U.S. Court of International Trade

Slip Op. 20–19

INVENERGY RENEWABLES LLC, Plaintiff, and SOLAR ENERGY INDUSTRIES ASSOCIATION, CLEARWAY ENERGY GROUP LLC, EDF RENEWABLES, INC. and AES DISTRIBUTED ENERGY, INC., Plaintiff-Intervenors, v. UNITED STATES of AMERICA, OFFICE of the UNITED STATES TRADE REPRESENTATIVE, UNITED STATES TRADE REPRESENTATIVE ROBERT E. LIGHTHIZER, U.S. CUSTOMS and BORDER PROTECTION, and ACTING COMMISSIONER of U.S. CUSTOMS and BORDER PROTECTION MARK A. MORGAN, Defendants, and HANWHA Q CELLS USA, INC. and AUXIN SOLAR, Defendant-Intervenors.

Before: Judge Gary S. Katzmann
Court No. 19–00192

[Plaintiffs' Motion to Show Cause as to Why the Court Should Not Enforce the Preliminary Injunction is denied.]

Dated: February 14, 2020

John Brew and *Larry Eisenstat*, Crowell & Moring LLP, of Washington, DC, argued for plaintiff, *Invenergy Renewables LLC* and plaintiff-intervenors, *Clearway Energy Group LLC* and *AES Distributed Energy, Inc*. With them on the brief were *Kathryn L. Clune*, *Robert LaFrankie*, and *Amanda Shafer Berman*.

Matthew R. Nicely, Hughes Hubbard & Reed LLP, of Washington, DC, argued for plaintiff-intervenor, *Solar Energy Industries Association*.

Kevin M. O'Brien and *Christine M. Streatfeild*, Baker & McKenzie LLP, of Washington, DC, argued for plaintiff-intervenor, *EDF Renewables, Inc*.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendants. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director.

John M. Gurley, and *Friederike S. Görgens*, Arent Fox LLP, of Washington, DC, argued for defendant-intervenors. With them on the brief was *Diana Dimitriuc Quaia*.

OPINION

Katzmann, Judge:

In this sequel to its prior order and accompanying opinion, Prelim. Inj. Order and Op., *Invenergy Renewables LLC v. United States*, 43 CIT __, __, Slip Op. No. 19–00153 (Dec. 5, 2019), ECF No. 113 ("PI"), the court now returns to a challenge to an agency action taken by the Office of the United States Trade Representative ("USTR") regarding the exclusion of safeguard duties on bifacial solar panels. Plaintiff Invenergy Renewables LLC ("Invenergy"), joined by Plaintiff-Intervenors Solar Energy Industries Association ("SEIA"), Clearway Energy Group LLP ("Clearway"), EDF Renewables, Inc. ("EDF-R"),

and AES Distributed Energy, Inc. ("AES DE") (collectively, "Plaintiffs"), filed a motion for a preliminary injunction to enjoin the United States, USTR, U.S. Trade Representative Robert E. Lighthizer, U.S. Customs and Border Protection ("CBP"), and CBP Acting Commissioner Mark A. Morgan (collectively "the Government") from implementing the *Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure*, 84 Fed. Reg. 54,244–45 (USTR Oct. 9, 2019) *available at* https://www.federalregister.gov/documents/2019/10/09/2019–22074/withdrawal-of-bifacial-solar-panels-exclusion-to-the-solar-products-safeguard-measure ("*Withdrawal*"). Invenergy's Mot. for Prelim. Inj., Nov. 1, 2019, ECF No. 49. The court granted the motion on December 5, 2019, observing in its prior opinion that "[t]he Government must follow its own laws and procedures when it acts." PI at 4. Before the court now is Plaintiffs Invenergy, Clearway, and AES DE's Motion to Show Cause as to Why the Court Should Not Enforce the Preliminary Injunction, Jan. 30, 2020, ECF No. 132 ("Motion"), alleging that the Government's publication of *Procedures to Consider Retention or Withdrawal of the Exclusion of Bifacial Solar Panels From the Safeguard Measure on Solar Products*, 85 Fed. Reg. 4,756–58 (USTR Jan. 27, 2020) *available at* https://www.federalregister.gov/documents/2020/01/27/2020–01260/procedures-to-consider-retention-or-withdrawal-of-the-exclusion-of-bifacial-solar-panels-from-the ("*Notice*"), violates the court's PI. For the reasons discussed below, the court denies Plaintiffs' Motion.

BACKGROUND

The court presumes familiarity with its opinion accompanying the preliminary injunction order,[1] and now only briefly addresses the relevant legal and procedural background. *See* PI.

Through *Presidential Proclamation 9693* issued on January 23, 2018, the President imposed safeguard duties, designed to protect domestic industry, on imported monofacial and bifacial solar panels but delegated authority to USTR to exclude products from the duties. 83 Fed. Reg. 3,541–50 *available at* https://www.federalregister.gov/documents/2018/01/25/2018–01592/to-facilitate-positive-adjustment-to-competition-from-imports-of-certain-crystalline-silicon ("*Presidential Proclamation*"). After a lengthy notice and comment process through which USTR considered requests for exclusions, USTR decided to exclude bifacial solar panels from safeguard duties. *Exclusion of Particular Products From the Solar Products Safeguard*

[1] The full order and accompanying opinion are available at: https://www.cit.uscourts.gov/sites/cit/files/19–153.pdf.

Measure, 84 Fed. Reg. 27,684–85 (June 13, 2019) *available at* https://www.federalregister.gov/documents/2019/06/13/2019–12476/exclusion-of-particular-products-from-the-solar-products-safeguard-measure ("*Exclusion*"). Four months later, however, USTR published the *Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure*, 84 Fed. Reg. 54,244–45 (USTR Oct. 9, 2019) ("*Withdrawal*"). Absent the PI, the *Withdrawal* would have reinstituted safeguard duties on certain bifacial solar panels, with only nineteen days' notice to the public, without an opportunity for affected or interested parties to comment, and without a developed public record on which to base its decision. *Id.* The *Withdrawal* explained that, "[s]ince publication of [the *Exclusion*] notice, the U.S. Trade Representative has evaluated this exclusion further and, after consultation with the Secretaries of Commerce and Energy, determined it will undermine the objectives of the safeguard measure." *Id.* at 54,244.

Plaintiff Invenergy initiated this case in response to the *Withdrawal*. Summons, Oct. 21, 2019, ECF No. 1; Invenergy's Compl., Oct. 21, 2019, ECF No. 13.[2] The Government subsequently moved for, and the court allowed, USTR to delay the effective date of the *Withdrawal* to November 8, 2019. Oct. 25, 2019, ECF Nos. 23, 29. The court then issued a TRO, Nov. 7, 2019, ECF No. 68, and later a PI enjoining the Government from implementing or enforcing the *Withdrawal*, including by amending the Harmonized Tariff Schedule of the United States ("HTSUS"), "until entry of final judgment as to Plaintiffs' claims against Defendants in this case," PI at 57. In so ruling, the court held that the *Withdrawal* of the *Exclusion* by the Government, without appropriate notice and comment, likely violated the Administrative Procedure Act, *id.* at 42, and likely was arbitrary and capricious, *id.* at 44. The court ordered that the parties confer and submit a proposed briefing schedule. *Id.* at 58.

On December 19, 2019, Plaintiffs filed the first of four motions for an extension of time to file the proposed briefing scheduling. Pls.' Mot. for an Ext. of Time, ECF No. 118. The motion stated that the parties believed they had reached an agreement in principle which would resolve the case and asked for additional time to finalize their agreement. *Id.* at 1–2. The court granted this motion on December 20, 2019. ECF No. 119. The Plaintiffs filed, and the court granted, three additional extensions of time based on the same attempt by parties to

[2] Throughout the course of this case, several parties moved to intervene as plaintiff- or defendant-intervenors. *See* PI at 11–14. Since the PI was issued, Auxin Solar, a domestic manufacturer of solar panels, also moved to intervene. Consent Mot. to Intervene as Def.-Inter., Feb. 7, 2020, ECF No. 136. The court granted Auxin Solar's motion on February 10, 2020. ECF No. 141.

resolve this case. Pls.' Mot. for Ext. of Time, Dec. 27, 2019, ECF No. 121; Order Granting Mot., Dec. 27, 2019, ECF No. 122; Pls.' Mot. for Ext. of Time, Jan. 3, 2020, ECF No. 123; Order Granting Mot., Jan. 3, 2020, ECF No. 124; Pls.' Mot for Ext. of Time, Jan. 17, 2020, ECF No. 125; Order Granting Mot., Jan. 17, 2020, ECF No. 126.

On January 21, 2020, the Government filed a Motion for Leave to File a Status Report and Status Report notifying the court and the other parties in the present case of its publication of "a notice in the Federal Register, requesting interested party comment regarding whether to withdraw the exclusion from the safeguard measure pursuant to section 201 of the Trade Act of 1974, 19 U.S.C. § 2251, *et seq.*, for bifacial solar panels contained in *Exclusion*." ECF No. 129. The court granted the Government's motion on January 24, 2020. ECF No. 130. The *Notice* was published three days later, thus initiating the comment period. The *Notice* acknowledged the court's PI "enjoining the U.S. Trade Representative from withdrawing the exclusion on bifacial solar panels from the safeguard measure. If the U.S. Trade Representative determines after receipt of comments pursuant to this notice that it would be appropriate to withdraw the bifacial exclusion or take some other action with respect to the exclusion, the U.S. Trade Representative will request that the Court lift the injunction." *Notice* at 4,756. The *Notice* provided a deadline for comments of February 17, 2020 and for responses to those comments of February 27, 2020. *Id.* at 4,757.

In response, Plaintiffs filed the present Motion on January 30, 2020. Plaintiffs asked the court to "order Defendants to show cause as to why it should not enforce the PI by ordering USTR to cease proceedings under the *Notice*, and instead proceed to briefing on Plaintiffs' substantive and procedural claims." Mem. in Supp. of Mot. to Show Cause as to Why the Court Should Not Enforce the PI at 12, Jan. 30, 2020, ECF No. 132 ("Pls.' Br."). The court ordered Defendants to respond, Jan. 31, 2020, ECF No. 133, which the Government did on February 7, 2020, Def.'s Resp. to Invenergy's Mot. to Show Cause and Mot. to Vacate Withdrawal and Dismiss Case as Moot, ECF No. 139 ("Def.'s Br."). In its response, the Government requested that the court deny Plaintiffs' motion. Def.'s Br. at 14. The Government included with its response a motion to vacate the *Withdrawal* and to dismiss the case as moot.[3] *Id.* at 1. Defendant-Intervenor Hanwha Q Cells ("Q Cells") also requested the court deny the Motion. Def.-Inter. Hanwha Q Cells USA, Inc. Resp. to Mot. to Show Cause at 11, ECF No. 140 ("Def.-Inter.'s Br."). Plaintiffs replied on February 11, 2020.

[3] The Government's motion for vacatur and dismissal have not been fully briefed by the parties. The court thus does not reach that motion here.

ECF No. 143. The court held a hearing on Plaintiffs' Motion on February 12, 2020. ECF No. 145. Parties then filed supplemental briefs. Pls.' Suppl. Submiss'n in Supp. of Mot. to Show Cause as to Why the Court Should Not Enforce the Prelim. Inj., Feb. 13, 2020, ECF No. 147; Def.'s Resp. to Ct. Order, Feb. 13, 2020, ECF No. 146; Def.-Inter. Hanwha Q Cells USA, Inc. Resp. to Ct. Order, Feb. 13, 2020, ECF No. 148.

DISCUSSION

Before the court is Plaintiffs' Motion challenging the USTR's *Notice*, in which the USTR "seek[s] public comment on whether the U.S. Trade Representative should maintain the exclusion of bifacial solar panels from the safeguard measure, withdraw the exclusion, or take some other action within his authority with respect to this exclusion," *Notice* at 4,756. Plaintiffs argue that the *Notice* violated the PI. Pls.' Br. at 7. Plaintiffs contend that the Government "failed to comply with [the court's] prohibition" on "'making effective,' 'enforcing,' or taking any action 'reflecting or including' the withdrawal of the bifacial panel Exclusion 'until entry of a final judgment as to the Plaintiffs' claims against Defendants in this case.'" *Id.* (quoting PI at 57). Plaintiffs characterize the *Notice* as "a new process intended to consider withdrawal of the exclusion before the parties have briefed, and the [c]ourt has decided, all of the claims raised . . . ." *Id.* Plaintiffs further claim that the *Notice* constitutes an attempt "to end-run [the PI] by pursuing another withdrawal through a new administrative process prior to final adjudication of all of Plaintiffs' claims on the merits." *Id.* (citations omitted).

The Government responds that "USTR did not, and has not, violated the [c]ourt's preliminary injunction." Def.'s Br. at 6. The Government states that the PI enjoins USTR and CBP from (1) "entering the *Withdrawal* into effect"; (2) "making any modification to the [HTSUS] that includes or reflects the *Withdrawal*"; and (3) "enforcing or making effective the Withdrawal or any modifications to the [HTSUS] reflecting or including the *Withdrawal*." *Id.* (quoting PI at 57). The Government contends that the *Notice* violates none of these injunctive orders, as the *Notice* (1) "does nothing to enter the [*Notice*] into effect; (2) "in no way makes any modification to the HTSUS"; and (3) does not "enforce[] or make[] effective the withdrawal of the bifacial panel exclusion contemplated by the [*Notice*]." *Id.* The Government argues that the PI is not so broad as "to prevent USTR from taking *any* action that relates to bifacial products." *Id.* at 9. Further, the Government notes that "USTR's notice acknowledged that the USTR

was subject to the [c]ourt's injunction and that USTR would 'request that the [c]ourt lift the injunction' before USTR takes any action to withdraw the bifacial exclusion." *Id.* at 6 (quoting *Notice* at 4,756).

The court is unpersuaded by Plaintiffs' contention that the USTR's *Notice* violated the court's December 5, 2019 PI. The PI enjoined the Government (1) "from entering the *Withdrawal* into effect," (2) "from making any modification to the [HTSUS] that includes or reflects the *Withdrawal*," and (3) "from enforcing or making effective the *Withdrawal* or any modifications to the [HTSUS] reflecting or including the *Withdrawal*." PI at 57. This order remains effective "from the date of issuance of this order [on December 5, 2019] until entry of final judgment as to Plaintiffs' claims against Defendants in this case." *Id.* The court retains jurisdiction to interpret and enforce its own orders. *See, e.g.*, *In re Shenango Group*, 501 F.3d 338 (3rd Cir. 2007); *In re Tomlin*, 105 F.3d 933 (4th Cir. 1997). The court concludes that the Government's *Notice* did not violate the text of that order because the *Notice* does not (1) implement the *Withdrawal*; (2) modify the HTSUS; or (3) enforce or make effective the *Withdrawal* or modifications to the HTSUS related to the *Withdrawal*. The *Notice* does not constitute a final decision to implement the previous or any new withdrawal of the *Exclusion* of bifacial solar panels. Instead, the *Notice* sets forth procedures for USTR to receive public comments regarding either the "[r]etention" or the "[w]ithdrawal" of the *Exclusion*. *Notice* at 4,756 (inviting "Comments on the Retention or Withdrawal of the Exclusion of Bifacial Solar Panels"). Thus, no new decision to implement a withdrawal is currently before the court. Therefore, the court is not persuaded that the Government has violated the PI; the Motion thus cannot succeed.

Further, the court does not now decide the Government's motion to vacate the *Withdrawal* and to dismiss the case. *See* Def.'s Br. at 1. Plaintiffs are entitled to respond to the Government's motion, to which the Government may also reply, under the rules of the court. In the meantime, the court retains exclusive jurisdiction over the implementation, enforcement, or modification of the October 19, 2019 *Withdrawal* until such date as a final judgment is entered in this case.

CONCLUSION

For the reasons discussed above, the court concludes that the Government has not violated the PI, and Plaintiffs' Motion is denied.

SO ORDERED.

Dated: February 14, 2020
New York, New York

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

Slip Op. 20–20

UNITED STEEL, PAPER and FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL and SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Plaintiff, v. UNITED STATES, Defendant, and COOPER TIRE & RUBBER COMPANY, CHINA RUBBER INDUSTRY ASSOCIATION, and CHINA CHAMBER of COMMERCE of METALS, MINERALS and CHEMICALS, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 17–00078

[Sustaining the U.S. International Trade Commission's remand redetermination following the antidumping and countervailing duty investigations of truck and bus tires from the People's Republic of China.]

Dated: February 18, 2020

Elizabeth J. Drake and *Geert De Prest*, Schagrin Associates, of Washington, D.C., argued for Plaintiff United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC. With them on the brief were *Terence P. Stewart, Mark D. Beatty*, and *Shahrzad Noorbaloochi*.

David A. Goldfine, Attorney, Office of General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for Defendant United States. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Ned H. Marshak, Max. F. Schutzman, and *Jordan C. Kahn*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of New York, N.Y., argued for Defendant-Intervenors China Rubber Industry Association and China Chamber of Commerce of Metals, Minerals and Chemicals.

OPINION

Choe-Groves, Judge:

This action involves a challenge to the U.S. International Trade Commission's ("ITC" or "Commission") final affirmative material injury determination on remand in its antidumping and countervailing duty investigations on truck and bus tires ("TBTs") from the People's Republic of China. *See Truck and Bus Tires from China*, Inv. Nos. 701-TA-556 and 731-TA-1311 (Final), USITC Pub. 4673 (Mar. 2017), PD 198 ("USITC Pub. 4673"); Views of the Commission on Remand (Int'l Trade Comm'n Jan. 30, 2019), ECF No. 63 ("*Remand Results*").

Before the court are the Commission's *Remand Results* filed per the court's order in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC v. United States*, 42 CIT __, 348 F. Supp. 3d 1328, 1339–40 (2018) ("*United Steel I*"). For the reasons discussed below, the court sustains the *Remand Results*.

I. BACKGROUND

The court presumes familiarity with the facts and record of proceedings as discussed in the prior opinion and recounts those facts relevant to the court's review of the *Remand Results*. *See United Steel I* at 1330–39.

In January 2016, Plaintiff United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("USW") filed a petition in the antidumping and countervailing duty investigations as to TBTs from China. *Remand Results* at 1. The Commission instituted countervailing and antidumping duty investigations and reached affirmative preliminary determinations. *Truck and Bus Tires from China*, 81 Fed. Reg. 14,888, 14,888 (Int'l Trade Comm'n Mar. 18, 2016). Based on the record developed in the subject investigations, the Commission voted 3–2 in February 2017 that the domestic industry was neither materially injured nor threatened with material injury by reason of subject imports of TBTs from China. *Remand Results* at 3.[1]

USW challenged several aspects of the Commission's negative material injury determination, including its findings on the conditions of competition and determinations as to price effects, impact, and threat. *United Steel I* at 1332–39. The court sustained the conditions of competition findings and adverse impact determinations, but remanded to the Commission for reconsideration of its price effects and threat analyses. *Id.* at 1335–39. The court directed the Commission to reconsider the presence of significant underselling in its price effects analysis and to address certain aspects of its negative threat determination. *Id.*

On remand in a 3–2 vote in January 2019, the Commission reached an affirmative material injury determination, an opposite result from the prior proceeding. *Remand Results* at 1.[2] The Commission reasoned that the subject imports are sold in the United States at less than fair value and are subsidized by the Chinese government. *See id.* at 1, 35–47. Specifically, the ITC found that "the volume and increase in volume of subject imports [was] significant in absolute terms and relative to domestic production and consumption[,]" *id.* at 37, that the

[1] In the original proceeding, then-Vice Chairman Johanson and Commissioners Broadbent and Kieff reached a negative injury determination, while two Commissioners—then-Chairman Schmidtlein and Commissioner Williamson—reached an affirmative material injury determination. *Remand Results* at 3; USITC Pub. 4673 at 3 n.1.

[2] Commissioners Schmidtlein, Williamson, and Kearns reached an affirmative material injury determination on remand, while Chairman Johanson and Commissioner Broadbent again reached a negative determination. *Remand Results* at 1 n.2, Dissent at 3–10. Although not a member when the Commission issued the original determination, Commissioner Kearns made an affirmative injury finding in the remand proceedings by conducting a *de novo* review of the record. Remand Results at 1 n.3.

subject imports undersold the domestic like product in increasing margins and significantly depressed prices, *id.* at 41–42, and "that the significant volume of subject imports, at prices that undersold the domestic like product and depressed domestic prices, adversely impacted the domestic industry," *id.* at 47.

Defendant-Intervenor China Rubber Industry Association and Sub-Committee of Tire Producers of the China Chamber of Commerce of Metals, Minerals & Chemical Importers (collectively, "Respondents") contest certain aspects of the *Remand Results*, specifically, the ITC's findings on the three mandatory injury factors: volume, impact, and price. Def.-Intervenors' Comments in Opp'n to the Commission's Remand 8–44, ECF No. 80 ("Respondents' Br."). Defendant United States and Plaintiff USW filed replies in support of the *Remand Results*. Def. United States' Reply Comments in Supp. of the Affirmative Remand Determinations, ECF No. 90 ("Def.'s Br."); Pl.'s Reply Comments in Supp. of the Commission's Affirmative Remand Determination, ECF No. 94 ("USW's Br."). Defendant-Intervenor Cooper Tire & Rubber Company filed no comments on the *Remand Results*. The court held oral argument. Oral Argument, Oct. 29, 2019, ECF No. 112.

II. JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c). The court will uphold the Commission's determination unless it is unsupported by substantial record evidence, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The court also reviews determinations made on remand for compliance with the court's order. *ABB Inc. v. United States*, 42 CIT __, 355 F. Supp. 3d 1206, 1211 (2018) (citation omitted).

III. DISCUSSION

Respondents contend that the Commission's volume, price effects, and impact analysis findings are unsupported by substantial evidence. Respondents' Br. at 6. USW responds that Respondents misapprehend the standard of review because Respondents request that the court conduct an impermissible reweighing of the evidence or otherwise make new factual findings based on opposing substantial evidence. USW's Br. at 11, 27.

A. The Commission's Volume Determination is Sustained

Respondents argue that the Commission's volume analysis is unsupported by substantial evidence because the Commission's market

segment analysis failed to consider retreaded TBTs in the aftermarket when evaluating the significance and increase in volume of subject imports. Respondents' Br. at 8. USW avers that because the domestic like product did not include retreaded TBTs, the Commission correctly disregarded shipments of retreaded TBTs and focused on shipments of the domestic like product. USW's Br. at 4, 31–34. USW highlights that before the Commission began its investigations, even Respondents asserted that retreaded TBTs should be excluded from the domestic like product analysis. *Id.* at 32–33. In its original negative determination, the Commission found that substantial evidence supported a conclusion that the volume of subject imports was significant in absolute terms and relative to consumption. USITC Pub. 4673 at 26. On remand, the Commission reached the same conclusion. *Remand Results* at 37.

When analyzing whether an industry is materially injured "by reason of" subject imports, the Commission must "consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i). In reviewing the Commission's findings, the court may not "'reweigh the evidence or . . . reconsider questions of fact anew.'" *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)).

In this case, the court concludes that substantial evidence supports the Commission's volume determination. The Commission relied on data showing an increase in subject imports and that subject imports gained market share during the period of investigation. *Remand Results* at 27, 35. As to the total market share increase, the Commission examined questionnaire data and found that the growth in subject imports was particularly concentrated in the TBT aftermarket. *Id.* at 35–37. The Commission excluded retreaded TBTs from the domestic industry in its preliminary determinations because no party advocated for a contrary result and the record generally showed "clear dividing lines between new and retreaded [TBTs], particularly given clear distinctions between them in terms of manufacturing processes, facilities, and employees, and price, and also due to distinctions between them in terms of use and channels of distribution and somewhat limited interchangeability." *Remand Results* at 16–17. When the Commission considered making its final determinations, the parties also agreed that retreaded TBTs should be excluded from the domestic like product and industry analysis. *Id.*; *see NSK Corp. v. United States*, 32 CIT 966, 983 (2008) ("It is well settled that the ITC

bears no obligation to perform a market segmentation analysis" and "d[oes] not err in basing its determination on data representing the experience of the domestic industry as a whole, rather than on the experience of [different segments of the industry] separately." (quoting *Tropicana Prods., Inc. v. United States*, 31 CIT 548, 559–60 (2007)). The Commission examined record evidence in the form of official Commerce statistics and questionnaire responses from domestic and foreign producers or exporters of TBTs to conclude that during the period of investigation, there was an increase in both subject imports and market share of subject imports. *Remand Results* at 35; *see* USITC Pub. 4673 at I-4, C-1. Because the court concludes that substantial evidence supports the Commission's volume determination, the court sustains the Commission's volume determination.

B. The Commission's Price Effects Determination is Sustained

Respondents argue that the Commission relied on an invalid methodology when it used quarterly pricing data to analyze price effects, because Respondents argue that the Commission should recalculate the data to derive annualized figures. Respondents' Br. at 12–14. Defendant responds that the Commission followed past practice in collecting and reporting pricing data and that the Commission relied on the same quarterly price comparisons in both the original and remand proceedings. Def.'s Br. at 19.

When evaluating the price effects of subject imports, the Commission must separately address two issues: (1) whether there is significant price underselling and (2) whether the subject imports have depressed or suppressed domestic prices to a significant degree. *See* 19 U.S.C. § 1677(7)(C)(ii). The Commission has discretion in evaluating domestic injury because the antidumping statute does not direct the use of a specific methodology. *See Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369, 1373 & n.3 (Fed. Cir. 2006) (citing *United States Steel Grp. v. United States*, 96 F.3d 1352, 1361–62 (Fed. Cir. 1996)). "When evaluating challenges to the ITC's choice of methodology, the court will affirm the chosen methodology as long as it is reasonable." *JMC Steel Grp. v. United States*, 39 CIT ___, 70 F. Supp. 3d 1309, 1316 n.4 (2015) (citations omitted).

Respondents' contentions lack merit. The Commission found that the domestic like product and subject imports were "moderately to highly substitutable" and that the quarterly price comparison data provided in the producer and importer questionnaire responses showed that subject imports undersold the domestic like product at high and increasing margins. *Remand Results* at 38–42 (observing that subject imports undersold the domestic like product in 79 of 85

possible quarterly comparisons). The Commission conducted a price and cost comparison and concluded that the drop in raw material costs could not account for the magnitude of the domestic price declines. *Id.*; USITC Pub. 4673 at Tables C-1, V-3. The Commission also found that subject imports depressed prices to a significant degree and that the domestic industry's lower raw material costs could not alone explain the magnitude of the domestic price declines because prices declined more than costs. *Remand Results* at 42; *Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1372 (Fed. Cir. 2015) ("While the court must consider the record as a whole, when the Commission has based its determination on substantial evidence and considered the evidence that fairly detracts from its conclusion, the court may not displace the agency's choice."). Based on the record evidence, it was reasonable for the Commission to conclude that the significant volume of subject imports undersold the domestic like product causing significant adverse price effects. The court sustains the Commission's price effects determination.

C. The Commission's Impact Determination is Sustained

Respondents argue that the Commission's impact analysis is flawed because the Commission: (1) fails to consider the "inverse correlation" between subject imports and domestic industry performance; (2) errs in conducting an "apples-to-oranges" comparison when comparing the annual declines in costs with quarterly declines in prices; (3) disregards record evidence showing the domestic industry was already operating at full capacity and was therefore unable to supply additional demand; and (4) ignores evidence about retreading and leasing operations. Respondents' Br. at 20. Respondents' arguments are unpersuasive.

The Commission evaluates the impact of subject imports on the domestic industry using "all relevant economic factors which have a bearing on the state of the industry." 19 U.S.C. § 1677(7)(C)(iii). Relevant factors "bearing on the state of the industry" include actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity, factors affecting domestic prices, actual and negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment. *Id.*; 19 U.S.C. § 1677(7)(J) (noting that the Commission may not find that there is no material injury to the domestic industry "merely because that industry is profitable or because the performance of that industry has recently improved[]"). The Commission fulfills its statutory duty by determining "whether the subject imports were a substantial factor in the injury to the domestic industry,

as opposed to a merely incidental, tangential, or trivial factor." *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 879 (Fed. Cir. 2008) (citation and footnote omitted).

In this case, the Commission noted the positive performance indicators in the domestic industry and determined that the significant volume of subject imports, at prices that undersold the domestic like product and depressed domestic prices, adversely impacted the domestic industry. *Remand Results* at 43, 47. The Commission found that many of the performance indicators lagged behind the strong growth in apparent U.S. consumption. *Id.* at 43. Specifically, the domestic market share grew by 21.3%, the domestic industry's market share fell 7.7 percentage points, from 53.3% in 2013 to 45.6% in 2015, and domestic industry shipments rose only by 3.9%. *Id.* Although it recognized that the domestic industry's production and capacity utilization both improved from 2013 to 2015, it also found that the domestic industry's capacity declined from 2013 to 2015 even in a growing market. *Id.* at 45. Even though the domestic industry's profit increased, the Commission characterized the profit increase as "modest" in light of the significant increase in demand and decline of raw material costs. *Id.* at 44. It was reasonable for the Commission to conclude that the significant volume of subject imports, which are "moderately to highly" suitable substitutes for the domestic like product, captured significant market share from the domestic industry and significantly undersold the domestic like product at increasing margins and depressed prices to a significant degree. *Id.* at 42, 47. The underselling and price depression prevented the domestic industry from increasing its revenues commensurate with growing demand. *Id.* at 45. Because the record shows that the domestic industry had fewer shipments and obtained lower revenues even during a period of increased demand, the court concludes that it was reasonable for the Commission to conclude that the subject imports significantly impacted the domestic industry.

The Commission considered and rejected Respondents' arguments that the domestic industry was operating at full capacity and concluded that the domestic industry had additional available capacity to supply the market with TBTs. *Id.* at 37–38, 44–45. Respondents' arguments that the Commission should have considered retreaded TBTs in the impact analysis lack merit, given the Commission's uncontested findings that retreaded TBTs were not part of the domestic like product and retreaded TBT producers were not part of the domestic industry. *See* 19 U.S.C. § 1677(7)(B)(i) (noting that the Commission must consider the volume of subject imports, effects of such imports on domestic like products, and "the impact of imports of

[subject] merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States"). The court concludes that substantial evidence supports the impact determination and sustains the Commission's findings.

The court concludes that substantial evidence supports the Commission's overall findings on the volume of subject imports, price effects, and impact on the domestic industry. The record reflects that the Commission considered whether other factors—apart from the subject imports—may have contributed to the domestic injury and concluded that those factors did not break the causal link between the subject imports and material injury to the domestic industry. *Remand Results* at 25, 46–48.

D. The Commission Complied with the Court's Remand Order

Respondents assert that the *Remand Results* are not in compliance with the court's remand order because the three Commissioners who found an affirmative injury determination "ignored this Court's opinion and analysis, acting as it [*sic*] had never existed, and essentially adopted" the original dissenting view. Respondents' Br. at 44–45. Respondents overlook examples of cases in which courts have affirmed Commission remand determinations that reached a result different from the original determinations where the Commission on remand largely adopted the original dissenting views as it did here. *See, e.g.*, Drill Pipe & Drill Collars from China, Inv. Nos. 701-TA-474 and 731-TA-1176 (Final) (Remand), USITC Pub. 4507 at 7 (Dec. 2014), *aff'd, Downhole Pipe & Equip., L.P. v. United States*, 38 CIT ___, 34 F. Supp. 3d 1310 (2014), *aff'd, Downhole Pipe & Equip., L.P. v. United States*, 621 F. App'x 667 (Fed. Cir. 2015); *Celanese Chems. Ltd. v. United States*, 32 CIT 1250, 1255–56 (2008), *aff'd*, 358 F. App'x 174 (Fed. Cir. 2009). The court notes that one commissioner reviewed the record on remand *de novo* because he was not a member when the Commission made its original determination. The court concludes that the *Remand Results* comply with the court's order.

IV. CONCLUSION

The court concludes that the Commission's affirmative material injury determination on remand complied with the court's remand order and that its factual findings as to volume, price, and impact are supported by substantial evidence. The court sustains the *Remand Results*.

Dated: February 18, 2020
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 20–22

LINYI CHENGEN IMPORT and EXPORT CO., LTD., Plaintiff, and CELTIC CO., LTD., et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and COALITION for FAIR TRADE in HARDWOOD PLYWOOD, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00002

[Remanding the U.S. Department of Commerce's remand redetermination as to the antidumping duty investigation of certain hardwood plywood products from the People's Republic of China.]

Dated: February 20, 2020

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, D.C., for Plaintiff Linyi Chengen Import and Export Co., Ltd., and Consolidated Plaintiffs Celtic Co., Ltd., Jiaxing Gsun Import & Export Co., Ltd., Suqian Hopeway International Trade Co., Ltd., Anhui Hoda Wood Co., Ltd., Shanghai Futuwood Trading Co., Ltd., Linyi Evergreen Wood Co., Ltd., Xuzhou Jiangyang Wood Industries Co., Ltd., Xuzhou Timber International Trade Co. Ltd., Linyi Sanfortune Wood Co., Ltd., Linyi Mingzhu Wood Co., Ltd., Xuzhou Andefu Wood Co., Ltd., Suining Pengxiang Wood Co., Ltd., Xuzhou Shengping Import and Export Co., Ltd., Xuzhou Pinlin International Trade Co. Ltd., Linyi Glary Plywood Co., Ltd., Linyi Linhai Wood Co., Ltd., Linyi Hengsheng Wood Industry Co., Ltd., Shandong Qishan International Trading Co., Ltd., Suzhou Oriental Dragon Import and Export Co., Ltd., Linyi Huasheng Yongbin Wood Co., Ltd., Qingdao Good Faith Import and Export Co., Ltd., Linyi Jiahe Wood Industry Co., Ltd., Jiaxing Hengtong Wood Co., Ltd., Xuzhou Longyuan Wood Industry Co., Ltd., Far East American, Inc., and Shandong Dongfang Bayley Wood Co., Ltd., and Plaintiff-Intervenors Celtic Co., Ltd., Jiaxing Gsun Import & Export Co., Ltd., Anhui Hoda Wood Co., Ltd., Jiaxing Hengtong Wood Co., Ltd., Linyi Evergreen Wood Co., Ltd., Linyi Glary Plywood Co., Ltd., Linyi Hengsheng Wood Industry Co., Ltd., Linyi Huasheng Yongbin Wood Co., Ltd., Linyi Jiahe Wood Industry Co., Ltd., Linyi Linhai Wood Co., Ltd., Linyi Mingzhu Wood Co., Ltd., Linyi Sanfortune Wood Co., Ltd., Qingdao Good Faith Import and Export Co., Ltd., Shandong Qishan International Trading Co., Ltd., Shanghai Futuwood Trading Co., Ltd., Suining Pengxiang Wood Co., Ltd., Suqian Hopeway International Trade Co., Ltd., Suzhou Oriental Dragon Import and Export Co., Ltd., Xuzhou Andefu Wood Co., Ltd., Xuzhou Jiangyang Wood Industries Co., Ltd., Xuzhou Longyuan Wood Industry Co., Ltd., Xuzhou Pinlin International Trade Co., Ltd., Xuzhou Shengping Import and Export Co., Ltd., and Xuzhou Timber International Trade Co., Ltd. With him on the brief were *J. Kevin Horgan* and *Alexandra H. Salzman*.

Jeffrey S. Neeley and *Stephen W. Brophy*, Husch Blackwell LLP, of Washington, D.C., for Consolidated Plaintiffs Zhejiang Dehua TB Import & Export Co., Ltd., Highland Industries, Inc., Jiashan Dalin Wood Industry Co., Ltd., Happy Wood Industrial Group Co., Ltd., Jiangsu High Hope Arser Co., Ltd., Suqian Yaorun Trade Co., Ltd., Yangzhou Hanov International Co., Ltd., G.D. Enterprise Limited, Deqing China-Africa Foreign Trade Port Co., Ltd., Pizhou Jin Sheng Yuan International Trade Co.,

Ltd., Xuzhou Shuiwangxing Trading Co., Ltd., Cosco Star International Co., Ltd., Linyi City Dongfang Jinxin Economic & Trade Co., Ltd., Linyi City Shenrui International Trade Co., Ltd., Jiangsu Qianjiuren International Trading Co., Ltd., and Qingdao Top P&Q International Corp.

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, D.C., for Consolidated Plaintiffs Taraca Pacific, Inc., Canusa Wood Products Ltd., Concannon Corporation d/b/a Concannon Lumber Company, Fabuwood Cabinetry Corporation, Holland Southwest International Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, and US Ply LLC. With him on the brief were *Jill A. Cramer* and *Bryan P. Cenko*.

Sonia M. Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel was *Nikki Kalbing*, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Timothy C. Brightbill, Wiley Rein LLP, of Washington, D.C., for Defendant-Intervenor Coalition for Fair Trade in Hardwood Plywood. With him on the brief were *Jeffrey O. Frank*, *Stephanie M. Bell*, and *Elizabeth Lee*.

OPINION AND ORDER

Choe-Groves, Judge:

At the center of this case is a discrepancy over one document – apparently during verification, the Department of Commerce ("Commerce") requested that Plaintiff Linyi Chengen Import and Export Co., Ltd. ("Linyi Chengen") provide a copy of the Chinese National Standard used to calculate the volume of purchased logs. Linyi Chengen attempted to provide a 12-page document representing the Chinese National Standard used for log volume, but Commerce accepted only a two-page excerpt of that document into evidence containing a conversion table. Apparently the two-page excerpt contained a phrase written in Chinese identifying the conversion table as the Chinese National Standard, without an English translation. Commerce agreed that the two-page conversion table excerpt was relevant to Linyi Chengen's manner of calculating log volumes reported in its questionnaire responses, but Commerce rejected the remaining pages as prohibited new factual information. Linyi Chengen alleges that the two pages are only one portion taken out of context of a larger 12-page document and notes that the 10 additional pages include the cover page identifying the document in English as the Chinese National Standard, the document requested by Commerce. The controversy in this case centers around Commerce's subsequent findings that Linyi Chengen provided incomplete information regarding volume calculations, conversions, and formulas, and that Linyi Chengen failed to establish that it applied the Chinese National Standard in calculating its log volumes. Thus, the question before the court is whether Commerce's conclusion is supported by substantial evidence that

Linyi Chengen failed to apply the Chinese National Standard, when Commerce itself prevented Linyi Chengen from submitting a complete document that could provide relevant factual information. For the following reasons, the court concludes that Commerce's determination is not supported by substantial evidence and remands for further proceedings consistent with this opinion.

This case involves a challenge to Commerce's final affirmative determination in the antidumping duty investigation of certain hardwood plywood products from the People's Republic of China. *See Certain Hardwood Plywood Products From the People's Republic of China*, 82 Fed. Reg. 53,460 (Dep't Commerce Nov. 16, 2017) (final determination of sales at less than fair value, and final affirmative determination of critical circumstances, in part), PR 882, *as amended*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) (amended determination of sales at less than fair value and antidumping duty order), PR 894 (collectively, "*Final Determination*"); *see also* Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Certain Hardwood Plywood Products from People's Republic of China, PR 871 (Nov. 16, 2017) ("*Final IDM*"); *Certain Hardwood Plywood Products From the People's Republic of China*, 82 Fed. Reg. 28,629 (Dep't Commerce June 23, 2017) (preliminary affirmative determination of sales at less than fair value, preliminary affirmative determination of critical circumstances, in part), *as amended*, 82 Fed. Reg. 32,683 (Dep't Commerce July 17, 2017) (amended preliminary determination of sales at less than fair value) (collectively, "*Preliminary Determination*").

Before the court are Commerce's remand results filed in response to the court's opinion and order in *Linyi Chengen Import and Export Co., Ltd. v. United States*, 43 CIT ___, 391 F. Supp. 3d 1283 (2019) ("*Linyi Chengen*"), Final Results of Redetermination Pursuant to Court Remand, ECF No. 89–1 ("Remand Results"), and Plaintiffs' Linyi Chengen Import and Export Co., Ltd., Shandong Dongfang Bayley Wood Co., Ltd., and the Separate Rate Plaintiffs' Motion for Leave to File Reply Comments, ECF No. 101.[1] The court decides the matter on the

[1] Linyi Chengen moved on behalf of Consolidated Plaintiffs Celtic Co., Ltd., Anhui Hoda Wood Co., Ltd., Far East American, Inc., Jiaxing Gsun Import and Export Co., Ltd., Jiaxing Hengtong Wood Co., Ltd., Linyi Evergreen Wood Co., Ltd., Linyi Glary Plywood Co., Ltd., Linyi Jiahe Wood Industry Co., Ltd., Linyi Linhai Wood Co., Ltd., Linyi Hengsheng Wood Industry Co., Ltd., Linyi Huasheng Yongbin Wood Co., Ltd., Linyi Mingzhu Wood Co., Ltd., Linyi Sanfortune Wood Co., Ltd., Qingdao Good Faith Import and Export Co., Ltd., Shanghai Futuwood Trading Co., Ltd., Shandong Qishan International Trading Co., Ltd., Suining Pengxiang Wood Co., Ltd., Suqian Hopeway International Trade Co., Ltd., Suzhou Oriental Dragon Import and Export Co., Ltd., Xuzhou Andefu Wood Co., Ltd., Xuzhou Jiangyang Wood Industries Co., Ltd., Xuzhou Longyuan Wood Industry Co., Ltd., Xuzhou Pinlin International Trade Co., Ltd., Xuzhou Shengping Import and Export Co., Ltd., and Xuzhou Timber International Trade Co., Ltd. (collectively, "Separate Rate Plaintiffs").

parties' written submissions and denies the motion seeking leave to file reply comments.[2]

I. BACKGROUND

The court assumes familiarity with the underlying facts and procedural history of this case as set forth in *Linyi Chengen*. 391 F. Supp. 3d at 1287–92.

In the *Preliminary Determination*, Commerce declined Defendant-Intervenor's request to value Linyi Chengen's poplar log inputs using its intermediate input methodology and assigned Linyi Chengen a zero or *de minimis* dumping margin and a 57.36% dumping margin as to the separate rate companies. 82 Fed. Reg. at 28,637. In the *Final Determination*, Commerce changed course and applied its intermediate input methodology to value Linyi Chengen's log inputs. 82 Fed. Reg. at 53,461; *Final IDM* at 23 (valuing veneers as the input used to produce hardwood plywood). Linyi Chengen's margin calculation changed from 0% to a final dumping margin calculation of 183.36%. *Final Determination*, 82 Fed. Reg. at 53,462. Commerce then applied Linyi Chengen's rate to the separate rate respondents. *Id.*

Commerce used its intermediate input methodology after concluding that Linyi Chengen's log volume reporting methods were "inherently imprecise." *Final IDM* at 25, 27 (noting that applying the intermediate input methodology to veneers instead of logs will yield a more accurate calculation). Commerce contended that Linyi Chengen had not shown that the conversion table and formula used to calculate log volume were the Chinese National Standard or that use of the conversion table and formula yielded accurate reported log volume. *Id.* at 25. Commerce also noted that it was unable to cross-check Linyi Chengen's reported log consumption against any third-party sources, such as supplier invoices. *Id.*

The court remanded the case for Commerce to reconsider how Linyi Chengen's log consumption calculations were unreliable when the record reflected conflicting accounts at verification as to whether the conversion table and formula Linyi Chengen used to compute its log consumption volume were the Chinese National Standard. *Linyi Chengen*, 391 F. Supp. 3d at 1294. Because Commerce applied Linyi Chengen's 183.36% dumping margin to the non-examined companies, the court also directed Commerce to reconsider the rates applied to the separate rate companies if Commerce changed Linyi Chengen's

[2] The court has broad discretion to manage its docket and deny a party's request to file reply comments after remand. USCIT R. 56.2(h)(6); *see Amado v. Microsoft Corp.*, 517 F.3d 1353, 1358 (Fed. Cir. 2008) ("District courts . . . are afforded broad discretion to control and manage their dockets, including the authority to decide the order in which they hear and decide issues pending before them." (citations omitted)).

margin on remand. *Linyi Chengen*, 391 F. Supp. 3d at 1301; *Final Determination*, 82 Fed. Reg. at 53,462.

On remand, Commerce faulted Linyi Chengen again for failing to build an adequate administrative record, found that Linyi Chengen was unable to report and substantiate its log volume factors of production accurately, and reapplied the intermediate input methodology. *Remand Results* at 60; *Final IDM* at 23. Commerce made no changes to the 183.36% dumping margin applied to Linyi Chengen and the separate rate companies. *Remand Results* at 60.

Commerce continued to find that Linyi Chengen's log volumes were unreliable becauseof a lack of record evidence showing that the conversion table and formula are the Chinese National Standard or that the table and formula elicit accurate log volumes. *Id*. at 24. Commerce reasoned that it disregarded Linyi Chengen's log consumption data because Linyi Chengen provided no third-party documentation supporting those reported log volumes. *Id*. at 15–32, 60. Commerce found that the value-added tax ("VAT") invoices and warehouse-in tickets that Linyi Chengen provided lacked third-party confirmation against which Commerce could cross-check Linyi Chengen's reported log volumes. *Id*. at 25–26, 45–54.

After the court issued *Linyi Chengen*, Commerce appended an extra-record declaration to the *Remand Results*. *Id.*, Analyst Decl., Attachment to *Remand Results*. In the analyst declaration, Commerce purports to explain how the verification team handled the conversion table and formula exhibit. *Id.*

Plaintiffs Linyi Chengen,[3] Taraca Pacific, Inc. ("Taraca"),[4] and Zhejiang Dehua TB Import & Export Co., Ltd. ("Dehua TB")[5] filed comments opposing the *Remand Results*. Dehua TB Cmts. on Remand Redetermination, ECF No. 93 ("Dehua TB Cmts."); Taraca's Cmts. on Final Remand Redetermination, ECF No. 94 ("Taraca Cmts."); Linyi Chengen Cmts. on Remand Redetermination, ECF No. 95. Defendant United States ("Defendant") and Defendant-Intervenor Coalition for Fair Trade in Hardwood Plywood ("Defendant-Intervenor") filed com-

[3] Comments were filed collectively on behalf of Chengen and the Separate Rate Plaintiffs.

[4] Comments were filed collectively on behalf of Taraca, Canusa Wood Products Ltd., Concannon Corp. d/b/a Concannon Lumber Company, Fabuwood Cabinetry Corporation, Holland Southwest International Inc., Liberty Woods International, Inc., Northwest Hardwoods, Inc., Richmond International Forest Products, LLC, and USPly LLC.

[5] Comments were filed collectively on behalf of Dehua TB, Highland Industries, Inc., Jiashan Dalin Wood Industry Co., Ltd., Happy Wood Industrial Group Co., Ltd., Jiangsu High Hope Arser Co., Ltd., Suqian Yaorun Trade Co., Ltd., Yangzhou Hanov International Co., Ltd., G.D. Enterprise Limited., Deqing China-Africa Foreign Trade Port Co., Ltd., Pizhou Jin Sheng Yuan International Trade Co., Ltd., Xuzhou Shuiwangxing Trading Co., Ltd., Cosco Star International Co., Ltd., Linyi City Dongfang Jinxin Economic and Trade Co., Ltd., Linyi City Shenrui International Trade Co., Ltd., Jiangsu Qianjiuren International Trading Co., Ltd., and Qingdao Top P&Q International Corp.

ments in support of the *Remand Results*. Def.'s Resp. to Cmts. on Remand Redetermination, ECF No. 97 ("Def. Resp."); Def.-Intervenor's Cmts. in Resp. to Remand Redetermination, ECF No. 100 ("Def.-Int. Resp.").

II. JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c). The court will uphold Commerce's antidumping determination, including redeterminations made on remand, unless the findings are unsupported by substantial record evidence, or are otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The court also reviews determinations made on remand for compliance with the court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

III. DISCUSSION

Linyi Chengen and Taraca argue that Commerce erred in finding the conversion table and formula unreliable because Commerce rejected a document showing that the conversion table and formula are the Chinese National Standard and that use of the table and formula yield accurate log volume calculations. Linyi Chengen Cmts. 1–10, 23–30; Taraca Cmts. at 4–8.[6] Linyi Chengen avers also that Commerce ignored third-party documentation, such as VAT invoices and warehouse-in tickets, that substantiated its reported log consumption. Linyi Chengen Cmts. at 10; Taraca Cmts. at 9–12 (arguing that the third-party confirmation requirement has no support in the law and facts on the record). Defendant responds that it was proper for Commerce to reject the 10 pages of the Chinese National Standard document because Linyi Chengen developed an inadequate administrative record and should have provided the document before verification. Def.'s Resp. at 8–23. Defendant asserts also that it was reasonable for Commerce to conclude that the record evidence Linyi Chengen put forth substantiating its log volume did not constitute proper third-party documentation because Commerce could not cross-check the reported log volume figures against independently-generated documents. *Id.* at 23–29; Def-Int. Resp. at 11.

A. Handling of Record Evidence at Verification

Linyi Chengen argues that Commerce erred in using the intermediate input methodology because at verification, Commerce accepted

[6] Dehua TB joins in and incorporates by reference Chengen's comments and asserts that any change Commerce makes to Chengen's margin calculation should be applied to the Separate Rate Plaintiffs. Dehua TB Cmts. at 1–2.

only a portion of the document containing the entirety of the Chinese National Standard. Linyi Chengen Cmts. 1–10; Taraca Cmts. at 4–8 (The removal of the pages identifying the document in English as the Chinese National Standard "is also the single most important decision that catapulted Linyi Chengen's antidumping margin from *de minimis* at the preliminary determination to the punitive final antidumping margin."). Defendant responds that Commerce appropriately rejected the documents as to the provenance and function of the conversion table and formula at verification as prohibited new facts. Def. Resp. at 8, 16–18.

Generally, Commerce examines the record at verification to test the accuracy of information collected during the investigation. *Tianjin Machinery Imp. & Exp. Corp. v. United States*, 28 CIT 1635, 1644 (2004), *aff'd*, 146 Fed. App'x 493 (Fed. Cir. 2005). Yet, Commerce has developed a practice of accepting new facts at verification when: "(1) the need for that information was not evident previously, (2) the information makes minor corrections to information already on the record, or (3) *the information corroborates, supports, or clarifies information already on the record*." *TMK IPSCO v. United States*, 40 CIT ___, 179 F. Supp. 3d 1328, 1354 n.34 (2016) (citation omitted) (emphasis added).

The question in this case is whether it was reasonable for Commerce to deem only two pages (the "conversion table") of a document as relevant while rejecting the remaining pages of the whole 12-page Chinese National Standard document as improper new factual information, particularly when Commerce later faulted Linyi Chengen for failing to show that it applied the Chinese National Standard in its volume calculations. At oral argument, Linyi Chengen averred that it provided to Commerce "a partially translated 12-page log standard, and [Commerce] [tore] off the cover page, which is the full translation." Oral Arg. Tr. 10:25–11:19, ECF No. 80 (noting that the two pages Commerce retained as a verification exhibit contained the untranslated "11-character Chinese standard [located] on one line at the top of the page").

The court finds Commerce's explanation to be unreasonable for rejecting the 12-page complete document representing the entirety of the Chinese National Standard. *See Remand Results* at 43 ("[T]he cover page and additional pages that purportedly explain the provenance and methodology underlying the conversion table and formula were new factual information that [Linyi] Chengen should have submitted prior to verification and were information that Linyi Chengen sought . . . to submit to the verifiers."). The court finds that the 12-page complete document should be construed instead as informa-

tion corroborating, supporting, or clarifying information already on the record (regarding Linyi Chengen's method of calculating log volumes) that should be accepted pursuant to Commerce's past practices at verification, rather than viewing the pages as prohibited new factual information. The remaining pages provide context for understanding whether the conversion table for log volume in the initial two pages are part of the Chinese National Standard contained in the complete 12-page document. By rejecting the additional information, Commerce missed an opportunity to accept evidence that would corroborate, support, or clarify the log volumes reported in the questionnaire responses, as well as provide context as to whether Linyi Chengen applied the Chinese National Standard. *See TMK IPSCO*, 179 F. Sup. 3d at 1354 n.34. It strains logic that Commerce would accept two pages of the conversion table, yet would reject additional pages of the same document that would clarify "the provenance and accuracy of conversion table and formula" used to calculate log volumes. *Remand Results* at 11; *see Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530, 544–45 (Fed. Cir. 2019) ("Practical considerations might play a role in the reasonableness of Commerce's choice. It might be reasonable to avoid methods that demand information that cannot practically be obtained in reliable form. On the other hand, it can be unreasonable for an agency to refuse to obtain readily available, highly relevant information." (citation omitted)). Similarly, the court concludes that it was unreasonable for Commerce to refuse to consider the entirety of the document purporting to be the Chinese National Standard, when the document is readily available and highly relevant.

The court remands for a second time and instructs that Commerce accept the additional pages representing the entire 12-page document, including the cover page and other pages that were previously rejected at verification, in order to provide a more complete record on which to base Commerce's reasoning. Because Linyi Chengen's log volume was an integral factor of production used in calculating the dumping margin, Commerce should reconsider modifying Linyi Chengen's margin and the rate assigned to the Separate Rate Plaintiffs. *See Final IDM* at 25 (noting that log consumption is "[Linyi] Chengen's most significant input[]").

B. Third-Party Documentation Requirement

Linyi Chengen and Taraca argue that Linyi Chengen provided ample and reliable record evidence that met Commerce's third-party confirmation requirement. Linyi Chengen Cmts. at 10–17, Taraca Cmts. at 10–12. Defendant counters that Commerce was correct in

finding Linyi Chengen's evidence, such as VAT invoices and warehouse materials, unreliable because Linyi Chengen alone produced, possessed, and maintained the documents. Def.'s Resp. at 23–29 (Commerce has a "strong preference" that respondents provide information from "independent sources that are not subject to its investigations or reviews[.]").

Commerce found insufficient record support of Linyi Chengen's log volumes because Commerce could not cross-check the reported log volumes against independent, third-party sources. *Remand Results* at 26, 53–54 ("[T]he need for third-party confirmation of [Linyi] Chengen's log consumption is appropriate . . . because the accuracy of the methodology by which [Linyi] Chengen calculates its log volume is a question at issue in this proceeding."). Commerce's imposition of a third-party confirmation requirement lacks a basis in law and fact.

First, Commerce cites no authority to specifically support its imposition of the third-party confirmation requirement. There does not appear to be a legal basis for requiring that Linyi Chengen must confirm its log consumption by an independent third-party source, and thus the court concludes that Commerce's requirement on this issue is contrary to the law.

Second, the evidence on the record does not support Commerce's conclusion that Linyi Chengen could "manipulat[e] or alter[]" documents under its control, such as the VAT invoices, because the invoices are generated on pre-approved Chinese government forms provided by the Chinese tax authority. *Id.* at 25–26, 49–51. Commerce identified no record evidence questioning the accuracy and completeness of the VAT invoices when Linyi Chengen maintained the invoices as part of its regular course of business. *See* Verification Report at 8, 20–21, PR 834. Commerce has cited no evidence on the record as a basis to doubt the accuracy of the VAT invoices when a third party audited Linyi Chengen's financial statements. Commerce dismissed the relevance of the audited financial statements because "it is unclear how [Linyi] Chengen's auditors and the [Chinese] tax authority would validate the quantities reported to Commerce." *Remand Results* at 51; Linyi Chengen Section A Questionnaire Resp., PR 306, CR 242, Ex. A-3 (2015 Audited Financial Statement). During verification, Commerce reviewed Linyi Chengen's reported per-unit consumption amounts of "poplar log[] [and] wood log" and found "[n]o discrepancies" when it traced the consumption of raw material inputs, as well as "the purchase quantities and values of poplar log[.]" *See* Linyi Chengen's Verification Report at 20–21 ("Using the source documents from [Linyi] Chengen['s] . . . accounting and data collection systems, we traced the material inputs from source documents to the account-

ing vouchers used to record source documents in the general ledger, to the appropriate inventory and production accounts in the general ledger. We observed no discrepancies."). In light of Commerce's statement that there were no discrepancies, the court concludes that Commerce's continued finding that Linyi Chengen's documentation was unreliable for lack of third-party confirmation is unsupported by substantial evidence and otherwise contrary to law.

IV. CONCLUSION

For the foregoing reasons, the court remands the matter for Commerce to reconsider its application of the intermediate input methodology and to accept the previously-rejected documents that Linyi Chengen presented at verification representing the complete and accurate Chinese National Standard used for volume conversion. If Commerce makes changes to Linyi Chengen's margin on remand, Commerce should make appropriate adjustments to the separate rates of the other parties before the court in this action. Accordingly, is hereby

ORDERED that Linyi Chengen's Motion for Leave to File Reply Comments, ECF No. 101, is denied; and it is further

ORDERED that the *Remand Results* are remanded to Commerce for a second determination; and it is further

ORDERED that this case will proceed per the following schedule as to the second remand redetermination:

1. Commerce must file the second remand redetermination by April 20, 2020;
2. Commerce must file the administrative record by May 4, 2020;
3. Comments in opposition must be filed by June 3, 2020;
4. Comments in support must be filed by July 6, 2020; and
5. The joint appendix must be filed by July 20, 2020.

Dated: February 20, 2020
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE