Hot-Rolled Steel Products from Kazakhstan, Romania, and South Africa

Investigation Nos. 701-TA-407 and 731-TA-902, 904, 905 (Review)(Remand)

Publication 4088 **July 2009**

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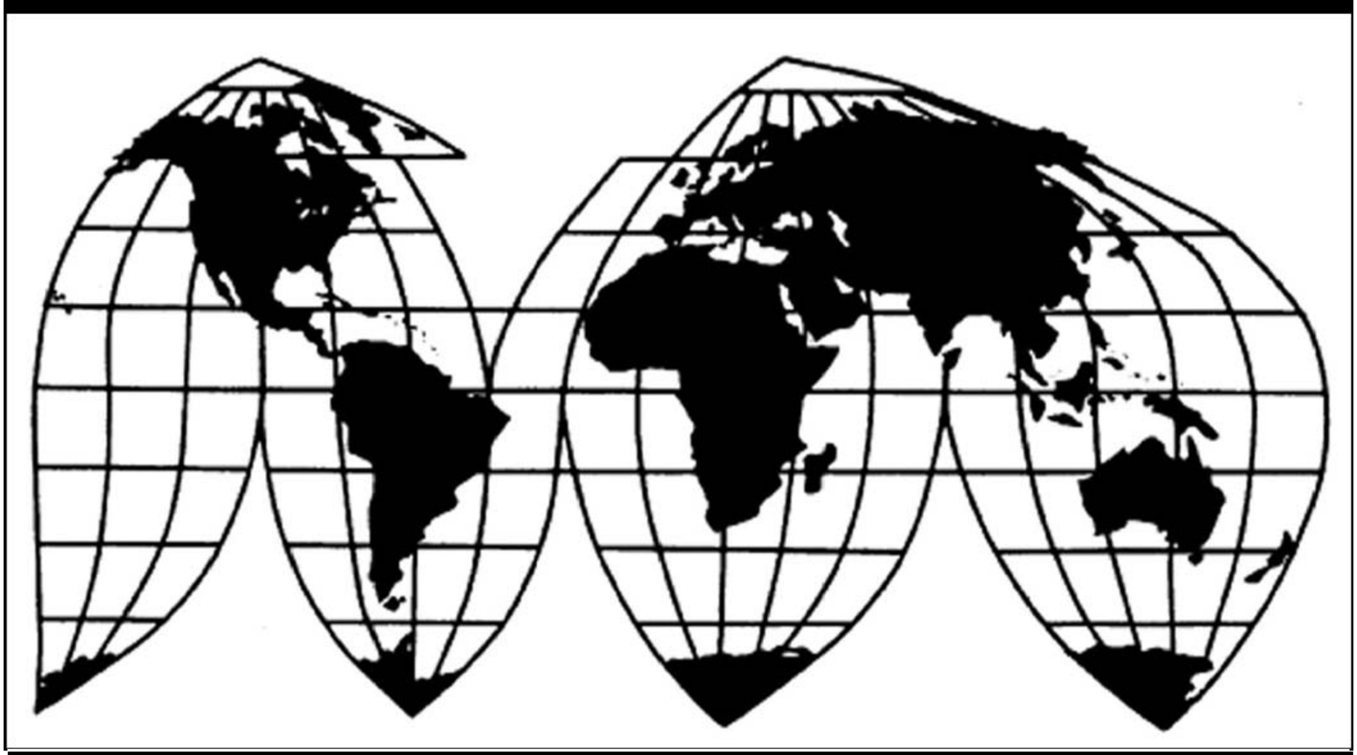

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Note.–Information that would reveal confidential operations of individual concerns may not be published and therefore has been deleted from this report. Such deletions are indicated by asterisks.

VIEWS OF THE COMMISSION

In October 2007, the Commission determined that revocation of the countervailing duty order on hot-rolled steel products from South Africa and the antidumping duty orders on hot-rolled steel products from Kazakhstan, Romania, and South Africa would not be likely to cause continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[1] Nucor Corp., United States Steel Corp. ("U.S. Steel"), and AK Steel Corp., domestic producers of hot-rolled steel, subsequently initiated actions in the U.S. Court of International Trade ("CIT") seeking review of these determinations. On March 9, 2009, the CIT issued an opinion affirming the Commission's determinations in part, and remanding them in part.[2] The CIT's opinion, which is discussed in more detail in section I below, directs the Commission to reassess its prior findings concerning likely subject import volume, and to revisit its findings concerning likely price effects and likely impact of subject imports in light of its revised findings on likely volume.

On May 11, 2009, the Commission published a notice in the Federal Register instituting remand proceedings, reopening the record with respect to certain issues, and inviting parties to submit new information and file final comments.[3] Nucor, U.S. Steel, and ArcelorMittal USA filed additional factual submissions.[4] Nucor, U.S. Steel, and ArcelorMittal also filed final comments.[5]

Based on the record, as supplemented in these remand proceedings, we again determine that revocation of the countervailing duty order on hot-rolled steel products from South Africa and the antidumping duty orders on hot-rolled steel products from Kazakhstan, Romania, and South Africa would

[1] Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine, Inv. Nos. 701-TA-404-408, 731-TA-898-902, and 904-908 (Review), USITC Pub. 3956 (Oct. 2007) ("2007 Determinations"). In addition, Commissioners Lane and Pinkert reached affirmative determinations concerning the orders on subject imports from Kazakhstan, Romania, and South Africa.

The Commission also reached affirmative determinations on orders concerning subject imports from China, India, Indonesia, Taiwan, Thailand, and Ukraine, and negative determinations on the orders concerning subject imports from Argentina. These determinations have not been the subject of any litigation and will not be discussed further.

[2] Nucor Corp. v. United States, 605 F. Supp.2d 1361 (Ct. Int'l Trade 2009).

[3] 74 Fed. Reg. 21821 (May 11, 2009).

[4] The Federal Register notice instituting remand proceedings required that any new factual information "must pertain to the period on or before October 2, 2007, the date on which the record closed in the reviews at issue." 74 Fed. Reg. at 21822. Some factual information submitted to the Commission involved periods after the original record closing date. Exhibit 9 of ArcelorMittal USA's factual submission on remand contains pricing data for periods after September 2007. Because these data pertain to the period after October 2, 2007, we have disregarded them. For the same reasons, we have disregarded the October 2007 pricing data (but not the data for earlier periods) in the pricing chart on the final page of ArcelorMittal USA's final comments on remand.

[5] The Federal Register notice instituting remand proceedings indicated that the final comments could not contain new factual information. 74 Fed. Reg. at 21822. Nucor's final comments on remand contained new factual information in footnote 20 after the first sentence, and also in footnote 36. We have consequently disregarded these materials.

not be likely to cause continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[6]

I. SCOPE OF THE REMAND PROCEEDINGS

The CIT's opinion discussed two principal issues pertaining to the 2007 determinations concerning the orders on hot-rolled steel from Kazakhstan, Romania, and South Africa. The first concerned the Commission's cumulation analysis. The CIT determined that the Commission's decision to decline to exercise its discretion to cumulate subject imports from Kazakhstan, Romania, and South Africa with imports from the other subject countries simultaneously subject to review was supported by substantial evidence and in accordance with law.[7]

The second set of issues concerned the Commission's analysis of likely subject import volume. In its 2007 determinations, the Commission found that subject import volume would not likely be significant. It observed that producers owned by Mittal Steel Co. NV ("Mittal NV") accounted for all or virtually all production of subject merchandise in Kazakhstan, Romania, and South Africa.[8] Mittal NV also owned Mittal Steel, USA, Inc. ("Mittal USA"), a very significant domestic producer of hot-rolled steel.[9]

The Commission found that several factors would limit the motivation of the subject producers in Kazakhstan, Romania, and South Africa to significantly increase their presence in the U.S. market. These included: (1) the production capacity for the three subject countries was relatively modest, and capacity and capacity utilization remained relatively stable over the period of review; (2) the new ArcelorMittal Group's policy was to have its producers focus on home and regional markets; (3) ArcelorMittal made a substantial investment in acquiring the individual domestic producers consolidated to form Mittal USA; and (4) Mittal USA controlled whether exports from other ArcelorMittal facilities could enter the U.S. market.[10] The Commission stated that the nationwide nature of the U.S. hot-rolled steel market "makes significant imports in any region of the country likely to have a disruptive impact on the overall U.S. market; thus, it is a course that Mittal USA is unlikely to pursue."[11] The Commission further found that the subject producers in Kazakhstan, Romania, and South Africa primarily served their home and regional markets, and that the proportion of shipments destined for export was largely stable in these subject

[6] Commissioner Lane and Commissioner Pinkert again determine that revocation of the countervailing duty order on hot-rolled steel products from South Africa and the antidumping duty orders on hot-rolled steel products from Kazakhstan, Romania, and South Africa would be likely to cause continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. They reaffirm their views as set out in Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine, Inv. Nos. 701-TA-404-408 and 731-898-902 and 904-908 (Review), USITC Pub. 3956 (Oct. 2007), and do not join in the remainder of this remand opinion.

[7] Nucor, 605 F. Supp. 2d at 1369-72.

[8] Additionally, at the time the Commission issued its 2007 determinations, Mittal NV was in the process of completing a merger with Arcelor S.A. to create a new entity, ArcelorMittal.

[9] 2007 Determinations, USITC Pub. 3956 at 17. For purposes of clarity, this opinion will call the worldwide entity "ArcelorMittal." It will call the U.S. producer now owned by ArcelorMittal "Mittal USA."

[10] 2007 Determinations, USITC Pub. 3956 at 44-45.

[11] 2007 Determinations, USITC Pub. 3956 at 45.

countries during the period of review.[12] The Commission further observed that the subject producers had only an insignificant potential for product shifting.[13]

In evaluating the Commission's analysis of likely subject import volume, the CIT concluded that there were four areas in which the Commission did not provide sufficient evidentiary support for its findings. First, the CIT questioned the reasoning upon which the Commission based its conclusion that either ArcelorMittal or Mittal USA would limit imports from the subject countries.[14] It characterized the evidence as supporting the finding that "ArcelorMittal affiliates will do what is good for the company as a whole" and found that the Commission had not sufficiently rebutted an argument asserted by U.S. Steel that ArcelorMittal could increase its overall profits on U.S. operations by increasing imports from the subject countries even if this would entail U.S. prices – and Mittal USA's profits – declining. The CIT also stated that the Commission had insufficiently rebutted evidence indicating that excess capacity and the ability to produce product at low cost in the subject countries provided an incentive for ArcelorMittal to export hot-rolled steel from the subject countries to the United States.[15]

Second, the CIT required the Commission to "reassess and further explain the basis for its finding 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 is also likely to impact Mittal USA."[16] The CIT stated that the Commission's principal support for its position was a chart listing producers and importers by region and that the chart did not support the Commission's conclusion. The court cited testimony from an ArcelorMittal executive that any imports by that company may affect competitors in geographic regions or market segments not served by Mittal USA, whose mills were located in the East and Midwest, as evidence detracting from the Commission's finding.[17]

Third, the CIT directed the Commission to "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."[18] Observing that subject imports from the Ispat-controlled producer in Kazakhstan sharply increased during the original 1998-2000 period of investigation, the court stated that the Commission did not sufficiently explain why ArcelorMittal would not increase subject import volumes comparably after revocation.[19]

Fourth, the CIT directed the Commission to "reassess and further explain evidence opposed to the ITC's volume determination, including . . . export orientation of the Mittal Countries' producers, attractiveness of the U.S. market, and capacity increases in alternate export markets."[20] With respect to the latter issue, the CIT requested that the Commission address how China's shift from a net importer to a net exporter of hot-rolled steel might create incentives for the producers in the subject countries to increase exports to the United States.[21]

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[12] 2007 Determinations, USITC Pub. 3956 at 43-44.

[13] 2007 Determinations, USITC Pub. 3956 at 45.

[14] Nucor, 605 F. Supp.2d at 1381.

[15] Nucor, 605 F. Supp. 2d at 1378-79.

[16] Nucor, 605 F. Supp.2d at 1381.

[17] Nucor, 605 F. Supp.2d at 1379.

[18] Nucor, 605 F. Supp.2d at 1381-82.

[19] Nucor, 605 F. Supp.2d at 1379-80.

[20] Nucor, 605 F. Supp.2d at 1382 (redaction in original public version).

[21] Nucor, 605 F. Supp.2d at 1381.

The CIT concluded that it could not sustain the findings on likely price effects and likely impact because the finding that likely subject import volume would not be significant was not supported by substantial evidence. It directed the Commission to reassess these issues in accordance with its revised volume determination.[22] Additionally, the CIT directed the Commission in its analysis of likely impact to "account for and explain the poor performance of the domestic industry in the latter portion of the [period of review]."[23]

II. DETERMINATIONS ON REMAND

As previously discussed, the CIT affirmed the Commission's cumulation analysis. Consequently, for the reasons stated in the 2007 determinations, we again cumulate the subject imports from Kazakhstan, Romania, and South Africa with each other, but not with imports from the other countries subject to review.[24] Our findings in the 2007 determinations concerning domestic like product, domestic industry, and conditions of competition were not at issue in the Nucor litigation. For purposes of our remand determinations, we incorporate these findings by reference.[25]

In compliance with the decision of the CIT, we provide below new findings on remand on the likely volume of subject imports, their likely price effects, and their likely impact on the domestic industry.

A. Likely Volume of Subject Imports

During the original period of investigation, the volume of cumulated subject imports from Kazakhstan, Romania, and South Africa increased from 339,016 short tons in 1998 to 680,634 short tons in 1999 and then to 771,039 short tons in 2000. Market penetration of these imports increased from 0.5 percent in 1998 to 1.0 percent in 1999 and then to 1.1 percent in 2000.[26] In 2001, the year duties were imposed, cumulated subject import volume declined sharply to 76,376 short tons. It then increased to 215,578 short tons in 2002, and fluctuated at lower levels thereafter, reaching a period low of 90 short tons in 2005, and was 22,721 short tons in 2006.[27] The share of apparent U.S. consumption of cumulated subject imports during the period of review reached a period high of 0.3 percent in 2002, and was under 0.1 percent in every subsequent year.[28]

During the original investigations, capacity in the subject countries increased, due principally to increases in Romania and Kazakhstan. Aggregate capacity utilization in the subject countries ranged

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[22] Nucor, 605 F. Supp.2d at 1382-83.

[23] Nucor, 605 F. Supp.2d at 1382.

[24] 2007 Determinations, USITC Pub. 3956 at 12-20.

[25] 2007 Determinations, USITC Pub. 3956 at 6-8 (domestic like product), 8-10 (domestic industry), 25-31 (conditions of competition). We also incorporate by reference our discussion from the 2007 determinations concerning the applicable legal standards, likely margins of dumping, and the findings the Commission made in its original determinations. See id. at 20-25.

[26] Derived from Confidential Report ("CR") and Public Report ("PR"), Table I-1. Because the Commission cumulated the subject imports from Kazakhstan, Romania, and South Africa with imports from other subject countries in the original investigations, it did not make a conclusion concerning the significance of the volume of these imports.

[27] Derived from CR/PR, Table I-1. There were 14,623 short tons of cumulated subject imports during the first half of ("interim") 2006 and 455 short tons in interim 2007. CR/PR, Table IV-1.

[28] Derived from CR/PR, Table I-1 (based on unrounded data).

from 68.1 percent in 1998 to 87.7 percent in 1999.[29] During the period of review, capacity in the subject countries increased from *** short tons in 2001 to *** short tons in 2002, and thereafter fluctuated in a range between *** short tons.[30] Capacity utilization for calendar years during the period of review was within the range observed during the original investigations, with a low of *** and a high of ***.[31] Thus, during the period of review there was at most incremental growth in capacity and incremental declines in capacity utilization in the subject countries.

As previously discussed, the CIT directed the Commission on remand to respond to four inquiries concerning its analysis of the likely volume of subject imports. We address each of these inquiries in the sequence that they were posed by the CIT.

1. <u>Reevaluation of the reasoning for the finding that ArcelorMittal companies and/or Mittal USA would limit subject imports</u>

Our analysis of ArcelorMittal's likely behavior upon revocation with respect to the hot-rolled steel mills it operates in the subject countries begins with ArcelorMittal's own testimony to the Commission in these reviews. We emphasize that on remand ArcelorMittal asserted that it "took a neutral position with respect to the orders at issue during the original investigation and maintains that position in this proceeding."[32] ArcelorMittal – unlike many foreign producers that appear before the Commission in five-year reviews – consequently does not seek revocation of the orders.

At the hearing in these reviews, Louis L. Schorsch, President and Chief Executive Officer, Flat Products-Americas, ArcelorMittal, spoke at some length about the firm's practices in importing merchandise produced by ArcelorMittal mills overseas:

> I can say, with a great deal of confidence, because of the processes that we have internally, how we manage our imports. Our flow is across the globe, if you will. It affects our operations in Europe as well as in the states, and anywhere we operate.
>
> I think that other ArcelorMittal operations would not injure our domestic business, or disrupt the market.
>
> *   *   *   *   *   *   *
>
> So we have a very substantial stake in our business here in the states, and also we think a good cost position, competitive facilities, those are the best suited facilities to supply those markets.
>
> Now, we do import some material into the states 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,

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[29] INV-Y-141, EDIS Doc. 263161, Tables VII-5, VII-7, VII-8. Capacity data for the subject countries collected in the original investigations are not directly comparable to capacity data in the review proceedings, because of a difference in the way the South African producer reported capacity. <u>See</u> CR/PR, Table IV-39. Capacity for the subject countries in 2000, which is comparable to the data collected for the period of review, was *** short tons. CR/PR, Tables IV-30, IV-34, IV-39.

[30] CR/PR, Tables IV-31, IV-35, IV-40.

[31] Derived from CR/PR, Tables IV-31, IV-35, IV-40.

[32] ArcelorMittal Final Comments on Remand at 1-2.

> 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.[33]

The Commission received similar information from subject producers controlled by ArcelorMittal. Two of the subject producers acknowledged in their submissions to the Commission (including responses to the notice of institution and questionnaire responses) that ***.[34]

In its factual submission on remand, ArcelorMittal submitted an affidavit from ***. *** elaborates upon the considerations ArcelorMittal examined as of the time the record closed in the 2007 proceedings concerning whether to export into the United States merchandise produced in overseas ArcelorMittal mills. ***.[35]

Consequently, the information submitted by ArcelorMittal indicates that the firm has decided in its overall corporate interest both to serve the U.S. market principally through its U.S. supplier, Mittal USA, and to provide Mittal USA with the right to veto any imports from other ArcelorMittal units that are not in its own interest. Inasmuch as ArcelorMittal controls virtually all production of subject merchandise,[36] these policies would serve as a powerful deterrent to significant volumes of subject imports entering the U.S. market from the subject countries.[37] This is particularly true in light of the discussion below explaining that the record does not indicate that there is any manner that ArcelorMittal could direct significant volumes of subject imports either into regional markets or "niche" products that would not adversely affect Mittal USA. Moreover, because Mittal USA accounts for a significant share of ArcelorMittal's worldwide operations, maximizing the profitability of Mittal USA operations is in ArcelorMittal's interest.

U.S. Steel and Nucor dispute this conclusion. They contend that ArcelorMittal's stated policy of providing Mittal USA a veto on imports from other countries to protect its interest in the U.S. market is neither economically rational nor credible.[38] In particular, Nucor submitted on remand a declaration from a corporate official who asserted that "I have never witnessed a company make a decision that benefits its subsidiary at a cost to overall operational profits. Simply put, this is not a rational business model under

[33] Tr. at 218-19 (Schorsch).

[34] CR at IV-84 (Romania), IV-94 (South Africa), PR at IV-46, IV-48.

[35] ArcelorMittal Factual Submission on Remand, ex. 8, ¶ 5.

[36] See 2007 Determinations, USITC Pub. 3956 at 17.

[37] In an attempt to provide further documentation of its policies restricting imports from its foreign affiliates, ArcelorMittal submitted a portion of its 2005 collective bargaining agreement with the United Steel Workers Union. See ArcelorMittal Factual Submission on Remand, ex. 3. We note that the provision highlighted by ArcelorMittal is consistent with the statements it furnished to the Commission. However, in the absence of the complete agreement, we have relied principally upon the statements for purposes of our analysis.

[38] They also contend that the CIT made "findings" on this issue. See U.S. Steel Final Comments on Remand at 4; Nucor Final Comments on Remand at 3. The Federal Circuit, however, has made clear that "[t]he Commission, and not this court, is the finder of facts in antidumping investigations." Mittal Steel Point Lisas, Ltd. v. United States, 542 F.3d 867, 875 (Fed. Cir. 2008). Accord, Nippon Steel Co. v. United States, 458 F.3d 1345, 1359 (Fed. Cir. 2006) ("it is the role of the expert factfinder – here the majority of the Presidentially-appointed, Senate-approved Commissioners – to decide which side's evidence to believe"). Because the CIT is not the factfinder in this matter, it is unwarranted to consider the CIT's commentary on the evidence presented in the 2007 proceedings to be the equivalent of findings of fact. The additional evidence produced on remand demonstrates that the decision in these proceedings is largely a function of "which side's evidence to believe;" we have provided extensive discussion below indicating why we find the materials submitted by ArcelorMittal to be credible and entitled to evidentiary weight, and find the documents submitted by U.S. Steel and Nucor as evidence, which consist principally of declarations of officials of those firms, do not warrant such weight.

which companies could operate. Companies operate to maximize profits for their entire enterprise."[39] U.S. Steel states that for any multi-national steel producer, "it is imperative that the producer do what is in the best interest of its overall operation, not that of each affiliated entity."[40] During the 2007 proceedings and the litigation before the CIT, U.S. Steel submitted a chart purporting to show that ArcelorMittal could serve its overall corporate interest by importing product from the subject countries, even if these imports serve to depress domestic prices and profits to Mittal USA.[41] On remand, U.S. Steel's witness relies on this chart as showing what would constitute "rational" economic behavior for ArcelorMittal.[42]

We are not persuaded by the challenges Nucor and U.S. Steel have made to the credibility of ArcelorMittal's witnesses. While the Nucor and U.S. Steel witnesses testify at some length about the policies that they believe ArcelorMittal should adopt, they do not address and do not indicate that they have any personal knowledge of policies ArcelorMittal has adopted. No U.S. Steel or Nucor witness has provided any specific instance where ArcelorMittal had acted in a manner contrary to that described by the firm's own witnesses.[43] To the contrary, the record contains several pieces of information indicating that ArcelorMittal, in conducting its business worldwide, is disinclined to charge prices at "disruptive" levels, and promotes corporate profitability even when this would require restraining output.[44] Moreover, data from the importer questionnaires indicate that imports from the trading companies associated with Mittal NV and Arcelor Steel were *** lower in interim 2007 than in interim 2006, which tends to corroborate the testimony of *** concerning the effects of the Arcelor-Mittal merger in 2006-07 on the combined firm's import practices.[45] In contrast to the generalized and undocumented allegations made by the Nucor and U.S. Steel witnesses and affiants, the statements made by the ArcelorMittal witnesses are specific and pertain to matters on which these witnesses have first-hand knowledge. Based on this, we find that the ArcelorMittal witnesses' testimony is credible and probative. By contrast, we conclude that the testimony provided by the Nucor and U.S. Steel witnesses should be accorded little evidentiary weight.

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[39] Nucor Factual Submission on Remand, Declaration of ***, ¶ 3.

[40] U.S. Steel Factual Submission on Remand, Declaration of Michael Meyers, ¶ 5.

[41] U.S. Steel Posthearing Brief, ex. 14.

[42] U.S. Steel Factual Submission on Remand, Meyers Dec., ¶ 10.

[43] Both Nucor and U.S. Steel cite prior imports from Kazakhstan by Ispat, one of ArcelorMittal's predecessor firms. See U.S. Steel Factual Submission on Remand, Meyers Dec., ¶ 3; Nucor Factual Submission on Remand, *** Dec., ¶ 4. As we explain below, these assertions do not accurately describe Ispat's behavior. Moreover, in light of several changes of policy and structure at ArcelorMittal, historical data concerning subject imports from Kazakhstan do not provide a useful guide to ArcelorMittal's likely behavior, which is the issue before the Commission in these reviews. Consequently, we do not believe that Nucor or U.S. Steel's citations to Ispat's practices detracts from the credibility of ArcelorMittal's witnesses. See also Mittal USA Final Comments in 2007 Proceedings, EDIS Doc. 283810, at 12 (noting that Nucor's challenges during 2007 proceedings to Mr. Schorsch's testimony unsupported by any material generated by ArcelorMittal).

[44] Tr. at 219 (Schorsch); Nucor Posthearing Brief, ex. 17 at 5, 7; MEPS International Steel Review (Feb. 2006), EDIS Doc. 283098.

[45] See ArcelorMittal Factual Submission on Remand, ex. 8, ¶ 4. ***. Id.

The combined imports of hot-rolled steel from all sources by Mittal Steel North America and Arcelor International (which combined to form AMI after the Arcelor-Mittal merger) were *** short tons in interim 2007, as compared to *** short tons in interim 2006. Most of these imports were from non-subject sources. See Importer's Questionnaires. The reduced quantity of imports was ***.

We agree with the CIT that ArcelorMittal "will do what is good for the company as a whole."[46] We do not agree that it follows that ArcelorMittal's overall interests would be served by allowing increased imports from its mills in the subject countries. The record indicates that the corporate behavior ArcelorMittal describes in its testimony and submissions is rational. As we indicated in our 2007 determinations, ArcelorMittal spent over $6 billion acquiring the companies that constitute Mittal USA and hundreds of millions more in investments since the acquisitions.[47] Mittal U.S.A. constitutes a significant portion of ArcelorMittal's operations worldwide.[48] In light of its very substantial investment in the U.S. market, ArcelorMittal could rationally – as its witnesses testified – perceive maintaining the profitability and market share of Mittal USA to be in its overall corporate interest.[49] Indeed, given the scope and magnitude of its investment in the U.S. market, ArcelorMittal would rationally be less likely to take risks to endanger its investment in Mittal USA than would a multinational firm with a much smaller stake in the U.S. market.[50]

The charts introduced by U.S. Steel which purport to show that ArcelorMittal could increase its total corporate profits on U.S. sales by importing subject merchandise even if such imports depress Mittal USA's prices and reduce its profits do not convince us otherwise. We find the charts lacking in probative value. We note initially that U.S. Steel has provided no documentation to support the figures it has included in the chart. Indeed, the gross profit margin for U.S. production that U.S. Steel posits in its charts exceeds even the peak gross profit margin reported by the domestic industry during the period of review, and far exceeds gross profit margins typical of the industry during the period.[51] The cost

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[46] Nucor, 605 F. Supp.2d at 1378.

[47] 2007 Determinations, USITC Pub. 3956 at 44 & n.257.

[48] See generally ArcelorMittal Factual Submissions on Remand, exs. 7, 10; Mittal USA Producers Questionnaire, response to question II-8. ArcelorMittal states that its U.S. and Canadian operations accounted for 22 percent of its worldwide production in 2006. ArcelorMittal Factual Submission on Remand, ex. 7. Because this figure includes ArcelorMittal's Canadian operations and its U.S. operations producing products other than hot-rolled steel, it likely overstates somewhat the proportion of ArcelorMittal's worldwide production of hot-rolled steel that occurs in the United States. Nevertheless, the reported U.S./Canadian percentage is substantial, and higher than the 18 percent for central Europe (including the Romanian mill, among others), the 10 percent for central Asia (which would include the Kazakh mill), and the 7 percent for Africa (including the South African mill, among others).

[49] We found in the 2007 determinations that in light of ArcelorMittal's investment in Mittal USA, it had a substantial commitment to the U.S. market, and that Nucor's assertions to the contrary were baseless. See 2007 Determinations, USITC Pub. 3956 at 45 & n.264. We reaffirm and incorporate by reference these findings, which the CIT did not question.

[50] Contrary to the argument of U.S. Steel, see U.S. Steel Final Comments on Remand at 3, we are not "[h]anding a 'get-out-of-jail-free' card to multinational companies." Rather, we are emphasizing that under facts such as these, multinational producers are less likely to imperil very large U.S. operations which account for a substantial share of worldwide operations than much smaller U.S. operations.

[51] U.S. Steel, in its "before" scenario, assumes a gross profit margin for domestic production operations of 27.3 percent. U.S. Steel Posthearing Brief, ex. 14. The data actually collected by the Commission indicate that annual gross profit margins for the domestic industry based on commercial sales ranged between negative 14.2 and positive 25.5 percent, CR/PR, Table III-14, and that annual gross profit margins for the domestic industry based on commercial and non-commercial operations combined, with non-commercial sales values based at fair market value, ranged between negative 24.4 and positive 25.0 percent. CR/PR, Table III-16. Even in 2004, when the domestic industry enjoyed its peak financial performance, sales values were lower and costs higher than those posited by U.S. Steel in its hypothetical.

information that U.S. Steel posits for projection of subject merchandise is similarly undocumented, and seemingly arbitrary.[52]

A second, more fundamental problem with U.S. Steel's hypothetical is that it assumes that ArcelorMittal can precisely gauge the price effects of its subject imports in such a manner that it can calculate the level of imports that would maximize ArcelorMittal's overall profits on U.S. sales, even as Mittal USA's prices and profits decline. Such an assumption is not merely speculative, it directly contradicts evidence and testimony that parties supporting continuation of the orders submitted during the 2007 proceedings. This evidence posited that no individual steel producer has sufficient market power to affect prices unilaterally.[53] Indeed, notwithstanding the scope of ArcelorMittal's operations worldwide, there are many worldwide producers of hot-rolled steel supplying the U.S. market not affiliated with ArcelorMittal.[54] Consistent with this view, ArcelorMittal cannot have sufficient market power to affect prices unilaterally. Therefore, it could not ensure with the degree of specificity presumed in the U.S. Steel hypothetical that it could direct to the United States subject imports in such an exact manner as to depress U.S. prices while maximizing ArcelorMittal's total profits on U.S. sales. In reality, additional imports by ArcelorMittal, combined with additional imports from other sources or changes in conditions of competition beyond the firm's control, could drive down prices beyond the profit-maximizing level. Indeed, prices could be driven to a point that would adversely affect both the profitability of Mittal USA and of overall ArcelorMittal operations.[55] The risk of such adverse price effects is particularly high given our finding in the 2007 determinations that because of the high degree of interchangeability between hot-rolled steel from various sources, "sustained underselling by even a relatively moderate amount of subject imports is likely to have significant price-suppressing or -depressing effects."[56]

Consequently, U.S. Steel's hypothetical charts, devoid of any factual basis and premised on assumptions concerning ArcelorMittal's pricing power that are contrary to the evidence in the record, have no value as a guide for assessing ArcelorMittal's likely behavior. Indeed, the defects in the hypotheticals confirm that a rational business strategy for ArcelorMittal is precisely the one the firm's witnesses have testified the firm has employed. This strategy limits imports – including imports of subject merchandise – in such a manner that they would not destabilize the market and have an adverse impact on Mittal USA.

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[52] As ArcelorMittal observes, "[o]ne must question the likelihood that Commerce would find dumping for a product making such a profit margin" as the one U.S. Steel hypothesizes for subject production. ArcelorMittal Final Comments on Remand at 6.

[53] Tr. at 246-47 (Kaplan); Nucor Posthearing Brief, ex. 1 at 16-17.

[54] Compare CR/PR, Table IV-2 with CR at IV-68 n.50, PR at IV-39 n.50.

[55] U.S. Steel's hypothetical posits ArcelorMittal's total profits on U.S. operations would increase from $450 million to $470 million if it imports 500,000 tons from the subject countries, maintains domestic production at 3 million tons, and U.S. prices fell by 5.45 percent (from $550 to $520 per ton). U.S. Steel Posthearing Brief, ex. 14. However, if prices fell by just two percentage points more (a 7.45 percent decline to $509 per ton), ArcelorMittal U.S. profits under the U.S. Steel hypothetical would be $431.5 million – less than the $450 million profit that U.S. Steel hypothetically assumes ArcelorMittal would achieve if it sold 3 million tons of domestically produced steel at $550 per ton and did not import. Thus, U.S. Steel's own hypothetical demonstrates that even very minor errors in price forecasting could have adverse financial results for ArcelorMittal.

[56] 2007 Determinations, USITC Pub. 3956 at 36.

2. <u>Reassessment and further explanation of the basis for 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 also to impact Mittal USA</u>

In his hearing testimony, Mr. Schorsch stated that any imports Mittal USA authorizes from foreign ArcelorMittal mills "may affect competitors in this market who are in different geographies or serve different market segments, and so on."[57] Similarly, ***, who submitted an affidavit for ArcelorMittal on remand, stated that ***.[58]

U.S. Steel and Nucor portray these statements as exceptions that effectively subsume any general policy by ArcelorMittal to restrain subject imports. They contend that these statements are admissions that ArcelorMittal will seek to find regional and/or niche markets in the United States to which it can direct subject imports. Consequently, we have examined whether there are any regional and/or niche products to which ArcelorMittal could direct significant quantities of subject imports, consistent with its interest in maintaining stability in the U.S. market and protecting Mittal USA from any adverse impact. As we explain below, we answer this inquiry in the negative.

We first observe that the testimony of Mr. Schorsch and the affidavit of *** concern ArcelorMittal flat products generally. Mittal USA produces substantial quantities of several flat-rolled products in addition to hot-rolled steel.[59] Thus, neither the testimony of Mr. Schorsch nor of *** constitutes a concession that there are regional or niche markets for the type of hot-rolled steel products that could be exported by the subject producers. Nor does the record indicate that such markets exist.

First, the record does not indicate that U.S. producers of hot-rolled steel supply exclusively – or even principally – the regions in which they operate production facilities. Six of the 12 responding producers reported that the majority of their sales were between 101 and 1000 miles of their facilities.[60] Five of 13 responding producers reported that they served the Midwest, Southeast, and Pacific Coast regions.[61] Thus, an appreciable number of U.S. producers serve each of these three regions, although no producers operated production facilities in all of the regions.[62]

More fundamentally, the record does not indicate any gaps in Mittal USA's geographic coverage. In its questionnaire response, Mittal USA reported ***.[63] On remand, Mittal USA submitted information

[57] Tr. at 219 (Schorsch).

[58] Arcelor Mittal Factual Submission on Remand, ex. 8, ¶ 6.

[59] Mittal USA Producer's Questionnaire, response to question II-6.

[60] CR at V-4, PR at V-3.

[61] <u>See</u> *** Producer's Questionnaires, response to question II-B-9.

[62] CR/PR, Table I-14.

[63] Mittal USA Producer's Questionnaire Response, response to question IV-B-9.

confirming that it serves specific customers in *** locations.[64] Consequently, the record does not indicate that there are any geographic markets to which ArcelorMittal could direct significant quantities of subject imports not already served by Mittal USA.

Furthermore, the record belies the existence of independent regional pricing markets for hot-rolled steel in the United States. During the remand proceedings, ArcelorMittal submitted monthly pricing data collected by the *** monitoring service reporting hot-rolled coil prices in the Midwest, Gulf, and West Coast regions.[65] These data indicate only very minor differences in reported pricing between the Midwest and Gulf regions.[66] There were greater disparities between prices in the West region, on the one hand, and those in the Midwest and Gulf regions, on the other. This is largely a function of mill locations and freight costs leading to higher prices in West Coast markets.[67] Notwithstanding this, during most months in the period of review West Coast prices were fairly close to those in the Midwest and Gulf.[68] There were very high correlations between the prices for each region during the period of review.[69] Indeed, notwithstanding the sometimes higher prices in West Coast markets, hot-rolled steel prices in all three regions displayed the same general pricing trends during the period of review, rising or

[64] These include ***. ArcelorMittal Factual Submission on Remand, ex. 6. This material indicates that the quantity of shipments Mittal USA made *** increased from 2005 to 2006. Id. The material contains shipment data for only the first quarter of 2007. Consequently, Nucor's assertion that shipments to *** declined *** in 2007, Nucor Final Comments on Remand at 8, is based on a misreading of the chart furnished by ArcelorMittal.

U.S. Steel argues that Mittal USA's shipments outside the Midwest and East are ***. U.S. Steel Final Comments on Remand at 9. Yet by U.S. Steel's own calculations, Mittal USA's shipments to the South in 2006 were *** net tons. Id. at 9 n.6. Subject imports from Kazakhstan or South Africa *** this volume during any year in the original period of investigation or period of review. CR/PR, Table I-1. U.S. Steel does not explain why, on the same page of its final comments, it refers to Mittal USA's shipments to the South as *** and the *** smaller volumes of subject imports from Kazakhstan during the original period of investigation as "enormous." U.S. Steel Final Comments on Remand at 9.

[65] By contrast, in its factual submission on remand, U.S. Steel chose to submit just two months of *** regional pricing data – for two consecutive months that showed regional pricing differences. U.S. Steel's witness then stated, based on these two months' data, that ***. U.S. Steel Factual Submission on Remand, Meyers Dec. ¶ 9 and Attachment A. As explained below, the full set of *** data for the period of review – which was presumably available to U.S. Steel, although it chose not to submit it – demonstrates that this statement is inaccurate. This is one of several reasons we have accorded little evidentiary weight to the declaration of U.S. Steel's witness.

[66] Mittal Factual Submission on Remand, ex. 9. Midwest and Gulf prices were *** for 31 of the 69 months between January 2002 and September 2007, and were within *** during 64 of the 69 months.

[67] During the period of review, there were only two hot-rolled steel mills on the West Coast. CR/PR, Table I-14. One of these mills had *** commercial sales. CR/PR, Table III-15. The production of these mills for the merchant market was insufficient to satisfy demand in West Coast markets, so some hot-rolled steel purchased in that region needed to be supplied from sources outside the West Coast. See *** Producer's Questionnaire, EDIS Doc. 276461. ***. Mittal USA Producer's Questionnaire, response to question IV-B-8.

[68] In the period from January 2002 through September 2007, West Coast prices were within *** of Midwest prices during 36 out of 69 months, and were within *** of Gulf prices during 35 out of 69 months. Derived from ArcelorMittal Factual Submission on Remand, ex. 9.

[69] Correlations between regions routinely exceeded 0.98, and specifically were *** between Midwest and Gulf prices, *** between West Coast and Gulf prices, and *** between Midwest and West Coast prices. Correlations were calculated by performing a standard Excel spreadsheet statistical function on the *** monthly pricing data submitted by ArcelorMittal. A correlation of 1.0 would indicate a perfect correlation, and two sets of random numbers would have a correlation of zero.

falling in harmony. No individual region had any independent sustained price movement; instead, price movements in all regions reflected price movements nationally.[70]

Because there are *** regional markets in the United States not served by Mittal USA, the concept that ArcelorMittal can import subject merchandise and affect only regions in which Mittal USA has no presence is fallacious. Moreover, even assuming arguendo that ArcelorMittal were to ship a significant quantity of subject merchandise to a region of the country where Mittal USA does not have production facilities, the lack of independent regional pricing markets means that any price effects would not be limited to that region. Instead, because prices in all regions move in concert, 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. As previously discussed, the record indicates that ArcelorMittal has determined that its own corporate interest is promoted by limiting subject imports to a level that would not adversely affect Mittal USA's sales and prices. The record does not indicate that there is any manner in which ArcelorMittal can direct a significant quantity of subject imports to specific regions without having an adverse impact on Mittal USA.[71]

Nor does the record provide any indication that ArcelorMittal produces in the subject countries any "niche" product not also manufactured by Mittal USA. As we found in the 2007 determinations, hot-rolled steel products, regardless of source, share the same essential chemical and physical properties, are used in the same applications, and are manufactured to standard specifications – characteristics that do not suggest there is a significant degree of product differentiation between sources.[72] Purchasers were asked in the questionnaires whether or not certain grades, types, or sizes of hot-rolled steel were available from only a single source. None listed Kazakhstan, Romania, or South Africa as a unique source of any product.[73] Witnesses from U.S. Steel and Nucor – who presumably are aware of the product lines ArcelorMittal produces both in the United States and in the subject countries – not only failed to identify any "niche" products that ArcelorMittal produces only in the subject countries, they do not even agree among themselves what varieties of subject merchandise ArcelorMittal would be inclined to export.[74]

The record does not indicate that ArcelorMittal could eliminate or mitigate adverse impact to Mittal USA by importing significant quantities of subject imports, while limiting these imports to distinct

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[70] See Arcelor Mittal Final Comments on Remand at 15.

[71] U.S. Steel's witness contends that there can be individual transactions ***. Meyers Dec., ¶ 9. U.S. Steel does not explain, nor does the record indicate, given the wide circulation of pricing information in the market – including monthly observations for individual regions – how any significant transaction or series of transactions could be invisible to the overall market. Moreover, Mittal USA is not insulated from market price volatility through use of long-term contracts, as Nucor contends. See Nucor Final Comments on Remand at 10. Mittal USA reports that *** were made on the spot market. Mittal USA Producer's Questionnaire, response to question IV-B-4.

[72] 2007 Determinations, USITC Pub. 3956 at 29-30. Indeed, during the 2007 proceedings, both U.S. Steel and Nucor asserted that hot-rolled steel is a commodity product. See Nucor Prehearing Brief at 50; U.S. Steel Posthearing Brief, ex. 1 at 13.

[73] CR at II-34, PR at II-24.

[74] Nucor states that subject imports are likely to be commodity products. Nucor Factual Submission on Remand, attachment 1, ¶ 9. U.S. Steel asserts that ArcelorMittal is likely to specialize in exports of ultra-thin rolled coil from South Africa. Meyers Dec., ¶ 11. Nucor and U.S. Steel do not contend that Mittal USA does not produce such products. To the contrary, the record indicates that Mittal USA sells the same "commodity"-type hot-rolled products imported during the period of review from Romania and South Africa. See CR/PR, Table V-3 (data for product 1); Mittal USA Producers Questionnaire Response, EDIS Doc. 275810. (There were no imports from Kazakhstan during the period of review.) The record also indicates that Mittal USA, as does the South African producer, produces *** products. See Mittal USA Producers Questionnaire Responses, attachment 3.

regional markets or niche products. This reinforces our conclusion that significant volumes of subject imports are not likely upon revocation.

3. Reassessment and further explanation of 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

During the original investigations that concluded in 2001, only one subject producer was affiliated with a domestic producer. Specifically, the Kazakh producer, now known as JSC Mittal Steel Temirtau ("Temirtau"), was affiliated with Ispat Inland, a U.S. producer of hot-rolled steel. Between 2000 and the time the record closed in these reviews, both Temirtau and Ispat Inland were acquired by ArcelorMittal.[75]

During the original period of investigation, subject imports from Kazakhstan increased. Nevertheless, the increase in imports from subject imports from Kazakhstan was very modest in relation to apparent U.S. consumption. The increase in market penetration of subject imports from Kazakhstan from 1998 to 2000 was only 0.1 percentage points. Kazakhstan's maximum level of market penetration occurred in 2000, when its imports accounted for 0.3 percent of apparent U.S. consumption.[76] Consequently, the record does not indicate that affiliated producers during the original period of investigation increased subject imports in a manner that would be significant in the U.S. market either on an absolute or relative basis.

Additionally, various changes in the structure and policy of the affiliated producer since the original period of investigation further support the conclusion that significant increases in subject imports are not likely notwithstanding that subject imports from Kazakhstan increased from 1998 to 2000. First, ArcelorMittal has more centralized control of exports from its affiliated firms than did Ispat Inland. *** Ispat North America ("INA").[77] ***.[78] After ArcelorMittal was formed, it continued the policy of not using third-party trading companies.[79] This change of policy is significant because, during the original period of investigation, the subject imports from Kazakhstan were sold both by INA and by third-party trading companies.[80] Material submitted on remand by ArcelorMittal indicates that a decreasing quantity of subject imports from Kazakhstan during the original period of investigation was imported by INA. INA was responsible for *** of subject imports from Kazakhstan in 1998, but only *** of such imports in 2000.[81] This would indicate that the increase in subject imports from Kazakhstan during the original period of investigation was due not to increased shipments by INA, but to increased imports by third

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[75] See Original Confidential Original Argentina/South Africa Determination, EDIS Doc. 263158, at 8-10, CR/PR, Table I-15; CR at IV-68, PR at IV-39. We will refer to the Kazakh producer as "Temirtau," although it operated under another name in 2001.

[76] CR/PR, Table I-1. South Africa's subject import volumes during the original period of investigation were even lower than Kazakhstan's. Among the subject countries, the bulk of the increase in market penetration was attributable to subject imports from Romania. Id. At the time of the original investigations, the Romanian producer was not affiliated with a U.S. producer.

[77] ArcelorMittal Factual Submission on Remand, ex. 1.

[78] ArcelorMittal Factual Submission on Remand, ex. 2.

[79] Tr. at 219 (Schorsch); ArcelorMittal Factual Submission on Remand, ex. 8.

[80] See INV-Y-141 at IV-5, VII-9.

[81] Compare ArcelorMittal Factual Submission on Remand, ex. 5 with CR/PR, Table I-1.

parties. Third-party traders could not increase imports from Kazakhstan comparably upon revocation in light of the purchasing system implemented by ArcelorMittal.[82]

Second, Mittal USA has a much larger presence in the U.S. market than did Ispat Inland. Ispat Inland accounted for *** percent of total domestic production in 2000.[83] By contrast, in 2006 Mittal USA accounted for *** percent of domestic production.[84] As previously stated, ArcelorMittal spent over $6 billion to acquire the companies that came to comprise Mittal USA. This substantial investment and Mittal USA's *** larger market presence distinguishes ArcelorMittal's likely behavior upon revocation from that of Ispat Inland during the original period of investigation. We reiterate that ArcelorMittal's substantial investment in Mittal USA provides a strong rationale for its stated policy not to destabilize the U.S. market by directing substantial amounts of exports that would adversely affect U.S. pricing and consequently likely put Mittal USA – and ArcelorMittal worldwide – in a worse position than it would have been in if it had restrained exports to very modest levels without materially affecting prices in the United States.

Pursuant to the CIT's instructions, we have also examined Mittal USA's exports of hot-rolled steel to Europe.[85] Mittal USA's export shipments ***.[86] The Commission's questionnaires did not request domestic producers to break out export quantities by destination. Mittal USA did indicate, however, that its primary export markets were ***.[87] The only evidence of a specific export shipment of hot-rolled steel to a European country in which ArcelorMittal operates a mill is a press report of a 12,000 ton shipment to Belgium,[88] although at the hearing Mr. Schorsch testified that Mittal USA had exported 180,000 tons of product outside North America, a figure that included products other than hot-rolled steel and export markets other than Europe.[89] Even this larger figure, according to Mr. Schorsch, was less than one percent of Mittal USA production on an annual basis;[90] indeed, its significance pales in comparison to either the over *** tons of hot-rolled steel Mittal USA commercially shipped or transferred for consumption in the United States in 2006,[91] or the *** short tons of hot-rolled steel consumed in Europe in 2008.[92] Thus, the information in the record concerning export shipments by Mittal USA does not support an inference that ArcelorMittal will likely make significant export shipments to other countries in

[82] There is one third-party trader that retains rights to export merchandise produced by the ArcelorMittal mill in South Africa. Tr. at 334-35 (Schorsch); Mittal USA Posthearing Brief at Aranoff-10. However, ArcelorMittal ***. Mittal USA Posthearing Brief at Pearson-12-13.

[83] Original Confidential Argentina/South Africa Determination at 9.

[84] CR/PR, Table I-14.

[85] See Nucor, 605 F. Supp.2d at 1380.

[86] Mittal USA Producer's Questionnaire, revised response to question II-8 (EDIS Doc. 281435).

[87] Mittal USA Producer's Questionnaire, response to question II-8. This is consistent with ArcelorMittal's priority of integrating North American production facilities. ArcelorMittal Factual Submission on Remand, ex. 10 at 7.

[88] U.S. Steel Posthearing Brief, ex. 16.

[89] Tr. at 333-34 (Schorsch). The figure may also include shipments to European countries where ArcelorMittal was not operating hot-rolled steel mills.

[90] Tr. at 334 (Schorsch).

[91] Mittal USA Producer's Questionnaire, revised response to question II-8. Additionally, the record contains information that ***. ArcelorMittal Factual Submission on Remand, ex. 4.

[92] CR/PR, Table IV-59.

which it operates hot-rolled steel production facilities.[93] If anything, it supports, rather than refutes, ArcelorMittal's testimony that its general policy is to have its mills serve home and regional markets.

4. Reassessment and explanation of 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

We acknowledge that unused capacity theoretically exists in the subject countries.[94] In 2006, the final year of the period of review, capacity exceeded production in the subject countries by *** tons.[95] The CIT opined that this level of excess capacity "is significant since it means that producers in the Mittal Countries could, by drawing on their unused capacity, ship a volume of imports equal to a large portion of the total imports during 2000."[96] While the CIT correctly characterizes the capabilities of the subject producers, as a mathematical matter,[97] there are several reasons why we do not believe that the mere existence of excess capacity renders it likely that the subject producers will direct significant volumes of subject imports to the United States upon revocation.[98]

First, there is no evidence that the subject industries can sustain full or even substantially higher capacity utilization levels or that a substantial proportion of the excess capacity is more than theoretical. While capacity utilization rates in the subject countries at the conclusion of the period of review were lower than those observed earlier in the reviews, annual fluctuations in capacity utilization during the period of review were fairly modest.[99] Moreover, as discussed above, the range of capacity utilization levels during the period of review was within that reported during the original period of investigation. At

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[93] There was no assertion that Mittal USA's export shipments to Europe adversely affected Arcelor Mittal steel operations there.

[94] Capacity levels in the subject countries, after increasing from 2002 to 2003, remained largely stable thereafter, ranging on an annual basis from *** tons to *** tons. Projected capacity for 2007 was slightly below the low end of this range, and projected capacity for 2008 was slightly above the high end of this range. CR/PR, Tables IV-31, IV-35, IV-40.

[95] CR/PR, Tables IV-31, IV-35, IV-40.

[96] Nucor, 605 F. Supp.2d at 1380.

[97] By the same token, we interpret statements made by the staff in the Commission Report that the subject industries "are likely to respond to changes in demand with relatively large changes in the quantity shipped to the U.S. market," CR at II-16-17, PR at II-11-12, as addressing merely the theoretical capability of the subject producers to respond to changes in demand. The staff assessment focused on empirical data such as excess capacity (based on full capacity utilization) and whether subject producers had export markets other than the United States. We do not believe that it purported to take into account pertinent conditions of competition for individual subject producers which might make increases in exports to the United States more or less likely; to the extent it did, we disagree with it for the reasons stated in this opinion. Our assessment is not limited to whether subject producers have merely the theoretical capability to increase subject imports upon revocation.

[98] The mere existence of excess capacity is insufficient to mandate a finding of significant likely subject import volume. See Nucor Corp. v. United States, 569 F. Supp.2d 1328, 1349 (Ct. Int'l Trade 2008) (although excess capacity "not insubstantial in relation to U.S. market," finding that significant subject import volumes unlikely reasonable in light of subject producers' focus on home and regional markets and strong demand conditions).

[99] Capacity utilization in the subject countries was *** percent in 2006 and *** percent during interim 2007. The maximum capacity utilization rate reported during the period of review was *** percent in ***. CR/PR, Tables IV-31, IV-35, IV-40.

no time from 1998 to 2006 did capacity utilization in the subject countries exceed *** percent.[100] In other words, *** of the *** tons of excess capacity cited by the CIT had never been utilized in the nine-year period examined by the Commission. The relatively stable capacity utilization levels during the period of review do not support a finding that significant subject imports are likely upon revocation.

Indeed, as we found above, ArcelorMittal lacks the incentive to increase capacity utilization significantly in the subject countries in light of its corporate policies: (1) to have its mills principally supply national and regional markets; (2) to limit production and exports in the interests of obtaining market stability; and (3) to give Mittal USA veto power over any exports to the United States. Indeed, while the *** tons of excess capacity in the subject countries in 2006 may seem impressive in the abstract, *** in contrast to Mittal USA's *** tons of excess U.S. capacity in 2006.[101] Moreover, much of Mittal USA's reported excess capacity is not theoretical. In 2004, when the firm had lower capacity than it did in 2006, it produced *** more short tons of hot-rolled steel than it did in 2006.[102] To the extent ArcelorMittal would desire to supply additional quantities of hot-rolled steel to the U.S. market, it could do so from its domestic mills, pursuant to its policy to have its mills serve principally national or regional markets.[103]

Indeed, consistent with this policy, throughout the period of review a majority of the shipments in the subject countries was either internally transferred within or shipped to the home market. While the subject producers exported significant quantities of their shipments, the proportion of export shipments to total shipments was relatively stable throughout the period of review, ranging between *** percent and *** percent during the six calendar years.[104] These percentages do not, in our view, signify that the subject industries are heavily export-oriented.[105]

Pursuant to the direction of the CIT, we have also considered the potential impact on likely subject import volume of China's shift from a net importer to a net exporter of hot-rolled steel.[106] We find that the Chinese transition to a net exporter is unlikely to have any significant effect on the subject

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[100] CR/PR, Tables IV-31, IV-35, IV-40; INV-Y-141, Tables VII-5, VII-7, VII-8.

[101] Mittal USA Producer's Questionnaire, revised response to question II-8. Mittal USA's excess capacity was *** in 2006. Id.

[102] Mittal USA Producer's Questionnaire, revised response to question II-8.

[103] As previously stated, the record does not indicate that there are any regions of the United States or any specific types of products that ArcelorMittal can supply from its mills in the subject countries that it cannot supply from Mittal USA. Nor is there evidence that ArcelorMittal would prioritize increasing capacity at its mills in the subject countries at the expense of capacity utilization at Mittal USA.

[104] CR/PR, Tables IV-31, IV-35, IV-40. Temirtau and the Romanian producer's exports were *** during the final two years of the period of review, with nearly all of the Romanian producer's other exports directed to ***. CR/PR, Tables IV-31, IV-35. The South African producer's exports during the period of review were increasingly directed to ***, which was its largest export market in 2006 and interim 2007. CR/PR, Table IV-40.

[105] Nor does the record indicate there are substantial motivations for the subject producers to shift their exports from other markets to the United States. It is true that in the 2007 determinations we characterized the U.S. market as attractive in light of its relatively open nature and the fact it offered higher prices than some other world markets. 2007 Determinations, USITC Pub. 3956 at 34. Nevertheless, ArcelorMittal operated hot-rolled steel mills in 15 different countries at the time the record closed. See CR at IV-68 n.50, PR at IV-39 n.50. Given the scope of ArcelorMittal's operations, and the fact that it operated facilities in the United States, Canada, and numerous foreign countries closer to the United States than the subject countries, it is unrealistic to expect – not to mention contrary to ArcelorMittal's stated policy – that its mills in the subject countries would shift exports to the United States in a significant way.

[106] Nucor, 605 F. Supp.2d at 1381.

producers, because they had already adjusted to this change by the conclusion of the period of review.[107] China had never been the principal export market for the subject producers during the period of review. Their exports to China peaked in 2002 as a percentage of total shipments and declined after 2003 on both an absolute and relative basis. Notwithstanding this, the subject producers' export shipments as a share of total shipments fluctuated within a relatively narrow range during the subsequent years, as the subject producers largely recouped declines in exports to China by increases in exports to other markets. Indeed, the subject producers' exports to other Asian markets remained substantial even after exports to China peaked, and by 2006, exports to other Asian markets, Africa, and the European Union were all larger than exports to China.[108] Moreover, several of the subject producers' principal Asian markets are outside the Southeast Asia region that is likely to be the primary target for any increased Chinese exports.[109]

In the 2007 determinations, we examined several other statutory factors pertaining to likely subject import volume, such as inventories, the potential for product shifting, and barriers to entry in other markets, and found that they did not support a finding that likely subject import volume would be significant upon revocation.[110] Those findings were not at issue in the CIT litigation, and we incorporate them here by reference.

With respect to those findings the CIT did direct us to reconsider, we conclude that the augmented record on remand again supports a conclusion that significant volumes of additional subject import volumes on revocation are unlikely. While there may be some excess capacity in the subject countries, and ArcelorMittal may increase subject import volumes modestly upon revocation, several considerations lead us to find that any increase would not be significant. First, ArcelorMittal, as a matter of corporate policy, will not permit the importation of merchandise from its mills in the subject countries if those imports would destabilize U.S. sales and prices and cause difficulties for Mittal USA's operations. In light of the substantial investment ArcelorMittal has made in Mittal USA, as well as our evaluation of the credibility and probative value of the testimony and written material we have received from the parties, we believe that ArcelorMittal's assertion that protecting Mittal USA's operations in the United States is in the interest of ArcelorMittal as a whole is credible and rational. Second, the record indicates that there are no regional markets not served by Mittal USA to which ArcelorMittal could direct subject imports; moreover, because regional hot-rolled steel prices in the United States move in concert, any price effects associated with significant volumes of subject imports in one region of the country would be felt nationally. Third, there is no indication of any "niche" products not produced by Mittal USA likely to result in significant subject import volumes. Fourth, the unused capacity of Mittal USA *** the unused capacity of the ArcelorMittal mills in the subject countries; in light of ArcelorMittal's stated corporate policy of using mills to supply national and regional markets, we find that it is unlikely that the firm would export significant quantities of subject merchandise in lieu of fully utilizing capacity at Mittal USA.

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[107] See CR/PR, Tables IV-31, IV-35, IV-40.

[108] CR/PR, Tables IV-31, IV-35, IV-40.

[109] These include *** for the Kazakh producer, CR at IV-75, PR at IV-44, and *** for the Romanian producer. CR at IV-84, PR at IV-46.

[110] 2007 Determinations, USITC Pub. 3956 at 45-46.

B. Likely Price Effects of Subject Imports

The CIT stated that "[o]n remand, the Commission must reassess the potential price effects in accordance with its revised volume determination."[111] The court did not identify any independent defects in the Commission's price effects analysis.

As we observed in the 2007 determinations, the record contains limited pricing data for subject imports during the period of review.[112] During the original period of investigation, imports from each of the subject countries undersold the domestic like product in the majority of price comparisons.[113] We further found that price plays an important role in purchasing decisions for hot-rolled steel.[114]

We concluded above in our analysis of likely subject import volume that while ArcelorMittal upon revocation is likely to export modest quantities of imports from the subject countries, the quantity of these imports will not be significant and these imports will not be priced in a manner to disrupt Mittal USA's operations. Indeed, ArcelorMittal's affiant on remand expressly states that ***.[115] We further found above that the record indicates that ArcelorMittal could not direct subject imports into particular regional markets in a manner that would not disrupt Mittal USA, while adversely affecting only other domestic producers.

Because the likely volume of subject imports will be small, and ArcelorMittal will likely price these imports so as not to disrupt the U.S. hot-rolled steel market, we find that there will not likely be significant underselling by subject imports from Kazakhstan, Romania, and South Africa. Nor will the subject imports likely have significant price-suppressing or -depressing effects. Consequently, we conclude that the subject imports will likely not have significant price effects.

C. Likely Impact of the Subject Imports

The 2007 determinations contained a lengthy discussion of the condition of the domestic hot-rolled steel industry during the period of review.[116] The Commission found that any improvement in the condition of the industry after imposition of the orders was inhibited in part by a U.S. economic recession in 2001 and a resulting decline in apparent U.S. consumption. The industry's performance improved substantially after 2003 as apparent U.S. consumption improved and prices increased sharply. Softening of demand after its 2004 peak, and flat or declining prices after 2006 led to substantial industry performance declines in interim 2007.[117] All Commissioners who are joining this opinion concluded that

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[111] Nucor, 605 F. Supp.2d at 1383.

[112] 2007 Determinations, USITC Pub. 3956 at 46 & n.269. As observed in the 2007 determinations, there were no pricing observations for subject imports from Kazakhstan during the period of review, the most recent observation for imports from Romania was in the first quarter of 2003, and the most recent observation for imports from South Africa was in the fourth quarter of 2003. In the available observations, there were 11 instances of underselling and 10 of overselling.

[113] 2007 Determinations, USITC Pub. 3956 at 46 & n.270.

[114] 2007 Determinations, USITC Pub. 3956 at 46.

[115] ArcelorMittal Factual Submission on Remand, ex. 8, ¶ 6.

[116] 2007 Determinations, USITC Pub. 3956 at 38-42, 47 (incorporating prior discussion into analysis of subject imports from Kazakhstan, Romania, and South Africa).

[117] 2007 Determinations, USITC Pub. 3956 at 38.

the industry was not in a vulnerable condition, notwithstanding substantial performance declines in interim 2007, in light of its overall profitability since 2004.[118]

We concluded above that the subject import volume upon revocation is unlikely to be significant and that the subject imports will likely not have significant price effects. In light of this, we do not find that the subject imports will likely have a significant impact on the domestic industry.

In these reviews we have found that, in light of ArcelorMittal's stated policy not to disrupt the operations of Mittal USA, and the inability of ArcelorMittal to import significant quantities of subject merchandise without having such a disruptive effect on its U.S. affiliate, ArcelorMittal will limit subject import quantities to modest amounts that would not significantly affect U.S. sales or prices. In other words, revocation of the orders on the subject imports from Kazakhstan, Romania, and South Africa will not likely have a significant impact on the domestic industry notwithstanding the industry's condition at the time of revocation. Thus, in response to the inquiry posed by the CIT,[119] while we acknowledge the declines in performance that the domestic industry experienced during interim 2007, these declines do not affect our analysis of likely impact.

CONCLUSION

For the foregoing reasons, we determine on remand that revocation of the countervailing duty order on hot-rolled steel from South Africa and revocation of the antidumping duty orders on hot-rolled steel from Kazakhstan, Romania, and South Africa are not likely to cause continuation or recurrence of material injury to the domestic hot-rolled steel industry within a reasonable foreseeable time.

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[118] 2007 Determinations, USITC Pub. 3956 at 41-42. The domestic industry remained profitable in interim 2007, although the industry's operating ratio was considerably lower in interim 2007 than it was in interim 2006. See id., USITC Pub. 3956 at 41 nn.238, 239. Under the methodology to which the Commission gave primary weight in the 2007 determinations, operating margins were 13.8 percent in 2005, 15.3 percent in 2006, 16.4 percent in interim 2006, and 6.7 percent in interim 2007. See id., USITC Pub. 3956 at 41 & n.239. We would not characterize such performance as "poor" on an absolute basis, compare Nucor, 605 F. Supp.2d at 1383, and it is far better than the large operating losses the industry incurred during the beginning of the period of review. See USITC Pub. 3956 at 41 nn.238, 239. In any event, given the inconsequential import volumes and price effects likely from the subject imports, we find that revocation of the orders under review is unlikely to exacerbate the performance declines that occurred during interim 2007.

[119] Nucor, 605 F. Supp.2d at 1383.