

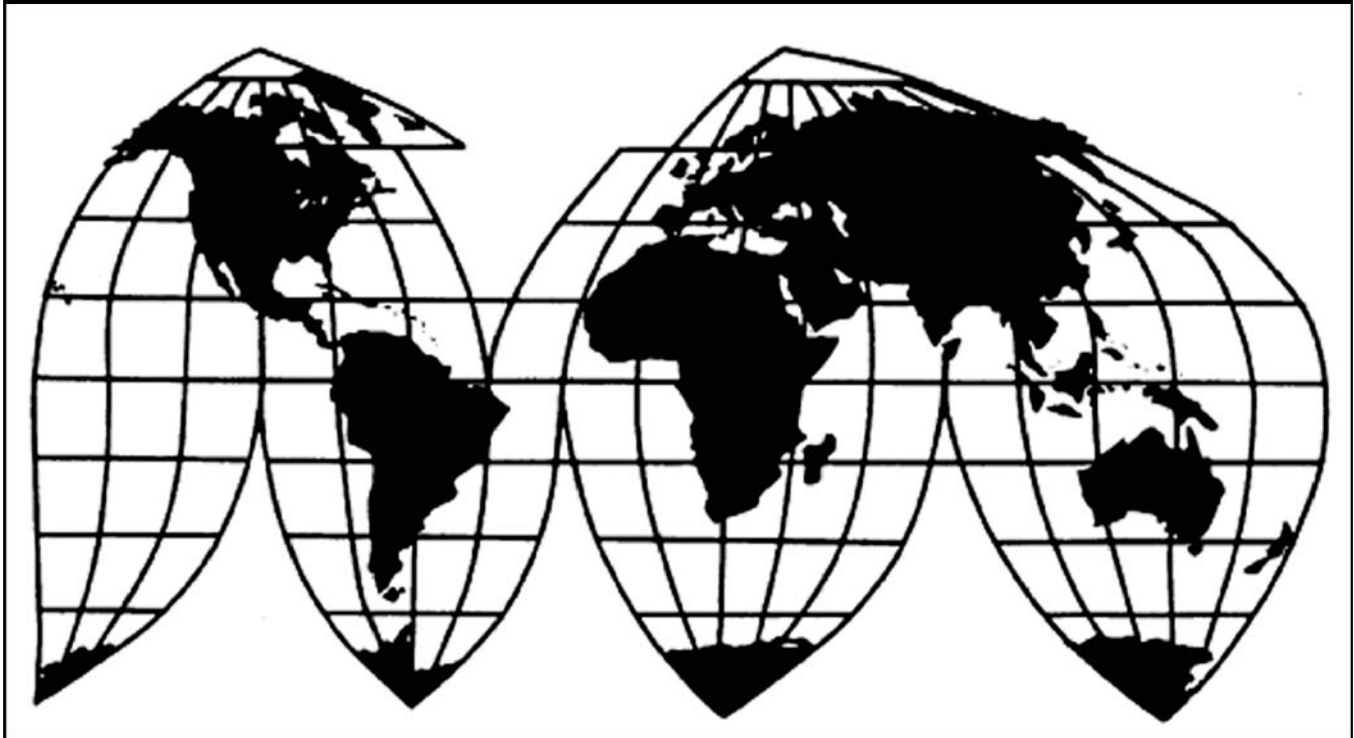
# **Certain Ball Bearings and Parts Thereof from Japan and the United Kingdom**

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

**Publication 4223**

**March 2011**

**U.S. International Trade Commission**



Washington, DC 20436

# U.S. International Trade Commission

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## **Certain Ball Bearings and Parts Thereof from Japan and the United Kingdom**

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## VIEWS OF THE COMMISSION ON REMAND

On December 9, 2010, the Court of International Trade (per Judge Barzilay) issued an opinion in *NSK Corp. et al. v. United States*, Slip Op. 10-133 (“*NSK V*”). In that opinion, the Court affirmed-in-part and remanded-in-part the Commission’s determinations in *Certain Ball Bearings and Parts thereof from Japan and the United Kingdom*, Inv. Nos. 731-TA-394-A & 399-A (Second Review) (Third Remand), USITC Pub. 4194 (Aug. 2010).

In *NSK V*, the Court affirmed the Commission’s determination not to cumulate subject imports from the United Kingdom with the other subject imports and its negative likely injury determination for the subject imports from the United Kingdom. *NSK V* at 4-6.<sup>1</sup> The Court also affirmed the Commission’s findings that the volumes of the cumulated subject imports from France, Germany, Italy, and Japan were likely to be significant and that they were likely to have significant effects on domestic prices upon revocation of the orders. *Id.* at 7. Nonetheless, the Court again remanded the Commission’s findings with respect to likely impact and causation for these subject imports. *Id.* at 8-12. The Court again concluded that the Commission had “failed to account adequately for the role of non-subject imports when analyzing likely impact and causation.” *Id.* at 9. In the Court’s view, “the record cannot support an affirmative finding of material injury” by the cumulated subject imports. *Id.* at 11.

In order to comply with the Court’s most recent remand order and instructions, we determine that, under section 751© of the Tariff Act of 1930, as amended (“the Act”), revocation of the antidumping duty order on imports of ball bearings (“BBs”) from Japan would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.<sup>2</sup> We have not changed our view of the record with respect to ball bearings (“BBs”) from Japan. In light of the Court’s conclusion in *NSK V* that “the record cannot support an affirmative finding of material injury”

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<sup>1</sup> As the Commission explained in its third remand determination, it only issued these determinations for the subject imports from the United Kingdom because it was compelled to do so by the Court’s remand order in *NSK Corp. v. United States*, Slip Op. 10-38 (Apr. 12, 2010).

<sup>2</sup> Chairman Deanna Tanner Okun did not participate in these reviews during the original proceeding, and has not participated in these remand proceedings.

by the cumulated subject imports, however, we have concluded that we are now compelled by the Court to determine that the subject imports from Japan, when cumulated with the other subject countries, will not be likely to lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

## **I. BACKGROUND**

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

This appeal has had a long and complicated history. It involves the second sunset reviews of the antidumping duty orders on ball bearings from France, Germany, Italy, Japan, Singapore, and the United Kingdom. These orders were issued in May 1989, after the Commission issued affirmative injury determinations for these countries.<sup>3</sup> The Commission completed the first sunset reviews of the orders in June 2000, issuing affirmative determinations for France, Germany, Italy, Japan, Singapore, and the United Kingdom.<sup>4</sup>

On June 1, 2005, the Commission instituted the second sunset reviews of the orders.<sup>5</sup> On August 31, 2006, the Commission issued its final determinations in these reviews.<sup>6</sup> The Commission unanimously determined that revocation of the antidumping duty orders on ball bearings from France, Germany, Italy, Japan, and the United Kingdom would likely result in continuation or recurrence of material injury within a reasonably foreseeable time.<sup>7</sup> The Commission also determined that revocation

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<sup>3</sup> *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).

<sup>4</sup> *Certain Bearings from China et al.*, Inv. Nos. AA1921-143, 731-TA-341, 343-345, 391-397 & -399 (Review), USITC Pub. 3309 (June 2000).

<sup>5</sup> 70 Fed. Reg. 31531 (June 1, 2005).

<sup>6</sup> 71 Fed. Reg. 51850 (Aug. 31, 2006).

<sup>7</sup> *Certain Bearings from France, Germany, Italy, Japan, Singapore, and the United Kingdom*, USITC Pub. 3876 (Second Review) (Aug. 2006) at 36-37 .

of the antidumping duty 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.<sup>8</sup>

**B. The Court of International Trade's Decision in *NSK I***

In September 2006, the Japanese and U.K. respondents appealed the Commission's affirmative determinations for Japan and the United Kingdom to the Court of International Trade. On September 9, 2008, the Court (per Judge Barzilay) issued its first decision in the action. *NSK Corp. et al. v. United States*, Court No. 06-334, Slip Op. 08-95 ("*NSK I*").<sup>9</sup> In that decision, the Court affirmed the Commission's determinations in part, and remanded them in part. The Court affirmed the Commission's findings that there was likely to be an overlap of competition between the subject imports and the domestic merchandise upon revocation of the orders, that there were likely to be significant volumes of the subject imports upon revocation of the orders, and that the subject imports would likely have significant price effects upon revocation.<sup>10</sup>

The Court remanded the Commission's affirmative determination, however, with instructions to address three issues. First, relying on the Federal Circuit's decision in *Bratsk Aluminum Smelter v. United States* ("*Bratsk*"),<sup>11</sup> the Court instructed the Commission to assess "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 will lead to a continuation or recurrence of material injury as a result of subject imports."<sup>12</sup> Second, the Court instructed the Commission to reconsider its vulnerability finding in light of the domestic industry's "restructuring" activities during the period of review ("POR"). Third, the Court instructed the Commission to reconsider its discernible adverse impact analysis for the United

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<sup>8</sup> USITC Pub. 3876 at 1, 36-37.

<sup>9</sup> *NSK Corp. v. United States*, 577 F. Supp. 2d 1322 (Ct. Int'l Trade 2008).

<sup>10</sup> *NSK I* at 17-18, 23-38.

<sup>11</sup> 444 F.3d 1369 (Fed. Cir. 2006)

<sup>12</sup> *NSK I* at 11.

Kingdom in light of the “significant rise in non-subject imports and large scale restructuring within the ball bearing industry.”<sup>13</sup> <sup>14</sup>

### C. The Commission’s First Remand Determination

On October 8, 2008, the Commission instituted its remand proceedings for the sunset reviews for ball bearings from Japan and the United Kingdom.<sup>15</sup> The Commission issued its first remand determinations on May 4, 2009,<sup>16</sup> unanimously deciding to cumulate the subject imports from France, Germany, Italy, Japan, and the United Kingdom.<sup>17</sup> It also unanimously determined that revocation of the antidumping duty orders on subject imports from the cumulated countries would likely result in the continuation or recurrence of material injury within a reasonably foreseeable time.<sup>18</sup>

In these remand determinations, the Commission addressed the three issues remanded by the Court. First, the Commission determined that U.K. subject imports would likely have a discernible

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<sup>13</sup> *Id.* at 20.

<sup>14</sup> 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 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, even when *Bratsk*’s triggering factors were met, the Commission was not required to assess in a sunset review whether non-subject imports had replaced, or were likely to replace, the subject imports after imposition of the orders, as the Court held in *NSK I*. On December 29, 2008, the Court denied the Commission’s motion for reconsideration in *NSK Corp. et al. v. United States*, Slip Op. 08-145 (Dec. 29, 2008) (“*NSK II*”). In that decision, the Court concluded that *Mittal* did not indicate that the analysis required by the Court’s remand instructions in *NSK I* was not applicable in the sunset context, as the Commission argued, and ordered the Commission to respond to its remand instructions. *NSK II* at 21-27.

<sup>15</sup> The Commission published its notice of initiation for the remand proceeding in the Federal Register at 73 Fed. Reg. 62317 (Oct. 14, 2008). The Commission re-opened the record to obtain certain foreign production, capacity, and shipment information for nonsubject imports in order to address the Court’s *Bratsk* instructions on remand.

<sup>16</sup> *Certain Ball Bearings and Parts thereof from Japan and the United Kingdom*, 731-TA-394A & 399A, (Second Review) (Remand), USITC Pub. 4082 (May 2009).

<sup>17</sup> USITC Pub. 4082 at 1-2.

<sup>18</sup> *Id.*



adverse impact on the domestic industry upon revocation, providing a comprehensive discussion of this finding.<sup>19</sup> Second, the Commission determined that the domestic industry was in a vulnerable condition, again discussing this issue at length.<sup>20</sup> Third, the Commission explained that, even with a significant volume of nonsubject imports in the market, there was likely to be significant and intense price competition among the domestic, subject, and nonsubject merchandise upon revocation of the orders, which would likely have a significant adverse effect on the prices and sales volumes of an already vulnerable domestic industry.<sup>21</sup> Accordingly, the Commission determined that revocation of the orders on the Japanese and U.K. subject imports would likely result in the continuation or recurrence of material injury to the domestic industry.

**D. The Court's Decision in *NSK III***

On August 31, 2009, the Court issued its decision in *NSK Corp. v. United States*, Court No. 06-334, Slip Op. 09-91 (“*NSK III*”).<sup>22</sup> In *NSK III*, the Court remanded the same three issues that it had previously remanded for further analysis in *NSK I*. First, the Court ordered the Commission to reconsider the impact of the industry’s restructuring efforts and of nonsubject imports on its cumulation analysis for the United Kingdom.<sup>23</sup> Second, the Court instructed the Commission to perform a more detailed assessment of the vulnerability of the industry, once again taking into account the industry’s restructuring efforts during the period.<sup>24</sup> Finally, in light of the significant presence of nonsubject imports in the market, the Court instructed the Commission to further analyze whether “subject imports are more than a mere minimal or tangential factor in the material injury to the domestic industry that is likely to

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<sup>19</sup> *Id.* at 21-26.

<sup>20</sup> *Id.* at 34-48.

<sup>21</sup> *Id.* at 41-42.

<sup>22</sup> *NSK Corp. v. United States*, 637 F. Supp. 2d 1311 (Ct. Int’l Trade 2009).

<sup>23</sup> *NSK III* at 30.

<sup>24</sup> *NSK III* at 30.

continue or recur in the absence of the antidumping duty order.”<sup>25</sup>

**E. The Commission’s Second Remand Determination**

The Commission issued its second remand determinations on January 5, 2010.<sup>26</sup> In its determinations, the Commission provided a detailed factual and legal response to each of the Court’s specific remand instructions.<sup>27</sup> The Commission again unanimously decided to cumulate the subject imports from France, Germany, Italy, Japan, and the United Kingdom.<sup>28</sup> It also unanimously determined that revocation of the antidumping duty orders on the cumulated subject imports would result in continuation or recurrence of material injury within a reasonably foreseeable time.<sup>29</sup>

The Commission again addressed the three issues remanded by the Court in *NSK III*. The Commission explained why the subject imports from the United Kingdom would likely have a discernible adverse impact on the domestic industry upon revocation.<sup>30</sup> The Commission also explained why the domestic industry was in a vulnerable condition, and why revocation of the orders on Japanese and U.K. subject imports would likely result in the continuation or recurrence of material injury to the domestic industry.<sup>31</sup>

**F. The Court’s Decision in *NSK IV***

The Court issued its next decision in the appeal on April 12, 2010. *NSK Corp. v. United States*,

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<sup>25</sup> *NSK III* at 29. The Court stated that it had not intended to require the Commission to perform the replacement/likely replacement/benefit analysis specified in *NSK I*. Instead, it stated that *NSK I* “made clear that ‘the only duty imposed on the ITC is to ensure that the subject imports, and not non-subject imports or some other factor, would be substantially responsible for injury to the domestic industry.’” *NSK III* at 13.

<sup>26</sup> *Ball Bearings from Japan and the United Kingdom*, Inv. Nos. 731-TA-394-A & 399-A, (Second Review) (Second Remand), USITC Pub. 4131 (Jan. 2010).

<sup>27</sup> The Commission’s second remand determination was 83 pages in length.

<sup>28</sup> USITC Pub. 4131 at 1-2.

<sup>29</sup> *Id.* at 1-2.

<sup>30</sup> *Id.* at 21-40.

<sup>31</sup> *Id.* at 40-54.

Slip Op. 10-38 (“*NSK IV*”). In *NSK IV*, the Court affirmed the Commission’s finding that the domestic industry was in a vulnerable condition. The Court concluded that the Commission reasonably relied upon the significant declines in the domestic industry’s capacity utilization rates, its productivity rates, and the on-going cost structure and profitability levels, along with declines in the industry’s net sales revenue and market share during the period of review, as a basis for this finding.<sup>32</sup> Nevertheless, the Court again remanded the Commission’s discernible adverse impact analysis for the United Kingdom, stating that the Commission had failed to “demonstrate that some incentive likely would draw a discernible amount of the subject United Kingdom goods specifically to the United States market in the absence of the order.”<sup>33</sup> The Court further explained that it did “not believe that the existing record, taken as a whole, can support an affirmative discernible adverse impact finding.”<sup>34</sup> It stated that the “Commission may reopen the record and obtain additional data on this issue in the next remand proceeding, if it so chooses.”<sup>35</sup>

The Court also remanded the Commission’s likely impact and causation analysis. The Court stated that “the facts of this case necessitate that the Commission confirm that subject imports likely will reach the requisite level of causation despite the significant presence of, and seemingly impenetrable barrier imposed by, non-subject imports in the United States market.”<sup>36</sup> In the Court’s view, the record showed that “[n]on-subject imports have ‘become a significant and price-competitive factor’ in the United States ball bearings market,” and that they “may prevent the subject imports from achieving the requisite level of causation and, therefore, serve as an impenetrable barrier that precludes the agency from

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<sup>32</sup> *NSK IV* at 10-11.

<sup>33</sup> *Id.* at 18.

<sup>34</sup> *Id.* at 16.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 17.

affirmatively finding injury in this sunset review.”<sup>37</sup> <sup>38</sup>

### **G. The Commission’s Third Remand Determinations**

On August 25, 2010, the Commission issued its third remand determination in *Ball Bearings from Japan and the United Kingdom*, 731-TA-394A & 399A, (Second Review) (Third Remand), USITC Pub. 4194 (Aug. 2010). The Commission did not reopen the record since, as explained previously, with respect to the issue of U.K. cumulation, the record in these ball bearing reviews contained as complete a data set as the Commission typically obtains in sunset reviews, and there were not any significant gaps or deficiencies in the record which would warrant reopening it.<sup>39</sup> Because the Court had held that the existing record could not support an affirmative discernible adverse impact finding for the United Kingdom, the Commission concluded that it was compelled by the Court’s instructions to determine that subject imports from the United Kingdom would not likely have a discernible adverse impact upon revocation. It also concluded that, as a result of these instructions, it was required to issue a negative likely injury determination for the United Kingdom.<sup>40</sup> The Commission explained that it would not have made these findings in the absence of the Court’s order and instructions.<sup>41</sup>

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<sup>37</sup> *Id.* at 17.

<sup>38</sup> The Court noted that it “appreciates the Commission’s continued vigor in resolving these issues and the diligence with which it has addressed these difficult questions thus far.” *Id.* at 17. The Court stated that “[i]ndeed, assuming that the {Commission} had correctly cumulated the subject imports, the Commission’s analysis of the two remaining issues nearly resembles the kind of substantial evidence needed for the court to sustain an agency determination.” *Id.* at 17-18.

<sup>39</sup> USITC Pub. 4194 at 10. In our third remand determination, we explained our decision not to re-open the record on the issue of U.K. cumulation as follows: “The Commission declined to reopen the record on remand because the existing record contained a complete data set with respect to the capacity, production, and shipment levels of the U.K. ball bearings industry as well as comprehensive information relating to other factors bearing on the discernible impact finding for the United Kingdom. Indeed, the record contained as complete a data set as the Commission typically obtains in five-year reviews, with no significant gaps or deficiencies. In fact, the Court did not identify any deficiencies with the record evidence or any specific data that the Commission might seek to collect on this issue on remand pertinent to the issue of cumulation.” USITC Pub. 4194 at 10.

<sup>40</sup> USITC Pub. 4194 at 11.

<sup>41</sup> *Id.* at 12.

Turning to the subject imports from the other subject countries (*i.e.*, France, Germany, Italy, and Japan), the Commission determined that these cumulated imports would likely have a significant adverse impact on the domestic industry within the reasonably foreseeable future upon revocation of the orders. The Commission first concluded that the volume of cumulated subject imports would be significant in the reasonably foreseeable future if the orders were revoked. In doing so, the Commission relied upon its findings that the relatively weak demand for BBs over the period of review was not projected to increase substantially within the reasonably foreseeable future, that the subject producers had significant amounts of excess capacity and were export-oriented, that the subject imports were already present in the U.S. market in significant volumes, that there was a high degree of interchangeability between subject imports and the domestic like product, and that the U.S. market's large size and higher prices made it attractive to subject imports.

The Commission also found that the cumulated subject imports would likely have significant effects on domestic prices if the orders were revoked. The Commission found that, if the orders were revoked, the subject imports would be priced aggressively to gain market share and would likely undersell the domestic like product by substantial margins, as they did in the original investigations, thereby suppressing domestic prices.<sup>42</sup> The Commission explained that the subject imports were likely to suppress the price increases necessary to compensate for the domestic industry's increasing costs, given that there had been a 5.1 percentage point increase in the ratio of the industry's cost of goods sold ("COGS") to net sales.<sup>43</sup> The Commission also pointed out, among other things, that demand for BBs was relatively price inelastic, that the U.S. market for BBs was price competitive, that the domestic like product and subject imports were generally substitutable, and that BBs represented a relatively small share of the cost of the downstream products in which they are ultimately used.<sup>44</sup> Given these prevailing

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<sup>42</sup> *Id.* at 22.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 22-23.

market conditions, the industry's cost-price squeeze during the review period, and the aggressive strategies pursued by subject producers during the original investigation, the Commission found that, on balance, the record indicated that the subject imports would likely have significant price effects within a reasonably foreseeable time if the orders were revoked.<sup>45</sup>

The Commission then found that revocation of the orders would have a significant adverse impact on the vulnerable domestic ball bearings industry. Noting that the cumulated subject imports would likely have significant volume and price effects, the Commission found that it followed that revocation of the orders would likely have a significant adverse impact on the domestic industry, especially given its vulnerable condition.<sup>46</sup>

The Commission then addressed the Court's instruction to "determine whether the cumulated subject imports constitute more than a minimal or tangential cause of injury to the domestic industry that will likely continue or recur in the absence of the antidumping duty orders, given the significant presence of, and seemingly impenetrable barrier imposed by, non-subject imports in the United States market."<sup>47</sup> The Commission observed that, as an initial matter, even with the price and volume disciplining effects of the antidumping duty orders in place, the subject imports had been able to maintain a significant presence in the U.S. market since the imposition of the orders, notwithstanding the significant presence of low-priced nonsubject imports in the U.S. market.<sup>48</sup> Indeed, the Commission pointed out, the subject imports had actually increased somewhat over the last three years of the POR, despite the significant presence of nonsubject imports in the market. The Commission emphasized that, upon revocation of the orders, the subject producers had the ability to increase substantially their penetration into the U.S. market, given that their excess capacity in the final year of the POR alone could have captured \*\*\* percent of the U.S.

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<sup>45</sup> *Id.* at 22-23.

<sup>46</sup> *Id.* at 31.

<sup>47</sup> *NSK IV* at 19.

<sup>48</sup> USITC Pub. 4194 at 33.

market.<sup>49</sup>

The Commission also pointed out that, in the event of revocation, the subject imports were likely to revert to the more aggressive volume and underselling strategies that were seen in the original investigations, when subject imports captured as much as 19.1 percent of the U.S. market.<sup>50</sup> The Commission further emphasized that there was a high degree of substitutability between the domestic like product and subject merchandise, that price was an important factor in purchasing decisions, that demand for ball bearings was not expected to increase dramatically within the foreseeable future, and that likely significant volumes of subject imports were likely to suppress the price increases necessary to compensate for the domestic industry's increasing costs.<sup>51</sup> Given these prevailing market conditions and the fact that the domestic industry still supplied the majority of the U.S. market, the Commission concluded that the presence of nonsubject imports in the market would not impair the subject imports' ability to gain significant market share at the expense of the domestic industry.<sup>52</sup> Accordingly, the Commission concluded that the cumulated subject imports will likely constitute more than a minimal or tangential cause of injury to the domestic industry.<sup>53</sup>

The Commission also explained that, even if subject imports were unable to take *any* market share whatsoever from nonsubject imports upon revocation, the subject imports would likely be well-positioned to capture significant additional market share from the domestic industry if the orders were revoked.<sup>54</sup> The Commission explained that, once the orders were revoked and the subject imports resumed a more aggressive pattern of price competition, it was likely that they would take market share

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<sup>49</sup> *Id.* at 32-33.

<sup>50</sup> *Id.* at 33.

<sup>51</sup> *Id.* at 33-34.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 34.

<sup>54</sup> *Id.*

from the domestic industry whose products were generally higher priced than either the subject or nonsubject imports, even with the orders in place.<sup>55</sup> The Commission emphasized that this situation would force the domestic producers to yield market share to subject imports upon revocation of the orders, or reduce their prices in order to meet the prices of the subject imports and retain their market share.<sup>56</sup> In either case, the Commission noted that the subject imports were likely to be more than a minimal or tangential cause of the injury to the domestic industry because revocation of the orders would result in the loss of significant market share by the industry or by a reduction in their prices as a way of maintaining market share.<sup>57</sup>

#### **H. The Court's Decision in NSK V**

On December 9, 2010, the Court issued its opinion and order in *NSK V*. The Court again affirmed-in-part and remanded-in-part the Commission's determinations in *Certain Ball Bearings and Parts Thereof from Japan and the United Kingdom*, Inv. Nos. 731-TA-394-A & 399-A (Second Review) (Third Remand), USITC Pub. 4194 (Aug. 2010). The Court affirmed the Commission's negative likely injury determination for the subject imports from the United Kingdom. The Court also affirmed the Commission's findings that the cumulated subject imports would be likely to have significant volume and price effects on the industry upon revocation of the orders. *NSK V* at 7.

The Court once again concluded, however, that the Commission "failed to account adequately for the role of non-subject imports when analyzing likely impact and causation." *Id.* at 9. The Court noted that "the Commission might have reached the correct conclusions on likely volume, underselling, and price effects of unrestrained subject imports" but "ignored the influence of non-subject imports in the market." *Id.* at 9. The Court pointed out that, "[b]ecause price plays such a crucial role in the market, it follows that a drop in price for one group, *i.e.*, domestic ball bearings, subject imports, or non-subject

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<sup>55</sup> *Id.* at 36-37.

<sup>56</sup> *Id.* at 38.

<sup>57</sup> *Id.*



imports likely will affect the prices at which another group sells subject merchandise.” *Id.* at 8.

According to the Court, “to understand the consequences of price changes in the domestic ball bearings industry, the Commission must focus on the market as a whole and examine the effects of each group on the others.” *Id.* at 8. Moreover, the Court observed that “if subject producers lower the prices of their imports, then the non-subject producers almost certainly will also drop their prices,” such that “the nonsubject imports likely would negate any potential significant adverse effect of lower-priced subject imports, thereby preventing the latter from achieving the requisite level of impact.” *Id.* at 10. In the final analysis, the Court concluded that “the record cannot support an affirmative finding of material injury” by the cumulated subject imports. *Id.* at 11. The Court stated, however, that “the Commission may reopen the record and obtain additional data on the issue at its discretion.” *Id.*

#### **I. Current Remand Proceeding**

On January 6, 2011, the Commission instituted this fourth remand proceeding.<sup>58</sup> We declined to re-open the record on remand because we believe that the record in these reviews contains as complete a data set as the Commission typically obtains in most sunset reviews. Moreover, there are, in our view, no significant gaps or deficiencies in the record that would necessitate re-opening the record.<sup>59</sup> Although the Court makes clear that it disagrees with the Commission’s ultimate conclusion that the subject imports are likely to have a significant adverse impact on the industry upon revocation of the orders, the Court itself has not identified any particular data that the Commission might want to seek on remand. Simply put, we believe that the Commission’s likely impact analysis in the original and remand determinations were supported by ample record evidence and that the record evidence on this issue is reasonably complete. Given the nature of the record on the issue of likely impact for cumulated subject imports, we

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<sup>58</sup> The Commission published its notice of initiation for these remand proceedings in the Federal Register at 76 Fed. Reg. 798 (Jan. 6, 2011).

<sup>59</sup> We note that the Commission previously re-opened the record during its first remand proceeding to obtain additional data relating to nonsubject imports.

do not see any basis to re-open the record on the issue.<sup>60</sup>

## **II. REVOCATION OF THE ANTIDUMPING DUTY ORDER ON BALL BEARINGS FROM JAPAN IS NOT LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF MATERIAL INJURY WITHIN A REASONABLY FORESEEABLE TIME**

In accordance with the Court's remand instructions, we have reviewed the Commission's prior findings concerning the likely impact of the cumulated subject imports upon revocation.<sup>61</sup> In its original and prior three remand determinations, the Commission unanimously determined that revocation of the antidumping duty order on imports of ball bearings from Japan, when cumulated with the subject imports from France, Germany, and Italy, would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.<sup>62</sup>

As instructed by the Court, we have reconsidered the role of nonsubject imports in the U.S. market as it relates to likely impact and causation, taking into account the Court's remand instructions in *NSK V*. We continue to believe that the existing record amply supports our previous finding that revocation of the antidumping duty orders covering imports of the subject ball bearings from Japan, when cumulated with the subject imports from France, Germany, and Italy, would result in the likely

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<sup>60</sup> We note that the Commission has the discretion to determine whether re-opening the record is necessary. *Nippon Steel Corporation v. United States*, 345 F.3d 1379, 1382 (Fed. Cir. 2003).

<sup>61</sup> We reaffirm the Commission's prior findings concerning the domestic like product and the domestic industry, which were not at issue in the litigation. We also incorporate herein the Commission's findings on cumulation for the United Kingdom and the other subject imports in this review that were issued in our fourth remand determination and affirmed by the Court in *NSK IV*. Finally, we re-affirm and incorporate herein our findings on the likely volume and price of the cumulated subject imports, which were also affirmed by the Court in *NSK IV*.

<sup>62</sup> In their comments to the Commission in these fourth remand proceedings, NSK and JTEKT argue that the Commission should exercise its discretion and de-cumulate subject imports from Japan from the other three cumulated countries (*i.e.*, France, Germany, and Italy). *See e.g.*, JTEKT Fourth Remand Comments at 5; NSK Fourth Remand Comments at 1-2. We note, however, that the issue was not raised by NSK or JTEKT before the Court or during any of the prior remand proceedings, and was therefore not a basis for the Court's remand instructions in *NSK V* or any prior remand order. As a result, we are not revisiting our findings on cumulation for these countries at this belated point in this litigation.

recurrence or continuation of material injury to the domestic bearings industry.<sup>63</sup>

Nevertheless, in light of the Court's remand instructions that the existing record taken as a whole cannot support a finding that the subject imports from Japan, when cumulated with those from France, Germany and Italy, will likely have a significant adverse impact on the industry upon revocation of the orders, we are compelled by the Court's instructions to determine that these subject imports are not likely to have a significant impact on the industry upon revocation.<sup>64</sup> Given that we have determined not to re-

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<sup>63</sup> In its comments to the Commission in these fourth remand proceedings, Timken argues that the Commission's likely impact analysis for the cumulated subject imports is supported by substantial evidence and should be affirmed. Timken Fourth Remand Comments at 2-15. Among other things, Timken cites questionnaire responses from OEM purchasers and U.S. affiliates of subject ball bearing producers reporting that subject imports from Japan and the other cumulated countries can and will compete successfully against both domestically produced bearings and nonsubject imports if the orders are revoked. Timken Fourth Remand Comments at 2-4. Timken also points to certain hearing testimony from purchaser witnesses, indicating that subject imports would not be prevented by nonsubject imports from having an adverse impact on the domestic industry if the orders were revoked. Timken Fourth Remand Comments at 5. Timken also references various questionnaire responses from numerous purchasers of ball bearings indicating that subject imports would not be displaced by nonsubject imports upon revocation, but instead would play a larger role in the U.S. market that would likely have significant adverse effects on the domestic industry. Timken Fourth Remand Comments at 5-8. Timken highlights a variety of other record evidence showing that nonsubject imports have not created an impenetrable barrier for subject imports to constitute more than a minimal or tangential cause of injury to the domestic industry, including information on imports of BBs from certain producers in the subject countries which were excluded from the orders either during or shortly before the POR, and evidence relating to Japanese producers' aggressive behavior in the U.S. market following revocation of other orders on spherical plain bearings and tapered roller bearings. Timken Fourth Remand Comments at 8-13. We agree with Timken that all of this record evidence provides significant additional evidentiary support for the Commission's affirmative determination for Japan. Notwithstanding the record evidence highlighted by Timken in its remand comments, however, we find that we are compelled by the Court's remand instructions to enter a negative determination for Japan.

<sup>64</sup> We note that, in its comments to the Commission in these fourth remand proceedings, JTEKT states unequivocally that, in light of the Court's finding in *NSK V* "that the administrative record does not support an affirmative impact or causation finding," the Commission now "must" enter a negative determination for Japan. JTEKT Fourth Remand Comments at 2-3. In support of its position, JTEKT references with approval the Commission's conclusion in entering a negative determination for the United Kingdom in its third remand determination that "the Court's remand instructions give us no leeway on this matter, and we have no alternative but to comply with them." JTEKT Fourth Remand Comments at 3 (quoting USITC Pub. 4194 at 12). JTEKT contends that the Court's remand instructions in *NSK V* similarly give the Commission no alternative other than to enter a negative determination for Japan. JTEKT Fourth Remand Comments at 2-3. Likewise, in its comments on the fourth remand, NSK contends that, in light of the Court's remand instructions in *NSK V*, there is no basis for the Commission to reexamine the record evidence or render any decision other than to enter a negative determination for

open the record because we believe the record to be reasonably complete, we have no alternative. We note that we would not have made this finding in the absence of the Court's holding in *NSK V* that the record as a whole cannot establish that the cumulated subject imports from France, Germany, Italy, and Japan would have a significant adverse impact on the domestic bearings industry in the event of revocation of the orders.

### III. CONCLUSION

Accordingly, in order to comply with the Court's remand order and instructions in *NSK V*, we determine that revocation of the antidumping duty orders covering imports of the subject ball bearings from Japan, when cumulated with the other subject countries (France, Germany, and Italy), would not be likely to lead to continuation or recurrence of material injury to a domestic industry within a reasonably foreseeable time.<sup>65</sup>

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Japan. NSK Fourth Remand Comments at 2.

<sup>65</sup> In its comments to the Commission on the fourth remand determination, Plaintiff-Intervenor The Barden Group argues that the Commission must enter negative determinations not only for Japan and the United Kingdom, but also for France, Germany, and Italy. Barden Group Fourth Remand Comments at 4-6. However, only Japanese and U.K. subject producers appealed the Commission's determinations in these five-year reviews, and, therefore, only the orders covering ball bearings from Japan and the United Kingdom are at issue in this appeal. Simply put, Plaintiff-Intervenors are not entitled to relief that is beyond the scope of this appeal. It is well-settled that an intervenor "is limited to the field of litigation open to the original parties." *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U.S. 53, 58 (1935). Moreover, this Court "has consistently held that the intervenor 'takes the action as it has been framed by the parties therein,' and cannot use the right of intervention to interpose claims otherwise inappropriate." *Torrington Co. v. U.S.*, 731 F.Supp. 1073, 1075 (CIT 1990) (quoting *Fuji Elec. Co. v. United States*, 595 F.Supp. 1152, 1154 (CIT 1984)). In fact, on February 15, 2008, the Court denied The Barden Group's request for injunctive relief with respect to subject imports from Germany and Italy because subject producers from those two countries did not appeal the Commission's determinations in these five-year reviews.