Slip Op. 19–72

BIO-LAB, Inc. et al., Plaintiffs, v. United States, Defendant, and Juancheng Kangtai Chemical Co., Ltd. and Heze Huayi Chemical Co., Ltd., Defendant-Intervenors.

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

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination.]

Dated: June 13, 2019

James R. Cannon, Jr., Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for plaintiffs, Bio-Lab, Inc., Occidental Chemical Corporation, and Clearon Corporation. With him on the brief were *Jonathan M. Zielinski* and *Ulrika K. Swanson*.

Sonia M. Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Patricia M. McCarthy*, Assistant Director, *Jeanne E. Davidson*, Director, and *Joseph H. Hunt*, Assistant Attorney General. Of Counsel on the brief was *Catherine Miller*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, DC, argued for Defendant-Intervenors, Juancheng Kangtai Chemical Co., Ltd. and Heze Huayi Chemical Co., Ltd. With him on the brief were *J. Kevin Horgan* and *Alexandra H. Salzman*.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce" or "the Department") final determination in the 2015–2016 administrative review of the antidumping duty ("ADD") order on chlorinated isocyanurates from the People's Republic of China ("China" or "the PRC"). *See Chlorinated Isocyanurates From [the PRC]*, 83 Fed. Reg. 5,243 (Dep't Commerce Feb. 6, 2018) (final results of [ADD] administrative review; 2015–2016) ("*Final Results*") and accompanying Decision Mem. for the Final Results of [ADD] Administrative Review: Chlorinated Isocyanurates from China; 2015–2016, A-570–898, Jan. 29, 2018, ECF No. 25–5 ("Final Decision Memo"). Plaintiffs Bio-Lab, Inc., Clearon Corporation, and Occidental Chemi-

cal Corporation (collectively "Plaintiffs")[1] move for judgment on the agency record, challenging Commerce's determination to treat respondent Juancheng Kangtai Chemical Co., Ltd.'s ("Kangtai") sales to Customer X as "export price" sales and Commerce's use of respondent Heze Huayi Chemical Co., Ltd.'s ("Heze Huayi") labor usage rates in its calculation of normal value.[2] *See* Pls.' Rule 56.2 Mot. J. Administrative R., July 24, 2018, ECF No. 29; Mem. Supp. Pls.' Mot. J. Administrative R. at 6–21, July 24, 2018, ECF No. 29–1 ("Pls.' Br."); *see also* Tariff Act of 1930 § 772, 19 U.S.C. § 1677a (2012).[3] For the reasons that follow, the court remands Commerce's determination to treat Kangtai's sales to Customer X as export price sales and sustains Commerce's determination to use Heze Huayi's labor usage rates in its calculation of normal value.

BACKGROUND

On August 11, 2016, Commerce announced the initiation of its administrative review of the ADD order on chlorinated isocyanurates from the PRC, for which the period of review would be June 1, 2015 through May 31, 2016.[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 53,121, 53,122 (Dep't Commerce Aug. 11, 2016). Respondents Heze Huayi and Kangtai submitted separate rate certifications[5] and timely responses to Commerce's ADD questionnaires. *See Chlorinated Isocyanurates from [the PRC]*, 82 Fed. Reg. 35,183 (Dep't Commerce July 28, 2017) (preliminary results of [ADD] administrative review; 2015–2016)

[1] Bio-lab, Inc., Clearon Corporation, and Occidental Chemical Corp. were petitioners in the administrative proceeding below. For purposes of this opinion, where referring to the administrative proceeding below, these parties are referred to as "Petitioners."

[2] Customer X is [[ ]].

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

[4] Each year during the anniversary month of the publication of an ADD order, interested parties may request that Commerce conduct an administrative review of that order. *See* 19 C.F.R. § 351.213; *see also* 19 U.S.C. § 1677(9) (defining interested parties).

[5] For non-market economy ("NME") countries, Commerce employs a rebuttable presumption that all companies within an NME are subject to government control and should therefore be assigned a single antidumping rate. *See* Decision Mem. for the Prelim. Results of the 2015–2016 [ADD] Administrative Review: Chlorinated Isocyanurates from [the PRC] at 3–4, A-570–898, PD 108, bar code 3588004–01 (June 30, 2017) ("Prelim. Decision Memo"). Commerce treats the PRC as an NME country in all ADD proceedings. *See id.* at 17. Commerce's policy is to assign all exporters of subject merchandise in the NME country a single rate unless the exporter can prove its independence from the government. To do so, Commerce requires entities who were assigned a separate rate in a previous segment of the proceeding to submit a separate-rate certification stating that they continue to meet the criteria for obtaining a separate rate. Here, Heze Huayi and Kangtai previously demonstrated their eligibility for a separate rate and, accordingly, submitted separate rate certifications to Commerce. *See id.* at 4.

("*Prelim. Results*") and accompanying Decision Mem. for the Prelim. Results of the 2015–2016 [ADD] Administrative Review: Chlorinated Isocyanurates from [the PRC], A-570–898, PD 108, bar code 3588004–01 (June 30, 2017) ("Prelim. Decision Memo").[6] Commerce determined that Heze Huayi and Kangtai were both eligible for separate rates, and that both had made sales in the United States at prices below normal value. *Prelim. Results*, 82 Fed. Reg. at 35,183; *see also Final Results*, 83 Fed. Reg. at 5,244 (unchanged).

Two of Commerce's findings in the final determination are relevant to the present action. First, in calculating Kangtai's dumping margin, Commerce relied on Kangtai's sales to Customer X, a purchaser operating in a third country, as export price sales, concluding that the sales were the first to an unaffiliated party outside the United States. *See* Final Decision Memo at 4. Commerce noted that it did so because Kangtai, in responding to Commerce's questions regarding Customer X, stated that it was not affiliated with Customer X pursuant to 19 U.S.C. § 1677(33) and provided record evidence supporting that position. *See id.* Second, in calculating Heze Huayi's dumping margin, Commerce opted to use Heze Huayi's reported labor usage rates as FOPs to calculate normal value, despite the Petitioners' claims that the rates had changed unreasonably from the prior two reviews. Final Decision Memo at 6–7.

Plaintiffs commenced the present action on March 7, 2018. *See* Summons, Mar. 7, 2018, ECF No. 1; Compl., Mar. 8, 2018, ECF No. 12. Plaintiffs challenge both determinations, contending they are unsupported by substantial evidence and not in accordance with law. *See* Pls.' Br. at 5–6. The court held oral argument on May 20, 2019. *See* Partially Closed Oral Arg., May 20, 2019, ECF No. 56 ("Oral Arg.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an ADD order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

[6] On April 23, 2018, Defendant submitted an index to the public administrative records, which can be found at ECF No. 25–2. *See* Administrative Record, Apr. 23, 2018, ECF No. 25–2. All further references to documents from the administrative record are identified by the numbers assigned by Commerce in these administrative records.

DISCUSSION

I. Commerce's Reliance on Kangtai's Sales to Customer X as Export Price Sales

Plaintiffs contend that Commerce's reliance on Kangtai's sales to Customer X, which operates in a third country, as a basis for export price is unsupported by substantial evidence because the parties are affiliated and Kangtai prevented Commerce from verifying the parties' relationship.[7] Pls.' Br. at 8–17. Defendant responds that Commerce properly used Kangtai's sales to Customer X as export price sales because Commerce found Kangtai's responses to its questionnaires and supplemental questionnaire sufficient, and Commerce was able to verify Kangtai's statement and supporting documentation that it was unaffiliated with Customer X. Def.'s Br. at 6. For the reasons that follow, Commerce's decision is not supported by substantial evidence.

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

A purchaser is affiliated with the producer if, *inter alia*, the producer controls the purchaser. *See* 19 U.S.C. § 1677(33)(G). The statute provides that one party controls the other if it "is legally or operationally in a position to exercise restraint or direction over the other" party. *Id.* Commerce has found control where a principal-agent relationship exists between the producer and purchaser. *See, e.g.*, *Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan*, 62 Fed. Reg. 24,394, 24,403 (Dep't Commerce May 5, 1997) (notice of

[7] Plaintiffs argue both that Commerce's determination is unsupported by substantial evidence and that it is not in accordance with law. *See* Pls.' Br. at 8. The substance of Plaintiffs' arguments, however, contend that Commerce's determination is unsupported by substantial evidence rather than contrary to law. *See id.* at 8–13.

final determination of sales at less than fair value) ("*Engineered Process Gas Turbo-Compressor Systems from Japan*"). In determining whether a principal-agent relationship exists, Commerce maintains that no bright line test exists, *id.*, and will consider "the totality of the circumstances surrounding the parties involved," Final Decision Memo at 5. Commerce's analysis focuses on "whether it is agreed that the agent is to act primarily for the benefit of the principal, not for itself." *Engineered Process Gas Turbo-Compressor Systems from Japan*, 62 Fed. Reg. at 24,403. Commerce considers a variety of factors, including (1) the foreign producer's role in negotiating prices with the downstream U.S. customers, (2) the extent to which the foreign producer interacts with such downstream customers, (3) the extent to which the purchaser maintains inventory of the product, (4) whether the purchaser takes title to shipments and accepts the risk of loss, (5) the extent to which the purchaser further processes the goods or adds value, (6) the methods of marketing a product by the producer to the U.S. customer in the pre-sale period, and (7) whether identification of the producer on the sales documentation implies an agency relationship during the transactions. *See Steel Threaded Rod from India*, 79 Fed. Reg. 9,164 (Dep't Commerce Feb. 18, 2014) (preliminary determination of sales at less than fair value, affirmative preliminary determination of critical circumstances, in part, and postponement of final determination) and accompanying Decision Mem. for the Prelim. Determination of the [ADD] Investigation of Steel Threaded Rod from India at 14–15, A-533–855, (Feb. 10, 2014), *available at* https://enforcement.trade.gov/frn/summary/india/2014–03483–1.pdf (last visited June 7, 2019) ("*Steel Threaded Rod from India*").

Commerce fails to support with substantial evidence its determination that Kangtai and Customer X are unaffiliated within the meaning of 19 USC § 1677a. Commerce bases its determination that Kangtai and Customer X are unaffiliated upon Kangtai's statements that it was not affiliated with Customer X and on "record evidence supporting this statement."[8] Final Decision Memo at 4. *Id.* Although the two entities may lack a formal corporate affiliation, Commerce's determination that the two are not affiliated through a principal-agent relationship is not supported by substantial evidence.

Of the seven factors mentioned in *Steel Threaded Rod from India*, Commerce relies on the foreign producer's role in negotiating and

[8] It is reasonably discernible that Commerce is referring to Kangtai's statement that Customer X is an unaffiliated customer, and that Kangtai company officials provided Commerce with documentation from the "Hong Kong Integrated Companies Registry Information System" that identified [[

]]. *See* Kangtai Verification Report at 2, CD 135, bar code 3642610–01 (Nov. 17, 2017) ("Kangtai Verification Report").

whether the purchaser takes title to the goods. *See* Final Decision Memo at 5. Commerce invokes Kangtai's statement that it played no role in negotiations between Customer X and Customer X's U.S. customers, and notes that its examination of Kangtai's sales traces and accounting and sales records identified Customer X as the importer of record that took title to the products upon importation and paid Kangtai for these sales. *Id.*; *see also* Kangtai Suppl. Sections A, C, & D Resp. at 2, CD 58–61, bar code 3563243–01 (Apr. 14, 2017). Commerce, however, concedes that Customer X never maintained an inventory of the goods, did not further process the goods, and that Kangtai shipped directly to U.S. customers, with the bill of lading identifying Kangtai as the supplier. Final Decision Memo at 5; Kangtai's Section A Resp. at Ex. A-8, CD 8–10, bar code 3523067–01 (Nov. 16, 2016). Moreover, the record shows that Kangtai's sales representatives attended trade shows to identify U.S. customers, that Kangtai "sets the prices of the merchandise under consideration through direct negotiation with its U.S. customers," and that its U.S. customers "arrive at a mutual agreement on the price and then . . . sign a sales contract or place orders with Kangtai." Kangtai's Section A Resp. at 7, 15, CD 8–10, bar code 3523067–01 (Nov. 16, 2016). Commerce has not adequately explained its determination that the two entities are unaffiliated in light of such evidence under a totality of the circumstances test. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (explaining that substantial evidence "must take into account whatever in the record fairly detracts from its weight").

Commerce has also failed to adequately analyze the relevant factors or the record evidence impacting the inquiry of whether a principal-agent relationship exists. Indeed, Commerce provides no analysis of whether identification of the producer on the sales documentation implies an agency relationship during the transactions. *See Steel Threaded Rod from India* at 14–15; *see also* Final Decision Memo at 5. At oral argument, Defendant averred that Commerce addressed whether the identification of the producer on the sales documentation implied an agency relationship, Oral Arg. at 00:23:40–00:24:18, noting that in its determination Commerce stated that "our examination during verification of Kangtai's sales traces and accounting and sales records all identified Customer X as the importer of record." Final Decision Memo at 5. This statement does not substitute for an analysis of whether the sales documentation reveals an agency relationship. Further, although Customer X takes title, the record contains no evidence concerning when Customer X takes title or when title is transferred to its downstream customers,

nor does it address the details of payments to and from Customer X.[9] Commerce also neglects to analyze the methods of marketing, the sixth factor listed above. *See* Final Decision Memo at 3–5.[10] This factor seems highly relevant here, given that Commerce acknowledges that Kangtai attends trade shows in the United States but seems not to reflect upon the fact that Kangtai finds and interacts with—and presumably markets to—potential U.S. customers at these trade shows. *See* Kangtai's Section A Resp. at 15, CD 8–10, bar code 3523067–01 (Nov. 16, 2016); *see also* Kangtai Verification Report at 2, CD 135, bar code 3642610–01 (Nov. 17, 2017) ("Kangtai Verification Report").[11] Kangtai asserts that Customer X is merely "its customer in the normal business of operation" and that Kangtai played no role in negotiating with Customer X's U.S. customers, *see* Kangtai Suppl. Sections A, C, & D Resp. at 2, CD 58–61, bar code 3563243–01 (Apr. 14, 2017), but Commerce seems to take the statement at face value

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[9] Petitioners in the proceeding below requested that Commerce ask Kangtai for some of this information, but Commerce elected not to do so. *See* Petitioners' Comments on Kangtai's Sections A, C, & D Resps. at 2–3, CD 44, bar code 3549988–01 (Mar. 9, 2017) (asking whether Customer X takes title to the merchandise, and whether Customer X pays Kangtai for the merchandise before [[ ]]). Examples of sales contracts submitted during verification include payment terms requiring payment from Customer X within one month of receipt of goods by Customer X's customer. *See* EP Sales Spot-Selected Package [attached as Ex. VE-11 to Kangtai Verification Report] at 2, CD 135, bar code 3626629–12 (Nov. 17, 2017). Commerce provides no analysis, however, of such payment terms or the payment details related to transactions between Customer X and its customers.

[10] At oral argument, Defendant noted that Commerce need not examine the same factors in each case, or all the factors it may have used in the past but averred that Commerce considered all the factors in this case. Oral Arg. at 00:16:35–00:17:25. Defendant argued that Commerce analyzed the means of marketing, Oral Arg. at 00:23:15–00:23:35, noting Commerce's statement that "our examination of the [sic] Kangtai's financial statements, sales contract, bill of lading, and payment records during verification, confirmed that Kangtai played no role in communicating with the ultimate downstream customers of Customer X." Final Decision Memo at 5. The inference that Kangtai played no role in marketing the goods is unreasonable as it fails to consider Kangtai's own statement that it attends trade shows and the record evidence demonstrating that it marketed to and negotiated with customers at trade shows. See Kangtai Verification Report at 2 (revealing that Kangtai met Customer X at [[ ]]. Commerce must address this evidence. Although analysis of a limited number of discrete factors may clearly establish the existence or the lack of a principal-agent relationship in some cases, Commerce must nonetheless support each determination with substantial evidence on the record of each case. 19 U.S.C. § 1516a(b)(1)(B)(i). Here, the record evidence analyzed by Commerce does not reasonably support its determination.

[11] Indeed, Kangtai met Customer X at[[ ]] and began selling subject merchandise to Customer X[[ ]]. *See* Kangtai Verification Report at 2.

despite record evidence potentially detracting from this conclusion.[12] Ultimately, it is undisputed that Customer X proved responsible for more than [[ ]] of Kangtai's U.S. sales during the period of review. *See* SAS Data File [attached as Ex. SQ1–1 to] Kangtai's Suppl. Sections A, C, & D Resp., CD 62, bar code 3563243–01 (Apr. 14, 2017). The record is silent regarding the events leading up to Kangtai securing such a commitment from Customer X, and given that the two [[ ]], it is conceivable that Kangtai made efforts to market to those same customers who in the end purchased Kangtai's goods through Customer X. Such insight would seemingly prove critical to Commerce's agency analysis, but the court is left to speculate. Although it is not this court's role weigh the evidence, such unaddressed evidence on the record exposes Commerce's failure to analyze this factor as problematic.

In sum, Commerce presents no analysis of factors that seem critical under the circumstances, or of record evidence detracting from its determination.[13] Without more evidence supporting its determination, or an explanation after at least considering all the relevant factors, Commerce's conclusion that Customer X and Kangtai are unaffiliated is unreasonable.[14]

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[12] Specifically, Commerce provides no analysis regarding whether any of Customer X's customers were [[ ]], and thus could have received marketing from or negotiated with Kangtai. The fact that [[ ]], and that Customer X is a trader of pool chemicals, *see* Huaidong Aff. [attached as Ex. A-4 to Kangtai's Section A Resp.] at 1, CD 8–10, bar code 3523067–01 (Nov. 4, 2016), both suggest that Customer X sought to find U.S. customers, much like Kangtai. These facts reasonably lead to an inference that Kangtai could have marketed to companies that ultimately purchased from Customer X. Commerce must address such record evidence to support its determination by substantial evidence.

[13] In its Final Decision Memo, Commerce seems to acknowledge that further inquiry is needed to properly address the potential existence of a principal-agent relationship. After asserting that Petitioners first alleged a principal-agent relationship a few days before verification, Commerce states that "[g]iven the gravity of the petitioners' allegation, however, where Kangtai is selected as a mandatory respondent in future reviews, Commerce intends to further examine potential principal-agent relationships." Final Decision Memo at 5. This statement's implication is that Commerce would have conducted a more thorough investigation had it focused on the issue earlier. Customer X's potential affiliation with Kangtai was properly before Commerce, and Commerce's determination must be supported by substantial evidence.

[14] Plaintiffs argue that in reaching its determination, Commerce should have applied adverse facts available pursuant to 19 U.S.C. § 1677e and found affiliation because "Kangtai prevented verification of its submitted data." Pls.' Br. at 15–17. Specifically, Plaintiffs contend that "[i]t was 'necessary' for Commerce to determine the relationship between Kangtai and [Customer X] because . . . that relationship dictates which sales and what expenses should be used in Commerce's dumping margin calculation." *Id.* at 16. The implication is that Commerce was missing necessary information, specifically, evidence revealing the nature of the relationship between Kangtai and Customer X, and that Commerce should have applied an adverse inference in selecting from available information to determine export price, given Kangtai's purported lack of cooperation in Commerce's verification. *See* 19 U.S.C. § 1677e. The court does not reach the argument because on the current record, Commerce has not supported its determination by substantial evidence that

Defendant laments that "at no point [did Petitioners] allege . . . a principal-agent relationship between Kangtai and Customer X" in the proceeding below. Def.'s Br. at 9. Commerce noted, by contrast, that "[P]etitioners first alleged a principal-agent relationship . . . a few days before verification," and reasoned that, consequently, "Commerce was not in a position to seek additional information from Kangtai, nor Customer X, concerning this issue." Final Decision Memo at 4. During oral argument, counsel for Defendant averred that Defendant was not arguing that Plaintiffs failed to exhaust their administrative remedies. Oral Arg. at 00:25:40–00:26:05; *see also* 28 U.S.C. § 2637(d). It is thus unclear for what reason Commerce and Defendant characterize the timing of Petitioners' principal-agent allegation. Nevertheless, to the extent that Defendant describes the timing in an effort to excuse Commerce from conducting a more thorough investigation, Defendant's argument falls short. Petitioners first raised the issue before Commerce in their March 9, 2017 deficiency comments, six months prior to verification. *See* Petitioners' Comments on Kantai's Sections A, C, & D Resps. at 2–3, CD 44, bar code 3549988–01 (Mar. 9, 2017). There, Petitioners requested that Commerce ask Kangtai several follow-up questions probing the nature of Kangtai's relationship with Customer X. The questions speak directly to the possibility of a principal-agent relationship, inquiring whether Customer X "hold[s] itself out or otherwise function[s] as a sales agent of Kangtai." *Id.* at 3. The submission also contained questions directed specifically at Commerce's principal-agent factors. For example, Petitioners wanted Commerce to inquire about Customer X's role, whether Customer X [[

]], whether Customer X took title to the merchandise and purchased and stored the merchandise in inventory, when Kangtai receives payment for the merchandise from Customer X, and the extent to which Customer X negotiates sales terms with its

Kangtai and Customer X were unaffiliated. Nonetheless, it seems clear on the current record that an adverse inference pursuant to 19 U.S.C. § 1677e(b) would be unwarranted, considering that Kangtai supplied the information requested by Commerce. *See* 19 U.S.C. § 1677e(b) (providing that Commerce may apply an adverse inference upon a finding that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information"); *see also* Prelim. Decision Memo at 2 (stating that Kangtai responded in a timely manner to Commerce's ADD questionnaires). Application of an adverse inference is a two-step process: (1) Commerce must find that necessary information is missing from the record, and (2) Commerce must find that an interested party failed to cooperate. *See* 19 U.S.C. § 1677e. Here, Commerce found neither of these elements. On remand, however, the possibility remains that Commerce could find that necessary information is missing from the record pursuant to 19 U.S.C. § 1677e(a), in which case Commerce could be within its statutory authority to apply "facts otherwise available," and then determine whether an adverse inference is warranted, pursuant to 19 U.S.C. § 1677e(b), based on the cooperation of the parties.

U.S. customers prior to finalizing sales terms with Kangtai. *See id.* at 2–3. It was thus clear that Kangtai and Customer X's potential affiliation was at issue.

Defendant attempts to draw a distinction between making an allegation to Commerce versus proposing questions for a supplemental questionnaire, implying that the former is necessary for Commerce to investigate the matter. Oral Arg. at 00:34:11–00:35:00. Such a distinction has no basis in statute or regulation. To the contrary, the statutory language requires a determination of non-affiliation, supported by substantial evidence to determine export price under 1677a(a). *See* 19 U.S.C. § 1677a(a) (defining "export price" as "the price at which the subject merchandise is first sold . . . outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States"); *see also* 19 U.S.C. § 1516a(b)(1)(B)(i) (Commerce's findings must be supported by substantial evidence on the record). Accordingly, Defendant's arguments regarding the timing of the purportedly necessary allegation are unpersuasive.

II. Commerce's Decision to Use Heze Huayi's Labor Usage Rates

Plaintiff contends that Commerce's decision to accept Heze Huayi's labor usage rates for the period of review is unsupported by substantial evidence and unlawful because the data is "unreasonable and unrealistic" compared to labor usage rates verified by Commerce for the 2013–2014 review and rates used in the 2014–2015 review, and because Commerce's practice is to reject such data. Pls.' Br. at 17. Defendant responds that Commerce's decision is supported by substantial evidence and in accordance with law because Heze Huayi complied with all requests for labor data, Commerce reasonably relied on Heze Huayi's data, and Commerce did not deviate from its practice in this case. Def.'s Br. at 13–15. For the reasons that follow, Commerce's decision to use Heze Huayi's labor usage rates is supported by substantial evidence and in accordance with law.

As discussed, Commerce determines a respondent's dumping margin by calculating the difference between normal value and export price (or constructed export price) of the merchandise. 19 U.S.C. § 1673. In cases involving non-market economies ("NME"), Commerce determines the normal value of the merchandise based on the "factors of production utilized in producing the merchandise" if the merchandise is exported from an NME, and the information does not permit calculation of normal value using home-market prices, third-country prices, or constructed value pursuant to 19 U.S.C. § 1677b(e). *See* 19 U.S.C. § 1677b(c). Commerce bases normal value on FOPs in NME

cases "because the presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies." Prelim. Decision Memo at 17. In NME cases, Commerce uses surrogate values to value the FOPs.[15] *See* 19 U.S.C. § 1677b(c). To determine normal value, Commerce multiplies the respondents' reported per-unit factor quantities by the chosen surrogate values. *See* Prelim. Decision Memo at 17. The hours of labor required to produce the subject merchandise is one FOP identified by statute. 19 U.S.C. § 1677b(c)(3)(A).

Here, Commerce's use of Heze Huayi's labor usage rates in its determination of the value of Heze Huayi's normal value is supported by substantial evidence. Plaintiffs do not dispute that Heze Huayi provided labor schedules identifying the number of workers and working days by production plant, labor cost calculation worksheets tied to its salary payable ledger, copies of the ledger for the sample months requested by Commerce, and complete payroll sheets. *See* Direct & Indirect Labor Schedule [attached as Ex. SQ1–24 to Heze Huayi Suppl. Sections A, C, & D Questionnaire Resp.], CD 45–48, bar code 3553345–03 (Mar. 20, 2017); Labor Cost Calculation in Normal Course of Accounting [attached as Ex. SQ1–25 to Heze Huayi Suppl. Sections A, C, & D Questionnaire Resp.], CD 45–48, bar code 3553345–03 (Mar. 20, 2017); *see also* Reply Br. of [Pls.] at 10–13, Nov. 20, 2018, ECF No. 37. Commerce found no fault with respect to Heze Huayi's reported labor usage rates despite Plaintiffs' contention that Heze Huayi's labor rates are "inconsistent with its previously submitted labor usage rates" and are thus unreasonable. Pls.' Br. at 17. That labor usage diverged from previous reviews does not make the data "unreasonable and unrealistic."[16] It is reasonably discernible

[15] Commerce uses "the best available information" from a market economy considered appropriate to value FOPs. 19 U.S.C. § 1677b(c)(1). Commerce selects information, to the extent practicable, that is publicly available, product specific, tax and import duty exclusive, contemporaneous with the period of review, and representative of a broad market average. *Qingdao Sea–Line Trading Co. v. United States, 766 F.3d 1378, 1386 (Fed. Cir. 2014)*; *see also* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited June 7, 2019) ("*Policy Bulletin 04.1*"); *Certain Frozen & Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 Fed. Reg. 42,672 (Dep't Commerce July 16, 2004) (notice of prelim. determination of sales at less than fair value, negative preliminary determination of critical circumstances and postponement of final determination).

[16] Plaintiffs also argue that Commerce's determination is contrary to law because Commerce failed "to address the record evidence and arguments demonstrating that Heze Huayi's reported data are unreasonable." Pls.' Br. at 20. The argument cannot withstand scrutiny. Plaintiffs did not raise a concern regarding the adequacy of Heze Huayi's reported data through the submission of deficiency comments. To the extent that Plaintiffs claim that "inconsistent usage data from the previous segments of the proceeding" detracts from Commerce's determination, however, it is reasonably discernible that Commerce found that

that Commerce concluded that Heze Huayi improved its labor usage from the past reviews. Commerce noted that nothing in the record supports the allegation that Heze Huayi's production process is "mature and well-established," as Petitioners argued in the proceeding below.[17] Final Decision Memo at 6. Moreover, although Commerce did not verify Huayi's labor usage data in this review,[18] it verified that of Kangtai, a direct competitor to Heze Huayi that also reported improved labor usage.[19] See Kangtai Verification Report at 3, 8. Commerce's verification revealed that Kangtai recently upgraded its production equipment to increase efficiency and reduce material waste. *Id.* Further, it revealed that Kangtai continues to upgrade its production process in ways that would conceivably drive more efficient labor

Heze Huayi's production process improved. *Id.* Commerce specifically noted that Petitioners alleged that Heze Huayi's production process was "mature and well-established," but Commerce concluded that the record lacked evidence supporting Petitioners' assertion. Final Decision Memo at 6.

[17] Plaintiffs argue that, "despite no changes to Heze Huayi's method of producing chlorinated isos," Heze Huayi's labor usage rates changed and are "unreasonable and unrealistic" compared to its rates in the previous two reviews. Pls.' Br. at 17–19. First, Plaintiffs cite nothing in the record supporting their contention that Heze Huayi made no changes to its production methods. *See id.* at 18. To the contrary, record evidence indicates that, if anything, Heze Huayi likely made improvements to its production methods leading up to the current period of review, as did its industry competitor, Kangtai. *See* Kangtai Verification Report at 3, 8.

[18] Plaintiffs' argument seems, in part, to be that Commerce should have verified Heze Huayi's labor usage data. *See* Reply Br. of [Pls.] at 11, Nov. 20, 2018, ECF No. 37 ("Commerce opted not to verify Heze Huayi, or its data."). Commerce was under no obligation to verify the data, however, because Heze Huayi's labor usage rates were verified in the 2013–2014 review. *See* 19 U.S.C. § 1677m(i)(3) (stating that Commerce shall verify information relied upon in a final determination in an administrative review where verification is timely requested and no verification was made under the two immediately preceding reviews). If Plaintiffs felt the data submitted by Heze Huayi was deficient, they could have filed deficiency comments asking Commerce to issue follow-up questions to Heze Huayi and examine the labor usage rates in greater detail. *See* 19 U.S.C. § 1677m(g) (providing that information submitted to Commerce during a proceeding is subject to comment by other parties); *see also* 19 U.S.C. § 1677m(d) (explaining the required procedure for when a party submits information deemed deficient). They did not do so, *see* Final Decision Memo at 7, and the court will not reweigh Commerce's verification decisions nor the validity of Heze Huayi's labor usage data, a factual matter decided by the agency. *See Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995) (explaining that the courts are "ill-suited" to be "routinely second-guessing the Secretary's decisions regarding whether to conduct verification in particular cases" as doing so "could be quite disruptive of Commerce's effort to establish enforcement priorities").

[19] Section 1677m(i) nonetheless provides for verification where "good cause for verification is shown," but nothing in the record indicates that Commerce made a finding of good cause, nor did the Plaintiffs pursue an argument that good cause existed before this court. Oral Arg. at 01:24:35–01:25:28. Accordingly, the court will not second-guess Commerce's verification decisions in this case. *See Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995) (holding that Commerce's determination that the Secretary has "substantial discretion" in deciding whether good cause for verification is shown is a reasonable interpretation of the statute); *see also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (noting that practical concerns regarding the unsuitability of judicial review form the basis for the principle of administrative law that courts generally will defer to the agency's procedures it adopts for implementing the statute it is charged with administering).

usage.[20] *Id.* at 8. It is reasonably discernible that Commerce, in using Heze Huayi's data, concluded that Heze Huayi made similar upgrades for the current period of review. Such record evidence provides a rational explanation for the divergence, and Commerce's decision to use Heze Huayi's rates was therefore reasonable. [21] The court will not reweigh the evidence. *See Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1376 (Fed. Cir. 2015) (explaining that the court's task is not to reweigh the evidence).

Plaintiffs argue that Commerce's decision to use Heze Huayi's labor usage data is unlawful because it runs contrary to Commerce's practice. Pls.' Br. at 20. Plaintiffs invoke *Fresh Garlic from [the PRC]* as an example of a determination in which Commerce rejected information that appeared to be unrealistic in light of other information on the record. *Id*. (citing *Fresh Garlic from [the PRC]*, 70 Fed. Reg. 34,082 (Dep't Commerce June 13, 2005) (final results of [ADD] administrative review) and accompanying Issues and Decision Mem. for the Administrative Review of the [ADD] Order on Fresh Garlic from [the PRC], A-570–831, (June 13, 2005), *available at* https://enforcement.trade.gov/frn/summary/prc/E5–3048–1.pdf (last visited June 7, 2019) ("*Fresh Garlic from the PRC*")). Plaintiffs' comparison to *Fresh Garlic from the PRC* misses the mark. There, Commerce applied partial adverse facts available because it found that two respondents "reported untimely, contradictory, and confusing information with respect to factors pertaining to herbicide usage, and with respect to growing and harvesting FOPs." *Fresh Garlic from the PRC* at 59. Commerce specifically noted that these two respondents reported garlic yields that appeared unrealistic in light of their own reported factor input levels, information provided by their own experts, and the growing and harvesting experience of the other respondents. *Id.* Such factors are not present here. As discussed, it is undisputed that Heze Huayi complied with Commerce's requests for information by providing its direct and indirect labor schedule for the period of

[20] Specifically, it upgraded its equipment by [[ ]]. *See* Kangtai Verification Report at 8.

[21] Plaintiffs argue in their reply brief that Kangtai's production flowchart is [[ ]] since the 2010–2011 review period, that Heze Huayi's production flowchart is [[ ]] and that the [[ ]] makes it improbable that any change would result in Heze Huayi's labor usage rates. Reply Br. of [Pls.] at 12, Nov. 20, 2018, ECF No. 37. This argument falls short given that Kangtai made changes to its production process that Commerce verified, *see* Kangtai Verification Report at 3, 8, and yet its production flowchart was [[ ]] from the 2010–2011 review period. *See* Petitioners' Case Br. at 11, CD 136, bar code 3646203–01 (Nov. 29, 2017) (citing Kangtai Production Flowchart [attached as Ex. D-1 to Kangtai Sections C & D Resp.], CD 16, bar code 3528720–02 (Dec. 9, 2016)). It is therefore perfectly conceivable that Heze Huayi could have made changes to its production methods that did not appear in its flowchart yet resulted in a change to its labor usage rates.

review, which identified the number of workers and working days by production plant, a labor cost calculation worksheet tied to its salary payable ledger, including copies of the ledger for sample periods requested by Commerce, and its complete payroll sheet for December 2015. Final Decision Memo at 7; *see also* Direct & Indirect Labor Schedule [attached as Ex. SQ1–24 to Heze Huayi Suppl. Sections A, C, & D Questionnaire Resp.], CD 45–48, bar code 3553345–03 (Mar. 20, 2017); Labor Cost Calculation in Normal Course of Accounting [attached as Ex. SQ1–25 to Heze Huayi Suppl. Sections A, C, & D Questionnaire Resp.], CD 45–48, bar code 3553345–03 (Mar. 20, 2017). Commerce made no finding that Heze Huayi's responses were untimely, inconsistent with other record information, or confusing, unlike the responses in *Fresh Garlic from the PRC*. To the contrary, Heze Huayi complied with Commerce's requests, and Commerce found no discrepancies with respect to Heze Huayi's responses to the original and supplemental questionnaires. Moreover, unlike *Fresh Garlic from the PRC*, where the respondents' yields appeared unrealistic in light of other respondents' experiences, Heze Huayi's competitor—Kangtai—also showed significantly improved labor usage rates. *See* Comparison of Kangtai's Usage Rates from 10th to 11th Administrative Reviews [attached as Ex. 5 to Petitioners' Dec. 21, 2016 Fact Submission], CD 40, bar code 3531469–02 (Dec. 21, 2016). Accordingly, Commerce's determination is in accordance with law.

CONCLUSION

Commerce's determination to use Kangtai's sales to Customer X as export price sales is not supported by substantial evidence. Commerce's determination to use Heze Huayi's reported labor usage rates in its calculation of Heze Huayi's normal value is supported by substantial evidence and in accordance with law. Therefore, in accordance with the foregoing, it is

ORDERED that this action is remanded to Commerce for reconsideration or additional explanation with respect to its decision to use Kangtai's sales to Customer X as export price sales; and it is further

ORDERED that Commerce's *Final Results* are sustained with respect to Commerce's decision to use Heze Huayi's reported labor usage rates in its calculation of Heze Huayi's normal value; and it is further

ORDERED that Commerce shall file its remand results in 90 days; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments; and it is further

ORDERED that the parties shall have 15 days thereafter to file their replies to comments on the remand determination.

Dated: June 12, 2019
New York, New York

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

Slip Op. 19–76

AMERICAN ALLIANCE FOR HARDWOOD PLYWOOD et al., Plaintiffs and Consolidated Plaintiffs, v. UNITED STATES AND UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants, and COALITION FOR FAIR TRADE OF HARDWOOD PLYWOOD, Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00013
PUBLIC VERSION

[Sustaining the U.S. International Trade Commission's final affirmative injury determination in its antidumping and countervailing duty investigations of hardwood plywood from the People's Republic of China.]

Dated: June 19, 2019

Jeffrey Sheldon Grimson and *James Corscaden Beaty*, Mowry & Grimson, PLLC, of Washington D.C., argued for plaintiffs American Alliance for Hardwood Plywood, Far East American, Inc., Northwest Hardwoods, Inc., Concannon Lumber and Plywood (Concannon Corp. d/b/a Concannon Lumber Company), American Pacific Plywood, Inc., Canusa Wood Products Ltd., Fabuwood Cabinetry Corp., Hardwoods Specialty Products USLP, Holland Southwest International Inc., Liberty Woods International, Inc., McCorry & Co. Ltd., MJB Wood Group, Inc., Patriot Timber Products, Inc., Richmond International Forest Products, LLC, Taraca Pacific, Inc., USPly Trading Co. (USPly LLC) and Wood Brokerage International d/b/a Red Tide International, LLC. With them on the brief were *Jill A. Cramer* and *Yuzhe PengLing*.

Stephen William Brophy, Husch Blackwell LLP, of Washington D.C., argued for consolidated plaintiffs Zhejiang Dehua TB Import & Export Co., Ltd. et al. With him on the brief was *Jeffrey S. Neeley*.

Karl Stuart von Schriltz, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, and *Andrea C. Casson*, Assistant General Counsel for Litigation, argued for defendant. With them on the brief was *Dominic L. Bianchi*, General Counsel.

Timothy C. Brightbill, Wiley Rein, LLP, of Washington D.C., argued for defendant-intervenor, the Coalition for Fair Trade of Hardwood Plywood. With him on the brief was *Stephanie Manaker Bell*.

OPINION AND ORDER

Kelly, Judge:

Before the court are several motions for judgment on the agency record challenging various aspects of the U.S. International Trade Commission's ("ITC" or "Commission") final affirmative injury deter-

mination in its antidumping and countervailing duty ("ADD" and "CVD") investigations of hardwood plywood ("HWPW") from the People's Republic of China ("PRC"). *See [HWPW] from China*, 82 Fed. Reg. 61,325 (Int'l Trade Comm'n Dec. 27, 2017); Mem. P. & A. Supp. Rule 56.2 Mot. J. Agency R. of American Alliance for Hardwood Plywood et al., Sept. 17, 2018, ECF No. 61 ("AAHP's Br."); Mem. Supp. Rule 56.2 Mot. J. Agency R. of Consol. Pls. Zhejiang Dehua TB Import & Export Co., Ltd. et al., Sept. 17, 2018, ECF No. 58 ("Zhejiang's Br.").

For the reasons that follow, the court sustains the ITC's final affirmative injury determination.

BACKGROUND

The ADD and CVD investigations at issue covered the period of January 1, 2014, to June 30, 2017, and involved imports of HWPW from the PRC. *See* Final Consol. Staff Report and Views at 4, Dec. 21, 2017, ECF No. 47–1.[1] HWPW is a wood panel product made from gluing two or more layers of wood veneer to a core.[2] *See* Views at 10. The core itself may be composed of veneers or other types of wood material. *See id.* HWPW products are differentiated by species, quality of veneer, overall thickness, number of plies, type of core, and type of adhesive used. *See id.*

On November 18, 2016, the Coalition for Fair Trade of Hardwood Plywood (the "Coalition"),[3] filed an ADD and CVD petition with the U.S. Department of Commerce ("Commerce") and the ITC. *See* Petition for the Imposition of Antidumping & Countervailing Duties, Inv. Nos. 701-TA-565 and 731–TA–1341, CD 1 (Nov. 18, 2016) ("Petition"). Commerce and the ITC initiated ADD and CVD investigations into imports of HWPW from the PRC in response to this petition. *See [HWPW] From China*, 81 Fed. Reg. 85,639 (Int'l Trade Comm'n Nov. 28, 2016) (institution of ADD and CVD investigations, and scheduling of prelim. phase investigations); *Certain [HWPW] Products From the [PRC]*, 81 Fed. Reg. 91,125 (Dep't Commerce Dec. 16, 2016) (initiation of less-than-fair-value investigation); *Certain [HWPW] Products From the [PRC]*, 81 Fed. Reg. 91,131 (Dep't Commerce Dec. 16, 2016) (initiation of CVD investigation).

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[1] The court cites to the confidential Final Consolidated Staff Report and Views, which is divided into two sections: the Views of the Commission and the Staff Report, referred to, respectively, as Views and Staff Report.

[2] A veneer is a slice of wood which is cut, sliced or sawed from a log, bolt, or flitch. *See* Views at 6. The core of HWPW is the layer or layers of material situated between the face and back veneers. *See id.* at 7.

[3] The Coalition consists of Columbia Forest Products, Commonwealth Plywood, Inc., Murphy Company, Roseburg Forest Products Co., States Industries, Inc., and Timber Products Company, all of which are domestic producers of hardwood plywood. Petition at 1.

In its preliminary determinations, Commerce found that HWPW from the PRC was being sold at less than fair value and the PRC-industry was receiving countervailable subsidies. *See Certain [HWPW] Products from the [PRC]*, 82 Fed. Reg. 28,629 (Dep't Commerce June 23, 2017) (prelim. affirmative determination of sales at less than fair value, prelim. affirmative determination of critical circumstances, in part); *Certain [HWPW] Products from the [PRC]*, 82 Fed. Reg. 19,022 (Dep't Commerce Apr. 25, 2017) (prelim. affirmative CVD determination, prelim. affirmative critical circumstances determination, in part, and alignment of final determination with final ADD determination). Commerce sustained these findings in its final determinations. *See Certain [HWPW] Products From the [PRC]*, 82 Fed. Reg. 53,460, 53,470 (Dep't Commerce Nov. 16, 2017) (final determination of sales at less than fair value, and final affirmative determination of critical circumstances, in part); *[CVD] Investigation of Certain [HWPW] Products From the [PRC]*, 82 Fed. Reg. 53,473, 53,476 (Dep't Commerce Nov. 16, 2017) (final affirmative determination, and final affirmative critical circumstances determination, in part); *see also Certain [HWPW] Products From the [PRC]*, 82 Fed. Red. 32,683 (Dep't Commerce July 17, 2017) (amending ministerial errors in prelim. determination of sales at less than fair value).

Concurrent with Commerce's proceedings, the ITC investigated whether domestic industry was materially injured or threatened with material injury by reason of imports of the subject merchandise. *See [HWPW] From China*, 81 Fed. Reg. 85,639 (Int'l Trade Comm'n Nov. 28, 2016). The ITC received questionnaire responses from nine domestic producers which accounted for nearly all domestic production of HWPW in 2016. Views at 4. Import data was based on questionnaire responses of 74 U.S. importers of HWPW from the PRC, which accounted for 94% of subject imports from the PRC in 2016. *Id.* The ITC defined the domestic like product to be a single product co-extensive with the scope Commerce's investigations. *See id.* at 11–12; *see also Hardwood Plywood from China* at 9, USITC Pub. 4661, Inv. Nos. 701-TA-565 and 731-TA-1341 (Prelim.), (Jan. 2017). No domestic producers of the domestic like product were excluded from the domestic industry. *See* Views at 12. The ITC issued a preliminary determination finding that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of HWPW from the PRC. *See [HWPW] Products from China*, 82 Fed. Reg. 2,393 (Int'l Trade Comm'n Jan. 9, 2017). Prior to making its final material injury determination, the ITC held a public hearing on October 26, 2017, and the interested parties submitted pre-and post- hearing briefs.

In its final determination, the ITC concluded that an industry in the United States is materially injured by reason of imports of HWPW from the PRC that Commerce had found to be subsidized and sold in the United States at less than fair value. *See Hardwood Plywood from China*, 82 Fed. Reg. 61,325 (Int'l Trade Comm'n Dec. 27, 2017). ADD and CVD duty orders were then issued by Commerce. *See Certain [HWPW] Products From the [PRC]*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) (amended final determination of sales at less than fair value and ADD order); *Certain [HWPW] Products From the [PRC]*, 83 Fed. Reg. 513 (Dep't Commerce Jan. 4, 2018) (CVD order).

Plaintiffs American Alliance for Hardwood Plywood et al. (collectively "AAHP"),[4] filed a complaint on March 2, 2018. *See* AAHP's Compl., Mar. 2, 2018, ECF No. 10. Consolidated Plaintiffs Zhejiang Dehua TB Import & Export Co., Ltd. et al. ("Zhejiang"),[5] separately filed a complaint on the same day. *See* Zhejiang's Compl., Mar. 2, 2018, ECF No. 8, Zhejiang Dehua TB Import & Export Co., Ltd. et al v. United States, Ct. No. 1800021 (USCIT filed Feb. 2, 2018). The proceedings initiated by Zhejiang were later consolidated into the present action. *See* Order, May 10, 2018, ECF No. 52.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)[6] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting a final affirmative injury determination. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

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[4] Plaintiffs, collectively defined as AAHP, include: American Alliance for Hardwood Plywood, Far East American, Inc., Northwest Hardwoods, Inc., American Pacific Plywood, Inc., Canusa Wood Products Ltd., Concannon Lumber and Plywood (Concannon Corp. d/b/a Concannon Lumber Company), Fabuwood Cabinetry Corporation, Hardwoods Specialty Products USLP, Holland Southwest International Inc., Liberty Woods International, Inc., McCorry & Co. Ltd., MJB Wood Group, Inc., Patriot Timber Products, Inc., Richmond International Forest Products, LLC, Taraca Pacific, Inc., USPly Trading Co. (USPly LLC), and Wood Brokerage International d/b/a Red Tide International, LLC. *See* AAHP's Summons, Feb. 2, 2018, ECF No. 1. Plaintiff Plywood Source LLC, although appearing on all briefing filed before this court, was dismissed from the present action for failure to retain substitute counsel, as required by this Court's Rule 75(b)(1). Order, Apr. 8, 2019, ECF No. 121.

[5] There are 84 consolidated plaintiffs in this consolidated action. *See* Summons at Attach., Feb. 2, 2018, ECF No. 1, Zhejiang Dehua TB Import & Export Co., Ltd. v. United States, Ct. No. 1800021 (USCIT filed Feb. 2, 2018) (providing all, in list form).

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

DISCUSSION

AAHP and Zhejiang together challenge five aspects of the ITC's final affirmative injury determination. First, they challenge the ITC's conditions of competition analysis, arguing the ITC's finding that subject imports are moderately substitutable with domestic like product is unsupported by substantial evidence. *See* AAHP's Br. at 1–2, 4–19; Zhejiang's Br. at 1–2, 10–16. Second, they argue the ITC's finding that the volume of subject imports was significant is unsupported by substantial evidence and is not in accordance with law. *See* AAHP's Br. at 2, 19–25; Zhejiang's Br. at 1–2, 16–18. Third, they argue the ITC's finding that subject imports undersold domestic like product during the period of investigation, and resulted in price suppression, is unsupported by substantial evidence and is not in accordance with law. *See* AAHP's Br. at 2, 25–37; Zhejiang's Br. at 2, 18–23. Fourth, they argue the ITC's finding that subject imports significantly impacted the domestic industry is unsupported by substantial evidence. *See* AAHP's Br. at 2, 37–39, Zhejiang's Br. at 2, 23. Finally, they argue the ITC's conclusion that non-subject imports could not account for the price effects and impact on the domestic industry identified in its analysis was unsupported by substantial evidence and arbitrary and capricious. *See* AAHP's Br. at 2, 39–44; Zhejiang's Br. at 2, 23–26.[7] For the reasons that follow, the court finds the ITC's final affirmative injury determination is supported by substantial evidence and in accordance with law, and not arbitrary or capricious.

I. Legal Framework

In ADD and CVD proceedings, respectively, Commerce determines whether subject merchandise was sold at less than fair value in the United States or benefited from countervailable subsidies. *See* 19 U.S.C. §§ 1671(a), 1673. At the same time, the ITC conducts an investigation to determine whether imports of subject merchandise have materially injured or threaten to materially injure a domestic industry, or retard the establishment of a domestic industry. *See id.* Commerce will issue the relevant antidumping and countervailing duty orders if both investigations lead to affirmative findings. *See id.* §§ 1671d(c)(2), 1673d(c)(2).

The ITC will make an affirmative material injury determination when it finds (1) material injury that is (2) by reason of the subject imports. *See Swiff–Train Co. v. United States*, 793 F.3d 1355, 1359 (Fed. Cir. 2015). Material injury is a harm which is not inconsequen-

[7] AAHP also adopts and incorporates by reference Zhejiang's arguments. *See* AAHP's Br. at 44.

tial, immaterial, or unimportant. *See* 19 U.S.C. § 1677(7)(A). To determine whether a domestic industry is materially injured, the ITC considers:

> (I) the volume of imports of the subject merchandise,
>
> (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and
>
> (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States.

Id. § 1677(7)(B)(i). The ITC may also "consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." *See id.* § 1677(7)(B)(ii). No single factor is dispositive, and the ITC evaluates "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).

II. Substitutability

AAHP and Zhejiang argue that the ITC's finding that subject imports and domestic like product are moderately substitutable is unsupported by substantial evidence. *See* AAHP's Br. at 4–19; Zhejiang's Br. at 10–16. Defendant responds that the ITC's determination is supported by substantial evidence. *See* Def. [ITC's] Mem. Opp'n Pls.' Mots. J. Agency R. at 9–25, Dec. 19, 2018, ECF No. 94 ("Def.'s Resp. Br."). For the reasons that follow, the ITC's finding of moderate substitutability is supported by substantial evidence.

Substitutability refers to the ease with which different products can be substituted for one another and is an economic factor that may be relevant to the conditions of competition. *See R–M Indus., Inc. v. United States*, 18 CIT 219, 226 n.9, 848 F. Supp. 204, 210 n.9 (1994); *see also General Motors Corp. v. United States*, 17 CIT 697, 706, 827 F. Supp. 774, 784 (1993). The ITC's findings regarding competition and market conditions must be supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The possibility of drawing two inconsistent conclusions from the evidence does not prevent the court from holding that the ITC's findings are supported by substantial evidence. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006).

In this case, the ITC found that subject imports and the domestic like product were "moderately substitutable." Views at 24. The ITC reached this conclusion through an analysis of several aspects of the HWPW market; in particular market share, product characteristics and questionnaire responses by market participants. *See id.* at 21–28.

As to market share, the ITC identified a substantial overlap between subject imports and domestic like product for cabinetry with exposed uses. *See* Views at 26. Specifically, the ITC also found that cabinetry with exposed uses was the "dominant application for the domestic product and a substantial application for subject imports." *Id.*[8] The ITC found there was "some overlap" with respect to the finish used in exposed cabinetry applications, with subject imports and domestic like product both being sanded and stained, as well as painted. *Id.*[9]

The ITC then considered product characteristics and found subject imports and the domestic like product "overlap with respect to numerous product characteristics," including overall thickness, face species, grade and core composition. Views at 25. AAHP and Zhejiang argue that the relevant United States Hardwood Plywood Veneer Association ("HPVA") grading system is not a suitable point of comparison because subject imports do not consistently conform to HPVA grades. *See* Zhejiang's Br. at 11–12; AAHP's Br. at 7.[10] Although the ITC recognized that not all subject imports conformed to the HPVA standard, Views at 11 n.18, reliance on this standard was reasonable because market participants had been directed to report grade either on the basis of the HPVA standard or "substantially equivalent

[8] In 2016, 50.8% of domestic like product was used for cabinetry end-uses and of that portion that was used for cabinetry end-uses [[ ]]% of such product was used for exterior cabinetry applications. *See* Staff Report at Table II-3 & Table III-12. With respect to subject imports, in 2016, 21.2% were shipped for cabinetry end-uses, and of that portion that was used for cabinetry end-use [[ ]]% used for exterior cabinetry applications. *See id.* at Table II-3 & Table IV-12.

[9] This data showed that [[ ]]% of domestic like product and[[ ]]% of subject imports used in exposed cabinet applications were sanded and stained, while [[ ]]% of domestic like product and [[ ]]% of subject imports were painted. *See* Staff Report at Table II-4.

[10] AAHP also asserts the ITC failed to consider the impact of differences in core species between domestic like product and subject imports. *See* AAHP's Br. at 8. However, the ITC identified that subject imports predominantly use cores composed of hardwood while [[ ]] of domestic like product use a hardwood core. *See* Views at 25. The ITC's explanations do not have to be perfect where the path of the agency decision is reasonably discernable. *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009). As the ITC found there was significant overlap in core composition between subject merchandise and domestic like product, it is reasonably discernible that the ITC concluded core species would not significantly limit substitutability between subject imports and domestic like product.

grade." *See, e.g.*, Blank U.S. Importers' Questionnaire at 17, PD 114 (July 6, 2017). Here, the responding U.S. importers indicated that around two thirds of shipments of subject imports were within or substantially equivalent to HPVA grades. *See* Staff Report at Table IV-11. Neither AAHP nor Zhejiang have identified any evidence indicating that the questionnaire responses of market participants incorrectly identified subject merchandise as "substantially equivalent" to the relevant HPVA grade.[11] The ITC thus reasonably identified an overlap in grades of subject imports and domestic like product.[12]

The ITC then noted that, although there was little overlap in face veneer thickness,[13] the evidence was mixed as to the impact of this product characteristic on the substitutability of subject imports and domestic like product. *See* Views at 27. The ITC did not, as AAHP and Zhejiang argue, ignore evidence that HWPW with thin and thick face veneers have distinct uses, as thin face veneers are unsuitable for a sanded and stained finish. *See* AAHP's Br. at 8–9, Zhejiang's Br. at 13–15.[14] On the contrary, the ITC noted record evidence indicating that thick face veneers were more desirable where the product is to be sanded and stained. *See* Views at 27–28 & n.107. This evidence, however, was contrasted by the ITC with questionnaire responses indicating that thick and thin face veneers were at least sometimes interchangeable.[15] *See id.* The ITC also noted that face veneer thick-

[11] Zhejiang also argues that it is not appropriate to compare subject imports and domestic like product on the basis of HPVA grade because HPVA grades have a minimum face veneer thickness requirement of 0.55 mm. *See* Zhejiang's Br. at 12. Zhejiang argues the minimum face veneer thickness requirement means HPVA grades are not applicable to subject imports, as 90% of subject imports have face veneers thinner than 0.55 mm. *See id.* Zhejiang's argument fails, however, as Zhejiang has not identified any reason that HWPW with thin face veneers could not be substantially equivalent to the relevant HPVA grade, as reported by market participants, even if the face veneer thickness of subject imports is thinner than 0.55 mm.

[12] AAHP further argues that an overlap in grade does not indicate that subject merchandise and domestic like product are used for the same applications, as grade is a "function of the appearance" and merely relates to "color and outward lack of visual defects." *See* AAHP's Reply at 14. However, grade is a reasonable point of comparison, as it affects the suitability of HWPW for exterior uses where appearance is a primary consideration. *See* Views at 10–11.

[13] In 2016, 93.9% of subject imports had a face veneer thinner than 0.4 mm while only [[ ]]% of domestic like product did. *See* Staff Report at Table III-7 & Table IV-7.

[14] AAHP specifically noted that the record evidence shows thin face veneers cannot be mechanically sanded. *See* AAHP's Br. at 8–9. AAHP also noted evidence that products were explicitly marketed on the basis of a thick face veneer. *See id.* at 8–10. Zhejiang argued that "[p]lywood with thin face veneers is typically not suitable for applications that require sanding and is not generally used for the exterior faces of cabinets which are sanded and stained." Zhejiang's Br. at 13–14.

[15] The ITC stated that "a majority of responding purchasers reported that hardwood plywood with face veneers thinner than 0.5 mm and hardwood plywood with face veneers thicker than 0.5 mm were at least sometimes interchangeable in front and side cabinetry applications." Views at 27; *see also* Staff Report at Table II-15.

ness was less significant for painted applications. *See id.* Additionally, the ITC noted that face veneer thickness did not limit use of HWPW for interior cabinetry. *Id.* at 27–28. The ITC thus reasonably weighed the competing evidence and concluded that the evidence was mixed regarding the impact of face veneer thickness on the substitutability of subject imports and domestic like product.[16]

Finally, the ITC found market participants had "expressed disparate views" as to the degree of interchangeability between subject imports and domestic like product. Views at 24. The ITC identified that a majority of importers identified subject merchandise as "always, frequently or sometimes" interchangeable, but that an equal number of importers (24 each) had reported the products sometimes or never interchangeable. *Id.* at 24–25 & n.90. Despite AAHP's and Zhejiang's arguments to the contrary, *see* Zhejiang's Br. at 11; AAHP's Br. at 9, the ITC did not improperly conflate the responses of market participants as to the interchangeability of subject imports and domestic like product. Rather, the ITC reasonably aggregated questionnaire responses "sometimes, frequently and always" on the basis that all those responses indicate that subject imports and domestic like product are, at least sometimes, interchangeable. *See* Views at 24–25. The ITC's finding of moderate substitutability is thus supported by substantial evidence because the evidence of overlap in market share and product characteristics of subject imports and domestic like product, as well as the perception of interchangeability by a majority of market participants, are such that a reasonable mind might accept as adequate support for the ITC's finding.[17]

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[16] Zhejiang also challenges the ITC's reliance on questionnaire responses identifying that thin and thick veneer faces were at least sometimes interchangeable on the basis that market participants were asked to identify whether HWPW with face veneers thinner than 0.5 mm were interchangeable with HWPW with face veneers thicker than 0.5 mm. *See* Zhejiang's Br. at 15. Zhejiang argues the questionnaire responses do not establish subject imports and domestic like product are interchangeable because the face veneers of the majority of subject imports were less than 0.4 mm and no evidence specifically shows that HWPW with face veneers less than 0.4 mm is interchangeable with HWPW with face veneers greater than 0.5 mm. *Id.* Zhejiang's argument is speculative because it has not pointed to any evidence indicating that questionnaire responses as to the interchangeability of thin and thick face veneers would be impacted by Zhejiang's preferred comparison of face veneers of less than 0.4 mm with face veneers of more than 0.5 mm.

[17] AAHP also argues the ITC ignored evidence that subject imports' thinner veneers and more numerous crossbands lead to "additional strength and stability contributing to the strength of the core" which makes subject merchandise "preferable for the internal, structural components of the cabinet." AAHP's Br. at 17; *see also id.* at 7 (noting that subject imports are made with thinner veneers in a two-step process, while domestic like product are made with thicker veneers in a mechanized process). "Crossbands" describes veneers stacked with their grain in alternating directions. *See* Staff Report at I-20. AAHP argues that the additional strength and stability of subject imports undermines the ITC's "conclusion that imported and domestic panels are fully interchangeable for the interior of the cabinet." AAHP's Br. at 16. AAHP's argument fails because the ITC did not find that subject imports and domestic like product are fully interchangeable for cabinet interiors, but rather

Nonetheless, AAHP argues that the ITC's determination is unsupported by substantial evidence because it failed to consider Purchaser A's[18] questionnaire response which indicates subject imports are not interchangeable with domestic like product.[19] *See* Reply Br. in Supp. Rule 56.2 Mot. J. Agency R. of [AAHP] at 14, Feb. 5, 2019, ECF No. 104 at 3–4 ("AAHP's Reply") (citing Purchaser A's Purchasing Questionnaire at 32, CD 430 (Aug. 10, 2017) ("Purchaser A's QR Resp.")). Purchaser A's comments were not expressly discussed in the ITC's analysis of substitutability. *See* Views at 24–28. However, the ITC's determination may be sustained, if the path of the agency's decision is reasonably discernable. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009). The ITC discussed the disparate views of purchasers, including the views of "most importers and purchasers that subject and domestic [HWPW] can always, frequently, or sometimes be used interchangeably." Views at 24–25; *see also id.* at n.90. From this discussion, it is reasonably discernible that the ITC concluded there was evidence in the record for and against the interchangeability of subject imports and domestic like product, and despite Purchaser A's response the ITC found subject imports and domestic like product to be interchangeable. *See* Views at 24–25.[20]

Zhejiang argues that "[e]ven if the Commission's characterization of the level of substitutability as 'moderate' is reasonable, the Commis-

that subject imports and domestic like product are "moderately substitutable." *See* Views at 18. In making this finding, the ITC did not address whether domestic like product's thinner veneers affected its suitability for interior cabinetry; it simply noted record evidence that market participants had not identified face veneer thickness as limiting the use of HWPW for interior cabinetry applications. *See id.* at 27–28. AAHP's argument does not render the ITC's finding of "moderate substitutability" unreasonable as AAHP points to no evidence which indicates that the domestic like product cannot be used for the interiors of cabinets.

[18] Purchaser A refers to [[ ]].

[19] Purchaser A's questionnaire states:

[[

]] ... [[

]]

Purchaser A's QR Resp. at 32.

[20] AAHP argues further that the ITC failed to consider the impact of core type differences in the lamination market. *See* AAHP's Br. at 18. However, the Staff Report identifies that no domestic like product used in cabinetry applications in 2016 was laminated. *See* Staff Report at Table II-4. Although lamination is common in the recreational vehicle/mobile home market, that market accounts for less than 3% of domestic like product end uses. *See* Staff Report at Table III-12. AAHP's argument thus fails as it is reasonably discernible that the ITC did not consider lamination or the recreational vehicle/mobile home market in its analysis of substitutability because it found there was no significant overlap between subject imports and domestic like product in those areas.

AAHP also contends that the ITC failed to consider the underlayment market segment. *See* AAHP's Br. at 17. However, the ITC found that "domestic industry had only a small presence" in underlayment. *See* Views at 26. AAHP's argument in relation to underlayment thus also fails as it is reasonably discernible that the ITC did not consider the underlayment market segment in its analysis of substitutability because it found there was no significant overlap between subject imports and domestic like product in that market segment.

sion never defines this term or makes any effort to quantify the actual level of competition between subject imports and the domestic like product." Zhejiang's Br. at 16. The ITC found there to be many overlapping product characteristics and substantial overlapping market share between subject imports and domestic like product. *See* Views at 24–28. The ITC also found certain distinctions in product characteristics and some responses by market participants indicating that the products are not interchangeable. *See id.* The ITC's description of the level of substitutability as moderate reasonably captures the degree of substitutability demonstrated by the record evidence. Findings of moderate substitutability and other findings of similar generality have been previously upheld by this court. *See, e.g., Altx, Inc. v. United States*, 26 CIT 709, 712–15 (2002) (sustaining a finding that there was "at least a moderate level of substitutability" while remanding on other grounds); *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC v. United States*, __ CIT __, __, 348 F. Supp. 3d 1328, 1333–35 (2018) (sustaining a finding of a "moderate-to-high" degree of substitutability while remanding on other grounds); *ITG Voma Corp. v. U.S. Int'l Trade Comm'n*, __ CIT __, __, 253 F. Supp. 3d 1339, 1351–57 (2017) (sustaining the ITC's finding of a "moderate to high" degree of substitutability). Consequently, the court sustains the ITC's finding of moderate substitutability in its analysis of the conditions of competition in the HWPW market as supported by substantial evidence.

III. Volume

AAHP and Zhejiang challenge as not in accordance with law and unsupported by substantial evidence the ITC's determination that the subject import's volume and market share grew at the expense of the domestic like product. *See* AAHP's Br. at 25–37; Zhejiang's Br. at 16–18; *see also* Views at 28–30. Specifically, AAHP contends that the ITC failed to consider data on consumer preferences and changing fashion trends disclosed in purchaser questionnaire responses. AAHP's Br. at 25–37. Zhejiang contends that the ITC failed to properly consider the different applications of domestic like product versus subject imports in the manufacture of cabinets. *See* Zhejiang's Br. at 16–18. Although AAHP and Zhejiang invoke different grounds for challenging the ITC's volume determination, each of the grounds invoked rest on the assumption that the ITC wrongfully applied its moderate substitutability finding and ignored the "attenuated" nature of the competition between domestic like product and subject

imports when conducting its volume analysis. Defendant responds that the ITC's volume determination was supported by substantial evidence. *See* Def.'s Resp. Br. at 25–32. For the following reasons, the ITC's volume determination is in accordance with law and is supported by substantial evidence.

The ITC found that between 2014 and 2016, subject imports' market share increased from 37.9% to 40.1%, while the domestic industry's decreased from 21% to 17.3%. Views at 29 (citing Table IV-14). Its analysis also took a nuanced looked at volume and market share trends associated with underlayment and within end-uses where the domestic industry was a substantial participant.[21] Specifically, the ITC explained that after excluding volumes associated with shipments of underlayment, a category in which the domestic industry had a small presence, id. at 26 (citing Tables III- 12, IV-12), it found that subject import volume rose steadily from "[[ ]] square feet in 2014 to [[ ]] square feet in 2015 and then to [[ ]] square feet in 2016[,]" and gained [[ ]] percentage points in market share between 2014 and 2016. *Id.* at 29–30. By contrast, the domestic industry's market share declined by percentage points in the same time period. *Id.* at 30. The ITC further examined the domestic like product's performance within the cabinetry end-segment, its largest end-use, and found that, during the same period, market share decreased by 5.1%, while subject import volume steadily increased from 244.1 million square feet to 301.0 million square feet, *id.* (citing Table IV-12), and increased its market share by 6.9%. *Id.* (citing Tables III-12, IV-12, IV-14). Finally, the ITC found that the ratio of subject imports to U.S. production increased from 168% in 2014 to 223.8% in 2016. Views at 29. The material injury analysis requires the ITC to assess "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." 19 U.S.C. § 1677(7)(C)(i). Given the record evidence before the ITC, it was reasonable for it to conclude that the volume of the subject imports, both relative to apparent domestic consumption and in absolute terms, grew significantly during the period of investigation, and its determination is supported by substantial evidence and is in accordance with law.

[21] To the extent that AAHP and Zhejiang challenge the ITC's findings on volume as not in accordance with law because the ITC failed to analyze record evidence through the lens of moderate substitutability or attenuation of competition, AAHP's Br. at 26, [Zhejiang's] Reply Br. at 9–11, Feb. 5, 2019, ECF No. 103, the challenge fails. In line with its moderate substitutability finding, when analyzing volume trends, the ITC excluded volumes of underlayment, an end-use category in which the domestic industry had a small presence, and reviewed changes in cabinetry, an end-use category in which the domestic industry had a significant presence. *See* Views at 29–30.

Evidence regarding the degree of interchangeability of subject imports and the domestic like product and changing consumer trends provided by Purchaser A, *see* AAHP's Br. at 27–28, does not detract from the ITC's volume determination. As discussed above, it is reasonably discernable that the ITC considered, but found unpersuasive, Purchaser A's attribution of increased demand for subject imports to shifts in consumer preferences and not interchangeability of the subject imports and domestic like product. *See generally* Purchaser A's QR Resp. at 32. The ITC acknowledged that some market participants found subject imports and domestic like product to never be interchangeable but explained that a majority of U.S. purchasers and most importers indicated a degree of substitutability. *See* Views at 25 n.90, 25–28; *see generally Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987). Further, Purchaser A was only one of over 30 responding U.S. purchasers. Staff Report at II-2.

AAHP's and Zhejiang's remaining arguments presume that differences in physical characteristics of domestic like product and subject imports, all of which go to substitutability, were ignored by the ITC in its volume analysis and resulted in the ITC misreading the relevant data. *See* AAHP's Br. at 25 (identifying the ITC's "[f]lawed [d]etermination [r]egarding [c]onditions of [c]ompetition" as the basis for its challenge to the volume analysis), 26 (contending that the determination "does not account for the attenuation of competition or the lack of substitutability proven by the record evidence[]" and that "the Commission's volume analysis is based on a fundamental misconception of the plywood market."), 27 (arguing that subject imports' physical characteristics made them "better suited" to satisfy increased demand than domestic like product), 27–31 (arguing that because domestic like product and subject imports satisfy specific and separate uses, e.g., the former for sanded and stained application and of thicker face-veneer, and the latter for painted application and of thinner face-veneer, and consumer preferences have shifted to painted cabinetry with thinner face-veneers, the volume analysis had to account for such nuance in the competition but failed to do so), 32–37 (arguing that increased demand cannot be distributed equally because domestic like product is used for cabinetry exteriors and subject imports for cabinetry interiors, which necessarily cover a larger surface area,[22] and that the domestic like product is not used

[22] The ITC addressed the exterior versus interior application challenge by identifying record evidence showing that a significant percentage of subject imports are used for exterior applications, a substantial percentage of domestic product can in fact be painted, and that a substantial percentage of subject imports can be sanded. See Views at 26–27 & n.101; Staff Report at Table II-3 (showing the share of purchases of subject imports for interior applications and exterior as [[ ]] and [[ ]], respectively).

for laminated purposes); Zhejiang's Br. at 16–18 (arguing that the volume analysis is unsupported by substantial evidence because the ITC failed to recognize the attenuated nature of competition within the cabinetry end segment, specifically focusing on interior versus exterior application and painted versus sanded and stained end-uses). AAHP's and Zhejiang's challenges to the ITC's treatment of competition between subject imports and domestic products in the volume analysis are unpersuasive. As discussed above, the ITC considered the differences in physical characteristics of domestic like product and subject imports when it examined substitutability. The ITC acknowledged the disparate views of various market participants and reached a reasonable conclusion based upon the record evidence. Views at 24–28. The court will not reweigh the evidence.

The ITC likewise addressed whether out-of-scope merchandise, like medium density fiberboard, had a depressing effect on volumes of domestic like product. *See* Views at 32–33 n.132, 38; AAHP's Br. at 29–31 (arguing that domestic actors turned to such out-of-scope merchandise to satisfy demand for painted cabinetry and away from domestic like product). The ITC specifically noted that 65.1% of domestic producers' shipments in 2016 were of product with maple or birch veneer that can be used for painted application and that during the period of investigation non-subject imports constituted less than 6% of U.S. shipments for cabinetry end-use. Views at 26, 38–39. Given the record evidence, the ITC's determination that out-of-scope merchandise was in limited competition with either domestic like product or subject imports was not unreasonable. Accordingly, the ITC's findings provide substantial evidence to support its conclusion that subject imports' volume grew, both in absolute terms and relative to production and consumption.

IV. Price-Effects

AAHP and Zhejiang challenge as not in accordance with law and unsupported by substantial evidence the ITC's determination that during the period of investigation subject imports significantly undersold domestic like product and that such underselling "prevented price increases, which otherwise would have occurred, to a significant degree." *See* AAHP's Br. at 19–25; Zhejiang's Br. at 18–23; Views at 34. AAHP and Zhejiang again invoke arguments grounded in the presumption that domestic like product and subject imports are not substitutable and that the market is more "attenuated" than the ITC gave credence to in its analysis. *See* AAHP's Br. at 19–25; Zhejiang's Br. at 18–23. AAHP also argues that the ITC failed to consider the

effect of non-subject imports on price. *See* AAHP's Br. at 24. Defendant responds that the ITC's determination was supported by substantial evidence. *See* Def.'s Resp. Br. at 32–41. For the following reasons, the ITC's pricing analysis is supported by substantial evidence.

The material injury analysis requires the ITC to determine the effects of subject imports on U.S. prices of the domestic like products, which it does by examining whether (1) there has been "significant price underselling by the imported merchandise as compared with the price of domestic like products" and (2) "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)(I)–(II).

As to underselling, the ITC identified record evidence that domestic like product was undersold by subject imports in all 84 quarterly price comparisons and identified lost sales revenue. Views at 31–33. The ITC also noted that of the 23 responding purchasers that reported buying subject imports rather than domestic like product, 13 identified price as the primary reason for the purchasing decision and 22 indicated that the subject merchandise was lower in price. *Id.* at 32 (citing Staff Report at V-24).[23] The ITC further found that increase in the domestic industry's cost of goods sold should have resulted in some price increase, but did not. *Id.* at 32–33. The ITC explained that given the high margins of underselling, the important role price plays in purchasing decisions, the increase in the volume of subject imports in segments of the plywood market where domestic like products participate substantially, and relatively flat prices of domestic product in a period where both demand and costs for raw materials and for goods sold increased, it determined that subject imports had a "restraining" effect on the prices of the domestic like product.[24] Views at

[23] AAHP argues that the ITC's lost revenue finding is unreasonable because, based on volume, the 13 purchasers that invoked price as the primary reason for switching from domestic like product to subject imports represent only [[ ]]% of all purchases reported during the period of investigation. AAHP's Br at 24–25; AAHP's Reply Br. at 25–26. Defendant and Defendant-Intervenor contest AAHP's interpretation of the lost sales and revenue data to arrive at the [[ ]]% figure. *See* Def.'s Resp. Br. at 39; Resp. Br. Def.-Intervenor [Coalition] at 25 Jan. 9, 2019, ECF No. 97. Notwithstanding the parties' disagreement on how the percentage figure was calculated, AAHP's argument is a request that the court reweigh the evidence. The ITC reviewed pricing data that was on the record before it and its determination is not unreasonable.

[24] AAHP argues that the pricing data can be explained by the "broad retreat in demand" for [[ ]]." AAHP's Reply Br. at 26–27 (citations omitted). The argument presumes lack of substitutability, asks the court to reweigh the evidence, and is unpersuasive given the court's findings on substitutability. AAHP also contends that the "modest" increases in the cost of goods sold and raw materials costs, amounting to $0.02 and $0.01 respectively, do not demonstrate that subject imports affected the prices of the

32–34.[25] Finally, the ITC addressed the effect of non-subject imports, explaining that because face-veneer species is important to purchasers and a "relatively little" number of subject imports and domestic like product have the tropical face veneer that the majority of non-subject imports have, any overlap is limited. Views at 38–39 (showing that domestic like product and subject imports are commonly of [[ ]] or [[ ]] face veneer); Staff Report at Table III-11, Table IV-11. The court addresses the impact of non-subject imports in greater detail below and here incorporates its reasoning for why such imports cannot account for the price effects the ITC attributed to subject imports. Given the record evidence before it, the ITC's conclusions as to underselling and price suppression is supported by substantial evidence and is in accordance with law.

AAHP's challenges assume that the ITC's substitutability finding is unsupported by substantial evidence and simply provide an alternate reading of the pricing data. Specifically, where the ITC concludes that evidence of stability in the average unit value of the domestic industry's net sales indicates that subject imports "restrain[ed]" the prices of the domestic like product, *see* Views at 32–34, AAHP contends that evidence demonstrates that subject imports and domestic like product "co-exist in the marketplace without any pricing effect on one another," because otherwise the prices would have converged. AAHP's Br. at 21.[26] The court will not reweigh the evidence.

Zhejiang contends that physical differences between domestic like product and subject imports, which were not accounted for in the six pricing products, limit the pricing data's relevance and usefulness

domestic like product. *Id.; see also* Views at 33–34. The ITC, however, explicitly recognizes that the increases were modest, Views at 32, and uses the evidence of increase to find that a modest increase in the domestic like product should have occurred. The ITC's determination is not unreasonable on this record.

[25] Both AAHP and Zhejiang contend that the ITC's price effects determination is not in accordance with law because the ITC failed to delineate the causal link between underselling and price suppression as required by 19 U.S.C. § 1677(7)(C)(ii). *See* AAHP's Reply Br. at 24–25, Zhejiang's Reply Br. at 12–13. The parties' challenges rest on the assumption that the lower priced subject imports could not have had an effect on the domestic like product because the products are not substitutable and therefore do not compete. As the court explained, the ITC's substitutability determination is supported by substantial evidence and its conclusion that subject imports had a restraining effect on prices of the domestic like product is reasonable on this record. Accordingly, AAHP's and Zhejiang's not in accordance with law challenges are unpersuasive.

[26] AAHP also attempts to reargue its substitutability challenge by claiming that the pricing data demonstrates that the market dynamics are more attenuated by end-use than the ITC gave credence to and that purchasers like Purchaser A, [[ ]], and [[ ]] distinctly recognize that price is not the distinguishing factor in product selection. AAHP's Br. at 21–22, 24–25. It is reasonably discernable that the ITC did not find AAHP's arguments persuasive given that there is also evidence on the record that [[ ]], Staff Report at Table V-12, and that Purchaser A is but one of over 30 responding U.S. purchasers. *See* Staff Report at II-2.

because the grades specified are "inapplicable" and forced importers "to subjectively determine 'substantially equivalent' grades without any objective parameters" and did not specify face veneer thickness. *See* Zhejiang's Br. at 18–23; [Zhejiang's] Reply Br. at 11–12, Feb. 5, 2019, ECF No. 103 ("Zhejiang's Reply Br.").[27] The challenge fails as it presumes that face-veneer thickness and grades, both physical indicators, demonstrate that domestic like product and subject imports are not substitutable. The court incorporates its reasoning sustaining the ITC's substitutability analysis here as basis for why Zhejiang's challenges to the ITC's treatment of competition between subject imports and domestic products in the pricing analysis are unpersuasive.[28] The ITC's findings provide substantial evidence to support its conclusion that subject imports significantly undersold domestic like product and suppressed its price.

V. Impact

AAHP argues that the ITC's finding that subject imports had a significant impact on the domestic industry is unsupported by substantial evidence because it relies on an unreasonable finding of moderate substitutability between subject imports and domestic like product. *See* AAHP's Br. at 38. Zhejiang argues the ITC's impact finding is unsupported by substantial evidence because it depends on findings regarding volume and price effects which Zhejiang considers unsupported by substantial evidence. *See* Zhejiang's Br. at 23. Defendant responds that the ITC's impact analysis was supported by sub-

[27] Zhejiang did not object to the pricing definitions proposed by the ITC in its draft questionnaires and has therefore failed to exhaust its challenge to the inapplicability of the six pricing products to the merchandise at issue. *See* 28 U.S.C. § 2637(d) (2012) (requiring that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies"); 19 C.F.R. § 351.309(c)(2) (2017) (requiring that a party's administrative case brief "present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination"). To the extent that Zhejiang's challenge is to how the ITC interpreted the data and the nature of competition, the challenge fails as it again rests on the assumption that the ITC wrongly determined that the domestic like product and the subject imports are substitutable.

[28] Zhejiang also invokes the ITC's negative injury determination in *Plywood I* to argue that here, the ITC acted in an arbitrary and capricious manner because it interpreted the same data as was previously before it and reached an opposite conclusion. *See* Zhejiang's Reply Br. at 2–4 (arguing that the principle of *sui generis*, which isolates determinations to their individual records, assumes that the facts and circumstances of each investigation are unique, which is not the case here); *see also Hardwood Plywood from China*, USITC Pub. 4434, Inv. Nos. 701-TA-490 and 731-TA1204 (Final) (Nov. 2013) (*Plywood I*). It further argues that given the consistency of record evidence here and in *Plywood I*, the ITC's determination is not supported by substantial evidence. *See, e.g.*, Zhejiang's Br. at 10–14, 18–19, 22–23. The records of the two proceedings are not identical and the record of each determination stands on its own.

stantial evidence. *See* Def.'s Resp. Br. at 41–49. For the reasons that follow, the ITC's impact analysis was supported by substantial evidence.

To determine whether material injury exists, the ITC must consider the impact of subject imports 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). When assessing the impact of subject imports, the ITC "shall evaluate all relevant economic factors which have a bearing on the state of the industry." 19 U.S.C. § 1677(7)(C)(iii). In this case, the ITC found that domestic industry's production, capacity utilization, end-ofperiod inventories, shipments, and market share all declined. *See* Views at 35–36. Although employment trends were mixed, the ITC found that domestic industry's net sales revenues, cost of goods sold, selling, general and administrative expenses, ratio of operating income to net sales, gross profit, operating income and net income all declined. *See id.* at 36–37. The ITC found that these economic factors declined as a result of the significant and increased volumes of subject imports that significantly undersold the domestic like product. *See id.* at 37. The deteriorating economic indicators, combined with the finding that there had been a significant increase in the volume of subject imports that undersold domestic like product, provided a reasonable basis for the ITC to conclude that subject imports had a significant impact on domestic industry.

AAHP's and Zhejiang's challenges to the ITC's impact analysis again presume that the ITC's substitutability, volume, and price effects analyses are unreasonable and unsupported by substantial evidence. *See* AAHP's Br. at 38; Zhejiang's Br. at 23. As discussed above, however, the ITC's finding that there is a moderate degree of substitutability between subject imports and domestic like product is supported by substantial evidence, as are its findings on volume and price effects. Consequently, the ITC's impact analysis is supported by substantial evidence.

VI. Causation

AAHP and Zhejiang argue that the ITC's affirmative injury determination is unsupported by substantial evidence because the ITC unreasonably concluded that non-subject imports could not account for the magnitude of the price effects or domestic industry's loss of market share during the period of investigation. *See* AAHP's Br. at 37–44; Zhejiang's Br. at 23–26. Zhejiang further argues that the ITC's

finding was arbitrary and capricious. *See* Zhejiang's Br. at 23–26. Defendant responds that the ITC's analysis of non-subject imports was supported by substantial evidence and not arbitrary and capricious. *See* Def.'s Resp. Br. at 41–49. For the following reasons, the ITC's determination regarding non-subject imports is supported by substantial evidence and not arbitrary and capricious.

The ITC must identify that the material injury to the domestic industry was "by reason of" subject imports. *See* 19 U.S.C. § 1677(7)(B)(ii). The term "by reason of" is not defined but has been held by the Court of Appeals of the Federal Circuit to require that the subject imports be more than a "merely incidental, tangential, or trivial" cause of the material injury suffered by domestic industry. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1357 (Fed. Cir. 2006). Subject imports need not, however, be the principal cause of injury. *See Nippon Steel Corp. v. United States*, 345 F.3d 1379, 1381 (Fed. Cir. 2003). In finding material injury is "by reason of" subject imports, the ITC will examine factors other than subject imports to ensure that it is not attributing injury from other factors to the subject imports. *See* Views at 17–18; *see also* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. 103–316, vol. I at 851–52 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4184–85.

Non-subject imports' market share increased from 41.1% in 2014 to 42.6% in 2016 and were the largest source of supply over the period of investigation. *See* Views at 24. The ITC acknowledged that non-subject imports were sold at a lower average unit value than domestic like product throughout the period of investigation. *See id.* at 38. The ITC, however, found that there was limited competition between non-subject imports as against domestic like product and subject imports, because non-subject imports were predominantly sold with face veneers of tropical species,[29] and were more concentrated in very thin plywood.[30] *See id.* The ITC also observed that non-subject imports were predominantly sold for recreational vehicle/mobile home use. *See id.*[31] Finally, the ITC noted that only 6% of non-subject imports were used for cabinetry, the domestic industry's largest end-

[29] HWPW with face veneers of tropical wood accounted for 81.3% of non-subject imports, but only 13.0% of subject imports and [[ ]]% of domestic shipments. *See* Staff Report at Table III-11 & Table IV-11.

[30] In 2016, 81.8% of non-subject imports had an overall thickness of less than 6.5 mm, as compared to 55.0% of subject imports and 22.6% of domestic like product. *See* Staff Report at Table III-8 & Table IV-8.

[31] In 2016, 62.6% of non-subject imports were sold for recreational vehicles/mobile homes, compared to 6.3% of subject imports and 2.9% of domestic like product. *See* Table III-12 & Table IV-12.

use. *See id.* Given the record evidence before it, the ITC's findings that the competition between non-subject imports on the one hand and subject imports and domestic like product on the other, was limited, and that "non-subject imports cannot explain the magnitude of the domestic industry's loss of market share or the price effects we have attributed to subject imports[,]" *id.* at 38–39, was reasonable and supported by substantial evidence.

AAHP argues that the ITC failed to consider a range of record evidence that detracts from its causation finding. *See* AAHP's Br. at 39–44.[32] AAHP's argument fails, however, as AAHP in substance simply asks the court to reweigh the evidence. As noted above, the ITC's determination may be sustained if the path of the agency's decision is reasonably discernable. *See NMB Singapore*, 557 F.3d at 1319–20. It is reasonably discernible that the ITC, looking at the record as a whole, concluded that non-subject imports' predominantly tropical face veneers and overall thinness were in limited competition with both the domestic like product and subject imports. *See* Views at 38–39. This conclusion is supported by the fact that non-subject imports are predominantly used for recreational vehicles/mobile homes, where other HWPW products do not compete. *See id.* It is also supported by the fact that non-subject imports have only a small presence in cabinetry, which is the main area of competition between domestic like product and subject imports. *See id.* AAHP has not cited any evidence which renders these factual findings unsupported by substantial evidence. AAHP's argument thus fails as it simply constitutes a request that the court reweigh the evidence.[33]

The ITC's finding that non-subject imports have limited competition with other products and thus cannot explain the material injury suffered by domestic industry is also not arbitrary or capricious. Zhejiang argues the ITC "arbitrarily dismissed non-subject imports as a cause of material injury based on differences in physical charac-

[32] AAHP points to evidence such as to the degree of competition between HWPW with tropical and non-tropical face veneers, the potential impact of the volumes of non-subject imports with non-tropical face veneers, the significance of overall plywood thickness, and the volume of non-subject imports used in cabinetry. *See* AAHP's Br. at 39–44.

[33] AAHP again argues that the ITC improperly failed to consider Purchaser A's questionnaire response in analyzing competition between non-subject imports and other HWPW products. *See* AAHP's Br. at 41–42. However, the ITC is not required to explicitly address every questionnaire response provided by market participants as long as its reasoning is reasonably discernible. *See NMB Singapore*, 557 F.3d at 1319–20. It is reasonably discernible here that the ITC concluded that the weight of evidence indicated that the different product characteristics of non-subject imports limited competition with other HWPW products. Purchaser A's response is one of many and does not alone make unreasonable the ITC's overall assessment that competition was limited between non-subject imports and other HWPW products as a result of differing product characteristics and uses.

teristics and end-uses, while finding that subject importers were a cause of material injury despite differences in physical characteristics and end-uses." *See* Zhejiang's Br. at 25–26. Agency action is arbitrary and capricious if the agency offers insufficient reasons for treating similar situations differently. *See West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 21 (D.C. Cir. 2014). The ITC's determination is not arbitrary or capricious because as discussed above it did not find that non-subject imports and subject imports differed from domestic like product in the same way, both in terms of physical characteristics and market impact. The ITC did not act arbitrarily in treating subject imports and non-subject imports differently. The court thus sustains the ITC's finding that non-subject imports cannot account for the magnitude of the price effects or impact on the domestic industry.

CONCLUSION

For the foregoing reasons, it is

ORDERED that the ITC's final affirmative injury determination is sustained.

Judgment will enter accordingly.

Dated: June 19, 2019
New York, New York

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

Slip Op. 19–77

SOLIANUS, INC. AND CONSOLIDATED FIBERS, INC., Plaintiffs, v. UNITED STATES, Defendant, and DAK AMERICAS LLC, NAN YA PLASTICS CORPORATION, AMERICA AND AURIGA POLYMERS INC., Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 18–00179

[The court sustains the determinations of the U.S. Department of Commerce.]

Dated: June 21, 2019

Gregory S. Menegaz, J. Kevin Horgan, Alexandra H. Salzman, deKeiffer & Horgan, PLLC, of Washington, D.C., for plaintiffs.

Kelly Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Kristen McCannon*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Paul C. Rosenthal, *David C. Smith*, *Kathleen M. Cusack*, Kelley Drye & Warren LLP, of Washington, D.C., for defendant-intervenors.

OPINION AND ORDER

Goldberg, Senior Judge:

Plaintiffs Solianus, Inc. ("Solianus") and Consolidated Fibers, Inc. ("Consolidated") (collectively "Plaintiffs") challenge the final results issued by the U.S. Department of Commerce ("Commerce" or "the Department") in its administrative review of the antidumping duty on fine denier polyester staple fiber from the Republic of Korea ("Korea"). *See Fine Denier Polyester Staple Fiber from the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value*, 83 Fed. Reg. 24,743 (Dep't Commerce May 30, 2018) (final determ.) ("*Final Determination*") and accompanying Issues & Decisions Mem. (Dep't Commerce May 23, 2018) ("I&D Mem."). Plaintiffs challenge the Department's "all-others" antidumping duty rate assigned to all non-investigated Korean producers and exporters in the *Final Determination*.

On review of Plaintiffs' motion for judgment on the agency record, Pls.' Mot. for J. on Agency R., ECF No. 24 (Jan. 17, 2019) ("Pls.' Br."), the court sustains Commerce's methodology in calculating the all-others antidumping duty rate of 30.15 percent.

BACKGROUND

Commerce initiated an antidumping duty investigation of fine denier polyester staple fiber from Korea in June 2017. *See Fine Denier Polyester Staple Fiber from the People's Republic of China, India, the Republic of Korea, Taiwan, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 82 Fed. Reg. 29,023 (Dep't Commerce June 27, 2017) (initiation). The period of investigation ran from April 1, 2016 through March 31, 2017. *Id*. On July 31, 2017, Commerce selected Down Nara Co. ("Down Nara") and Huvis Corporation ("Huvis") as mandatory respondents for this investigation and issued both companies antidumping questionnaires. *See* Selection of Resp'ts Mem., Joint Appendix, ECF No. 30 ("J.A.") (May 2, 2019) Tab 9 (July 31, 2017). Toray Chemical Korea Inc. ("TCK") requested to be examined as a voluntary respondent. TCK Request for Voluntary Resp't Selection, J.A. Tab 12 (Aug. 7, 2017). Immediately thereafter, Huvis informed Commerce that it did not intend to participate in the investigation. Huvis's Notice of Intent Not to Participate, J.A. Tab 13 (Aug. 10, 2017). The Department then selected TCK as a third mandatory respondent. *See* Selection of an Add'l Mandatory Resp't Mem., J.A. Tab 15 (Aug. 18, 2017). The Department did not elect to replace any other mandatory respondent for indi-

vidual investigation. Commerce issued questionnaires to both Down Nara and TCK. I&D Mem. at 13, 21. Down Nara never responded to the Department's questionnaire.

In its Preliminary Determination, Commerce found that Down Nara and Huvis failed to cooperate to the best of their ability under 19 U.S.C. § 1677e(b) and assigned them each a rate of 45.23 percent, based on total adverse facts available (AFA). *See Fine Denier Polyester Staple Fiber from the People's Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 83 Fed. Reg. 660 (Dep't Commerce Jan. 5, 2018) (prelim. determ.) ("*Preliminary Determination*") and accompanying Prelim. Decision Mem., J.A. Tab 5 (Dec. 18, 2017) ("PDM"). TCK received a *de minimis* rate and Commerce preliminary calculated an all-others rate of 30.15 percent, reflecting an average of the rates assigned to all three mandatory respondents. *See* PDM at 11 ("[W]e preliminarily determine that it is reasonable to calculate the all-others rate based on a simple average of the zero percent dumping margin and the two dumping margins based totally on AFA."). Commerce did not make any major changes to these rates in its Final Determination and continued to assign the average rate of 30.15 percent from all three mandatory respondents to all-others rate companies, including Plaintiffs. Plaintiffs (Solianus and Consolidated Fibers) are Korean exporters of fine denier polyester staple fiber not individually investigated.

Today, Plaintiffs raise a challenge before this court concerning the Department's all-others rate assignment. *See generally* Pls.' Br. Specifically, Plaintiffs claim that because two of the mandatory respondents (Down Nara and Huvis) did not participate in the investigation, they were not "individually investigated" within the meaning of 19 U.S.C. § 1673d(c)(1)(B)(i), and therefore, should not be included in Commerce's calculation. As a result, Plaintiffs maintain that Commerce's all-others rate was improperly calculated. *Id*. at 8. Instead, Plaintiffs argue, Commerce should have calculated the all-others rate using only TCK's *de minimis* margin. *Id*. at 8–9. The Government defends the Department's position as consistent with the Federal Circuit's interpretation of an "individually investigated" respondent. *See generally* Def.'s Resp. to Pls.' Mot., ECF No. 28 (Mar. 22, 2019) ("Def.'s Br.").[1]

[1] Additionally, Defendant-Intervenors raise an exhaustion challenge to Plaintiffs' claims, arguing that because Plaintiffs did not request to become voluntary respondents, they cannot "seek [their] own duty rate" by way of challenging the all-others rate. *See* Def.-Intervenors' Resp. to Pls.' Mot., ECF No. 27 (Mar. 22, 2019). The court shall require exhaustion of administrative remedies where appropriate. 28 U.S.C. § 2637(d). However, Plaintiffs here are not seeking an individual duty rate separate from the all-others rate. As

Ultimately, the Department's methodology in calculating the all-others rate was legally sound and did not produce an unfair result. The court upholds the resulting 30.15 percent all-others antidumping rate assigned to Plaintiffs.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and will sustain Commerce's determinations 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).

DISCUSSION

Pursuant to 19 U.S.C. § 1673d(a)(1), Commerce is required to make a final determination of whether certain merchandise is sold in the United States at less than its fair value. In so doing, the antidumping duty law generally requires that Commerce establish an antidumping duty margin for each exporter for which review is requested. Specifically, the Department must (i) determine the estimated weighted average dumping margin for each exporter and producer individually investigated; and (ii) determine the estimated all-others rate for all exporters and producers not individually investigated. § 1673d(c)(1)(B)(i).

Because it would be practically impossible to examine *all* producers and exporters of all relevant merchandise, the statute contains a built-in all-others rate calculation—which allows Commerce to assign an antidumping rate to non-investigated firms. Section 1673d(c)(5) governs the method for determining the all-others rate. Generally, the estimated all-others rate is equal to the weighted average of the estimated weighted average dumping margins for exporters and producers that were individually investigated, excluding any zero or *de minimis* margins, or margins based entirely upon facts available. § 1673d(c)(5)(A). However—foreshadowing the issue at hand—the statute also recognizes an exception to the general rule for calculating all-others rates: if all margins are zero, *de minimis*, or based entirely on facts available, the statute permits Commerce to use "any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated." *Id*. According to the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, the "expected method in such cases will be to weight-average the zero and *de minimis* margins and margins deter-

Plaintiffs correctly identify, Plaintiffs are challenging the all-others rate methodology and application to all non-investigated firms, including itself. Therefore, the exhaustion doctrine is not at issue in this case.

mined pursuant to facts available." *See* Statement of Administrative Action, H.R. Doc. No. 103–316 (1994), at 873 reprinted in 1994 U.S.C.C.A.N. 4040, 4201 ("SAA")[2]. But, "if this method is not feasible . . . Commerce may use other reasonable methods." *Id*.

Here, Commerce had assigned two of the mandatory respondents (Down Nara and Huvis) total AFA because they refused to participate in the investigation, and the remaining mandatory respondent, TCK, received a *de minimis* rate—thereby triggering the "exception" under section 1673d(c)(5). Commerce then calculated the all-others rate by averaging the rates assigned to these three respondents, including the AFA rates assigned to Down Nara and Huvis. I&D Mem. at 14–18. Plaintiffs challenge the Department's methodology because "it does not rely upon the margin calculated for the only individually investigated exporter for purposes of determining the all-others rate for Solianus." Pls.' Br. at 8. Implicit in (and integral to) Plaintiffs' argument, however, is the claim that because Down Nara and Huvis failed to participate in the investigation, the only "individually investigated" exporter was TCK—which received a *de minimis* rate. Essentially, Plaintiffs assert, a company cannot be "individually investigated" unless it places *some* information on the record for Commerce to actually examine. Moreover, according to Plaintiffs, Commerce abandoned the "expected method" of calculating the separate rate (that is, weight-averaging the margins) without first establishing that the method was not "feasible" or would result in a margin that is not "reasonably reflective of potential dumping margins." Pls.' Br. at 8–9. Ultimately, Plaintiffs request that Commerce, on remand, recalculate the all-others rate using only TCK's *de minimis* margin. *See* Pls.' Br. at 18.

What is the meaning of "individually investigated," in the context of section 1673d? The statute permits Commerce to "use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers *individually investigated*." 19 U.S.C. § 1673d(c)(5)(B). Plaintiffs are pointedly refraining from arguing that the term "individually investigated" is ambiguous. Pls.' Reply Br. at 4. That is the correct approach, based on controlling precedent that, "as a matter of the plain meaning of words, there is no ambiguity in the

[2] Congress has deemed the SAA "as an authoritative expression of the United States concerning the interpretation and application of the Uruguay Round Agreements." 19 U.S.C. § 3512(d).

word 'individually' or in the word 'investigated.'" *MacLean-Fogg v. United States*, 753 F.3d 1237, 1243 (Fed. Cir. 2014). Indeed, the phrase "individually investigated" "must be understood to be a term of art," *id.* at 1244. The issue before the court today boils down to whether firms that were assigned a rate based entirely on AFA (due to a total refusal to cooperate with the investigation) are still considered "individually investigated," so as to be included in the all-others calculation. Plaintiffs assert that entirely non-cooperating firms cannot be "individually investigated" unless they place at least some information on the record for Commerce to examine. Pls.' Br. at 8–9. Based on the plain language of the statute and Federal Circuit precedent, the court disagrees.

The antidumping statute creates two categories of importers or producers: those that are "individually investigated" and those that are not. The statute explicitly states that the estimated all-others rate is the rate applied to "exporters and producers not individually investigated," 19 U.S.C. § 1673d(c)(5)(B). Based on statutory context, then, producers that are "not individually investigated" represent the "all-other" firms that, "[a]s a practical matter," were "not selected for examination," SAA at 4200. *See also Changzhou Hawd Flooring Co., Ltd. v. United States*, 848 F.3d 1006, 1011 (Fed. Cir. 2017) ("In investigations involving exporters from market economies, 19 U.S.C. § 1673d(c)(5) establishes the method for determining the rate for entities that are not individually investigated, *the so-called all-others rate*." (emphasis added)). On the other hand, firms that are "individually investigated" fall into the category of producers or exporters wherein Commerce initiated an investigation and made a determination "based upon the information available to it at the time of the determination, or whether there is a reasonable basis to believe or suspect that the merchandise is being sold . . . at less than fair value." 19 U.S.C. § 1673b(b)(1)(A). In other words, "there is no possible doubt that a [] respondent who receives his individual rate has undergone 'individual investigation.'" *MacLean-Fogg Co*., 753 F.3d at 1243. This rule is further confirmed by the operating regulation, which defines what it means to be individually examined:

> (c) Exporters and producers *examined*—
>
> (1) In general. In an investigation, the Secretary will attempt to determine an *individual weighted-average dumping margin* or individual countervailable subsidy rate *for each known exporter or producer of the subject merchandise*. However, the Secretary may decline to examine a particular exporter or producer if that exporter or producer and the petitioner agree.

19 C.F.R. § 351.204(c)(1) (emphasis added). Neither the statute nor the regulation makes a distinction between mandatory respondents who put forward information for Commerce to evaluate, and mandatory respondents that refuse to do so. In either circumstance, so long as a mandatory respondent received an "individual rate"—zero, *de minimis*, based on facts available, or otherwise—that respondent has undergone individual investigation sufficient for section 1673d. *See MacLean-Fogg Co.*, 753 F.3d at 1244–45 ("The legislative history confirms that those who are 'individually investigated' receive an 'individual countervailable subsidy rate' and those who are 'not individually investigated' receive an 'all-others' rate.").

Plaintiffs' suggestion that it is the submission of evidence or documents that is necessary to fulfill the statutory definition of "individually investigated" is not supported by either the statute's text or precedential case law. Indeed, if rates determined entirely under AFA fell outside of the scope of individually investigated respondents (but zero or *de minimis* margins did not), Congress could have easily included that distinction in either the plain language of the statute or in the legislative history. *See Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 524 (1981) ("If Congress had meant to carve out such an expansive exception, one would expect to find some mention of it."); *Allied Tube & Conduit Corp. v. United States*, 13 CIT 698, 704, 721 F. Supp. 305, 311 (1989), *aff'd*, 898 F.2d 780 (Fed. Cir. 1990) ("It is clear to this Court that if Congress had intended to exclude verification documents from the scope of the statute it could easily have so provided in the plain language of the statute. This Court declines to look beyond the plain meaning of the statutory language . . . .").

The court's understanding of section 1673d is further confirmed by the structure of the statute, which initially lists the available dumping margins of individually investigated exporters and producers as zero, *de minimis*, or determined entirely under section 1677e[3] —and then later refers to those same dumping margins as derived from "individually investigated" exporters or producers.[4] 19 U.S.C. § 1673d(c)(5)(B); *see also Robinson v. United States*, 335 F.3d 1365, 1369 (Fed. Cir. 2003) (statutory reference to a previously defined term is "powerful evidence that [the term] was meant to have the same meaning in the [statute]."). This leaves the court with the understanding that even those producers or exporters who receive a "zero

[3] *See* 19 U.S.C. § 1673d(c)(5)(B) ("If the estimated weighted average dumping margins established for all exporters and producers individually investigated are *zero, or de minimis margins, or are determined entirely under section 1677e of this title*."(emphasis added))

[4] *See id*. ("[I]ncluding averaging the estimated weighted average dumping margins determined for the exporters and producers *individually investigated*." (emphasis added)).

or *de minimis* margin," *or* receive rates "determined entirely under section 1677e," § 1673d(c)(5)(B), are still "exporters and producers individually investigated," *id*.

Additionally, the Federal Circuit has already affirmed the Department's method of calculating an "all-others"-type antidumping rate calculation in *Yangzhou Bestpak Gifts & Crafts Company v. United States*, 716 F.3d 1370, 1374 (Fed. Cir. 2013) ("*Bestpak*"). There, the Federal Circuit addressed the Department's calculation of a "separate rate" for eligible non-mandatory respondents for a proceeding in a non-market economy (China)—the calculation of which follows the same statutory method outlined in section 1673(d). In *Bestpak*, Commerce selected two exporters as mandatory respondents for investigation, one of which completely failed to cooperate and was assigned the AFA China-wide rate while the other cooperated and was assigned a *de minimis* margin. Because all dumping margins in the investigation were either *de minimis* or AFA rates, Commerce applied the exception found in section 1673d(c)(5)(B) in order to calculate a separate rate for twelve additional exporters that submitted applications. In so doing, Commerce took a simple average of both the *de minimis* rate and the AFA China-wide rate, yielding a 123.83 percent margin. Thereafter, one of the twelve additional exporters and separate rate respondent, Bestpak, challenged the separate rate determination, arguing that the simple average methodology was contrary to law. *Id*. at 1375. But in affirming Commerce's methodology to calculate the separate rate, the Federal Circuit depended on the "statute's lenient standard of 'any reasonable method'" to conclude that a simple average of a *de minimis* rate and an AFA rate was "explicitly allow[ed]" by the statute and the SAA. *Id*. at 1378. Therefore, the simple average of an AFA rate and a *de minimis* rate was affirmed and the Court found "no legal error" in Commerce's methodology. *Id*. The same principle can be applied here: Commerce calculated the all-others rate using a simple average of the three individually investigated mandatory respondents.[5] This methodology was permitted by the Federal Circuit in *Bestpak* and is affirmed by the court today.

[5] Plaintiffs argue that Commerce abandoned the "expected method" of calculating the all-others rate, as prescribed by the SAA. The "expected method" requires Commerce "to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available." SAA at 4201. The SAA continues that "if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable means." *Id*. Here, Commerce did not conduct a weighted-average of the margins available (*de minimis*, and margins determined pursuant to the facts available), because, as the SAA anticipated, volume data was not available for the mandatory respondents that failed to cooperate. Def.'s Br. at 7. Therefore, the Department resorted instead to a simple average of the margin data—an approach "explicitly allowed" by the statute. *Bestpak*, 716 F.3d at 1378.

Despite sanctioning the Department's underlying methodology, the Federal Circuit in *Bestpak* also found that while the methodology was permitted by the statute, "the circumstances of [that] case render[ed] a simple average of a *de minimis* and AFA China-wide rate unreasonable *as applied*." *Id*. (emphasis added). Specifically, the resulting average assigned to Bestpak and the other eleven separate rate respondents (123.83 percent margin) did not reasonably "reflect[] economic reality" and the Department failed to substantiate and calculate the basis for such a dumping margin. *Id*. at 1378.

Plaintiffs focus on one specific portion of *Bestpak* to support their claim that a mandatory respondent who receives a rate based entirely on AFA is not "individually investigated" for the purposes of section 1673d(c)(5)(B); the Federal Circuit, in dictum, stated that "[the] record simply does not supply enough data for Commerce to calculate its separate rate determination *based on only one individually investigated respondent*." *Id*. (emphasis added). Plaintiffs hang their hat on the Court's idle reference to the mandatory respondent that received a *de minimis* rate as the "*only* . . . individually investigated respondent" as their premise for finding the Department's methodology in this administrative review contrary to law. However, to find that the *Bestpak* Court implied that an individually investigated respondent is one that necessarily puts forth evidence on the record (as the *de minimis* mandatory respondent did in *Bestpak*) would render the first portion of the *Bestpak* decision—that affirmed the Department's underlying methodology of averaging both rates—meaningless at best, and contradictory at worst. Moreover, the Court used varying terminology throughout the decision to differentiate between the "responding" mandatory respondent and the non-cooperative respondent—all the while refusing to omit the non-cooperative mandatory respondent from the separate rate calculation. *See id*. at 1379 ("Assigning a non-mandatory, separate rate respondent a margin equal to over 120 percent of the only *fully investigated respondent* . . . ." (emphasis added)); *id*. at 1374 ("In sum, Commerce's investigation was left with one *participant* after Jiantian's withdrawal." (emphasis added)).

Coupled with the Federal Circuit's explicit approval of the Department's methodology in calculating the separate rate under section 1673d(c)(5)(B), the court is ultimately left with the understanding that, regardless of the level of cooperation, if a firm is chosen as a mandatory respondent to an investigation, it is "individually investigated." Indeed, that is the "plain meaning" we can safely afford the statutory text. *See generally Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998).

Not only does Commerce's chosen methodology find support in the text of section 1673d(c)(5)(B) and the court's precedents, but Plaintiffs have failed to advance either a legal or factual reason why the Department's methodology is flawed as applied to this administrative review. Citing specifically to *Bestpak*, Plaintiffs misinterpret the relevant case law as supporting the proposition that a respondent is only individually investigated if it cooperates in the investigation. *See* Pls.' Br. at 11–12. But that is not the "approach" that the court "rejected," Pls.' Br. at 12. Instead, the Federal Circuit found that the circumstances of the case before them rendered the resulting rate unreasonably high and not reflective of the economic realities for firms independent of Chinese intervention. *See Bestpak*, 716 F.3d at 1379 ("When there is only one benchmark, Commerce's comparison of the potential dumping margins with the estimated AUVs based on scant information available here is not reasonable."). Therefore, as to Bestpak's calculated margin, the record did "not contain any information—save the AUV estimate—that indicat[ed] what Bestpak's individually calculated margin might be," and "[t]here [was] no basis in the record to tie this 123.38 percent rate to Bestpak's commercial activity." *Id*. at 1380.

Plaintiffs attempt to raise a similar challenge here, stating that "the circumstances of this investigation render a simple average of a *de minimis* rate and two AFA rates unreasonable as applied" and that "the record reveals no evidence showing that such a determination reflects economic reality." Pls.' Br. at 14. But as it stands, Plaintiffs have failed to allege any specific error in the Department's application of the methodology to the facts of this case. That is, Plaintiffs have offered no reason *why* the resulting 30.15 percent all-others rate failed to "reflect[] economic reality" of the "all-other" firms. *Id*. The court need not (and will not) take Plaintiffs at their word that "[o]n its face, this rate does not bear a connection to the actual production experience and sales costs of an actual cooperating Korean producer or exporter." Pls.' Reply Br. at 9. Indeed, the Department has justified the application of the sanctioned methodology to calculating the all-others rate. First, the Department selected Down Nara and Huvis as mandatory respondents in the investigation based on the assumption that, as the largest volume exporters, they were "representative of the rest of the market." I&D Mem. at 18. Additionally, the 45.23 percent AFA rate was corroborated by "compar[ing] the 45.23 percent margin to the transaction-specific dumping margins that [the Department] calculated for TCK." I&D Mem. at 14. And, in its analysis, Commerce "found that the dumping margin of 45.23 percent [was] not

significantly higher than the highest transaction-specific margin calculated for TCK, and therefore [was] relevant and [had] probative value." *Id*. Plaintiffs do not dispute these findings. Nor do Plaintiffs dispute the claim that "no information on the record [] supports Solianus' claim that it is like TCK but unlike Down Nara and Huvis." *Id*. at 18. Without more evidence to support the claim that the resulting rate is not fairly representative of "all other" exporters, the court sustains the Department's application of the simple average methodology to calculate the all-others rate.

Plaintiffs' reliance on *Changzhou Hawd* fares no better in this regard. Pls.' Br. at 10 (citing *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1009 (Fed. Cir. 2017)). Plaintiffs argue that the Federal Circuit "confirm[ed] the principle that to include AFA in calculating the 'all-others' rate when the only individually investigated respondent received a *de minimis* rate . . . is unreasonable." *Id*. But again, that is a misreading of the Federal Circuit's ruling and the specific facts underlying that case. In *Changzhou Hawd*, Commerce selected three of the largest exporters as mandatory respondents and found all three to have zero or *de minimis* dumping margins. However, in calculating the separate rate, Commerce averaged those three zero/*de minimis* figures (derived from the mandatory respondents) together with the 25.62 percent AFA rate it had previously adopted as the China-wide rate—yielding a "separate rate" of 6.41 percent for the non-individually investigated companies.[6] The Federal Circuit rejected that approach as departing from the "expected method" without first determining "that the separate-rate firms' dumping is different from that of the mandatory respondents." 848 F.3d at 1012. But the AFA rate that was averaged together with the three individually investigated respondent rates was the distinct China-wide entity rate assigned to all entities "that had not shown their independence from the Chinese government." *Id*. at 1008. The China-wide AFA rate was not derived from a mandatory respondent (or, an individually investigated company)— as it was here.[7] That fact is integral to the Court's decision, then, because to factor in a rate not derived from a mandatory respondent would defeat the presumption

[6] As in *Bestpak*, *Changzhou Hawd* dealt with Commerce's antidumping duty investigation on imports from the People's Republic of China—a non-market economy. In non-market economy investigations, certain Chinese entities may demonstrate their independence from the Chinese government. The firms that successfully demonstrate their independence receive a "separate" antidumping duty rate distinct from the "China-wide" rate that applies to entities that did *not* demonstrate their independence from the Chinese government. These circumstances are not present in the case before us today.

[7] The China-wide rate is a stand-in rate for companies that are owned and controlled by the Government of China. *See Changzhou Hawd*, 848 F.3d at 1009, 1012–13.

that "mandatory respondents . . . are assumed to be representative" of all exporters, especially those "separate" entities that demonstrated their independence from the Chinese government. *Id*. at 1012. Moreover, in explaining the statutory context surrounding the calculation of a separate rate, the Federal Circuit also indicated that "the language of 'margins determined pursuant to the facts available'" "refers to margins *so determined for firms that are individually investigated*"—implicitly acknowledging a situation wherein calculating an all-others (or separate) rate may include AFA rates from *individually investigated* firms. *Id*. at 1011 n.4 (emphasis added).

The statute and our precedents permit the methodology that Commerce has undertaken in this administrative review. Commerce acted in accordance with law in imposing an all-others rate derived from a simple average of the dumping margins from the three mandatory respondents. Additionally, Plaintiffs have failed to allege that this sanctioned methodology was improperly applied in this administrative proceeding. The record below does not support Plaintiffs' argument that the 30.15 percent all-others rate is unreasonably high or unrepresentative of "all other" exporters. Accordingly, the court sustains Commerce's determinations here.

CONCLUSION

For the foregoing reasons, upon consideration of Plaintiff's motion for judgment on the agency record and all papers and proceedings herein, it is hereby:

ORDERED that Commerce's methodology of calculating the all-others rate by simple average of the three individually investigated exporters is sustained; it is further

ORDERED that Commerce properly applied its methodology to calculate the all-others rate in this administrative review, pursuant to 19 U.S.C. § 1673d; and it is further

ORDERED that Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record is DENIED; and it is further

ORDERED that the court sustains Commerce's determination in full and enters judgment in the Department's favor.

Dated: June 21, 2019
New York, New York

/*s*/ *Richard W. Goldberg*
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 19–78

ASPECTS FURNITURE INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 18–00222

[Defendant's partial motion to dismiss for lack of subject matter jurisdiction is denied.]

Dated: June 21, 2019

Robert W. Snyder and *Leanne R. E. Torres*, Law Offices of Robert W. Snyder, of Irvine, CA, for Plaintiff.

Marcella Powell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Amy M. Rubin*, Assistant Director, and *Joseph H. Hunt*, Assistant Attorney General.

OPINION AND ORDER

Barnett, Judge:

In this action, Plaintiff, Aspects Furniture International, Inc. ("Plaintiff" or "AFI"), contests the denial of two protests[1] challenging U.S. Customs and Border Protection's ("CBP" or "Customs") allegedly untimely liquidation of ten entries associated with those protests. *See generally* Compl., ECF No. 2. The matter is before the court on Defendant's ("the Government") partial motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to United States Court of International Trade ("USCIT" or "CIT") Rule 12(b)(1) with respect to eight entries covered by the 1st Subject Protest. *See* Def.'s Partial Mot. to Dismiss for Lack of Jurisdiction ("Def.'s Mot."), ECF No. 14. AFI opposes the motion. *See* Pl. Aspect Furniture Int'l, Inc.'s Opp'n to Def. United States' Partial Mot. to Dismiss for Lack of Jurisdiction [and] Mem. of P&A in Supp. ("Pl.'s Opp'n"), ECF No. 18; *see also* Decl. of Robert W. Snyder ("Snyder Decl.") and Exs. In Supp. Thereof ("Pl.'s Ex."), ECF No. 18–1. For the reasons discussed herein, Defendant's motion is denied.

BACKGROUND

The imported merchandise at issue in this case consists of wooden bedroom furniture from the People's Republic of China ("the PRC" or "China"). Compl. ¶ 7. AFI is the importer of record. *Id*. ¶ 4. On various dates in January, February, July, and December of 2014, AFI made

[1] AFI contests the denial of Protest No. 5201–18–100098, covering nine entries, and Protest No. 5201–18–100100, covering one entry. Summons, ECF No. 1; *see also* Confidential Protest Number 5201–18–100098 ("1st Subject Protest"), ECF No. 9–1; Confidential Protest Number 5201–18–100100 ("2nd Subject Protest"), ECF No. 9–2.

ten entries of wooden bedroom furniture. *See* 1st Subject Protest at 6, 19, 29, 40, 50, 61, 72, 80, 91 (entry summary headers); 2nd Subject Protest at 5 (entry summary header).[2]

On April 11, 2016, the U.S. Department of Commerce ("Commerce") published the final results of its tenth administrative review of the antidumping duty order on wooden bedroom furniture from China. Compl. ¶ 11 (citing *Wooden Bedroom Furniture From the People's Republic of China*, 81 Fed. Reg. 21,319 (Dep't Commerce Apr. 11, 2016) (final results and final determination of no shipments, in part; 2014 admin. review) ("*Final Results*")). The review covered 18 companies; Commerce determined that 11 companies had no shipments during the period of review, and the remaining 7 did not establish their eligibility for a separate rate.[3] *Final Results*, 81 Fed. Reg. at 21,319–20. Commerce indicated that it would instruct CBP to liquidate suspended entries of subject merchandise at the assessment rate of 216.01 percent, which is the rate assigned to the PRC-wide entity. *Id.* at 21,320.

On April 27, 2016, the CIT preliminarily enjoined liquidation of certain entries in connection with a lawsuit filed to challenge the *Final Results*. Compl. ¶¶ 12–13; *see also Am. Furniture Mfrs. Comm. for Legal Trade, et al. v. United States*, Court No. 1600070 (CIT March 13, 2017). The case was ultimately dismissed on March 13, 2017. Compl. ¶ 16.

On November 24, 2017, CBP liquidated nine entries (Entry Nos. W69–33259005, W69–3325953–4, W69–3326026–8, W69–3329300–4, W69–3329302–0, W69–33299555, W69–3343109–1, W69–3345392–1, and W69–3368746–0). Compl. ¶ 19; Snyder Decl. ¶ 3; Pl.'s Ex. 1 at 3. On December 1, 2017, CBP liquidated one additional entry (Entry No. W69–3327386–5). Compl. ¶ 20.

On April 6, 2018, AFI filed the 1st Subject Protest. Compl. ¶ 21; 1st Subject Protest at 1. On April 16, 2018, AFI filed the 2nd Subject Protest. Compl. ¶ 22; 2nd Subject Protest at 1.

In the narrative portion of the 1st Subject Protest, AFI stated that it:

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[2] For ease of reference, the court uses the ECF pages numbers stamped on the entry summaries appended to the protest information.

[3] In antidumping duty proceedings involving a nonmarket economy country, such as China, "Commerce presumes all respondents are government-controlled and therefore subject to a single country-wide rate." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1353 (Fed. Cir. 2015). A respondent may rebut that presumption and obtain a "separate" antidumping duty rate by demonstrating the absence of both *de jure* (in law) and *de facto* (in fact) government control over its export activities. *See id.* at 1353.

> respectfully protests [CBP's] noticed rate advance and interest assessed against Entry No. W69–3325900–5, as liquidated on 11/24/2017. [AFI] disputes the amount of interest that [CBP] has assessed on its subject goods and maintains that said goods are not subject to anti-dumping and countervailing liquidation duties due to the construction of the imported product.
>
> Lastly, as the liquidation date for Entry No. W69–3325900–5 did not occur until 11/24/2017, the rate advance noticed and applied to this importer's previously entered subject goods by CBP is untimely. Such liquidation is not in compliance with 19 U.S.C. § 1504(d), after removal of suspension of liquidation for wooden bedroom furniture imported in 2014 from manufacturer Shanghai Jian Pu Import & Export Co., Ltd. [("Jian Pu")], in the [PRC], occurred on or about April 11, 2016, in accordance with the [*Final Results*]. While an injunction on liquidation of the aforementioned goods was later imposed due to USCIT Case No. 16–00070 (sometime after April 26, 2016), that injunction was dissolved on 05/12/2017 after determination of USCIT Case No. 16–00070, as reflected in CBP Message No. 7150306. As a result, the asserted liquidation date of 11/24/2017 occurred more than six (6) months after receiving the notice of the removal of the suspension of liquidation; and more than six (6) months after the injunction was dissolved.
>
> Therefore, in consideration of the foregoing, [AFI] asserts it should be granted relief from the noticed rate advance and assessed interest by CBP for Entry No. W69–3325900–5 due to non-conformance with 19 U.S.C. § 1504(d).

1st Subject Protest at 1, 5. AFI used the "Add Additional Entry Numbers" feature in CBP's Automated Commercial Environment ("ACE") system to identify eight additional entry numbers ("the Contested Entries") with the protest; *to wit*, Entry Nos. W69–3325953–4, W69–3326026–8, W69–3329300–4, W69–3329302–0, W69–3329955–5, W69–3343109–1, W69–3345392–1, and W69–3368746–0, along with their corresponding dates of entry and liquidation. *See* Pl.'s Ex. 1 at 3; Pl.'s Opp'n at 1; Pl.'s Opp'n at 6 (discussing Customs' guidelines).[4]

[4] Plaintiff points to several sources of information, including, for example, U.S. Customs and Border Protection, Office of Trade, Quick Reference Guide: Automated Commercial Environment (ACE): ACE Protest for Trade (2016) ("ACE Guide"), *available at* https://www.cbp.gov/sites/default/files/assets/documents/2016-Aug/ACE-EntrySum%20-%20Trade%20-%20Protest%20QRG_2.pdf (last visited June 13, 2019). The ACE Guide instructs

CBP denied AFI's protests on May 10, 2018. Compl. ¶¶ 21–22; 1st Subject Protest at 1; 2nd Subject Protest at 1. According to CBP, AFI provided "[i]nsufficient information . . . about the 'construction of the imported product'" for CBP to reevaluate the propriety of antidumping duties. *See, e.g.*, 1st Subject Protest at 2. CBP did not address AFI's challenge to the timeliness of liquidation. *See id.* On October 27, 2018, AFI timely initiated this action challenging the denial of its protests. *See* Summons; Compl. The court has jurisdiction to consider this motion pursuant to 28 U.S.C. § 1581(a).[5]

DISCUSSION

I. Legal Standard

To adjudicate a case, a court must have subject-matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). A plaintiff bears the burden of establishing subject-matter jurisdiction. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). When, as here, the "motion challenges a complaint's allegations of jurisdiction, the factual allegations in the complaint are not controlling and only uncontroverted factual allegations are accepted as true." *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012).[6] To "resolv[e] these disputed predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings." *Id.* (internal quotation marks and citation omitted).

In this case, the Government challenges the existence of jurisdiction over the Contested Entries. *See* Def.'s Mot. at 2–3, 5–6. Therefore, the court may consider extrinsic evidence, if necessary. *Shoshone Indian Tribe*, 672 F.3d at 1030.

II. Analysis

A. Requirements for Jurisdiction

Pursuant to 28 U.S.C. § 1581(a), the court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest,

importers to include the "lead entry number" in the "Entry Number" field, and, if appropriate, to add additional entry numbers using the "Add Additional Entry Numbers" feature. ACE Guide 19.

[5] "A court always has jurisdiction to determine jurisdiction . . . ." *Bunting v. Mellen*, 541 U.S. 1019, 1026 (2004) (Scalia, J., dissenting) (citing *United States v. Mine Workers,* 330 U.S. 258, 291 (1947)); *see also Bush v. United States*, 717 F.3d 920, 928 (Fed. Cir. 2013).

[6] In contrast, when the motion challenges the sufficiency of the pleadings, the court assumes that the allegations within the complaint are true. *H & H Wholesale Servs., Inc. v. United States*, 30 CIT 689, 691, 437 F. Supp. 2d 1335, 1339 (2006).

in whole or in part, under section 515 of the Tariff Act of 1930," 19 U.S.C. § 1515. "[A] prerequisite to [CIT] jurisdiction . . . is the denial of a valid protest." *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1365 (Fed. Cir. 2006) (second alteration in original) (citation omitted). A valid protest satisfies the requirements set forth in 19 U.S.C. § 1514(c)(1) and 19 C.F.R. § 174.13(a). *Koike Aronson, Inc. v. United States*, 165 F.3d 906, 908 (Fed. Cir. 1999) (per curiam).

Pursuant to 19 U.S.C. § 1514,

> [a] protest must set forth distinctly and specifically—(A) each decision . . . as to which protest is made; (B) each category of merchandise affected by each decision . . .; (C) the nature of each objection and the reasons therefor; and (D) any other matter required by [CBP] by regulation.

19 U.S.C. § 1514(c)(1). Customs implementing regulations provide that a protest must contain, *inter alia*:

> (1) The name and address of the protestant, i.e., the importer of record or consignee, and the name and address of his agent or attorney if signed by one of these; (2) The importer number of the protestant. If the protestant is represented by an agent having power of attorney, the importer number of the agent shall also be shown; (3) The number and date of the entry; (4) The date of liquidation of the entry, or the date of a decision not involving a liquidation or reliquidation; (5) A specific description of the merchandise affected by the decision as to which protest is made; (6) The nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal . . . .

19 C.F.R. § 174.13(a)(1)-(6). When, as here, multiple entries are at issue,

> [a] single protest may be filed with respect to more than one entry with CBP, either at any port or electronically, if all such entries involve the same protesting party, and if the same category of merchandise and a decision or decisions common to all entries are the subject of the protest. In such circumstances, the entry numbers, dates of entry, and dates of liquidation of all such entries should be set forth as an attachment to the protest.

Id. § 174.13(b).

Protests must "be construed generously in favor of finding them valid, but [] a protest is defective if it gives no indication of the reasons why

the collector's action is alleged to be erroneous." *Saab*, 434 F.3d at 1365–66 (internal quotation marks and citation omitted).

B. Parties' Contentions

In its motion, the Government seeks dismissal on the basis that AFI filed a valid protest only as to Entry No. W69–3325900–5 and failed to "seek relief for any other entry." Def.'s Mot. at 2; *see also* Def.'s Reply Mem. in Further Supp. of Partial Mot. to Dismiss ("Def.'s Reply") at 6, ECF No. 22.[7] According to the Government, AFI never protested the liquidation of Entry Nos. W69–3325953–4, W69–3326026–8, W69–3329300–4, W69–3329302–0, W69–3329955–5, W69–3343109–1, W69–3345392–1, and W69–3368746–0, Def.'s Mot. at 2, because the 1st Subject Protest "expressly cover[ed]" Entry No. W69–3325900–5 alone and "cannot be expanded to cover liquidations that were never challenged or even mentioned in the protest," *id.* at 3; *see also id.* at 5–6 (the 1st Subject Protest "is directed to a single entry" and does not satisfy statutory and regulatory requirements for the eight additional entries).

AFI responds that the Government "failed to disclose the critical fact that" AFI listed the Contested Entries using the "Add Additional Entry Numbers" function in CBP's ACE system, which is a valid method of protesting multiple entries in one protest. Pl.'s Opp'n at 5. According to AFI, it is not necessary to explicitly list additional entry numbers in the narrative portion of the protest; rather, CBP's regulation provides that additional entries are to "be set forth as an *attachment* to the protest." *Id.* at 8 (quoting 19 C.F.R. § 174.13(b)). When "the requirements have been met as to a lead entry," AFI asserts, "they have also been met as to the other entries attached to a protest." *Id.* at 9; *see also id.* at 10–12 (discussing compliance with statutory and regulatory protest requirements).

The Government replies that listing additional entry numbers in the ACE system is insufficient to properly protest the liquidation of those entries. Def.'s Reply at 2–3. According to the Government, while subsection (b) of CBP's regulation "eliminates the burden of filing a separate protest for each entry," protestants must nevertheless "comply[] with the specificity requirements of [19 U.S.C. § 1514] with respect to all entries covered by a protest." *Id.* at 3. The Government contends that the 1st Subject Protest is not specific as to the Contested Entries because it is limited to Entry No. W69–3325900–5 and

[7] In its reply, the Government characterizes the 1st Subject Protest as deficient with respect to Entry No. W69–3325900–5. Def.'s Reply at 6. However, the Government goes on to assert that "Entry No. W69–3325900–5 is the only entry that was properly protested," and seeks dismissal as to the eight Contested Entries associated with the 1st Subject Protest. *Id.* Accordingly, the court addresses those entries.

does not indicate that the entry is representative of all entries. *Id.* at 4. Through its narrative, the Government asserts, "AFI conveyed that the protest language should be construed narrowly" and AFI "should be held to the language of its protest." *Id.* ("[W]here an importer states with specificness his objections he is limited thereby. He is bound by the allegations of his protest.") (quoting *United States v. Troy Laundry Mach. Co.,*5 Ct. Cust. App. 430, 431 (1914)). The Government further points to statements made in connection with AFI's application for further review to bolster its contention the Contested Entries were never properly protested. *Id.* at 5.[8]

C. The Government's Motion is Denied; the Court Has Jurisdiction Over the Contested Entries Pursuant to 28 U.S.C. § 1581(a)

The Government's motion is premised on the factually incorrect notion that AFI never protested the liquidation of the eight Contested Entries. *See* Def.'s Mot. at 2 ("The protest did not seek relief for any other entry. . . . [T]he liquidation of [the Contested Entries] were [*sic*] never protested."); *id.* at 3 (A protest that expressly covers the liquidation of a **single entry** cannot be expanded to cover liquidations that never challenged *or even mentioned in the protest*.") (italicization added). The Government shifts gears in its reply, asserting the "absence of a *valid* protest" in connection with the Contested Entries. *See* Def.'s Reply at 1–2 (emphasis added).[9] The Government argues that compliance with 19 U.S.C. § 1514—in particular, its specificity requirement—requires protestants to discuss each protested entry in the narrative portion of the protest or otherwise indicate that the cited entry is "representative of all the entries." *Id.* at 3–4. Case law on the requirements for properly protesting multiple entries in a single protest is scarce.[10] Nevertheless, the court rejects the Government's arguments and finds that it has jurisdiction over the eight Contested Entries.

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[8] AFI submitted an application for further review of the 1st Subject Protest, which was denied by CBP. *See* 1st Subject Protest at 3. In its request for reconsideration of the denial, AFI referenced "the entry" CBP allegedly failed to timely liquidate. *See id.*; Def.'s Reply at 5.

[9] The protest information on the court docket explicitly references all nine entries, *see* 1st Subject Protest at 1–2, and a printout from CBP's ACE system shows that the protest was denied as to all nine entries, *see* Pl.'s Ex. 1 at 3. "The test for determining the sufficiency of a protest under [19 U.S.C. § 1514]" is, however, "an objective one," *Mattel, Inc. v. United States*, 72 Cust. Ct. 257, 266, 377 F. Supp. 955, 963 (1974); thus, CBP's apparent awareness that the Contested Entries were included in the protest is not dispositive of the jurisdictional question.

[10] Plaintiff relies on *Lykes Pasco, Inc. v. United States*, 22 CIT 614, 615, 14 F. Supp. 2d 748, 749 (1998), for the proposition that the court "will *not* look to the narrative statement to determine the entries intended to be covered by a protest," but will "instead look[] only to

In 1993, the Customs Modernization Act ("Mod Act")[11] made several changes to the customs laws. Those changes included the implementation of "automated customs transactions" and the introduction of "the concept of 'informed compliance,'" which represents the idea "that importers have a right to be informed about customs rules and regulations, as well as interpretive rulings, and to expect certainty that [CBP] will not unilaterally change the rules without providing importers proper notice and an opportunity for comment." S. Rep. No. 103–189 at 63–64 (1993).[12]

Here, AFI adhered to Customs' regulatory provisions regarding protesting multiple entries together when it included Entry No. W69–3325900–5 as the "lead entry" and manually added the Contested Entries in the ACE system along with their respective dates of entry and liquidation. *See* Pl.'s Ex. 1 at 3; Pl.'s Opp'n at 6; *supra* note 4. In this way, AFI asserted that the regulatory conditions for protesting multiple entries together in a single protest were met. *See* 19 C.F.R. § 174.13(b) (requiring entries protested together to involve the same protestant, category of merchandise, and decision(s) forming the basis of the protest).[13] When considered as a whole and in accordance with the "general rule that customs protests are to be construed generously" and deemed "defective" only when they afford "no indication" of the basis for the protest, *Saab*, 434 F.3d at 1365–66 (internal quotation marks and citation omitted), it is readily apparent that AFI's grounds for protesting Entry No. W69–3325900–5 apply likewise to the Contested Entries. AFI's protest does not run afoul of

the list of additional entries." Pl.'s Opp'n at 8–9. *Lykes Pasco* is factually distinguishable and legally inapposite because it does not address the specificity requirement in the context of multiple entries protested electronically pursuant to 19 C.F.R. § 174.13(b).

[11] The Mod Act was enacted as Title VI to the North American Free Trade Agreement ("NAFTA") Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057 (1993).

[12] The Mod Act substantially amended 19 U.S.C. § 1625, which now directs CBP to make available written or electronic materials providing the "advice necessary for importers and exporters to comply with the Customs laws." 19 U.S.C. § 1625(e); *see also Precision Specialty Metals, Inc. v. United States*, 25 CIT 1375, 1388, 182 F. Supp. 2d 1314, 1328 (2001). Then-Commissioner of CBP (formerly the U.S. Customs Service) framed the amendment in terms of the "shared responsibility" between Customs and the trade community. *Precision Specialty Metals*, 25 CIT at 1388, 182 F. Supp. 2d at 1328 (quoting *Customs Modernization and Informed Compliance Act: Hearing on H.R. 3935 Before the Subcomm. on Trade of the H. Comm. on Ways and Means,* 102d Cong. 91 (1992) (statement of Commissioner Carol Hallett, United States Customs Service)). Shared responsibility means that "Customs must do a better job of informing the trade community of how Customs does business; and the trade community must do a better job to assure compliance with U.S. trade rules." *Id.* To that end, "informed compliance" means that "[i]mporters have the right to be informed about Customs rules and regulations, and its interpretive rulings and directives, and to expect certainty that the ground rules would not be unilaterally changed by Customs without the proper notice and an opportunity to respond." *Id*.

[13] The Government does not argue that the Contested Entries were ineligible for inclusion in the 1st Subject Protest because of differences in the enumerated criteria.

the specificity required by 19 U.S.C. § 1514 or merit the "severe" consequence of denial of subject matter jurisdiction over the Contested Entries. *See Estee Lauder, Inc. v. United States*, 35 CIT 258, 264–65 (2011) (citation omitted); *Mattel*, 72 Cust. Ct. at 262, 377 F. Supp. at 960 (the court's "liberal posture" towards protest sufficiency holds "that, however cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest for purposes of [19 U.S.C. § 1514] if it conveys enough information to apprise knowledgeable officials of the importer's intent and the relief sought"). This is particularly true given AFI's compliance with CBP's guidance in this area. *See supra* note 12 (discussing CBP's obligation to provide clear and consistent guidance to importers to promote compliance with the Customs laws).

The court finds that the Government's interpretation of CBP's regulation is unreasonable.[14] The Government asserts that the court should disregard the attached list of entry numbers, entry dates, and liquidation dates and consider only the entry number identified in the narrative as meeting the specificity requirements of 19 C.F.R. § 174.13(a)(1)-(6). *See* Def.'s Reply at 3–4. If, however, section 174.13(a) was interpreted as requiring an enumeration of every entry number, entry date, and liquidation date in the narrative portion of the protest, any identification of additional entry numbers, entry dates, and liquidation dates by means of an attachment to the protest pursuant to section 174.13(b) would be superfluous. To the extent that the Government's objection is that AFI did not include a statement explicitly linking the narrative to the eight entries in the attachment, such an express statement is not required by the regulations and the linkage is adequately inferred by the inclusion of the entries in the attachment. Moreover, any differences in the enumerated criteria between the lead entry and those entries identified in the attachment would provide CBP a basis for denying the protest as to such entries. Thus, the court rejects the Government's interpretation of the regulation as unreasonable.

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[14] The Government's interpretation is not entitled to deference pursuant to *Auer v. Robbins,* 519 U.S. 452 (1997). While *Auer* calls for deference to an agency's "fair and considered" interpretation of its own ambiguous regulation, 519 U.S. at 461–62, there are limits to this rule, *see Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 155 (2012) (*Auer* deference "does not apply in all cases"). The Government's interpretation of 19 C.F.R. § 174.13 was not adopted by CBP when it denied AFI's protests and there is no indication that it represents CBP's "fair and considered judgment on the matter in question." *Id.* (quoting *Auer*, 519 U.S. at 462). Instead, the interpretation "is nothing more than a 'convenient litigating position'" adopted by the U.S. Department of Justice in its reply. *Id.* (quoting *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 213 (1988).

The Government's reliance on *Troy Laundry* lacks merit. *See id.* at 4. While an importer that protests a classification decision by pointing to a particular tariff provision may waive its ability to later assert the propriety of a different tariff provision, *Troy Laundry*, 5 Ct. Cust. App. at 431, that is not what happened here. AFI is not asserting any objection not discussed in its protest. The Government's reliance on AFI's request for reconsideration of CBP's denial of its application for further review of its protest also lacks merit. *See* Def.'s Reply at 5. Further review of a protest is governed by different regulatory provisions (19 C.F.R. §§ 174.23–174.25) and has no bearing on the validity of the underlying protest or this court's jurisdiction over the underlying protest.

CONCLUSION & ORDER

For the reasons discussed herein, the Government's partial motion to dismiss for lack of subject matter jurisdiction is hereby **DENIED**.

Dated: June 21, 2019
New York, New York

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