

PUBLIC VERSION

(December 2014) (“*Final Determination*”). Support for this motion is set forth in the brief annexed hereto and is hereby incorporated by reference. A proposed order is also attached.

Consolidated Plaintiff respectfully requests that this Court grant this motion, hold that the Commission’s *Final Determination* is not supported by substantial evidence and is otherwise not in accordance with the law for the reasons set forth and addressed in the accompanying Memorandum, and remand this matter to the Commission with instructions to correct the errors of law and fact made in the *Final Determination*.

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On behalf of The Chemours Company (“Chemours”), successor-in-interest to E.I. DuPont de Nemours and Company (“DuPont”) and Consolidated Plaintiff in this action,¹ we hereby file the following memorandum in support of our motion for judgment on the agency record. At the outset, it may be noted that this action consolidates two appeals, one by Chemours and the other by Mexichem Fluor, Inc. Both plaintiffs participated actively in the investigations that are now before this Court. Both are filing motions for judgment on the record pursuant to Rule 56.2. Chemours fully supports the motion filed by Mexichem. However, Chemours does not repeat the points raised by Mexichem.

I. RULE 56.2 STATEMENT AND SUMMARY OF ARGUMENT

A. Administrative Determination Challenged

The administrative determination challenged in this action is the negative final determination of the U.S. International Trade Commission (“the Commission”) pursuant to 19 U.S.C. § 1673d(b) in the antidumping investigation of *1,1,1,2 Tetrafluoroethane from China*, Inv. No. 731-TA-1244 (Final), USITC Pub. 4503 (December 2014). P.R. 198.²

¹ As of July, 2015, the DuPont Performance Chemicals business was spun-off into a new company, *i.e.*, Chemours, which is now the real party in interest in this proceeding. *See* Amended Corporate Disclosure Statement, ECF No. 29.

² Citations are denoted by reference to the document numbers assigned to the Public Record (“P.R.”) and Confidential Record (“C.R.”), as identified in the Index of the Administrative Record, filed March 23, 2015, in the captioned action. The Commission’s published determination is found at P.R. 198. The confidential version is at C.R. 297 (the pagination, however, is not the same).

B. Issues Presented and Summary of Argument**1. Issues of Law**

- a. *Did the Commission majority misapply the statute by insisting that “observed underselling” must be “correlated” with a shift in market share?*

The trade remedies statute instructs the Commission to consider both the volume and price effects of subject imports. Although the two may be related where prices fall and the domestic industry loses market share, a domestic producer may choose to defend its market share by lowering its own prices in the face of underselling by subject imports. Here, the Commission majority acknowledged that there were “significant quantities of subject imports that undersold the domestic like product during each year of the POI.” P.R. 198 at 18. The majority further acknowledged “that the domestic industry’s prices declined over the POI.” *Id.* And, the decline in domestic industry revenues – due primarily to declining prices – caused operating profits to fall “severely, both from 2011 to 2012, when subject import volume and market share increased, and from 2012 to 2012, when subject import volume and market share declined.” *Id.* at 34-35. Yet, the Commission majority found that the dumped imports were not a significant cause of falling market prices because there was “no correlation between observed underselling and shifts in market share.” *Id.* at 18; *see also id.* at 21. In other words, the Commission insisted that it is not sufficient that dumped imports depressed price levels (thereby severely depressing industry profits). Instead, the Commission also demanded that the low-priced imports must significantly increase market share.

Such reasoning ignores the language and structure of the statute. 19 U.S.C. § 1677(7)(C)(ii) requires the Commission to consider whether the price underselling by subject imports depressed U.S. producer prices *regardless of whether there was a shift in market share*. The Commission majority’s failure to do this is not in accordance with law.

- b. *Did the Commission Lawfully (1) Refuse to Collect Pricing Data on Direct Imports in Bulk by Major Retailers and Repackagers, and (2) Reject Data Establishing that the Prices of Direct Imports from China Undersold Domestic Producer Prices for Bulk R-134a?*

DuPont requested that the Commission collect pricing data on direct imports of R-134a from China in bulk, *i.e.*, Pricing Product 1. There was no dispute that certain retailers and repackagers imported Chinese R-134a directly, *i.e.*, without use of a middleman or trading company. These customers imported bulk R-134a and repackaged the refrigerant into retail containers. There was also no dispute that domestic producers competed with Chinese producers for bulk sales to these same retailers and repackagers. In other words, competition for bulk sales of R-134a took place between domestic producers and Chinese exporters for sales to retailers and repackagers that were direct importers. DuPont therefore requested that the Commission collect pricing data concerning the purchase prices paid for R-134a in bulk by direct importers, including “big box” retailers and repackers. Without these data, the prices obtained by the domestic industry on sales of bulk R-134a could not be meaningfully compared to import prices.

The Commission refused without explanation to collect the direct import pricing data sought by DuPont. As a consequence, the data for Pricing Product 1 compared high volume bulk sales to repackagers by U.S. producers to very low volume re-sales of bulk R-134a by importers. Hence, the pricing data collected with respect to Pricing Product 1 were not indicative of the degree to which Chinese importers undersold U.S. producer prices.

Because the Commission failed to collect pricing data on direct imports, DuPont provided as Exhibit 2 to its Post-Hearing Brief and Answers to Commission Questions data which showed that the prices paid by repackagers for their direct imports of R-134a in bulk form were systematically below the prices paid to domestic producers for shipments of R-134a in bulk. C.R. 278. The Commission majority ignored the data, stating in a footnote that they “are not directly

comparable to importers' sales prices, as they do not include any sales markup that would typically be made by an importer selling R-134a in the U.S. market." P.R. 198 at 19, n.122.

The reason a repackager imports directly instead of purchasing through an importer is precisely to avoid paying an importer's markup. The point which the Commission majority missed entirely is that domestic producers selling to repackagers that import directly must compete with the price of their direct imports. Having failed to collect pricing data on direct imports and having refused to analyze the direct import pricing data provided by DuPont, the Commission failed to address material issues.

2. Issues of Substantial Evidence

- a. Whether the record evidence supports the finding that an increasing volume of subject imports was "significant" but did not have a negative impact on U.S. producers' shipments or financial performance?*

The Commission majority found that the increase in market share by imports of R134a from China between 2011 and 2012 "was a function of purchasers' response to the supply shortages that persisted through at least the end of 2011." P.R. 198 at 18. The record showed, however, that any supply shortage ended in 2011. Yet, Chinese imports increased in 2012. And, the Chinese imports remained at a level the Commission acknowledged to be "significant" in 2013. *Id.* In other words, even accepting that subject imports increased through 2012 due to a shortage of supply, those imports did not retreat in 2013. Instead, by cutting prices (at an average dumping margin of 280.67 percent), Chinese imports held on to market share gains achieved in 2012, thereby preventing the domestic industry from regaining market share, increasing output or filling its capacity.

- b. *Whether, the record evidence confirms the causal link between (i) the decline in R-134a prices and the consequent decline in domestic industry revenues and profits, and (ii) subject imports*

The majority's negative determination rests largely on the following logical construct: Because (1) subject imports were drawn into the U.S. market by a 2010-2011 supply shortage (P.R. 198 at 22-23), and (2) prices for R-134a fell as the supply shortage eased (*Id.* at 28), therefore (3) the fall in prices (and associated fall in industry revenues and profits) was caused by the cessation of short supply conditions, *not* subject imports (*Id.*). The Commission majority's reasoning is not supported by substantial evidence and, indeed, is not logical. Given that the "supply shortage" ceased by reason of increasing imports, and given that U.S. market prices fell because the supply shortage ended, the fall in U.S. producer prices was *necessarily* caused by subject imports.³

- c. *Whether the Commission Majority's Conclusion that "There Is No Correlation between Observed Underselling and Shifts in Market Shares for the Subject Imports" Is Supported by Substantial Evidence*

The record evidence contradicts the Commission's conclusion that there is "no correlation between observed underselling and shifts in market shares for the subject imports." The Commission majority recognized that U.S. market prices fell between 2011 and 2012 as the market share held by subject imports increased from [] to [] before declining to [] in 2013. C.R. 297 at 22-23. However, the majority disregarded the full period of

³ The Commission also found a high degree of substitutability between subject imports and the domestic like product (P.R. 198 at 19), found non-subject imports had a minimal presence in the U.S. market throughout the POI (*Id.* at 17), and found that "subject imports as a share of the U.S. market increased from [] percent in 2011 to [] percent in 2012, and then declined to [] percent in 2013" (C.R. 297 at 22-23). These facts (which are not in dispute), underscore the cause and effect relationship between the rise in subject imports and the cessation of the supply shortage.

investigation increase in subject imports, and instead, found no connection between market share shifts and falling market prices based upon the 2012 – 2013 decline [

] market share of subject imports. This analysis not only ignored the full period of investigation gain in import market share, but also ignored the 2012 to 2013 [

] subject imports as domestic producer prices [].

The underselling data on which the Commission’s pricing analysis rests compare the prices of *shipments* of R-134a by importers to the prices of *shipments* by domestic producers. They show underselling by the great volume of subject imports *shipped* over the full period of investigation. For an “apples-to-apples” comparison, the correlation between underselling and market share shifts must, therefore, be analyzed on the basis of import *shipment* data. The Commission’s *shipment* data show that the market share held by subject imports increased from [] percent of market in 2011 to [] percent in 2012 as prices fell, and further increased to [] percent in 2013 as prices fell further. C.R. 297 at I-24 (Table I-3). Yet, the Commission did not mention the increasing trend in shipments of imports.

In addition, the Commission failed to consider the [] in inventories of subject imports. From 2012 to 2013 – that is, after the “shortage” had ended – inventories of subject imports []. Given that these imports entered the market in 2013, there was in fact a correlation: the dumped imports continuing to arrive in the U.S. market in 2013 drove price levels downward. As a result, domestic producer profits declined “severely.” The Commission’s incomplete analysis of import data, versus shipment and inventory data, thus led to a conclusion unsupported by the record as a whole.

d. Whether Substantial Evidence Supports the Majority's Conclusion that the Pricing Data Show Declines Regardless Whether Subject Imports Were Present

According to the Commission majority, the “pricing data on the record demonstrate that the price declines occurred whether the subject imports oversold or undersold the domestic like product and regardless of whether subject imports were present in the market for a particular pricing product.” P.R. 198 at 29. There is only one pricing product, *i.e.*, Pricing Product 3, for which there were no reported imports. As the dissent notes, “{f}or the five products where subject imports and the domestic like product competed head-to-head, the domestic industry’s prices declined between [] percent [] percent. For the one pricing product where U.S. producers did not face import competition, (*i.e.*, Product 3), their price declined by [] percent. Thus, contrary to the majority’s decision, the domestic industry’s prices declined far more sharply in the products facing import competition.” Dissent at 5-6, C.R. 297.

e. Whether Substantial Evidence Supports the Majority's Conclusion that There Was No Correlation between Subject Imports and the “Severe” Period of Investigation Drop in the Domestic Industry's Operating Income

The record data show that the domestic industry’s operating income fell from [] in 2011 to [] in 2013 as its net revenues fell from [] in 2011 to [] in 2013. C.R. 297 at D-3. The data further show that of the total [] fall in the value of U.S. industry sales revenues, fully [] or [] percent of it was the result of a fall in revenues from U.S. industry shipments into the automotive aftermarket. *Id.* at III-11. On this record, the Commission acknowledged that domestic operating profits fell “severely.” P.R. 198 at 23.

Over the period of investigation, the domestic industry’s share of automotive aftermarket shipments fell from [] percent to [] percent as the market share held by subject imports

rose from [] percent in 2011 to [] percent in 2012, to [] percent in 2013. Staff Report at I-24, C.R. 291. These data, coupled with the underselling data collected by the Commission, disprove the majority's contention there was "no correlation between the fall in the industry's operating income and subject imports."

f. Whether, Given the Substantial Errors in the Majority's Findings, its Determination that Subject Imports do not Threaten to Cause Material Injury is Supported by Substantial Evidence

The Commission majority determined that there was no threat of material injury to the domestic industry. However, this determination was based upon its findings of no material injury. Because the Commission majority's finding of no material injury is not supported by substantial evidence, neither is its determination of no threat of material injury.

II. STATEMENT OF THE CASE

A. Background

On October 22, 2013, Mexichem Fluor Inc. filed an antidumping and countervailing duty petition with the U.S. Department of Commerce ("Commerce") and the Commission alleging that producers and exporters in China were receiving countervailable subsidies, that they were selling subject merchandise in the United States at less than fair value, and that imports from these producers and exporters were materially injuring, or threatening with material injury, the U.S. industry. P.R. 1. In due course, the Commission made a unanimous preliminary determination that there was a reasonable indication that an industry in the United States was materially injured by reason of imports of R134a from China. *1,1,1,2-Tetrafluoroethane from China*, Inv. Nos. 701-TA-509 and 731-TA-1244 (Prelim.), USITC Pub. 4444 (Dec. 2013).

Thereafter, the U.S. Department of Commerce published a final affirmative determination of sales at less than fair value on October 20, 2014. *1,1,1,2-Tetrafluoroethane from the People's*

Republic of China, 79 Fed. Reg. 62,597 (Dep’t of Commerce Oct. 20, 2014) (fin. det.). The dumping margin found by Commerce was 280.67 percent. On December 9, 2014, the Commission published its Final Determination that the domestic R134a industry was neither materially injured nor threatened to be materially injured by reason of imports from China. P.R. 198. Four Commissioners voted in the negative and two Commissioners voted in the affirmative.

B. The Final Determination

1. Agreed Facts

The following facts are not in dispute:

1. R-134a is a refrigerant gas produced in the United States and China by processes that generally involve reacting hydrogen fluoride with a compound containing carbon and chlorine. P.R. 198 at 7. “Demand for R-134a derives from demand for its end uses, the largest of which is automotive air conditioning systems. Approximately [] percent of sales of R-134a for use in automotive air conditioning are to the replacement market.” C.R. 297 at 16.
2. Nonsubject imports had a minimal presence in the U.S. market throughout the period of investigation. *Id.* at 13.
3. From “mid-2010 through at least 2011, the U.S. market for R-134a experienced a supply shortage.” *Id.* at 18.
4. “{T}here is a high degree of substitutability between subject imports and the domestic like product. All of the domestic producers and the great majority of importers and purchasers reported that U.S.-produced R-134a was always or frequently interchangeable with R-134a from China and other countries.” *Id.* at 19.
5. Price is “an important factor” in purchasing decisions. *Id.* at 20.
6. Imports of R-134a rose from [] short tons in 2011 to [] short tons in 2012 before decreasing slightly to [] short tons in 2013. *Id.* at 21.
7. Domestic shipments of subject imports rose from [] short tons in 2011 to [] short tons in 2012 to [] short tons in 2013. Staff Report at I-23, C.R. 291.
8. Measured by shipments of subject imports, nonsubject imports, and the domestic like product, the market share held by subject imports was [] percent in 2011, [] percent in 2012 and [] percent in 2013. The market share held by the

domestic industry was [] percent in 2011, [] percent in 2012, and [] percent in 2013. *Id.* at I-24.

9. The “overwhelming majority” of subject imports were sold for use in the automotive refrigerant aftermarket, with some sold for use as other refrigerants. P.R. 198 at 13.
10. In the automotive aftermarket segment, the market share of subject imports was [] percent in 2011, [] percent in 2012 and [] percent in 2013 while the share held by the domestic industry was [] percent in 2011, [] percent in 2012 and [] in 2013. Staff Report at I-24, C.R. 291.
11. Between 2011 and 2013, the average unit value of domestic producer sales of R-134a in the automotive aftermarket fell by [] percent. For other segments, the fall in the average unit value of domestic shipments ranged from [] percent (“other applications”) to [] percent (pharmaceutical). *Id.* at III-11, C.R. 291.
12. Over the period of investigation, the domestic industry’s revenues on its U.S. shipments of R-134a fell by []. Of that amount, [] or [] percent was attributable to the fall in the value of shipments into the automotive aftermarket. *Id.* at III-11 and D-3.

2. The Majority Determination

The Commission majority found that although the volume of subject imports was significant both absolutely and relative to U.S. consumption, and although there was underselling by subject imports throughout the period of investigation, subject imports did not have a significant impact on the U.S. industry. More specifically, the Commission majority concluded that:

1. The period of investigation rise in subject imports of R-134a from China was the consequence of “a domestic supply shortage that began in 2010 and persisted at least through the end of 2011” which drew Chinese supply into the U.S. market “as a reliable source of R-134a, both during the shortage and as the shortage began to dissipate.” P.R. 198 at 16; C.R. 297 at 21-23.
2. Despite “significant quantities of subject imports that undersold the domestic like product during each year of the POI,” there were no significant price effects because there was no correlation between the observed underselling and shifts in market shares for the subject imports. *Id.* at 27.
3. Although “the domestic industry’s prices declined over the POI,” the price decline was attributable to “the cessation of the supply shortages that temporarily inflated

prices.” *Id.* at 28. With specific regard to the fall in prices in the automotive aftermarket where subject imports were heavily concentrated, “{b}ecause the supply shortage was most acute in the automotive aftermarket, prices therein increased the most, and as a consequence, experienced greater declines over the POI as compared to prices of R-134a sold for other purposes.” *Id.*

4. Subject imports had not suppressed domestic industry prices even though the “domestic industry’s ratio of cost of goods (“COGS”) sold to net sales ratio increased from 2011 to 2013” because “this increase {in the COGS ratios} ... is attributable primarily to changes in net sales value, which decreased from [] in 2011 to [] in 2012 and then to [] in 2013.” P.R. 198 at 30, C.R. 297. The period of investigation decline in the domestic industry’s net sales values was, therefore, a function of the “high price levels that existed at the beginning of the POI due to supply shortages — and the subsequent alleviation of those shortages — rather than the presence of subject imports.” P.R. 198 at 30, C.R. 297.
5. There was a “severe decline in {the domestic industry’s} operating performance from 2011 to 2013 {that} was attributable to the decline in prices that occurred during the POI,” but “these price declines occurred because prices were anomalously high at the beginning of the POI due to the supply shortages of 2010 and 2011 and began to return to their pre-shortage levels as the market stabilized in 2012 and 2013. By contrast, the subject imports did not have significant price depressing effects and did not significantly prevent price increases that otherwise would have occurred. Moreover, there is no correlation between declines in operating performance, which occurred throughout the POI, and changes in subject import volume and market share.” *Id.* at 36.
6. The likely volume and price effects of subject imports did not pose a threat of material injury. With regard to volume, “{s}ubject imports did not significantly increase their presence in the U.S. market once the domestic supply shortage was resolved and we consequently find that there is not a likelihood of substantially increased subject imports in the imminent future.” *Id.* at 4.
7. With regard to price effects, there was no threat of material injury because “we believe that the absence of significant price effects that characterized the POI will likely persist in the imminent future.” *Id.*

3. The Dissent

The dissenting Commissioners joined their colleagues in their findings regarding the domestic like product, the domestic industry and the conditions of competition. However, the two dissenting Commissioners found that:

“a significant volume of subject imports has undersold the domestic like product, significantly depressed U.S. prices, and caused material injury to the domestic industry...”

Dissent at 1, P.R. 198.

In their dissent, Commissioners Williamson and Schmidlein recognized supply tightness that led to “abnormally high prices in 2011” and acknowledged that “some aspect of the price declines is likely related to the alleviation of that tightness.” Dissent at 5, P.R. 198. They noted, however, that:

“U.S. prices declined consistently throughout the POI, despite the fact that the parties agreed that supply tightness was no longer a real issue after 2011.”

Id. And they found

“that the subject imports put significant downward pressure on U.S. prices, exacerbating price declines in the market and contributing to the domestic industry’s cost-price squeeze.”

Id.

With regard to the volume effects of subject imports, the dissent noted their concentration and market share gains in the automotive aftermarket:

“The subject imports were concentrated in the automotive aftermarket segment of the market during the POI, which is also the largest segment of the total R-134a market. Consequently, an examination of the trends in the automotive aftermarket is also relevant to our analysis of material injury. The volume of subject imports in this segment increased from [] short tons in 2011 to [] short tons in 2013, for an increase of [] percent. At the same time, the domestic industry’s shipments to this segment declined and lost market share.”

Dissent at 2, C.R. 297.

With regard to the price effects of subject imports, the dissenting Commissioners noted that the pricing product data “show significantly larger price declines in the products where U.S. producers face competition from subject imports.” *Id.* And with specific regard to the data

relating to the automotive aftermarket, the dissent addressed the majority's conclusion that prices in the automotive aftermarket declined more than in other segments because prices in that segment had risen higher when supply was tight:

“Although it is true that the automotive aftermarket segment had the highest AUV in 2011, respondents' theory utterly fails to explain why the domestic industry's AUV for its aftermarket sales continued to plummet in 2013, falling well below the AUVs of the other market segments.”

Dissent at 7, P.R. 198.

Regarding the impact of subject imports on the domestic industry, the dissenting Commissioners found that:

“...subject imports had a significant impact on the domestic industry, in particular on its financial condition. As discussed above, subject import volume was significant throughout the POI, both absolutely and relative to U.S. consumption. The main effect of this volume on the domestic industry was through the underselling and price depression discussed above, as the domestic industry maintained most of its production and sales volume but only at sharply lower prices. Consequently, while the industry's volume-based indicators did not show major changes, the industry's financial indicators declined sharply.”

Id. at 11.

The dissent concluded its injury and causation analysis as follows:

“In sum, we find that the significant volume of subject imports, at prices that undersold the domestic like product and depressed domestic prices, adversely impacted the domestic industry, leading to significant declines in that industry's financial performance. We consequently determine that the domestic industry is materially injured by reason of subject imports.”

Id. at 15.

III. ARGUMENT

A. Standard of Review

To be sustained, the Commission's determination of “material injury” to the domestic industry “by reason of” subject imports must be supported by “substantial evidence” on the record

as a whole, and be otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B). The Commission is entitled to deference in weighing the evidence, but its findings must be grounded in “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consolo Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Thus deference to agency expertise does not excuse the misstatement of material evidence or conclusions of material fact that are unsupported by the record as a whole. Nor does it permit conclusions of fact drawn from the record evidence that defy logic or basic principles of economics.⁴ Thus, for purposes of judicial review of a Commission determination on the economic effects of dumped imports, application of the “reasonable mind” test requires basic economic literacy.

As a matter of law, the Commission “must address significant arguments and evidence which seriously undermines its reasoning and conclusions,” *Altx, Inc. v. United States*, 25 CIT 1100, 1117-18, 167 F. Supp. 2d 1353, 1374 (2001), and must articulate a “rational connection between the facts found and the choice made.” *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 285 (1974) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). A corollary to the requirement of a “rational connection” between the record facts and Commission findings, is that the Commission must provide a “logical” explanation for its findings. *Nucor Fastener Div. v. United States*, 791 F. Supp. 2d 1269, 1283 (2011). In this regard, the statutory factors enumerated by 19 U.S.C. § 1677(7) are not a

⁴ In *Sigma Corp.*, the Federal Circuit rejected a Commerce Department methodology based on “something that no rational producer in a market economy would do.” *Sigma Corp. v. United States*, 117 F. 3d 1401, 117 F. 3d 1401 at 1408 (Fed. Cir. 1997). Here, where the Commission is analyzing economic effects, its conclusions must be based on sound economic principles. *See, e.g., Diamond Sawblades Manufacturers Coalition v. United States*, 32 CIT 134, 149-50 (2008), *aff’d* 612 F.3d 1348 (Fed. Cir. 2010) (rejecting the Commission’s incomplete analysis of a “price/volume” tradeoff and citing P.A. Samuelson, W.D. Nordhaus, *Economics* (16th Ed. 1988)).

checklist; the Commission “cannot simply not{e} a potential factor and issu{e} a conclusory assertion that such a factor did or did not play a major role in causing a material injury.”

Shandong TTCA Biochemistry Co. v. United States, 774 F. Supp. 2d 1317, 1332 (Ct. Int'l Trade 2011) (quoting *Hynix Semiconductor, Inc. v. United States*, 431 F. Supp. 2d 1302 (Ct. Int'l Trade 2006)). Rather, the Commission must analyze all of the statutory factors and provide a rational explanation for its decision on the basis of the entire record.

Finally, with respect to its application of the statute, the Commission must apply the plain language of the statute or, if the statute is ambiguous, the Commission’s statutory interpretation must be otherwise reasonable. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“the issue for the court is whether the agency's answer is based on a permissible construction of the statute”).

B. Issues of Law

1. The Majority Impermissibly Concluded that Because It Could Not Tie Price Underselling to Market Share Gains (*i.e.*, Volume Effects) by Subject Imports, There Were No Price Effects

The injury provisions of the statute give the Commission latitude to consider all relevant economic factors in determining whether there is material injury by reason of the imports under investigation. 19 U.S.C. § 1677(7)(B)(ii). At the same time, the statute *requires* the Commission to evaluate in every case both the volume and the price effects of subject imports. 19 U.S.C. § 1677(7)(C). Indeed, reflecting the importance of both inquiries, the statute calls for the Commission to analyze “volume” and “price” in separate subparagraphs. 19 U.S.C. §§ 1677(7)(C)(i) and (C)(ii). In considering volume effects, the Commission must take account of the absolute level and market share held by the subject imports and increases in either over the period of investigation. 19 U.S.C. § 1677(7)(C)(i). In considering price effects, the Commission is

to consider whether there is underselling and whether the imports otherwise depress or suppress U.S. market prices. 19 U.S.C. § 1677(7)(C)(ii).

The plain language of the statute calls for separate inquiries. On its face, the statute does not require any link between underselling, price depression or price suppression and the volume of subject imports. Indeed, even with respect to the “impact on affected domestic industry” in Section 771(7)(C)(iii), the statute separates the analysis of domestic volume (“output, sales market share ...”) in subsection (I) from the analysis of “factors affecting domestic prices.”

The statute treats volume and price separately because a domestic industry faced with dumped import competition can be materially injured either because it resists the pressure to lower prices and loses market share or because it cuts its price to maintain share.⁵ Indeed, the Commission in several cases has found material injury where subject imports depressed domestic producers’ prices even though the imports were not increasing in volume or market share over the period. *See, e.g., Certain Steel Grating from China, Inv. Nos. 701-TA-465 and 731-TA-1161 (Final), USITC Pub. 4168 at 38-9 (July 2010).*

As a matter of law, the Commission may not conclude as it did here that there are no price effects associated with significant underselling by subject imports simply because the Commission could not correlate the underselling to market share shifts. The statute requires the Commission to consider the effect of subject imports specifically in terms of “underselling” and whether imports “depress{} prices to a significant degree or prevent{} price increases....” 19 U.S.C. §

⁵ *See, e.g.,* House Report No. 96-347, Report of the Committee on Ways and Means on the Trade Act of 1979 at 73. (“In evaluating the first factor, the ITC shall consider whether the volume of imports is or any increase in such volume, is significant. With regard to price, the ITC shall consider whether domestic prices are being significantly undercut or suppressed . . .”); *See, also, Swiff-Train Co., Metropolitan Hardwood Floors, Inc. v. United States*, 904 F. Supp. 2d 1336 (Ct. Int’l Trade 2013).

1677(7)(C)(ii). These inquiries are independent of any analysis of the volume of imports. Here, the Commission failed its statutory obligation to determine whether the pricing of subject imports placed downward pressure on U.S. producer prices apart from any market share shifts.

2. The Majority Provided No Meaningful Explanation for Its Refusal to Collect Pricing Data on Direct Imports or Consider Such Data Supplied by DuPont

a. The Commission should have collected purchase price data for direct imports

DuPont informed the Commission that for shipments of R-134a in bulk, accurate underselling analysis required a comparison of the prices major retailers and repackagers paid their domestic suppliers to the prices the same repackagers and retailers paid for their direct imports from China. P.R. 71; P.R. 128 at Exhibit 1. DuPont reminded the Commission of the testimony at the Staff Conference by an AutoZone witness who stated “...we secured the gas in bulk quantities overseas, had them brought over and packaged in the United States.” *Id.* DuPont also informed the Commission, “...major repackagers are also direct importers of bulk R-134a from China.” *Id.* Indeed, as the dissent noted, the record included importer questionnaire responses from [] establishing that these []

] C.R. 297, Dissent at 6, n. 22.

These direct imports account for a significant portion of total imports.

Nevertheless, in the face of this persuasive evidence of its necessity, the Commission failed to include any request for direct import pricing data in its questionnaires. The Commission is under an affirmative obligation to explain its refusal to consider material issues raised by a party. Its failure to do so is a legal error. *Atlantic Sugar, Ltd. v. United States*, 4 C.I.T. 248, 250, 553 F. Supp. 1055 (Dec. 14, 1982).

Moreover, “the court will not uphold a determination that relies solely on the absence of information that the Commission chose not to pursue.” *Diamond Sawblades Manufacturers Coalition v. United States*, 32 C.I.T. 134, 148 (Ct. Int’l Trade, 2008) (citing *Czestochowa (Stalexport) v. United States*, 19 CIT 758, 785-86, 890 F. Supp. 1053, 1075 (1995)). Here, the Commission asserted that “{s}subject imports were concentrated in three of the pricing products: Products 4, 5, and 6.” P.R. 198 at 17; C.R. 297 at 25. However, the questionnaire responses filed by [] showed that all of these importers were repackagers that “import{} R-134a and repackage{} into smaller containers for resale,” [].⁶ As such, imports by these companies were not Products 4, 5 or 6 (all of which consist of R-134a in 30-lb. or 12-ounce containers). These imports were bulk R-134a. And, the imports by these companies amounted to [] short tons, or [] percent of total imports from China in 2013.⁷ Thus, the majority finding that subject imports were “concentrated” in 30-lb. or 12-ounce containers (Pricing product 4, 5, or 6) was based on the “absence of information” regarding a material issue. As important, the finding that underselling was “mixed” is based on an inadequate record. Underselling only appears “mixed” because there are [] imports of Pricing Product 1. *See* C.R. 297 at V-6 and V-7.

b. Alternatively, the Commission should have relied on evidence submitted by DuPont and showing the prices paid for direct imports

Because the Commission failed to collect data on the pricing of direct imports, DuPont provided evidence showing that their pricing was systematically below the prices paid by the same

⁶ []

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⁷ C.R. 134, 163, 181 and 182 at II-5 (showing total subject imports of [] in 2013). C.R. 297 at IV-12 (showing total subject imports of [] in 2013).

repackagers for R-134a in bulk from their domestic suppliers. The Commission majority dismissed the relevance of the DuPont data in a footnote:

“DuPont provided an exhibit comparing certain repackagers’ annual direct import AUVs to sales AUVs of [] to each of these repackagers . . . We note that these AUVs are not directly comparable to importers’ sales prices, as they do not include any sales markup that would typically be made by an importer selling R-134a in the U.S. market.”

P.R. 198 at 29, n. 122.

This footnote is not based either upon record evidence or reason. The prices paid by repackagers for their direct imports of Chinese bulk supply of course do not include an importer’s markup. The repackagers are themselves the importers. The fact is that repackagers import directly precisely so that that they do not have to pay an importer’s markup. The point, which the Commission majority misses, is that domestic producers that sell in bulk to these same repackagers have to compete with the price the repackagers pay for their direct imports.

Thus, the purchaser questionnaires submitted by [] all showed that all of these importers were purchasing R-134a from U.S. producers.⁸ As such, “the level of trade relevant to . . . injury analysis” is the sales by domestic producers to these repackagers and the corresponding direct sales by Chinese producers to these same repackagers. *See, e.g., Certain Large Residential Washers from Korea and Mexico*, Inv. Nos. 701-TA-488 and 731-TA-1199-1200 (Final), USITC Pub. 4378 at 64, 92 (Feb. 2013); *Crepe Paper Products from China*, Inv. No. 731-TA-1070A (Review), USITC Pub 4148 at 13 (April 2010)(finding “significant adverse effects by subject imports on the domestic prices of crepe

⁸ C.R. 146, 171, 172, 282 at II-1. *See also* C.R. 38 (Mexichem) and 61 (Arkema) at IV-21 (domestic producer responses showing that [] were among the “top ten” customers).

paper during the period examined” and that “the domestic industry sold crepe paper to both retailers and distributors, including forms that were increasingly importing subject crepe paper from China, and that the import purchaser prices for both importer/retailers and importer/distributors were consistently lower than U.S. producers’ selling prices.”);

Tetrahydrofurfuryl Alcohol from China, Inv. No. 731-TA-1046 (Final), USITC Pub. 3709 (July 2004) at n. 42 (declining to place significant weight on price comparisons from differing levels of trade); *Durum and Hard Red Spring Wheat from Canada*, Inv. Nos. 701-TA-430A and 430B and 731-TA-1019A and 1019B (Final), USITC Pub. 3639 (October 2003) at 27, n. 245 (“not directly comparable”).

Having been alerted to the issue and given that the pricing data were central to the question of causation in this case, the Commission at a minimum owed the parties a reasoned explanation for its decision to reject data submitted to it. 19 U.S.C. § 1677f(i)(3)(B). *See Diamond Sawblades, supra*, 32 CIT at 148. The Commission’s “explanation” for its rejection of DuPont’s data does not satisfy this standard. To say that direct imports do not reflect the markup that an importer would charge on resale says nothing about the validity of the evidence of systematic underselling by direct imports in bulk that DuPont placed on the record of the investigation.

C. Issues of Substantial Evidence

1. The Commission Majority Failed to Properly Analyze Volume Effects because It Did Not Take into Account the Period of Investigation Rise in, and Market Share Gains Associated with, Shipments of Subject Imports

a. Market share gained by subject imports in 2012 and maintained in 2013 was in fact at the expense of domestic industry

The first “relevant factor” that the Commission must consider in assessing whether a domestic industry is materially injured by reason of subject imports is “whether the volume of

imports of the merchandise, or any increase in the volume, either in absolute or relative to production or consumption in the United States, is significant.” 19 U.S.C. § 1677(7)(C)(i). Here, the Commission found that “the volume of subject imports ... was significant, both absolutely and relative to apparent U.S. consumption and production.” C.R. 297 at 24; P.R. 198 at 24. At the same time, the Commission majority concluded that this “significant volume” of subject imports did not have any “significant price effects or a significant impact on the domestic industry.” *Id.*

The Commission majority does not dispute that subject imports gained, and the domestic industry lost, market share over the full period of investigation. Rather, the majority dismisses the significance of the full period of investigation data because the “increase in subject import volume that occurred between 2011 and 2012 is attributable to the effects of a domestic supply shortage that began in 2010 and persisted at least through the end of 2011.” P.R. 198 at 21. But having found that the supply shortage ended in 2011, the conclusion that the 2012 market share gain by subject imports was not at the direct expense of the U.S. industry is impossible to reconcile with the evidence.

Thus, the record shows that U.S. producers were operating at [] percent of capacity in 2010. C.R. 106 at III-3, Table III-2. In the same year, subject imports amounted to 4,369 short tons, or only [] percent of apparent domestic consumption. *Id.* at IV-7-8, Table IV-4. However, domestic producers’ capacity utilization had already fallen to [] percent in 2011, where it remained in 2012. *Id.* at III-3, Table III-2; *see also* C.R. 297 at III-5, Table III-3. In 2011, subject imports had increased to [] short tons, or [] percent of apparent domestic consumption. C.R. 297 at IV-12, Table IV-6.

On this record, any supply shortage in 2010 does not account for the continuing increase of subject imports from 2011 and 2012. In fact, following the surge in imports in 2011, U.S.

producers had excess capacity available to supply the market in 2011. In 2013 – by which time even the Commission majority agrees that the shortage had ended – domestic producers’ capacity utilization was [] than in 2011 or 2012. C.R. 297 at III-5, Table III-3.

It follows that, independent of any price effects discussed below, the domestic industry did suffer a loss of market share from 2011 to 2012 which then persisted into 2013. Stated differently, “but for” the dumped imports in 2012 and 2013, the domestic industry would have been able to increase its sales volumes and revenues. *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008) (“{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 industry.”)

b. The majority ignored that shipments of subject imports increased from 2012 to 2013

The majority’s analysis of apparent consumption understated the period of investigation market share gained by subject imports, and market share lost by the U.S. industry, because it impermissibly ignored the import shipment data it had collected. Imports of R-134a are kept in inventory and delivered as demand for air conditioning, which is weather-dependent, dictates. Imports held in inventory do not have market effects. They impact the market when they are shipped. Further, when the Commission uses domestic shipments by domestic producers to measure the domestic industry’s market share, import shipment data are essential to calculate market share shifts on an “apples-to-apples” basis.

Table I-3 of the Commission’s Staff Report sets out the period of investigation data on market share both overall and by market segment for the domestic industry, subject imports, and non-subject imports. They show that (1) the overall market share held by subject imports rose from [] percent in 2011 to [] percent in 2012 to [] percent in 2013, and that (2) subject

imports gained [

] Staff Report at I-23-I-24, Table I-

3, C.R. 291. Because the automotive aftermarket is not only the largest segment of the R-134a market, but in 2011 was the highest priced segment of the market [

]. The Commission

majority ignored entirely these volume effects data in its final determination.

c. The majority also ignored the [] in inventories of subject imports during the POI

In prior cases, the Commission has either relied on “shipments” of imports (out of inventory) to calculate market share or it has considered whether imports in one year may be held in inventory and thereby affect price levels in a subsequent year. Overhanging inventory was precisely the reason that the Commission in *Steel Grating* found that unfairly traded imports continued to have an adverse impact on U.S. prices even though the volume of such imports declined in the last year of the period of investigation. “Although the volume of subject imports and market share decreased *** in 2009, the record shows that ... there was a large build-up of U.S. importers’ inventories of subject imports... severely limiting the domestic industry's ability to gain sales in the market place.” USITC Pub. 4168 at 38-9.

Likewise, in *Orange Juice from Brazil*, the Commission not only considered whether imports entered the U.S. market to fill a shortage in U.S. supply, but went on to consider whether such imports remained in inventory, continuing to depress U.S. prices, after the shortage had ended. *Certain Orange Juice from Brazil*, Inv. No. 731-TA-1089 (Final), USITC Pub. 3838 at 17-28 (Mar. 2006). The Commission found that “the amount of Brazilian subject imports held in U.S. inventory increased {over the POI}, thereby exceeding the volume of imports necessary to counter domestic production shortfalls.” *Id.* at 20. On appeal, the court criticized the Commission for

failing to examine the reasons for the large inventory of imported orange juice and remanded the case. *Tropicana Products, Inv. v. United States*, 31 C.I.T 548, 555, 484 F. Supp. 2d 1330, 1337 (Ct. Int'l Trade 2007). In this case, by comparison, the Commission did not even begin to analyze the issue.

Here, importers' inventories [] percent from 2011 to 2012, and [] in 2013. C.R. 279 at VII-10, Table VII-3. Although inventories []]. This [] adversely affected domestic prices..

Moreover, had the Commission measured import market share based on shipments of imports, as shown in Table I-3, C.R. 279 at I-23-24, it would have captured the significant increase in import penetration from 2012 to 2013. Alternatively, had the Commission considered the [] of subject imports, it would have observed that the subject imports “thereby exceed{ed} the volume of imports necessary to counter domestic production shortfalls.” USITC Pub. 3838 at 20. Having ignored these data, its determination is unsupported by substantial evidence.

2. The Evidence Contradicts the Majority's Findings Regarding the Price Effects of Subject Imports

As shown in Section B(1) above, the statute requires the Commission to consider specifically whether the subject imports are underselling U.S. producers' prices, are causing price depression or are suppressing price increases needed by the industry to cover costs. 19 U.S.C. 1677(7)(C)(ii). By statute, the impact of subject imports on U.S. price levels can be independent of any volume effects by reason of the subject imports. Quite apart from the legal flaws in its analysis discussed above, the Commission's analysis of the “correlation” between falling prices and market share is itself unsupported by the record or basic principles of economics.

At the outset, the Commission majority recognized price as an “important factor in purchasing decisions” and also that there “is a high degree of substitutability between the domestic like product and the subject imports.” C.R. 297 at 25, P.R. 198 at 25. Given these conclusions of fact, elementary economics leads to the conclusion that underselling by subject imports would force U.S. producers to either cede market share or lower their own prices to remain competitive. And, in fact, the Commission found that there “were significant quantities of subject imports that undersold the domestic like product during each year of the POI ...” and also found that “domestic industry’s prices declined over the POI.” C.R. 297 at 27-28, P.R. 198 at 18-19, 33-34.

However, the Commission majority found no cause and effect relationship between underselling and the fall in U.S. market prices for two reasons. First, the Commission concluded that “{a}s the supply situation normalized in 2012, prices declined. Therefore, the decline in prices during the POI is associated with the cessation of the supply shortage that temporarily inflated prices.” C.R. 297 at 28; P.R. 198 at 19. Second, the Commission majority concluded that because

the only gains in subject import market share occurred from 2011 to 2012, when subject imports increased their market share from [] percent to [] percent and U.S. producers’ U.S. shipments fell from [] percent to [] percent of the U.S. market . . . this increase in market share was a function of purchasers’ response to the supply shortages that persisted through at least the end of 2011. Thus, the supply situation of the domestic industry, rather than underselling by subject imports, explains the shifts in market share for subject imports.

C.R. 297 at 27; P.R. 198 at 18.

These passages (and others), which capture the essence of the majority’s reasoning on the price effects of subject imports, are a monument to imprecision of thought and mischaracterization of the evidence.

- a. *By the majority's own logic, market price levels were directly affected by the increase in subject imports and the end of the supply shortage*

The Commission majority claims that it could not find any “correlation between observed underselling and shifts in market share for subject imports.” C.R. 297 at 27; P.R. 198 at 18.

However, the next two sentences of its determination confirm the very correlation between underselling and market share gains by subject imports that the majority says it could not find:

“There were significant quantities of subject imports that undersold the domestic like product during each year of the POI, but the only gains in subject import market share occurred from 2011 to 2012, when subject imports increased their market share from [] percent to [] percent and U.S. producers' U.S. shipments fell from [] percent to [] percent of the U.S. market. As noted above, however, we earlier found that this increase in market share was a function of purchasers' response to the supply shortages that existed through at least the end of 2011. Thus, the supply situation of the domestic industry, rather than underselling by subject imports, explains the shifts in market share.”

Id.

When the Commission majority asserts that “the decline in prices during the POI is associated with the cessation of the supply shortages” it is affirming the link between domestic price levels and the rising supply of R-134a. P.R. 198 at 19. Yet, as the Commission itself found, the supply shortage eased because imports from China entered the U.S. market. The decline in U.S. market prices was therefore the result of the increased supply of R-134a, including Chinese imports.

By the Commission's own reckoning the supply shortage in question ended at the beginning of 2012. There is no evidence to suggest that the domestic industry was incapable of supplying U.S. market demand over the full year 2012 and, therefore, no support for the majority's conclusion that “the supply situation of the domestic industry explains” the 2012 shift in market share. To the contrary, in 2012, the domestic producers had excess capacity. C.R. 297 at III-5. It

follows that the increase in Chinese imports from 2011 to 2012 is explained by the fact that [] of subject imports by volume undersold U.S. producers' prices.⁹ The majority's finding that a supply shortage accounts for the decline in price levels cannot be squared with this record.

b. The record contradicts the conclusion that falling prices in 2013 represented a return to "normal"

Even if the Commission meant to say that the "significant quantities" of underselling that it found pushed prices back to their normal levels and, therefore, was not a cause of material injury, its determination that subject imports did not depress U.S. prices to an unsustainable level would find no support in the record evidence. As explained further below, the domestic industry's operating income [] in by the first half of 2014. *Id.* at 34 and n. 146. A radical []

[] is not "a return to normal," but rather, is the definition of "material injury." *See* 19 U.S.C. § 1677(7)(A) and 1677(7)(C)(ii)(II). The Commission cannot rationally characterize a fall in market prices to below cost levels as a return to "normal".

3. The Commission Majority Ignored Shipment and Inventory Data which Established a Clear Correlation between Observed Underselling and Rising Import Market Share

a. Subject imports increased even after the shortage had ended and then remained in the market, continuing to drive down domestic prices

As discussed above, the Majority examined the relationship between market share shifts and underselling by subject imports on the basis of import data (which includes imports held in

⁹ *See* C.R. 297 at V-24, Table V-12 []

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inventory) rather than data on shipments of imports. In other words, the Commission treated imports into inventory in 2012 as if those imports were “consumed” in 2012. This approach not only distorts the calculation of market shares, it significantly alters the trend in sales of imported R-134a relative to the trend in prices.

To be clear, the underselling data relied on by the Commission are based on the volume and values of *shipments* by domestic producers and subject imports. The data relied on by the Commission for its calculation of the U.S. industry’s market share are, similarly, *shipment data*. The only data that permit a meaningful analysis of the “correlation” between the observed underselling and shifts in market shares for subject imports vis-à-vis shipments of the domestic like product are the data collected by the Commission on *shipments* of imports. These data, which are set out in Table I-3 of the Staff Report, show the market share of subject imports [

]. C.R. 297 at I-24, Table I-3.

In addition, as shown in Section C(1)(c), above, inventories of subject imports [] during the period of investigation. C.R. 297 at VII-13. Hence, the continuing decline in price levels in 2013 was in fact related to the increasing volume of subject imports present in the U.S. market. The [] in inventories of imports in 2014 likewise explains why price levels were still falling in the first half of 2014 – which is precisely the reason that the industry [].

Contrary to the majority’s assertion, these data show an unequivocally positive correlation between underselling and market share gains by subject imports throughout the period of investigation. The Majority’s findings to the contrary are not supported by substantial evidence.

- b. *Analysis of the impact of subject imports on prices in the automotive aftermarket confirms that increasing imports severely depressed price levels quite apart from any lingering effects of a supply shortage*

The data collected by the Commission relating to shipments into the auto aftermarket underscore the relationship between market share gains by subject import and falling market prices. The automotive aftermarket is the largest segment of the R-134a market, accounting for [] percent to total shipments by quantity. C.R. 297 at I-23, Table I-3. The Commission majority acknowledged that subject imports are heavily concentrated in the automotive aftermarket,¹⁰ and further acknowledged that prices fell further in that segment of the market than in other segments. *Id.* at 28.

In terms of share of the automotive aftermarket, subject imports [] percent in 2011 to [] percent in 2012 and [] percent in 2013. C.R. 297 at I-23 and I-24, Table I-3. Over the same period, the domestic industry's market share fell from [] percent in 2011 to [] percent in 2012, and to [] percent in 2013. At the same time, average U.S. producer prices of R-134a shipped into the automotive aftermarket [] per short ton in 2011 to [] to [] in 2013. C.R. 297 at III-11, Table III-6. Based upon this record evidence, the correlation between market share gains by subject imports, underselling by subject imports, and falling domestic producer prices is indisputable.

¹⁰ C.R. 297 at 23, 25; P.R. 198 at 31, 22. The data in the Staff Report at Table I-3 show that in 2014 over [] percent of imports from China were shipped into the auto aftermarket. Staff Report at I-23, Table I-3, C.R. 297.

4. The Record Established Significant Underselling of Domestic Producer Prices by the Dumped Chinese Imports as Well as a Link Between Import Prices and Domestic Prices

The Commission majority misleads when it states that the “pricing data on the record demonstrate that price declines occurred whether subject imports oversold or undersold the domestic like product and regardless of whether subject imports were present in the market for a particular pricing product.” C.R. 297 at 29, P.R. 198 at 19. As the dissent pointed out:

“The pricing product data show significantly larger price declines in the products where U.S. producers face competition from subject imports. For the five products where subject imports and the domestic like product competed head-to-head, the domestic industry’s prices declined between [] percent and [] percent. For the one pricing product where U.S. producers did not face import competition (*i.e.*, Product 3), their price declined by [] percent. Thus, the domestic industry’s prices declined far more sharply in the products facing direct subject import competition.”

C.R. 297, Dissent at 5-6; P.R. 198 at 34. In other words, the record evidence demonstrates that domestic industry prices declined for the products that faced import competition at about double the rate of products that did not face import competition.

Moreover, the Commission majority is disingenuous in its characterization of the underselling data:

We find that there are mixed instances of underselling and overselling by subject imports. The record shows more instances of overselling than underselling by subject imports on a quarterly basis and more underselling than overselling on a volume basis.

C.R. 297 at 26; P.R. 198 at 18.

The facts are as follows. *First*, the quarterly incidence of underselling is skewed by the Commission’s refusal to collect pricing data for direct imports of Pricing Product 1 (*i.e.*, bulk shipments to repackagers). But for the Product 1 data, the quarters of underselling exceed the quarters of overselling. *Second*, to dismiss the volume data as “more underselling by subject imports on a volume basis” without mentioning the fact that [] of the volume of

imports undersold the domestic like product fails to capture what the data actually show — *i.e.*, that the underselling was pervasive.

In addition, the Commission majority impermissibly dismissed confirmed lost sales of [] and nearly [] in confirmed lost revenue allegations. C.R. 297 at V-25, Tables V-13, V-14; Dissent at pg. 8, C.R. 297. It did so by means of a footnote which in its entirety reads as follows:

“We acknowledge that there were some instances of confirmed lost sales and revenues. These, however, do not outweigh the other data in the record which, taken as a whole, show the lack of significant price effects.”

C.R. 297 at 31, n. 132; P.R. 198 at 21, n. 132.

Lost sales/lost revenue allegations are often difficult to document and confirm. As is often the case, most purchasers in the underlying investigation did not reply to the Commission’s requests for lost sales/lost revenue confirmation. C.R. 297 at V-13 and V-14. Under these circumstances, the dollar value of the confirmed lost sales and confirmed lost revenues is extraordinary. Sales of [] amount to over [] percent of total sales in 2013 and [] in 2013. The lost sales and lost revenues represent a material amount of lost business and lost profits. To say that “they do not outweigh the other data in the record” without further explanation is to dismiss significant contrary evidence without a reasoned explanation.

5. The Presence of Dumped Imports at Low Prices Caused Domestic Profits to Decline and Ultimately Become Losses Well Outside the Period of Any Supply Shortage

During the period of investigation, the domestic industry saw its revenues decline from [] in 2011 to [] in 2013 (or by [] percent). C.R. 297 at D-3. Over the same period, the industry’s operating income fell from [] to

[], or by [] percent. *Id.* The majority correctly characterized the decline in operating performance as “severe,” but discounted the volume or pricing of subject imports as a cause of the decline. Specifically, the Commission found “no correlation between declines in operating performance, which occurred throughout the POI, and changes in subject import volume and market share.” C.R. 297 at 36; P.R. 198 at 24. The majority’s inability to find a correlation between the decline in domestic producer operations and market share is not supported by its own data.

Most obviously, domestic industry operating profits fell from 2012 to 2013 – outside even any expansive interpretation of the “shortage” period. By 2013, operating profits were []. C.R. 297 at D-3. Then, in the first half of 2014, well outside the shortage period, operating profits []

Id.

By far the greatest period of investigation drop in the domestic industry’s operations occurred in the automotive aftermarket. The Commission’s data show that the domestic industry’s average sales prices in this segment of the market fell further than in any other segment, and that the domestic industry [] of the period of investigation:

Table 2				
Decline in Average Unit Value (\$/ST) of Domestic Industry Sales				
	2011	2012	2013	2011-2013 Change
Total U.S. Shipments Excluding Auto Aftermarket	[]	[]	[]	- []
Aftermarket Shipments	[]	[]	[]	- []

Source: Staff Report at Table III-6, C.R. 297.

Table 3				
Domestic Producer Revenue on Domestic Shipments				
	2011	2012	2013	2011-2013 Change
Total Including Auto Aftermarket	[]	[]	[]	- []
Auto Aftermarket	[]	[]	[]	- []

Source: Staff Report at Table III-6, C.R. 297.

Table 4				
U.S. Aftermarket Share				
	2011	2012	2013	2011-2013 Change
Domestic	[]	[]	[]	[]
Subject Imports	[]	[]	[]	+ []

Source: Staff Report at Table I-3, C.R. 297.

These data, which are not in dispute, are taken from the Commission's Staff Report. They show that [] percent of the 2011-2013 fall in the U.S. industry's revenues was directly attributable to declines in the volume and value of its automotive aftermarket shipments. The Commission majority's inability to correlate the decline in the U.S. industry's operating performance which occurred mainly in the automotive aftermarket with price undercutting and market share gains by subject imports in the automotive aftermarket reflects a conclusion that is contradicted by the record evidence.

6. Given Substantial Errors in the Majority's Analysis of Causation, the Conclusion that Subject Imports Do Not Threaten to Cause Material Injury Is Equally Flawed

The Commission majority found that "any increase in subject import market share {was} due to the domestic supply shortage rather than the pricing of the subject imports." P.R. 198 at 28. Thus, again, the majority persisted in finding that Chinese imports had increased from 2011 to 2012 only because of the shortage and not due to dumped prices. Yet, as demonstrated above, this

conclusion is not supported by the record evidence or consistent with the statute. Even assuming that Chinese imports arrived in the U.S. market due to a shortage, those imports did not cede back their market share after the shortage ended. Instead, the subject imports undersold U.S. producers' prices, dumping R-134a by an average margin of 280.67. Whether or not subject imports increased on the basis of a shortage, such imports are not entitled to maintain their market share on the basis of dumped prices or to continue cutting prices to the point that U.S. producer profits disappear.

When Commission "findings of subsidiary fact, or inferences therefrom" are not supported by substantial evidence, all of the ultimate conclusions that rest upon such findings are implicated, and the court may remand the determination with respect to any conclusion that becomes doubtful "with the erroneous finding removed from the picture." *Diamond Sawblades, supra*, 32 C.I.T. at 151, quoting *U.S. Steel Group, a Unit of USX Corp. v. United States*, 18 C.I.T. 1190, 1215, 873 F. Supp. 673, 696 (Ct. Int'l Trade 1994). Here, the Commission majority found no link between the dumped imports and the falling price levels in the U.S. market. Inasmuch as that finding lacks any rational basis on the record in this case, the same finding cannot be the basis for a negative threat determination. Accordingly, the determination should be remanded both to reconsider the material injury determination and the threat determination.

D. Conclusion and Relief Sought

For the reasons explained above, the majority misapplied the law to the facts before it and reached conclusions of material fact that are unsupported by substantial evidence. Chemours respectfully requests the Court to remand to the Commission its final negative determination for reconsideration with instruction to:

1. Explain the refusal to collect pricing data on imports of R-134a in bulk by repackagers and retailers.

2. Explain if there was a reason other than the absence of an importer's markup to reject the data comparing the prices paid by repackagers for their direct imports of R-134a in bulk to the prices paid by the same repackagers for bulk purchasers from their domestic suppliers. If not, explain why the absence of an importer's markup on direct imports is necessary for the price comparisons at issue.
3. Explain why market share shifts in favor of subject imports are necessary to support a finding of price depression or suppression under the antidumping statute.
4. Explain how the Commission could rationally conclude that there was "no correlation between observed underselling and shifts in market share" when (1) there was underselling throughout the period of investigation, and (2) imports rose sharply between 2011 and 2012, (3) fell off slightly between 2012 and 2013 and, therefore, (4) rose sharply over the full period of investigation.
5. Explain why the better benchmark to assess the "correlation" between market share shifts and underselling was not the data on shipments of imports when (1) the underselling data are based on shipments and (2) the U.S. industry's market share is by reference to its domestic shipments.
6. Explain why the shipment data which show year-on-year market share gains by subject imports do not show a "correlation between the observed underselling and shifts in market shares for subject imports."
7. Having recognized that imports of R-134a from China are heavily concentrated in the automotive aftermarket, explain why the market share gains by subject imports in that segment of the market do not show a correlation between observed underselling and shift in market shares for subject imports.
8. Point to evidence that the domestic industry was unwilling or unable to supply spot demand in 2012 and 2013.
9. Explain the finding of no correlation between subject imports and the severe POI drop in the domestic industry operating income when [] of the period of investigation drop in the domestic industry's revenue was associated with the decline in the volume of, and revenue from, automotive aftermarket share, where subject imports both gained market share and undercut U.S. producer prices throughout the period of investigation.
10. In light of the above described errors, and in the absence of a finding of material injury, explain how the domestic industry is not threatened imminently by subject imports.

Respectfully submitted,

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Certification of Compliance with Chambers Procedures 2(B)(1)

The undersigned hereby certifies that the foregoing brief contains 11,614 words according to the word count function of the word-processing system used to prepare this brief, exclusive of the corporate disclosure statement, table of contents, table of authorities, and certificates of counsel, and therefore complies with the maximum 14,000 word count limitation set forth in the Standard Chambers Procedures of the U.S. Court of International Trade.

BY: /s/ Jonathan M. Zielinski

necessary for the price comparisons at issue, 3) explain why market share shifts are necessary to support a finding of price depression or suppression under the antidumping statute, 4) explain how it could rationally conclude that there was “no correlation between observed underselling and shifts in market share” when (a) there was underselling throughout the period of investigation, and (b) imports rose sharply between 2011 and 2012, (c) fell off slightly between 2012 and 2013 and, therefore, (d) rose sharply over the full period of investigation., 4) explain why the better benchmark to assess the “correlation” between market share shifts and underselling was not the data on shipments of imports when (a) the underselling data are based on shipments and (b) the U.S. industry’s market share is by reference to its domestic shipments, 5) explain why the shipment data which show year-on-year market share gains by subject imports do not show a “correlation between the observed underselling and shifts in market shares for subject imports,” 6) explain why the market share gains by subject imports in that segment of the market do not show a correlation between observed underselling and shift in market shares for subject imports, 7) point to evidence that the domestic industry was unwilling or unable to supply spot demand in 2012 and 2013, 8) explain the finding of no correlation between subject imports and the severe POI drop in the domestic industry operating income when over two-thirds of the period of investigation drop in the domestic industry’s revenue was associated with the decline in the volume of, and revenue from, automotive aftermarket share, where subject imports both gained market share and undercut U.S. producer prices throughout the period of investigation, 9) explain how the domestic industry is not threatened imminently by subject imports.

Dated: _____, 2015
New York, NY

JUDGE