UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE JENNIFER CHOE-GROVES, JUDGE

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, *Plaintiff*, v. UNITED STATES, *Defendant*, *and* COOPER TIRE & RUBBER COMPANY, CHINA RUBBER INDUSTRY ASSOCIATION, and CHINA CHAMBER OF COMMERCE OF METALS, MINERALS AND CHEMICALS, *Defendant-Intervenors*.	**Court No. 17-00078** **NON-CONFIDENTIAL VERSION**

PLAINTIFF'S REPLY BRIEF TO DEFENDANT AND DEFENDANT-INTERVENORS' RESPONSE BRIEFS

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Dated: November 28, 2017

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Plaintiff, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (the "USW"), submits this reply brief pursuant to USCIT Rule 56.2 and this Court's June 28, 2017 Scheduling Order.

STANDARD OF REVIEW

Defendant and Defendant-Intervenors claim Plaintiff has impermissibly asked this Court to "reweigh" the evidence in order to achieve a remand of the Commission's negative injury determination. *See, e.g.,* Defendant Brief ("ITC Br.") at 1; Defendant-Intervenors Brief ("Respondents Br.") at 4. This is not the case. To the contrary, Plaintiff only asks this Court to apply the proper standard of review and "hold unlawful any determination, finding, or conclusion found … to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

Plaintiff contests three Commission majority conclusions as contrary to law: (1) its reliance on a lack of price depression in its negative underselling determination; (2) its failure to analyze the domestic industry's performance in the context of the business cycle and conditions of competition in its impact determination; and (3) its reliance on the absence of present injury in its negative threat determination. USW Brief ("USW Br.") at 21, 27-31, 43.

Plaintiff further contests various aspects of the majority's determination as unsupported by substantial evidence. *Id.* at 6-27, 32-45. Plaintiff identified ample record evidence that fairly detracted from and seriously undermined each of the challenged findings, and Plaintiff demonstrated that the Commission majority either inadequately addressed this evidence or never addressed it at all.

The Commission "'must address significant arguments and evidence which seriously undermine its reasoning and conclusions.'" *Nucor Corp. v. United States*, 33 CIT 157, 182, 605

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F. Supp. 2d 1361, 1381 (2009) (citation omitted). The Commission must also "articulate a … 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). And it must "explain its actions with sufficient clarity to permit 'effective judicial review.'" *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 (Fed. Cir. 2005) (citation omitted).

In reviewing the Commission's determination, the Court must consider the record as a whole, not only the evidence that justifies the Commission's findings, but also whatever evidence "fairly detracts from its weight." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (citation omitted). "The court cannot defer to a decision which is based on inadequate analysis or reasoning." *USX Corp. v. United States*, 11 CIT 82, 88, 655 F. Supp. 487, 492 (1987). Instead, an agency's "failure to consider evidence that supports the possibility of an alternative conclusion … render{s} its determination unsupported by substantial evidence." *Ceramark Technology, Inc. v. United States*, 38 CIT ___, ___, 11 F. Supp. 3d 1317, 1325 (2014).

As demonstrated in Plaintiff's opening brief and discussed further below, that standard is met here, meriting remand.

ARGUMENT

I. The Majority's Conditions of Competition Findings Were Unsupported by Substantial Evidence

A. Substitutability

Defendant misconstrues Plaintiff's challenge as contesting the determination that there was a moderate-to-high degree of substitutability between domestic tires and subject imports. ITC Br. at 10. Instead, Plaintiff challenges the majority's determination that, despite this moderate-to-high degree of substitutability, purchasers perceived sufficient differences in features such as quality, warranties, retreadability, service, and brand that they would purchase

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higher-priced domestic tires. PSR at 24.[1] The majority failed to articulate a rational connection between this conclusion and record evidence that fairly detracted from it, including:

1) 73% of firms reported domestic and Chinese tires were always or frequently interchangeable. *Id.* at Table II-15.

2) Half or more of purchasers reported Chinese and domestic tires were comparable across 13 out of 20 factors surveyed, including quality, availability, reliability, consistency, and warranties; majorities rated domestic tires as superior on only 6 factors. *Id.* at Table II-14.

3) 90% or more of purchasers reported both Chinese and domestic tires usually or always met minimum quality specifications. *Id.* at Table II-17.

4) Most domestic and Chinese tires carried similar retreading warranties, and purchasers reported Chinese tires were even more likely than domestic tires to have warranties. *Id.* at II-14 – II-15 and Tables II-10, II-12.

5) 59% of firms reported branded and unbranded tires were at least somewhat competitive with each other. *Id.* at II-17.

6) 94% of purchasers reported buying U.S.-produced tires was not an important factor in their purchasing decisions. *Id.* at II-14.

While the majority cited data from the first two sources, they did not adequately explain how the data supported their conclusions. *Id.* at 23-24 and nn.142, 143, 150. In addition, they never addressed the evidence in items 3 through 6 above, though it seriously undermined their conclusions. *Id.* at 23-26.

While 51% of responding firms reported that differences other than price between domestic and Chinese tires were always or frequently significant, [ ] of the nine purchasers that reported such significant differences [

]. PSR at Table II-18; Petitioner's Final Comments (Feb. 16, 2017) ("Pet. Final Comments") (P.R. 194, C.R. 381) at 6. Thus, any perceived non-price differences were not significant enough to [

[1] Citations to the Commission's public staff report and views ("PSR") and confidential staff report and views ("CSR") are to P.R. 198 and C.R. 384, respectively.

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]. The majority addressed the data in Table II-8, but never addressed the [ ] discussed in Petitioner's Final Comments. PSR at 23 and n.149.

Defendant merely reiterates the majority's findings without explaining how their determination that purchasers perceived non-price differences to be significant can be reconciled with the record evidence that domestic and Chinese tires were perceived as substitutable – [ ] – by responding firms. ITC Br. at 11. For all these reasons, the Commission majority's findings regarding the significance of non-price differences between Chinese and domestic tires were unsupported by substantial evidence.

B. Tiers

The Commission majority found the truck and bus tires market was divided into tiers based on varying levels of quality, service, and price, that the largest share of domestic producers' sales were concentrated in tier 1, and that certain purchasers only considered tier 1 tires and were willing to pay more for those tires. PSR at 24-25. The majority failed to articulate a rational connection between these conclusions and record evidence that fairly detracted from them, including:

1) A [ ]. CSR at Table II-13; USW Br. at 11-12.

2) [ ] Petitioner's Pre-Hearing Brief (Jan. 13, 2017) ("Pet. PreHB") (P.R. 130, C.R. 325) at 35-36.

3) 73% of purchasers reported competition between tires in different tiers. PSR at II-16.

4) Tires in different tiers were advertised side-by-side by the same sellers to the same customers for the same applications. Pet. PreHB at 40-41 and Exs. 23, 24.

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5) 80% of purchasers reported customers compared prices of tires in different tiers when making purchasing decisions. PSR at II-17.

6) All domestic producers who stated tiers exist, as well as most purchasers, reported that purchases shifted between the tiers over the period. *Id.* at II-16 – II-17.

7) All three major domestic producers launched lower-end brands to compete over the period. Pet. PreHB at 41-42 and Exs. 5, 16.

8) Witnesses both for and against relief testified that fleets will switch to lower-tier tires to save money. Hearing Tr. at 96-97, 104-105, 219-221, 225, 233, 234, 236-37.

While the majority cited data from the first and third sources, they did not adequately explain how the data supported their conclusions. PSR at 24-25 and nn.158, 159, 161. In addition, they never addressed the record evidence in item 2 and items 4 through 8 above, though it seriously undermined their conclusions. *Id.* at 23-26.

Defendant reiterates the majority's conclusions regarding tiers, but fails to address how the evidence cited above did not fairly detract from those conclusions and thus requires explanation from the Commission. ITC Br. at 15-19. For example, the majority relied on certain pieces of testimony to find some purchasers prefer higher-tier tires, but, as noted above, it failed to address other testimony indicating that purchasers will in fact buy lower-tier tires to save money. Defendant counters that witness credibility is a matter within the Commission's discretion. *Id.* at 18-19. This is post-hoc rationalization. The majority never stated that any testimony was not credible, and they ignored the testimony cited above even though it was from the very same witnesses they relied on elsewhere.

Witness	Hearing Tr. Cited by Majority	Hearing Tr. Not Discussed by Majority
Chamblee	83-84	96-97, 104-105
Pearson	189	225, 234, 236-237
Schroeder	211-212	219-221, 233

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The Court should thus reject Defendant's argument and find that the failure to address these witness statements, as well as other record evidence that undermined their conclusions, rendered the majority's findings about tiers unsupported by substantial evidence.

C. The Importance of Price

Despite the importance of price, the majority concluded that alleged non-price distinctions such as quality, retreadability, warranties, service, and brand would lead purchasers to buy higher-priced domestic tires instead of lower-priced tires from China. PSR at 24-25. The majority failed to articulate a rational connection between this conclusion and record evidence that fairly detracted from it, including:

1) 80% of purchasers reported price was a "very important" purchasing factor, while much fewer purchasers reported that brand (53%), warranties (45%), retreadability (37%), or service (32%) were very important. *Id.* at Table II-7.

2) While large majorities of purchasers reported that quality meeting industry standards, availability, product consistency, and reliability of supply were also very important purchasing factors, half or more of purchasers also reported that domestic and Chinese tires were comparable on each of these factors. *Id.* at Tables II-7, II-14.

3) Price was the only top purchasing factor where most purchasers reported domestic and Chinese tires were not comparable, with 67% reporting Chinese tires were lower-priced. *Id.* at Table II-14.

4) 70% of purchasers reported price was one of their top three purchasing factors, more than any other factor other than quality; no purchasers reported that tier or retreadability was an important purchasing factor, [

]. *Id.* at Table II-6; USW Br. at 9-10.

5) 85% of purchasers reported they sometimes or usually buy the lowest-priced product. *Id.* at Table II-8.

6) 78% of purchasers reported shifting from domestic to Chinese tires over the period, 79% of those that did so reported Chinese prices were lower, and 64% of those that switched confirmed lower Chinese prices were the primary reason – thus, fully half of all purchasers reported switching from domestic to Chinese tires primarily because of lower prices. *Id.* at V-17.

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7) [ ] of the nine purchasers that reported significant non-price differences between domestic and Chinese tires [

].

Id. at Table II-18; Pet. Final Comments at 6.

Though the majority cited some portions of this data in its discussion on the importance of price and non-price factors (except items 6 and 7), they failed to specifically address the relevant facts set out above, much less explain how those facts could be squared with their conclusion that purchasers will buy higher-priced tires based on alleged non-price differences.

Defendant claims the majority never found that non-price factors were "more important" than price. ITC Br. at 12-13. Though the majority did not use those exact words, their conclusion that purchasers would buy higher-priced tires because of non-price differences necessarily implies that those non-price features are "more important" than price. As outlined above, that finding was contradicted by ample record evidence demonstrating the opposite. Price was more important for many purchasers, and it led at least half of them to switch from domestic to Chinese tires. The majority's determination was thus unsupported by substantial evidence.

II. The Majority's Negative Adverse Price Effects Determination Was Unsupported by Substantial Evidence and Otherwise Contrary to Law

A. Underselling

The majority acknowledged that underselling was pervasive, and at high and increasing margins, during the period of investigation ("POI"). PSR at 27-28 and n.180. They nonetheless found underselling was mitigated in part by a lack of price depression. *Id.* at 30. This was contrary to law. The Commission may not base a negative underselling determination solely on a lack of price depression. *Altx, Inc. v. United States*, 25 CIT 1100, 1109-10, 167 F. Supp. 2d 1353, 1365 (2001). While Defendant cites cases stating underselling alone does not demonstrate injury, those cases were based on other facts that rendered underselling insignificant; they do not

contradict *Altx*. ITC Br. at 23-24. Indeed, the Commission has often found underselling to be significant if it permits subject imports to gain market share at the domestic industry's expense, even in the absence of any price depression or suppression. *See, e.g., Phosphor Copper from Korea*, Inv. No. 731-TA-1314 (Final), USITC Pub. 4681 (Apr. 2017) at 16; *Certain Amorphous Silica Fabric from China*, Inv. Nos. 701-TA-555 and 731-TA-1310 (Final), USITC Pub. 4672 (Mar. 2017) at 20; *Certain New Pneumatic Off-the-Road Tires from India and Sri Lanka*, Inv. Nos. 701-TA-552-553 and 731-TA-1308 (Final), USITC Pub. 4669 (Mar. 2017) at 29-30.

The same facts were present here. As margins of underselling increased, subject imports gained 4.9 percentage points of market share, all at the direct expense of the domestic industry. PSR at Table C-1. In the aftermarket, where subject imports were concentrated, [

]. Petitioner's Post-Hearing Brief (Jan. 31, 2017) ("Pet. PostHB") (P.R. 161, C.R. 356) at Broadbent #3. Widening underselling margins also correlated with domestic producers losing market share to subject imports for each of the four aftermarket pricing products. PSR at Tables V-3 – V-6.[2] In sum, all of the data showed that underselling allowed Chinese tires to seize market share from domestic producers, directly contradicting the majority's finding that underselling did not deprive the domestic industry of shipments and was therefore not significant. *Id.* at 29-30.[3]

The fact that 78% of purchasers reported shifting from domestic to Chinese tires over the period, and that 64% of those confirmed lower Chinese prices were the primary reason for the switch, was further probative evidence of the significant adverse effect of Chinese underselling. *Id.* at V-17. The majority discounted this important evidence based on faulty assertions.

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[2] Margins of underselling and the ratio of Chinese to domestic shipments increased for each product from the first quarter of 2013 to the last quarter of 2015, before the petitions were filed. *Id.*

[3] The majority also found a lack of available domestic capacity mitigated underselling, an unsupported conclusion addressed in Section III.B, below.

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First, the majority noted that one of the purchasers who shifted a large volume of sales elsewhere indicated domestic supply constraints, but [

]. *Id.* at 30 n.194; CSR at 42 n.194, Table V-10.

Second, the majority claimed the purchaser accounting for the most lost sales ([

]) only "modestly" reduced the share of its total purchases from domestic producers. PSR at 30 n.194; CSR at 42 n.194. [

] [

]. [ ] [

]

Third, the majority further discounted the evidence of lost sales due to underselling by characterizing the reported shifts as "minor." PSR at 30 n.194. Yet the purchasers who reported switching primarily based on price together accounted for [ ] of the total increase in Chinese imports and [ ] of the increase in Chinese market share at the expense of domestic producers. CSR at Table V-10; PSR at Table C-1; USW Br. at 20. The fact that a [ ] of the market share domestic producers lost to Chinese imports was due primarily to lower Chinese prices (based on purchasers' own reports) seriously undermined the Commission majority's conclusion that shifts due to lower prices were "minor" and thus that underselling was not significant.

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For all these reasons, the majority's negative underselling conclusion was unsupported by substantial evidence and otherwise contrary to law.

B. Price Depression

While significant adverse price effects may be based on significant underselling alone, there was also significant price depression by subject imports. The majority's determination that price declines were attributable solely to raw material costs and not subject imports was contradicted by the following evidence:

1) Prices for domestic tires fell much more rapidly in the aftermarket (where subject imports were concentrated and underselling was universal) than in the OEM market, where there were fewer subject imports. PSR at Table V-7; CSR at Table V-7.

2) Unit raw material costs and unit prices fell by [ ] in the OEM market; prices for the exact same products in the import-heavy aftermarket fell by much more than unit raw material costs. USW Br. at 22.[4]

3) Subject import prices fell faster than domestic prices. *Id.* at 24.

4) Underselling margins varied widely and grew over time, and thus could not be attributed solely to a consistent premium for domestic tires. PSR at Tables V-3 – V-6.

5) Domestic producers reported low Chinese prices impacted their operations, and purchasers reported domestic producers lowered prices to compete with subject imports. USW Br. at 25.

Defendant reiterates the majority's findings, but it does not explain how the facts above do not fairly detract from and seriously undermine those findings.

With regard to the fact that prices declined faster in the aftermarket than the OEM market, for example, Defendant repeats the majority's assertion that OEM sales were subject to

[4] Defendant claims Plaintiff is challenging the Commission's price comparison methodology. ITC Br. at 21. Instead, we identify record evidence that fairly detracted from the majority's statement that raw material costs fell faster than prices by "any metric observed." PSR at 28. In any event, while the Commission has broad discretion to select its methodologies, its choice must be reasonable. *Shandong TTCA Biochemistry Co. v. United States*, 35 CIT ___, ___, 774 F. Supp. 2d 1317, 1329 (2011).

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long-term, fixed-price contracts which supposedly protected OEM prices from downward pressure more than aftermarket prices. ITC Br. at 21-22. As a preliminary matter, long-term contracts only accounted for 52.3% of the domestic industry's OEM sales. PSR at Table V-2. In addition, one of the three domestic producers that sold under long-term OEM contracts [

]. USW Br. at 23. The majority never addressed this fact. They also failed to address sworn testimony from an importer of Chinese tires: "Pricing went down in all segments of the markets. This is especially the case in channels such as OEM … where contracts are in place with raw material indexes to lower customer pricing in line with production cost decreases." Hearing Tr. at 154.

These facts established that both OEM and aftermarket prices reflected falling raw material costs. The disparity in price declines for the exact same products in the two markets thus cannot be explained by falling raw material costs impacting the markets differently. Where the two markets did differ markedly is in the presence of subject imports, about [ ] of which were concentrated in the aftermarket, where they universally undersold domestic tires at wide and growing margins. PSR at Tables V-3 – V-6; CSR at Table II-1. It was underselling by these subject imports that drove the much steeper price declines in the aftermarket, facts the majority failed to adequately address.

For all these reasons, the majority's negative price depression determination was unsupported by substantial evidence.

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III. The Majority's Negative Impact Determination Was Unsupported by Substantial Evidence and Otherwise Contrary to Law

A. Domestic Industry Performance Had to Be Analyzed within the Context of Rising Demand and Falling Raw Material Prices

Contrary to Defendant's claim, Plaintiff did not argue that the "Commission unlawfully based its impact analysis *solely* on the domestic industry's profitability and recently improved performance." ITC Br. at 29 (emphasis added). Rather, Plaintiff contends the majority failed to analyze modest improvements in domestic industry indicators in the context of the rapid growth in demand (which reached a cyclical peak in 2015) and falling raw material prices. USW Br. at 26-31. The statute requires the Commission to "evaluate all relevant factors which have a bearing on the state of the industry in the United States … within the context of the business cycle." 19 U.S.C. § 1677(7)(C)(iii). Where the Commission fails to discuss the impacts of rising demand in its evaluation of material injury, "or provide{s} only conclusory statements addressing, the industry business cycle …. the court cannot assume that the Commission has evaluated all relevant factors having a bearing on the state of the domestic industry," and remand is required. *JMC Steel Group v. United States*, 38 CIT ___, ___, 24 F. Supp. 3d 1290, 1307-08 (2014) (citations omitted).

The majority based its negative impact determination on increases in a number of domestic performance indicators. PSR at 31-33. But increases in the domestic industry's production [ ], shipments (3.9%), employment (5.4%), wages (11.2%), and productivity (2.3%) were all just a fraction of the 21.3% increase in demand during the POI. PSR at Table C-1; CSR at Table C-1. At the same time, subject imports rose by 41.9%, seizing 4.9 percentage points of market share from domestic producers. PSR at Table C-1. As a result, the domestic industry supplied less than 10% of the increase in demand during the POI, while China supplied

nearly 60%. *Id.* The majority also based its negative impact determination on the domestic industry's rising capital expenditures, failing to consider that this increase was [

]. *Id.* at 33. [

] when demand was at its peak, a time when industries must maximize investment before the inevitable downturn. CSR at Table VI-7a.

Defendant claims the Commission's injury determination was based on a lack of correlation between subject imports and the domestic industry's performance, because domestic indicators peaked at the same time as subject import volume. ITC Br. at 30. Yet these peaks also coincided with the peak in demand in 2015, a fact never addressed by the majority. While the majority cited the increase in apparent consumption in its conditions of competition section, it failed to discuss the relevance of this rising demand to its impact analysis at all. PSR at 21, 30-36. Congress has explained: "Sometimes, the existence of temporary cyclical trends can mask real harm being caused by unfairly traded imports." S. Rep. No. 71, 100th Cong., 1st Sess 116 (1987). It was thus incumbent upon the Commission to evaluate increases in domestic industry performance indicators within the context of the rapid growth in demand. Its failure to do so was contrary to law.

The majority also failed to analyze the industry's profitability in the context of sharply declining raw material costs. The unit value of U.S. shipments fell 6.4% (despite rising demand) as subject imports rose and pervasively undersold domestic producers; it is only because unit COGS dropped by 16.8% as raw material costs fell that the industry was able to increase its profitability despite lower prices. PSR at Table C-1. While the majority noted that falling raw material costs drove the increase in profitability, they failed to explain how this important

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condition of competition was factored into their impact analysis. PSR at 32-33. Their failure to do so was contrary to law.

B. The Majority's Conclusions regarding Capacity Constraints Were Unsupported by Substantial Evidence

1. Domestic Producers Had Sufficient Capacity to Increase Shipments

In 2014, the domestic industry operated at [ ] of capacity and inventories increased by 21 thousand tires; in 2015, they operated at [ ] of capacity and inventories rose by 597 thousand tires. PSR at Table C-1; CSR at Table C-1. There was thus [ ] capacity and inventories to supply [ ] of the market share seized by Chinese imports in 2014 (1.143 million tires) and 2015 (1.292 million). USW Br. at 32-34. The fact that the industry had sufficient excess capacity to increase shipments was confirmed by USW witnesses who testified that their three plants alone had sufficient unused capacity to ship an additional 1.5 million tires. Hearing Tr. at 31, 37, 39, 43. The majority never addressed this testimony.

Defendant mischaracterizes Plaintiff's argument as suggesting the domestic industry would have had to operate at [ ] of capacity to supply the market share lost to China. ITC Br. at 32. In fact, if the industry had been able to sell the tires it added to inventory, it only would have had to increase production by 1.122 million tires in 2014 and 694 thousand tires in 2015 to supply all of the market share seized by Chinese imports. PSR at Table C-1. This would have resulted in capacity utilization rates of [ ] for the industry as a whole, rates that individual producers [ ]. CSR at Tables III-4, C-1. The majority did not address these facts, which seriously undermined their conclusion that the industry did not have sufficient capacity to further increase shipments in the absence of unfair import competition. PSR at 34-35.

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Defendant further claims that the majority did take rising inventories into account, because the data was cited in a footnote. ITC Br. at 37 n.15. But mere citation of a fact is insufficient when that fact on its face provides significant support for an alternative conclusion. Such facts must be adequately addressed and explained by the Commission, not merely cited in a conclusory manner. *See, e.g., Agilent Technologies v. United States,* 41 CIT ___, ___, 256 F. Supp. 3d 1338, 1344-45 (2017).

The majority also relied in part on high capacity utilization rates achieved by [ ]. CSR at 48 and n.224. But [ ]. CSR at Table VI-10b. These statements [ ] the majority's finding that the domestic industry was operating at "effectively full capacity," but they were never addressed by the majority.

Defendant-Intervenors claim the fact that 11 out of 20 purchasers reported supply constraints supported the majority's determination on capacity constraints, but this fact was never cited by the Commission itself. Respondents Br. at 39. Moreover, some of the cited supply problems were with Chinese, not domestic, producers. PSR at II-6. More tellingly, only [ ]. CSR at Table V-10.

For all these reasons, the majority's conclusion that the domestic industry lacked available capacity to further increase shipments was unsupported by substantial evidence.

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2. Nonsubject Imports Were Not Evidence of Capacity Constraints

The majority found the domestic industry's reliance on nonsubject imports indicated a lack of domestic capacity.[5] Interim data directly contradicted the majority's finding, but were never addressed by the majority.[6] USW Br. at 38. As subject imports dropped following the filing of the petitions and preliminary relief, domestic shipments increased 3.4% and nonsubject imports [ ]. PSR at Table C-1; CSR at Table C-1. Domestic producers' own nonsubject imports [

]. CSR at Table III-9. This contradicted the majority's finding that the domestic industry used nonsubject imports because of capacity constraints; rather, when subject imports exited the market, domestic producers devoted [ ].[7]

Defendant argues the majority permissibly gave less weight to interim data under 19 U.S.C. § 1677(7)(I), due to its finding of post-petition effects. ITC Br. at 34. First, while the majority noted it was "according reduced weight to the interim data," the majority did not state that it was ignoring the data, nor did it. PSR at 26 n.173. In fact, on nearly every page of its determination the majority cited the interim data.

Second, Defendant's argument fundamentally misconstrues the purpose of the statute's interim data provision. The provision exists because initiation of trade remedy proceedings "can create an artificially low demand for subject imports, thereby distorting post-petition data."

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[5] There is no short supply provision in the statute, and a domestic industry need not be able to supply all of demand in order to be materially injured. *See, e.g., Frozen Warmwater Shrimp from China, Ecuador, India, Malaysia, and Vietnam,* Inv. Nos. 701-TA-491-93, 495, and 497 (Final), USITC Pub 4429 (Oct. 2013) at 22 n.104.

[6] Defendant-Intervenors claim Plaintiff failed to exhaust this argument, but Plaintiff made this same argument in its post-hearing brief. *See* Pet. PostHB at 6.

[7] Defendant-Intervenors claim subject imports [ ]. Respondents Br. at 40. This ignores the fact that nonsubject imports [ ] in the interim period, while domestic shipments increased. They also argue the nine-month interim data only covers four months after preliminary relief was imposed. *Id.* at 40-41. The statute contemplates changes following the filing of the petition, not just after provisional duties. 19 U.S.C. § 1677(7)(I). The petitions were filed in January of 2016. PSR at 3.

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Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1 at 853-854 (1994). Interim period data thus may show rising prices and improvements in the domestic industry due to post-petition effects, masking the material injury that has occurred. *Id.* at 854. The Defendant turns the provision on its head by arguing it can also be used to ignore post-petition changes that in fact underscore – rather than mask – the extent of injury that has been suffered. The Court should reject this misguided argument.

In response to Plaintiff's company-specific arguments about reliance on nonsubject imports, Defendant erroneously claims we seek to give more weight to [ ] and ignored [ ] and [ ]. ITC Br. at 34. To the contrary, Plaintiff's claim is that the record as a whole undermined the majority's conclusion that the domestic industry increased nonsubject imports to address capacity constraints. USW Br. at 37-38. Of the three producers the majority found to operating at "effectively full capacity," only the [

]. CSR at Tables III-4, III-9. Though [

]. *Id.* While [

]. *Id.*

The majority never addressed these facts, rendering its findings regarding nonsubject imports unsupported by substantial evidence.

3. Capital Expenditures and Planned Expansions Were Not Evidence of Capacity Constraints

The majority concluded that capital expenditures and planned capacity expansions by U.S. producers indicated "the industry's awareness of the need to address limitations on capacity." PSR at 35. Little record evidence supported this conclusion, and ample evidence contradicted it. USW Br. at 34-36.

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Despite the increase in capital expenditures, the domestic industry's capacity actually [ ] over the POI. CSR at Table C-1. This is consistent with the fact that most producers reported capital expenditures reflected efforts to [ ]. *Id.* at Table VI-7b. The fact that Yokohama's new facility accounted for [ ] in capital expenditures during the POI seriously undermined the majority's conclusion that these expenditures evidence a recognition of capacity limitations by the industry as a whole. Even with regard to Yokohama itself, there is no evidence its investment reflected a recognition of limited capacity; rather, its decision to build a new facility was likely a result of the dissolution of its joint venture with Continental at [ ]. USW Br. at 35-36. This fact was never addressed by the majority.

Defendant highlights Continental's investment in Mt. Vernon, Illinois and its planned new facility in Mississippi. ITC Br. at 34-35. First, Continental's Mt. Vernon expansion resulted in only a [ ]. CSR at Table III-4. Second, while Defendant argues that construction of the Mississippi facility was related to Continental's capacity issues during the POI, ITC Br. at 35, the majority provided no indication it relied on this fact. To the contrary, the record showed the facility was [ ]. Continental reported: [

] CSR at Table VI-10a.

This evidence was discounted by the majority, which noted that no other domestic producer reported project cancellations or postponements. PSR at 34 n.224. This finding was also unsupported by substantial evidence, as it ignored the testimony of USW witnesses

representing workers at facilities owned by Bridgestone, Goodyear, and Sumitomo who testified that they had seen significant capacity expansion plans put on hold during the POI. USW Br. at 37. Defendant claims the majority did address the USW testimony, but the cited language never refers directly to the testimony, nor does it reconcile the testimony with the majority's conclusions. ITC Br. at 36. Without some discussion of the witness testimony that directly contradicted the majority's findings, this Court cannot assume the evidence was properly evaluated. *JMC Steel Group*, 38 CIT at ___, 24 F. Supp. 3d at 1308.

Indeed, the fact that capital investment was [ ] and that expansion plans were put on hold, even as demand was hitting its cyclical peak, only underscored the material injury the industry suffered by reason of subject imports. For all of these reasons, the majority's conclusion that capital investments indicated a lack of capacity during the POI was unsupported by substantial evidence.

IV. The Majority's Negative Threat Determination Was Unsupported by Substantial Evidence and Otherwise Contrary to Law

A. The Nature of Subsidies Benefitting Chinese Producers

In its negative threat determination, the majority claimed it considered the nature of the subsidy programs benefitting Chinese tire producers, but that none of them were found to be export subsidies. PSR at 38-39 n.237. Defendant justifies this conclusion by stating that the Commission does not characterize the nature of subsidies itself, but merely relies on information from Commerce. ITC Br. at 41.

Here, Commerce did provide the Commission with information indicating that two of the subsidies were export subsidies. Export-contingency was clear from the names of the subsidy programs themselves: "Export Seller's Credits from State-Owned Banks," and "Export Buyer's Credits from State-Owned Banks." PSR at 38-39 n.237. The Commerce Issues and Decision

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Memorandum to which the Commission majority cited also states: "... we continue to find evidence of countervailable subsidies contingent upon export ...." *Truck and Bus Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, in Part*, 82 Fed. Reg. 8606 (Dep't Commerce Jan. 27, 2017) and accompanying Issues and Decision Memorandum at 7. The Commission has previously identified these exact same Chinese government programs as export subsidies. *See, e.g., Chlorinated Isocyanurates from China and Japan*, Inv. Nos. 701-TA-501 and 731-TA-1226 (Final), USITC Pub. 4494 (Nov. 2014) at 36-37 n.222 (observing that "export seller's and buyer's credits" from China ExIm Bank were "specifically directed to export activities"). The majority thus had sufficient information from Commerce regarding the nature of the export subsidies, but it failed to properly consider that information as required by law.

It is far from clear that the majority's mistake was harmless error, as Defendant-Intervenors claim. Respondents Br. at 41-42. *See, e.g., Whirlpool Corp. v. United States*, No. 12-00164, 2013 WL 6980820 at *5 (Ct. Int'l Trade Dec. 26, 2013) (remanding where the Court has sufficient doubt the Commission would have reached the same conclusion after correcting its mistake). The Commission has recognized that Congress considered export subsidies "to be more likely to threaten material injury" than purely domestic subsidies, "because they are directed specifically at the export market." *Leather Wearing Apparel from Uruguay*, Inv. No. 701-TA-68 (Final), USITC Pub. 1144 (May 1981) at 13-14. Accordingly, the Commission has cited the existence of export subsidies to support affirmative threat determinations. *See id. See also Certain Kitchen Appliance Shelving and Racks from China*, Inv. Nos. 701-TA-458 and 731-TA-1154 (Final), USITC Pub. 4098 (Aug. 2009) at 22 n.129; *Sulfanilic Acid from the People's Republic of China*, Inv. No. 731-TA-538 (Final), USITC Pub. 2542 (Aug. 1992) at 19 n. 80.

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Remand is thus required to permit the Commission to determine whether the existence of export subsidies in this case similarly supports an affirmative threat determination here.

B. The Remainder of the Majority's Negative Threat Determination

The majority failed to articulate a rational connection between its negative threat determination and record evidence that fairly detracted from it, including:

1) The Chinese industry's excess capacity grew 63% from 2013 to 2015, and was nearly 19 million tires in 2015 – enough to more than triple 2015 exports to the United States and wipe out all of domestic producers' U.S. shipments that year. PSR at Tables VII-3, C-1.

2) At least 16 different expansion projects were projected to increase Chinese capacity by more than 40 million tires in the imminent future. Pet. PreHB at 74-78.

3) Subject imports rose nearly twice as fast as domestic demand from 2013 to 2015. PSR at Table C-1.

4) Chinese producers' exports to the United States grew twice as fast as exports to all other markets and three times as fast as home market shipments, demonstrating the attractiveness of the U.S. market. *Id.* at Table VII-3.

5) During the POI, subject imports gained market share from domestic producers through pervasive and intensifying underselling, resulting in [ ]. *Id.* at Tables V-3 – V-6, C-1; CSR at Table V-10.

6) This unfair import competition prevented the domestic industry from fully participating in rapid demand growth over the POI, demand was beginning to slow in late 2015, and demand [ ]. PSR at Figure II-2 and Table C-1; CSR at Table C-1.

7) Declining raw material costs that had benefitted the domestic industry during the POI [ ]. CSR at Figure V-1; Pet. PreHB at Ex. 45.

The majority found increases in volume would be "commensurate" with demand in the imminent future, failing to address the fact that imports increased more rapidly than demand both from 2013 to 2014 and from 2014 to 2015. PSR at 39. The majority failed to address the significance of Chinese overall capacity and excess capacity, as well as imminent capacity expansions, in relation to the size of the U.S. market. USW Br. at 41-42. The majority also

failed to address the attractiveness of the U.S. market for Chinese producers. *Id.* at 42. Other aspects of the Commission's volume findings were based on their flawed present material injury findings, contrary to law. *Id.* at 42-43.

Contrary to law, the majority's likely price effects analysis was based almost entirely on its price effects analysis for its present material injury determination. PSR at 39-40. The majority ignored evidence regarding recent and anticipated increases in raw material prices, an important change from the declining raw material prices during the POI that had been key to their negative adverse price effects findings for the purposes of present material injury. *Id.* *See also* USW Br. at 43-44.

The majority's likely impact analysis relied on new investments and recent improvements in the industry when demand was at its peak. PSR at 40. The majority ignored record evidence showing that capital expenditures by domestic producers [

]. *Id.* The majority also failed to address evidence that domestic producers deferred capital investments due to competition from subject imports and operated below their capacity due to Chinese imports. *Id.* *See also* USW Br. at 45.

For the most part, Defendant merely reiterates the majority's negative threat findings without sufficiently addressing many of the facts that undermined these conclusions. ITC Br. 38-43. Regarding trends in raw material costs, Defendant does offer an explanation based on allegedly volatile price trends and "erratic" futures prices. ITC Br. at 42. This is pure post-hoc rationalization, as the majority itself never offered such an explanation for ignoring the raw material price data. Indeed, the majority never addressed this data at all, even though it fairly

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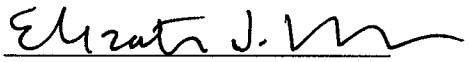
detracted from its conclusion that subject imports would not have adverse price effects nor adversely impact the domestic industry in the imminent future. PSR at 39-40.

For all these reasons, the Court should find the majority's negative threat determination unsupported by substantial evidence and otherwise contrary to law.

V. Conclusion

For the foregoing reasons, the Court should hold unlawful the Commission's negative material injury and threat determinations and remand with instructions for the Commission to issue a determination consistent with the Court's decision.

Respectfully submitted,



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Dated: November 28, 2017

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMITATION

Pursuant to Standard Chambers Procedures paragraphs 2(B)(1) and (2), I hereby certify that the attached reply brief complies with the 7,000 word count limitation. The brief, not including the table of contents, table of authorities, and counsel's signature block, contains 6,994 words, according to the word-count function of the word processing system used to prepare this brief (Microsoft Word 2010).

Dated: November 28, 2017

/s/ Elizabeth J. Drake
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