The Commission specifically considered the nature of the subsidy and "recognized the possibility that the imposition of countervailing duties on Canadian live swine might result in an increase in Canadian pork imports.").

As to the degree of consideration required, the Federal Circuit has held that the ITC failed to consider a countervailable subsidy within the meaning of subsection E in cases where the Commission has provided a greater analysis of the subsidies than is present here. In *Suramerica*, for example, the Federal Circuit found the ITC failed to consider, in its subsidy report, that a "bond program did not provide

by the Commission on the basis of threatened as opposed to actual material injury." *Id.* at 39, *reprinted in* 1984 U.S.C.C.A.N. at 5166. Congress stated these new factors were previously contemplated in the 1979 amendment of the law. *Id.* ("The factors set forth in section 771(7) as amended by the bill are consistent with, and restate legislative history on, this term in present law as it was amended by the Trade Agreements Act of 1979.").

Venezuelan producers with a subsidy advantage over U.S. manufacturers," and accordingly, "did not comply with section 1677(7)(E)(i)'s requirement that the ITC consider the likely effects of any subsidy." *Suramerica*, 44 F.3d at 985. In that case, the International Trade Administration report explained that the subsidy program at issue "compensate[d] for overvaluation of the Bolivar," and the Venezuelan producers argued "that the prevailing free market exchange rate correlated with the subsidy." *Id.* In its Final Determinations, the Commission in *Suramerica* determined, however, that the bond program provided an "important incentive to imports." *Id.* (internal quotation marks and citation omitted). The Court found that the ITC failed to consider the actual effects of the subsidy, such that the bond program "only facilitated the opportunity for Venezuelan producers to compete in export markets on a level playing field." *Id.* The Federal Circuit found the ITC's failure to consider the actual effects of the countervailable subsidy—that the subsidy in effect provided a "level playing field" for Venezuelan producers and "did not provide Venezuelan producers with a subsidy advantage over U.S. manufacturers"—was inadequate consideration under the statute. *Id.*

The court finds the Commission failed to consider adequately the countervailable subsidy, and thus its determination is not in accordance with law. While the statute instructs the Commission to consider the threat factors "as a whole," and provides that "[t]he presence or absence of any [threat] factor . . . shall not necessarily give decisive guidance with respect to the determination," if countervailable subsidies are present, then the Commission must actually consider them and their effects on the domestic industry. *See* 19 U.S.C. § 1677(7)(E)(ii); *see also id.* § 1677(7)(F)(ii). In its Final Determinations, just as with its evaluation of the antidumping duty margins, the ITC noted Commerce's countervailing duty finding in a footnote without any further explanation. This alone does not amount to the consideration required by the statute.

On this point, the court is not persuaded by the Commission's argument that its discussion of the potential for volume increases amounts to consideration of "the nature of the countervailable subsidy" and its effects. *See* Def.'s Br. 36–37. The Commission stated:

> [T]he increase in subject import volume and market share during the [POI] does not indicate a likelihood that any increase in subject import volume in the imminent future would result in declines in the domestic industry's output or market share. As described above, we have found that the increased volume of subject imports did not have significant adverse effects on the domestic industry during the [POI], during which the industry's

> market share and U.S. shipments also increased. Increases in subject imports resulted in declines in the volume of nonsubject imports, rather than of domestic product. There is no evidence in the record that these trends will change in the imminent future.

Views at 38. This discussion of increase in volume does not mention subsidies and indeed, its conclusion is based on factors unrelated to countervailable subsidies. In addition to the factor at issue, two other statutory factors require that the Commission examine "whether imports of the subject merchandise are likely to increase." *See* 19 U.S.C. § 1677(7)(F)(i)(I), (II) ("indicating the likelihood of substantially increased imports of the subject merchandise into the United States"), (III) ("a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports"). Thus, the court finds the Commission's discussion does not suffice to constitute consideration of the nature of the subsidy and its effects.

As noted, the Commission's consideration of "the nature of the subsidy" and "the effects likely to be caused by the countervailable subsidy," as well as "whether imports of the subject merchandise are likely to increase," was expressly contemplated by Congress in its 1979 and 1984 amendments. Further, this Court and the Federal Circuit have recognized that the Commission must actually consider the nature of the subsidies by providing some explanation. Accordingly, the court finds that the Commission's mention of the subsidy in a footnote appended to its "Analysis" heading in its Views does not constitute adequate consideration under the statute. Views at 38. Given the legislative history and case law illustrating the degree of consideration of countervailable subsidies that is required in a threat of material injury determination, the Commission's discussion of the subsidy in this case is not in accordance with law.

With the exception of the Commission's consideration of the countervailable subsidies, the remaining findings in its threat of material injury determination are supported by substantial evidence and are in accordance with law.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the United States International Trade Commission's final negative material injury determination is remanded in part; it is further

ORDERED that, on remand, the Commission shall issue a redetermination that complies in all respects with this Opinion and Or-

der, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that on remand, the ITC is directed to explicitly evaluate the "magnitude of the dumping margins" when making its impact finding as part of its injury determination; and it is further

ORDERED that on remand, the ITC is directed to consider the nature of the countervailable subsidies in accordance with the statute; and it is further

ORDERED that the Commission shall reopen the record to solicit additional information required to make these determinations or otherwise complete its analysis; it is further

ORDERED that the remand results shall be due on September 8, 2016; comments to the remand results shall be due thirty (30) days following filing of the remand results; and replies to such comments shall be due fifteen (15) days following filing of the comments.

Dated: June 8, 2016
New York, New York

\s\ *Richard K. Eaton*
RICHARD K. EATON, JUDGE

Slip Op. 16–63

DAVIS WIRE CORP. AND INSTEEL WIRE PRODUCTS COMPANY, Plaintiffs, v. UNITED STATES, Defendant, AND THE SIAM INDUSTRIAL WIRE CO., LTD., Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 14–00131

[Affirming in part, and remanding in part, a negative less-than-fair-value determination in an antidumping duty investigation]

Dated: June 28, 2016

Kathleen W. Cannon of Kelley Drye & Warren LLP, of Washington DC, argued for plaintiffs Davis Wire Corporation and Insteel Wire Products Company. With her on the brief were *David C. Smith, Jr.*, and *R. Alan Luberda*.

Carrie A. Dunsmore, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant United States. With her on the brief were *Joyce M. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Whitney M. Rolig*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Edward M. Lebow of Haynes & Boone LLP, of Washington DC, argued for defendant-intervenor The Siam Industrial Wire Co., Ltd.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiffs Davis Wire Corp. and Insteel Wire Products Company contest a negative less-than-fair-value determination ("Final Determination") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude an antidumping duty investigation of prestressed concrete steel rail tie wire ("PC tie wire") from Thailand. *Final Determination of Sales at Not Less than Fair Value: Prestressed Concrete Steel Rail Tie Wire from Thailand*, 79 Fed. Reg. 25,574 (Int'l Trade Admin. May 5, 2014) ("*Final Determination*"). In the Final Determination, Commerce calculated a 0.00% weighted-average dumping margin for Siam Industrial Wire Company, Ltd. ("SIW"), a Thai producer and exporter of PC tie wire. Because SIW was the sole company investigated, Commerce terminated the investigation without issuing an antidumping duty order. SIW is the defendant-intervenor in this action. Plaintiffs are U.S. producers of PC tie wire and were the petitioners in the investigation.

Plaintiffs challenge three aspects of the Department's determination of normal value in the Final Determination: (1) the Department's selection of South Africa as a viable comparison market; (2) the Department's exclusion of certain quantities of a material, wire rod, from its calculation of SIW's cost of production ("COP"); and (3) the Department's calculation of a general and administrative ("G&A") expense ratio for SIW. Compl. ¶¶ 9–16 (June 26, 2014), ECF No. 9.

Before the court is plaintiffs' motion for judgment upon the agency record pursuant to USCIT Rule 56.2. Mot. for J. on Agency R. 56.2 (Oct. 17, 2014), ECF No. 23 ("Pls.' Mot."). Also before the court is a request by defendant United States that the Final Determination be remanded in part to allow Commerce to reconsider its exclusion from its calculation of SIW's cost of production certain wire rod inputs that SIW's PC tie wire division procured internally from another of SIW's divisions. Resp. to Pls.' Mot. for J. on the Admin. R. (Jan. 16, 2015), ECF No. 34 (public), ECF No. 33 (conf.) ("Def.'s Resp."). The court grants defendant's request, and it also remands the Final Determination for reconsideration of the Department's calculation of the G&A ratio. The court declines to order relief on plaintiffs' remaining challenges.

I. BACKGROUND

A. The Department's Antidumping Duty Investigation

In response to petitions filed by Davis Wire and Insteel Wire, Commerce initiated the antidumping duty investigation in May 2013 to examine imports of certain PC tie wire from Thailand entered during the period of April 1, 2012 through March 31, 2013 ("period of investigation" or "POI").[1] *Prestressed Concrete Steel Rail Tie Wire From Mexico, the People's Republic of China, and Thailand: Initiation of Antidumping Duty Investigations*, 78 Fed. Reg. 29,325, 29,325 (Int'l Trade Admin. May 20, 2013).

In late 2013, Commerce issued a negative preliminary determination ("Preliminary Determination") upon finding that U.S. sales of the merchandise under consideration had not been, and were not likely to be, made at less than fair value.[2] *Prestressed Concrete Steel Rail Tie Wire From Thailand: Preliminary Determination of Sales at Not Less Than Fair Value and Postponement of Final Determination*, 78 Fed. Reg. 75,547 (Int'l Trade Admin. Dec. 12, 2013) ("*Prelim. Determination*"); *Decision Mem. for the Prelim. Determination in the Antidumping Duty Investigation of Prestressed Concrete Steel Tie Wire from Thailand*, A-549–829 (Dec. 5, 2013) (P.R. Doc. 119), *available at* http://enforcement.trade.gov/frn/summary/thailand/201329692–1.pdf (last visited June 23, 2016) ("*Prelim. Decision Mem.*"). To determine whether U.S. sales of PC tie wire from Thailand were made at less than fair value, Commerce compared POI weighted-average constructed export price to POI weighted-average normal value (average-to-average methodology). *Prelim. Decision Mem.* 7; *see* 19 C.F.R. § 351.414(b)(1) (describing the "average-to-average method" of comparing home market and U.S. sales), *and id.* § 351.414(c)(1) ("In an investigation, the Secretary normally will use the average-to-

[1] For purposes of the antidumping duty investigation, Commerce defined "prestressed concrete steel rail tie wire" ("PC tie wire") as "high carbon steel wire; stress relieved or low relaxation; indented or otherwise deformed; meeting at a minimum the physical, mechanical, and chemical requirements of the American Society of Testing Materials (ASTM) A881/A881M specification; regardless of shape, size, or alloy element levels; suitable for use as prestressed tendons in concrete railroad ties (PC tie wire)." *Final Determination of Sales at Not Less than Fair Value: Prestressed Concrete Steel Rail Tie Wire from Thailand*, 79 Fed. Reg. 25,574, 25,575 (Int'l Trade Admin. May 5, 2014).

[2] On June 20, 2013, the U.S. International Trade Commission preliminarily determined that there was a reasonable indication that an industry in the United States is materially injured by reason of imports of PC tie wire from Thailand. *Prestressed Concrete Steel Rail Tie Wire From China, Mexico, and Thailand*, 78 Fed. Reg. 37,236 (Int'l Trade Comm'n June 20, 2013).

average method.").[3] Basing SIW's POI weighted-average normal value on constructed value,[4] Commerce assigned SIW a de minimis preliminary weighted-average dumping margin of 0.07% *ad valorem*. *Prelim. Determination*, 78 Fed. Reg. at 75,548.

Commerce published its Final Determination on May 5, 2014. *Final Determination*, 79 Fed. Reg. at 25,574. Commerce released an accompanying Issues and Decision Memorandum. *Issues and Decision Mem. for the Antidumping Duty Investigation of Prestressed Concrete Steel Rail Tie Wire from Thailand*, A-549–829 (Apr. 28, 2014), (P.R. Doc. 175), *available at* http://enforcement.trade.gov/frn/summary/thailand/2014–10237–1.pdf (last visited June 23, 2016) ("*Final Decision Mem.*"). Using SIW's third-country POI sales to South Africa, rather than constructed value, as the basis for determining normal value, Commerce assigned SIW a final margin of 0.00% and concluded the investigation.[5] *Final Determination*, 79 Fed. Reg. at 25,575 ("As our final determination is negative, this proceeding is terminated.").

B. Litigation before the Court of International Trade

Plaintiffs initiated this action by filing a summons on June 3, 2014 and a complaint on June 26, 2014. Summons, ECF No. 1; Compl. ¶ 1. Plaintiffs filed their motion for judgment on the agency record and accompanying brief on October 17, 2014. Pls.' Mot. 1; Br. in Support of Pls.' Rule 56.2 Mot. for J. on Agency R., ECF No. 26 (public), ECF No. 24 (conf.) ("Pls.' Br."). On January 16, 2015, defendant and defendant-intervenor each filed responses opposing plaintiffs' motion. Def.'s Resp.; Resp. of Def.-Intervenor in Opp'n to Mot. for Rule 56.2 J. on the Agency R. (Jan. 16, 2015), ECF No. 32 (public), ECF No. 31 (conf.) ("Def.-Intervenor's Resp."). Plaintiffs filed their reply on February 17, 2015. Pls.' Reply Br., ECF No. 38 (public), ECF No. 37 (conf.) ("Pls.' Reply").

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[3] Unless otherwise stated, all statutory citations are to the 2012 edition of the U.S. Code, and all citations to agency regulations are to the 2012 edition of the Code of Federal Regulations.

[4] *See* 19 U.S.C. § 1677b(e) (describing constructed value as the sum of the cost of materials and processing employed in producing the subject merchandise, the selling, general, and administrative expenses, and profit).

[5] Under Sections 773 and 775 of the Tariff Act of 1930, a weighted-average dumping margin determined in an antidumping duty investigation is de minimis, and therefore disregarded, if it is less than 2% *ad valorem*. 19 U.S.C. § 1673d(a)(4) (In making a final determination in a less-than-fair-value investigation, Commerce "shall disregard any weighted average dumping margin that is de minimis as defined in section 1673b(b)(3) of this title."); *id.* § 1673b(b)(3) (For a preliminary less-than-fair-value determination, "a weighted average dumping margin is de minimis if the administering authority determines that it is *less than 2 percent ad valorem* . . . ." (emphases added)).

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 may review a negative final determination of sales at less than fair value in an action brought under section 516A(a)(2) of the Tariff Act of 1930 ("Tariff Act"); *see* 19 U.S.C. § 1516a(a)(2)(A), (a)(2)(B)(ii). Upon judicial review, the court will hold unlawful any finding, conclusion, or determination not supported by substantial record evidence or otherwise not in accordance with law. *Id.* § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

B. The Department's Selection of South Africa as the Comparison Market

Plaintiffs challenge the Department's decision in the Final Determination to base normal value on SIW's sales to South Africa during the POI. Pls.' Br. 17–29. Plaintiffs argue that Commerce instead should have determined normal value on a constructed value basis. *See*, *e.g*., *id.* at 2–3; Pls.' Reply 13, 21.

Section 773(a)(1)(B)(i) of the Tariff Act identifies normal value ("NV") as, ordinarily, the price at which the foreign like product is first sold for consumption in the exporting country (the "home market"). 19 U.S.C. § 1677b(a)(1)(B)(i). In the absence of a viable home market, i.e., a market with sufficient sales of the foreign like product during the relevant period, Commerce may calculate normal value using the price at which the foreign like product is sold "for consumption in a country other than the exporting country or the United States" (a "third country" comparison market), provided certain conditions are met. *Id.* § 1677b(a)(1)(B)–(a)(1)(C). Among those conditions are that "such price is representative," *id.* § 1677b(a)(1)(B)(ii)(I), and that Commerce "does not determine that the particular market situation in such other country prevents a proper comparison with the export price or constructed export price," *id.* § 1677b(a)(1)(B)(ii)(III). If these conditions are not met, Commerce may determine normal value on the basis of constructed value. *Id.* § 1677b(a)(4).

During the preliminary phase of the investigation, Commerce found that "the wire product that SIW sold in Thailand did not meet at least one of the requirements specified in the ASTM [American Society of Testing Materials specification A881/A881M] standard"

and so found that "SIW's wire product sold in Thailand was not a 'foreign like product' within the meaning of section 771(16) of the [Tariff] Act and could not be used as a basis for NV." *Prelim. Decision Mem.* 7. During the investigation, the petitioners alleged that, according to SIW's third-country sales data, "a 'particular market situation' exists which renders sales to South Africa inappropriate as a basis for NV." *Id.* Explaining that the petitioners' allegation "raises questions as to whether SIW's sales to South Africa are suitable as a basis for NV," and that it lacked "sufficient time to analyze the matter," Commerce preliminarily based normal value on constructed value. *Id.* at 8; *see* 19 U.S.C. § 1677b(a)(4). As to plaintiffs' allegation of a "particular market situation," Commerce explained, further, that it intended to request "additional information from SIW with respect to this issue" and would "verify this information and consider it for purposes of the final determination." *Prelim. Decision Mem.* 8. SIW submitted its responses to the Department's request for additional information on December 30, 2013. *See, e.g.*, *Response of the Siam Industrial Wire Co, Ltd. to the Dept. of Commerce's First Suppl. Section D Antidumping Questionnaire* (P.R. Docs. 136–141) (C.R. Docs. 116–134). In the Final Determination, Commerce rejected petitioners' allegation of a particular market situation and determined normal value based on SIW's sales in the South Africa market. *Final Decision Mem.* 3, 18.

Plaintiffs claim that Commerce was required to find, in accordance with section 773(a)(1)(B)(ii)(III), that "the 'particular market situation' in South Africa prevented a 'proper' price comparison" with constructed export price. Pls.' Br. 20; *see* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III). Plaintiffs claim, further, that use of SIW's South Africa sales was unlawful because the prices in those sales were not "representative" as required by section 773(a)(1)(B)(ii)(I) of the Tariff Act. Pls.' Br. 22, 29; *see* 19 U.S.C. § 1677b(a)(1)(B)(ii)(I). For the following reasons, the court concludes that plaintiffs cannot prevail on either of these claims.

1. Commerce Permissibly Declined to Find a "Particular Market Situation" in South Africa in Response to Plaintiffs' "Rejected Merchandise" Argument

Rejecting plaintiffs' allegation, Commerce found in the Final Determination that there was not a "particular market situation" in South Africa that would prevent a proper comparison with SIW's U.S. sales. *Final Decision Mem.* 18. The term "particular market situation" is not defined by the statute, the Statement of Administrative Action ac-

companying the Uruguay Round Agreements Act ("SAA"), the Department's regulations, or the Preamble accompanying promulgation of the Department's regulations. *See* 19 U.S.C. §§ 1677b(a)(1)(B)(ii)(III), (a)(1)(C)(iii); *Uruguay Round Agreements Act Statement of Administrative Action*, H.R. Doc. No. 103–316, 656, 822 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4162 ("*SAA*"); 19 C.F.R. § 351.404(c)(2)(i); *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296 (preamble to the Department's regulations promulgating 19 C.F.R. § 351.404). Accordingly, Commerce must be afforded considerable discretion to determine, case-by-case, whether or not a particular market situation in a third country prevents a proper comparison with U.S. price.

Although it does not define the term, the SAA provides examples of what may constitute a "particular market situation" that would prevent proper comparison with U.S. price, namely: (1) where a single sale in the comparison market constitutes five percent of sales to the United States; (2) there is government control over prices to such extent that comparison market prices "cannot be considered to be competitively set," or (3) there are differing patterns of demand experienced in the U.S. and in the comparison market country.[6] *SAA* at 822.

Plaintiffs argue that, based on the Department's administrative precedent, a "particular market situation" exists where there are "sales to third countries of leftover merchandise from the U.S. market . . . ." Pls.' Br 18 (citing *Notice of Preliminary Results of New Shipper Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from Ecuador*, 71 Fed. Reg. 34,888, 34,890 (Int'l Trade Admin. June 16, 2006); *Notice of Final Results of New Shipper Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from Ecuador*, 71 Fed. Reg. 54,977 (Int'l Trade Admin. Sept. 20, 2006)). Plaintiffs argue that the sales in South Africa were of merchandise "rejected" by SIW's U.S. customer and that this fact "should have led to a 'particular market situation' finding by Commerce and a refusal to rely on South African sales as the basis of normal value." *Id.* at 19–20.

Plaintiffs' argument is unconvincing on this record. Commerce found that the merchandise sold in South Africa "was neither defective, nor non-prime," *Further Discussion of Comment 2 in the Issues and Decision Mem.* at 3 (Apr. 28, 2014), (C.R. Doc. 329) ("*Further Discussion of Comment 2*"), and substantial evidence supports this

[6] The SAA lists these examples in the context of consideration of a home market. However, a reading of this section of the SAA together with the following section on third-country sales supports an inference that these examples apply when assessing comparison market viability in either a home market or third-country market context.

finding. Commerce found, consistent with the record evidence, that all of the merchandise SIW sold in South Africa met the ASTM A-881 standard, a finding plaintiffs do not contest. Alluding to "rejection" by the U.S. customer, CXT, plaintiffs characterize this merchandise as "downgraded to a lower specification (A881)." Pls.' Br. 20–22. Through this characterization, plaintiffs submit that the merchandise in the South Africa sales was inferior in a way that had implications for sales price and that thereby prevented a valid comparison with U.S. price. *See id.* at 22 ("Certainly, CXT would have been unwilling to pay the same price for rejected, downgraded material as it paid for material meeting its proprietary standard. *Indeed, it refused to pay for rejected material at all.*" (emphasis in original)).

The court is unable to find on the record any evidence that the PC tie wire SIW sold in the South Africa market is regarded in the industry or in commerce as being of a lower or inferior grade when viewed according to some generally-accepted standard, and plaintiffs do not direct the court to any such evidence. In the investigation, Commerce found that "[a]ll of the merchandise sold to South Africa during the POI met the ASTM A-881 standard and production requirements of the scope of this investigation" and also found that "SIW's U.S. customer requires that its merchandise meet certain additional specifications beyond the ASTM A-881 standard." *Further Discussion of Comment 2* at 3.

In the investigation, Commerce found the ASTM A-881 specification to be a generally-recognized industrial specification applying to PC tie wire, relying on it to define the scope of the investigation, and plaintiffs do not take issue with this finding. Plaintiffs, however, did not identify a second, higher specification that is recognized in commerce or in the industry as superior to ASTM A-881. As plaintiffs' own discussion of the issue concedes, CXT's additional specifications are "proprietary" specifications for that company's own purchases; Commerce was presented with no record evidence that these additional specifications were based on commercial or industry standards that have gained general acceptance. Therefore, plaintiffs' characterization of the merchandise SIW sold in South Africa as "downgraded to a lower specification (A881)" cannot be supported on this record. Viewed in light of the discretion Commerce may exercise, the finding that a U.S. customer purchased PC tie wire only according to these additional specifications was insufficient to require Commerce to conclude that a particular market situation in South Africa prevented a valid price comparison.

2. *Plaintiffs Failed to Exhaust their Administrative Remedies on their Argument that the South Africa and U.S. Markets Were Characterized by Different Terms of Sale*

Plaintiffs argue that a "particular market situation" should have been found to exist because the terms of SIW's sales in South Africa differed from the terms of its sales to the United States. According to plaintiffs, Commerce was required to consider the different terms of sale here because "[t]he misalignment of sales terms between markets is one of the principal considerations undertaken by Commerce in every case in which it analyzes a 'particular market situation.'" Pls.' Br. 27 (emphasis omitted).

In reviewing an agency determination, the court is directed to "where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The Supreme Court has instructed that "[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred *against objection made at the time appropriate under its practice*." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (emphasis added) ("*L.A. Tucker Truck Lines*"); *see also Richey v. United States*, 322 F.3d 1317, 1326 (Fed. Cir. 2003) ("*Richey*") (holding that the requirement of exhausting administrative remedies serves "the twin purposes . . . of protecting administrative agency authority and promoting judicial efficiency." (citation omitted)). Commerce has provided in its regulations that the "case brief" filed with the agency during an investigation "must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination . . . , including any arguments presented before the date of publication of the preliminary determination . . . ." 19 C.F.R. § 351.309(c)(2).

Plaintiffs did not raise their "terms of sale" argument in either their "particular market situation" allegation or their administrative case brief before Commerce. Although basing normal value on constructed value in the Preliminary Determination, Commerce indicated that this was not a final decision and that in the final phase of the investigation it would revisit the issue of whether to base normal value on the third-country market of South Africa. *See Prelim. Decision Mem.* 8. Commerce announced, specifically, that it would request additional information from SIW and consider the allegation of a particular market situation for the final determination. *Id*. Plaintiffs, therefore, were on notice at the time they filed their administrative case brief that Commerce would reconsider the issue of whether to

base normal value on SIW's South Africa sales. Furthermore, SIW responded to the Department's request for additional information before plaintiffs filed their administrative case brief. *See, e.g.*, *Petitioners' Case Br.* (Mar. 21, 2014), (P.R. Doc. 162) (C.R. Doc. 321). If plaintiffs believed the different sales terms brought about a particular market situation in South Africa that prevented a valid price comparison, then plaintiffs had an obligation to raise that argument before Commerce in their administrative case brief so that Commerce could decide the issue in the first instance. The court, therefore, declines to consider on the merits plaintiffs' argument on terms of sale.

3. Plaintiffs Failed to Exhaust their Administrative Remedies on their Claim that SIW's South Africa Sales Were Not "Representative" under 19 U.S.C. § 1677b(a)(1)(B)(ii)(I)

In addition to their "particular market situation" claim, plaintiffs claim that the prices for the South Africa sales were not "representative" and therefore could not be used for determining normal value. *See* Pls.' Br. 22, 29; 19 U.S.C. § 1677b(a)(1)(B)(ii)(I). Plaintiffs argue that the court must remand the Final Determination on this issue because Commerce failed to address their argument during the investigation. *See* Pls.' Br. 28–29. Here also, the court concludes that plaintiffs failed to exhaust their administrative remedies.

In their case brief before Commerce, plaintiffs, as petitioners, stated that the price at which SIW sold PC tie wire in South Africa "was neither normal nor representative." *Petitioners' Case Br.* 42. However, they stated this argument solely in the context of their claim that Commerce should have found the existence of a particular market situation in the third-country market of South Africa. The statutory requirement of 19 U.S.C. § 1677b(a)(1)(B)(ii)(III) that the particular market situation not prevent a proper comparison with the export price or constructed export price is distinct from the statutory requirement of 19 U.S.C. § 1677b(a)(1)(B)(ii)(I) that the price be "representative," a statutory requirement plaintiffs' case brief did not address specifically. To further the statutory directive that exhaustion of administrative remedies be required where appropriate, the court does not consider the merits of the argument plaintiffs ground in § 1677b(a)(1)(B)(ii)(I).

C. The Department's Exclusion of Certain Wire Rod Inputs from SIW's Cost of Production

When basing normal value on sales in a viable comparison market (i.e., home market or third country market), Commerce in certain circumstances may disregard sales made at prices below the cost of production. 19 U.S.C. § 1677b(b)(1). Section 773(b) of the Tariff Act directs Commerce, when determining cost of production for this purpose, to include in its calculation of the cost of production "the cost of materials . . . employed in producing the foreign like product . . . ." *Id.* § 1677b(b)(3)(A). In determining SIW's cost of production for the POI, Commerce included a weighted-average calculation of the cost of "Grade 82b" high carbon steel wire rod—the primary input material SIW used in producing PC tie wire for the South Africa and U.S. markets. *See Prelim. Determination Mem.* 4; *Cost of Production and Constructed Value Calculation Adjustments for the Final Determination –Siam Industrial Wire Co., Ltd.*, at 1 (Apr. 28, 2014), (P.R. Doc. 174) (C.R. Doc. 328).

Plaintiffs allege two errors in the Department's calculation of the cost of the Grade 82b wire rod input. First, plaintiffs allege that Commerce, when averaging the cost of this input over the POI, erroneously included only the wire rod from the inventory of SIW's "PC Wire" division, which produced PC tie wire, and failed to include in the average the cost of Grade 82b wire rod from the inventory of SIW's "PC Strand" Division, which produced prestressed concrete steel reinforcing bar. Pls.' Br. 14–17. According to plaintiffs, the record shows that wire rod inventory from the PC Strand Division was used at times to produce PC tie wire. *Id.* at 15 (citing *Verification of the Cost Response of Siam Industrial Wire Co., Ltd.*, at Ex. CVE-7, 44–45 (Mar. 10, 2014), (P.R. Doc. 154) (C.R. Doc. 320) ("*Cost Verification Report*")). Below, the court addresses defendant's request that the court remand the Final Determination with respect to this issue and the court's reasoning in granting the request.

Second, plaintiffs allege that Commerce erred in confining its average to Grade 82b wire rod that was of 13 mm diameter and also should have included Grade 82b wire rod of 11 mm diameter, asserting that SIW admitted that it used this type of wire rod in its production of PC tie wire. Pls.' Br. 13–14. As also discussed below, the court denies relief on plaintiffs' claim pertaining to 11 mm wire rod.

1. *The Court Remands the Final Determination to Allow Commerce to Reconsider Its Calculation of the Weighted-Average Cost of the 13 mm Wire Rod*

Defendant's request is that the court remand the Final Determination to allow Commerce to reconsider "the cost of production issue relative to 13 mm diameter Grade 82B from SIW's PC Strand Division." Def.'s Resp. 10. Under this request, Commerce would not reconsider its decision to base SIW's wire rod cost solely on costs for wire rod of 13 mm diameter. *Id.* at 10–11. Plaintiffs support defendant's request but urge the court also to remand the Final Determination on the issue they raise as to 11 mm wire rod. Pls.' Reply 1–2. Defendant-intervenor takes the position that "limiting the analysis to the PC Wire Division has no impact whatsoever on the cost of the subject merchandise." Def.-Intervenor's Resp. 10.

A court ordinarily will grant a request that a decision be remanded to the agency that made the decision if "the agency's concern is substantial and legitimate." *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Citing record evidence, plaintiffs have raised a substantial and legitimate question as to whether Commerce correctly excluded wire rod input obtained from the PC Strand Division, a question Commerce has indicated it wants to reconsider. Defendant's request, therefore, is meritorious, and the court will grant it. In granting the request, the court reaches no position on whether including wire rod from the PC Strand Division's inventory will affect the weighted-average dumping duty margin.

2. *Commerce Permissibly Determined that 11 mm Wire Rod Was Not Used in the Production of PC Tie Wire that Was the Subject of the Investigation*

According to plaintiffs, "[t]he record facts demonstrate that SIW could and did use Grade 82B 11 mm wire rod in the production of PC tie wire." Pls.' Br. 13. Plaintiffs argue, specifically, that SIW "acknowledged to Commerce that SIW also uses 11 mm wire rod for some of its production of subject PC tie wire in addition to 13 mm wire rod." *Id.* at 13–14 (citing *Corrected Comment of Respondent SIW on Product Matching Elements* (June 11, 2013), (P.R. Doc. 30) (quotations omitted)). In the Final Determination, Commerce concluded that, contrary to the position taken by plaintiffs, SIW did not use 11 mm wire rod in producing the PC tie wire sold during the POI in the United States and in South Africa, the Department's chosen comparison market. *Final Decision Mem.* 25.

Record evidence supports a finding that SIW did not use 11 mm wire rod to produce PC tie wire that was the subject of the investi-

gation. SIW included with its section D questionnaire response detailed wire rod input data showing the actual wire rod consumption as 13 mm 82B wire rod for each of the two products sold in the U.S. and South Africa markets, described as SIW's CONNUM 332 and its CONNUM 232. *Resp. of the Siam Industrial Wire Co., Ltd. to the Dep't of Commerce's Antidumping Questionnaire Section D*, Ex. D-12 at 5 (Nov. 19, 2013), (P.R. Doc. 104) (C.R. Doc. 88) ("*Section D Questionnaire Resp.*"); *see* Def.-Intervenor's Resp. 7. Commerce verified these data. *Cost Verification Report* at 3. Plaintiffs fail to identify any relevant record evidence indicating that SIW used 11 mm wire rod to produce PC tie wire imported into the United States or sold in the comparison market. Plaintiffs' reliance on the product-matching comments that SIW provided to Commerce, in which SIW referenced the use of 11 mm wire rod for some of its production of PC tie wire, is misplaced. Subsequent to this submission, Commerce narrowed the scope of the investigation (at petitioners' request) to include only PC tie wire from Thailand meeting ASTM specification A-881, which left only merchandise in CONNUMs 332 and 232 subject to the investigation. *See Letter from Sec'y to Haynes and Boone on Home Market Reporting* (Oct. 28, 2013), (P.R. Doc. 86).

In their reply brief, plaintiffs make the unavailing argument that "the relevant inquiry is to determine the cost of the raw material held in inventory by SIW that *could have been* used to produce the subject merchandise, not simply the cost of the raw material the respondent selects or assigns to the production of the subject merchandise." Pls.' Reply 4 (emphasis in original). Plaintiffs offer no convincing reason why Commerce was required to broaden its COP calculation in the way plaintiffs advocate. Nor does the court discern any such reason in the statute. *See* 19 U.S.C. § 1677b(b)(3)(A) (providing that COP includes the cost of materials "*employed in producing* the foreign like product" (emphasis added)).

D. The Department's Determination of SIW's G&A Expense Ratio

In addition to the cost of materials used in producing the foreign like product, Commerce is required by section 773(b) of the Tariff Act to include in its calculation of COP "an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question." 19 U.S.C. § 1677b(b)(3)(B). Accordingly, Commerce directed SIW to include a G&A expense ratio in its cost data submission, specifically requesting that SIW "[c]ompute G&A expenses on an annual basis as a ratio of total company-wide G&A expenses divided

by cost of goods sold (COGS).” *Section D Questionnaire Resp*. at 31. Commerce also instructed SIW to “[i]nclude in your reported G&A expenses an amount for administrative services performed on your company’s behalf by its parent company or other affiliated party.” *Id.*

In the Preliminary Determination, Commerce calculated a G&A ratio based on SIW’s submitted cost data, which remained unchanged in the Final Determination. *Final Decision Mem.* 30; *see Section D Questionnaire Resp*., Exs. D-15, D-17; *Cost Verification Report*, Ex. CVE-9. Objecting to the Department’s ratio, petitioners argued in their administrative case brief that “SIW failed to report G&A expenses incurred by its parent company, Tata Steel” in its cost response, “despite the active control by Tata over SIW’s accounting operations.” *Petitioners’ Case Br.* 41 (citing *Cost Verification Report* at 15–19). In their memorandum accompanying the Final Determination, Commerce found that it did not need to adjust SIW’s G&A ratio because “[t]he record clearly states . . . that Tata Steel provided IT [i.e., information technology] services to SIW during the POI,” and that “SIW paid for these services and such payments are included in the reported costs.” *Final Decision Mem.* 30 (citing *Section D Questionnaire Resp.* at 5; *Cost Verification Report* at 21, 37). Commerce concluded that “[b]ecause the costs incurred by Tata Steel on behalf of SIW have already been included in the reported costs, we find it unnecessary to adjust SIW’s G&A expense ratio.” *Id.*

Before the court, plaintiffs claim that the Department’s final G&A calculation is not supported by substantial evidence because SIW’s reported G&A expense ratio, on which Commerce relied for its calculation, failed to account for G&A expenses incurred by Tata Steel on SIW’s behalf. Pls.’ Br. 5 (“SIW reported only its own general and administrative costs, and never included an amount for G&A costs incurred by Tata Steel on SIW’s behalf . . . .”). Plaintiffs bring their claim on two grounds. First, plaintiffs argue that SIW received certain inspection and selling services from Tata Steel in conjunction with SIW’s U.S. sales to CXT, and that there is no record evidence that these services were included in SIW’s G&A ratio. *Id.* at 30–32. Second, plaintiffs argue, in essence, that record evidence does not support the Department’s finding that the value of IT services provided to SIW by Tata Steel are reflected in the G&A ratio. *Id.* at 32–34. Plaintiffs propose that to “accurately capture G&A expenses,” Commerce “should have added G&A expenses for Tata Steel,” which plaintiffs calculate at 8.92% “based on Tata Steel’s most recent financial statements” to the G&A expenses reported by SIW. *Id.* at 34.

Plaintiffs’ first ground is precluded by the exhaustion doctrine. According to plaintiffs, Tata Steel “coordinates the purchase and sale

of PC tie wire between SIW and CXT and handles the administrative and other costs associated with shipping and testing coils, as well as handling rejected coils, among the parties." Pls.' Br. 32. Plaintiffs cite the testimony of a "sales manager for Tata Steel International (Americas), Mr. Bhandari," who testified before the U.S. International Trade Commission that "Tata Steel sent '16 samples' from each PC tie wire coil to the U.S. customer CXT, that CXT either then accepts or 'rejects those coils,' that CXT 'regularly' rejects SIW coils, that CXT maintains stricter specifications for PC tie wire, and that Tata Steel uses the same wire rod (raw material) to produce PC tie wire for CXT as for other customers." *Id*. at 31–32 (citing *Petitioners' Comments on Product Characteristics and Product Matching Hierarchy*, Attach. 2, at 111–112 (June 3, 2013), (P.R. Doc. 26) (C.R. Doc. 16); *Petitioners' Comments on Scope*, Attach. 3, at 120–122 (June 3, 2013), (P.R. Doc. 27) (C.R. Doc. 17)). Plaintiffs argue that these services were not accounted for in the cost data SIW submitted to Commerce. *Id*. The court declines to consider plaintiffs' argument on the merits because plaintiffs did not raise the argument in their administrative case brief before Commerce. *See* 28 U.S.C. § 2637(d) (directing the court to "where appropriate, require the exhaustion of administrative remedies"); 19 C.F.R. § 351.309(c)(2) ("The case brief must present all arguments that continue in the submitter's view to be relevant to ... the final determination . . . ."); *see also L.A. Tucker Truck Lines*, 344 U.S. at 37; *Richey*, 322 F.3d at 1326. Perhaps because it was not raised in the case brief, Commerce did not address this argument in the Final Determination or the accompanying Issues & Decision Memorandum.

Plaintiffs contend that their administrative case brief "sufficiently raised the issue of Tata's involvement in SIW's operations for purposes of the exhaustion doctrine." Pls.' Reply 18. In support of this contention, plaintiffs cite the following language from their case brief:

> In its cost response, SIW failed to report G&A expenses incurred by its parent company, Tata Steel, despite the active control by Tata over SIW's accounting operations. Tata's active involvement *in SIW's operations*, particularly in the management of SIW's accounting system, was apparent at the cost verification.

Id. at 17–18 (quoting *Petitioners' Case Br.* at 41) (emphasis added in Pls.' Reply). The only specific costs identified in this paragraph relate to accounting operations, and the only other reference is to operations generally, not shipping or inspection of merchandise for sale to the U.S. customer, CXT. The generalized reference to "Tata's active involvement in SIW's operations" did not communicate to Commerce

the allegation that Tata Steel provided shipping and product inspection services to SIW that were not accounted for in SIW's cost data. Accordingly, Commerce did not have the opportunity during the investigation to address plaintiffs' specific argument, which plaintiffs may not raise for the first time before the court.

The court concludes that the Final Determination should be remanded on plaintiffs' second ground. The court is unable to identify on the record substantial evidence to support the Department's finding that the value of IT services Tata Steel reportedly provided to SIW was reflected in the G&A ratio. In its Section D Questionnaire Response, SIW stated that it purchased IT services from Tata Steel and was invoiced monthly for those services. *See Section D Questionnaire Resp.* at 5; *see also Final Decision Mem.* 30. In the Final Determination, Commerce found that "the record shows that SIW paid for these services and such payments are included in the reported costs." *Final Decision Mem.* 30. The court is unable to conclude that this finding is supported by substantial evidence on the record.

As support for its finding, Commerce cited in the Final Decision Memorandum two pages in a document it prepared following verification (the "Cost Verification Report"). *Id.* at 30 n.139 (citing *Cost Verification Report* at 21, 37). The Department's first citation, to page 21 of the Cost Verification Report, includes a table with a line item for "Administrative Expenses" but makes no reference to IT expenses, IT services, or Tata Steel. *Cost Verification Report* at 21. The Cost Verification Report cited several sources for the data included in the table, but these sources do not provide clarification relevant to the issue presented. *See id.*(citing *Resp. of the Siam Industrial Wire Co., Ltd. to the Dep't of Commerce's Antidumping Questionnaire Section A*, Ex. A-12 at 6 (July 16, 2013), (P.R. Doc. 42) (C.R. Doc. 19); *Section D Questionnaire Resp.*, Ex. D-17 at 1–2; *Cost Verification Report*, Ex. CVE-7 at 1–2).

The second citation in the Final Decision Memorandum is to page 37 of the Cost Verification Report. *Final Decision Mem.* at 30 n.139. But like page 21 of the Cost Verification Report, page 37 lacks any reference to IT services, IT expenses, or Tata Steel. One of the exhibits to the Cost Verification Report cited on page 37 contains a table, identified as "Cost Center Detail –General Expenses," that itemizes certain general expenses grouped under the heading "IT Unit." *Cost Verification Report*, Ex. CVE-9 at 4. Defendant-intervenor argues that this chart "provides the detailed support for the total amount of G&A expenses reported in SIW's audited financial statement, which was used as the basis for the reported G&A ratio." Def.-Intervenor's Resp.

19 (citing *Cost Verification Report*, Ex. CVE-9 at 4). The table itemizes the "IT Unit" expenses under more specific categories, two of which are arguably relevant here. One of them, however, is designated "General Expenses –Others," a title too general to support a conclusion as to the particular IT services at issue, and the amount presented is sufficiently small as to cast some doubt as to whether the value of those services could be contained therein. Another cost category, "Other Repairs and Maintenance," is larger, but nothing in the record supports a conclusion that the IT services provided by Tata Steel were for maintenance and repair of IT equipment.

In summary, there are unresolved questions on this record as to whether, as Commerce found, the G&A ratio includes the value of the IT services Tata Steel is said to have provided to SIW. The court, therefore, remands the Final Determination to Commerce for reconsideration of this issue and for modification or explanation, as appropriate.

III. CONCLUSION AND ORDER

For the foregoing reasons, the court affirms in part, and remands in part, the Final Determination. Upon consideration of the Final Determination and all submissions made herein, and upon due deliberation, it is hereby

ORDERED that defendant's request that the Final Determination be remanded as to the issue of wire rod obtained from the PC Strand Division be, and hereby is, granted; it is further

ORDERED that Commerce shall reconsider its determination of SIW's cost of production as it relates to 13 mm diameter Grade 82B wire rod and the inventory of SIW's PC Strand Division; it is further

ORDERED that Commerce shall reconsider its calculation of SIW's G&A ratio to determine whether the ratio properly captures the value of IT services provided by Tata Steel and take any necessary corrective action; it is further

ORDERED that Commerce shall submit a redetermination in compliance with this Opinion and Order within 90 days of the date of the issuance of this Opinion and Order; it is further

ORDERED that plaintiffs and defendant-intervenor may submit comments to the court on the Department's redetermination within 30 days of the filing of the redetermination with the court; and it is further

ORDERED that defendant may file a response to comments within 15 days of the filing of the last comment submission.

Dated: June 28, 2016
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
Chief Judge

Slip Op. 16–65

IKEA SUPPLY AG, Plaintiff, v. UNITED STATES, Defendant, AND ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 15–00153

[Plaintiff's motion for judgment on the agency record is denied.]

Dated: July 5, 2016

Kristen S. Smith, *Mark R. Ludwikowski*, *Arthur K. Purcell*, and *Michelle L. Mejia*, Sandler Travis & Rosenberg P.A., of Washington, DC, for plaintiff.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistance Director. Of counsel on the brief was *David P. Lyons*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Alan H. Price, *Robert E. DeFrancesco, III*, and *Derick G. Holt*, Wiley Rein LLP, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

GOLDBERG, Senior Judge:

Plaintiff IKEA Supply AG ("IKEA") challenges a decision by the U.S. Department of Commerce ("Commerce") interpreting the scopes of two antidumping and countervailing duty orders (the "Orders," which state their scopes in essentially identical terms) to include towel racks that IKEA imported. Final Scope Ruling, PD 39 (Apr. 27, 2015) (interpreting *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Dep't Commerce May 26, 2011) ("*AD Order*"); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) ("*CVD Order*")).[1] The orders apply to certain "aluminum extrusions" from the People's Republic of China. *AD Order*, 76 Fed. Reg. 30,650.

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[1] Because the Orders' scopes are essentially identical, the court cites only to the antidumping duty order when rehearsing the scopes' inclusions and exclusions, and, starting now, refers to the Orders' scopes, inclusions, exclusions, and so on, in the singular.

IKEA has moved for judgment on the agency record, arguing that Commerce should have found the towel racks to be excluded from the Orders' scope. Defendant United States ("the Government") and defendant-intervenor Aluminum Extrusions Fair Trade Committee oppose plaintiff's motion. The court affirms Commerce's decision interpreting the Orders' scope to include IKEA's towel racks.

BACKGROUND

Commerce issued the Orders in May 2011. *AD Order*, 76 Fed. Reg. 30,650. The Orders include within their scope "aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents)." *Id.* at 30,650.

The Orders exclude from their scope "finished merchandise" and "finished goods kits." *Id.* at 30,651. Under the "finished merchandise" exclusion, "[t]he scope . . . excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." *Id.* And under the "finished goods kits" exclusion,

> [t]he scope . . . excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product.

Id.

On January 16, 2014, IKEA requested a scope ruling on two types of its towel racks. Scope Review Ruling Req. 2, PD 1 (Jan. 16, 2014). In its request, IKEA described the racks as "made of aluminum extrusions." *Id.* at 6. Commerce later issued a supplemental questionnaire, and as part of IKEA's response IKEA differentiated the two types of racks by the parts packaged with the racks. Suppl. Question-

naire Response: IKEA Supply AG 1, PD 9 (Apr. 2, 2014). According to the questionnaire response, one type of rack includes “a plastic gasket and a steel bracket,” while the other includes just “a steel bracket.” *Id.* IKEA also specified that, with the parts included in the rack packages, the racks are “ready to be used.” *Id.* at 2.

In the scope ruling request, IKEA maintained that the towel racks qualified for the “finished merchandise” exclusion from the Orders’ scope. *See* Scope Review Ruling Req. 2–3. IKEA did not raise any parallel contention concerning the “finished goods kit” exclusion. *Id.*

The regulation that governs Commerce’s scope rulings provide an interpretive framework through which the agency can decipher ambiguous scope language. 19 C.F.R. § 351.225(k). However, the Federal Circuit has cautioned that “a predicate for the interpretive process is language in the order that is subject to interpretation.” *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1383 (Fed. Cir. 2005) (citing *Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002)).

> If Commerce determines that the language at issue is not ambiguous, it states what it understands to be the plain meaning of the language, and the proceedings terminate. On the other hand, if Commerce finds that the scope language is ambiguous, it then looks to two sets of factors spelled out in [19 C.F.R. § 351.225(k)(1) and (2)] to determine the intended scope of the order.

ArcelorMittal Stainless Belgium N.V. v. United States, 694 F.3d 82, 84 (Fed. Cir. 2012). 19 C.F.R. § 351.225(k)(1) instructs Commerce to “take into account” the relevant order’s regulatory history, as contained in “[t]he descriptions of the merchandise contained in the petition, [Commerce’s] initial investigation, and the [prior] determinations of [Commerce] (including prior scope determinations) and the [International Trade] Commission.”

> If the . . . materials [listed in 19 C.F.R. § 351.225(k)(1)] are not dispositive, Commerce then considers the . . . criteria [listed in 19 C.F.R. § 351.225(k)(2)]: “[t]he physical characteristics of the product,” “[t]he expectations of the ultimate purchasers,” “[t]he ultimate use of the product,” “[t]he channels of trade in which the product is sold,” and “[t]he manner in which the product is advertised and displayed.”

Mid Continent Nail Corp. v. United States, 725 F.3d 1295, 1302 (Fed. Cir. 2013).

Commerce issued its final scope ruling on April 27, 2015. At the outset, Commerce described IKEA's two towel racks as follows: "[One model] is comprised of a[n] . . . aluminum extrusion and a plastic gasket; [the other model] is comprise of a[n] . . . aluminum extrusion with two steel brackets." Final Scope Ruling 2. No party contests Commerce's description before this court.

After looking to "the sources listed in [19 C.F.R. § 351.225(k)(1)]," Commerce concluded that "IKEA's towel racks are covered by the scope." Final Scope Ruling 10. The "finished merchandise" exclusion did not apply because the exclusion requires eligible merchandise to include aluminum extrusions "as parts." *Id.* at 11. Commerce took the "as parts" requirement to mean that the merchandise had to be assembled from aluminum extrusions "plus an additional non-extruded aluminum component." *Id.* IKEA's towel racks did not meet this requirement because both were "comprised entirely of extruded aluminum and d[id] not have [an]other non-extruded aluminum component, aside from fasteners ([for example,] a plastic gasket)." *Id.* According to Commerce, fasteners could not qualify as eligible non–extruded aluminum components because the "finished goods kit" exclusion expressly provided that including fasteners would not transform otherwise unqualifying merchandise into a "finished goods kit." *Id.* at 12. Commerce said it would be inconsistent to read the "finished merchandise" exclusion without a matching requirement. *Id.* And Commerce classified the plastic gaskets and steel brackets packaged with IKEA's towel racks as fasteners because IKEA had described those components as being "used as sturdy plates that are affixed to the wall for the towel racks to be attached in order to provide stability for the rack to hold towels." *Id.* at 11 (quoting IKEA Rebuttal Comments 3, PD 34 (Nov. 17, 2014)). This description accorded with some online dictionary definitions that Commerce had found for "fastener." *Id.* at 11 & n.41.

IKEA commenced this action by filing a summons with this court on May 27, 2015. Summons, ECF No. 1. IKEA has moved for judgment on the agency record, contending that its towel racks are excluded from the scope of the order under the "finished merchandise" exclusion or, alternatively, the "finished goods kit" exclusion. Pl.'s 56.2 Mot. for J. on Agency R., ECF No. 30.[2]

[2] IKEA also states in its lead brief that an oral argument "is requested." Mem. Supp. Pl.'s Mot. 23, ECF No. 30–1. Despite this request, IKEA has not moved for oral argument. In any event, the court does not believe that oral argument is necessary to resolve the issues IKEA has raised, which are straightforward.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction under 28 U.S.C. § 1581(c) (2012). In reviewing Commerce's scope ruling, the court must set aside "any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

"Commerce is entitled to substantial deference with regard to its interpretations of its own antidumping duty order." *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012) (citing *Tak Fat Trading*, 396 F.3d at 1382). "This broad deference is not unlimited, however, since 'Commerce cannot interpret an antidumping duty order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms.'" *Id.* (quoting *Walgreen Co. v. United States*, 620 F.3d 1350, 1354 (Fed. Cir. 2010)). "[M]erchandise facially covered by an order may not be excluded from the scope of the order unless the order can reasonably be interpreted so as to exclude it." *Mid Continent*, 725 F.3d at 1301.

DISCUSSION

The court affirms Commerce's scope ruling. IKEA's towel racks do not qualify for the "finished merchandise" exclusion because they are not assembled with other parts. Similarly, the towel racks do not meet the requirements of the "finished goods kit" exclusion because, besides fasteners, the towel racks consist of a single aluminum extrusion.

I. IKEA's Towel Racks do not Qualify for the "Finished Merchandise" Exclusion.

In order to be eligible for the "finished merchandise" exclusion, merchandise must contain aluminum extrusions "as parts" and be "fully and permanently assembled." *AD Order*, 76 Fed. Reg. at 30,651. As imported, IKEA's towel racks consist of a single aluminum extrusion, unassembled with any other parts. Because IKEA's towel racks are not imported assembled with other parts, they cannot qualify for the "finished merchandise" exclusion.

IKEA levies several arguments to forestall this commonsense conclusion. First, IKEA argues that Commerce misinterpreted the "as parts" part of the "finished merchandise" exclusion by requiring "finished merchandise" to "include some non-aluminum extrusion component." Mem. Supp. Pl.'s Mot. 7, ECF No. 30–1. IKEA also characterizes Commerce's interpretation as adding an "aluminum

extrusions content requirement" where none should exist. *Id.* at 17. Second, IKEA argues that Commerce added still another requirement to the "finished merchandise" exclusion: namely, the provision relating to fasteners, which is part of the "finished goods kit" exclusion. *Id.* at 8. IKEA further insists that the plastic gaskets and steel brackets packaged with its towel racks are not fasteners in any case. *Id.* at 11. Finally, IKEA argues that "finding IKEA's imports outside the scope of the [Orders] is consistent with the subassembly test." *Id.* at 16.

IKEA's arguments fail because they do not change the fundamental fact that IKEA's towel racks are single extrusions not assembled with other parts. In *Whirlpool Corporation v. United States*, Slip Op. 16–8 at 3, 2016 WL 385454 (CIT Feb. 1, 2016), the court addressed whether similar merchandise—door handles consisting of "a single aluminum extrusion . . . imported with an Allen wrench and two stainless steel set screws"—satisfied the "finished merchandise" exclusion. The court held that the door handles did not meet the "finished merchandise" exclusion because "the one-piece handles do not contain extrusions as parts and are not assemblies." *Id.* at 8. The fact that the door handles were imported with screws was irrelevant to the "finished merchandise" analysis, because the handles were not assembled with those screws. *See id.*

IKEA cannot steer clear of the *Whirlpool Charybdis*. *The Odyssey of Homer*, Book XII. IKEA's towel racks have one piece, the extrusion, and are not imported assembled together with other parts. Although IKEA's towel racks come with plastic gaskets or steel brackets, these components are merely packaged with the towel racks, not assembled with them. The "finished merchandise" exclusion therefore does not apply.[3]

This does not mean that IKEA's arguments lack any persuasive force. In particular, the court agrees with IKEA that the "finished merchandise" exclusion does not have a "fasteners" exception mirroring the one in the "finished goods kit" exclusion. As this court noted in *Meridian Products, LLC v. United States*, 39 CIT __, __, 125 F. Supp. 3d 1306, 1315–16 (2015), "[T]here is . . . an interpretive difficulty with [Commerce's] apparent reasoning that the presence of fasteners is to be disregarded for purposes of applying the finished merchandise

[3] The parties bicker about whether IKEA conceded in briefing that its towel racks are unassembled. Commerce points to the portion of IKEA's brief addressing the "finished goods kit" exclusion, in which IKEA describes the towel racks as an "unassembled combination of parts." Def.'s Resp. to Pl.'s Mot. 10, ECF No. 32 (quoting Mem. Supp. Pl.'s Mot 15). IKEA rebuts that it was simply making an argument in the alternative, which is standard and permissible practice. Pl.'s Reply 8, ECF No. 35. Whether or not IKEA "conceded" in briefing that its towel racks are unassembled, no party contests the description of the product given by Commerce: a single aluminum extrusion packaged but not assembled with fasteners. It is that description that is dispositive in this case.

exclusion. The difficulty is that the finished merchandise exclusion contains no reference to fasteners." Commerce argues that limiting the "fasteners" exception to "finished goods kits" would lead to inconsistent results. Def.'s Resp. to Pl.'s Mot. 13, ECF No. 32. That is Commerce's problem, because the agency drafted the Orders. Unfortunately for IKEA, though, the spat of bad reasoning in Commerce's scope ruling does not transform IKEA's towel racks into multipart assemblies, as they must be to qualify as "finished merchandise."[4]

II. IKEA's Towel Racks do not Qualify for the "Finished Goods Kit" Exclusion.

The "finished goods kit" exclusion applies to "packaged combination[s] of parts that contain[] . . . all of the necessary parts to fully assemble a final finished good." *AD Order*, 76 Fed. Reg. at 30,651. For

[4] As mentioned, IKEA also takes issue with Commerce's contention that "finished merchandise" must "include some non-aluminum extrusion component." Mem. Supp. Pl.'s Mot. 7. According to IKEA, nothing in the Orders suggests that "finished merchandise" has to be assembled from components besides aluminum extrusions. *Id.* Relatedly, IKEA contends that Commerce's interpretation expands the scope of the Orders by adding an "aluminum extrusion content requirement." *Id.* at 17. IKEA further alleges that this requirement is arbitrary and capricious because it is inconsistent with prior scope rulings. *Id.* at 18–19. IKEA adds that Commerce's reading leads to an absurd result: "Under [Commerce's] analysis, a towel rack manufactured with aluminum is subject to the [Orders], yet a virtually identical towel rack with a small number of decorative crystals would be excluded simply based upon its non-aluminum content." *Id.* at 19.

The court deems it best to leave these questions open. Whatever the answers are, they cannot affect IKEA's towel racks, which are not assemblies at all, but instead consist of single aluminum extrusions unassembled with other parts. IKEA's arguments are best addressed when IKEA actually starts importing merchandise that could be excluded based on those arguments. Because IKEA has not yet begun bedazzling its housewares, nor importing them alongside less sparkly, extrusion-only assemblies, the court will hold off for now. *Cf. Rubbermaid Commercial Prods. LLC v. United States*, Slip Op. 15–79 at 7–9 & n.2, 2015 WL 4478225 (CIT July 22, 2015) (declining to address the same argument because it would not affect the merchandise then before the court).

Likewise, the court need not address IKEA's argument that the plastic gaskets and steel brackets are not "fasteners," at least not for purposes of the "finished merchandise" exclusion. Mem. Supp. Pl.'s Mot. 11. Whether fasteners or not, the gaskets and brackets are not assembled with IKEA's towel racks, and so are irrelevant to the "finished merchandise" analysis. (The court does need to address whether the gaskets and brackets are "fasteners" to resolve IKEA's "finished goods kit" argument, and does so below.)

Finally, the court need not address IKEA's argument that "finding IKEA's imports outside the scope of the Orders [would be] consistent with the subassembly test." Mem. Supp. Pl.'s Mot. 16. According to IKEA, the "subassemblies test allows for subassemblies to be excluded from the scope of the order provided that they are imported as finished goods. . . . Because IKEA's towel racks are finished merchandise, they satisfy the finished merchandise exception to the [Orders]." *Id.* In other words, IKEA's subassembly argument is predicated on the assumption that IKEA's towel racks otherwise meet the "finished merchandise" exclusion. They don't, so the court will skip consideration of IKEA's subassembly argument.

purposes of this exclusion, "fasteners" do not count as "parts." *Id.* IKEA's towel racks do not qualify for the "finished goods kit" exclusion because the towel racks consist of a single aluminum extrusion packaged alongside fasteners.[5]

Once again, IKEA objects. IKEA first argues that the towel racks are covered by the "finished goods kit" exclusion because they come with all the parts necessary for assembly, namely the racks themselves plus a plastic gasket or steel brackets. Mem. Supp. Pl.'s Mot. 15. According to IKEA, the "fasteners" exception does not apply because that exception is designed only to prevent circumvention of the Orders by "merely" including fasteners alongside merchandise that would otherwise fall within the Orders' scope. *Id.* In support of this argument, IKEA marshals the aforementioned *Meridian Products*, 39 CIT __, 77 F. Supp. 3d 1307. IKEA also again argues that the plastic gasket and steel brackets are not fasteners within the meaning of the exclusion. *See* Mem. Supp. Pl.'s Mot. 12.

IKEA's arguments fail to convince. In *Meridian*, the court considered whether trim kits consisting "entirely of subject aluminum extrusions, fasteners, and 'extraneous' materials" satisfied the "finished goods kit" exclusion. 39 CIT at __, 77 F. Supp. 3d at 1311. Commerce took the position that the trim kits did not satisfy the exclusion, and predicated its stance on the language of the "fasteners" exception. *Id.* The court disagreed with Commerce's reading. *Id.* at __, 77 F. Supp. 3d at 1316–17. The court explained that the unambiguous language of the Orders revealed three requirements for the "finished goods kit" exclusion:

> The kit must be (1) an unassembled combination of parts that (2) includes at the time of importation *all* of the necessary parts to fully assemble a final finished good, with no further finishing or fabrication (such as cutting or punching), and (3) be capable of assembly 'as is' into a finished product.

Id. at __, 77 F. Supp. 3d at 1316. The court continued,

> The inclusion of 'fasteners' or 'extraneous materials' is not determinative when qualifying a kit consisting of multiple parts

[5] Commerce takes the position that IKEA failed to exhaust its argument that the "finished goods kit" exclusion covers its towel racks because IKEA did not present the argument before the agency. Def.'s Resp. to Pl.'s Mot. 21. By statute, this court must "require the exhaustion of administrative remedies" where appropriate. 28 U.S.C. § 2637(d). However, requiring exhaustion can be inappropriate in certain circumstances, including when the relevant argument concerns a "pure question of law." *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1146 (Fed. Cir. 2013). Because the language of the "finished goods kit" exception is unambiguous, whether that exception applies can be resolved as a matter of law. The court therefore declines to require exhaustion in this case.

> which otherwise meets the exclusionary requirements[] as a 'finished goods kit[.'] Likewise, there is nothing in the language that indicates that the parts in an otherwise qualifying kit cannot consist entirely of aluminum extrusions. . . .
>
> The "clarification" language [that is, the "fasteners" exception, which Commerce had described as a "clarification,"] does not support Commerce's reading of the ["finished goods kit" exception], but is instead simply an attempt to prevent the circumvention of the scope of the [Orders] by ensuring that the "mere" inclusion of fasteners in a packaged aluminum extrusion product, that does not otherwise meet the scope-exclusion requirements, will not qualify it as a "combination of parts" for the "finished goods kit" exclusion.

Id. at __, 77 F. Supp. 3d at 1316–17.

IKEA clings to the court's characterization of the "fasteners" exception as "an attempt to prevent the circumvention" of the Orders. Mem. Supp. Pl.'s Mot. 13. IKEA says that it did not "merely" include the plastic gaskets and steel brackets to skirt the Orders. *Id.* at 15. "Rather, the [gaskets and brackets] are included in the combination of parts that form the final finished product." *Id.*

IKEA reads *Meridian* too broadly. In describing the "fasteners" exception as "an attempt to prevent circumvention" of the Orders, the *Meridian* court was only rebutting Commerce's argument that the language of the "fasteners" exception gave the agency grounds to include the trim kits (which consisted "entirely of subject aluminum extrusions, fasteners, and 'extraneous' materials") within the Orders' scope. 39 CIT at __, 77 F. Supp. 3d at 1311, 1316–17. As the court read the "fasteners" exception, it did not provide grounds for including kits comprised entirely of aluminum-extrusion parts. *Id.* That was all the court said on the subject of the "fasteners" exception. *Id.*

The *Meridian* court did, however, set forth the plain requirements of the "finished goods kit." *Id.* at __, 77 F. Supp. 3d at 1316. IKEA's towel racks do not meet those requirements. Specifically, the towel racks are not "an unassembled combination of parts," because the towel racks consist of a single aluminum extrusion (not multiple extrusions) plus fasteners. *Id.* The "fasteners" exception clearly states that, within the context of the "finished goods kit" exclusion, "fasteners" do not count as "parts." *AD Order*, 76 Fed. Reg. at 30,651. Addressing the door handles at issue in *Whirlpool*, this court held that a sole aluminum extrusion is not an unassembled combination of parts for purposes of the "finished goods kit" exclusion. Slip Op. 16–8

at 8. Nor, relatedly, is a single extrusion a kit. *Id.*; *see also Meridian Prods., LLC v. United States*, Slip Op. 16–5 at 2, 2016 WL 270238 (CIT Jan. 20, 2016) ("The court fails to understand why . . . it would be reasonable to argue that a single part shipped with mere fastener(s) is a 'kit[.]'").

As noted, IKEA also contends that the plastic gasket and steel brackets are not "fasteners" at all (and therefore should be counted as "parts" of a kit). Mem. Supp. Pl.'s Mot.11. According to IKEA,

> the plastic gaskets and steel brackets . . . are not fasteners used to fasten aluminum extrusions or assemble the towel racks. Nor do they attach the towel rack to the wall like a screw or a bolt. Rather, they serve a separate and distinct function, to provide stability to the rack.

Id. (citation omitted).

Contrary to IKEA's argument, the plastic gaskets and steel brackets are "fasteners." This court has advised that the term "fasteners" as used in the Orders should "be given its common and commercial meaning." *Meridian*, 39 CIT at __, 125 F. Supp. 3d at 1314. *Merriam Webster's*[6] does not define "fastener," but defines "fasten" as "to attach esp[ecially] by pinning, tying, or nailing," "to make fast and secure," and "to fix firmly or securely." *Merriam-Webster's Collegiate Dictionary* 455 (11th ed. 2009). The "fasteners" exception provides additional guidance on what constitutes a "fastener" by listing "screws" and "bolts" as examples. *AD Order*, 76 Fed. Reg. at 30,651. Before Commerce, IKEA described the plastic gaskets and steel brackets as being "used as sturdy plates that are affixed to the wall for the towel racks to be attached in order to provide stability for the rack to hold towels." Final Scope Ruling 11 (quoting IKEA Rebuttal Comments 3, PD 34 (Nov. 17, 2014)). Because the gaskets and brackets are the means by which the towel racks are attached to walls (the towel racks attach to the gaskets and brackets, which in turn attach to walls), the gaskets and brackets are fasteners. This conclusion is consistent with the specific examples of fasteners listed in the exception, because those examples also serve an attachment purpose.[7]

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[6] Not *Webster*, one of two online dictionaries that Commerce used. *Webster* is unaffiliated with *Merriam Webster's* and sourced from a version of *Webster's* now in the public domain because it was published in 1913. *See Sources*, Webster Dictionary, http://www.webster-dictionary.org/sources.htm (last visited July 5, 2016). (*Webster* also provides access to other definitional sources evidently in the public domain, which is commendable. However, for the court's purposes, it is important to use more up-to-date and verifiable source material.)

[7] IKEA also argues that "Commerce failed to employ the *Diversified Products* analysis which would further support a finding that IKEA's towel racks are out-of-scope merchandise." Mem. Supp. Pl.'s Mot. 19. By "*Diversified Products* analysis," IKEA means the

Because the plastic gaskets and steel brackets are fasteners, they do not count for purposes of determining whether IKEA's towel racks constitute a "finished goods kit." Leaving fasteners out, IKEA's towel racks are not "unassembled combination[s] of parts," nor kits, because they consist of single extrusions. The "finished goods kit" exception therefore does not apply.

CONCLUSION AND ORDER

For the foregoing reasons, the court sustains Commerce's final scope ruling. Accordingly, upon consideration of all papers and proceedings in this case and upon due deliberation, it is hereby

ORDERED that Commerce's Final Scope Ruling is affirmed.

Dated: July 5, 2016
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
Senior Judge

Slip Op. 16–66

IKEA SUPPLY AG, Plaintiff, v. UNITED STATES, Defendant, AND ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 15–00152

[Plaintiff's motion for judgment on the agency record is denied.]

Dated: July 5, 2016

Kristen S. Smith, *Mark R. Ludwikowski*, *Arthur K. Purcell*, and *Michelle L. Mejia*, Sandler Travis & Rosenberg P.A., of Washington, DC, for plaintiff.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistance Director. Of counsel on the brief was *David P. Lyons*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Alan H. Price, *Robert E. DeFrancesco, III*, and *Derick G. Holt*, Wiley Rein LLP, of Washington, DC, for defendant-intervenor.

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multifactorial analysis laid out in 19 C.F.R. § 351.225(k)(2). *Id.* Commerce does not engage in a (k)(2) analysis unless it finds that the relevant order is ambiguous and that the (k)(1) factors do not resolve the ambiguity. In this case, the Orders are unambiguous in all relevant respects. Hence, it does not matter that that some of the (k)(2) factors may favor IKEA (including that "[t]he style of the towel rack is important. . . . Towel racks differ in style. Certain racks are large to hold big, fluffy towels. Others are small to hold fingertip towels"). Mem. Supp. Pl.'s Mot. 20. Commerce had no occasion to consider those factors.

OPINION AND ORDER

GOLDBERG, Senior Judge:

This case concerns cabinet/drawer handles that plaintiff IKEA Supply AG ("IKEA") imports to the United States. On April 27, 2015, the U.S. Department of Commerce ("Commerce") issued a decision interpreting the scopes of an antidumping and a countervailing duty order (the "Orders," which state their scopes in essentially identical terms) to include IKEA's handles. Final Scope Ruling, PD 32 (Apr. 27, 2015) (interpreting *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Dep't Commerce May 26, 2011) ("*AD Order*"); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) ("*CVD Order*")).[1] The orders apply to certain "aluminum extrusions" from the People's Republic of China. *AD Order*, 76 Fed. Reg. 30,650.

IKEA has moved for judgment on the agency record, arguing that Commerce should have found IKEA's handles to be excluded from the Orders' scope. In *IKEA Supply AG v. United States* (*IKEA I*), Slip Op. 16–65, __ WL __ (CIT July 5, 2016), the court held that the scope of the Orders extended to another product that IKEA imports: towel racks. The towel racks consisted of a single aluminum extrusion packaged with either a plastic gasket or steel brackets. *Id.* at 4. The court held that the Orders' "finished merchandise" exclusion did not exempt IKEA's towel racks because the racks were not imported assembled with other parts. *Id.* at 6–7. Nor did the towel racks enjoy the "finished goods kit" exclusion, because the racks consisted of just one extrusion plus fasteners. *Id.* at 9.

In this case, IKEA's handles are not meaningfully distinguishable from the towel racks in *IKEA I*. Like the towel racks, the handles "consist of one . . . aluminum extrusion" and "come in packages that include" fasteners, namely, "a steel screw and a nut to hold the handle in place." Final Scope Ruling 2. And IKEA does not raise any novel arguments in this case that would cause the court to depart from the holding of *IKEA I*. For the same reasons articulated in *IKEA I*, IKEA's handles are not subject to the "finished merchandise" exclusion because they are not imported assembled with other parts. They are not "finished goods kits" because they are comprised of a single extrusion packaged with fasteners.

For the foregoing reasons, it is hereby

[1] Because the Orders' scopes are essentially identical, the court cites only to the antidumping duty order when rehearsing the scopes' inclusions and exclusions, and, starting now, refers to the Orders' scopes, inclusions, exclusions, and so on, in the singular.

ORDERED that Commerce's Final Scope Ruling is affirmed.
Dated: July 5, 2016
New York, New York

/s/ *Richard W. Goldberg*
RICHARD W. GOLDBERG
Senior Judge

Slip Op. 16–67

PAPIERFABRIK AUGUST KOEHLER AG, Plaintiff, v. UNITED STATES, Defendant, AND APPLETON PAPERS, INC., Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 12–00091

[Affirming the redetermination issued by the International Trade Administration, U.S. Department of Commerce in response to a previous order of the court]

Dated: July 6, 2016

F. Amanda DeBusk, Hughes Hubbard & Reed LLP, of Washington DC, for plaintiff Papierfabrik August Koehler AG. With her on the brief were *Eric S. Parnes*, *John F. Wood*, *Matthew R. Nicely*, *Lynn G. Kamarck*, and *Alexandra B. Hess*.

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OPINION

In this consolidated action, plaintiffs Papierfabrik August Koehler AG ("Koehler") and Appleton Papers, Inc. contested the amended final results issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") to conclude the second administrative review ("AR2") of an antidumping duty order on lightweight thermal paper from Germany (the "subject merchandise"). *See Lightweight Thermal Paper from Germany: Notice of Final Results of the 2009–2010 Antidumping Duty Admin. Review*, 77 Fed. Reg. 21,082, 21,083 (Int'l Trade Admin. April 9, 2012) ("*Final Results*"); *Lightweight Thermal Paper from Germany: Notice of Amended Final Results of the 2009–1010 Antidumping Duty Admin. Review*, 77 Fed. Reg. 28,851, 28,852 (Int'l Trade Admin. May 16, 2012) ("*Amended Final Results*").

Before the court is the decision (the "Remand Redetermination") Commerce issued in response to a previous order of the court, which, in response to defendant's request, remanded the amended final results so that Commerce could consider evidence of improper conduct that came to the Department's attention after the amended final results were issued. *Redetermination Pursuant to Court Remand Order in Papierfabrik August Koehler AG v. United States, Consol. Ct. No. 12–00091* (June 16, 2014), ECF No. 75 ("*Remand Redetermination*"). Upon a finding that Koehler fraudulently omitted certain sales from its submitted database of home market sales, the Remand Redetermination assigned Koehler, a German producer and exporter of the subject merchandise, a 75.36% antidumping duty rate based on the use of facts otherwise available, as well as an adverse inference, that Commerce applied to the entire determination. Koehler opposes the Remand Redetermination in a motion for judgment on the agency record. The Remand Redetermination is supported by Appleton Papers, Inc., which is a domestic producer of lightweight thermal paper, the petitioner in the original antidumping duty investigation, and a plaintiff and a defendant-intervenor in this consolidated action. The court denies Koehler's motion for judgment on the agency record and affirms the assignment of the 75.36% rate to Koehler.

I. BACKGROUND

A. The Investigation and the Antidumping Duty Order

Concluding an antidumping duty investigation on lightweight thermal paper from Germany, Commerce reached an affirmative final less-than-fair-value determination in October 2008. *Lightweight Thermal Paper from Germany: Notice of Final Determination of Sales at Less Than Fair Value*,73 Fed Reg. 57,326 (Int'l Trade Admin. Oct. 2, 2008). Commerce determined a weighted-average dumping margin of 6.50% for Koehler, the only exporter/producer individually investigated. *Id.*, 73 Fed. Reg. at 57,328. Following an affirmative final threat determination by the U.S. International Trade Commission (the "Commission"), *see Certain Lightweight Thermal Paper from China and Germany; Determinations*, 73 Fed. Reg. 70,367 (Int'l Trade Comm'n Nov. 20, 2008), Commerce published the antidumping duty order on lightweight thermal paper from Germany (the "Order") later that year. *Antidumping Duty Orders: Lightweight Thermal Paper from Germany and the People's Republic of China*, 73 Fed. Reg. 70,959 (Int'l Trade Admin. Nov. 24, 2008).[1] Because the Commission's

[1] The order covers "certain lightweight thermal paper, which is thermal paper with a basis weight of 70 grams per square meter (g/m2) (with a tolerance of ±4.0 g/m2) or less;

determination was as to threat rather than injury, Commerce announced that a rate of 6.50% would apply to lightweight thermal paper from Germany entered, or withdrawn from warehouse, for consumption after the date of publication of the Commission's final determination, i.e., November 20, 2008. *Id.*, 73 Fed. Reg. at 70,960.

B. The First Review of the Antidumping Duty Order

Commerce issued final results of the first periodic administrative review of the Order in April 2011, which applied to a period of review of November 20, 2008 through October 31, 2009. *Lightweight Thermal Paper from Germany; Notice of Final Results of the First Antidumping Duty Administrative Review*, 76 Fed. Reg. 22,078, 22,079 (Int'l Trade Admin. Apr. 20, 2011). Commerce determined a weighted-average dumping margin of 3.77% for Koehler, the only reviewed respondent. *Id*. Koehler challenged the final results of the first review, claiming that Commerce, when determining normal value, incorrectly failed to reduce the prices in Koehler's home market sales to account for certain monthly rebates ("monatsbonus") paid to home market customers. Concluding that failure to recognize the rebates was contrary to the Department's regulations, this Court remanded the final results of the first review for reconsideration. *Papierfabrik August Koehler AG v. United States*, 38 CIT __, 971 Fed. Supp. 2d 1246, 1259 (2014). In response, Commerce reduced the listed prices in the affected home market sales to allow for the monthly rebates and calculated a margin of 0.03% for Koehler, which was de minimis. *See Papierfabrik August Koehler AG v. United States*, 38 CIT __, 37 Fed. Supp. 3d 1378, 1381 (2014). This Court affirmed the remand redetermination. *Id.*, 38 CIT at __, 37 Fed. Supp. 3d at 1382–83.

C. The Second Review of the Antidumping Duty Order

On December 28, 2010, Commerce initiated the second review of the Order, which applies to entries of subject merchandise made between November 1, 2009 and October 31, 2010 (the "Period of Review" or "POR"). *Initiation of Antidumping and Countervailing Duty Admin. Reviews and Request for Revocation in Part*, 75 Fed. Reg. 81,565, 81,567 (Int'l Trade Admin. Dec. 28, 2010). Koehler was the sole respondent in the second review.

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irrespective of dimensions; with or without a base coat on one or both sides; with thermal active coating(s) on one or both sides that is a mixture of the dye and the developer that react and form an image when heat is applied; with or without a top coat; and without an adhesive backing. *Antidumping Duty Orders: Lightweight Thermal Paper from Germany and the People's Republic of China*, 73 Fed. Reg. 70,959, 70,960 (Int'l Trade Admin. Nov. 24, 2008) (footnotes omitted).

On February 23, 2011, Koehler submitted to Commerce one of its responses to the Department's series of questionnaires (the "Section A" response) and, on March 2, 2011, filed its responses to Sections B and C. *Lightweight Thermal Paper from Germany: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 76 Fed. Reg. 76,360, 76,361 (Int'l Trade Admin. Dec. 7, 2011) ("*Prelim. Results*"). Koehler responded to supplemental questionnaires on June 6, August 18, October 25, and November 14, 2011. *Id*. Koehler and its counsel submitted certifications of accuracy and completeness for these questionnaire responses. *See Draft Results of Redetermination Pursuant to Court Remand* 3 (Mar. 31, 2014) (Remand R.Doc. No. 7) ("*Draft Remand Redetermination*").[2] Relying on Koehler's certified questionnaire responses, Commerce preliminarily determined that Koehler had made sales in its home market at less than fair value and preliminarily assigned Koehler a weighted average dumping margin of 3.16%. *Prelim. Results*, 76 Fed. Reg. at 76,364.

Commerce published the final results of the second review on April 9, 2012 and issued an amended version to correct a ministerial error on May 16, 2012 ("Amended Final Results"), which assigned Koehler a weighted average dumping margin of 4.33%. *Amended Final Results*, 77 Fed. Reg. at 28,851.

Koehler initiated this action on April 9, 2012. Summons, ECF No. 1; Koehler's Compl., ECF No. 6. Koehler again claimed that Commerce erred in refusing to include in the calculation of normal value monthly rebates that Koehler paid to its home market customers. Koehler's Compl. ¶¶ 15–17. During the second review, Commerce concluded, as it had in the first review, that each monthly rebate, or "monatsbonus," was "not a legitimate rebate" because it was "retroactively applied" and was not pursuant to a "written agreement or long-standing practice" as were other rebates Koehler paid to home market customers. *See Issues and Decision Memorandum for the Final Results of the 2009–2010 Administrative Review of the Antidumping Duty Order on Lightweight Thermal Paper from Germany*,A-428–840 ARP 09–10, at 11–14 (Int'l Trade Admin. Apr. 5, 2012) *available at* http://enforcement.trade.gov/frn/summary/germany/2012–8477–1.pdf (last visited June 28, 2016).

Appleton Papers, Inc. ("Appleton" or "Appvion"),[3] a domestic producer of lightweight thermal paper and petitioner in the investigation, also contested the Final Results. Summons (May 9, 2012), ECF

[2] Documents contained in parts one or two of the original administrative record for the underlying administrative review will be cited as "Admin.R.Doc." Documents contained in the remand record will be cited as "Remand R.Doc."

[3] Appleton Papers Inc. ("Appleton") changed its name to Appvion, Inc. without changing the corporate structure. *See* Notification of Name Change (June 21, 2013), ECF No. 50.

No. 1 (Court No. 12–00130); Appleton's Compl. ¶ 14 (June 7, 2012), ECF No. 10 (Court No. 12–00130) (alleging that Commerce erred in determining the constructed export price of subject merchandise produced by Kohler).[4] Appleton later amended its complaint to allege, further, that Koehler had "engaged in a fraudulent scheme to conceal certain otherwise reportable home market transactions" and that "Koehler had sales of the foreign like product that it knew were destined for consumption in Germany, but that it did not report." Appleton's Second Am. Compl. ¶ 17 (July 16, 2014), ECF No. 78.

B. The Third Review of the Antidumping Duty Order

On December 30, 2011, prior to releasing the Amended Final Results for the second administrative review, Commerce initiated the third periodic administrative review of the Order, which covered entries during which covered entries during which covered entries during which covered entries during which covered entries during which covered entries during which covered entries during which covered entries during the period of November 1, 2010 through October 31, 2011. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 76 Fed. Reg. 82,268, 82,269 (Int'l Trade Admin. Dec. 30, 2011). During the third review, Commerce concluded that Koehler intentionally concealed certain home market sales transactions that occurred during the period of that review, using what Commerce termed a "transshipment" scheme that disguised these sales as third-country export sales. *Issues & Decision Mem. For the Final Results of the 2010–2011 Admin. Review on Lightweight Thermal Paper from Germany*, A-428–840, ARP 10–11, at 3 (Apr. 10, 2013) (Remand R.Doc. No. 8) available at http://enforcement.trade.gov/frn/summary/germany/2013–09049–1.pdf (last visited June 28, 2016) ("*AR3 I&D Mem*").

The Department's determination that Koehler engaged in a fraudulent scheme stemmed from allegations Appleton raised during the third review in a May 18, 2012 letter to Commerce, *Lightweight Thermal Paper from Germany: Submission of New Factual Info.* 2–3 (May 18, 2012) (Remand R.Doc. No. 8), which allegations Koehler later admitted were "substantially correct," *AR3 I&D Memo* 2. Koehler admitted that "the transshipment scheme began during the period covered by the previous administrative review, *i.e.*, November 1, 2009, through October 31, 2010 (AR2)." *Id.*

In the final results of the third review, issued April 18, 2013, Commerce found that Koehler had "(A) [w]ithheld information that

[4] The cases were consolidated by court order on July 11, 2012. Scheduling Order, ECF No. 24.

had been requested by the Department; (B) failed to provide such information in a timely manner or in the form or manner requested; (C) significantly impeded [the] proceeding; and (D) provided information that cannot be verified." *Lightweight Thermal Paper from Germany: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 23,220, 23,221 (Int'l Trade Admin. Apr. 18, 2013) ("*AR3 Final Results*"). Using facts otherwise available and an adverse inference, Commerce assigned Koehler a dumping margin of 75.36% in the third review. *Id.*[5]

C. Defendant's Motion that the Court Remand the Amended Final Results for Reconsideration

On May 30, 2013, defendant moved for a court order remanding the Amended Final Results so that Commerce could consider how the Department's proper calculation of normal value is affected by the unreported home market sales that were made during the period of the second administrative review. Def.'s Partial Consent Mot. Voluntary Remand, ECF No. 43. On December 5, 2013, the court held oral argument on this issue, ECF No. 69, and, with the mutual consent of the parties, remanded the amended final results to Commerce for further consideration, Order, ECF No. 71 (Jan. 15, 2014).

D. The Remand Redetermination Before the Court

On March 31, 2014, Commerce simultaneously issued a draft remand redetermination ("Draft Remand Redetermination") and reopened the record, placing twenty-three documents from the third administrative review on the record of the second administrative review. In the Draft Remand Redetermination, Commerce found that "Koehler withheld complete and accurate information regarding its total quantity and value of sales requested in the Section A Questionnaire, and certain otherwise reportable home market sales transactions, as requested in the Section B Questionnaire." *Draft Remand Redetermination* 15 (footnote omitted). Commerce determined "that certain necessary information is not available on the record within the meaning of section 776(a)(1) of the Act [19 U.S.C. § 1677e(a)(1)]" because of the withholding of information and that, by "intentionally conceal[ing] certain otherwise reportable home market transactions," Koehler had "significantly impeded the review." *Id.*

[5] Koehler challenged the results of the third review on multiple grounds before this Court, which affirmed the Department's determination. *See Papierfabrik August Koehler SE v. United States*, 38 CIT __, 7 F. Supp. 3d 1304 (2014), *reconsideration denied*, 39 CIT __, 44 F. Supp. 3d 1356 (2015). Koehler appealed this decision on March 25, 2015, and the appeal is pending before the United States Court of Appeals for the Federal Circuit. *Id.*, *appeal docketed*, No. 15–1489 (Fed. Cir. Mar. 25, 2015).

Commerce used facts otherwise available in reaching the decision stated in the Draft Remand Redetermination, finding that it was "not possible to reach any reliable conclusions based on Koehler's data" and further finding that it was "not practicable or appropriate during this remand proceeding to provide Koehler with the opportunity to remedy the deficiency of its reporting" because Koehler had engaged in a transshipment scheme, had failed to acknowledge it until Appleton reported it in the third administrative review, and had intentionally concealed "otherwise reportable home market sales." *Id.* at 17, 19. For these same reasons, Commerce determined "that Koehler failed to cooperate to the best of its ability" to comply with the Department's request for information and applied an adverse inference to its selection of the facts otherwise available. *Id.* at 19. When Koehler attempted, after the amended final results were published, to submit an amended home market sales database that included the sales it had omitted when it reported its home market sales during the second review, Commerce rejected the submission as "untimely" and "unsolicited." *Id.* at 9 n.4. Commerce added, "if we were to allow Koehler to provide information which it intentionally concealed, only after another party brought the issue to our attention, it would allow a party to game the system and not provide truthful information when it is required to do so." *Id.* at 17.

In the Draft Remand Redetermination, Commerce determined it appropriate to apply to Koehler a rate 75.36% for the second review, based on the information provided in the petition and in furtherance of the Department's practice "to assign the highest margin determined for any party in the LTFV [less-than-fair-value] investigation or in any administrative review of a specific order to respondents who fail to cooperate with the Department." *Id.* at 20–21. Commerce found the petition rate "reliable and relevant in light of Koehler's highest transaction-specific margin calculated during AR2," concluding that the 75.36% rate could be corroborated "because it falls within the range of transaction-specific margins the Department calculated based on Koehler's reported data." *Id.* at 22–23.

In the cover letter attached to the Draft Remand Redetermination, Commerce invited the parties to submit comments as well as "submit new factual information specifically related to the rate being applied and the corroboration of this rate" but noted that the Department would "not accept any information that could be considered responsive to the Department's initial questionnaire or supplemental questionnaires from the underlying 2009–2010 administrative review proceeding, including additional sales data for the period of review." *Id.* at Cover Letter. Commenting on the Draft Remand Redetermination,

Koehler again attempted to file for the record information on the home market sales Koehler omitted from its reported database in responding to questionnaires in the second review as well as certain information regarding a single sale upon which Commerce relied in the Draft Remand Redetermination for corroboration of the 75.36% rate Commerce determined in that draft. *See Koehler's Comments on Draft Results of Redetermination and Submission of Factual Information* (Apr. 28, 2014) (Remand R.Doc. No. 13). Commerce rejected all of this new information three days later, stating it "should have been provided in response to the Department's initial questionnaire and supplemental questionnaires." *Rejection of Submission Filed by Papierfabrik August Koehler SE (Koehler)* 2 (May 2, 2014) (Remand R.Doc. No. 18). Three days later, in response to the Department's directive, *id.* at 3, Koehler retendered its comments on the Draft Remand Redetermination "in redacted form to remove the rejected information" and protested "that the Department erred in rejecting that information." On May 13, 2014, Koehler and Appleton submitted rebuttal comments. *Remand Redetermination* 2.

On June 16, 2014, Commerce submitted to the court its final Remand Redetermination. *Id.* Mirroring the draft version, the Remand Redetermination applied a rate of 75.36% to Koehler and relied on facts otherwise available with an adverse inference. *Id.* at 2–3. Commerce continued to corroborate the dumping margin using a transaction-specific margin of 144.63% that Commerce determined according to data on a single sale Koehler reported in the second review. *Id.* at 23–24.

One month after Commerce filed the Remand Redetermination, Koehler, with leave of court, filed its second amended complaint, in which it raised numerous objections to the assignment of the 75.36% antidumping duty rate. Second Amend. Compl. ¶¶ 19–31 (Jan. 1, 2014), ECF No. 79; Order (July 16, 2014), ECF No. 71. Pursuant to this complaint, Koehler filed a motion for judgment on the agency record on September 22, 2014, Pl.'s R. 56.2 Mot. J. Agency R., ECF No. 87 (public), ECF No. 86 (confidential) ("Pl.'s Br."), to which Appleton and defendant responded on February 24, 2015 and March 3, 2015, respectively, Resp. Br. of Def.-Int. in Opp'n to Pl.'s Mot. J. Agency R., ECF No. 100 (public), ECF No. 99 (confidential); Def.'s Mem. in Opp'n to Pl.'s and Def.-Int.'s Mot. for J. Agency R., ECF No. 107 (public), ECF No. 106 (confidential). Koehler and Appleton filed reply briefs. Pl.'s Reply Br. (Apr. 8, 2015), ECF No. 116 (public), ECF No. 115 (confidential); Reply Br. of Def.-Int. (Apr. 7, 2015), ECF 112.

On October 21, 2015, defendant filed a notice of supplemental authority concerning the opinion of the Court of Appeals for the

Federal Circuit ("Court of Appeals") in *Ad Hoc Shrimp Trade Action Comm. v. United States*, Nos. 2014–1514, 2014–1647, 2015 WL 5781477 (Fed. Cir. Oct. 5, 2015). Def.'s Notice Supp. Auth., ECF No. 127. On November 2, 2015, Koehler filed a response, Pl.'s Resp. to Def.'s Notice Supp. Auth., ECF No. 128, and on November 12, 2015 defendant-intervenor responded, Def.-Int.'s Resp. to Def.'s Notice Supp. Auth., ECF No. 129. On November 20, 2015, defendant moved for leave to respond to Koehler's and Appleton's briefing on this issue. Def.'s Mot. Leave to Respond Substantive Briefs re: Supp. Auth., ECF No. 130. On December 4, 2015, Koehler filed a motion for leave to reply to defendant and defendant-intervenor's responses. Pl.'s Mot. Leave to Reply Def. and Def.-Int.'s Resp. re: Notice Supp. Auth., ECF No. 131.

On January 27, 2016, Appleton filed a notice of supplemental authority discussing *Nan Ya Plastics Corp. v. United States*, No. 2015–1054 (Fed. Cir. Jan. 19, 2016). Def.-Int.'s Notice Supp. Auth., ECF No. 134. Koehler and defendant responded on February 11, 2016 and March 30, 2016, respectively. Pl.'s Resp. to Def.-Int.'s Notice Supp. Auth., ECF No. 135; Def.'s Resp. to Def.-Int.'s Notice Supp. Auth., ECF No. 140. Koehler filed a motion for leave to reply to defendant's response on April 14, 2016. Pl.'s Mot. Leave to Reply to Def.'s Comments re: Def.-Int.'s Notice Supp. Auth., ECF No. 141.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction over this action according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c).[6] This provision grants the Court of International Trade exclusive jurisdiction over a challenge brought under section 516A(a)(2)(A)(i)(I) of the Tariff Act of 1930, as amended (the "Tariff Act"), 19 U.S.C. § 1516a(a)(2)(A)(i)(I), including those contesting the final results of an administrative review issued under section 751 of the Tariff Act, 19 U.S.C. § 1675(a). The court will sustain a determination by Commerce if it complies with the court's order, is supported by substantial evidence on the record, and is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

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[6] Except where otherwise noted, all statutory citations herein are to the 2006 edition of the United States Code and all regulatory citations herein are to the 2012 edition of the Code of Federal Regulations.

B. The Court Affirms the Department's Assignment of a 75.36% Rate to Koehler

Koehler raises numerous arguments against the Department's assigning it a 75.36% rate in the Remand Redetermination. Koehler's first claim is, essentially, that Commerce unlawfully assigned that rate based on facts otherwise available and an adverse inference and instead was required to assign Koehler a de minimis margin based on the data Koehler actually submitted. Koehler maintains that the information it withheld during the second review was so limited in scope as to be "insignificant" and would have made no material difference in the calculation of any margin that is correctly determined according to Koehler's data on its home market and U.S. sales. Koehler's Br. 17–18, 26–29. According to Koehler, had Commerce properly reduced normal value to account for the monthly rebates it made to home market customers, the calculated margin would have been de minimis whether or not Commerce were to include in the calculation the previously withheld information. *Id.* at 28–29.

The inherent flaw in Koehler's claim is Koehler's positing that Commerce lacked the authority to respond as it did to the uncontested evidence concerning Koehler's fraudulent conduct during the second review. Koehler's admissions that Appleton's allegations of fraud were substantially correct and that the transshipment scheme began during the period of the second review are on the remand record of this proceeding. *See AR3 I&D Memo* 2. Notably, Koehler does not contest the Department's findings in the Remand Redetermination that Koehler intentionally engaged in a scheme to underreport its home market sales or that the home market sales database it reported to Commerce during the second review was affected by this scheme. These two findings, therefore, not only are supported by substantial record evidence but also are undisputed. Based on these findings, Commerce permissibly concluded that Koehler's misreporting of its home market sales database prevented it from determining the correct normal value for Koehler's subject merchandise during the review. *See Remand Redetermination* 2 ("In light of Koehler's incomplete reporting in AR2, we find that Koehler failed to provide accurate information and sales data required by the Department to evaluate the level of Koehler's dumping."), 13 ("Koehler knowingly submitted inaccurate and incomplete sales data which are essential for the Department to calculate a dumping margin for Koehler's [*sic*] in the AR2 proceeding."). Further, Commerce found as to this reporting that "Koehler deliberately provided false information, despite the fact that Koehler and its representatives certified to the accuracy and

completeness of such information in response to the Department's initial questionnaire and four supplemental questionnaires issued in AR2." *Id.* at 2.

In summary, Commerce found that Koehler's intentional reporting of an incomplete and inaccurate database of home market sales during the second review prevented Commerce from determining a valid antidumping duty margin for Koehler at the time it conducted the review. Substantial evidence supports the finding that the database was intentionally underreported and the finding that Commerce could not have used that database to reach a valid margin for Koehler before the second review was concluded. That the omitted information may have been immaterial, in a numerical sense, to any margin determined after the issuance of the Amended Final Results does not change the controlling facts, which are that the home market database was fraudulently underreported to Commerce at the time the statute required Koehler to submit it and that Commerce thereby was prevented from performing its statutory responsibility.

The antidumping statute provided Commerce ample authority to disregard entirely the falsified home market sales database Koehler reported during the second review. If "necessary information is not on the record or an interested party or any other person withholds information" requested by Commerce, "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," or "significantly impedes a proceeding under this subtitle," Commerce is directed to "use facts otherwise available in reaching the applicable determination." 19 U.S.C. § 1677e(a). With respect to 19 U.S.C. § 1677e(a), Commerce found in the *Remand Redetermination*, based on substantial record evidence, that "Koehler withheld complete and accurate information regarding its total quantity and value of sales" as requested by the Department. Remand Redetermination 15. Commerce further found, with respect to this statutory provision, that "Koehler intentionally concealed certain otherwise reportable home market transactions, and thereby significantly impeded the review." *Id*. at 16. This finding, too, is supported by the record evidence. Because Commerce could not have used the underreported home market sales database to calculate a valid margin for Koehler, Koehler not only "impeded" the review proceeding but also went so far as to take deliberate steps preventing Commerce from fulfilling its duty under the statute. Commerce, therefore, was authorized by the statute to determine a margin upon remand that was based entirely on the facts otherwise available.

The statute further provides that if an "interested 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." 19 U.S.C. § 1677e(b). In this case, it is an understatement to say that Koehler failed to act to the best of its ability when responding to the relevant questionnaires. The statute allows Commerce, when using an adverse inference in selecting from among the facts otherwise available, to use "facts from the petition," *id*. at § 1677e(b)(2)(a), which in this case were the basis for the 75.36% rate. Commerce must be allowed to apply 19 U.S.C. § 1677e(b) in a way that deters intentional conduct of the sort presented in this case, which prevented it from fulfilling its statutory responsibility. Below, the court presents its reasons for affirming the Department's selection of the 75.36% rate for application to Koehler.

1. *In Determining a Rate for Koehler, Commerce Was Not Required to Give Koehler the Benefit of the Home Market Sales Data Koehler Omitted from its Initial Reporting*

Koehler bases several arguments on the volume and value information for the sales it omitted when reporting its home market sales database in questionnaire responses it submitted during the second review. Noting that it attempted to submit this information during the remand proceeding, along with a completed home market database, Koehler argues that Commerce, rather than reject this information, was required to admit it to the remand record and consider it because it was "relevant, necessary for this proceeding, and timely." Koehler's Br. 15. The court disagrees.

As to timeliness, Koehler was required to report the information during the second review. Considered according to the terms of 19 U.S.C. § 1677e(a), the missing information was not submitted "timely"; rather, it was not submitted at all. The remand proceeding does not give Koehler a second chance to comply with the duties imposed upon it by statute, which were not only to respond timely, and to the best of its ability, to the Department's information requests but also to act in good faith. Instead, Koehler intentionally reported an incomplete home market sales database in perpetrating a fraud upon the agency conducting the review.

Nor is the withheld information "relevant" and "necessary for this proceeding." Koehler submits that "[t]he purpose of this remand proceeding is to determine the appropriate response to the fact that certain information was omitted from the record of AR2." *Id.* at 16. According to Koehler, "Commerce cannot fulfill this mandate and determine the appropriate response unless it has information on the

nature of the information and extent of the information that was omitted – yet, this is precisely the information that Commerce excluded." *Id*. In arguing that Commerce was required to admit the withheld information to the remand record, Koehler cites 19 C.F.R. § 351.301(c)(4), the Department's practice prior to the promulgation of that regulation, and two decisions of this Court. *Id.* at 19–22. Koehler's argument misses the point.[7] The court need not decide whether Commerce was required to admit to the record the information Koehler had previously, and intentionally, withheld. Admitting that information to the record could have done nothing to change the controlling fact that Koehler purposefully withheld that same information at the time it was required to submit it, i.e., in response to questionnaires during the second review. The database Koehler reported within the time period allowed for its submission was deliberately underreported and, therefore, unusable at that time for the purpose of determining a valid margin. However presented, the gist of Koehler's argument is that the court must now compel Commerce to give Koehler the mitigating benefit of the very information Koehler acknowledges it fraudulently withheld during the second review. Nothing in the statute, the Department's regulations, or the Department's administrative practice requires such a remarkable result.

Koehler contends that "when Commerce acts contrary to a standard practice without reasonable explanation, it acts arbitrarily," citing *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003), among other cases. *Id.* at 21. Koehler posits that, here, "[a]ny departure from that regulation [19 C.F.R. § 351.301(c)(4)] and practice was required to be reasonable, explained, and not arbitrary," *id.*, claiming that "Commerce's blind application of its exception without a legitimate purpose precluded Koehler from a meaningful opportunity to rebut, clarify, or correct the new information Commerce placed on the record." *Id.* at 22. Because Commerce gave a reasonable explanation for not considering the previously unreported information, this argument is also unpersuasive.

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[7] The regulation Koehler cites, 19 C.F.R. § 351.301(c)(4), was promulgated with an effective date after the initiation of the second review and is, therefore, inapplicable. *Definition of Factual Information and Time Limits for Submission of Factual Information*, 78 Fed. Reg. 21,246, 21,246 (Int'l Trade Admin. Apr. 10, 2013) (stating that the regulation will "apply to all segments initiated on or after" May 10, 2013); *see also* 19 C.F.R. § 351.102(47)(i)-(ii) (defining "segment of proceeding" as "a portion of the proceeding that is reviewable under section 516A of the Act" and providing examples, such as "[a]n antidumping or countervailing duty investigation or a review of an order"). The two decisions of this Court upon which Koehler relies, *Wuhu Fenglian Co. v. United States*, 36 CIT __, 836 F. Supp. 2d 1398 (2012) and *Crawfish Processors Alliance v. United States*, 28 CIT 646, 343 F. Supp. 2d 1242 (2004), are not analogous to this case.

Commerce explained in the Remand Redetermination that "Koehler engaged in a transshipment scheme which concealed certain otherwise reportable home market sales during the AR2 review," that the scheme "was not revealed" until the petitioner raised it during the third administrative review, and that Koehler subsequently acknowledged the truth of petitioner's allegations. *Remand Redetermination* 17–18. Commerce concluded that it was not "practicable or appropriate during this remand proceeding to provide Koehler with the opportunity to remedy the deficiency of its reporting," reasoning that were it "to allow Koehler to provide information which it intentionally concealed, only after another party brought the issue to our attention, it would allow a party to game the system and not provide truthful information when it is required to do so." *Id.* at 18. The court finds nothing deficient in the Department's explanation for its refusal to give Koehler the benefit of the wrongfully withheld information.

Koehler also contends that in rejecting its submissions Commerce violated the "general notions of procedural due process and fundamental fairness." Koehler's Br. 22. According to Koehler, these due process notions "dictate that Commerce must provide Koehler an opportunity to be heard and must provide this Court with a record by which it can provide meaningful review pursuant to the substantial evidence standard." *Id*. Koehler quotes *Techsnabexport Ltd. v. United States*, 16 CIT 420, 427–28, 795 F. Supp. 428, 436 (1992) for the principle that the "essential elements of due process are notice and the opportunity to be heard." *Id*. The court discerns no due process violation here.

Koehler had the full opportunity to participate in, and thereby be "heard" in, the second review, during which it fraudulently withheld from Commerce certain information essential to the Department's calculation of an antidumping duty margin for Koehler. In participating in the review, Koehler was under a duty to act in good faith, a duty to which it did not adhere. Koehler argues, unconvincingly, that due process considerations now require Commerce, as well as the court, to afford it the mitigating benefit of the very information it wrongfully withheld, despite Koehler's having admitted to the essential facts concerning its intentional underreporting during the second review. In exercising its discretion in the Remand Redetermination, Commerce in no sense denied Koehler fundamental fairness or the opportunity to be heard.

2. *Commerce Had a "Sufficient Basis" to Amend the Final Results*

Asserting that its "inaccuracies" in reporting were "insignificant and immaterial," Koehler argues that Commerce lacked a "sufficient basis" to amend the Final Results and in doing so "did not properly balance interests of finality, the extent of the inaccuracies, the level of materiality, and other factors such as Koehler's cooperation with Commerce under the circumstances." Koehler's Br. 24, 26. In citing the "extent of the inaccuracies" and "the level of materiality," this argument fails by sidestepping the controlling fact that Koehler fraudulently underreported its home market sales database during the second review. The underreporting itself and in particular the extent, however minor it might have been, to which it undermined the accuracy and completeness of the questionnaire responses Koehler submitted were concealed from Commerce during that review. The statute specifically requires compliance with information requests during the time periods established in the proceeding. *See, e.g.*,19 U.S.C. §§ 1677e, 1677m(d)(2), 1677m(e)(1). Certainly, it cannot have been an abuse of discretion for Commerce to decide to view Koehler's intentional noncompliance from the perspective of the time at which Commerce conducted the second review, during which time Koehler's duty of good faith compliance arose.

As to the "interests in finality," Koehler argues that it "voluntarily notified Commerce of the missing sales in AR2 and agreed to this remand even though doing so was not necessary to protect the integrity of the review" because "the corrected information does not have a material effect on the margin calculation." Koehler's Br. 30. Koehler posits that altering the Final Results was, therefore, an abuse of discretion because "the interest in correcting immaterial errors does not outweigh the interests of finality and other additional factors, such as Koehler's cooperation in this proceeding." *Id.* Koehler warns that, by ignoring this cooperation and altering the Final Results, Commerce runs the risk of sending a "message to other parties that those who cooperate in correcting misconduct will be treated no differently than those who do not." *Id.* The record evidence, however, does not support this argument. Commerce did not find, and was justified in not finding, that but for Koehler's cooperation and disclosure the "misconduct" would not have been corrected.

The record reveals that during the second review the petitioner, Appleton, expressed a suspicion that Koehler had manipulated its home market sales database by excluding certain sales of merchandise that were to be consumed in Germany. *Appvion's Comments on the Second Supplemental Questionnaire Responses of Koehler* 3 (Aug.

30, 2011) (Admin.R.Doc. No. 2.4). In these allegations, Appleton lodged specific accusations that Koehler was participating in a scheme to manipulate its reporting of home market sales involving one of its customers in particular, *id.* at 3–5; this was one of the same customers to whom Koehler sold merchandise in the transshipment scheme to which Koehler eventually admitted with respect to the third administrative review. *Remand Redetermination* 8–9. Appleton did not yet have the details, and the proof, it brought to the Department's attention during the third review, but its suspicions of underreporting were grounded in what Appleton viewed as unexplained irregularities in Koehler's reporting of the home market database. During the second review, when Commerce responded to petitioner's claims with inquiries directed to Koehler, Koehler responded, notably, that it had "reported all sales of the subject merchandise during the POR with a 'ship-to' address within Germany," *Supplemental Questionnaire Response of Koehler* 1–2 (Oct. 24, 2011) (Admin.R.Doc. No. 2.6). *See Remand Redetermination* 8–9.

The court also rejects Koehler's argument that, due to the importance of "finality," Commerce was not justified in altering the original outcome of the second review. Commerce discovered Koehler's fraudulent underreporting of the home market database after publishing the amended final results and acted justifiably in moving for an order remanding that decision incident to this judicial review proceeding. Even if it is assumed that the underreporting was, as Koehler argues, minor and immaterial in a numerical sense, it was not minor in its significance, for it compromised the integrity of the second administrative review proceeding.

3. Commerce Permissibly Relied on an Adverse Inference

Koehler argues that "Commerce abused its discretion by applying an adverse inference in its use of facts available" because "[i]n determining whether the application of an adverse inference is warranted, Commerce must examine whether the errors or the missing information is material," Koehler's Br. 31, which, Koehler submits, it was not. Here again, Koehler's argument would have the court direct Commerce to give Koehler the benefit of the information Koehler intentionally withheld during the second review. As discussed above, Commerce was well within its authority in viewing the withholding of information from the standpoint of Koehler's conduct during the second review.

Koehler relies on *Ferro Union, Inc. v. Unites States*, 23 CIT 178, 201, 44 F. Supp. 2d 1310, 1332 (1999), in arguing that Commerce improperly failed to consider the lack of materiality of the missing

information and on *Mannesmannrohren-Werke AG v. United States* , 23 CIT 826, 849, 77 F. Supp. 2d 1302, 1321–22 (1999) in arguing that de minimis errors cannot justify an adverse inference. These cases are inapposite. In *Mannesmannrohren-Werke*, the respondent had provided Commerce with requested information, but those figures "slightly var[ied] from those calculated by Commerce" and the respondent "was unable to recreate or explain at verification the method by which it arrived at the results." *Mannesmannrohren-Werke*, 23 CIT at 849, 77 F. Supp. 2d at 1322. In *Ferro Union*, the failure to identify properly affiliated companies was held not to be "alone [ ] a significant impediment" to the review and, therefore, Commerce could not properly "apply total adverse facts on the basis of the non-identification of these companies." *Ferro Union*, 23 CIT at 201, 44 F. Supp. 2d at 1332. In contrast, Koehler engaged in deliberate underreporting and thereby prevented Commerce from fulfilling its statutory responsibility. Commerce must be afforded discretion to take decisive action to deter such conduct and encourage full and honest compliance in the future.

In further support of its argument that Commerce should not have drawn an adverse inference, Koehler also relies on the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, at 868, 870 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198–99, which states that "[i]n employing adverse inferences, one factor the agencies will consider is the extent to which a party may benefit from its own lack of cooperation." On the particular, and unusual, facts of this case, the language from the SAA does not preclude Commerce from using an adverse inference in choosing from among facts otherwise available in response to Koehler's fraudulently misreported home market database. As the court has emphasized, the information upon which Koehler seeks to have Commerce reach a finding that Koehler would not have benefitted from the underreporting, i.e., the "missing" information upon which Koehler relies in arguing that it would have qualified for a de minimis margin in any event, was intentionally withheld from Commerce during the second review. Commerce is under no obligation to reach the finding Koehler advocates, i.e., a finding that Koehler did not benefit from its own lack of cooperation.

Similarly, citing various decisions of this Court, Koehler argues that even were an adverse inference warranted, Commerce should have used the data on home market sales that Koehler submitted during the second review, which Koehler describes as "timely" and "verifiable," and should have confined any adverse inference to the sales that were omitted from Koehler's original data. Koehler's Br.

34–39. As do many of Koehler's arguments, this argument overlooks the essential point that the data on the omitted sales, due to Koehler's own misconduct, were not submitted during the second review. This factual situation is distinguishable from those in the cases Koehler cites.

4. The Department's Choice of the 75.36% Rate Is Not Invalidated by the Corroboration Provision in the Statute

In the Remand Redetermination, Commerce explained that it applied a dumping margin of "75.36 percent, the highest rate on the record of this proceeding, derived from information provided in the petition, to exports by Koehler," determining that "this information is the most appropriate, from the available sources, to effectuate the purposes of AFA." *Remand Redetermination* 21–22. Commerce cited section 776(b)(1) of the statute, 19 U.S.C. § 1677e(b)(1), and its regulations, 19 C.F.R. § 351.308(c)(1) and (2), as authorizing it to rely on information derived from the petition in using an inference adverse to Koehler. *Id.* at 21.

Commerce considered its use of the 75.36% rate to be "corroborated" after examining "the transaction-specific margins calculated for Koehler in this review, AR2," concluding that the "75.36 rate is relevant and reliable because it falls within the range of transaction-specific margins the Department calculated based on Koehler's reported data, with the highest transaction-specific margin being 144.63 percent." *Id.* at 23 (footnote omitted). Commerce found that this rate, which Commerce calculated from a single sales transaction conducted by Koehler during the POR for the second review, was "based on Koehler's own data" and was, "therefore, reflective of Koehler's commercial business practices in this segment of the proceeding." *Id.* at 23–24. Commerce concluded, further, that "there is no information on the record that demonstrates that the sale underlying this margin is aberrant." *Id.* at 24. Commerce also opined that its "corroboration exercise was conservative," noting that "had Koehler properly disclosed its concealed sales, it is likely that there could have been additional transaction-specific margins at or above the level of the AFA rate being applied." *Id.*

Koehler claims that the 75.36% rate selected by Commerce was not supported by substantial evidence because it does not reflect Koehler's "commercial reality," Koehler's Br. 41, and does not meet the corroboration requirement of 19 U.S.C. § 1677e(c), which, Koehler argues, must be met when Commerce uses "secondary information as

AFA [adverse facts available], including petition rates," *id*. at 46 (footnote omitted). Koehler maintains that "the fact that the AFA rate is eleven times Koehler's highest actual verified rate demonstrates the rate is not supported by substantial evidence." *Id*. at 41–42. Additionally, Koehler contends that the 144.63% margin Commerce used to corroborate the 75.36% rate was "erroneous, clearly aberrational" and "based on data that Commerce has now deemed to be unreliable." *Id*. at 40–41. Koehler submits that the 144.63% transaction-specific margin Commerce calculated was the result of Koehler's incorrectly applying "the total cash discount for three line items . . . to *each* line item." *Id*. at 50.

The statute, in 19 U.S.C. § 1677e(c), provides that when Commerce or the Commission "relies on secondary information rather than on information obtained in the course of an investigation or review," Commerce or the Commission, "as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal."[8] The SAA discusses the corroboration as follows:

> Consistent with Annex II, paragraph VII of the Agreement, section 776(c) [19 U.S.C. § 1677e(c)] requires Commerce and the Commission to corroborate secondary information where practicable using independent sources. Secondary information is information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise. Secondary information may not be entirely reliable because, for example, as in the case of the petition, it is based on unverified allegations, or as in the case of information from prior section 751(a) reviews, it concerns a different time frame than the one at issue. Independent sources may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation or review.

SAA, H.R. Doc. No. 103–316 at 870, 1994 U.S.C.C.A.N. at 4199. The SAA further explains that "[c]orroborate means that the agencies will satisfy themselves that the secondary information to be used has probative value." *Id.* Commerce has incorporated into its applicable

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[8] Congress amended the corroboration provision in the American Trade Enforcement Effectiveness Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (codified at 19 U.S.C. § 1677e(c)). The amendment was not made effective retroactively so as to apply to the determination before the court. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1350–51 (Fed. Cir. 2015).

regulation this definition and other explanation from the SAA. *See* 19 C.F.R. § 351.308(d). As the SAA and the regulation clarify, the intent underlying the corroboration provision is to ensure, to the extent practicable, that secondary information is, in the words of the SAA and the regulation, "reliable." The SAA and the Department's regulation contemplate that Commerce will consider whether secondary information is reliable by ascertaining the "probative value" of such information.

Commerce found that the information from a single transaction reported by Koehler during the second review, from which Commerce calculated a transaction-specific margin of 144.63%, had probative value with respect to its chosen rate of 75.36%. *See Remand Redetermination* 23. The court concludes that this finding is not supported by substantial evidence on the record.

When Koehler attempted to submit new information during the remand proceeding to show that the 144.63% individual margin was grossly inflated due to Koehler's having reported erroneously, during the second review, the information underlying the transaction, Commerce rejected that new information. Commerce did so even though it had invited the parties to "submit new factual information specifically related to the rate being applied and the corroboration of this rate." *Draft Remand Redetermination*, Cover Letter. In inviting new information for the reopened record, Commerce also stated that it would "not accept any information that could be considered responsive to the Department's initial questionnaire or supplemental questionnaires from the underlying 2009–2010 administrative review proceeding, including additional sales data for the period of review." *Id.* On that ground, Commerce rejected the transaction-specific information Koehler attempted to submit during the remand proceeding to show that the 144.63% margin Commerce calculated for the transaction was erroneous.

The court need not decide whether Commerce acted within its authority in rejecting the information Koehler sought to place on the remand record concerning the 144.63% margin. For even if the court assumes, *arguendo*, that Commerce had this authority, the court still must conclude that the 144.63% margin is not evidence corroborating as "probative" the Department's use of the 75.36% rate as secondary information.[9] The Department's calculated margin of 144.63% percent is aberrant when compared to a margin obtained from any other

[9] Koehler submits that applying the discount correctly, rather than erroneously, to all line items in the sales transaction in question would yield a negative margin rather than a margin of 144.63%. Koehler's Br. 50. Because the 144.63% margin is aberrant and cannot serve as corroboration, the court need not decide whether Koehler's recalculation is correct.

specific transaction, none of which yielded a margin close to 144.63%, and is extremely aberrant when viewed against a weighted average of all individual margins. The information Koehler attempted to submit to demonstrate that the 144.63% margin was erroneous was "reasonably at" the Department's "disposal" within the meaning of 19 U.S.C. § 1677e(c) as explicated in the SAA and interpreted by the Department's regulation, 19 C.F.R. § 351.308(d).[10] After excluding this information from the record during the remand proceeding, Commerce offered the self-serving statement that "there is no information on the record that demonstrates that the sale underlying this margin is aberrant." *Remand Redetermination* 24. With or without this additional information, Commerce did not have on the record substantial evidence to support its finding that the sales transaction underlying its calculated 144.63% margin could serve to corroborate the rate it chose as an adverse inference.

In further support of its chosen adverse inference rate of 75.36%, Commerce concluded that "had Koehler properly disclosed its concealed sales, it is likely that there could have been additional transaction-specific margins at or above the level of the AFA rate being applied." *Id*. Rather than constitute a finding based on substantial record evidence, this conclusion is entirely based on speculation. A valid agency finding as to corroboration (or indeed, as to any issue) cannot be based solely on a *lack* of record evidence.[11]

Although the single transaction from which Commerce calculated a 144.63% margin lent no evidentiary support to corroboration of the 75.36% rate as secondary information, certain other record evidence has some, albeit limited, probativity on that issue. As Koehler concedes, two transactions yielded significant margins, which were in the approximate range of 30–50%, *see* Koehler's Br. 53, and 18 trans-

[10] The regulation provides, in pertinent part, that

> Under section 776(c) of the Act, when the Secretary relies on secondary information, the Secretary will, to the extent practicable, corroborate that information from independent sources that are reasonably at the Secretary's disposal. Independent sources include, *but are not limited to*, published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review.

19 C.F.R. § 351.308(d) (emphasis added).

[11] The information Koehler attempted to submit to show the de minimis effect on its margin of the sales it intentionally withheld from disclosure is also information reasonably at the Department's disposal for purposes of corroboration. Commerce chose to reject and thereby disregard this information for purposes of its decisions to use total facts otherwise available and an adverse inference, and the court, as discussed above, takes no issue with that decision. The court does not reach a conclusion that Commerce was required to consider this information in its corroboration analysis. But having chosen to exclude this information entirely from the record, Commerce at the same time could not validly have relied on the missing information in *support* of its corroboration analysis.

actions had margins in the 20–30% range, *see id.* at 52. Still, the evidence as a whole does not support a finding that Koehler would have received a high margin had it cooperated fully and in good faith.

Koehler submits that the overwhelming majority of its reported transactions in the second review had margins between negative 10 percent and positive 10 percent, *see id.*, a contention to which defendant does not marshal record evidence in rebuttal. Commerce determined a weighted average margin of only 4.33% for Koehler in the Amended Final Results of the second review, and this margin could only have been reduced were Commerce to have accounted for the monthly rebates on Koehler's home market sales. Other information reasonably at the Department's disposal, information of which the court may take judicial notice, is also probative. In the investigation, Commerce determined a margin of 6.50% for Koehler, but even that margin would have applied to Koehler's subject merchandise only had Koehler not been reviewed in the first administrative review of the Order. The period of review for the first administrative review extended back to November 20, 2011, the date of the Commission's affirmative threat determination, and thereby covered all entries of Koehler's merchandise to which the Order, which became effective only after that date, applied prior to the second review. Because Koehler *was* reviewed in the first administrative review and qualified for a de minimis margin upon conclusion of all court proceedings relating to the first review, the only margin actually applicable to any of Koehler's subject merchandise prior to the second review was, effectively, a margin of zero.

In summary, Commerce erred in finding that the transaction underlying its calculated 144.63% margin could serve to corroborate its 75.36% rate, but there is other record evidence with *some*, albeit extremely limited, probativity on the issue of the "reliability" of the 75.36% rate Commerce chose as secondary information. *See* SAA, H.R. Doc. No. 103–316 at 870, 1994 U.S.C.C.A.N. at 4199. Probativity is a matter of degree, and that evidence is, accordingly, the minimal extent to which that rate can be said to be "corroborated." The question the court considers next is whether such a minimal extent of corroboration is sufficient to support the Department's decision to impose a rate of 75.36% as an adverse inference. Based on the extraordinary factual situation posed by this case and a consideration of the statutory provisions involved, the court concludes that it is.

The court begins by considering the purposes of two statutory provisions, 19 U.S.C. § 1677e(b), the "adverse inference" provision, and 19 U.S.C. § 1677e(c), the "corroboration" provision. The purpose of § 1677e(b) is evident from the very words Congress chose: Com-

merce or the Commission may use an inference that is *adverse* to the *interests* of a noncooperating party when choosing from among the information otherwise available. As the Court of Appeals has instructed, § 1677e(b) provides Commerce the authority to use an inference adverse to the interests of such a party in order to deter future noncompliance. *See*, *e.g.*, *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco*").

The purpose of the corroboration provision of § 1677e(c) is, as discussed previously, to ensure that Commerce, to the extent "practicable" when using secondary information, uses secondary information that is "reliable." As applied to the choice of facts otherwise available with an adverse inference, the corroboration provision serves to ensure that Commerce, when seeking to deter future noncooperation, does not "overreach." *See id*.

It is possible to envision one or more factual situations in which a respondent's failure to "cooperate" in an antidumping investigation or review consists of misconduct so serious that it undermines the very integrity of the proceeding. Although not the ordinary circumstance, it is also possible that a respondent committing serious misconduct might have received a small or de minimis margin even had it cooperated fully and in good faith. In such an unusual circumstance, were a court to insist that Commerce confine its discretion to the use of a rate constituting secondary information that is *fully* corroborated, i.e., a rate the respondent likely would have received had it so cooperated, such a rate could never be sufficiently "adverse" within the meaning of § 1677e(b) as to provide any meaningful deterrent to the type of misconduct involved. Where that is the case, a court must be mindful of the purpose of § 1677e(b), which is to allow Commerce to use an *adverse* inference in choosing from among the facts otherwise available.

This case presents just such an extraordinary circumstance. Commerce found, and the record supports, that Koehler engaged in a fraudulent scheme with the objective of preventing Commerce from fulfilling its statutory duty to determine a valid antidumping duty margin. In § 1677e(c), Commerce created a general qualification that applies both to the use of facts otherwise available (as provided for in § 1677e(a)) and the use of an adverse inference (as provided for in § 1677e(b)). But that general qualification must not be read so broadly as to defeat entirely the more specific purpose of § 1677e(b), under which Commerce must have discretion to carry out that purpose. In the rare factual circumstance in which the objectives of the two provisions come into direct conflict, the more specific purpose of §

1677e(b) must prevail. Doing otherwise would produce the absurd result in which Commerce could recognize the serious misconduct and have no useful authority to apply an inference that is sufficiently adverse and thereby deter that misconduct in the future.

The rate of 75.36% is, as Koehler argues, numerically higher than Koehler's "commercial reality," but the commercial reality is also that Koehler set about deliberately to compromise the outcome of the review. Commerce found that "Koehler deliberately provided false information," *Remand Redetermination* 2, and recounted in the Remand Redetermination the substantial, and essentially uncontested, evidence supporting that finding, *id.* at 8–10. Commerce further found that "the AR2 proceeding has been tainted by Koehler's transshipment scheme . . . ," *id.* at 12, elaborating that "[i]n particular, as a result of petitioner's allegations and Koehler's acknowledgment of those allegations, we find that Koehler engaged in an elaborate scheme to conceal certain otherwise reportable home market sales from the Department that would impact its normal value and, thus, contribute to an improper reduction of its dumping duties in AR2," *id.* at 13. As Commerce itself concluded, the intentional, and fraudulent, misreporting of the home market sales database prevented Commerce from determining *any* valid margin for Koehler during the second review. Commerce explicitly found "that the transshipment scheme perpetrated by Koehler undermined the reliability and integrity of the entire AR2 proceeding," *Remand Redetermination* 36, and this finding is an integral part of the Department's reasoning for imposing the highest rate in any previous segment of the proceeding, which was 75.36%.

While a purpose of the corroboration requirement is to prevent Commerce from "overreaching" in deterring the failure to cooperate, *De Cecco*, 216 F.3d at 1032, the seriousness of the type of misconduct Commerce was seeking through the Remand Redetermination to deter causes the court to conclude that Commerce did not overreach in assigning the 75.36% rate to Koehler. On this extraordinary record, Commerce was within its discretion in selecting a rate with a substantial "built-in increase," *see id.* Moreover, the statute expressly allows Commerce to base an adverse inference on information derived from the petition. 19 U.S.C. § 1677e(b)(2)(A). Commerce determined on this record that a rate set at the highest rate in any previous segment of the proceeding was necessary to serve the purpose of deterrence, and the court will not disturb the exercise of that discretion.

Arguing that Commerce exceeded its discretion, Koehler relies in part on *De Cecco*, *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d

1319, 1323 (Fed. Cir. 2010), and *D&L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997). But in these cases, the Court of Appeals was not confronted with a factual situation analogous to that presented here. The court declines to construe the corroboration requirement so as to eliminate the discretion Commerce must possess to confront the serious misconduct it encountered in this case, in which Koehler undermined the integrity of the proceeding Commerce conducted and prevented Commerce from fulfilling its statutory responsibility.

Koehler maintains that Commerce "clearly imposed a punitive rate" rather than one that was designed "to provide an incentive to cooperate," as it was required to do. Koehler's Br. 55–56. The court rejects this argument because Commerce justifiably concluded that fraudulent action tainting an entire proceeding justifies an adequate deterrent to future "noncooperation" of the type evidenced by the record in this case.

Koehler's final argument is that Commerce was required to adjust its assigned margin by taking into account Koehler's home market monthly rebates, citing this Court's decisions in the litigation contesting the results of the first administrative review; *see Papierfabrik August Koehler AG v. United States*, 38 CIT __, 971 Fed. Supp. 2d 1246 (2014); *Papierfabrik August Koehler AG v. United States*, 38 CIT __, 37 Fed. Supp. 3d 1378 (2014). This argument lacks merit because that litigation, unlike the case at bar, did not present a situation that caused Commerce to seek to apply a total use of facts otherwise available and an adverse inference.

III. CONCLUSION

For the reasons stated in the foregoing, the court will deny Koehler's motion for judgment on the agency record, affirm the assignment of the 75.36% rate to Koehler, and enter judgment accordingly.[12]

[12] As discussed above, defendant and Koehler have moved for leave to file briefs pertaining to a Notice of Supplemental Authority filed by defendant. *See* Def.'s Mot. Leave Respond Substantive Briefs re: Supp. Auth. (Nov. 20, 2015), ECF No. 130; Pl.'s Mot. Leave Reply Def. and Def.-Int.'s Resp. re: Notice Supp. Auth. (Dec. 4, 2015), ECF No. 131. Additionally, Koehler moves for leave to reply to defendant's comments on defendant-intervenor's notice of supplemental authority. Pl.'s Mot. Leave to Reply to Def.'s Comments re: Def.-Int.'s Notice Supp. Auth. (Apr. 14, 2016), ECF No. 141. The court's judgment grants the motions for additional briefing and deems the respective briefs to be filed. The discussions in these briefs did not cause the court to alter its conclusion to affirm the Remand Redetermination upon the reasoning set forth in this Opinion.

Dated: July 6, 2016
New York, N.Y.

/s/ *Timothy C. Stanceu*
Timothy C. Stanceu
Chief Judge