

PRACTITIONER COMMENTARIES

OVERVIEW OF 2010 DECISIONS BY THE U.S. COURT OF INTERNATIONAL TRADE IN APPEALS OF DETERMINATIONS OF THE U.S. INTERNATIONAL TRADE COMMISSION

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U.S. Court of International Trade decisions in 2010 of U.S. International Trade Commission determinations reflected the ongoing tug-of-war between the Court and the agency as to the amount of evidence and analysis required for the agency to legally discharge its obligation under U.S. law. This article discusses three relevant cases that address whether a final determination was supported by substantial evidence on the record or otherwise in accordance with law or whether further remand was necessary. The cases discussed herein do not ultimately and conclusively resolve the “evidence and analysis” issue, but contribute to the ongoing dialogue between the Court and the agency as to what is ultimately necessary to satisfy and conclude a Court’s review.

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I. INTRODUCTION

Under 28 U.S.C. § 1581(c), the U.S. Court of International Trade (CIT) has jurisdiction to review antidumping (AD) and countervailing duty (CVD) determinations made by the U.S. International Trade Commission (ITC). During 2010, the CIT issued six decisions related to decisions made by the ITC. Of the six, the CIT affirmed one negative remand determination in a sunset review involving hot-rolled steel products and, on two occasions, continued to sustain and/or remand aspects of the ongoing sunset review litigation involving ball bearings from the United Kingdom. These three cases are discussed further below and reflect the ongoing tug-of-war between the Court and the ITC as to the amount of evidence and analysis required by the Court from the ITC to conclude whether final determinations are supported by substantial evidence on the record or otherwise in accordance with law.¹

II. THE COURT UPHOLDS THE ITC'S DE-CUMULATION OF SUBJECT COUNTRIES THAT HAVE AFFILIATED FACILITIES WITH A U.S. PRODUCER

In *Nucor Corp. v. United States*, the CIT affirmed in its entirety² the ITC's negative remand determination involving the sunset review of hot-rolled steel products from various countries.³ Plaintiff Nucor

1. The Court also issued one opinion dealing with the procedural aspect of an ongoing appeal as to whether an interested party in one investigation can intervene in an appeal involving concurrent but separate investigations of similar merchandise. *See* Shandong TTCA Biochemistry Co., v. United States, 710 F. Supp. 2d 1368, 1371-72 (Ct. Int'l Trade 2010) (holding that the company could not intervene because it was not an interested party in the instant action and because the court lacked jurisdiction). As this opinion neither relates to any substantive issues in the main appeal nor to any substantive findings made by the ITC in the course of its investigations, it will not be discussed further as part of this article.

In addition, the Court issued an order and a second amended judgment by Senior Judge Aquilino related to the appeal of the original investigation determination by the ITC involving imports of certain wire rod from Trinidad and Tobago. *See* Mittal Steel Point Ltd. v. United States, 32 I.T.R.D. (BNA) 1223 (Ct. Int'l Trade 2010) (remanding the case to the ITC and establishing a schedule to file comments therein); *Mittal Steel Point Ltd. v. United States*, 32 I.T.R.D. (BNA) 1959 (Ct. Int'l Trade 2010) (affirming the ITC's determination on remand and dismissing the case). Although Judge Aquilino should be commended for his use of colorful language and creative punctuation during the drafting of these documents, they will not be discussed further as part of this article.

2. *Nucor Corp. v. United States (Nucor II)*, 675 F. Supp. 2d 1340 (Ct. Int'l Trade 2010).

3. Hot-Rolled Steel Prods. from Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine, USITC Pub. 3956, Inv. Nos. 701-TA-404-408, 731-TA-898-902, 904-908 (Review) (Oct. 2007) [hereinafter ITC Final Determination] (final

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and Plaintiff-Intervenors U.S. Steel Corporation and AK Steel Corporation initially appealed the ITC's negative final determination⁴ regarding the CVD order on hot-rolled steel products from South Africa and the AD orders on hot-rolled steel from Kazakhstan, Romania, and South Africa, alleging that the ITC's final determination was unsupported by substantial evidence.⁵ In its initial opinion, the Court found that the ITC failed to provide an adequate explanation or substantial evidentiary support for its findings related to likely volume, price effect, and impact of subject imports from the three countries. The Court, therefore, remanded the case back to the ITC and instructed it to explain more fully its negative determination.⁶

On remand, the ITC's negative determination remained unchanged from its final determination and the Plaintiff and Plaintiff-Intervenors continued to assert that the negative determination was unsupported by substantial evidence or otherwise contrary to law and urged the

determination). The author wishes to note that he was involved in the underlying sunset review on behalf of foreign manufacturers from Thailand.

4. In an ITC sunset review, a negative determination is a determination that revocation of the CVD and AD orders would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See* 19 U.S.C. § 1675a(a)(1) (2006). In making a "likely/not likely" determination, the ITC "is required to consider whether the likely volume, price effect, and impact of imports of the subject merchandise on the industry will be significant if an order is revoked." *U.S. Steel Corp. v. United States*, 572 F. Supp. 2d 1334, 1341 (Ct. Int'l Trade 2008) (internal citations omitted).

5. *Nucor II*, 675 F. Supp. 2d at 1344.

6. *Nucor Corp. v. United States (Nucor I)*, 605 F. Supp. 2d 1361, 1381-82 (Ct. Int'l Trade 2009). Specifically, the Court ordered the ITC to complete the following on remand:

(1) reevaluate its flawed reasoning for the finding that ArcelorMittal companies and/or Mittal USA would limit subject imports from the subject countries; (2) reassess and further explain the basis for its findings that significant imports in any region of the country are likely to have a disruptive impact on the overall U.S. market, and that any pricing practices that would negatively impact Mittal USA's competitors are likely to also impact Mittal USA; (3) reassess and further explain the behavior of ArcelorMittal and its predecessor, the Ispat organization, with respect to their business practices in exporting to countries in which they maintain production facilities; (4) reassess and further explain evidence opposed to the ITC's volume determination, including access capacity, export orientation of the subject countries' producers, attractiveness of the U.S. market, and capacity increases in alternative export markets; (5) reassess the potential price effects in accordance with its revised volume determination; and (6) reassess its likely impact analysis in accordance with its revised volume and price effects determinations, and account for and explain the poor performance of the domestic industry in the latter portion of the period of review.

Id.; *Nucor II*, 675 F. Supp. 2d at 1346.

Court to remand the matter for further consideration.⁷ The ITC, along with *amicus curiae* ArcelorMittal USA,⁸ argued that the negative determination should be sustained.⁹ In its opinion of the ITC's negative remand determination, the Court examined the six specific areas of its remand order.¹⁰

A. *ArcelorMittal's Limitation of Subject Imports*

In the remand determination, the ITC once again found that ArcelorMittal's likely behavior with respect to its hot-rolled steel operations in Kazakhstan, Romania, and South Africa would not result in significant volumes of subject imports entering the U.S. market.¹¹ The ITC based its finding on information submitted by ArcelorMittal, in both the original sunset review and the remand proceeding. According to the ITC, ArcelorMittal's strategy of having its subsidiaries supply home and regional markets and not the export markets where the company is a producer, limited the motivation of the producers in those countries to increase shipments to the United States and maximized domestic production, serving to maintain price stability and promote ArcelorMittal's overall corporate interests.¹² In supporting this position, the ITC pointed to record evidence indicating the substantial investment ArcelorMittal had made in its subsidiary, Mittal USA, a large and prominent

7. *Nucor II*, 675 F. Supp. 2d at 1344.

8. ArcelorMittal USA is an affiliate of ArcelorMittal International, the corporate parent of subject producers from Kazakhstan, Romania, and South Africa. *Id.* at 1344 n.3.

9. *Id.* at 1344.

10. In a review of an ITC determination, whether initially or on remand, the standard of review is conducted under the substantial evidence and in accordance with law standard. Specifically, under 19 U.S.C. § 1516a(b)(1)(B)(i) (2006), "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "Substantial evidence requires more than a mere scintilla, but is satisfied by something less than the weight of the evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004). The Court "must affirm a[n ITC] determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the [ITC's] conclusion." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal quotation marks omitted) (quoting *Altx*, 370 F.3d at 1121).

11. See Hot-Rolled Steel Products from Kazakhstan, Romania, and South Africa at 6, USITC Pub. 4088, Inv. Nos. 701-TA-407, 731-TA-902, 904, 905 (Jul. 2009) [hereinafter Remand Determination], 2009 WL 2345438.

12. See Defendant's Rebuttal to Plaintiff's Comments on Remand Determination at 15, *Nucor II*, 675 F. Supp. 2d 1340 (Ct. Int'l Trade 2010) (No. 07-00454).

producer in the U.S. market.¹³ In addition, Mittal USA had the right to veto any imports from other ArcelorMittal facilities.¹⁴ The ITC also pointed to empirical data on record from the U.S. importer questionnaires indicating that U.S. hot-rolled steel imports by ArcelorMittal decreased subsequent to the merger of Arcelor SA and Mittal Steel Co. NV.¹⁵ Finally, the ITC explicitly rejected a theoretical model put forth by Nucor supposedly showing that ArcelorMittal would likely benefit from imports from the three countries even if doing so caused harm to Mittal USA. The ITC stated that the model lacked probative value because it lacked any documentation to support the figures reported and that even a slight variation of these figures could result in a completely different outcome.¹⁶

Nucor's arguments focus around an ArcelorMittal director/officer's fiduciary duty to maximize profits of the entire company. Specifically, if ArcelorMittal could produce and sell steel in the United States more profitably through its overseas mills, then it would do so.¹⁷ In support of this theory, U.S. Steel submitted two hypothetical profit maximization scenarios purporting to show how ArcelorMittal would be better served by importing hot-rolled steel from its affiliated companies and still cause prices to fall.¹⁸

In response to these arguments, the Court stated that the ITC acted within its discretionary authority when it discounted the probative value of the models and scenarios.¹⁹ The Court supported the ITC pointing to gathered evidence from the record in support of its conclusion as sufficient to meet the agency's burden of offering a rational basis between the facts found and the choices made; the Court pointed to the ITC's use of U.S. importer questionnaire data as evidence in support of ArcelorMittal's corporate policy of giving Mittal USA a right to veto any imports from other ArcelorMittal facilities.²⁰ Notably, the Court also addressed Nucor's and U.S. Steel's speculative assertions and stated that "the mere plausibility of a set of given circumstances is insufficient to overcome the high barrier to reversal of

13. See Remand Determination, *supra* note 11, at 6.

14. See *id.*

15. See *id.* at 7.

16. See *id.* at 8.

17. Nucor Corp.'s Comments on Remand Determination at 9-10, *Nucor II*, 675 F. Supp. 2d 1340 (Ct. Int'l Trade 2010) [hereinafter Nucor Comments] (No. 07-00454).

18. U.S. Steel's Comments on the Remand Determination at 11, *Nucor II*, 675 F. Supp. 2d 1340 (Ct. Int'l Trade 2010) [hereinafter U.S. Steel Comments] (No. 07-00454).

19. *Nucor II*, 675 F. Supp. 2d 1340, 1348 (Ct. Int'l Trade 2010).

20. *Id.* at 1348.

an agency determination . . . and Plaintiffs [] have offered only innuendo and speculation as evidence to the contrary.”²¹ In other words, the ITC’s decision to put greater weight on facts versus speculation satisfied the standard of review that agency determinations be supported by substantial evidence or otherwise [be] in accordance with law.²²

B. *Regional Imports and Pricing Practices*

In relation to regional imports and pricing practices, the ITC explained in its remand determination that the administrative record does not indicate that there exist any U.S. regional markets to which ArcelorMittal could direct subject imports while maintaining overall U.S. market stability and protecting Mittal USA from harm.²³ As record evidence, the ITC gathered on remand additional evidence from Mittal USA regarding its U.S. market coverage and obtained nationwide pricing data for hot-rolled steel. This evidence showed a high degree of pricing correlation in the different regions.²⁴ Therefore, the ITC concluded that even if ArcelorMittal were to bring in subject imports into a region where Mittal USA does not produce hot-rolled steel, any price effect would be seen nationwide, not just in regions where Mittal USA operated mills.²⁵

In response, Nucor and U.S. Steel referred the Court to witness testimony whereby ArcelorMittal officials made statements that ArcelorMittal was capable of supplying particular market segments or geographic regions that Mittal USA would be unable to supply. Both Nucor and U.S. Steel then returned to their respective hypothetical models and scenarios to support this notion.²⁶

Mittal USA’s rebuttal to these arguments consisted of pointing to record pricing data and customer lists which demonstrated similar

21. *Id.* at 1350.

22. *Id.*

23. Remand Determination, *supra* note 11, at 9.

24. *See id.* at 10-11.

25. *See id.* at 12. The Commission also addressed the point of whether there were any niche products that the sister companies could produce that would compete with U.S. manufacturers. The ITC stated that record evidence did not support the existence of any such niche products, pointing to questionnaire data indicating a high degree of interchangeability between imported and domestically produced products, there being no niche products produced in Kazakhstan, Romania, or South Africa, and the lack of any evidence proffered by Nucor or U.S. Steel as to there being any niche products manufactured by ArcelorMittal in these countries. *See id.*

26. Nucor Comments, *supra* note 16, at 15; U.S. Steel Comments, *supra* note 17, at 25.

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pricing data by region and a “widespread” customer base.²⁷ Mittal USA also submitted evidence of its actual business practices of ensuring that company import prices in a geographic region were consistent with Mittal USA prices in other regions so that there was no U.S. market price disruption.²⁸

After considering these arguments, the Court found that there was “substantial evidence in the record to support the [ITC’s] finding that significant imports in any region of the country are likely to have a disruptive impact on the overall U.S. market.”²⁹ Specifically, the Court found persuasive the record pricing data submitted by Mittal USA on remand and the correlation between regional prices as adequate support for the ITC’s conclusion, as well as Mittal USA’s evidence as to its nationwide reachability.³⁰ Moreover, the Court found relevant that, without any historical data of actual national price effects of regionally-confined imports, the ITC did not make a statement of certainty regarding the effect on any regionally-confined imports, but rather stated its conclusion in the conditional (i.e., “would cause” and “would effect”). Use of such language, according to the Court, did not run afoul of the substantial evidence standard.

C. *Prior Business Practices*

On remand, the ITC determined that the administrative record did not support an inference that ArcelorMittal will likely make significant shipments into the United States from its facilities in Kazakhstan, Romania, or South Africa, pointing to specific evidentiary points in support of its determination.³¹ First, ArcelorMittal had a more centralized system of control over its exports from affiliated producers than predecessor Ispat International. This change was evidenced by the decrease in shipments from the three countries as the control system began to take effect.³² Second, Mittal USA had a larger market share than did Ispat Inland, and this provided a strong incentive to adhere to

27. Reply to Comments on Remand Results on Behalf of Amicus Curiae at 8, *Nucor II*, 675 F. Supp. 2d 1340 (Ct. Int’l Trade 2010) (No. 07-00454).

28. *Id.* at 9.

29. *Nucor II*, 675 F. Supp. 2d 1340, 1350 (Ct. Int’l Trade 2010).

30. *Id.* at 1352 (“The Court finds that a reasonable mind would accept the high level of correlation between regional prices as adequate support for this conclusion . . . and therefore constitutes substantial evidence within the meaning of the standard of review.”).

31. Remand Determination, *supra* note 11, at 12.

32. *See id.* at 13.

the policy of restricting imports to maintain market stability.³³ Third, low volume of shipments to European countries (i.e., where ArcelorMittal also had facilities) further supported the argument that ArcelorMittal will not import into markets where it already has facilities.³⁴

In response, U.S. Steel's main argument, according to the Court, was that looking at post-order behavior was not indicative of future behavior, but rather the ITC should look at pre-order behavior (i.e., when there were no AD and/or CVD duties in place).³⁵ Stated differently, if there was a significant increase in shipments to the United States pre-order(s), then that same type of behavior will repeat once the order(s) are revoked. Nucor and U.S. Steel also attempted to discount the ITC's market share argument, stating that it had already been rejected by the Court in *Nucor I*.³⁶

The Court rejected Nucor's and U.S. Steel's arguments outright. On the market share point, the Court reiterated that it is not in the position of re-weighting evidence considered by the ITC and declined to do so here.³⁷ The Court further stated that neither Nucor nor U.S. Steel have pointed to any evidence that would impeach the credibility of the data relied on by the ITC. Outside of what was already in the administrative record, nothing else was proffered by either Nucor or U.S. Steel of any actual additional exports of hot-rolled steel to a country where ArcelorMittal had an affiliate. The actual evidence put forth by Nucor and U.S. Steel was, in the Court's view, purely circumstantial and "simply insufficient to overcome Plaintiffs' high burden in this case."³⁸ Rather, the Court concluded that the ITC on remand adequately investigated and explained the basis for its finding, thereby sufficiently addressing the Court's order on remand.

D. *Neglected Volume Considerations*

On remand, the Court instructed the ITC to "reassess and further explain evidence opposed to the ITC's volume determination, including excess capacity, export orientation of the Mittal countries' producers, attractiveness of the U.S. market, and capacity increases in alterna-

33. *See id.* at 14.

34. *See id.* at 14-15.

35. U.S. Steel Comments, *supra* note 17, at 28. U.S. Steel makes an additional argument attempting to rebut ArcelorMittal's statements about shipments to European markets, but the Court's opinion provides limited discussion of the evidence proffered.

36. *Id.* at 27; Nucor Comments, *supra* note 16, at 18.

37. *Nucor II*, 675 F. Supp. 2d 1340, 1356 (Ct. Int'l Trade 2010).

38. *Id.*

tive export markets.”³⁹ With respect to the excess capacity issue, the ITC determined that although there was excess capacity at the end of the period of review, it was not persuaded that such capacity would be utilized.⁴⁰ The ITC again referred to administrative record evidence in support of its position, specifically that throughout the period of investigation as well as the period of review, capacity utilization was below maximum.⁴¹ Therefore, such excess capacity was nothing more than theoretical. In addition, in light of ArcelorMittal’s corporate policy to control shipments in markets where it has production facilities, there was little incentive to utilize such excess capacity.⁴²

Second, with respect to export orientation, the ITC concluded on remand that ArcelorMittal exports from the three countries remained relatively stable when viewed as a proportion of total shipments. As a result, there was no indication that the subject industries were heavily export-oriented.⁴³

Third, with respect to the attractiveness of the U.S. market, the ITC stated that in light of ArcelorMittal’s U.S. and Canadian operations and stated corporate policies, there was little incentive for other ArcelorMittal producers to target the U.S. market.

Finally, with respect to capacity increases in export markets, the ITC addressed China’s shift from being a net importer to being a net exporter and the impact that would have on ArcelorMittal’s export shipments from the subject countries (i.e., Kazakhstan, Romania, and South Africa). The ITC concluded that there would not be increased competition from China. As China had not been a primary export market before the shift, this would not be a loss of a big export market.⁴⁴ Also, the ITC found that Southeast Asian markets were not primary export markets either, where it was presumed that China would direct most of its exports.⁴⁵

In response to the remand determination, Nucor pointed out that the subject countries experienced a significant increase in capacity during the period of review—in direct contradiction to the ITC’s

39. *Id.*

40. *See* Remand Determination, *supra* note 11, at 15.

41. *See id.* at 15-16.

42. *See id.* at 15.

43. *See id.* at 16. The portion of the opinion discussing shipments from the specific countries to specific destinations is confidential.

44. *See id.* at 16-17.

45. *Id.* at 17.

findings.⁴⁶ Furthermore, Nucor disputed the ITC's characterization of the excess capacity as merely theoretical. Nucor argued that this data was taken from questionnaires that required the reporting of actual, not theoretical, capacity.⁴⁷

On the export orientation issue, both Nucor and U.S. Steel disputed the apparently⁴⁸ significant export amounts shipped from the subject countries as not being persuasive enough to find for continuation of the orders when a similar export orientation analysis was used to support continuation of the orders for subject countries China, India, Indonesia, Taiwan, Thailand, and Ukraine.⁴⁹ And on the attractiveness of the U.S. market issue, U.S. Steel argued that the ITC's use of a footnote to address this point was insufficient.⁵⁰ Finally, in terms of China and its export impact, U.S. Steel argued that Chinese producers were focused on markets that were critical in Mittal countries.⁵¹

In its opinion, the Court sympathized with Nucor's and U.S. Steel's argument regarding the characterization of the excess capacity as theoretical, citing to the ITC's questionnaire instructions to report actual, not theoretical capacity.⁵² However, the Court's primary disagreement was merely one of terminology and not merit. The Court stated that while the data did not suggest that the subject producers were "incapable" of expanding output, historically low capacity utilization rates and ArcelorMittal's policy to source locally where possible supported the ITC's determination.⁵³

On export orientation, the Court dismissed Nucor's and U.S. Steel's arguments as ineffective, stating that they failed to demonstrate why their use of total exports to total commercial shipments was somehow more accurate than the calculation that was relied upon by the ITC (i.e., taking into account internally consumed production).⁵⁴ On the issue

46. Nucor Comments, *supra* note 16, at 20.

47. *Id.* at 21.

48. The specific data and information points used in rebuttal are confidential. *Nucor II*, 675 F. Supp. 2d 1340, 1358 (Ct. Int'l Trade 2010).

49. Nucor Comments, *supra* note 16, at 22-23.

50. U.S. Steel Comments, *supra* note 17, at 33-34.

51. *Id.* at 35.

52. *Nucor II*, 675 F. Supp. 2d at 1359 ("[T]he ITC's characterization of subject producer excess capacity as merely 'theoretical' is problematic.").

53. *Id.*

54. *Id.* at 1360 & n.15. The Court also criticized their concerns regarding the ITC's characterization of exports from Kazakhstan, Romania, and South Africa as "large," as that characterization was made merely for the purposes of cumulation and whether imports from those countries "are likely to have no discernible adverse impact on the domestic industry in the

of the attractiveness of the U.S. market, the Court stated that because the ITC relied upon ArcelorMittal's corporate policy to source locally and provide Mittal USA with veto power over imports from other ArcelorMittal facilities, and the Court had already found that the ITC's acceptance of this information was supported by substantial evidence and otherwise in accordance of law, the Court was satisfied with the ITC's explanation on this issue.⁵⁵

Finally, on the issue of China, the Court agreed with the ITC that Nucor's and U.S. Steel's arguments amounted to nothing more than a request to re-weigh the evidence and saw no reason to disturb the ITC's determination on this basis.⁵⁶

E. *Potential Price Effects*

On this issue, the ITC concluded that since the likely volume of subject imports will be small and ArcelorMittal made efforts to price these imports so as not to disrupt the market, there will not likely be significant underselling from the three countries.⁵⁷ Both Nucor and U.S. Steel argued that the significant volume argument they made earlier will lead to similar price effects as well.⁵⁸ Furthermore, Nucor separately argued that confidential data disregarded by the ITC in its determination supported the notion of significant underselling and that such underselling will have a significant price-suppressing or depressing effect.⁵⁹

The Court summarily dismissed Nucor's and U.S. Steel's arguments because it had already determined that the ITC's finding regarding volume was supported by substantial evidence and otherwise in accordance with law, thus compelling the Court to reject any contrary arguments regarding price effects. Importantly, the Court referred to the fact that the ITC acknowledged the underselling argument, but found that it was not dispositive when compared to ArcelorMittal's practices regarding imports from affiliated facilities. The Court concluded that the ITC sufficiently explained its price effects findings in

event of revocation of orders covering those imports." *Id.* (citing ITC Final Determination, *supra* note 3, at 20); *see also* 19 U.S.C. § 1675a(a)(7) (2006) ("The [ITC] shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.").

55. *Nucor II*, 675 F. Supp. 2d at 1361.

56. *Id.*

57. Remand Determination, *supra* note 11, at 18.

58. Nucor Comments, *supra* note 16, at 23; U.S. Steel Comments *supra* note 17, at 36.

59. Nucor Comments, *supra* note 16, at 24.

light of its findings on volume and, as a result, the ITC's determination was supported by substantial evidence or otherwise in accordance with law.⁶⁰

F. *Likely Impact*

On impact, the ITC reached the same conclusion as in its final determination, that is when taking into account the volume and price effect, subject imports were not likely to have a significant impact on the domestic industry.⁶¹ In addition, the ITC determined that the domestic industry's poor performance was due to flat or declining prices after 2006; however, the domestic industry was not in a vulnerable condition in light of its overall profitability since 2004.⁶² In other words, in the ITC's view, any price declines evident in the market were not enough to outweigh the profits being earned by the domestic industry during the later portion of the period of review. In response, neither Nucor nor U.S. Steel raised any new arguments on remand.⁶³

Because the Court already sustained the ITC's volume and price effects analyses and no new arguments were proffered by the domestic industry on impact, the Court found that the ITC's likely impact analysis was supported by substantial evidence and was otherwise in accordance with law.⁶⁴

III. THE COURT CONTINUES TO REQUEST THAT THE ITC FIND ITS BEARINGS IN A SUNSET REVIEW

The Court's two opinions in 2010 in *NSK Corp. v. United States*⁶⁵ are part of the well-renowned, age-old, and continuing trade saga involving ball bearings from a number of countries. This litigation's chapters pertained to the second and third remands of the sunset reviews of antidumping duty orders regarding ball bearings the United Kingdom.

In August 2009, the Court remanded the ITC's affirmative injury

60. *Nucor II*, 675 F. Supp. 2d at 1362.

61. *See* Remand Determination, *supra* note 11, at 19.

62. *See id.* at 18-19.

63. *Nucor II*, 675 F. Supp. 2d at 1363.

64. Both Nucor and U.S. Steel filed notices of appeal to the U.S. Court of Appeals for the Federal Circuit on March 31, 2010, but both appeals were dismissed. *Nucor II*, 675 F. Supp. 2d 1340 (Ct. Int'l Trade 2010), *appeal dismissed*, Nos. 10-1281, 10-1282 (Fed. Cir. Apr. 27, 2010).

65. *NSK Corp v. United States (NSK IV)*, 712 F. Supp. 2d 1356 (Ct. Int'l Trade 2010), *aff'd in part, remanded in part*, *NSK Corp v. United States (NSK V)*, 744 F. Supp. 2d 1359 (Ct. Int'l Trade 2010).

determination for a second time, and asked the ITC to reconsider (1) whether the ITC may cumulate ball bearings from the United Kingdom with other subject imports, (2) the likely impact of subject imports on the domestic industry upon revocation of the AD orders, and (3) whether the subject imports likely would constitute more than a minimal or tangential cause of material injury to the domestic industry in the absence of the subject orders.⁶⁶ In *NSK IV*, the Court concluded that the ITC did not support part of its cumulation analysis with substantial evidence, and the Court therefore could not address the merits of the remaining two issues and remanded the case back to the agency for further consideration.⁶⁷ In *NSK V*, the Court once again concluded that the ITC failed to properly discuss certain legal aspects to support its remand determination and once again ordered an additional remand.⁶⁸

A. NSK IV

On remand from *NSK III*, the ITC confirmed the vulnerability of the domestic ball bearing industry and determined that the subject ball bearings from the United Kingdom likely will have a discernible adverse impact in the absence of the order.⁶⁹ Plaintiffs NSK Corporation, NSK Ltd., and NSK Europe Ltd. (collectively NSK) argued that the subject United Kingdom industry's capacity and production capabilities, and focus on markets other than the United States, indicated that United Kingdom producers had no incentive to ship additional amounts of the subject merchandise to the United States if the order was revoked.⁷⁰ NSK further challenged the ITC's vulnerability finding by arguing that the domestic industry likely will not suffer an adverse impact if the order were revoked.⁷¹ The Court agreed with the ITC's vulnerability determination and concluded that the ITC's citation of a

66. *NSK Corp. v. United States (NSK III)*, 637 F. Supp. 2d 1311, 1328-29 (Ct. Int'l Trade 2009).

67. *NSK IV*, 712 F. Supp. 2d at 1360.

68. *NSK V*, 744 F. Supp. 2d at 1366-67.

69. Recall from the discussion of *Nucor II* above that, "[t]he [ITC] shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry." 19 U.S.C. § 1675a(a)(7) (2006).

70. *NSK Response to Commission Second Remand Determination* at 4-14, *NSK IV*, 712 F. Supp. 2d 1356 (Ct. Int'l Trade 2010) (No. 06-00334).

71. *NSK IV*, 712 F. Supp. 2d at 1363 (internal citations omitted). Defendant-Intervenor The Timken Company agreed with and supported the ITC's second remand determination. *Id.*

number of economic indicia to support its determination “provided the rational connection missing from its previous determinations” and sustained the finding on this issue.⁷²

The ITC concluded in its second remand determination that subject United Kingdom imports would have a discernible adverse impact based on the subject producers’ level of available capacity, high degree of export orientation, and continued presence in and the price attractiveness of the U.S. market.⁷³ The Court found for a number of reasons that the ITC did not support its determination with substantial evidence.⁷⁴ First, the Court criticized the ITC for using as support of its affirmative discernible adverse impact determination the Court’s own review of the ITC’s assessment of certain price data under the volume and price components of the material injury analysis, and ordered the ITC to instead separately discuss the pricing data in the context of a cumulation (i.e., discernible adverse impact) analysis.⁷⁵

Second, the Court further disagreed with the ITC’s conclusions in data points such as the value and market of the subject United Kingdom ball bearings as, according to the Court, this data undercut the ITC’s rationale that the United Kingdom imports maintained a stable presence in the U.S. market and, according to the ITC, would compete on price with U.S. ball bearings and non-subject imports.⁷⁶ Such data issues failed to satisfy the rational connection needed for the Court to sustain the finding.

Third, the Court concluded that the ITC failed to support with substantial evidence its conclusion that the United Kingdom industry likely would export an additional amount of product to the United States upon revocation. Once again, the Court pointed to record evidence that appeared to contradict the ITC’s finding, namely the United Kingdom producer’s focus on exports to the European market and the previously identified (and problematic) data points of market share and presence in the U.S. market, and asserted that it cannot discern, without additional substantiation, the connection between the record evidence and the agency’s conclusion.⁷⁷

72. *Id.* at 1364.

73. Second Remand Results Filed by U.S. Int’l Trade Comm’n at 47, *NSK IV*, 712 F. Supp. 2d 1356 (Ct. Int’l Trade 2010) (No. 06-00334); *NSK IV*, 712 F. Supp. 2d at 1364.

74. *NSK IV*, 712 F. Supp. 2d at 1365.

75. *Id.*

76. *Id.* at 1366 (internal citations omitted).

77. *Id.* at 1366-67 (“[t]he evidence offered by the [ITC] does not rise above a speculative level . . .”).

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As the Court found that the ITC did not adequately support its affirmative discernible adverse impact finding, it declined to address the merits of the remaining issues. Instead, the Court remanded the case to the ITC for a third time to discuss the following: (1) a demonstration that some incentive likely would draw a discernible amount of the subject United Kingdom goods specifically to the U.S. market in the absence of the order, thereby supporting the ITC's determination to cumulate the United Kingdom's imports with other subject ball bearings, (2) whether the cumulated subject imports likely will have a significant adverse impact on the vulnerable domestic industry in the absence of the AD orders, and (3) whether the cumulated subject imports likely would constitute more than a minimal or tangential cause of material injury to the domestic industry that likely will continue or recur in the absence of the orders, given the significant presence of, and seemingly impenetrable barrier imposed by, non-subject imports in the U.S. market.⁷⁸

B. NSK V

In *NSK V*, the Court opened by criticizing the ITC for not providing “a genuine discussion on complex issues of law and [the ITC] has, thus, foreclosed the opportunity for meaningful judicial review of the latest agency action. The [ITC] again fails to support its determination with substantial evidence and unfortunately continues to mischaracterize the court's remand instructions.”⁷⁹ In its third remand determination, the ITC determined (1) not to cumulate the United Kingdom ball bearings with those from the other subject countries, (2) that subject imports from the United Kingdom alone would not have significant volume or price effects on the domestic industry upon revocation of the order, and (3) that ball bearings from the United Kingdom would not lead to the continuation or recurrence of material injury absent the order.⁸⁰

On the de-cumulation issue, the Court sustained the ITC's finding as, in the Court's view, the administrative record did not support a cumulation finding and the ITC declined to otherwise reopen the

78. *Id.* at 1368.

79. *NSK V*, 744 F. Supp. 2d 1359, 1361 (Ct. Int'l Trade 2010) (internal citations omitted).

80. Third Remand Results Filed by U.S. Int'l Trade Comm'n at 12-13, *NSK V*, 744 F. Supp. 2d 1359 (Ct. Int'l Trade 2010) (No. 06-00334). The ITC also stated that it “would not have made these findings in the absence of the Court's conclusion in *NSK IV* that the record taken as a whole cannot establish that the subject imports from the United Kingdom would likely have a discernible adverse impact upon revocation.” *Id.* at 12.

record to gather additional evidence to support its earlier determinations.⁸¹

As a result of the de-cumulation of the United Kingdom from the group of subject countries subject to cumulated review, the ITC had to undergo anew an analysis of the likely volume and price effects of this new group of cumulated subject imports. In its remand determination, the ITC made similar conclusions to those from earlier determinations, and because the Court previously sustained the ITC's conclusions as supported by substantial evidence, the Court again sustained the agency's findings on these points.⁸²

On the issue of the role of non-subject imports in the market, the Court criticized the ITC for failing to adequately account for the role of non-subject imports when analyzing the legal elements of impact and causation. Specifically, the Court appeared irritated that the ITC did not specifically discuss non-subject imports, despite the Court's explicit request to do so in *NSK IV*. As a result, the Court stated that it "cannot determine whether the cumulated subject imports constitute more than a minimal or tangential cause of injury to the domestic industry which will likely continue or recur."⁸³ The Court once again found that, without a thorough examination of non-subject imports, the record evidence cannot support affirmative significant adverse impact or causation determinations. The Court, therefore, remanded the case back to the ITC for a fourth time, specifically ordering the ITC to address: (1) whether the cumulated subject imports likely will have a significant adverse impact on the vulnerable domestic industry in the absence of the AD orders, and (2) whether the cumulated subject imports constitute more than a minimal or tangential cause of injury to the domestic industry that likely will continue or recur in the absence of the AD orders, given the presence of non-subject imports in the U.S. market.⁸⁴

81. *NSK V*, 744 F. Supp. 2d at 1363 (internal citations omitted). There was some issue as to whether the Court's opinion in *NSK IV* precluded anything but a "no discernible impact" finding. The Court responds to this by stating "[t]hat the court may have limited the [ITC's] options on remand is of no moment; '[e]ven though a reviewing court's decision that substantial evidence does not support a particular finding may have the practical effect of dictating a particular outcome, that is not the same as the court's making its own factual finding.'" *Id.*

82. *Id.* at 1363-64.

83. *Id.* at 1366.

84. *Id.* at 1366-67. As if part of some Dickensian-like plot, this story continues. The case continues to be litigated as of the publication of this Article with further remands and appeals to the U.S. Court of Appeals for the Federal Circuit. This case will likely be reported (but not

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IV. CONCLUSION

The CIT's decisions from 2010 discussed above provide excellent examples of the ongoing tug-of-war between the agency and the Court as to the amount of evidence and analysis that is required by the Court from the ITC in order to determine whether final determinations are supported by substantial evidence on the record or otherwise in accordance with law. This tug-of-war is almost certain to continue in 2011 and beyond, and it remains to be seen in subsequent overviews as to what, if any, impact these decisions had in this ongoing legal discourse.

necessarily with a final conclusion) in next year's overview of CIT decisions in appeals of determinations of the ITC. Stay tuned.