

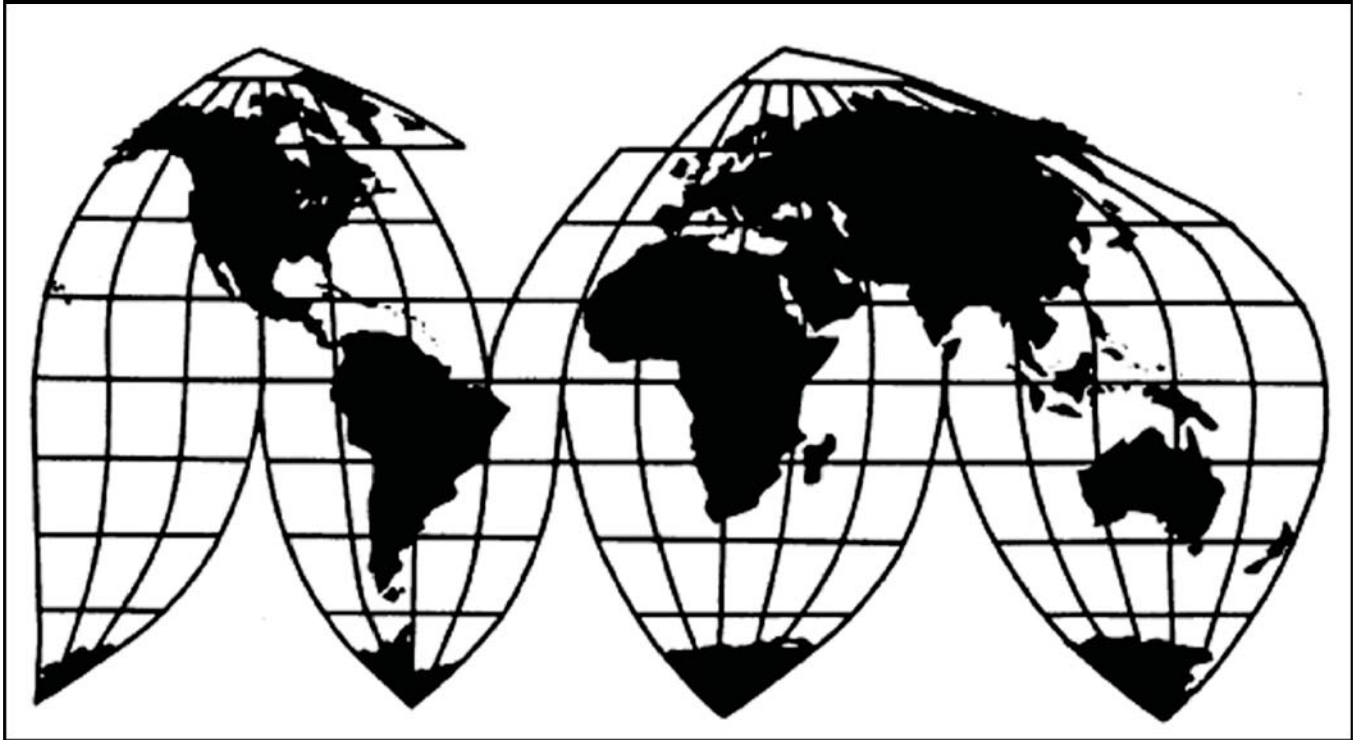
Certain Ball Bearings and Parts thereof from Japan and the United Kingdom

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

Publication 4131

January 2010

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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VIEWS OF THE COMMISSION ON REMAND

By decision and order dated August 31, 2009, the U.S. Court of International Trade remanded the Commission's affirmative determinations that revocation of the antidumping duty orders on ball bearings ("BBs") from Japan and the United Kingdom would be likely to 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, Slip Op. 09-91 (Aug. 31, 2009) (hereinafter "NSK III").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

I. BACKGROUND

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

This appeal involves the second sunset reviews of the antidumping duty orders on ball bearings 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

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) and Certain Ball Bearings and Parts Thereof from Japan and the United Kingdom, Inv. Nos. 731-TA-394-A and -399-A (Second Review) (Remand), USITC Pub. 4082 (May 2009). In these views, we cite to the public version of the Commission's original sunset views and staff report as USITC Pub. 3876 and to the confidential version of the Commission's original views as "CD." We also cite to the public version of the Commission's first remand opinion and staff report as USITC Pub. 4082, to the confidential version of the remand determinations as "RCD," and to the confidential version of the remand staff report as "RSR" in these views.

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

³ Commissioner Deanna Tanner Okun did not participate in these reviews during the original proceeding, and has not participated in these remand proceedings.

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countries.⁴ The Commission conducted its first sunset reviews of the orders in June 2000, issuing affirmative determinations for France, Germany, Italy, Japan, Singapore, and the United Kingdom.⁵

On June 1, 2005, the Commission instituted its second sunset reviews of the ball bearings orders.⁶ It issued its final determinations in its second sunset reviews on August 31, 2006.⁷ 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 to the domestic industry within a reasonably foreseeable time.⁸ The Commission determined that revocation of the Singapore order would not result in continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.⁹

B. The Court of International Trade's First Remand Order in *NSK I*

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 Barzilai) issued its decision in the appeal. NSK Corp. et al. v. United States, Court No. 06-334, Slip Op. 08-95 (Sept. 9, 2008) ("NSK I"). In NSK I, the Court affirmed-in-part, and remanded-in-part, the Commission's sunset determinations for Japan and the United

⁴ 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).

⁵ Certain Bearings from China et al., Inv. Nos. AA1921-143, 731-TA-341, 343-345, 391-397 & -399 (Review), USITC Pub. 3309 (June 2000).

⁶ 70 Fed. Reg. 31531 (June 1, 2005).

⁷ 71 Fed. Reg. 51850 (Aug. 31, 2006).

⁸ USITC Pub. 3876 at 36-37.

⁹ Id.

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Kingdom. *Id.* Among other things, the Court affirmed the Commission's findings that the subject imports from the cumulated countries were likely to compete with each other and the domestic like products in the reasonably foreseeable future, that the volumes of the subject imports were likely to be significant upon revocation of the orders, that the subject imports were likely to undersell the industry significantly to gain market share from the domestic industry, and that the subject imports would likely have significant adverse effects on prices of the domestic like product if the orders were revoked. NSK I at 17-18, 23-38.

Nonetheless, the Court remanded the Commission's determinations and instructed the Commission to address three issues. First, relying on the Federal Circuit's decision in Bratsk Aluminium Smelter v. United States ("Bratsk"),¹⁰ the Court concluded that the Commission needed to provide a more detailed analysis of the role of the non-subject imports in the ball bearings market. See NSK I at 7-14. After finding that the triggering factors specified in Bratsk were satisfied,¹¹ the Court then appeared to direct the Commission to specifically 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

¹⁰ 444 F.3d 1369 (Fed. Cir. 2006). In Bratsk, the Federal Circuit held that, in an antidumping investigation:

Where commodity products are at issue and fairly traded, price competitive, non-subject imports are in the market, the Commission must explain why the elimination of subject imports would benefit the domestic industry instead of resulting in the non-subject imports' replacement of the subject imports' market share without any beneficial impact on domestic producers.

444 F.3d at 1373.

¹¹ NSK I at 12-14.

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a result of subject imports.” *Id.* at 11.¹²

Second, the Court also instructed the Commission to reconsider its finding that the industry was vulnerable to the likely effects of subject imports upon revocation of the order, stating that the record suggested that “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.* at 23. The Court further instructed the Commission to reconsider its discernible adverse impact analysis for the United Kingdom, and take into account the “significant rise in non-subject imports and large-scale restructuring within the ball bearing industry” during the period. *Id.* at 20.¹³

C. The Commission’s Reconsideration Request and the Court’s Decision in *NSK II*

Nine days after the Court issued *NSK I*, the Federal Circuit issued its decision in *Mittal Steel*

¹² See also *id.* at 10 (in sunset reviews, the Commission “should be able to determine with greater certainty than in an investigation whether non-subject imports have replaced or are likely to replace the subject imports in the U.S. market”) & 11-12 (in cases in which there are a significant volume of price-competitive, non-subject imports in the market, 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.”).

In *NSK III*, the Court has, of course, explained that it did not intend the Commission to perform the specific “replacement/likely replacement” test specified in *NSK I*. *NSK III* at 12-14 (stating that the Commission “incorrectly surmised that the court has asked it to conduct a rigid ‘market share replacement’ analysis and 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.”). Instead, the Court emphasized that “the only duty {that it} imposed on the Commission {was} 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.

¹³ The Commission instituted its remand proceedings for the sunset reviews for ball bearings from Japan and the United Kingdom in October 2008. 73 Fed. Reg. 62317 (Oct. 20, 2008). 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 instructions concerning non-subject imports on remand. In reopening the record, the Commission sent questionnaires to 76 foreign producers and 58 importers of non-subject ball bearings. The Commission did not reopen the record on any other issue.

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Point Lisas, Ltd. v. United States, 542 F.3d 867 (Fed. Cir. 2008) (“Mittal”). In Mittal, the Federal Circuit clarified the scope of its “replacement/benefit” statements in Bratsk. It 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.”¹⁴ It further explained that the “focus of the {Bratsk} inquiry is on the cause of injury in the past, not the prospect of effectiveness in the future.”¹⁵

Because of these clarifications by the Federal Circuit, the Commission filed a motion for reconsideration with the Court of International Trade on October 9, 2008. In its motion, the Commission asked the Court to reconsider its holdings in NSK I. The Commission argued that, in Mittal, the Federal Circuit’s analysis indicated that the Commission was not expected 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.¹⁶ Accordingly, the Commission stated, it should not be required to perform such an analysis in the context of these sunset reviews.

On December 29, 2008, the Court denied the Commission’s motion for reconsideration. NSK Corp. et al. v. United States, Slip Op. 08-145 (“NSK II”).¹⁷ In denying the motion, the Court stated that, under Bratsk, Mittal, NSK I and other cases, the Commission had a duty to “ensure that the subject

¹⁴ Mittal, 542 F.3d at 876.

¹⁵ Mittal, 542 F.3d at 876.

¹⁶ In the motion, 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. 73 Fed. Reg. 72836 (Dec. 1, 2008).

¹⁷ All citations in these second remand views to NSK II are to the Court’s slip opinion.

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imports, and not non-subject imports or some other factor, would be substantially responsible for injury to the domestic industry” if the orders were revoked. NSK II at 13. The Court stated, however, that it is “essential to note that the {Commission} is not required to address the causation issue in any particular way.” NSK II at 16 (quoting Mittal, 542 F.3d at 878). It also indicated its decision in NSK I was not intended to force “the {Commission} to adopt a rigid ‘benefit’ analysis or sacrifice discretion in determining the likelihood of material injury under 1675a(a).” NSK II at 4 & 16.

Nonetheless, in NSK II, the Court did appear to re-affirm its holding that the Commission should apply a “replacement/likely replacement” analysis on remand, twice stating that, in sunset reviews involving a commodity product and significant volumes of price-competitive non-subject imports, the Commission was required to “ ‘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 a continuation or recurrence of material injury as a result of subject imports.’ ” NSK II at 3-4 & 26-27 (quoting NSK I, 577 F.Supp.2d at 1333).¹⁸

D. The Commission’s Remand Determination

After the Court denied the Commission’s motion for reconsideration, we resumed our remand proceeding on February 5, 2009.¹⁹ We issued our remand determination on May 4, 2009, and again unanimously determined that revocation of the subject orders on ball bearings from France, Germany,

¹⁸ Relying on these statements and the fact that the Court denied the Commission’s reconsideration request, we concluded that we were still required to perform the “replacement/likely replacement” analysis specified in NSK I. We therefore performed that analysis in our first remand determination, believing that we were complying in good faith with the specific instructions of the Court on this issue when preparing our earlier remand determination.

¹⁹ 74 Fed. Reg. 6173 (Feb. 5, 2009). The Commission prepared a staff report summarizing the results of its remand investigation and permitted the parties to comment on the new information obtained on remand concerning the non-subject imports. See generally Remand Staff Report (“RSR”) at I-1 et seq.

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Italy, Japan, and the United Kingdom would likely result in continuation or recurrence of material injury to the industry within a reasonably foreseeable time.²⁰

In that remand determination, we addressed the three issues remanded by the Court. Relying on what we believed was the Court's instruction to perform a "replacement/likely replacement" analysis for the non-subject imports, we analyzed whether the non-subject imports had replaced the cumulated subject imports during the POR, and whether they were likely to replace the subject imports upon revocation of the orders.²¹ We concluded that the non-subject imports had not fully or mostly replaced the subject imports since the issuance of the original orders, and were not likely to do so if the orders were revoked.²² We also found that, even with significant volume of non-subject imports in the market, the subject imports would be likely to enter into the market in significant volumes, and would likely engage in significant underselling of the domestic like products once the orders were revoked. We further found that the increased volumes of lower-priced subject imports would cause significant price competition among the domestic, subject and non-subject merchandise, and that this price competition among the domestic, subject and non-subject suppliers in the market would further erode the condition of an already vulnerable domestic industry.²³

With respect to the industry's condition, we concluded that the industry's apparent restructuring efforts during the period had not resulted in a stronger or more efficient industry, noting that almost all indicia of the industry's condition had fallen considerably during the period of review.²⁴ With respect to

²⁰ Ball Bearings from Japan and the United Kingdom, 731-TA-394A & 399A, (Second Review) (Remand), USITC Pub. 4082 (May 2009).

²¹ Id. at 37-42.

²² Id.

²³ Id. at 41-42.

²⁴ Id. at 31-35.

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its determination to cumulate the imports from the United Kingdom, we determined that U.K. subject imports would likely have a discernible adverse impact on the domestic industry upon revocation on an increasingly vulnerable industry, notwithstanding the large presence of non-subject imports in the market.²⁵ Accordingly, we again 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.

E. The Court's Decision in NSK III

On August 31, 2009, the Court issued its decision in NSK III. In NSK III, the Court concluded that we had not meaningfully responded to the Court's remand instructions. Accordingly, the Court remanded all three issues addressed on remand for further analysis. With respect to our analysis of non-subject imports, the Court stated that we incorrectly surmised that we were required to perform the rigid "replacement/likely replacement" analysis set forth in NSK I. NSK III at 14. Because we mistakenly applied this test, the Court found that we failed to thoroughly analyze whether, "in light of the significant presence of non-subject imports, the subject imports are more than a mere tangential factor in the material injury to the domestic industry that is likely to continue or recur in the absence of the antidumping duty order." NSK III at 10-19 & 29. The Court therefore instructed us to perform a more thorough analysis of this issue on remand.

The Court also concluded that we had not thoroughly analyzed all aspects of the record relating to our finding that the industry was in a vulnerable condition. NSK III at 21-25 & 30. As a result, it has instructed us to perform a more detailed assessment of the industry's condition during the period of review, emphasizing that we should re-evaluate the record evidence relating to reasons underlying the

²⁵ Id. at 21-26.

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industry's restructuring efforts during the period of review. NSK III at 26-28. Finally, the Court concluded that we had not adequately explained our discernible adverse impact analysis for the United Kingdom. The Court added that, on remand, we must more thoroughly explain our thinking on this issue, taking into account the industry's restructuring efforts during the period of review and the large volumes of non-subject imports currently in the market. NSK III at 21-26.

II. 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

We have reviewed the original 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 remand instructions. Having done so, 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. In doing so, we have attempted to provide a thorough response to the Court's concerns, as specified in NSK III.

A. The Domestic Like Product and the Domestic Industry

As an initial matter, 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.²⁶ 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.²⁷ In this regard, we note that neither the Japanese nor the United Kingdom plaintiffs challenged the

²⁶ See USITC Pub. No. 3876 at 5-13; CD at 5-13; see also RCD at 28.

²⁷ See USITC Pub. No. 3876 at 5-13; CD at 5-13.

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Commission's domestic like product or domestic industry findings on appeal.²⁸

B. Conditions of Competition

We have also reviewed the Commission's prior findings concerning conditions of competition in the United States market for ball bearings during the period of review. In its original determinations, the Commission found that the ball bearings market was not characterized by a regular and measurable business cycle and that the industry included a number of production facilities owned by large multinational firms. The Commission also found that the industry had restructured and consolidated its operations since the first reviews; in particular, the record showed that some producers relocated facilities overseas, some closed production facilities or lines, and two producers added domestic production lines to produce more customized bearings.²⁹

The Commission further found that the capacity, production, shipment levels and market share of the domestic industry declined considerably during its second period of review.³⁰ Finally, the Commission found that the subject and domestic ball bearings were substitutable and that, while bearings are often described as "custom" or "standard" bearings, there was no clear dividing line between the two categories.³¹ We adopt the Commission's findings in their entirety here,³² except to the extent that we supplement and revise them in this opinion.

In NSK I, the Court affirmed several of the Commission's findings relating to conditions of

²⁸ We also incorporate the Commission's previous discussion of the background information for these reviews and the legal standards governing its sunset review analysis. See USITC Pub. No. 3876 at 5-15; CD at 5-14.

²⁹ USITC Pub. 3876 at 39-40; CD at 54-57.

³⁰ USITC Pub. 3876 at 40, CD at 57-59.

³¹ USITC Pub. 3876 at 41-42 & 46; CD at 58-60 & 67.

³² See USITC Pub. 3876 at 38-42, CD at 54-61; see also RCD at 41-42.

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competition in the ball bearings market.³³ 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."³⁴

The Court also affirmed the Commission's finding that there was a significant degree of substitutability between domestically produced bearings and subject imports.³⁵ 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."³⁶ The Court also confirmed that the record established that the "United States remains an attractive market for subject producers of ball bearings," that the record indicates "there is an incentive to shift available capacity to capture U.S. sales" as a result of the fact that "higher prices {are} available in the U.S. market as compared to other foreign markets," and that "price is an essential factor in purchase decisions."³⁷ The Court also agreed with the Commission's finding that demand for ball bearings was not expected to increase significantly within the foreseeable future.³⁸

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, stating that the Commission prefers value-based measures for this purpose due to the "wide variety of ball bearings" within the scope

³³ NSK I at 21-27.

³⁴ NSK I at 23-25.

³⁵ NSK I at 25.

³⁶ NSK I at 25 & 27.

³⁷ NSK I at 32-33 & 34-35.

³⁸ NSK I at 38.

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of the review.³⁹ 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.”⁴⁰

We have taken these conditions of competition, and others, into account when analyzing the discernible adverse impact of the subject imports from the United Kingdom, the vulnerability of the industry, and the role of non-subject imports in the market.

C. Cumulation

Consistent with the Court’s remand instructions, we have also reviewed the Commission’s prior findings concerning the cumulation of the subject imports of ball bearings from the United Kingdom with the subject imports from France, Germany, Italy, and Japan. In its original determinations, the Commission determined that the subject imports from each of the five countries at issue, including the United Kingdom, were likely to have a discernible adverse impact on the industry if the orders were revoked. The Commission found, among other things, that subject imports from all five countries had remained in the market throughout the period of review, that the subject producers in these countries were export-oriented, that the subject producers had sufficient available capacity to ship additional volumes to the United States upon revocation, and that the five countries were some of the largest exporters of ball bearings in the world.⁴¹

The Commission also found that there would likely be a reasonable overlap of competition between the subject imports from these countries and the domestic like product, finding that the subject imports and the domestic like product were likely to be fungible for one another, were likely to move in

³⁹ NSK I at 19 (citing American Bearings Manufacturers Association v. United States, 28 CIT 1698, 1705; 350 F. Supp. 2d 1100, 1108-10 (2004).

⁴⁰ NSK I at 19.

⁴¹ USITC Pub. 3876 at 27-34; CD at 38-48.

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the same channels of distribution, and were likely to compete simultaneously in the same geographic markets if the orders were revoked.⁴² Because the Commission did not find that the subject imports from the five countries were likely to compete under different conditions of competition in the U.S. market, it exercised its discretion to cumulate the imports from the five countries.⁴³ We adopt the Commission's prior findings on these issues in their entirety here, except to the extent that we supplement and revise them below.⁴⁴

In NSK I, the Court affirmed many of the findings underlying our decision to cumulate the subject ball bearings from the United Kingdom with the subject imports from France, Germany, Italy, and Japan.⁴⁵ For example, in NSK I, 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, noting that 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.⁴⁶

The Court also affirmed several Commission findings supporting its conclusion that the subject imports from the United Kingdom were not likely to have no discernible adverse impact on the industry upon revocation.⁴⁷ For example, the Court found that the Commission "reasonably found that U.K. producers maintain a significant share of the U.S. market," stating that the record showed that the

⁴² USITC Pub. 3876 at 34-36; CD at 48-52.

⁴³ USITC Pub. 3876 at 36-37; CD at 51-54.

⁴⁴ See USITC Pub. 3876 at 25-37; CD at 34-54; USITC Pub. 4082 at 18-26; RCD at 28-42.

⁴⁵ NSK I at 17-19.

⁴⁶ NSK I at 17-18.

⁴⁷ NSK I at 19.

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“subject imports from the United Kingdom have remained steady in terms of value throughout the review period.”⁴⁸ Similarly, the Court affirmed the Commission’s finding that producers in the United Kingdom were “highly export-oriented,” noting that the record indicated there had been a “large percentage increase in [the U.K.’s] exports over the review period” and that the United Kingdom was “the *** exporter of ball bearings” during the period.⁴⁹

Moreover, although the Court questioned the Commission’s finding that the United Kingdom had sufficient excess capacity to ship bearings in discernible volumes to the United States upon revocation of the U.K. order, the Court specifically stated that, as long as the industry was in a vulnerable state, “it seems that any increase in the subject imports would likely have an adverse impact” on the industry.⁵⁰ The Court also specifically acknowledged that, if the U.K. producers had sufficient capacity to ship approximately \$*** worth of ball bearings to the U.S. market, as the domestic producer Timken argued, “[t]his would likely constitute a discernible level of subject imports” because it exceeded the amount of the domestic industry’s operating income in 2005.⁵¹

As instructed by the Court, we have again reviewed the record evidence on these issues, including the record evidence relating to the likely discernible adverse impact of the subject imports from the United Kingdom on the industry. Having done so, we again 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

⁴⁸ NSK I at 19.

⁴⁹ NSK I at 19.

⁵⁰ NSK I at 20 (emphasis in original).

⁵¹ NSK I at 20.

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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.⁵² 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.⁵³ We discuss these issues below.

1. *The Court's Remand Instructions in NSK III*

In NSK III, the Court again remanded our finding that the subject imports of ball bearings from the United Kingdom were likely to have a discernible adverse impact on the domestic industry if the U.K. order were to be revoked. NSK III at 19-25. The Court explained that we erred in finding that the industry was in a vulnerable condition and therefore susceptible to the likely discernible adverse impact of U.K. imports. Id. at 21-25. Specifically, the Court found that we mistakenly attributed the significant declines in the industry's capacity, production, and shipments over the period of review to the effects of subject import competition. According to the Court, the record could be read to show that the reported capacity and production declines were generally due to factors other than the subject imports. Id. at 22-23. The Court asked us to address the facts relating to this issue more thoroughly on remand.

The Court also found that we did not reasonably explain our finding that the significant declines in the industry's production and shipment levels were not fully attributable to the declines in the

⁵² See USITC Pub. 3876 at 25-37; CD at 34-54; USITC Pub. 4082 at 18-26; RCD at 28-42.

⁵³ 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. USITC Pub. 3876 at 31-33 & 36-37; CD at 44-47 & 52-54; USITC Pub. 4082 at 18, n.121, RCD at 29, n.121. 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.

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industry's capacity during the period of review. NSK III at 23. In our remand determination, we explained that declines in the industry's production and shipment levels could not be fully attributable to the industry's restructuring efforts because the declines in the industry's production and shipment significantly outpaced the declines in the industry's capacity levels over the period of review.⁵⁴ The Court rejected this conclusion, stating that we failed to "answer{ } the {court's} concern regarding the effect of restructuring within the ball bearing industry, or why the period from 2000 to 2005 {was} the best time frame in which the agency must look to alleviate the court's concerns." Id. at 24.

The Court then noted that we had found that the industry's restructuring efforts had not improved the health of the industry. NSK III at 24-25. The Court acknowledged that we had performed a "thorough analysis" of the industry's profitability levels, cost structure, capacity utilization rates, net sales revenues, and market share levels in reaching this conclusion. NSK III at 24-25. The Court found, however, that we had failed to explain "'whether the potential volumes of U.K. exports . . . are likely to have an adverse impact on the domestic industry if the order is removed.'" Id. at 24 (citing NSK I, 577 F. Supp. 2d at 1338). In this regard, the Court stated, the fact that "restructuring did not improve the health of the domestic market does not necessarily mean that the potential volumes of U.K. exports will have a likely discernible {adverse} impact if the antidumping order is removed." Id. at 24-25.

Finally, the Court found that we did not adequately explain our finding that the large volumes of non-subject imports were not likely to minimize the discernible adverse impact of the subject U.K. imports on the industry upon revocation of the U.K. order. NSK III at 25-26. The Court found the Commission did not explain "why that fact {was} inconsequential to its analysis." Id. at 25. The Court concluded that the fact "that the discernible adverse impact standard presents a 'relatively low threshold'

⁵⁴ USITC Pub. 4082 at 32, RCD at 51.

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does not license the TTC to act arbitrarily, nor does it absolve the agency from its duty to address an important aspect of the problem.” *Id.* at 26. In this regard, the Court also observed that the Commission had “not explain{ed} how the subject imports from the United Kingdom are well suited to begin pricing their products more aggressively in the market to recover market share once the order is revoked.” *Id.* at 26.

2. *The Parties’ Arguments*

Respondents’ arguments. In their comments to the Commission on the Court’s remand instructions, NSK Corporation, NSK Ltd. and NSK Europe Ltd. (“NSK”) state that the domestic industry undertook extensive restructuring during the period of review in an effort “to rationalize production capacities and remain competitive vis-a-vis imports from non-subject countries.”⁵⁵ Although these structural changes necessarily lowered certain performance indicators, NSK argues that the industry was “not in a weakened condition at the end of the review period but was considerably stronger.”⁵⁶ NSK claims that, “in the latter years of the review period – when much of the {industry’s} restructuring had been completed – ***⁵⁷ and that the industry’s net sales values, gross profits, operating income, and capital expenditures *** at the end of the POR.”⁵⁸

NSK argues that the reductions in the industry’s capacity, production and sales levels are “totally unrelated to the subject imports, particularly those from the United Kingdom.”⁵⁹ NSK states that only

⁵⁵ NSK Second Remand Comments at 14.

⁵⁶ *Id.*

⁵⁷ *Id.* at 9.

⁵⁸ *Id.* at 9-10.

⁵⁹ *Id.* at 3.

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one of 20 firms reporting declines in capacity attributed the declines to the subject imports, and that the three firms reporting the largest decreases in capacity stated that the reductions were primarily due to reasons other than the subject countries, including competition from non-subject imports.⁶⁰ NSK also argues that the industry's operating results were skewed by poor data for three firms, ***⁶¹ and that, aside from these three companies, the industry generally did well during the period of review.⁶² NSK asserts that the Commission should exclude these three companies from its vulnerability analysis, stating that *** poor financial performance was due to the poor performance of the automotive industry during the period,⁶³ that ***'s poor performance was the result of *** during the period, and that *** reported it was expecting to turn a profit in 2008, three years after the end of the period.⁶⁴

Finally, NSK asserts that the subject imports are likely to have no discernible adverse impact on the industry,⁶⁵ given the significant rise in nonsubject imports during the period of review.⁶⁶ NSK notes that the non-subject imports have outpaced subject imports in gaining market share since the original investigations, and that non-subject producers have greater excess capacity than subject producers in the United Kingdom.⁶⁷ NSK argues that the U.K. producers "have been compelled by competition from BBs from non-subject countries to restructure their production facilities in a manner that now constrains

⁶⁰ Id. at 3-4.

⁶¹ Id. at 10.

⁶² Id. at 10-11.

⁶³ Id. at 11-12.

⁶⁴ Id. at 12-13.

⁶⁵ Id. at 6-9.

⁶⁶ Id. at 6-7.

⁶⁷ Id. at 6.

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their ability to ship BBs to the United States.”⁶⁸ NSK adds that the U.K. producers *** did not ship any BBs to the US during the POR, and have no plans to do so in the foreseeable future, and that the U.K. producer *** states that it is now largely incapable of manufacturing BBs for the US market.⁶⁹

According to NSK, the U.K. producers have no available capacity to ship to the U.S. market, and are unlikely to be able to ship additional exports to the United States, given “that the breadth and level of non-subject imports to the United States forms an impenetrable barrier against U.K. imports.”⁷⁰

Timken’s arguments. The domestic producer Timken argues that the industry is vulnerable to the likely injurious effects of the subject imports, including the U.K. imports, upon revocation of the orders. Timken points out that, despite the Court’s conclusions to the contrary, the Commission did not find on remand that the domestic industry’s production and capacity declines were due solely or primarily to subject import competition. Moreover, Timken points out, the Commission is not under any statutory obligation to make such a finding.⁷¹

Timken also emphasizes the fact that the domestic industry’s major performance indicators were significantly worse at the end of the second period of review than during the original POI, when the industry was actually found to be suffering material injury.⁷² Timken points out that the domestic industry’s capacity, production, shipments, sales, gross profits and operating income levels all fell at a

⁶⁸ *Id.* at 6.

⁶⁹ *Id.* at 7-8.

⁷⁰ *Id.* at 8.

⁷¹ Timken’s Second Remand Comments at 11-12.

⁷² *Id.* at 12-14.

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higher rate during the period of review than during the original investigations.⁷³ Given that the industry's condition was worse during the POR than during the original investigations, Timken asserts that the Commission reasonably found that the domestic industry was vulnerable.⁷⁴ Timken also points out that a number of industry witnesses reported that the domestic industry's declines in production, capacity, and sales were all indicative of the industry's deteriorating and vulnerable condition.⁷⁵

Timken also contends that the Commission's finding of discernible adverse impact for U.K. subject imports was reasonable.⁷⁶ Timken points out that the available capacity in the United Kingdom was sufficient to permit the U.K. producers to capture an additional \$8 million in U.S. market share upon revocation.⁷⁷ It notes that this amount would have exceeded the domestic industry's operating income in 2005, as the Court observed in NSK I.⁷⁸ Timken adds that the subject imports from the United Kingdom are well-positioned to be priced more aggressively to recover market share once the order is revoked, notwithstanding the increased market share of non-subject imports.⁷⁹ Timken points out that, during the period of review, the U.K. imports ****⁸⁰ In comparison, the U.K. subject imports undersold the domestic like product at margins ranging up to **** percent during the original period

⁷³ Id. at 13.

⁷⁴ Id. at 13-14.

⁷⁵ Id. at 10 & n.41.

⁷⁶ Id. at 14-15.

⁷⁷ Id. at 14.

⁷⁸ Id. at 14.

⁷⁹ Id. at 14-15.

⁸⁰ Id. at 15.

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of investigation, and at a higher average margin of *** percent.⁸¹

3. Analysis

We have considered the Court's remand instructions and the relevant record evidence on this issue, and again determine that the subject imports from the United Kingdom are likely to have a discernible adverse impact on the domestic industry upon revocation of the order covering ball bearings from the United Kingdom. In doing so, we agree with the Court that the industry was engaged in significant restructuring during the period of review, that the resulting changes in the industry's capacity levels had a depressing effect on the industry's production, shipment and sales levels; and that these reductions were not due solely or primarily to the effects of subject import competition. See NSK III at 21-25. Although we acknowledge that the industry has reduced its capacity levels significantly for reasons that are not primarily related to the subject imports, we find that the industry was in a weakened state at the end of the period, and therefore vulnerable to the likely discernible adverse effects of subject imports from the United Kingdom upon revocation of the U.K. order.

We also find that the subject imports from the United Kingdom are likely to have a discernible adverse impact on this weakened industry. In this regard, the record shows that the U.K. imports maintained a stable, non-negligible share of the market during the period of review, that the U.K. producers have sufficient capacity to increase their volumes to the United States in a discernibly adverse manner upon revocation of the U.K. order, and that they are well-suited to increase their shipments to the United States to a level that would have a discernible adverse impact on the domestic industry. Finally, we find that the large volumes of the non-subject imports in the market at the end of the period would not be likely to prevent the subject producers in the United Kingdom from increasing their U.S. imports to a

⁸¹ Id. at 15.

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level that would likely have a discernible adverse effect on the domestic industry on revocation of the order. We address each of these issues in more detail below, taking into account the Court's specific remand instructions in NSK III.

a. The Industry Is Vulnerable

Before turning to our analysis of the condition of the industry, we outline the principles governing the Commission's vulnerability analysis in sunset reviews, because doing so will help place our analysis in context. Under the sunset provisions of the statute, the Commission is required to analyze "whether the industry is vulnerable to material injury if the order is revoked..."⁸² When performing this assessment, the Commission assesses whether the industry is generally in a "weakened state" that renders it susceptible to the likely injurious effects of subject imports if an order is revoked. Statement of Administrative Action for the Uruguay Round Amendments Act ("SAA") at 885;⁸³ see also Consolidated Fibers, Inc. v. United States, 571 F. Supp. 2d 1355, 1365 (CIT 2008) (holding that the SAA "instructs the Commission to consider the weakened condition of the U.S. industry" when assessing the vulnerability of

⁸² 19 U.S.C. § 1675a(a)(1)(C).

⁸³ In this regard, the Statement of Administrative Action ("SAA") for the sunset provisions of the statute explains that "{t}he term 'vulnerable' relates to susceptibility to material injury by reason of dumped or subsidized imports. This concept is derived from existing standards for material injury and threat of material injury." SAA at 885 (emphasis added). The SAA states further that, "{i}n material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports." Id. The SAA adds that, "{i}f 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. If the Commission finds that the industry is in a weakened state, it should consider whether the industry will deteriorate further upon revocation of an order . . . {and} whether such a weakened state is due to the possible ineffectiveness of the order." Id. (emphasis added).

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the industry) (emphasis added).⁸⁴ As the Court of International Trade has explained in the threat context, the “present relative health of an industry is an important indicator as to the imminence of material injury. A healthy industry can better withstand competition from future imports than one that is functioning close to a state of material injury.”⁸⁵

Furthermore, if an industry is found to be vulnerable, the Commission is not required to determine that the industry’s vulnerability was caused by the subject imports.⁸⁶ Although the Commission must ultimately assess whether material injury due to subject imports is likely to continue or recur in the reasonably foreseeable future,⁸⁷ the statute provides that the Commission may find an industry to be in a vulnerable condition even if that “vulnerability may be caused by factors other than subject imports.”⁸⁸ Thus, as the Court and the Commission have stated,⁸⁹ the Commission can find that

⁸⁴ See also *Siderca, S.A.I.C. v. United States*, 29 CIT 572, 586, 374 F. Supp. 2d 1285, 1298 (2005) (affirming Commission’s vulnerability finding in sunset review, noting that the domestic industry was “in many respects even weaker” at the end of the POR compared to the beginning of the POR) (emphasis added)..

⁸⁵ *Calabrian Corp. v. United States*, 16 CIT 342, 354, 794 F. Supp. 377, 387 (CIT 1992) (stating that a “strong indication ‘of the likelihood’ of material injury to an industry in the near future is its present state. A robust industry, as indicated by such factors as increasing production, increasing capacity utilization rates, increasing shipments and strong profits, is less likely to become materially injured in the near future than an industry characterized by declining production and negative profit margins”). *Id.* at 354, 388. We cite to the Court’s statements on vulnerability in the threat context, because the Commission’s approach to vulnerability in the threat context formed the foundation for Congress’s requirement that the Commission analyze whether the industry is vulnerable in the sunset context. SAA at 885 (the vulnerability “concept is derived from existing standards for material injury and threat of material injury”). In this regard, in the threat context, as in the sunset area, the Commission analyzes the current condition of the industry in order to determine whether the industry is likely to be more susceptible to the “probable future impact of imports.” SAA at 885.

⁸⁶ See SAA at 885; *Consolidated Fibers*, 571 F. Supp. 2d at 1364-65.

⁸⁷ See, e.g., *NSK I* at 8-9.

⁸⁸ *Consolidated Fibers*, 571 F. Supp. 2d at 1365; see also SAA at 885 (“{i}n material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that the industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports”). In *Consolidated Fibers*, the Court added that, under the

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the industry has been made vulnerable by factors having nothing to do with the subject imports, including factors such as demand changes, changes in consumer preferences, competition from non-subject imports, or management decisions that adversely affect the condition of the industry.⁹⁰

The Commission is required to assess whether the industry is currently in a vulnerable condition. 19 U.S.C. § 1675a(a)(1)(C) (the Commission must consider “whether the industry is vulnerable to material injury if the order is revoked”); Usinor v. United States, 26 CIT 767, 789 (2002) (stating that the Commission has a “statutory duty to carefully assess current trends and competitive conditions in gauging {the} vulnerability” of the industry); Nippon Steel Corp. v. United States, 301 F. Supp. 1355,

statute,

The Commission’s task is therefore to determine whether revocation of the antidumping duty orders would likely result in the recurrence or continuation of material injury by reason of the subject imports within a reasonably foreseeable time, not to determine whether the subject imports significantly contributed to the decline of the domestic industry during the POR. Because the antidumping duty orders under review imposed duties on subject imports equal to dumping margins over the POR, the existence of the orders generally makes it less likely that subject imports would be the source of any domestic industry vulnerability during the POR. See 19 U.S.C. 1673. Thus, the Commission appropriately factored the domestic industry’s vulnerability into its analysis of the likely impact of revocation in these reviews.

571 F. Supp. 2d at 1365 (emphasis added).

⁸⁹ Consolidated Fibers, 571 F. Supp. 2d at 1365; Certain Polyester Staple Fiber from Korea and Taiwan, Inv. Nos. 731-TA-825-826 (Review), USITC Pub. 3843 at 31 (March 2006); Certain Preserved Mushrooms from Chile, China, India, and Indonesia, Inv. Nos. 731-TA-776-779 (Review), USITC Pub. 3731 at 32 (October 2004).

⁹⁰ E.g., NEC Corp. v Commerce, 23 CIT 987, 989-991 & 998-99, 83 F. Supp. 2d 1339, 1342-43 & 1350 (CIT 1999) (finding that, as part of its threat analysis, the Commission reasonably found that declining government demand for supercomputers and competition from non-vector supercomputers rendered the industry vulnerable to future injury from the subject imports); Asociacion de Productores de Salmon y Trucha v. United States Int’l Trade Comm’n, 26 CIT 29, 43-44, 180 F. Supp. 2d 1360, 1375 (CIT 2002) (Commissioner reasonably concluded, in threat analysis, that demand shifts due to consumer preferences rendered industry vulnerable to likely effects of subject imports).

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1383 (CIT 2003) (explaining that the Commission “properly considered . . . whether the domestic industry was currently in a vulnerable condition.”) (emphasis added). As a result, the Commission has typically focused on the most recent data since the previous investigation or review concerning the industry’s condition in a sunset review, which in this case covers 2000 to 2005.⁹¹ By doing so, the Commission is able to ensure that it examines what is generally the most probative data on the current state of the industry. This is why the Commission focused its assessment of the industry’s vulnerability on data primarily from the second period of review rather than the entire period after imposition of the orders in 1989.^{92 93}

With these principles in mind, we have re-examined the record evidence relating to the industry’s restructuring efforts and its impact on the industry’s overall condition during the period of review,⁹⁴ taking into account the Court’s instructions in NSK III.⁹⁵ As instructed by the Court, we have considered whether the industry’s restructuring efforts “had the effect of depressing certain economic

⁹¹ E.g., Cut-to-Length Carbon Steel Plate from China, Russia, and Ukraine, Inv. Nos. 731-TA-753, 754, & 756 (Second Review), USITC Pub. 4103 at 31-33 (Oct. 2009); Pure and Alloy Magnesium from Canada and Pure Magnesium from China, Inv. Nos. 701-TA-309-A-B and 731-TA-696 (Second Review), USITC Pub. 3859 at 58 (July 2006).

⁹² We also focused on the data relating to the industry’s condition for the second period of review because NSK had argued that the industry’s restructuring efforts had been primarily effectuated during the second period of review. See USITC Pub. 4082 at 29-30; RCD at 46-47. In this remand, we have assessed whether the changes in the industry’s condition since the original period of investigation show that the industry is in a weaker condition now than it was in the original period of investigation, because the Court suggested in its remand instructions that the Commission do so. NSK III at 16 & 24.

⁹³ We would note that, in our original remand opinion, we did not focus solely on the data showing the industry’s condition during the second period of review, but also compared many key indicia of the industry’s condition (such as its profitability levels and capacity utilization rates) to those found during the original period of investigation. USITC Pub. 4082 at 33-34; RCD at 52-53.

⁹⁴ The period of review in this remand determination covers the period 2000 to 2005. The first period of review covers the period 1997 to 1998. The original investigation covers the period 1985 to 1987. CR at Table BB-I-1.

⁹⁵ See NSK III at 21-24 & 26-28.

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indicators” of the industry’s condition during the period, and whether the declines in these indicators actually indicate that “the domestic industry {was} vulnerable to increased volumes of subject imports or simply responding to other market forces.” NSK III at 28. Consistent with the Court’s instructions, we have also re-examined the evidence relating to the industry’s reasons for reducing its capacity levels during the period of review, and assessed how the industry’s condition has changed since the orders on the United Kingdom and the other subject countries were first imposed in 1989. NSK III at 23-24. Having done so, we again find that the domestic industry was in a vulnerable condition at the end of the period of review, and that it was therefore susceptible both to the likely discernible adverse impact of the subject U.K. imports upon revocation of the U.K. order and to the likely material impact of the cumulated subject imports.

In coming to these conclusions, we agree with the Court that the industry engaged in a significant restructuring of its production operations during the period of review.⁹⁶ In this regard, the record shows that the industry reduced its overall production capacity from 448.8 million BBs in 2000, the first year of the period of review, to 338.4 million BBs in 2005, the last year of the period.⁹⁷ This reduction resulted in a decline in the industry’s overall capacity level of approximately 110.4 million ball bearings, thus representing an overall decline in the industry’s capacity of 24.6 percent.⁹⁸ The Court noted that this capacity reduction “had the effect of depressing certain economic measures of industry performance” during the period of review, including such economic measures as the industry’s production, shipment and sales quantities.⁹⁹ As the Court has indicated, we could expect that a reduction in the industry’s

⁹⁶ NSK I at 23.

⁹⁷ Confidential Staff Report (“CR”) at Tables BB-I-1 & C-2.

⁹⁸ Id.

⁹⁹ NSK I at 23.

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capacity of 24.6 percent would result in a similar percentage decline in the industry's production, shipment and sales levels because, by reducing its capacity, the industry effectively lost some ability to produce bearings at the levels seen before the reductions were effectuated.

We also agree with the Court that the industry did not reduce its capacity levels during the second period of review due primarily or solely to the injurious effects of the subject imports.¹⁰⁰ Although one producer, *** reported that it closed down several of its production lines because of continued competition from the subject imports,¹⁰¹ the domestic producers who reduced their capacity levels during the period generally reported that they reduced their capacity for reasons other than subject import competition.¹⁰² For example, of the eight domestic producers that reported shutting down parts of their production capacity during the period of review,¹⁰³ four, ***, stated that they shuttered production lines or facilities in the United States due, in significant part, to competition from non-subject imports.¹⁰⁴ Moreover, two of these producers, ***, reported that the closure was intended to retool their capacity to produce high-valued, customized

¹⁰⁰ See NSK III at 22-23.

¹⁰¹ CR at BB-I-55.

¹⁰² CR at BB-I-48-55 & Table BB-I-13.

¹⁰³ CR at Table BB-I-13 (***).

¹⁰⁴ CR at BB-I-48 and Table BB-I-13 (*** reported that it ***); CR at Table-BB-I-13 (*** reported that it ***); CR at Table-BB-I-13 (*** closed a plant because of "an increase in competition from inexpensive Chinese imports"); See also *** U.S. Producer Questionnaire at Response to Question IV-B-19 (***).

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bearings.¹⁰⁵ Finally, another domestic producer, ***, reported that it reduced capacity due to the existence of “excess global capacity.”¹⁰⁶ Other producers reported no reasons for the reductions.¹⁰⁷ Given this record evidence, we agree with the Court that the industry’s restructuring efforts were attributable, to a significant degree, to “market forces” other than the subject imports. NSK III at 28.¹⁰⁸

Nonetheless, while we agree with the Court that the industry’s capacity reductions during the period were not primarily attributable to the subject imports, and that they could contribute to a significant apparent depressing effect on the industry’s overall production, shipment and sales quantities during the period, we do not believe that these findings resolve whether the industry is currently in a

¹⁰⁵ CR at Table BB-I-13.

¹⁰⁶ CR at Table BB-I-13.

¹⁰⁷ CR at Table BB-I-13.

¹⁰⁸ In this regard, we respectfully note that the Commission did not determine, as the Court stated in NSK III (at pp. 22-23), that the industry’s capacity reductions during the period of review were attributable solely or primarily to subject import competition. USITC Pub. 4082 at 31-32; RCD at 49-50. Instead, in our remand determinations, we specifically examined NSK’s “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.” Id. We rejected this argument, which was NSK’s primary argument concerning restructuring in our first remand proceedings, pointing out that “only two {of the nine producers reporting capacity declines}, ***, reported in their questionnaires that the closure was intended to retool their capacity to produce high-valued, customized bearings.” Id.

Moreover, the record showed that the majority of producers shuttering capacity “reported that the reductions were caused by an inability to meet aggressive import competition in the U.S. market, reported other reasons for their production reductions, or reported no specific reasons for the shutdowns.” Id. Given that the industry was continuing to produce significant levels of commodity bearings, we concluded we could 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 NSK argued. Id. Instead, because the record showed that four of the producers with significant capacity reductions during the period, *** reported that their reductions were due, in part, to subject or non-subject import competition, we concluded that the “circumstances underlying these shutdowns 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.” Id. (emphasis added).

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weakened state that renders it susceptible to the future effects of imports. In this regard, we note, as we did above, that an industry's vulnerability need not be caused by the subject imports at all. Instead, an industry can be placed in a vulnerable condition by factors that have nothing to do with the subject imports, including factors such as non-subject competition or an ineffective decision by the industry to restructure its production operations.¹⁰⁹ In this regard, the issue for us in a sunset review is whether the industry is currently in a weakened or vulnerable condition that renders it susceptible to likely, or prospective, injury by reason of the subject imports after revocation of the orders, whatever the cause of the vulnerability.

Moreover, we agree with the Court's previous suggestion that an industry's decision to shut down significant amounts of production capacity does not necessarily mean that the industry is in a vulnerable state because the closures may "increase{ } the efficiency and profitability of the industry as a whole."¹¹⁰ In the absence of evidence establishing an industry's restructuring efforts have resulted in a more profitable, efficient and productive industry, however, we have often considered such significant declines in an industry's capacity, production, shipment and sales levels to be supportive of a finding that the industry is in a vulnerable condition.¹¹¹

¹⁰⁹ SAA at 885; Consolidated Fibers, 571 F. Supp. 2d at 1365.

¹¹⁰ Nevinnomysskiy Azot v. United States, Court No. 06-0013, 2007 WL 2563571, at *16, 2007 Ct. Int'l Trade LEXIS 135, at *51 (Aug. 28, 2007).

¹¹¹ See, e.g., Certain Frozen Fish Fillets from Vietnam, 731-TA-1012 (Review), USITC Pub. 4083 at 18-20 (June 2009); Solid Urea from Russia and Ukraine, Inv. Nos. 731-TA-340-E and H (Second Review) (Remand), USITC Pub. 4059 at 11-15 (Nov. 2007); Brass Sheet and Strip from Brazil, Canada, France, Germany, Italy, and Japan, USITC Pub. 3842 at 26-27, Inv. Nos. 701-TA-269 and 731-TA-311-314, 317, and 379 (Second Review) (March 2006). Indeed, the U.S. Court of International Trade has affirmed the Commission's reliance on declines in the industry's capacity, production and shipment levels as being supportive of a vulnerability finding in other five-year reviews, especially when they are accompanied by declines in other key indicia of the industry's conditions, as they are here. See, e.g., Nevinnomysskiy Azot v. United States, 565 F.Supp.2d 1357, 1371-72 (CIT 2008); Wieland-Werke AG v. United States, 525 F.Supp.2d 1353, 1369 (CIT 2007).

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Given this, we have re-examined the record evidence to determine whether the industry's restructuring efforts during the period have resulted in a more efficient, profitable, and "stronger" industry, as NSK claims.¹¹² We believe that the evidence on record is clearly to the contrary. That evidence does not show that the industry was more profitable, stronger, more efficient or more productive at the end of the period of review than it was at the beginning of the period. Instead, the evidence shows that the industry was weaker in many key respects than it was at any point since the original investigation.

For example, the record does not indicate that the industry has become more productive or efficient as the result of its restructuring efforts. If it had become more efficient, we would expect that, at a minimum, the industry's capacity reduction efforts would have helped the industry improve its capacity utilization rates to the levels seen in 2000, the beginning of the period of review. The industry's capacity reductions did not have such an effect, however. Even after the industry's capacity reductions, the industry's capacity utilization rate in 2005 was 60.2 percent, a level considerably lower than its capacity utilization rate of 73.1 percent in 2000.¹¹³ Moreover, the industry's capacity utilization rate of 60.2 percent in 2005 was significantly lower than its capacity utilization rates during the first sunset reviews, when its capacity utilization rate ranged from 70.1 to 76.1 percent, and during the original period of investigation, when its capacity utilization rates ranged from 72.8 percent to 76.7 percent.¹¹⁴

¹¹² NSK Second Remand Comments at 12-14.

¹¹³ CR at Tables BB-I-1 & C-2.

¹¹⁴ CR at Tables BB-I-1 & C-2. During the original period of investigation, the industry's capacity utilization rates were 72.8 percent in 1985, 73.4 percent in 1986, and 76.7 percent in 1987. During the first period of review, the industry's capacity utilization rates were 76.1 percent in 1997 and 70.1 percent in 1998. *Id.*

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Given that the industry's restructuring efforts have not resulted in a significant improvement in the industry's capacity utilization rates, we cannot conclude that the industry's restructuring efforts have resulted in a stronger, more robust or more efficient industry in this respect. Instead, we find that the overall declines in these rates since the original period of investigation are one factor indicating that the industry is in a weakened condition and therefore susceptible to a discernible adverse impact from the U.K. imports upon revocation of that order.

Moreover, the record shows that the industry's capacity reductions did not improve the industry's productivity levels by the end of the period of review. Although the industry's productivity level fluctuated somewhat during the period,¹¹⁵ it generally fell from 17.2 bearings per hour in 2000 to 13.5 bearings per hour in 2005, representing a decline of 22.0 percent.¹¹⁶ Moreover, the industry's productivity rate of 13.5 bearings per hour in 2005 was considerably lower than the industry's productivity levels in the first sunset review, when the industry's productivity rate ranged between 18.5 and 19.0 bearings per hour.¹¹⁷ In other words, the reductions in the industry's capacity levels and its other restructuring efforts did not make the industry more productive as the period progressed. On the contrary, even with the industry's restructuring efforts, the industry saw its productivity decline considerably over the period of review.

The industry's cost structure also deteriorated significantly during the period of review, further belying NSK's claim that the industry became stronger, more robust and more efficient as a result of its

¹¹⁵ The industry's productivity rate was 17.2 bearings per hour in 2000, 14.6 bearings per hour in 2001, 15.2 bearings per hour in 2002, 15.4 bearings per hour in 2003, 15.2 bearings per hour in 2004, and 13.5 bearings per hour in 2005. CR at Tables BB-I-1 & C-2.

¹¹⁶ CR at Tables BB-I-1 & C-2.

¹¹⁷ We note that a comparison of the industry's productivity levels to those seen in the original period of investigation is not possible because productivity rates for the original period of investigation are not available. CR at Table BB-I-1, n.5.

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capacity reductions. Although the industry's capacity levels and aggregate costs both declined over the second period of review,¹¹⁸ the ratio of the industry's cost of goods sold ("COGS") to its net sales revenues increased by 5.1 percentage points during the period, growing from 83.4 percent in 2000 to 88.5 percent in 2005.¹¹⁹ Moreover, the industry's COGS to net sales revenues ratio of 88.5 percent in 2005 was significantly higher than in any year of the first period of review or the Commission's original period of investigation.¹²⁰ Because this ratio was at a significantly higher level in 2005 than at any point since the original period of investigation, we find that this too indicates that the industry has become increasingly susceptible to the negative effects of price-suppression from additional volumes of dumped subject imports, including those from the United Kingdom.

Furthermore, the industry's restructuring efforts and capacity reductions have not made the industry more profitable during the period. On the contrary, the industry's operating income levels declined by 94.4 percent during the period, falling from a total of \$132.0 million in 2000 to only \$7.3 million in 2005.¹²¹ The industry's operating income margins also fell significantly during the period, dropping from 6.1 percent in 2000 to 0.4 percent in 2005.¹²² Similarly, the industry's gross profits declined by 39.0 percent during the period, declining from \$358.4 million in 2000 to a period low of \$218.6 million in 2005.¹²³ The industry's gross profit margins also fell, declining from 16.6 percent in

¹¹⁸ The industry's aggregate costs declined from \$1.8 million in 2000 to \$1.7 million in 2005. CR at Tables BB-I-1 & C-2.

¹¹⁹ CR at Tables BB-I-1 & C-2.

¹²⁰ CR at Tables BB-I-1 & C-2. During the original period of investigation, the industry's COGS to net sales ratio ranged between 79.6 and 82.9 percent. *Id.* During the first sunset review, the industry's COGS to net sales ratio ranged between 82.4 and 82.7 percent. *Id.*

¹²¹ CR at Tables BB-I-1 & C-2. In fact, the industry actually experienced operating losses of \$8.7 million in 2004. *Id.*

¹²² CR at Table C-2.

¹²³ CR at Table C-2.

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2000 to 11.5 percent in 2005.¹²⁴ Thus, the industry's gross profit and operating margins in 2005 were considerably worse at the end of the period of review than at the beginning.¹²⁵ They were, moreover, considerably lower at the end of the period of review than during the first sunset review or the original period of investigation.¹²⁶ If the industry's reported capacity reductions and restructuring efforts 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, over the course of the second period of review. As can be seen, this is simply not the case.

We also note that the reductions in the industry's capacity levels during the second period of review do not explain all of the declines in the industry's production, shipment, and sales quantities during the second period of review. On the contrary, the record shows that the industry's production, shipment, and sales quantities all declined at considerably higher rates during the period of review than the reported declines in the industry's overall capacity levels. In this regard, the industry's capacity levels fell by 24.6 percent during the period of review.¹²⁷ This decline could reasonably explain a decline in the industry's production, shipment, and sales quantities during the period, as the Court

¹²⁴ CR at Table BB-III-8.

¹²⁵ 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 at Table C-2.

¹²⁶ CR at Table BB-I-1. The industry's operating income of \$7.3 million in 2005 was lower than its operating income during the first period of review, when it ranged between \$170.2 million and \$148.1 million, and its operating income during the original period of investigation, when it ranged between \$88.8 million and \$126.1 million. *Id.* The industry's operating income margin of 0.4 percent in 2005 was lower than its operating income margin in either the first period of review or the original period of investigation, when the industry always had an operating income margin at or above 6.6 percent. *Id.* The industry's gross profit levels in 2005 were also lower than they were during the first period of review, or the original period of investigation. *Id.*

¹²⁷ CR at Table C-2.

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pointed out in NSK I and NSK III. Nonetheless, the record shows that the industry's production, shipment, and sales quantities all fell at a much faster rate than its capacity levels during the period, with the industry's production quantities declining by 37.9 percent, its domestic shipment quantities declining by 41.8 percent, and its net sales quantities declining by 39.1 percent between 2000 and 2005.¹²⁸ Moreover, because the industry's production levels fell at a faster pace than did its overall capacity levels during the period, the industry's capacity utilization declined from a high of 73.1 percent in 2000 to a rate of 60.2 percent in 2005.¹²⁹ In light of the fact that the industry's restructuring efforts did not account for the significant declines in the industry's production and shipments, and given that the industry's restructuring efforts have not resulted in a more profitable or productive industry, we find that the declines in the industry's production and shipment quantities are also a sign that the industry has become increasingly vulnerable during the period, and therefore more susceptible to the likely adverse effect of subject imports from the United Kingdom.¹³⁰

¹²⁸ CR at Table C-2. The record also shows that the absolute declines in the industry's production and domestic shipment quantities outpaced the declines in the industry's capacity levels during the period of review. CR at Tables BB-I-1 & C-2. For example, while the industry's capacity levels declined by 110.4 million bearings between 2000 and 2005, the industry's production quantities fell by 124.5 million bearings during that period, and its domestic shipment quantities fell by 125.2 million bearings as well. Id. Thus, the industry's production and shipment declines during the period outstripped its capacity declines by approximately 15 million bearings between 2000 and 2005. Id.

¹²⁹ It is also worth pointing out that the majority of the industry's production declines during the period occurred between 2000 and 2001, when the industry's production quantities fell by 67.5 million bearings. CR at Tables BB-I-1 & C-2. During that same period, that is, between 2000 and 2001, the industry's production capacity declined by only 22.6 million bearings, again indicating that the industry's restructuring and capacity reduction efforts were not the sole, or even primary, driver behind the declines in the industry's production levels. Id.

¹³⁰ We also note that the industry's production and domestic shipment quantities in 2005 were both lower than the industry's production and shipment quantities in 1985, the first year of the Commission's original period of investigation, even though the industry's capacity levels were actually higher in 2005 than in 1985. CR at Table BB-I-1. Thus, although, the industry could produce more in 2005 than in 1985, it was in fact producing and shipping less product in 2005 than in 1985. Given this, we find that the industry's production and shipment quantity data also support our finding that the industry was in a more vulnerable state at the end of the second period of review than it was at the

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We note that the declines in the industry's net sales revenues also indicate that the industry was in a weakened condition at the end of the second period of review. 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 they would manage that transition in a way that would allow them to maintain a reasonably stable stream of revenue. In particular, we would expect that shifting to higher-value products would allow the industry to maintain a reasonably consistent revenue level because the U.S. industry's average unit prices increased over the period.¹³¹ The industry did not maintain a reasonably stable revenue level, however, with its net sales values falling by 12.0 percent during the period of review, declining from \$2.2 billion in 2000 to \$1.9 billion in 2005.¹³² Moreover, the industry's net sales revenues in 2005 were considerably lower than the net sales revenues enjoyed by the industry during the first period of review.¹³³ Finally, although the industry's net sales revenue increased from 1985 to 2005 (in other words, from the first year of the original period of investigation to the last year of the second review period),¹³⁴ the growth in the industry's sales revenues since the original period of investigation failed to keep up with the growth in

beginning of the original period of investigation.

¹³¹ The industry's average unit value for net sales was \$5.92 in 2000, \$6.47 in 2001, \$6.80 in 2002, \$6.85 in 2003, \$7.31 in 2004, and \$8.64 in 2005. CR at Table C-2. The average unit values for the industry's U.S. shipments exhibited a similar trend. Id.

¹³² CR at Tables BB-1 & C-2.

¹³³ CR at Table BB-I-1. The domestic industry's net sales revenues were *** in 1998, the last year of the first period of review. The domestic industry's net sales revenues were \$*** in 2005, the last year of the second period of review. Id.

¹³⁴ CR at Table BB-I-1. The industry's net sales revenues increased from \$1.5 billion in 1985 to \$1.9 billion in 2005, an increase of 30.7 percent. Id.

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apparent U.S. consumption in the market between 1985 and 2005,¹³⁵ indicating that the industry has been unable to improve its sales revenues to track the growth in demand.¹³⁶ Given these trends, we find that the industry's net sales revenues levels also reflect an industry that remains in a vulnerable position in the marketplace.

We further 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 NSK has claimed, we would expect that the industry would have been able to maintain 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. Despite an increase in the industry's average unit values over the period of review, however, 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 2005.¹³⁷ Moreover, the industry's market share in 2005 remains significantly below the industry's market share levels during the first period of review, when it ranged between 69.9 and 70.5 percent, and the original period of investigation, when it ranged between 73.4 and 77.3 percent.¹³⁸ In other words, in line with the other indicators of the industry's condition, the industry's market share levels show that the industry was smaller and less competitive at the end of the second period of review than it was at any point since the beginning of the Commission's original period of investigation.

¹³⁵ Apparent U.S. consumption grew from \$1.7 billion in 1987 to \$2.7 billion in 2005, an increase of 62.8 percent. CR at Table BB-I-1.

¹³⁶ CR at Table BB-I-1.

¹³⁷ CR at Tables BB-I-1 & C-2.

¹³⁸ CR at Tables BB-I-1 & C-2.

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In its remand comments, NSK argues that, as a result of its restructuring efforts and capacity reductions, the industry has grown stronger toward the end of the period of review, noting that the industry's capacity, production, and capacity utilization levels all stabilized toward the end of the review period, and that the industry's net sales values, gross profits, operating income, and capital expenditures all increased by the end of the period.¹³⁹ We observe that, although these indicia did stabilize or improve somewhat in the last year of the period of review, they remained considerably below the levels the industry experienced in 2000, the first year of the period.¹⁴⁰ Put another way, while the industry may have experienced some stabilization or modest increases in its net sales, gross profits, operating income, and capital expenditures in 2004 and 2005, the small increases in these indicia simply did not come close to offsetting the double-digit declines in these indicia for the entire POR overall between 2000 and 2005.¹⁴¹ Accordingly, we do not consider the small improvements or stabilization in these indicia toward the end of the period to signify the industry's current strength or robustness, as NSK urges.¹⁴²

In its remand comments, NSK also argues that the Commission should exclude the financial results of three domestic producers, ***, from its vulnerability analysis.¹⁴³ NSK

¹³⁹ JTEKT Second Remand Comments at 9-10.

¹⁴⁰ CR at Tables BB-I-1 & C-2.

¹⁴¹ CR at Table C-2. See, e.g., *Siderca, S.A.I.C. v. U.S.*, 29 CIT 572, 586-587, 374 F. Supp. 2d 1285, 1298-99 (CIT 2005) (affirming Commission's vulnerability analysis, notwithstanding evidence of improving industry indicators in the final year of the POR, because the domestic industry was in many respects "even weaker" at the end of the POR compared to the beginning of the POR).

¹⁴² NSK is essentially arguing that we should assume that the worst operating performance for the industry is past, and that these slight improvements are the start of the industry's resurgence. These small recent improvements, however, do not warrant such a conclusion, especially given that the industry has seen such temporary improvements in certain of its indicia earlier in the period, but then suffered declines in those same indicia in subsequent years. CR at Tables BB-I-1 & C-2 (showing, for example, that the industry's net shipment values, gross profits, and operating income all improved somewhat between 2001 and 2002, but then fell considerably afterwards in 2003 through 2005.)

¹⁴³ NSK Second Remand Comments at 10-14.

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asserts that the inclusion of these producers in the Commission's analysis unfairly indicates that the industry was in a vulnerable condition at the end of the period.¹⁴⁴ We do not agree that we should take such an approach. Under the statute, the Commission is required to assess whether the "industry is vulnerable to material injury" if the order on the U.K. is revoked. 19 U.S.C. §1675a(a)(1)(C) (emphasis added). Moreover, the industry is defined as the "producers as a whole of a domestic like product." 19 U.S.C. §1677(4)(A). Thus, as the Court of International Trade has stated, the Commission "must evaluate the entire industry and include all of the participating producers" as part of its vulnerability analysis in a sunset review.¹⁴⁵ Given the statute and the Court's holdings on this issue, we see no basis for excluding these three producers from our vulnerability analysis here.¹⁴⁶

¹⁴⁴ NSK Second Remand Comments at 11-13.

¹⁴⁵ Nevinnomysskiy Azot v. United States, 565 F. Supp. 2d 1357, 1373 (CIT 2008) (citing Cleo Inc. v. United States, Slip Op. 06-131, 2006 Ct. Intl. Trade LEXIS 143, 2006 WL 2685080, at *16 (Aug. 31, 2006)).

¹⁴⁶ Furthermore, we do not find that the circumstances surrounding the operations of these three companies warrant such treatment. For example, NSK argues that *** "peculiar and unnaturally large operating losses" skewed the aggregate industry data for operating income and other indicia. NSK Remand Comments at 12. *** Id. The fact that *** was performing poorly in the automotive sector does not distinguish it from the other companies in the industry that were also experiencing problems in that sector, such as ***. Moreover, the record reflects that most domestic producers – whether or not they were selling BBs in the automotive sector – experienced overall declines in their operating income and operating margins during the POR. See, e.g., CR at Table BB-III-9. Similarly, NSK argues that *** should be excluded from our analysis because it projected that *** NSK Remand Comments at 13-14. That possibility does not, however, change the fact that the company *** CR at Table BB-III-9. Moreover, although the company did ***. NSK Remand Comments at 13. Furthermore, its projection of *** NSK Remand Comments at 13. Finally, NSK's claim that *** operating losses were a "statistical incongruity" ignores the fact that *** posted operating losses similar to ***, suggesting that the losses were not highly unusual for a large domestic producer in the ball bearings market. See e.g., CR at Tables BB-III-1 & BB-III-9. We would add that declines in a producer's condition that are related to changes in demand in the automotive industry are still evidence of its vulnerability, because an industry's vulnerability can be caused by demand changes.

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Finally, we note that many of NSK's arguments about the vulnerability of the industry are mistakenly premised on the notion that the industry's vulnerability needs to be the result of the subject imports, either from the United Kingdom (in the case of the Commission's discernible adverse impact analysis) or from the cumulated imports (in the case of the Commission's likely injury analysis).¹⁴⁷ As indicated, the Commission need not establish that the industry is in a vulnerable condition due to the effects of the subject imports;¹⁴⁸ instead, it need only establish that the overall condition of the industry indicated that it was in a vulnerable or weakened position at the end of the period. Given this, NSK's focus on the issue of whether the industry's weakened condition was caused by the subject imports is misplaced.

In sum, we agree with the Court that the industry did attempt to restructure its operations by significantly reducing its production capacity during the period, and that these capacity reductions did depress the industry's capacity, production, and shipment, and sales quantities during the period of review to some extent. We also agree that the reductions in the industry's capacity levels were not attributable solely or primarily to the injurious effects of subject imports during the period. Nonetheless, we find that the record shows that, on the whole, the industry was in a weakened condition at the end of the period, having experienced significant declines in its profitability, capacity utilization, productivity levels, and market share during the period. Moreover, the significant declines in the industry's capacity, production, and shipment and sales levels did not result in a stronger and more efficient industry, but

¹⁴⁷ NSK Second Remand Comments at 3-4.

¹⁴⁸ SAA at 885; Consolidated Fibers, 571 F. Supp. 2d at 1364-65.

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rather have caused it to be smaller and weaker than it was in prior periods. Accordingly, we find the overall declines in these indicia during the period of review are not a sign of the industry's incipient health, but are rather a sign of the industry's weakened condition as a whole.

We therefore find that the industry is in a vulnerable condition that makes it susceptible to both the likely discernible adverse impact of the subject imports from the United Kingdom, as well as the likely injurious effects of the cumulated subject imports overall.

- b. The Subject Imports from the United Kingdom Are Not Likely to Have No Discernible Adverse Impact on the Industry, Even Considering the Significant Presence of Non-Subject Imports in the Market

Having found the industry to be in a vulnerable condition, we now turn to the Court's remand instructions concerning our finding that the subject imports from the United Kingdom would be likely to have a discernible adverse impact on the industry if the U.K. order were revoked.

Under the sunset provisions of the statute, the Commission may only cumulate the subject imports from a particular country with other subject imports if those imports are not "likely to have no discernible adverse impact on the domestic industry." 19 U.S.C. §1675a(a)(7).¹⁴⁹ As the Commission and the Court of International Trade have stated, "neither the statute nor the {SAA} provides specific guidance on what factors the Commission is to consider in determining that imports 'are likely to have no

¹⁴⁹ The statute also requires the Commission to find that the subject imports are "likely to compete with each other and with the domestic like products in the United States market" as a condition for cumulating the subject imports. 19 U.S.C. §1675a(a)(7). As we have previously indicated, the Court has already affirmed the Commission's findings on this issue. NSK I at 17-18. Plaintiffs NSK and JTEKT have not challenged the Commission's findings that there are not significant differences between the conditions of competition for subject imports in the U.S. market that would warrant a decision not to cumulate the subject imports from France, Germany, Italy, Japan, and the United Kingdom. See USITC Pub. 3876 at 36.

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discernible adverse impact' on the domestic industry."¹⁵⁰ In the absence of such guidance, the Commission "generally considers the likely volume of the subject imports and the likely impact of those imports on the domestic industry within a reasonably foreseeable time if the orders are revoked."¹⁵¹

As the Court of International Trade has stated, when the Commission assesses whether there is likely to be sufficient volumes of imports from a subject country to have a discernible adverse impact on the industry, "even a modest likely volume may satisfy the statutory standard."¹⁵² Because an "adverse impact, or harm, can be discernible but not rise to a level sufficient to cause material injury,"¹⁵³ the Court has made clear that the Commission may cumulate "imports from various countries that each account individually for a very small percentage of total market penetration but when combined may cause material injury."¹⁵⁴

The Court of International Trade has explained that Congress extended the discretion to cumulate to the Commission in sunset reviews to "address the concern that a domestic industry could be injured by the 'hammering effect' of unfairly traded imports from multiple countries, an effect that could be obscured if subject import levels were reviewed on a country-by-country basis."¹⁵⁵ As a result, the

¹⁵⁰ USITC Pub. 3876 at 25-26; Wieland Werke AG v. United States, 525 F. Supp. 2d 1353, 1364-65 (CIT 2007); Cogne Acciai Speciali S.P.A. v. United States, Ct. No. 04-00411, Slip Op. 05-122 at 8-9 (Sept. 27, 2005).

¹⁵¹ Id.

¹⁵² Cogne Acciai, Slip Op. 05-122 at 9.

¹⁵³ Cogne Acciai, Slip Op. 05-122 at 9; Wieland Werke AG v. United States, 525 F. Supp. 2d at 1364-1365; Usinor Industeel v. United States, 27 CIT 1395, 1399 (2003).

¹⁵⁴ Cogne Acciai, Slip Op. 05-122 at 9 (emphasis added); Wieland Werke AG v. United States, 525 F. Supp. 2d at 1364-1365; Neenah Foundry v. United States, 25 CIT 702, 708, 155 F. Supp. 2d 766, 771 (2001).

¹⁵⁵ Cogne Acciai, Slip Op. 05-122 at 9 (citing Nippon Steel Corp. v. United States, Slip Op. 05-72 at 18, n. 5 (June 15, 2005) & Neenah Foundry, 25 CIT at 708, 155 F. Supp. 2d at 772); Wieland Werke, 525 F. Supp. 2d at 1364-65.

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discernible adverse impact standard presents a “relatively low threshold” and “is relatively easy for the {Commission} to satisfy.”¹⁵⁶ Specifically, the standard is satisfied as long as the Commission finds that 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.”¹⁵⁷

With these principles in mind, we have reconsidered the evidence relating to the likely discernible adverse impact of the subject imports from the United Kingdom, taking into account the Court’s remand instructions on this issue in NSK III. Having reviewed the record evidence obtained in our investigation and remand proceedings, we find that the subject imports from the United Kingdom are likely to compete in the market at volumes that are likely to have a discernible adverse impact on an increasingly vulnerable industry. As the Court stated in NSK I, even “though modest levels of U.K. bearings might be diverted to the U.S. market {upon revocation}, it seems that any increase in subject imports would likely have an adverse impact” on a very vulnerable industry.¹⁵⁸

Turning to the Court’s instructions concerning the discernible adverse impact of the U.K. imports, we first find that the subject imports from the United Kingdom are, indeed, “well-suited to begin pricing their products more aggressively in the market to recover market share once the order is

¹⁵⁶ Cogne Acciai, Slip Op. 05-122 at 9; Neenah Foundry, 25 CIT at 708, 155 F. Supp. 2d at 772.

¹⁵⁷ Wieland-Werke, 525 F. Supp. 2d at 1364-1365; 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).

¹⁵⁸ NSK I at 20. In this regard, see also Cogne Acciai Speciali, S.P.A. v. United States, 29 CIT 1168, 1184 (2005) (affirming Commission’s discernible adverse impact analysis and explaining that “other factors such as the vulnerability of the domestic industry” support that analysis); see also Usinor v. United States, 28 CIT 1107, 1127, 342 F. Supp. 2d 1267, 1285 (Ct. Int’l Trade 2004).

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revoked.” NSK III at 26. The record shows the U.K. imports are substitutable with both domestic and non-subject ball bearings. For example, 11 of 14 responding purchasers, 9 of 13 U.S. producers, and 15 of 22 importers reported that the U.K. imports were “always” or “frequently” interchangeable with the domestic like product.¹⁵⁹ Similarly, 4 of 5 purchasers, 7 of 10 U.S. producers, and 9 of 14 importers reported that the U.K. imports were “always or “frequently” interchangeable with non-subject imports.¹⁶⁰ Given this, the record shows that market participants perceive there to be a high level of substitutability among the domestic, subject, and non-subject ball bearings.¹⁶¹

Other aspects of the record also show that the U.K. imports are well-suited to compete more aggressively on price with domestic and non-subject bearings if the order is revoked. For example, even with the U.K. order in place, the subject imports from the United Kingdom have maintained a consistent and stable presence in the market during the first and second period of review, shipping between \$8.2 million and \$17.2 million worth of bearings to the United States during both periods.¹⁶² This indicates that the U.K. producers have maintained the ability to market and sell their BBs effectively in the United States, and this ability can be used to increase their U.S. imports in the reasonably foreseeable future. Second, even though their market share has been modest throughout the period, the U.K. imports have been sold, in custom and standard form, in almost every major end-use category in the OEM and

¹⁵⁹ CR at Table BB-II-4.

¹⁶⁰ CR at Table BB-II-4. The record shows that similar majorities of responding U.S. producers and importers reported that the U.K. imports were “always” or “frequently” substitutable for the domestic like products and other subject ball bearings. *Id.*

¹⁶¹ The Court affirmed the Commission’s finding of a significant degree of substitutability between the subject and domestic bearings in NSK I. NSK I at 17-18.

¹⁶² CR at Table BB-I-1. The subject imports from the United Kingdom occupied 0.5 percent of the market in the first sunset review period, and 0.3 or 0.4 percent of the market during the second period of review. *Id.* The value of the subject imports from the United Kingdom ranged between \$8.1 million and \$11.8 million during the second sunset review period. *Id.*

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aftermarket segments of the market during the period of review,¹⁶³ and were sold in the major sales channels in the United States.¹⁶⁴ Finally, as previously noted, the subject U.K. producers were heavily export-oriented at the end of the period of review, with exports representing 90.9 percent of their total shipments by the end of the period.¹⁶⁵ We find that, taken together, these facts indicate that the subject producers in the United Kingdom are willing and able to export and sell ball bearing products across the full range of end use categories in the U.S. market, should the U.K. order be revoked.¹⁶⁶

We also find that the U.K. imports are not only well-suited to enter the market in discernible volumes, but that they are likely to do so if the order is revoked. In this regard, the U.K. industry has sufficient capacity to increase its exports to the United States to discernible levels should the U.K. order be revoked. While the industry in the United Kingdom reduced its capacity considerably during the

¹⁶³ CR at Table BB-I-10 & BB-I-40. The U.K. imports were sold in custom and/or standard form to OEMs in the agricultural and construction, mining, metalworking, machinery, general purpose machinery, automotive, and aerospace segments of the market, and to aftermarket purchasers in the automotive and supply merchant wholesalers' segment of the market, machinery, equipment and supply merchant wholesalers' segment of the market, and other general bearing segments of the market. *Id.*

¹⁶⁴ CR at Table BB-I-11.

¹⁶⁵ CR at Table BB-IV-9.

¹⁶⁶ CR at BB-IV-37-42; NSK III at 21. During the first remand proceeding, NSK claimed 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 noted that the U.K. industry has focused its operations more on custom-produced products for the European market, including the automotive market. NSK First Remand Comments at 13-14. The record shows that, even with this restructuring, U.K. imports retain a stable presence in the U.S. market and are sold in most of the end use sectors of the market. CR at Table BB-I-10. Moreover, the domestic industry sells significant numbers of bearings to the automotive market, and approximately two-thirds of the domestic industry's products are custom bearings. CD at 60-61, n. 335. Thus, the fact that the United Kingdom is becoming more focused on customized or automotive bearings does not indicate that any future imports from the United Kingdom would not have a discernible adverse impact on the industry upon revocation of the order.

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period of review,¹⁶⁷ the United Kingdom was the tenth largest ball bearing exporter in the world in 2004.¹⁶⁸ Moreover, although the U.K. industry's capacity utilization rate increased over the period to a very high capacity utilization rate of *** percent in 2005,¹⁶⁹ the U.K. industry's available capacity in that year was still equivalent to *** million bearings.¹⁷⁰ This available capacity would have permitted the industry to increase its shipments to the United States, in quantity terms, more than ten-fold when compared to the import levels for U.K. imports in 2005.¹⁷¹ Moreover, this available capacity was

¹⁶⁷ CR at Table BB-IV-9. The U.K. industry's capacity declined from 480.9 million bearings in 2000 to 127.4 million bearings in 2005, for a decline of 73.5 percent during the period of review. We note that these numbers do not include capacity data for Koyo, because it did not report capacity or production data for 2000 through 2002. See CR at BB-IV-42.

With respect to the considerable declines in the U.K.'s capacity, we note that NSK has previously argued that these capacity declines, and the corresponding increase in the U.K.'s capacity utilization rates, have made the U.K. industry highly unlikely to ship any additional amount of bearings to the United States if the U.K. order was revoked. RCD at 31-32; NSK Remand Comments at 6-9. It is true, as we stated above, that the U.K. producers reported significant declines in their capacity and production levels, in terms of quantity, during the period of review. CR at Table BB-IV-9. Despite the declines in these levels, however, the U.K. industry has considerably increased the value of its total shipments of ball bearings over the period; the value of its total shipments increased by *** percent, from \$*** million in 2000 to \$*** million in 2005. CR at Table BB-IV-9. Similarly, despite the reported capacity declines, the U.K. producers were able to increase the value of their total exports to all countries considerably over the period, with the value of these shipments increasing by *** percent, from \$*** million in 2000 to \$*** million in 2005. Id. Finally, we note that, even after the U.K. industry had completed its capacity reductions for the period in 2003, it was still able to increase the value of its exports to the United States by *** percent between 2003 and 2005, with the value of its U.S. exports increasing from \$*** million in 2003 to \$*** million in 2005. CR at Table BB-IV-9. Given this, it seems clear that the reductions in the U.K. industry's capacity have not rendered it less capable of increasing its presence in the world market, when measured in terms of value.

¹⁶⁸ CR at Table BB-IV-11.

¹⁶⁹ CR at Table BB-IV-9.

¹⁷⁰ This amount includes the excess capacity of *** million bearings in 2005 that is set forth in Table BB-IV-9 (which does not include Koyo), and the excess capacity for Koyo of *** bearings in that year, which is set forth in the chart on p. BB-IV-42. We note that, in our original and remand views, we mistakenly failed to include Koyo's excess capacity for 2005 in this calculation.

¹⁷¹ The subject producers were responsible for approximately *** BBs imported into the United States market in 2005. CR at Tables BB-I-1 & C-2. As noted earlier, in reviews of products that have a wide range of unit values, like bearings, we typically prefer the use of value as means of assessing the

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equivalent to approximately 1.7 percent of the domestic industry's production quantities in 2005.¹⁷²

Furthermore, when the amount of the U.K. industry's available capacity is added to the actual volumes of the U.K. imports in that year, the U.K. industry could have shipped a total of *** million bearings, with an estimated value of approximately ***,¹⁷³ to the U.S. market in 2005. These amounts would have represented *** percent of the quantity of the domestic industry's domestic shipments in 2005, and *** percent of the value of the industry's domestic shipments during the period.¹⁷⁴ Furthermore, the value of these imports would have been *** times the amount of the industry's operating income of *** in 2005. Given these facts, we find that the record indicates that the U.K. industry had the ability to increase its exports to the United States to levels that would have a discernible adverse impact on the domestic industry upon revocation of the order.¹⁷⁵

production, sales, shipments and revenue levels of producers, and the Court has affirmed this practice here. NSK I at 19. In the case of capacity and capacity utilization, we generally collect data on the basis of quantity, as producers are generally not able to place an estimated value on the amount of their production capacity until such time as the actual production of a product occurs.

¹⁷² CR at Table BB-I-1 & C-2.

¹⁷³ To derive the total estimated value of these imports, we multiply the unit value of the U.K. imports in 2005, \$*** per bearing, by the U.K. industry's available capacity of *** bearings in 2005, resulting in a total value for the potential shipments resulting from this available capacity of ***. CR at Table C-2. Because the value of the subject imports from the United Kingdom into the United States was \$11.284 million in 2005, CR at Table BB-I-1, the total of the industry's potential and existing shipments was \$26.05 million. Thus, the U.K. industry could have more than doubled the value of its exports to the United States.

¹⁷⁴ The quantity of the industry's domestic shipments was 174.0 million in 2005, and the value of those shipments was \$1.732 billion in 2005. CR at Table BB-I-1 & C-2.

¹⁷⁵ Further, the U.K. industry could have more than doubled the value of its U.S. imports in 2005, increasing their imports by approximately *** million in that year. See calculation in footnote 173. Given this, the industry's available capacity in 2005 would have allowed suppliers of U.K. bearings to more than double their market share from 0.4 percent in 2005 to *** percent. To calculate this market share, we add the current value of U.K. imports, \$11.284 million, to the value represented by the U.K. industry's available capacity in 2005, ***, and divide by the amount of apparent consumption in 2005, \$2.743 billion. More specifically, $\$11.284 \text{ million} + *** = ***/\$2.743 \text{ billion} = *** \text{ percent}$. We note that this market share of 0.95 would exceed the highest market share achieved by the U.K. in the original investigation, which was 0.9 percent in 1987. CR at Table BB-I-1.

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In sum, even after taking into account its high capacity utilization rate for 2005,¹⁷⁶ the industry in the United Kingdom had sufficient available capacity to increase its exports to the United States in a manner that would have had a discernible adverse impact on an industry in vulnerable condition. Given the U.K. industry's level of available capacity in 2005, its high degree of export-orientation, its continued presence and interest in the U.S. market, and the continued attractiveness of the U.S. market to exporters,¹⁷⁷ we find that it is likely that the subject producers in the United Kingdom would increase their exports to the United States to a level that would have a discernibly adverse impact on the domestic industry, if the U.K. order were to be revoked.¹⁷⁸

¹⁷⁶ Moreover, we would add that the U.K. industry's capacity level appears to fluctuate on a yearly basis to accommodate increases in its production and sales levels. CR at Table BB-IV-9. The record indicates that the U.K. industry reduced its capacity to its lowest level of the period in 2003. *Id.* In that year, the industry reported a capacity level of *** bearings and reported a production quantity of *** bearings. *Id.* In the next year, 2004, however, the industry's production level increased to *** bearings, which was approximately *** bearings higher than its reported capacity in 2003 of *** million bearings. Apparently to accommodate this increase, the U.K. industry reported a capacity increase of *** bearings, which increased its capacity to *** bearings. *Id.* In 2005, the industry's production level was again higher than its 2003 capacity level, and the industry again reported a capacity level, ***, that was higher than its reported capacity for 2003. Given this, we believe that the record indicates that the U.K. industry is able to increase their capacity levels in a manner that could result in additional exports of bearings to the United States if the order were revoked.

¹⁷⁷ NSK I at 33 (the United States market remains an attractive market for the subject producers' ball bearings because it is the second largest destination for bearings in the world and there are higher prices available in the United States than elsewhere).

¹⁷⁸ In its remand comments, NSK argues that the significant producers in the United Kingdom, ***, are not likely to seek to increase their shipments of bearings to the United States upon revocation of the order. NSK Remand Comments at 6-8. NSK points out that the U.K. producer *** has reported that it has curtailed its U.K. production operations and begun focusing on the European market, and states that this means the company is unlikely to ship any additional products to the U.S. market. We would note that, despite the reduction in *** capacity and its reported focus on Europe, *** has continued to ship bearings to the United States, even with the order in place, and that the company accounted for the majority of the U.K. industry's excess capacity in 2005, the final year of the period. CR at Table BB-IV-3; NSK Foreign Producer Questionnaire. Moreover, in its questionnaire response, *** reported that it will ship ball bearing to the United States at the request of its sister companies when they are unable to supply certain bearings to their U.S. customers. NSK Foreign Producer Response at III-8. We find that these facts indicate that *** remains willing and able to ship subject bearings to the United States upon revocation of the U.K. order.

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Moreover, as instructed by the Court, we have also examined whether the subject imports are likely “to begin pricing their products more aggressively in the market to recover market share once the order is revoked.” NSK III at 26. We find that they are likely to do so. There is a significant degree of substitutability among the domestic bearings, the U.K. imports, and non-subject imports.¹⁷⁹ As the Court noted in NSK I, the “more substitutable a product, the more likely {it is that} price will play a significant role in purchasing” when purchasers are choosing between various suppliers.¹⁸⁰ Furthermore, as the

NSK also points out that the U.K. producer *** did not export to the United States during the period, and argues that this indicates that it is likely not to do so in the future. We do not agree. Even though it is not currently shipping ball bearings to the United States, the company had available capacity in 2005 that could be used to ship additional bearings to the United States upon revocation. CR at Table BB-IV-3. Moreover, as the Court has indicated, as the second largest market in the world, the United States remains an attractive market for bearings exporters, especially since the record indicates that higher prices are available in the U.S. market than elsewhere. NSK I at 33. Given this, revocation of the U.K. order will make the U.S. market a more attractive export option for producers like ***, even if they are not currently in the U.S. market. Finally, NSK argues that the U.K. producer *** is unlikely to export bearings to the U.S. market upon revocation, because it produces only miniature ball bearings, it did not ship to the United States during the period of review, and it was operating at full capacity throughout the period. We agree that these factors suggest that the company is less likely than the other U.K. companies to take advantage of revocation of the U.K. order to ship bearings to the United States. However, since the company had no excess capacity and since there are five other U.K. producers of bearings, including ***, this does not change our conclusion that, on the whole, the ball bearings industry in the United Kingdom is likely to ship sufficient bearings that would have a discernible adverse impact on the domestic industry upon revocation. CR at BB-IV-37-39.

¹⁷⁹ CR at Table BB-II-4.

¹⁸⁰ NSK I at 35.

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Court affirmed in NSK I, “price is an essential factor in purchase decisions” in the ball bearings market.¹⁸¹ In fact, a majority of U.S. producers and importers reported that factors other than price did not typically affect purchasers when making purchase decisions between the U.K. imports and domestic bearings, or the U.K. bearings and non-subject bearings.¹⁸² Given these considerations, we find that it is likely that competitive pricing will be a significant factor for purchasers assessing whether to purchase U.K. imports as opposed to domestic or non-subject bearings, if the U.K. order is revoked.¹⁸³

Furthermore, we find that the price comparison data obtained for the Commission’s second sunset review also indicate the U.K. imports would be able to compete more aggressively on price with the domestic and non-subject imports to obtain market share, should the order be revoked. Although we agree with the Court that the price comparison data we obtained during the second sunset review for the U.K. imports were quite limited,¹⁸⁴ the data still show that the U.K. imports nevertheless undersold the domestic like product in 45 out of 48 instances, representing 93.8 percent of the available price comparisons for the U.K. imports.¹⁸⁵ Furthermore, the data also show that the margins of underselling for the U.K. imports were considerable, with the large majority of reported underselling margins for the

¹⁸¹ NSK I at 34-35.

¹⁸² CR at Table BB-II-5. 8 of 11 U.S. producers and 10 of 17 importers reported that factors other than price were “never” or only “sometimes” a factor in the purchase decision between U.K. and domestic ball bearings. 6 of 8 U.S. producers and 5 of 9 importers reported that factors other than price were “never” or only “sometimes” a factor in the purchase decision between U.K. and non-subject ball bearings. Id.

¹⁸³ See NSK I at 37-38.

¹⁸⁴ As the Court correctly pointed out in NSK I, the Commission only had price comparison data for the U.K. imports for one of the ten price comparison products reviewed in the Commission’s report in the sunset review. NSK I at 37.

¹⁸⁵ CR at Table BB-V-2.

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United Kingdom ranging from 10.7 to 47.3 percent.¹⁸⁶ Thus, the price comparison data indicate that, even with the U.K. order in place, the U.K. imports were able to undersell the domestic products by significant margins when there was head-to-head competition between the domestic producers and the U.K. suppliers.

Additionally, the U.K. imports undersold the domestic bearings at more significant levels during the original period of investigation, when the order was not in place, than during the second period of review. During the original period of investigation, the subject imports from the United Kingdom undersold the domestic bearings at underselling margins as high as 64 percent,¹⁸⁷ and had an average underselling margin of 30.4 percent.¹⁸⁸ During the second period of review, however, the underselling margins of the U.K. imports did not exceed 47.3 percent,¹⁸⁹ and they had an average underselling margin of only 19.3 percent.¹⁹⁰ Moreover, during the original period of investigation, the underselling margins of the U.K. imports were higher than 25 percent in 60.8 percent of price comparisons involving underselling.¹⁹¹ In comparison, during the second period of review, the underselling margins of the U.K. imports were higher than 25 percent in only 13.3 percent of the available price comparisons.¹⁹² Given

¹⁸⁶ CR at Tables H-18 & H-19. In 37 of 45 instances of underselling by the U.K. imports (82 percent), the U.K. imports undersold domestic bearings by margins ranging from 10.7 to 47.3 percent. *Id.*

¹⁸⁷ Final Staff Report, Original Commission Investigation, dated April 24, 1989 (hereinafter "FSR") at A-194 & Tables 39 to 48 (pp. A-173-A-182).

¹⁸⁸ Second Remand Table A-1 (attached to this remand in Appendix A).

¹⁸⁹ CR at Tables H-18 & H-19.

¹⁹⁰ Second Remand Table A-1 (attached in Appendix A).

¹⁹¹ During the original period of investigation, the U.K. imports undersold domestic bearings at margins above 25 percent in 31 of the 51 instances of underselling. FSR at Tables 39 to 48 (pp. A-173-A-182).

¹⁹² CR at Table H-18 & H-19. During the period of review, the U.K. imports undersold domestic bearings at margins above 25 percent in only 6 of 45 instances of underselling.

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these trends, we find that removal of the order and its price-disciplining effects would likely result in the U.K. imports resuming the more significant degree of underselling seen in the original period of investigation.

We also find that the U.K. imports are likely to be able to compete closely on price with the non-subject imports in the event of revocation. The limited price comparison data obtained on remand indicates that the U.K. imports and non-subject imports were actually underselling the domestic bearings at reasonably similar levels of underselling during the second period of review.¹⁹³ As we noted previously, the U.K. imports typically undersold domestic ball bearings at margins ranging from 10.7 to 47.3 percent in the large majority of underselling instances.¹⁹⁴ The non-subject imports undersold domestic products at similar rates during the period, with the underselling margins of the non-subject imports ranging between 12 and 35 percent in the majority of instances.¹⁹⁵ In other words, even with the price-disciplining effects of the U.K. order in place,¹⁹⁶ the U.K. imports and the non-subject imports were

¹⁹³ On remand, the Commission sought price comparison data for non-subject imports for all ten of the price comparison products from the Commission's sunset review. The questionnaire respondents reported no non-subject prices for price comparison product 20, the only product for which prices were reported for the U.K. imports during the sunset review. Accordingly, no price comparisons were possible between the U.K. products and the non-subject imports on remand. RSR at Tables III-1-III-15.

¹⁹⁴ CR at Tables H-18 & H-19.

¹⁹⁵ RCR at Tables III-11-III-14. The underselling margins of the non-subject imports ranged between 12 and 35 percent in 39 of 62 underselling instances. *Id.* In 37 of 45 instances of underselling by the U.K. imports (82 percent), the U.K. imports undersold domestic bearings by margins ranging from 10.7 to 47.3 percent. CR at Tables H-18 & H-19.

¹⁹⁶ We would add that Commerce's dumping findings suggest that imposition of the order on the U.K. imports has had significant disciplining effects on the pricing practices of the subject importers from the United Kingdom during the period of review. In its original investigations, the Department of Commerce announced dumping margins for the subject producers in the United Kingdom that ranged from 44.02 to 54.27 percent. CR at Table BB-I-2 (showing announced dumping margins of 44.02 for NSK/RHP, dumping margin of 61.14 for SKF, and an "all others" dumping rate of 54.27). During the course of Commerce's annual administrative reviews of the U.K. order, there has been a general decline in the dumping margins announced for subject producers in the United Kingdom, with the most recent margins announced for these producers during the Commission's second period of review period ranging between 0.32 and 16.87 percent. For example, the most recent margins announced for NSK, SKF,

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generally underselling the domestic products at similar underselling margins in most instances during the period of review. Given this, we find that the suppliers of U.K. imports would not need to reduce their pricing levels very significantly in order to compete more aggressively with the non-subject imports.

Finally, we have considered whether the large volumes of non-subject imports will provide an “impenetrable barrier” against imports from the United Kingdom that prevents them from increasing their imports into the U.S. market in a discernible manner, as NSK argues.¹⁹⁷ We do not agree that the non-subject imports will prevent the entry of additional imports from the United Kingdom into the market upon revocation of the order. In coming to this conclusion, we acknowledge that the non-subject imports are currently a significant and price competitive presence in the market, because the non-subject imports occupy a considerably larger share of the market than the U.K. imports,¹⁹⁸ and are currently underselling domestic and the subject bearings from countries other than the United Kingdom in a significant majority of price comparisons.¹⁹⁹ Nonetheless, the record also establishes that the non-subject imports have not been able to prevent the subject imports from the United Kingdom from maintaining a consistent and stable presence in the market,²⁰⁰ even with the price- and volume-disciplining effects of the U.K. order in place. In our view, this fact indicates that the non-subject

Barden/FAG and Timken were 0.23, 16.87, 2.78, and 1.11 percent, respectively. CR at Table BB-I-8 (at p. BB-I-31). Although there were two exceptions to this trend in administrative reviews after 2000 (i.e., the dumping margins of 61.14 announced for SKF in 2004 and Aeroengine Bearings in 2003), the overall trends for Commerce review margins shows a considerable decline in the margins announced for the U.K. producers during the period since the imposition of the order. *Id.*

¹⁹⁷ NSK Second Remand Comments at 8-9.

¹⁹⁸ CR at Table BB-I-1 (showing non-subject imports occupying 23.6 percent of the market in 2005, as compared to a market share of only 0.4 percent for the United Kingdom).

¹⁹⁹ RSR at Table III-15.

²⁰⁰ CR at Tables BB-I-1 & C-2.

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imports are not likely to prevent the U.K. imports from increasing their presence in the market in a manner that will have a discernible adverse impact on the industry upon revocation of the U.K. order.

Moreover, as we pointed out, the subject imports from the United Kingdom remain well-suited to compete more aggressively on price with both the domestic and non-subject bearings. The record shows that the U.K. industry has sufficient capacity to increase its import volumes in a manner that will have a discernible adverse impact on the industry, the U.K. industry is highly export-oriented, the United Kingdom remains one of the largest ball bearings exporting countries in the world, and the U.S. market remains an attractive one for exporters.²⁰¹ Furthermore, the record shows that the U.K. bearings are substitutable with respect to both the domestic and non-subject bearings and are currently competing at competitive pricing levels with the domestic and non-subject imports, even with the price-disciplining effect of the orders in place. In other words, the record shows that the U.K. imports are “well-suited” to compete more aggressively on price in order to increase their market share levels in the United States, should the U.K. order be revoked. Given these considerations, we find that it is likely that the subject imports from the United Kingdom will be able to increase their import levels to the “very small percentage of market share” necessary to satisfy the discernible adverse impact standard, even with the significant presence of non-subject imports in the market.²⁰²

²⁰¹ See NSK I at 19 & 32-33.

²⁰² Wieland-Werke, 525 F. Supp. 2d at 1364-1365. We note that it is not appropriate to find that the subject imports from the United Kingdom are not likely to have a discernible adverse impact on the industry simply because their current or likely volumes are much smaller than the volumes of the non-subject imports. In this regard, we note that Congress and the Courts have consistently made clear that we are not to weigh causes of injury when performing our analysis in injury investigations and sunset reviews. Statement of Administrative Action, Trade Agreements Act of 1979 (“SAA”), S. Rep. 96-249, at 75 (July 1979)) (“the Commission is not to weigh causes”); Taiwan Semiconductor Industry v. United States, 23 CIT 410, 446, 59 F. Supp 2d. 1324, 1331 (1999) (the “Commission need not weigh (i.e., determine which is greater or lesser) causes in complying with the ‘by reason of’ standard”). Moreover, we believe that weighing the relative effects of the non-subject imports and the U.K. imports would undermine Congress’s concern that the Commission cumulate “imports from various countries that each

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In sum, we find that the subject imports from the United Kingdom are not likely to have no discernible adverse impact on the domestic industry if the order is revoked. Because we have also found 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, and that conditions of competition do not warrant a decision not to exercise our discretion to cumulate these countries in this sunset review, we have again exercised our discretion to cumulate the subject imports from France, Germany, Italy, Japan, and the United Kingdom in these reviews.²⁰³

D. The Likely Volume of the Cumulated Subject Imports

We have also reviewed the Commission's previous finding that there is likely to be a significant volume of the cumulated subject imports upon revocation of the orders.²⁰⁴ In the Commission's original determinations in these reviews, the Commission found that the volumes of the cumulated subject imports were likely to be significant upon revocation of the orders.²⁰⁵ It found that the cumulated

account individually for a very small percentage of total market penetration but when combined may cause material injury.” Cogne Acciai, Slip Op. 05-122 at 9; Wieland Werke AG v. United States, 525 F. Supp. 2d at 1364; Usinor Industeel S.A. v. United States, 27 CIT 1395, 1399 n.8 (2003). It would, in other words, not be consistent with Congress's instruction that we cumulate countries with small individual injurious effects if they would have a ‘hammering effect’ on the industry. Cogne Acciai, Slip Op. 05-122 at 9 (citing Nippon Steel Corp. v. United States, Slip Op. 05-72 at 18, n. 5 (June 15, 2005) & Neenah Foundry, 25 CIT at 708, 155 F. Supp. 2d at 772); Wieland Werke, 525 F.Supp. 2d. at 1364-65.

²⁰³ 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. USITC Pub. 3876 at 31-33 & 36-37; CD at 44-47 & 52-54; USITC Pub. 4082 at 18, n.121, RCD at 29, n.121. 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.

²⁰⁴ See CD at 61-66.

²⁰⁵ USITC Pub. 3876 at 43.

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imports had maintained a growing and significant presence in the U.S. market during the period of review, that the subject producers were highly export-oriented, and that they maintained a significant presence in markets throughout the world, ranking among the largest exporters of ball bearings in the world.²⁰⁶ Moreover, the Commission found that the subject producers had demonstrated an ability to shift exports quickly between markets, and that they had substantial amounts of excess capacity to increase their shipments to the United States upon revocation of the ball bearings orders.²⁰⁷ We adopt and incorporate in their entirety the Commission's findings on these issues.

We note that, in NSK I, the Court has affirmed the Commission's determination that the volumes of subject imports are likely to be significant upon revocation.²⁰⁸ 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.²⁰⁹ 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."²¹⁰ "Viewed in this context," the Court agreed that "the subject producers do indeed possess a significant level of excess capacity."²¹¹

Furthermore, in NSK I, the Court confirmed that the United States "remains an attractive market for the subject producers' ball bearings" because the United States is the "second largest destination for

²⁰⁶ USITC Pub. 3876 at 43-44.

²⁰⁷ USITC Pub. 3876 at 44-45; see also RCD at 42-43.

²⁰⁸ NSK I at 28-33.

²⁰⁹ NSK I at 29-30.

²¹⁰ NSK I at 29-30.

²¹¹ 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.

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imported ball bearings.”²¹² The Court also 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.”²¹³ 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.²¹⁴

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.²¹⁵ In its original determinations, the Commission found that price was an important factor in the purchase decision for ball bearings and that the large majority of purchasers reported the subject and domestic products to be substitutable, and therefore concluded that the subject imports would therefore be priced aggressively to gain market share and would undersell the domestic like product by significant margins so as to suppress domestic prices.²¹⁶ The Commission also found that the subject imports were likely to suppress domestic prices, because the industry’s costs of goods sold as a percentage of net sales had risen significantly over

²¹² NSK I at 32-33.

²¹³ NSK I at 33.

²¹⁴ Id.

²¹⁵ See CD at 66-68.

²¹⁶ USITC Pub. 3876 at 46.

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the period of review, indicating that the industry was having trouble recouping its costs.²¹⁷ We adopt and incorporate in their entirety the Commission's prior findings on this issue.

In NSK I, the Court questioned certain aspects of the Commission's underselling analysis.²¹⁸ Nonetheless, it ultimately affirmed the Commission's findings that the subject imports were likely to significantly undersell the domestic like products and were likely to have significant adverse effects on domestic prices upon revocation of the orders.²¹⁹ 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."²²⁰

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."²²¹ The Court also concluded the Commission reasonably found "there {was} a strong likelihood that competitive pricing will be a significant factor in purchasing decisions,"²²² given that "demand for ball bearings is not expected to increase dramatically within the foreseeable

²¹⁷ USITC Pub. 3876 at 47; see also RCD at 43-44.

²¹⁸ 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.

²¹⁹ NSK I at 33-38.

²²⁰ NSK I at 37.

²²¹ NSK I at 37-38.

²²² 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.

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future.”²²³ 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.”²²⁴

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 revisited 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.²²⁵ In its original and first remand determinations, the Commission found that the cumulated subject imports were likely to have a significant impact on the domestic industry.²²⁶ The Commission found the domestic industry to be in a vulnerable condition, noting that there were substantial declines in nearly all indicators of the industry’s condition during the period.²²⁷ The Commission found that the likely significant increases in volumes of the subject imports would largely be at the expense of the vulnerable domestic industry, taking into account the large share of the market occupied by the industry.

Moreover, because demand was not likely to increase robustly in the reasonably foreseeable future, the Commission found that the increases in subject import volumes would likely have a significant adverse impact on the domestic industry’s production, shipment, sales, profitability, and

²²³ NSK I at 37-38.

²²⁴ NSK I at 38.

²²⁵ See CD at 68-71.

²²⁶ USITC Pub. 3876 at 47-49.

²²⁷ USITC Pub. 3876 at 47-48.

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employment levels.²²⁸ Furthermore, the Commission found that, due to the likely aggressive pricing of the subject imports, the domestic industry would either need to cut prices for its products or lose sales. Under either scenario, the Commission stated, the industry's sales revenues and profitability levels would likely decline significantly.²²⁹ We adopt and incorporate in their entirety the Commission's prior findings on these issues, except to the extent they are supplemented and revised below.²³⁰

1. *The Court's Remand Instructions*

In NSK III, the Court remanded the Commission's likely impact analysis so that the Commission could address two issues. First, the Court rejected the Commission's finding that the domestic industry was vulnerable to the likely adverse effects of subject imports.²³¹ The Court stated that whether "the domestic industry is vulnerable to increased volumes of subject imports or simply responding to other market forces is an appropriate inquiry for the ITC to perform on remand."²³²

The Court also instructed the Commission to perform a more detailed analysis of the role of non-subject imports in the U.S. market.²³³ In NSK III, the Court stated that it had previously "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.'"²³⁴ The Court found that the Commission failed to do so, primarily because the Commission had mistakenly concluded it was expected to apply the "replacement/likely replacement" analysis first discussed in Bratsk.

²²⁸ USITC Pub. 3876 at 48-49.

²²⁹ USITC Pub. 3876 at 48-49.

²³⁰ See CD at 66-68; see also RCD at 44-68.

²³¹ NSK III at 26-28

²³² NSK III at 28.

²³³ NSK III at 12-21.

²³⁴ Id.

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Accordingly, the Court stated that, on remand, the Commission must “reevaluate whether the revocation of the antidumping duty orders would be likely to lead to continuation or recurrence of material injury to the domestic industry, given the significant presence of non-subject imports in the domestic market.”²³⁵ More specifically, the Court stated that the Commission failed to thoroughly consider whether the “subject imports are more than a mere minimal or tangential cause of injury in light of the significant presence of non-subject imports in the domestic market.”²³⁶

In its analysis, the Court provided several specific critiques of the Commission’s non-subject import analysis, stating that it hoped “to give further guidance to the {Commission} in preparing its new remand results.”²³⁷ The Court first explained that it could not “reasonably discern how the ITC concluded that subject imports are more than a mere minimal or tangential cause of likely injury to the domestic industry, especially when most of the non-subject imports’ market share increases occurred at the expense of the domestic industry.”²³⁸ Noting that the Commission focused on market share trends for the subject and non-subject imports during the period of review, the Court also stated that the Commission “fail{ed} to explain why the period from 2000 to 2005 {was} most indicative of trends in the subject imports’ market share, especially when a more broad analysis that covers market share fluctuations over the life of the antidumping order seems most logical.”²³⁹ The Court further noted that “the {Commission} acknowledges, albeit in a footnote, that non-subject imports are certain to deleteriously affect the domestic market,” but then failed to address this issue in its analysis.²⁴⁰ The

²³⁵ NSK III at 6.

²³⁶ NSK III at 19.

²³⁷ NSK III at 15

²³⁸ NSK III at 16.

²³⁹ NSK III at 16.

²⁴⁰ NSK III at 16-17.

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Court also questioned why the Commission had focused on historical market share trends, given that the trends did not explain why the subject imports played more than a minor role in causing likely continuing or recurring injury to the domestic industry.²⁴¹ The Court noted that the Commission failed “to explain [how] subject producers would be able to drop prices to the levels required to capture market share from the non-subject imports.”²⁴²

Finally, the Court stated that the Commission’s findings on whether the subject imports were likely to be more than a minimal or tangential cause of likely injury were “problematic” for two reasons.²⁴³ First, the Court observed, “[the Commission] presumes, without providing any evidence to support its claim, that the subject imports will be in a position to compete successfully against non-subject imports once the antidumping order is removed.”²⁴⁴ Second, the Court stated that the Commission failed to directly address the issue of non-subject import underselling, noting that it sidestepped the issue with unpersuasive reasoning.²⁴⁵

2. *The Parties’ Arguments*

JTEKT’s Arguments. The Japanese producers JTEKT Corporation and Koyo Corporation (“JTEKT”) argue that, when analyzed properly, the subject imports are likely to be, at most, a minimal or tangential cause of likely future injury to the domestic industry.²⁴⁶ JTEKT contends that the single biggest change in the market since imposition of the orders is the significant growth in non-subject

²⁴¹ NSK III at 17-18.

²⁴² NSK III at 18.

²⁴³ NSK III at 18.

²⁴⁴ NSK III at 18.

²⁴⁵ NSK III at 19.

²⁴⁶ JTEKT Remand Comments at 3.

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imports,²⁴⁷ and that the record shows that this growth has come at the expense of both the domestic and subject bearings.²⁴⁸ JTEKT emphasizes that the increase in market share by non-subject imports occurred primarily at the expense of the domestic industry, indicating that non-subject imports are far more likely than subject imports to cause injury to the domestic industry within a reasonably foreseeable time.²⁴⁹ With non-subject imports serving as the most significant factor impacting the domestic industry, JTEKT states the subject imports would likely be a minimal or tangential cause of likely injury to the domestic industry, because they would have tremendous difficulty dislodging nonsubject imports from their dominant position in the U.S. market.²⁵⁰

JTEKT also argues that the record shows that the non-subject producers have more excess capacity than the subject producers, thus indicating that they are far more likely to increase their shipments to the U.S. market than the subject producers.²⁵¹ It also argues that the non-subject producers are “strongly export-oriented,” with 48 percent of their shipments being made for export.²⁵² JTEKT also notes that the non-subject producers can shift exports between markets quickly, and that they are likely to compete aggressively with the subject imports to maintain their market share if the orders are revoked.²⁵³

Finally, JTEKT argues that the pricing data reveal that subject import prices would have to

²⁴⁷ JTEKT Remand Comments at 4.

²⁴⁸ JTEKT Remand Comments at 5.

²⁴⁹ JTEKT Remand Comments at 5.

²⁵⁰ JTEKT Remand Comments at 6.

²⁵¹ JTEKT Remand Comments at 7.

²⁵² JTEKT Remand Comments at 8.

²⁵³ JTEKT Remand Comments at 8.

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decline to “unrealistically low levels” to recapture market share from nonsubject imports.²⁵⁴ NSK contends that the non-subject imports undersell the subject imports at significant levels, generally in the range of *** percent.”²⁵⁵ According to JTEKT, to undersell the non-subject imports, the prices of the subject imports would have to drop well below their variable costs of production, which is an irrational economic decision.²⁵⁶ JTEKT also argues that the subject producers are unlikely to do so because they are operating at high capacity utilization rates, and the subject producers have facilities in the United States at which they are producing bearings. JTEKT contends that, given these considerations, the subject producers have no reason to jeopardize their U.S. business by lowering the price of subject imports to very low levels.²⁵⁷

Timken’s Arguments. Timken argues that the subject imports are likely to be a more than minimal or tangential cause of injury to the industry should the orders be revoked.²⁵⁸ Timken argues that the record shows that, during the period of review, the subject imports increased at the same rate as non-subject imports, even with the orders in place.²⁵⁹ Without the orders in place, Timken explains, subject imports would likely increase even more rapidly than non-subject imports.²⁶⁰

Timken also argues that the subject imports would be able to drop to the pricing levels necessary to compete with non-subject imports if the orders are revoked.²⁶¹ Timken points out that, during the

²⁵⁴ JTEKT Remand Comments at 9.

²⁵⁵ JTEKT Remand Comments at 10.

²⁵⁶ JTEKT Remand Comments at 11-12.

²⁵⁷ JTEKT Remand Comments at 13-14.

²⁵⁸ Timken Remand Comments at 3.

²⁵⁹ Timken Remand Comments at 3.

²⁶⁰ Timken Remand Comments at 3.

²⁶¹ Timken Remand Comments at 4.

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original investigations, the subject imports undersold the domestic like product at margins that were very comparable to those exhibited by the non-subject imports when underselling the domestic product during the period of review.²⁶² Timken states that the underselling margins for the subject imports during the original investigations ranged up to 64 to 87 percent for the subject countries,²⁶³ and that the highest underselling margins for the non-subject imports against the domestic merchandise ranged from 55.2 to 77.0 percent.²⁶⁴ Timken also emphasizes that the subject imports undersold the domestic like product in a larger percentage of instances than the non-subject imports did during the period of investigation.²⁶⁵ Given this, Timken argues, the pricing behavior of the subject producers during the original period of investigation indicates that the subject imports will also likely have significant price effects on revocation of the orders.²⁶⁶ Finally, Timken cites the statements of a number of purchasers and importers indicating that purchasers would turn to the subject imports if the orders were revoked.²⁶⁷

3. Analysis

We have considered the Court's remand instructions and the relevant record evidence concerning the industry's vulnerability and the role of non-subject imports in the market. Having reviewed the record evidence on these issues in detail, we again determine that revocation of the antidumping duty orders covering imports of the subject ball bearings from Japan and the United Kingdom, when cumulated with the other subject countries, will result in the recurrence or continuation of material injury to the domestic bearings industry.

²⁶² Timken Remand Comments at 3-4.

²⁶³ Timken Remand Comments at 4.

²⁶⁴ Timken Remand Comments at 4-5.

²⁶⁵ Timken Remand Comments at 5.

²⁶⁶ Timken Remand Comments at 6.

²⁶⁷ Timken Remand Comments at 6-7.

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In doing so, we again find that the industry is in a vulnerable condition and is therefore susceptible to material injury from the cumulated subject imports if the orders covering the cumulated subject imports are revoked. We also find that the record establishes that the subject imports are likely to be more than a minimal or tangential cause of material injury to the domestic industry if the orders are revoked, even after taking into account the significant presence of non-subject imports in the market during the period of review. We discuss these issues below.

a. The Domestic Industry Is Vulnerable

We first determine that the domestic industry was in a weakened condition at the end of the period of review and therefore vulnerable to likely material injury from the cumulated subject imports if the orders covering these imports are revoked. We discussed our specific findings on this issue in our analysis of the discernible adverse impact of imports from the United Kingdom, and we incorporate our analysis in that discussion in full here.

As can be seen from that discussion, we find that the domestic industry engaged in a significant restructuring process over the period of review and this restructuring process resulted in a significant reduction of its production capacity. Moreover, we note that the domestic industry's capacity reductions resulted in the depression of the domestic industry's capacity, production, shipment, and sales to some extent. Nonetheless, the record also shows that the domestic industry's restructuring efforts did not improve the condition of the domestic industry during the period. On the contrary, the record shows that, even after its restructuring efforts, the domestic industry continued to experience significant declines in capacity utilization, productivity, profitability, and market share levels over the course of the period and saw its cost structure continue to erode. Moreover, the domestic industry was, in many key respects, in a weaker and more vulnerable condition at the end of the second period of review than it was at any time since the beginning of the original period of investigation. Furthermore, since the significant declines in

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the domestic industry's capacity, production, shipments, and sales did not result in an improvement of the domestic industry's condition, we also find the declines in these factors support a finding that the domestic industry was in a weakened state.

We therefore find the domestic industry was in a vulnerable condition that made it susceptible to the likelihood of material injury by reason of the subject imports should the orders on the cumulated subject imports be revoked.

b. The Subject Imports Are Likely To Be More Than a Minimal or Tangential Cause of Material Injury to the Industry

Having found the domestic industry to be in a vulnerable condition, we turn to the Court's instruction that we more thoroughly address the "significant presence of non-subject imports in the domestic market" and whether, in light of this presence, "subject imports are more than a mere minimal or tangential factor in the material injury to the domestic industry that is likely to continue or recur in the absence of the antidumping duty order."²⁶⁸ Having reviewed the Court's instructions on this issue as well as the pertinent record evidence, we find that the record establishes that, notwithstanding the significant presence of low-priced, non-subject imports in the U.S. market, the subject imports are likely to be more than a minimal or tangential factor in the material injury to the domestic industry that is likely to continue or recur upon revocation of the orders.

It is a fundamental principle that the Commission is not to weigh causes of injury when assessing whether the subject imports have caused, or are likely to cause, material injury to a domestic industry.²⁶⁹

²⁶⁸ NSK III at 29.

²⁶⁹ Statement of Administrative Action, Trade Agreements Act of 1979 ("SAA"), S. Rep. 96-249 at 75 (July 1979)(the Commission "is not to weigh causes" in its injury analysis); Taiwan Semiconductor Industry v. United States, 23 CIT 410, 416, 59 F. Supp.2d 1324, 1330 (1999)(the "'by reason of standard' is consistent with a requirement not to weigh causes contributing to overall injury")

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In this regard, this Court and the Federal Circuit have consistently stated that the Commission need not determine that the subject imports are the sole, principal, or even major cause of material injury or likely injury to an industry.²⁷⁰ Even if non-subject imports or some other factors are likely to cause material injury to the domestic industry upon revocation of an order, subject imports can also be a cause of such injury to the domestic industry, as long as they represent more than a minimal or tangential cause of the material injury that is likely to be suffered by the industry upon revocation.²⁷¹ As a result, if the record shows that subject imports are likely to be more than a minimal or tangential contributor to the injury that will likely continue or recur upon revocation, the Commission may issue an affirmative injury or likely injury finding, even if the non-subject imports or some other factor are likely to be a more significant cause of injury to the domestic industry upon revocation of the order.²⁷²

Further, the statute directs the Commission to assess whether the subject imports are likely to cause material injury to the domestic industry upon revocation of an order, which requires a counterfactual and prospective assessment of the likelihood of injury to the domestic industry in the

²⁷⁰ See, e.g., NSK III at 7 (the Commission “need not determine that the subject merchandise is the ‘sole or principal cause of injury.’”) (quoting NSK I, 593 F. Supp. 2d at 1365); Nippon Steel Corp. v. United States, 345 F.3d 1379, 1381 (Fed. Cir. 2003) (the dumped imports “need not be the sole or principal cause of injury. As long as its effects are not merely incidental, tangential, or trivial, the foreign {like} product meets the causation requirement.”); Celanese Chems. Ltd., v. United States, 2007 Ct. Int’l. Trade LEXIS 35 at *19 (there is no “need to show that subject imports are the sole, or even the major, cause of injury”)

²⁷¹ SAA at 885 (factors other than subject imports may be causing injury to the industry but “also may 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”).

²⁷² Taiwan Semiconductor Industry v. United States, 59 F. Supp. 2d at 1330-1331 (the Commission needs to establish that “the subject imports themselves made a material contribution to the overall injury” of the industry; the fact “that injurious effects from other sources may be greater than the effect of the subject imports is not determinative {of the causation issue}, so long as the Commission reasonably finds that the subject imports contribution to the overall harm is material”).

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future. 19 U.S.C. §1675(c) & 1675a(a)(1).²⁷³ Specifically, under the statute, the Commission must analyze the “likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked.” 19 U.S.C. § 1675a(a)(1). Accordingly, in a sunset review, the “Commission must decide the likely impact in the reasonably foreseeable future of an important change in the status quo – the revocation of an order . . . and the elimination of the restraining effects of that order . . . on volumes and prices of imports.”²⁷⁴ This process requires the Commission to “engage in a counter-factual analysis” that assesses what will happen upon revocation of an order, since this results in the “elimination of its restraining effects on volumes and prices of imports.”²⁷⁵

Moreover, because the likelihood of continuation or recurrence of material injury standard is prospective in nature, “a separate determination regarding current material injury is not necessary.”²⁷⁶ In other words, while the Commission may consider “current and likely continued depressed shipment levels and current and likely continued prices for the domestic like product” as part of its sunset analysis, it need not determine whether subject imports or some other source of injury have been causing material injury to the domestic industry during the period of review covered by the sunset review.²⁷⁷ Instead, the primary issue for the Commission to resolve in a sunset reviews is whether the subject imports are likely

²⁷³ The statute provides that, in a sunset review, the Commission must assess “whether revocation of the countervailing or antidumping duty order . . . would be likely to lead to continuation or recurrence of . . . material injury.” 19 U.S.C. § 1675(c)(1).

²⁷⁴ SAA at 883.

²⁷⁵ SAA at 884.

²⁷⁶ SAA at 884.

²⁷⁷ Consolidated Fibers, 571 F. Supp. 2d at 1365 (in a sunset review, the “Commission’s task is therefore to determine whether revocation of the antidumping duty orders would likely result in the recurrence or continuation of material injury by reason of the subject imports within a reasonably foreseeable time, not to determine whether the subject imports significantly contributed to the decline of the domestic industry during the POR) (emphasis added).

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to cause material injury to the domestic industry in the reasonably foreseeable future should the antidumping order be revoked.

With these principles in mind, we find that the subject imports are likely to be a “substantial factor in the cause of injury to the domestic industry, rather than some secondary, ‘merely incidental, tangential, or trivial’ factor,” upon revocation of the orders.²⁷⁸ In coming to this conclusion, we acknowledge that the non-subject imports have become a significant and price-competitive factor in the ball bearings market. The record shows that the market share of the non-subject imports has grown considerably since the orders were imposed in 1989, increasing from a level of 5.2 percent in 1987, the last year of the original period of investigation, to 23.6 percent in 2005, the last year of the period of review.²⁷⁹ The record also shows that this growth in the market share of the non-subject imports has come at the expense of both the domestic like products and the subject imports during this period. Specifically, since the issuance of the orders, the market share of the non-subject imports increased by 18.4 percentage points, but the market share of the domestic industry has declined by 10.2 percentage points²⁸⁰ and the market share of the subject imports has declined by 5.8 percentage points.²⁸¹ Given

²⁷⁸ NSK III at 7. In NSK III, the Court expressed its concern that the Commission had focused on the period from 2000 to 2005 as being “most indicative of trends in the subject imports’ market share, especially when a more broad analysis that covers market share fluctuations over the life of the antidumping duty order seems more logical.” Id. at 16. In this remand, the Commission has examined market share trends for the subject and non-subject imports for the entire period since the orders were imposed.

²⁷⁹ CR at Table BB-I-1 & C-2.

²⁸⁰ The domestic industry’s market share declined from 73.4 percent in 1987 to 63.2 percent in 2005. CR at Table BB-I-1 & C-2.

²⁸¹ The market share of subject imports declined from 20.0 percent in 1987 to 13.2 percent in 2005. CR at Table BB-I-1 & C-2 (excluding data for Singapore). Commissioner Lane notes that she cumulated imports from Singapore with the other subject imports in her analysis but again finds that the inclusion of data for this country does not significantly change trends in import volumes during the period of review.

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this, after the imposition of the orders, the non-subject imports obtained significant amounts of market share from the domestic industry and the subject imports.

The record also shows that the non-subject imports have become a significant factor with respect to price competition in the market. During the second period of review, non-subject imports undersold the domestic like product in 66.0 percent of possible price comparisons at margins ranging from 1.9 percent to 77.0 percent.²⁸² The non-subject imports also undersold the subject imports in 72.0 percent of possible price comparisons, at margins ranging from 3.1 percent to 89.9 percent.²⁸³ Additionally, several domestic producers reported that non-subject imports affected both their pricing in the market and their decisions relating to restructuring during the period of review.²⁸⁴ Given these considerations, we find that the significant and growing volumes of non-subject imports have become a significant competitive factor in the market, and have contributed to the declines in the industry's condition since the orders were first imposed in 1989.

Nonetheless, we also find that the subject imports have remained a significant factor in the price-competitiveness of the market, even with the volume- and price-restraining effects of the orders in place. In coming to this conclusion, we note that the orders have had some restraining effect on the volumes of the subject imports, as one would expect.²⁸⁵ For example, after the orders were put in place in 1989, the subject imports lost 6.8 percentage points of market share, with their market share level falling from 20.0 percent in 1987 to 13.2 percent in 2005, for an overall decline of one-third of their market share since the

²⁸² RSR at Table III-15.

²⁸³ RSR at Table III-15.

²⁸⁴ See, e.g., CR at BB-V-5 to V-6 & Table BB-I-13.

²⁸⁵ In this regard, the SAA indicates that an order can be presumed to have "restraining effects on volumes and prices of imports." SAA at 883-884.

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orders were imposed.²⁸⁶

The orders also had a restraining effect on the pricing practices of the subject imports. For example, during the original period of investigation, the subject imports undersold the domestic product in 67.3 percent of all price comparisons, and had a simple average underselling margin of 34.0 percent.²⁸⁷ During the second period of review, however, the subject imports undersold the domestic producers in only 54.0 percent of the available price comparisons, and had an average underselling margin of 27.3 percent.²⁸⁸ Given these changes in the underselling patterns of the subject imports, we find that the orders had a restraining effect on the frequency and level of underselling by the subject imports during the period of review.²⁸⁹

Nonetheless, even with the restraining effects of the orders in place, the subject imports have remained a substantial and price-competitive factor in the market. For example, despite the declines in their market share level after the orders were put in place, the subject imports retained a significant

²⁸⁶ CR at Tables BB-I-1 & C-2 (excluding Singapore).

²⁸⁷ Second Remand Table A-1, Appendix A. The subject imports undersold the domestic products in 409 of 608 instances, or 67.3 percent of all price comparisons. *Id.*

²⁸⁸ Second Remand Table A-1, Appendix A. The subject imports undersold the domestic products during the period of review in 207 of 383 comparisons, for a rate of 54.0 percent. *Id.*

²⁸⁹ We would add that our finding on this score is consistent with Commerce's dumping findings, which show that the dumping margins for the cumulated subject imports have generally declined since the orders were imposed in 1989. Compare CR at Table BB-I-2 with Tables BB-I-3-BB-I-8. In its final determination in its less than fair value investigations for ball bearings, Commerce announced final margins for individual and "all other" subject producers at rates that generally ranged between 21.36 and 155.57 percent. CR at Tables BB-I-2 (the only exception was a margin of 2.55 for the Japanese producer Nippon Pillow Block). Moreover, the large majority of these margins were higher than 40 percent. CR at Tables BB-I-2 (18 of 24 announced margins in the investigation were higher than 18 percent). In subsequent annual administrative reviews, however, the dumping margins announced by Commerce have generally been considerably lower, with the majority of the margins being below 20 percent. CR at Tables BB-I-3-I-8 (Commerce's announced annual review margins were below 20 percent in 350 of 458 instances, or 76.4 percent of all announced margins, since imposition of the orders).

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market share throughout the second period of review.²⁹⁰ In particular, their share of the market has ranged between 11.5 and 14.2 percent during the first and second periods of review.²⁹¹ Moreover, although their market share declined between 1997, the first year of the first period of review, and 2002, the second year of the Commission's second period of review, the subject imports have been able to increase their share of the market over the final three years of that period, with their market share growing from 11.5 percent in 2002 to 13.2 percent in 2005.²⁹² In fact, the market share of the subject imports of 13.2 percent in 2005 was fully 55.9 percent of the market share of non-subject imports in that year. Given these considerations, we find that the volume of the subject imports has remained significant, even with the restraining effects of the orders in place.

The subject imports have also remained a price-competitive factor in the market. The large majority of purchasers reported that subject imports were generally priced lower than the domestic bearings during the second period of review, with 34 of 43 responding purchasers stating that U.S. prices were higher than prices for the subject imports from France, Germany, Italy, Japan and the United Kingdom.²⁹³ Similarly, our price comparison data for the second period of review, while limited, nonetheless still indicates that the subject imports undersold domestic bearings in a majority of the available price comparisons.²⁹⁴ Given these data, we find that the subject imports have remained a significant and price-competitive presence in the market, even with the orders in place.

²⁹⁰ CR at Tables BB-I-1 & C-2.

²⁹¹ CR at Tables BB-I-1 & C-2 (excluding Singapore). The market share of the subject imports ranged between 14.1 and 14.2 percent during the first period of review, and ranged between 11.5 and 13.2 percent during the second period of review. *Id.*

²⁹² CR at Tables BB-I-1 & C-2 (excluding Singapore)

²⁹³ CR at BB-V-7.

²⁹⁴ CR at Table BB-V-2.

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Having found that the subject imports were a significant and price-competitive factor in the market during the period of review, we now turn to the issue of whether the subject imports are likely to be more than a minimal or tangential cause of injury to the domestic industry upon revocation of the orders covering the cumulated subject imports. After reviewing the record evidence, we find that the subject imports are likely to be more than a minimal or tangential cause of injury to the industry in the reasonably foreseeable future if the orders were revoked, and therefore determine that it is likely that the subject imports will have a significant material impact on the domestic industry upon revocation of the orders.

In coming to this conclusion, we first find the subject imports are likely to “be in a position to compete successfully against non-subject imports” and the domestic like products if the antidumping duty orders were to be revoked.²⁹⁵ First, the record shows the subject imports are substitutable with respect to both the domestic products and the non-subject imports.²⁹⁶ In particular, 70 of 77 responding purchasers, 44 of 64 responding producers, and 81 of 125 importers reported that the subject imports were “always” or “frequently” interchangeable with the domestic like product.²⁹⁷ Similarly, 24 of 26 purchasers, 40 of 55 U.S. producers, and 46 of 73 importers reported that the subject imports were “always” or “frequently” interchangeable with non-subject imports.²⁹⁸ Given this, we find that the subject imports are significantly substitutable with domestic and non-subject bearings.

Moreover, other record evidence indicates the subject imports will be able to compete successfully against both the domestic and non-subject bearings in the market upon revocation of the

²⁹⁵ See NSK III at 18.

²⁹⁶ We note that the Court affirmed the Commission’s finding concerning the high degree of substitutability between the subject and domestic bearings in NSK I. NSK I at 25-27.

²⁹⁷ CR at Table BB-II-4.

²⁹⁸ NSK I at 17-18; CR at Table BB-II-4.

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orders. During the second period of review, the subject imports from the cumulated countries were sold, in custom or standard form, to every major end-use category in the OEM and aftermarket segments of the market.²⁹⁹ Moreover, the subject imports were sold through both distribution channels making up the bearings market, that is, through the end user/OEM sales channel and through the distributor/aftermarket sales channel.³⁰⁰ Furthermore, the record shows that the subject imports have maintained a significant presence in the market since imposition of the orders,³⁰¹ indicating not only that they retain a significant interest in the U.S. market, but also that they maintain significant marketing and sales operations that can be used to take advantage of the revocation of the orders. Finally, the subject producers are export-oriented and rank among the largest ball bearing exporters in the world.³⁰² Since the subject producers have demonstrated that they have both the ability to export significant volumes of a wide variety of ball bearings to the United States and have a continued interest in doing so, we find that it is likely that they will take advantage of the favorable export opportunity presented by the revocation of the existing orders to increase their shipments of bearings to the United States in the reasonably foreseeable future.

We also find that other evidence indicates that the subject imports are likely to ship significant additional volumes of bearings to the United States upon revocation of the orders. For example, the

²⁹⁹ CR at Table BB-I-10 & BB-I-40 (chart on customs and standard sales).

³⁰⁰ CR at Table BB-I-11.

³⁰¹ CR at Table BB-I-1. As discussed above, the market share of the subject imports was 14.1 or 14.2 percent in the first reviews and ranged between 11.5 and 13.2 percent in the second review period. Id.

³⁰² CD at 63-64. In terms of global exports, for example, Japan was the largest exporter in the world, Germany the second largest, Italy the fourth largest, France the fifth largest, and the United Kingdom the tenth largest exporter in the world in 2004. CR at Table BB-IV-11. In 2004, when global BB exports amounted to \$ 8.1 billion, Japan exported approximately \$ 1.340 billion worth of bearings, Germany exported \$ 1.018 billion worth of bearings, Italy exported \$ 703.5 million worth of bearings, France exported \$ 692.9 million worth of bearings, and the United Kingdom exported \$ 223.370 million worth of bearings. Id. By way of comparison, the United States exported \$429.1 million worth of bearings in 2004. Id.

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subject producers have the ability to increase their exports to the United States significantly if the orders were revoked. The subject producers had substantial excess capacity throughout the second period of review, with available capacity of *** million bearings in 2005, the final year of the period,³⁰³ which was approximately equivalent to *** percent of apparent U.S. consumption in 2005.³⁰⁴ Thus, even though many of the subject producers in the cumulated countries were operating at high capacity utilization rates during the final years of the period or review,³⁰⁵ they still retained sufficient capacity to ship very significant additional volumes of bearings to the United States upon revocation of the orders. Given their continued significant interest in the U.S. market, their export-orientation and the fact that the U.S. market remains an attractive one for exporters as a result of its size and pricing levels,³⁰⁶ we find it likely that the subject producers will use their significant amounts of available capacity to increase

³⁰³ CR at Tables BB-IV-4-BB-IV-7 & Table BB-IV-9. The subject producers had excess capacity of *** million bearings in 2000, *** million bearings in 2001, *** million bearings in 2002, *** million bearings in 2003, and *** million bearings in 2004. *Id.*

³⁰⁴ Apparent consumption in the U.S. market was 816.0 million ball bearings in 2005. CR at Table C-2.

³⁰⁵ CR at Tables BB-IV-4-IV-BB-IV-7 & Table BB-IV-9. Furthermore, although the subject producers in Italy, Japan, and the United Kingdom were operating at high capacity utilization rates in the final years of the period, the record shows that the subject producers in those countries were able to produce at levels above full reported capacity. *Id.* For example, in 2001, the Italian producers operated at a level of *** percent of reported capacity, and the Japanese producers operated at a level of *** percent of reported capacity in 2000. CR at Tables BB-IV-6 & BB-IV-7. The record also shows that, in value terms, the subject producers were able to increase their total exports and their export shipments to the United States considerably, even while operating at high capacity levels. For example, the Japanese producers increased the value of their total exports and their exports to the United States in both 2004 and 2005, even though they were operating at a capacity utilization rate of *** percent in both years. CR at Table BB-IV-6.

³⁰⁶ CD at 63-64. The Court affirmed the Commission's findings on these issues in NSK I. NSK I at 32-33.

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significantly their exports to the United States upon revocation of the orders.³⁰⁷

Moreover, we find that existing conditions of competition in the market indicate that the subject imports are likely to compete more aggressively on price with the domestic and non-subject bearings in the market in order to recapture market share if the orders are revoked.³⁰⁸ Specifically, as we noted, there is a significant degree of substitutability among the domestic bearings, the subject imports, and non-subject imports.³⁰⁹ As the Court stated in NSK I, the record establishes that price is an “essential factor in purchas{e} decisions” in the market³¹⁰ and that “demand is not expected to increase dramatically within the foreseeable future.”³¹¹ Thus, as the Court also stated in NSK I, “there is a strong likelihood that competitive pricing will be a significant factor in purchasing decisions.”³¹² Given these conditions of competition, it is likely that competitive pricing will be a significant factor for purchasers when they assess whether to purchase the subject, non-subject, or domestic bearings in the future. Accordingly, we find that these conditions indicate that subject imports would have a strong incentive to compete more aggressively against the domestic bearings and non-subject imports, should the orders be revoked.³¹³

³⁰⁷ In this regard, we note that the Court has already affirmed our finding that the subject imports are likely to ship significant volumes of bearings to the United States upon revocation of the orders. NSK I at 28-31.

³⁰⁸ See NSK III at 26 (the Commission must assess on remand whether “the subject imports will be in a position to compete successfully against non-subject imports once the antidumping duty order is removed.”)

³⁰⁹ CR at Table BB-II-4.

³¹⁰ NSK I at 24-25, 34-35 & 37-38. See also CR at Table BB-II-1 & BB-II-5.

³¹¹ NSK I at 38.

³¹² NSK I at 38. As the Court noted in NSK I, the “more substitutable a product, the more likely {it is that} price will play a significant role in purchasing” when purchasers are choosing between various suppliers. NSK I at 35.

³¹³ See NSK I at 37-38.

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Moreover, the pricing data on the record demonstrate that the subject imports will be able to compete successfully with both the domestic and non-subject bearings upon revocation of the orders.³¹⁴ Subject imports have generally been priced lower than domestic bearings during the second period of review, with a majority of purchasers reporting that the domestic bearings were generally priced higher than subject imports.³¹⁵ The price comparison data for the review, while limited, also shows that subject imports undersold domestic product in a majority of instances.³¹⁶ In other words, the record indicates that the subject imports were able to compete closely on price with the domestic like product during the second period of review, even with the price-restraining effects of the orders in place.

The record also indicates that, if the orders are revoked, the cumulated subject imports are likely to become more aggressive on price when competing with the domestic bearings. Subject imports undersold the domestic like products more frequently and more significantly during the original period of investigation than this second period of review. During the second period of review, the subject imports undersold the domestic like products in 54.0 percent of price comparisons,³¹⁷ at an average underselling margin of 27.3 percent during the period from 2000 to 2005. During the original period of investigation, however, the subject imports undersold the domestic like product in 67.3 percent of comparisons, at an average underselling margin of 34.0 percent.³¹⁸ We conclude that revocation of the orders is likely to

³¹⁴ NSK III at 18.

³¹⁵ CR at BB-V-7.

³¹⁶ CR at Table BB-V-2.

³¹⁷ Second Remand Table A-1, Appendix A. The subject imports undersold the domestic products in 207 of 383 comparisons. Id.

³¹⁸ Second Remand Table A-1, Appendix A. The subject imports undersold the domestic products in 409 of 608 instances. Id. The record shows even more pronounced differences for three of the five cumulated countries, Japan, France, and Germany. During the original period of investigation, German imports undersold domestic product in 70.5 percent comparisons, but undersold domestic product in only 39.2 percent of comparisons in the second review period. During the original period of investigation, French imports undersold domestic product in 62.9 percent of price comparisons, but

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result in the more aggressive underselling patterns exhibited by the subject imports during the period of investigation.

The record also indicates the subject imports are likely to compete successfully on price with the non-subject imports if the orders covering the cumulated imports are revoked. For example, the subject imports undersold the domestic like products as frequently and as significantly during the original period of investigation as did the non-subject imports during the second period of review. During the original period of investigation, subject imports undersold domestic product in 67.3 percent of comparisons, at an average underselling margin of 34.0 percent,³¹⁹ with margins ranging up to 87 percent.³²⁰ By way of comparison, during the second period of review, non-subject imports undersold domestic product in 66.0 percent of comparisons, at an average underselling margin of 35.8 percent,³²¹ with margins ranging up to 83.4 percent.³²² We find that these data establish that the subject imports have the ability to undersell the domestic like products as frequently and significantly as the non-subject imports did during the second period of review. Accordingly, we conclude that, at a minimum, the subject imports have the ability and the propensity to meet the non-subject imports on price when competing for sales with the domestic like products.

undersold domestic product in no comparisons in the second review period. The Japanese imports undersold domestic product in 74.7 percent of comparisons during the original period of investigation, but undersold domestic product in 50.5 percent of comparisons in the second review period.

³¹⁹ Second Remand Table A-1, Appendix A. As previously indicated, during the second period of review, subject imports undersold the domestic bearings in 54.0 percent of price comparisons and at an average margin of 27.3 percent.

³²⁰ FSR at A-191-A-194. The highest margin for Germany was 86 percent, for France 87 percent, for Italy 76 percent, for Japan 83 percent and for the United Kingdom 64 percent. Id.

³²¹ Second Remand Table A-2, Appendix A.

³²² RSR at Table III-15.

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In this same vein, we do not agree with JTEKT's theory that the subject producers are unlikely to reduce their prices to the levels needed to undersell the non-subject imports in order to re-capture market share from them.³²³ According to JTEKT, subject imports would need to reduce their prices by 40 to 50 percent to undersell the non-subject bearings; JTEKT claims this approach would be irrational because it allegedly requires the subject producers to price their products below their variable costs.³²⁴ JTEKT's argument has several significant flaws. First, JTEKT's theory is contradicted by the record evidence showing that, even with the disciplining effects of the orders in place, the subject imports are already underselling non-subject imports in a significant number of instances and are doing so at significant levels.³²⁵ Thus, the subject imports have already demonstrated that they have the ability to deeply undersell the non-subject imports, even with the orders in place. As a result, we conclude that revocation of the orders would enable the subject imports to increase their underselling of both the domestic and non-subject imports.

³²³ JTEKT Second Remand Comments at 11-13.

³²⁴ JTEKT Second Remand Comments at 11-12. Although JTEKT's argument fails for the reasons stated in the text, it is also worth noting that it mistakenly relies on the assumption that the variable cost structure of the subject producers is the same as that of the domestic industry. As JTEKT itself concedes, this is not an accurate way of calculating the variable cost structure of the subject producers, but is instead "inherently inexact." *Id.* at 12, n.36. Moreover, JTEKT's theory is at odds with the record evidence that the domestic products were often able to undersell non-subject imports during the period of review, despite their existing variable cost structure. RSR at Table III-15 (showing non-subject imports overselling domestic product at margins ranging from 1.1 to 485.7 percent in 32 of 94 price comparisons). Finally, JTEKT's theory overlooks the fact that, if all producers share the same basic variable cost structure, then the non-subject producers, particularly those in more developed countries like Canada and Korea, should not be able to undersell the domestic and subject bearings at the significant levels seen during the period of review. If the subject and non-subject producers share the same or similar cost structures, and this cost structure stops the subject imports from underselling at the non-subject levels of underselling, then the non-subject imports from developed countries should not be underselling at those levels either.

³²⁵ RSR at Table III-15 (showing subject imports being oversold by (i.e. being lower-priced than) non-subject imports in 40 of 143 instances at overselling margins ranging between 2.7 percent and 275.8 percent).

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Second, JTEKT's theory ignores the fact that the non-subject imports did not undersell the subject imports by 40 to 50 percent underselling margins in every single instance of underselling. Although non-subject imports undersold the subject imports in two-thirds of possible price comparisons, the price comparison data show that the margins of underselling by non-subject imports of subject imports varied during 2004 and 2005, ranging from 1.9 percent to 89.9 percent over the period of review.³²⁶ Thus, it is not necessary for the subject imports to reduce their prices by 40 to 50 percent on every sale in order to begin competing successfully with them for market share. Instead, the subject imports will be able to compete on price with non-subject imports in many instances by reducing their prices by as little as 10 or 20 percent upon revocation of the orders. Finally, JTEKT's argument is mistakenly based on the premise that the Commission needs to establish that the subject imports will take significant market share from the non-subject imports.³²⁷ Under the statute, our obligation is to assess whether the subject imports are likely to have a significant impact on the domestic industry upon revocation, not whether the subject imports will take market share from the non-subject imports, or otherwise adversely affect them. 19 U.S.C. § 1675a(a)(1)(2), (3) & (4).³²⁸

In this regard, we find that revocation of the orders will likely cause the subject imports to have a more significant impact on the pricing and market share of the domestic industry than on the prices and market share of the non-subject imports. The non-subject imports are currently priced lowest-priced

³²⁶ RSR at Table III-15. For example, the price comparison data show that, in 9.7 percent of the instances of underselling of subject imports by non-subject imports, the non-subject imports undersold the subject imports by margins ranging between 0.1 and 20 percent. In an additional 13.6 percent of instances, the non-subject imports undersold the subject imports at margins ranging from 20 to 30 percent. Finally, in 16.5 percent of instances, the non-subject imports undersold the subject imports at margins ranging from 30 to 40 percent. RSR at Tables III-11-III-15.

³²⁷ JTEKT Second Remand Comments at 11.

³²⁸ 19 U.S.C. § 1675a(a)(1)(2), (3) & (4).

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products in the market, with the non-subject imports underselling domestic bearings in 66 percent of comparisons and underselling the subject imports in 72 percent of comparisons.³²⁹ Because the non-subject imports are priced lower than either the domestic or subject bearings,³³⁰ the more significant levels of underselling by the subject imports that are likely to occur upon revocation will make the subject imports more attractive to purchasers of domestic bearings than to purchasers of non-subject imports that are priced significantly lower.

In other words, once the orders are revoked and the subject imports will resume a more aggressive pattern of underselling, it is likely that they will thereby take market share primarily from the domestic industry rather than the non-subject imports, given that the non-subject imports are priced lower than the domestic bearings or the subject imports. This situation will force the domestic producers to yield market share to subject imports or reduce their prices in order to meet the prices of the subject imports and retain their market share. In either case, the subject imports are likely to be more than a minimal or tangential cause of the injury to the domestic industry because revocation of the order will result in the domestic industry losing significant additional amounts of market share or reducing their prices significantly to maintain their existing market share.

In coming to this conclusion, we have considered JTEKT's argument that the large volumes of non-subject imports will act as a "bulwark" that will prevent the subject imports from significantly increasing their import volumes into the United States upon revocation of the orders. We do not agree that this is the case. We again acknowledge that the non-subject imports are currently occupying a larger

³²⁹ See RSR at Table III-15.

³³⁰ Id.

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share of the market than the subject imports,³³¹ and are currently underselling both domestic and subject bearings in a significant majority of price comparisons.³³² Nonetheless, the record also establishes that the non-subject imports have not been able to prevent the cumulated subject imports from maintaining a significant and price-competitive presence in the market, even with the disciplining effects of the orders in place. In our view, this indicates that the non-subject imports are not likely to prevent the cumulated subject imports from increasing their presence in the market to levels that will have a significant adverse impact on the pricing and condition of the domestic industry, once the disciplining effects of the orders are revoked.³³³

Finally, we disagree with JTEKT's contention that a negative determination is warranted because the record indicates that the non-subject imports are likely to be the "predominant" source of injury to the industry in the future. Even if the non-subject imports were to remain the "predominant" or "primary" source of injury to the industry, the Commission is not to weigh the causes of injury when assessing whether the subject imports are likely to be a cause of material injury to the industry.³³⁴ Instead, as this

³³¹ CR at Table BB-I-1 (showing non-subject imports occupying 23.6 percent of the market in 2005, as compared to a market share of 13.2 percent for the subject imports).

³³² RSR at Table III-15.

³³³ JTEKT also argues that the record shows that the non-subject producers have more excess capacity than the subject producers, thus indicating that they are far more likely to increase their shipments to the U.S. market than the subject producers. JTEKT Remand Comments at 9. We have already explained in detail why we have placed limited weight on the data concerning non-subject producers' capacity levels and why the data does not indicate that there is likely to be a sudden influx of non-subject imports after revocation. RCD at 64-65 & nn. 282 & 283. We incorporate that analysis here.

³³⁴ See, e.g., NSK III at 7 (the Commission "need not determine that the subject merchandise is the 'sole or principal cause of injury.'") (quoting NSK I, 593 F. Supp. 2d at 1365); Nippon Steel, 345 F.3d at 1381 (the dumped imports "need not be the sole or principal cause of injury. As long as its effects are not merely incidental, tangential, or trivial, the foreign like product meets the causation requirement.").

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Court stated in NSK III,³³⁵ the Commission need only establish that the subject imports are more than a minimal or tangential cause of injury to the industry, even with the significant presence of non-subject imports in the market.

Here, the record shows that the subject imports remain well-suited to compete more aggressively on price with both the domestic and nonsubject bearings, that the subject producers are export-oriented, and that they have significant available capacity that can be used to increase their exports to the United States. The producers in the subject countries are amongst the largest exporting countries in the world, *and the U.S. market remains an attractive one for exporters.*³³⁶ The record also shows that the subject imports are substitutable to a significant degree with both the domestic and non-subject bearings, and are therefore likely to be able to compete at competitive pricing levels with the domestic and non-subject imports. In other words, the record shows that the subject imports are both “well-suited” to compete more aggressively on price in order to increase their market share levels in the United States, and that they are likely to do so should the orders be revoked. For all of the above reasons, we find that subject imports are likely to be more than a minimal or tangential factor with respect to the material injury to the domestic industry that is likely to continue or recur in the absence of the antidumping duty order, notwithstanding the significant presence of non-subject imports in the U.S. market.

III. CONCLUSION

Accordingly, we again 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.

³³⁵ NSK III at 7.

³³⁶ See NSK I at 19 & 32-33.

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APPENDIX A

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Second Remand Table A-1

Ball bearings: Number of instances of under/(over selling) and average margins of underselling, by subject country, for the original and second review investigations

	Original Investigations				Second review investigations			
	Underselling			Overselling	Underselling			Overselling
	Instances	Percent of total instances	Average margin	Instances	Instances	Percent of total instances	Average margin	Instances
France	56	62.9	44.2	33	0	0	-	10
Germany	74	70.5	34.3	31	31	39.2	49.8	48
Italy	48	59.3	24.6	33	35	62.5	20.6	21
Japan	180	74.7	34.2	61	96	50.5	26.3	94
UK	51	55.4	30.4	41	45	93.8	19.3	3
Total	409	67.3	34.0	199	207	54.0	27.3	176

Source: FSR at tables 39-48. CR at tables H-1-H-19, Appendix H.

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Second Remand Table A-2

Ball bearings: Number of instances of under/(over selling) and average margins of underselling by nonsubject countries vs. domestic product in the remand investigations (2004-05)

	Underselling		Overselling	Average margin of underselling
	Instances	percent of instances	Instances	Percent
Canada	2	14.3	12	3.9
China	18	100	0	65.7
Korea	14	82.4	3	26.4
All others	28	62.2	17	23.6
Total	62	66.0	32	35.8

Source: RSR at tables III-1-III-15.

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Second Remand Table A-3

Ball bearings: Number of instances of under/(over selling) and average margins of underselling by nonsubject countries vs. subject countries in the remand investigations (2004-05)

	Underselling		Overselling	Average margin of underselling
	Instances	percent of instances	Instances	Percent
Canada	14	40.0	21	26.3
China	12	100	0	70.9
Korea	37	94.9	2	48.9
All others	39	69.6	17	35.9
Total	102	71.8	40	43.4

Source: RSR at tables III-1-III-15.

