U.S. Customs and Border Protection

Slip Op. 14–66

SIEMENS ENERGY, INC., et al., Plaintiffs, v. UNITED STATES, Defendant, and WIND TOWER TRADE COALITION, Defendant-Intervenor.

PUBLIC VERSION

Before: Mark A. Barnett, Judge
Consol. Court No. 13–00104

[Plaintiffs challenge numerous aspects of the United States International Trade Commission's affirmative determination in the final injury investigation. The court denies Plaintiffs' motions for judgment on the agency record.]

Dated: 6/17/2014

Elliot J. Feldman, Baker Hostetler, of Washington, DC, argued for plaintiff Siemens Energy, Inc. With him on the brief was *Michael S. Snarr*.

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OPINION

Barnett, Judge:

Plaintiffs, Siemens Energy, Inc. ("Siemens"), Titan Wind Energy (Suzhou), CS Wind Tech, CS Wind Vietnam, and Chengxi Shipyard (collectively, "Titan"), move, pursuant to USCIT R. 56.2, for judgment on the agency record, challenging the United States International Trade Commission's ("Commission" or "ITC") affirmative determination in the final injury investigations in antidumping and countervailing duty investigations concerning utility scale wind towers ("wind towers") from the People's Republic of China ("China") and in an antidumping investigation of wind towers from the Socialist Republic of Vietnam ("Vietnam") published in *Utility Scale Wind Towers from China and Vietnam*, 78 Fed. Reg.10,210 (ITCFeb.13, 2013) ("*Fi-*

nal Determination"), and the accompanying memorandum, *Utility Scale Wind Towers from China and Vietnam*, USITC Pub. 4372, Inv. Nos. 701-TA-486 and 731-TA-1195–1196 (Final) (Feb. 2013) ("*Views of the Commission*"or"*Views*").[1] For the reasons stated below, the court denies Siemens' and Titan's motion.

BACKGROUND AND PROCEDURAL HISTORY

On December 29, 2011, the Wind Tower Trade Coalition[2] filed petitions with the United States Department of Commerce ("Commerce") and the Commission, seeking the imposition of antidumping and countervailing duties on wind towers imported from China and antidumping duties on wind towers from Vietnam. Commerce issued notices initiating investigations on January 24, 2012. *See Utility Scale Wind Towers from the People's Republic of China and the Socialist Republic of Vietnam*, 77 Fed. Reg. 3440 (Dep't Commerce Jan. 24, 2012) (initiation of antidumping duty investigations); *Utility Scale Wind Towers from the People's Republic of China*, 77 Fed. Reg. 3447 (Dep't Commerce Jan. 24, 2012) (initiation of countervailing duty investigation). Following a preliminary investigation, the Commission issued a preliminary determination on February 13, 2012, voting in a 5–0 decision that there was a reasonable indication that an industry in the United States was threatened with material injury by imports of wind towers from China and Vietnam. *Utility Scale Wind Towers from China and Vietnam*, 77 Fed. Reg. 9700 (ITC Feb. 17, 2012) (preliminary determination).

In the final investigation, the Commission relied on data from certified questionnaire responses from foreign producers of subject imports and from U.S. importers and domestic producers of the like product. The period of investigation ("POI") spanned 2009 through the first six months of 2012 ("interim 2012"). *Views* at 9 n.30. Six domestic producers submitted questionnaire responses, accounting for the vast majority of U.S. shipments of wind towers during 2011.[3]Five Chinese and two Vietnamese producers submitted questionnaire responses, providing data for almost all subject imports

[1] All citations to the *Views of the Commission* are to the confidential version of the document. All six Commissioners joined in sections I-VI of the *Views*. Section VII of the *Views* ("Material Injury By Reason of Subject Imports") represents the views of Chairman Williamson and Commissioner Aranoff. Commissioner Pinkert issued a separate threat of injury determination, which will be cited hereafter as "*Pinkert Views*."

[2] The Wind Tower Trade Coalition consists of four domestic producers, Broadwind Towers, Inc.; DMI Industries; Katana Summit LLC; and Trinity Structural Towers, Inc.

[3] The six domestic producers accounted for more than [[ ]] percent of U.S. shipments during 2011. *Views* at 4 (citing *Confidential Staff Report*, INV-LL-002 (Jan. 7, 2013) (revised by INV-LL-006, Jan. 11, 2013) ("*Staff Report*") at III-1 n.1).

during the POI.[4] Eleven U.S. importers submitted questionnaire responses, representing over 95 percent of subject imports during the POI.[5]

Relying on this data, the Commission reached a divided final determination. Four Commissioners found "no material injury," and two Commissioners made affirmative determinations on the basis of "material injury." Three Commissioners found "no threat of material injury," and one made an affirmative determination on the basis of "threat of material injury."[6] Combined, the two affirmative determinations based on material injury, by Chairman Williamson and Commissioner Aranoff, and the one affirmative determination based on threat of material injury, by Commissioner Pinkert, resulted in a final affirmative determination that the domestic industry was materially injured or threatened with material injury by reason of Chinese and Vietnamese imports of wind towers.

The Commission defined wind towers as "large tubular steel towers that are part of wind turbines." *Views* at 6. It elaborated:

> Wind turbines convert the mechanical energy of wind to electrical energy and are comprised of three main components – the nacelle, rotor, and tower. The nacelle houses the wind turbine's main power generation components (the gearbox, generator, and other components), while the rotor typically consists of three blades and the hub. The nacelle sits on top of the wind tower. . . . [W]ind towers within the scope of these investigations are 50 meters or more in height and designed to support the nacelle and rotor blades in a wind turbine with a minimum rated electrical power generation capacity in excess of 100 kilowatts.[7]

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[4] *Views* at 4 (citing *Staff Report* at VII-5, VII-11).

[5] *Views* at 4 (citing *Staff Report* at IV-1).

[6] The two Commissioners who made affirmative determinations on the basis of material injury did not make a threat of material injury determination.

[7] Commerce defined the scope of the imported merchandise under investigation in further detail, as including:

> [C]ertain wind towers, whether or not tapered, and sections thereof. Certain wind towers are designed to support the nacelle and rotor blades in a wind turbine with a minimum rated electrical power generation capacity in excess of 100 kilowatts ("kW") and with a minimum height of 50 meters measured from the base of the tower to the bottom of the nacelle (i.e., where the top of the tower and nacelle are joined) when fully assembled.
>
> A wind tower section consists of, at a minimum, multiple steel plates rolled into cylindrical or conical shapes and welded together (or otherwise attached) to form a steel shell, regardless of coating, end-finish, painting, treatment, or method of manufacture, and with or without flanges, doors, or internal or external components (e.g., flooring/decking, ladders, lifts, electrical buss boxes, electrical cabling, conduit, cable harness for nacelle generator, interior lighting, tool and storage lockers) attached to the wind tower section. Several wind tower sections are normally required to form a completed wind tower.

Views at 6 (citing *Staff Report* at I-8 to I-9). Despite limited interchangeability between wind towers manufactured to different original equipment manufacturers' ("OEMs") specifications, the Commission found that wind towers within the scope of the investigation constituted a single domestic like product because they shared common physical characteristics and uses, channels of distribution, manufacturing facilities, production processes and employees, and producer and customer perceptions. *Views* at 7–8. The Commission further determined that subject imports compete with each other and the domestic like product. *Views* at 11–14.

Against this backdrop, two Commissioners made affirmative determinations that subject imports had materially injured the domestic industry. They found that the volume and increase in volume of Chinese and Vietnamese wind towers were significant in absolute terms and relative to domestic consumption and production. *Views* at 27–30. They further decided that these imports suppressed prices in the domestic market, despite the absence of underselling and price depression on a total delivered price basis. *Views* at 30–35. They thus determined that the subject imports' high volumes and price effects had an adverse impact on the domestic industry over the POI, and particularly during interim 2012. *Views* at 35–42. They concluded:

> The increasing volumes of subject imports resulted in reduced growth in sales volumes and U.S. shipments and suppressed domestic price increases despite a robust growth in demand at the end of the period. Their effects have also included lower rates of capacity utilization, as well as declining market share and financial losses. . . .
>
> [Therefore,] we conclude that there is a causal nexus between the subject imports and the poor performance of the domestic industry. Consequently, we find that the domestic industry is materially injured by reason of subject imports.

Views at 42.

A third Commissioner made an affirmative determination on the basis that the subject imports posed an imminent threat of material injury to the domestic wind tower industry. Weighing the statutory

> Wind towers and sections thereof are included within the scope whether or not they are joined with nonsubject merchandise, such as nacelles or rotor blades, and whether or not they have internal or external components attached to the subject merchandise.
>
> Specifically excluded from the scope are nacelles and rotor blades, regardless of whether they are attached to the wind tower. Also excluded are any internal or external components which are not attached to the wind towers or sections thereof.

Views at 5–6 (citing *Utility Scale Wind Towers from the People's Republic of China*, 77 Fed. Reg. 75,978 (Dep't Commerce Dec. 26, 2012); 77 Fed. Reg. 75,985 (Dep't Commerce Dec. 26, 2012); 77 Fed. Reg. 75,993–94 (Dep't Commerce Dec. 26, 2012)).

factors for finding threat, 19 U.S.C. § 1677(7)(F), he found, *inter alia*, that the subject imports competed in all major regions of the United States; Chinese and Vietnamese producers could accelerate production and delivery; subject import prices were trending downward; China had inventories of undelivered product; and subject import volume was significant and would likely increase significantly. *Pinkert Views* at 3–8. He found that demand for wind towers would soon moderate, such that "in the near future, it should take a much smaller volume of subject imports to constitute a significant share of the market than it took" during the POI. *Pinkert Views* at 6. He thus concluded that subject imports were likely to have an adverse impact on the domestic industry in the imminent future. *Pinkert Views* at 7–8. The two affirmative determinations based on material injury, combined with the third affirmative determination based on threat of material injury, resulted in a final affirmative injury determination.

Plaintiffs now challenge this *Final Determination* on several grounds. (*See generally* Siemens Energy, Inc.'s Rule 56.2 Motion for Judgment on the Agency Record ("Siemens Mot."); Memorandum of Law in Support of Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record ("Titan Mot.").) First, Siemens argues that the court should not defer to the Commission's affirmative determination because the determination did not arise from a majority vote for either material injury or threat of material injury. (Siemens Mot. 14–18.) Second, Titan and Siemens contest the material injury determination, alleging that the Commission improperly found that (1) the volume of subject imports displaced a significant volume of domestic wind towers; (2) competition from subject imports suppressed domestic wind tower prices; and (3) subject imports adversely impacted the domestic industry. (*See generally* Siemens Mot.; Titan Mot.) Third, they challenge Commissioner Pinkert's threat of material injury determination, alleging that he improperly found that the subject imports posed an imminent threat of material injury to the domestic wind tower industry. (*See generally* Siemens Mot.; Titan Mot.) The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(c).

STANDARD OF REVIEW

An ITC determination is "presumed to be correct," and the burden of proving otherwise rests upon the challenging party. 28 U.S.C. § 2639(a)(1). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It requires "'more than a mere scintilla,'" but "'less than the weight of the evidence.'" *Nucor Corp. v. United States*, 34 CIT __, __, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)). In determining whether substantial evidence supports the Commission's determination, the court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The Commission need not address every piece of evidence presented by the parties; absent a showing to the contrary, the court presumes that the Commission has considered all of the record evidence. *Aluminum Extrusions Fair Trade Comm. v. United States*, 36 CIT __, __, 2012 WL 5201218, at *2 (2012) (citing *USEC Inc. v. United States*, 34 F. App'x 725, 731 (Fed. Cir. 2002)).

That a plaintiff can point to evidence that detracts from the agency's conclusion or that there is a possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence. *Matsushita Elec. Indus.Co. v. United States*, 750 F.2d 927, 933, 936 (Fed. Cir. 1984) (citing *Consolo v. Fed. Mar.Comm'n*, 383 U.S. 607, 619–20 (1966); *Armstrong Bros. Tool Co. v. United States*, 626 F.2d 168, 170 n.4 (C.C.P.A. 1980)). Moreover, "when adequate evidence exists on both sides of an issue, assigning evidentiary weight falls exclusively within the authority of the Commission." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1358 (Fed. Cir. 2006). The court may not "'even as to matters not requiring expertise . . . displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *Mitsubishi Materials Corp. v. United States*, 20 CIT 328, 331, 918 F. Supp. 422, 425 (1996) (quoting *Universal Camera Corp.v. NLRB*, 340 U.S. 474, 488 (1951) (ellipses in original)). Thus, the court "may not reweigh the evidence or substitute its own judgment for that of the agency." *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004) (citation omitted).

Furthermore, when presented with a challenge to the Commission's methodology, the court examines "not what methodology [Plaintiff] would prefer," but "whether the methodology actually used by the

Commission was reasonable." *Shandong TTCa Biochem.Co. v. United States*, 45 CIT at __, __, 774 F. Supp. 2d 1317, 1329 (2011) (quotation marks omitted). "As long as the agency's methodology and procedures are a reasonable means of effectuating the statutory purpose . . . the courtwill not... question the agency'smethodology." *Int'l Imaging Materials, Inc. v. United States*, 30 CIT 1181, 1189 (2006) (quoting *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986)) (first ellipses in original).

The two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of the Commission's interpretation of the antidumping and countervailing duty statutes. *NucorCorp.v.United States*, 414 F.3d 1331, 1336 (Fed. Cir. 2005). First, the court must determine "'whether Congress has directly spoken to the precise question at issue.'" *Heino v. Shinseki*, 683 F.3d 1372, 1377 (Fed. Cir. 2012) (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear, "'that is the end of the matter . . . .'" *Id.* (quoting *Chevron*, 467 U.S. at 842–43). However, "if the statute is silent or ambiguous," the court must determine whether the agency's action "is based on a permissible construction of the statute." *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1317 (Fed. Cir. 2012) (citing *Chevron*, 467 U.S. at 842–43).

DISCUSSION

I. The Tariff Act's Tie-Vote Provision

a. Siemens' Contentions

Siemens argues that the court should not defer to the Commission's affirmative determination because the determination did not arise from a majority vote for either material injury or threat of material injury. (Siemens Mot. 14–16.) Siemens points out that four of the six Commissioners found no material injury to the domestic industry, while just two of the six Commissioners found present material injury. (Siemens Mot. 16–17.) As to the "threat of material injury," only one Commissioner found threat, three found no threat, and the two who found material injury did not vote with respect to threat. (Siemens Mot. 17.) Thus, Siemens argues, the Commission reached an affirmative determination by aggregating the two material injury votes with the single threat of material injury vote, even though these determinations arise from different criteria and analyses. (*See* Siemens Mot. 17–18.) Although Siemens concedes that the Tariff Act requires aggregation of material injury and threat of material injury votes to reach an affirmative determination, it opposes judicial deference to an affirmative determination reached in this manner. (Siemens Mot. 14–15). Instead, Siemens urges that the court should

defer to the majority of Commissioners who made negative determinations of material injury and threat of material injury. (Siemens Mot. 15–16.)

Siemens cites two cases for support. It contends that *Wind Tower Trade Coalition v. United States*, a recent Federal Circuit decision related to this case, held that "'the ITC as a whole makes a finding'" of whether there is material injury. (Siemens Reply 7.) As a result, disregarding "'two-thirds of the ITC's votes' flouts the purpose of the statute." (Siemens Reply 7.) Siemens also relies on *Nippon Steel Corp. v. United States* in which the court stated, "'when the totality of the evidence does not illuminate a black-and-white answer to a disputed issue, it is the role of the expert fact-finder – here the majority of the Presidentially-appointed, Senate-approved Commissioners – to decide which side's evidence to believe.'" (Siemens Reply 6.) Siemens argues these cases indicate that the court should defer to the majority of Commissioners, here, the four Commissioners who found no material injury, rather than the views of the two Commissioners reflected on the views of the Commission.

b. Analysis

The Tariff Act considers the Commission's voting pattern relevant in two scenarios. First, it is relevant under the section of the Act that explains how to aggregate votes when the Commission is evenly-divided. This section of the Act states:

> If the Commissioners voting on a determination by the Commission . . . are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination. For the purpose of applying this paragraph when the issue before the Commission is to determine whether there is—
>
> (A) material injury to an industry in the United States,
>
> (B) threat of material injury to such an industry, or
>
> (C) material retardation of the establishment of an industry in the United States
>
> United States, by reason of imports of the merchandise, an affirmative vote on any of the issues shall be treated as a vote that the determination should be affirmative.

19 U.S.C. § 1677(11). This section clearly provides that any affirmative vote for material injury, threat of material injury, or material retardation of the domestic industry "shall be treated as a vote that the determination should be affirmative" when the Commissioners are evenly divided as to whether a determination is affirmative or

negative. *See id.* Thus, an affirmative determination need not arise from three affirmative votes on the same basis, as long as there are at least three affirmative votes on any of the three bases. *See id.*

In the case of a divided vote by the Commission, as occurred here, this statutory provision is important. The provision defines an evenly divided vote as an affirmative determination for purposes of determining whether an antidumping or countervailing duty order will be put in place. Moreover, it makes it clear that the Commission shall be deemed to have made that affirmative determination. The standard of review to be applied by this court, as established by Congress, is whether the determination of the Commission is "unsupported by substantial evidence on the record, or otherwise not in accordance with law…" 19 U.S.C. § 1516a(b)(1)(B)(i). By making the standard of review applicable to court review of the determination of the Commission (*see* 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II), 1516a(a)(2)(B)(i)), and defining a tie vote as affirmative and as the determination of the Commission (*see* 19 U.S.C. § 1677(11)), Congress made plain that the same standard of review is applicable to the Commission determination even when it is based on a split, tie vote.

The Commission's voting pattern also is relevant to the sections of the Tariff Act that deal with the effective date of Commerce's antidumping and/or countervailing duty orders when the Commission has reached an affirmative determination. *See* 19 U.S.C. §§ 1671e(a), 1673e(a) (providing parallel rules for countervailing and antidumping duties, respectively); *see also Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 96–97 (Fed. Cir. 2014). According to these sections, the effective date of these orders may be retrospective, from the date the entries were suspended (the "General Rule"), or prospective, from the date of publication of the final Commission determination (the "Special Rule"). These Rules provide:

(1) General rule

> If the [Commission], in its final determination ... finds material injury or threat of material injury which, but for the suspension of liquidation ... would have led to a finding of material injury, then entries of the [subject merchandise], the liquidation of which has been suspended ..., shall be subject to the imposition of ... duties....

(2) Special rule

> If the [ITC], in its final determination ... finds threat of material injury, other than threat of material injury described in paragraph (1), ... then [subject merchandise] which is entered, or withdrawn from warehouse, for consumption on or after the

> date of publication of notice of an affirmative determination of the [ITC] ... shall be subject to the [assessment or imposition] of ... duties ..., and [Customs] shall release any bond or other security, and refund any cash deposit made.

Id. §§ 1671e(b), 1673e(b). "In other words, the General Rule applies if the ITC makes (1) an affirmative finding of present material injury, or (2) a finding of a threat of material injury that would have been a finding of present material injury ["but for"] provisional measures." *Wind Tower*, 741 F.3d at 97. The General Rule mandates that antidumping and countervailing duties be collected retrospectively on merchandise that entered the United States during the investigation. *Id.* In contrast, the Special Rule applies when the ITC finds a threat of material injury that would *not* be present material injury "but for" the application of provisional measures. *Id.* Under the Special Rule, antidumping or countervailing duties are collected prospectively, from the date the ITC publishes its final determination, and any provisional cash deposits are refunded. *Id.*

In arguing that the court should not defer to an affirmative determination arising from a divided vote, Siemens conflates the Tariff Act provision dealing with tied votes with the sections dealing with the effective date of duties. The tied-vote provision explicitly requires aggregation of material injury and threat of material injury decisions to reach an affirmative determination without regard to the "but for" findings in sections 1671e(b)(1) and 1673e(b)(1). *See, e.g.*, *Metallverken Nederland B.V. v. United States*, 13 CIT 1013, 728 F. Supp. 730 (1989). In contrast, the Tariff Act provision dealing with the effective date of antidumping and countervailing duties emphasizes the importance of the "but for" finding when the Commission makes a threat determination, but does not explain how to treat a divided voting pattern. *See Wind Tower*, 741 F.3d at 96–97; *see also MBL (USA) Corp. v. United States*, 16 CIT 108, 113–14, 787 F. Supp. 202, 207–08 (1992).

The cases that Siemens cites are inapposite as to whether the court should decline to defer to a divided affirmative vote or otherwise apply some different, less deferential, standard of review. The *Wind Towers* case deals with the vagary of how to treat a divided voting pattern when applying the General Rule or the Special Rule for collecting duties. *See* 741 F.3d at 97. It does not address the issue of deference to a divided affirmative vote. *See generally id.* Siemens also misstates the significance of the *Nippon Steel* quote that "when the totality of the evidence does not illuminate a black-and-white answer

to a disputed issue, it is the role of . . . the majority of the . . . Commissioners – to decide which side's evidence to believe." 458 F.3d at 1359. *Nippon* does not concern the question of divided affirmative determinations, and so the court's emphasis on the majority of Commissioners lacks the significance with which Siemens would imbue it.

The court sees no basis in the statute, precedent, or logic to apply a different standard of review to affirmative determinations based on a divided vote than it would apply to an affirmative determination in which a majority of the Commissioners reached a common conclusion about the nature of the injury. The language of 19 U.S.C. § 1677(11) provides no basis for treating an affirmative determination by a divided Commission any differently than any other Commission determination. Similarly, the standard of review provided in 19 U.S.C. § 1516a(b)(1)(B)(i) does not suggest any distinction when reviewing a determination by a divided Commission. Indeed, cases reviewing a determination by a divided Commission have applied the same "substantial evidence" standard of review as used in cases with more uniform voting patterns. *See, e.g.*, *Metallverken*, 13 CIT 1013, 728 F. Supp. 730; *cf. Corus Staal Bv v. United States*, 27 CIT 459, 2003 WL 1475045 (2003).

This approach makes sense given the absence of a manageable alternative standard of review. Substantial evidence review acknowledges that substantial evidence may exist to support different conclusions. *See Matsushita*,750 F.2d at 936 (citing *Consolo*, 383 U.S. at 619–20; *Armstrong Bros.*, 626 F.2d at 170 n.4); *see also Metallverken*, 13 CIT at 1017, 728 F. Supp. at 734 ("It is well settled that substantial evidence may exist in a record to support several inconsistent conclusions."). Substantial evidence review is not a vote counting exercise. *See, e.g.*, *Philip Bros., Inc. v. United* States, 10 CIT 485, 486, 640 F. Supp. 1340, 1342 (1986) (finding that the"size of the Commission majority is ...irrelevant" when reviewing the determination and that the court "may consider only whether the determination of the Commission is unsupported by substantial evidence"). Even when four Commissioners are persuaded by certain evidence, it does not mean that a contrary vote by the other two Commissioners cannot be supported by substantial evidence or that such substantial evidence must be reviewed with less deference by this court. Treating affirmative determinations by a divided Commission differently from uniform determinations would ask the reviewing court to engage in impermissible reweighing of the evidence in such cases. *See Usinor*, 28 CIT at 1111, 342 F. Supp. 2d at 1272; *see also Metallverken*, 13 CIT at 1017, 728 F. Supp. at 734. In *Metallverken*,which presented the same voting pattern as the underlying determination, the court re-

jected plaintiff's argument to negate an affirmative determination based solely on the findings of the dissenting commissioners. The court reasoned as follows:

> In asking the Court to negate a commissioner's determination based upon the findings of dissenting commissioners, plaintiffs are, in essence, asking the Court to reweigh the evidence. The function of this Court is not to reweigh the evidence, but rather to ascertain whether the Commissioner's determination is "unsupported by substantial evidence on the record or otherwise not in accordance with law."

Metallverken, 13 CIT at 1017, 728 F. Supp. at 734 (citations omitted). Thus, contrary to Siemens' arguments, the court reviews the Commission's determination, no matter how reached, based upon the substantial evidence standard.

II. The Material Injury Determination

Plaintiffs contest the Commission's material injury determination, alleging that the Commission improperly found that (1) the volume of subject imports displaced a significant volume of domestic wind towers; (2) competition from subject imports suppressed domestic wind tower prices; and (3) subject imports adversely impacted the domestic industry. (*See generally* Siemens Mot.; Titan Mot.)

Pursuant to the Tariff Act, as amended, the Commission determines whether a domestic industry is materially injured, or threatened with material injury, by reason of unfairly subsidized or dumped imports. *See* 19 U.S.C. §§ 1671d(b), 1673d(b). The Commission will issue an affirmative determination if it finds "present material injury or a threat thereof" and makes a "finding of causation." *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1210, 431 F. Supp. 2d 1302, 1306 (2006) (quotation marks omitted). In making a material injury determination, the Commission evaluates "(1) the volume of subject imports; (2) the price effects of subject imports on domestic like products; and (3) the impact of subject imports on the domestic producers of domestic like products." *Id.* (citing 19 U.S.C. §§ 1677(7)(B)(i)(I)-(III)); *accord GEO Specialty Chems., Inc. v. United States*, Slip Op. 09–13, 2009 WL 424468, at *2 (CIT Feb. 19, 2009). The Commission may also consider "'such other economic factors as are relevant in the determination.'" *Hynix Semiconductor*, 30 CIT at 1210, 431 F. Supp. 2d at 1306 (quoting 19 U.S.C § 1677(7)(B)(ii)).

a. Volume

In performing its volume analysis, the ITC must consider "'whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.'" *Shandong TTCa Biochem.*, 45 CIT at __, 774 F. Supp. 2d at 1322 (quoting 19 U.S.C. § 1677(7)(C)(i)).

In its *Views*, the Commission assessed several metrics and determined that the volume and the increase in volume of subject imports were significant, both in absolute terms and relative to consumption. *Views* at 27. Specifically, the Commission found that the volume of subject imports, by quantity, grew significantly between 2009 and 2011, and that "[t]he growth in subject imports in interim 2012 relative to interim 2011 was dramatic." *Views* at 27 (citing *Staff Report* at Table IV-2).[8] The Commission also observed that, although subject imports' U.S. market share fell slightly between 2009 and 2010, it increased significantly in 2011. *Views* at 28 (citing *Staff Report* at Table IV-6). Likewise, subject imports' share of the U.S. market, by quantity, rose from interim 2011 to interim 2012. *Views* at 28 (citing *Staff Report* at Table IV-6). The ratio of subject imports to U.S. production similarly increased substantially both from 2009 to 2011 and from interim 2011 to interim 2012, despite an increase in U.S. production. *Views* at 28 (citing *Staff Report* at Table IV-7).

The Commission also considered domestic industry volume trends. It found that the domestic industry's volume decreased, despite an increase in demand in interim 2012 prompted by the anticipated expiration of the investment tax credit and the production tax credit ("PTC"). *Views* at 19–20 (citing *Staff Report* at II-11), 28–29.[9] To benefit from the PTC, the wind turbine had to be operational by the end of 2012. *Views* at 19–20 (citing *Staff Report* at II-11). Thus, OEMs rushed to install wind towers to benefit from the PTC, leading to a substantial increase in apparent U.S. consumption of wind towers between interim 2011 and interim 2012. *Views* at 28 (citing *Staff Report* at Table IV-6). Although the Commission acknowledged that the domestic industry's market share rose somewhat between 2009 and 2011, it found that it was "far lower . . . than at any prior point during the period of investigation" by interim 2012, dropping by more than [[ ]] points from interim 2011 to interim 2012. *Views* at 28 (citing

[8] Subject imports grew by 41.8 percent between 2009 and 2011 and increased from 456 towers to 1,257 towers from interim 2011 to interim 2012. *Views* at 27 (citing *Staff Report* at Table IV-2).

[9] The PTC provided a 2.2 cents per kilowatt-hour credit for the first ten years of a wind turbine's operation. *Views* at 20 (citing *Staff Report* at II-10 to II-11).

Staff Report at Table IV-6). The Commission found that subject imports disproportionately benefited from the surge in demand, with their shipments increasing "even more sharply" than the rise in apparent U.S. consumption. *Views* at 28 (citing *Staff Report* at Table C-1).

The Commission considered several alternative explanations for why domestic market share declined while subject import market share dramatically increased during the POI. It considered, for example, that subject imports took market share from nonsubject imports. *Views* at 28–29. It found, however, that "[t]he increase in subject imports' share of the U.S. market . . . came primarily at the direct expense of the domestic industry rather than nonsubject imports," noting that nonsubject imports' market share declined from 2009 to 2011, and even by a small amount during interim 2012 when demand was peaking. *Views* at 28–29 (citing *Staff Report* at Table IV-6). The Commission also rejected the possibility that the domestic industry's inability to supply the market accounted for the high levels of subject imports, observing that the domestic industry had excess capacity that would have allowed it to fill a greater share of demand than it did. *Views* at 29 (citing *Staff Report* at III-18, Tables III-3, III-5, III-6, IV-2, Figs. E-1 to E-4). It concluded,

> [w]hile factors such as operational inefficiencies and the expected non-renewal of the PTC and other federal incentives may have played some role in the domestic industry's modest growth in production and shipments during interim 2012, the record indicates that the subject imports also played a role in precluding the domestic industry from increasing production to take advantage of the increase in apparent consumption.

Views at 30 (citing *Staff Report* at III-18 n.33, VI-11; Hr'g Tr. (Cole) 81, 122–123).

The Commission thus determined that the volume and increase in volume of subject imports was significant during the POI. *Views* at 30.

i. Tax Credit Argument

Titan argues that the anticipated expiration of the PTC and investment tax credit at the end of 2012 led to an anomalous surge in demand that domestic producers were unable to accommodate. (Titan Mot. 5, 24–25, 36.) Relying on the dissenting Commissioners' rationale, Titan contends that, "'[d]uring the latter half of the POI, subject imports filled demand that was itself inflated and accelerated by the likely expiration of the PTC and other federal incentives, but subject

imports did not displace significant amounts of domestic production or sales.'" (Titan Mot. 25.) As a result, Titan urges that the Commission lacked substantial evidence to support its determination of a significant volume and increase in volume of subject imports during the POI.

However, the Commission acknowledged that the surge in demand at the end of the POI was particularly strong because of the anticipated non-renewal of the PTC. *View s* at 28. Citing substantial record evidence, it found that significant volumes of subject imports prevented the domestic industry from taking full advantage of this surge. *Views* at 28. It cited, for example, the increase in quantity of subject imports, *Views* at 27 (citing *Staff Report* at Table IV-2), and their growing market share during the POI, *Views* at 28 (citing *Staff Report* at Tables IV-6, C-1). The Commission also relied on record evidence that showed subject imports' market share increased "more sharply" than demand between interim 2011 and interim 2012 while the domestic industry's market share fell to its lowest point during that timeframe. *Views* at 28 (citing *Staff Report* at Table IV-6, C-1). The Commission considered and dismissed the possibility that subject import market share grew at the expense of nonsubject imports, finding that nonsubject imports lost a small amount of market share when subject imports were increasing dramatically. *Views* at 28–29 (citing *Staff Report* at Table IV-6).

These findings provide substantial evidence to support the conclusion of significant volumes and increase in volumes of subject imports during the POI, both in absolute terms and relative to consumption. Relying on the dissenting Commissioners' findings, Titan argues that the Commission determination is unsupported by substantial evidence. That Titan can point to evidence that detracts from the Commission's conclusion, however, does not preclude the Commission's finding from being supported by substantial evidence. *Matsushita*, 750 F.2d at 936. In fact, in light of the dissent of three Commissioners, the court is hardly surprised that the record contains contrary evidence. Conflicting evidence, however, is insufficient for Titan to carry the day. *Id*. 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. *Mitsubishi*, 918 F. Supp. at 425. Titan's arguments improperly ask the court to reweigh the record evidence and, therefore, must be rejected. *Usinor*, 28 CIT at 1111, 342 F. Supp. 2d at 1272.

ii. Excess Capacity

Titan and Siemens challenge the Commission finding that the domestic industry had excess capacity during the POI as unsupported by substantial evidence. (*See* Siemens Mot. 44–55; Titan Mot. 25–36.) They argue that the domestic industry was unable to meet the spike in demand for wind towers, leaving purchasers with no choice but to purchase subject imports. (*see* Siemens Mot. 44–55; Titan Mot. 25–36.) In support of this argument, Titan and Siemens cite record evidence that calls into question the domestic industry's reported capacity. (*See* Siemens Mot. 44–55; Titan Mot. 25–36.) For example, they point to record evidence that one company backed out of orders, (Siemens Mot. 51–53), and that another company turned away orders from domestic plants in 2010 and 2011 (Siemens Mot. 47–48). Plaintiffs also note that a third company reported excess capacity though it told OEMs it could not accommodate certain projects, (Siemens Mot. 55), and had not yet constructed a facility for which it reported capacity (Titan Mot. 28–29). Similarly, Plaintiffs observe that a company claimed capacity for a plant that lacked the staff to produce towers (Siemens Mot. 53-54; Titan Mot. 29). Based on these examples of delayed and declined orders, Plaintiffs argue that OEMs were forced to pay premiums for subject imports because the domestic industry lacked actual capacity. (*See* Siemens Mot. 44–55; Titan Mot. 25–36.)

Notwithstanding these claims, the Commission cited substantial record evidence corroborating domestic producers' reported excess capacity. It reasonably relied on the domestic producers' certified capacity data. *See Views* at 4, 29–30. This data provided substantial evidence for the Commission's conclusion that the domestic industry had excess capacity during the POI.

Further, the Commission reasonably addressed evidence that detracted from the data upon which it relied. It acknowledged that domestic producers were not able to meet all of the growing demand, but found that OEMs elected to purchase wind towers overseas despite available capacity among domestic producers. *Views* at 29 (citing *Staff Report* at Tables III-3, III-5, III-6, Figs. E-1 to E-4). For example, the Commission observed that several qualified facilities operated at modest rates of capacity utilization during interim 2012, *Views* at 30 n.169 (citing *Staff Report* at Table III-5), and that one company built a facility that its expected customer declined to use, *Views* at 30 n.170 (citing *Staff Report* at II-4 n.6, V-67). Additionally, the Commission found that domestic producers had no choice but to decline certain orders because of the contractual obligations they had

undertaken through long-term supply agreements that they believed required them to reserve certain production capacity for particular OEM customers. *See Views* at 30 n.173 (citing *e.g.*, Hr'g Tr. (Cole) 81, 122–123). When the OEMs later renegotiated these agreements, domestic producers were left with unused excess capacity. *See id.*[10] In addition, the Commission noted that some domestic producers submitted bids for large projects for which subject imports were used, undermining Plaintiffs' allegations that these producers lacked capacity. *Views* at 41 n.234 (citing Staff Report at II-4 n.6). The Commission further determined that concerns about the preparedness of certain domestic production were unfounded given the two-year delivery horizon, the large number of towers involved, and the OEMs' decisions to qualify new facilities after production begins. *Views* at 30 n.170. Finally, the Commission addressed and rejected the argument that domestic producers' facilities were too far from the wind tower sites, noting several examples in which OEMs relied on subject imports despite nearby domestic facilities with reported excess capacity.[11] *Views* at 29–30 (citing *Staff Report* at Tables V-1, V-2, V-5, III-5).

Thus, the Commission relied on substantial record evidence to conclude that the domestic industry had excess capacity due to the significant volume and increasing volume of subject imports. Plaintiffs have not identified any error with the Commission's analysis. As discussed with respect to the standard of review applied by this court, even if Plaintiffs may point to evidence relied on by the dissenters and inconsistent with the Commission's conclusion, that does not preclude the Commission's finding from being supported by substantial evidence. *Matsushita*, 750 F.2d at 936; *Armstrong Bros.*, 626 F.2d at 170 n.4. The court "may not reweigh the evidence or substitute its own judgment for that of the agency." *Usinor*, 28 CIT at 1111, 342 F. Supp. 2d at 1272.

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[10] For example, one large producer, [[ ]], could not operate at capacity because it had a long-term supply agreement with [[ ]] that [[ ]] later renegotiated in favor of purchasing more subject imports. *Views* at 30 n.173 (citing *e.g.*, Hr'g Tr. (Cole) 81, 122123). Meanwhile, [[ ]] lowered its prices per tower by over [[ ]] percent under this long-term agreement. OEMs similarly renegotiated contracts with [[ ]]. *Views* at 30 n.171 (citing *Staff Report* at III-18 n.33, V-11).

[11] [[ ]], for example, relied on subject imports for a Midwest project even though Trinity had facilities with capacity in Iowa and Texas. *Views* at 29 (citing *Staff Report* at Tables V-2, III-5). [[ ]] also opted to supply its Shephard's Flats project entirely with subject imports, even though [[ ]] had a nearby facility and Broadwind offered to build a new facility to supply the project. *Views* at 30 (citing *Staff Report* at II-4 n.6, V67). Plaintiffs' claims that the [[ ]] is also without merit. (*See* Siemens Mot. 54; Titan Mot. 29.) While Plaintiffs accurately note that the record indicates that there were only [[ ]] (Titan Mot. 29 (citing *Staff Report* at III-29 n.53)), the record also indicates that [[ ]] (*See Staff Report* at III-29 n.53.) Consequently, there was substantial evidence to support the Commission's finding that this plant had excess production capacity.

b. Price Effects

When performing a price effects analysis, the ITC must consider (1) whether there has been significant price underselling by the imported merchandise as compared with the price of the domestic like product and (2) whether the effect of subject imports otherwise depresses prices to a significant degree or suppresses prices to a significant degree. 19 U.S.C. § 1677(7)(C)(ii).

The Commission evaluated the existence of underselling, price depression, and price suppression. It found that subject imports and the domestic like product are generally substitutable, and compete for sales to OEMs. *Views* at 31 (citing *Staff Report* at II-19, II-31 to II-32). It also noted that most OEMs ranked total cost, of which f.o.b. prices are the largest component, as the most important factor in purchasing decisions. *Views* at 31 (citing *Staff Report* at Tables V-1, V-5). Further, the Commission observed that OEM pricing data indicated that subject imports generally had lower f.o.b. prices than domestic towers, but that domestic towers were less expensive on a delivered basis. *Views* at 32 (citing *Staff Report* at Table V-1; Hr'g Tr. (Dougan) 156–157). Thus, the Commission found that subject imports were not significantly underselling domestic products on a delivered basis. *Views* at 32–33. The Commission likewise found that the subject imports did not have price depressing effects on the domestic industry, concluding that unit value was an unreliable metric for evaluating price depression in this case because the size of wind towers increased as sale values increased over the period of investigation. *Views* at 33.

However, the Commission found substantial record evidence of price suppression because the domestic industry's ratio of cost of goods sold to net merchant market sales ("COGS ratio") increased significantly during the POI. *Views* at 34 (citing *Staff Report* at Table VI-1).[12] The Commission observed that the rising COGS ratio coincided with the increasing volume of subject imports during 2011 and interim 2012. *Views* at 34–35. It found this trend to be discordant with the price increases it would have expected given the inelastic nature of the wind tower market and the spiking demand during the period. *Views* at 35.

The Commission attributed the domestic industry's unexpected cost-price squeeze to evidence that OEMs negotiated based on f.o.b. prices. *Views* at 33–34 (citing Pet'r's Post-Hr'g Br., Ex. 2; Hr'g Tr. (Cole) 31–32; Hr'g Tr. (Smith) 37). It reasoned,

[12] The domestic industry's COGS ratio increased from [[ ]] percent in 2009 to [[ ]] percent in 2010 to [[ ]] percent in 2011. *Views* at 34 (citing *Staff Report* at Table VI1). In interim 2011, this ratio was [[ ]] percent, and in 2012 it was [[ ]]. *Id*.

> There have also been instances where the OEMs have pressured the domestic producers to renegotiate their supply agreements to set lower prices or alter volumes in light of the availability of low-priced subject imports. The small number of OEMs in the market, the importance to them of price in purchasing decisions, their pattern of negotiating prices with domestic producers, and the availability of alternative sources of supply in the market (the most prominent of which during the latter portion of the period of investigation was subject imports), placed pressure on domestic producers to discipline their prices in order to receive bid solicitations or orders.

Views at 34 (citing *Staff Report* at II-23, III-11, III-12, VI-17 n.28). Thus, the Commission concluded that subject imports prevented the domestic industry from raising prices during the POI, resulting in significant adverse price effects on the industry. *Views* at 35.

i. Price Suppression

Siemens challenges the Commission's determination of adverse price effects as unsupported by substantial evidence because the Commission found no evidence of significant price underselling, price depressing effects by subject imports, or confirmed lost sales. (Siemens Mot. 43–44.) It further argues that the Commission's price suppression determination is inconsistent with the finding that subject imports cost more on a delivered basis. (Siemens Mot. 44.)

However, the Commission did not need to find underselling, price depression, or lost sales[13] to determine that the subject imports adversely affected the domestic industry by suppressing prices. *Cemex, S.A. v. United States*, 16 CIT 251, 260–61, 790 F. Supp. 290, 299 (1992) ("To require findings of underselling would be inconsistent with the proposition that price suppression or depression is sufficient."), *aff'd*, 989 F.2d 1202 (Fed. Cir. 1993). Likewise, higher priced subject imports are not inconsistent with price suppression. *Maine Potato Council v. United States*, 9 CIT 293, 301–02, 613 F. Supp. 1237, 1245 (1985) (holding that higher quality imports may have price suppressing effects notwithstanding their higher price); *Allegheny Ludlum Corp. v. United States*, 24 CIT 858, 880–81, 116 F. Supp. 2d 1276, 1298–99 (2000) (postulating that higher, though declining prices for subject imports could have depressed prices). Indeed, the

[13] The Commission acknowledged the absence of confirmed lost sales, but pointed out that it viewed the [[ ]] as a sales opportunity that was lost during the demand boom in interim 2012. *Views* at 33 n.190, 41 (citing *Staff Report* at II-4 n.6).

Commission explained that, in this case, subject imports suppressed prices because OEMs negotiated with domestic producers to lower their f.o.b. prices, which were higher than those of subject imports. *Views* at 34 (citing Pet'r's Post-Hr'g Br., Ex. 2; Hr'g Tr. (Cole) 31–32; Hr'g Tr. (Smith) 37).

The Commission reasonably found that subject imports suppressed domestic prices and Plaintiffs have not demonstrated any error in the Commission's assessment of the facts. The Commission's determination regarding the subject imports' price suppressing effects on the domestic industry is supported by substantial evidence. Thus, the court may not reweigh the record evidence or otherwise second-guess the Commission's reasonable explanation. *See Usinor*, 28 CIT at 1111, 342 F. Supp. 2d at 1272.

ii. COGS Ratio

Titan challenges the Commission's methodology for finding price suppression. It argues that the Commission failed to show a causal link between the subject imports and the domestic industry's rising COGS ratio. (Titan Mot. 42–43.) Specifically, Titan contends that the COGS ratio cannot reliably show that subject imports suppressed domestic prices because the COGS ratio does not correlate with the domestic industry's net sales on a year-to-year basis. (Titan Mot. 42.)[14] Titan asserts that the lack of year-to-year correlation between subject import market share, domestic industry market share, and the COGS ratio disrupts the causal link between subject imports and any price suppressing effects the domestic industry may have experienced. (Titan Mot. 42.) Titan postulates that operational inefficiencies prevented the domestic industry from raising prices during this period rather than subject imports. (*See* Titan Mot. 46; *see* also Siemens Mot. 35–37, 58.)

However, the Commission reasonably relied on the rising COGS ratio as evidence of price suppression. *See, e.g.*, *Nippon Steel*, 458 F.3d at 1354 n.4 ("When cost of goods sold ('COGS') exceeds price, the producer is unable to sell the product for more than what it costs to produce the product; if the producer is unable to raise prices, the industry finds itself in what is referred to as a cost-price squeeze."); *Chlorinated Isocyanurates from China and Spain*, Inv. Nos. 731-TA-1082–1083 (Final), USITC Pub. 3782 (June 2005) at 30 (finding that

[14] For example, Titan notes that between 2009 and 2010, subject import market share decreased while domestic COGS increased by [[ ]] points. (Titan Mot. 42 (citing *Staff Report* at Tables C-1 and C-2).) And, between 2009 and 2011, domestic market share increased while COGS increased. (Titan Mot. 42 (citing *Staff Report* at Tables C-1 and C-2).) Further, during interim 2011 and interim 2012, domestic market share decreased while COGS decreased. (Titan Mot. 42 (citing *Staff Report* at Tables C-1 and C-2).)

rises in unit COGS and in ratio of COGS to net sales indicates cost-price squeeze). Indeed, the Commission articulated a sufficient causal link between the subject imports and the domestic industry's rising COGS ratio. It focused on the trend of volume increases and elevated COGS ratios in 2011 and interim 2012, not across the entire POI. *Views* at 35–36. The Commission observed that the COGS ratio increased from 2009 to 2011, remaining very high in interim 2012. *Views* at 34 (citing *Staff Report* at Table VI-1). The Commission found that the high COGS ratio in 2011 and interim 2012 coincided with dramatic increases in subject import volumes. *Views* at 34–35 (citing *Staff Report* at Table VI-1). There is no support for Titan's argument that there must be a perfect correlation between subject imports and COGS on a yearly basis. The Commission may reasonably rely on the trend of volume increases and elevated COGS ratios as it did here.

Furthermore, the Commission reasoned that the domestic industry should have been able to raise prices during 2011 and interim 2012 given the spike in demand, but found it could not because of competition with subject imports. *Views* at 34–35 (citing *Staff Report* at Table V-2). The Commission acknowledged that operational inefficiencies contributed to the domestic industry's inability to raise costs, but concluded that these issues did not account for the entirety of the cost-price squeeze. *Views* at 34–35.[15] Rather, the Commission found that market conditions, such as the small number of OEMs, the importance of price in purchasing decisions, negotiations based on f.o.b. pricing, and the availability of subject imports, "placed pressure on domestic producers to discipline their prices in order to receive bid solicitations or orders." *Views* at 34. It determined that the changes in the COGS ratio reflected this price suppressive effect. *Views* at 34–35.

The Commission examined the relevant data and articulated a reasonable explanation. To that end, the Commission established a sufficient causal link between the subject imports and the domestic industry's rising COGS ratio. *Motor Vehicle Mfrs.Ass'n v. State Farm Mut.Auto.Ins.Co.*, 463 U.S. 29, 43 (1983); *see also* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316, at 156 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4184–85 ("SAA") (stating that the Commission "need not isolate the injury caused by other factors from injury caused by unfair imports ... [r]ather, the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports").

[15] Moreover, the Commission found that at least some of these inefficiencies resulted from OEM customers pressuring domestic producers to change production designs to accommodate their shift to subject imports for designs previously supplied by the domestic producer *Views* at 34 n.195 (citing *Staff Report* at VI-17 n.28).

Plaintiffs' ability to point to evidence that detracts from the Commission's findings, evidence that was examined and discounted by the Commission, does not provide a justification for this court to reweigh the evidence that was before the Commission. *Usinor*, 28 CIT at 1111, 342 F. Supp. 2d at 1272 (2004); *see also Matsushita*, 750 F.2d at 936.

iii. F.O.B. and Delivered Costs Argument

Plaintiffs next argue that the Commission lacked substantial evidence to support its determination that OEMs negotiated with domestic producers based on f.o.b. prices, thereby preventing price increases. (Siemens Mot. 43; Titan Mot. 38–41.) They argue that delivered costs were more important to OEMs than f.o.b prices, and that domestic wind towers were less expensive on that basis. (Titan Mot. 41.) Titan further observed that domestic producers could not have known about the f.o.b. prices quoted by their subject import competitors because OEM price negotiations were closed. (Titan Mot. 40–41.) Titan urges that the fact that OEMs attempted to reduce prices through negotiations does not constitute the requisite causal link between subject imports and domestic prices. (Titan Mot. 41.) Moreover, Siemens argues that the Commission based its assessment of OEM negotiation patterns entirely on a misreading of a single email. (Siemens Mot. 43.)

Contrary to Plaintiffs' contentions, the Commission relied on substantial evidence to determine that subject imports' lower f.o.b. prices gave OEMs leverage in negotiating with domestic producers, thereby suppressing domestic prices. The Commission acknowledged that subject imports were more expensive on a delivered basis, *View s* at 32–33 (citing *Staff Report* at V-1, V-2, V-6), but cited record evidence that f.o.b. price was the biggest component of total cost and that OEMs negotiated based on those prices. *Views* at 33–34 (citing Pet'r's Post-Hr'g Br., Ex. 2; Hr'g Tr. (Cole) 31–32; Hr'g Tr. (Smith) 37). These negotiations pressured domestic producers to lower prices to compete with subject imports. *Id*. Though bids were closed, the Commission cited hearing testimony that OEMs leveraged quotes from other producers to drive f.o.b. prices down. *Id*. Further, the Commission found that OEMs pressured domestic producers to renegotiate supply agreements to set lower prices or alter volumes based on lower priced subject imports. *Views* at 34 (citing *Staff Report* at II-23, III-11,

III-12).[16] Thus, the Commission examined the relevant data and articulated a reasonable explanation for its determination that was supported by substantial evidence. *See Motor Vehicle Mfrs.*, 463 U.S. at 43.

c. Adverse Impact

In examining the impact of subject imports, the Commission "shall evaluate all relevant economic factors which have a bearing on the state of the industry," including output, sales, inventories, ability to raise capital, research and development, and factors affecting domestic prices. 19 U.S.C. § 1677(7)(C)(iii). No single factor is dispositive, and all are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Id*.

The Commission found that subject imports adversely affected the domestic industry during the POI based on these factors and considerations. *Views* at 36. It determined that "the domestic industry was unable to benefit from the sharp increase in apparent U.S. consumption before the PTC was expected to expire" and "experienced a decline in market share and only a modest increase in production and U.S. shipments" as a result of significant volumes of subject imports during the POI, and especially in interim 2012. *Views* at 36. The Commission further observed that the domestic industry was unable to raise prices because of the presence of subject imports and pressure by OEMs to lower f.o.b. prices to better compete with subject imports. *Views* at 36. As a result, the domestic industry was unable to cover increased costs, causing steep declines in operating income and resources available for capital expenditures. *Views* at 36. The Commission evaluated whether other factors – non-subject imports, operational inefficiencies, and the geographic location of projects – may have harmed the industry during the POI, but found that these other factors accounted for only a part of the adverse impact the domestic industry experienced. *See Views* at 40–41. The Commission concluded that the "record contains ample evidence that the presence of the subject imports led to reduced production levels, shipments, capacity utilization and price increases for the domestic industry as the OEMs turned to subject imports rather than rely upon the domestic producers who had nearby unused capacity." *Views* at 42.

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[16] For example, the Commission found that [[

]] *Views* at 34 n.195 (citing *Staff Report* at V-17 n.28). It also found that [[ ]] awarded bids to subject import producers over [[ ]] even though these domestic producers could have had new plants ready to produce towers within the two-year delivery timeframe. *See Views* at 30, 30 n.170 (citing *Staff Report* at II-4 n.6, V67).

i. Excess Capacity

Plaintiffs challenge the Commission's adverse impact finding on the basis that the industry did not have excess capacity and actually gained market share throughout the POI. (*See* Siemens Mot. 44–55; Titan Mot. 25–36.) In particular, Plaintiffs argue that data showing excess capacity did not reflect actual market conditions, noting that OEMs paid a premium for subject imports and that U.S. producers refused and canceled orders throughout the period. (*See* Siemens Mot. 4455; Titan Mot. 25–36.)

As discussed previously in reviewing the Commission's volume and price effects analysis, Plaintiffs' arguments that the domestic industry lacked excess capacity cannot withstand the standard of review. The Commission relied on substantial record evidence from the domestic industry's certified questionnaire responses to support its finding of excess capacity. *Views* at 40 (citing *Staff Report* at Tables III-5, III-6). It also had substantial evidence to support its determination that subject imports suppressed domestic industry prices because OEMs used subject imports' lower f.o.b. prices as leverage in negotiations with domestic producers. Views at 33–34, 36 (citing Pet'r's Post-Hr'g Br., Ex. 2; Hr'g Tr. (Cole) 31–32; Hr'g Tr. (Smith) 37). The Commission cited record evidence that domestic producers refused and canceled orders because of long-term supply agreements with OEMs that tied up their production. These domestic producers were then left with excess capacity when the OEMs subsequently renegotiated downward the quantity of wind towers they would purchase from the domestic producers and increased their purchases of subject imports. *See* Views at 30 n.171, n.173 (citing Hr'g Tr. (Cole) 81, 122–123; Staff Report at III-18 n.3, V-11). The Commission thus had substantial evidence to support its *Views*. Plaintiffs have not identified any error in the Commission's analysis and, instead, simply disagree with the outcome of that analysis. The court may not reweigh the evidence, as Plaintiffs request. *Usinor*, 28 CIT at 1111, 342 F. Supp. 2d at 1272.

ii. Market Share

Plaintiffs argue that the Commission lacked substantial evidence to support its determination that the domestic industry's market share declined as a result of increased subject imports. Titan argues that subject imports could not have adversely affected the domestic industry given that domestic producers gained market share throughout the POI. (Titan Mot. 46.) Siemens urges that the Commission should have viewed any loss in market share in the context of overall expansion of demand that saturated domestic production capacity, such

that "any further growth necessarily meant a decline in domestic market share with no implications for the domestic industry's prosperity." (Siemens Mot. 41–42.)

The Commission acknowledged that domestic market share grew throughout most of the POI, but found that the domestic industry lost market share during interim 2012, when demand was spiking. *Views* at 37–38. As previously discussed, the Commission also found that the domestic industry had excess capacity during this period, indicating that growth in market share did not have to go to subject imports, as Siemens contends. *Views* at 40. The Commission reasonably found that the domestic industry's market share declined as a result of increased subject imports. Because the Commission's determination is supported by substantial evidence, the court may not reweigh the record evidence by second-guessing the Commission's reasonable explanation. *See Usinor*, 28 CIT at 1111, 342 F. Supp. 2d at 1272.

iii. Non-Subject Imports

Siemens also challenges the Commission's finding of adverse impact by revisiting the contention that the Commission insufficiently analyzed the role of non-subject imports in domestic market trends. (Siemens Mot. 59.)

As addressed earlier, the Commission considered the role of non-subject imports and found that they did not have an adverse impact on the domestic market during the POI. The Commission determined that "nonsubject imports lost market share throughout the period of investigation" and "[a]t the same time that subject imports were generally increasing, nonsubject imports' share of the market was declining." *Views* at 23, 28 (citing *Staff Report* at Tables IV-2, IV-6; Tr (Revak) 226). Based on this record evidence, the Commission concluded that non-subject imports could not have caused the adverse impact that the domestic industry experienced during the POI. The Commission instead decided that the "increase in subject imports in interim 2012 relative to interim 2011 came almost entirely at the expense of the domestic industry, while nonsubject imports remained a minor factor in the growing U.S. market." *Views* at 40 (citing *Staff Report* at Table C-2). Because the Commission relied on substantial record evidence to support its conclusion about the role of non-subject imports, the court may not reweigh the record evidence. *Usinor*, 28 CIT at 1111, 342 F. Supp. 2d at 1272.

III. The Threat of Material Injury Determination

In determining whether a domestic industry is threatened with material injury by reason of subject imports, the Tariff Act requires

the ITC to consider, "among other relevant economic factors," (i) the nature of any countervailable subsidy; (ii) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country, taking into account the availability of other export markets to absorb any additional exports; (iii) a significant rate of increase of the volume or market penetration of the subject merchandise; (iv) the likely price effects of the subject imports; (v) inventories of the subject imports; (vi) the potential for product-shifting in facilities currently being used to produce other products; (vii) if the investigation involves raw agricultural products, any product processed from such products; (viii) the actual and potential negative effects on the existing development and production efforts of the domestic industry; and (ix) any other adverse trends that indicate that material injury by reason of subject imports is likely. 19 U.S.C. § 1677(7)(F)(i). Though the presence or absence of any factor is not decisive, "a determination may not be made on the basis of mere conjecture or supposition." *See* 19 U.S.C. § 1677(7)(F)(ii).[17]

In his *Views*, Commissioner Pinkert weighed the relevant statutory factors and determined that wind tower imports from China and Vietnam posed a threat of material injury to the domestic industry. *See generally Pinkert Views*. Focusing on market conditions at the end of the POI, he found that the domestic industry was vulnerable to material injury in the imminent future because foreign producers had, *inter alia*, significantly increased volumes and market share; significantly and rapidly expanded their presence throughout the U.S. market, even in regions where they did not traditionally compete; generated substantial excess capacity that could quickly be directed at the U.S. market; and accumulated significant inventories. *Pinkert Views* at 3–6. Commissioner Pinkert further observed that the price differential between the domestic product and subject imports narrowed during this timeframe and that demand for wind towers in the foreseeable future was expected to moderate from the 2012 high. *Pinkert Views* at 6–7. In this context, he determined that subject import volumes will likely be significant in the imminent future, leading to increased price competition with the domestic industry. *Pinkert Views* at 7–8. He concluded:

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[17] 19 U.S.C. § 1677(7)(F)(ii) states:

> The Commission shall consider the factors set forth in clause (i) as a whole in making a determination of whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted under this subtitle. The presence or absence of any factor which the Commission is required to consider under clause (i) shall not necessarily give decisive guidance with respect to the determination. Such a determination may not be made on the basis of mere conjecture or supposition.

> Limited sales opportunities in a less than robust market will intensify price competition between subject imports and domestic producers, and even a modest volume of subject imports would be likely to result in negative effects on the domestic industry. As a consequence, in the absence of trade relief, the industry is likely in the imminent future to suffer a significant loss of revenues that will cause a further deterioration in its financial condition, as well as declining employment, output, and productivity.

Pinkert Views at 8.

Plaintiffs challenge Commissioner Pinkert's determination, arguing that he lacked substantial evidence to support a finding that injury to the domestic market was "imminent"; improperly extrapolated conditions from interim 2012 in finding imminent threat; and lacked substantial evidence to support the statutory factors that he found indicated an imminent threat of material injury to the domestic market. (*See generally* Siemens Mot.; Titan Mot.) Thus, they argue that his findings, as a whole, rest on speculation and conjecture. (*See generally* Siemens Mot.; Titan Mot.)

a. "Imminent" Material Injury

In his Views, Commissioner Pinkert found that the termination of the PTC and the investment tax credit in 2012, and their one-year renewal for 2013, would cause demand to moderate in the near future. He reasoned:

> [I]t should take a much smaller volume of subject imports to constitute a significant share of the market than it took during the period of heightened demand in 2011 and 2012 leading up to the then-expected end of the PTC and [investment tax credit]. Given moderate demand, subject producers are likely to compete intensely for U.S. sales in order to better utilize their available capacity. Consequently, for the above reasons, I find that, in the absence of trade relief, imports of the subject merchandise in the imminent future are likely to be significant and to increase significantly, both in absolute terms and relative to consumption, over the low-to nonexistent levels to which they fell as a result of expectations that the PTC and [investment tax credit] would not be renewed.

Pinkert Views at 6 (citing *Staff Report* at II-10, Table VII-9). He further indicated that such increased volumes of subject imports were imminent because "it would likely take six to nine months for purchasers to respond to the renewal of the PTC with new orders." *Pinkert Views* at 6–7 n.27 (citing Hr'g Tr. (Smith) 80).

Siemens urges that the harm Commissioner Pinkert predicted could not occur imminently because a year or more would pass between planning projects in response to the renewed tax credits and delivery of towers. (Siemens Mot. 25–26.) It argues that this timeframe is at odds with the dictionary definition of "imminent" as meaning "about to happen." (Siemens Mot. 25–26 (citing *Oxford Concise Dictionary* (2d ed. 1989).)

Commissioner Pinkert's determination was supported by substantial evidence and in accordance with law. A six to nine month timeframe is sufficiently imminent to support a threat determination. Although "[n]o bright-line test exists to determine when injury is imminent", this court has found timeframes longer than "six to nine months" to be "imminent." *Asociacion de Productores de Salmon y Trucha de Chile A.G. v. USITC*, 26 CIT 29, 39, 180 F. Supp. 2d 1360, 1371 (2002) (rejecting arguments that imminent "cannot mean within one to two years"); accord *Goss Graphics System, Inc.v.United States*, 22 CIT 983, 1007–08, 33 F. Supp. 2d 1082, 1103–04 (1998) (upholding as reasonable finding that harm was imminent where it would manifest in two or more years); *see also Co-Steel Raritan, Inc. v. USITC*, 29 CIT 562, 570–71 (2005). Further Commissioner Pinkert cited hearing testimony to support his finding that competition with subject imports would increase within a "six to nine month" timeframe. *Pinkert Views* at 6–7 n.27 (citing Hr'g Tr. (Smith) at 80). That Plaintiffs can point to record evidence that supports a different timeframe is of no moment. *See Matsushita*, 750 F.2d at 936.

b. Tax Credit Renewal

Plaintiffs also argue that Commissioner Pinkert improperly speculated that significant subject import volumes during interim 2012 represented a trend, urging that 2012 was actually a unique year during which domestic producers could not satisfy demand. (Siemens Mot. 27–29, 34–35; Titan Mot. 48–49.) Plaintiffs contend that the looming expiration of the PTC and investment tax credit drove 2012's spike in demand, (Siemens Mot. 27–29, 34–35; Titan Mot. 48–49), and that Commissioner Pinkert wrongfully assumed that the renewal of these tax credits would lead to continued high demand. (Siemens Mot. 17–18, 27–29, 34–35; Titan Mot. 48–49.) They assert that the renewal could not produce the same level of demand as existed in interim 2012 because the tax credits' terms changed for 2013. (Siemens Mot. 17–18, 27–29, 34–35; Titan Mot. 48–49.) In contrast to the 2012 tax credits, the 2013 tax credits required that projects be commenced, not that orders be placed, by the end of the year to qualify. (Siemens Mot. 17–18, 27–29, 34–35; Titan Mot. 48–49.)

Therefore, Plaintiffs assert that projects commenced in 2013 "[m]ight never be finished, depending upon the economic circumstances and prospects for grid parity." (Siemens Mot. 29.) Plaintiffs thus contend that Commissioner Pinkert's determination about demand trends in the imminent future was inherently speculative and conjectural. (*See* Siemens Mot. 29.)

Commissioner Pinkert used an accepted methodology and relied on substantial evidence to support his determination that the renewal of the tax credits would spur further demand. The court has repeatedly upheld reliance on trends as constituting substantial evidence in support of a threat of material injury determination. *See Asociacion de Productores*, 26 CIT at 38, 180 F. Supp. 2d at 1370 (holding that trend data showing imminent increase in import volumes constituted substantial evidence to support Commission's threat finding); *see also Bando Chem.Indus., Ltd. v. United States*, 17 CIT 798, 807 (1993), *aff'd*, 26 F.3d 139 (Fed. Cir. 1994) (finding that the Commission reasonably inferred from trend data that increased foreign production was likely destined for U.S. market). Commissioner Pinkert thus reasonably relied on substantial record evidence of trends showing, *inter alia*, increased volumes, market share, and excess capacity among foreign producers as evidence of a threat of imminent material injury to the domestic industry.

c. Factors for Finding Threat of Material Injury

Finally, Plaintiffs challenge Commissioner Pinkert's weighing of the statutory factors for examining whether there is a threat of material injury. (Siemens Mot. 39–42; Titan Mot. 48–52.) They argue that no substantial evidence supports Commissioner Pinkert's findings that (i) the surge in subject import volume would continue after interim 2012; (ii) subject imports had an expanding presence in the U.S. market; (iii) foreign producers had excess capacity; (iv) foreign producers had significant end-of-year inventories poised for the U.S. market; and (v) subject imports would have future price effects on the domestic industry.

i. Volume After Interim 2012

With respect to Plaintiffs' argument that the interim 2012 surge in volume was an anomaly, as discussed previously, Commissioner Pinkert reasonably relied on the trend in subject import volumes at the end of the POI in assessing whether a threat of material injury existed to the domestic market. *See Asociacion de Productores*,26 CIT at 38, 180 F. Supp. 2d at 1370; *Bando Chem.*, 17 CIT at 807. In particular, Commissioner Pinkert identified substantial evidence to

support his determination that subject import volumes were trending upward.[18] He noted that most of this surge occurred late in the period of investigation and came at the expense of the domestic industry. *Pinkert Views* at 3–4 (citing *Staff Report* at Table C-1). He also addressed the absence of future orders, explaining that record data was compiled before the renewal of the tax credits and that purchasers would have been reluctant to place orders until after that situation had been clarified. *Pinkert Views* at 6–7 n.27 (citing Hr'g Tr. (Smith) 80). He reasoned that, with the renewal of the PTC and investment tax credit for construction projects beginning in 2013, "purchasers are necessarily compelled to act quickly to place orders, likely resulting in intense competition for the reduced volume of sales and likely negatively impacting domestic producers in the imminent time frame." *Pinkert's Views* at 6–7 n.27 (citing Hr'g Tr. (Smith) 80).

While Plaintiffs have a point that the situation in 2013 will differ from that in 2012 with the changes in the two tax credits, Commissioner Pinkert had to make a determination on the basis of the record that was before him. While discussing the future is inherently uncertain, Commissioner Pinkert tied his findings with regard to the future to the facts of record as they existed at the time he was making his determination. On that basis, Commissioner Pinkert relied on substantial record evidence in finding that subject import volumes would remain high in the imminent future.

ii. Expanding Presence

In weighing the statutory factors for threat of material injury, Commissioner Pinkert reasoned,

> There is no reason to believe that the subject exporters, having expanded their presence in the U.S. market so significantly, beginning in 2011 and accelerating in 2012, including in the central region of the country where they might be expected not to be fully competitive due to transportation costs and logistical difficulties, would, in the absence of trade relief, relinquish it by not competing in the imminent future to their fullest abilities in all regions of the U.S. market.

Pinkert Views at 4. Plaintiffs contend that Commissioner Pinkert lacked substantial evidence to support this conclusion. (Siemens Mot. 38; Titan Mot. 49.) They argue that OEMs had no choice but to rely on subject imports because domestic producers routinely defaulted and

[18] Commissioner Pinkert observed that shipments of subject imports were [[ ]] percent higher in interim 2012 than in interim 2011. *Pinkert Views* at 3–4 (citing *Staff Report* at Table C-1).

rejected orders. (Siemens Mot. 38; Titan Mot. 49.) With less demand after interim 2012, they urge, OEMs are likely to return to their preferred practice of sourcing from domestic producers. (Titan Mot. 49.)

Contrary to Plaintiffs' contentions, Commissioner Pinkert reasonably found substantial record evidence that subject imports had an expanding presence in the U.S. market. He noted that purchases and installations of subject imports increased significantly at the end of the POI, even in regions where Plaintiffs argue subject imports do not compete with domestic wind towers. *Pinkert Views* at 4 (citing Siemens Post-Hr'g Br. at 1, 8–10; Foreign Resp'ts Final Comments, at 11–12 & n.43; *Staff Report* at Tables V-1, V-5).[19] Moreover, as previously discussed, Commissioner Pinkert identified record evidence indicating that the domestic industry's operational inefficiencies could not account for the full surge in subject import volume at the end of the POI, and that OEMs caused these inefficiencies in some cases by renegotiating contracts in favor of purchasing more subject imports. Thus, Commissioner Pinkert based his finding of expanding presence of subject imports at the end of the POI on substantial evidence.

iii. Excess Capacity

As part of his threat determination, Commissioner Pinkert found that "the Chinese and Vietnamese industries have significant unused capacity for the production of wind towers that they can use to export to the United States in the imminent future." *Pinkert Views* at 5 (citing *Staff Report* at Table VII-6; Pet'r's Post-Conf. Br. at Ex. 2). He based this finding on data from foreign producers showing significantly increased capacity between 2009 and 2012 and no projection that this capacity would fall in 2013. *Pinkert Views* at 4–5 (citing *Staff Report* at Table VII-6).

Titan argues that Commissioner Pinkert lacked substantial evidence to support this determination. (Titan Mot. 50.) It asserts that foreign producers reported theoretical data on capacity when they were actually already operating at full capacity. (Titan Mot. 50.) It further contends that foreign producers with capacity cannot ship in the absence of orders, and that OEMs prefer to purchase from domestic producers. (Titan Mot. 50.)

[19] For example, he found that subject imports sold in Midwestern states grew substantially over prior years to [[ ]] units in all of 2011 and then surged to [[ ]] units in the first six months of 2012. Similarly, he found that the number of subject imports sales in the region consisting of Texas, Oklahoma, New Mexico, and Arizona grew from [[ ]] units in all of 2010 to [[ ]] units during interim 2012. *Pinkert Views* at 4 (citing *Staff Report* at Tables V-1, V-5).

Commissioner Pinkert cited certified data from Chinese and Vietnamese producers about their capacity to support his conclusion. *See Pinkert Views* at 4–5 (citing *Staff Report* at Table VII-6). This data constituted substantial evidence that foreign producers had increased their capacity in recent years; that their capacity utilization was falling across the period; and that, as a result, they had significant excess capacity that they could use to export additional volumes of subject imports to the United States. *See Pinkert Views* at 5 (citing *Staff Report* at Table VII-6). Although Titan argues that the data relied upon was reported on a theoretical basis, it has failed to support this contention with record evidence. In fact, Titan merely cites to the general questionnaire responses of the foreign producers without any further support for its theory that the data is theoretical. (Titan Mot. 50.) Thus, Titan has not established that Commissioner Pinkert's findings on excess capacity were unreasonable or unsupported by substantial evidence.

iv. End-of-Year Inventories

Commissioner Pinkert also found that foreign producers had significant end-of-year inventories poised for the U.S. market. Plaintiffs argue that this conclusion is not supported by substantial evidence. (Siemens Mot. 30, 34–36, 40; Titan Mot. 50 51.) They explain that foreign producers inaccurately reported as "inventory" "made to order" towers that had already been sold. (Siemens Mot. 30, 34–36, 40; Titan Mot. 5051.)

Commissioner Pinkert considered the made-to-order nature of wind towers but also noted that they are not necessarily custom-made. *Pinkert Views* at 5–6 n.23 (citing *Staff Report* at Tables VII-2, VII-4, VII-8). Moreover, the record showed that at least on one occasion, a foreign producer used subject towers in its inventory that were made-to-order for one project for a different project. (*See Staff Report* at V-48.) Thus, Commissioner Pinkert's consideration of the subject producers' end-of-period inventories was reasonable and the existence of contradictory record evidence does not indicate that Commissioner Pinkert's determination was not supported by substantial evidence. *See Armstrong Bros.*, 626 F.2d at 170 n.4. Further, the statutory factors for assessing threat of material injury must be considered "as a whole," such that even if there were a weakness in the analysis of any one factor, it does not impeach the overall determination. *See* 19 U.S.C. § 1677(7)(F)(ii).

v. Price Effects

Commissioner Pinkert found that the price gap between subject imports and domestic products narrowed at the end of the POI and he anticipated that prices of subject imports would continue to fall as demand moderated in 2013. *Pinkert Views* at 7 (citing *Staff Report* at Tables V-2, V-6). He reasoned that competition would intensify, pushing down prices and adversely affecting an already vulnerable domestic industry. *Id.*

Plaintiffs assert that this finding is speculative because OEMs likely would return to their preferred practice of purchasing from domestic producers to obtain their base load requirements if demand moderated and domestic producers could meet such demand. (Titan Mot. 52.) They also argue that Commissioner Pinkert's finding of a narrowing price gap lacks substantial evidentiary support because the record shows that import prices were consistently higher than domestic prices on a delivered basis. (Siemens Mot. 39; Titan Mot. 51.) Siemens further contends that Commissioner Pinkert's finding of future price suppression is contrary to law because the Tariff Act requires that price suppression be found in the present. (Siemens Mot. 40 (citing 19 U.S.C. § 1677(7)(F)(iv) ("[Subject imports] are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports.")

Commissioner Pinkert reasonably found evidence of future price effects. He observed that the domestic industry's operating income margin declined from 2009 to 2011 and [[ ]] in interim 2012, even as U.S. consumption of wind towers peaked.[20] Further, Commissioner Pinkert cited record evidence that the gap in prices between subject imports and the domestic like product fell from 2009 to interim 2012.[21] He reasoned that, in the context of increased subject imports and moderate demand growth, subject import producers would further lower prices, exerting additional downward pressures on domestic prices. *Pinkert Views* at 8. Commissioner Pinkert noted that several domestic producers had already shuttered plants or switched to other products in interim 2012. *Pinkert Views* at 8 (citing *Staff Report* at III-1 to III-2).

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[20] Specifically, the domestic industry's operating income margin fell from [[ ]] percent in 2009, to only [[ ]] percent in 2011 and to [[ ]] in interim 2012. *Pinkert Views* at 8 (citing *Staff Report* at Tables C-1, C-2).

[21] In particular, Commissioner Pinkert found that the price gap shrunk from 28 percent in 2009–2011 to 11.2 percent in interim 2012. *Pinkert Views* at 7 (citing *Staff Report* at Tables V-2, V-6).

Commissioner Pinkert thus concluded that subject imports were likely to have negative price effects on the domestic industry. Contrary to Plaintiffs' contentions, Commissioner Pinkert reasonably extrapolated future price effects from these end-of-POI trends. *See*, *e.g.*, *Goss*, 22 CIT at 1002–03, 33 F. Supp. 2d at 1099–1100 (affirming Commission determination that small number of sales likely to be awarded in imminent future would "likely result in intense competition among domestic and foreign suppliers for bid awards. Moreover, this intensified competition for a smaller pool of sales opportunities increases the incentive for suppliers of [subject] imports to compete on the basis of price."). Because Commissioner Pinkert supported his trend findings with substantial evidence, the court will not reweigh the evidence or substitute its judgment for the Commissioner's. *Usinor*, 28 CIT at 1111, 342 F. Supp. 2d at 1272.

CONCLUSION

For the reasons provided above, the court denies Plaintiffs' motions for judgment on the agency record.

Dated: June 17, 2014
New York, New York

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

Slip Op. 14–80

PUERTO RICO TOWING & BARGE CO., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 11–00438

[Action dismissed for lack of subject matter jurisdiction for failure to file a timely protest with Customs.]

Dated: July 10, 2014

Peter S. Herrick, Peter S. Herrick, P.A., of St. Petersburg, FL, for plaintiff.

Jason M. Kenner, Trial Attorney, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Michael W. Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION

Restani, Judge:

This matter is before the court on Defendant United States' motion to dismiss for lack of subject matter jurisdiction pursuant to U.S. Court of International Trade Rule 12(b)(1). Because Plaintiff Puerto Rico Towing & Barge Co. ("PR Towing") failed to satisfy the jurisdictional requirement of filing a timely protest with U.S. Customs and Border Protection ("Customs") prior to commencing suit, the court grants the motion.

BACKGROUND

PR Towing is the owner and operator of tug boats operating under the U.S. flag, including the tug Punta Borinquen ("the tug"). Compl. ¶¶ 1, 3, ECF No. 13 (Jan. 16, 2013). In 2003, the tug was repaired in the Dominican Republican before being returned to San Juan, Puerto Rico. *Id.* ¶¶ 4–5. Upon the return of the tug to the United States, PR Towing submitted on September 5, 2003, a Record of Vessel Foreign Repair or Equipment Purchase, listing the work performed on the vessel while in the Dominican Republic. *Id.* ¶ 6, Ex. A. PR Towing later submitted an Application for Relief from Foreign Vessel Repair Duties, claiming that under the Carribean Basin Economic Recovery Act the vessel repairs were exempt from the otherwise applicable 50 percent ad valorem duty rate. *See id.* ¶ 7, Exs. A–C. Customs liquidated the entry on September 28, 2007, granting the application in part and denying it in part. *Id.* ¶ 8, Ex. C. Customs denied complete relief because it could not determine based on the invoice submitted by PR Towing what portion of the materials and equipment used in the repairs was a product of the beneficiary country, the Dominican Republic.[1] *See id.* at Ex. C.

PR Towing then sent an email with an attached letter to a vessel repair specialist at the Port of New Orleans on December 12, 2007, questioning the partial rejection of the application for relief. *See id.* at Exs. D–E. The attached letter informed the specialist that PR Towing was preparing to request a new, more detailed invoice from the shipyard to satisfy Customs but "before undertaking this time consuming task," PR Towing requested the specialist consider a headquarters ruling (H006055) that it believed obviated the need for such an invoice. *Id.* at Ex. D. The specialist replied via email the next day, informing PR Towing that "[e]ach entry and each ruling stands on its

[1] Customs asserted that repairs qualified for duty free treatment only if the cost or value of materials produced in one or more beneficiary countries plus direct costs of processing operations performed in the beneficiary country were equal to or greater than 35 percent of the appraised value of the repair work. *See* Compl., Ex. C.

own." *Id.* at Ex. E. The specialist reiterated her previous decision and reasoning before informing PR Towing that its "only option here is to file a protest." *Id.*

On December 17, 2007, less than 90 days after liquidation, PR Towing sent a second emailed letter, addressed to the same specialist. *Id.* at Ex. F. Counsel began the letter by explaining that the letter was "in the hopes that we can avoid the necessity of preparing a very exhaustive protest." *Id.* The letter made the same arguments as the previous letter, relying heavily on the headquarters ruling that PR Towing believed was controlling. *Id.* The specialist replied the same day and explained that the invoice provided by PR Towing was not as detailed as the one involved in the prior ruling. Email from Glenda Bradley to Peter Herrick (Dec. 17, 2007), Case File, Tab 1. She instructed counsel that "[i]f you believe your argument has merit, then you may base your protest on those grounds only. I will let the attorneys in Headquarters decide." *Id.*

On January 10, 2008, more than 90 days after liquidation, PR Towing sent a letter to Customs stating that "the importer has 180-days from the date of liquidation to file a protest for the referenced entry pursuant to 19 U.S.C. § 1514(c)(3)." Letter from Peter Herrick to Port Director (Jan. 10, 2008), Case File, Tab 4. The letter further stated that PR Towing "shall be filing a protest before the filing deadline expires" and that "[t]he importer is well within the time limit to file the required protest." *Id.* PR Towing filed a protest on January 28, 2008, using Customs' standard protest form. CBP Protest No. 2002–08–100071 (Jan. 28, 2008), Case File. The protest made no reference to the previous emails exchanged with the vessel repair specialist, and it did not claim that a protest had been filed previously. *Id.* The port denied the protest as untimely the next day. *Id.*

On February 8, 2008,[2] PR Towing filed a second protest, claiming for the firsttime that the prior letters had constituted protests under § 1514. CBP Protest No. 2002–08100080 (Feb. 8, 2008), Case File, Tab 1. On February 27, 2008, PR Towing sent the New Orleans Port Director a letter informing him that PR Towing had filed the second protest and requesting that Customs take no action against the importer. Letter from Peter Herrick to Port Director (Feb. 27, 2008), Case File, Tab 4. On May 18, 2011, Customs denied the second protest as untimely, as it was not filed within 90 days of the contested decision, and the emailed letters from December 2007 did not consti-

[2] The court notes that it appears the second protest was backdated to December 12, 2007, despite being received on February 8, 2008. *See* CBP Protest No. 2002–08–100080 (Feb. 8, 2008), Case File, Tab 1.

tute protests. *See* Compl., Ex. G. Customs also denied a new claim for reliquidation based on inadvertence brought under then-in-force 19 U.S.C. § 1520(c)(1) (2003). *Id.*

After its loss before the agency, PR Towing commenced suit by filing a summons on November 9, 2011. Summons, ECF No. 1 (Nov. 9, 2011). In its later-filed complaint, PR Towing alleged three counts: 1) the "letter protest" of December 12, 2007, and the amendment of December 17, 2007, were timely filed within the 90-day protest period; 2) Customs failed to consolidate PR Towing's protest with that of its surety;[3] and 3) Customs improperly denied PR Towing's claim of inadvertence under 19 U.S.C. § 1520(c)(1) (2003). Compl. ¶¶ 22–31. The United States moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that because PR Towing failed to file a timely protest, its complaint fails to invoke the court's protest jurisdiction. *See* Def.'s Mem. in Supp. of Its Mot. to Dismiss, ECF No. 25 (Oct. 30, 2013) ("Def. Mem.").

ANALYSIS

I. Timeliness of Section 1514 Protest

The court has jurisdiction over customs matters in "any civil action commenced to contest the denial of a protest, in whole or in part." 28 U.S.C. § 1581(a) (2013). Jurisdiction is contingent on the filing of a timely protest with Customs followed by the filing of a timely summons in the court challenging denial of the protest. *See id.* ; 28 U.S.C. § 2636(a); *Koike Aronson, Inc. v. United States*, 165 F.3d 906, 909 (Fed. Cir. 1999). "The requirements for a valid protest are contained in section 1514(c)(1) and the implementing regulation . . . [and] are mandatory." *Koike*, 165 F.3d at 909. The statute requires that

> A protest of a decision made under subsection (a) of this section shall be filed in writing, or transmitted electronically pursuant to an electronic data interchange system, in accordance with regulations prescribed by the Secretary. A protest must set forth distinctly and specifically–
>
> (A) each decision described in subsection (a) of this section as to which protest is made;
> (B) each category of merchandise affected by each decision set forth under paragraph (1);
> (C) the nature of each objection and the reasons therefor; and

[3] On February 28, 2008, PR Towing's surety, Hartford Fire Insurance Co., filed a protest for the vessel repair entry (Protest No. 2002–08–100086). Compl. ¶¶ 26–27. It remains undecided. *Id.* ¶ 29.

> (D) any other matter required by the Secretary by regulation.

19 U.S.C. § 1514(c)(1). As permitted by the statute, Customs has promulgated regulations creating additional requirements for the filing of a protest. "Protests against decisions of a port director shall be filed in quadruplicate on Customs Form 19 or a form of the same size clearly labeled 'Protest' and setting forth the same content in its entirety, in the same order, addressed to the port director." 19 C.F.R. § 174.12(b) (2008). Additionally,

> A protest shall contain the following information:
>
> (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;
> (7) The date of receipt and protest number of any protest previously filed that is the subject of a pending application for further review pursuant to subpart C of this part and that is alleged to involve the same merchandise and the same issues, if the protesting party requests disposition in accordance with the action taken on such previously filed protest;
> (8) If another party has not filed a timely protest, the surety's protest shall certify that the protest is not being filed collusively to extend another authorized person's time to protest; and
> (9) A declaration, to the best of the protestant's knowledge, as to whether the entry is the subject of drawback, or whether the entry has been referenced on a certificate of delivery or certificate of manufacture and delivery so as to enable a party to make such entry the subject of drawback (see §§ 181.50(b) and 191.81(b) of this chapter).

19 C.F.R. § 174.13(a) (2013).

The courts have construed purported protests generously in the past, noting the harsh consequences of failing to comply with this jurisdictional prerequisite. *See, e.g.*, *Koike*, 165 F.3d at 908–09; *Eaton Mfg. Co. v. United States*, 469 F.2d 1098, 1104 (C.C.P.A. 1972); *Mattel, Inc. v. United States*, 72 Cust. Ct. 257, 261–62, 377 F. Supp. 955, 960 (Cust. Ct. 1974). Nonetheless, the Court of Appeals for the Federal Circuit also has explained that "protests are not 'akin to notice pleadings [that] merely have to set forth factual allegations without providing any underlying reasoning.'" *Koike*, 165 F.3d at 909 (alteration in original) (quoting *Computime, Inc. v. United States*, 772 F.2d 874, 878 (Fed. Cir. 1985)). Protesting on Customs Form 19 has not always been required, but the court has stated that "[u]nder existing and longstanding case law, a separate letter containing the information required in the regulations and clearly labeled as a protest . . . suffice[s] so long as the letter [is] in conformity with the importer's obligations under the statutory scheme and 'sufficient to notify the [duty] collector of [the objection's] true nature and character.'" *Ammex, Inc. v. United States*, 27 CIT 1677, 1685–86 & n.11, 288 F. Supp. 2d 1375, 1382–83 & n.11 (2003) (fifth and sixth alterations in original) (quoting *Davies v. Arthur*, 96 U.S. 148, 151 (1877)) (rejecting paragraph on entry papers as protest where it "could solely be viewed as an indication that a protest was about to follow (as opposed to constituting a valid protest in itself)"). The Federal Circuit has refused to hold that a protest is valid simply because a court could surmise, from the surrounding circumstances, that Customs was aware of the substance of the protesting party's claim when the party failed to comply with the relevant statute and regulations. *Koike*, 165 F.3d at 909. Additionally, many of the earlier cases cited by PR Towing adopting generous views of purported protests predate revisions to the statute clarifying the authority of the agency to establish additional requirements for protests. *See, e.g.*, *Mattel*, 72 Cust. Ct. at 259, 377 F. Supp. at 958.

In addition to apprising the agency of the basis and subject of the protest, the purported protest must be sufficiently clear as to its purpose in order to put into motion the administrative process. In this vein, "the sense conveyed by the letter and the circumstances attending its delivery by the customshouse broker" must demonstrate that "the letter was intended as a protest under section 514." *Continental Ore Corp. v. United States*, 67 Cust. Ct. 202, 205, 331 F. Supp. 1060, 1063 (1971) ("A customshouse broker experienced in filing protests, who writes a letter which puts the collector in the equivocal position of guessing how he should consider the letter under section 514, must do so at the peril that the collector will not consider the letter as a

protest."). Although the standard for judging a purported protest is an objective one, the court has dismissed actions "when it appears that the letter was not intended as a protest." *See id.* at 1063 (citing *Rosa v. United States*, 54 Cust. Ct. 322 (1965)); *see also Mattel*, 72 Cust. Ct. at 266, 377 F. Supp. at 963 ("The test for determining the sufficiency of a protest under section 514 . . . is an objective one and is not dependent upon the district director's subjective reaction thereto.").

Applying these standards, our predecessor court found a letter to constitute a protest where it specified the IRS number, entry numbers, date of entry and liquidation, requested tariff classification, article number, and supporting authority. *Mattel*, 72 Cust. Ct. at 257–58, 265–66, 377 F. Supp. at 957–58, 962–63 (noting however that "no formal rules have been devised for the manner in which such objections should be expressed" and that defendant conceded the sufficiency of letters written by a non-professional employee of the importer). By contrast, the court rejected a letter indicating that the duties were being paid under protest pending the filing of a formal protest. *Continental Ore*, 67 Cust. Ct. at 205, 331 F. Supp. at 1063 ("[W]e cannot find or say that the collector should have considered the letter as a protest. The letter was not filed in the usual manner that the customhouse broker filed protests with the deputy collector . . . ."). The court has rejected letter protests in other cases where the letter was not designated as a protest and did not reference the term protest. *Chrysal USA, Inc. v. United States*, 853 F. Supp. 2d 1314, 1324, 1330 (CIT 2012). The court in *Chrysal* arrived at its holding even though Customs allegedly had actual knowledge of the protestant's grievance. *See id.* at 1328 (citing *Koike*, 165 F.3d at 909); *see also XL Specialty Ins. Co. v. United States*, 28 CIT 858, 870, 341 F. Supp. 2d 1251, 1261 (2004) (explaining that the validity and scope of a protest is objective and independent of a Customs official's subjective reaction to it).

Here, PR Towing's letters failed to comply with several provisions of both the statute and regulations, and therefore PR Towing has failed to invoke properly the jurisdiction of the court. Read together the letters of December 12 and December 17 "distinctly and specifically" mention the entry number, date of Customs' decision letter, and name of the tug. *See* Compl., Exs. D, F. The letters also identify the general category of merchandise as "repairs" performed on the subject tug in the Dominican Republic. *See id.* They point to a headquarters ruling (H006055) that PR Towing believed was controlling and argue that the ruling did not require a more detailed invoice than the one

submitted in order to obtain duty-free treatment. *See id.* The only information provided in the second letter not contained in the first is a copy of the ship repair invoice referred to in the cited headquarters ruling. *Id.* at Ex. F. Noticeably absent from both letters are the name and address of the importer of record (except by reference to the invoice from another customs ruling attached to the second letter, which contains the name only), the date of entry, and a specific description of the various repairs that were made along with support for claiming each as exempt from duty. *See id.* at Exs. D, F. Accordingly, the letters failed to meet the specific statutory requirements of a valid protest, as well as the regulations expressly authorized by the statute, even reading the letters generously. Although in the context of prior communications with Customs, the vessel repair specialist appears to have understood the gist of the complaint, it is not at all clear that without this information or labeling the letters as protests, that the official was on notice as to the bases of the specific objections of PR Towing as well as the fact that these were intended as protests within the definition of § 1514. At all relevant times, PR Towing was represented by experienced customs counsel who demonstrated knowledge of the protest statute and regulations by later filing a sufficiently detailed, albeit untimely, protest with Customs.

Perhaps most importantly, the language of the letters makes it clear that PR Towing never intended them to serve as protests within the meaning of § 1514. The December 12 letter indicated that PR Towing was planning on obtaining a more detailed invoice to submit to Customs if its legal argument was not accepted, indicating to Customs that the letter was not meant to be the single protest permitted by statute. *See* 19 U.S.C. § 1514(c)(1). Likewise, the letter of December 17 went so far as to say that PR Towing hoped to "avoid the necessity of preparing a very exhaustive protest." Compl., Ex. F. Neither document was labeled as a protest, despite such a requirement in 19 C.F.R. § 174.12(b), and the first letter does not even include the term. In response to the vessel repair specialist's instructions to file a protest on both December 13 and December 17, 2007, PR Towing did not reply with a clarification that its letters were intended to serve as a protest. Instead, it waited until January 10, 2008, after the 90-day protest period, to send the port director a letter indicating that PR Towing "*shall be* filing a protest before the deadline expires." Letter from Peter Herrick to Port Director (Jan. 10, 2008), Case File, Tab 4. Even when the initial protest was filed after the permitted period, PR Towing failed to raise any argument that its previous letters constituted formal protests of Customs' actions. *See* CBP Protest No. 2002–08–100071 (Jan. 28, 2010), Case File. PR

Towing's post hoc attempts to reconstrue its emails as protests after its discovery of the statutory deadline[4] cannot save its complaint. By filing letters that were at best ambiguous as to their intent, counsel did "so at the peril that the collector [would] not consider the letter[s] as a protest." *Continental Ore*, 67 Cust. Ct. at 205, 331 F. Supp. at 1063.

Because PR Towing failed to meet the statutory and regulatory requirements of filing a protest with Customs and did not distinctly and specifically communicate its intent to protest, PR Towing has failed to satisfy a jurisdictional prerequisite to suit, and the court must dismiss the action.[5]

II. Claim under 19 U.S.C. § 1520(c)

PR Towing also alleges that Customs' failure to afford its vessel repairs duty-free treatment amounted to inadvertence by failing to properly consider the shipyard invoices submitted with PR Towing's application for relief. Compl. ¶¶ 30–31. The government contends that PR Towing failed to protest the denial of this claim raised within the second protest and rejected by Customs, and therefore, the court lacks jurisdiction to consider it. Def. Mem. 13–14. The denial of a request for reliquidation under 19 U.S.C. § 1520(c) (2003) was a protestable decision at the time. *See* 19 U.S.C. § 1514(a)(7) (2003). PR Towing fails to address this argument in its opposition to the motion to dismiss, even though, as the plaintiff, PR Towing bears the burden

[4] PR Towing's failure to timely protest Customs' liquidation of its entry likely stems from the change in the protest period caused by the Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108–429, §§ 2104, 2105, 2108, 118 Stat. 2434, 2598. The law repealed 19 U.S.C. § 1520(c), which permitted a claim for reliquidation within one year based on clerical error, mistake of fact, or inadvertence, requiring these claims instead be brought as protests under § 1514. The law also extended the period for filing protests under § 1514 from 90 to 180 days, but only for entries on or after December 18, 2004. *See id.* The entry here occurred on September 5, 2003, and therefore the shorter 90-day period applied. Compl. ¶ 6. Nonetheless, PR Towing's letter to Customs on January 10, 2008, incorrectly asserted that the company had 180 days to protest Customs' decision.

[5] Because the court concludes that PR Towing failed to file a timely protest, there is no basis for PR Towing's claim in Count II that its "letter protest" should have been consolidated with the protest of its surety. Therefore, this count also is dismissed.

Furthermore, even under PR Towing's theory, its present action before the court would be timebarred. Pursuant to 28 U.S.C. § 2636(a), a civil action contesting the denial of a protest must be brought within 180 days of the date of mailing of a notice of denial of a protest. "There is no precise form that a denial of a protest must take." *Labay Int'l, Inc. v. United States*, 83 Cust. Ct. 152, 156 (1979). Assuming arguendo that either the December 12 or December 17, 2007 letters could amount to a protest, both received definitive, negative responses on the merits on December 13 and December 17, 2007, respectively. *See* Email from Glenda Bradley to Peter Herrick (Dec. 13, 2007), Case File, Tab 1; Email from Glenda Bradley to Peter Herrick (Dec. 17, 2007), Case File, Tab 1. Therefore, PR Towing would have been required to file a summons with the court no later than June 16, 2008, years before the summons in this case was actually filed on November 9, 2011. *See* Summons.

of establishing jurisdiction. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). Because PR Towing has not submitted any argument as to why its failure to protest[6] the denial of its § 1520(c) claim should not preclude the court from exercising jurisdiction over this claim, the court must dismiss this count of the complaint as well.

CONCLUSION

Because PR Towing failed to meet the jurisdictional prerequisite of filing a timely protest with Customs with respect to any of the counts in its complaint, the court must dismiss the case for lack of subject matter jurisdiction. Judgment will enter accordingly.

Dated: July 10, 2014
New York, New York

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

Slip Op. 14–81

CHANGZHOU HAWD FLOORING CO., LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Senior Judge
Court No. 12–00020

[motion to intervene denied]

Dated: July 14, 2014

Gregory S. Menegaz, *J. Kevin Horgan*, and *John J. Kenkel*, deKieffer & Horgan, PLLC, of Washington, DC, for Plaintiffs.

Kristin H. Mowry, *Jeffrey S. Grimson*, *Jill A. Cramer*, *Sarah M. Wyss*, and *Daniel R. Wilson*, Mowry & Grimson, PLLC, of Washington, DC, for Plaintiff-Intervenor Fine Furniture (Shanghai) Ltd.

H. Deen Kaplan, Hogan Lovells US LLP, of Washington, DC, for Plaintiff-Intervenor Armstrong Wood Products (Kunshan) Co., Ltd.

Mark R. Ludwikowski, *Arthur K. Purcell*, *Michelle L. Mejia*, and *Kristen Smith*, Sandler, Travis & Rosenberg, PA, of Washington, DC, for Plaintiff-Intervenors Lumber Liquidators Services, LLC, and Home Legend, LLC.

Ronald M. Wisla and *Lizabeth R. Levinson*, Kutak Rock,LLP, of Washington, D.C., for Movants Metropolitan Hardwood Floors, Inc., Baishan Huafeng Wooden Product Co., Ltd., DalianDajen Wood Co., Ltd., Dalian Kemian Wood Industry Co., Ltd.,Dalian Penghong Floor Products Co., Ltd., Dasso Industrial GroupCo., Ltd., Dunhua City

[6] Although the request for reliquidation pursuant to 19 U.S.C. § 1520(c) was contained in a document labeled as a protest, this cannot constitute a protest within the meaning of 19 U.S.C. § 1514, as the document presented the issue to Customs for the first time and no subsequent protest of that adverse decision was made. *See* 19 U.S.C. § 1514(c)(3) (requiring a protest be filed "after but not before" a protestable decision).

Hongyuan Wood Industry Co., Ltd., Dunhua City Wanrong Wood Industry Co., Ltd., Fusong Jinlong Wooden Group Co., Ltd., Guangzhou Panyu Southern Star Co., Ltd., HaiLin LinJing Wooden Products, Ltd., Hangzhou Hanje Tec Co., Ltd., Hunchun Forest Wolf Industry Co., Ltd., Huzhou Chenghang Wood Co., Ltd., Huzhou Fulinmen Imp. & Exp. Co., Ltd., Huzhou Fuma Wood Bus. Co., Ltd., Jianfeng Wood (Suzhou) Co., Ltd., Jilin Forest Industry Jinqiao Flooring Group Co., Ltd., Kemian Wood Industry (Kunshan) Co., Ltd., MuDanJiang Bosen Wood Industry Co., Ltd., Nakahiro Jyou Sei Furniture (Dalian) Co., Ltd., Shanghai Eswell Timber Co., Ltd., Shanghai Lizhong Wood Products Co., Ltd., Shanghai Shenlin Corporation., Shenyang Haobainian Wooden Co., Ltd., Shenzhenshi Huanwei Woods Co., Ltd., Suzhou Dongda Wood Co., Ltd., Xuzhou Shenghe Wood Co., Ltd., Zhejiang Dadongwu Green Home Wood Co., Ltd., Zhejiang Longsen Lumbering Co., Ltd., and Zhejiang Shiyou Timber Co., Ltd.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. Appearing with him were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Shana Hofstetter*, Attorney, International Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Jeffrey S. Levin, Levin Trade Law, P.C., of Bethesda, MD, for the Defendant-Intervenor.

OPINION AND MEMORANDUM

Pogue, Senior Judge:

The motion before the court comes from numerous exporters of multilayered wood flooring manufactured in the People's Republic of China ("Movants"),[1] who seek Plaintiff-Intervenor status in *Changzhou Hawd Flooring, Co. v. United States*, Court Number 12–00020, pursuant to USCIT Rules 7(b) and 24(a)(3). Mot. to Intervene at 1. Defendant, the United States, and Defendant-Intervenor, the Coalition for American Hardwood Parity ("CAHP"), oppose the motion. Def.'s Resp. to the Mot. for Intervention, ECF No. 97; Def.Intervenor's Oppo'n to Mot. to Intervene, ECF No. 94. Because Movants have not demonstrated good cause for the untimely filing of their motion to intervene, their motion is DENIED.

[1] Metropolitan Hardwood Floors, Inc., Baishan Huafeng Wooden Product Co., Ltd., Dalian Dajen Wood Co., Ltd., Dalian Kemian Wood Industry Co., Ltd., Dalian Penghong Floor Products Co.,Ltd., Dasso Industrial Group Co., Ltd., Dunhua City Hongyuan Wood Industry Co., Ltd., Dunhua City Wanrong Wood Industry Co.,Ltd., Fusong Jinlong Wooden Group Co., Ltd., Guangzhou Panyu Southern Star Co., Ltd., HaiLin LinJing Wooden Products, Ltd., Hangzhou Hanje Tec Co., Ltd., Hunchun Forest Wolf Industry Co., Ltd., Huzhou Chenghang Wood Co., Ltd., Huzhou Fulinmen Imp. & Exp. Co., Ltd., Huzhou Fuma Wood Bus. Co., Ltd., Jianfeng Wood (Suzhou) Co., Ltd., Jilin Forest Industry Jinqiao Flooring Group Co., Ltd., Kemian Wood Industry (Kunshan) Co., Ltd., MuDanJiang Bosen Wood Industry Co., Ltd., Nakahiro Jyou Sei Furniture (Dalian) Co., Ltd., Shanghai Eswell Timber Co., Ltd., Shanghai Lizhong Wood Products Co., Ltd., Shanghai Shenlin Corporation.,Shenyang Haobainian Wooden Co., Ltd., Shenzhenshi Huanwei Woods Co., Ltd., Suzhou Dongda Wood Co., Ltd., Xuzhou Shenghe Wood Co., Ltd., Zhejiang Dadongwu Green Home Wood Co., Ltd., Zhejiang Longsen Lumbering Co., Ltd., and Zhejiang Shiyou Timber Co.,Ltd. Mot. to Intervene as Intervenor Pls. Pursuant to R. 24(a)(3), ECF No. 78 ("Mot. to Intervene") at Attachment 1.

BACKGROUND

On February 8, 2012, Plaintiffs filed their complaint in this action, challenging Commerce's determination in *Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 64,318 (Dep't Commerce Oct. 18, 2011) (final determination of sales at less than fair value) ("*Final Determination*"). Compl., ECF No. 9.[2] On June 13, 2014, more than two years later,[3] Movants filed their motion to intervene pursuant to USCIT Rule 24(a)(3). Mot. to Intervene at 1.

DISCUSSION

Under USCIT Rule 24(a)(3), movants may intervene as a matter of right[4] "no latter than 30 days after the date of service of the complaint," or at such later time if good cause is shown. USCIT R. 24(a)(3). It is uncontested that Movants have filed late. Mot. to Intervene at 2. They must, therefore, show good cause for their delay.

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[2] This action was subsequently consolidated with Court Numbers 11–00452, 12–00007, and 12–00013, under Consolidated Court Number 12–00007. Order May 31, 2012, Consol. Ct. No. 12–00007, ECF No. 37. Court Number 11–00452 was ultimately severed and dismissed. Am. Order Nov. 27, 2012, Consol. Ct. No. 12–00007, ECF No. 75; Judgment, Ct. No. 11–00452, ECF No. 68; *see Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, __ CIT __,853 F. Supp. 2d 1290 (2012); *Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, __ CIT __, 865 F. Supp. 2d 1300 (2012).

[3] In this time, the court has issued two decisions, *Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, __ CIT __,925 F. Supp. 2d 1332 (2013) and *Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, __ CIT __,971 F. Supp. 2d 1333 (2014), resulting in two redeterminations from Commerce, Final Results of Redetermination Pursuant to Court Order, Consol. Ct. No. 12–00007, ECF No. 132, and Final Results of Redetermination Pursuant to Court Order, ECF No. 52. Following the first remand determination, Court Numbers 12–00007 and 12–00013 were severed and final judgment entered. Order Granting Mot. to Sever, Consol. Ct. No. 12–00007, ECF No. 162; Judgment, Ct. No. 12–00007, ECF No. 163; Judgment, Ct. No. 12–00013, ECF No. 32. These have since been appealed by Defendant-Intervenor CAHP. Appeal of Judgment, Ct. No. 12–00007, ECF No.166; Appeal of Judgment, Ct. No. 12–00013, ECF No. 33.

[4] Where, as here, the court has jurisdiction under 28 U.S.C. §1581(c) (2012) (all further citations to the U.S. Code are to the 2012 edition), intervention may be sought only as a matter of right. *See* 28 U.S.C. § 2631(j)(1)(B); USCIT Rule 24(a)(3); *Ontario Forest Indus. Assoc. v. United States*, 30 CIT 1117, 1130 n. 12, 444 F. Supp. 2d 1309, 1322 n. 12 (2006); *Dofasco Inc. v. United States*, 31 CIT 1592, 1594–95, 519 F. Supp. 2d 1284, 128687 (2007); *U.S. Magnesium LLC v. United States*, 31 CIT 792, 793(2007). To intervene as a matter of right, Movants must be interested parties that were party to the underlying administrative proceedings. 28 U.S.C. § 2631(j)(1)(B). Movants, all separate rate respondents, are interested parties. *See* 28 U.S.C. § 2631(k)(1) (providing that "'interested party' has the meaning given such term in [19 U.S.C. § 1677(9)]); 19 U.S.C. § 1677(9)(A) (defining "interested party" to include "a foreign manufacturer, producer, or exporter . . . of subject merchandise"). They were also all party to the underlying investigation. *See Final Determination* at 64,323–24 (assigning separate rate to movants). They may, therefore, timely intervene as a matter of right.

Good cause is defined as "mistake, inadvertence, surprise or excusable neglect." USCIT R. 24(a)(3)(i).[5] It is "at bottom," an equitable standard incorporating "all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 395 (1993) (discussing the excusable neglect analysis). Relevant circumstances include "the danger of prejudice to the [nonmovants], length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.*[6]

Here, the likely prejudice to the non-movants is minimal, as Movants "do not seek to raise any new legal or factual issue not already brought before the court,"[7] and some prejudice to the Movants is probable, as, without intervention, they will be denied "the benefit of the separate rate" that results from this litigation. Mot. to Intervene at 3. However, the length of the delay — over two years with two CIT opinions and two redeterminations by Commerce issued in that time[8]—is substantial. The Movants allege that they have intervened now because "for the first time, the very important issue of what the new separate rate should be, and to whom it should apply, has arisen." Mot. to Intervene at 2. The reason they provide for their delay is that they could not, in good faith, have "reasonably predicted" that the litigation would take this direction. *Id.* But Plaintiffs initiated this action to represent the interests of the separate rate respondents in the course of this litigation. Compl. at 1. The separate rate has been at issue, whether directly or indirectly, throughout. Movants had notice of the substantive issues raised because they were full participants in the administrative proceedings below.

As Movants state, the "impetus behind [their] Motion" is the sudden "viable possibility" for "the separate rate companies to achieve a zero rate." Mot. to Intervene at 2. This suggests not so much good cause, as strategic timing, "a conscious decision not to intervene

[5] Good cause may also be found if the delay is the result of "circumstances in which by due diligence a motion to intervene under this subsection could not have been made within the 30-day period." USCIT R. 24(a)(3)(ii).

[6] *See Changzhou Hawd Flooring Co. v. United States*, Slip Op. 1460, 2014 WL 2210737, at *3–4 (CIT May 29, 2014), for further discussion of use of this standard.

[7] *See Home Products Int'l, Inc. v. United States*, 31 CIT 1706,1708, 521 F. Supp. 2d 1382, 1385 (2007) (finding little prejudice to non-moving parties given the restricted, supporting role an intervenor takes); *Silver Reed Am., Inc. v. United States*, 9 CIT 1, 7, 600 F. Supp. 852, 857 (1985) (finding no prejudice to non-moving parties where moving party "does not seek to raise any new issues or to otherwise interfere with the progress of the litigation.").

[8] *See supra note 3*

timely." *See Siam Food Products Pub. Co., Ltd. v. United States*, 22 CIT 826, 830, 24 F. Supp. 2d 276, 280 (1998). Allowing such opportunistic intervention would "render the actual time limit [of USCIT Rule 24(a)(3)] superfluous." *Id.*, 22 CIT at 830, 24 F. Supp. 2d at 281.[9] Accordingly, Movants have not established good cause sufficient to excuse their delay. *Cf. Geum Poong Corp. v. United States*, 26 CIT 908, 909, 217 F. Supp. 2d 1342, 1343–44 (2002) (finding that a party cannot intervene two years late without good cause "because the litigation is now leaning its way").

CONCLUSION

Because Movants have failed to show good cause for their delay in filing, their motion to intervene as Plaintiff-Intervenors is DENIED.

IT IS SO ORDERED.

Dated: July 14, 2014
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE

Slip Op. 14–82

SWIFF-TRAIN CO., METROPOLITAN HARDWOOD FLOORS, INC., BR CUSTOM SURFACE, REAL WOOD FLOORS, LLC, GALLEHER CORP. and DPR INTERNATIONAL, LLC, Plaintiffs, v. UNITED STATES, Defendant, and COALITION FOR AMERICAN HARDWOOD PARITY, Defendant-Intervenor.

Before: R. Kenton Musgrave, Senior Judge
Court No. 12–00010

[Sustaining administrative material injury redetermination in antidumping and countervailing duty investigations of multilayered wood flooring from the People's Republic of China.]

Dated: July 16, 2014

William E. Perry and *Emily Lawson*, Dorsey & Whitney, LLP, of Seattle, WA, for the plaintiffs.

Mary Jane Alves, Attorney, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for the defendant. With her on the brief were *Dominic*

[9] Movants would liken their motion to intervene to that of Armstrong Wood Products (Kunshan) Co., Lumber Liquidators Services, LLC, and Home Legend, LLC (collectively "Armstrong").Mot. to Intervene at 3; Defendants' Motion to Re-Designated as Intervenor Plaintiffs, Consol. Ct. No. 12–00007, ECF No. 160. However, Movants do not share in Armstrong's unique circumstance. Armstrong had fully participated as a Defendant-Intervenor and had been treated by the non-moving parties as if already a Plaintiff-Intervenor. *Changzhou Hawd Flooring*, 2014 WL 2210737, at *4. Movants here did not so participate and have not been so treated.

L. Bianchi, General Counsel, *Neal J. Reynolds*, Assistant General Counsel, and *Robin L. Turner*, Attorney.

Jeffrey S. Levin, Levin Trade Law, P.C., of Bethesda, MD, for the defendant-intervenor.

OPINION

Musgrave, Senior Judge:

This opinion considers the *Remand Views*[1] of the U.S. International Trade Commission ("Commission" or "ITC") in response to Slip Op. 13–38, 37 CIT ___, 904 F. Supp. 2d 1336 (Mar. 20, 2013), addressing certain of the Commission's material injury determinations in the investigations of multilayered wood flooring ("MLWF") from the People's Republic of China ("PRC").[2] Familiarity with that opinion is presumed. Remanded were (1) the decision not to investigate domestic producers of hardwood plywood used for flooring, (2) findings on the issue of price suppression/depression, and (3) the impact the subject imports had on the domestic industry in light of the collapse of the housing market during the period of investigation. Addressing those issues in its *Remand Views*, the Commission has again determined the domestic MLWF industry materially injured byreason of subject MLWF imports. After hearing oral argument on the parties' comments on June 24, 2014, the court must conclude that the *Remand Views* comply with the orders of remand and sustain the material injury determination.

Discussion

I

On remand, the Commission reopened the record to solicit domestic MLWF production responses from 20 U.S. hardwood plywood manufacturers. *See Multilayered Wood Flooring from [the PRC]*, 78 Fed. Reg. 30329 (USITC May 22, 2013) (solicitation of participation in remand proceeding). Written comments on remand were limited to the remanded issues, interested parties to the original investigations who participate in the present action, and any new information obtained by the Commission not through the comment process. The Commission denied the request of the U.S. importers, plaintiffs herein, to release a draft producer questionnaire for comment, and the Commission here maintains that its definition of the domestic MLWF industry as investigated in the original investigations is supported by the record. The court finds that to be the case.

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[1] PDoc 310R (Oct. 17, 2013), CDoc 555R (Oct. 18, 2013).

[2] *See Multilayered Wood Flooring from [the PRC]*, Inv. Nos. 701-TA-476 and 731-TA-1179 (Final), USITC Pub. 4278 (Dec. 2011), PDoc 283 (Dec. 16, 2011).

The plaintiffs contend that the *Remand Views* are procedurally deficient, that as a matter of due process they should have been allowed to offer input into the tailoring of the questions posed to the domestic hardwood plywood producers upon the reopening of the record. Pls' Comments at 7–8. The Commission avers that it simply followed its usual approach for remands and that its rules do not require soliciting input on questionnaires issued during remand proceedings. Given the record and the parties' representations, the court cannot find procedural abuse of discretion in the Commission's interpretation of the remand orders and its undertakings thereon.

Substantively, the plaintiffs complain that the remand questionnaire issued to the domestic hardwood plywood producers was simply the same language that appeared in the original questionnaire issued to the domestic MLWF industry insofar as it included "just the domestic industry definition (*i.e.*, the scope definition)".[3] Noting in their comments that the domestic hardwood plywood industry definition explicitly excluded certain hardwood plywood product that is subject to and covered by the MLWF orders, *i.e.*, hardwood plywood product that is "unfinished" MLWF or suitable for flooring and falls within the scope of the MLWF investigations, and emphasizing at oral argument that U.S. Customs and Border Protection has been "stopping" certain imports of hardwood plywood on the ground that it could be suitable for use as MLWF, the plaintiffs argue that the queried domestic producers of hardwood plywood may not have understood or appreciated the inclusiveness of what actually constitutes the scope of the domestic like product, *i.e.*, that the domestic hardwood plywood producers (or the Commission) may not have properly imputed "used for MLWF" when answering (or asking) the relevant question, and also that the Commission failed to properly ask or consider if their product "is suitable for that use." Pls' Comments at 9.

On this point, the court must conclude the plaintiffs' contentions both speculative and in conflict with their previous argument on administrative exhaustion. The prior opinion considered the plaintiffs' arguments into investigating potential "producers of the domestic hardwood plywood industry used for flooring as part of the domestic like product industry" sufficient for purposes of exhaustion, 37 CIT at ___, 904 F. Supp. 2d at 1340, and given the overlap in the definition

[3] *Cf.*, *e.g.*, scope definition for *Hardwood Plywood from [the PRC]*, Inv. Nos. 701-TA-490 and 731-TA-1204 (Final), USITC Pub. 4434 at I-7 (Nov. 2013) ("*Hardwood and decorative plywood* is *a flat panel* composed of an assembly of two or more layers or plies of wood veneers in combination with a core. The *veneers*, along with the core, are glued or otherwise bonded together to form a *finished* product. . . .") (italics added) *with* scope definition for MLWF from the PRC.

of MLWF and hardwood plywood[4] the court deemed the Commission's explanation of why it had not investigated hardwood plywood suitable for use as MLWF flooring (*i.e.*, potentially "unfinished" MLWF) insufficiently responsive to the question posed by the plaintiff regarding the scope of the domestic MLWF industry. *Id*. at ___, 904 F. Supp. 2d at 1342. On remand, however, the Commission had discretion over what additional information to solicit from the identified domestic hardwood plywood producers in upholding its duty to take Commerce's determination on the scope of subject imports at face value in order to define the domestic like product. *See, e.g., Federal Power Commission v. Transcontinental Gas Pipe Line Corp*., 423 U.S. 326, 333 (1976). *Cf. USEC, Inc. v. United States*, 34 Fed. App'x 725, 730 (Fed. Cir. 2002) ("it is Commerce's investigation that defines the scope of the ITC's analysis").[5] The plaintiff was provided the opportunity to comment on the original questionnaire and instructions at the outset of the investigation,[6] and in the instruction booklet accompanying the 30-page U.S. Producer Questionnaire issued in the remand proceedings (based upon the original MLWF industry questionnaire), the domestic like product definition is restated co-extensively with the scope of the investigations. The questionnaire asked, *inter alia,* "Has your firm produced multilayered wood flooring (as defined in the instruction booklet) at any time between January 1, 2008 and June 2011?" CDoc 556R (June 26, 2013). For the purpose of answering, the questionnaire referred the recipient to the instruction booklet.

Despite the apparent overlap of hardwood plywood and MLWF in the scope definition of MLWF,[7] during the remand proceedings none of the 20 domestic producers of hardwood responded that they manufactured product used for flooring. The plaintiffs do not explain why domestic hardwood plywood producers would be, or should be presumed to be, unknowledgeable regarding what constitutes either an "unfinished" MLWF product or a product suitable for use as MLWF (and "irrespective" of the actual uses to which their hardwood ply-

[4] *I.e.*, because "plywood always has an outer veneer, and thus could fall within the scope's definition of MLWF". 37 CIT at ___, 904 F. Supp. 2d at 1342.

[5] *Cf. id*.

[6] *Cf*. CDoc 555R at 11 n.37, citing PDoc 298R (June 26, 2013) in noting that the Commission had considered the plaintiffs' "letter, the schedule for these proceedings, and information on the record of these proceedings".

[7] *See, e.g.*, 37 CIT at ___, 904 F. Supp.2d at 1341–42. The Commission's explanation was that "whereas the scope does not include hardwood plywood for flooring or the veneers peeled from plywood or logs, it does, for example, include as *unfinished* MLWF those products manufactured by pressing one or more layers of wood veneer to a hardwood plywood core that may or may not yet have a tongue and groove or click-and-lock profile, stain, and/or finish". *Id*. at __, 904 F. Supp. 2d at 1341 (bracketing removed, italics added).

wood product are put[8]), nor do they explain why those producers as a whole[9] should be singled out, of domestic like product, for special questionnaire treatment within the domestic MLWF industry. The court therefore finds that the Commission properly complied with the order of remand on this issue.

II

The Commission was also asked on remand to make explicit its findings on the effect of the subject imports on the price suppression/depression factors. On remand, the Commission found evidence that the subject imports depressed prices of the domestic like product, although it did not find "significant" price suppression. *See Remand Views* at 23. The Commission based its finding of price depression on the traditional pricing data for one pricing product as well as supplemental pricing data, on purchaser questionnaire responses, and on confirmed lost revenue allegations. CDoc 555R at 19–20. It found both traditional and supplemental pricing data showing overall declines in domestic like product prices in the face of significant underselling by subject imports from the PRC. *Id*. at 31–32; CDoc507 (Oct. 27, 2011) at Tables V-1--V-8; CDoc 525 (Dec. 5, 2011) (majority views) at 44, n.202; CDoc 553R (Oct. 18, 2013). Between 2008 and 2010, the supplemental pricing data showed "overall declines in prices of the domestic like product for birch, hickory, maple, oak, red oak, and walnut as well as overall declines in prices of the domestic like product for birch products, hickory products, maple products, oak products, and walnut products." CL555R at 20; CL525 at 44 n.202. The Commission found further "[e]vidence from purchasers' questionnaires . . . indicat[ing] that domestic producers were forced to lower prices to compete with low-priced imports of MLWF from subject producers in [the PRC]." CL555R at 20 (citing CL525 at 45 n.204); CL507 at V-26-V-27 (seven of eight responding purchasers reported that domestic producers reduced prices to compete with prices of MLWF from the PRC). The Commission found that

[8] The plaintiffs explain that since end-use certifications were not required for the subject imports, the actual use of the product is not a "defining characteristic" in the identification of the domestic like product, which is co-extensive with the scope language.

[9] The plaintiffs argue that two domestic hardwood plywood producers' denials of MLWF production conflicts with the record of their actual product. *Cf.*, CDoc 482 (Oct. 4, 2011) at 5–9, n.11–20 & Ex. 3–9; CDoc 496 (Oct. 19, 2011) at 14–15 and n.38; CDoc 548R (July 12, 2013) at 6. The court cannot conclude, however, that the confidential information of record to which the plaintiffs point, and their interpretation of it, amounts to "more than a mere scintilla", *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951), demonstrating that the Commission did not take into account "whatever in the record fairly detracts from its weight", *id.* at 487, in its definition of domestic MLWF industry and its determination not to include any member of the domestic hardwood plywood industry therein.

purchaser confirmations of domestic producers' lost revenue allegations further demonstrated that the domestic industry lowered prices due to low-priced imports of MLWF from the PRC. CDoc 555R at 20; CDoc525 at 45; CDoc 507 (Oct. 27, 2011) (final staff report) at V-27, V-29.

The plaintiffs argue that the Commission's analysis improperly emphasizes traditional pricing data for one product. The foregoing, however, indicates more than mere emphasis on traditional pricing for one product. As requested, furthermore, the Commission also addressed the Dissenting Commissioner's analysis of the issue, CDoc 555R at 20–23, and the majority found that the record showed "domestically produced MLWF faced competition from a large and growing volume of substitutable MLWF that was lower priced and that the domestic industry lowered its prices", *id*. at 19–20. *See also* CDoc 525 at 44 & n.202; CDoc 553R. In the case of hand-scraped products, the Commission found that both the traditional and supplemental pricing data showed nearly universal underselling of the domestic like product by subject imports, and that declines in domestic like product prices exceeded any decline during this period in the cost of raw materials used to manufacture MLWF. The Commission concluded that the domestic industry's lowering of its prices for these hand-scraped products by more than its cost declines demonstrated that these price declines were not due to lower demand, the severe economic downturn, or fluctuating raw material costs, but instead corresponded to the significant and significantly increasing volume of low-priced subject imports. CDoc 555R at 20, 32; CDoc 525 at 31, 40, 43–45 & nn.141, 149, 189, 200, 203–05; CDoc 507 at V-1, V-26--V-27, V-29, Table V-1; CDoc 553R at question 2.

In the final analysis, substantial evidence in the record supports the Commission's price effects analysis. It, too, must therefore be sustained.[10]

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[10] In passing, the Commission contends that in situations where there has been significant underselling by subject imports, where this underselling has enabled subject imports to maintain and gain market share at the domestic industry's expense, and where a significant and significantly increasing volume of subject imports has adversely impacted the domestic industry, the Commission is not required to find that there also is significant price depression or significant price suppression. ITC Resp. to Pls' Comments on Remand Determinations at 18, referencing CDoc 555R at 17–18 & CDoc 525 at 34–54 (emphasis omitted). The Commission explains that under the statute, a lack of price depression and/or price suppression does not preclude a finding of adverse price effects based on significant underselling, nor does it prevent it from making affirmative determinations if the significant underselling enables subject imports to maintain a significant volume in the U.S. market and/or to increase significantly. *Id*., referencing CDoc 555R at 17–18. The Commission points out that since its finding of significant underselling by a significant volume of subject imports was sustained in the prior opinion, its price effects analysis should also be

III

The court also remanded for fuller examination of causation in accordance with 19 U.S.C. §1673d(b), specifically with regard to "the effect that the severe disruption of the home building and remodeling industries had on the domestic like product industry" in the determination of whether subject imports were the material cause of injury.

A

The *Remand Views* interpret that order as follows:

We understand our burden under *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867 (Fed. Cir. 2008), is to identify substantial evidence in the record demonstrating the domestic industry is materially injured by reason of subject imports notwithstanding any record evidence of other factors that might also be having adverse effects on the industry at the same time. While the type of analysis posited by respondents might be one way to conduct such an inquiry, the Federal Circuit has been clear in holding that the Commission has discretion in choosing its methodology for assessing causation and need not follow any rigid formula, such as that proposed by respondents. . . . Congress has delegated this finding to the Commission because of the agency's institutional expertise in resolving injury issues. . . . As the Federal Circuit also has made clear, since the statute does not define the phrase "by reason of," the question of whether the injury to the domestic industry by subject imports satisfies the material injury threshold notwithstanding any injury from other factors falls within the Commission's discretion and is reviewable under the substantial-evidence standard.

Remand Views at 33 n.142.

According to the plaintiffs, this statement demonstrates the Commission's determination to avoid the duty to undertake "but for" causation analysis, which is not simply a "type of analysis" they

sustained on that basis. *Id*. at 18–19 & n.21, referencing, *inter alia*, *U.S. Steel Group v. United States*, 96 F.3d 1352, 1364–65 (1996) (if substantial evidence supports the Commission's determinations as a whole they are to be sustained even if one or more findings are unsupported by substantial evidence), *Grupo Industrial Camesa v. United States*, 85 F.3d 1577, 1582 (Fed. Cir. 1996), & CDoc 555R at 17–18, 23. However, the precise issue of price depression and suppression was not apparently presented in *Grupo*, *see also* 18 CIT 461, 853 F. Supp. 440 (1994), and notwithstanding the Commission's position here, "[s]ection 1677(7)(C)(ii) requires the Commission to undertake two distinct analyses to examine (1) the significance of underselling and (2) the causal connection between subject imports and price depression and/or suppression", which are "two statutorily-mandated discrete inquiries". *Altx, Inc. v. United States*, 25 CIT 1100, 1109, 1110, 167 F. Supp. 2d 1353, 1365 (2001). *See also Nucor Corp. v. United States* , 414 F.3d 1331, 1340 (Fed. Cir. 2005). In any case, the Commission's clarification of its position on remand is helpful. *Cf. Altx, Inc. v. United States*, 370 F.3d 1108, 1117 (Fed. Cir. 2004).

"posited" but a requirement under law. *E.g.*, Pls' Comments at 20, referencing *Mittal Steel, supra, Bratsk Aluminum Smelter v. United States*, 444 F. 3d 1369 (Fed. Cir. 2006), and *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 722 (Fed. Cir. 1997).

The court disagrees with the plaintiffs' characterization in part. The reference to "type of analysis posited" refers to the "natural experiment"[11] the respondents proffered, not "but for" analysis *per se*. That appears plain from the Commission's expression of its discretion over causation methodology for its findings of fact and from the reference to the reviewing standard of "substantial evidence" on the record.

The defendant-intervenor argues the Commission should not have been required to perform a "but for" test of causation at all, since the cases upon which the plaintiffs rely all turned on the fact that the subject imports were commodity products in markets also consisting of fairly traded and price-competitive non-subject imports, and the Commission determined that MLWF is not a commodity product.[12] If "but for" methodology was in fact the functional equivalent of a compulsory legal standard, it argues, the Federal Circuit would not have couched the mode of analysis as a "not necessarily dispositive, but important" analytical framework. Rather, the defendant-intervenor argues the "controlling standard" of 19 U.S.C. §1516a(b)(1)(B) is whether the "causative connection between subject imports and the condition of the domestic industry --*i.e.*, the 'by reason of' portion of the statute -- is established by substantial evidence on the record and is otherwise in accordance with law". Def-Int's Comments at 7–9, referencing, *inter alia, Mittal Steel*, 542 F.3d at 874–75. *See* PDoc 283 at 5–6, 28–31, 33–34, 53. This argument, however, does not appear to distinguish between the legal standard for cause-in-fact under 19 U.S.C. §1673d(b)(1), which is necessarily governed by the "in accordance with law" aspect of 19 U.S.C. §1516a(b)(1)(B)(i), and the "substantial" standard for the evidence necessary to support findings on cause-in-fact. The court will attempt to clarify.

Broadly speaking, the Federal Circuit has interpreted section 1673d(b) as equivalent to the "substantial factor" test of causation-in-fact. *See*, *e.g.*, *Mittal Steel*, 542 F.3d at 879 ("*Bratsk* . . . required the Commission to consider the 'but for' causation analysis in fulfilling its statutory duty to determine whether the subject imports were a

[11] The plaintiffs attribute the term to Commissioner Pinkert's characterization of the period from 2009 onward. Pl's comments at 25, referencing PDoc 202 (Oct. 14, 2011) at 86–87.

[12] A commodity product is one that is "generally interchangeable regardless of its source." *Bratsk*, 444 F.3d at 1371.

substantial factor in the injury to the domestic industry, as opposed to a merely 'incidental, tangential, or trivial' factor") (italics added), quoting *Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1381 (Fed. Cir. 2003). "Substantial factor" analysis subsumes "but for" causation analysis, albeit with multiple acts and effects for consideration.[13] Thus, "inquiry into 'but for' causation [i]s a proper part of the Commission's responsibility to determine whether the injury to the domestic industry is 'by reason of' the subject imports." *Mittal*, 542 F.3d at 877. In other words, if the Commission undertakes a proper "substantial factor" analysis and finds subject imports the legal cause of material injury, then the Commission has, perforce, necessarily determined that subject imports are the "but for" cause of injury. But, the converse does not follow: if the record or its analysis is unclear as to a not-immaterial factor's impact on material injury, or if its consideration has been omitted altogether, then the legality of the causation analysis is thrown into doubt. *See*, *e.g.*, *Bratsk*.[14] To that extent, at least, the plaintiffs were and are correct: a finding of cause-in-fact must express, at a minimum (and howsoever ex-

[13] *See Restatement (Second) of Torts* §431 (1965); W. P. Keaton, D. Dobbs, R. Keeton, D. Owen, *Prosser & Keeton on Torts* (5th ed. 1984) §41, p. 265; *see*, *e.g.*, *June v. Union Carbide Corp.*, 577 F.3d 1234, 1247 (10th Cir. 2009); *Shawmut Bank, N.A. v. Kress Assoc's*, 33 F.3d 1477, 1495 (9th Cir. 1994). "The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense' which includes every one of the great number of events without which any happening would not have occurred." Comments to §431. In tandem, it will be noted that although "material" modifies the "injury" language of 19 U.S.C. §1673d(b) and not the cause-in-fact language (*i.e*, "by reason of"), *Mittal* and *Nippon* have effectively equated the "substantial" of "substantial factor" analysis with "material" with regard to injury. *Cf*. 542 F.3d at 879 ("incidental, tangential, or trivial") *with* 19 U.S.C. §1677(7)(A) ("'material injury' means harm which is not inconsequential, immaterial, or unimportant"). That is consistent with the "substantial factor" test, which effectivelymelds cause-in-fact and legal or "proximate" cause into an encompassing analysis. *See*, *e.g.*, *Restatement (Second) of Torts* § 431. The court's prior opinion on the subject, *see* 37 CIT at ___, 904 F. Supp. 2d at 1347, was for a record that would reflect distinct analysis of both cause-infact and legal cause nonetheless.

[14] Subsequent elucidation in *Mittal Steel* on *Bratsk* explained that "[a]n important element of the causation inquiry --not necessarily dispositive, but important -- is whether the subject imports are the 'but for' cause of the injury to the domestic injury". *Mittal Steel*, 542 F.3d at 876. Such elucidation simply reflects the minimum required to support the legal sufficiency of any finding of cause-in-fact. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989); *The Adeline*, 9 Cranch 244, 257 (1815).

pressed), the fundamental sufficiency of a "but for" analysis.[15] *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (agency decisions of less than ideal clarity will be upheld if the agency's path may reasonably be discerned).

In this matter, the Commission has properly framed the legal basis upon which to determine whether subject imports are the cause-in-fact of material injury, to wit, "notwithstanding any injury from other factors". That is an obvious expression of a "but for" cause-in-fact inquiry. *Cf. Mittal*, 542 F.3d at 879 n.2 (summarizing remarks of two former commissioners). The question then becomes whether the Commission has properly isolated subject imports and considered the impact of those other factors in context when reaching the conclusion that subject imports are a "but for" cause of injury. *See* 37 CIT at ___, 904 F. Supp. 2d at 1348.

B

On the methodological and factual sufficiency of the Commission's analysis, the plaintiffs argue the Commission has merely paid lip-service to "but for" causation. They contend their particular "natural experiment" data demonstrates the fallacies of the *Remand Views* on "but for" causation, even as they acknowledge that their argument invades to a degree the traditional realm of the fact finder. *See* Pls' Comments at 16 (the Commission "has discretion on how to apply the methodology to be used to determine whether the 'but for' causation standard is met").

The validity of methodology depends upon the circumstance of the particular fact to be proven. "[C]ourts must accord deference to the agency in its selection and development of *proper* methodologies", *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir.1999) (italics added), but that, of course, merely begs the question. In the general international trade context, methodology is reviewed depending upon type under either or both the "substantial evidence of record" and "in accordance with law" standard(s) of 19 U.S.C. §1516a(b)(1)(B)(i). An analytic construct drawn from a fact finder's *a priori* knowledge, for example, is generally reviewed for reasonable-

[15] It was for that reason that, although a decision on the Commission's finding that MLFW is not a commodity product was deferred and the finding on non-substitution of subject MLWF and other flooring products was sustained, *see* 37 CIT at ___ n.5 & ___ n.9, 904 F. Supp. 2d at 1342 n.5 & 1347 n.9, the matter was remanded, in order to address the plaintiffs' broader argument concerning the effect of demand elasticity on causation, and the tectonic shock of the recent Great Recession upon the housing market, as the prior views of the Commission did not appear to have made an adequate causal analysis in those respects, *see id.* at ___, 904 F. Supp. 2d at 1347–48.

ness under the "in accordance with law" provision. Methodological validity may also be revealed from any "feedback" from the record or the parties, *e.g.*, in light of the reasonableness of the conclusion to which the method leads when assessing the substantiality of the evidence of record supporting or detracting from the conclusion, *i.e.*, the "substantial evidence" standard. *See generally*, *e.g.*, *Hynix Semiconductor, Inc. v. United States*, 424 F.3d 1363, 1368 (Fed. Cir. 2005); *Mid Continent Nail Corp. v. United States*, 34 CIT ___, ___, 712 F. Supp. 2d 1370, 1377–78 (2010); *Micron Tech., Inc. v. United States*, 19 CIT 829, 835–36, 893 F. Supp. 21, 30 (1995); *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986). Here, so long as the method chosen reasonably addresses the "but for" question of causation relevant to the material injury issue (*i.e.*, "by reason of"), the Commission's discretion over the method employed will be sustained. If the methodology is valid, then the question simply resolves to whether analysis of the substantiality of the evidence of record supports the conclusion drawn.

1

The Commission found from the period of investigation ("POI") that but for the unfairly traded subject MLWF imports from [the PRC] in the U.S. market during the POI, the domestic industry would have been materially better off both during the housing market collapse and during the developing recovery that followed. On remand, we therefore affirm the conclusion that subject imports of MLWF from [the PRC] had a significant adverse impact on the domestic industry during the POI.

Remand Views at 47.[16]

This conclusion is drawn from findings on a number of factors: (i) subject imports and the domestic like product competed in the U.S. market primarily based on price; (ii) traditional quarterly pricing data indicated that subject imports of MLWF undersold the domestic like product throughout the POI; (iii) low-priced subject imports gained sales and market share directly at the domestic industry's expense; (iv) by underselling the domestic like product at significant margins while selling products that were highly substitutable for the domestic like product and competing in the same geographic markets

[16] The Commission further states that in accordance with the court's remand instructions, it has evaluated in detail the impact of the subject imports on the domestic industry within the context of the business cycle and conditions of competition that are distinctive to the affected industry, and that the Commission specifically addressed the economic impact issues identified as affecting the domestic like product industry in the Dissenting Views of the initial determination. *See Remand Views* at 43–46; *see also infra*.

and channels of distribution, subject imports were able to maintain a significant volume in both absolute terms and relative to consumption in the United States, increase significantly relative to domestic production, and capture significant market share from the domestic industry; (v) subject "low-priced imports of MLWF" have depressed prices of the domestic like product in the U.S. market; and (vi) such low-priced, directly competitive subject imports had a materially injurious impact on the domestic industry. *Id*. at 28–36.

More precisely, for the period January 2008-June 2011, the Commission found that demand declined by 9.2 percent but that the declines in many of the domestic industry's performance indicators generally exceeded the decline in demand and were indicative of the industry's poor performance. CDoc 555R at 43–44; CDoc 554R (Oct. 17, 2013) (noting, *e.g.*, that the domestic industry's U.S. shipments, production, net sales quantities, and net sales values declined substantially). Subject import market share increased significantly by underselling at significant margins and regardless of demand conditions. The subject imports' U.S. shipments declined overall, but the decline was significantly less than the decline in demand, indicating that subject imports were able to significantly increase their market share of the U.S. market over the course of the POI. Importantly, the Commission found that the domestic industry's loss of market share to unfairly traded subject imports that significantly undersold the domestic like product throughout the POI was not a function of any declines in demand. CDoc 555R at 44; CDoc 525 at 35, 45, 48–49, 53–54.

Focusing on demand between 2008 and 2009, the Commission found that the domestic industry's already poor condition worsened in 2009, as declines in the domestic industry's 2008 to 2009 performance indicator generally exceeded the 15.7 percent decline in demand between 2008 and 2009. CDoc 555R at 44–45; CDoc 525 at 48–49; CDoc 554R (noting that the domestic industry's U.S. shipments, production, net sales quantities and net sales values declined substantially). Subject imports' overall decline in U.S. shipments was less than the decline in demand. As a result, during this period of declining demand, subject imports had significantly increased their share of the U.S. market. CDoc 555R at 45 & n.198; CDoc 525 at 35, 48–49; CDoc 554R. Accordingly, the domestic industry's loss of market share to unfairly traded subject imports that significantly undersold the domestic like product between 2008 and 2009 could not be described as a function of demand. Thus, notwithstanding the demand decline between 2008 and 2009 and an overall demand decline during the

POI, subject imports from the PRC "had a material impact on the domestic industry" during this period. CDoc 555R at 45; CDoc 525 at 49.

The Commission also focused on the relative effects of subject imports and demand during the January 2009 to June 2011 period, and found that during this period some of the domestic industry's performance factors indicated apparent U.S. consumption improvement but that they generally lagged the overall improvement in market demand during a time when subject imports continued to increase their market share by significantly underselling the domestic like product; that U.S. consumption apparently increased 7.8 percent between 2009 and 2010, but that the domestic industry's U.S. shipments of MLWF and net sales quantity increased only marginally and its net sales value actually declined. CDoc 555R at 45–46 & n.204; CDoc 525 at 46–54; CDoc 554R. The domestic industry disproportionately bore the burden of economic downturns during these periods, did not share proportionately in market improvements, consistently suffered losses and experienced steep employment and wage declines. General market demand conditions did not adequately explain the changes in the domestic industry's indicators at the end of the POI. CDoc 555R at 46.

The Commission further concluded that the apparent improvement in the domestic industry's negative performance at the end of the POI was due less to enhanced sales related to a general economic recovery than to the "severe measures" the domestic industry undertook to remain competitive in the face of significant low-priced subject imports. Specifically, the Commission found that the domestic industry's apparent financial improvements were driven in large part by partial abandonment of domestic production in favor of low-cost subject imports, asset impairments, and significant SG&A cost cutting while operating at low capacity. The domestic industry slashed SG&A expenses, decreased its unit cost of goods sold, undertook asset impairments, laid off workers, and actually furthered the increase in subject imports from the PRC. The financial data also reflected the benefit but not the cost of such partial production abandonment. CDoc 555R at 46–47 & n.207; CDoc 525 at 47–54. Thus, the Commission found that the decline in the domestic industry's financial losses at the end of the POI did not "sever" any causal connection between the domestic industry's condition and subject imports. CDoc 555R at 47; CDoc 525 at 49–52.

2

The plaintiffs argue the Commission's "but for" methodology is legally unsupportable, and they complain they are being "penalized

for the collapse in demand that occurred in 2008." They allege the Commission disregarded the data of the "natural experiment" of the period 2009 through the end of the POI, June 2011, to which they pointed on remand and during the investigation; and they argue their submission thereon in its own right proves the Commission's causation analysis is irrational. *See*, *e.g.*, Pls' Comments at 20.

The plaintiffs contend the "natural experiment" data shows the following (court's omissions here of citations to the administrative record): (i) shipments to the U.S. market of both the U.S. like product and subject imports increased; (ii) flooring demand in the United States substantially stabilized or declined only slightly (albeit at a level far below 2008 and earlier years, which the plaintiffs contend provides an unfair comparison); (iii) U.S. producer prices for U.S. shipments overall were essentially flat, fluctuating very modestly, but ending the period effectively where they began; (iv) U.S. industry performance, including shipments and profitability, improved sharply, in that the industry's operating income margin improved by 3.4 percentage points from 2008 to 2009, and by 2.1 percentage points from interim 2010 to interim 2011. Pls' Comments at 25–26. The plaintiffs contend that the difference between observed industry performance during the POI and this "counterfactual state" is what constitutes the "legally cognizable" effects on the U.S. industry that are "by reason of" the subject imports, and that the Commission must determine the extent to which, in order to properly determine whether, they are materially injurious. They contend their effort relies "in full" on all of the pricing data submitted through the original U.S. Producers' Questionnaires, and they accuse the Commission of "cherry picking" that fails to consider the administrative record as a whole,[17] with especial reliance on "product 7" in which underselling occurred "to support a biased analysis of pricing." *Id.* n.16. "Thus, even if imports have not had an adverse impact overall, prices of imports of some products may be below U.S. producer prices, or declining in relation to those prices -- as long as prices of imports of other products are above U.S. producer prices or increasing." *Id*. The decline in U.S. producer prices from 2009 onwards was not the result of increased subject imports or due to increasing demand, they contend, because flooring demand generally declined only slightly during

[17] "A reviewing court must consider the record as a whole, including that which 'fairly detracts from its weight', to determine whether there exists 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477–78 (1951)). The plaintiffs argue that a pricing index that makes full and symmetric use of all the prices submitted by U.S. producers would reveal deficiency in the present investigation, and they imply theirs is such an index.

this period. If imports affected prices during a period of stable-to-declining demand, they continue, then an increase in subject import sales in the U.S. market would necessarily have resulted in lower U.S. prices. The only other possible analytic explanation, according to the plaintiffs, is that U.S. demand for MLWF is highly elastic (*i.e.*, geometrically corresponding to a flat or horizontal demand curve that "locks down" price within relevant ranges of volume sold), and such elasticity, they argue, effectively "insulated" domestic MLWF producers from the effect of increased imports.

Continuing, the plaintiffs acknowledge that in the original final determination the Commission challenged the theory that a high demand elasticity for MLWF is consistent with the ability and willingness of consumers to substitute one kind of flooring product for another based on price incentives. *See* PDoc 283 at 27, 48, CDoc 525 at 27, 48. But, they argue, elasticity does not depend upon substitution, as indicated by the fact that increased sales of MLWF from 2009 onward "did not reduce" U.S. producers' MLWF prices overall despite the flat to slightly declining U.S. demand. Because substitution among flooring products is incidental to their elasticity point, they contend, the Commission never directly rebutted the reasoning by challenging any of the four facts on which their analysis depends. As additional support, they point to the Commission's observation in the hardwood plywood investigations that "we do not find that the record shows a significant negative correlation between subject imports and the industry's condition, much less a causal relationship", Pls' Comments at 27, referencing *Hardwood Plywood from [the PRC]* (Investigation Nos. 701-TA-490 and 731-TA-1204 (Final)) at 25, and the plaintiffs contend the same is true in the MLWF investigations for the period from 2009 onwards.

The plaintiffs therefore request that the court reconsider finding that the Commission's conclusion that MLWF did not displace non-MLWF flooring products is supported by substantial evidence, arguing that the Commission's stated reasoning is based on a "palpable inaccuracy" in characterizing the factual record.[18] They argue the table relied upon by the Commission shows that the market share of MLWF among all flooring products increased by 0.1 percentage point (from 1.6 percent to 1.7 percent of the U.S. flooring market) between 2008 and 2010, contrary to the Commission's assertion that the share was "stable" over this period, with the gain actually occurring be-

[18] *I.e.*, the Commission stated in its original final determinations: "We find no evidence that substitute flooring products took sales from MLWF during the period of investigation; MLWF products accounted for a steady share of sales of all flooring products between 2008 and 2010." PDoc 283 at 27, CDoc 525 at 27.

tween 2009 and 2010 as U.S. sales of MLWF by both importers and U.S. producers increased after having remained "stable" at 1.6 percent from 2008 to 2009 as overall flooring demand declined due to the housing collapse. They contend that while 0.1 percent appears small, it represents the increased share of MLWF sales within the entire U.S. flooring market:

> Based on total flooring sales in 2009, for instance, 0.1 percent of the market amounts to approximately 17,493,400 square feet (derived from Final Staff Report, C.R. 507 at II-12, Table II-4 (Oct. 27, 2011)/P.R. 235 at II-12, Table II-4 (Nov. 2, 2011)) whereas the increase in U.S. sales of MLWF over this period amounted to 22,291,000 square feet over this same period. *Id*. In other words, the increase in MLWF's share of the U.S. flooring market from 2009 to 2010 was roughly similar in magnitude to the actual increase in MLWF sales over that year, based on the same data and mode of reasoning that the ITC employed. This rough equivalency cannot support the ITC's conclusion regarding substitutability.

Pls' Comments at 27–29 n.19.

The plaintiffs argue for re-visiting this "factual error" regarding substitution of flooring products, contending that the Catalina Research data on which the Commission has relied is in no way inconsistent with MLWF displacing other non-MLWF flooring products. *Id*., referencing CDoc 548R at 17–19; CDoc 550R; PDoc 303R at 17–19 (July 15, 2013). Pointing to the *Remand Views'* segregated discussion of the collapse-year 2008 and the conclusion that subject imports caused injury because "[t]he declines in the domestic industry's performance indicators between 2008 and 2009 . . . generally exceeded the 15.7 percent decline in demand", the plaintiffs argue such a "summary conclusion" of the economic impact issues is not a valid part of a full "but for" analysis because the fact that MLWF constitutes just 1.6 percent of the broader U.S. flooring market immerses MLWF in a "sea" of other potentially substitutable flooring products and reinforces the independent conclusion that MLWF demand must be highly elastic, since basic principles of microeconomics establish that demand tends to be more elastic in the presence of potential substitutes.

More broadly, they contend the Commission has confused U.S. consumption with demand. They argue demand "certainly" fell by more than 15.7 percent during 2008, because housing starts, which in January 2008 had stood at a seasonally-adjusted annual rate of 1.1 million units, by January 2009 had declined by 55 percent to just 0.5

million units. By contrast, they argue, consumption dropped by less than the fall in demand, principally because (they further contend) of increased purchases of MLWF at the expense of other flooring products induced by variations in relative price among the various products. They argue this "confusion" on the part of the Commission is evident elsewhere in the remand determinations, for instance at page 45, footnote 202, of the *Remand Views* where the Commission cited increasing U.S. consumption from 2009 onwards as evidence of increasing demand. Their point, however, is that the Commission has never contested record evidence showing that the drivers of demand downstream (housing starts and remodeling/renovation activity, from which demand for flooring is derived) both declined modestly over the relevant periods. *See Remand Views* at 45 n.202.

The plaintiffs argue housing starts that determine MLWF demand in early 2009 "must be counted from mid- to late-2008, since flooring is among the last products installed in a new home, and homes take a number of months to construct." Pls' Comments at 23 n.12. They point out that the Commission quoted them as arguing that "but for" injury could only have occurred in the face of increased supply from 2009 onwards if "demand for MLWF increased to absorb the increased supply, resulting in unchanged pricing." *Id*., referencing *Remand Views* at 45 n.202 (citing PDoc 303R at 15, CDoc 548R at 15; CDoc 550R). Therefore, the plaintiffs contend, it is clear that they were and are distinguishing between increases in supply and increases in demand by noting that supply increased. The plaintiffs argue that "[n]aturally, both an increase in *supply* or demand could *result in* increased U.S. consumption, which is why separate indicators of demand, such as downstream drivers (housing starts and renovation/remodeling activity) are needed to distinguish these two possibilities." *Id*. (court's italics). "The ITC's confusion is stark since it cited the increased consumption as evidence of increased demand, without reference to any facts that distinguish supply changes from demand changes." *Id*. at 24 n.12. The plaintiffs also find no probative value in the Commission's comment that "[a]lmost all of the domestic industry's performance indicators declined significantly from 2008 to 2009, and even those factors that improved somewhat between 2009 and 2010 remained at lower levels in 2010 than in 2008." Pls' Comments at 22–23, referencing *Remand Views* at 33–34. That is, they perceive no significance from the fact that the industry's performance indicia of housing starts and remodeling activity had not recovered to levels at or near the beginning of the POI following their collapse through the end of 2008 and into early 2009. *See* PDoc 235 at II-7 (Nov. 2, 2011) (public final staff report), CDoc 507 at II-7. The plain-

tiffs also take issue with a similar statement regarding MLWF pricing, whereby the Commission noted that "the traditional quarterly pricing data show lower prices of the domestic like product at the end of the POI than in the first quarter of the POI." *Remand Views* at 31.

The plaintiffs contend, then, that even if, hypothetically, the Commission had rejected their proffered "but for" analysis based on some source of "substantial evidence" sufficient to satisfy judicial review, the Commission would still be required to offer its own "but for" analysis, which they contend it continues not to do. They also take issue with the Commission's rationale that the domestic industry's apparent recent financial improvements were driven in large part by "partial abandonment of domestic production capacity in favor of low-cost subject imports, asset impairments, and significant cost-cutting of SG&A expenses while operating at low capacity utilization." *Remand Views* at 46 (footnote omitted). This point, the plaintiffs claim, serves only to underscore that the Commission is not analytically constructing a counterfactual state of the industry's condition and diverts attention from the fact that increased U.S. shipments of subject imports from 2009 onward did not impair the industry's ability to capture its cost-rationalization benefits in the form of higher profits, because imports did not, they claim, "result in" lower U.S. producer prices. "Prices are the nexus where competition plays out --not costs", the plaintiffs emphasize:

Cost rationalization, *i.e.*, closing high-cost, obsolete capacity, . . . is commonplace among many industries that seek to right-size in the wake of a recession. Because the housing collapse was even more severe than the general decline in business activity throughout the broader economy, it is even more likely that upstream industries that serve housing would use the demand crisis as an opportunity to rationalize costs. . . . [D]espite closing obsolete capacity, the industry as a whole actually increased U.S. shipments from 2009 onwards so the loss of this capacity did not constrain sales. In summary, . . . increased sales of subject imports are not responsible for the industry's decision to improve its structure through cost rationalization efforts, [and] the lack of effect of the imports on U.S. producer prices was important in the industry's ability to pocket these savings in the form of higher operating margins achieved after 2009.

Pls' Comments at 29–30.

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Despite the quality of the arguments the plaintiffs propound, the court cannot conclude that the *Remand Views* are unsupported by substantial evidence on the record or not in accordance with law.

The plaintiffs assert that the Commission should have focused its causation analysis on the January 2009-June 2011 period rather than the entire POI and assigned "no probative value" to the fact that the domestic industry's performance indicators were lower in 2010 than in 2008, because its prices at the end of the POI were lower than in 2008, and that between January 2009 and June 2011 demand "substantially stabilized," shipments increased, the domestic industry's prices were flat, and the domestic industry's operating margins improved. The Commission rejected the plaintiffs' request on remand to emphasize the shorter POI period of January 2009-June 2011, because it found no basis to deviate from its normal practice of considering data for the three most recent calendar years plus applicable interim periods. *See* CL555R at 44 n.195. The court cannot find that the decision not to emphasize a shorter POI period was an abuse of its discretion.

In accordance with the orders of remand, the Commission evaluated the effect that the severe disruption of the home building and remodeling industries had on the domestic like product industry in determining whether subject imports were the material cause of injury, and in addition to the full POI, the Commission assessed the relative effects of demand and subject imports during 2008–2009 and during January 2009 to June 2011, the periods the plaintiffs' brief emphasized. By doing so, the Commission appears to have adequately refuted the plaintiffs' claims that data for these periods established that there was no causal link between subject imports and the material injury to the domestic industry.

The court further disagrees that the Commission has confused the demand analysis. The Commission used U.S. consumption as a statistical proxy for demand, as it routinely does, *see*, *e.g.*, *Shandong TTCA Biochemistry Co., Ltd. v. United States*, 35 CIT ___, ___, 774 F. Supp. 2d 1317, 1323–24 (2011), and the statute specifically instructs the Commission to consider whether the volume of subject imports relative to "consumption in the United States" is significant. 19 U.S.C. §1677(7)(C)(i). Given the consistency of the data therefor with other indicators, reliance thereon was not unreasonable. Further, an increase in supply does not "result in" an increase in demand, and the court declines to interfere with what the Commission regards as the relevant indicia for properly determining what drives demand for MLWF, and when it is driven.

Furthermore, the hypothetical the plaintiffs propose as "but for" causation analysis is not dispositive on that issue -- of what the domestic MLWF industry *would have* experienced in the absence of

imports of subject merchandise. The court previously disagreed "that the statute in conjunction with our appellate precedent requires . . . [ ]strict application of the 'but-for' causation standard to a particular factual scenario". And the court's function here does not involve re-weighing the facts. *See*, *e.g.*, *Nippon Steel Corp. v. United States*, 458 F.3d 1345 (Fed. Cir. 2006). If it did, the process would necessarily as well involve consideration of the defendant-intervenor's proposed quantified analysis of "what the world would look like without subject imports' continual gains in market share", which it submitted in the underlying investigation and in its comments for the remand proceedings, in which the defendant-intervenor concluded as follows:

> . . . [O]ne can observe the injurious impact of the growth in subject import market share incremental to the injurious impact of the recession by assuming that the domestic industry held its pre-housing market crisis market share throughout the remainder of the POI. Any injurious impact of the recession would be shown by the decline in profitability associated with the adverse changes in the MLWF market overall. The difference between domestic producers' profitability when holding a constant market share and as actually observed is attributable to the injurious volume effects of subject imports.
>
> We note that the income statement analysis model considers only the market share lost to subject imports, and takes no account of the price effects caused by subject imports. That is, if domestic industry were able to hold its prices, and its average net sales value did not decline over the POI, its profitability would have been even stronger. Thus, the incremental injury caused by subject imports was almost certainly greater than the substantial figures shown in the scenarios above.

E.g., PDoc 304R (July 22, 2013). And it is well-established that the possibility of drawing two inconsistent conclusions from the evidence does not preclude the Commission's remand determinations from being supported by substantial evidence in any event. *See, e.g., Thai Pineapple Public Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999).

The plaintiffs' broad attack is that the Commission has not articulated a rational basis to find the subject imports had a material impact on the domestic industry, that the Commission's causation analysis remains unsupported, and that in fact that there is no causal

connection between subject imports and the domestic industry's condition for the latter portion of the POI. They contend that what the Commission has done in its *Remand Views* cannot be assessed, because nowhere do those views purport to describe the condition of the industry absent "unfair" competition by subject imports, or describe how the Commission has analyzed record evidence to reach conclusions about the "but for" condition of the industry, at least as contended by the plaintiffs.

The court must again disagree. The Commission need not state for the record the precise contours of the hypothetical counterfactual "but for" state, so long as its ultimate conclusions, on causation "by reason of" subject imports from the evidence of record, are discernable and reasonable. *Cf. NSK Corp. v. U.S. Intern. Trade Comm'n*, 716 F.3d 1352, 1368 (Fed. Cir. 2013) (the fact that numerous facts of record detract from the Commission's conclusion, including the fact that non-subject imports "had a significant presence in the domestic market" and were sold at lower prices than domestic like product, did not detract to such an extent that the court may conclude the Commission's determinations unsupported by substantial evidence). As indicated above, following a rather thorough analysis of the issue to identify and isolate the effects of subject imports, the Commission on remand concluded that "but for the unfairly traded subject MLWF imports from [the PRC] in the U.S. market during the POI, the domestic industry would have been materially better off both during the housing market collapse and during the developing recovery that followed." CDoc 555R at 47. The Commission therefore reaffirmed its conclusion that subject imports of MLWF from the PRC had a significant adverse impact on the domestic industry during the POI. The Commission found the domestic industry disproportionally suffered not only during the market collapse but also in the period that followed as the direct result of unfairly priced subject imports.

The plaintiffs complain that "increased sales of subject imports are not responsible for the industry's decision to improve its structure through cost rationalization efforts", but that in turn does not take into account what would have been the "counterfactual state" of how the domestic industry would have fared in the absence of unfairly priced subject imports, *i.e.*, the plaintiffs contentions in general also do not take into account the Commission's finding of widespread underselling throughout the POI that enabled subject imports to capture market share from the domestic industry. CDoc 555R at 34–35. Despite their emphasis on demand "stabiliz[ation]" and domestic industry performance "improvement" from 2009 onward, Pls'

Comments at 26, the fact that the plaintiffs offer an alternate explanation of the record evidence does not undermine the Commission's reasoned analysis. *See NSK Corp., supra; Matsushita Elec. Ind. Co., Ltd. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984). The Commission found that the domestic industry lost a significant percentage of market share from 2009 to 2010 and also continued to suffer disproportionately between interim 2010 and interim 2011 as subject imports' U.S. shipment volumes significantly outpaced growth in demand during these periods. *Remand Views* at 35 & n.34, referencing CDoc 555R at 45–46 & n.204, CDoc 525 at 46–54l, CDoc 554R. And the plaintiffs conceded that it is "conceivable that the U.S. industry would have performed even better but-for the increase in subject import shipment volume". CDoc 548 at 15.

Even accepting the plaintiffs' broader economic argument, it is difficult to envision what further "cost rationalization" measures, in order to "compete" against "significant underselling" of subject imports from 2009 onward even after the collapse of the housing market, could reasonably be compelled from the domestic MLWF industry before the Commission, having identified the harm summarized above, may reasonably reach the determination that material injury to the domestic industry has occurred "by reason of" those imports. A cause-in-fact analysis from the Commission exacted to that extent would either be superfluous or antithetical to the purposes of the antidumping law and the function of judicial review of administrative determinations made pursuant thereto. *See NSK Corp., supra*.

In passing, the court here declines to give more than cursory comment on the plaintiffs' June 6, 2014 letter, docketed as "notice of supplemental authority" to apprise of *Baroque Timber Industries (Zhongshan) Co. v. United States*, 38 CIT ___, 971 F. Supp. 2d 1333 (2014). The *status quo* for the time being is apparently an affirmative determination of less-than-fair-value sales notwithstanding that the three mandatory respondents of that antidumping duty case now apparently have administratively-determined margins of zero, and it is also apparently affirmative in the countervailing duty determination before Commerce where one of three mandatory respondents was determined to have received a 1.5% subsidy. As the Commission rightly objects, this does not present the kind of *Borlem* circumstance that would compel the Commission to reconsider the present disposition of this matter as reflected in its *Remand Views*. *See Borlem SA-Empreendimentos Industriais v. United States*, 913 F.2d 933 (Fed. Cir. 1990); *see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277–78 (Fed. Cir. 2012) (noting "small number of exceptions" for agency record supplementation).

Conclusion For the foregoing reasons, the *Remand Views* will be sustained. Judgment will enter accordingly.

So ordered.

Dated: July 16, 2014
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE