CIT 2013: A REVIEW OF APPEALS FROM THE INTERNATIONAL TRADE COMMISSION

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ABSTRACT

In 2013, the United States Court of International Trade (CIT) issued six decisions involving the antidumping (AD) and countervailing duty (CVD) determinations of the U.S. International Trade Commission (ITC) in original investigations or sunset reviews. Although most of these decisions involved a remand order for further consideration by the ITC, all of the decisions highlight how a properly deferential review by the CIT can result in improved ITC determinations by establishing a more consistent and transparent standard for what constitutes substantial evidence in support of the ITC's findings.

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I. Introduction

In 2013, the U.S. Court of International Trade (CIT or Court) issued six slip opinions related to antidumping (AD) and countervailing duty (CVD) determinations made by the U.S. International Trade Commission (ITC or Commission). This Article will address five of the six slip opinions that involved a decision by the Court at some stage of the proceeding that ordered the Commission to reconsider its original determination.[1] This Article will first review three of the CIT slip opinions that involved the Commission's determinations from an original injury investigation and remanded the case in each one for further consideration.[2] One CIT decision involved the review of the ITC's remand determination pursuant to a 2011 CIT remand order.[3] Finally, this Article will address a one-page CIT slip opinion involving an appeal of an ITC second sunset review that was filed in 2006 and resulted in four remand results issued by the Commission; six CIT decisions substantively reviewing the Commission's determinations; a decision by the U.S. Court of Appeals for the Federal Circuit (CAFC or Federal Circuit); and an appeal to the U.S. Supreme Court that was denied.[4]

Although all of the 2013 CIT decisions of ITC determinations involved a CIT remand order at some point of the case proceeding, all

1. The remaining 2013 CIT slip opinion related to an ITC determination involved a procedural issue. LG Electronics, Inc. v. United States, No. 13-00100, slip op. 13-136, 2013 WL 5943229 (Ct. Int'l Trade Nov. 6, 2013). In this decision, the CIT denied a motion to stay the appeal of the ITC's final determination in Large Residential Washers from Korea and Mexico, pending the final resolution of the appeal of the DOC's final determination in Large Residential Washers from Korea. The CIT concluded that it would be inappropriate to grant a stay of a potentially extended duration, particularly because it was too speculative to assume that the appeal of the DOC determination would necessarily result in a changed DOC final margin for the Korean respondents that would be so significant to alter the ITC's injury analysis.

2. Swiff-Train Co. v. United States, 904 F. Supp. 2d 1336 (Ct. Int'l Trade 2013); Downhole Pipe & Equip. v. United States, 963 F. Supp. 2d 1335 (Ct. Int'l Trade 2013); Whirlpool Corp. v. United States, No. 12-00164, slip op. 13-155, 35 ITRD 2513 (Ct. Int'l Trade Dec. 26, 2013).

3. Nucor Fastener Div. v. United States, No. 09-00531, slip op. 13-65, 2013 WL 3033385 (Ct. Int'l Trade May 24, 2013).

4. NSK Corp. v. U.S. Int'l Trade Comm'n, No. 06-00334, slip op. 13-143, 2013 WL 6068455 (Ct. Int'l Trade Nov. 18, 2013).

of these CIT decisions nonetheless reflected an appropriate level of deference to the agency's determinations. The CIT decisions all pointed out specific problems with the ITC's determinations, such as gaps or inconsistency in the cited record evidence or explanations of certain findings that were inadequate or required clarification. In each of these cases the CIT gave the ITC the opportunity on remand to address and remedy these highlighted problems. This Article suggests that judicial deference to the agency should perhaps not be over-emphasized, particularly when there are legitimate concerns that the ITC is not adequately addressing certain issues and may be relying too heavily on its wide administrative discretion in making determinations that are flawed and unsupported by substantial evidence. These cases provide good examples of how the CIT's exercise of a properly deferential standard of review can improve the ITC determinations in AD/CVD proceedings so that they establish a more consistent and transparent standard for what constitutes substantial evidence to support the ITC's findings.

Part II of this Article provides an overview of the Commission's role in AD/CVD proceedings, as well as the basic principles of how appellate review of ITC determinations is conducted. Part III and Part IV of this Article summarize and analyze five 2013 CIT decisions. Part IV offers a proposal that the CIT could use three-judge panels as a way to address similar protracted litigation, promote judicial economy, and bolster the chances that its decision will be viewed with greater deference by the CAFC.

II. Overview of the ITC's Role in AD/CVD Proceedings and Appellate Review of ITC Decisions

A. *ITC's Role in AD/CVD Proceedings*

The Commission is an independent quasi-judicial federal agency with broad investigative responsibilities on matters of trade. The Commission's primary functions include administering AD and CVD investigations and five-year (sunset) reviews.[5] AD and CVD investigations are

5. The Commission's website describes its mission is "to (1) administer U.S. trade remedy laws within its mandate in a fair and objective manner; (2) provide the President, USTR, and Congress with independent analysis, information, and support on matters of tariffs, international trade, and U.S. competitiveness; and (3) maintain the Harmonized Tariff Schedule of the United States (HTS)." *About the USITC*, United States Int'l Trade Comm'n, http://www.usitc.gov/press_room/about_usitc.htm (last visited Sep. 20, 2014). Under its trade remedy investigation portfolio, the Commission not only conducts AD/CVD investigations, but also global safeguard

initiated pursuant to the filing of a petition on behalf of the domestic industry seeking relief from unfair trade in the form of subject imports that are allegedly sold at less than fair value (dumped) or allegedly benefit from countervailable subsidies provided through foreign government programs (subsidized).[6]

The Commission and the U.S. Department of Commerce (DOC or Commerce) are the two federal agencies responsible for conducting AD/CVD investigations and sunset reviews under Title VII of the Tariff Act of 1930.[7] The Commission and Commerce each conduct their own AD/CVD investigations that address two separate issues. Commerce determines whether the subject imports are dumped or subsidized, and, if so, the margin of dumping or amount of subsidy.[8] The Commission examines whether a domestic industry is materially injured or threatened with material injury by reason of the dumped or subsidized imports.[9] Only if both Commerce and the Commission make affirmative final determinations, will Commerce be allowed to issue an AD or CVD order covering the subject imports.[10] If the Commission makes a negative determination (i.e., no injury or threat of material injury) in either the preliminary or final investigation, the investigations are terminated and no AD or CVD order may be issued regardless of the AD/CVD margin calculated by Commerce.[11]

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investigations, and intellectual property based import investigations (e.g., Section 337 investigations).

6. 19 U.S.C. §§ 1671a(b), 1673a(b) (1996). The statute also provides that AD/CVD investigations may be self-initiated by Commerce. 19 U.S.C. §§ 1671a(a), 1673a(a); 19 C.F.R. § 351.201 (2014). In practice, self-initiated AD/CVD investigations have been exceptionally rare, with only one since 1991 under special circumstances. *See*, Self-Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada, 56 Fed. Reg. 56055-03 (Oct. 31, 1991) (DOC self-initiated new CVD investigation after Canada unilaterally terminated a U.S.-Canada softwood lumber trade agreement).

7. 19 U.S.C. § 1677(1) (2014) ("The term 'administering authority' means the Secretary of Commerce, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this subtitle are transferred by law."); 19 U.S.C. § 1677(2) (2014) ("The term 'Commission' means the United States International Trade Commission").

8. 19 U.S.C. §§ 1671b(b), 1671d(a), 1673b(b), 1673d(a).

9. 19 U.S.C. §§ 1671b(a), 1671d(b), 1673b(a), 1673d(b).

10. 19 U.S.C. §§ 1671e, 1673e. The AD/CVD order issued by Commerce imposes a requirement for importers of subject imports to pay an additional estimated AD/CVD duty deposit as calculated by Commerce for entries of subject merchandise made after the date of publication of the AD/CVD order.

11. 19 U.S.C. §§ 1671b(a), 1671d(b), 1673b(a), 1673d(b).

AD/CVD orders are subject to revocation after five years unless both Commerce and the Commission determine that doing so would be likely to lead to continuation or recurrence of dumping or subsidies (DOC) and of material injury (ITC) within a reasonably foreseeable time.[12] Like the original investigations, the Commission and Commerce each conduct their own separate "sunset" review that examines their respective issue.[13] If either agency makes a negative determination, the AD or CVD order will be revoked.[14] The AD or CVD order will remain in place only if both agencies make affirmative determinations (i.e., DOC determines dumping or subsidization is likely to continue or recur after revocation of the order; ITC determines material injury is likely to continue or recur after revocation of the order).[15]

B. *Appellate Standard of Review of ITC's AD/CVD Determinations*

The AD statute permits interested parties who participated in an AD or CVD proceeding before the Commission to file an appeal with the U.S. Court of International Trade to review a determination that terminates or concludes an original investigation or a sunset review determination.[16] The CIT is the only Article III trial-level court that was expressly designed by Congress to have exclusive jurisdiction over international trade cases, such as ITC determinations.[17] After a final decision of the CIT is made, the losing party before the CIT may then file an appeal to the CAFC.[18]

1. U.S. Court of International Trade

The CIT's standard of review of an ITC AD/CVD determination depends on what kind of determination was issued by the ITC. For an ITC negative preliminary injury determination, the CIT's standard of review is whether the ITC's determination was "arbitrary, capricious, an

12. 19 U.S.C. §§ 1675(c), 1675a.

13. 19 U.S.C. § 1675(c)(1).

14. 19 U.S.C. § 1675(d)(2).

15. *Id.*

16. 19 U.S.C. § 1516a(a). Interested parties may appeal an ITC negative preliminary determination, a negative final determination, or an affirmative final determination. An ITC affirmative preliminary determination may not be appealed to the CIT.

17. 28 U.S.C. § 1581(c).

18. 28 U.S.C. § 1295(a)(5). The CAFC has exclusive jurisdiction over final decisions of the CIT.

abuse of discretion, or otherwise not in accordance with law."[19] For other ITC AD/CVD determinations, the CIT's standard of review is whether the ITC's determination was "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[20]

It is clear that the CIT may not use a *de novo* standard of review. Congress expressly provided that ITC determinations are to be "presumed to be correct" in CIT appeals, and that "[t]he burden of proving otherwise shall rest upon the party challenging such decision."[21] In addition, the legislative history of the Trade Agreements Act of 1979 explicitly stated that the bill was intended to:

> remove all doubt on whether *de novo* review is appropriate by excluding *de novo* review from consideration as a standard in antidumping and countervailing duty determinations . . . The amendments . . . provide all parties with greater rights of participation at the administrative level and increased access to information upon which the decision of the administering authority and the International Trade Commission are based . . . [and] have eliminated any need for *de novo* review.[22]

Both the "arbitrary and capricious" and "substantial evidence" standards of review require the CIT to give deference to the Commission's determinations. In applying the "arbitrary and capricious" standard of review to ITC preliminary negative determinations, the reviewing court "must determine whether there is a 'rational basis in fact' for the ITC's determination."[23] The "arbitrary and capricious" standard of review requires the reviewing court to:

> consider whether the [Commission]'s decision was based on a consideration of the relevant factors and whether there has

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19. 19 U.S.C. §§ 1516a(b)(1)(A), 1516a(b)(1)(B)(ii). The "arbitrary and capricious" standard of review also applies to ITC determinations not to initiate a changed circumstances review or an expedited ITC sunset review determination.

20. 19 U.S.C. § 1516a(b)(1)(B)(i). Most often these are ITC final investigation determinations and sunset review determinations—either affirmative or negative.

21. 28 U.S.C. § 2639(a)(1).

22. S. REP. No. 96-249, at 251-52 (1979), *as reprinted in* 1979 U.S.C.C.A.N. 637.

23. *See* Ranchers-Cattlemen Action Legal Found. v. United States, 23 Ct. Int'l Trade 861, 878, 74 F. Supp. 2d 1353, 1368 (Ct. Int'l Trade 1999) (citing Torrington Co. v. United States, 16 Ct. Int'l Trade 220, 221, 790 F. Supp. 1161, 1165 (Ct. Int'l Trade 1992) (quoting American Lamb Co. v. United States, 785 F.2d 994, 1004 (Fed Cir. 1986) (quoting S. REP. No. 249, *as reprinted in* 1979 U.S.C.C.A.N. 381, 638))).

> been a clear error of judgment . . . Although [the] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency.[24]

Under an "arbitrary and capricious" standard, the CIT "may only reverse the ITC's determination if there is a 'clear error' of judgment and where there is 'no rational nexus between the facts found and the choices made.'"[25]

The "substantial evidence" standard of review also requires the CIT to be deferential to an agency determination, albeit not as deferential as the "arbitrary and capricious" standard of review. Substantial evidence has been defined by the Supreme Court as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[26] Substantial evidence requires "more than a mere scintilla," but "less than the weight of the evidence."[27] In determining whether substantial evidence supports an ITC determination, the Court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'"[28] "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[29] Under the "substantial evidence" standard of review, the CIT "may not reweigh the evidence or substitute its own judgment for that of the agency."[30]

Although either the "arbitrary or capricious" or "substantial evidence" standard of review requires the Court to give deference to the Commission's determination, in practice it is sometimes difficult to ascertain to what extent the Court is being deferential and whether the amount of deference being given is sufficient to comply with the standard of review mandated by law. Most of the CIT decisions recite the relevant cases that describe the applicable standard of review so

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24. Tex. Crushed Stone Co. v. United States, 35 F.3d 1535, 1540 (Fed. Cir. 1994).

25. *See* Ranchers-Cattlemen Action Legal Found., 74 F. Supp. 2d at 1369 (citing Conn. Steel Corp. v. United States, 18 Ct. Int'l Trade 313, 315, 852 F. Supp. 1061, 1064 (Ct. Int'l Trade 1994) (quotations and citations omitted).

26. Consol. Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938) (quoted in Huaiyin Foreign Trade Corp. v. United States, 322 F.3d 1369, 1374 (Fed. Cir. 2003)).

27. Altx, Inc. v. United States, 370 F.3d 1108, 1116 (Fed. Cir. 2004).

28. Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting Atl. Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

29. Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966).

30. Usinor v. United States, 28 Ct. Int'l Trade 1107, 1111 (2004).

that it has almost become perfunctory boilerplate language. Yet there is no obvious way to determine if a particular case does not present "more than a mere scintilla" of evidence or demonstrates "clear error" as necessary to meet the standard for overturning the agency's determination.

The issue of the CIT's deference to the ITC's determination is further complicated by the fact that not all CIT judges have decided ITC cases in the same manner. Although the Court as a whole has been given exclusive jurisdiction over ITC determinations in AD/CVD cases, each CIT judge is free to make his or her own decision and is not bound by the decisions of any other CIT judge. There is no requirement that a CIT judge must follow or is controlled by the precedent established by prior decisions of another CIT judge on the same issue. The Federal Circuit addressed this issue in *Algoma Steel Corp. v. United States* and observed that:

> among trial courts it is unusual for one judge to be bound by the decisions of another and, if it is to occur, such a rule should be stated somewhere. That is not done here; with all the criticism directed by appellants toward Judge Restani for not following Judge Newman, nowhere is anything pointed out saying she must. She, herself, accepts an analysis of Judge Newman's decisions as precedents which we deem in part mistaken, but she is right in making her own decision nevertheless.[31]

As a result, given the independence of each CIT judge, the principle of *stare decisis* may be exercised to a greater or lesser degree depending on the individual judge. The standard of review applied in any particular case may vary simply because each CIT judge can and often does have his or her own view on what constitutes adequate deference to the Commission's decision. As discussed below, because a CIT decision may be implicitly perceived to be the decision of one particular CIT judge rather than by the CIT as a whole, this perception, whether accurate or not, may contribute to less deferential review of some CIT decisions.

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31. Algoma Steel Corp. v. United States, 865 F.2d 240, 243 (Fed. Cir. 1989), *cert denied*, 492 U.S. 919 (1989).

2. Federal Circuit

The standard of review for the Federal Circuit of a CIT decision that reviewed an agency determination is open to debate. The Federal Circuit has acknowledged that the statutory provisions at § 1516a specifies only the standard of review that is to be applied by the CIT, but does not expressly provide a standard for the CAFC's appellate review of the CIT's decisions under § 1516a.[32]

In practice, the Federal Circuit has applied different standards of review depending upon the posture of the case presented to them.[33] If the Federal Circuit determines that the CIT had merely remanded the case back to the ITC for additional explanation or clarification of the original determination, the Federal Circuit would apply a deferential standard of review to see if the CIT had abused its discretion in its review.[34] On the other hand, if the Federal Circuit determines that the CIT had limited the flexibility of the ITC on remand by directing the ITC to enter a negative determination or to reopen the record to support its determination, the Federal Circuit would "step into the shoes" of the CIT and conduct a *de novo* review of the ITC's determination and decide for itself whether the ITC's determination was supported by substantial evidence. [35]

In conducting its *de novo* review of an agency determination under § 1516a (both DOC and ITC determinations), the Federal Circuit has sometimes noted that it gives "due respect"[36] or "great weight"[37] to the CIT's decision. In other decisions, however, the Federal Circuit has noted only that it will not "altogether ignore its informed opinion."[38] Still other Federal Circuit decisions have expressly given no deference to the CIT's decision at all or completely omitted acknowledging any level of deference to the CIT.[39] From this broad range of Federal

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32. Nippon Steel Corp. v. United States, 458 F.3d 1345, 1350 (Fed. Cir. 2006); Suramerica De Aleaciones Laminadas, C.A. v. United States, 44 F.3d 978, 988 n.1 (Fed. Cir. 1994).

33. NSK Corp. v. U.S. Int'l Trade Comm'n, 716 F.3d 1352, 1363-64 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 2719 (2014).

34. *Id.* at 1363 (citing Altx, Inc. v. United States, 370 F.3d 1108, 1117 (Fed Cir. 2004)).

35. *See id.* at 1363-64 (citing Nippon Steel Corp. v. U.S. Int'l Trade Comm'n, 494 F.3d 1371, 1378 (Fed. Cir. 2007)).

36. *See, e.g.*, *Suramerica*, 44 F.3d at 983.

37. *See, e.g.*, *Nippon Steel*, 458 F.3d at 1351; *see also* Huvis Corp. v. United States, 570 F.3d 1347, 1351 (Fed. Cir. 2009); Cleo Inc. v. United States, 501 F.3d 1291, 1296 (Fed. Cir. 2007).

38. *See, e.g.*, Royal Thai Gov't v. United States, 436 F.3d 1330, 1335 (Fed. Cir. 2006).

39. *See, e.g.*, AMS Assocs. Inc. v. United States, 737 F3d 1338, 1342 (Fed. Cir. 2013) ("We review decisions of the trade court without deference, applying the same substantial evidence standard of review that the trade court itself applies in reviewing Commerce's determinations.");

Circuit decisions, it is difficult to establish any clear pattern of how much, if any, deference the CAFC gives to CIT decisions, particularly when compared to the amount of deference given to the underlying agency determination.

III. Summary and Analysis of CIT 2013 Decisions Involving Review of ITC AD/CVD Original Determinations

All three of the CIT 2013 decisions involving a review of an ITC original injury determination resulted in a remand order for the ITC to reconsider certain aspects of its determination. Although the 2013 decisions reflect a higher rate of remand orders than in years past,[40] the decisions themselves do not indicate a new trend. Rather, each of the CIT decisions identify specific issues that require further clarification or explanation and do not substitute the ITC's interpretation of the factual record with the Court's own. In framing its remand orders, the CIT provided a clear roadmap as to the specific factual or legal issues that needed to be clarified and gave the ITC ample opportunity to exercise its administrative discretion on how to address the identified flaws so that the ITC's determination could ultimately be found to be supported by substantial evidence and in accordance with law. These decisions reflect a careful and properly deferential review of the ITC determinations.

A. *Swiff-Train Co. v. United States*

In *Swiff-Train*,[41] the CIT reviewed the ITC's affirmative injury determination in the AD/CVD investigation of multilayered wood flooring

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Target Corp. v. United States, 609 F.3d 1352, 1358 (Fed. Cir. 2010); Viraj Group v. United States, 476 F.3d 1349, 1354 (Fed. Cir. 2007); Micron Tech. v. United States, 117 F.3d 1386, 1392-93 (Fed. Cir. 1997).

40. *See* Neal J. Reynolds, *The Court of International Trade's Review of the International Trade Commission's Injury Determinations in Antidumping and Countervailing Duty Proceedings in 2012: An Overview and Analysis*, 45 Geo J. Int'l L. 1 (2013) (In 2012, the CIT affirmed six ITC determinations in AD/CVD investigations or reviews); Daniel B. Pickard & Alexandra E. Landis, *The U.S. Court of International Trade in 2011: Appeals from the U.S. International Trade Commission and Department of Labor*, 44 Geo J. Int'l L. 1 (2012) (In 2011, the CIT affirmed two ITC determinations in investigations, affirmed the ITC's fourth remand determination in *NSK*, and in Nucor Fastener Div. v. United States (*Nucor Fastener I*), 791 F. Supp. 2d 1269, 1292 (Ct. Int'l Trade 2011), remanded the ITC's preliminary negative injury determination).

41. Swiff-Train Co. v. United States, 904 F. Supp. 2d 1336 (Ct. Int'l Trade 2013).

from China.[42] The CIT benefited from the split vote because the dissenting views of the Commission already highlighted any data gaps or inadequate explanations that called into question whether the findings of the majority affirmative views were supported by substantial evidence. The CIT considered and ultimately remanded all four issues challenged by the importer group in *Swiff Train*: (1) whether the ITC properly considered the composition of the domestic industry; (2) whether the ITC's price effects analysis was supported by substantial evidence; (3) whether the ITC properly evaluated the impact on the domestic industry in context of the conditions of competition; and (4) whether the ITC applied the correct legal standard for determining whether subject imports were a cause of material injury.

The first issue considered by the CIT was whether the ITC had properly defined the domestic industry when it declined to investigate whether producers of hardwood plywood that was used as flooring should be considered part of the domestic industry for multilayered wood flooring.[43] The CIT noted that the ITC had acknowledged that there was some hardwood plywood that fell within the scope definition, and as a result, this acknowledgment rendered "arbitrary the reasoning behind the Commission's refusal to investigate" that portion of the domestic industry.[44] The CIT found that the ITC is required to evaluate the entire domestic industry in making its injury determination, but failed to do so in this investigation by omitting the subset of producers of hardwood plywood that was used as flooring.[45] The CIT directed the ITC to reopen the record, issue questionnaires to any such hardwood plywood producers, and make findings according to any new record evidence developed on remand.[46]

The CIT then reviewed two parts of the ITC's price effects analysis, affirming the ITC's finding of significant underselling, but ordering the ITC on remand to make an analysis of the price suppression and price depression factor. First, the CIT agreed with the majority's view

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42. Multilayered Wood Flooring from China, Inv. Nos. 701-TA-476, 731-TA-1179, USITC Pub. 4278 (Nov. 2011). Four of the Commissioners voted to find material injury and two Commissioners dissented.

43. *Swiff-Train*, 904 F. Supp. 2d at 1339-42.

44. *Id.* at 1341 ("The Commission states that the scope 'includes hardwood plywood insofar as it meets the scope definition, i.e., 'unfinished MLWF . . . manufactured by pressing one or more layers of wood veneer to a hardwood plywood core.'").

45. *Id.* at 1342 (citing NSK Corp. v. United States, 712 F. Supp. 2d 1356, 1365 n.13 (Ct. Int'l Trade 2010)); *cf.* Wheatland Tube Co. v. United States, 973 F. Supp. 149, 158 (Ct. Int'l Trade 1997).

46. *Swiff-Train*, 904 F. Supp. 2d at 1342.

that there was significant underselling. Although the CIT acknowledged the dissent's conclusion that there was attenuated competition between the domestic product and Chinese imports,[47] the CIT nevertheless still concluded that there was enough data cited by the majority views to support a significant underselling finding.[48]

In contrast, the CIT faulted the ITC's analysis of price suppression and depression. The CIT found that the ITC had concluded only that there was evidence of adverse price effects, but did not make an explicit finding of significant price depression, and made no findings at all regarding price suppression.[49] The CIT on this issue concluded that the ITC's findings were not supported by record evidence and directed the ITC on remand to make explicit findings on the relationship of subject imports to any price suppression or depression and to address the economic issues cited by the dissenting views.[50]

On the third issue, the CIT found that the ITC did not adequately discuss how the relevant conditions of competition affected its analysis of how the subject imports impacted the domestic industry.[51] The CIT cited the discussion of the dissent's views of the severe general economic downturn and the decline in housing starts and remodels and how these general economic conditions resulted in a corresponding decline in demand for multi-layered wood flooring. The CIT noted that "[w]ithout an explanation of how the dramatic collapse of the home building and remodeling markets impacted sales of domestically produced MLWF the court cannot review the Commission's implicit determination that it did not attribute injury from the overall market decline to the subject imports."[52] The CIT ordered the ITC, on

47. The CIT acknowledged that the dissent had pointed out that price was not the most important factor in purchasing decisions and that the record showed mixed overselling and underselling, with domestic product underselling subject imports where the Chinese product was most specialized and subject imports underselling where the domestic product was most specialized.

48. *Swiff-Train*, 904 F. Supp. 2d at 1343 (noting that although the validity of price comparisons for three of the eight products was undermined by significant volume differences, the pricing data for four of the eight products showed significant underselling by subject imports).

49. *Id.* at 1343-44.

50. The CIT cited the dissent's argument that there was no evidence that subject imports prevented domestic industry's prices from increasing to a significant degree. *Id.* at 1343-44 (the dissent had highlighted evidence that showed price declines for six of the eight products were modest, and that Chinese product oversold the domestic product for one of the remaining products in all but one quarter).

51. *Id.* at 1344-45.

52. *Id.* at 1345 (citing Taiwan Semiconductor Indus. Ass'n. v. United States, 59 F. Supp. 2d 1324, 1331 (Ct. Int'l Trade 1999), *aff'd*, 266 F.3d 1339 (Fed. Cir. 2001)).

remand, to re-evaluate its impact findings to specifically address the context of the general economic downturn as identified by the dissenting views.

The last issue considered by the CIT in *Swiff-Train* involved the issue of causation, which appeared on its face to be the most likely to create controversy due to the CIT's decision to highlight the specific term of a "but-for" analysis in its discussion of the legal standard for injury causation. At a minimum, given the history and evolution of the legal standard for causation,[53] the CIT's specific reference to a required "but-for" analysis has created some confusion and apprehension that the causation standard may once again be subject to significant debate in future cases before the ITC, CIT and Federal Circuit.[54]

In its underlying determination, the ITC had noted that the statute did not define the phrase "by reason of" and that accordingly this

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53. The three Federal Circuit decisions in Gerald Metals, Inc. v. United States, 132 F.3d 716, 722 (Fed. Cir. 1997), Bratsk Aluminum Smelter v. United States, 444 F.3d 1369 (Fed. Cir. 2006), and Mittal Steel Point Lisas Ltd. v. United States, 542 F.3d 867, 872-73 (Fed. Cir. 2008) represent the benchmarks for the legal standard for how the ITC is to conduct its causation analysis. The primary issue in these cases involved whether the Commission properly distinguished causation of injury from subject imports as opposed to from some other factors (e.g., significant volumes of non-subject imports, changes in technology, demand, or consumer tastes, competition among the domestic producers, or management decisions by the domestic producers).

54. In 1997, the Federal Circuit in *Gerald Metals* explained that there must be evidence in the record "to show that the harm occurred 'by reason of' the LTFV imports, not by reason of a minimal or tangential contribution to material harm caused by LTFV goods." *Gerald Metals*, 132 F.3d at 722. The Federal Circuit in *Gerald Metals* found that the CIT below had erred in applying a legal standard whereby *any* contribution to injury by the subject imports was sufficient to satisfy the "by reason of" test that was based on legislative history that indicated the Commission did not need to weigh causes of injury. *Id.* The court clarified that "evidence of de minimis (e.g., minimal or tangential) causation of injury does not reach the causation level required under the statute." *Id.*

In 2006, the Federal Circuit issued *Bratsk*, which altered the injury causation standard by requiring the ITC to apply a particular additional methodology following its finding of material injury in cases involving commodity products and a significant market presence of price-competitive non-subject imports. *Bratsk*, 444 F.3d at 1369. In *Bratsk*, the Federal Circuit held that the ITC needed to apply a "replacement/benefit" test to consider whether non-subject or fairly traded imports would have replaced less than fair value (LTFV) subject imports without any benefit to the domestic industry. *Id.*

In 2008, the Federal Circuit issued *Mittal Steel*, in which it clarified that the ITC's interpretation of *Bratsk* had been too rigid. Rather than focusing on any particular test or methodology for determining causation, the Court explained that it merely required the ITC to have a reasoned explanation and sufficient evidence in the record to support a finding that injury was "by reason of" the subject imports and that the ITC was not attributing injury from non-subject imports or other factors to the subject imports. *Mittal Steel*, 542 F.3d at 873 (citing *Gerald Metals*, 132 F.3d at 722).

aspect of the injury analysis was "left to the Commission's reasonable exercise of its discretion."[55] The CIT in *Swiff-Train* objected to the standard by which the ITC determined whether a domestic industry is materially injured "by reason of" the subject imports.[56] The CIT cited the Federal Circuit precedent of *Gerald Metals* to explain how the statutory "by reason of" language implicitly requires the ITC to "show that the harm occurred 'by reason of' the LTFV imports, not by reason of a minimal or tangential contribution to material harm caused by LTFV goods."[57] The CIT also highlighted language from the Federal Circuit decision in *Mittal* that "[a]n important element of the causation inquiry—not necessarily dispositive, but important—is whether the subject imports are the 'but-for' cause of the injury to the domestic industry."[58]

The CIT faulted the ITC for its causation analysis, but aside from an open-ended comment regarding its dissatisfaction to the ITC's minimal citation of evidence connecting the subject imports to the condition of the domestic industry, the CIT did not provide a detailed breakdown as to how the ITC's causation analysis was inadequate.[59] Given that the CIT did not elaborate how the evidence cited by the ITC was insufficient, it appears that the CIT was dissatisfied by the ITC's lack in depth of explanation with supporting evidence, rather than by any particular flawed method of analysis. The CIT did not specify any particular factual issues to address, but rather broadly directed the ITC on remand to ensure that "subject imports were a but-for cause of injury, as well as whether the quantum of injury was material or consequential."[60]

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55. *Swiff-Train*, 904 F. Supp. 2d at 1346-47.

56. 19 U.S.C. § 1673d(b). The Commission is to "make a final determination of whether . . . an industry in the United States . . . is materially injured . . . by reason of [the subject] imports." The CIT specifically disputed the ITC's scope of discretion on causation determinations. "While the Commission may, in its discretion, make findings regarding whether the standard is met or choose an evaluation methodology suited to a particular case, its discretion does not extend to defining the standard itself." *Swiff-Train*, 904 F. Supp. 2d at 1347 n.8.

57. *Swiff-Train*, 904 F. Supp. 2d at 1346-47 (citing *Gerald Metals*, 132 F.3d at 722); *see also* Gerald Metals v. United States, 27 F. Supp. 2d 1351, 1355 (Ct. Int'l Trade 1998) (The ITC must "determine whether these factors as a whole indicate that the [subject] imports themselves made a material contribution to the injury.").

58. *Mittal Steel*, 542 F.3d at 876.

59. *Swiff-Train*, 904 F. Supp. 2d at 1347 ("But aside from citing to contemporaneous economic data, the Commission cites to little evidence on the record that connects the subject imports to the condition of the domestic industry.").

60. *Id.* Although the CIT noted that the ITC had to determine whether the subject imports were a "but-for" cause of injury, the CIT also notably rejected an argument raised by the importer

The CIT's decision in *Swiff-Train* reflects an example of how the CIT can rely heavily on the dissenting views of the ITC for ordering a remand and still be well within the deferential standard of review required under 19 U.S.C. § 1516a. For each of the remanded issues, the CIT pointed out inconsistencies or gaps in the majority views, often citing to the dissenting views but without necessarily endorsing the dissenting views. In addition, the CIT did not mandate a particular methodology to fix those problems but remained deferential by clearly giving the ITC an opportunity to address the remanded issues as the ITC saw fit. The CIT merely pointed out that the ITC had to do a better job of explaining certain aspects of the issues in light of the dissenting views. By articulating the particular factual and legal issues that needed to be addressed on remand, the CIT gave the ITC a clear roadmap for how it could expand its explanation to demonstrate how the existing record evidence still provides substantial evidence to support the majority view's findings that resulted in the affirmative injury determination.

B. *Downhole Pipe & Equipment v. United States*

In *Downhole Pipe*, the CIT considered challenges raised by an importer regarding the ITC's final determination in the AD/CVD investigation of drill pipe and drill collars from China.[61] Although the ITC unanimously found that the domestic industry was not suffering present material injury, the ITC found by a 3-3 vote that the subject imports

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plaintiffs that the Commission should have applied a "but-for" replacement benefit analysis similar to that applied in *Bratsk*. *Id.*at 1347 ("The court finds plaintiff's 'replacement' argument speculative and not well-suited to the facts in this case.") (citing Bratsk Aluminum Smelter v. United States, 444 F.3d 1369 (Fed. Cir. 2006)). The CIT thus suggests there are two different types of "but-for" analyses—a "hard" "but-for" analysis as outlined in *Bratsk* and a "soft" "but-for" analysis as outlined in *Mittal Steel*. The "hard" "but-for" analysis as set forth in *Bratsk* would require the ITC to determine whether non-subject imports were in the market at sufficient levels and had the potential to increase and replace subject imports in the market in a manner that would deprive the domestic industry of any benefit. *Id.* 1347. In this case, it appears that the CIT directed the ITC to conduct the "soft" and more general "but-for" analysis in a broader sense of whether the domestic industry would have been better off if the dumped goods had been absent from the market. However, given the long contentious history of this issue, it would not be surprising if the ITC addressed this issue with great sensitivity and emphasized the need for the CIT to give sufficient deference to the agency's authority and discretion to conduct its causation analysis in a reasonable manner.

61. Drill Pipe and Drill Collars from China, Inv. Nos. 701-TA-474, 731-TA-1176, USITC Pub. 4213 (Feb. 2011) (Final).

threatened the domestic industry with material injury.[62] The CIT focused its review on the affirmative threat determination and the ITC's underlying factual findings for that determination.[63]

In making its negative injury determination, the ITC acknowledged that the domestic industry had suffered significant declines in production, shipments, sales, employment, and profits.[64] However, the ITC found that subject imports did not have a significant role in these declines given the substantial market turmoil (i.e., severe declines in oil and gas prices) that occurred in the Great Recession in 2009 and first half 2010.[65] The ITC based its affirmative threat determination on the conclusion that subject imports would increase significantly in absolute terms and relative to domestic consumption and production in the imminent future.[66]

The CIT found that the record evidence did not support and in fact refuted the ITC's finding that only smaller domestic purchasers, as opposed to "large" purchasers, were buying subject merchandise at the start of the POI.[67] From this erroneous factual finding, the CIT found that the ITC reached an erroneous conclusion that the participation of

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62. The statute specifically provides that tie votes in ITC final determinations of AD/CVD investigations are to be treated as an affirmative determination. 19 U.S.C. § 1677(11).

63. The CIT also rejected an argument raised by the Plaintiff importer contesting the ITC's determination of one single like product, and cited judicial estoppel and failure to exhaust administrative remedies as the ITC did not have occasion to rule on this issue because Respondents did not maintain a consistent position on this issue. Downhole Pipe & Equip. v. United States, 963 F. Supp. 2d 1335, 1340-41 (Ct. Int'l Trade 2013).

64. *Id.* 963 F. Supp. 2d at 1342 (citing Drill Pipe and Drill Collars from China, Inv. Nos. 701-TA-474, 731-TA-1176, USITC Pub. 4213 at 38-39 (Feb. 2011) (Final).

65. *Id.*

66. *Id.* (citing Drill Pipe and Drill Collars from China, Inv. Nos. 701-TA-474, 731-TA-1176, USITC Pub. 4213at 32 (Feb. 2011) (Final)). The conclusion that the volume of subject imports would increase significantly was based on four findings of fact: (1) "subject imports held a substantial share of the U.S. market throughout the period examined, a share that grew in first-half 2010"; (2) "importers of subject merchandise have now become suppliers to even the largest U.S. purchasers and thus have demonstrated access to the full range of the API-grade drill pipe and collar market;" (3) "U.S. importers have increased their quantities of inventories of Chinese product to levels that are particularly significant in the context of current market conditions;" and (4) "the Chinese industry is very large and growing, is export-oriented, possesses substantial unused capacity, and has an incentive to increase its production and U.S. exports of unfinished drill pipe in response to the 2010 U.S. antidumping and countervailing duty orders on Chinese casing and tubing products." *Id.* at 1342-43.

67. The CIT found that the testimony cited by ITC did not actually support the factual findings, and that the ITC overlooked record evidence that contradicted and showed large purchasers did in fact buy subject merchandise in the first year of the POI. The CIT also found that the record did not support the ITC's factual finding that the participation of Chinese

Chinese suppliers in the U.S. market had evolved and grown over the period that indicated further expansion was imminent.[68]

Although the ITC argued that any erroneous findings were not critical to the chain of causation and thus should be considered harmless, the CIT disagreed because "the importance the ITC attached to the erroneous findings and the unwarranted conclusions in reaching its affirmative threat determination does not allow the court to consider the errors to be harmless."[69]

The CIT also directed the ITC to provide additional explanation for two other factual findings underlying the affirmative threat determination. The CIT requested additional explanation regarding the ITC's finding that "subject imports held a *substantial* share of U.S. market *throughout* the period examined, a share that *grew* in first half 2010."[70] The CIT found it unclear whether the ITC, in characterizing subject import market share as "substantial," was referring only to finished products, or also to unfinished products. The CIT questioned whether the market share of subject merchandise could reasonably be characterized as "substantial" if only referring to finished products.[71] The CIT also questioned the ITC's statement that subject import market share "grew" in first half 2010. In view of the actual data that appeared to conflict with the ITC's statements, the CIT asked ITC to explain why, and to what extent, its determination regarding the likely future import volume related to the allegedly "substantial" market share that allegedly "grew" in the first half of 2010.[72]

The CIT requested additional explanation for a third finding—that U.S. importers had increased their inventories of Chinese products to levels that were significant in the context of current market conditions.[73] The CIT noted that although inventories increased from 2007 to 2008, inventories declined over the rest of the period of investigation. The CIT directed the ITC to provide an explanation of its stated findings in light of all relevant record evidence, including any evidence that may detract from its findings.[74]

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suppliers in the U.S. market over the period of investigation had broken through the supposed prior limitation to smaller suppliers. *Downhole Pipe*, 963 F. Supp. 2d at 1343-44.

68. *Id.* at 1344-45.

69. *Id.* at 1345.

70. *Id.* at 1346-47 (emphasis added).

71. *Id.*

72. *Id.* at 1347.

73. *Id.*

74. *Id.*

The CIT's analysis in *Downhole Pipe* must be considered in the context that the ITC had made an affirmative threat determination by a split vote, only after it had unanimously made a negative injury determination. The record undisputedly did not support a finding that the subject imports were presently injuring the domestic industry given the lack of evidence of adverse volume or price effects from the subject imports. If the volume data did not support a present injury determination, it was reasonable for the CIT to question how the ITC could determine that the same weak volume data could nevertheless support an imminent threat determination. Like *Swiff-Train*, the CIT in *Downhole Pipe* benefitted from the dissent's views that outlined how the record evidence could not reasonably sustain an affirmative threat determination. Given the articulated views of the unanimous negative injury determination and the dissenting views on the threat determination, the CIT was able to identify specific issues for the ITC to reconsider, but the remand orders were nonetheless made with appropriate deference.

It could be argued that the CIT was improperly substituting its own interpretation of the factual record and that it was not giving sufficient deference to the ITC's determination. In sorting out whether subject imports were being purchased by "larger" or "smaller" purchasers or whether there was a change of that purchasing pattern over the period of investigation, the CIT disputed the ITC's factual findings based on its own reading of the record. Notably, however, in identifying the apparent conflicting data, the CIT did not appear to assign any particular weight to the various factual evidence being considered. Rather, the CIT merely pointed out apparent inconsistencies in the factual record that did not support the ITC's statements, but gave the ITC another opportunity to provide additional explanation to resolve these inconsistencies or cite to other record evidence to support its findings. The CIT's analysis was properly limited to the question of whether there was substantial evidence to support the factual findings made by the ITC. As noted by the CIT in *Downhole Pipe*, "[a] court must review an agency determination on the reasoning the agency puts forth."[75] Here, the CIT limited its analysis to the ITC's factual findings underlying its affirmative threat determinations and whether there was substantial evidence to support those findings. The CIT did not mandate a negative threat determination, but rather by pointing out the inconsistencies or conflicting record evidence, the CIT reasonably gave

75. *Id.* at 1345 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

the ITC an opportunity to review the record and reconsider whether enough evidence could be cited to support a more detailed explanation of the previously made factual findings.

C. *Whirlpool Corp. v. United States*

In *Whirlpool*,[76] the CIT reviewed the challenge of the ITC's unanimous determination that cumulated imports of certain refrigerators from Korea and Mexico did not cause or threatened to cause material injury to the domestic industry.[77] Although the plaintiff challenged four aspects of the ITC's negative determination, the CIT affirmed the ITC in all aspects except one part of the volume analysis.[78] A comparison of the court's analysis of the affirmed issues and the one remanded issue demonstrates how the CIT applied a balanced and appropriately deferential standard of review in considering whether the ITC's determination was supported by substantial evidence.

The one part of the ITC's determination that the CIT did not agree with was whether the ITC's volume analysis was tainted by a data methodology issue that may have resulted in the double-counting of certain types of refrigerators (jumbo capacity and four-door).[79] Because most of the increase in subject import volume and market share resulted from increased sales of jumbo capacity and four-door models that the domestic industry either did not produce or produced only toward the period of investigation, the ITC concluded that the increase in volume did not occur at the expense of the domestic industry.[80]

Whirlpool disputed the ITC's finding that jumbo capacity and four-door refrigerators accounted for the percentage increase in apparent domestic consumption and increase in subject import volume. According to Whirlpool, the ITC double-counted certain data for jumbo-capacity refrigerators that have four doors by counting them first as

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76. Whirlpool Corp. v. United States, No. 12-00164, 35 I.T.R.D. (BNA) 2513, at *1 (Ct. Int'l Trade 2013).

77. Bottom Mount Combination Refrigerator-Freezers from Korea and Mexico, Inv. Nos. 701-TA-477, 731-TA-1180-1181, USITC Pub. 4318 (May 2012) (Final).

78. *Whirlpool*, No. 12-00164, 35 I.T.R.D. (BNA) at *2, *18. Whirlpool challenged four aspects of the ITC's negative determination: (1) that the volume of subject imports did not displace a significant volume of the domestic like product; (2) that the subject imports did not significantly undersell the domestic producer prices; (3) that competition from subject imports did not depress or suppress domestic producers' prices; and (4) that price played a significant role in a domestic industry lost sale allegation. *Id.*

79. *Id.* at *4-6.

80. *Id.* at *4.

jumbo capacity refrigerators and also as four-door refrigerators. Whirlpool asserted that correcting for the double-counting of these refrigerators would show that jumbo capacity refrigerators and four-door refrigerators accounted for a significantly lower share of the increase in apparent consumption and subject imports than originally stated by the ITC.[81]

The CIT found that the ITC's determination and the underlying record evidence did not adequately show the methodology by which the ITC calculated apparent domestic consumption according to various refrigerator types. Although the ITC in its briefs to the CIT had tried to explain how the consumption data was not double-counted, the CIT found that the ITC's explanation of the various data sources used and the attempt to extrapolate and fill in data gaps was not reflected in the ITC's determination, but was only a *post hoc* rationale that could not be accepted.[82]

The CIT also rejected the ITC's argument that, even if double counting had occurred, the ITC would still have reached the conclusion that the increase in subject import volume and market share did not come at the expense of the domestic industry because "most" of the increase occurred in jumbo capacity and four-door refrigerators, even after using the corrected figures asserted by Whirlpool.[83] The CIT noted that the data questions raised sufficient doubt that the ITC would have reached the same conclusion that it would require the ITC to provide a better explanation of the gaps in the data that the ITC relied on, how it evaluated that data, and the conclusions drawn from that evaluation.[84]

Aside from this one remanded issue, the vast majority of the CIT's decision in *Whirlpool* described how the ITC acted reasonably in its analysis and explained in sufficient detail the factual basis from the record evidence that supported its conclusions for each of the issues

81. *Id.*

82. *Id.* at *5.

83. *Id.* at *6.

84. *Id.* The CIT found that the double-counting data issue would also affect a pricing issue challenged by Whirlpool. The ITC had concluded that subject imports did not cause domestic producer prices to fall because much of the subject import market share had occurred in the jumbo capacity market segment, which Whirlpool did not serve. Because the ITC's price depression findings hinged on the effects of the alleged double-counting of jumbo capacity and four-door refrigerators, the CIT included this price depression issue to be considered on remand to the extent necessary. *Id.* at *15.

raised by Whirlpool.[85] The CIT noted in several instances how the ITC specifically acknowledged the arguments raised by Whirlpool but was able to explain how other record evidence supported its findings. "[E]ven if Whirlpool presents what may have been considered a reasonable methodology if it had been adopted by the Commission, in each case, Whirlpool has failed to demonstrate that the Commission's methodology was not reasonable, and the court, therefore, affirms the agency's determination."[86]

The CIT in *Whirlpool* overwhelmingly found the ITC's determination to be reasonable and supported by substantial evidence, perhaps in part because there were no dissenting views to highlight any flaws unlike in *Swiff-Train* and *Downhole Pipe*. For all but one challenged issue, the CIT sided with the ITC and concluded that the ITC provided a reasonable explanation that was supported by substantial evidence. Although the CIT recognized there may have been evidence that detracted from the ITC's findings, the CIT nonetheless consistently deferred to the ITC's interpretation of the factual record and avoided substituting its own interpretation or reweighing the record evidence.

Even with the one remanded issue, the CIT properly applied a deferential standard of review in a manner consistent with all of the other issues that were affirmed by the CIT. The CIT did not accept the ITC's explanation of the data because it was a *post hoc* rationalization of facts and explanations not evident from the record. However, it appears likely that on remand, the ITC would be able to take that same rationalization as a starting point and provide a similar breakdown of how the data was derived from the underlying data sources and demonstrate that double-counting of data did not occur. The CIT did not challenge the ITC's interpretation of the volume data; rather the CIT specifically found that the ITC did not satisfactorily articulate a rational connection between the factual record (i.e., data on how

85. *See id.* at *6-7 (supporting the ITC's conclusion that jumbo capacity refrigerators were a distinct market segment from smaller refrigerators); *id.* at *8 (that competition between subject imports and Whirlpool was attenuated); *id.* at *8-9 (the range of volume data considered by the ITC was reasonable); *id.* at *11-12 (the ITC's underselling analysis and the choice of data used was reasonable); *id.* at *12-13 (differences in features between refrigerator models were accounted for to the extent possible); *id.* at *14 (potential pricing data deficiencies were reasonably accounted for); at *14-15 (no clear correlation between subject import underselling and declining domestic prices); *id.* at *16 (product life cycle effects were reasonably accounted for in the ITC's consideration of price declines); *id.* at *16-17 (subject imports did not cause the domestic industry's inability to raise prices during the period); *id.* at *17-18 (the ITC's lost sales analysis was reasonable).

86. *Id.* at *11.

jumbo capacity and four-door refrigerators were counted) and the conclusion made (i.e., most of the increase in apparent domestic consumption was due to jumbo capacity and four-door refrigerators). The manner in which the CIT described the deficiencies in the ITC's determination gave the ITC a clear roadmap as to how it should re-examine the record evidence; how it should further explain how the various data sources were evaluated; and how the data should be laid out to demonstrate the percentage of increase in apparent consumption and subject imports.[87]

IV. Summary and Analysis of CIT 2013 Decisions Involving Review of ITC Remand Determinations

Two of the 2013 CIT decisions involved a subsequent round of review by the CIT after at least one remand determination by the ITC. In *Nucor Fastener*, the CIT accepted the ITC's remand determination that again found that a domestic industry was not injured even at the preliminary investigation stage. In *NSK*, the CIT was directed by an order from the Federal Circuit to vacate two previous decisions and to reinstate the affirmative injury determination of the ITC's second remand determination. Both cases illustrate different approaches by the CIT in giving the appropriate level of deference to an ITC determination. The CIT's decision in *NSK* reflects the difficulties that arise when the Federal Circuit conducts a *de novo* review of the ITC's determination and raises significant issues as to the appropriate amount of deference that the Federal Circuit should give to CIT decisions. Although defining the proper level of deference may be elusive, these cases suggest that the CIT's standard of review is broad enough that the CIT can still issue multiple remand orders for repeated reconsideration by the ITC and still be considered properly deferential as required by the statute.

87. Shortly after the CIT issued its decision ordering a remand to the ITC for further consideration, Whirlpool filed an unopposed motion to dismiss its case. *See* Unopposed Mot. to Dismiss, Whirlpool v. United States, No. 12-00164, 35 I.T.R.D. (BNA) 2513, at *1 (Ct. Int'l Trade 2013) (No. 94). Given the unanimous negative determination by the ITC and the manner in which the CIT affirmed all but one narrow aspect of the ITC's determination, Whirlpool apparently decided that the chances of overturning the ITC's negative determination were too slim to justify the cost of trying, so that it was no longer worth continuing the appeal process.

A. *Nucor Fastener II*

1. Summary of Case History

The CIT reviewed the ITC's preliminary negative injury determination in the AD/CVD investigation of steel fasteners from China and Taiwan[88] and issued a decision in August 2011 that ordered a remand for the ITC to address two issues of concern to the CIT.[89] In *Nucor Fastener I*, though the CIT affirmed other aspects of the ITC's determination, the CIT took issue with (1) the ITC's treatment of its import data as comprehensive; and (2) the ITC's unqualified reliance on Producer A's (which identified itself as a U.S. producer of domestic like product) questionnaire response.[90]

In reviewing the ITC's conclusion that the importer questionnaire data was comprehensive, the CIT in *Nucor Fastener I* agreed with the petitioner that the ITC had failed to provide a "reasoned basis" for its conclusion that the importer response was sufficient in light of the record evidence of apparent gaps in the data and ambiguous descriptions of what the data represented.[91] The CIT found the ITC's approach to be a "casual conflation of a limited sample with the larger population from which that sample is drawn"[92] On remand, the CIT directed that the ITC "must include at least a candid recognition of and response to inherent limitations" of the importer questionnaire responses received.[93]

On the second issue, the CIT in *Nucor Fastener I* agreed with the petitioner's argument that there were significant questions whether the ITC should have included in the domestic industry data the questionnaire response data from a producer (Producer A) that may not have actually produced the domestic like product. Although the ITC had argued that it was "authorized to weigh evidence and resolve conflicts in the data," the CIT found that the ITC did not demonstrate that it had even considered any discrepancies.[94] As a result of this apparent

88. Certain Standard Steel Fasteners from China and Taiwan, Inv. Nos. 701-TA-472, 731-TA-1171-1172, USITC Pub. 4109 (Nov. 2009) (Preliminary).

89. *Nucor Fastener I*, 791 F. Supp. 2d 1269, 1292 (Ct. Int'l Trade 2011).

90. *Id.* at 1280-87.

91. *Id.* at 1281-84, 1292 (e.g., CIT unclear whether ITC referred to "significant known importers" or "significant known imports"; CIT cited lack of evidence of overlap of reporting importers and universe of relevant importers; CIT found no explanation for why reported export volume was greater than reported import volume).

92. *Id.* at 1283.

93. *Id.* at 1285.

94. *Id.* at 1287.

omission, the CIT found it was prevented from identifying a rational basis for the unqualified inclusion of Producer A in ITC's analysis.[95]

On December 7, 2011, four months after the CIT issued its remand order in *Nucor Fastener I*, the ITC issued its remand determination that again affirmed its original negative injury determination.[96] On May 24, 2013, the CIT issued its decision in *Nucor Fastener II* that affirmed the ITC's remand determination.[97] The CIT specifically found that the ITC on remand had adequately addressed the concerns raised in *Nucor Fastener I* by providing a more detailed explanation of how the record evidence supported the ITC's conclusions.

First, the CIT explained that it had remanded the issue of the ITC's finding that the importer questionnaire data was comprehensive because the ITC had failed to acknowledge the inherent limitations of its methodology and thus had failed to consider a critical aspect of the problem.[98] The CIT found that the ITC on remand had provided a more detailed explanation of its methodology, including why it chose to use importer data instead of Customs data, how it collected the data, and how it analyzed the data.[99] The CIT agreed with the ITC that, although the import data may not be comprehensive, the ITC had collected enough import data to reach a negative injury determination and there was no need to proceed with a final investigation.[100] The CIT agreed with the ITC that the standard in preliminary investigations is not whether any additional data could be collected in any final investigation, but rather whether the record as a whole indicates a likelihood that contrary evidence leading to a different outcome could be obtained.[101]

The CIT rejected arguments raised by Petitioner that the questionnaire data was still "spotty and unreliable" and that the ITC's methodology still had significant flaws. The CIT noted that Petitioner's arguments missed "the point of the court's remand instructions—to acknowledge that the ITC's investigatory methods were imperfect."[102]

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95. *Id.*

96. Certain Standard Steel Fasteners from China and Taiwan, Inv. Nos. 701-TA-472, 731-TA-1171, USITC Pub. 4297 (Dec. 2011) (Preliminary) (Remand).

97. Nucor Fastener Div. v. United States (*Nucor Fastener II*), 35 I.T.R.D. (BNA) 1582, *1 (Ct. Int'l Trade 2013).

98. *Id.* at *7.

99. *Id.*

100. *Id.*

101. *Id.* (citing Remand Results at 44 (citing Co-Steel Raritan, Inc. v. United States, 357 F.3d 1294, 1311, 1314-17 (Fed. Cir. 2004))).

102. *Id.* at *7-8.

In accepting the ITC's remand determination, the Court gave particular weight to the ITC explanation that it never obtains perfect data on imports, foreign producers, or the domestic industry in any investigation, given the statutory constraints that require a preliminary determination to be made within forty-five days of the filing of the petition.[103]

On the second issue, the court explained that it had remanded this issue because the ITC had not properly shown that it even considered any discrepancies in the questionnaire responses submitted by Producer A.[104] On remand, the ITC acknowledged the discrepancy between the two questionnaire responses submitted by Producer A and noted the company official's admission of error and subsequent amended response. The ITC argued that it was entitled to rely on a firm's certified statements about its own internal operations and to weigh evidence and resolve conflicts in data.[105] The CIT found that the ITC had adequately addressed the court's remand instructions and that no further investigation was warranted, and sustained the ITC's determination.[106]

2. Analysis

It is worth emphasizing that the underlying ITC determination reviewed by the CIT in *Nucor Fastener I and II* involved a preliminary negative determination, which occurs very rarely.[107] In a preliminary AD/CVD investigation, the ITC must determine whether there is a reasonable indication based on the record as a whole that there is "clear and convincing evidence" of no material injury or threat of injury and that there is "no likelihood" that contrary evidence will arise

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103. *Nucor Fastener II*, 35 I.T.R.D. (BNA) 1582, *7 (Ct. Int'l Trade 2013) (citing 19 U.S.C. §§ 1671b(a)(1)-(2), (f), 1673b(a)(1)-(2), (f)).

104. *Id.* at *9.

105. *Id.* at *8-9. The ITC also noted on remand that because Producer A accounted for such a small fraction of domestic production, inclusion (or exclusion) of Producer A from the domestic industry would not have changed the outcome of the negative injury determination.

106. *Id.* at *9.

107. In the ten years of cases filed between 2004-2013, the ITC has made approximately 200 preliminary determinations, and has made negative determinations in only eight cases: the 2009 cases on Steel Fasteners from China and Taiwan (subject of *Nucor Fastener*); the 2007 case on Lightweight Thermal Paper from Korea (negligible imports); the 2006 cases on Carbon and Certain Alloy Steel Wire Rod from China, Germany, and Turkey; the 2005 case on Liquid Sulfur Dioxide from Canada; and the 2004 case on Polyvinyl Alcohol from Taiwan. For a list of completed AD/CVD preliminary determinations, see *AD CVD Investigations*, UNITED STATES INT'L TRADE COMM'N, http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/completed/index.htm (last visited Oct. 10, 2014).

in a final investigation.[108] The legislative history indicates that Congress purposefully intended for most ITC preliminary investigations to result in affirmative determinations and accordingly required ITC preliminary negative determinations to be held to a higher clear and convincing standard, rather than just a substantial evidence standard that is used for the ITC's final determinations.[109] The limited purpose of the ITC's preliminary investigation is "to weed out those cases that are lacking in merit."[110]

As noted above, the standard of review for the CIT in an appeal of an ITC preliminary negative determination is under an "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[111] It seems inconsistent that Congress on the one hand clearly intended the ITC to make negative determinations only if they essentially had no doubt that the case should not continue, whereas the CIT's review of such negative determination is given the highest level of deference under the "arbitrary and capricious" standard of review instead of the usual level of deference under the "substantial evidence" standard of review for most other ITC determinations including ITC final determinations. If Congress clearly wanted petitioners to have the fullest opportunity to have their cases at least advance to the final investigation phase with more time to conduct a more thorough investigation to develop the record for the ITC to consider, it seems inconsistent that Congress would require a standard of review for the CIT that would make it harder for the CIT to overturn an ITC negative preliminary determination, as opposed to any ITC final determination. Given the intent that most AD/CVD petitions (except for the meritless ones) should move forward at least to the final investigation stage, it seems more appropriate that the CIT should apply the same substantial

108. 19 U.S.C. §§ 1671b(a)(1), 1673b(a)(1); *Nucor Fastener II*, 35 I.T.R.D. (BNA) 1582 at *1 (citing Am. Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986)).

109. "The purpose of a preliminary injury determination is to 'eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade.'" Am. Lamb Co. v. United States, 785 F.2d 994, 1002-03 (Fed. Cir. 1986) (quoting S. REP. No. 1298, 93rd Cong., 2d Sess. 171, *as reprinted in* 1974 U.S.C.C.A.N. 7186, 7308).

110. *Am. Lamb Co.*, 785 F.2d at 1000 (quoting Republic Steel Co. v. United States, 591 F. Supp. 640, 647 (Ct. Int'l Trade 1984)).

111. ITC negative preliminary determinations are grouped together with DOC determinations not to initiate an AD/CVD investigation, ITC determinations to not initiate a changed circumstances review, and DOC/ITC determinations in an expedited sunset review, as determinations that are all subject to the "arbitrary and capricious" standard of review. 28 U.S.C. § 1516a(b)(1)(A), (B)(ii).

evidence standard to ITC negative preliminary determinations, as it does to any ITC final determination.

The legislative history is largely silent as to why ITC preliminary negative determinations are subject to the more deferential "arbitrary and capricious" standard of review than the "substantial evidence" standard of review for ITC final determinations. The Senate Report for the Trade Agreements Act of 1979 states that "[i]n general, the standard for interlocutory determinations would whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The standard for other determinations would be whether they are supported by substantial evidence on the record or are otherwise not in accordance with law."[112] The record for an ITC preliminary determination is not as developed as an ITC final determination because of the shorter time frame to conduct its investigation.[113] Thus perhaps there was concern that the record may not be developed enough to justify a substantial evidence standard. An ITC preliminary negative determination, however, does not seem like an interlocutory determination because it is neither a separate determination that is made independent of other determinations, nor is it a determination that is not otherwise appealable. An ITC preliminary negative determination has the same finality of terminating the investigation as does an ITC final negative determination. Accordingly, it seems that the CIT's standard of review should not give an ITC preliminary negative determination any more deference than an ITC final negative determination (or final affirmative determination).

Although the standard of review for ITC negative preliminary determinations under the "arbitrary and capricious" standard is supposed to be more deferential than the "substantial evidence" standard for ITC final determinations, in practice, it is not obvious how the CIT distinguishes between the two standards. The *Nucor Fastener II* decision actually cited to the substantial evidence standard of review, yet appeared to give more deference to the ITC's remand determination than the *Nucor Fastener I* decision. The CIT in *Nucor Fastener II* emphasized that the original remand order was due to the ITC's failure to acknowledge certain discrepancies or to address particular issues. Once the ITC acknowledged the limitations of its data collection process and provided a more detailed explanation of its findings, the

112. S. REP. No. 96-249, at 414 (1979).

113. ITC preliminary determinations are to be made within forty-five days of petition filing date. 19 U.S.C. § 1673b(a)(2)(A). ITC final determinations are to be made within 120 days after DOC's preliminary determination date. 19 U.S.C. § 1673d(b)(2)(A).

CIT in *Nucor Fastener II* was satisfied and specifically recognized the ITC's discretion to conduct its investigations, particularly in the short time frame provided for preliminary determinations. Regardless of its intent to apply either an "arbitrary and capricious" or "substantial evidence" standard of review, it is clear that the CIT gave sufficient deference to sustain the ITC's preliminary negative determination.

B. *NSK Corporation v. U.S. International Trade Commission*

The CIT's decision in *NSK Corp. v. U.S. International Trade Commission*[114] is the shortest of the 2013 CIT decisions involving an ITC AD/CVD determination, and the one-page slip opinion is simple and straightforward. The CIT's decision notes that pursuant to the Federal Circuit's decision,[115] the ITC's negative material injury determinations from the third and fourth remand results are to be vacated, and the ITC's affirmative material injury determination from the second remand results are to be reinstated.

This *NSK* decision, however, reflects a complicated and convoluted case history that began more than seven years prior with the September 2006 filing of an appeal by several foreign ball bearing producers and exporters that challenged the Commission's affirmative determinations in the second sunset review of the antidumping order on ball bearings from certain countries, including Japan and the United Kingdom.[116]

We first review the lengthy case history of *NSK* through the multiple CIT decisions and ITC remand determinations, the Federal Circuit's decisions, and the appeal to the Supreme Court.[117] We then analyze whether the *NSK* case has bolstered the ITC's authority to exercise its discretion in AD/CVD investigations and to stand its ground in CIT appeals and demand that the CIT give proper deference to the agency's interpretations. Although the *NSK* case could be interpreted

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114. NSK Corp. v. U.S. Int'l Trade Comm'n, No. 06-00334, 2013 WL 6068455 (Ct. Int'l Trade Nov. 18, 2013).

115. *NSK*, 716 F.3d 1352 (Fed. Cir. 2013), *cert. denied*, No. 13-1014, 2014 WL 2440784 (U.S. June 2, 2014).

116. The interested parties that originally appealed or intervened in the challenge of the ITC's affirmative second sunset review determination included NSK Corporation (producer and importer from Japan, U.K), JTEKT Corporation (producer and importer from Japan), Schaeffler (producer from U.K, Germany, Italy, U.S.), and SKF (U.S. producer and importer from France, Germany, Italy, and the United Kingdom).

117. The case history of *NSK* is more fully summarized in the CAFC decision in *NSK*. *See NSK*, 716 F.3d at 1355-63.

as requiring the CIT to be more deferential to the ITC, the passage of time over the course of the *NSK* case also could be interpreted as demonstrating that the CIT was correct in not being satisfied by the ITC's remand determinations. Finally, in light of the perceived or real lack of deference given by the Federal Circuit to the CIT's decisions involving ITC cases, we propose that the CIT consider using three-judge panels to bolster the credibility of the CIT's decision as it is reviewed by the Federal Circuit.

1. *NSK* Case Timeline and Key Issues

a. *ITC Original Determination Through NSK VI*

In August 2006, the Commission completed its second sunset review of the ball bearing AD orders[118] and unanimously found that revocation of the AD orders on bearings from China, France, Germany, Japan, and the United Kingdom likely would lead to the continuation or recurrence of material injury to the domestic industry in a reasonably foreseeable time.[119] Two years after several respondent interested parties filed appeals, the CIT issued its first *NSK* decision that affirmed in part and remanded in part the ITC's second sunset review determination.[120] The CIT affirmed several parts of the Commission's original findings,[121] but remanded the case for the ITC to address three issues that the CIT found inadequately explained in the ITC's original determination: (1) the issue of causation and specifically the impact that non-subject imports might have on the ITC's injury analy-

118. The original AD orders on ball bearings from numerous countries were published in May 1989. Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, 54 Fed. Reg. 20900-11 (May 15, 1989). The first sunset review of the ball bearing orders resulted in affirmative determinations and the continuation of the orders for France, Germany, Italy, Japan, Singapore, and the United Kingdom. Continuation of Antidumping Duty Orders: Certain Bearings from France, Germany, Italy, Japan, Singapore, the United Kingdom, and the People's Republic of China, 65 Fed. Reg. 42665-02 (Jul. 11, 2000).

119. Certain Bearings from China, France, Germany, Italy, Japan, Singapore, and the United Kingdom, 71 Fed. Reg. 51850-01 (Aug. 31, 2006). The ITC issued a negative determination for Singapore.

120. NSK Corp. v. United States (*NSK I*), 577 F. Supp. 2d 1322, 1327-28 (Ct. Int'l Trade 2008).

121. *Id.* at 1336-37, 1342-47. The CIT affirmed the ITC's findings (1) that the subject imports are likely to have a reasonable competitive overlap with the domestic product; (2) that there would likely be a significant volume of subject imports upon revocation of the order; and (3) that subject imports likely would have significant adverse price effects upon revocation of the order.

sis; (2) the issue of the domestic industry's vulnerability to injury from the subject imports in light of the large scale restructuring that had occurred within the ball bearing industry; and (3) the issue of whether imports from the United Kingdom should have been cumulated with other subject imports.[122]

Shortly after the Court issued *NSK I*, the Commission and domestic producer Timken filed a motion to reconsider the decision in *NSK I* in light of the issuance of an intervening decision by the Federal Circuit in *Mittal Steel* that addressed the issue of how the Commission's analysis of causation should account for non-subject imports. The CIT in *NSK II* denied the motions for reconsideration and disagreed that the Federal Circuit's latest decision demonstrated that the Court's analysis of the issue of causation in *NSK I* was in error.[123]

In the ITC's first remand determination, consistent with the Court's instructions in *NSK I*, the Commission reopened the record and obtained additional information to conduct an analysis of non-subject imports.[124] The Commission nonetheless reaffirmed its original findings for each of the three remanded issues of cumulation,[125] vulnerability,[126] and causation.[127] The ITC's first remand determination again reached an affirmative determination that revocation of the orders would likely result in the continuation or recurrence of dumping.

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122. *Id.* at 1333-34, 1338-39.

123. NSK Corp. v. United States (*NSK II*), 593 F. Supp. 2d 1355, 1372 (Ct. Int'l Trade 2008) (discussing the significance of the CAFC decision in Mittal Steel Point Lisas Ltd. v. United States, 542 F.3d 867 (Fed. Cir. 2008)).

124. Ball Bearings from Japan and the United Kingdom, Inv. Nos. 731-TA-394-A, 399-A, USITC Pub. 4082 (May 2009) (Second Review) (Remand) [hereinafter ITC First Remand Determination]. The Commission sent questionnaires to 76 producers of non-subject ball bearings and received usable responses from eighteen producers located in 10 different countries. *Id.* at II-1.

125. *Id.* at 21-26. The Commission found that the U.K. subject imports should be cumulated with other subject imports because the United Kingdom was a substantial producer of ball bearings that maintained a stable and consistent U.S. market presence and that U.K. producers had actually increased their total shipments to the United States during the period of review. *Id.*

126. *Id.* at 34-35. The Commission continued to find the domestic industry to be vulnerable to injury and again pointed to the record evidence of declines in the domestic industry's capacity, production, and sales levels during the POR. *Id.* at 34.

127. The Commission concluded that non-subject imports had not captured, and were not likely to capture market share from subject imports. The ITC's conclusion on causation was based on the findings that (1) subject imports maintained significant market share since the imposition of the orders; (2) most of the market share increases obtained by non-subject imports were at the expense of the domestic industry, not subject imports; and (3) data from the questionnaire responses of producers in non-subject countries indicated that many of them had shipped few, if any ball bearings to the United States. *Id.* at 40-42.

In August 2009, the CIT issued its decision in *NSK III*, finding that the three issues still had not been adequately addressed by the Commission, and again ordered a remand of the same three issues for further reconsideration by the Commission. The Court observed that the Commission did not "genuinely comply with the court's remand instructions" or failed to "meaningfully demonstrate a rational connection between the facts in the record and the conclusions reached."[128] The CIT again ordered a remand for the ITC to better address the issues of cumulation,[129] vulnerability,[130] and causation.[131]

In January 2010, the Commission issued its second remand determination, and again reaffirmed its original findings.[132] The ITC offered some additional explanation, but largely reiterated the same record evidence in maintaining its original position on the issues of cumulation,[133] vulnerability,[134] and causation.[135] Accordingly, the Commis-

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128. NSK Corp. v. United States (*NSK III*), 33 Ct. Int'l Trade 1185, 637 F. Supp. 2d 1311, 1319 (2009).

129. On cumulation, the Court found that ITC's analysis failed to account for significant restructuring and other developments in the ball bearing industry and the significant rise of non-subject imports in the U.S. market. *Id.* at 1328-29.

130. On vulnerability, the Court directed the Commission to address the conflicting evidence in the record regarding the finding of vulnerability because the Commission had "failed to sufficiently address the effect of restructuring within the ball bearing industry" and did not address "whether the domestic industry is vulnerable to increased volumes of subject imports or is simply responding to other market forces." *Id.* at 1328.

131. On causation, the Court noted it could not reasonably discern how the ITC has attributed injury to subject imports rather than non-subject imports given the significant price underselling by non-subject imports. *Id.* at 1323. Accordingly, the Court directed the Commission to "perform a more focused analysis on the causation issue . . . in light of the significant presence of non-subject imports in the domestic market." *Id.* at 1323-24.

132. Certain Ball Bearings and Parts Thereof from Japan and the United Kingdom, Inv. Nos. 731-TA-394-A, 399-A, USITC Pub. 4131 (Jan. 2010) (Second Review) (Second Remand) [hereinafter ITC Second Remand Determination].

133. On the issue of cumulation, although the ITC acknowledged there had been industry restructuring and a significant presence of non-subject imports, the Commission basically reiterated the same factual findings that U.K. producers had available capacity, were highly export-oriented, had a significant presence and interest in the U.S. market, and concluded that U.K. subject imports were well suited to compete aggressively in the U.S. market if the orders were revoked. *Id.* at 54-61.

134. The Commission found that the domestic industry was in a vulnerable, weakened state, making it susceptible to the likely discernible adverse impact of subject imports. *Id.* at 39-40, 65-66. The Commission noted that the domestic industry had reduced its overall production capacity from 448.8 million ball bearings in 2000, the first year of the period of review, to 338.4 million ball bearings in 2005, the last year of the period. *Id.* at 26.

135. As to causation and non-subject imports, the Commission again concluded that despite the significant presence of low-priced, non-subject imports, "the subject imports are likely to be

sion concluded that non-subject imports would not prevent the cumulated subject imports from materially injuring the domestic industry if the orders were revoked.[136]

In April 2010, the Court issued its *NSK IV* decision that finally affirmed the Commission's findings regarding vulnerability, but again ordered yet another remand because it continued to find the Commission's cumulation analysis to be lacking.[137] Moreover, because the cumulation analysis was inadequate, the Court found it could not address the issue of causation.[138] The Court indicated that the Commission did not support its cumulation determination with substantial evidence and instructed that on remand the Commission could "reopen the record and obtain additional data . . . if it so chooses."[139]

In August 2010, the Commission issued its third remand results.[140] Despite being given the opportunity by the Court to reopen the record, the Commission chose not to do so and found that the existing record contained a complete data set for its analysis. The Commission continued to maintain that "the existing record supports our finding that subject imports of ball bearings from the United Kingdom are likely to have a discernible adverse impact upon revocation."[141] The Commission, however, emphasized that the Court's views and remand instructions specifically stated that the existing record as a whole could not

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more than a minimal or tangential factor in the material injury to the domestic industry that is likely to continue or recur upon revocation of the orders." *Id.* at 66. The Commission emphasized that subject imports, non-subject imports, and the domestic like product were all highly substitutable with each other, and also noted that subject imports had maintained a significant market share during the period of review, indicating that non-subject imports were not likely to prevent the cumulated subject imports from increasing their already significant presence to even higher levels that would have a significant adverse impact on pricing and the domestic industry. *Id.* at 73-74.

136. *Id.* at 82.

137. NSK Corp. v. United States (*NSK IV*), 33 Ct. Int'l Trade 1185, 712 F. Supp. 2d 1356, 1364-68 (2009) ("[T]he Commission does not support with substantial evidence its conclusion that the [U.K.] industry likely would export an additional discernible amount of its products to the United States upon revocation.").

138. *Id.* at 1368. Since the case was already being remanded, the Court directed the Commission to address in any revised causation analysis the evidence that non-subject imports increased their market share, had undersold the domestic like product and subject imports in at least two-thirds of the possible price comparisons. *Id.*

139. *Id.* at 1367.

140. Certain Ball Bearings and Parts Thereof from Japan and the United Kingdom, Inv. Nos. 731-TA-394-A, 399-A USITC Pub. 4194 (Aug. 2010) (Second Review) (Third Remand) [hereinafter ITC Third Remand Results].

141. *Id.* at 10-11.

support an affirmative adverse impact finding with respect to subject imports from the United Kingdom. As a result, the Commission stated:

> Since we now are constrained by the Court's remand instructions to find that subject imports from the United Kingdom are not likely to have a discernible adverse impact upon revocation, we are therefore also compelled to find that subject imports from the United Kingdom cannot be cumulated with subject imports from the other four subject countries under the statute.[142]

Although the Commission felt compelled to make a negative determination with respect to subject imports from the United Kingdom, the Commission continued to reach an affirmative determination that subject imports from Japan would likely result in the continuation or recurrence of material injury within a reasonably foreseeable time.[143] The Commission continued to cumulate Japanese subject imports with those from the other subject countries and concluded an affirmative determination was appropriate in light of the conditions of competition.[144] The Commission determined that the presence of non-subject imports would not impair the subject imports' ability to gain significant market share at the expense of the domestic industry.[145]

In December 2010, the Court issued *NSK V* that affirmed the part of the ITC's third remand results with respect to negative determination for the United Kingdom, as well as the Commission's findings that the cumulated subject imports likely would have significant volume and price effects if the orders were revoked.[146] The CIT, however, ordered yet another remand with respect to the affirmative significant impact and causation determination.[147] The CIT found that the Commission had yet again "ignored the influence of non-subject imports in the market" and that "[w]ithout a more thorough examination of non-subject imports, the court cannot determine whether the cumulated

142. *Id.* at 12.

143. *Id.* at 13.

144. *Id.* at 12 n. 56.

145. *Id.* at 34. The Commission emphasized that despite the significant presence of low-priced non-subject imports in the U.S. market, the subject imports have maintained a significant U.S. market presence that had actually increased (by value). *Id.* at 30, 32.

146. NSK Corp. v. United States (*NSK V*), 744 F. Supp. 2d 1359, 1366-67 (Ct. Int'l Trade 2010).

147. *Id.* at 1367.

subject imports constitute more than a minimal or tangential cause of injury to the domestic industry which will likely continue to recur."[148]

In March 2011, the Commission issued its fourth remand determination.[149] The Commission again declined to reopen the record and considered the record of this review to contain as complete a data set as the Commission typically obtains in most sunset reviews.[150] The Commission on remand stated that it believed its prior remand determinations on the likely impact and causation issues were supported by ample record evidence, but that it was "compelled by the Court's instructions to determine that these subject imports are not likely to have a significant impact upon revocation."[151]

The Court quickly sustained the ITC's fourth remand results that the subject imports from Japan would likely not have a significant adverse impact or cause injury to the domestic industry in the absence of the antidumping orders.[152] Although the court affirmed the Commission's negative determination, the court criticized the Commission for continuing "to mischaracterize the court's remand instructions and to mistakenly insist that the court compelled this result."[153]

b. *NSK—CAFC and Petition for Rehearing En Banc*

After the CIT issued *NSK VI* that affirmed the negative determination of the ITC's fourth remand results, the Commission and domestic producer Timken timely filed an appeal to the CAFC. On May 16, 2013, the CAFC reversed or vacated the CIT's decisions in *NSK IV*, *NSK V*, and *NSK VI*, and ordered the CIT to vacate the Commission's negative injury determinations in the ITC's third and fourth remand determinations and to reinstate the affirmative injury determination of the ITC's second remand determination.[154]

The parties disputed the standard of appellate review for the CAFC. The CAFC held that the standard of review "depends on the posture of

148. *Id.* at 1364, 1366.

149. Certain Ball Bearings and Parts Thereof from Japan and the United Kingdom, Inv. Nos. 731-TA-394-A, 399-A USITC Pub. 4223 (Mar. 2011) (Second Review) (Fourth Remand) [hereinafter ITC Fourth Remand Results].

150. *Id.* at 13.

151. *Id.* at 15-16.

152. NSK Corp. v. United States (*NSK VI*), 774 F. Supp. 2d 1296, 1297 (Ct. Int'l Trade 2011).

153. *Id.* at 1297.

154. *NSK*, 716 F.3d 1352 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 2719 (2014).

the case."[155] On the one hand, the CAFC would review for abuse of discretion by the CIT in cases where the CIT does not assess the sufficiency of the evidence supporting the Commission's determinations or require additional investigation by the Commission, but merely remand the matter for additional explanation that would clarify the Commission's determination.[156] On the other hand, if the CIT limits the Commission to either enter a negative determination or reopen the record to support its determination, then the CAFC "steps into the shoes" of the CIT and "conducts a *de novo* review of whether the Commission's determinations are supported by substantial evidence."[157]

In this case, the CAFC concluded that it was appropriate to conduct a *de novo* review of the CIT's decisions and to assess whether the Commission's determinations were supported by substantial evidence.[158] The CAFC found that the CIT had made numerous substantive assessments of the Commission's determinations, and effectively left the Commission with only two options: either to reopen the record and make additional findings, or issue a negative determination.[159]

The CAFC reviewed the Commission's determination to cumulate subject imports from the United Kingdom with those from the other subject countries and found that substantial evidence supported the Commission's conclusion that revocation of the antidumping order on subject ball bearings from the United Kingdom would have a discernible adverse impact on the domestic industry.[160] The CAFC found that the Commission adequately addressed the role of non-subject imports in the marketplace.[161] The CAFC acknowledged that there was evidence that detracted from the Commission's conclusion that U.K. subject imports would have more than a discernible adverse impact on the domestic industry, but concluded "we cannot say that this conflict-

155. *Id.* at 1363 (citing Nippon Steel Corp. v. U.S. Int'l Trade Commission, 494 F.3d 1371, 1378 (Fed. Cir. 2007)).

156. *Id.* at 1363 (citing Altx, Inc. v. United States, 370 F.3d 1108, 1117 (Fed Cir. 2004)).

157. *Id.* at 1363 (citing *Nippon Steel*, 494 F.3d at 1378).

158. *Id.* at 1363-64.

159. *Id.* at 1364 (citing *NSK V*, 774 F. Supp. 2d 1296, 1297, 1366-67 (Ct. Int'l Trade 2011) and *NSK IV*, 33 Ct. Int'l Trade 1185, 712 F. Supp. 2d 1356, 1367 (2009) ("The court does not believe that the existing record, taken as a whole, can support an affirmative discernible adverse impact finding.").

160. *Id.* at 1364-65 (noting the vulnerability of the domestic industry; the significant degree of substitutability among domestic bearings, U.K. bearings, other subject bearings, and non-subject bearings; the underselling by U.K. subject imports; and sufficient available capacity to increase shipments to the United States).

161. *Id.* at 1366.

ing evidence cases such doubt on the Commission's conclusions to leave less than a mere scintilla of evidence or less evidence than a reasonable mind might accept as adequate to support the Commission's conclusion."[162] The CAFC explained that "[u]nder the substantial evidence standard, when adequate evidence exists on both sides of an issue, assigning evidentiary weight falls exclusively within the authority of the Commission."[163] Accordingly, the CAFC reversed the CIT's order affirming the Commission's decision made under protest not to cumulate the U.K. subject imports with those of the other subject countries and ordered the reinstatement of the Commission's decision in the second remand determination to cumulate subject imports from the United Kingdom with the other subject imports.

The CAFC then reviewed the Commission's determinations that revocation of the antidumping orders on subject ball bearing imports from the United Kingdom and Japan, cumulated with other subject imports, would result in the continuation or recurrence of material injury to the domestic industry.[164] The CAFC, "[h]aving reviewed the record as a whole," concluded that "the Commission appropriately determined that revocation of the orders covering the subject countries, in all likelihood, would materially injure a vulnerable domestic industry."[165] Although the CAFC acknowledged that non-subject imports had a significant presence in the market and undersold both domestic bearings and bearings from subject countries, the CAFC found that these facts "do not detract from the Commission's findings to such an extent that we can say the Commission's determinations were not supported by substantial evidence."[166] The CAFC specifically noted that the Commission had addressed and rejected the theories regarding the impact of non-subject imports.[167] The CAFC held that in this case where "there is an adequate basis in support of the Commission's choice of evidentiary weight, the Court of International Trade, and this court, reviewing under the substantial evidence standard, must defer to the Commission."[168]

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162. *Id.* at 1366 (citing Atl. Sugar Ltd. v. United States, 744 F.2d 1556, 1563 (Fed. Cir. 1984) (determining that the Commission's determination was supported by substantial evidence despite significant conflicting evidence)).

163. *NSK*, 716 F.3d 1352, 1366 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 2719 (2014) (quoting Nippon Steel Corp. v. United States, 458 F.3d 1345, 1350 (Fed. Cir. 2006)).

164. *Id.* at 1366-69.

165. *Id.* at 1368.

166. *Id.* at 1368.

167. *Id.* at 1369.

168. *Id.* at 1369 (quoting *Nippon Steel*, 458 F.3d at 1359).

After the CAFC issued its opinion in *NSK*, the court received a motion for rehearing and rehearing en banc. By a 7-3 vote, the CAFC denied the request for rehearing and rehearing en banc.[169]

Judge Lourie, joined by Judges Dyk, Prost, Moore, and O'Malley, authored a concurring opinion, arguing that "there is no legal justification for this court to adopt a rule requiring deference to the substantial evidence determinations of the Court of International Trade."[170] In defending the CAFC's determination to not give the CIT's substantial evidence determinations any deferential treatment, Judge Lourie noted that this standard of review was consistent with traditional principles of administrative law. "All circuit courts have adopted the position that, under the Administrative Procedure Act ("APA"), when district courts review agency action for substantial evidence, and the district court decisions are reviewed by the court of appeals, the appellate courts conduct a non-deferential second level of substantial evidence review, applying the same standard as the district court."[171] Judge Lourie reviewed the legislative history of the relevant statutory provisions regarding the CIT and CAFC judicial review and noted that "the standards of review for administrative action set forth in Section 1516a(b) are exactly the standards set forth in section 706 of the APA."[172] Given the common statutory language, there was "thus every reason to believe that Congress intended the judicial review process in the trade area to track the more general review process in district courts and court of appeals under the APA," that would justify the CAFC's application of a *de novo* consideration of the issue of substantial evidence. Accordingly, Judge Lourie concluded that there was "no need or justification for this court to jettison the *Atlantic Sugar* rule" of applying anew a *de novo* review of an ITC determination.

The concurring judges specifically declined to address the dissenters argument that in light of the special expertise of the CIT it would be "sound policy" for the CAFC to defer to the CIT.[173] They noted that even if it did make more sense for the CAFC to give more deference to the CIT decisions, any change to the CAFC's standard of review should come through legislative action, and not through judicial modification.

Judge Wallach, joined by Chief Judge Rader and Judge Reyna, dissented from the denial of rehearing en banc. The dissent argued

169. NSK Corp. v. United States, 542 F. App'x 950 (Fed. Cir. 2013).

170. *Id.* at 951.

171. *See id.*

172. *Id.* at 954.

173. *Id.* at 955.

that the CAFC should abandon *de novo* review in favor of deference to the CIT and should reverse a decision only if the CIT had "misapprehended or grossly misapplied" the substantial evidence standard.[174]

The dissenting judges first noted that the CAFC's application of the *de novo* standard of review began with a single, unsupported footnote in *Atlantic Sugar*,[175] but that the CAFC has acknowledged that "[o]ther than citation to [19 U.S.C.] § 1516a, *Atlantic Sugar* gave no explanation for according no deference to decisions of the [CIT]."[176] Judge Wallach further noted that the legislative history of Section 1516a(b) further weighs against *de novo* review because Congress expressed its intent to "eliminate *de novo* review of [AD or CVD] determinations or assessments" because such review was "time-consuming and duplicative."[177] Thus it was his opinion that the legislative history favors a more deferential standard of review because "[d]uplicative and burdensome review at the appellate level is inconsistent with Congress' professed goal of streamlining trade cases at the agency and trial court levels."[178]

Not only did the *Atlantic Sugar* standard lack any basis in the statute or case law, the dissent also noted that the CAFC had developed a bifurcated application of the *Atlantic Sugar* standard but that "this clumsy framework is unworkable."[179] By applying different standards of review depending on how much flexibility the ITC was given on remand, the CAFC is forced to first wrestle with difficult and complex questions merely to determine the appropriate standard of appellate review. Furthermore, the dissent found no meaningful distinction between a CIT remand for "clarification" or a CIT remand for "clarifying data," as the CIT often gives the agency the choice of how to deal with the lack of sufficient evidence. "Allowing an agency to effectively choose at whim this court's standard of CIT review is simply nonsensical."[180]

The dissent claimed that deference to CIT decisions was appropriate because of the well-recognized specialized expertise of the CIT in

174. *Id.* at 956 (quoting Universal Camera v. NLRB, 340 U.S. 474, 491 (1951)).

175. Atl. Sugar, Ltd. v. United States, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984).

176. NSK Dissent from denial of petition for rehearing en banc at 4, NSK Corp. v. United States, 774 F.Supp. 2d 1296 (Ct. Int'l Trade 2011) (quoting Zenith Elecs. Corp. v. United States, 99 F.3d 1576, 1580 (Fed. Cir. 1996) (Rader, J., concurring)).

177. *Id.* at 5 (citing H.R. REP. No. 96-317, at 181 (1979)).

178. *Id.*

179. *Id.* at 6-8.

180. *Id.* at 8.

international trade issues of unique complexity.[181] The dissent specifically noted that the CIT is not simply a subject-specialty court, and thus is unlike other trial courts or specialty courts that are subject to the *de novo* standard of review by other appellate courts. Unlike other settings, if the CIT remands a case back to the ITC (or DOC), the remand determination returns to the CIT for further re-examination, and this process may take multiple iterations until the CIT finds the determination is supported by substantial evidence. By the time the case reaches the CAFC, the CIT has already spent a lengthy amount of time reviewing multiple agency determinations and issuing decisions that identify gaps in the evidentiary record that require further explanation or supplemental evidence. The dissent noted that the CAFC has recognized the complex procedural history of cases from the CIT.[182] In this particular *NSK* case, the CIT had authored six separate decisions, reviewed five successive injury determinations by the ITC, reviewing thousands of pages of record evidence, over a seven year period. The dissent expressed skepticism that the CAFC "purportedly reviewed all of this *de novo*" with "five and half pages of analysis."[183]

c. *Petitions for Certiorari and Amicus Briefs*

On February 21, 2014, a petition for writ of certiorari was filed with the Supreme Court on behalf of NSK Corporation, NSK Ltd., NSK Europe, JTEKT Corporation, and JTEKT North America.[184] In support of the petition, briefs as amici curiae were filed by seven international trade law professors,[185] and by the Japanese Bearing Industry Association.[186]

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181. *Id.* at 9-10 (citing United States v. Haggar Apparel Co., 526 U.S. 380, 394 (1999); *Nippon Steel*, 458 F.3d at 1350; H.R. Rep. No. 96-1235 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 3729; Ad Hoc Shrimp Trade Action Comm. v. United States, 618 F.3d 1316, 1321 (Fed. Cir. 2010)).

182. *Id.* at 11-12 (citing *Nippon Steel*, 494 F.3d at 1373; *Nippon Steel*, 458 F.3d at 1348).

183. *Id.* at 12.

184. NSK Corp. v. United States, 774 F. Supp. 2d 1296 (Ct. Int'l Trade 2011), *petition for cert. filed*, No. 13-1014 (U.S. Feb. 21, 2014).

185. Brief of 7 International Trade Law Professors as Amici Curiae in Support of Petitioners, NSK Corp. v. U.S. Int'l Trade Comm'n, 716 F.3d 1352 (Fed. Cir. 2013) [hereinafter Professors' Amicus Brief]. Professors Padideh Ala'I (American University Washington College of Law), Steve Charnovitz (George Washington University Law School), William Davey (University of Illinois College of Law), Robert Howse (New York University School of Law), Petros Mavroidis (Columbia University Law School), Matthew Schaefer (University of Nebraska College of Law), Claire Wright (Thomas Jefferson School of Law).

186. Brief of the Japan Bearing Industry Association as Amicus Curiae in Support of Petitioners, NSK Corp. v. U.S. Int'l Trade Comm'n, 716 F.3d 1352 (Fed. Cir. 2013) [hereinafter JBIA Amicus Brief].

The petition argued that 19 U.S.C. § 1516a specified the standard of review for the CIT, without expressly providing a standard of review for the Federal Circuit, and that the *Atlantic Sugar* "apply anew" standard of appellate review was not supported by "historical tradition."[187] The petition further argued trade actions under § 1516a were not intended to be reviewed by the Federal Circuit under the APA's judicial review provision, given that Congress affirmatively provided for APA review for CIT actions brought under the residual jurisdiction provision of 28 U.S.C. § 1581(i), but did not expressly do the same for actions brought under § 1516a.[188] The traditional factors used to infer standards of appellate review under *Pierce* weighed against the Federal Circuit's "apply anew" standard of review.[189] The petition highlighted how deferential appellate review would acknowledge the benefits of the CIT's expertise in trade matters and would streamline and expedite judicial review by reducing redundant proceedings.[190]

The petition also highlighted how the Federal Circuit's standard of review increases the uncertainty of trade litigation. The Federal Circuit has frequently asserted that the CIT decision is entitled to "due respect" or even "great weight," but that the level of respect actually given varied widely.[191] The Federal Circuit's relative inexperience in trade matters, compared to the CIT,[192] generates unpredictability as to

187. Petition for Cert. at 20-23, NSK Corp. v. United States, 774 F.Supp. 2d 1296 (Ct. Int'l Trade 2011). The supporting amicus briefs argued that the CAFC's "applying anew" standard was inconsistent with Congressional concern over duplicative, redundant, and lengthy review. *See* Professors' Amicus Brief, *supra* note 185, at 13-15.

188. *Id.* at 23-24 (agency hearings on trade matters exempt from APA requirements (19 U.S.C. § 1677c(b)), and established unique review structure with exclusive jurisdiction granted to the only Article III trial court that is dedicated solely to cases within international trade subject matter).

189. *Id.* at 26-30 (citing Pierce v. Underwood, 487 U.S. 552, 558-62 (1988)).

190. *Id.* at 29-30. *See also* JBIA Amicus Brief, *supra* note 186, at 18-19 ("[The Federal Circuit's] replication of the record review already performed effectively renders the Court of International Trade's review superfluous[, and] undercuts the benefits [the Federal Circuit] derives from the experience and expertise of the Court of International Trade.") (quoting Zenith Electronics Corp. v. United States, 99 F.3d 1576, 1583 (Fed. Cir. 1996) (Rader, J., concurring) (citations omitted)).

191. *Id.* at 31 (some CAFC cases with close examination of CIT's analysis, e.g., Suramerica De Aleaciones Laminadas, C.A. v. United States, 44 F.3d 978, 985-87 (Fed. Cir. 1994); *Nippon Steel*, 458 F.3d at 1353-59; other CAFC cases with little to no examination of CIT 's analysis, e.g., Cleo Inc. v. United States, 501 F.3d 1291, 1296-03 (Fed. Circ. 2007); Matsushita Elec. Indus. v. United States, 750 F.2d 927, 932-33 (Fed. Cir. 1984).

192. In *Nippon Steel*, the CAFC acknowledged that "trade cases comprise only about six percent of the Federal Circuit docket." 458 F.3d at 1350. The diversity of the CAFC's caseload

how the CAFC will consider a case.[193] The petition noted that the CAFC did not even acknowledge the many problems identified by the CIT regarding the ITC's causation analysis, but merely asserted a bald conclusion that the ITC's determination was supported by substantial evidence. The petition for cert noted that this CAFC standard of review created a "system in which parties can, as in this case, litigate for years before the [CIT] and the agency, only to roll the dice in an appeal in which even the standard of review is unclear."[194]

In opposition to the petition, the government filed a response, as well as the Timken Company,[195] who was the original petitioner of the bearings AD/CVD case. The government noted that "[f]or purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."[196] Longstanding appellate practice establishes that a trial court's review of agency action based on an administrative record, including the trial court's determination whether the administrative decision was supported by substantial evidence, presents a question of law that is subject to *de novo* review. When a party

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covers appeals of patent issues, government contracts, federal personnel issues, veteran's benefits, and suits for money damages against the United States such as unlawful takings, tax refund appeals, and civilian and military pay claims. *See also* Professors' Amicus Brief, *supra* note 185, at 5 (citing H.R. REP. No. 96-1235, at 28 (1980), *as reprinted in* U.S.C.C.A.N. 3729, 3739 ("re-emphasis and clarification of Congress' intent that the expertise and national jurisdiction of the [CIT] be exclusively utilized in the resolution of conflicts and disputes arising out of the tariff and international trade laws.")), at 6-8 (citing S. REP. No. 97-275, at 6 (1981) *as reprinted in* U.S.C.C.A.N. 11, 16 ("The Court of Appeals for the Federal Circuit will not be a 'specialized court,' as that term is normally used. The Court's jurisdiction will not be limited to one type of case, or even to two or three types of cases.")).

193. The supporting amicus briefs also noted that the members of the CAFC at times have acknowledged the problems of the *Atlantic Sugar* "apply anew" standard of review and the unpredictability of the CAFC's level of deference to CIT decisions. *See* Professors' Amicus Brief, *supra* note 185, at 20-26.

194. *Id.* at 32.

195. Timken highlighted Congress's reforms of the U.S. trade laws in 1979 which eliminated the Customs Court's *de novo* review of the Treasury Department's antidumping factual determinations and created judicial review standards for trade remedy decisions that mirrored the standards used for judicial review of other federal agency decisions. Brief for Defendant-Appellee Timpken U.S. Corp. at 5, NSK LTD v. United States, Nos. 05-1275, 05-1276, 2005 WL 5915739 (Fed. Cir. 2005). Timken explained that Congress intended only to eliminate duplicative fact-finding with its 1979 amendments, but intended for traditional administrative law principles to apply to judicial review of trade determinations. *Id.* at 18-24.

196. Government Response Brief at 7, NSK Corp. v. U.S. Int'l Trade Comm'n, 716 F.3d 1352 (Fed. Cir. 2013) (quoting *Pierce*, 487 U.S. at 558).

seeks review of agency action under the Administrative Procedure Act (APA),[197] the district judge sits as an appellate tribunal and "[t]he entire case on review is a question of law."[198] Where the entire agency-review case is essentially a legal question, a court of appeals owes no deference to a district court's resolution of that legal question. Because the agency itself is owed deference by the trial court, it would be "anomalous" or even "analytically impossible" for a court of appeals "to defer also to another court's review of the agency's action."[199] Therefore, for such agency-review decisions, the district court and the court of appeals are to perform the identical task "of deciding whether, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review."[200]

The Government also disputed the argument that a different standard of review was appropriate because of the specialized nature of international trade law. The Government noted that the Supreme Court has consistently rejected arguments for a special rule of law based on the complexity of the subject matter and the specialized nature of the tribunal.[201]

Although the government acknowledged that the CIT is a more specialized court than the CAFC, the CIT is not the entity with primary responsibility for antidumping determinations; the Commission and Commerce are the expert agencies with such primary responsibilities.[202] By specifying a substantial evidence standard of review for the CIT's review of ITC determinations, Congress sought to ensure that the court would not second-guess the Commission's assessment of conflicting evidence or substitute its own interpretation of the record evidence. The Government noted that requiring the Federal Circuit to defer to the CIT's decision *rather than* to the ITC's determination would effectively treat the CIT as the primary decision-maker, which would be contrary to Congress' intent. Accordingly, the CAFC's *de novo* review of

197. 5 U.S.C. §§ 551-59.

198. *Government Response Brief, supra* note 196, at 7-8 (quoting American Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083 (D.C. Cir. 2001)).

199. *Id.* at 8 (quoting Novicki v. Cook, 946 F.2d 938, 941 (D.C. Cir. 1991)).

200. *Id.* (quoting Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985)).

201. *Id.* at 15 (citing Dickinson v. Zurko, 527 U.S. 150, 154 (1999) ("[r]ecognizing the importance of maintaining a uniform approach to judicial review of administrative action.") (rejecting suggestion that CAFC's expertise in patent matters justified a more searching judicial review of fact-finding by the U.S. Patent and Trademark Office); Mayo Found. For Med. Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011) (declining "to carve out an approach to administrative review good for tax law only")).

202. *Id.* at 16.

the CIT's decision in the review of the ITC's second sunset review determination was the correct standard of review.

2. Analysis

The *NSK* case reflects the tension in the different expectations of judicial deference that the ITC, CIT and CAFC each have towards the judicial review of ITC determinations. An enormous gap developed between the ITC and CIT in *NSK* because they strongly disagreed as to how the CAFC's decision in *Mittal Steel* affected the injury causation standard and the level of deference that the ITC is entitled to during judicial review. Because the CIT in *NSK I* had relied upon the CAFC decision in *Bratsk* for explaining why the ITC needed to do a better job explaining how it considered non-subject imports in its injury analysis,[203] the ITC took the position that CAFC's decision in *Mittal Steel*, issued shortly after *NSK I*, represented an intervening change in controlling law so that the CIT was legally required to reconsider its *NSK I* decision and adhere to the deferential standard of review. The CIT disagreed that *Mittal Steel* precluded the application of the principles of *Bratsk* to sunset reviews, and explained that its analysis in *NSK I* was consistent with the principles expressed in *Gerald Metals*, *Bratsk*, and clarified by *Mittal Steel*, where the ITC's injury analysis involved commodity products in which fairly-traded, price competitive non-subject imports were a significant factor in the market.[204]

From the ITC's perspective, the CAFC's decision in *NSK* can be interpreted as requiring the CIT to be more deferential and to not second-guess how the ITC conducts its causation analysis in injury determinations. The ITC firmly believed that it had more than adequately addressed in its causation analysis any concerns that injury caused by non-subject imports was incorrectly being attributed to subject imports, and that the CIT was not properly considering the undisputed finding that the domestic industry was vulnerable. Under the substantial evidence standard of review, this condition of competition was an important context for the ITC's conclusion that subject imports would be more than a minimal or tangential cause of injury, even with the significant presence of competitive non-subject imports.

Indeed, by the time the CIT issued *NSK IV*, it appears that the ITC concluded that the CIT had misapplied the standard of review in considering the causation arguments and had gone so far as to compel

203. *NSK I*, 577 F. Supp. 2d 1322, 1327-28, 1333-34 (Ct. Int'l Trade 2008).

204. *NSK II*, 593 F. Supp. 2d at 1367-72 (Ct. Int'l Trade 2008).

the CIT to issue negative determinations in the third and fourth remand determinations.[205] Ultimately, the ITC appears to have made a strategic decision by the third remand determination to essentially concede to the CIT under protest in the hopes that the CAFC would be more deferential and accepting of the ITC's interpretation that *Mittal Steel* had limited the reach of *Bratsk*. From the ITC's perspective, the CAFC decision in *NSK* validated its firm stance to defend its institutional interest in maintaining its independence and bolstered the ITC's authority to exercise its discretion in how it conducts its investigations, particularly on how it decides difficult causation issues. Although the CIT in *NSK* found the ITC's analysis of non-subject imports to be conclusory, cursory, and with obvious gaps in logic,[206] the CAFC disagreed and found the ITC's analysis to be sufficiently supported by substantial evidence even though it acknowledged that there were "numerous record facts [that] detract from the Commission's conclusion."[207] The CAFC emphasized that the ITC's views are entitled to deference from the courts because "it is the role of the expert fact-finder—here the majority of the Presidentially appointed, Senate-approved Commissioners—to decide which side's evidence to believe."[208]

From the CIT's perspective, even if questions of whether the CAFC properly reversed and vacated the CIT's decisions and sustained the ITC's affirmative sunset review determination are set aside,[209] the CIT's position in *NSK* nevertheless could still be viewed as proven reasonable by the decision of Petitioner Timken to abandon the ball bearing AD orders in the third sunset review.[210] Unlike an original investigation in

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205. *See, e.g.*, ITC Third Remand Results, *supra*, note 140, at 12-13 ("[T]he Court's statement that the record, as it stands, cannot establish that subject imports from the United Kingdom would likely have a discernible adverse impact upon revocation necessarily compels us to" make a negative determination).

206. *See, e.g.*, *NSK III*, 637 F. Supp. 2d at 1321-22 (2009).

207. NSK Corp. v. U.S. Int'l Trade Comm'n, 716 F.3d 1352, 1368 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 2719 (2014).

208. *NSK*, 716 F.3d at 1368-69 (quoting *Nippon Steel*, 458 F.3d at 1359).

209. The CAFC dissent was skeptical that the CAFC "purportedly reviewed all of" the thousands of pages of record evidence from multiple CIT and ITC determinations in "five and half pages of analysis." *NSK-CAFC Dissent from denial of petition for re-hearing en banc* at 12.

210. In September 2011, the AD orders were revoked for ball bearings from France, Germany and Italy. Ball Bearings and Parts Thereof from France, Germany and Italy: Final Results of Sunset Reviews and Revocation of Antidumping Duty Orders, 76 Fed. Reg. 57019 (Sept. 15, 2011). After the CIT issued its final order in NSK, the AD order on ball bearings from Japan and the United Kingdom was reinstated in December 2013. Ball Bearings and Parts Thereof from Japan and the United Kingdom: Notice of Reinstatement of Antidumping Duty Orders, Resump-

which the ITC must determine the existence of present material injury, a sunset review requires the ITC to conduct a prospective analysis of the likelihood of the recurrence or continuation of injury based on a forward-looking analysis of facts from the past and present to reach a reasoned conclusion about the likely future developments. Although the CAFC deferred to the ITC's prediction in the second sunset review that subject imports would be more than a tangential factor in material injury in the imminent future, the petitioner's decision to not participate in the third sunset review suggests that the ITC's view of the future in the second review was wrong.

Presumably, if Timken thought that subject imports were more than a mere and tangential injury factor, then it would have sought to maintain the orders in the third sunset review. Given how strongly the ITC defended its affirmative second sunset review determination through multiple rounds at the CIT and CAFC, Timken could have reasonably expected that the ITC in the third sunset review would have considered causation and the effect of non-subject imports in a similar manner to the second sunset review. However, by the time the third sunset reviews were initiated in 2011, it appears that some other factor had altered the business conditions of the U.S. ball bearing market enough so that Timken concluded that it was nonetheless no longer worth trying to defend the AD orders in the third sunset review.

The CIT's review of the ITC's determination in the second sunset review, thus, appears to have been validated by the passage of time that strongly suggests that the domestic industry was being affected more significantly by some other factor besides the subject imports. The CIT appropriately did not consider the statutory requirement for a deferential standard of review to mean that it should abdicate its responsibility to ensure that the agency adequately explain how its factual findings and legal conclusions are supported by substantial evidence. The CIT repeatedly expressed concerns that the ITC had provided only cursory and conclusory statements regarding the significant presence of non-subject imports that posed a potentially impenetrable barrier and had failed to explain how subject imports were more than a mere and tangential factor in any prediction of the continuation or recurrence of material injury. In demanding that the ITC provide a better explana-

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tion of Administrative Reviews, and Advance Notification of Sunset Reviews, 78 Fed. Reg. 76104 (Dec. 16, 2013). The reinstated orders proceeded immediately to a sunset review that resulted in the revocation of the orders in March 2014. Ball Bearings and Parts Thereof from Japan and the United Kingdom: Final Results of Sunset Reviews and Revocation of Antidumping Duty Orders, 79 Fed. Reg. 16771 (Mar. 26, 2014).

tion that did not dodge the issue of non-subject imports, the CIT maintained that it was being appropriately deferential and criticized the ITC for mischaracterizing its instructions which merely invited the ITC to reopen the record to give them the opportunity to better address the issue of non-subject imports and did not compel the ITC to make a negative determination.[211] Thus, despite the CAFC's holding in *NSK* that the CIT should have been more deferential, the CIT could reasonably conclude that it had applied an appropriately deferential standard of review in light of petitioner's abandonment of the AD orders in the third sunset review.

The *NSK* case highlights how the CIT faces two fundamental problems in how its decisions are viewed. First is the fact that the CIT does not have primary responsibility for the administration of the AD/CVD laws. The ITC and DOC are the agencies designated by Congress to have such primary responsibility. The second problem is the fact that the CIT also is not the final arbiter as to whether the agency's interpretation of the AD/CVD laws was reasonable and justified. Even if the CAFC gives "great weight" or "due respect" to the CIT's decision, it is clear that the CAFC will step into the shoes of the CIT and conduct a *de novo* review of the ITC's decision. On the one hand, the CIT's review of ITC determinations is limited because it can only point out flaws in the ITC's determinations under the substantial evidence or arbitrary and capricious standard of review and cannot direct the ITC to a particular outcome. On the other hand, the CAFC's practice is to conduct *de novo* review of the ITC's decision and the CIT's decision is given some unspecified quantum of deference. As demonstrated in *NSK*, the CIT can be limited to a passive-aggressive commentary of the ITC's decision that is often resisted by the ITC and ignored by the CAFC.

One suggestion for the CIT to bolster its position relative to the CAFC and ITC may be to use three-judge panels in appeals of ITC determinations that reach more than one remand determination. This would address the concern that one CIT judge is going too far in his/her review of the ITC's determination. If that CIT judge is joined by two other CIT judges, the CIT's decision would arguably carry greater weight because it will have been considered by three different CIT judges. A three-judge panel could also emphasize the CIT's concerns about the agency's position on certain issues. If the CIT perceives a pattern of undue resistance on an issue that has been

211. *NSK V*, 774 F. Supp. 2d at 1297, 1361 (Ct. Int'l Trade 2011).

addressed by multiple decisions, a CIT three-judge panel could be used to highlight the importance of the CIT's position and emphasize the need for the agency to comply in a satisfactory manner.

A three-judge panel could also expedite the CIT's review of ITC determinations. Unlike the ITC which must make its determinations in investigations or sunset reviews within a statutorily mandated deadline,[212] the CIT has no statutory deadline by which it must issue its decisions. Each of the CIT decisions in 2013 required significantly more time than the underlying ITC decision, particularly the ones involving ITC remand determinations.[213] A three-judge panel could help limit the multiple remands back to the ITC if the panel's decisions are given greater weight and a sense of finality in the CIT's position.

The chief judge of the CIT has authority under 28 U.S.C. 255(a) to assign an action to a three-judge panel if the action: (1) raises an issue of constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.[214] Rule 77(e)(2) provides that the chief judge may assign a three-judge panel either upon motion or upon the chief judge's own initiative.[215]

Although review of ITC decisions does not raise a constitutional challenge to a federal statute, a presidential proclamation or executive order, there may be issues raised in an appeal of an ITC decision that could have broad or significant implications in the administration or interpretation of trade laws. The debate over how the ITC should evaluate causation, particularly in cases involving commodity products and a significant presence of competitive non-subject imports could be one such issue with broad implications as many injury cases must wrestle with this issue. Given the significant line of Federal Circuit cases

212. The ITC must make preliminary determinations in AD/CVD investigations within forty-five days of the filing date of the petition. 19 U.S.C. §§ 1671b(a), 1673b(a). The ITC must make final determinations in AD/CVD investigations within 120 days of DOC's preliminary determination or 45 days of DOC's final determination. 19 U.S.C. §§ 1671d(b)(2), 1673d(b)(2). The ITC must make sunset review determinations within 360 days of its initiation. 19 U.S.C. § 1675(c)(5).

213. *Swiff-Train* was issued fifteen months after the appeal was filed with the CIT. *Downhole* was issued twenty-eight months after the appeal was filed. *Whirlpool* was issued seventeen months after the appeal was filed. The original ITC determination considered in *Nucor Fastener* was issued in November 2009. The ITC sunset review determination underlying *NSK* was issued in August 2006.

214. 28 U.S.C. § 255(a).

215. USCIT R. 77(e)(2).

that have addressed this issue in *Gerald Metals*, *Bratsk*, *Mittal Steel*, and now *NSK*, a three-judge panel may be an appropriate way for the CIT to provide its latest interpretation of how causation should be determined in a manner that reflects the consensus of the CIT. A decision by a three-judge panel could be viewed as having greater weight than a decision by a single judge because it reflects some consensus among the CIT judges and would promote uniformity in decision-making on this key issue. A three-judge panel theoretically could also promote judicial economy and efficiency as it could eliminate several rounds of remands and remand determinations that may not fully comply with a decision by a single judge.

Granted, use of a three-judge panel should be used sparingly.[216] A three-judge panel is not intended to function as an appellate court or to correct errors of a single judge.[217] However, the CIT has used three-panel judges in certain rare instances that did not raise any constitutional issues.[218] Given the CIT's protracted review and multiple remands in *NSK* that was eventually reversed and vacated by the CAFC, the CIT may wish to consider using a three-judge panel if an issue of significant implications in future ITC cases (such as the causation issue) looks like it may escalate to the level reached in *NSK*. For example, the CIT in *Swiff-Train* remanded the case back to the ITC to reconsider several issues including one concerning the proper standard for determining causation. If, after the ITC's remand determination is issued in *Swiff-Train*, the CIT sees that the issue is headed towards loggerheads with the ITC and CIT far apart on the issue of causation, the CIT may on its own initiative empanel a three-judge panel in the interest of judicial economy and efficiency and to add further weight to the CIT's consideration of this issue. If the original judge and two other judges agree, the CIT's decisions would have greater weight of the CIT behind it when it is appealed to the CAFC. Presumably, the addition of two other judges would help temper the

216. Nat'l Corn Growers Ass'n v. Baker, 10 Ct. Int'l Trade 517, 522, 643, F. Supp. 626, 631 (Ct. Int'l Trade 1986).

217. Aectra Refining and Marketing Inc. v. United States, 545 F. Supp. 2d 1354 (Ct. Int'l Trade 2008) (citing Seattle Marine Fishing Supply Co. v. United States, 13 Ct. Int'l Trade 227, 709 F. Supp. 226 (Ct. Int'l Trade 1989)).

218. *See, e.g.*, USEC, Inc. v. United States, 259 F. Supp. 2d 1310 (Ct. Int'l Trade 2003); USEC Inc. v. United States, 27 Ct. Int'l Trade 1419, 281 F. Supp. 2d 1334 (2003); Tembec, Inc. v. United States, 30 Ct. Int'l Trade 1519, 461 F. Supp. 2d 1355 (Ct. Int'l Trade 2006); Tembec, Inc. v. United States, 31 Ct. Int'l Trade 241, 475 F. Supp. 2d 1393 (Ct. Int'l Trade 2007).

views of a single judge that may be seen as too extreme by the ITC or CAFC.

The CIT has noted that in particular cases should not be assigned to three-judge panels after a decision has been rendered by the assigned single judge.[219] However, a request for a three-judge panel that comes from the originally assigned CIT judge could be viewed as different from a request from one of the parties. A request for a three-judge panel from one of the judges could be viewed as a request for the CIT to address a particular issue of significant concern with the full weight of the court. Because the CIT is caught in a position where it is between the ITC, which has primary fact-finding authority in trade cases, and the CAFC, which has essentially the final say in judicial review of trade cases, the CIT may wish to consider using its three-judge panels to bolster its position on certain controversial issues.

V. Conclusion

In 2013, all but one of the CIT's decisions in appeals from ITC determinations resulted in remand orders or involved remand determinations. Although each of the CIT decisions involved an order for the ITC to reconsider its original determination, the CIT conducted its review of the agency's determinations with an appropriate level of deference according to the statutorily mandated judicial standard of review. These CIT decisions demonstrate that "deference" does not mean "acceptance." Rather, in applying a "substantial evidence" or "clear and convincing" standard of review, the CIT properly identified specific gaps in the evidentiary record that required additional explanation or supplemental evidence, but still gave the ITC the opportunity to exercise its sound administrative discretion to reconsider and address the issues on remand.

In light of the CIT's exclusive jurisdiction on international trade cases, including ITC determinations, the CIT is uniquely positioned to focus its expertise on trade matters and conduct a deep and thorough review of an agency determination that cannot be matched by any other court. However, the CIT's decisions are limited by the fact that the agencies (ITC and DOC) are the primary fact-finders and administrators of the trade laws, while the CIT's decisions also are subject to another layer of judicial review by the CAFC on a *de novo* basis. Although the CAFC's decision in *NSK* suggests that the CIT should be

219. *Aectra*, 545 F. Supp. 2d at 1354 (citing Cemex, S.A. v. United States, 15 Ct. Int'l Trade 235, 240, 765 F. Supp. 745, 750 (Ct. Int'l Trade 1991)).

more deferential to the ITC, the subsequent termination of the ball bearing AD orders suggests that the CIT properly applied the standard of review in repeatedly questioning whether the ITC had done enough to demonstrate that injury was likely to continue or recur by reason of subject imports in light of the significant volume of competitive non-subject imports. In each of the CIT's 2013 decisions, the CIT was properly deferential to the ITC in making sure that the ITC's determinations were based on reasonable explanations that were supported by substantial record evidence.