U.S. Customs and Border Protection

Slip Op. 14–130

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, Chief Judge Court No. 11–00080

[Affirming a redetermination that the U.S. International Trade Commission issued in response to a remand order in litigation under the antidumping and countervailing duty laws]

Dated: November 10, 2014

Mark B. Lehnardt, Lehnardt & Lehnardt, LLC, of Liberty, MO and Irene H. Chen, Chen Law Group, LLC, of Rockville, MD, argued for plaintiff Downhole Pipe & Equipment, LP.

David Goldfine, Attorney-Advisor, U.S. International Trade Commission, of Washington, DC, argued for defendants.

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

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

OPINION

Stanceu, Chief Judge:

Before the court is a determination ("Remand Redetermination") issued by the U.S. International Trade Commission ("ITC" or the "Commission") in response to the court's remand order in *Downhole Pipe & Equipment, LP v. United States,* 37 CIT __, 963 F. Supp. 2d 1335 (2013) ("Downhole Pipe I"). Views of the Comm'n on Remand (Dec. 11, 2013), ECF No. 96 (public version) ("Remand Redetermination").¹ In Downhole Pipe I, the court reviewed the ITC's final determination that the domestic industry manufacturing steel drill pipe

 $^{^{1}}$ Citations in this Opinion are to the public version of each document unless otherwise indicated.

and steel drill collars, although not experiencing present material injury, was threatened with material injury by imports of finished and unfinished steel drill pipe and steel drill collars (the "subject merchandise") from the People's Republic of China ("China" or the "PRC"). See Drill Pipe & Drill Collars From China, 76 Fed. Reg. 11,812 (Int'l Trade Comm'n Mar. 3, 2011) ("Final Injury Determination"); Drill Pipe & Drill Collars from China, Inv. Nos. 701-TA-474 and 731-TA-1176 (Final), USITC Pub. 4213 (Feb. 2011) ("ITC Publ'n"). http://www.usitc.gov/trade remedy/ available at731_ad_701_cvd/investigations/2010/ drill_pipe_from_china/final/ PDF/pub4213.pdf (last visited Nov. 4, 2014). The court remanded the Commission's affirmative threat determination for reconsideration, principally upon the conclusion that two of the Commission's findings of fact were unsupported by substantial evidence on the record of the investigation. Downhole Pipe I, 37 CIT at __, 963 F. Supp. 2d at 1348. On remand, the ITC reconsidered its earlier determination in the absence of the unsupported findings. The Commission again reached a negative determination on material injury but reversed its prior affirmative determination with respect to threat. Remand Redetermination 3.

The defendant-intervenors in this case, VAM Drilling USA, Texas Steel Conversion, Inc., Rotary Drilling Tools, TMK IPSCO, and United States Steel Corporation, are domestic drill pipe producers. *Id.* at 6. They raise various objections to the Remand Redetermination and advocate a second remand for reconsideration of the ITC's negative threat determination. Comments of Def.-intervenors; VAM Drilling USA; Texas Steel Conversion, Inc.; Rotary Drilling Tools; TMK IPSCO; & U.S. Steel Corp. Regarding the Remand Results (Jan. 27, 2014), ECF No. 105 ("Def.-intervenors' Comments"). For the reasons discussed herein, the court rejects defendant-intervenors' arguments and concludes that the Remand Redetermination must be affirmed.

I. BACKGROUND

The background of this case is presented in the court's prior opinions in this action and is supplemented herein. *Downhole Pipe I*, 37 CIT at __, 963 F. Supp. 2d at 1338; *Downhole Pipe & Equipment Co. v. United States*, 37 CIT __, __, Slip Op.14–23 at 2–4 (Feb. 25, 2014) (denying motion for rehearing).

The ITC initiated its injury and threat investigation on January 6, 2010. *Drill Pipe From China*, 75 Fed. Reg. 877, 878 (Int'l Trade Comm'n Jan. 6, 2010) (initiation). The Commission conducted its investigation on the basis of data from a period of investigation

("POI") from January 2007 to June 2010. Drill Pipe & Drill Collars from China: Staff Report to the Comm'n on Investigation Nos. 701-TA-474 and 731-TA-1176 (Final) at I-30 (Table I-4) (Jan. 26, 2011) (Pub. Admin.R.Doc. No. 213) (Conf. Admin.R.Doc. No. 523) ("Final Staff Report").

The Commission published the preliminary results of its investigation on March 8, 2010, determining that, for purposes of sections 703(a) and 733(a) of the Tariff Act of 1930 (the "Tariff Act"), 19 U.S.C. §§ 1671b(a), 1673b(a), "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."² Drill Pipe & Drill Collars from China, 75 Fed. Reg. 10,501 (Int'l Trade Comm'n Mar. 8, 2010) (preliminary results). The International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), determined, pursuant to sections 705(a) and 735(a) of the Tariff Act, 19 U.S.C. §§ 1671d(a), 1673d(a), that drill pipe and drill collars were being sold at less than fair value and that the Chinese producers received countervailable subsidies. 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 (Int'l Trade Admin. Jan. 11, 2011); Drill Pipe From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, 76 Fed. Reg. 1,971 (Int'l Trade Admin. Jan. 11, 2011). Subsequently the ITC, reaching a negative determination on injury and an affirmative determination on threat pursuant to sections 705(b) and 735(b) of the Tariff Act, 19 U.S.C. §§ 1671d(b), 1673d(b), published its final determination on injury and threat concurrently with the publication of antidumping and countervailing duty orders on March 3, 2011. Drill Pipe and Drill Collars From China, 76 Fed. Reg. 11,812 (Int'l Trade Comm'n Mar. 3, 2011) ("Final Injury Determination"); Drill Pipe From the People's Republic of China: Antidumping Duty Order, 76 Fed. Reg. 11,757 (Int'l Trade Admin. Mar. 3, 2011); Drill Pipe From the People's Republic of China: Countervailing Duty Order, 76 Fed. Reg. 11,758 (Int'l Trade Admin. Mar. 3, 2011).

Plaintiff Downhole Pipe & Equipment, LP, a Chinese producer of the subject merchandise, initiated this action contesting the ITC's final affirmative threat determination by filing a summons on April 1, 2011 and a complaint on April 29, 2011. Summons, ECF No. 1; Compl., ECF No. 8. Plaintiff subsequently moved for judgment on the agency record pursuant to USCIT Rule 56.2. Pl.'s R. 56.2 Mot. for J.

 $^{^2}$ All statutory citations are to the relevant provisions the 2006 edition of the U.S. Code, unless otherwise indicated.

on the Agency R. (Oct. 19, 2011), ECF No. 28. In *Downhole Pipe I*, the court concluded that the contested determination relied in part on two factual findings that were not supported by substantial evidence on the administrative record and also directed the Commission to provide further explanation with respect to two other aspects of the affirmative threat determination.³ *Downhole Pipe I*, 37 CIT at __, 963 F. Supp. 2d at 1344–47.

In reaching a negative determination on threat, the Remand Redetermination incorporated by reference, and adopted in its entirety, a section of the final ITC publication presenting the opinion of three Commissioners who had dissented from the Commission's original affirmative threat determination ("Original Dissenting Views"). *Remand Redetermination* 7 (citing *ITC Publ'n*, Original Dissenting Views 41–62). In light of the reversal, the Remand Redetermination did not respond to the court's order seeking additional explanation with respect to certain aspects of the original majority's final affirmative threat determination.⁴

II. DISCUSSION

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), under which the Court of International Trade is granted exclusive jurisdiction over actions brought under section 516A of the Tariff Act, 19 U.S.C. § 1516a. In reviewing the Remand Redetermination, the court will

³ The U.S. International Trade Commission ("ITC" or the "Commission") had relied in part on a finding that U.S. sales of the subject merchandise had been confined to small purchasers at the beginning of the period of investigation ("POI") and a finding that importers had "broken through a major prior limitation on their reach in the U.S. market" by successfully targeting sales to large firms toward the end of the POI. Drill Pipe and Drill Collars from China at 29, Inv. Nos. 701-TA-474 and 731-TA-1176 (Final), USITC Pub. 4213 (Feb. 2011) ("ITC Publ'n"), available at http://www.usitc.gov/trade_remedy/ 731_ad_701_cvd/investigations/ 2010/drill_pipe_from_china/final/PDF/pub4213.pdf (last visited Nov. 4, 2014). In Downhole Pipe & Equipment, LP v. United States, 37 CIT _, 963 F. Supp. 2d 1335 (2013) ("Downhole Pipe I"), the court concluded that the ITC had relied on these two factual findings, which the court held impermissible, in determining that the U.S. market share of Chinese imports was "poised to increase." Id. at __, 963 F. Supp. 2d at 1342-45. The court ordered clarification of the ITC's findings that "subject imports held a substantial share of the U.S. market throughout the period examined, a share that grew in first-half 2010" and "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." Id. at __, 963 F. Supp. 2d at 1346-47 (citing ITC Publ'n, Original Comm'n Views 32).

⁴ "Since we have adopted the Original Dissenting Views in their entirety, the Court's remand instructions do not apply to our negative determinations on remand." *Views of the Comm'n on Remand* 7 (Dec. 11, 2013), ECF No. 96 ("*Remand Redetermination*"). In addition, the ITC addressed two errors in the Final Staff Report pointed out in the court's remand order. *Id.* at 6 n.16.

"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). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). The court considers evidence on the record in its entirety, and a determination as to the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Where evidence is ambiguous or subject to different weightings of the record, substantial evidence may consist of "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. Maritime Comm'n, 383 U.S. 607, 620 (1966).

Under sections 705(b)(1) and 735(b)(1) of the Tariff Act, 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1), the Commission is required 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. Section 771(7)(A) of the Tariff Act defines material injury as harm that "is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A).

In making its determination on threat, the ITC is required to "consider, among other relevant economic factors," eight specific factors. 19 U.S.C. § 1677(7)(F)(i).⁵ The statute also identifies a ninth, nonspecific threat factor: "any other demonstrable adverse trends

⁵ The specific economic factors prescribed for the threat determination are as follows:

^{(1) &}quot;if a countervailable subsidy is involved . . . the nature of the subsidy . . . and whether imports of the subject merchandise are likely to increase," 19 U.S.C. § 1677(7)(F)(i)(I); (2) "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); (3) "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); (4) "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); (5) "inventories of the subject merchandise," id. § 1677(7)(F)(i)(V); (6) "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); (7) "the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission . . . with respect to either the raw

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).

Defendant-intervenors claim that the ITC's findings regarding four of the nine factors enumerated in 19 U.S.C. § 1677(7)(F)(i) are unsupported by substantial evidence and that, because the Remand Redetermination relies upon these findings, the court must order another remand in this case.⁶ Def.-intervenors' Comments 4. They organize their comments under two general objections to the Remand Redetermination. First, they claim that the ITC's finding on the likely volume and market share of subject imports lacked the support of substantial record evidence. Id. at 3. Second, they claim that the ITC's analysis of the U.S. industry's financial performance was fundamentally flawed. Id. at 27–29. At oral argument, the court asked whether, as it appeared from defendant-intervenors' comments on the Remand Redetermination, the second claim was a challenge the ITC's negative injury determination. Redacted Tr. of Confidential Oral Arg. at 9 (July 30, 2014), ECF No. 117 ("Oral Tr."). In response, counsel for defendant-intervenors waived the second claim to the extent that the claim is interpreted to challenge the injury determination but expressly declined to waive this claim to the extent that it applies to the threat determination. Id. at 10.

A. The Court Rejects Defendant-intervenors' Arguments Pertaining to Likely Volume and Market Share of Subject Imports and Existing Unused Production Capacity of Chinese Producers

In making a threat determination, the ITC is required to consider, among several other factors, "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

agricultural product or the processed agricultural product" (not relevant to this case), *id.* § 1677(7)(F)(i)(VII); and (8) "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).

⁶ In their comments on the Remand Redetermination, defendant-intervenors identify the four statutory factors under which they contend the Commission made impermissible findings as follows: "... existing unused production capacity, any 'significant rate of increase in the volume or market penetration of imports of the subject merchandise,' inventories of subject merchandise, [and] '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." Comments of Def.-intervenors; VAM Drilling USA; Texas Steel Conversion, Inc.; Rotary Drilling Tools; TMK IPSCO; & U.S. Steel Corp. Regarding the Remand Results 3–4 (Jan. 27, 2014), ECF No. 105 (public) ("Def.-intervenors' Comments") (citing 19 U.S.C. §1677(7)(F)(i)(II-V)).

into account the availability of other export markets to absorb any additional exports" 19 U.S.C. § 1677(7)(F)(i)(II). The Commission noted that "Chinese capacity increased overall during the period examined, with capacity utilization dropping to low levels by the end of the period, so that reported excess capacity is extensive." *ITC Publ'n*, Original Dissenting Views 43 (footnote omitted). The ITC added that "[f]or finished products, reported excess capacity in 2009 ... slightly exceeded apparent U.S. consumption in that year." *Id.* at 43–44. The ITC concluded, however, that the existing unused production capacity in China did not indicate "a likelihood of substantially increased imports of the subject merchandise into the United States, given the demonstrated ability of other export markets to absorb any additional exports from China." *Id.* at 45.

In claiming generally that the ITC's finding on the likely volume and market share of subject imports was unsupported by substantial record evidence, defendant-intervenors object that "[t]he Commission's finding that Chinese excess capacity would not imminently lead to increased Chinese imports and market penetration was unreasonable and lacked substantial evidence to support it." Def.-intervenors' Comments 5. They make five specific arguments in support of this objection, *id.* at 5–26, each of which the court finds unpersuasive for the reasons discussed below.

1. Defendant-intervenors' Argument Mischaracterizes the Commission's Finding on Third Country Export Markets

Defendant-intervenors first argue that "[t]he current majority's finding that 37rd-country export markets could 'absorb any additional exports from China' was not supported by substantial evidence." Def.-intervenors' Comments 6. According to their argument, the ITC "based this on the fact that the proportion of the Chinese industry's total exports that were headed to the United States had declined" during the POI. Id. They maintain that "[t]he undisputed fact that Chinese producers' unused capacity was so 'extensive' by the end of the POI . . . showed that their export markets were inadequate to absorb their surplus," id. (citations omitted), and that "[t]he new Commission majority failed to identify any reason to believe that available third-country demand was willing or able to absorb any of this amount of excess capacity, let alone all of it," id. at 7. Further, defendant-intervenors submit that "[t]he finding that third-country export markets could 'absorb any additional exports from China' did not rest on substantial evidence[] and therefore could not reasonably support its conclusion that rising Chinese exports would bypass the U.S. market in the future." Id. at 8.

Defendant-intervenors' argument mischaracterizes the Commission's finding on existing unused production capacity. The ITC did not find that third country export markets would necessarily absorb "any additional exports from China" that might result from future utilization of that capacity. The ITC found instead that the existing unused production capacity did not indicate a likelihood of substantially increased imports of the subject merchandise into the United States "given the demonstrated ability of other export markets to absorb any additional exports from China." ITC Publ'n, Original Dissenting Views 45. In formulating its conclusion in this way, the ITC adhered to the language of the statute rather than predicting that third country markets necessarily would absorb any future increase in exports of Chinese drill pipe and drill collar that might result from increased capacity utilization. 19 U.S.C. § 1677(7)(F)(i)(II). Rather than making the prediction that defendant-intervenors argue it made, the ITC referred to the "demonstrated ability of other export markets to absorb any additional exports from China," id. (emphasis added), thereby alluding to record data on the past pattern of exports, i.e., the pattern that third country markets generally had absorbed an increasing share of total Chinese exports of drill pipe and drill collars during the POI while the U.S. share of total exports declined.

Moreover, the Commission's finding that existing unused production capacity in China would not likely result in substantially increased exports of Chinese drill pipe and collars did not rest solely on consideration of the demonstrated ability of third country export markets to absorb additional Chinese exports. The ITC also considered record information pertaining to conditions of competition existing in the United States during the POI. As the Commission explained, "[t]he issue before us, however, is not simply the amount of excess capacity that currently exists in China but rather whether, given the conditions of competition in the U.S. market, the Chinese industry is likely to use that excess capacity to substantially increase shipments to the U.S. market." *ITC Publ'n*, Original Dissenting Views 44. The Commission gave several reasons for its conclusion that "such an outcome is unlikely." *Id*.

The ITC relied, first, on a number of related findings to support its conclusion that the Chinese industry is unlikely to use its excess capacity to substantially increase shipments to the U.S. market. It found that Chinese exporters had not reported a "surge of exports" during the POI, that exports of finished products (which the ITC found to have constituted the substantial majority of subject imports during the POI) had increased only moderately between 2007 and 2008 before declining precipitously in 2009, that the U.S. market share of the Chinese finished products had declined over the POI, and that imports of subject unfinished products did not surge between 2007 and 2009. Id. Concerning the increase in subject finished exports that occurred from 2007 to 2008, the ITC reasoned that "[t]o the extent that any increase occurred, it did so against the backdrop of an overheated demand environment, which is not likely to recur in the imminent future," and which was "characterized by extended lead times of U.S. producers in 2008 compared to importers of the subject products." Id. The ITC further reasoned that "[b]ecause subject imports declined in volume in 2009 (and, in the case of finished products, in market share as well) when demand was weak, there is no reason to expect a surge in subject import volume and market share in the imminent future, inasmuch as demand and domestic producers' lead times have not yet returned to the levels they reached during the period when those trends were last observed." Id. (footnotes omitted).

With respect to the third country markets, the ITC found that "although the Chinese industry can be characterized as exportoriented, the Chinese industry is not very reliant on the U.S. market compared to other markets[] and did not increase significantly the share of its exports going to the U.S. market during the period examined." Id. The Commission found that the percentage of the total Chinese exports of finished drill pipe and collar products exported to the United States increased only slightly between 2007 and 2009 "and was less than the share of shipments going to non-U.S. markets throughout the period examined." Id. at 44-45 (footnote omitted). It found, further, that the percentage of responding Chinese producers' shipments of subject finished products going to the United States declined between 2007 and 2008, "a period during which demand in the U.S. market was generally strong," and that the share going to "all other markets" increased "sharply" in 2008 and increased "even more markedly" in 2009. Id. at 45.

In summary, the court concludes from the entirety of the ITC's discussion of the existing unused production capacity of Chinese producers that defendant-intervenors are attempting to challenge a finding the ITC did not actually make. To that extent, defendant-intervenors' argument must be rejected.

At oral argument, defendant-intervenors argued that the ITC, in making its finding as to existing unused capacity, erred in overlooking record data demonstrating that, viewed in absolute terms as opposed to relative terms, the volume of exports of Chinese drill pipe and drill collars shipped to third country export markets essentially remained unchanged during the POI. Oral Tr. at 16–17 (describing

Final Staff Report at VII-11 (Table VII-3b)). This precise argument does not appear in defendant-intervenors' comments on the Remand Redetermination and therefore is not before the court. Even were the court to consider this argument, it still would be compelled to reject it. Regardless of whether Chinese exports of drill pipe and drill collars to third countries, in volume terms, remained essentially level during the POI, the fact that an increasing share went to third country markets while the U.S. share declined still constitutes relevant evidence in support of the Commission's finding that the existing unused capacity would not likely lead to substantially increased shipments of subject merchandise to the U.S. market, given the demonstrated ability of third country markets to absorb Chinese exports of drill pipe and drill collars.

2. The Court Rejects Defendant-intervenors' Argument Pertaining to an Overheated Demand Environment and the Lead Times of Domestic Suppliers

Next, defendant-intervenors argue that "the Commission's finding that Chinese imports would likely gain market share only in an 'overheated demand environment' in which U.S. producers had 'extended lead times' was unreasonable and lacked substantial evidence to support it." Def.-intervenors' Comments 9. They assert that "the Commission failed to reasonably analyze-or even in some cases to recognize—several significant changes that had transpired since the 2007 to 2008 period," adding that "[t]hese changes indicated that producers, exporters and importers of subject merchandise were more aggressive than in 2007 to 2008[] and could in fact increase their market share in periods of low demand when the U.S. industry had relatively short lead times." Id. at 10. In referring to "changes," defendant-intervenors explain that "Chinese producers were operating a[t] nearly full capacity in 2007 and for most of 2008, but by 2010 they had 'extensive' excess capacity." Id. (footnote omitted). Repeating their argument that the ITC erroneously found that export markets could absorb any additional exports (which the court rejects for the reasons discussed previously), they maintain that "facilitated by all this excess capacity, subject exports and imports actually had in fact started to surge by the end of the POI." Id. at 11. According to their argument, the Commission, having failed to analyze these changes, could not reasonably draw a "connection between the facts found and the choices made." Id. at 10 (citing Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). They conclude by contending that "the Commission failed to reasonably account for evidence that 'fairly detracts' from the weight of its base assumption that only overheated demand could lead to surging subject imports because that was what had happened before." *Id.* at 14 (citation omitted).

The court is not persuaded by defendant-intervenors' argument. Defendant-intervenors once again mischaracterize a statement by the ITC. Moreover, in considering the likelihood of a substantial increase in subject imports in the imminent future, the Commission did not fail to analyze the relevant record evidence, including the record evidence to which defendant-intervenors direct the court's attention.

Defendant-intervenors attempt to challenge an ITC finding that Chinese imports likely would gain market share only in an overheated demand environment in which U.S. producers had extended lead times. *Id.* at 9. The actual statement by the ITC, however, was narrower and more nuanced than as interpreted by defendantintervenors: "Because subject imports declined in volume in 2009 (and, in the case of finished products, in market share as well) when demand was weak, there is no reason to expect a surge in subject volume and market share in the imminent future, inasmuch as demand and domestic producers' lead times have not yet returned to the levels they reached during the period when those trends were last observed." *ITC Publ'n*, Original Dissenting Views 44 (footnote omitted).

The ITC referred to the unlikelihood of an imminent "surge" in import volume and market share, not merely a "gain" in market share, as defendant-intervenors paraphrase the Commission's statement. Def.-intervenors' Comments 9. The Commission spoke in the context of the prospect of a return to the overheated demand levels and extended lead times that occurred concurrently with the increase in volume of subject imports from 2007 to 2008, not simply any increase in demand. In this respect, defendant-intervenors' argument that the ITC failed to recognize that the changes they identify "indicated that producers, exporters and importers of subject merchandise were more aggressive than in 2007 to 2008[] and could in fact increase their market share in periods of low demand when the U.S. industry had relatively short lead times," *id.* at 10, is misguided.

The ITC's statement referring to "demand and domestic producers' lead times" that "have not yet returned to the levels they reached during the period when those trends were last observed," *ITC Publ'n*, Original Dissenting Views 44 (footnote omitted), was part of a broader discussion in which the ITC concluded that, given the conditions of competition in the U.S. market, the Chinese industry was not likely to use its excess capacity to increase substantially shipments of subject merchandise to the United States, *id*. In presenting its analysis, the Commission mentioned, specifically, the extensive level of existing unused capacity, the volume trends of subject imports during the POI, and the record evidence that third country markets had absorbed an increasing share of total exports of drill pipe and drill collars. *Id.* at 44–45.

As the court discussed previously, the ITC found that the increase in import volume that took place early in the POI-which the Commission did not consider to be a substantial increase-occurred during a period of overheated demand in which the extended lead times were evident. ITC Publ'n, Original Dissenting Views 44. As the court also discussed previously, the Commission concluded that a substantial increase in subject imports in the imminent future was unlikely for several reasons. The initial reason it gave was this: "[f]irst, responding firms did not report a surge of exports to the U.S. market during the period examined." Id. Specifically, the Commission found that subject finished products increased "only modestly" from 2007 to 2008, declined substantially in 2009, and that subject unfinished products "did not surge between 2007 and 2009." Id. (footnote omitted). The Commission reasonably considered the absence of a surge of subject imports during the POI to be an indicator, among others, that a surge was not likely to occur in the imminent future. The ITC discussed the overheated demand environment and the lead times only as an ancillary point, in the context of the limited increase that occurred between 2007 and 2008: "To the extent that any increase occurred, it did so against the backdrop of an overheated demand environment, which is not likely to recur in the imminent future." Id. (emphasis added). The Commission added that "this demand environment was characterized by extended lead times of U.S. producers in 2008 compared to importers of the subject products, which we find accounted for any increase in imports that occurred." Id. The Commission's discussion suggests that the scale of the increase in subject imports during the POI, which the Commission considered too small to constitute a "surge," was at least as important to the analysis as the demand environment in which that increase took place.

In making their argument concerning overheated demand conditions and lead times, defendant-intervenors assert that "subject exports and imports actually had in fact started to surge by the end of the POI," pointing to an increase from the second half of 2009 to first-half (i.e., "interim") 2010 that occurred even though "demand remained relatively weak and U.S. producers were not experiencing extended lead times." Def.-intervenors' Comments 11. They maintain that "[s]ince there was no evidence of seasonality that would distort

a comparison between the second half of 2009 and the first half of 2010, as the original majority determined . . . , this upsurge showed that Chinese producers were racing back into the U.S. market." Id. at 11–12 (citation omitted). They argue that during the twelve-month period consisting of second-half 2009 and interim 2010, "subject import volume and market share increased at an even more rapid rate than before, even though demand was improving" and that "[t]his showed that subject imports were capable of rapidly increasing in both volume and market share even absent an overheated demand environment." Id. at 12. Acknowledging the ITC's observation that "finished subject imports had a lower volume and less U.S. market share in the first half of 2010 than in the first half of 2009," defendant-intervenors object that "the Commission failed to provide a reasonable explanation of why it considered the comparison between the first half of 2010 and the first half of 2009 more significant than the more recent data." Id. Taking issue with the Commission's comparing interim 2009 data with interim 2010 data, they complain that "[t]he only explanation the Commission here offered was that this was the Commission's 'typical' methodology." Id. at 13 (citing Remand Redetermination 10 n.42).

Defendant-intervenors' argument that the Commission failed to recognize the significance of the increase in subject imports from second-half 2009 to interim 2010 is also unpersuasive. Regardless of the conditions in which the ITC found the increase to have occurred. i.e., in the absence of overheated demand, the court finds no basis to conclude that the Commission improperly disregarded evidence of that increase. Although defendant-intervenors characterize the increase from second-half 2009 to interim 2010 as a "surge" in subject imports, their characterization is open to question in light of record evidence, cited by the ITC, demonstrating that the subject import volume in interim 2010 still was substantially below the level that was present in interim 2009. ITC Publ'n, Original Dissenting Views 41 & n.3. It was reasonable for the Commission to accord significance to this evidence as it considered the record as a whole, and it was reasonable for the Commission not to characterize the interim 2010 increase in imports as a "surge." See id., Original Dissenting Views 45 & n.26.

3. The ITC's Finding that Changes in Inventory Levels Do Not Indicate an Imminent Threat to Domestic Producers is Supported by Substantial Evidence

In attacking what they consider, erroneously, to be the Commission's finding pertaining to an overheated demand environment and extended lead times, defendant-intervenors argue that certain changes in inventories of subject merchandise showed a likely increase in subject imports. Def.-intervenors' Comments 14. Specifically, they argue that "[a]s Petitioners pointed out in the investigation, and the current majority acknowledged, by the end of the POI, the ratio of importers' inventories of subject merchandise to total demand was high and increasing." *Id.* at 15 (footnote omitted). They go on to argue that "[t]his overhang of subject merchandise would be available to compete in the marketplace in the future with new U.S.-made products, harming U.S. sales in the imminent future." *Id.*

The ITC, as required by 19 U.S.C. § 1677(7)(F)(i)(V), considered "inventories of the subject merchandise" in making its threat determination. Defendant-intervenors' argument as to importers' inventories is essentially that the ITC erred in not finding an indication of threat by comparing importer inventory levels with total demand. In the Remand Redetermination, the ITC addressed and rejected this argument, which had been presented to the Commission by United States Steel Corporation. Remand Redetermination 8 n.25. In its response, the ITC acknowledged that "there was a significant increase in the ratio of U.S. importers' inventories of subject imports relative to apparent U.S. consumption throughout the POI" but placed greater weight on absolute inventory volumes held by importers, which remained roughly the same from 2008 through interim 2010. Id. (citing Final Staff Report, App. C at 6-7 (Table C-2) (confidential version)). The Commission specifically considered the impact of these high inventory levels through the POI and found that "the record did not establish that these relative inventory increases were a factor having a significant injurious impact on the domestic industry during the POI, including in interim 2010." Id. The Commission concluded that "[a]bsent any significant changes in market conditions that would suggest otherwise, we do not see any basis to conclude that continued high ratios of subject inventories relative to apparent consumption would be an indication that subject imports would likely have a significant adverse impact on the domestic industry in the imminent future." Id.

The court rejects the argument defendant-intervenors base on the ratio of importers' inventories to apparent domestic consumption. The ITC cannot be faulted for considering the data on importers' inventories in light of other data of record that detracted from an affirmative threat finding, such as data on market conditions. The standard of review does not permit the court to reweigh the evidence so as to reach a conclusion different from the Commission's on the record data considered as a whole. In a related argument, defendant-intervenors contend that the ITC erroneously discounted the "the significance of the buildup in foreign producers' and importers' inventories over the POI," having failed to recognize that that "inventory levels are leading indicators of sales, not concurrent indicators (which is why the statute directs that they be considered as a threat factor)." Def.-intervenors' Comments 17–18. But their characterization of a "buildup" in importers' inventories "over the POI" is not a fair characterization of the record data, which showed that combined importers' inventories of finished drill pipe and drill collars increased from 2007 to 2008 but remained approximately level thereafter. *See Final Staff Report* at VII-15 (Tables VII-4b, 4d) (confidential version).

Regarding the defendant-intervenors' reference to "foreign producer" inventories, the ITC stated in the Remand Redetermination that "we do not find that any increases in the ratios of Chinese producers' inventories of subject merchandise relative to Chinese subject producers' total shipments and apparent U.S. consumption would be likely to have a significant adverse impact on the domestic industry in the imminent future, especially given that they had also not led to injury during the POI." Remand Redetermination 8 n.25. Defendant-intervenors dispute the ITC's reasoning by contending that the patterns of the inventories observed during the POI, including inventories held by producers in China, portend future injury. Def.-intervenors' Comments 18. On this record, the ITC was not required to conclude or infer that the inventory held abroad by Chinese producers required an affirmative threat determination, and it was reasonable for the ITC to ground its decision in part on data pertaining to circumstances existing during the POI. Moreover, the Commission reasonably could consider inventory held by Chinese producers, which is not necessarily destined for the United States, to be inherently less probative of future injury than is inventory located in the United States.

Defendant-intervenors also raise an argument they ground in the significance of changes in inventories of subject merchandise held by purchasers. Def.-intervenors' Comments 14 (citing 19 U.S.C. § 1677(7)(F)(i)(V)). Defendant-intervenors submit that "purchasers' total inventories of finished drill pipe and drill collars increased steadily over the POI in absolute terms to a peak at the end of the first half of 2010, so they increased tremendously compared to consumption, given the sharp fall in demand in that time." *Id.* at 15 (footnote omitted). Defendant-intervenors add that "the one type of purchaser inventory that was declining was Chinese-made merchan-

dise," which, according to defendant-intervenors, "indicated that purchasers were using their Chinese drill pipe preferentially[] and were consuming it faster than they could buy." *Id.* at 15–16. Referring to these U.S. purchasers, defendant-intervenors add that "[t]heir low levels of this product portended stepped-up purchases in the future" and that "[i]ndeed, the record showed that U.S. purchasers were stepping up their purchases of Chinese-made merchandise toward the end of the POI." *Id.* at 16 (footnote omitted). The court does not find merit in these arguments.

The record data showed that purchasers' inventory of subject merchandise declined generally over the POI. See Final Staff Report at II-18 (Table II-4) (confidential version). The ITC analyzed these data, together with the data on importers' inventories of subject merchandise, to determine whether inventory "overhang" existed that would cause it to alter its conclusion that a substantial increase in imports of subject merchandise was unlikely. ITC Publ'n, Original Dissenting Views 45. From the record evidence, the ITC found that "in this market there is no overhang of inventories from subject sources waiting to be sold into the U.S. market in the imminent future." Id. The Commission did not draw from the record evidence the speculative inference defendant-intervenors would draw, i.e., that the drawdown of subject merchandise from purchasers' inventories relative to the draw-down of domestic merchandise signaled an imminent increase in the volume of subject imports. Although the statute required the ITC to consider inventories of the subject merchandise, 19 U.S.C. § 1677(7)(F)(i)(V), nothing in the statute required the ITC to draw the inference defendant-intervenors advocate. Moreover, defendant-intervenors fail to identify record evidence that would make such an inference inescapable, and the court is aware of no such evidence.

4. The Court Sustains the Commission's Finding that Importers Did Not Use Underselling to Increase the Volume of Sales of Subject Merchandise

The statute directs the Commission to consider "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." 19 U.S.C. § 1677(7)(F)(i)(IV). In support of their argument that the Commission erred in finding that Chinese excess capacity would not lead imminently to increased imports of subject merchandise, defendantintervenors challenge a statement contained within a footnote in the Original Dissenting Views: "As explained below, we find no evidence that importers used underselling to increase the volume of sales in the U.S. market, a fact that further supports our finding as to likely volume." *ITC Publ'n*, Original Dissenting Views 44 n.20. Defendantintervenors point out that the Commission itself acknowledged the fact that "subject imports undersold domestic like product in most comparisons in 2010," arguing that "[t]hus, there was evidence of significant underselling during the most recent part of the POI." Def.-intervenors' Comments 20 (citation omitted). Raising various objections to the Commission's findings and logic, they argue that "[s]ince Chinese producers have made little progress in eliminating excess capacity and only partial progress in reducing inventories, subject merchandise from China would be likely to continue to undersell U.S. domestic like product in the imminent future as it had begun to do in the first half of 2010, rather than returning to its pre-2009 pattern." *Id.* at 23–24 (footnote omitted).

The arguments put forth by defendant-intervenors are unpersuasive because substantial record evidence supported the Commission's conclusion as to underselling. The ITC observed that the subject merchandise oversold the domestic merchandise in a majority of price comparisons during the POI but undersold the domestic merchandise in six of eight comparisons in interim 2010. ITC Publ'n, Original Dissenting Views 53. The Commission added that "the subject merchandise undersold the domestic product in four of four price comparisons in the first quarter of 2010, but in only two of four price comparisons in the second quarter of 2010." Id. at 53-54 (footnote omitted). The ITC further noted, and the data confirmed, that the margins of underselling in the two instances in the second quarter of 2010 were much smaller than the margins of underselling in the first quarter. Id. at 54. The Commission stated that "[w]e do not consider the underselling observed during the most recent six month period to constitute evidence that significant underselling is likely in the imminent future." Id. at 53.

The record evidence that underselling occurred more frequently in interim 2010 than in the prior three years of the POI, viewed in isolation, might have been seen to contribute to an affirmative threat determination. But on this record the ITC did not err in finding that importers of subject merchandise did not use underselling to increase the volume of sales of subject merchandise in the United States, as there was substantial evidence to support this finding. The decreasing incidence, and in particular the steeply decreasing magnitude, of the underselling during the first six months of 2010 supported a conclusion that significant underselling was unlikely to cause an increase in subject import volumes in the imminent future, as did the fact that incidences of underselling by the subject merchandise did not predominate when compared to incidences of overselling during the POI in general. *See Final Staff Report* at V-10 to V-15 (Tables V-2 to V-7) (confidential version).

Defendant-intervenors also contend that the ITC's analysis "rested on a clear error of fact." Def.-intervenors' Comments 20. They point to a statement by the Commission that "[b]ecause subject imports mostly oversold the domestic product when demand was increasing during the 2007 to 2008 time frame, we expect overselling to predominate in the imminent future, consistent with the pattern observed during the period examined." Id. (quoting ITC Publ'n, Original Dissenting Views 53). Directing the court's attention to data on total consumption of finished drill pipe and drill collars, defendantintervenors assert that "[t]he record shows that demand peaked in 2007," id. (citing Final Staff Report at C-6, C-7 (Table C-2) (confidential version)) and that "it was decreasing, and it decreased more in 2009," id. They submit that the ITC "was thus wrong to conclude that overselling was associated with increasing demand," id. at 20-21, and that "[d]emand finally began to increase from the second half of 2009 to the first half of 2010, when underselling increased, so if anything, increasing demand is associated with large and increasing levels of underselling," id. at 21.

Defendant-intervenors are correct that the record data on U.S. consumption of the finished goods show that consumption was higher in 2007 than in 2008. But these data do not demonstrate an error of fact undermining the Commission's analysis. Consumption may be a reliable indicator of demand when supply and demand are in balance, but as discussed previously, the ITC identified a special circumstance that affected U.S. market conditions: an overheated demand environment was found by the ITC to have existed in the 2007 to 2008 timeframe, characterized by "reported supply tightness in the U.S market," ITC Publ'n, Original Dissenting Views 42, and also characterized by extended lead times of U.S. producers in 2008 compared to imports of the subject products, *id*. Original Dissenting Views 42 n.8.⁷ The ITC also found that Chinese imports did not compete meaningfully in the premium segment of the drill pipe market. Id., Original Dissenting Views 60. On these findings and the record facts, it was reasonable for the Commission to conclude that there was some constraint in the supply of the domestic products relative to demand in 2008. In this regard, the record showed that subject imports

⁷ The record contained evidence of supply tightness in the U.S. market that was related to the extended lead times of domestic suppliers. *See Drill Pipe & Drill Collars from China: Staff Report to the Comm'n on Investigation Nos.* 701-TA-474 and 731-TA-1176 (Final) at II-13, II-14 (Jan. 26, 2011) (Conf. Admin.R.Doc. No. 523).

peaked in 2008—just as the supply of the domestic products would appear to have been constrained, as shown by the extended lead times—and then declined precipitously in 2009. Moreover, the consumption data on which defendant-intervenors rely for their "clear error of fact" argument, when considered in the context of other record data, do not show enough of a decline in consumption to compel a finding that demand actually fell between 2007 and 2008. These data show that consumption of finished goods declined only somewhat from 2007 to 2008, remained relatively high compared to the remainder of the POI, and declined drastically from 2008 to 2009. *Final Staff Report.* at C-6 (Table C-2) (confidential version). The Commission's analysis that demand, when evaluated according to factors that include not only data on consumption but other record data, was increasing in the 2007 to 2008 timeframe is substantiated by the record evidence considered as a whole.

5. The Commission Provided an Adequate Explanation for its Conclusion on Product-Shifting

The Tariff Act requires the ITC to consider, when assessing the threat of material injury, "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." 19 U.S.C. § 1677(F)(i)(VI). Recognizing in its threat analysis that unfinished drill pipe could be made on certain production lines in China that now make seamless oil country tubular casing and tubing ("oil country tubular goods," or "OCTG"), the ITC considered the extent to which such "product-shifting" was likely to occur in the imminent future. ITC Publ'n, Original Dissenting Views 45. The Commission concluded that the potential for product-shifting existed but was "somewhat limited." Id. Citing record data on imports of unfinished drill pipe and drill collars from China for the period corresponding to, and extending beyond, the effective dates of antidumping and countervailing duty orders on OCTG from China, the Commission concluded that the record "does not indicate any significant surge into the U.S. market of such products when the OCTG orders went into effect "8 Id. at 45 & n.26 (comparing record data on subject imports of unfinished products for interim 2010 with data for

⁸ A countervailing duty order went into effect on January 20, 2010. *Certain Oil Country Tubular Goods From the People's Republic of China: Am. Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 Fed. Reg. 3,203 (Int'l Trade Admin. Jan. 20, 2010). An antidumping duty order followed on May 21, 2010. *Certain Oil Country Tubular Goods From the People's Republic of China: Am. Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 75 Fed. Reg. 28,551 (Int'l Trade Admin. May 21, 2010).

the first half of 2009 (citing *Final Staff Report*. at C-4, C-5 (Table C-1) (confidential version))).

Defendant-intervenors claim that the Commission's "productshifting analysis was unexplained," objecting that the ITC "did not explain why they compared imports in the first half of 2009 to imports in the first half of 2010, rather than comparing imports in the period immediately before imposition of the order and immediately after." Def.-intervenors' Comments 24 "Had they compared imports of unfinished drill pipe in the second half of 2009 to imports in the first half of 2010, they would have seen that they increased." Id. (citing Final Staff Report at C-4, C-5 (Table C-1) (confidential version)). Defendant-intervenors, however, do not show that the Commission erred in analyzing the subject data or in providing an explanation for its conclusion. Subject imports of unfinished drill pipe and drill collars increased from second-half 2009 to first-half 2010, but from a very low level, having plummeted in second-half 2009. See Final Staff Report at C-4, C-5 (Table C-1) (confidential version). Although imports of subject unfinished drill pipe recovered somewhat in first-half 2010, it was only to a level far below what they had been in first-half 2009. Id. Subject imports of finished drill pipe and drill collars followed the same pattern in 2009 and first-half 2010, but the ITC concluded that significant additional finishing is required to produce finished drill pipe, making product-shifting from OCTG to finished drill pipe less likely. ITC Publ'n, Original Dissenting Views 45. The record data, considered on the whole, supported the Commission's conclusion that no significant surge into the U.S. market of unfinished products occurred when the OCTG orders went into effect. The court, therefore, has no valid basis on which to conclude that the ITC's product-shifting analysis was flawed and thereby merits a remand on the ground that the product-shifting analysis was "unexplained."9

⁹ To further their argument on the issue of product-shifting, defendant-intervenors characterize as irrelevant certain hearing testimony the ITC cited in support of the conclusion that "it is unlikely that production could be easily shifted from either" oil country tubular goods ("OCTG") or "seamless pipe to production of finished drill pipe." Def.-intervenors' Comments 24–25 (citing *ITC Publ'n*, Original Dissenting Views 45 & n.27). Read in context, the cited testimony is merely tangential to the point the Commission expressed in the sentence at issue—that "finishing processes for finished drill pipe are extensive, and thus it is unlikely that production could be easily shifted from either OCTG or seamless pipe to production of finished drill pipe." *ITC Publ'n*, Original Dissenting Views 45 (footnote omitted). Moreover, the testimony cited in the footnote addresses the general subject of product-shifting and therefore is not "irrelevant." Finally, defendant-intervenors take issue with the Commission's conclusion in the next sentence that "it is unlikely that producers of subject merchandise in China would shift to the production of subject merchandise given the lack of motivation to do so in the imminent future." Def.-intervenors' Comments 25

6. The Commission Did Not Reach a Finding as to Existing Unused Capacity that Lacked a "Rational Connection Between the Facts Found and the Choices Made"

Alluding to certain of their previous arguments (which the court rejected above), defendant-intervenors challenge the Commission's "conclusion that high levels of excess capacity besetting producers of subject merchandise at the end of the POI would not likely lead to significantly increased imports."¹⁰ Def.-intervenors' Comments 26. Taking issue with what they consider to be certain of the reasons the ITC offered, defendant-intervenors submit that the conclusion "lacked a 'rational connection between the facts found and the choices made." *Id.* at 26–27 (quoting *Burlington Truck Lines*, 371 U.S. at 168). The court disagrees.

Defendant-intervenors once again base an argument on the Commission's statement that "we do not consider that the existing unused production capacity in China, or the export orientation of Chinese producers, indicates a likelihood of substantially increased imports of the subject merchandise into the United States, given the demonstrated ability of other export markets to absorb any additional exports from China."" Id. at 25-26 (quoting ITC Publ'n, Original Dissenting Views 45). Defendant-intervenors argue that "the evidence the new majority cited-the reduction in the share of total Chinese exports going to the United States—was not rationally connected to this finding, and the fact that Chinese producers had been unable to ship enough to third country markets to avoid their excess capacity situation contradicted it." Id. at 26. But the evidence showing that an increasing share of total Chinese export production of drill pipe and drill collars went to third country markets during the POI had at least some relevance to that finding. The implication of defendantintervenors' argument is that a finding that excess capacity was likely to lead to an increase in subject imports was unavoidable due to the lack of evidence that third country export markets could absorb sufficient Chinese exports to allow the Chinese producers to achieve

⁽quoting *ITC Publ'n*, Original Dissenting Views 45–46). They characterize this sentence as "opaque" and assert that "the relevant incentive to shift production from OCTG to drill pipe is the new order on OCTG." *Id.* The Commission, however, acknowledged that the potential for product-shifting as a result of the OCTG orders "exists currently." *ITC Publ'n*, Original Dissenting Views 45.

¹⁰ For example, defendant-intervenors repeat their argument that "[t]he new majority also asserted that a significant increase in subject imports could not occur absent 'the backdrop of an overheated demand environment' or 'extended lead times of U.S. producers, because only such an environment had led to increased import market share in 2008." Def.-intervenors' Comments 26 (quoting *ITC Publ'n*, Original Dissenting Views 44). As discussed previously in this Opinion, this argument mischaracterizes the finding the ITC actually made.

full capacity utilization in the future without expanding their exports to the United States. As is apparent from the court's previous discussion, the ITC did not base the finding of which defendant-intervenors complain on a prediction that third country markets necessarily would absorb all additional Chinese exports even at full capacity utilization. Moreover, the ITC based its finding on a range of factors in addition to the record evidence that third country markets had absorbed a generally increasing share of total Chinese exports of drill pipe and drill collars during the POI. This included record data that imports of subject finished merchandise had increased only moderately between 2007 and 2008 before declining precipitously in 2009, that the U.S. market share of Chinese finished products had declined over the POI, and that imports of subject unfinished products did not surge between 2007 and 2009. See ITC Publ'n, Original Dissenting Views 44 & n.19 (citing *Final Staff Report* at C-4, C-5 (Table C-1)) (confidential version)).

In making their argument, defendant-intervenors also misinterpret the issue that the Commission was discussing. As the Commission itself stated, "the issue before us . . . is not simply the amount of excess capacity that currently exists in China but rather whether, given the conditions of competition in the U.S. market, the Chinese industry is likely to use that excess capacity to substantially increase shipments to the U.S. market." Id. at 44. As the ITC acknowledged, the record contained evidence related to existing unused production capacity that could serve as support for an affirmative threat finding. For example, the Commission recognized that reported Chinese excess capacity was extensive, that it increased overall during the POI, and that for finished products this capacity exceeded apparent U.S. consumption in 2009. Id. at 43-44. The Commission further stated that "[o]n balance, however, we find that Chinese drill pipe and drill collar producers have the ability to increase shipments to the United States" and that the Chinese drill pipe and drill collar industry is "export-oriented." Id. at 44. As defendant-intervenors point out, there also was record evidence that the Chinese industry exported a large share of its output, a share that had mainly increased during the POI, Def.-intervenors' Comments 6, and that unused capacity far exceeded total exports by the end of the POI, id. at 7. Defendant-intervenors would surmise that "[t]he undisputed fact that Chinese producers' unused capacity was so 'extensive' by the end of the POI . . . showed that their export markets were inadequate to absorb their surplus." Id. at 6 (citation omitted). According to defendant-intervenors, "[t]hese findings indicated that Chinese drill pipe producers had a powerful motivation to significantly increase their exports to the United States: to reduce their excess capacity" and that the unused capacity, "combined with Chinese producers' proven ability to export far larger quantities than they were at the end of the period of investigation ('POI'), gave them the means to achieve this end." *Id.* at 2.

When viewed in the context of the relevant statutory language, the general argument defendant-intervenors seem to make concerning the existing unused capacity essentially is that the Commission erred in not reaching a comprehensive finding that an increase in the capacity utilization of the Chinese producers was likely to occur, that such an increase indicated "the likelihood of substantially increased imports into the United States," 19 U.S.C. § 1677(7)(F)(i)(II), and that the likely increase in subject imports was "imminent" within the meaning of 19 U.S.C. § 1677(7)(F)(ii). The evidence that unused capacity was extensive and had increased over the POI, even when coupled with evidence that the export-oriented Chinese industry had exported a large share of its output, and even when considered with the other evidence that defendant-intervenors cite, did not suffice to compel the ITC to find that the existing unused capacity likely would lead to substantially increased exports of the subject merchandise to the United States. As the court has discussed, the record contained considerable evidence that detracted from such a finding. The ITC complied with the statute by considering each of the relevant factors required by 19 U.S.C. § 1677(7)(F)(i) and basing findings thereunder on the record evidence considered as a whole.

B. The Court Rejects Defendant-intervenors' Argument that the ITC's Analysis of the Financial Performance of the U.S. Industry Was "Fundamentally Flawed"

Defendant-intervenors' final argument is grounded in certain data on the financial performance of NOV Grant Prideco, which the ITC identified as "the leading U.S. producer of finished drill pipe and the second largest U.S. producer of finished drill collars." *ITC Publ'n*, Original Dissenting Views 56 n.97. Defendant-intervenors direct the court's attention to the Commission's statement that "because of its dominant size, NOV Grant Prideco's financial results have a large impact on the combined financial results of the domestic industry." Def.intervenors' Comments 27 (quoting *ITC Publ'n*, Original Dissenting Views 56 & n.97).

At oral argument on the Remand Redetermination, defendantintervenors expressly waived their argument pertaining to NOV Grant Prideco to the extent this argument is framed as a challenge to the ITC's negative injury determination. Oral Tr. 10. Clarifying that they are not challenging the Commission's negative injury determination, they expressed an intention to maintain their argument to the extent relevant to challenging the ITC's negative threat determination. *Id.* The court, therefore, considers their argument only in this context. As discussed below, what little is left of that argument lacks merit.

The Commission's discussion of NOV Grant Prideco's financial performance occurred in the midst of an analysis of present injury, not threat. See ITC Publ'n, Original Dissenting Views 56-57. Considered as it applies to the negative threat determination, defendantintervenors' argument can pertain only to the Commission's finding as to the current vulnerability of the domestic industry. On that subject, the Commission stated that "[a]s an initial matter, we do not find that the domestic industry producing drill pipe and drill collars is currently vulnerable." Id. at 59. According to defendantintervenors, the ITC should have viewed the reduction in profitability of the domestic industry reflected in the reported financial information of NOV Grant Prideco as related to subject imports. Def.intervenors' Comments 28 ("The new majority . . . has no basis for assuming that this substantial reduction in industry profitability was 'unrelated to subject imports." (quoting ITC Publ'n, Original Dissenting Views 57)). Defendant-intervenors submit that correction of this error would require the ITC to "revise its analysis of vulnerability, which rested in part on its conclusion that 'throughout the period examined, U.S. producers . . . experienced high levels of profitability." Id. at 29 (quoting ITC Publ'n, Original Dissenting Views 59).

The court disagrees that the Commission erred in reaching a conclusion that the domestic industry was not currently vulnerable. In support of that conclusion, the ITC found that "throughout the period examined, U.S. producers invested in greater production capacity, experienced high levels of profitability, and currently remain in a strong position notwithstanding the gradual economic recovery." ITC Publ'n, Original Dissenting Views 59 (footnotes omitted). The ITC proceeded to summarize the various data on the record related to the vulnerability issue, from which it concluded that "most trends point to a healthy industry that is weathering its normal business cycle, albeit one that has been exacerbated by the general economic recession." Id. at 59–62. Among the trends cited were improving demand for drill pipe and drill collars, the dominance of domestic producers in the important, growing, and high-priced premium sector of the market, and the general competitiveness of U.S. producers in growing export markets. Id. at 60.

When making the statement that U.S. producers experienced high levels of profitability throughout the POI, the Commission already had acknowledged, in its previous discussion directed to the question of present injury, the information on the reported financial performance of NOV Grant Prideco to which defendant-intervenors direct their argument. The ITC considered the information to result "primarily from a one-time adjustment" that was "unrelated to subject imports." Id. at 57. Significantly, the Commission, following that discussion, stated a finding that "[i]n any event, the finished drill pipe and drill collar industry returned to profitability in interim 2010 . . . "." Confidential Excerpts from ITC Publ'n, Original Dissenting Views 28, (Feb. 2011) (Conf. Admin.R.Doc. No. 358) (showing statement redacted from public version (cf. ITC Publ'n, Original Dissenting Views 57)). In support of that finding, the Commission cited industrywide data on operating income and the ratio of operating income to total net sales. ITC Publ'n, Original Dissenting Views 57-59. As it applies to the threat determination, defendant-intervenors' argument fails because it does not challenge that finding.

The argument defendant-intervenors direct against the ITC's negative vulnerability finding is undermined by the Commission's having analyzed the overall profitability of the domestic industry during the POI in two ways, one of which considered the effect of the NOV Grant Prideco adjustment and one of which did not. The former led to the Commission's overriding conclusion that even if there had been an interruption in the overall profitability of the domestic industry that was represented by the one-time adjustment, that interruption was followed "in any event" by a return to profitability of the industry as a whole. Even were the court to assume, arguendo, that defendantintervenors are correct in their assertion that the adjustment pertaining to NOV Grant Prideco was related to subject imports (an assertion that defendant-intervenors fail to demonstrate is correct). the court still would be forced to reject defendant-intervenors' challenge to the negative vulnerability finding. Absent a challenge to the finding that the domestic industry, in any event, returned to profitability by the end of the POI, defendant-intervenors' argument that the ITC erred in concluding that the industry is not currently vulnerable is not a plausible one. That conclusion was based not only on profitability data for the domestic industry at large, including NOV Grant Prideco, but also on various other indications of the industry's strength.

III. CONCLUSION

For the aforementioned reasons, the court rejects the various arguments defendant-intervenors raise in their challenge to the Remand Redetermination. The ITC complied with the order issued in *Downhole Pipe I* by reconsidering its previous affirmative threat determination in the absence of the erroneous findings and unwarranted conclusions the court previously disallowed. As the court stated in *Downhole Pipe I*, nothing in that order precluded the ITC, on remand, from reconsidering those or any other findings. *Downhole Pipe I*, 37 CIT at __, 963 F. Supp. 2d at 1347–48. The court concludes that the Remand Redetermination must be affirmed and will enter judgment accordingly.

Dated: November 10, 2014 New York, New York

> /s/Timothy C. Stanceu TIMOTHY C. STANCEU Chief Judge

Slip Op. 14–143

SHAH BROS., INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Senior Judge Court No. 10–00205

[granting in part plaintiff's motion for attorneys' fees and expenses]

Dated: December 15, 2014

Elon A. Pollack and *Kayla Owens*, Stein Shostak Shosta kPollack & O'Hara, LLP, of Los Angeles, CA, for the Plaintiff.

Edward F. Kenny, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the Defendant. Also on the brief were Joyce R. Branda, Acting Assistant Attorney General, and Amy M. Rubin, Acting Assistant Director, International Trade Field Office.

OPINION AND ORDER

Pogue, Senior Judge:

In this action, Plaintiff Shah Bros., Inc. ("Shah Bros.") – the prevailing $party^1$ – was previously awarded, pursuant to the Equal

¹ See Shah Bros., Inc. v. United States, ____ CIT ___, 953 F. Supp. 2d 1328, 1332 (2013) (granting Defendant's motion to confess judgment in favor of Shah Bros. and explaining that "the Government has agreed to provide all the relief that is legally available to Shah Bros. – by reliquidating the merchandise in question at the tariff and tax rates claimed in

Access to Justice Act, 28 U.S.C. § 2412(d) (2012) ("EAJA"), compensation for attorneys' fees and expenses that it had reasonably incurred.² Shah Bros. now seeks a supplemental award of the additional attorneys' fees it incurred while litigating its EAJA application (the "fee litigation").³ Because Plaintiff is entitled to recover attorney fees for work reasonably expended to obtain the amount previously awarded, Plaintiff's motion is granted in part. The supplemental award is reduced to reflect excess hours and the extent of Plaintiff's success in the fee litigation.

DISCUSSION

The prevailing party in a civil action brought by or against the United States is entitled to an award of the attorneys' fees and other expenses incurred by that party in such action, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d). Here, previous rulings have established that Plaintiff was the prevailing party in this civil action against the United States, and the position of the Government that gave rise to this litigation was not substantially justified.⁴ This "single finding that the Government's position lacks substantial justification, like the determination that a claimant is a 'prevailing party,' . . . operates as a one-time threshold for fee eligibility," ⁵ such that "absent unreasonably dilatory conduct by the prevailing party in any portion of the litigation, which would justify denying fees for that portion, a fee award presumptively encompasses all aspects of the civil action," including the fee the amended complaint"); Judgment & Order, ECF No. 91 (entering judgment for Shah Bros. and ordering U.S. Customs and Border Protection to reclassify the merchandise at

² Shah Bros., Inc. v. United States, __ CIT __, 9 F. Supp. 3d 1402, 1409 (2014) ("Shah Bros. EAJA Litig.") (holding that Plaintiff Shah Bros. is entitled to a fees and expenses award pursuant to the EAJA "because Shah Bros. is the prevailing party in this civil action brought against the United States; because the United States has not shown that the agency action upon which this civil action is based – i.e., the denial of Shah Bros.' classification protest after confession of judgment in [a prior action concerning materially-identical merchandise, imported by the same importer shortly prior to this litigation] – was substantially justified; and because the Government has not shown that special circumstances exist in this case that would make a fee award unjust") (quotation marks and citations omitted); see id. at 1406 (discussing the legal framework for EAJA awards). Familiarity with the facts and procedural posture of this case is presumed.

issue as requested by Shah Bros.).

³ Pl.'s Supplemental Appl. for Att'y Fees Under the [EAJA], ECF No. 108.

⁴ Shah Bros. EAJA Litig., __ CIT at __, 9 F. Supp. 3d at 1407–08, 1409 & n.13.

⁵ Comm'r, INS v. Jean, 496 U.S. 154, 160 (1990).

litigation.⁶ Accordingly, Shah Bros. is entitled to an EAJA award that includes compensation for the fee litigation. The next question before the court is therefore the appropriate magnitude of such award.

As a threshold matter, the EAJA entitles the Plaintiff to compensation only for work that was "reasonably expended."⁷ In this regard, the Government argues that certain entries contained in Plaintiff's itemized fee litigation bill⁸ are noncompensable.⁹ Specifically, the Government contests entries that reflect 1) a junior attorney working together with a senior attorney; 2) work on unfiled motions; 3) performance of more than one task; and 4) preparation of the supplemental EAJA application.¹⁰ Each argument is addressed in turn.

First, the Government's objection to the reasonableness of work performed by a junior and senior attorney working together¹¹ is unpersuasive. Indeed "it is the rule rather than the exception to have a junior and senior attorney working together on a matter,"¹² and

⁷ Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) ("The district court . . . should exclude from [the] fee calculation hours that were not 'reasonably expended,' . . . [such as] hours that are excessive, redundant, or otherwise unnecessary.") (quoting S. Rep. No. 94–1011, at 6 (1976)); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) ("Any fee-setting inquiry begins with the 'lodestar': the number of hours reasonably expended multiplied by a reasonable hourly rate. . . . Compiling raw totals of hours spent, however, does not complete the inquiry. It does not follow that the amount of time *actually* expended is the amount of time *reasonably* expended.") (emphasis in original).

⁸ See Ex. A (supplemental EAJA application and itemized fee bill) to Decl. of Elon A. Pollack, ECF No. 108 (*"Pl.'s Suppl. Fee Bill"*).

 9 Def.'s Resp. to Pl.'s Supplemental Appl. for Att'y Fees Under the [EAJA], ECF No. 109 ("Def.'s Opp'n") at 2–5.

¹⁰ Id.

⁶ Id. at 161 (emphasis added, quotation marks and footnote omitted); see also id. at 162 ("Denying attorneys' fees for time spent in obtaining them would dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees") (alteration, quotation marks, and citation omitted); id. at 164 ("If the Government could impose the cost of fee litigation on prevailing parties by asserting a 'substantially justified' defense to fee applications, the financial deterrent that the EAJA aims to eliminate would be resurrected."); cf. Scarborough v. Principi, 541 U.S. 401, 407 (2004) ("Congress' aim, in [enacting the EAJA], was 'to ensure that certain individuals, partnerships, corporations . . . or other organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved.") (quoting H.R. Rep. No. 99–120, at 4 (1985)).

¹¹ See Def.'s Opp'n, ECF No. 109, at 3–4 (challenging entries billing for "KO" and "EAP" working together); Shah Bros. EAJA Litig., __ CIT at __, 9 F. Supp. 3d at 1411 n.21 (noting that"KO" was the most junior attorney on the team, whereas "EAP" was the most senior attorney).

¹² Former Emps. of BMC Software, Inc. v. U.S. Sec'y of Labor, 31 CIT 1600, 1649, 519 F. Supp. 2d 1291, 1334 (2007) (quoting Ross v. Saltmarsh, 521 F. Supp. 753, 760 n.35 (S.D.N.Y. 1981), aff'd, 688 F.2d 816 (2d Cir. 1982)); Ross, 521 F. Supp. at 760 (noting that "this arrangement is the normal partner/associate or senior associate/junior associate working relationship in most legal firms").

nothing suggests any inappropriate duplication of effort here. On the other hand, the Government is correct that no EAJA fees are recoverable for unfiled motions, and that this is the law of the case.¹³ Accordingly, time spent working on unfiled motions¹⁴ shall be excluded from Plaintiff's EAJA award.

With regard to the billing entries reflecting performance of more than one task,¹⁵ the particular entries at issue here are not so devoid of specificity, and the billing time blocks are not so large, as to obscure the reasonableness of the work performed.¹⁶ Only two of Plaintiff's supplemental billing entries exceed 3 hours,¹⁷ most contain no more

¹⁴ See Def.'s Opp'n, ECF No. 109, at 4 (identifying entry numbers 56, 57, 58, and 61 as pertaining to unfiled motions (as numbered in the Government's annotated reproduction of the Plaintiff's itemized supplemental fee bill)); Ex. 1 (Plaintiff's itemized supplementary fee bill, annotated to reflect the Government's itemized objections) to Def.'s Opp'n, ECF No. 109–1 ("Def.'s Annotated Fee Bill") at 5 (showing entry numbers 56, 57, 58, and 61 – comprising 2.5 hours in total – as pertaining to unfiled motions).

 15 See Def.'s Opp'n, ECF No. 109, at 4 (challenging billing entries "attributed to more than one billing event")

¹⁶ *Cf. Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1554 n.15 (10th Cir. 1996) ("Block billing' refers to the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks."); Wise v. Kelly, 620 F. Supp. 2d 435, 450 (S.D.N.Y. 2008) ("Although not prohibited, block-billing [sometimes] makes it exceedingly difficult for courts to assess the reasonableness of the hours billed.") (quotation marks and citations omitted).

¹⁷ *Cf., e.g., Noel v. Hall,* No. 3:99-cv-00649-AC, 2013 WL 5376542, at *6 (D. Or. Sept. 24, 2013) (permitting block-billed entries under three hours because, "[a]lthough cautioning against this practice, the court may excuse this method when the billing period is no more than three hours") (quoting *Sterling Savings Bank v. Sequoia Crossing, LLC,* Civ. No. 09–555-AC, 2010 WL 3210855, at *5 (D. Or. Aug. 11, 2010) ("[W]hile billing periods of three hours or more may be subject to exclusion, the court is more lenient with smaller blocks of time, which it may divide by the total number of included tasks in order to find the length of time required for each individual task.") (citation omitted)). Here, Plaintiff's supplemental fee bill contains two entries comprising four-hour increments, each of which lists two

¹³ Shah Bros. EAJA Litig., ___ CIT at __, 9 F. Supp. 3d at 1413 (accepting the Government's challenge to, *inter alia*, EAJA compensation for work on unfiled motions, for the reasons provided in the Government's annotations to Plaintiff's initial itemized fee bill); Ex. 5 (Plaintiff's itemized fee bill, annotated to reflect hours and rates contested by the Government) to Def.'s Mem. in Opp'n to Pl.'s Appl. for Att'ys Fees & Expenses Under the [EAJA], ECF Nos. 96–2 & 96–3 ("*Def.'s Initial Objections*"), at 42 (challenging entries reflecting work on unfiled motions) (citing *Gibson v. Colvin*, No. 4:03-cv-90,2013 WL 2422611 (S.D. Ga. June 3, 2013)); Gibson, 2013 WL 2422611 at *4 ("Unfiled motions, whether or not unfiled because of strategic judgments by counsel, cannot be compensated. They represent miscalculation by counsel and . . . mistakes will not be compensated under the EAJA.") (citing *Hensley*, 461 U.S. at 437 (cautioning that counsel must use billing judgment in hours worked)); see Hensley, 461 U.S. at 434 (quoting *Copeland*, 641 F.2d at 891 ("In the private sector, 'billing judgment' is an important component in fee setting. . . . Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.") (emphasis in original)).

than two separate (though often related) tasks, and each entry reflects work reasonably expended when the time billed is considered to have been divided evenly among the tasks listed therein.¹⁸

Finally, with regard to Plaintiff's claim for compensation for time spent preparing the supplemental EAJA application, the Government argues that such work is noncompensable because "[a]llowing Plaintiff to continue to request fees for work performed on supplemental applications would permit a never-ending cycle of EAJA fee requests."¹⁹ But "a fee award presumptively encompasses *all* aspects of the civil action" (absent unreasonably dilatory conduct by the prevailing party),²⁰ including those aspects related to the compensation to which the prevailing party is entitled. ²¹ And compensating Plaintiff for time spent in preparing the supplemental EAJA application would not "permit a never-ending cycle of EAJA fee requests" because, as Plaintiff is not permitted any further briefing on this matter, no further work remains to be compensated.

But determining which of Plaintiff's fee litigation hours were reasonably expended does not end the inquiry. Because the court must "consider the relationship between the amount of the fee awarded and the results obtained," fee litigation awards should reflect the extent to which the applicant was ultimately successful in such litigation.²² Thus where (as here) the Government's challenge to Plain-

arguably related tasks. *See Def's Annotated Fee Bill*, ECF No. 109–1, at 4 (entry nos. 40 and 42) (billing 4 hours each for "Review *Libas* case; continue preparing submission" and "Discuss issues with EAP; continue preparing submission," respectively).

¹⁸ See, e.g., Def.'s Annotated Fee Bill, ECF No. 109–1, at 1 (entry no. 7) (billing 0.50 hours for "[c]orrespondence with Rebecca Demb re: court conference; discuss same with KO"); *id.* at 2 (entry no. 12) (billing 1.75 hours for "[d]iscuss[ing] fee application with EAP re: conference with the court; review brief"); *id.* (entry no. 14) (billing 2.25 hours for "research-[ing] case law cited in opposition; draft[ing] notes for teleconference"); *id.* (entry no. 19) (billing 2.25 hours for "[p]repar[ing] for court conference; conferenc[ing] with Department of Justice and court re: fee award; review[ing] billing documents with KO and formulat[ing] settlement strategy"); *id.* at 4 (entry no. 47) (billing 1.50 hours for "[r]eview[ing] final submission; review[ing] government submission; adjust[ing] submission based on government response").

¹⁹ Def.'s Opp'n, ECF No. 109, at 5 (quoting *Belcher v. Astrue*, No. 1:09cv1234 DLB, 2011 WL 3847181, at *2 (E.D. Cal. Aug. 30, 2011), *rev'd in part on other grounds*, 522 F. App'x 401 (9th Cir. 2013)).

²⁰ Jean, 496 U.S. at 161 (emphasis added).

 21 *Id.*; *id.* at 162 (quoting *Sullivan v. Hudson*, 490 U.S. 877, 888 (1989) ("[Where proceedings are] necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded.")); *id.* at 166 ("The purpose and legislative history of the statute reinforce our conclusion that Congress intended the EAJA to cover the cost of all phases of successful civil litigation addressed by the statute.").

²² Jean, 496 U.S. at 163 n.10 (relying on Hensley, 461 U.S. at 437); see also Wagner v. Shinseki, 640 F.3d 1255, 1260 (Fed. Cir. 2011) ("Courts should look to the framework" tiff's EAJA application resulted in the court's recalculating and reducing the amount of the award initially sought,²³ the subsequent fee litigation award should generally reflect a reduction reasonably proportionate to the applicant's degree of success.²⁴

Here, the fee litigation proceeded, at least in part, because Plaintiff's EAJA application was overly broad. In its opposition, the Government correctly identified numerous entries in Plaintiff's itemized fee bill that were either not compensable under the EAJA at all, or else not compensable at the claimed hourly rates.²⁵ As a result of the Government's opposition and the ensuing fee litigation, approxi-

²³ See Shah Bros. EAJA Litig., __ CIT at __, 9 F. Supp. 3d at 1411–13 (awarding fees pursuant to the EAJA but reducing both the hourly rates and the total number of hours initially requested by the applicant).

²⁴ Cf. Jean, 496 U.S. at 163 n.10 ("For example, if the Government's challenge to a requested rate for paralegal time resulted in the court's recalculating and reducing the award for paralegal time from the requested amount, then the applicant should not receive fees for the time spent defending the higher rate."); Wagner, 640 F.3d at 1260 ("Because Hensley requires a court to calibrate the amount of attorney fees to the degree of success a claimant has achieved, it is generally appropriate to make an award of supplemental fees that is commensurate with the degree of success obtained on the original fee application.") (citing, inter alia, Schwartz v. Sec'y of Health & Human Servs., 73 F.3d 895, 909 (9th Cir. 1995) (affirming 50 percent reduction to supplemental fee request where the applicant had obtained approximately 50 percent of the fees claimed in her initial fee application); Thompson v. Gomez, 45 F.3d 1365, 1367-69 (9th Cir. 1995) (affirming 13 percent reduction to supplemental fee request where the applicants had received 87 percent of the fees claimed in their initial fee application); Harris v. McCarthy, 790 F.2d 753, 758-59 (9th Cir. 1986) (affirming 88.5 percent reduction to supplemental fee request where the applicants had obtained only 11.5 percent of the fees claimed in their initial fee application); Institutionalized Juveniles v. Sec'y of Pub. Welfare, 758 F.2d 897, 924-25 (3d Cir. 1985) (affirming 12.5 percent reduction to supplemental fee request where the claimants did not obtain complete success on their original fee application); Mercer v. Duke Univ., 301 F. Supp. 2d 454, 470 (M.D.N.C. 2004) (reducing supplemental fee award by 20 percent because the initial fee request was reduced by 20 percent), aff'd, 401 F.3d 199 (4th Cir. 2005)).

²⁵ Shah Bros. EAJA Litig., ___ CIT at __, 9 F. Supp. 3d at 1413 ("[T]he Government correctly identified the entries in Plaintiff's itemized attorneys' bill that are not compensable by an EAJA fee award in this case because they were related to an unsuccessful separate claim; involved work not reasonably related to the case; involved unreasonably vague time entries; involved clerical work billed at attorney rates; reflected over staffing or duplicative work; involved work on unfiled motions; and involved unnecessary work protracting the litigation.") (citation omitted).

established in *Hensley* when calculating an appropriate supplemental fee award.") (citing *Hensley*, 461 U.S. at 435–39; *Jean*, 496 U.S. at 161–63); *Hensley*, 461 U.S. at 436 ("[T]he most critical factor [in calculating a fee award] is the degree of success obtained."); *cf. Wagner*, 640 F.3d at 1260 n.3 (explaining that "[a]lthough *Hensley* involved the award of fees under the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988, the standards set forth for awarding attorney fees 'are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party," and that "[f]urthermore, although *Hensley* involved an initial fee application, the fee guidelines it provides are applicable to supplemental fee applications as well") (quoting *Hensley*, 461 U.S. at 433 n.7, and citing *Jean*, 496 U.S. at 161–63).

mately 11 percent of the attorney hours Plaintiff initially claimed were found to be non-compensable.²⁶ Accordingly, the hours reasonably and unambiguously expended to litigate Plaintiff's contested fee application (as documented in Plaintiff's supplemental fee bill, excluding the 2.5 hours spent on unfiled motions, as discussed above) shall be reduced by 11 percent, to reflect the degree of success obtained by Plaintiff in the fee litigation.²⁷

Accordingly, for all of the foregoing reasons, the 2.5 hours spent on unfiled motions shall be deducted as noncompensable from the 59 fee litigation hours claimed in Plaintiff's supplemental EAJA application,²⁸ and the remaining 56.5 compensable hours shall be reduced by 11 percent, to reflect the degree of success actually obtained in the fee

²⁶ Plaintiff submitted an itemized bill seeking compensation for 729.5 hours and was granted an award reflecting 650 hours. *See* Ex. A (Plaintiff's initial itemized fee bill) to Decl. of Elon A. Pollack, ECF No. 93–2, at 50; *Shah Bros. EAJA Litig.*,__ CIT at __, 9 F. Supp. 3d at 1413 (granting all of the Government's suggested reductions to the number of compensable hours claimed in Plaintiff's EAJA application); *Def.'s Initial Objections*, ECF Nos. 96–2 & 96–3 (objecting to a total of 79.5 hours claimed in Plaintiff's itemized fee bill as non-compensable).

²⁷ The Government points out that "[t]he difference between the fees that plaintiff originally requested (\$311,330.00), and the fees that plaintiff obtained following [the decision in Shah Bros. EAJA Litig., __ CIT __, 9 F. Supp. 3d 1402] (\$206,737.00), amounts to a 33% reduction of its original request," Def.'s Opp'n, ECF No. 109, at 5-6, and argues that "any supplemental fee recovery should be similarly reduced." Id. at 6. But the 33 percent reduction reflects a reduction of both the number of hours claimed and the claimed hourly rates, whereas the magnitude of Plaintiff's degree of success in the fee litigation is better reflected by the reduction to the claimed number of compensable hours, which was based on the clear over-reach contained in the EAJA application, rather than the court's cap on the claimed hourly rates, which reflected merely a slight modification to Plaintiff's largely reasonable claim. Compare Shah Bros. EAJA Litig., __ CIT at __, 9 F. Supp. 3d at 1413 (accepting all of the Government's challenges to non-compensable hours contained in the Plaintiff's initial EAJA application), with id. at 1411 (accepting the Plaintiff's claim to a special factor enhancement of the statutory cap on the compensable hourly rate); id. (noting that evidence submitted by Shah Bros. corroborates the Plaintiff's claim that its hourly rates were "within the range of rates customarily charged for legal work in this field," and noting also that the Government submitted no contradictory evidence); id. at 1412 (granting the Plaintiff compensation at hourly rates significantly above the rates suggested by the Government); see Def.'s Mem. in Opp'n to Pl.'s Appl. for Att'ys Fees & Expenses Under the [EAJA], ECF No. 96, at 13-15 (arguing that Plaintiff should not be compensated at rates above \$125 per hour); id. at 14 (arguing, in the alternative, that Plaintiff's hourly rates should be capped at \$300 per hour). Cf. Jean, 496 U.S. at 163 ("[A] district court will always retain substantial discretion in fixing the amount of an EAJA award."); Wagner, 640 F.3d at 1261 ("To be sure, a court has broad discretion in awarding attorney fees, and is not bound, in all cases, to make an award of supplemental fees that is [exactly] proportionate to the degree of success obtained on the original EAJA application.") (citing Hensley, 461 U.S. at 437). Moreover, the rates to be awarded for the additional fee litigation hours reflect only the basic statutory cap. See infra note 29 and accompanying text.

²⁸ Pl.'s Suppl. Fee Bill, ECF No. 108, at 5 (showing total number of hours claimed).

litigation. The remaining 50.5 compensable hours shall be compensated at the rate of \$125 per hour, in accordance with the law of the case. 29

CONCLUSION

For the reasons provided above, Plaintiff's EAJA award in this case³⁰ shall be supplemented with an additional \$6,312.50.³¹ Therefore, Defendant shall pay the Plaintiff a total of \$223,636.79 in compensation for attorneys' fees, expenses, and costs reasonably incurred in this action.

It is SO ORDERED. Dated: December 15, 2014 New York, NY

> /s/ Donald C. Pogue Donald C. Pogue, Senior Judge

²⁹ Shah Bros. EAJA Litig., __ CIT at __, 9 F. Supp. 3d at 1413 n.32.

³⁰ See Shah Bros. EAJA Litig., __ CIT at __, 9 F. Supp. 3d at 1414 (awarding costs and expenses in the uncontested amount of \$10,586.79, and ordering the parties to submit a joint calculation for the attorneys' fees total, in accordance with the compensable hours and rates specified in the court's opinion); Parties' Joint Statement of Amount of Fees to be Awarded to Pl. Pursuant to Ct.'s Order, ECF No. 107 ("In accordance with the Court's Opinion and Order dated September 18, 2014 (Slip Op. 14–109), Plaintiff and Defendant hereby submit that Shah Brothers is entitled to a fee award in the amount of \$206,737.50.").

 $^{^{31}}$ 50.5 compensable hours at \$125 per hour.