

UNITED STATES COURT OF INTERNATIONAL TRADE

Before: Gregory W. Carman, Judge

NUCOR CORPORATION,	:	
	:	
	:	
Plaintiff,	:	
	:	
and	:	
	:	
UNITED STATES STEEL CORPORATION and AK	:	
STEEL CORPORATION,	:	Consol.
	:	Court No. 07-00454
Plaintiff-Intervenors,	:	PUBLIC VERSION
	:	
v.	:	
	:	
UNITED STATES,	:	
	:	
Defendant.	:	

[The Court affirms, in its entirety, the United States International Trade Commission’s Remand Determination, dated July 8, 2009.]

Wiley Rein LLP, (Daniel B. Pickard; Alan H. Price; Maureen E. Thorson; Lori E. Scheetz) for Plaintiff, Nucor Corporation.

Skadden, Arps, Slate, Meagher & Flom, LLP, (James C. Hecht; John J. Mangan; Robert E. Lighthizer; Stephen P. Vaughn; Stephen J. Narkin) for Plaintiff-Intervenor, United States Steel Corporation.

King & Spalding, LLP, (Joseph W. Dorn; Jeffrey M. Telep) for Plaintiff-Intervenor, AK Steel Corporation.

Kelley Drye and Warren, LLP, (Kathleen W. Cannon; Paul C. Rosenthal; R. Alan Luberda) for Amicus, ArcelorMittal USA.

James M. Lyons, General Counsel; Andrea C. Casson, Assistant General Counsel, Office of the General Counsel, United States International Trade Commission (Marc A. Bernstein; Robin L. Turner), for Defendant, United States.

Dated: January 27, 2010

OPINION

CARMAN, Judge: This matter comes before the Court following its decision in Nucor Corp. v. United States, 33 CIT ___, 605 F. Supp. 2d 1361 (2009), in which the Court remanded a decision of the United States International Trade Commission ("ITC" or "Commission") which found that revocation of certain antidumping and countervailing duty orders would not be likely to lead to the continuation or recurrence of material injury to the domestic hot-rolled steel industry. See Hot-Rolled Steel Products From Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine ("Final Determination"), USITC Pub. 3956, Inv. Nos. 701-TA-404-408 and 731-TA-898-902 and 904-908 (Review) (Oct. 2007) (PR 453) (CR 427).¹ This lawsuit arose from Plaintiff's and Plaintiff-Intervenors' challenges to the Commission's Final Determination, and ensuing Motion for Judgment on the Agency Record under USCIT Rule 56.2. The parties allege, inter alia, that the ITC's negative injury determination in the five-year sunset review of the countervailing duty order on hot-rolled steel products from South Africa and the antidumping duty orders on hot-rolled steel from Kazakhstan, Romania and South Africa was unsupported by substantial evidence. In its opinion, the Court found that the ITC had failed to provide an adequate

¹ Hereinafter all documents in the confidential record will be designated "CR" and all documents in the public record designated "PR."

explanation or substantial evidentiary support for certain findings relating to the likely volume, price effect, and impact of subject imports from the affected countries. As a result, the Court remanded the matter and instructed the Commission to reevaluate and explain more fully its negative injury determination in light of the Court's findings. See Nucor, 33 CIT at ____, 605 F. Supp. 2d 1361, 1381-82.

The Court now reviews the Commission's findings pursuant to the Court's remand² ("Remand Determination"), dated July 8, 2009, in which the ITC's revocation decision remains unchanged from the Final Determination. Plaintiff, Nucor Corporation ("Nucor") and Plaintiff-Intervenors, United States Steel Corporation ("U.S. Steel") and AK Steel Corporation ("AK Steel") (collectively "Plaintiffs" or "Domestic Producers") assert that the Remand Determination is also unsupported by substantial evidence or otherwise contrary to law and urge the Court to remand the matter for further consideration. The Commission, joined by Amicus, ArcelorMittal USA,³ argues that the decision should be sustained. For the reasons set forth below, the Court affirms the Remand Determination of the ITC.

² All references are made to the confidential version of this document filed under CR 441R.

³ ArcelorMittal USA ("Mittal USA") is an affiliate of ArcelorMittal International ("ArcelorMittal") which is the corporate parent of the subject producers.

I. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (2006).

II. STANDARD OF REVIEW

Review of the Commission's redetermination pursuant to the Court's remand is conducted under the substantial evidence and in accordance with law standard, which is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i) (2006) ("The 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. (30) 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) (internal citations and quotation marks omitted). The Court "must affirm a Commission determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion." Nippon Steel Corp. v. United States, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal citations and quotation marks omitted). There must be a "rational connection between the facts found and the choice made"

in an agency determination if it is to be characterized as supported by substantial evidence and otherwise in accordance with law. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

III. BACKGROUND

The Court presumes familiarity with its decision in Nucor, which provides background discussion on the five-year sunset review that Plaintiffs contest in this judicial proceeding. Below, the Court provides only that background information specific to the Remand Determination now before the Court.

In August and November of 2001, the Commission unanimously determined that the domestic hot-rolled steel industry was materially injured by reason of subsidized imports of hot-rolled steel from Argentina, India, Indonesia, South Africa, and Thailand, and by reason of less than fair value imports of hot-rolled steel from Argentina, China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine. See Hot Rolled Steel Products From Argentina and South Africa, Inv. Nos. 701-TA-404 and 731-TA-898 and 905 (Final), USITC Pub. 3446 (Aug. 2001) (PR 65); Hot-Rolled Steel Products From China, India, Indonesia, Kazakhstan, The Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine, Inv. Nos. 701-TA-405-408 and 731-TA-899-904 and 906-908 (Final), USITC Pub. 3468 (Nov. 2001) (PR 66) (collectively "Original Determinations"). Accordingly, between

September 2001 and December 2001, the United States Department of Commerce ("Commerce") published countervailing duty orders on hot-rolled steel from Argentina, India, Indonesia, South Africa, and Thailand, as well as antidumping duty orders on hot-rolled steel from Argentina, China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand and Ukraine. See Final Determination at I-2.

On August 1, 2006, the Commission initiated five-year sunset reviews to determine whether revocation of the countervailing duty and antidumping duty orders on hot-rolled steel products from Argentina, China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand and Ukraine would likely lead to the continuation or recurrence of material injury to the domestic hot-rolled steel industry. See Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine, 71 Fed. Reg. 43,521 (Aug. 1, 2006) (PR 3). At the conclusion of the sunset reviews, the Commission determined that revocation of the antidumping and countervailing duty orders on hot-rolled steel from China, India, Indonesia, Taiwan, Thailand and Ukraine would likely lead to the continuation or recurrence of material injury. See Final Determination at 3 (PR 453). However, the Commission determined that revocation of the orders on hot-rolled steel from Argentina, Kazakhstan, Romania and South Africa ("subject

countries") 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.⁴ Id.

Domestic Producers subsequently initiated actions in this Court seeking review of the ITC determinations. On March 9, 2009, after briefing and oral argument the Court remanded the Commission's negative determinations in part, ordering the ITC to:

(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 excess 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.

See Nucor, 33 CIT at ___, 605 F. Supp 2d 1361, 1381-83.

On remand, the Commission reopened the record with respect to

⁴ Plaintiffs do not challenge the Commission's negative final determination with respect to hot-rolled steel products from Argentina. See Plaintiff's Rule 56.2 Mot. for Summ. J. On the Agency R. at 1 n.1.

certain issues, inviting parties to offer additional information on matters relating to the remand and submit written comments. See Hot-Rolled Steel Products From Kazakhstan, Romania, and South Africa, Inv. Nos. 701-TA-407 and 731-TA-902, 904, 905 (Review) (Remand) 74 Fed. Reg. 21,821 (May 11, 2009). As much of the Court directed inquiry focused on the business practices of ArcelorMittal, the Commission permitted Mittal USA to participate as a party in the proceeding. The Commission issued its Remand Determination on July 8, 2009, once again finding that revocation of the countervailing duty order on hot-rolled steel from South Africa and the antidumping duty orders on hot-rolled steel from Kazakhstan, Romania and South Africa would not be likely to lead to the continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. See Remand Determination at 2.

IV. DISCUSSION

This Court's remand instructions were carefully delineated into six areas for further review by the Commission: four involving volume, one involving price effects and one involving likely impact on the domestic industry. See Nucor, 33 CIT at ___, 605 F. Supp 2d 1361. The Court will hew to that framework in evaluating the Commission's determination on remand.

1. ArcelorMittal's Limitation of Subject Imports

A. The Commission's Determination on Remand

Pursuant to the Court's instructions, the Commission specifically examined whether, upon revocation of the antidumping and countervailing duty orders, ArcelorMittal or Mittal USA would limit imports from the subject countries. See Nucor 33 CIT at ___, 605 F. Supp. 2d 1361, 1381. The Commission's analysis once again led it to the conclusion that ArcelorMittal's likely behavior with respect to the hot-rolled steel mills it operates in Kazakhstan, Romania and South Africa would not result in significant volumes of subject imports entering the U.S. market. See Remand Determination at 10. The Commission relied on information submitted by Arcelormittal, in both the five-year reviews and remand proceeding, as evidence of the firm's decision to serve the U.S. market principally through its American subsidiary, Mittal USA. See id. According to the ITC, this strategy of constraining imports in furtherance of maximizing domestic production did in fact serve to maintain price stability and promote Arcelormittal's overall corporate interests. See Defendant's Rebuttal to Plaintiff's Comments on Remand Determination ("ITC Rebuttal Comments") at 15.

B. Parties' Arguments

The Commission argues that ArcelorMittal's strategy for its subsidiaries to supply home and regional markets, and not to serve export markets where the company is a producer, limits the motivation of the subject producers in Kazakhstan, Romania and South Africa to significantly increase shipments to the U.S.

market.⁵ As support for this position, Defendant points to the substantial investment ArcelorMittal has made in its subsidiary, Mittal USA.⁶ Because Mittal USA accounts for such a large segment of ArcelorMittal's production overall, and in light of the domestic producer's prominence in the U.S. market, the Commission concludes, it is in ArcelorMittal's best interests to limit the amount of imports of hot-rolled steel. Similarly, the ITC points to the decision by ArcelorMittal to provide Mittal USA with the right to veto any imports from other ArcelorMittal facilities, and its policy of serving the U.S. market principally through Mittal USA. See Remand Determination at 10. Inasmuch as the production of hot-rolled steel in the subject countries is controlled entirely by ArcelorMittal, these practices, according to the Commission, "serve as a powerful deterrent to significant volumes of subject imports entering the U.S." See id.

Specifically, the Commission relies on statements from two of

⁵ Mills owned by ArcelorMittal are responsible for virtually all production of subject hot-rolled steel in Kazakhstan, Romania and South Africa. See Final Determination at 44 n.255.

⁶ Mittal USA is the composite of acquisitions and consolidations of former U.S. steel companies owned and operated by Mittal Steel Co. NV. In 2006, Mittal Steel Co. NV merged with Arcelor SA, creating the new entity ArcelorMittal International. See Final Determination at 17 n.88. Over six billion dollars were spent in acquiring the companies that make up Mittal USA, which accounts for approximately [[]] of Arcelormittal's worldwide production (this figure includes ArcelorMittal's U.S. and Canadian based operations). See ArcelorMittal Factual Submission on Remand, ex. 7 (CR 433R); Remand Determination at 13.

ArcelorMittal's corporate officers. The first, Louis L. Schorsch, the company's president and chief executive officer, provided testimony during the hearing describing the approval required for the entry of merchandise from other ArcelorMittal mills.⁷ See Administrative Record, Tr. at 218-19 (PR 253). The second, an affidavit from [[

]] discusses the factors ArcelorMittal considers in deciding whether or not to export to the United States merchandise produced in overseas ArcelorMittal facilities.⁸ See ArcelorMittal Factual Submission on Remand, Ex. 8, ¶ 5 (CR 433R). In addition, the ITC identifies empirical data from the importer questionnaires which indicate that U.S. hot-rolled steel imports by ArcelorMittal decreased noticeably subsequent to the merger of Arcelor SA and Mittal Steel Co. NV. See Remand Determination at

⁷ The relevant portions of Schorsch's testimony include the statement "Now, we do import some material into the [S]tates in a variety of products. The way that is done is: Nothing comes into this market or, for that matter, any other market where we operate, where we bring material in from another part of the world without, let's say, the approval and management of the marketing, or the commercial organization, in that home country. So the interest of the home country takes precedence." Hearing Tr. pp. 218-19 (PR 253).

⁸ [[

]] ArcelorMittal Factual Submission on Remand, Ex. 8, ¶ 5 (CR 433R).

12. This, says the Commission, is the effect of ArcelorMittal's corporate strategy which perceived that maintaining the profitability and market share of Mittal USA was in its overall interest. See id.

In response to Plaintiffs' theoretical model showing how ArcelorMittal would likely benefit from subject imports even if doing so caused harm to Mittal USA, the Commission found this scenario "lacking in probative value." Id. at 14. Citing the lack of any documentation to support the figures reported, the ITC argues that even a slight variation of these figures results in adverse financial consequences for ArcelorMittal. Moreover, the ITC points to the difficulty in precisely gauging the price effects of subject imports in such a manner as to calculate accurately the level of imports necessary to achieve such a favorable result. See id. at 15.

By contrast, Plaintiffs argue that the record does not support the premise that ArcelorMittal will restrain subject imports from lower production cost facilities if such imports would maximize overall corporate profits. See Nucor Corporation's Comments on Remand Determination ("Nucor Comments") at 9. As Plaintiffs recite the record, the evidence demonstrates that if ArcelorMittal can produce and sell steel for consumption in the U.S. more profitably through its mills overseas, "thereby increasing company-wide profits, it will do so." Id. According to this theory, any

potential harm to Mittal USA would be outweighed by the benefit to Arcelormittal's overall operations. Plaintiffs argue that it is a core principal of the director/officer's fiduciary duty to maximize profits of the entire company for the benefit of its shareholders. See id. This basic tenet of corporate law is discussed in two affidavits submitted by Plaintiffs. The first, [[

]] discusses the obligation a corporate officer has to his shareholders, which is the maximization of corporate profits even at the expense of one of its subsidiaries. See Nucor Factual Submission on Remand, Attachment 1, Affidavit of [[]] ¶ 3 (CR 434R) ("I have never witnessed a company make a decision that benefits its subsidiary at a cost to overall operational profits.") The second, Michael Meyers, the general manager of sales of U.S. Steel, speaks to the "imperative that the producer do what is in the best interest of its overall operation, not that of each affiliated entity." Nucor Comments at 10; U.S. Steel Factual Submission on Remand, Affidavit of Michael Meyers, ¶ 5 (CR 435R). Thus, according to Plaintiffs, "a rational business model requires companies to maximize profits for the entire enterprise, rather than protecting one business unit at the expense of total corporate profits." Nucor Comments at 10.

In support of this assertion, U.S. Steel presented two hypothetical profit maximization scenarios purporting to show how ArcelorMittal could serve its overall corporate interest by

importing hot-rolled steel from the subject countries, while concomitantly causing U.S. prices to fall. See Comments on the Remand Determination Filed by United States Steel Corporation ("U.S. Steel Comments") at 11.

C. Analysis

During a five-year review, the ITC determines whether revocation of an antidumping or countervailing duty order "would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. § 1675a(a)(1). In making this decision, the Commission "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." United States Steel Corp. v. United States, 32 CIT ___, 572 F. Supp. 2d 1334, 1341 (2008) (internal citation omitted). Plaintiffs argue that the ITC made several erroneous findings which it contends are not supported by substantial evidence. U.S. Steel and Nucor attack the substantiality of the Commission's likely volume determination by offering their own evidence in support of an alternative result. Essentially, Plaintiffs claim that the testimony on which they rely is a more adequate basis from which to draw a conclusion. The task for the reviewing court, however, is not to evaluate the evidence the Commission collects during its review, or to decide the weight to be assigned to a particular piece of evidence. See United States

Steel Group v. United States, 96 F.3d 1352, 1357 (Fed. Cir. 1996). It is the Commission's task to evaluate the evidence it collects in conducting an investigation or review, and "certain decisions, such as the weight to be assigned a particular piece of evidence, lie at the core of that evaluative process." See id.

In the case at bar, the Commission acted within its discretionary authority when it discounted the probative value of Plaintiffs' profit maximization scenarios. On the basis of the data that was compiled with respect to the risk of adverse price effects on the circumstances of Plaintiffs' hypothetical, the Commission evaluated the competing economic data to reach a well-supported conclusion. The risk of adverse price effects may well be considered high in instances, such as the one here, where there is a high degree of interchangeability between hot-rolled steel from a variety of sources. Thus, the likelihood that prices could be driven to a point that would adversely affect both ArcelorMittal and Mittal USA is significant. In addition, the Commission now points to data from the importer questionnaires which reveal that imports from ArcelorMittal mills overseas were noticeably [[]] in interim 2007 than in interim 2006. See Remand Determination at 12 n.45; see also Mittal Steel NA, Importer Questionnaire at 11-13 (CR 155); Arcelor International, Importer Questionnaire at 10-11 (CR 137). Such evidence is consistent with Defendant's argument concerning the effects of ArcelorMittal's corporate policy of

providing Mittal USA with the right to veto any imports from other ArcelorMittal production facilities. While it is true, as Plaintiffs point out,⁹ that there are circumstances under which ArcelorMittal could conceivably increase its overall profits in the U.S. market even if doing so caused harm to Mittal USA, the mere plausibility of a set of given circumstances is insufficient to overcome the high barrier to reversal of an agency determination. ArcelorMittal's fiduciary obligations to its shareholders and its role as corporate parent are not mutually exclusive. The welfare of one does not inevitably result in the demise of the other, and Plaintiffs' have offered only innuendo and speculation as evidence to the contrary. The ITC's reliance on testimony from ArcelorMittal officials about the policies and practices of which these witnesses have first hand knowledge cannot be considered unreasonable. Therefore, all the agency has done is reach an alternate conclusion based upon data it has assigned greater evidentiary weight.

In its prior opinion, the Court voiced concerns over the sufficiency of the ITC's explanation for its findings on ArcelorMittal's likely behavior upon revocation of the orders at issue here. On remand, however, the Commission has proffered

⁹ The two hypothetical scenarios provided by U.S. Steel demonstrate that there are a number of potential combinations of prices and costs that could incentivize the importation of hot-rolled steel from the subject countries. See U.S. Steel Comments at 11.

additional grounds on which it based its original decision. This explanation is sufficient to meet the ITC's burden of offering a rational basis between the facts found and the choices made. Accordingly, the Court finds the Commission's determination, in this regard, to be supported by substantial evidence and otherwise in accordance with law.

2. Regional Imports and Pricing Practices

A. The Commission's Determination on Remand

This Court previously objected to the basis cited for the Commission's determination that significant imports into any region of the country are likely to have a disruptive impact on the overall U.S. market, and that any price impact on Mittal USA's competitors would also negatively impact Mittal USA. Nucor, 33 CIT at ___, 605 F. Supp. 2d 1361, 1379. The Court explained that the "only data" cited by the Commission in support of its conclusions was "a chart listing producers and importers by region," and that with nothing more to rely upon, the Commission's volume determination could not be sustained. Id. (citing Final Determination at Table II-1 (PR 453)). The Court also pointed to the testimony of "an executive of ArcelorMittal that its imports may affect competitors in this market who are in different geographies or serve different market segments, and so on." Id. Accordingly, the Court instructed the Commission to reassess and further substantiate its findings. Id. 33 CIT at ___, 605 F. Supp.

2d 1361, 1381.

On remand, the Commission explained that the record does not reveal any regional markets within the United States to which ArcelorMittal could direct subject imports while maintaining stability in the U.S. market overall and protecting its domestic subsidiary from harm. Remand Determination at 17. The Commission obtained additional information from Mittal USA during the remand proceeding and concluded that "the record does not indicate any gaps in Mittal USA's geographic coverage." Id. at 17.

Additionally, the Commission obtained nationwide pricing data for hot-rolled steel and determined that while prices in the United States show some regional variation (owing to freight costs and distances between producers and purchasers), the prices in the different regions show a high degree of correlation. Id. at 19. The Commission therefore concluded that even if ArcelorMittal were to bring subject imports to a region of the United States where Mittal USA does not produce hot-rolled steel, "any significant influx of imports into a particular region that would cause a regional price dislocation would affect prices nationwide - including those in the regions where Mittal USA does operate mills." Id. at 20.

Finally, the Commission again considered whether there was any evidence that ArcelorMittal might manufacture niche products in the subject countries that it could import to compete with Mittal USA's

competitors. In concluding that this was unlikely, the ITC pointed to three pieces of evidence. First, in the Final Determination, the ITC found a high degree of interchangeability between the products, regardless of source. Id. at 21. Second, there were no purchasers of hot-rolled steel that indicated in response to ITC questionnaires that Kazakhstan, Romania or South Africa were the source of any unique niche products. Id. Finally, witnesses for Nucor and U.S. Steel could not identify any niche products that ArcelorMittal is manufacturing in the subject countries. Id.

B. Parties' Arguments

In response, Plaintiffs point to the testimony of witnesses Louis Schorsch and [[]]. Schorsch testified that subject imports "may affect competitors in this market who are in different geographies or serve different market segments, and so on." Nucor Comments at 13; U.S. Steel Comments at 20. Whereas [[]] suggested that ArcelorMittal is capable of supplying particular market segments or geographic regions that Mittal USA would be unable to supply. Nucor Comments at 13; U.S. Steel Comments at 20-21. Plaintiffs are of the opinion that these statements work as something of an admission against interest by ArcelorMittal, and should be dispositive on the ITC's likely volume determination.

Both Nucor and U.S. Steel, once again, rely on the hypothetical scenarios purporting to show how ArcelorMittal could

benefit financially from importing subject goods, in spite of having a large domestic presence in the U.S. market. Nucor Comments at 15; U.S. Steel Comments at 25. Nucor also emphasized that a "large percentage of Mittal USA's domestic sales are sold on a contract basis." Nucor Comments at 16. Nucor reasoned that if a [[]] amount of production by Mittal USA is already accounted for by long-term contracts, then Mittal USA is only competing on the spot market for a portion of its overall production, making it easier to import subject goods without harming itself. Id.

Friend of the Court Mittal USA rebuts Plaintiffs' arguments by invoking the pricing data and customer list Mittal USA provided to the Commission on remand which demonstrated "largely identical" prices by region, and a "widespread" customer base. ArcelorMittal USA Rebuttal Comments ("Mittal USA Rebuttal Comments") at 8. Mittal USA also provided evidence of its "actual business practices" of "ensur[ing] that prices in a geographic region that might be served by imports of an affiliate were consistent with prices in other regions in which Mittal Steel USA was selling, and did not disrupt U.S. market prices." Id. at 9.

Defendant, ITC, rebuts Plaintiffs' arguments by pointing out that it explicitly considered the testimony of the two ArcelorMittal executives in its Remand Determination. ITC Rebuttal Comments at 16 (citing Remand Determination at 17). Defendant

points out that neither of the witnesses affirmatively declared that there were "U.S. regional markets or specialty products that Mittal USA could not serve or supply," but instead had phrased their comments "in the conditional." Id. The Commission also defended its consideration of the niche products argument by pointing out that neither Nucor nor U.S. Steel identified "any hot-rolled steel products that they produce, but Mittal USA does not." Id. at 20. The ITC found this inability of Plaintiff and Plaintiff-Intervenor to be weighty, and thereby concluded that "there are no such actual products." Id.

C. Analysis

The Court finds that there is substantial evidence in the record to support the Commission's finding that significant imports in any region of the country are likely to have a disruptive impact on the overall U.S. market. The strongest evidence that the ITC points to in support of this finding consists of pricing data submitted by Mittal USA on remand. The ITC analyzed the regional price data in pairs, and concluded that the correlation coefficient for prices between the West and Midwest, the Midwest and Gulf, and the Gulf and the West, each exceeded 0.98, respectively. Remand Determination at 20 n.69. It is true that the ITC's analysis does not include any empirical historical observation of the actual national price effect of some burst of regionally-confined imports in the past. As such, it would be difficult to state with absolute

certainty what effect an influx of regionally-confined imports would have on nationwide prices. However, the Commission did not attempt to make such a bold prognostication. Instead, it merely concluded that "any significant influx of imports into a particular region that would cause a regional price dislocation would affect prices nationwide." Id. at 20 (emphasis added). The Court finds that a reasonable mind would accept the high level of correlation between regional prices as adequate support for this conclusion, formed as a conditional statement, and therefore constitutes substantial evidence within the meaning of the standard of review. See Huaiyin Foreign Trade Corp., 322 F.3d at 1374.

The Court finds that there is also substantial evidence in the record to support the Commission's finding that pricing practices that would negatively impact Mittal USA's competitors are likely also to impact Mittal USA. Specifically, the Court notes the evidence indicating that there are no regional markets in the United States to which ArcelorMittal could direct imports while maintaining stability in the U.S. market and protecting its domestic subsidiary from harm. On remand, Mittal USA submitted a chart purporting to show domestic shipments of hot rolled steel more than 1000 miles from Chicago. See ArcelorMittal Factual Submission on Remand, Ex. 6, (CR 433R). This chart indicates that between 2005 and the first quarter of 2007, Mittal USA shipped hot rolled steel to 12 continental states that have some portion of

land further than 1000 miles from Chicago. See id. The chart clearly indicates that Mittal USA's domestic shipments reach all regions of the United States. The Court further notes the Producers' Questionnaire, filled out by Mittal USA, explicitly indicates that every geographic market area in the United States is served by the firm's hot-rolled steel. See Mittal USA Producers' Questionnaire, Part IV-B-9 (CR 126). The Court finds that taken together, the questionnaire response and chart constitute more than a mere scintilla of evidence in support of the ITC's conclusion that there are no regions of the U.S. where ArcelorMittal could import hot rolled steel, to which Mittal USA does not already ship domestically. See Altx, Inc., 370 F.3d at 1116.

The Court also finds that the arguments advanced by Plaintiff and Plaintiff-Intervenor do not effectively undermine the Commission's conclusion. Specifically, the ITC has given appropriate consideration to the testimony of Louis Schorsch and the affidavit of [[]] which are the subject of much ado by Plaintiffs. See Remand Determination at 16-17. Not only is it inappropriate for the Court to re-weigh this evidence, or to require the ITC to do so, but when the statements are viewed in context, it is clear that they do not amount to the veritable admissions against interest as Plaintiffs suggest.¹⁰ As for

¹⁰ Schorsch prefaces his statement about the effect imports may have on ArcelorMittal's competitors by explaining that import decisions are made in a way that ensures the price and volume

Plaintiffs' contentions that "a large percentage" of Mittal USA's sales are made pursuant to contract, and therefore do not compete on the spot market; the Court notes Plaintiffs' own concession that, "large percentage" or not, [[]] of Mittal USA's sales do compete on the spot market--a percentage large enough to ensure Mittal USA's ongoing concern with spot market prices. Nucor Comments at 16. In sum, the Court sustains this aspect of the ITC's volume determination as supported by substantial evidence and otherwise in accordance with law.

3. Prior Business Practices

A. The Commission's Determination on Remand

In its remand instructions, the Court required the Defendant to further explain the behavior of ArcelorMittal and its predecessor company, Ispat International, with respect to their past practice of exporting to countries in which they maintained production facilities.¹¹ Consistent with its earlier findings, the

levels will not disrupt Mittal USA's domestic operations. See Administrative Record, Tr. at 219 (PR 253) [[]] statement about the decision to permit ArcelorMittal International to serve certain geographic regions outside of Mittal USA's scope was framed strictly in the hypothetical. See ArcelorMittal Factual Submission on Remand, Ex. 8, ¶ 6 (CR 433R).

¹¹ During the original period of investigation, Ispat International owned Ispat Inland, Inc. (a U.S. producer) as well as Ispat Karmet, the only hot-rolled steel producer in Kazakhstan. Within this period, U.S. imports from Kazakhstan went from 130,329 short tons in 1998 to 192,470 short tons in 2000, an increase of 47.7 percent. See Final Determination at I-8 (Table I-1) (PR 453).

Commission determined that the record does not support an inference that ArcelorMittal will likely make significant shipments of hot-rolled steel from its low cost production facilities into the U.S. market. See Remand Determination at 26. Unlike its previous position, however, the ITC does not rely solely on a market share analysis of Ispat and its affiliates. Instead, the Defendant identifies changes in the policy, structure and export trends of the ArcelorMittal organization since the original period of investigation.

B. Parties' Arguments

On remand, the Commission offers three distinct evidentiary points as the basis for its determination. First, Arcelormittal exerts a more centralized system of control over its exports from affiliated producers than did its predecessor Ispat International. See Remand Determination at 23. According to the ITC, this is an important change in the evolution of Mittal USA and distinguishes its practices from those of Ispat. After the formation of ArcelorMittal the newly formed entity continued the policy, [[
]] of not using third-party trading companies.¹²

See id. Prior to the adoption of this policy, whereby Ispat - and ultimately ArcelorMittal - became the solitary sales agent for

¹² [[

]] Remand
Determination at 23.

corporate affiliates abroad, imports of subject merchandise from these affiliates were not controlled by the corporate parent. See id. The efficacy of this policy, argues Defendant, is evidenced by the decrease in quantity of hot-rolled steel imported by Ispat from Kazakhstan during the original period of investigation. Because Ispat was responsible for approximately [[]] of the imports from Kazakhstan in 1998, but only [[]] of those imports in 2000, the increase in subject imports during the original period of investigation was due not to Ispat, but rather the third-party traders that the new corporate policy was intended to eliminate. Compare Final Staff Report at Table I-1 (CR 376) (U.S. import data from Kazakhstan during original period of investigation), with ArcelorMittal Factual Submission on Remand, Ex. 5 (CR 433R) (breakdown of hot-rolled steel imports from Kazakhstan by Ispat during the original period of investigation); see also Remand Determination at 23-24.

Second, the Commission restates its previous position that Mittal USA has a [[]] larger presence in the U.S. market than did Ispat Inland, and that this larger market share provides a strong incentive to strictly adhere to its stated policy of maintaining market stability through the restriction of imports from affiliated producers. See Remand Determination at 24.

Finally, in accordance with the court's instructions, the ITC examined the pattern of Mittal USA's exports to Western Europe in

light of the presence of other ArcelorMittal production facilities. The ITC can identify only one shipment of hot-rolled steel to a European country in which ArcelorMittal maintained a presence, a single 12,000 ton shipment to Belgium.¹³ See Remand Determination at 25. Therefore, the Commission argues, the record does not support the inference that ArcelorMittal will likely export significant shipments of subject merchandise to countries in which it operates hot-rolled steel production facilities. See id. at 26.

In Plaintiffs' first assertion of error, they posit that the behavior of the Ispat organization prior to the assignment of the antidumping and countervailing duty orders is "far more probative" of ArcelorMittal's future behavior than crediting a policy instituted after the orders were put in place. U.S. Steel Comments at 28. Therefore, Plaintiffs argue, the Commission is in error to give more weight to policies made effective after the institution of relief as opposed to those actions taken when the subject countries had unlimited access to the U.S. market - a condition that would be replicated if the orders are revoked. See id. For example, the 47.7 percent increase in imports of hot-rolled steel by Ispat from Kazakhstan, during the original period of investigation, is identified by Plaintiffs as evidence of the likely future behavior of ArcelorMittal based upon the theory that

¹³ Because the questionnaires relied on by the Commission did not break down export quantities by destination, there is a dearth of record evidence on this point.

should the orders be revoked, ArcelorMittal will similarly increase the volume of hot-rolled steel exported to the U.S. market. See Nucor Comments at 17.

Next, Plaintiffs challenge the ITC's conclusion that the record is limited to only one specific instance in which ArcelorMittal exported hot-rolled steel to a European country wherein it maintained a production facility. As alleged by Plaintiffs, "the record actually contains very significant evidence about Mittal USA's exports to Europe." U.S. Steel Comments at 29. The evidence to which Plaintiffs refer includes two press releases; one in which Mittal USA acknowledges the previously identified 12,000 ton shipment to Belgium; and another describing Mittal USA's intention to become an active exporter of steel. See U.S. Steel's Post-Hearing Brief, Ex's. 15, 16 (PR 328). The third piece of evidence Plaintiffs cite to is the testimony of Louis Schorsch who speaks briefly about exports to Western Europe. See Administrative Record, Tr. at 334 (PR 253). Plaintiffs suggest that this evidence is indicative of ArcelorMittal's intention to take advantage of the relatively attractive market conditions in the U.S. even if that market contains another ArcelorMittal facility. See U.S. Steel Comments at 30.

Lastly, Plaintiffs discount the Commission's reiteration of its market analysis claim, arguing that it is essentially the same explanation rejected by the Court in its previous opinion. See

U.S. Steel Comments at 27; Nucor Comments at 18.

C. Analysis

In evaluating whether the likely volume of subject imports will contribute to the recurrence or continuation of material injury within a reasonably foreseeable time, the ITC is statutorily required to take into account numerous factors including its previous injury determination conducted prior to the order being issued. See 19 U.S.C. § 1675a(a)(1)(A). As the Statement of Administrative Action accompanying the statute explains, the purpose of this inquiry is to examine the most recent period of time in which subject imports competed without the discipline of an antidumping or countervailing order in place. See Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), H.R. 5110 (H.R. Doc. No. 103-316), reprinted in 1994 U.S.C.C.A.N. 4040, 4209. Section 1675a(a)(1)(A) does not, however, require a "full blown reconsideration" of the original injury determination in a sunset review. See Consolidated Fibers, Inc. v. United States, 30 CIT 1820, 1823, 465 F. Supp. 2d 1338, 1341 (2006). Instead, that provision simply requires the Commission take into account its findings as to volume, price, and impact of subject imports prior to the institution of an order. Neither the statute nor its legislative history direct the ITC to distinguish every factor of its original investigation findings from those made in a sunset review. Presently, the ITC did not disregard the findings from its

original investigation, but rather cited to such findings repeatedly. See, e.g., Remand Determination at 22-25. The Commission discussed its negative determination in terms of the likely volume of imports from the subject countries while incorporating and distinguishing various aspects of the original investigation. See id. at 21-26. Therefore, Plaintiffs' claim that the behavior of ArcelorMittal's predecessor, Ispat, is far more probative than the current practices of the corporation and its affiliates, merely replicates their previous position urging the Court to re-weigh the evidence considered by the Commission. Once again, the Court is disinclined to accept Plaintiffs' invitation to displace the agency's interpretation of that evidence with its own.

The Court rejects Plaintiffs' argument on additional grounds. Namely, that they have pointed to no evidence impeaching the credibility of the data relied on by the Commission. Other than the single 12,000 ton shipment to Belgium, the press reports cited by Plaintiffs make no mention of any actual exports of hot-rolled steel to a country with an ArcelorMittal affiliate. At most, the statements relied upon by Plaintiffs indicate a willingness on the part of Mittal USA to expand its export activity to parts of Western Europe, which may or may not include countries in which ArcelorMittal has a production facility. Such vague and circumstantial evidence is simply insufficient to overcome

Plaintiffs' high burden in this case. In this way, the witness testimony, e-mail correspondence and producer's questionnaire utilized by the Commission in making its determination must preponderate. Accordingly, the Court holds that the ITC adequately investigated and explained the basis for its finding that the prior business practices of ArcelorMittal's predecessor, Ispat International, do not support an inference that ArcelorMittal will likely make significant export shipments to other countries in which it operates hot-rolled steel production facilities.

4. Neglected Volume Considerations

A. The Commission's Determination on Remand

This Court previously found that there were several pieces of evidence in the record that had not been properly considered by the Commission in its initial sunset review determination, and that if considered, may have weighed against revoking the relevant orders. On remand, the ITC was instructed 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 alternative export markets." Nucor, 33 CIT at ___, 605 F. Supp. 2d 1361, 1382.

With respect to excess capacity of the subject countries, the Commission determined that while the Court had correctly identified excess capacity at the end of the period of review, it was not

persuaded that the subject producers could or would utilize that capacity. Remand Determination at 26-27. In support, the Commission pointed out that through the duration of the period of investigation and the period of review, capacity utilization remained well below maximum. Id. at 27. On this basis, the Commission concluded that the subject producers' excess capacity is nothing more than "theoretical." Id. The Commission also concluded that "ArcelorMittal lacks the incentive to increase capacity utilization . . . in light of its corporate policies." Id. at 28. Moreover, the excess capacity of the subject countries is [[]] and Mittal USA has shown higher levels of capacity utilization as well. Id.

With respect to export orientation of the subject countries, the ITC found that exports, when viewed as a proportion of total shipments, remained "relatively stable throughout the period of review, ranging between [[]] percent and [[]] percent during the six calendar years." Id. at 28-29. The Commission found that these percentages did not "signify that the subject industries are heavily export-oriented." Id. at 29. The ITC also noted that the majority of these subject producers' exports were directed to regions outside the U.S.: from Kazakh and Romanian producers to [[]], from Romania to [[]], and from South Africa [[]]

] Id. at 29 n.104.

With respect to the attractiveness of the U.S. market, the Commission included a footnote in its remand determination acknowledging that the U.S. market has a "relatively open nature" and "higher prices than some other world markets." Id. at 29 n.105. However, the Commission reasoned that in light of ArcelorMittal's U.S. and Canadian operations and stated corporate policies, the attractiveness of the U.S. market was unlikely to incentivize the subject producers to target the U.S. market. Id.

With respect to capacity increases in export markets, specifically China, the ITC's finding was twofold. First, China had not been a primary export market for any of the subject producers before it shifted from being a net-importer to being a net-exporter, so the subject countries did not lose an export market as a result of China's shift. Id. at 29. Second, the ITC found that the subject countries' primary export markets were not in southeast Asia, where it reasoned China would be directing most of its exports. Id. Consequently, the ITC determined that the subject countries did not face increased competition from China as a result of China's shift in status from net-importer to net-exporter. Id. at 29-30.

B. Parties' Arguments

Plaintiffs focus their remand comments on excess capacity by highlighting what appears to be large excess capacity in the

subject countries. Nucor points out that the subject countries experienced a "nearly [[]] increase in capacity" during the period of review, which, in absolute terms, is "[[

]] volume of subject imports from the Mittal Countries during the last year of the period of investigation." Nucor Comments at 20. Accordingly, Nucor asserts that the Commission's conclusion that the subject countries have experienced "'at most incremental growth in capacity and incremental declines in capacity utilization in the subject countries,'" is fallacious. Id. (quoting Remand Determination at 8); see also U.S. Steel Comments at 31-35.

Nucor also takes issue with the Commission's characterization of the subject countries' excess capacity as merely "theoretical." Nucor Comments at 21. Nucor argues that data relating to excess capacity was obtained by questionnaires which "specifically instructed the Mittal country producers to report actual, not theoretical, capacity, and [that] there is no evidence to suggest that they did not report actual capacity." Id. U.S. Steel points out that the questionnaire instructions specifically request that the respondent provide "'[t]he level of production that [the producer] could reasonably have expected to attain during the specified periods.'" U.S. Steel Comments at 15 (quoting Foreign Producer Questionnaire Instructions at 8 (PR 132)).

Nucor and U.S. Steel also both push back on the Commission's finding about the export orientation of the subject countries.

Nucor argues that Romania, Kazakhstan and South Africa export a "[[]] of total shipments than [[

]] and [that] in its affirmative determination for China, India, Indonesia, Taiwan, Thailand, and Ukraine, the Commission relied on subject producers' export orientation to support continuation of the orders." Nucor Comments at 22-23. Nucor claims that it is "arbitrary for the Commission to cite a particular factor in support of continuation in one instance, but discount it entirely in another wherein the evidence in support is greater." Id. at 23. U.S. Steel argues that the figures the Commission identified as reflecting the proportion of subject producers' export shipments to total shipments ([[]] percent), are misleading because [[

]] U.S. Steel Comments at 32-33. U.S. Steel claims that the proportion of export shipments to commercial shipments suggests [[

]] Id. at 33.

With respect to the attractiveness of the U.S. market, U.S. Steel charges that the extent of the Commission's treatment of this issue - a footnote - is insufficient. Id. at 33-34. And last, U.S. Steel challenges the Commission's remand determination on the

capacity increases of alternative export markets, namely, China. U.S. Steel claims that in 2006, [[]] percent of exports from the subject producers "went to Asian markets other than China." Id. at 35. In the same year, of "the Chinese producers who responded to the Commission's questionnaire" 57.7 percent of their exports were shipped to this same market. Id. U.S. Steel thereby concludes that Chinese producers are focused on a market that is critical to producers in the Mittal Countries. Id.

In its rebuttal comments, the Commission reiterated that during the nine-year period examined by the ITC, [[

]] tons of excess capacity in the subject countries was never utilized. ITC Rebuttal Comments at 26. The ITC also acknowledged that U.S. Steel is correct in pointing out that a relatively large portion of the subject countries' shipments were exports, but pointed out that this proportion of exports during the period of review remained "relatively stable." Id. The Commission attempted to defend its characterization of the subject countries' excess capacity as "theoretical" by emphasizing that in using that term, it only meant to draw attention to the fact that the subject producers have no history of operating at full capacity, and are unlikely to do so in the near future. Id. at 27. Moreover, the ITC asserts that the mere existence of excess capacity in the subject producers "is insufficient to mandate a finding of significant likely subject import volume." Id. at 28 (citing Nucor

Corp. v. United States, 32 CIT ___, 569 F. Supp. 2d 1328, 1349 (2008)).

With respect to U.S. Steel's arguments about the effect of China on the subject producers, the ITC points out that it considered China's production extensively, and determined that the subject producers' exports to third countries were not affected by increasing exports from China. Id. at 28-29. The Commission also extensively and repeatedly emphasized its belief that ArcelorMittal will abide by corporate policies to have producers focus on local markets, to limit production to promote market stability, and to permit Mittal USA veto power over subject imports. See generally id. at 26-31. The Commission concludes by accusing Nucor and U.S. Steel of wanting the Court to do nothing more than re-weigh the evidence that the Commission already considered. Id. at 31.

C. Analysis

The Court shares Plaintiffs' concerns about the Commission's characterization of the excess capacity of the subject countries as "theoretical," to the extent that this suggests that subject producers are incapable of utilizing the excess capacity that they have reported. See Remand Determination at 27. As U.S. Steel pointed out, the subject producers were explicitly instructed to provide data about the level of production that the producer "could reasonably have expected to maintain during the specified periods." Foreign Producer Questionnaire Instructions at 9. Moreover, closer

inspection of the Foreign Producer Questionnaire responses provided by the Mittal affiliated producers in Romania, South Africa and Kazakhstan confirms that all three producers complied with that instruction. In their responses, each Mittal affiliated subject producer indicated that production capacity had been adjusted downward to take into account lost production time due to planned and unplanned repairs, delays, maintenance and other shutdowns. See Foreign Producer Questionnaire of Mittal Steel Galati at Ex. 3 (CR 113); Foreign Producer Questionnaire of Mittal Steel South Africa at 23 (CR 78); and Foreign Producer Questionnaire of Temirtau at 15 (CR 145). In light of what appear to be carefully calculated responses, the ITC's characterization of subject producer excess capacity as merely "theoretical" is problematic.

Presumably, the purpose of the Commission's query into subject producer excess capacity during a sunset review is to determine whether the subject producers would be capable of ramping up production if the orders are permitted to expire. While a report of little or no excess capacity would weigh in favor of permitting the antidumping orders to sunset, a report of significant excess capacity may be a legitimate cause of concern for the domestic industry. The Commission should not seek to diminish the weight of reported subject producer excess capacity by characterizing it as "theoretical," and thereby implying that the subject producers are somehow incapable of utilizing their reported unused capacity. The

numbers speak for themselves.

Nevertheless, the Court's objection is primarily with the Commission's terminology. The excess capacity figures do not suggest that the subject producers are incapable of expanding output, but when considered in light of historically low capacity utilization rates, there is reason to believe that the subject producers are unlikely to expand output, even upon revocation of the orders. Moreover, the Court also finds significant that the scale of the subject producers' excess capacity is [[]] by the excess capacity of Mittal USA. See Remand Determination at 28. Given ArcelorMittal's policy to source locally, these figures support the Commission's conclusion that dumping or injury is not likely to recur if the orders are revoked.

With respect to export orientation of the subject producers, the Court finds that the arguments of Plaintiff and Plaintiff-Intervenor are ineffective. First, U.S. Steel's contention that the percentages cited by the Commission [[

]] rather than of total shipments, as the Commission claims, is untrue. See U.S. Steel Comments at 32. Based on the data found in the Final Staff Report at Tables IV-31, IV-35, and IV-40, the Court finds that the percentage of exports as a share of total shipments does, indeed, range from [[

]] percent.¹⁴ Moreover, U.S. Steel fails to offer a compelling reason why this figure does not accurately represent the extent to which the subject producers are export oriented, and why the better ratio to consider is total exports to total commercial shipments. Surely, the volume of production that is internally consumed is pertinent to the question of how export-oriented a particular producer is.¹⁵

Turning to Plaintiff's concerns regarding export orientation, the Court is similarly unconvinced. Plaintiff is correct that in the Commission's initial sunset review determination, the ITC referred to the hot-rolled steel industries of Kazakhstan, Romania, and South Africa, along with the six other countries for which

¹⁴ Total shipments is a composite figure that includes internal consumption, commercial home market shipments, and total exports. The figure for total shipments is usually close to, but not identical to total production, the difference owing primarily to carryover end of period inventories. In [[]], the total exports from the Mittal countries totaled [[]] short tons, while total shipments from the Mittal countries totaled [[]] short tons, for a ratio of [[]] percent. In [[]], by comparison, the total exports from the Mittal countries totaled [[]] short tons, while total shipments from the Mittal countries totaled [[]] short tons, for a ratio of [[]] percent. See Final Staff Report at Table IV-31, IV-35, and IV-40 (CR 376).

¹⁵ For example, suppose 98% of a subject producer's total shipments was internally consumed, 2% of total shipments were exported, and nothing was shipped commercially to the home market. Under U.S. Steel's reasoning, such a producer would be considered extremely export dependent, because all of its commercial shipments are being exported. However, under the Commission's more logical analysis, it is clear that such a producer is not that export-dependent at all, exporting a mere 2% of total shipments.

antidumping orders remained in place, as "export[ing] a large percentage of total shipments." Views of the Commission at 20 (CR 427). Context, however, is everything. In this portion of its opinion, the Commission was deciding whether or not to cumulate the respective subject countries for the purposes of the sunset review. See id. at 13-29. Specifically, as a part of that inquiry, the Commission was addressing the question of whether the subject imports "are likely to have no discernible adverse impact on the domestic industry in the event of revocation of orders covering those imports." Id. at 20. The Commission characterized the percentage of exports from the Mittal Countries as "large" in the course of deciding that imports from the Mittal Countries were not likely to have no discernible adverse impact. In other words, because of the specific question the Commission was addressing at the cumulation stage, the bar had been set low. The Court finds that it is not arbitrary, nor even inconsistent to characterize export percentage as "large" because a country's exports are not likely to have no discernible adverse impact, and then subsequently, to find that the same country is not "heavily export-oriented" when those percentages fall in the range of [[

]] percent¹⁶. See id.; see also Remand Determination at 28-

¹⁶ The Court also notes that export orientation is not considered in isolation, and that the percentages discussed above are meaningless apart from considering absolute volumes. While Kazakhstan, Romania and South Africa may have larger percentages of exports to total shipments than the other six countries, in

29.

Next, the Court considers the argument of Plaintiff-Intervenor with respect to the attractiveness of the U.S. market. Ultimately, the Commission has credited the testimony and data provided by ArcelorMittal regarding its corporate policies to source hot-rolled steel locally and to provide the domestic subsidiary veto power over imports. Because the Court has already found that the Commission's acceptance of ArcelorMittal's stated corporate policies is supported by substantial evidence and otherwise in accordance with law, the Court is satisfied with the agency's explanation of the attractiveness of the U.S. market. See Discussion IV.1.C., supra.

On the issue of China's shift from net-importer to net-exporter status, this Court's previous instructions to the Commission consisted essentially of a requirement to address, and at a minimum, to explain why China is irrelevant with respect to the Mittal Countries. The Court finds that in the Commission's Remand Determination, it has thoroughly considered the evidence about the shift in China's import/export patterns. See Remand Determination at 29-30. The Court agrees that the arguments of the Plaintiff-Intervenor on this issue amount to nothing more than a

2006, total export volumes of the three countries was [[]] short tons, while the export volume of the other six countries was [[]] short tons. See Final Staff Report at Table IV-31, IV-35, and IV-40 (CR 376); see also Views of the Commission at 50 (CR 427).

desire to re-weigh the evidence. While it is true that comparable percentages of exports are directed to Asian markets other than China from the Mittal Countries, on one hand, and from China, on the other, the Court does not see reason to disturb the Commission's volume determination on that basis. For the foregoing reasons then, the Court finds that the Commission's determination regarding excess capacity, export orientation, the attractiveness of the U.S. market and China's shift from net-importer to net-exporter status to be supported by substantial evidence in the record and otherwise supported by law.

5. Potential Price Effects

A. The Commission's Determination on Remand

The Court predicated its remand instructions on the potential price effects of the subject imports on the correlative effects of the Commission's faulty volume analysis. Because the relationship between the imports' potential price effects and their volume is obvious, it logically follows that likely volume findings deemed unsupported by substantial evidence would impact the agency's conclusions with regard to price effects. As a result, the ITC was ordered on remand to reassess its potential price effects analysis in accordance with the agency's revised volume determination.

Consistent with its decision in the Final Determination, the ITC concluded that upon revocation of the antidumping and countervailing duty orders, the likely volume of subject imports

will be small, and in light of ArcelorMittal's efforts to price these imports in a manner so as not to disrupt the U.S. market for hot-rolled steel, there will not likely be significant underselling of hot-rolled steel from the subject countries. See Remand Determination at 32; see also Final Determination at 46.

B. Parties' Arguments

Both Nucor and U.S. Steel advance arguments that are grounded on the assumption that the Commission's likely volume finding cannot be sustained. As such, Plaintiffs aver, that finding cannot support the agency's likely price effects analysis. See U.S. Steel Comments at 36; Nucor Comments at 23. Nucor further alleges that the ITC disregarded significant pricing evidence, and cites to data from the Final Determination demonstrating that the average unit values¹⁷ ("AUVs") of the subject countries' home markets and third country exports were [[]] than the AUV of U.S. commercial shipments during the period of review. See Nucor Comments at 23-24 n.9. Thus, Nucor maintains, the potential for significant underselling of hot-rolled steel in the U.S. market combined with the Commission's recognition that even moderate levels of undersold merchandise will have a significant price suppressing or depressing effect, undermines the ITC's analysis.

¹⁷ Average unit values are computed by multiplying, the price of each product times the quantity sold, adding these figures, and then dividing by the total number of products sold. See United States Steel Group, 96 F.3d at 1364.

See id. at 24.

The Commission bases its price effects determination primarily on the reaffirmation of its likely volume analysis. That is to say, while ArcelorMittal may import modest levels of hot-rolled steel into the U.S. from its overseas affiliates, the volume of such imports would not be significant. Moreover, Defendant claims, the stated policy of ArcelorMittal is to ensure that when the company did import products from its affiliates [[

]] Remand

Determination at 32.

C. Analysis

Having already found that the Commission's likely volume determination is supported by substantial evidence and otherwise in accordance with law, the Court rejects Plaintiffs' arguments regarding the sufficiency of the agency's price effects analysis. In addition, Plaintiffs' complaint about the ITC's assessment of the pricing evidence is clearly in error. Far from being dismissive of the pricing data, the Commission cited to this information in the explanation of its price effects determination. See Remand Determination at 31-32. In fact, the ITC specifically discussed the underselling data from both the original period of investigation and the five-year review. See id. While acknowledging the instances of underselling which form the basis of

Nucor's claim, the ITC concluded that this evidence was not dispositive when examined against the backdrop of ArcelorMittal's practices regarding imports from affiliated firms. To be sure, this evaluation of the evidence is more than mere conjecture, and the agency's decision is reasonably discernible to the Court. See NSK Corp. v. United States, 33 CIT ___, 637 F. Supp. 2d 1311, 1318 (2009) (citing NMB Singapore Ltd. v. United States, 557 F.3d 1316, 1319-20 (Fed. Cir. 2009)). Therefore, the Court finds that the Commission sufficiently explained its price effects findings in the context of its likely volume determination as mandated by the Court. As a result, the Commission's determination is supported by substantial evidence and otherwise in accordance with law.

6. Likely Impact

A. The Commission's Determination on Remand

The Court instructed the Commission on remand to reconsider its likely impact determination in light of its revised volume and price effects determinations. Nucor, 33 CIT ___, 605 F. Supp 2d 1361, 1383. The Commission was also required to "account for and explain the poor performance of the domestic industry in the latter portion of the POR." Id. Because the ITC did not reach a different conclusion on either the volume issue or the price effects issue, it similarly concluded that the subject imports were not likely to have a significant impact on the domestic industry. Remand Determination at 33. The Commission also attributed the

domestic industry's poor performance in the latter portion of the POR to "flat or declining prices after 2006." Id. However, "[a]ll Commissioners who are joining this opinion concluded that the industry was not in a vulnerable condition, notwithstanding substantial performance declines in interim 2007, in light of its overall profitability since 2004." Id.

B. Parties' Arguments

Plaintiff Nucor responds to the Commission's likely impact determination simply by invoking its objections to the Commission's volume and price effects determinations, without raising any new objection. Nucor Comments at 24-25. Plaintiff-Intervenor U.S. Steel contends that in reaching an affirmative determination in the original sunset review on certain countries (not involved in this litigation), the Commission determined that imports from those countries would have a negative impact on the domestic industry. U.S. Steel Comments at 37. The Commission responds to Nucor's comments by pointing out that Plaintiff does not raise any new arguments on the likely impact analysis, and urges that the ITC should be affirmed. ITC Rebuttal Comments at 32-33.

C. Analysis

As the Court has already sustained the Commission's volume and price effects analyses, and upon hearing no compelling argument from Plaintiff or Plaintiff-Intervenor as to why the ITC's likely impact analysis is flawed, the Court finds that the likely impact

analysis is supported by substantial evidence and is otherwise in accordance with law.

CONCLUSION

For all the reasons set forth above, the Commission's negative injury determination, reached on remand, is sustained in its entirety. Judgment shall be entered accordingly.

_____/s/ Gregory W. Carman

GREGORY W. CARMAN

JUDGE

Dated: January 27, 2010
New York, New York