CERTAIN BALL BEARINGS AND PARTS THEROF FROM JAPAN AND THE UNITED KINGDOM

Investigation Nos. 731-TA-394-A and 399-A (Second Review) (Remand)

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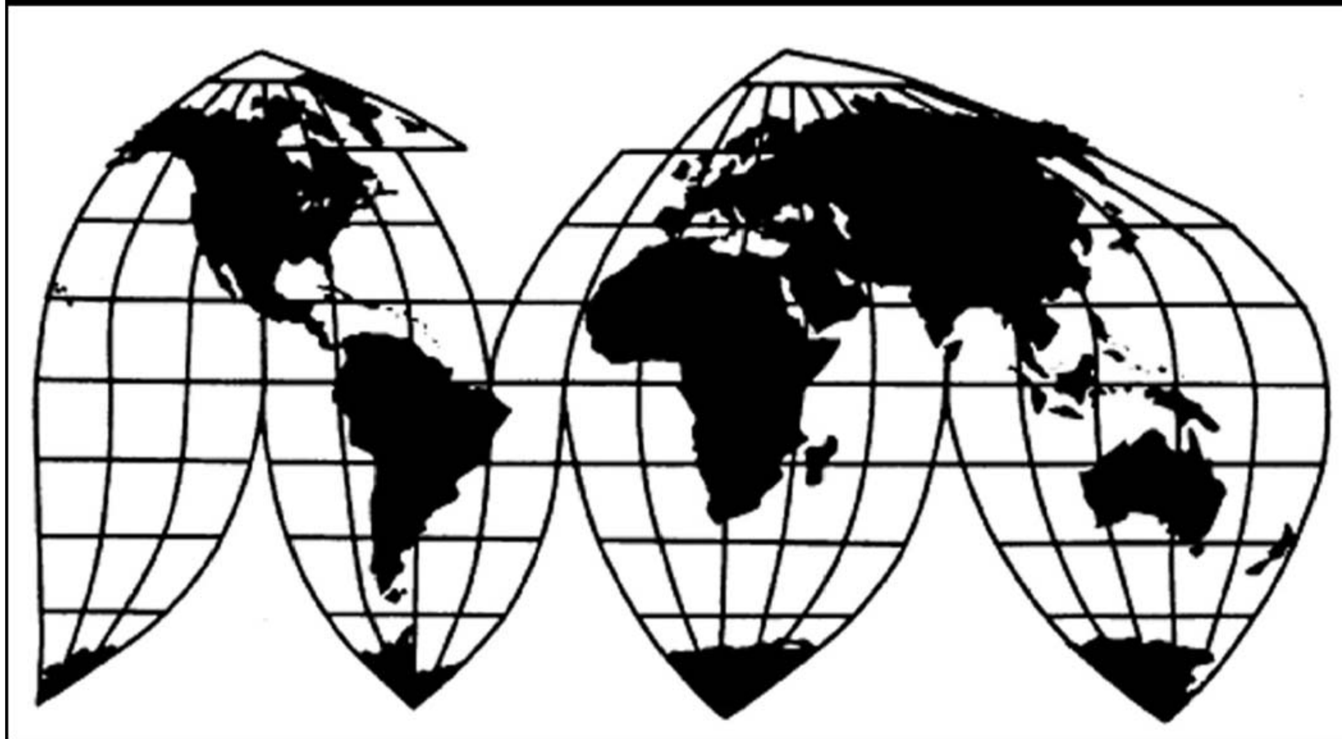

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U.S. International Trade Commission

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Dean A. Pinkert

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Director of Operations

Staff assigned

Jim McClure, Investigator
Catherine DeFilippo, Economist
David Goldfine, Attorney
Neal Reynolds, Attorney

Address all communications to
Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

U.S. International Trade Commission

Washington, DC 20436
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VIEWS OF THE COMMISSION ON REMAND

By decision and order dated September 9, 2008, the U.S. Court of International Trade affirmed in part, and remanded in part, the Commission's affirmative sunset determinations that revocation of the antidumping duty orders on ball bearings ("BBs") from Japan and the United Kingdom would likely lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[1] NSK Corp. v. United States, 32 CIT ___, 577 F. Supp. 2d 1322 (CIT 2008), Slip Op. 08-95 (Sept. 9, 2008) (hereinafter "NSK I").[2] Upon consideration of the Court's remand order, we again determine that, under section 751(c) of the Tariff Act of 1930, as amended ("the Act"), revocation of the antidumping duty orders covering BBs from Japan and the United Kingdom would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[3] [4]

I. BACKGROUND

A. The Commission's Original Injury Determinations and Its Sunset Review Determinations

This appeal involves the Commission's second sunset reviews of the antidumping duty orders on BBs from France, Germany, Italy, Japan, Singapore, and the United Kingdom. The Department of Commerce issued those orders in May 1989, after the Commission issued affirmative injury determinations for these countries.[5] In June 2000, the Commission conducted its first sunset reviews of the orders and issued affirmative determinations for ball bearings from France, Germany, Italy, Japan, Singapore, and the United Kingdom.[6]

On June 1, 2005, the Commission instituted its second reviews to determine whether revocation of the antidumping duty orders on ball bearings from France, Germany, Italy, Japan, Singapore, and the United Kingdom would likely lead to the continuation or recurrence of material injury.[7] The

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[1] The Commission determinations on appeal were published in Certain Bearings from France, Germany, Italy, Japan, Singapore, and the United Kingdom, Inv. Nos. 731-TA-344, 391-A, 392-A and C, 393-A, 394-A, 396, and 399-A (Second Review), USITC Pub. 3876 (Aug. 2006). In these views, we cite to the public version of the Commission's original sunset views and staff report as "USITC Pub. 3876." We cite the confidential version of the Commission's original views as "CD."

[2] All citations in these remand views are to the confidential version of the Court's slip opinion in NSK I.

[3] Chairman Shara L. Aranoff, Vice Chairman Daniel A. Pearson, Commissioner Charlotte R. Lane, Commissioner Irving A. Williamson, and Commissioner Dean A. Pinkert join the Commission's views on remand. Commissioners Williamson and Pinkert were not members of the Commission at the time that the Commission issued its determinations in these sunset reviews in 2006 and therefore did not participate in those determinations. Accordingly, for purposes of these remand views, they have reviewed the record of that proceeding and make an affirmative determination for Japan and the United Kingdom now. As discussed below, they adopt the findings made in the Commission's original sunset views in this proceeding, as supplemented, revised, and noted below.

[4] Commissioner Deanna Tanner Okun did not participate in these reviews during the original proceeding, and has not participated in these remand proceedings.

[5] Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany et al., Inv. Nos. 303-TA-19 & 20 and 731-TA-391-399 (Final), USITC Pub. 2185 (May 1989).

[6] Certain Bearings from China et al., Inv. Nos. AA1921-143, 731-TA-341, 343-345, 391-397 & -399 (Review), USITC Pub. 3309 (June 2000).

[7] 70 Fed. Reg. 31531 (June 1, 2005).

Commission issued its final determinations in its second sunset reviews on August 31, 2006.[8] By unanimous vote, the Commission determined that it was appropriate to cumulate the subject imports from France, Germany, Italy, Japan, and the United Kingdom and that revocation of the antidumping duty orders on ball bearings from the cumulated countries would likely result in continuation or recurrence of material injury within a reasonably foreseeable time.[9] The Commission also determined, however, that revocation of the order on ball bearings from Singapore would not likely result in continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[10]

B. The Court of International Trade's Remand Order

In September 2006, the Japanese and U.K. respondents appealed the Commission's affirmative determinations for ball bearings from Japan and the United Kingdom to the Court of International Trade. On September 9, 2008, the Court (per Judge Barzilay) issued its decision in NSK I. In that decision, the Court affirmed the Commission's sunset determinations for Japan and the United Kingdom in part, and remanded them in part. Among other things, the Court affirmed the Commission's findings that there was a reasonable level of likely overlap of competition between the subject imports and the domestic industry, that the United States remained an attractive market for subject imports, that the volumes of the subject imports were likely to be significant upon revocation of the orders, and that the subject imports would likely have significant adverse price effects upon revocation. NSK I at 17-18, 23-38.[11]

However, the Court remanded the Commission's affirmative determination with instructions to address three issues. First, the Court concluded that, under the Federal Circuit's decision in Bratsk Aluminium Smelter v. United States ("Bratsk"),[12] the Commission must perform a Bratsk-style replacement analysis in sunset reviews whenever the Bratsk triggering factors are met. Id. at 7-14. Since the Court found that the Bratsk triggering factors were satisfied here, the Court instructed the Commission to analyze "whether non-subject imports have captured or are likely to capture market share previously held by the subject imports, and whether this level of displacement makes it unlikely that removal of the orders will lead to a continuation or recurrence of material injury as a result of subject imports." Id. at 11.

The Court also instructed the Commission to reconsider its vulnerability and impact findings in light of the domestic industry's "restructuring" activities during the POR. Id. at 22. The Court directed the Commission to perform "a more thorough examination" of this issue, "given the amount of information that suggests global restructuring had the effect of depressing certain economic measures of industry performance relied upon {by the Commission} to cast the U.S. market as vulnerable." Id. Third, the Court instructed the Commission to reconsider its discernible adverse impact analysis for the

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[8] 71 Fed. Reg. 51850 (Aug. 31, 2006).

[9] USITC Pub. 3876 at 36-37.

[10] Id. Commissioner Pinkert adopts the finding by then-Chairman Pearson and Commissioner Koplan in the second-five year review determinations that the subject imports from Singapore would not likely have a discernible adverse impact on the domestic industry upon revocation. CD at 44-46. Because of that finding, he does not reach the issue of whether he should exercise his discretion not to cumulate the subject imports from Singapore with those from other subject countries based on other considerations. Commissioner Williamson adopts the decision of Chairman Aranoff and Commissioner Hillman not to exercise their discretion to cumulate the subject imports of ball bearings from Singapore based on the differences in conditions of competition between these imports and the other subject imports and the domestic like product. CD at 52-54.

[11] The Court's decision has been published in the Federal Supplement at 577 F. Supp. 2d 1322 (Ct. Int'l Trade 2008). All cites in these remand determinations are to the confidential version of the Court's opinion.

[12] 444 F.3d 1369 (Fed. Cir. 2006)

United Kingdom in light of the "significant rise in non-subject imports and large-scale restructuring within the ball bearing industry." Id. at 20.

Accordingly, on October 8, 2008, the Commission instituted its remand proceedings for the sunset reviews for ball bearings from Japan and the United Kingdom.[13] The Commission reopened the record to obtain certain foreign production, capacity, and shipment information for non-subject imports in order to address the Court's Bratsk instructions on remand.[14] In reopening the record, the Commission sent questionnaires to 76 foreign producers and 58 importers of non-subject ball bearings.[15] The Commission did not reopen the record on any other issue. The Commission also permitted parties to comment on the Court's remand instructions and on the new information obtained on remand.[16]

C. The Court of International Trade's Denial of the Commission's Motion for Reconsideration

Nine days after the Court issued NSK I, the Federal Circuit issued its decision in Mittal Steel Point Lisas v. United States, 542 F.3d 867 (Fed. Cir. 2008) ("Mittal"). In Mittal, the Federal Circuit clarified the scope of its holding in Bratsk. Among other things, the Federal Circuit made clear that Bratsk is intended only to apply on a retrospective, rather than prospective, basis in injury investigations.[17] The Federal Circuit explained that the Bratsk analysis was "not concerned with whether an antidumping duty order would actually lead to the elimination of those goods from the market in the future or whether those goods would be replaced by goods from other sources."[18] Instead, the Federal Circuit stated, the "focus of the inquiry is on the cause of injury in the past, not the prospect of effectiveness in the future."[19] Further, the Federal Circuit added, an assessment of whether a particular product was a "commodity" for purposes of the Bratsk analysis was a matter committed to the Commission's sole discretion.[20]

In light of Mittal, the Commission filed a motion for reconsideration with the Court of International Trade on October 9, 2008. In the motion, the Commission asked the Court to reconsider its instruction that the Commission perform a Bratsk-style replacement/benefit analysis in these sunset reviews on remand. The Commission argued that Mittal established that the Commission was not required to assess in a sunset review whether non-subject imports had replaced, or were likely to replace,

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[13] The Commission published its notice of initiation for the remand proceeding in the Federal Register at 73 Fed. Reg. 63217 (Oct. 20, 2008).

[14] 73 Fed. Reg. 63217. The Commission's staff relied on customs net import files to determine the largest importers and foreign producers of non-subject importers in 2004 and 2005. Based on these files, the Commission sent importer questionnaires to the 58 largest importers of non-subject imports. These importers represented approximately 75 percent of imports from non-subject suppliers during these years. Relying on the same data, the Commission also sent foreign producer questionnaires to the 76 suppliers of non-subject imports in countries that were the largest suppliers of imported ball bearings to the United States in these years. The Commission sent questionnaires to all of the producers in these countries, except for China, where the Commission sent questionnaires to the 21 largest suppliers.

[15] Commission Remand Staff Report ("RSR") at I-2 & II-1.

[16] 73 Fed. Reg. 63217.

[17] Mittal, 542 F.3d at 875-877.

[18] Mittal, 542 F.3d at 876.

[19] Mittal, 542 F.3d at 876.

[20] Mittal, 542 F.3d at 875.

the subject imports after imposition of the orders, as the Court held in NSK I. The Commission also argued the Court should not have made findings on the Bratsk triggering factors, but should have remanded these issues to the Commission for its consideration. Finally, the Commission asked the Court to stay its remand order until it disposed of the Commission's reconsideration request. Defendant-Intervenor The Timken Company ("Timken") filed a similar motion for reconsideration and a motion for a stay of the remand proceedings.

On October 29, 2008, the Court granted the Commission's and Timken's motions to stay the remand proceeding. As a result, on November 17, 2008, the Commission stayed its remand proceedings until the Court ruled on the Commission's motion for reconsideration.[21]

On December 29, 2008, the Court denied the Commission's and Timken's respective motions for reconsideration. NSK Corp. et al. v. United States, Slip Op. 08-145 (Dec. 29, 2008) ("NSK II").[22] The Court concluded that Mittal did not indicate that a Bratsk analysis was not applicable in the sunset context, as the Commission argued.[23] Moreover, the Court added, it had not made factual findings on the Bratsk triggering factors.[24] According to the Court, rather than issuing factual findings on these factors, it simply "relied on the {Commission's} record . . . for its legal conclusions" on these issues.[25]

After the Court denied the Commission's and Timken's respective motions for reconsideration, the Commission resumed its remand proceeding on February 5, 2009.[26] In a published notice, the Commission provided parties with an opportunity to file comments on the Court's remand instructions and the evidence obtained on remand, and directed that they be filed by March 23, 2009.[27] The Commission also prepared a supplemental staff report regarding non-subject producer questionnaire information gathered in the remand proceeding.[28] On March 23, 2009, comments on the remand were filed by petitioner The Timken Company, and the Japanese and United Kingdom respondents JTEKT Corp., Koyo Corp. of U.S.A., NSK Corporation, NSK Ltd., and NSK Europe Ltd.

Accordingly, we address the Court's remand instructions below.

III. COMMENTS ON THE COURT'S INTERPRETATION OF BRATSK IN NSK I

As instructed by the Court, we have reviewed the record of these sunset reviews in detail, taken into account the evidence obtained on remand, considered the parties' remand comments, and evaluated the Court's instructions concerning non-subject imports, the industry's restructuring efforts, and the impact of these issues on our cumulation analysis for the United Kingdom. We again determine that revocation of the antidumping duty orders on ball bearings from Japan and the United Kingdom is likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time, and discuss our findings in detail below.

Before doing so, however, we comment on the Court's holding that the Federal Circuit's decision

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[21] The Commission published a notice of its decision to stay the remand process in the Federal Register at 73 Fed. Reg. 72836 (Dec. 1, 2008).

[22] All citations in these remand views to NSK II are to the Court's slip opinion.

[23] NSK II at 21-27.

[24] NSK I at 17-21.

[25] NSK I at 19.

[26] 74 Fed. Reg. 6173 (Feb. 5, 2009).

[27] 74 Fed. Reg. 6174.

[28] See generally RSR at I-1 et seq.

in Bratsk is applicable in a sunset context and that the Commission must therefore assess in a sunset review "whether non-subject imports have captured or are likely to capture, market share previously held by the subject imports, and whether this level of displacement makes it unlikely that removal of the orders will lead to a continuation or recurrence of material injury as a result of subject imports."[29] Because the Court has ordered us to perform this analysis on remand in this review, we have, of course, done so. Nonetheless, we continue to maintain that such an analysis is not required in a sunset review.

A. The Court's Bratsk Analysis in NSK I

In NSK I, the Court determined that the "basic principles" outlined by the Federal Circuit in Bratsk are applicable to the Commission's likely injury analysis in a sunset review. In Bratsk, the Federal Circuit stated that the Commission must undertake "an additional causation inquiry" in an original antidumping duty investigation "whenever the antidumping investigation is centered on a commodity product, and price competitive non-subject imports are a significant factor in the market."[30] When these two triggering factors are met, the Federal Circuit added, the Commission should assess "whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers" as part of its injury and causation analysis in an original injury investigation. [31]

In NSK I, the Court concluded that the Bratsk replacement/benefit analysis "reaches beyond injury investigations." Accordingly, the Court held that Bratsk "requires the ITC to analyze, in the course of conducting a sunset review, whether non-subject imports have replaced or are likely to replace subject imports in the domestic market to such an extent that removal of the order would be unlikely to lead to continuation or recurrence of material injury by reason of subject imports."[32] In coming to this conclusion, the Court reasoned there was an "implied element of causation under" the sunset provisions of the statute. It also noted that the Commission assesses similar volume, price and impact factors in original injury investigations and sunset reviews.[33] In the Court's view, these facts indicated there was a "significant overlap in the statutory considerations that guide the ITC's evaluation of material injury in an investigation and likelihood of material injury in a sunset review."[34] Relying on this level of overlap, the Court inferred that a Bratsk-style replacement analysis was a necessary part of the Commission's causation analysis in a sunset review.[35]

Consequently, the Court concluded that the "application of Bratsk to sunset review causation analysis would compel the ITC to address significant increases in market share by non-subject imports and thereby examine the effectiveness of the underlying antidumping order in relation to fundamental changes in the marketplace that might be more likely to cause injury to the domestic industry than unrestrained subject imports."[36] Accordingly, the Court held that, "whenever [a sunset review] is centered on a commodity product, and price competitive non-subject imports are a significant factor in the

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[29] NSK I at 11.

[30] Bratsk, 444 F.3d at 1375.

[31] Id.

[32] NSK I at 7-8, 11-12.

[33] NSK I at 8-9.

[34] NSK I at 9.

[35] NSK I at 11.

[36] NSK I at 10-11. The Court added that "[t]o hold otherwise would permit the ITC to ignore a significant factor affecting the domestic industry when conducting a sunset review." Id. at 11.

market," the Commission "must consider whether non-subject imports have captured or are likely to capture market share previously held by the subject imports, and whether this level of displacement makes it unlikely that removal of the orders will lead to continuation or recurrence of material injury as a result of subject imports."[37]

In addition to holding that a Bratsk-style analysis is required in sunset reviews if the Bratsk triggering factors are met, the Court found that the Bratsk triggering factors were satisfied in these reviews.[38] With respect to the first factor, i.e., whether the product under investigation is a commodity product, the Court found that domestic and subject bearings were generally considered "always" or "frequently" interchangeable and determined that "the subject ball bearings {were} sufficiently fungible to satisfy the 'commodity product' test under Bratsk."[39] With respect to the second factor, i.e., whether there was a significant volume of price-competitive non-subject imports in the market, the Court found that non-subject imports accounted for between *** and *** percent of total imports, by volume, from 2003 to 2005 and determined that "non-subject imports are a significant factor in the domestic industry."[40] After finding that the triggering factors were met, the Court directed the Commission to conduct a "full review of the impact of non-subject imports on the domestic industry in conformity with this opinion."[41]

B. Comments on the Court's Conclusion that a Bratsk Replacement Test is Required in a Sunset Review

1. Causation and Non-Subject Imports Generally

As we indicated above, we do not agree with the Court that Bratsk requires the Commission to assess whether non-subject imports have captured, or are likely to capture, the market share previously held by the subject imports and to assess whether this level of displacement means that the subject imports are not likely to cause material injury to the industry upon revocation of the orders.[42] Although we disagree with the Court on this issue, we do agree that the Commission is required to find causation in both its material injury and sunset review analyses, and that it must consider the possible injurious effects of other relevant factors, such as non-subject imports, as an integral part of causation analysis in injury investigations and sunset reviews.

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[37] NSK I at 11. In such circumstances, the Court stated, the Commission "would be obligated to explain why continuation of the order is warranted, given that non-subject imports have replaced or are likely to replace subject imports as the overriding cause of material injury to the domestic industry." Id. at 12.

[38] NSK I at 12-14.

[39] NSK I at 13.

[40] NSK I at 14.

[41] NSK I at 14.

[42] NSK I at 10-11.

As we have consistently stated, in investigations and sunset reviews, there may be economic factors other than the subject imports that are having, or may be likely to have, adverse effects on the domestic industry.[43] Such economic factors might include, for example, non-subject imports, changes in technology, demand, or consumer tastes, competition among domestic producers, or management decisions by domestic producers.[44] The legislative history of the statute explains that, in an injury analysis, the Commission must examine factors other than subject imports to ensure that it is not attributing injury from other factors to the subject imports, thereby inflating an otherwise tangential cause of injury into one that satisfies the statutory material injury threshold.[45] Moreover, in the Statement of Administrative Action for the sunset review provisions of the statute,[46] Congress has indicated that the Commission should also consider other factors in its sunset analysis, because they may account for any injury likely to be suffered by the industry after revocation of an order.[47]

Nonetheless, as the Federal Circuit has consistently made clear, the Commission has broad discretion to perform its causation analyses in any reasonable manner and is not required to follow a single methodology for making these determinations.[48] [49] Indeed, in Mittal, the Federal Circuit emphasized that the Commission was not bound to follow any "Procrustean formula," such as the "replacement/benefit" analysis discussed in Bratsk, when performing its injury and causation analysis in an investigation.[50] Instead, when assessing causation, the Commission need only have "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.'"[51]

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[43] See, e.g., 1-Hydroxyethylidene-1, 1-Diphosphonic acid from China and India, Inv. Nos. 1146-1147 (Final), USITC Pub. No. 4072 at 16 (April 2009).

[44] USITC Pub. 4072 at 16.

[45] Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316 (1994) ("SAA") at 851-52 ("{T}he Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports."); S. Rep. 96-249 at 75 (1979); H.R. Rep. 96-317 at 47 (1979) ("the ITC will take into account evidence presented to it which demonstrates that the harm attributed by the petitioner to the subsidized or dumped imports is attributable to such other factors," including such factors as"the volume and prices of nonsubsidized imports or imports sold at fair value, contraction in demand or changes in patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry").

[46] The SAA is the "authoritative expression" of the meaning of the Uruguay Round amendments to the antidumping and countervailing duty laws in all judicial proceedings. 19 U.S.C. §3512(d).

[47] SAA at 885; 19 U.S.C. §1675a(2) & (4)(the Commission shall consider "all relevant factors" when assessing likely volumes and impact of the subject imports").

[48] Mittal, 542 F.3d at 873 (citing U.S. Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996).

[49] Commissioner Pinkert does not join this paragraph or the following two paragraphs. He points out that the Federal Circuit, in Bratsk, 444 F.3d 1369, and Mittal, held that the Commission is required in original investigations, under certain circumstances, to undertake a particular type of analysis of non-subject imports.

[50] Mittal, 542 F.3d at 879.

[51] Mittal, 542 F.3d at 878-79.

As a result, in injury determinations since Mittal, the Commission has not applied the replacement/benefit test that it originally concluded was required by Bratsk.[52] Instead, we have performed an assessment of other relevant factors designed to ensure the Commission does not attribute injury from non-subject imports or other factors to the subject imports.[53] [54] [55] Thus, when an investigation involves commodity products and price-competitive non-subject imports are a significant factor in the U.S. market, we will give full consideration to significant causation issues, including non-attribution issues respect to other factors (such as non-subject imports), and will provide a reasoned explanation of our findings on these issues.[56] In other words, we do not, and will not, "ignore significant factor{s} affecting the industry," such as non-subject imports, in our injury or sunset analysis, which was the Court's primary concern in NSK I.[57]

The Commission seeks to obtain the necessary information and performs a reasoned analysis of these issues in our original injury investigations. For example, prior to reaching our affirmative threat determination in the recent investigation involving 1-hydroxyethylidene-1, 1-diphosphonic acid ("HEDP") from China and India,[58] we collected information from major producers and importers of non-subject imports of HEDP relating to their capacity, production, export and home market shipments, and the prices of non-subject imports.[59] After obtaining these data, we examined the available information concerning the relative volume and price trends for domestic, subject and non-subject HEDP; the levels of substitutability among the domestic, subject and non-subject HEDP; demand trends in the market; the capacity, production, and shipments levels of non-subject producers of HEDP, and the export-orientation of non-subject producers.[60] By performing a reasoned analysis of the record data on these and other issues, we were able to support our finding that subject imports were a significant cause of the material

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[52] E.g., Welded Stainless Steel Pressure Pipe from China, Inv. No. 731-TA-1144, USITC Pub. 4064 at 13 (March 2009) (Final); Small Diameter Graphite Electrodes from China, Inv. No. 731-TA-1133, USITC Pub. 4062 at 13, n. 67 (Feb. 2009) (Final).

[53] E.g., Welded Stainless Steel Pressure Pipe, USITC Pub. 4064 at 13; Small Diameter Graphite Electrodes, USITC Pub. 4062 at 13, n. 67.

[54] Commissioner Pinkert does not join this paragraph. He points out that the Federal Circuit, in Bratsk, 444 F.3d 1369, and Mittal, held that the Commission is required, in certain circumstances, to undertake a particular kind of analysis of non-subject imports. See his discussion of this issue in Welded Stainless Steel Pressure Pipe, USITC Pub. 4064, at 13, n.74 & Small Diameter Graphite Electrodes, USITC Pub. 4062 at 13, n.68.

[55] Commissioner Lane also refers to her dissenting views in Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, China, Thailand, and the United Arab Emirates, Invs. Nos. 731-TA-1131 to 1134 (Final), USITC Pub. 4040 (Oct. 2008), for further discussion of Mittal Steel.

[56] E.g., Welded Stainless Steel Pressure Pipe, USITC Pub. 4064 at 13; Small Diameter Graphite Electrodes, USITC Pub. 4062 at 13, n. 67.

[57] NSK I at 11; see also Nucor, Slip Op. at 08-191 at p. 124.

[58] Inv. Nos. 1146-1147 (Final), USITC Pub. No. 4072 (April 2009).

[59] To that end, after the Federal Circuit issued its decision in Bratsk, the Commission began to send out information requests in final phase investigations to producers in non-subject countries that accounted for substantial shares of U.S. imports of subject merchandise (if, in fact, there were large non-subject import suppliers). In order to provide a more complete record for the Commission's causation analysis, these requests typically seek information on capacity, production, and shipments of the product under investigation in the major source countries that export to the United States. The Commission plans to continue utilizing published or requested information in final phase investigations in which there are substantial levels of non-subject imports.

[60] USITC Pub. No. 4072, at 29-31 (April 2009).

injury that the industry was likely to suffer in the imminent future, even though we did not perform the replacement/benefit analysis that we originally believed was required in Bratsk.[61]

Similarly, in sunset reviews, we have always considered non-subject imports and their current and possible future effects on the industry as one aspect of our analysis.[62] Such an analysis in a sunset review is different than the analysis we perform in an injury investigation, because the statutory standards in a sunset review are "not the same as the standards for material injury and threat of material injury."[63] In a sunset review, unlike an original injury investigation, the Commission is required to project likely future events upon revocation of an order, including the likely volume, price and impact of subject imports, rather than assessing whether the subject imports caused material injury to the industry in the past or whether material injury is threatened imminently, given the status quo in the market.[64]

Nonetheless, even in sunset reviews, we typically examine the current volume and price levels of the non-subject imports, as well as other pertinent data, as a means of assessing whether non-subject imports are so significant that the subject imports are not likely to contribute significantly to any injury likely to be suffered by the domestic industry upon revocation. In fact, we performed such an assessment of the non-subject imports from China in our determinations for these sunset reviews.[65] We recognize that the Court found our analysis of the potential effects of the non-subject imports from China to be insufficient to ensure that we were not attributing the likely effects of these imports to the subject imports upon revocation.[66] However, we could have done a more detailed analysis of this issue on remand, had the Court afforded us the opportunity to do so.

2. A Bratsk Replacement Analysis is Not Required or Meaningful in the Sunset Context

We disagree with the Court that the Commission is required by Bratsk to perform the "market share replacement" analysis prescribed in NSK I. As an initial matter, we note that Bratsk is not, by its terms, specifically applicable to a likely injury analysis in a sunset review. The Bratsk appeal involved the Commission's determination in an original injury investigation, not a sunset review.[67] Moreover, Bratsk did not discuss the sunset review provisions of the statute, or address the injury and causation analysis required in sunset reviews. In fact, the Federal Circuit specifically stated that a Bratsk analysis

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[61] USITC Pub. No. 4072, at 29-31 (April 2009).

[62] See, e.g., Silicon Metal from Russia, 731-TA-991, USITC Pub. 4018 at 11-13 (Review) (June 2008) (discussing the role of non-subject imports in the U.S. market in the Commission's analysis of likely significant volume and price effects); Sorbitol from France, Inv. No. 731-TA-44, USITC Pub. 3706 at 23-24 (July 2004) (Review) ("[b]ecause the domestic market is dominated by U.S. and non-subject suppliers . . . revocation of the antidumping order is not likely to lead to [a] significant increase in the volume of subject imports.").

[63] SAA at 883.

[64] As the SAA points out, unlike the injury portions of the statute, which instructs the Commission to determine "whether there is current material injury by reason of imports of subject merchandise" or whether such "injury is imminent, given the status quo," in a sunset review, the Commission must "engage in a counter factual analysis," in which it assesses "the likely impact in the reasonably foreseeable future of an important change in the status quo – the revocation or termination of a proceeding and the elimination of its restraining effects on volumes and prices of imports." SAA at 883.

[65] CD at 71, n.382.

[66] NSK I at 12, n. 11.

[67] 444 F.3d at 1373-1374.

was only triggered "whenever the antidumping investigation is centered on a commodity product, and price competitive non-subject imports are a significant factor in the market."[68] Given this, there is nothing in Bratsk itself that suggests that a "replacement" analysis is necessary or appropriate in a sunset review.[69]

Further, in Mittal, the Federal Circuit has made clear that the Bratsk analysis was limited in nature and was not intended to require a prospective replacement analysis in sunset reviews.[70] In Mittal, the Federal Circuit explained that Bratsk was not "addressed to the potential effectiveness of any possible remedial order" but was only "directed to determining the cause of the injury already suffered by the domestic industry."[71] The Federal Circuit further emphasized the following:

> Bratsk . . . directs that in cases involving commodity products in which non-LTFV imported goods are present in the market, the Commission must ... consider{} . . . whether the domestic industry would have been better off if the dumped [imports] had been absent from the market. That inquiry is not concerned with whether an antidumping order would actually lead to the elimination of those goods from the market in the future or whether those goods would be replaced by goods from . . . other sources. Rather, the inquiry is a hypothetical one that sheds light on whether the injury to the domestic industry can reasonably be attributed to the subject imports. The focus on the inquiry is on the cause of injury in the past, not the prospect of effectiveness in the future."[72]

Mittal therefore establishes that the Bratsk inquiry is focused solely on the issue of whether the subject imports have caused injury to the industry in the past, and that Bratsk does not require the Commission to assess whether an order will be effective in the future. More to the point, the decision also establishes that Bratsk does not require the Commission to assess whether non-subject imports are likely to replace subject imports after an order is in place. Yet, that is exactly what the Court has asked the Commission to do here.

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[68] Bratsk, 444 F.3d at 1375.

[69] In Nucor Corp. v. United States, Consol. Ct. No. 07-00071, Slip Op. 08-141, at pp. 115-125 (Ct. Int'l Trade) (Dec. 23, 2008) ("Nucor"), Judge Carman specifically held that a Bratsk replacement analysis was not required in the sunset context, and relied, in part, on the fact that Bratsk linked the replacement analysis directly to the statutory provisions concerning a present injury analysis. Id. at 119. Judge Carman noted that the Bratsk "ruling was issued in a case reviewing the ITC's final phase investigation in an antidumping case," and that the "ruling does not speak to the applicability of the analysis to any other type of Commission decision, such as . . . five year review{s}. . ." Id. Moreover, he added that, in Mittal, the Federal Circuit explicitly "link[ed] the Bratsk analysis with the final phase investigation statute, supporting a strong inference that the final phase investigation is the only context in which the Bratsk/Mittal Steel analysis should be applied." Id. at 120.

[70] Mittal, 542 F.3d at 874-77.

[71] Mittal, 542 F.3d at 876 (emphasis added).

[72] Mittal, 542 F.3d at 876 (emphasis added).

In fact, in Nucor Corp. v. United States,[73] which was issued after NSK I and Mittal, Judge Carman held that a Bratsk-style replacement analysis was not required in a sunset review.[74] In Nucor, Judge Carman explained that Mittal "unambiguously held that in a Bratsk analysis, '{t}he focus of the inquiry is on the cause of injury in the past,'"[75] and that Bratsk "requires a strictly retrospective assessment of what has happened during the period of investigation, prior to the imposition of an antidumping order." As a result, he noted that "any language within the text of Bratsk arguably implying that it should have been extended to sunset reviews now seems foreclosed in light of the holding and reasoning of Mittal."[76]

Indeed, in Mittal, the Federal Circuit explained that the Commission need not perform the "rigid" Bratsk replacement/benefit analysis even in the injury context. The Federal Circuit also confirmed that the Commission has broad discretion to perform its causation analysis in any reasonable manner and is not bound to follow any "Procrustean formula," such as the "replacement/benefit" analysis apparently specified in Bratsk, when assessing causation in an injury investigation.[77] Accordingly, Mittal states that the Federal Circuit does not require the Commission to apply an additional test nor any one specific methodology.[78] Instead, Mittal instructs that the Commission must have "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,'" and that the Commission should not attribute injury from non-subject imports or other factors to subject imports.[79] As a result, we do not consider

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[73] Consol. Ct. No. 07-00071, Slip Op. 08-141, at pp. 115-125 (Ct. Int'l Trade) (Dec. 23, 2008) ("Nucor")

[74] Nucor, Slip Op. 08-141 at 119-125.

[75] Nucor, Slip Op. 08-141 at 123 (citing Mittal, 542 F.3d at 876.)

[76] Nucor, Slip Op. 08-141 at 121. In coming to this conclusion, Judge Carman specifically cited the NSK I Court's holding to the contrary and concluded that Mittal had indicated that the Court's analysis was overbroad. Nucor, Slip Op. 08-141 at 120-121, n. 47. We would also add that, in Diamond Sawblades Manufacturers Coalition v. United States, Ct. No. 06-00247, Slip Op. 09-05 (Jan. 13, 2009), Judge Musgrave of the Court of International Trade rejected the argument that, under Bratsk, the Commission must perform a prospective replacement analysis before making an affirmative threat determination. Diamond Sawblades Manufacturers Coalition, Slip Op. 09-05 at 24. Judge Musgrave also held that this type of prospective analysis had been rejected by the Federal Circuit in Mittal. Id.

[77] 542 F.3d at 879.

[78] 542 F.3d at 879.

[79] E.g., Welded Stainless Steel Pressure Pipe, USITC Pub. No. 4064 at 14; Small Diameter Graphite Electrodes, USITC Pub. No. 4062 at 13, n. 67.

that we are required to apply, either in original injury investigations or sunset reviews, the replacement/benefit test that we previously interpreted Bratsk as requiring in the present injury context.[80] [81] [82]

Moreover, we note that the statute does not itself direct the Commission to perform the type of "replacement" analysis prescribed in NSK I. See generally 19 U.S.C. §§ 1675(c) & 1675a(a). In particular, the statute directs the Commission to consider in a sunset analysis such factors as (i) the "likely volume, price effect, and impact of imports of the subject merchandise on the industry" upon revocation, (ii) the Commission's "prior injury determinations," (iii) any "improvement in the state of the industry . . . related to the order," (iv) the industry's "vulnerab{ility} to material injury" if an order is revoked, and (v) whether importers have absorbed duties after imposition of an order. 19 U.S.C. §§ 1675a(a)(1)(A)-(D). The statute also instructs the Commission to assess whether import volumes are likely to be significant after revocation of the order, taking into account (i) "likely increase{s} in production capacity or existing unused production capacity in the {subject} countr{ies}," (ii) existing and likely levels of inventories of the subject merchandise, (iii) third country barriers to trade impacting the subject merchandise, and (iv) the potential for product-shifting in the production facilities in the subject countries. 19 U.S.C. §§ 1675a(a)(2)(A)-(D).

The statute also provides that the Commission must assess the likely price effects of the subject imports, by considering whether there is "likely to be significant price underselling" by the subject imports of the domestic like products and whether the subject imports "are likely to enter the {market} at prices that would otherwise have a significant depressing or suppressing effect" on domestic prices. 19 U.S.C. §§ 1675a(a)(3)(A)-(B). Finally, under the statute, the Commission must consider "all relevant economic factors which are likely to have a bearing on the state of the industry," including such factors as likely declines in the industry's "output, sales, market share, profits, productivity, return on investments, and capacity utilization," and likely negative effects of the subject imports on the industry's "cash flow, inventories, employment, wages, growth, ability to raise capital, investment," and development and production efforts. 19 U.S.C. §§ 1675a(a)(4)(A)-(C). As can be seen, the statute specifies in detail the factors the Commission must analyze when assessing whether revocation of an order is likely to result in material injury by reason of the subject imports. It does not, however, direct the Commission to consider the type of "replacement" analysis prescribed by the Court in NSK I. In other words, there is no explicit statutory basis for the Court's instruction for the Commission to perform this analysis.[83]

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[80] In this regard, we agree with Judge Carman that we should not "unilaterally disregard data related to non-subject imports during a sunset review, {when we} find that such imports are a 'relevant economic factor{}' to {our} determination." Nucor, Slip Op. at 08-141 at p. 124.

[81] Commissioner Pinkert does not join this paragraph. He points out that the Federal Circuit, in Bratsk, 444 F.3d 1369, and Mittal, held that the Commission is required in original investigations, under certain circumstances, to undertake a particular type of analysis of non-subject imports.

[82] Commissioner Lane also refers to her dissenting views in Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, China, Thailand, and the United Arab Emirates, Invs. Nos. 731-TA-1131 to 1134 (Final), USITC Pub. No. 4040 (Oct. 2008), for further discussion of Mittal Steel.

[83] In United States Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996)(emphasis added), the Federal Circuit held as follows:

> This Court has no independent authority to tell the Commission how to do its job. We can only direct the Commission to follow the dictates of its statutory mandate. So long as the Commission's analysis does not violate any statute and is not otherwise arbitrary and capricious, the Commission may perform its duties in the way it deems most suitable.

Given that the statute does not itself require, explicitly or implicitly, that the Commission perform a Bratsk-style replacement analysis, the Commission has consistently taken the position it is not required to apply such an analysis in the sunset context.[84] We continue to believe that this is a reasonable interpretation of the sunset provisions of the statute and is entitled to deference from the Court under Chevron U.S.A., Inc. v. Natural Resources Defense Council.[85]

When reviewing an agency's construction of a statute under Chevron, the Courts must apply a two-prong analysis, under which it first looks at whether Congress has spoken directly to the issue.[86] If the intent of the statute is clear, then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[87] However, where Congressional intent is unclear, "the court does not simply impose its own construction on the statute," but assesses whether the agency's interpretation is based on a permissible construction of the statute.[88] If the agency's interpretation of the statute is reasonable, the Courts must affirm it, even if it is not the only reasonable interpretation of the statute, or the most reasonable interpretation.[89]

Given the absence of any indication in the statute or legislative history that a replacement/benefit analysis is required in the injury or the sunset context, we believe that such an analysis is neither necessary nor meaningful in either context.[90] Moreover, it is not dispositive that the Court may have spoken to the contrary on this issue in NSK I. As the Supreme Court has held, "a court's choice of one reasonable reading of an ambiguous statute does not preclude an implementing agency from later adopting a different reasonable interpretation."[91]

Finally, we do not agree that it is appropriate to extend the "basic principles" of Bratsk to the sunset area simply because similarities exist between the Commission's analysis in sunset reviews and its analysis in injury investigations. It is true, as the Court indicates in NSK I,[92] that the statute directs the Commission to consider some similar elements in its causation analysis in injury investigations and sunset

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[84] See, e.g., Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine, Inv. Nos. 701-TA-417, and 731-TA-953, 954, 957-959, 961, and 962 (Review), USITC Pub. No. 4014 at 21 n.126 (June 2008); Polyethylene Terephthalate Film, Sheet, and Strip From India and Taiwan, Inv. Nos. 701-TA-415 and 731-TA-933 and 934 (Review), USITC Pub. No. 3994 at 28-29 n.203 (April 2008).

[85] 467 U.S. 837, 842-843 (1984); United States v. Eurodif S.A., 129 S. Ct. 878, 886-887 (2009) Under Chevron, unless a statute contains clear and unambiguous language to the contrary, an agency's reasonable interpretation of a statute must be given deference by a Court. Id. Moreover, the agency's interpretation of an ambiguous statute need not be the only reasonable interpretation, or even the most reasonable interpretation for it to be approved by the Court. Allegheny Ludlum Corp. v. United States, 475 F. Supp.2d 1370, 1375 (CIT 2006).

[86] Chevron, 467 U.S. at 842-43; see also Allegheny Ludlum Corp. v. United States, 475 F. Supp.2d 1370, 1375 (CIT 2003).

[87] Chevron, 467 U.S. at 842-43.

[88] Chevron, 467 U.S. at 843.

[89] Allegheny Ludlum, 475 F. Supp.2d at 1375.

[90] For a full discussion of the rationale for this interpretation of the present injury provisions of the statute, see Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, Inv. No. 731-TA-961 (Final) (Remand), USITC Pub. 3903, at 4-5 & 14-16 Jan. 2007); Silicon Metal from Russia, Inv. No. 731-TA-991, (Final) (Second Remand), USITC Pub. 3910, at 3-8.

[91] Eurodif S.A., 129 S. Ct. at 886 (citing National Cable & Telecommunications Service Association v. Brand X Internet Services, 545 U.S. 967, 982-983 (2005)).

[92] NSK I at 10-11.

reviews. Nonetheless, in the SAA, the President and Congress made clear that the "likelihood of continuation or recurrence of material injury standard is not the same as the standards for material injury and threat of material injury."[93] As the SAA points out, unlike the injury portions of the statute, which instruct the Commission to determine "whether there is current material injury by reason of imports of subject merchandise" or whether such "injury is imminent, given the status quo,"[94] in a sunset review, the Commission must "engage in a counter factual analysis," in which it assesses "the likely impact in the reasonably foreseeable future of an important change in the status quo – the revocation or termination of a proceeding and the elimination of its restraining effects on volumes and prices of imports."[95] Given that the legislative history of the sunset provisions makes clear that the two analyses are not to be considered the same and do not involve the exact same considerations, the Commission does not believe that the similarities between the injury and sunset analyses themselves justify an extension of the Bratsk analysis to the sunset context, as the Court appeared to conclude in NSK I.[96]

3. The Court's Consideration of the Bratsk Triggering Factors

We also maintain that the Court should not have independently made factual and legal conclusions with respect to the Bratsk triggering factors. We recognize that the Court believes that it did not make factual and legal findings on these factors, but simply "relied on the [Commission's] record . . . for its legal conclusions."[97] Nonetheless, as we pointed out in our reconsideration motion, the Commission simply did not address the triggering factors – or perform any aspect of the Bratsk analysis – in its decision, because it has never considered such an analysis to be necessary or meaningful in a sunset

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[93] SAA at 883 (emphasis added).

[94] SAA at 883.

[95] SAA at 884. We agree with Judge Carman that the difference in the nature of the two analyses renders the use of a replacement analysis in a sunset "untenable." As Judge Carman points out, sunset reviews require the Commission to perform an analysis of how the subject imports will impact the industry in the reasonably foreseeable future upon revocation of an order, not on whether the subject imports were a cause of injury already suffered by the industry. Nucor, Slip Op. 08-141 at 122. Accordingly, as Judge Carman stated, "{i}f the Commission was required to apply such an analysis in a sunset review, it would necessarily have to do so counterfactually, i.e., without any data on the price, volume, and effect of subject and non-subject imports that would possibly re-enter the market upon revocation of the antidumping duty order. Attempting to complete a Bratsk analysis under such conditions would be predicated upon speculation and conjecture. It would therefore be untenable." Id.

[96] The Court appears to assume that, whenever non-subject imports have fully replaced subject imports after an order is imposed, it is likely that non-subject imports will constitute the "overriding cause of material injury" to the industry in the reasonably foreseeable future, even after revocation of the order. NSK I at 10-12. This assumption is simply not correct. Even if non-subject imports have replaced the subject imports at the same volume and pricing levels in the market after imposition of an order, revocation of an order can still result in the influx of a significant volume of low-priced subject imports into the market that can have a significant negative impact on pricing in the market as well as the industry's overall condition. It is for this reason that the SAA makes clear that an order may remain in place even if "other causes, as well as future imports, are likely to contribute to injury." SAA at 885. Moreover, as we have previously pointed out in the present injury context, "{t}he statutory scheme clearly contemplates that an industry may be facing difficulties from a variety of sources, including non-subject imports and other factors, but the existence of injury caused by other factors does not compel a negative determination if the subject imports are themselves making more than a minimal or tangential contribution to injury." Silicon Metal from Russia, USITC Pub. 3910 at 7; see also Nippon Steel Corp., 345 F.3d at 1381 (dumped imports "need not be the sole or principal cause of injury").

[97] NSK II at 19.

review. In its determinations, the Commission did, of course, make findings on the fungibility of domestic and subject ball bearings (in its cumulation analysis),[98] and the substitutability of domestic and subject bearings (for purposes of its causation analysis).[99] However, the Commission did not consider any aspect of the Bratsk analysis in its determinations, such as whether subject and non-subject imports are interchangeable, whether ball bearings from all sources are reasonably considered "commodities" for purposes of Bratsk, or whether there are significant volumes of price-competitive non-subject imports in the market.[100] Given the fact that the Commission neither addressed nor reached any conclusions on these factors, the Court was required to permit the Commission to address them in the first instance.[101]

As the Federal Circuit and this Court have consistently recognized, it is the Commission – not the Court of International Trade – that makes factual and legal findings in injury investigations and sunset reviews.[102] As the Federal Circuit emphasized in Nippon I:

> Under the statute, only the Commission may find the facts and determine causation and ultimately material injury – subject, of course, to Court of International Trade review under the substantial evidence standard. {In the Nippon appeal}, {t}he Court of International Trade, despite its very fine opinions and analysis, went beyond its statutorily-assigned role to "review." Despite its express dissatisfaction with the fact-finding underlying the Commission's remand decision, the Court of International Trade abused its discretion by not returning the case to the Commission for further consideration. See, e.g., Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744, 84 L. Ed. 2d 643, 105 S. Ct. 1598 (1985). Thus, to the extent the Court of International Trade engaged in refinding facts (e.g., by determining witness credibility), or interposing its own determinations on causation and material injury itself, the Court of International Trade, we hold, exceeded its authority.[103]

Thus, by drawing its own conclusions on the Bratsk factors rather than remanding the issue to the Commission for its consideration, we respectfully maintain that the Court exceeded its review authority here.

We would add that the Federal Circuit addressed this very issue in Mittal and resolved it in the Commission's favor.[104] In that appeal, the Commission pointed out that the Federal Circuit appeared to make findings on the triggering factors in its prior decision in the appeal, thus preventing the Commission from addressing the factors itself.[105] The Federal Circuit acknowledged that its holdings on this issue were unclear and that it may have inadvertently appeared to draw such a conclusion in its prior decision. The Federal Circuit added, however, that making such a finding was not within its authority. Noting that "{t}he Commission, and not this Court, is the finder of facts in antidumping

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[98] CD at 49-51.

[99] CD at 58-61, 67.

[100] See generally CD.

[101] E.g., Nippon Steel Corp. v. ITC, 345 F.3d 1379, 1381 (Fed. Cir. 2003) (Nippon I).

[102] E.g., Nippon I, 345 F.3d at 1381; Nippon Steel Corporation v. United States, 458 F.3d 1345, 1358-59 (Fed Cir. 2006).

[103] Nippon I, 345 F.3d at 1381 (emphasis added).

[104] Mittal, 542 F.3d at 875.

[105] Mittal, 542 F.3d at 875.

investigations,"[106] the Federal Circuit emphasized that it is the Commission's responsibility --- not the Court's -- to make a determination on the "commodity" nature of products under Bratsk. Accordingly, the Federal Circuit remanded the matter so that the Commission could consider the issue on its own.[107] Simply put, the Court could have, and should have, done the same here.

Moreover, the Court's analysis does not reflect an assessment of all of the factors relevant to a this determination. In its analysis, the Court relied solely on record evidence showing that the domestic and subject bearings were generally considered to be "always" or "frequently" interchangeable as a basis for its finding that all bearings are commodity products.[108] To assess whether bearings are "interchangeable regardless of source," however, it is necessary to examine whether all of the bearings in the market are reasonably considered interchangeable for one another, including those sold by non-subject suppliers.[109] We would note that the Commission did not make a specific finding on this issue in its own views, as it would have if it had been given the opportunity to perform this analysis.[110] Since the Court relied only on the evidence relating to the interchangeability of domestic and subject bearings, its findings reflect an incomplete analysis of the evidence on the interchangeability of bearings sold by all sources in the market.

The Court's analysis also reflects an incomplete understanding of the evidence examined by the Commission when it assesses whether a particular product is a commodity. In its analysis of this issue, the Court relied solely on record evidence concerning purchaser and importer statements about the interchangeability of domestic and imported bearings.[111] As the Commission, however, has consistently stated:

> {I}t is improper to assume that simply because goods are generally interchangeable for purposes of the "reasonable overlap of competition" analysis for cumulation, or are interchangeable for purposes of defining the domestic like product, that they are necessarily "commodities," for purposes of assessing causation, which is the function of the Bratsk 'test.' (citing BIC Corp. v. United States, 964 F. Supp. 391, 397, & 399 (Ct. Int'l Trade 1997)).[112]

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[106] Mittal, 542 F.3d at 875.

[107] Mittal, 542 F.3d at 875.

[108] NSK I at 13.

[109] E.g., Certain Activated Carbon from China, Inv. No. 731-TA-1103 (Final), USITC Pub. No. 3913 (April 2007); Certain Polyester Staple Fiber from China, Inv. No. 731-TA-1104 (Final), USITC Pub. No. 3922 at 27 (June 2007). For example, in Activated Carbon, the Commission concluded that activated carbon was not a commodity product for purposes of Bratsk because the non-subject imports were not generally interchangeable with the domestic and subject imports, even though the domestic and subject merchandise were interchangeable with each other. Activated Carbon, USITC Pub. No. 3913 at 26-27. In coming to this conclusion, the Commission noted that domestic and subject activated carbon were coal-based, while the non-subject imports were primarily coconut-based, which meant they were not significantly interchangeable with each other and were used for different end uses. Id. It also noted that there was a lack of customer overlap for the two types of activated carbon, thus demonstrating limited substitutability between the two. Id.

[110] E.g., Certain Activated Carbon from China,USITC Pub. 3913 at 26-27; Certain Polyester Staple Fiber from China, USITC Pub. 3922 at 27.

[111] NSK I at 13-14.

[112] E.g., Certain Polyester Staple Fiber from China, Inv. No. TA-1104 (Final), USITC Pub. No. 3922 at 27, n. 176 (June 2007). Moreover, in Mittal, the Federal Circuit agreed with the Commission that it was reasonable to take such an approach to the commodity issue under Bratsk. Mittal, 542 F.3d at 875.

As a result, in its prior determinations, the Commission has looked at a number of factors when analyzing whether a product is a commodity under Bratsk. In addition to considering purchaser, importer and producer comments on interchangeability, for example, the Commission has examined evidence concerning the types of customers to whom the products are sold, the degree to which the products are produced from the same raw material inputs, and market perceptions on whether the products are thought to be "commodity" products.[113] Because it did not apply a Bratsk analysis here, however, the Commission never had the opportunity to determine whether there was pertinent evidence on these issues and address them in its views.

Of course, it is possible that, in any particular case – including this one – the Commission could reasonably rely solely on purchaser and importer characterizations of the interchangeability of the imported and domestic product as a basis for its "commodity" finding under Bratsk. However, that decision is within the Commission's discretion as the trier-of-fact in injury proceedings under the antidumping laws.[114] In the end, the Court should have remanded this matter to the Commission, so that the Commission could have collected, considered and analyzed the relevant record data and issued its own findings on the matter. Once made, those findings could then properly be reviewed by the Court in its role as the entity that "vet{s} the {Commission's} determination," but does not make it.[115]

IV. REVOCATION OF THE ANTIDUMPING DUTY ORDERS ON BALL BEARINGS FROM JAPAN AND THE UNITED KINGDOM IS LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF MATERIAL INJURY WITHIN A REASONABLY FORESEEABLE TIME

As indicated above, we have again reviewed the record of this proceeding, the evidence obtained on remand, the Court's remand instructions, and the comments of the parties relating to the Court's instructions. Having taken these steps, we again determine that revocation of the orders on ball bearings from Japan and the United Kingdom would likely result in the recurrence of material injury to an industry in the United States within a reasonably foreseeable time. We discuss our reasons for this determination below.

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[113] Certain Color Television Receivers from China, Inv. No. 731-TA-1034, USITC Pub. 3905 (Final) (Remand) (Feb. 2007) (finding that color televisions are not highly interchangeable and not considered a commodity product); see also Certain Polyester Staple Fiber from China, USITC Pub. No. 3922 at 26-27; .

[114] Nippon I, 345 F.3d at 1381.

[115] Nippon Steel Corp. v. United States, 458 F.3d at 1352.

A. The Domestic Like Product and the Domestic Industry

We have reviewed the Commission's prior findings concerning the domestic like product and the domestic industry in these reviews, and adopt them in their entirety here.[116] Accordingly, we again determine that the domestic like product includes all ball bearings, as defined within the scope of the order and that the industry consists of all domestic producers of ball bearings.[117] In this regard, we note that neither the Japanese nor the United Kingdom plaintiffs challenged the Commission's domestic like product or domestic industry findings on appeal. We also incorporate the Commission's previous discussion of the background information for these reviews and the legal standards governing its sunset review analysis.[118]

B. Cumulation

We have reviewed the Commission's prior findings concerning the cumulation of the subject imports of ball bearings from Japan and the United Kingdom with the subject imports from France, Germany, and Italy, and adopt them in their entirety here, except to the extent that we supplement and revise them below.[119] Accordingly, we determine (I) that there is likely to be a reasonable overlap of competition between the subject imports of ball bearings from France, Germany, Italy, Japan, and the United Kingdom and the domestic like product, (ii) that the subject imports of ball bearings from France, Germany, Italy, Japan, and the United Kingdom are not likely to have no discernible impact on the industry if the orders are revoked; and (iii) that conditions of competition do not warrant a decision not to exercise our discretion to cumulate these countries in this sunset review.[120] As a result, we exercise our discretion to cumulate the subject imports from France, Germany, Italy, Japan, and the United Kingdom for purposes of our analysis in these reviews.[121] We address below the Court's remand instructions concerning our decision to cumulate the subject ball bearings from the United Kingdom with the other cumulated imports.

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[116] See USITC Pub. No. 3876 at 5-13; CD at 5-13.

[117] See USITC Pub. No. 3876 at 5-13; CD at 5-13.

[118] See USITC Pub. No. 3876 at 5-15; CD at 5-14.

[119] See USITC Pub. No. 3876 at 25-37; CD at 34-54.

[120] See USITC Pub. No. 3876 at 25-37; CD at 34-54.

[121] In this regard, we have also reviewed and adopted the Commission's prior determination that the subject imports from Singapore should not be cumulated with the other subject imports. CD at 44-47 & 52-54. As indicated previously, Commissioner Pinkert adopts the views on this issue of Commissioner Pearson and Koplan, as expressed in their original views in these sunset reviews. See CD at 44-47 & 52, n.287. Commissioner Williamson adopts the views on this issue of Commissioners Aranoff and Hillman, as expressed in their original views in these sunset reviews. See CD at 52-54. Commissioner Lane reaffirms her prior decision to exercise her discretion to cumulate the subject imports from Singapore with the other subject imports, but otherwise joins the discussion in the remainder of these remand views. She notes that the inclusion of the Singapore imports in her analysis does not significantly affect her analysis in these remand views.

1. The Court's Remand Instructions

In NSK I, the Court affirmed most of the Commission findings underlying its decision to cumulate the subject ball bearings from the United Kingdom with the subject imports from France, Germany, Italy, and Japan.[122] The Court affirmed the Commission's finding that the subject imports from the United Kingdom were likely to have a reasonable competitive overlap with the domestic like product and the other subject imports, stating the overwhelming majority of purchasers reported that U.K. subject imports were "always" or "frequently" interchangeable with the domestic like product, and with subject imports from France, Germany, Italy, and Japan.[123]

The Court also affirmed several Commission findings supporting the finding that the subject imports from the United Kingdom were not likely to have no discernible adverse impact on the industry upon revocation.[124] For example, because the record showed that the "subject imports from the United Kingdom have remained steady in terms of value throughout the review period," the Court found that the Commission "reasonably found that U.K. producers maintain a significant share of the U.S. market."[125] Similarly, because the record showed there was a "large percentage increase in [the UK's] exports over the review period" and that the United Kingdom was "the *** exporter of ball bearings during the period, the Court also affirmed the Commission's finding that producers in the United Kingdom were "highly export oriented."[126]

The Court found "less convincing," however, the Commission's "findings that U.K. producers have discernible levels of excess production capacity and capacity utilization" that could be directed at the U.S. market upon revocation.[127] In questioning these findings, the Court noted that the United Kingdom's production capacity for ball bearings fell from *** million in 2000 to *** million in 2005, and that U.K. capacity utilization rates increased from *** percent to *** percent during the period.[128] The Court pointed out the U.K. imports represented only one percent of all U.S. imports and maintained a market share of *** to *** percent during the period, which the Court thought "might {otherwise} appear insignificant."[129] Nonetheless, the Court acknowledged that, "given the weakened state of the domestic industry, even the most marginal increase in exports would likely lead to material injury," and stated that "the existence of non-negligible excess capacity in relation to non-negligible percentage of U.S. consumption provides sufficient grounds to cumulate."[130] The Court found that all of these

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[122] NSK I at 17-19.

[123] NSK I at 17-18.

[124] NSK I at 19.

[125] NSK I at 19.

[126] NSK I at 19.

[127] NSK I at 19.

[128] NSK I at 19-20.

[129] NSK I at 20.

[130] NSK I at 20.

considerations "would likely constitute a discernible level of subject imports," especially since the Commission had "characterized the domestic industry as extremely vulnerable."[131] *Id.*

Nonetheless, the Court found that, since the Commission had "failed to address the significant rise in non-subject imports and large scale restructuring within the ball bearing industry," it could not "determine, without a more complete analysis of the conditions of competition, whether this level of available capacity would likely have an adverse impact on the domestic industry." [132] The Court therefore remanded the Commission's discernible adverse impact findings for the U.K. imports "for additional explanation as to whether the potential volumes of U.K. exports discussed above are likely to have an adverse impact on the domestic industry if the order is removed."[133]

2. Parties' Arguments

On remand, NSK Corporation, NSK Ltd., and NSK Europe Ltd. ("the NSK companies") argue that the Commission should not cumulate the subject imports from the United Kingdom with those from France, Germany, Italy and Japan.[134] According to the NSK companies, the restructuring efforts made by the U.K. producers during the period of review have resulted in substantial declines in the U.K.'s capacity and production levels for ball bearings, and resulted in very high capacity utilization rates during the last years of the period of review.[135] Moreover, they claim, the U.K. industry has focused on bearing types that are of interest to the European market.[136] In other words, they assert, "the restructuring of the U.K. ball bearings industry since the imposition of the order demonstrates that the levels of excess production capacity and capacity utilization within that industry will not be directed to the United States and thus will not have an adverse impact on the domestic industry if the order is revoked."[137] As a result, they contend that the Commission should not cumulate the subject imports from the United Kingdom with the other subject imports because they are unlikely to have a discernible adverse impact on the domestic industry.[138]

For its part, Timken argues that the subject imports from the United Kingdom are likely to have a discernible adverse impact on the industry, and that a consideration of the increasing role of non-subject imports in the market and the issue of global restructuring "simply affirms the correctness and reasonableness of the Commission's initial findings in these reviews," i.e., that the subject imports from

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[131] NSK I at 20. The Court agreed with the Commission that "it seems that *any* increase in subject imports would likely have an adverse impact," given the vulnerability of the industry. Id. In fact, the Court recognized that the Court of International Trade had "upheld the ITC's decision to cumulate imports in cases with similar facts." Id. (citing Usinor v. United States, 28 CIT 1107 (2004)).

[132] NSK I at 20.

[133] NSK I at 20-21.

[134] NSK Comments at 12.

[135] NSK Comments at 12. In particular, NSK notes that U.K. production capacity dropped by *** percent between 2001 and 2005, and that the production levels in the United Kingdom also fell substantially during this same period. Id. at 12-13. NSK also notes that capacity utilization in the United Kingdom was 99 percent in 2005. Id. at 13.

[136] NSK Comments at 12.

[137] NSK Comments at 12.

[138] NSK Comments at 14.

the United Kingdom should be cumulated with imports of ball bearings from the other subject countries.[139]

3. Analysis

We determine that the subject imports of ball bearings from the United Kingdom are likely to have a discernible adverse impact on the domestic industry if the order is revoked. The Court of International Trade has consistently pointed out that the discernible adverse impact standard presents a "relatively low threshold" and "is relatively easy for the [Commission] to satisfy."[140] Moreover, the Court has stated that the discernible adverse impact standard is satisfied as long as it is "likely that [a producer] could obtain a discernible amount of [the product in question] from somewhere – such as by exploiting excess capacity, by shifting from domestic and internal production, or by shifting from other export markets – and would have some incentive to sell a discernible amount into the U.S. market."[141] We find that the record evidence in this review more than satisfies this standard, for the following reasons.

First, the industry in the United Kingdom remains a substantial producer of ball bearings. Although the capacity and production levels of the U.K. industry declined considerably during the period of review,[142] the U.K. industry still remained a substantial supplier of ball bearings at the end of the period. In particular, the U.K. industry had a capacity of *** bearings in 2005 and produced *** bearings in that year.[143] Moreover, the subject producers in the United Kingdom have been highly and increasingly export-oriented throughout the period of review, with their export shipments rising from a level of *** percent of total shipments in 2000 to a level of *** percent of total shipments in the final year of the period.[144] Finally, the record shows that, even with the disciplining effects of the order in place, subject imports of ball bearings from the United Kingdom have maintained a stable and consistent presence in the U.S. market.[145] In particular, the subject imports from the United Kingdom have generally maintained the same market share level throughout the period of review, ranging between 0.3 and 0.4 percent during the period.[146]

Furthermore, although it is true that the U.K. producers reported significant declines in their

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[139] Timken Comments at 15.

[140] Cogne Acciai, Slip Op. 05-122 at 9.

[141] Wieland-Werke AG v. United States, Slip Op. 07-163 at 16-17 (Nov. 7, 2007) (quoting Cogne Acciai, 2005 Ct. Int'l Trade LEXIS 130 at 13-14, (Slip Op. 05-122 at 9)); see also Usinor, Beautor, Haironville v. United States, 28 CIT 1107, 342 F. Supp. 2d 1267, 1285 (Ct. Int'l Trade 2004) (explaining that even a small increase in subject imports after revocation would not likely be absorbed without discernible injury).

[142] In quantity terms, the capacity of the U.K. producers fell by *** million bearings from 2000 to 2005, and the production levels of the U.K. producers fell by *** million bearings from 2000 to 2005. CR/PR at Table BB-IV-9.

[143] CR/PR at Table BB-IV-9; CR at BB-IV-42, PR at BB-IV-21. As a point of comparison, we note that the domestic industry's production quantity was 203.8 million ball bearings in 2005. CR/PR at Tables BB-I-1 & C-2.

[144] CR/PR at Table BB-I-IV-9; CD at 47-48.

[145] By value, the subject imports from the United Kingdom fell from $*** in 2000 to $*** in 2001 to $*** in 2002. However, they have increased every year since 2002, growing from $*** in 2003 to $*** in 2004 to $*** in 2005. CR/PR at Tables BB-I-1 & C-2.

[146] CR/PR at Tables BB-I-1 & C-2; CD at 47.

capacity and production levels, in terms of quantity, during the period of review,[147] the U.K. producers actually increased their total shipments of all ball bearings (in terms of value) during the period of review, with the total value of their aggregate shipments growing by *** percent during the period of review.[148] Similarly, despite the reported capacity declines, the U.K. producers were able to increase the value of their exports by *** percent during the period of review.[149] Finally, the record shows that the United Kingdom is the *** largest ball bearing exporter in the world.[150] In light of the significant size of the U.K. industry, the continued and stable presence of U.K. ball bearings in the U.S. market and the consistent increases in the value of their exports to global markets during the period, we find that, if the order covering ball bearings from the United Kingdom were revoked, the subject producers in the United Kingdom are likely to ship sufficient volumes of ball bearings to the United States upon revocation that these volumes will have a discernible adverse impact on the industry in the reasonably foreseeable future.

In coming to this conclusion, we again find that the subject U.K. producers are likely to use existing and available capacity to direct additional shipments of ball bearings to the United States upon revocation of the U.K. order. In making this finding, we recognize that the Court questioned the Commission's prior findings, given the reported declines in the U.K. industry's capacity and production levels and its high capacity utilization rates during the final years of the period.[151] However, despite the reported capacity declines and the recent high capacity utilization rates, the subject producers still retained the capacity to direct additional exports to the U.S. market upon revocation of the order that could have a discernible impact on the industry. For example, in 2005, the last year of the period of review, the U.K. industry reportedly operated at a capacity utilization rate of *** percent.[152] Even at this high rate of utilization, however, the U.K. industry's available excess capacity in that year was equivalent to *** percent of U.S. production.[153] Further, even when operating at high capacity levels in 2003, 2004, and 2005, the U.K. producers were still able to increase the total value of their shipments to home and

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[147] CR/PR at Table BB-I-IV-9.

[148] The total value of total shipments by U.K. subject producers increased from $239.4 million in 2000 to $*** million in 2001 to $*** in 2002 to $*** in 2003 to $*** in 2004 to $*** in 2005. CR/PR at Table BB-IV-9. As we stated in our views, the Commission generally relies on value measures, rather than quantity measures, when assessing most volume-related data in its bearings investigations and reviews, due to product mix issues. CD at 38, n.191. In NSK I, the Court confirmed that the Commission can reasonably rely primarily on value-based measures when assessing the volumes of the subject imports, due to the "wide variety of ball bearings" within the scope of the review. The Court stated that "case law confirms that the {Commission} may assign more weight to value versus quantity in administering reviews under the antidumping statutes." NSK I at 19 (citing American Bearings Mfrs. Ass'n, 28 CIT 1698, 1705; 350 F. Supp. 2d 1100, 1108 (2004).

[149] The total value of total exports by U.K. subject producers increased from $*** million in 2000 to $*** in 2001, dropped to $*** in 2002, and then increased from $*** in 2003 to $*** in 2004 to $*** in 2005. CR/PR at Table BB-IV-9.

[150] CR/PR at Table BB-IV-11; USITC Pub. 3876 at BB-IV-11.

[151] NSK I at 19-20.

[152] CR/PR at Table BB-IV-9.

[153] CR/PR at Tables BB-III-1 & BB-IV-9 (U.K. producers' excess capacity was *** bearings in 2005, compared to domestic production of *** bearings). We would add that, in NSK I, the Court noted that this excess capacity would appear to allow the U.K. producers to capture an additional $8 million in U.S. market share, which "would likely constitute a discernible level of [U.K.] subject imports" given that it exceeded the domestic industry's operating income in 2005. NSK I at 20.

export markets considerably between 2003 through 2005.[154] Thus, even as the U.K. producers were reportedly reducing their capacity levels in an effort to focus on the production of higher-value, custom products, the record indicates they nevertheless retained the ability to increase significantly the value of their shipments of ball bearings to the U.S. market. We find that this indicates that they would likely have a discernible adverse impact on the industry upon revocation of the order, especially given their current presence in the market.

Furthermore, as the Commission indicated in its original determination,[155] the prevailing conditions of competition in the market indicate that the volumes of subject imports from the United Kingdom are likely to enter the U.S. market in a manner that is likely to have a discernible adverse impact on domestic pricing. In this regard, the record shows that price is an important factor in the purchase decision for ball bearings,[156] that purchasers reported there is a high degree of substitutability between the U.K. and domestic ball bearings,[157] and that prices for ball bearings tend to be higher in the U.S. market than other markets.[158] In other words, as the Court itself correctly stated, even a relatively small volume of imports from the United Kingdom after revocation of the order would not likely be absorbed without at least some discernible impact on the domestic industry.[159] Considering that the U.K. industry remains a large and export-oriented industry, that subject U.K. imports are substitutable for the domestic like products, and that price is an important factor in the purchase decision, we find that U.K. producers are likely to take advantage of the revocation of the order to compete more aggressively with both the

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[154] CR/PR at Table BB-IV-9. During this period, the U.K. industry's total shipments grew, in value, from $*** in 2003 to $*** in 2005, which were both higher than the value of the industry's shipments in 2000. Id. The U.K. industry's total exports also increased in value between 2003 and 2005, growing from $*** in 2003 to $*** in 2005, which were again both higher than the value of the industry's shipments in 2000. Id.

[155] USITC Pub. No. 3876 at 34; CD at 48.

[156] USITC Pub. No. 3876 at 46-47; CD at 67.

[157] CR/PR at Table BB-II-4; CD at 49. The NSK companies claim that the restructured U.K. industry is unlikely to enter the U.S. market upon revocation because it is increasingly focused on products of "particular interest" to the European market. NSK Comments at 13-14. However, NSK notes that, among other things, the U.K. industry is focused more on custom-produced products for this market, including the automotive market. Id. Given that the U.K. producers already have a stable presence in the U.S. market, that the domestic industry sells significant numbers of bearings to the automotive market, and that the domestic industry itself produces a large number of custom products, CD at 60-61, n. 335, we do not believe that this distinction makes it likely that the subject imports from the United Kingdom will not have a discernible adverse impact on the industry upon revocation of the order.

In this same vein, we note that substantial proportions of ball bearings are sold as both standard and customized product in the United States by the domestic industry and the suppliers of subject ball bearings from the United Kingdom. CD at 50 n.280. As a share of value, standard bearings reportedly constituted 51.3 percent and custom bearings 48.7 percent of subject imports from the United Kingdom that were sold in the U.S. market in 2005, while standard bearings constituted 33.1 percent and custom bearings constituted 66.9 percent of domestically produced ball bearings. CR at BB-I-40, PR at BB-I-34. The data also showed an overlap among end-user categories for both standard bearings and custom bearings for the UK product and the domestic product, including for custom bearings sold to aerospace and other OEM users. CR/PR at Table BB-I-10.

[158] USITC Pub. No. 3876 at 44; CD at 64.

[159] NSK I at 20.

domestic and non-subject ball bearings suppliers on price and thereby increase their market share.[160] We find therefore that the subject imports of ball bearings from the United Kingdom will have a discernible adverse impact on the industry upon revocation.[161]

We have also considered the Court's instruction that the Commission reconsider its discernible adverse impact analysis in light of the "significant rise in non-subject imports and {the} large scale restructuring within the ball bearing industry, which might have skewed its analysis of the domestic industry's level of vulnerability and likely injury from unrestrained imports."[162] As we discuss below, neither of these factors change our view that the subject imports from the United Kingdom are not likely to have no discernible adverse impact on the industry upon revocation of the order.

First, as is discussed in detail below, we again determine that the industry was in a weakened condition during the period and therefore vulnerable to the likelihood of material injury by reason of the

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[160] Moreover, we find that the U.K. subject imports are likely to be priced aggressively in the market if the U.K. order were revoked, given that the limited available data on pricing reflects that they were already competing aggressively on price with the domestic ball bearings. Six purchasers reported that U.S. prices were higher than the prices of the U.K. imports, and one purchaser reported their prices were comparable. CR at BB-V-7, PR at BB-V-5. Further, the price comparison data show that the U.K. subject imports undersold the domestic like product in 45 out of 48 instances over the period of review, that is, even with the order in place. CR/PR at Table BB-V-2. Although these overselling figures are, as the Court points out, based on a small number of price comparisons, the limited pricing data are consistent with purchaser responses and constitute a higher coverage percentage than the data for the United Kingdom in the first sunset review. CR at BB-V-9, n.19; PR at BB-V-7, n.19.

[161] In their remand comments, the NSK companies also argue that the Commission's decision to cumulate the UK imports with other subject imports was inconsistent with its decision not to cumulate subject imports from Singapore in these second five-year reviews. NSK Remand Comments at 14-15. The Commission reasonably explained why the imports from Singapore should not be cumulated with the other imports, including those from the United Kingdom. CD at 44-47 (Chairman Pearson and Commissioner Koplan) & 52-54 (Vice Chairman Aranoff and Commissioner Hillman, joined by Chairman Pearson and Commissioner Koplan). Unlike the subject imports from the United Kingdom, the subject imports from Singapore declined significantly in terms of value during the period, and were approximately one-third of the value of subject imports from the United Kingdom at the end of the period. CD at 44, 52-53; CR/PR at Table BB-I-1. Moreover, Singapore accounted for the smallest share, by far, of all of the subject imports from the individual subject countries. In addition, the product mix of subject imports from Singapore differed substantially from the products produced by the UK and other subject suppliers because they included a large volume of miniature, non-precision BBs. In fact, the industry in Singapore could not produce BBs in excess of 30 mm. CD at 44-45, 52-53. These differences justified the Commission's different treatment of the subject imports from Singapore and the United Kingdom.

The NSK companies also argue that the Commission's decision to cumulate the UK imports with other subject imports was inconsistent with its decision not to cumulate subject imports from Romania during the first sunset reviews of the ball bearings orders. Again, this argument is misplaced. First, it is well-established that each Commission determination is "*sui generis*, [in that it] involv[es] a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior investigation cannot be regarded as dispositive of the determination in a later investigation." Nucor Corp. v. United States, 414 F.3d 1331,1340 (Fed. Cir. 2005). Second, the factual circumstances relating to the Romanian exports in the first review differ from those of the U.K. imports here, given that the Romanian imports' market fell from 0.7 percent of U.S. consumption in the original period of investigation to just 0.1 percent at the end of the period in the first review; the Romanian industry was significantly smaller than the U.K. industry was at the end of the period, and the subject imports from Romania were not certified for sales to major OEM's, among other things. Certain Bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, Inv. Nos. AA1921-143, 731-TA-341, 343-345, 391-397 & -399 (Review), USITC Pub. 3309 at 36-38 (June 2000).

[162] NSK I at 20.

cumulated subject imports. We incorporate that analysis in full in this discussion. As can be seen from that discussion, we do not regard the evidence concerning the industry's restructuring efforts during the period of review as indicating that the domestic ball bearings industry was "strong at the end of the review period and was growing stronger," as the NSK companies contend.[163] Instead, the record evidence shows that, during the period, the domestic industry suffered serious declines in its production levels, sales volumes, sales revenues, income, profit margins, market share and employment, and that these declines cannot be attributed solely, or even primarily, to the industry's "restructuring" efforts. As a result, we conclude that the industry's condition during the period of investigation made it vulnerable to the likely discernible adverse impact of the subject imports from the United Kingdom upon revocation of the U.K. order.

We have also considered the Court's instruction that we reconsider our discernible adverse impact finding for the subject U.K. imports in light of the "significant rise in non-subject imports" during the period.[164] Again, we do not find that the increase in the volume of the subject imports affects our conclusion that the subject imports from the United Kingdom will have a discernible adverse impact on the industry if the U.K. order is revoked. We discuss the role of non-subject imports in the market in detail in our likely impact analysis below, and incorporate that discussion here. Nonetheless, we would add, the record shows that the increase in the non-subject imports during the period of review has not had a significant impact on the role that the subject bearings from the United Kingdom have played in the market during the period, nor is it likely to do so upon revocation of the order.

In this regard, we find that the increase in non-subject imports has not resulted in a significant displacement of the subject U.K. ball bearings during the period of review. During the period of review, the U.K. imports have consistently retained a market share of *** percent, despite the existence of the U.K. order and despite the increase in non-subject imports during the period of review.[165] Given that the non-subject imports have not significantly replaced the subject imports from the United Kingdom or been able to capture significant market share from the U.K. imports even with the disciplining effects of the U.K. order in place, we find that they are not likely to have such an effect in the reasonably foreseeable future once the order is revoked. Moreover, given the size and export-orientation of the subject U.K. producers and their level of substitutability with the domestic products, we find that, upon revocation of the order, the subject U.K. imports are likely to begin pricing their products more aggressively in the market in order to recover any market share that may have been lost immediately after imposition of the U.K. order. As a result of these efforts, we find that the subject imports of ball bearings from the United Kingdom are likely to have a discernible effect on the prices, market share, and overall condition of the industry upon revocation, even with the level of non-subject imports now seen in the market.

Furthermore, our finding on this issue is not affected by the fact that the non-subject imports occupy a considerably larger share of the market than the subject imports from the United Kingdom. As we noted earlier, the discernible adverse impact standard presents a "relatively low threshold" and "is relatively easy for the [Commission] to satisfy."[166] Given the small level of impact required to establish that the subject U.K. imports will have a discernible adverse impact on the industry here, the substantial presence of non-subject imports in the market does not cause us to conclude that the subject imports from the United Kingdom will have no discernible adverse impact on the industry, especially once they are free

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[163] NSK Comments at 10.

[164] Neither the Japanese nor United Kingdom respondents have chosen to address this issue specifically in their remand comments.

[165] CR/PR at Tables BB-I-1 & C-2.

[166] Wieland-Werke AG, Slip Op. 07-163 at 16-17 (Nov. 7, 2007) (quoting Cogne Acciai, Slip Op. 05-122 at 9)); see also Usinor, Beautor, Haironville, 342 F.Supp.2d at 1285.

of the disciplining effects of the U.K. order.

Accordingly, we conclude that the subject imports from the United Kingdom are not likely to have no discernible adverse impact on the industry upon revocation of the order. Since we have also concluded that there is a reasonable level of overlap of competition between the subject imports from the United Kingdom and the subject imports from the other cumulated countries, and we do not find that other considerations warrant a decision not to cumulate the U.K. imports with the other cumulated countries, we exercise our discretion to cumulate the subject imports from the United Kingdom with the subject imports from France, Germany, Italy, and Japan.[167]

C. Conditions of Competition

We have reviewed the Commission's prior findings concerning conditions of competition in the United States market for ball bearings during the period of review, and adopt them in their entirety here,[168] except to the extent that we supplement and revise them in the discussion of the industry's restructuring efforts set forth below. As we have noted, in NSK I, the Court instructed the Commission to reconsider its analysis of the vulnerability of the industry in light of the restructuring of the industry's operations during the period of review. Since this issue is directly related to our finding of the industry's level of vulnerability, we discuss this issue in our likely impact analysis below.

However, we note that the Court affirmed several other aspects of the Commission's conditions of competition findings.[169] In particular, the Court affirmed that the Commission reasonably analyzed the impact of subject imports on the industry as a whole, rather than on certain aspects of the industry's operations. In doing so, the Court noted that it is "well-settled that the ITC bears no obligation to perform a market segmentation analysis."[170] Second, the Court affirmed the Commission's finding that "'there is a significant degree of substitutability between domestically produced {bearings} and subject imports.'" In this regard, the Court noted that a "clear majority of respondent purchasers and importers reported that subject bearings were interchangeable with the domestic like product."[171] Finally, the Court confirmed that it was appropriate for the Commission to rely primarily on value-based measures when assessing the volumes of the subject imports, noting that the Commission prefers value-based measures for this purpose due to the "wide variety of ball bearings" within the scope of the review. The Court stated that "case law confirms that the {Commission} may assign more weight to value versus quantity in administering reviews under the antidumping statutes."[172]

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[167] Commissioner Lane notes that she also determined to cumulate the subject imports from Singapore in her analysis.

[168] See CD at 54-61.

[169] NSK I at 21-27.

[170] NSK I at 23-25.

[171] NSK I at 25 & 27.

[172] NSK I at 19 (citing American Bearings Manufacturers Association, 28 CIT 1698, 1705; 350 F. Supp. 2d 1100, 1108-10 (2004).

D. The Likely Volume of the Cumulated Subject Imports

We have also reviewed the Commission's previous determination that there is likely to be a significant volume of the cumulated subject imports upon revocation of the orders.[173] We adopt and incorporate in their entirety the Commission's findings on this issue. In doing so, we note that the Court has affirmed the Commission's determination that the volumes of subject imports are likely to be significant upon revocation.[174] In particular, the Court held that the Commission reasonably found that the subject producers had sufficient excess capacity to increase their exports significantly to the United States upon revocation.[175] The Court noted that the record showed that "the subject countries could potentially capture an additional *** percent of U.S. consumption by utilizing their excess capacity."[176] "Viewed in this context," the Court agreed that "the subject producers do indeed possess a significant level of excess capacity."[177] NSK I at 29-30. Moreover, the Court added that the United States "remains an attractive market for the subject producers' ball bearings," given that the United States is the "second largest destination for imported ball bearings."[178] Furthermore, the Court found that, "with higher prices available in the U.S. market as compared to other foreign markets, there is [an] incentive to shift available capacity to capture U.S. sales."[179] Emphasizing that the subject producers are "among the world's top exporters" and "have at their disposal a significant level of excess capacity," the Court found that the Commission's likely volume finding was reasonable.[180] Accordingly, we again determine that the volume of the cumulated subject imports would likely be significant in the reasonably foreseeable future upon revocation of the orders.

E. The Likely Price Effects of the Cumulated Subject Imports

We have also reviewed the Commission's prior determination that revocation of the orders on the cumulated subject imports would be likely to lead to significant underselling by the subject imports and significant price-suppression or depression within a reasonably foreseeable time.[181] We adopt and incorporate in their entirety the Commission's findings on this issue. In doing so, we note that, although the Court questioned certain aspects of the Commission's underselling analysis,[182] the Court ultimately concluded that the Commission reasonably found that the subject imports were likely to have significant

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[173] See CD at 61-66.

[174] NSK I at 28-33.

[175] NSK I at 29-30.

[176] NSK I at 29-30.

[177] NSK I at 30. The Court also emphasized that the Commission "incorporated other conditions within the industry – such as the modest increase in demand for bearings, export orientation of subject producers, current volume in the U.S. market, high degree of substitutability, and price incentives to shift exports to the United States – to support its determinations concerning the likely use [of] excess capacity." Id.

[178] NSK I at 32-33.

[179] NSK I at 33.

[180] Id.

[181] See CD at 66-68.

[182] The Court expressed its concern that the Commission's underselling analysis was "based on a relatively small sample of price comparisons" for the subject and domestic merchandise. NSK I at 35.

adverse effects on domestic prices upon revocation of the orders.[183] In particular, the Court found that the Commission reasonably determined that, due to the high degree of substitutability between subject imports and the domestic like product, the "'subject imports would likely be priced aggressively to gain market share, and would undersell the domestic like product by substantial margins so as to significantly suppress domestic prices."[184] The Court also found that the Commission reasonably determined that "significant volumes of subject imports are likely to suppress the price increases necessary to compensate for the domestic industry's increasing costs."[185] Further, the Court concluded that the Commission reasonably found "there {was} a strong likelihood that competitive pricing will be a significant factor in purchasing decisions,"[186] given that "demand for ball bearings is not expected to increase dramatically within the foreseeable future."[187] Given these considerations, the Court held that it was reasonable for the Commission to determine that "removal of the orders would likely lead to significant underselling and price suppression within the foreseeable future."[188] Accordingly, we again determine that revocation of the orders would be likely to lead to significant underselling by the subject imports and significant price-suppression or depression within a reasonably foreseeable time.

F. The Likely Impact of the Cumulated Subject Imports on the Industry

Finally, we have also reviewed the Commission's prior determination that revocation of the orders on the cumulated subject imports would likely have a significant adverse impact on the domestic industry.[189] We adopt and incorporate in their entirety the Commission's findings on this issue, except to the extent they are supplemented and revised below.[190] As we have previously stated, in NSK I, the Court instructed the Commission to reconsider its vulnerability and likely impact findings in light of the industry's "restructuring" efforts during the period of review.[191] The Court also instructed the Commission to perform a Bratsk-style replacement analysis on remand.[192] Accordingly, we address the Court's instructions in detail below. After considering these issues, we again determine that revocation of the orders on the cumulated subject imports would likely have a significant adverse impact on the domestic industry.

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[183] NSK I at 33-38.

[184] NSK I at 37.

[185] NSK I at 37-38.

[186] The Court also found "that there {was} sufficient evidence to support the ITC's determination that price is an essential factor in purchase decisions," noting that price was reported to be the second most important factor after quality in the purchase decision and the large majority of purchasers reported that price was a "very important" factor in the purchase decision. NSK I at 34-35.

[187] NSK I at 37-38.

[188] NSK I at 38.

[189] See CD at 68-71.

[190] See CD at 66-68.

[191] NSK I at 21-23.

[192] NSK I at 10-11.

1. *Consideration and Analysis of the Industry's Restructuring Efforts*

a. The Court's Instructions.

In NSK I, the Court remanded the Commission's vulnerability and likely impact findings so that the Commission could re-examine and take into account the impact of the industry's restructuring efforts on its condition during the period of review.[193] In its analysis, the Court noted that the Commission had found the industry to be vulnerable to the likely impact of subject imports, based in part on the fact that there had been a "widespread contraction in various statistical measures of industry performance."[194] According to the Court, the Commission's reliance on this data "appears to understate evidence of large scale restructuring within the ball bearing industry that could explain much of {this} seemingly negative data."[195] The Court observed that, "[i]n an effort to respond to evolving market conditions and reduce production costs, several major producers have moved their production facilities for less-technical ball bearings to non-subject countries, while tailoring their U.S. production facilities to serve specific clients located in the same geographic area, most of which require highly customized ball bearings."[196]

The Court added that, "[a]s a result of this restructuring, it seems logical that domestic production, capacity, capacity utilization, and net sales would experience sharp declines as major ball bearing producers moved some of their manufacturing facilities to other countries."[197] After observing that "structural changes of this magnitude would undoubtedly depress certain indicators of market performance," the Court stated that the Commission"did not analyze these issues in its discussion of the conditions of competition."[198] The Court therefore directed the Commission to perform "a more thorough examination" of this issue, "given the amount of information that suggests global restructuring had the effect of depressing certain economic measures of industry performance relied upon to cast the U.S. market as vulnerable."[199]

b. The Parties' Arguments.

In their remand comments, the NSK companies have argued that, on remand, the Commission should find that "the domestic industry, having undergone a self-imposed restructuring during the review period, grew stronger towards the end of that period."[200] According to the NSK companies, during the period of review, the domestic industry "widely re-designed its production lines to maximize future

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[193] NSK I at 21-23.

[194] NSK I at 22.

[195] NSK I at 22-23.

[196] NSK I at 23.

[197] NSK I at 23.

[198] NSK I at 23.

[199] The Court explained that "[w]hether the domestic industry is vulnerable to increased volumes of subject imports or simply responding to other market forces is an appropriate inquiry" for the Commission to perform on remand. Id.

[200] NSK Comments at 2.

financial performance."[201] To achieve a "balance between market orientation and cost optimization,"[202] they assert that the industry took two steps. First, it reduced its capacity to "better position specialized ball bearing production capabilities in the U.S. market." Second, it moved "commodity ball bearing capabilities overseas to more cost-effective countries so as to remain competitive against BB imports from non-subject countries."[203] In their comments, the NSK companies acknowledge that the industry's capacity, production, capacity utilization, and sales levels all declined seriously over the period.[204] They theorize that these declines represent a "positive trend" for the industry, because the industry's restructuring efforts have resulted in a "a stronger, more robust" industry at the end of the review period.[205] Indeed, they argue, the record shows that the majority of U.S. producers reported stable to increased capacity, production, and capacity utilization during the latter part of the period of review, and that the industry's net sales values, gross profits, operating income, and capital expenditures all increased toward the end of the review period."[206]

For its part, Timken argues that the Commission should again find that the domestic industry is vulnerable to material injury.[207] Timken points out that, "[i]f the reduction in capacity [for domestic BB producers] had resulted in a stronger domestic industry, one would expect to see evidence of that in the industry's financial performance."[208] Timken emphasizes that the industry's operating income margins steadily declined throughout the review period, and that its financial performance was worse than its performance during the original period of investigation.[209] Timken also challenges NSK's claim that "the domestic industry's restructuring efforts consisted primarily of shifting standard BB production offshore and retooling remaining domestic capacity to produce custom {ball bearings}," noting that many of the reported changes in industry capacity have nothing to do with shifting their production of various categories of ball bearings to specific markets.[210] Moreover, Timken argues, Respondents' claims are inconsistent with the requirements of the statute, which requires the Commission to focus on the condition of the industry's domestic operations, not its domestic and international operations.[211]

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[201] NSK Comments at 2.

[202] NSK Comments at 2.

[203] NSK Comments at 5.

[204] In its comments, NSK points in particular to the restructuring efforts of *** during the review period. NSK Comments at 5-7. NSK notes that it accounted for *** in the domestic industry's production capacity but concedes that declines were related, in part, to *** efforts to *** Id. at 8. NSK also acknowledges that the declines in *** production capacity are due in part to efforts to *** Id. at 8-9.

[205] NSK Comments at 7.

[206] NSK Comments at 7.

[207] Timken Comments at 11.

[208] Timken Comments at 13.

[209] Timken Comments at 13-14.

[210] Timken Comments at 12.

[211] Timken Comments at 13-14.

c. Analysis.

As instructed by the Court, we have considered the industry's restructuring efforts during the period to assess whether these efforts explain "much of the seemingly negative data" concerning the industry's overall condition, and whether the industry was actually in a stronger and less vulnerable condition at the end of the period due to these restructuring efforts.[212] As discussed below, we do not believe that the declines in the industry's capacity, production, and sales levels during the period have resulted in a "stronger," more "robust," and more "efficient" industry that is less vulnerable to the likely effects of the subject imports, as the NSK companies contend. Instead, we find that the serious declines in almost all significant indicia of the industry's condition establish that the industry was in a weakened condition at the end of the period and was therefore vulnerable to likely material injury from the subject imports.

First, we do not agree with the NSK companies' claims that the industry's capacity and production reductions were effectuated primarily to rationalize the industry's production of commodity bearings in overseas markets and to focus their domestic operations on higher-value, customized ball bearings.[213] Of the domestic producers that reported shutting down significant production capacity during the period of review,[214] only two, ***, reported in their questionnaires that the closure was intended to retool their capacity to produce high-valued, customized bearings.[215] Instead, the majority of producers who shuttered significant capacity during the period reported that the reductions were caused by an inability to meet aggressive import competition in the U.S. market,[216] reported other reasons for their production reductions,[217] or reported no specific reasons for the shutdowns.[218] Further, ***, the three domestic producers that reported the largest capacity declines during the period, all stated that they closed production facilities in the United States due, in significant part, to price competition from subject and/or non-subject imports.[219] Furthermore, the record established that the U.S. producers still sold substantial amounts of commodity-type ball bearings in the market during the period of review, with approximately 33.1 percent of the industry's sales consisting of these types of ball bearings.[220] Given this, we do not find that the industry's capacity and production reductions were simply part of an overall industry strategy to locate most of their commodity production operations overseas, as the NSK companies have suggested throughout these proceedings.[221] Instead, the circumstances underlying these shut-downs

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[212] NSK I at 21-23.

[213] NSK Comments at 5-7.

[214] CR/PR at Table BB-I-1 (***).

[215] CR/PR at Table BB-I-13.

[216] CR/PR at Table BB-I-13.

[217] E.g., CR/PR at Table BB-I-13 (***).

[218] E.g., CR/PR at Table BB-I-13 (***).

[219] CR at BB-I-55 (*** reported that it ***); CR at BB-I-53 (*** reported that it ***); *** U.S. Producer Questionnaire at Response to Question IV-B-19 (***).

[220] CR at BB-I-40, PR at BB-I-34.

[221] Nor is it true, as NSK suggests, that the shift of production overseas by the industry is a new trend that began occurring in this period of review. NSK Comments at 4. In the first reviews of the ball bearings orders, for example, the Commission specifically addressed this issue and noted as follows:

suggest that the industry has shut down much of its capacity due in significant part to the fact that it is unable to compete on price with subject and non-subject imports in the market.[222]

Second, even if the reductions in the industry's capacity could be attributed to a strategic decision on the industry's part to rationalize the standard bearing production operations overseas, the declines in the industry's capacity levels do not fully account for the corresponding declines in the industry's production levels and sales volumes during the period of review. In this regard, the record shows that the industry's production capacity fell from 448.8 million bearings in 2000 to 338.3 million bearings in 2005, thus representing an overall decline in capacity of 110.4 million ball bearings during the period.[223] The industry's production and shipment quantities fell by a greater volume than its capacity during the period of review, however.[224] Between 2000 and 2005, the industry's production and shipment levels both declined by approximately 125 million bearings, a decline that was approximately 15 million bearings larger than the decline in the industry's capacity during the period.[225] Since this 15 million bearing decline represents approximately 12 percent of the declines in the industry's total production and shipment quantities between 2000 and 2005, the record shows that a significant amount of the declines in the industry's production, shipment and sales levels declines cannot be attributed to the reductions in the industry's capacity during the period, whether or not that reduction was designed to rationalize its bearings production in the U.S. and other markets.[226]

Furthermore, the NSK companies's claim that the industry's restructuring efforts during the period have resulted in a "stronger," "robust" and "healthy" industry are clearly not borne out by the record. In addition to the capacity, production, and shipment declines relied upon by the NSK companies in their remand comments, the domestic industry experienced serious, and often double digit, declines in the other indicia of its condition. For example, during the period of review, the industry's gross profits declined from $358.4 million in 2000 to a period low of $218.6 million in 2005, representing a decline of

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> The industry includes production facilities owned by large multinational producers that have facilities in several nations. These large producers typically produce for the local market, but also engage in some degree of global rationalization . . . The expansion of overseas facilities reflects in part a trend by large bearing manufacturers to localize production facilities in response to customers needs.

USITC Pub. 3309 at 59-60.

[222] Calling the changes experienced by the domestic industry a "strategic rationalization" begs the question of why it might be considered strategic for the domestic industry to undertake such changes. We concede that, in some circumstances, global rationalization could represent a change in management philosophy freely adopted by the industry. On the facts of these reviews, however, we find that the industry's strategic management decisions were generally reactive and defensive actions driven by the economic realities imposed on the domestic industry, which were caused in significant part by competition from low-priced imports and other considerations.

[223] CR/PR at Table C-2.

[224] CR/PR at Tables BB-I-1 & C-2.

[225] CR/PR at Tables BB-I-1 & C-2. In this regard, the record shows that the declines in the industry's production and shipment quantities over the period of review were 37.9 and 41.8 percent, respectively, significantly higher than the decline of 24.8 percent in the industry's capacity during the period. CR/PR at Table C-2.

[226] Moreover, we would add, these declines of *** million bearings represent *** percent of the industry's total production levels in 2005 and *** percent of the industry's U.S. shipment levels in 2005. CR/PR at Table BB-I-1.

39.1 percent during that period.[227] Similarly, the industry's operating income levels fell sharply during the period, falling from a total of $132.0 million in 2000 to only $7.3 million in 2005, thus representing a decline of approximately 94.4 percent during that period.[228] The industry's operating income margins also fell significantly during the period, dropping from 6.1 percent in 2000 to 0.4 percent in 2005, which represents a 5.7 percentage point decline over the period.[229] The industry's gross profit margins also fell, declining from 16.6 percent in 2000 to 11.5 percent in 2005.[230] In other words, the industry's gross profit and operating income levels and its gross profit and operating margins were considerably worse at the end of the period of review than at the beginning.[231] They were, moreover, considerably lower at the end of the period of review than they were during the original period of investigation.[232] If the industry's reported capacity and production declines had indeed caused it to be stronger and more robust at the end of the period, as NSK claims, then the industry's gross profit and operating income margins should have remained relatively stable, or even improved, by the end of the period. As can be seen, this is simply not the case.

In addition to watching its profits decline during the period, the industry has also seen its cost structure deteriorate significantly during the period of review, thus belying the claim that the industry has become more efficient as a result of its capacity reductions. Despite the reductions in its capacity and declines in its aggregate costs, the ratio of the industry's cost of goods sold to its sales revenues increased by 5.1 percentage points during the period, growing from 83.4 percent in 2000 to 88.5 percent in 2005.[233] Given the increase in this ratio, it can hardly be said that the industry has become more efficient in cost terms as a result of its decision to reduce its capacity levels during the period. On the contrary, the industry has instead become increasingly susceptible to the likelihood of price-suppression from additional volumes of dumped imports from the cumulated countries, if the orders were revoked.

Furthermore, the industry's capacity utilization rates do not indicate that the industry has become healthier and more robust, as the NSK companies claim. If the industry had become more efficient and stronger as a result of its reported capacity reductions during the period, we would expect that the industry's capacity utilization rates would have remained stable or improved over the period as a result of these reductions. The record shows, however, that the industry's capacity utilization declined considerably in the period, first falling from 73.1 percent in 2000 to 61.2 percent in 2001,[234] and then remaining between 60.2 to 63.8 percent through 2005.[235] Moreover, these capacity utilization rates are significantly lower than the industry's capacity utilization rates during the original period of investigation

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[227] CR/PR at Table C-2.

[228] CR/PR at Tables BB-I-1 & C-2. In fact, the industry actually experienced operating losses of $8.7 million in 2004. Id.

[229] CR/PR at Table C-2.

[230] CR/PR at Tables BB-III-8.

[231] Moreover, this decline in profits, as well as the declines in the industry's sales revenues, has impacted the industry's ability to reinvest in its operations. In particular, the industry's capital expenditures fell from $107.7 million in 2000 to $77.2 million in 2005, a decline of 28.3 percent. CR/PR at Tables BB-I-1 & C-2.

[232] CR/PR at Table BB-I-1.

[233] CR/PR at Table C-2.

[234] CR/PR at Tables BB-I-1 & C-2.

[235] CR/PR at Tables BB-I-1 & C-2.

and the first sunset review, when they ranged between 70 and 76 percent.[236] Since the industry's capacity reductions appear not to have allowed it to operate at a stable or more efficient level of capacity utilization, we cannot conclude that these reductions have caused the industry to become stronger and more efficient during the period. Instead, we find these declines to be a sign of the industry's increasing susceptibility to likely material injury by reason of the subject imports upon revocation.

Similarly, the declines in the industry's net sales revenues and market share levels are not a sign of a "strong" and "robust" industry. To the extent that U.S. producers have actually reduced their capacity levels as a result of shifting their production focus from lower-value, standardized ball bearings to higher-value, customized ball bearings, we would expect that they would manage that transition in a way that would allow them to maintain a reasonably stable stream of revenues. In particular, we would expect that shifting to higher-value products would allow the industry to maintain a reasonably consistent revenue level, given the increase in the U.S. industry's unit prices over the period.[237] It has not been able to do so, however, as its net sales values fell by 12.0 percent during the period of review, declining from $2.2 billion 2000 to $1.9 billion in 2005.[238]

We also find that the industry's market share levels reflect an increasingly vulnerable industry. As indicated above, if it were true that the industry were shifting to higher-value, custom products in the U.S. market, as the NSK companies claim, we would expect that the industry would have maintained a reasonably stable market share, in value terms, over the period, because it should have been able to compensate for declining sales volumes with higher sales prices in the market for its customized bearings. However, despite an increase in the industry's average unit values over the period of review, the industry's market share declined by 4.3 percentage points (in terms of value) over the period, falling from 67.5 percent in 2000 to 63.2 percent in 2005.[239]

Finally, we note that the statute directs us to consider whether the "industry" is "vulnerable to material injury" upon revocation of an order. 19 U.S.C. § 1675a(a)(1)& (4). The statute provides that the "industry" consists of the "producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4). Thus, we must focus our vulnerability analysis on whether the domestic production operations of the industry are in a vulnerable or healthy state, not whether the overall operations of the domestic producers and their overseas affiliates are strong and robust. Furthermore, the SAA establishes that the determination that an industry is vulnerable to the likely impact of subject imports can depend on factors having nothing to do with the subject imports, such as a decision to shift production overseas, changes in demand trends, or changes in consumer

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[236] CR/PR at Tables BB-I-1 & C-2.

[237] The industry's average unit values for net sales were $*** in 2000, $*** in 2001, $*** in 2002, $*** in 2003, $*** in 2004, and $*** in 2005. CR/PR at Table C-2. The average unit values for the industry's U.S. shipments exhibited a similar trend. Id.

[238] CR/PR at Tables BB-1 & C-2. In their comments, the NSK companies point to increases in some of the indicia of the industry's condition, such as its net sales value, gross profits, operating income, and capital expenditures, during the last year or two of the period, as a sign of the industry's new-found robustness. NSK Comments at 2. While there was some improvement in these factors in the last years of the period, all of these factors remained considerably below the levels seen in 2000, the first year of the period. Accordingly, we do not consider these improvements to be a sign of the industry's incipient health.

[239] CR/PR at Tables BB-1 & C-2.

preferences.[240] Given these considerations, we are statutorily given the discretion to consider any significant deterioration in the industry's condition, whatever its source or underlying rationale, to be an indication of the industry's vulnerability.[241] Because the record shows that the industry experienced substantial declines in almost all of its economic indicia and was therefore in a considerably smaller and more weakened condition at the end of the period, we believe that a finding that the industry is vulnerable to the likely impact of the subject imports upon revocation is warranted here.

For the foregoing reasons, as well as for the reasons the Commission discussed in its original views, we find that the domestic industry is vulnerable to the likely adverse impact of the subject imports upon revocation.

2. *Response to the Court's Instruction to Apply a Bratsk-style Analysis In these Reviews*

a. The Court's Instructions.

As previously discussed, in NSK I, the Court concluded that the basic principles of Bratsk were applicable in a sunset review and that the Commission should therefore apply a Bratsk-style replacement analysis on remand.[242] After finding the Bratsk triggering factors were met in these reviews, the Court instructed the Commission to analyze on remand "whether non-subject imports have captured, or are likely to capture, market share previously held by the subject imports, and whether this level of displacement makes it unlikely that removal of the orders will lead to continuation or recurrence of material injury as a result of subject imports."[243]

b. The Parties' Arguments

The Japanese respondents JTEKT and Koyo Corporation ("JTEKT") argue that, if the Commission applies the Court's "replacement" test here, the Commission should conclude that the cumulated subject imports will not cause the continuation or recurrence of material injury to the domestic industry upon revocation of the orders.[244] JTEKT contends that the non-subject imports are more likely

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[240] SAA at 885 (other factors not related to the subject imports "may demonstrate that an industry is facing difficulties from a number of sources and is vulnerable to dumped or subsidized imports."). In this respect, we note that NSK mistakenly assumes that the industry's vulnerability must be caused by the subject imports. NSK Comments at 7 & 11 (arguing that the declines in the industry's condition were "caused by the industry's restructuring, and not by imports of the subject bearings.") The industry's vulnerability can be caused by any number of factors having nothing to do with subject imports, including a decision to substantially reduce its capacity and production levels, demand or regulatory changes, or consumer preferences.

[241] As the Court of International Trade has acknowledged, "{u}nderlying the vulnerability analysis is the principle that the foreign industry {and therefore the Commission} must 'take the industry as [it]finds it.'" Committee for Fair Beams Imports v. United States, 27 CIT 932, 961 (2003) (quoting Hosiden Corp. v. Advanced Display Mfrs. of America, 85 F.3d 1561, 1569 (Fed. Cir. 1996)).

[242] NSK I at 7-11.

[243] NSK I at 11.

[244] As a threshold matter, JTEKT observes that the Court has already conclusively determined that the Bratsk triggering factors are satisfied in this proceeding. JTEKT Comments at 2. According to JTEKT, therefore, the Commission "should proceed directly to the Bratsk analysis of non-subject imports as required in the remand instructions." JTEKT Comments at 2-3.

than subject imports to be the cause of material injury to the domestic industry if the orders are revoked. In this regard, JTEKT asserts that the data obtained on remand show that the production capacity of non-subject producers far exceeded U.S. apparent consumption in 2004 and 2005.[245] JTEKT also points out that non-subject imports accounted for *** percent of U.S. apparent consumption in 2004 and *** percent of U.S. apparent consumption in 2005, and that the volumes of non-subject imports were equal to *** percent and *** percent of U.S. domestic production capacity in 2004 and 2005, respectively.[246] JTEKT asserts that this comparison of non-subject import volume to domestic capacity "reveals that the supply of non-subject imports has been increasing at the same time that domestic production capacity has declined."[247] According to JTEKT, these data indicate that the volume of the non-subject imports are likely to remain significant upon revocation.

With respect to pricing, JTEKT argues that the price comparison data indicate that the non-subject imports undersold both domestic and subject bearings and that the "large volume of non-subject imports is {therefore} priced aggressively in comparison to domestic merchandise."[248] JTEKT also argues that, when "[t]aken together, the data concerning non-subject import volumes and price effects indicate that non-subject imports are likely to have a significant adverse impact on the domestic industry."[249]

JTEKT raises two additional points concerning the Court's replacement analysis. First, JTEKT argues, "the fact that lower-priced non-subject imports would be purchased in preference to subject imports indicates that subject imports will have difficulty entering the U.S. market in greater quantities if the antidumping duty orders are revoked."[250] *Id.* at 11. Second, JTEKT emphasizes that any "likely future injury caused by subject imports is . . . minimized when viewed in conjunction" with the growing presence of low-priced non-subject imports from China.[251]

For its part, Timken argues that, even if the Commission applies the Court's "replacement" analysis, it should not conclude that subject imports are unlikely to cause a recurrence or continuation of material injury if the bearings orders are revoked.[252] Timken asserts that the non-subject imports have not replaced, and are not likely to replace, the subject imports, noting that the market share of the cumulated subject imports has increased during the review period, even with the orders in place.[253]

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[245] JTEKT Comments at 7-8.

[246] JTEKT Comments at 7-8

[247] JTEKT Comments at 8.

[248] JTEKT Comments at 9-10.

[249] JTEKT Comments at 10.

[250] JTEKT Comments at 11.

[251] JTEKT Comments at 13-14. JTEKT adds that, "[t]he Commission has never explained how it could find, on the one hand, that unfettered Chinese imports were not causing, and did not threaten to cause, injury to the domestic industry in Ball Bearings from China, but, on the other hand, that subject imports would cause a recurrence of injury in the underlying sunset review." Id. at 14. JTEKT submits that, "if Chinese imports, which chronically undersell both the subject imports and domestic products and whose production capacity is expanding, pose no threat to the domestic industry, the higher priced subject imports similarly pose a negligible risk of material injury to the domestic industry in the reasonably foreseeable future." Id. at 14.

[252] In its brief, Timken first acknowledges that the Court has not given the Commission the opportunity to address the Bratsk triggering factors but nonetheless contends that the Commission should do so, and should find that they are not satisfied here. Timken Comments at 3-5.

[253] Timken Comments at 5.

Timken also points out that the subject imports from Japan and the United Kingdom increased their market share at a faster rate than the non-subject imports between 2003 and 2005, and contends that it is reasonable to infer that subject imports will increase even more if the orders were revoked.[254] As further evidence that the subject imports are likely to increase their U.S. exports significantly upon revocation, Timken notes that purchasers reported the orders were impairing their ability to purchase subject imports and that subject import pricing would have a beneficial effect on market prices.[255]

Timken adds that the subject producers are among the most important exporters of ball bearings in the world market and that their exports to the U.S. market increased during the period of review.[256] Despite the limited response to the Commission's remand questionnaires, Timken contends these data establish that non-subject imports are unlikely to displace subject imports, since bearings "producers in non-subject countries have less capacity and less unutilized capacity than producers in subject countries."[257] Finally, Timken points out that, "[i]f the substantial and widespread underselling of subject imports by non-subject imports during the review period could not displace the former with the orders in place, there is no reasonable basis to conclude that they would do so with the orders removed."[258]

Analysis. As directed by the Court, we have considered "whether non-subject imports have captured, or are likely to capture, market share previously held by the subject imports, and whether this level of displacement makes it unlikely that removal of the orders will lead to continuation or recurrence of material injury as a result of subject imports."[259] As we discuss below, we do not find that the non-subject imports have captured, or are likely to capture, the market share previously held by the subject imports and we do not find that any such displacement makes it unlikely that revocation of the orders will result in a recurrence or continuation of material injury by reason of the subject imports. Accordingly, we again find that revocation of the antidumping duty orders covering ball bearings from Japan and the United Kingdom is likely to result in the continuation or recurrence of material injury by reason of subject imports.

To address the Court's order on this issue, we first consider the Court's instruction that the Commission must assess whether "non-subject imports have captured . . . the market share previously held by the subject imports."[260] After review of the record, we find that the non-subject imports have not fully, or even mostly, captured the market share previously held by the subject imports before the orders

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[254] Timken Comments at 5. Timken points out that, after revocation of the orders on tapered roller bearings and cylindrical roller bearings in the 2000 sunset reviews of the bearings orders, the subject producers increased their shipments of those products to the United States considerably. Id. at 6.

[255] Timken Comments at 6-8.

[256] Timken Comments at 8.

[257] Timken Comments at 9.

[258] Timken Comments at 10.

[259] NSK I at 11.

[260] NSK I at 11; NSK II at 27. In this regard, we note that the Court's instructions can be broken down into three distinct but related analytical inquiries. First, the Court directed the Commission to assess whether "non-subject imports have captured ... the market share previously held by the subject imports." Id (emphasis added). Second, the Court instructed the Commission to assess whether the "non-subject imports ... are likely to capture market share previously held by the subject imports" in its analysis. Id. Third, to the extent the non-subject imports have or will capture the market share held by the subject imports, the Court has instructed the Commission to assess "whether this level of displacement makes it unlikely that removal of the orders will lead to continuation or recurrence of material injury as a result of subject imports." Id.

were put in place.[261] In 1987, the last year of the period of investigation, the market share of the subject imports reached a level of 20.0 percent in 1987, which was their highest market share level during that period.[262] After the orders were imposed, the subject imports lost approximately seven percentage points of market share during the period from 1987 through 2005, the final year of the period covered by these second sunset reviews.[263]

Nonetheless, despite this loss of six percentage points of market share, the subject imports have maintained a significant presence in the market since the imposition of the orders.[264] For example, despite a loss of 5.9 percentage points of market share between the imposition of the orders and the beginning of the first sunset reviews, the subject imports maintained a significant share of the market during the first sunset reviews, with their market share staying at a level of 14 percent.[265] Similarly, despite losing an additional 1.3 percent of market share between the first sunset review and the beginning of the second sunset reviews, the subject imports continued to maintain a significant share of the market during the period covered by the second sunset reviews, with their market share ranging between 11.5 and 13.2 percent during the period from 2000 to 2005.[266] In fact, although the market share of the subject imports fluctuated somewhat during the period covered by these second sunset reviews, the market share of the subject imports actually grew somewhat between 2000 and 2005, increasing from 12.9 percent in 2000 to 13.2 in 2005.[267] [268] In other words, despite some decline in market share, the subject imports have remained a consistent and significant presence in the market after the orders were put in place.

Accordingly, the non-subject imports have not captured all, or most of the market share previously held by the subject imports before the orders were imposed. It is true that the market share of the non-subject imports has grown considerably since the orders were imposed, with the market share of the non-subject imports increasing from a level of 5.2 percent in 1987 to 23.6 percent in 2005.[269] However, most of the market share increases obtained by the non-subject imports occurred at the expense

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[261] CR/PR at Tables BB-I-1 & C-2.

[262] CR/PR at Table BB-I-1 & C-2 (these data do not include the import data for Singapore). The market share of the subject imports was 17.3 percent in 1985, 19.7 percent in 1986, and 20.0 percent in 1987. Id.

[263] CR/PR at Tables BB-I-1 & C-2 (these data do not include the import data for Singapore). The market share of the subject imports fell from 20.0 percent in 1987 to 13.2 percent in 2005, the last year covered by these second sunset reviews.

[264] CR/PR at Table BB-I-1 & C-2 (these data do not include the import data for Singapore).

[265] CR/PR at Table BB-I-1 & C-2 (these data do not include the import data for Singapore). The subject imports' share of the market was 14.1 percent in 1997 and 14.2 percent in 1998.

[266] CR/PR at Table BB-I-1 & C-2 (these data do not include the import data for Singapore).

[267] CR/PR at Table BB-I-1 & C-2 (these data do not include the import data for Singapore). The subject imports share of the market was 12.9 percent in 2000, 12.5 percent in 2001, 11.5 percent in 2002, 11.7 percent in 2003, 12.8 percent in 2004, and 13.2 percent in 2005. Id.

[268] Commissioner Lane does not join this sentence (and other statements concerning the increase in subject imports in the analysis above) because she cumulated the subject imports from Singapore with the other subject imports for purposes of her determination. With the imports from Singapore included in her analysis, the record shows that the market share of the subject imports declined somewhat during the period, decreasing from 14.1 percent in 2000 to 13.3 percent in 2005. CR/PR at Tables BB-I-1 & C-2. Nonetheless, she agrees with the other Commissioners that the subject imports maintained a stable and significant share of the market throughout the period of review and that the non-subject imports have not captured, and are not likely to capture, the market share previously held by the subject imports.

[269] CR/PR at Table BB-I-1 & C-2.

of the domestic industry, with the industry losing 10.1 percentage points of market share to the non-subject imports between 1987, the last year of the period of investigation, and 2005.[270] Moreover, the subject imports actually gained a small amount of market share from the other participants in the market between 2000 and 2005, thus establishing that non-subject imports have captured no market share at all from subject imports during the five most recent years covered by these second reviews. Given the foregoing, we find that the record establishes that the subject imports have continued to maintain a consistent and significant presence in the U.S. market and that the non-subject imports have not seriously displaced the subject imports from the market during the period after imposition of the orders.[271] Accordingly, we do not find that the "non-subject imports have captured . . . the market share previously held by the subject imports."[272]

Second, we consider the Court's instruction that the Commission assess whether "non-subject imports ... are likely to capture market share previously held by the subject imports."[273] After considering the original record and the additional evidence obtained on remand, we find that the record evidence does not establish that the non-subject imports are likely to capture the market share previously held by the subject imports upon revocation.[274] In coming to this conclusion, we have relied primarily on the historical market share trends that we previously discussed. These trends indicate that, while the non-subject imports did capture some market share from the subject imports before the beginning of the period covered by these second sunset reviews, they have not captured any meaningful level of market share from the subject imports since the beginning of these second reviews.[275] Instead, during the most recent period covered by these reviews, the subject imports have continued to maintain a significant share of the market even with the orders in place, and have even increased their market share in a small fashion.[276] Given these considerations, we do not find that in the reasonably foreseeable future non-subject imports are likely to capture the market share previously held by the subject imports before the orders were imposed.

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[270] CR/PR at Table BB-I-1 & C-2. The market share of the non-subject imports was 5.2 percent in 1987, the last year of the period of investigation, 14.0 percent in 1997, 14.7 percent in 1998, 18.4 percent in 2000, 18.7 percent in 2001, 19.8 percent in 2002, 20.4 percent in 2003, 23.2 percent in 2004, and 23.6 percent in 2005.

[271] CR/PR at Tables BB-I-1 & C-2. Moreover, because the non-subject imports entered the market and took market share primarily from the domestic industry, we find that it was not the orders that drew most of the non-subject imports into the market, but the attractiveness of the U.S. market. In our view, this indicates that non-subjects will not readily exit the market and will compete aggressively with the likely significant volumes of subject imports that enter the market after revocation of the orders, in an attempt to maintain their existing market share. This intense competition between the subject and non-subject imports will likely have a significant adverse impact on domestic market share, sales volumes and revenues, and pricing. In other words, we do not agree with JTEKT that the significant and growing volumes of the low-priced non-subject imports will "serve as a formidable bulwark" that will prevent any significant volume increase or price effects from the subject imports after revocation. JTEKT Comments at 11-12.

[272] NSK I at 11; NSK II at 27.

[273] NSK I at 10-11.

[274] We note that the Court did not make clear whether the Commission was supposed to perform this "likely market share replacement" analysis before or after the order is revoked. NSK I at 7-10. We believe that the most reasonable interpretation is that the Court expects the Commission to assess whether the non-subject imports are likely to replace the subject imports after revocation of the order, since this is the primary focus of the sunset provisions of the statute.

[275] CR/PR at Tables BB-I-1 & C-2.

[276] CR/PR at Tables BB-I-1 & C-2.

In other words, the historical market share trends suggest that the presence of the non-subject imports in the market will not prevent the subject imports from seeking to regain market share in a significant fashion from the domestic industry, once the disciplining effects of the orders are removed. Moreover, we determine that these trends do not seriously call into question our finding that the subject imports will, upon revocation, continue to seek to gain market share at the expense of the domestic industry by underselling, that they will have significant price depressing and suppressing effects on domestic prices as a result of this underselling, and that they will therefore have a significant adverse impact on the industry's sales volumes, sales revenues, market share and profitability.[277]

In coming to these conclusions, we have also examined the capacity, production, and shipment data that was obtained on remand from producers in the major non-subject countries that supply ball bearings to the United States.[278] We have chosen to place very little weight on these data because the responses received by the Commission to these questionnaires provide only limited coverage for producers in half of the non-subject countries in question.[279] In particular, we note that the Commission received questionnaires from 1 of 10 Canadian producers to whom the staff sent questionnaires, 4 of 21 Chinese producers, 2 of 7 Korean producers, 2 of 7 Mexican producers, and 1 of 7 Taiwanese producers.[280] Given that China, Korea and Canada were the three of the largest non-subject suppliers of ball bearings to the U.S. market during the period of review,[281] we believe that, on the whole, the data obtained from these questionnaire responses is of limited utility, at best.[282] Accordingly, we do not think

[277] In coming to this conclusion, we note that there has been an increase of 5.2 percent in the market share of the non-subject imports between 2000 and 2005, which might otherwise suggest that the non-subject imports would continue gaining market share in the reasonably foreseeable future once the orders are revoked. CR/PR at Tables BB-I-1 & C-2. But, as we have previously pointed out, the record also establishes that none of this market share gain was made at the expense of the subject imports during the period between 2000 and 2005, even with the disciplining effect of the orders in place. This indicates that, whether or not the orders are in place, the non-subject imports are unlikely to capture significant market share from the subject imports in the reasonably foreseeable future.

[278] See RSR at I-1-I-2, II-1-II-12.

[279] RSR at II-1. The Commission received responses reflecting a reasonable degree of coverage from non-subject producers in five of the other ten non-subject countries: France (the only non-subject producer sent a questionnaire responded); Romania (2 of 2 responded), Slovakia (2 of 3 responded), Spain (1 of 1 responded), and Thailand (2 of 3 responded).

[280] RSR at II-1.

[281] RSR at II-1, n.2.

[282] The questionnaire responses from the producers in China indicate the extent to which the questionnaires provide only a limited level of coverage for non-subject producers generally. Only 4 of 21 non-subject producers from China responded to the Commission's questionnaires. As shown in Table BB-IV-1 of the Confidential Staff Report, non-subject imports from China were 265.2 million BBs in 2004 and were 276.3 million BBs in 2005. However, the four responding non-subject producers from China reported just *** million BB exports to the U.S. market in 2004, and just *** million BB exports to the U.S. market in 2005. CR/PR at Table C-2; RSR at Table II-2.

that it undercuts, in any significant manner, our conclusion that the non-subject imports are not likely in the reasonably foreseeable future to capture the market share previously held by the subject imports.[283]

Finally, in order to assess whether the significant volumes of non-subject imports in the market are likely to be the "overriding cause of material injury to the domestic industry" upon revocation of the orders, as instructed by the Court in NSK I,[284] we have also considered the price comparison data for the domestic, subject and non-subject products that we collected on remand.[285] These price comparisons show that the non-subject imports undersold the domestic like products in approximately 66 percent of possible price comparisons and undersold the subject imports in approximately 72 percent of the possible price comparisons.[286] Although these levels of underselling are significant, they represent a level of underselling by non-subject imports that has occurred with the volume- and price-disciplining effects of the orders in place. As we have previously noted, we have concluded that the subject imports will, upon revocation of the orders, begin aggressively underselling the domestic and non-subject merchandise in an attempt to regain the market share that they have lost since the original period of investigation, as well as additional market share. Because price is an important aspect of the purchase decision[287] and because there is a good degree of substitutability between the domestic, subject and non-subject imports,[288] these levels of underselling by the subject imports are likely to have a significant adverse effect on both domestic and non-subject prices, and on the overall condition of the industry.[289] In sum, even with the

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[283] To the extent that this limited data does have any relevance, it does not suggest that there is likely to be a sudden significant increase in the volume of the non-subject imports that would overwhelm the subject imports and capture significant amounts of their market share upon revocation of the orders. Of the five countries that provided a reasonably complete set of responses from their non-subject producers (i.e., France, Romania, Slovakia, Spain, and Thailand), the non-subject producers in two countries (France and Spain) shipped less than *** percent of their total shipments to the United States during the period, the non-subject producer in one country (France) shipped less than *** of its total shipments to export markets, and two (Romania and Thailand) were operating at capacity utilization rates in excess of *** percent. RSR at Tables II-3, II-6 to II-8, and II-10. The remaining country (Slovakia) had a small amount of total capacity and was operating at a capacity utilization rate of approximately *** percent in 2004 and 2005. Id. at Table II-7. Morever, the non-subject imports have been able to compete in the market without the disciplining effects of an order, which indicates to us that there is unlikely to be such a sudden and significant increase in their exports to the United States in the reasonably foreseeable future that would minimize the effects of any likely increase in subject imports after the orders are revoked.

[284] NSK I at 12. By making this statement, the Court seems to be indicating that non-subject imports will constitute the "overriding cause" of material injury to the industry if they are large enough or significant enough to be the "principle" or "most important" cause of injury to the industry. However, Congress, the Courts and the Commission have consistently stated that the subject imports need not be the "sole" or "principal" cause of injury to the industry. Nippon Steel Corp., 345 F.3d at 1381; see also SAA at 885. Thus, as long as the subject imports are more than a minimal or tangential contributor to the injury being suffered by the industry, causation is established, even if the non-subject imports themselves cause a significantly greater portion of the injury being suffered by the industry. Id.

[285] RSR at Table III-15.

[286] RSR at Tables III-1 to III-15.

[287] See CD at 67, n. 363.

[288] CD at 58-59 & CR/PR at Table BB-II-4.

[289] In its remand comments, JTEKT argues that the non-subject imports are now in the market in significant volumes, are currently underselling the subject imports and are likely to have significant adverse effect on the industry, thus indicating that they will be the only significant cause of injury to the industry upon revocation. JTEKT Comments at 7-11. We note that the volume and price trends cited by JTEKT have occurred with the

significant volume of non-subject imports in the market, we expect that revocation of the ball bearings orders will result in severe price competition in the market between the domestic, subject and non-subject merchandise, and that this intense price competition among the domestic, subject and non-subject suppliers in the market will have a significant adverse effect on the prices and sales volumes of an already vulnerable domestic industry.[290]

Accordingly, we find that the non-subject imports have not captured, and are not likely to capture, market share previously held by the subject imports, and that the evidence of record as to displacement does not obviate our conclusion that removal of the orders will lead to continuation or recurrence of material injury as a result of subject imports.[291] Moreover, as we discussed above, we find that the domestic industry is vulnerable to the likely adverse impact of the subject imports upon revocation. Furthermore, we find that the subject imports are likely to enter the market in significant volumes and at prices that will have a significant adverse impact on the industry's prices. As a result, we find that revocation of the orders would result in the entry of significant quantities of dumped subject imports of ball bearings into the U.S. market and that these imports are likely to have a significant adverse impact on the domestic ball bearings industry.

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volume- and price-disciplining effects of the orders in place, and that revocation of the orders will allow the subject imports to compete more aggressively on price with the domestic and non-subject imports in the market in an attempt to regain market share. Moreover, even if non-subjects are a cause of material injury in the reasonably foreseeable future, it is clear that the subject imports can themselves also be a cause of injury as well. SAA at 885 (factors other than subject imports may be causing injury to the industry but "may also demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports. . . If the Commission finds that an industry is vulnerable to injury from subject imports, it may determine that injury is likely to continue or recur, even if other causes, as well as future imports, are likely to contribute to future injury"); see also Nippon Steel Corporation, 345 F.3d at 1381.

[290] Finally, JTEKT claims that "[t]he Commission has never explained how it could find, on the one hand, that unfettered Chinese imports were not causing, and did not threaten to cause, injury to the domestic industry in Ball Bearings from China, but, on the other hand, that subject imports would cause a recurrence of injury in the underlying sunset review." JTEKT Comments at 14. This argument is mistaken in two respects. First, it has been long-established that the Commission is not required to explain the differences between its findings in one investigation and another review, even if they involve similar products, because each Commission investigation or review is sui generis, and involves a unique combination of many economic variables. See, e.g., Cleo, Inc. v. United States, 2007 U.S. App. LEXIS 21642 at *16 (Fed. Cir. Sept. 10, 2007); Nucor v. United States, 414 F.2d 1331, 1340 (Fed. Cir. 2005). Second, the Commission quite clearly explained why it made a negative injury determination in its Chinese ball bearings investigation. For example, it noted that the record in that investigation showed that the increase in the volume of the subject imports was "modest," that the increase "came at the expense of non-subject imports," and that there was no evidence of price effects from the Chinese imports. Ball Bearings from China, 731-TA-989, USITC Pub. 3593 at 16-20 (Apr. 2003). Moreover, in our original and these remand views, we have provided a detailed discussion of our affirmative findings in these reviews. To contend that the Commission has "never explained" why it made a negative determination in one matter and affirmative determinations in these reviews is both legally and factually unfounded.

[291] NSK I at 11.

V. CONCLUSION

Accordingly, we determine that revocation of the antidumping duty orders on imports of ball bearings from Japan and the United Kingdom would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

PART I: INTRODUCTION

BACKGROUND

On August 25, 2006, the U.S. International Trade Commission ("Commission" or "USITC") determined that revocation of the antidumping duty orders on ball bearings from France, Germany, Italy, Japan and the United Kingdom (UK) would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[1]

The Commission's determinations for Japan and the UK were appealed by Japanese and UK respondents to the U.S. Court of International Trade ("Court"). On September 9, 2008, the Court affirmed-in-part and remanded-in-part the Commission's affirmative sunset determinations that revocation of the orders on ball bearings from Japan and the United Kingdom would likely result in the recurrence or continuation of material injury within a reasonably foreseeable time.[2] The Court affirmed the Commission's findings that the subject and imported merchandise were substitutable, that the volumes of subject imports were likely to be significant upon revocation, and that the subject imports were likely to have significant price effects upon revocation, among other things.[3]

However, the Court remanded the Commission's affirmative determinations and instructed the Commission to address certain issues. The Court instructed the Commission to (1) "conduct a *Bratsk* analysis of nonsubject imports as outlined in this opinion;"(2) "reassess supply conditions within the domestic industry," i.e., the industry's restructuring efforts during the period of review, and (3) "reexamine its findings with regard to likely impact and its decision to cumulate imports from the United Kingdom in light of changes in its determinations that may result as a consequence of the foregoing remand instructions."[4] The Court ordered the Commission to file its remand results on these issues by January 7, 2009.

On October 8, 2008, the Commission re-opened the record and instructed the Office of Investigations to collect data to perform the analysis of nonsubject imports outlined in the Court's opinion on remand. The Office of Investigations issued questionnaires seeking data on nonsubject pricing (Importers' questionnaire) and nonsubject foreign industry data (Foreign producers' questionnaire) in October 2008. The Office of Investigations issued these questionnaires to 76 nonsubject producers of ball bearings 58 U.S. importers.

On October 9, 2008, the Commission filed a motion with the Court asking it to reconsider its instruction in light of the Federal Circuit's subsequent decision in *Mittal Steel Point Lisas v. United States*, 542 F.3d 867 (Fed. Cir. 2008)("*Mittal*"), which clarified and limited the scope of the *Bratsk* decision.[5] When the Commission filed this motion for reconsideration, it also asked that the Court stay the remand proceeding, pending its decision on the reconsideration request. The Court granted this request, and the Commission published notice of the stay of its remand proceedings in the Federal Register on December 1, 2008.[6]

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[1] *Certain Bearings from China, France, Germany, Italy, Japan, Singapore, and the United Kingdom, Investigation. Nos. 731-TA-344, 391-A, 392-A and C, 393-A, 394-A, 396, and 399-A (Second Review),* USITC Publication 3876 (August 2006), p. 1. Commissioner Deanna Tanner Okun not participating. Ibid.

[2] *NSK Corp. et al. v. United States*, Slip Op. 08-95 (Sept. 9, 2008).

[3] Slip Op. at 23-38.

[4] Slip Op. 08–95 at Judgment, pp.1-2.

[5] The Defendant-Intervenor, The Timken Company ("Timken"), filed a similar motion for reconsideration with the Court.

[6] 73 Fed. Reg. 72836 (Dec. 1, 2008).

On December 29, 2008, Judge Barzilay denied the Commission's motion for reconsideration.[7] In her opinion, Judge Barzilay instructed the Commission to file its remand determination with the Court by May 4, 2009. She also authorized the other parties to file comments on the Commission's remand determination by June 22, 2009. Accordingly, on January 30, 2009, the Commission resumed its remand proceedings in these reviews.

SUMMARY OF PROCEEDING

Information relating to the remand proceeding is provided below.[8]

Date	Action
September 9, 2008	Remand issued by Court (Slip Opinion 08-95).
October 8, 2008	Commission issues notice of remand proceedings, noting its intent to re-open the record (73 FR 62317, October 20, 2008).
October 9, 2008	Commission's files motion for reconsideration with the Court
December 1, 2008	Commission stays remand proceeding pending the Court's consideration of its motion for reconsideration (73 FR 72830, December 1, 2008)
December 29, 2008	Court denies Commission's motion for reconsideration (Slip Opinion 08-145)
January 30, 2009	Commission issues notice of resumption of remand proceedings (74 FR 6173, February 5, 2009)
March 16, 2009	Commission's remand staff report
March 23, 2009	Submission of briefs by parties
May 4, 2009	Transmittal of the Commission's determinations and views to the Court.

[7] *NSK Corp. et al. v. United States*, Slip Op. 08-145 (Dec. 29, 2008).

[8] The *Federal Register* notice cited in the tabulation are presented in app. A.

PART II: INFORMATION WITH RESPECT TO CAPACITY, PRODUCTION, AND SHIPMENT DATA PROVIDED BY NONSUBJECT PRODUCERS

In its opinion, the Court directed the Commission to assess whether "nonsubject imports have captured or are likely to capture market share previously held by the subject imports, and whether this level of displacement makes it unlikely that removal of the orders will lead to a continuation or recurrence of material injury as a result of imports.[1] Accordingly, the Commission reopened the record to obtain data concerning the capacity, production, and shipment levels of nonsubject producers. Additionally, the Commission sought to obtain quarterly pricing data from importers of nonsubject product.[2] The pricing data obtained from importers' questionnaires are discussed in Part III of this report, *Information With Respect to Pricing Data Provided by Importers of Nonsubject Product*.

The Commission sent questionnaires to 76 foreign firms identified as producers of nonsubject ball bearings during the period for which data were gathered. It received useable responses from 18 foreign producers located in 10 different countries ***[3] *** responded to the Commission's request for data.[4] That data are presented in tables II-1 through II-10.

[1] Slip Op. 08-95 at 11, *see also* Slip Op.08-95 at 7 & 12.

[2] Proprietary Customs data identified 58 firms as significant importers of ball bearings during the period for which data were gathered. ***.

[3] ***.

[4] Foreign producers questionnaires were also sent to producers in Austria, Germany, India, Italy, Japan, Poland, Singapore, and the United Kingdom

Table II-1
Ball bearings: CANADA'S production capacity, production, purchases of third-party ball bearings, shipments, and inventories, 2004-05

*   *   *   *   *   *   *

Table II-2
Ball bearings: CHINA'S production capacity, production, purchases of third-party ball bearings, shipments, and inventories, 2004-05

*   *   *   *   *   *   *

Table II-3
Ball bearings: FRANCE'S production capacity, production, purchases of third-party ball bearings, shipments, and inventories, 2004-05

*   *   *   *   *   *   *

Table II-4
Ball bearings: KOREA'S production capacity, production, purchases of third-party ball bearings, shipments, and inventories, 2004-05

*   *   *   *   *   *   *

Table II-5
Ball bearings: MEXICO'S production capacity, production, purchases of third-party ball bearings, shipments, and inventories, 2004-05

*   *   *   *   *   *   *

Table II-6
Ball bearings: ROMANIA'S production capacity, production, purchases of third-party ball bearings, shipments, and inventories, 2004-05

*   *   *   *   *   *   *

Table II-7
Ball bearings: SLOVAKIA'S production capacity, production, purchases of third-party ball bearings, shipments, and inventories, 2004-05

*   *   *   *   *   *   *

Table II-8
Ball bearings: SPAIN'S production capacity, production, purchases of third-party ball bearings, shipments, and inventories, 2004-05[1]

*   *   *   *   *   *   *

Table II-9
Ball bearings: TAIWAN'S production capacity, production, purchases of third-party ball bearings, shipments, and inventories, 2004-05[1]

*   *   *   *   *   *   *

Table II-10
Ball bearings: THAILAND'S production capacity, production, purchases of third-party ball bearings, shipments, and inventories, 2004-05[1]

*   *   *   *   *   *   *

PART III: INFORMATION WITH RESPECT TO PRICING DATA PROVIDED BY IMPORTERS OF NONSUBJECT PRODUCT

The Commission requested U.S. importers of certain ball bearings to provide quarterly data for the total quantity and f.o.b. value of selected products that were imported from nonsubject country sources and were shipped to unrelated U.S. customers.[1] [2] Data were requested for the period January 2004-December 2005 . The products for which pricing data were requested are as follows:

Product 11: 203PP Z10 SF 5000 (Fafnir)/ 6203.2RS (ISO) Radial ball bearing, single row, deep groove, with two single lip contact seals and a steel retainer. ABEC 1. 17 mm bore, 40 mm OD, and 12 mm width.

Product 12: 6202ZZ–Ball bearing, single row, deep groove radial. 15 mm bore, 35 mm OD, 11 mm width with two shields. ABEC 3 tolerance.

Product 13: 5203KYY2 (Fafnir)/ 5203BLL (NTN)/ 5203KVVAN (Federal Mogul) Annular ball bearing, double row, angular contact 3200 Series with (2) double lip rubber seals. 0.640" bore, 1.5748" OD, and 1.730" width.

Product 14: 6001 RS1Z–Ball bearing, single row, deep groove radial. 12 mm bore, 28 mm OD, 8 mm width with one seal and one shield. ABEC 1 tolerances.

Product 15: 204RR6 (A4216 & A3812)–Radial ball bearing, single row with two seals. ABEC 1 tolerance.

Product 16 : BAHB 311424 B. Ball bearing Hub unit, generation 1, inner diameter 42 mm, outer diameter 75 mm, width 37 mm, weight 0.537 kg.

Product 17: 618/630 MA. Large size ball bearing, radial deep groove, bore diameter 630 mm, outer diameter 780 mm, weight 72.2 kg, cage machined solid.

Product 18: RA100-RRB + Collar–Ball bearing, single, deep groove radial with eccentric locking collar, narrow overall width. 1 inch bore, 52 mm spherical OD, 1-7/32 inch overall width with two seals. ABEC 1 tolerance.

Product 19: SR6HH5, Stainless, R6 size. ABEC 5. 0.375" bore, 0.875" OD, and 0.3125" width.

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[1] These products were the same products selected for quarterly price comparison purposes in the Second Review. As in the review investigations, data were requested separately for sales to distributors and for sales to end users.

[2] Proprietary Customs data identified 58 firms as significant importers of ball bearings during the period for which data were gathered. ***. Importers were requested to provide pricing data for sales of ball bearings imported from Canada, China, and Korea separately and for sales of ball bearings imported from all other nonsubject countries.

Product 20: Two bearings matched by width, angular contact of 15 degrees, 17 mm bore, 35 mm OD, 10 mm width per bearing; ABEC 7 tolerance.

Data for domestic ball bearings and ball bearings imported from subject countries were obtained from the final staff report in the Second Review investigations.[3] In those review investigations, eight U.S. producers and 12 importers provided usable pricing data for sales of the requested products, although not all firms reported pricing for all products for all quarters.[4] In this remand, questionnaires were sent to 58 importers; useable pricing data for sales of ball bearings from nonsubject countries were received from seven firms.[5] Price data for domestic and imported ball bearings are presented in tables III-1 to III-10 and in figures III-1 to III-10. Tables III-11 through III-15 present data on price comparisons.

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[3] *Certain Bearings from China, France, Germany, Italy, Japan, Singapore, and the United Kingdom, Inv. Nos. 731-TA-344, 391-A, 392-A and C, 393-A, 394-A, 396, and 399-A (Second Review)*, Confidential Staff Report, INV-DD-084, app. H, pp. H-3 through H-24.

[4] Pricing data reported in the second review investigations accounted for approximately 2.9 percent of U.S. producers' shipments of BBs in 2005 (by quantity), 11.0 percent of U.S. shipments of subject imports from France, 0.7 percent of U.S. shipments of subject imports from Germany, 1.2 percent of U.S. shipments of subject imports from Italy, 1.8 percent of U.S. shipments of subject imports from Japan, and 0.1 percent of U.S. shipments of subject imports from the United Kingdom.

[5] Pricing data reported for nonsubject imports accounted for approximately 7.2 percent of U.S. shipments of ball bearings imported from nonsubject countries.

Table III-1
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 11 to DISTRIBUTORS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Figure III-1
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 11 to DISTRIBUTORS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Table III-2
Ball bearings: Weighted-average f.o.b. prices and quantities for sales to of PRODUCT 11 to END USERS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Figure III-2
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 11 to END USERS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Table III-3
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 12 to DISTRIBUTORS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Figure III-3
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 12 to DISTRIBUTORS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Table III-4
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 12 to END USERS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

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Figure III-4
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 12 to END USERS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

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Table III-5
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 13 to DISTRIBUTORS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Figure III-5
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 13 to DISTRIBUTORS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Table III-6
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 14 to DISTRIBUTORS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Figure III-6
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 14 to DISTRIBUTORS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Table III-7
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 14 to END USERS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Figure III-7
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 14 to END USERS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Table III-8
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 15 to DISTRIBUTORS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Figure III-8
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 15 to DISTRIBUTORS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Table III-9
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 15 to END USERS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Figure II-9
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 15 to END USERS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Table III-10
Ball bearings: Weighted-average f.o.b. prices and quantities for sales of PRODUCT 18 to DISTRIBUTORS and sales to END USERS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Figure III-10
Ball bearings: Weighted-average f.o.b. prices and quantities for sales to DISTRIBUTORS and sales to END USERS, as reported by U.S. producers and importers of product 18, by quarters, January 2004-December 2005

* * * * * * *

Table III-11
Ball bearings: Margins of underselling/(overselling) for sales of PRODUCT 11 to DISTRIBUTORS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Table III-12
Ball bearings: Margins of underselling/(overselling) for sales of PRODUCT 11 to END USERS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Table III-13
Ball bearings: Margins of underselling/(overselling) for sales of PRODUCT 12 to DISTRIBUTORS and to END USERS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Table III-14
Ball bearings: Margins of underselling/(overselling) for sales of PRODUCTS 13, 15, and 18 to DISTRIBUTORS and to END USERS, as reported by U.S. producers and importers, by quarters, January 2004-December 2005

* * * * * * *

Table III-15
Ball bearings: Summary of margins of underselling/(overselling)

	Sales to Distributors				Sales to Endusers				Total	
	Underselling		Overselling		Underselling		Overselling		Underselling	Overselling
	Number of instances	Range	Number of instances	Range	Number of instances	Range	Number of instances	Range	Number of instances	Number of instances
U.S. vs Nonsubject	23	4.1 to 77.0	21	1.1 to 485.7	39	1.9 to 55.2	11	6.9 to 41.9	62	32
Subject vs. Nonsubject	53	3.1 to 89.9	34	4.8 to 275.8	50	14.9 to 70.3	6	2.7 to 162.0	103	40

Note: Margins for comparisons between U.S. prices and prices for nonsubject prices are relative to the U.S. prices; thus, underselling indicates that the prices of nonsubject product were below those for domestic product and overselling numbers indicate that prices of nonsubject product were above those for domestic product. Margins for comparisons between prices for subject product and prices for nonsubject product are relative to the subject import prices; thus, underselling indicates that the prices of nonsubject product were below those for subject product and overselling indicates that prices of nonsubject product were above those for subject product.

Source: Tables III-11 to III-14.

APPENDIX A

FEDERAL REGISTER NOTICES

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–394–A & 399–A (Second Review) (Remand)]

Ball Bearings From Japan and the United Kingdom

AGENCY: United States International Trade Commission.

ACTION: Notice of remand proceedings.

SUMMARY: The U.S. International Trade Commission (''Commission'') hereby gives notice of the court-ordered remand of its affirmative determinations in the five-year reviews of the antidumping orders on ball bearings from Japan and the United Kingdom. For further information concerning the conduct of this proceeding and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207).

DATES: *Effective Date:* October 8, 2008.

FOR FURTHER INFORMATION CONTACT: Russell Duncan, Office of Investigations, telephone 202–708–4727, or David Goldfine, Office of General Counsel, telephone 202–708–5452, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server *(http://www.usitc.gov).* The public record of investigation Nos. 731–TA–340 E & H may be viewed on the Commission's electronic docket (''EDIS'') at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—In June 2006, the Commission determined that revocation of the antidumping duty orders on ball bearings from France, Germany, Italy, Japan, and the United Kingdom would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. The Commission's determinations for Japan and the United Kingdom were appealed to the Court of International Trade. On September 9, 2008, the Court issued a decision remanding the matter to the Commission for further proceedings. *NSK* v. *United States,* Slip Op. 08–95 (Ct. Int'l Trade, Sept. 9, 2008). In its opinion, the Court issued an order instructing the Commission to (1) ''conduct a *Bratsk* analysis of non-subject imports as outlined in this opinion;''(2) ''reassess supply conditions within the domestic industry,'' *i.e.,* the industry's restructuring efforts during the period of review, and (3) ''reexamine its findings with regard to likely impact and its decision to cumulate imports from the United Kingdom in light of changes in its determinations that may result as a consequence of the foregoing remand instructions.''

Participation in the proceeding.—Only those persons who were interested parties to the reviews (*i.e.*, persons listed on the Commission Secretary's service list) and parties to the appeal may participate in the remand proceeding. Such persons need not make any additional filings with the Commission to participate in the remand proceeding. Business proprietary information (''BPI'') referred to during the remand proceeding will be governed, as appropriate, by the administrative protective order issued in the reviews.

Written submissions.—The Commission is re-opening the record in this proceeding to obtain information to conduct a *Bratsk* analysis of non-subject imports as outlined in the Court's opinion. The Commission will permit the parties to file comments pertaining to the specific issues that are the subject of the Court's remand instructions and, in this regard, may comment on the new information obtained on remand. Comments should be limited to no more than fifteen (15) double-spaced and single-sided pages of textual material. The parties may not themselves submit any new factual information in their comments and may not address any issue other than those that are the subject of the Court's remand instructions. Any such comments must be filed with the Commission no later than November 28, 2008.

All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (Nov. 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigation must be served on all other

parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Parties are also advised to consult with the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207) for provisions of general applicability concerning written submissions to the Commission.

By order of the Commission.

Issued: October 14, 2008

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–24890 Filed 10–17–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–394–A & 399–A (Second Review) (Remand)]

Ball Bearings From Japan and the United Kingdom

AGENCY: United States International Trade Commission.

ACTION: Notice of stay of remand proceedings.

SUMMARY: The U.S. International Trade Commission (''Commission'') hereby gives notice of the stay of its remand proceedings in the Commission's five-year reviews of the antidumping duty orders on ball bearings from Japan and the United Kingdom.

DATES: *Effective Date:* November 24, 2008.

FOR FURTHER INFORMATION CONTACT: Russell Duncan, Office of Investigations, telephone 202–708–4727, or David Goldfine, Office of General Counsel, telephone 202–708–5452, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–

05–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record of investigation Nos. 731–TA–394–A & 399–A may be viewed on the Commission's electronic docket (''EDIS'') at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—In June 2006, the Commission determined that revocation of the antidumping duty orders on ball bearings from France, Germany, Italy, Japan, and the United Kingdom would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonable foreseeable time. The Commission's determinations for Japan and the United Kingdom were appealed to the Court of International Trade. On September 9, 2008, the Court issued a decision remanding the matter to the Commission for further proceedings. *NSK* v. *United States*, Slip Op. 08–95 (Ct. Int'l Trade, Sept. 9, 2008). In its opinion, the Court issued an order instructing the Commission to (1) ''conduct a *Bratsk* analysis of non-subject imports as outlined in this opinion;''(2) ''reassess supply conditions within the domestic industry,'' *i.e.*, the industry's restructuring efforts during the period of review, and (3) ''reexamine its findings with regard to likely impact and its decision to cumulate imports from the United Kingdom in light of changes in its determinations that may result as a consequence of the foregoing remand instructions.'' The Commission initiated its remand proceeding on October 8, 2008.

On September 18, 2008, the U.S. Court of Appeals for the Federal Circuit issued its opinion in *Mittal Steel Point Lisas, Ltd.* v. *United States* (Ct. No. 2007–1552), which clarified and limited its holding in *Bratsk Aluminium Smelter* v. *United States,* 444 F.3d 1369 (Fed. Cir. 2006). On October 9, 2008, the Commission filed a motion for reconsideration with the Court of International Trade (''CIT''), requesting that the CIT reconsider its decision in light of the Federal Circuit's analysis in *Mittal.* As part of that motion, the Commission also requested the CIT to issue a stay of its remand proceeding pending the Court's disposition of the motion for reconsideration. Defendant-Intervenor The Timken Company (''Timken'') filed a similar motion for reconsideration and a motion to stay the remand proceeding.

On October 29, 2008, the CIT granted the motions of the Commission and Timken and ordered a stay of the Commission's remand proceeding. In that Order, the CIT also directed that the stay shall remain in effect until the Court has ruled on the pending motions for reconsideration.

Accordingly, the remand proceedings in this matter are hereby stayed pending further order.

By order of the Commission.

Issued: November 24, 2008.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. E8–28392 Filed 11–28–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–394–A & 399–A (Second Review) (Remand)]

Ball Bearings From Japan and the United Kingdom

AGENCY: United States International Trade Commission.

ACTION: Notice of remand proceedings.

SUMMARY: The U.S. International Trade Commission (''Commission'') hereby gives notice of the resumption of its remand proceedings with respect to its affirmative determinations in the five-year reviews of the antidumping duty orders on ball bearings from Japan and the United Kingdom. For further information concerning the conduct of this proceeding and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207).

DATES: *Effective Date:* January 30, 2009.

FOR FURTHER INFORMATION CONTACT: Jim McClure, Office of Investigations, telephone 202–205–3191, or David Goldfine, Office of General Counsel, telephone 202–708–5452, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*).

SUPPLEMENTARY INFORMATION:

Background. In June 2006, the Commission determined that revocation of the antidumping duty orders on ball bearings from France, Germany, Italy, Japan, and the United Kingdom would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. The Commission's determinations for Japan and the United Kingdom were appealed to the Court of International Trade (the ''Court''). On September 9, 2008, the Court issued a decision remanding the matter to the Commission for further proceedings. *NSK* v. *United States,* Slip Op. 08–95 (Ct. Int'l Trade, Sept. 9, 2008). In its opinion, the Court issued an order instructing the Commission to (1) ''conduct a *Bratsk* analysis of non-subject imports as outlined in this opinion;'' (2) ''reassess supply conditions within the domestic industry,'' *i.e.*, the industry's restructuring efforts during the period of review, and (3) ''reexamine its findings with regard to likely impact and its decision to cumulate imports from the United Kingdom in light of changes in its determinations that may result as a consequence of the foregoing remand instructions.''

On October 8, 2008, in accordance with the Court's order, the Commission initiated remand proceedings in the above-captioned reviews. The notice of initiation for the remand proceeding was published in the **Federal Register** at 73 FR 63217 (Oct. 20, 2008). The Commission noted that it was re-opening the record to obtain information to conduct an analysis of non-subject imports as outlined in the Court's opinion. The Commission also noted that it was permitting parties to file comments pertaining to the specific issues that are the subject of the Court's remand instructions and to comment on the new information obtained on remand. *Id.*

On October 9, 2008, the Commission filed a motion for reconsideration with the Court. In the motion, the Commission requested that the Court reconsider its decision in light of the Federal Circuit's decision, *Mittal Steel Point Lisas Limited* v. *United States,* Court No. 2007–1552 (September 18, 2008) (''*Mittal*''). In its motion, the Commission also requested that the Court issue a stay of the remand proceeding pending the Court's disposition of the Commission's motion for reconsideration. Defendant-Intervenor The Timken Company (''Timken'') filed a similar motion for reconsideration and a motion to stay the remand proceeding.

On October 29, 2008, the Court granted the requests of the Commission and Timken to stay the Commission's remand proceeding pending its reconsideration of the Commission's and Timken's motions for reconsideration. Accordingly, the Commission stayed its remand proceeding on November 17, 2008 pending the Court's ruling on the motions for reconsideration.

On December 29, 2008, the Court denied the motions for reconsideration by the Commission and Timken. The Court has ordered the Commission to file its remand determination with the Court by May 4, 2009. Accordingly, the Commission is hereby resuming the remand proceeding in this review and announcing an amended schedule for the proceeding, as set forth herein.

Participation in the proceeding. Only those persons who were interested parties to the reviews (*i.e.*, persons listed on the Commission Secretary's service list) and parties to the appeal may participate in the remand proceeding. Such persons need not make any additional filings with the Commission to participate in the remand proceeding. Business proprietary information (''BPI'') referred to during the remand proceeding will be governed, as appropriate, by the administrative protective order issued in the reviews.

Written submissions. The Commission is re-opening the record in this proceeding to obtain information to conduct an analysis of non-subject imports as outlined in the Court's opinion. The Commission will permit the parties to file comments pertaining to the specific issues that are the subject of the Court's remand instructions and, in this regard, may comment on the new information obtained on remand. Comments should be limited to no more than fifteen (15) double-spaced and single-sided pages of textual material. The parties may not themselves submit any new factual information in their comments and may not address any issue other than those that are the subject of the Court's remand instructions. Any such comments must be filed with the Commission no later than March 23, 2009.

All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (Nov. 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the remand proceeding must be served on all other parties to the remand proceeding (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Parties are also advised to consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207) for provisions of general applicability concerning written submissions to the Commission.

Issued: January 30, 2009.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–2402 Filed 2–4–09; 8:45 am]

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