Nos. 10-1433, 10-1439

In The
Supreme Court of the United States

UNITED STATES STEEL CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA AND
TATA STEEL IJMUIDEN BV (FORMERLY KNOWN AS CORUS STAAL BV),
Respondents.

NUCOR CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA AND
TATA STEEL IJMUIDEN BV (FORMERLY KNOWN AS CORUS STAAL BV),
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF SOUTHERN SHRIMP ALLIANCE AND COALITION FOR FAIR LUMBER IMPORTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Southern Shrimp Alliance ("SSA") is an organization of shrimp fishermen, shrimp processors, and other members of the domestic industry in the eight warmwater shrimp producing states of Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas. The SSA works to ensure the continued vitality and existence of the U.S. shrimp industry that has been, and continues to be, adversely impacted by the abandonment of zeroing in antidumping investigations.

The Coalition for Fair Lumber Imports ("Coalition") is an alliance of large and small producers of softwood lumber from across the United States. The Coalition monitors Canada's unfair trade practices involving softwood lumber, including sales of softwood lumber in the United States at less than fair value (*i.e.*, dumping) and the under-pricing of timber used to produce the lumber (*i.e.*,

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[1] Pursuant to U.S. Supreme Court Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice of the *Amici Curiae*'s intention to file this brief at least 10 days prior to the due date. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to U.S. Supreme Court Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or its submission.

subsidization). The Coalition's goal is to ensure full and fair competition in the American lumber market, free from the effects of the undue advantages currently enjoyed by Canadian lumber producers. The Coalition has a vital interest in preserving the strength and effectiveness of U.S. trade laws, including the use of zeroing in antidumping investigations.

REASONS FOR GRANTING THE PETITIONS

United States Steel Corp. v. United States, 621 Fed.3d 1351 (Fed. Cir. 2010), has importance that extends far beyond the U.S. steel industry. Every domestic industry that relies on U.S. antidumping duty laws to counteract injury from unfairly dumped imports has a stake in the outcome of this case and the proper interpretation of the Tariff Act of 1930. The appellate decision endorses an impermissible statutory construction that purports to authorize the U.S. Department of Commerce ("Commerce") to abandon its use of zeroing in investigations — a reversal of longstanding agency insistence that the antidumping law requires zeroing — solely to placate the World Trade Organization ("WTO"). The deleterious impacts of this ruling are felt broadly throughout the U.S. economy.

The U.S. shrimp and softwood lumber industries each have a strong, continuing interest in whether zeroing is compelled by the Tariff Act of 1930. *See* 19 U.S.C. §§ 1673, 1677(34), (35). Both have benefitted from the trade relief afforded by

zeroing in antidumping investigations at a time when Commerce interpreted the statute to require zeroing. More recently, in response to activist WTO decisions creating international obligations that the United States never agreed to accept, Commerce reversed its understanding of the statutory mandate and now asserts its discretion not to use zeroing.

The U.S. shrimp and softwood lumber industries will endure substantial harm if *United States Steel* remains uncorrected. As set forth in the Petitions for Writ of Certiorari filed by United States Steel Corporation and Nucor Corporation, the plain language of the statute mandates the use of zeroing in investigations and Commerce's decision to abandon this required practice weakens the trade laws. When the antidumping laws are not properly enforced, domestic industries suffer "lost sales, declining prices, declining market share, and declining profits." *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1364 (Fed. Cir. 2007).

I. THE U.S. SHRIMP INDUSTRY HAS A STRONG INTEREST IN THE COURT GRANTING CERTIORARI

A. The Critical Antidumping Duty Orders Have Been Eroded By The Abandonment Of Zeroing In Investigations

The U.S. shrimp industry in 2005 obtained urgently needed and well-deserved relief against a flood of dumped imports from Brazil, China, Ecuador,

India, Thailand, and Vietnam. Pursuant to the statutory process, before the antidumping duty orders issued, the U.S. International Trade Commission ("ITC") determined that the industry was materially injured. *See* 19 U.S.C. § 1673d. The ITC found that dumped imports had both "significant price-depressing effects" and an overall "significant impact on the domestic industry." *Certain Frozen or Canned Warmwater Shrimp and Prawns From Brazil, China, Ecuador, India, Thailand, and Vietnam*, USITC Pub. 3748 (Jan. 2005) ("ITC Investigation"), at 31, 35.

The ITC detailed that the dumped imports caused material harm to the U.S. shrimp industry. Specifically, the ITC determined:

- "[T]hat a causal nexus exists between the large quantities of subject imports entering the U.S. market at declining prices and the corresponding price declines for U.S.-processed certain non-canned warmwater shrimp.";
- "During the period examined, *fishermen experienced declines in employment-related indicators and extreme deterioration in operating performance*."; and
- "The large and increasing volume of subject imports that entered the United States during the period examined caused domestic prices to decline. *These declines led to declines in operating revenues for both*

> *fishermen and processors, poor financial performance, and declining employment*."

Id. (emphasis added).

Commerce thereafter issued antidumping duty orders. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Brazil, Thailand, India, the People's Republic of China, the Socialist Republic of Vietnam, and Ecuador*, 70 Fed. Reg. 5,143, 5,145, 5,147, 5,149, 5,152, 5,156 (Feb. 1, 2005). Using zeroing in its 2004 investigation, Commerce found that imports from each of the six countries were pervasively dumped into the U.S. market at prices below fair value. *See id.*[2]

Erosion of the trade relief granted to the U.S. shrimp industry began with a 2007 WTO ruling for

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[2] Aside from ministerial corrections, Commerce determined the dumping margins at the conclusion of its 2004 investigation. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China and the Socialist Republic of Vietnam*, 69 Fed. Reg. 70,997, 71,005 (Dec. 8, 2004); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Brazil and Ecuador*, 69 Fed. Reg. 76,910, 76,913 (Dec. 23, 2004); *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From India and Thailand*, 69 Fed. Reg. 76,916, 76,918 (Dec. 23, 2004).

Ecuador against the use of zeroing in investigations. *See United States - Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, Report of the Panel (Jan. 30, 2007). Commerce in response recalculated, without zeroing, the dumping margins assigned to Ecuadorian exporters in the 2004 investigation. *See Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Ecuador: Notice of Determination Under section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Ecuador*, 72 Fed. Reg. 48,257 (Aug. 23, 2007). "As a result of the recalculations, all of the margins [became] either zero or *de minimis*."[3] *Id.* at 48,258. Following its re-interpretation of the statute, Commerce found that shrimp from Ecuador was not sold at less than fair value and revoked the antidumping duty order on Ecuadorian shrimp in its entirety, effective mid-August 2007. *See id.*

Attrition of the orders continued with a 2008 WTO decision against zeroing in a challenge brought by Thailand. *See United States - Measures Relating to Shrimp From Thailand,* WT/DS343/R, Report of the Panel (Feb. 29, 2008). Once again, Commerce recalculated dumping margins from the investigations without zeroing. *See Implementation*

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[3] When an exporter's weighted average dumping margin is less than two percent *ad valorem*, it is considered *de minimis* and that exporter is excluded from the antidumping duty order. *See* 19 U.S.C. §§ 1673b(b)(3), 1673d(a)(4).

of the Findings of the WTO Panel in United States—Antidumping Measure on Shrimp From Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp From Thailand, 74 Fed. Reg. 5,638 (Jan. 30, 2009). As a result of Commerce's re-interpretation of its statutory obligations, exports from two of the largest Thai exporters of shrimp to the United States were found to have been made at or above fair value. *See id.* at 5,639. Effective mid-January 2009, imports from these two exporters were excluded from the antidumping duty order on Thai shrimp. *See id.*

B. The Vulnerable U.S. Shrimp Industry Will Be Seriously Harmed If Commerce Continues To Recalculate Investigation Dumping Margins Without Zeroing

In its five-year review completed this year, the ITC kept in place the antidumping duty orders on shrimp from the remaining five countries after finding that the domestic industry is vulnerable to further injury from dumped imports. *See Frozen Warmwater Shrimp From Brazil, China, India, Thailand, and Vietnam*, USITC Pub. 4221 (Mar. 2011) ("ITC Review"), at 35-36. The ITC concluded "that revocation of the antidumping duty orders on frozen warmwater shrimp from Brazil, China, India, Thailand, and Vietnam would be likely to lead to continuation or recurrence of material injury to the

domestic industry within a reasonably foreseeable time." *Id.* at 36.

The ITC emphasized the initial arrest of the substantial increases in dumped imports following the implementation of the 2005 orders, as well as existing market conditions rendering the U.S. shrimp industry vulnerable to further injury from another flood of dumped imports:

> In light of the poor financial performance the processors displayed through the period in review, the operating losses the reporting fishermen recorded in 2009 and interim 2010, and the declines in employment and output both fishermen and processors experienced in interim 2010 when the Gulf Oil Spill limited fishing, *we conclude that the domestic industry is in a vulnerable condition.*
>
> Should the orders under review be revoked, we have found that *the volume of subject imports will likely increase significantly*. We have further found that these additional volumes of subject imports will be priced in a manner that will likely undersell the domestic like product and *have significant depressing or suppressing effects on prices for the domestic like product.* Consequently, to compete with the likely additional

> volumes of subject imports*, the domestic industry will need to cut prices or restrain price increases.* The resulting loss of revenues will likely cause *further deterioration in the already poor financial performance of the vulnerable domestic industry. Further deterioration in financial performance will result in likely losses of employment, and, ultimately, likely losses in output and market share.*

Id. at 34-35 (emphasis added) (footnotes omitted).

There are two pending WTO challenges to the use of zeroing in the investigation for the antidumping duty orders on shrimp. A decision is overdue in the first-ever WTO dispute brought by Vietnam. *See United States - Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/8, Communication from the Chairman of the Panel (Apr. 20, 2011). Earlier this year, China initiated the WTO dispute settlement process to address the same issue. *See United States - Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from China*, WT/DS422/1, Request for Consultations from China (Mar. 2, 2011). Based on the prior WTO decisions and Commerce reactions thereto, shrimp exporters in Vietnam and China may similarly obtain exemptions from the orders.

The U.S. shrimp industry will be substantially harmed if *United States Steel* is not corrected. The

2005 orders are necessary to prevent continued injury from dumped imports. That relief has steadily eroded through no fault of the industry, but because of Commerce changing course and misconstruing the statute enacted by Congress, simply to appease the WTO. What remains is threatened by the pending WTO challenges that are anticipated to further hollow out the trade remedy. Moreover, given the absence of a statute of limitations at the WTO demonstrated by the recent China filing, Brazil and India could still seek WTO recourse. This would prompt Commerce to recalculate the margins initially assigned to Brazilian and Indian companies, without zeroing, potentially further eviscerating the antidumping duty orders.

The Court can stop Commerce's abdication of its statutory responsibilities and ensure that the domestic shrimp industry receives the trade relief to which it is entitled by statute. By granting the Petitions and ruling that zeroing is mandated, Commerce would be required to adhere to the statute. The Court has an opportunity to clarify that only Congress is authorized to amend the statute in response to WTO decision-making. Without such judicial intervention, a vulnerable domestic industry will once again be exposed to a deluge of dumped imports that previously led to financial ruin and unemployment. *See* ITC Investigation at 35; ITC Review at 34.

II. THE U.S. LUMBER INDUSTRY HAS A STRONG INTEREST IN THE COURT GRANTING CERTIORARI

A. Zeroing In Investigations Has Been Important To The U.S. Lumber Industry

In the most recent round of trade litigation involving softwood lumber from Canada, each of the six largest Canadian exporters investigated was found to be dumping. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,539, 15,541 (Apr. 2. 2002). Commerce used its then-standard practice of zeroing to assess the magnitude of dumping. *See id.*, Issues and Decisions Memorandum appended thereto ("Investigation Memo"), at cmt. 12.

Commerce issued an antidumping duty order in 2002. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36,068 (May 22, 2002). The Canadian exporters quickly requested Binational Panel review under Chapter 19 of the North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 683 (1993) ("NAFTA"), in lieu of judicial review by the U.S. Court of International Trade ("CIT"), for issues that included zeroing. *See Certain Softwood Lumber From Canada: Final Affirmative Antidumping Determination*, NAFTA Secretariat File No. USA-

CDA-2002-1904-02, Decision of the Panel (July 17, 2003) ("Panel Decision"). Binational Panels are supposed to apply the same statutes, regulations, and U.S. case law that the CIT would use to assess whether such final determinations are consistent with U.S. antidumping law. *See* NAFTA art. 1904(2). By statute, the Binational Panel — consisting of persons who are neither officers of the United States nor federal judges — makes binding decisions of U.S. law.[4] *See* 19 U.S.C. § 1516a(g).

The Binational Panel in 2003 initially upheld Commerce's use of zeroing, consistent with binding U.S. case law affirming the use of zeroing. *See* Panel Decision at 56-61. However, other issues were remanded to Commerce with instructions for the agency to change those determinations. *See id.* at 185-88. While the Binational Panel review was ongoing, the Government of Canada simultaneously brought a WTO challenge to Commerce's use of zeroing in the lumber antidumping investigation. In 2004, the WTO Appellate Body ruled that

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[4] The NAFTA Implementation Act establishes in U.S. law that an interested party to an antidumping proceeding can obtain review of a final determination by a Binational Panel consisting of five members who are not judges, and of which two or three of the members will be non-U.S. citizens. *See* 19 U.S.C. § 1516a(g). These decisions are binding, must be implemented by officers of the United States such as the Secretary of Commerce, and cannot be reviewed by any U.S. court. *See id.* § 1516a(g)(7). Although not germane to this case, the Binational Panel system and the U.S. laws implementing it are unconstitutional. *See* U.S. Const. art. II § 2 cl. 2.

Commerce's use of zeroing was inconsistent with the United States' WTO obligations. *See United States - Final Dumping Determination On Softwood Lumber From Canada*, WT/DS264/AB/R, Report of the Appellate Body (Aug. 11, 2004), at 61.

Armed with this WTO decision, the NAFTA Binational Panel in 2005 reversed its zeroing decision. *See Certain Softwood Lumber From Canada: Final Affirmative Antidumping Determination*, NAFTA Secretariat File No. USA-CDA-2002-1904-02, Decision of the Panel Following Remand (June 9, 2005). The Binational Panel found that zeroing was now inconsistent with U.S. law based on the WTO decision and remanded the case to Commerce to amend its final determination. *See id.* at 39-44. The Binational Panel further tried to enforce the WTO ruling on Commerce retrospectively, in spite of clear U.S. law to the contrary.[5] *See id.* at 45.

Commerce, faced with decisions from the WTO and a NAFTA Panel that it had improperly used zeroing in the final determination, tried to apply zeroing in a way that would be acceptable to

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[5] U.S. law is very clear that WTO agreements do not control or modify laws of the United States, and that WTO dispute settlement cannot compel the United States to change its own laws. *See* 19 U.S.C. § 3512. Further, if the United States decides to comply with a WTO decision, such an amended final determination would only have prospective effect. *See id.* § 3538(b),(c).

the WTO. In the investigation, Commerce used an "average-to-average" price comparison method, along with zeroing, to calculate the dumping margins. *See* Investigation Memo at cmt. 12. When this method was ruled WTO-inconsistent (and then ruled not in accordance with U.S. law by the Binational Panel), Commerce recalculated the dumping margins using a different price comparison methodology, the "transaction-to-transaction" method, and again used zeroing because the original WTO decision addressed only zeroing in the average-to-average methodology. *See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada*, 70 Fed. Reg. 22,636, 22,637 (May 2, 2005).

The WTO Appellate Body in August 2006 ruled that Commerce's recalculated determination was inconsistent with the United States' WTO obligations. *See United States – Final Dumping Determination On Softwood Lumber From Canada, Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, Report of the Appellate Body, (Aug. 15, 2006), at 59. However, both the WTO and NAFTA proceedings were thereafter settled when the 2006 Softwood Lumber Agreement went into effect on October 12, 2006. *See* Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America, U.S.-Can., Sept. 12, 2006 ("SLA").

The U.S. lumber industry's experience with zeroing in antidumping investigations is consistent with the experience of other domestic industries. Foreign governments have aggressively and successfully challenged U.S. antidumping determinations in an effort to eliminate zeroing from investigations. Yet federal courts must enforce U.S. law, not the rulings of unaccountable international tribunals creating obligations that the United States never accepted. Unless the Court now clarifies that Commerce's prior longstanding position that the statute mandates zeroing is the correct interpretation, the agency will implement these international tribunal rulings rather than the express will of Congress. If U.S. law is to be changed to reflect those rulings, only Congress — not administrative agencies — may do so.

B. The U.S. Lumber Industry Will Benefit From Commerce Resuming Its Use Of Zeroing In Investigations

Zeroing in investigations remains important to the U.S. softwood lumber industry. Although the SLA has provided some stability to the U.S. lumber market in the face of continuing Canadian subsidization of its lumber industry, the SLA is scheduled to expire in 2013. *See* SLA art. XVIII. If the SLA is not extended or renewed, the Coalition would likely file petitions for trade relief under the Tariff Act of 1930, which would likely result in a new antidumping investigation. Without zeroing used to compute dumping margins, the Tariff Act of 1930

will provide a substantially lessened remedy against the dumping of foreign merchandise in the United States.

The livelihood of Americans reliant upon the U.S. softwood lumber industry would be adversely affected if *United States Steel* is not reviewed by the Court. The American wood products and forestry industries are critical elements of the U.S. manufacturing base and state economies. The U.S. sawmill and wood preservation industry employs close to 90,000 workers across America. According to the U.S. Department of Labor, this employment represents an annual payroll income of close to $3 billion which supports the economies of thousands of communities nationwide. Commerce estimates that an additional 270,000 American workers directly depend on sawmills for employment. There are more than 1,400 manufacturing facilities operating in the sawmill, wood product manufacturing, and wood preservation sectors. Approximately 11 million U.S. private landowners, managing close to 650 million acres of family-owned timberlands, provide the majority of the logs used by the lumber industry. All of these owners and workers depend on a strong domestic lumber industry that receives the full extent of statutory trade relief that Congress intended to provide.

CONCLUSION

For the reasons set forth herein and in the Petitions, the Court should grant the Writ of Certiorari.

Respectfully submitted,

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