U.S. Customs and Border Protection

Slip Op. 13–108

DOWNHOLE PIPE & EQUIPMENT, LP, Plaintiff, v. UNITED STATES and UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants, and VAM DRILLING USA, TEXAS STEEL CONVERSIONS, INC., ROTARY DRILLING TOOLS, TMK IPSCO, and UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 11–00080
PUBLIC VERSION

[Remanding a final affirmative determination by the U.S. International Trade Commission, made in an antidumping and countervailing duty proceeding, that a domestic industry is threated with material injury by reason of imports of steel drill pipe and steel drill collars from China]

Dated: August 19, 2013

Mark B. Lehnardt, Lehnardt & Lehnardt LLC, of Liberty, MO and *Irene H. Chen*, Chen Law Group LLC, of Rockville, MD, for plaintiff.

David A.J. Goldfine, Attorney-Advisor, U.S. International Trade Commission, of Washington, DC, for defendant. With him on the brief were *James M. Lyons*, General Counsel and *Neal J. Reynolds*, Assistant General Counsel for Litigation.

Roger B. Schagrin and *John W. Bohn*, Schagrin Associates, of Washington, DC, for defendant-intervenors VAM Drilling USA, Texas Steel Conversions, Inc., Rotary Drilling Tools, and TMK IPSCO.

Stephen P. Vaughn, *Robert E. Lighthizer*, *James C. Hecht*, and *Stephen J. Narkin*, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, DC, for defendant-intervenor United States Steel Corporation.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Downhole Pipe & Equipment, LP ("Downhole Pipe") contests a final determination of the U.S. International Trade Commission ("ITC" or the "Commission") that a domestic industry is threatened with material injury by dumped and subsidized imports of steel drill pipe and steel drill collars ("subject merchandise") from the People's Republic of China ("China" or the "PRC"). Compl. ¶ 26 (Apr. 29, 2011), ECF No. 8; *see Drill Pipe and Drill Collars From China*, 76 Fed. Reg. 11,812 (Mar. 3, 2011) ("*Final Injury Determination*"), *Drill Pipe and Drill Collars from China*, Inv. Nos. 701-TA-474 and 731-TA-

1176 (Final), USITC Pub. 4213 (Feb. 2011) ("*ITC Report* ").[1] Downhole Pipe, an importer of the merchandise subject to the antidumping and countervailing duty investigations and a respondent before the Commission, claims that aspects of the affirmative final threat determination were unsupported by substantial evidence and otherwise not in accordance with law. Compl. ¶¶ 5–26.

Before the court is Downhole Pipe's motion under USCIT Rule 56.2 for judgment on the agency record. Pl.'s R. 56.2 Mot. for J. on the Agency R. (Oct. 19, 2011), ECF No. 28 ("Pl.'s Mot."). Defendant-intervenors VAM Drilling USA, Texas Steel Conversions, Inc., Rotary Drilling Tools, and TMK IPSCO, all petitioners before the ITC, support the ITC's affirmative threat determination, as does defendant-intervenor United States Steel Corporation ("U.S. Steel"). The defendant-intervenors argue that the ITC conducted a proper analysis and that the threat determination is supported by substantial evidence and in accordance with law. The court concludes that certain findings and conclusions within the ITC's determination are not supported by substantial evidence. The court remands the affirmative threat determination to the Commission for reconsideration.

I. BACKGROUND

The ITC initiated its injury and threat investigation on January 6, 2010 in response to petitions concurrently filed on December 31, 2009 with the Commission and the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"). *Drill Pipe from China*, 75 Fed. Reg. 877, 878 (Jan. 6, 2010). On March 8, 2010, the ITC published the preliminary results of its investigation, determining that "there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from China of drill pipe and drill collars." *Drill Pipe & Drill Collars from China*, 75 Fed. Reg. 10,501 (Mar. 8, 2010); *see also Drill Pipe and Drill Collars from China*, Inv. Nos. 701-TA-474 and 731-TA-1176 (Prelim.), USITC Pub. No. 4127, PR 253, (Mar. 2010), at 3.

On January 11, 2011, Commerce determined that subject merchandise was being sold at less than fair value. *Drill Pipe From the People's Republic of China: Final Determination of Sales at Less Than Fair Value & Critical Circumstances*, 76 Fed. Reg. 1,966 (Jan. 11, 2011). Concurrently, Commerce determined that the Chinese indus-

[1] Confidential documents within the administrative record are identified by the abbreviation "CR" and public documents are referred by the abbreviation "PR." Confidential information has been redacted from certain footnotes in this public Opinion and Order as identified by blank spaces within brackets.

try was being provided with countervailable subsidies. *Drill Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 76 Fed. Reg. 1,971 (Jan. 11, 2011).

Commerce published antidumping and countervailing duty orders on March 3, 2011, the same day the ITC published its final affirmative threat determination, which it based on a period of investigation ("POI") beginning in January 2007 and ending in June 2010. *Drill Pipe From the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 11,757 (Mar. 3, 2011); *Drill Pipe From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 11,758 (Mar. 3, 2011); *Final Injury Determination*, 76 Fed. Reg. at 11,812. The Commission reached its affirmative threat determination on the votes of three of the six Commissioners (Vice Chairman Williamson and Commissioners Lane and Pinkert) and noted the dissenting votes of Chairman Okun and Commissioners Pearson and Aranoff. *See Final Injury Determination*, 76 Fed. Reg. at 11,813.

Downhole Pipe initiated this action by filing a summons on April 1, 2011 and a complaint on April 29, 2011. Summons, ECF No. 1; Compl. On October 18, 2011, plaintiff moved for judgment on the agency record pursuant to USCIT Rule 56.2. Pl.'s Mot.; Pl.'s R. 56 Mem. of Law in Supp. of Mot. for J. on the Agency R. (Oct. 19, 2011), ECF No. 28–1 ("Pl.'s Mem."). Defendant and defendant-intervenors responded to this motion on January 25, 2012. Mem. of Def. U.S. Int'l Trade Comm'n in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 38 ("Def.'s Resp."); Mem. of Def.-Intervenors VAM Drilling USA; Texas Steel Conversions, Inc.; Rotary Drilling Tools; and TMK IPSCO in Opp'n to Mot. for J. on the Agency R. by Pl. Downhole Pipe & Equipment L.P., ECF No. 39; Mem. in Opp'n to Pl.'s Mot. for J. on the Agency R. Filed by Def.-Int. U.S. Steel Corp., ECF No. 40 ("U.S. Steel Resp."). On February 29, 2012, plaintiff filed its reply. Pl.'s Reply Br. to Def. and Def.-Intervenors' Resps. to Pl.'s R. 56.2 Mot. for J. on the Agency R., ECF No. 57. The court held oral argument on July 26, 2012. ECF No. 75.

II. DISCUSSION

The court exercises jurisdiction over this action under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2006), which grants jurisdiction of civil actions brought under section 516A of the Tariff Act of 1930 (the "Act"), 19 U.S.C. § 1516a(a)(2)(B)(i) (2006).[2] Where, as here, an action is brought under 19 U.S.C. § 1516a(a)(2)

[2] Unless otherwise indicated, further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2006 edition.

seeking review of a final determination of the ITC reached under 19 U.S.C. § 1673d, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). The ITC's determinations must take "into account the entire record, including whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984) (footnote omitted). The Commission must explain the standards applied and the analysis leading up to the conclusion, thereby demonstrating a rational connection between the evidence on the record and the conclusions drawn. *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

The imported merchandise subject to the antidumping and countervailing duty investigations consists of steel drill pipe and steel drill collars and includes these products in unfinished form, including "green tubes," which are drill pipes and drill collars not yet forged and assembled. *ITC Report: Comm'n Views* 5–7. Drill pipes and drill collars are used on onshore and offshore drilling rigs, chiefly in the drilling of oil and gas wells. *Id*. at 5. Drill pipes serve as rotational components in an assembly of other components (the "drill stem") that includes drill collars. *Id*. at 5–6 (footnote omitted). Drill pipes are lengths of seamless hollow tube, generally 30–31 feet long, with threaded connecting pieces ("tool joints") welded to each end that are designed to be leak-proof to contain the drilling fluids. *Id.* at 6 (footnote omitted). Drill collars are heavy, thicker-walled components of the drill stem that provide stiffness to the drill stem and add weight to the drill bit. *Id*. at 7 (footnote omitted). Drill pipe ordinarily is designed to meet standards adopted by the American Petroleum Institute ("API"); "premium" drill pipe is specially designed for harsh drilling conditions that require properties surpassing the API standards. *Id.* at 7 (footnote omitted).

Plaintiff raises two claims in this litigation, which the court addresses below. Downhole Pipe claims, first, that the Commission's determination of the domestic like product is impermissible, arguing that the ITC should have considered unfinished drill pipe to be a separate like product. Pl.'s Mem. 40. Second, challenging numerous of the Commission's factual findings and conclusions, Downhole Pipe claims that the Commission erred in determining that the drill pipe and collar industry is threatened with material injury by reason of imports of subject merchandise. *Id*. at 11–39.

A. Plaintiff Is Not Entitled to Relief on its Claim Contesting the ITC's Like Product Determination

For the purpose of determining whether one or more domestic industries are injured or threatened with injury from subject imports, section 771(4)(A) of the Act requires the Commission to identify as a domestic industry "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of a product." 19 U.S.C. § 1677(4)(A). In the investigation giving rise to this litigation, the ITC concluded that steel drill pipes and steel drill collars, whether finished or unfinished, comprise a single domestic like product. *ITC Report: Comm'n Views* 7–17. In so concluding, the ITC rejected arguments that it should find a separate like product consisting of unfinished drill pipe and drill collars, *id.* at 7–12, or a separate like product consisting of "premium" drill pipe, *id.* at 12–14.

In its Rule 56.2 motion, plaintiff asserts a claim that the Commission's domestic like product finding is unsupported by substantial evidence. Pl.'s Mem. 40; *see* Compl. ¶ 6. Plaintiff's Rule 56.2 brief offers only one ground for this claim: "To the extent that the Plaintiff's appeal of Commerce's scope determinations is successful, Downhole Pipe reserves the right to raise the like-product arguments raised in its prehearing brief, and incorporated by reference herein." Pl.'s Mem. 40 (citing *Pre-Hearing Br. of Downhole Pipe & Equipment, L.P. and Command Energy Services, Ltd.* (Dec. 15, 2010), PR 154 at 40–44 ("*Resps.' Pre-Hearing Br.*")). Plaintiff's prehearing brief before the ITC informed the Commission that scope inquiries were pending before Commerce on the question of whether green tube for drill pipe falls within the scope of the antidumping duty order on certain oil country tubular goods from China; products falling within the scope of another antidumping duty or countervailing duty order are expressly excluded from the scope of the investigations as defined by Commerce. *See Resps.' Pre-Hearing Br.* 40–41. In that brief, Downhole Pipe argued that information on the record of the investigation at issue in this case demonstrates that green tubes should be a separate domestic like product. *Id*. at 42–44.

The Views of the Commission state that "[a]lthough Respondents argued in their prehearing brief that the Commission should find green tubes to be a separate domestic like product, *Respondents assert unequivocally in their posthearing brief that 'the Commission should find one domestic like product consisting of a continuum of drill pipe and drill collar products*.'" *ITC Report: Comm'n Views* 8

(citing *Resps.' Prehearing Brief* at 43; *Post-Hearing Br. of Downhole Pipe & Equipment, L.P. and Command Energy Services, Ltd.* (Jan. 12, 2011), PR 192, at 3 (*Resps.' Post-hearing Br.*")) (emphasis added). The two respondents in the proceedings before the ITC, Downhole Pipe and another importer, Command Energy Services, Ltd. ("Command"), filed joint prehearing and posthearing briefs. *Id.* at 3. The joint posthearing brief to which the Commission referred expresses the position that the Commission should find a single like product, and the record does not contain information contradicting the Commission's statement that Downhole Pipe changed its position before the ITC, thereby abandoning its previous position advocating a separate domestic like product consisting of green tubes. Nor does plaintiff, in its Rule 56.2 motion, direct the court's attention to any such information. The court finds from the record evidence that during the investigation plaintiff abandoned its previous position advocating a separate like product and adopted a position in favor of a single like product.

The court, in its discretion, declines relief on plaintiff's claim contesting the Commission's domestic like product determination. Plaintiff is advocating before the court a position exactly contrary to the position it took in the posthearing brief before the ITC that it filed jointly with Command. The court, therefore, declines to consider the claim on the merits on the ground of judicial estoppel. *See Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1353–54 (Fed. Cir. 2010). Moreover, because plaintiff did not maintain in the posthearing brief the position it took in its prehearing brief, the ITC did not have occasion to rule on the specific like product issue plaintiff attempts to raise before the court. It is also appropriate, therefore, to deny relief on plaintiff's like product claim for the failure to exhaust administrative remedies. *See* 28 U.S.C. § 2637(d) (providing that this Court shall, where appropriate, require the exhaustion of administrative remedies).

B. The Affirmative Threat Determination Must Be Remanded to the Commission

Plaintiff directs the remainder of its Rule 56.2 motion to contesting the ITC's determination that the single domestic industry, although not experiencing present injury, is threatened with material injury by reason of imports of the subject merchandise. In its motion, plaintiff challenges various of the Commission's underlying findings as unsupported by substantial record evidence. Pl.'s Mem. 11–39. Specifically, plaintiff challenges the ITC's findings as to likely volume effects of

the subject imports, the findings as to the likely price effects of the subject imports, and the finding of a likely adverse impact by those imports on the domestic industry. *Id*.

Sections 705(b)(1) and 735(b)(1) of the Act require the ITC to determine whether a domestic industry or industries are materially injured, or threatened with material injury, "by reason of imports, or sales (or the likelihood of sales)" of the merchandise for which Commerce has made an affirmative determination of subsidy or sales at less than fair value. 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1). Section 771(7)(A) of the Act defines material injury as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A).

In determining whether an industry is threatened with material injury, the ITC is required "to consider, among other relevant economic factors," eight specific factors. 19 U.S.C. § 1677(7)(F)(i). Particularly relevant to this case is the third specific threat factor: "a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports." *Id*. § 1677(7)(F)(i)(III). The statute also contains a ninth, nonspecific threat factor: "any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time)." *Id.* § 1677(7)(F)(i)(IX).[3]

The Commission is to consider the nine statutory threat factors "as a whole in making a determination of whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted under this subtitle." *Id.* § 1677(7)(F)(ii). "The presence or absence of any one factor which the Commission is required to consider . . . shall not necessarily give decisive guidance

[3] The other economic factors prescribed by the statute for the threat determination are as follows: the nature of the countervailable subsidy, 19 U.S.C. § 1677(7)(F)(i)(I); "any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports," *id*. § 1677(7)(F)(i)(II); "whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports," *id*. § 1677(7)(F)(i)(IV); "inventories of the subject merchandise," *id*. § 1677(7)(F)(i)(V); "the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products," *id*. § 1677(7)(F)(i)(VI); the likelihood of product shifting involving raw and processed agricultural products (not relevant to this case), *id*. § 1677(7)(F)(i)(VII); and "the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product," *id*. § 1677(7)(F)(i)(VIII).

with respect to the determination," which must "be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent" and not "on the basis of mere conjecture or supposition." *Id*. The legislative history clarifies that the ITC's threat determination "require[s] a careful assessment of identifiable current trends and competitive conditions in the marketplace . . . [and] a thorough, practical, and realistic evaluation of how it operates, the role of imports in the market, the rate of increase in unfairly traded imports, and their probable future impact on the industry." H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 174–75 (1984), U.S. Code Cong. & Admin. News 1984, pp. 4910, 5291, 5292.

As to present injury, the Commission reached a negative determination despite concluding that over the POI "the domestic industry suffered significant declines in a number of basic indicators, including production, shipments, sales, and employment" and that "the industry's operating profits were solid in 2007 and 2008, dropped sharply in 2009 (as adjusted) to an overall loss, then improved in first-half 2010 to a level below the levels of 2007 and 2008." *ITC Report: Comm'n Views* 38–39 (footnote omitted). The ITC found, however, that "[s]ubject imports played a role in these declines but we cannot find their role to be significant given the substantial market turmoil that occurred in 2009 and first-half 2010." *Id.* at 39. By "market turmoil," the Commission referred to severe declines in oil and gas prices, which reached low levels in 2009, and to a resulting sharp decline in drilling activity that began in October 2008 and continued until May 2009 before returning close to 2007 levels by 2010. *Id.* at 24 (footnotes omitted).

1. Two Erroneous Findings of Fact, and Two Erroneous Conclusions from those Findings, Require the Court to Remand the Affirmative Threat Determination

In determining the domestic drill pipe and collar industry to be threatened with material injury, the Commission reached conclusions on the future volume of imports of subject imports, the future price effects of those imports, and the impact of those future imports on the domestic industry. As to volume, the Commission concluded "that subject imports will increase significantly in absolute terms and relative to domestic consumption and production in the imminent future . . . ." *ITC Report: Comm'n Views* 32. On price effects, the ITC found that "subject imports are likely to enter at prices that will have significant price-depressing and/or price-suppressing effects." *Id.* at 34. On impact of the subject imports, the Commission stated that "[g]iven that the industry is already in a weakened state, we conclude

that, unless antidumping duty and countervailing duty orders are issued, significant volumes of dumped and subsidized imports will gain additional U.S. market share in the imminent future and material injury by reason of subject imports will occur." *Id.* at 37.

The Commission summarized four findings of fact to support its conclusion that subject imports would increase significantly in volume: (1) "subject imports held a substantial share of the U.S. market throughout the period examined, a share that grew in first-half 2010;" (2) "importers of subject merchandise have now become suppliers to even the largest U.S. purchasers and thus have demonstrated access to the full range of the API-grade drill pipe and collar market;" (3) "U.S. importers have increased their quantities of inventories of Chinese product to levels that are particularly significant in the context of current market conditions;" and (4) "the Chinese industry is very large and growing, is export-oriented, possesses substantial unused capacity, and has an incentive to increase its production and U.S. exports of unfinished drill pipe in response to the 2010 U.S. antidumping and countervailing duty orders on Chinese casing and tubing products." *Id.* at 32. The Commission based the second finding, as quoted above, on more detailed findings that it expressed as follows:

> The participation of suppliers of Chinese product in the U.S. market has evolved and grown over the period in ways that indicate further expansion is imminent. During the preliminary phase of these investigations importer respondents indicated that subject imports were limited to sales to smaller customers to whom domestic producers had no interest in making sales. Information on the record in the final phase of these investigations shows this is no longer the case. Importers of Chinese product have recorded sales to the largest U.S. purchasers. By the end of the period examined, most of the largest U.S. customers for drill pipe and drill collars reported purchasing subject merchandise.

Id. at 28–29 (footnotes omitted). In the quoted paragraph, the ITC discerned a trend in which large domestic customers did not buy the Chinese products at the beginning of the period of investigation but did buy subject merchandise by the end of the POI. This perceived trend caused the ITC to conclude that the participation of Chinese suppliers in the U.S. market has "evolved and grown over the period in ways that indicate further expansion is imminent." *Id*. at 28. The ITC relied on its perceived trend in concluding that "[t]he fact that

suppliers of Chinese product *have broken through a major prior limitation on their reach in the U.S. market* is an indication that their U.S. market share is poised to increase." *Id*. at 29 (emphasis added). In this way, the Commission grounded its threat analysis, in part, on "[s]ubject suppliers' emergence as providers to even the largest U.S. purchasers [of drill pipe and drill collars] . . . ." *Id*.

The record evidence does not support and in fact refutes any finding or inference that only smaller domestic purchasers, as opposed to purchasers the ITC considered "large," were buying subject merchandise at the start of the POI. The Commission relied on certain testimony given at the Commission's conference during the preliminary phase of the investigation, held on January 21, 2010. *Id*. at 28 & n.231. However, that testimony, even as paraphrased in the Commission's preliminary determination and in the Views of the Commission, was not to the effect that large purchasers do not buy *any* subject merchandise; it was instead that the largest domestic purchasers obtained drill pipe and collar predominantly from domestic suppliers.[4] *See id.* The Commission overlooked record evidence that purchasers it considered "large" did in fact buy subject merchandise during the first year of the POR. The Commission identified eight U.S. purchasers of drill pipe and drill collar that it considered to be the largest, according to either the number of drill rigs owned or operated or the value of total purchases of drill pipe and drill collars (domestic and foreign).[5] *ITC Report: Final Staff Report* II-7, II-8 (PR 213). Three of these largest purchasers reported having purchased significant quantities of subject merchandise during 2007, the first year of the POI.[6]

The record evidence consisting of large purchasers' questionnaire responses, considered as a whole, also falls short of supporting the

[4] The conference testimony of the respondents, as cited by the Commission, [

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[5] The Commission identified six purchasers of drill pipe and drill collar as the largest according to drill rigs owned or operated: [

] The Commission's list of large purchasers or drill pipe and drill collars by purchase volume during the POR (from all countries) [

] *Drill Pipe and Drill Collars from China*, Inv. Nos. 701-TA-474 and 731-TA-1176 (Final), USITC Pub. 4213 (Feb. 2011) ("*ITC Report*"), at II-7 (*Final Staff Report*, CR 523).

[6] The record consisting of responses to purchasers' questionnaires shows [

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ITC's finding that the participation of Chinese suppliers in the U.S. market over the POI broke through a prior limitation to smaller suppliers. Of the eight largest purchasers, three did not purchase any Chinese drill pipe or collar during the POI.[7] Three others made purchases of Chinese products, but these purchases either ended in 2007 or fell off substantially after 2007, the first year of the POI.[8] Of the remaining two large purchasers, one had a purchasing pattern that fails to lend support to the Commission's finding that purchases of subject merchandise began during, and grew over, the POI so as to indicate imminent "further expansion."[9]

Concerning the remaining (eighth) large purchaser, the three Commissioners who voted in favor of the affirmative threat determination and the three dissenting Commissioners disagreed on the significance of a transaction, or a group of related transactions, in early 2010 that involved this purchaser and a particular importer of subject merchandise. Redacted Oral Tr. 8–10 (Sept. 30, 2013), ECF No. 93; *ITC Report: Comm'n Views* 40 n.232 (CR 537); *ITC Report: Dissenting Views* 46 n.30 (CR 538). But even were the court to sustain every inference the Commission drew from the record facts pertaining to this large purchaser, it still would be unable to conclude that the record evidence supports the larger finding that participation of Chinese suppliers has evolved and grown over the POI "in ways that indicate further expansion is imminent." *ITC Report: Comm'n Views* 28. The evidence pertaining to the transaction or transactions occurring in early 2010 involves only one importer and one large domestic purchaser; in addition, the record evidence refutes a finding or inference that the transaction or transactions involved were representative or typical.[10]

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In summary, from its review of the record evidence in this case, and particularly its review of the evidence contained in the responses to the ITC's purchasers' questionnaire submitted by the domestic purchasers that the ITC considered "large," the court concludes that substantial evidence does not support two findings made by the Commission and two general conclusions the ITC reached on the basis of those two findings. As discussed above, the impermissible findings were that only smaller domestic purchasers, as opposed to purchasers the ITC considered "large," were buying subject merchandise at the start of the POI and that, during the POI, the participation of Chinese suppliers in the U.S. market broke through a prior limitation to smaller suppliers. From these erroneous findings, the ITC reached the unsupported conclusion that "[t]he participation of suppliers of Chinese product in the U.S. market has evolved and grown over the period in ways that indicate further expansion is imminent," *ITC Report: Comm'n Views* 28, and the related conclusion that "[t]he fact that suppliers of Chinese product have broken through a major prior limitation on their reach in the U.S. market is an indication that their U.S. market share is poised to increase," *id.* at 29.

Defendant's counsel acknowledged at oral argument that the record lacks substantial evidence to support one or more of the ITC's findings concerning purchasing by large customers during the POR. According to defendant's argument, the erroneous finding or findings are not critical to the chain of causation, and the court should disregard any error is harmless. The court disagrees.

A court must review an agency determination on the reasoning the agency puts forth. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). As the court indicated above, the ITC's general finding that "importers of subject merchandise have now become suppliers to even the largest U.S. purchasers and thus have demonstrated access to the full range of the API-grade drill pipe and collar market," which the ITC grounded in the two erroneous findings and invalid conclusion the court has identified, was one of the four reasons the Commission expressed for concluding that subject imports would "increase significantly in absolute terms and relative to domestic consumption and production in the imminent future." *ITC Report: Comm'n Views* 32. In turn, the imminent increase in import volumes that the Commission foresaw was integral to the affirmative threat determination. *Id.* at 37 ("Given that the industry is already in a weakened state, we conclude that, unless antidumping duty and countervailing duty orders are issued, significant volumes of dumped and subsidized imports will gain additional U.S. market share in the imminent future and material injury by reason of subject imports will occur."). Addi-

tionally, the finding of an imminent increase in the volume of subject imports was related to the finding that these increased imports would undersell the domestic product. *Id.* at 34 ("[W]e conclude that, in the imminent future, the aggressive price competition demonstrated by subject imports at the end of the period examined will likely continue, and the introduction of increased quantities of subject imports, aggressively priced in an effort to gain market share, will put pressure on domestic producers to lower prices in a market recovering from depressed demand."). The importance the ITC attached to the erroneous findings and the unwarranted conclusions in reaching its affirmative threat determination does not allow the court to consider the errors to be harmless.

Arguing for affirmance of the affirmative threat determination, defendant-intervenor U.S. Steel maintains that the court can and should conclude that substantial evidence supports the remainder of the Commission's determination even if also concluding that certain findings were not lawful. Relying on the decision of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *Nippon Steel Corp. v. United States*, 458 F.3d 1345 (Fed. Cir. 2006) ("*Nippon Steel* "), U.S. Steel argues that the determination under review in this case should be upheld based on an examination of the record as a whole notwithstanding the potentially unlawful finding or findings. However, *Nippon Steel* was grounded in an evidentiary record distinguishable from that presented in the case at bar. In *Nippon Steel*, the Court of Appeals upheld an affirmative injury determination of the ITC that had been set aside by the Court of International Trade even though concluding that this Court was correct in determining that the ITC had made an "obvious error" when ascertaining the way in which subject merchandise undersold the domestic like product. *Nippon Steel*, 458 F.3d at 1353–54, 1358–59. The Court of Appeals concluded that the affirmative injury determination, despite the error, was supported by an "adequate basis in support of the Commission's choice of evidentiary weight" that required deference to the Commission under the substantial evidence standard. *Id.* at 1358–59. In this case, the Commission's own presentation of its affirmative threat determination causes the court to conclude that the ITC gave significant weight to the factual findings, and the associated conclusions, that the court views as erroneous.

U.S. Steel also argues that the transaction in early 2010 involving the aforementioned eighth large purchaser could have been viewed as a watershed event that signified a meaningful change for a producer that previously sold only to smaller U.S. customers. This argument is unconvincing. As the court has pointed out, there can be no dispute

that the transaction or transactions in question involved only one importer and one purchaser and did not reflect a typical sales arrangement.

In conclusion, the court must reject as unsupported by substantial record evidence the ITC's finding that only smaller domestic purchasers, as opposed to purchasers the ITC considered "large," were buying subject merchandise at the start of the POI and the ITC's finding that, during the POI, the participation of Chinese suppliers in the U.S. market over the POI broke through a prior limitation to smaller suppliers. The court must also reject the two conclusions the ITC reached based on these findings, which were that "[t]he participation of suppliers of Chinese product in the U.S. market has evolved and grown over the period in ways that indicate further expansion is imminent," *ITC Report: Comm'n Views* 28, and the related conclusion that "[t]he fact that suppliers of Chinese product have broken through a major prior limitation on their reach in the U.S. market is an indication that their U.S. market share is poised to increase," *id.* at 29. Because, as discussed above, it is apparent from the Views of the Commission that these erroneous findings and unwarranted conclusions were important to the affirmative threat determination, the Commission must reconsider that determination on the whole, in the absence of these findings and conclusions.

2. Additional Explanation Is Required on Two Other Aspects of the Commission's Affirmative Threat Determination

Although the erroneous findings and conclusions identified above are alone sufficient to require the ITC to reconsider its affirmative threat determination, the court also sees a need for the ITC to provide additional explanation on two other aspects of that determination.

The first of the four findings the ITC presented to support its conclusion that subject imports would increase significantly in volume was as follows: "subject imports held a *substantial* share of the U.S. market *throughout* the period examined, a share that *grew* in first-half 2010." *ITC Report: Comm'n Views* 32 (emphasis added). The statement of the finding summarizes earlier discussion in which the ITC characterized the market share of imports of subject finished drill pipe and drill collars as fluctuating and "significant." *Id.* at 28. It is not clear whether the Commission, in characterizing the market share of subject imports as "substantial," was referring only to finished imports, which it discussed, or also to unfinished products. The data the ITC cited earlier referred only to finished products. As to the finished products, the use of the term "substantial" to describe the market share is questionable as applied to the POI as a whole, in

which that market share fluctuated considerably, at times to levels that would not appear to qualify as "substantial," and never exceeded a particular threshold. *Id*. Moreover, the Commission's statement that the market share "grew" in first-half 2010 must be interpreted in light of those data, which showed that the market share of finished subject merchandise grew from second-half 2009 to first-half 2010 but in first-half 2010 still was considerably less than it was in first-half 2009. *See id*. at 28 (citing *Final Staff Report* at Table C-2). The same data showed that the increase in first-half 2010 must be seen in the context of a precipitous drop in that market share occurring in second-half 2009. *See id*. In view of the actual data, the court directs the Commission to explain why, and to what extent, it based its overall determination related to likely future import volume on its stated findings that the U.S. market share of subject merchandise was "substantial" throughout the POI and "grew" in first-half 2010.[11] In doing so, the ITC should be mindful of the statutory directive that the ITC, when evaluating a threat of material injury, must consider whether there has been "a significant rate of *increase* of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports." 19 U.S.C. § 1677(7)(F)(i)(III) (emphasis added).

A second aspect of the final threat determination requiring additional explanation is the ITC's basing of conclusions as to likely future import volume on the finding that "U.S. importers have increased their quantities of inventories of Chinese product to levels that are particularly significant in the context of current market conditions." *ITC Report: Comm'n Views* 32. The data the ITC cited for its finding, which it presented on page 41 of the Views of the Commission and obtained from Table C-2 of the Final Staff Report, show a sizable increase in importers' inventories only from 2007 to 2008 and show modest declines thereafter. Citing a different table in the Final Staff Report (Table II-4, showing inventory of subject finished products held by "purchasers,"), the three dissenting Commissioners concluded that "[w]ith regard to inventories of the subject merchandise, there was no significant increase in inventories of subject product held by U.S. importers or purchasers over the period examined." *ITC Report: Dissenting Views* 45. The dissenting Commissioners added that "[i]n fact, while inventories of finished products from U.S. sources predictably increased from 2007 to 2009 as demand declined, inventories of subject imports of finished products dropped substantially over the

[11] In a single paragraph in the Views of the Commission, the ITC tied its findings as to market share directly to one of the conclusions the court found erroneous for the reasons discussed above, *i.e.*, the finding that the U.S. market share of Chinese suppliers is "poised to increase." *ITC Report: Comm'n Views* 29.

same period." *Id.* (footnote omitted). The court directs the ITC to provide additional explanation of its stated finding in light of all of the relevant evidence of record, including evidence that may detract from that finding.

In directing the ITC to provide additional explanations for two of its findings, the court does not preclude the ITC, on remand, from reconsidering those or any other findings upon which the ITC reached its final affirmative threat determination.

III. CONCLUSION AND ORDER:ON REMAND, THE ITC MUST RECONSIDER ITS AFFIRMATIVE THREAT DETERMINATION AND ISSUE A REDETERMINATION THAT IS SUPPORTED BY SUBSTANTIAL RECORD EVIDENCE

Because of the importance the ITC placed on the two erroneous findings and unwarranted conclusions discussed previously in this Opinion, the court directs the ITC to reconsider its affirmative threat determination on the whole, absent those findings and conclusions, and issue a redetermination upon remand that is supported by substantial evidence on the record considered as a whole. For the reasons also discussed above, the court directs the Commission to provide additional explanation on two other aspects of the affirmative threat determination.

Therefore, upon consideration of the *Drill Pipe and Drill Collars From China*, 76 Fed. Reg. 11,812 (Mar. 3, 2011); *Drill Pipe and Drill Collars from China*, Inv. Nos. 701-TA-474 and 731-TA-1176 (Final), USITC Pub. 4213 (Feb. 2011), and all papers and proceedings had herein, it is hereby

ORDERED that the U.S. International Trade Commission ("ITC") shall file with the court a remand redetermination that complies fully with this Opinion and Order and is supported by substantial evidence on the record considered as a whole; and it is further

ORDERED that the ITC shall file its remand redetermination within ninety (90) days of this Opinion and Order, plaintiff and defendant-intervenors shall have thirty (30) days from the filing of that remand redetermination to comment thereon, and defendant shall have fifteen (15) days from the filing of the last comment to submit any reply.

Dated: August 19, 2013
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
JUDGE

Slip Op. 14–12

JIAXING BROTHER FASTENER CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 12–00384

[Final results of administrative review sustained in part and remanded in part.]

Dated: February 6, 2014

Gregory S. Menegaz, *J. Kevin Horgan*, and *John J. Kenkel*, deKieffer & Horgan of Washington, D.C. for Plaintiffs Jiaxing Brother Fastener Co., Ltd., aka Jiaxing Brother Standard Parts Co., Ltd., IFI & Morgan Ltd., and RMB Fasteners Ltd.

Jane C. Dempsey, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington DC for Defendant United States. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Attorney in Charge. Of counsel on the brief was *Daniel J. Calhoun*, Office of the Chief Counsel, Import Administration, U.S. Department of Commerce of Washington, DC.

Frederick P. Waite and *Kimberly R. Young* for Vorys, Sater, Seymour and Pease LLP of Washington, D.C. for Defendant-Intervenor Vulcan Threaded Products Inc.

OPINION AND ORDER

Gordon, Judge:

This action involves the second administrative review conducted by the U.S. Department of Commerce ("Commerce" or "Defendant") of the antidumping duty order covering steel threaded rod from the People's Republic of China ("PRC"). *See Certain Steel Threaded Rod from the People's Republic of China*, 77 Fed. Reg. 67,332 (Dep't of Commerce Nov. 9, 2012) (final results second admin. review) ("*Final Results*"); *see also* Issues and Decision Memorandum for Final Results of Second Administrative Review of Certain Steel Threaded Rod from the People's Republic of China, A-570–932 (Dep't of Commerce Nov. 5, 2012), *available at* http://ia.ita.doc.gov/frn/summary/PRC/2012–27438–1.pdf (last visited Jan. 31, 2014) ("*Decision Memorandum*"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006).

Before the court is the motion for judgment on the agency record of Jiaxing Brother Fastener Co., Ltd., aka Jiaxing Brother Standard Parts Co., Ltd. ("Jiaxing Brother"), IFI & Morgan Ltd. ("IFI"), and RMB Fasteners Ltd. ("RMB") (collectively "Plaintiffs") challenging Commerce's (1) selection of Thailand as the primary surrogate country, (2) surrogate valuation for steel wire rod and steel round bar, and

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

(3) surrogate valuation for hydrochloric acid. Pls.' Mem. in Supp. of Mot. for J. on the Agency R. 2–4, ECF No. 25 ("Pls.' Br."). For the reasons that follow, the court sustains Commerce's rejection of India as the primary surrogate country, but remands the selection of Thailand over the Philippines to Commerce for clarification or reconsideration as may be appropriate.

I. Standard of Review

For administrative reviews of antidumping duty orders, the U.S. Court of International Trade sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d. ed. 2013). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms, National Courts* § 13342 (2d ed. 2013).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

II. Background

On May 27, 2011, Commerce initiated the second administrative review of *Certain Steel Threaded Rod from the People's Republic of China*, 74 Fed. Reg. 17,154 (Dep't of Commerce Apr. 14, 2009) (antidumping duty order), covering exporters RMB and IFI and their affiliated supplier Jiaxing Brother for the April 1, 2010 through March 31, 2011 period of review. *See Certain Steel Threaded Rod from the People's Republic of China*, 77 Fed. Reg. 27,022, 27,022 (Dep't of Commerce May 8, 2012) (prelim. results admin. review) ("*Preliminary Results*"). As part of that review, Commerce's Import Administration Office of Policy ("OP") issued the following "non-exhaustive" list of potential surrogate countries proximate to the PRC on the basis of per capita gross national income ("GNI") as reported in the World Bank's 2012 World Development Report:

Country	Per Capita GNI
China	$4,260
Philippines	$2,050
Indonesia	$2,580
Ukraine	$3,010
Thailand	$4,210
Peru	$4,710
Colombia	$5,510
South Africa	$6,100

Request for Surrogate Country Comments, at Att. I (Dep't of Commerce Nov. 18, 2011), PD 102, Joint App'x at JA-00021 to JA-00022 ("*Surrogate Country Memorandum*"); *see Certain Steel Threaded Rod from the People's Republic of China*, 77 Fed. Reg. 27,022, 27,025 (Dep't of Commerce May 8, 2012) (prelim. results admin. review) ("*Preliminary Results*").[2] The OP did not include India, the primary surrogate country used in the investigation, because its per capita GNI was $1,340.

Commerce then evaluated Global Trade Atlas ("GTA") data and determined that the countries on the OP list "can be considered significant producers of comparable merchandise." *Preliminary Results*, 77 Fed. Reg. at 27,025. With respect to reliability and availability of surrogate value data, and responding to Plaintiffs' arguments that India, not Thailand, was the appropriate surrogate country, Commerce stated:

[2] "PD" refers to a document contained in the public administrative record.

> Petitioner provided data for Thailand from GTA to value certain material inputs, and a financial statement from a Thai producer of comparable merchandise to calculate surrogate financial ratios. [Plaintiffs] provided GTA data for India, as well as various Indian government, nongovernmental organization, and industry publications to value material inputs, energy, and movement expenses. In addition, [Plaintiffs] submitted Indian financial statements to calculate surrogate financial ratios. However, the Department has stated that "unless we find that all of the countries determined to be equally economically comparable are not significant producers of comparable merchandise, do not provide a reliable source of publicly available surrogate data or are unsuitable for use for other reasons, we will rely on data from one of these countries." . . . Because the Department finds that one of the countries from the Surrogate Country List [Thailand] meets the selection criteria, . . . the Department is not considering India, a country not included in the OP memorandum, as the primary surrogate country.

Id. (footnote omitted).

Although Plaintiffs lost the preliminary surrogate country selection argument, they continued to press the argument for India in their case brief. Plaintiffs also supplemented the record with data from the Philippines and argued in the alternative that the Philippine surrogate data was the best available on the administrative record. Commerce did not agree, concluding that "Thailand offers superior quality of data for valuing the steel wire rod consumed by [Plaintiffs] and offers usable data to value all [factors of production] necessary for the final results." *Decision Memorandum* at 12.

Relevant statutory and regulatory framework

In an antidumping duty administrative review, Commerce determines whether subject merchandise is being, or is likely to be, sold at less than fair value in the United States by comparing the export price (the price of the goods sold in the United States) and the normal value of the merchandise. 19 U.S.C. §§ 1675(a)(2)(A), 1677b(a). In the nonmarket economy context, Commerce calculates normal value using data from surrogate countries to value the factors of production. 19 U.S.C. § 1677b(c)(1)(B). Commerce must use the "best available information" in selecting surrogate data from "one or more" surrogate market economy countries. 19 U.S.C. § 1677b(c)(1)(B), (4). The surrogate data must "to the extent possible" be from a market economy country or countries that are (1) "at a level of economic development

comparable to that of the nonmarket economy country" and (2) "significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). Commerce has a stated regulatory preference to "normally . . . value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2).

The statute does not define the phrase "level of economic development comparable to that of the nonmarket economy," nor does it require Commerce to use any particular methodology in determining whether that criterion is satisfied. To fill this statutory gap Commerce promulgated 19 C.F.R. § 351.408(b):

> *Economic Comparability*. In determining whether a country is at a level of economic development comparable to the nonmarket economy under [19 U.S.C. §1677b(c)(2)(B)] or [19 U.S,C, §1677b(c)(4)(A)] of the Act, the Secretary will place primary emphasis on *per capita* GDP as the measure of economic comparability.

19 C.F.R. § 351.408(b) (emphasis in original). Commerce has since explained that it "now uses per capita GNI, rather than per capita GDP, because while the two measures are very similar, per capita GNI is reported across almost all countries by an authoritative source (the World Bank), and because the Department believes that the per capita GNI represents the single best measure of a country's level of total income and thus level of economic development." *Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates*, 72 Fed. Reg. 13,246, 13,246 n.2 (Dep't of Commerce Mar. 21, 2007) (req. for cmts.).

Commerce has developed a four-step process of "*sequential consideration* of the statutory elements" to select an appropriate primary surrogate country. Import Administration Policy Bulletin 04.1: Non–Market Economy Surrogate Country Selection Process (Dep't of Commerce Mar. 1, 2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Jan. 31, 2014) (emphasis added) ("*Policy Bulletin 04.1*"). Commerce (1) compiles a list of countries at a comparable level of economic development to the subject nonmarket economy based on per capita GNI, (2) ascertains which of the listed countries produce comparable merchandise to the subject merchandise, (3) determines which of the listed countries are significant producers of such merchandise, and (4) evaluates the quality (*i.e.*, reliability and availability) of the data from these countries. *Id.* Although the OP's list is not exhaustive and parties may request that Commerce select a country not on the list, Commerce generally selects a surrogate country from the OP list unless all of the listed

countries lack sufficient data. *See id.*; *see also Decision Memorandum* at 4 ("[W]hen selecting a primary surrogate country, the Department will normally look first to the list of countries included in the surrogate country memo . . . .").

III. Discussion

A. Commerce's decision to not select India as the primary surrogate country

Plaintiffs argue that Commerce erred by not selecting India as the primary surrogate country. India, though, had a per capita GNI of $1,340, whereas the PRC had a per capita GNI of $4,260. Given that disparity, as well as the availability of surrogate value data from two other economically comparable countries, Commerce's decision to not select India appears reasonable; it is difficult to envision how India would have been a reasonable or defensible choice on this administrative record. *See, e.g.*, *Dupont Teijin Films v. United States*, 37 CIT ___, ___, 896 F. Supp. 2d 1302, 1306–10 (refusing to sustain Commerce's surrogate selection of India over Thailand given disparities in 2009 per capita GNI data), *after remand* 37 CIT ___, ___, 931 F. Supp. 2d 1297 (2013); *Ad Hoc Shrimp Trade Action Comm. v. United States*, 36 CIT ___, ___, 882 F. Supp. 2d 1366, 1374–76 (2012) (refusing to sustain Commerce's selection of India over Thailand given disparities in per capita GNI data), *modified on other grounds*, 37 CIT ___, 882 F. Supp. 2d 1377, *after remand*, 37 CIT ___, 925 F. Supp. 2d 1315 (2013).

1. Commerce's use of per capita GNI to measure the comparable level of economic development is reasonable

Plaintiffs nonetheless argue that Commerce should have selected India as the primary surrogate country. Plaintiffs first challenge Commerce's use of per capita GNI to identify countries at a comparable "level of economic development," which, according to Plaintiffs, is an unreasonable interpretation of the statute under the second prong of *Chevron*. Pls.' Br. at 4–14. Under the second prong of *Chevron*, Commerce's "interpretation governs" as long as it is reasonable. *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009); *accord Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) ("[A]ny reasonable construction of the statute is a permissible construction." (quoting *Torrington v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996))). To determine whether Commerce's interpretation is reasonable, the court may look to the express terms of the provisions Commerce interpreted, the objectives of those provisions, and the

objectives of the antidumping scheme as a whole. *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1361 (Fed. Cir. 2007).

As explained above, Commerce obtains its per capita GNI data from "an authoritative source," the World Bank. 72 Fed. Reg. 13,246, 13,246 n.2. That data has the benefit of being "reported across almost all countries." *Id.* As for the individual per capita GNI measure, Commerce "believes that the per capita GNI represents the single best measure of a country's level of total income and thus level of economic development." *Id.* The particular per capita GNI metric Commerce uses is "the sum of value added by all resident producers plus any product taxes (less subsidies) not included in the valuation of output [*i.e.*, GDP] plus net receipts of primary income . . . from abroad," divided by population. The World Bank, GNI Per Capita, Atlas Method (current US$), http://data.worldbank.org/indicator/NY.GNP.PCAP.CD; *see* Def.'s Br. at 10 n.3. That is indeed a measure of a country's level of total income. Commerce's utilization of that otherwise consistent, transparent, and objective metric to identify and compare a country's level of economic development is, in the court's view, a reasonable interpretation of the statute.

Plaintiffs argue that rather than per capita GNI, Commerce should instead consider the "actual industry under review." Pls.' Br. at 8–9. According to Plaintiffs, changes in per capita GNI in India and the PRC have not affected steel prices, and the PRC's steel industry is more comparable to India's than it is to Thailand's. *Id.* at 8–12. Defendant responds that Plaintiffs' proposed industry-sensitive approach overlooks the first of the statute's two-pronged criteria for surrogate production data – identifying a surrogate country at a "comparable" "level of economic development," 19 U.S.C. § 1677b(c)(4)(A)– and explains that Commerce already analyzes the target industry in subsequent sequential steps of its surrogate country selection process. *See* Def.'s Br. at 11; *Policy Bulletin 04.1*. The court agrees with Defendant that Plaintiffs' industry-sensitive approach only fulfills the statute's second criterion to identify a country that is a "significant producer of comparable merchandise," 19 U.S.C. § 1677b(c)(4)(B), without addressing economic comparability. *See* Def.'s Br. at 11.

Plaintiffs' approach focuses on certain metrics to deliver a preferred outcome, while ignoring other metrics that undermine that choice. Plaintiffs argue that India is the "superior" choice and "closer to China across many material factors of economic comparability, including (1) GDP; (2) [GNI]; (3) World Bank 'Doing Business' Report ranking; (4) Unemployment; (5) Investment; (6) Industrial Produc-

tion Growth Rate; (7) Household Income by Percentage Share." *Id.* at 8–14. Plaintiffs, however, omit from their analysis other apparent "material factors of economic comparability" contained on the administrative record that tend to demonstrate greater similarities between the PRC and Thailand than the PRC and India, including per capita GDP, life expectancy, adult literacy, and GDP composition by sector of origin. Jiaxing India Surrogate Value Submission, Exs. 18–20 (Dep't of Commerce Mar. 2, 2012), PDs 50–54, Joint App'x at JA000813 to JA-000833 & JA-000871 to JA-000872 ("*India Data Submission*"). Plaintiffs' industry-sensitive approach therefore leaves open to debate which metrics Commerce should utilize to identify economically comparable countries. The court wonders how such an approach could possibly be administrable across all NME cases. Commerce must efficiently identify a primary surrogate country early in the proceeding, and Plaintiffs' approach makes that difficult if not impossible. Commerce's method, on the other hand, has established a consistent, transparent, and objective measure to determine economic comparability.

Commerce's use of per capita GNI as the measure of economic comparability (as opposed to some other assortment of metrics that account for the specific features of relevant industries in potential surrogate countries) is a reasonable interpretation of the statutory mandate to identify and select a primary surrogate country at a "level of economic development comparable" to the nonmarket economy country. 19 U.S.C. § 1677b(c)(4)(A). Accordingly, the court must defer to Commerce's permissible construction of the statute.

2. Section 553 of the Administrative Procedure Act ("APA") does not apply to Commerce's refusal to select India as the primary surrogate country

Plaintiffs also claim that Section 553 of the APA required Commerce to provide notice and comment to interested parties before choosing Thailand as the primary surrogate country in the second administrative review. According to Plaintiffs the selection of Thailand instead of India represents a "massive change in practice [that] should have been put before the public for notice and comment." Pl.'s Br. at 22–23. In addition, Plaintiffs claim that respondents in proceedings before Commerce "could reasonably rely on Indian costs to estimate normal value [for Chinese entities] year after year for 30 years." *Id.*

Section 553 of the APA requires administrative agencies to provide interested parties with notice and an opportunity to comment on proposed rulemaking. 5 U.S.C. § 553(c). Rulemaking is the "agency process for formulating, amending, or repealing a rule," and a rule is

"an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4), (5). These requirements "do[] not apply to antidumping administrative proceedings," which mostly involve fact-based, investigative activities. *GSA, S.r.l. v. United States*, 23 CIT 920, 931–32, 77 F. Supp. 2d 1349, 1359 (1999); *cf.* 19 U.S.C. § 1677c(b) (antidumping investigations are not subject to the APA's notice and comment requirement).

Commerce's surrogate country determination is a fact-based, investigative determination carried out pursuant to existing policies and regulations – not a rulemaking action subject to the APA's notice and comment requirements. *See Foshan Shunde Yongjian Housewares & Hardwares Co. v. United States*, 37 CIT ___, ___, 896 F. Supp. 2d 1313, 1323–24 (2013) (APA's notice and comment requirement inapplicable to Commerce's selection of Indonesia rather than India as the surrogate country for the PRC during an administrative review); *JTEKT Corp. v. United States*, 35 CIT ___, ___, 768 F. Supp. 2d 1333, 1347 (2011) (APA inapplicable to alteration in methodology for identifying similar merchandise despite plaintiffs' inability to anticipate effect of Commerce's methodology on its margins). In any event, Commerce informed Plaintiffs early in the proceeding of its intent to select Thailand as the surrogate country, and provided ample opportunity for Plaintiffs to respond (which it did). *Surrogate Country Memorandum* at 1–2. *See generally India Data Submission* (Indian surrogate value data summaries and sources); Jiaxing Brother Surrogate Value Submission, Ex. 2 (Dep't of Commerce June 19, 2012), PDs 70–84 (Philippine surrogate value data summaries and sources) ("*Philippines Data Submission*").

Having invested substantial effort in locating and analyzing Indian data in past proceedings, Plaintiffs' frustration with Commerce's decision to select Thailand is understandable. Nevertheless, Commerce altered no policy or regulation by selecting Thailand over India as the primary surrogate country on this administrative record. Plaintiffs' APA argument therefore must fail.

3. Commerce reasonably refrained from selecting India as the primary surrogate country

Plaintiffs also argue that Commerce should have selected India as the primary surrogate country because of an alleged primacy of Indian over Thai data. *See* Pls.' Br. at 14–20. India though cannot be a suitable primary surrogate country on this administrative record because it is not economically comparable to the PRC. *See Decision Memorandum* at 3–4. During the administrative review, as an alternative to Indian data, Plaintiffs proffered data from the Philippines,

which the OP listed as economically comparable to the PRC. India therefore could never be a reasonable choice because at least one country, the Philippines, satisfies the statutory criterion of economic comparability, whereas India does not. Plaintiffs' argument about the qualitative superiority of Indian data compared to Thai data ultimately concentrates on a false choice. Commerce's only real choice was not between India and Thailand, but between Thailand and the Philippines. The court now turns to Commerce's analysis, findings, and conclusions about the relative quality and reliability of the Thai and Philippine data sets.

B. Commerce's selection of Thailand rather than the Philippines as the primary surrogate country is potentially unreasonable

Having rejected India on the basis of economic comparability, Commerce focused its surrogate country analysis on Thailand and the Philippines, the only two economically comparable significant producers of comparable merchandise for which it had any surrogate data. *See Decision Memorandum* at 3–12. When selecting surrogate data to value factors of production, Commerce is guided by a general regulatory preference for publicly available, non-proprietary information. 19 C.F.R. § 351.408(c)(1), (4). Beyond that, Commerce generally considers the quality, specificity, and contemporaneity of the available data. *Decision Memorandum* at 7.

Commerce explained that it selected Thailand over the Philippines because "Thailand offers superior quality of data for valuing the steel wire rod consumed by [Plaintiffs] and offers usable data to value all [factors of production] necessary for the final results," whereas "the Philippine import statistics for the steel wire rod are less specific" and "the Philippine [data] . . . do not contain values for certain factors, such as diesel or marine insurance, that are necessary to calculate a dumping margin for [Plaintiffs]." *Decision Memorandum* at 12. There are a number of problems with these findings that render them potentially unreasonable given the information on the administrative record.

To begin, Commerce's rejection of the Philippines due to its lack of data for "diesel or marine insurance" does not appear to be a valid or relevant reason because Commerce did not use Thai data to value either input. *See Preliminary Results*, 77 Fed. Reg. at 27,027 (valuing Plaintiffs' marine insurance using "rates from RJG Consultants," a non-Thai source covering "sea freight from the Far East Region," presumably as applicable to the Philippines as Thailand); Surrogate Value Memorandum at 6 (Dep't of Commerce Apr. 30, 2012), PD 63, Joint App'x at JA-000891 (ignoring Plaintiffs' energy costs in accor-

dance with prior practice "in order to avoid double counting energy costs which have necessarily been captured in the surrogate financial ratios" because the single Thai financial statement on the record did not "identify energy expenses").

In addition, Commerce has an announced criterion of utilizing *multiple* financial statements when available to eliminate distortions that may arise from using those of a single producer. *Certain Malleable Iron Pipe Fittings from the People's Republic of China*, 70 Fed. Reg. 76,234, 76,237 (Dep't of Commerce Dec. 23, 2005) (prelim. results admin. review), *as modified*, 71 Fed. Reg. 37,051 (Dep't of Commerce June 29, 2006) (final results admin. review); *see Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368, 1373–75 (Fed. Cir. 2010). Here, there was *one* Thai financial statement as opposed to *three* usable Philippine financial statements, undermining Commerce's finding that the Thai financial data were of "similar quality" to the Philippine data. *See Decision Memorandum* at 9–12. More problematical, in a separate, roughly contemporaneous administrative proceeding covering steel wire garment hangers from the PRC, Commerce rejected use of the very same Thai financial statement (in favor of Philippine financial statements) because of "several concerns" with the Thai financial statement's "suitability for calculating surrogate financial ratios." Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Steel Wire Garment Hangers from the People's Republic of China, A-570–918, at 14–16 (Dep't of Commerce Nov. 8, 2012), *available at* http://enforcement.trade.gov/frn/summary/prc/2012–27337–1.pdf (last visited Jan. 31, 2014); *see Steel Wire Garment Hangers From the People's Republic of China*, 77 Fed. Reg. 66,952 (Dep't of Commerce Nov. 8, 2012) (prelim. results third admin. review), unchanged in final results, 78 Fed. Reg. 28,803 (May 16, 2013) (final results third admin. review).

Beyond these problems, Commerce's conclusion that Thailand "offers usable data to value all [factors of production]," does not appear reasonable for the hydrochloric acid ("HCL") input. Just as a quick clarification and reminder, the statutory standard is not whether surrogate data is merely "usable", but whether it is the "best available", and Plaintiffs persuasively challenge the reasonableness of Commerce's selection of the Thai HCL data. The only Thai HCL data on the record were average import values, which Commerce used to price Plaintiffs' HCL at $2.92 per kilogram. *Decision Memorandum* at 9. Plaintiffs argue that this value is "aberrantly high" due to expenses associated with shipping and importing a hazardous substance like

HCL, and that Thai data were not the best available approximation of the domestic HCL it actually consumed. Pls. Br. at 26. Specifically, according to Plaintiffs:

> Review of [Thai import data] data reveals that no country came close to importing the quantities consumed by [Plaintiffs] in a single purchase for any given year in total. In many instances the country had shipped less than 1000 kg of HCL to Thailand per year reported. For example, in 2010, Belgium shipped 300 kg and Ukraine shipped 530 kg for the year ending in March. Even extrapolated out over an entire year, it is clear that many of the shipments were small quantities per shipment, suggesting that this HCL had completely different uses, concentrations, or sizes. Indeed, taking just Belgium as an example again, it shipped nothing in 2010 and 3552 kg in 2009. Germany and Japan have more sizable annual shipments . . . [that do] not even equal what [Plaintiffs] purchase[ ] in one delivery. In short, nothing in [the Thai import data] substantiates the Department's baseless assertion that HCL is now being shipped in commercial quantities. More to the point, HCL is not shipped to Thailand in quantities that are commercially comparable to a producer of STR.
>
> Further, regardless of whether the shipments are commercial, the merchandise is still hazardous and expensive to ship internationally, as the Department has repeatedly recognized in the past. The shipments do not become cheap just because the shipments may be commercial. Brother sourced from local domestic sources, avoiding the costs and hassles of international shipping and clearing customs with hazardous goods.

Id. at 28–29.

Plaintiffs' argument is more than "mere speculation" as Commerce concluded. *See Decision Memorandum* at 9. Although the available Indian data cannot be used to value Plaintiffs' HCL (because India is not economically comparable), it nevertheless may be used to analyze the relative quality of the Thai and Philippine HCL data. Plaintiffs explain that India imported a similar amount of HCL as Thailand during the period of review, and a margin calculated using Indian import data would yield a surrogate value similar to Thailand at $3.64 per kilogram. *India Data Submission* at Ex. 2, JA-000505. By contrast, domestic Indian values reported in "Chemical Weekly," a data source Commerce previously utilized in place of Indian import

statistics,[3] list a much lower range of HCL prices: $0.08 to $0.15 per kilogram, according to Plaintiff. Pls.' Br. at 26. Infodrive India data shows that Indian HCL imports fluctuate substantially with respect to volume and price, lending credence to Plaintiffs' assertion that import prices differ from domestic prices as a result of the hazardous nature of HCL (and the concomitant costs of handling, shipping, and importing). *Id.* at Ex. 6, JA-000565 to JA-000603. Although there is no similar entry-specific data for Thai imports on the record, the Thai data seem to reveal "significant swings in the average unit values of the HCL" similar to the swings in Indian average unit import values as Plaintiffs claim. Pls.' Br. at 26 & Ex. 2. It therefore appears that the only reasonable inference one could draw from the administrative record is that the Thai import values are similarly affected, and thus do not reflect domestic Thai HCL prices. *See id.*; *see also India Data Submission*, at Ex. 2, JA-000505 (listing an average import value of $0.81 per kilogram for HCL from Thailand); *Philippines Data Submission* at Ex. 2, JA-000912 (listing an even lower average import value of 15.81 Philippine pesos per kilogram of HCL from Thailand).

Plaintiffs also placed on the record Philippine import statistics featuring entry of *more than ten times* as much HCL by volume than both the Thai data and the Indian data. *See Philippines Data Submission* at Ex. 2, JA-000912 (indicating the Philippines imported 2,818,389 kg of HCL during the POR); Pls.' Br. at Ex. 2 (indicating Thailand imported 275,886 kg of HCL during the POR); *India Data Submission* at Ex. 2, JA-000505 (indicating India imported 172,000 kg of HCL during the POR). Commerce even acknowledged that this data "consist[ ] of a wider range of country AUVs than Thai HCL import data." *Decision Memorandum* at 9. According to Plaintiffs, this data would yield a $0.38 per kilogram surrogate value, Pls.' Reply at 15, a price much closer to the domestic values listed in Chemical Weekly than those Indian and Thai average unit import values reflecting significant fluctuations in entry prices and volumes. The Philippine import statistics simultaneously appear to undermine the reasonableness of relying on Thai import statistics and offer an apparently better available means of valuing Plaintiffs' HCL input. At the very least, Plaintiffs' evidentiary arguments amount to more than "mere speculation" with respect to the Thai HCL data as Commerce concluded. *See Decision Memorandum* at 9.

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[3] *See, e.g.*, *Certain Helical Spring Lock Washers From the People's Republic of China*, 73 Fed. Reg. 4175 (Dep't of Commerce Jan. 24, 2008) (final results admin. review) and accompanying Issues and Decision Memorandum (Jan. 15, 2008), available at http://ia.ita.doc.gov/fm/summruyIPRCIE8–1228–1.pdf (last visited Jan. 31, 2014) at Cmt. 4.

Each of the aforementioned issues precludes the court from sustaining Commerce's choice of Thailand over the Philippines as the primary surrogate country. Therefore, the court will remand the matter to Commerce for further explanation and consideration. On remand, Commerce may wish to consider the following questions: Does Thailand's apparently more specific steel input data outweigh the apparent comparative strengths of the Philippine HCL and financial data (and deficiencies of Thai HCL and financial data)? *See Decision Memorandum* at 7, 12. Rather than the otherwise irrelevant rationale of missing Philippine marine insurance and diesel data, are there other potential deficiencies with the Philippine data that counsel its rejection, such as an apparent absence of values for five packing material inputs that are included in the Thai data? *Compare* Surrogate Value Memorandum at Ex. 1, JA-000897 (Thai surrogate value master spreadsheet) *with Philippines Data Submission* at Ex. 2, JA-000910 (Philippine surrogate value spreadsheet, omitting values for "PE Bag," "Plastic Cap," "Carton," "Paper Tube," and "Staples"). Does Commerce's preference to source all surrogate values from the same surrogate country somehow outweigh the apparent superior quality and availability of the Philippine HCL and financial surrogate data?

III. Conclusion

Accordingly, it is hereby

ORDERED that Commerce's rejection of India as the primary surrogate country is sustained; it is further

ORDERED that Commerce's selection of Thailand as the primary surrogate country is remanded for clarification or reconsideration, as appropriate; it is further

ORDERED that Commerce shall file its remand results on or before April 8, 2014; it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: February 6, 2014
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON