U.S. Customs and Border Protection

Slip Op. 10–132

FAG HOLDING CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Before: Nicholas Tsoucalas,: Senior Judge:
Court No. 06–00325

[Granting Defendant's Motion to Dismiss for Failure to State a Claim]

Dated: December 8, 2010

Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP (*Max F. Schutzman, Andrew Thomas Schutz, Ned Herman Marshak, and Robert Fleming Seely*) for the plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Alexander J. Vanderweide*); Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Beth Brotman*), of counsel, for the defendant.

OPINION

Tsoucalas, Senior Judge

Introduction

Plaintiff FAG Holding Corporation brings this action pursuant to § 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514 (2006),[1] challenging the liquidation of two entries by the United States Customs Service.[2] *See* Summons. Currently pending is Defendant United States' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, filed according to Rule 12(b)(5) of the Rules of the United States Court of International Trade. *See* Mem. in Supp. of Def.'s Mot. to Dismiss ("Def.'s Mot. to Dismiss") at 1. For the reasons that follow, the Court finds in favor of Defendant and accordingly dismisses Plaintiff's Complaint.

[1] All references to statutes herein are to the 2006 edition of the United States Code. Similarly, all citations to regulations are to the 2010 edition of the Code of Federal Regulations.

[2] The United States Customs Service is now U.S. Customs and Border Protection and is herein referred to as "Customs."

Jurisdiction

Jurisdiction lies under 28 U.S.C. § 1581(a) and 19 U.S.C. § 1514(a)(3) and (5).

Standard of Review

Dismissal for failure to state a claim upon which relief can be granted is appropriate only when a complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. __, __, 129 S.Ct. 1937, 1949 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).[3] In order to avoid dismissal under Rule 12(b)(5), the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 550 U.S. at 555 (internal citations omitted).

Background

The entries at issue, which were subject to an antidumping duty order by the United States Department of Commerce ("Commerce"), were imported into the United States from Canada on April 20 and 21, 1992. *See* Entry No. 331–3884817–2 and Entry No. 331–3886959–0; *see also Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 20,900 (Dep't Commerce May 15, 1989) (the "Order"). After arrival, the merchandise was released under a special permit for immediate delivery. *See* subject entries. Corresponding entry summaries were filed with Customs on May 4 and 5, 1992. *See id.* Customs liquidated the subject entries on December 21, 2001, at an assessed antidumping duty rate of 25.62% *ad valorem*. *See id.*; Compl. ¶ 15.

In accordance with the provisions of § 1514, Plaintiff protested the liquidation of the subject entries, which Customs subsequently denied on March 28, 2006. *See* Compl. ¶¶ 16, 17. Plaintiff then timely filed a summons with this Court on September 25, 2006, seeking reliquidation on the ground that, under 19 U.S.C. § 1504(d), the subject entries were deemed liquidated by operation of law years prior to the 2001 liquidation date. *See id.* ¶¶ 1, 19. Defendant now moves to dismiss Plaintiff's Complaint arguing that it contains insufficient facts to plausibly support its claim. *See* Def.'s Mot. to Dismiss at 2, 6. Defendant posits that Plaintiff has incorrectly calculated the date of entry and that this suit is baseless because the subject

[3] USCIT Rule 12(b)(5) is directly parallel to Fed. R. Civ. P. 12(b)(6), which was the subject of *Iqbal* and *Twombly*.

entries were entered under a special permit for immediate delivery and liquidated before deemed liquidation would have occurred under § 1504(d). *See id.* at 4, 6.

Analysis

"Liquidation" is the final ascertainment of duties and other issues involved in an entry. *See* 19 C.F.R. § 159.1. Under ordinary circumstances, Customs has up to one year from the "date of entry" in which to effect liquidation. *See* § 1504(a); 19 C.F.R. § 159.11. However, in order to preserve the rights of the parties in certain situations, liquidation may be suspended by court order or during an administrative review of an antidumping duty order. *See* 19 C.F.R. § 159.12(a)(2); *see also* 19 U.S.C. § 1673b(d)(2). Once such review is completed, Commerce provides notice that the suspension has been removed and § 1504(d) directs that Customs has six months in which to liquidate the entry. If Customs fails to do so, the unliquidated entry is deemed liquidated by operation of law at the rate of duty asserted by the importer in the entry documentation. *See* § 1504(d).

The Federal Circuit has held that a valid claim of liquidation by operation of law under § 1504(d) must satisfy the following elements: (1) the suspension of liquidation formerly in place was terminated; (2) Customs was notified that such suspension was removed; and (3) notwithstanding such notice, Customs failed to liquidate the entry within six months. *See Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002). First, the Court must ascertain when the six-month period began to run. In order to do so, the Court must first determine the date which suspension of the subject entries was terminated under the first element. This determination is contingent on which administrative period was under review at the time. Ascertaining the controlling period of review, in turn, relies on the "date of entry," as defined by the regulations. Therefore, establishing the correct date of entry is a critical link in the chain of the components in a claim for deemed liquidation. Depending on the date of entry asserted in a complaint, such a claim might not be factually "plausible." *Iqbal*, 129 S.Ct. at 1949.

Plaintiff's argument rests on the assumption that the date of entry for the subject merchandise was April 20 and 21, 1992. *See* Compl. ¶ 6 (the subject merchandise was "entered into the United States for consumption on April 20 and April 21, 1992"). Consequently, Plaintiff asserts that liquidation of the subject merchandise was suspended under the administrative review of the Order covering May 1, 1991,

through April 30, 1992 (the "91–92 Review").[4] Under this line of reasoning, Commerce's promulgation of the amended final results on April 16, 1998, served as the requisite notice to Customs, commencing the six-month period for liquidation. *See* Compl. ¶¶ 11–12. Accordingly, Plaintiff maintains that Customs's actual liquidation was beyond the six-month deadline to liquidate any entries subject to the 91–92 Review, thus rendering Customs's December 21, 2001, liquidation "null and void." *Id.* ¶¶ 13–15. As a result, Plaintiff concludes that the entries were deemed liquidated on October 16, 1998, at 3.9% *ad valorem*, the duty rate asserted by Plaintiff in the entry documentation. *See id.* ¶¶ 13, 16.

Although Plaintiff's allegations superficially satisfy the elements of § 1504(d), the Complaint is not supported by plausible facts and thus fails as a matter of law. Determining the plausibility of a claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct at 1950 (internal citation omitted). A complaint does not exist in a vacuum but rather must be congruent with the truth of what actually occurred. Here, the best reflection of what occurred is found in the physical entry documents for Entry No. 331–3884817–2 and Entry No. 331–3886959–0, which are central to these claims.[5]

Since the entry documents show that the subject entries were imported pursuant to a special permit for immediate delivery, reference to the Customs regulations is illuminating in determining the date of entry. *See generally* 19 C.F.R. §§ 142.21–142.29; *see also* 19 U.S.C. § 1448(b). Customs defines "entry" not as the arrival of a

[4] Although Commerce published the conclusion of this review on July 26, 1993, *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order*, 58 Fed. Reg. 39,729 (Dep't Commerce July 26, 1993), the final results were subsequently litigated, prolonging suspension of liquidation for the subject entries until the Court rendered its final determination in *Federal-Mogul Corp. v. United States*, 20 CIT 1438, 950 F.Supp. 1179 (1996). Amended final results of the 91–92 Review were published in the *Federal Register* on April 16, 1998. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof*, 63 Fed. Reg. 18,877 (Dep't Commerce Apr. 16,1998) (amended final results).

[5] Normally, when considering a motion to dismiss, the court is limited to the facts alleged on the face of a complaint and documents incorporated by reference or appended thereto. *See Globe Metallurgical Inc. v. United States*, 31 CIT 1722, 1723, 530 F.Supp. 2d 1343, 1345 (2007). However, any matters integral to a claim or upon which it is based may be considered without converting it to summary judgment under USCIT Rule 12(d). *See Int'l Audio text Network v. Am. Tel. & Tel. Co.*, 62 F.3d 69 (2nd Cir. 1995).

In contrast, Plaintiff attaches to its response documents outside the pleadings, invoking USCIT Rule 12(d) for the proposition that the Court is "required to treat defendant's motion as one for summary judgment." Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss at 4. However, it is well-settled that a court retains discretion to exclude matters outside the pleadings and, if such matters are excluded, conversion to summary judgment is not required. *See Carter v. Stanton*, 405 U.S. 669(1972); *Hall v. Bellmon*, 935 F.2d 1106 (10th Cir. 1991).

particular shipment of goods at the port (as it may be considered colloquially), but rather as the formal filing of required documentation in order to secure the release of imported merchandise from Customs's custody and assess the proper amount of duties. *See* 19 C.F.R. § 141.0a(a); *see also Lowa, Ltd. v. United States*, 5 CIT 81, 85–86, 561 F.Supp. 441, 445 (1983) (in Customs usage, the word "entry" is a "term of art"), *aff'd* 724 F.2d 121 (Fed. Cir. 1984). *See generally* U.S. Customs and Border Protection, What Every Member of the Trade Community Should Know About Entry (March 2004).

Goods admitted under the immediate delivery process are released into United States commerce prior to the conclusion of formal entry procedures. In most respects, immediate delivery is similar to ordinary entry, the critical difference being the method of determining the date of entry. Under most entry procedures, the date of entry is usually the date of release. *See* 19 C.F.R. § 141.68. However, this is not the case for entries admitted under immediate delivery, in which case § 141.68(c) directs that "[t]he *time of entry* of merchandise released under the immediate delivery procedure *will be the time the entry summary is filed* in proper form, with estimated duties attached." (emphasis added). Therefore, applying § 141.68(c), the controlling dates of entry are May 4 and 5, 1992—the dates that the entry summaries were filed. The entry summary documents themselves list both the "Entry Date" and "Entry Summary Date" as either May 4 or May 5, accordingly. *See* entry summaries at Box 3, 4.

Plaintiff's argument that the dates of entry were April 20 and 21, 1992, the dates that the subject goods were entered into the United States for consumption or, alternatively, the dates that the subject goods were authorized for release, is squarely at odds with the regulatory language governing these facts. 19 C.F.R. § 142.22(b) provides that merchandise entered under a special permit for immediate delivery is considered to remain in Customs's custody, despite physical release, until the timely filing of an entry summary with duties attached. Thus, read together, § 141.68(c) and § 142.22(b) designate that the time of release and the time of entry are independent events in the immediate delivery context. The regulation cannot reasonably be construed otherwise, nor does Plaintiff cite any authority in support of its interpretation. Applying the standard set forth in *Iqbal* and *Twombly*, the Court cannot establish that Plaintiff's supporting facts plausibly entitle it to relief within this framework.

While all of the factual allegations in a complaint are taken as true in a motion to dismiss, any "[t]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements do not

suffice." *Iqbal*, 129 S.Ct. at 1949–50 (internal citation omitted). Plaintiff's assertion that the dates of entry are April 20 and 21, 1992, is not a fact in dispute, but instead is a "legal conclusion" that, as such, is not entitled to the presumption of truth. *See id.*

The Court's ultimate task is to determine whether Plaintiff is entitled to offer evidence in support of its claim—not whether Plaintiff will prevail on the merits. *See Int'l Custom Prods., Inc. v. United States*, 32 CIT __, __, 549 F.Supp. 2d 1384, 1397 (2008). As a matter of law, there is no "reasonable expectation" that discovery will reveal anything and thus the pleadings do not provide a basis to infer that Plaintiff can plausibly prove its claim in subsequent stages of litigation. *See Totes-Isotoner Corp. v. United States*, 32 CIT __, __, 569 F.Supp. 2d 1315, 1328 (2008) (*citing Twombly*, 550 U.S. at 556), *aff'd*, 594 F.3d 1346 (Fed. Cir. 2010). A deficient claim should be "exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (internal quotation omitted). A dismissal here is consistent with the Court's paramount mandate to secure the just, speedy, and inexpensive determination of every action. *See* USCIT R. 1.

Since the proper dates of entry were May 4 and 5, 1992, the subject entries were encompassed by Commerce's May 1, 1992, through April 30, 1993, period of review (the "92–93 Review") and the subject entries remained suspended until November 16, 2002, when Commerce published its amended final results.[6] Under § 1504(d), Customs had until May 16, 2002, in which to liquidate any entries subject to Commerce's 92–93 Review prior to deemed liquidation by operation of law. Thus, the subject entries were properly liquidated on December 21, 2001, well within the six-month deadline. Therefore, the subject entries were timely liquidated with assessed antidumping duties in full compliance with § 1504(d).

Conclusion

After reviewing the sufficiency of the Complaint, the Court holds that Plaintiff is unable to plausibly plead its claim as a matter of law. Defendant's motion to dismiss under USCIT Rule 12(b)(5) is granted and this action is hereby dismissed.

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[6] Commerce's final determination, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof*, 60 Fed. Reg. 10,900 (Dep't Commerce Feb. 28, 1995), was affirmed by the Court of Appeals in *SKF USA, Inc. v. INA Walzlager Schaeffler KG*, 180 F.3d 1370 (Fed. Cir. 1999). Commerce subsequently published the amended final results in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Germany*, 66 Fed. Reg. 57,704 (Dep't Commerce Nov. 16, 2001) (amended final results).

Dated: December 8, 2010
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 10–133

NSK CORPORATION, et al., Plaintiffs, and FAG ITALIA S.P.A., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 06–00334

[The court sustains in part and remands in part the third remand determination of the U.S. International Trade Commission.]

Dated: December 9, 2010

Crowell & Moring LLP (*Matthew P. Jaffe*, *Robert A. Lipstein*, and *Carrie F. Fletcher*), for Plaintiffs NSK Corporation, NSK Ltd., and NSK Europe Ltd.

Sidley Austin LLP (*Neil R. Ellis* and *Jill Caiazzo*), for Plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Max F. Schutzman* and *Andrew T. Schutz*), for Plaintiff-Intervenors FAG Italia S.p.A., Schaeffler Group USA, Inc., Schaeffler KG, The Barden Corporation (U.K.) Ltd., and The Barden Corporation.

Steptoe & Johnson (*Herbert C. Shelley* and *Alice A. Kipel*), for Plaintiff-Intervenors SKF Aeroengine Bearings UK and SKF USA, Inc.

United States International Trade Commission, *James M. Lyons* (General Counsel), *Neal J. Reynolds* (Assistant General Counsel for Litigation), and *David A.J. Goldfine*, Office of the General Counsel, for Defendant United States.

Stewart and Stewart (*Terence P. Stewart*, *Eric P. Salonen*, *Philip A. Butler*, and *Jumana Madanat Misleh*), for Defendant-Intervenor The Timken Company.

OPINION & ORDER

Barzilay, Judge:

I. Introduction

The U.S. International Trade Commission's ("the Commission") sunset review of antidumping duty orders covering ball bearings from France, Germany, Italy, Japan, and the United Kingdom comes before the court for the fifth time.[1] *See NSK Corp. v. United States*, 34 CIT ___, 712 F. Supp. 2d 1356 (2010) ("*NSK IV*") (affirming in part and remanding in part second remand determination); *NSK Corp. v.*

[1] The court presumes familiarity with the procedural history of the case.

United States, 33 CIT ___, 637 F. Supp. 2d 1311 (2009) (“*NSK III*”) (remanding first remand determination for agency’s failure to provide substantial evidence and failure to comply with court’s remand instructions); *NSK Corp. v. United States*, 32 CIT ___, 593 F. Supp. 2d 1355 (2008) (“*NSK II* ”) (denying motion for rehearing); *NSK Corp. v. United States*, 32 CIT ___, 577 F. Supp. 2d 1322 (2008) (“*NSK I*”) (affirming in part and remanding in part second sunset review). In its third remand determination now at issue, the agency addresses three questions: (1) whether some incentive likely would draw a discernible amount of United Kingdom ball bearings specifically to the United States in the absence of the antidumping duty order, thereby supporting the Commission’s decision to cumulate the United Kingdom imports with other subject ball bearings;[2] (2) whether the cumulated subject imports likely will have a significant adverse impact on the vulnerable domestic industry in the absence of the antidumping duty orders; and (3) whether the cumulated subject imports likely would constitute more than a minimal or tangential cause of material injury to the domestic industry that likely will continue or recur in the absence of the orders, given the significant presence of, and seemingly impenetrable barrier imposed by, non-subject imports in the United States market. *See generally Views of the Commission on Remand*, Inv. Nos. 731-TA-394-A, 731-TA-399-A (Aug. 25, 2010) (“*Third Remand Determination*”). With its most recent conclusions, the Commission has declined to provide a genuine discussion on complex issues of law and has, thus, foreclosed the opportunity for meaningful judicial review of the latest agency action. *See generally Third Remand Determination*. The Commission again fails to support its determination with substantial evidence and unfortunately continues to mischaracterize the court’s remand instructions. As explained below, the court remands the case to the Commission for further action consistent with this and all previous opinions in this matter.

II. Standard of Review

The Court will not sustain an agency determination “unsupported by substantial evidence on the record.” 19 U.S.C. § 1516a(b)(1)(B)(i). An agency supports its findings with substantial evidence when the record exhibits “more than a mere scintilla” of relevant and reason-

[2] In *NSK IV*, the court did “not believe that the existing record, taken as a whole, c[ould] support an affirmative discernible adverse impact finding” on ball bearings from the United Kingdom and invited the Commission to “reopen the record and obtain additional data on this issue in the next remand proceeding, if it so chooses.” *NSK IV*, 34 CIT at ___, 712 F. Supp. 2d at 1367; *accord id.* at ___, 712 F. Supp. 2d at 1368 (“[T]he Commission may reopen the record and obtain additional data on the issue.”).

able evidence to buttress its conclusion. *See Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). To provide the requisite support, the agency must present more than mere conjecture. *See NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (citation omitted). Though the court does not require perfect explanations from the agency, the path taken by the administrative body "must be reasonably discernible." *Id.* at 1319 (citation omitted). At a minimum, the agency must explain the standards that it applied and rationally connect them to the conclusions it made from the record. *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

III. Discussion

A. Ball Bearings from the United Kingdom

Despite the court's invitation in *NSK IV* to reopen the record, 34 CIT at ___, 712 F. Supp. 2d at 1367–68, the Commission declined to do so in its redetermination of whether ball bearings from the United Kingdom likely would have a discernible adverse impact on the domestic industry in the absence of the antidumping duty order. Status Report and J. Scheduling Order at 2, *NSK Corp. v. United States*, No. 06–00334 (CIT filed May 12, 2010).[3] Nevertheless, the Commission has now chosen not to cumulate the United Kingdom ball bearings with those from the other four subject countries.[4] *Third Remand Determination* at 12. The agency also reasoned that subject imports from the United Kingdom alone likely would not have significant volume or price effects on the domestic industry upon revocation of the order. *Id.* at 13. The Commission in turn found that ball bearings from the United Kingdom likely would not lead to the continuation or recurrence of material injury absent the order. *Id.*

Plaintiffs NSK Corporation, NSK Ltd., and NSK Europe Ltd. (together, "NSK") and Defendant-Intervenor The Timken Company ("Timken") urge the court to affirm the Commission's decisions on

[3] Notwithstanding the court's explicit conclusion to the contrary, the agency later stated that it would not reopen the record because the existing record supported its finding that the United Kingdom imports likely would leave the requisite impact on the industry. *Third Remand Determination* at 2 n.8, 11–12. The court interprets this as a finding that reopening the record would cause no significant change to the relevant body of evidence.

[4] The agency notes that it "would not have made these findings in the absence of the Court's conclusion in *NSK IV* that the record taken as a whole cannot establish that the subject imports from the United Kingdom would likely have a discernible adverse impact upon revocation." *Third Remand Determination* at 12.

United Kingdom ball bearings, though for separate reasons.[5] NSK Comments 2–5; Timken Comments 5–6. NSK argues that the agency could not offer substantial evidence for an affirmative finding on either the discernible adverse impact or likely material injury analysis and, therefore, the Commission reached the correct result. NSK Comments 2–4. NSK also notes that it does not believe that the court compelled the Commission to make a particular finding. NSK Comments 4–5. While it does not explicitly state that it agrees with the agency's view of the court's instructions in *NSK IV*, Timken explains that it "understands" the Commission's conclusion that it had to reverse its position. Timken Comments 6. Timken also shares the Commission's belief that the current record could support an affirmative finding on the discernible adverse impact of United Kingdom ball bearings. Timken Comments 6.

The court sustains the Commission's determination. Ordinarily, the Commission retains the sole discretion as to whether it will reopen the record and make certain factual findings. *Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1382 (Fed. Cir. 2003). That the court may have limited the Commission's options on remand is of no moment; "[e]ven though a reviewing court's decision that substantial evidence does not support a particular finding may have the practical effect of dictating a particular outcome, that is not the same as the court's making its own factual finding." *Nucor Corp. v. United States*, 371 F. App'x 83, 90 (Fed. Cir. 2010) (unpublished). As the record presently constituted does not support a decision to cumulate United Kingdom imports and the Commission has declined to reopen the record, the court upholds the agency's negative conclusions on ball bearings from the United Kingdom.

B. The Cumulated Subject Imports

In the context of a sunset review, the Commission assesses whether revocation of the antidumping duty order under review likely would lead to continuation or recurrence of material injury.[6] 19 U.S.C. §

[5] Plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT") take no position on the cumulation issue and instead focus their comments exclusively on the likely impact of subject imports on the domestic industry and the role of non-subject imports in the United States market. JTEKT Comments 4–6 & n.2.

[6] At the heart of this provision lies a causation inquiry, whereby the Commission must determine whether the cumulated subject imports likely would constitute more than a minimal or tangential cause of material injury to the domestic industry that likely will continue or recur in the absence of the orders. *NSK IV*, 34 CIT at ___, 712 F. Supp. 2d at 1367–68; *see NSK II*, 32 CIT at ___, 593 F. Supp. 2d at 1363–67; *Usinor v. United States*, 26 CIT 767, 794–95 (2002) (not reported in F. Supp.); *Neenah Foundry Co. v. United States*, 25 CIT 702, 710–11, 155 F. Supp. 2d 766, 773–74 (2001).

1675a(a)(1). As part of that analysis, the agency examines the likely volume, price effect, and impact of subject imports on the domestic industry. *Id.* The Commission addressed these factors on remand, using only data on the cumulated imports from France, Germany, Italy, and Japan in its analysis. *Third Remand Determination* at 12 n.56, 13–39. The court reviews the elements below.

1. The Conditions of Competition in the United States Market and the Likely Volume and Price Effects of Cumulated Subject Imports

In the *Third Remand Determination*, the agency reassessed the conditions of competition within the domestic industry and the likely volume and price effects of cumulated subject imports. *Id.* at 13–23. The Commission modeled its discussion of these factors after its earlier presentation of the same elements in *NSK I*, basing its conclusions on nearly-identical grounds. *Compare id.* at 13–23, *with NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1338–47. When the court first heard this case, it affirmed the agency's determinations on these issues as supported by substantial evidence, despite reservations about some evidence offered by the Commission. *NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1338–47. NSK raises anew concerns on likely volume and price effects of the subject imports, NSK Comments 10–16, while Timken supports the Commission's current analyses as sufficiently analogous to its previous determinations. Timken Comments 7–13. Although NSK has identified gaps in the agency record that normally would merit further discussion, the court already has concluded that these problems do not undercut the substantial evidence in support of the Commission's conclusions. *NSK I*, 32 CIT at ___, 577 F. Supp. 2d at 1338–47. Moreover, NSK has not shown how the subtraction of United Kingdom imports from the equations alters the agency's previous determinations. For these reasons, the court sustains the Commission's results on these points.

2. Non-Subject Imports, the Likely Significant Adverse Impact of the Cumulated Subject Imports on the Vulnerable Domestic Industry, and the Causation Inquiry

A brief discussion of the structure of the United States ball bearing market will highlight the importance of non-subject imports in this case. Two crucial facts characterize the domestic market: (1) the high degree of substitutability between domestic ball bearings, subject imports, and non-subject imports and (2) the important role of price

in purchase decisions. *Third Remand Determination* at 33, 36; *Views of the Commission on Remand*, Inv. Nos. 731-TA-394-A, 731TA-399-A, at 43 (Jan. 5, 2010) ("*Second Remand Determination* "). Because price plays such a crucial role in the market, it follows that a drop in price for one group i.e., domestic ball bearings, subject imports, or non-subject imports likely will affect the prices at which another group sells the subject merchandise. Therefore, to understand the consequences of price changes in the domestic ball bearing industry, the Commission must focus on the market as a whole and examine the effects of each group on the others.

In *NSK IV*, the court summarized its concerns expressed in earlier opinions over the role of non-subject imports in the United States market. The court noted that "[n]on-subject imports have 'become a significant and price-competitive factor' in the United States ball bearing market, amply increased their market share in terms of value at the expense of domestic and subject ball bearings, and have undersold the domestic like product and subject imports in at least two-thirds of the possible price comparisons." *NSK IV*, 34 CIT at ___, 712 F. Supp. 2d at 1368 (citing *Second Remand Determination* at 69–70). The court explained that "the facts of this case necessitate that the Commission confirm that subject imports likely will reach the requisite level of causation despite the significant presence of, and seemingly impenetrable barrier imposed by, non-subject imports in the United States market." *Id*. at ___, 712 F. Supp. 2d at 1367–68. The court asked the Commission to answer two questions on remand in light of the data on non-subject imports: in the absence of the antidumping duty orders, "whether the cumulated subject imports likely will have a significant adverse impact on the vulnerable domestic industry" and "whether the cumulated subject imports constitute more than a minimal or tangential cause of injury to the domestic industry which will likely continue or recur." *Id.* at ___, 712 F. Supp. 2d at 1367.

In the *Third Remand Determination*, the Commission again has failed to account adequately for the role of non-subject imports when analyzing likely impact and causation. With respect to likely impact, the agency offered two sentences in support of its affirmative determination:

> Upon reviewing the Court's instructions on this issue as well as the pertinent record evidence, we find that revocation of the orders will likely have a significant adverse impact on the vulnerable domestic ball bearing industry. Given our findings on the subject imports' likely significant volume, likely significant underselling and likely significant price effects, the substitut-

> ability between domestic and subject bearings, and the domestic industry's vulnerability, it necessarily follows that revocation of the orders would likely have a significant adverse impact on the domestic industry.

Third Remand Determination at 31. The conspicuous absence of any discussion on the effects of non-subject imports underscores the Commission's refusal to accurately examine the three-part structure of the domestic market. While the Commission might have reached the correct conclusions on likely volume, underselling, and price effects of unrestrained subject imports, *id.*, it ignored the influence of non-subject imports in the market, as NSK and JTEKT also discuss in their comments. NSK Comments 5–16; JTEKT Comments 12–27. On this record, it appears to the court that if subject producers lower the prices of their imports, then the non-subject producers almost certainly will also drop their prices. As a result, the non-subject imports likely would negate any potential significant adverse effect of lower-priced subject imports, thereby preventing the latter from achieving the requisite level of impact. Without more, the court cannot determine whether the cumulated subject imports likely will have a significant adverse impact on the vulnerable domestic industry in the absence of the antidumping duty orders.

On the issue of causation, the Commission correctly framed the question that lies at the heart of the court's remand instructions:

> whether any impediment imposed by the significant presence of low-priced non-subject imports in the U.S. market will likely inhibit the subject imports from capturing additional market share from the domestic industry such that the subject imports are thereby precluded from having a likely significant adverse impact on the condition of the domestic industry if the orders were revoked.

Third Remand Determination at 32. However, despite this cogent articulation, the agency did not offer any meaningful discussion on non-subject imports in its causation analysis or directly address the question posed by the court in its remand instructions. *See id.* at 32–39. Instead, the Commission based its affirmative causation determination on seven grounds: (1) the continued presence of subject imports in the domestic market; (2) the excess capacity of subject producers; (3) the likely return of more aggressive volume and underselling strategies of the subject producers that occurred prior to the imposition of the order; (4) the fungibility between the domestic like product and subject merchandise; (5) the importance of price in

purchase decisions; (6) the inelastic demand of ball bearings; and (7) the likely significant volumes of subject imports in the absence of the order. *Id.* at 32–34. The rationale offered by the Commission fails for many reasons. That subject imports maintain a continued presence in the domestic market does not mean that subject merchandise would achieve the requisite level of causation in the absence of the order. Contrary to the agency's conclusion, unexplained inferences from a continuation of market share, measured either in terms of quantity or value, will not necessarily prove that subject imports likely would cause material injury to the domestic industry. The same holds true for the agency's arguments on excess capacity, fungibility, the importance of price, and inelastic demand, none of which alone can prove cause. The third justification does not consider that changed market conditions, i.e., a large increase in non-subject imports' market share, likely would render past volume and underselling strategies unworkable. Finally, the evidence on likely volumes of subject imports does not pass muster because, as previously explained, it unreasonably narrows its analysis to only certain segments of the domestic market. With each of these justifications, the agency centers its reasoning on the relationship between subject imports and the domestic industry. For the reasons previously explained, "the non-subject imports may prevent the subject imports from achieving the requisite level of causation and, therefore, serve as an impenetrable barrier that precludes the agency from affirmatively finding injury in this sunset review." *NSK IV*, 34 CIT at ___, 712 F. Supp. 2d at 1368. Without a more thorough examination of non-subject imports, the court cannot determine whether the cumulated subject imports constitute more than a minimal or tangential cause of injury to the domestic industry which will likely continue or recur.

In light of the foregoing, the court finds that the record evidence cannot support affirmative significant adverse impact or causation determinations. Consequently, the court concludes that the record cannot support an affirmative finding of material injury. The Commission may reopen the record and obtain additional data on the issue at its discretion.

IV. Conclusion

In the *Third Remand Determination*, the Commission has presented a host of reasons to support its conclusions. The court sustains the agency's decisions dealing with United Kingdom ball bearings. However, amid the myriad of justifications produced by the agency, the court cannot discern the necessary connection between the facts found and the agency's conclusions on likely impact and causation. As

the court stated in *NSK II*, the consideration of interchangeable non-subject imports is an important aspect of the causation analysis. 32 CIT at ___, 593 F. Supp. 2d at 1363–67, 1369 (citing *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867 (Fed Cir. 2008); *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006); *Gerald Metals, Inc. v. United States*, 132 F.3d 716 (Fed. Cir. 1997)). These decisions all stand clearly for the proposition that the agency, in a case of this type, must rationally account for non-subject imports before it may issue an affirmative injury determination. For the foregoing reasons, it is

ORDERED that the court **SUSTAINS IN PART** and **REMANDS IN PART** the Commission's *Third Remand Determination*. More specifically, it is

ORDERED that the court **SUSTAINS** the Commission's decision not to cumulate ball bearings from the United Kingdom with other subject merchandise; it is further

ORDERED that the court **SUSTAINS** the agency's determination that revocation of the antidumping duty order on subject imports from the United Kingdom likely would not lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time; it is further

ORDERED that the court **SUSTAINS** the Commission's conclusions on the conditions of competition within the domestic industry and the likely volume and price effects of cumulated subject imports; it is further

ORDERED that the court **REMANDS** the likely significant adverse impact analysis to the Commission. The agency must determine whether the cumulated subject imports likely will have a significant adverse impact on the vulnerable domestic industry in the absence of the antidumping duty orders. In so doing, the Commission must account for the tripartite nature of the United States ball bearing market and decide whether the interplay and competition between subject imports, non-subject imports, and domestic ball bearings would prevent subject imports from achieving the requisite level of impact. Because the court finds that the existing record, taken as a whole, cannot support an affirmative finding on likely significant adverse impact, the Commission may reopen the record and obtain additional data on the issue; it is further

ORDERED that the court **REMANDS** the causation inquiry to the Commission. The agency must determine whether the cumulated subject imports constitute more than a minimal or tangential cause of injury to the domestic industry that likely will continue or recur in the absence of the antidumping duty orders, given the significant presence of, and seemingly impenetrable barrier imposed by, non-subject imports in the United States market. Once again, the Commission must account for the three-part composition of the domestic

ball bearing market and decide whether the interplay and competition between subject imports, non-subject imports, and domestic ball bearings would prevent subject imports from achieving the requisite level of cause. Because the court concludes that the existing record, taken as a whole, cannot support an affirmative finding on causation, the Commission may reopen the record and obtain additional data on the issue; it is further

ORDERED that, in completing its analysis of the likely significant adverse impact and causation inquiries on remand, the Commission must address the court's concerns over non-subject imports as noted in *NSK IV*, *NSK III*, *NSK II*, and *NSK I*; and it is further

ORDERED that the Commission shall provide a status report to the court by December 20, 2010, that explains whether the agency will re-open the record on the likely significant adverse impact and causation issues. The parties also shall file a joint scheduling order consistent with Court and Chambers rules at that time.

Dated: December 9, 2010
New York, New York

/s/ *Judith M. Barzilay*
JUDITH M. BARZILAY, JUDGE