BEFORE THE UNITED STATES
INTERNATIONAL TRADE COMMISSION

In the Matter of:
Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom
Investigation Nos. 731-TA-391-399 and 303-TA-19 and 20

March 23, 1989

PRE-HEARING BRIEF OF THE FEDERAL TRADE COMMISSION

Federal Trade Commission
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I. Introduction

The International Trade Commission ("ITC" or "Commission") has before it in this case a single company's antidumping and countervailing duty petitions, which address antifriction bearings and parts imported from nine countries.[1] This is the final stage in a process that began a year ago with the filing of these petitions. An affirmative finding by the ITC that imports of bearings sold at "less than fair value" and imports of subsidized bearings are causing material injury to the domestic industries producing bearings will result in issuance of duty orders that will likely burden bearing imports for years to come.

This brief is respectfully submitted by the Federal Trade Commission ("FTC"),[2] which, like the ITC, is an independent regulatory agency of the federal government. The FTC's mission is to protect competition and promote consumer welfare. The FTC is charged with enforcing Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which prohibits, inter alia, unfair methods of competition. In fulfilling its mandate, the FTC seeks to ensure that sound and consistent principles are applied to issues

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[1] The petition covers imports from the Federal Republic of Germany, France, Italy, Japan, Rumania, Singapore, Sweden, Thailand, and the United Kingdom.

[2] Commissioners Azcuenaga and Strenio dissented from the vote to file this brief.

affecting competition, and has intervened in the past before the International Trade Commission toward that goal.[3]

The ITC and FTC, of course, administer different statutes with somewhat different, but related, goals. The antitrust laws protect consumers from unfair trade practices that injure competition; the trade laws protect competitors from unfair foreign trade practices that injure domestic industries. We believe tools of analysis developed to identify domestic unfair trade practices may be usefully applied to international trade matters within the trade laws' statutory framework with beneficial consequences. It is with that goal that we appear in this proceeding and submit this brief for the ITC's consideration.

Important issues in this case include the definition of "like product" and "domestic industry"; resolution of those issues may determine whether the Commission finds injury. Congress has left it to the ITC to give content to those ambiguous terms, and the ITC in the past has relied on a number of factors

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[3] See, e.g., Stainless Steel and Alloy Tool Steel, Inv. No. TA-203-16 (1987); Softwood Lumber Products from Canada, Inv. No. 701-TA-274 (1986); 64K DRAM Components from Japan, Inv. No. 731-TA-270 (1986); Electric Shavers, Inv. No. TA-201-57 (1986); Apple Juice, Inv. TA-201-59 (1986); Nonrubber Footwear, Inv. No. TA-201-55 (1985); Carbon and Certain Alloy Steel Products, Inv. No. TA-201-51 (1984); Certain Canned Tuna Fish, Inv. No. TA-201-53 (1984); Unwrought Copper, Inv. No. TA-201-52 (1984); Color Television Receivers from the Republic of Korea and Taiwan, Inv. No. 731-TA-134, 135 (1983); Certain Steel Products from Belgium, Brazil, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, and the United Kingdom, Inv. Nos. 701-TA-86-87. 92-94, 96-97, 99, 101, 104-105, 107, 109, 117, 119, 121, 123-124, 128 and 138 (1982). The statute governing the ITC in fact calls for cooperation between the ITC and FTC to aid and assist the ITC in its work. See 19 U.S.C. § 1334.

in defining the relevant "domestic industry" on which to focus its investigation. The Commission itself has noted, however, that decisions are reached in an ad hoc manner and, in the preliminary decision in this case, it noted that past decisions have limited precedential value. Common outcomes in similar cases would promote predictability and allow both domestic and foreign businesses to plan their affairs knowing what is and what is not a violation of the law.

The ITC is concerned about the effect of unfair, low-priced imports on domestic industries. Producers may be adversely affected by low-priced imports if the imports are substitutes for their own products. The injury analysis therefore should focus on industries defined to include substitutable products. An injury analysis which focuses on such meaningful markets, using consistent, objective criteria, would be predictable and would be consistent with Congressional intent. The approach we offer for the ITC's consideration would allow the ITC to identify those products that are substitutes for unfairly traded imported products, and to consider whether the domestic industry producing those products is injured.

The Federal Trade Commission has had substantial experience in defining markets for purposes of analyzing mergers, and has refined the tools for defining product markets in merger guidelines and in case law.[4] We suggest that the ITC consider adopt-

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[4] See, e.g., B.F. Goodrich Co., slip op. at 14-16, FTC Docket No. 9159 (March 15, 1988); Hospital Corp. of America, 106 (continued...)

ing an analogous market approach in its determinations of "like product" and "domestic industry." We will discuss in subsequent sections the importance of a consistent approach to industry definition, the FTC's market-based approach, the appropriateness of a similar approach for the ITC, and the experience of the FTC in bearings investigations.[5]

II. THE ITC SHOULD CONSIDER ADOPTING A MARKET APPROACH TO DETERMINING 'LIKE PRODUCT' AND 'DOMESTIC INDUSTRY'

A. Industry Definition Is Central To Injury Determinations

A two-prong test must be met before antidumping or countervailing duties can be imposed. Not only must the Department of Commerce find that foreign merchandise is being (or is likely to be) sold in the United States at "less than fair value" or is "subsidized," but the ITC must also find that an industry in the United States is materially injured, or is threatened with material injury, or that the establishment of an industry in the

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[4](...continued)
F.T.C. 361, 464, 466 (1985); Grand Union Co., 102 F.T.C. 812, 1039-41 (1983); Federal Trade Commission Statement Concerning Horizontal Mergers, 4 Trade Reg. Rep. (CCH) ¶ 13,200 at 20,905-906 (June 14, 1982). See also Justice Department Merger Guidelines ¶¶ 2.11, 2.12, 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,556-557 (1984).

[5] The Federal Trade Commission has substantial expertise with respect to bearings. See, e.g., SKF Industries, Inc., 94 F.T.C. 6 (1979), modified, 96 F.T.C. 752 (1980); Textron Inc., 77 F.T.C. 655 (1970); Bearings, Inc., 64 F.T.C. 373 (1964); The Timken Roller Bearing Co., 58 F.T.C. 98 (1961); American Ball Bearing, 57 F.T.C. 1259 (1960); Federal Mogul, 54 F.T.C. 1628 (1958). The FTC has, in addition, conducted several recent non-public investigations into mergers and joint ventures among companies that produce bearings.

United States is materially retarded by reason of imports of that merchandise.[6]

To make its injury determination, the ITC must first identify the relevant domestic industry. The applicable statute defines the relevant domestic "industry" as:

> the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product.

19 U.S.C. § 1677(4)(A). "Like product," in turn, is defined as:

> a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation.

19 U.S.C. § 1677(10). Petitioners may specify the scope of the imports investigated, but the ITC must define the domestic industry for which it will consider whether those imports have caused injury.

Determination of what product is "like" the allegedly dumped and subsidized imports is one of the most important issues in an injury investigation.[7] The statute fails to elaborate on the

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[6] 19 U.S.C. §§ 1671, 1673.

[7] Although many factors are relevant to the inquiry, the ITC is required to examine: (1) the volume of imports, (2) the effects of the imports on prices in the United States for "like" products, and (3) the impact of the imports on domestic producers of like products, focusing on factors such as output, sales, profits, domestic prices, cash flow, and market shares. 19 U.S.C. § 1677(7)(B)-(C). Former Vice Chairman Calhoun explained several years ago:

> To me, identification and analysis of what domestic product is like the imported article in characteristics and uses, or, in the absence of like, most similar in characteristics and uses with the imported article is one of the critical issues before us in any Title VII

(continued...)

definition of "like product." By simply stating that a "like product" is a product that is "like" the imported article subject to investigation, the statutory language is circular and provides little guidance to the ITC. In that respect, it is somewhat like the "vague and general" language of the antitrust laws.[8] As the Supreme Court said in Brown Shoe Co. v. United States, referring to the antitrust laws, "Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets."[9]

B. Neutral Principles Are Needed To Promote Predictability

In defining "like product" and "domestic industry," the ITC begins with the definition of the imports subject to investiga-

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[7](...continued)
investigation. It is based upon our identification of the like product that we define the industry. Our definition of the industry, in turn, establishes the pool of domestic producers whose health we are to assess.
Truck Trailer Axle-and-Brake Assemblies from Hungary, Inv. No. 731-TA-38 (prelim.), USITC Pub. 1135, 3 ITRD 1261, 1266 (1981) (views of Vice Chairman Calhoun) (emphasis added).

[8] P. Areeda, Antitrust Analysis 5 (1981). The antitrust laws include the Clayton, Sherman, and Federal Trade Commission Acts. The Clayton Act prohibits acquisitions "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18. The Sherman Act prohibits "every contract, combination . . ., or conspiracy, in restraint of trade" and imposes penalties on "every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce." 15 U.S.C. §§ 1-2. The Federal Trade Commission Act declares unlawful "unfair methods of competition in or affecting commerce." 15 U.S.C. § 45.

[9] 370 U.S. 294, 320 (1962).

tion, usually defined in the petition that caused the case to be initiated and in the scope of the investigation initiated by the Department of Commerce. The ITC then examines domestically produced products that are "like" the imports.

Acting ITC Chairman Brunsdale has recognized that the ITC's "like product" determinations could benefit from "greater predictability and transparency."[10] Last year, then Vice Chairman Brunsdale described "the problem faced by one experienced commentator as he reviewed, in apparent bewilderment, a string of Commission like-product decisions":

> A galvanized carbon steel sheet is not "like" an ungalvanized carbon steel sheet, but a galvanized carbon steel wire nail is "like" an ungalvanized carbon steel wire nail. Carbon steel wire rope and stainless steel wire rope are like products, as are galvanized and ungalvanized wire rope, but a porcelain-coated carbon steel cooking pan is not "like" a stainless steel cooking pan -- yet all stainless steel pans are "like products", even though they may be combined with other metals such as copper or aluminum. Carbon steel wire rod and stainless steel wire rod, however, apparently are not "like products." Pipe that is welded is not "like" pipe that is seamless, unless the pipe is used for the oil industry.[11]

Brunsdale noted "the seeming ad hoc nature of the Commission's like product determinations."[12] In the preliminary determination

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[10] Certain All-Terrain Vehicles from Japan, Inv. No. 731-TA-388 (prelim.), USITC Pub. 2071 at 26 (1988) (views of Vice Chairman Brunsdale and Chairman Liebeler).

[11] Id. at 26-27 (quoting Palmeter, Injury Determinations in Antidumping and Countervailing Duty Cases -- A Commentary on U.S. Practice, 21 J. of World Trade Law 7, 15 (1987)).

[12] Id. at 26.

in this case, the Commission said that "even apparently similar investigations . . . have limited precedential value."[13]

While each case must, of course, be decided on its own facts, such an ad hoc approach undercuts predictability.[14] Unpredictability may make complying with the law more difficult for foreigners, and create uncertainty for domestic purchasers of imported goods, as well as for domestic manufacturers who must make business decisions based on what their foreign competitors are likely to do and who may want to bring trade cases challenging foreign practices only when they expect to prevail. Predictability would likely lead to fewer violations of the law. The legislative history of the antidumping and countervailing duty laws reveals that Congress sought to "ensure[] maximum predictability" in enacting the laws.[15]

The way an industry is defined can determine the outcome of the case. Generally, a given volume of imports will have a greater impact on a narrowly defined market. Thus, the more

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[13] Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, Inv. No. 731-TA-391-399 and 303-TA-19 and 20 (prelim.), USITC Pub. 2083 (1988) at 9.

[14] One commentator has said that the only consistency he could find in ITC industry definition decisions is that "[t]he petitioner almost always wins." Palmeter, Injury Determinations, supra, at 16. That characterization recalls Justice Potter Stewart's comment that the sole consistency he could find in a line of antitrust cases was that "the Government always wins," United States v. Von's Grocery Co., 384 U.S. 280, 301 (1965) (Stewart, dissenting), at a time before economic analysis played a major role in antitrust cases.

[15] S. Rep. No. 249, 96th Cong., 1st Sess. 36 (1979).

narrowly the domestic market is defined, the greater is the likelihood that the imports will be found to have caused or to threaten to cause material injury to the domestic industry. On the other hand, in cases such as this bearings case, in which dumping or subsidization allegations are made against products from several countries with small import volumes, the imports of any country may be insufficient to cause material injury or there may be no imports at all of some products from some countries. Those imports will be cumulated, however, if they constitute a single "like product." Thus, broad industry definitions in those circumstances may be more likely to lead to affirmative injury findings and broad duty orders. If no domestic product is exactly like an imported product, a broad definition may also be more likely to result in an affirmative finding since a narrow definition would result in a finding that there is no domestic industry to protect.

A neutral principle would give the ITC's decisions greater consistency and make them more understandable to the domestic and international business communities. Consistency and consequent predictability would likely lead to greater compliance with the trade laws. Whichever way it cuts in any given case -- for or against an affirmative finding -- a market-based approach to defining domestic industries would promote predictability and would be in accord with the goals of the injury test, as explained below.

C. A Market Approach Is Consistent With The Purposes Of The Trade Laws And With Congressional Intent

The trade laws require the ITC to find that a domestic industry, not just a firm, is injured before imposing duties in response to subsidization or dumping. That requirement limits the potential ambit of the law, which might otherwise protect inefficient businesses. It allows domestic consumers to benefit from foreign subsidization and dumping when these acts do not injure an industry as a whole. If a domestic industry is not injured, consumers simply benefit from low-priced goods, regardless of whether the goods are low in price because a foreign government is subsidizing U.S. consumers or because a foreign company dumps its goods in the U.S. market.

When dumped or subsidized imports are sold in this country, purchasers of a variety of alternative products, rather than merely purchasers of goods identical in all characteristics to the imports, may shift their purchases away from their former suppliers and to the importer. Producers who lose sales to the dumped or subsidized imports may be injured by the imports. For this reason, the alternative products should be considered "like" products and the companies producing those alternative products should be included in the domestic industry that the Commission examines for injury. Otherwise the unfair trade practice might not be the cause of injury, and protection that is levied may impose costs on consumers while providing no benefit to those who

are injured.[16] A proper market definition would therefore include substitutes that exert competitive influence on sales of the imports.[17]

This analysis does not require petitioners to prove or the Commission to find that the foreign manufacturers are pricing below marginal cost or that they intend to drive the domestic manufacturers out of business.[18] The statute requires only that domestic competitors are injured. Another statute, the Antidumping Act of 1916, provides for criminal sanctions and treble damages against importers who dump with the intent to destroy or injure a U.S. industry.[19]

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[16] A case brought against blue glass bottles, for instance, which ignores green glass bottles, would lead to improper results. If domestic blue glass bottle producers are unhealthy while domestic green glass bottle producers are healthy, then the unfair blue glass bottle imports are probably not the cause of the domestic problems. Imposition of duties on blue glass bottle imports will lead consumers to switch to green glass bottles, and will not benefit the domestic blue glass bottle producers.

[17] In considering injury issues, the ITC presumes that there is a national geographic market, but may find a regional industry is appropriate. See 19 U.S.C. § 1677(4)(C). Since most markets in which imports are significant are national in geographic scope, this presumption is rational, and does not lead to overinclusion.

[18] The Court of International Trade, in a case addressing causation analysis, made clear that "[i]n applying the antidumping law under which this action is brought it is improper for ITC to place at the center of its causation analysis the intent of a foreign producer." USX Corp. v. United States, 682 F. Supp. 60, 68 (Ct. Int'l Trade 1988). See also Maverick Tube Corp. v. United States, 687 F. Supp. 1569 (Ct. Int'l Trade 1988).

[19] Revenue Act of 1916, ch. 463, §§ 800-806, 39 Stat. 798 (codified at 15 U.S.C. §§ 71-77). See Hiscocks, International Price Discrimination: The Discovery of the Predatory Dumping Act of 1916, 11 Int'l Law. 227 (1977).

The antidumping and countervailing duty laws that the ITC enforce derive from the Antidumping Act of 1921. In that Act, Congress made injury to the U.S. industry, rather than intent, a prerequisite for imposition of antidumping duties.[20] Jacob Viner explained at the time:

> [t]he limitation of dumping duties to dumping which injures or is likely to injure an American industry leaves it open to a wise customs administration to refrain from interfering with all dumping whose benefit to the American consumer is not clearly offset in part at least by an injury, actual or prospective, to American industry.[21]

The current "like product" and "domestic industry" provisions were enacted as part of the Trade Agreements Act of 1979. That statute repealed the Antidumping Act of 1921 and "replace[d] it with a comprehensive statute built upon the 1921 Act," in order to implement the GATT Tokyo Round MTN Codes.[22] The new law made broad procedural changes, adopted an injury requirement in countervailing duty cases, and required that injury be "material,"

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[20] Antidumping Act of 1921, ch. 14, § 201, 42 Stat. 11, formerly codified at 19 U.S.C. § 160-71 (1976), repealed 1979.

[21] J. Viner, Dumping: A Problem in International Trade 263 (1966 reprint). The legislative history of that Act makes clear that the law's purpose was to

> protect[] our industries and labor against a now common species of commercial warfare of dumping goods on our markets at less than cost or home value if necessary until our industries are destroyed, whereupon the dumping ceases and prices are raised at above former levels to recoup dumping losses. By this process while temporarily cheaper prices are had our industries are destroyed after which we more than repay in the exaction of higher prices.

H.R. Rep. No. 1, 67th Cong., 1st Sess. 23-24 (1921).

[22] S. Rep. No. 249, 96th Cong., 1st Sess. 15 (1979).

but otherwise left intact most of the substantive provisions of the 1921 Act.[23]

Two remarks in the legislative history of the 1979 Act suggest that Congress intended the ITC to utilize a market approach to defining "like product." The Senate Finance Committee recognized that under then current law the domestic industry was defined to include producers of articles competitive with the imported articles. The Committee Report states:

> [T]he ITC has generally considered as relevant industries those composed of domestic producer facilities engaged in the production of articles like the imported articles, although it has considered domestic producer facilities engaged in the production of articles which, although not like the imports concerned, are nevertheless competitive with those imports in U.S. markets.[24]

Although Congress used the "like product" language of the GATT codes, it did not intend that the term be interpreted narrowly. The Committee Report states:

> The requirement that a product be "like" the imported article should not be interpreted in such a narrow fashion as to permit minor differences in physical

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[23] S. Rep. No. 249, 96th Cong., 1st Sess. 61, 107 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 59 (1979). In its discussion of the Trade Reform Act of 1974, the Senate Finance Committee explained, "This [1921 Antidumping] Act is not a 'protectionist' statute designed to bar or restrict U.S. imports; rather, it is a statute designed to free U.S. imports from unfair price discrimination practices." S. Rep. No. 1298, 93d Cong., 2d Sess. (1974) at 179. This sentence was cited with approval by Senator Danforth in the debates on the 1979 Act. Cong. Rec. S10317 (daily ed. July 23, 1979). Senator Danforth went on to say that dumped imports are not in the best interest of the United States consumer, since "the long run impact is likely to be higher prices and greater profits for the foreign producers once the domestic competition has been crippled." Id.

[24] S. Rep. No. 249, 96th Cong., 1st Sess. 82, 90-91 (1979) (emphasis added).

characteristics or uses to lead to the conclusion that the product and article are not "like" each other.[25]

Moreover, by using the "characteristics and uses" language in the statute, Congress seems to have required some physical similarity but, at the same time, recognized the importance of commercial interchangeability.[26] A test based on substitutability is

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[25] S. Rep. No. 249, 96th Cong., 1st Sess. 82, 90-91 (1979). Congress, in defining "like product" to include "similar" products and in emphasizing "uses" as well as "characteristics," did not follow the GATT MTN Codes precisely. The codes define "like product" to mean "a product which is identical, i.e. alike in all respects to the product under consideration or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration." Subsidies Code, Art. 6, ¶ 1 n.18; Antidumping Code, Art. 2, ¶ 2. The Finance Committee was apparently aware that some U.S. trading partners were concerned that elements of the 1979 Act did not follow the Codes. S. Rep. No. 249, 96th Cong., 1st Sess. 36 (1979). Section 3(a) of the 1979 Act made clear that if there is a conflict between the statute and the MTN Codes, the 1979 Act prevails. 19 U.S.C. § 2504(a).

[26] See E. Vermulst, Antidumping Law and Practice in the United States and the European Communities at 518-19 (1987); Langer, The Concepts of Like Product and Domestic Industry Under the United States Trade Agreements Act of 1979, 17 G.W.J. Int'l L. & Econ. 495, 500 (1983). Langer argues that Congress used the term "similar" in the antidumping and countervailing duty laws to mean the same thing as "directly competitive" under sections 201 and 406 of the Trade Act of 1974. Section 201, the U.S. escape clause, requires injury to a "domestic industry producing an article like or directly competitive with the imported article." 19 U.S.C. § 2251(b)(1). Section 406 provides a remedy if imports of an article from a communist country, "like or directly competitive with an article produced by [a] domestic industry," are causing market disruption. 19 U.S.C. § 2436(a)(1), (e)(2). "Directly competitive" articles are defined to include "those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes, that is, are adapted to the same uses and are essentially interchangeable therefor." S. Rep. No. 1298, 93d Cong., 2d Sess. 122 (1974). Thus a directly competitive article is defined in terms of being similar in characteristics and uses to the imported product under investigation.

therefore consistent with Congressional intent.

The ITC has struggled with the "like product" language since enactment of the Trade Agreements Act but has never required that products be identical.[27] In fact, the Commission appears to be moving more and more toward an economically meaningful approach to defining "like product" and "domestic industry." Three Commissioners last year took the position that

> [t]he purpose of the Commission's [like product] inquiry is to identify the producers whose goods are most clearly competitive with, and therefore most likely to be adversely affected by, dumped imports. The Commission's like product determination must focus on distinctions between products that have economic consequences, and must be rooted in attention to the nature of the markets for closely competing imported and domestic products.[28]

In recent decisions, the ITC has considered factors suggestive of a market approach, including interchangeability; customer and

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[27] See Portable Electric Nibblers from Switzerland, Inv. No. 731-TA-35 (prelim.), USITC Pub. 1108, 2 ITRD 5460 (1980) ("[t]he concept of likeness does not require exact identity, but it does require that the goods be substantially the same in uses or characteristics"); Truck Trailer Axle-and-Brake Assemblies from Hungary, Inv. No. 731-TA-38 (prelim.), USITC Pub. 1135, 3 ITRD 1261, 1264, n.7 (1981) ("like" does not mean "virtually identical"). The Commission has divided products like those under investigation into separate "like products," but we are not aware of any cases in which the ITC has expanded the product definition to consider competitive products not included in the petitioner's definition. Past cases therefore may have ignored products excluded by the petitioner that would be included in a market-based approach.

[28] Digital Readout Systems and Subassemblies Thereof From Japan, Inv. No. 731-TA-390 (prelim.), USITC Pub. 2081 at 5 (1988) (views of Vice Chairman Brunsdale, Commissioner Cass, and Chairman Liebeler). See also Antifriction Bearings, supra, at n.6; All-Terrain Vehicles, supra, at 23-27 (views of Vice Chairman Brunsdale and Chairman Liebeler); Certain Copier Toner from Japan, Inv. No. 731-TA-373 (prelim.), USITC Pub. 1960 (1987) (views of Vice Chairman Brunsdale and Chairman Liebeler).

producer perceptions of the articles; the similarity (or dissimilarity) of prices for imports and potential like domestic products; channels of distribution; and production processes, common manufacturing equipment, facilities, and production employees.[29] The purpose of this inquiry, as some commissioners have recognized, is "to evaluate overlapping markets in which different products compete."[30]

D. The Proposed Framework

FTC case law and merger guidelines, developed after substantial experience with market definition, provide a framework that could be used to define "domestic industry."[31] Most importantly,

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[29] See, e.g., Mechanical Transfer Presses from Japan, Inv. No. 731-TA-429 (prelim.), USITC Pub. 2160 (1989); Certain Steel Wheels from Brazil, Inv. No. 731-TA-420 (prelim.), USITC Pub. 2124 (1988); Certain Forged Steel Crankshafts from the Federal Republic of Germany and the United Kingdom, Inv. No. 731-TA-351 and 353 (final), USITC Pub. 2014 (1987); 64K Dynamic Random Access Memory Components from Japan, Inv. No. 731-TA-270 (final), USITC Pub. 1862 (1986); Certain Radio Paging and Alerting Devices from Japan, Inv. No. 731-TA-102 (final), USITC Pub. 1410 at 21-25 (1983) (views of Commissioner Stern). See also Asociacion Colombiana de Exportadores v. United States, 693 F. Supp. 1165 (Ct. Int'l Trade 1988); Yuasa-General Battery Corp. v. United States, 661 F. Supp. 1214 (Ct. Int'l Trade 1987). The Commission has not been consistent in relying on these factors and it is not always clear when or why certain of the factors receive special emphasis. In the preliminary determination in this case, for instance, the Commission identified five factors but noted it "may consider other factors which it deems relevant based on the facts of a given investigation," Antifriction Bearings, supra, at 7, and the Commission recently identified eight factors. Mechanical Transfer Presses, supra, at 4.

[30] Digital Readout Systems, supra, at 5 (views of Vice Chairman Brunsdale, Commissioner Cass, and Chairman Liebeler).

[31] Professor Elzinga has noted, "Just like the antitrust agencies, the ITC worries about 'relevant markets' -- though it (continued...)

the FTC recognizes that market definition is based on both demand and supply responses to postulated price changes.

As the Federal Trade Commission explained in one recent decision, measuring demand and supply elasticities would be an ideal approach:

> A relevant product market can . . . be delineated by measuring cross-elasticities of supply and demand; that is, by determining the degree to which -- within a given period of time -- changes in the price of a given product or service will induce changes in the quantities of a second product or service that are demanded or supplied.[32]

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[31](...continued)
avoids the term. As I understand the ITC's nomenclature, it is concerned with the definition of 'like products' and 'domestic industries.' . . . The parallels to antitrust are obvious." Elzinga, Antitrust Policy and Trade Policy -- An Economist's Perspective, 56 Antitrust L.J. 439 (1987). Of course, the Clayton Act similarly talks about "lines of commerce" and "sections of the country" rather than product and geographic markets. See also Note, Economically Meaningful Markets: An Alternative Approach to Defining Like Product and Domestic Industry Under the Trade Agreements Act of 1979, 73 U. Va. L. Rev. 1459 (1987).

[32] B.F. Goodrich Co., slip op. at 15, FTC Docket No. 9159 (March 15, 1988) (citations omitted). The FTC explained further, "Thus, the Supreme Court has concluded that both demand and supply substitutability are relevant to determining the contours of a relevant product market. Consistent with that position, the Commission seeks 'to define a product or group of products sufficiently distinct that buyers could not defeat an attempted exercise of market power on the part of sellers of those products by shifting purchases to still different products.' Similarly, the Justice Department has concluded that a given item constitutes a relevant product if its manufacturer could 'profitably impose a "small but significant and nontransitory" increase in price' -- in most contexts, a five percent increase lasting one year -- without (1) inducing a significant number of buyers to begin purchasing substitute products, or (2) inducing a significant number of manufacturers of other products to begin producing the product at issue." Id. at 15-16.
Own price elasticities, which measure demand sensitivity to changes in a good's own price, are also important measures for
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The ITC might consider an analogous market approach: if a foreign competitor were to charge a below-market price, would buyers switch their purchases to the imported product? If so, affected producers should be included in the domestic industry.

The fact that the ITC currently considers the production process, common manufacturing equipment, facilities and production employees in defining industries properly recognizes that supply-side substitutability as well as demand-side substitutability is relevant to market definition. As Acting Chairman Brunsdale has said:

> From the standpoint of producers, two products are 'like' each other if producers can easily switch from one to the other, e.g., without a substantial new investment or other material change in the production operations. Thus the Commission has often focused on whether the products in question are made by the same

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[32](...continued)
determining the extent of a particular market. When these elasticities are large, demand is relatively sensitive to changes in price. Such behavior indicates that consumers will switch to other products when there is a small price change and, therefore, that good substitutes exist in the marketplace. Cross-elasticities can be used to identify the substitute goods. The Court of International Trade has upheld the use of elasticities in Title VII cases. See, e.g., Maverick Tube Corp., supra, at 1574-75; Alberta Pork Producers' Mktg. Bd. v. United States, 669 F. Supp. 445, 461-65 (Ct. Int'l Trade 1987). For recent discussions of market definition analysis, see Tarr, A Note on Obtaining Estimates of Cross-Elasticities of Demand, FTC Working Paper No. 153 (1987); Scheffman & Spiller, Geographic Market Definition under the U.S. Department of Justice Merger Guidelines, 30 J. Law & Econ. 123 (1987) (noting analysis is also relevant to defining product markets); Stigler & Sherwin, The Extent of the Market, 28 J. Law & Econ. 555 (1985); Relevant Markets in Antitrust, 15 J. Reprints in Antitrust (Elzinga & Rogowsky eds. 1984). For a general overview, see American Bar Association Antitrust Section, Horizontal Merger Law and Policy 89-116 (1986).

> employees using the same equipment in the same facilities.[33]

When direct evidence of elasticities is unavailable, the FTC instead relies upon highly probative evidence of elasticities:

> It is often difficult to measure these effects directly, either by calculating cross-elasticities of supply and demand, or by calculating the degree to which firms within the postulated product market could in fact exercise market power. Surrogates such as distinctive uses or characteristics, industry firm perceptions, and persistent price differences over time may therefore be considered.[34]

The FTC has defined markets on the basis of specific circumstantial evidence:

> With regard to product market definition, we consider such factors as whether the products and services have sufficiently distinctive uses and characteristics; whether industry firms routinely monitor each other's actions and calculate and adjust their own prices (at least in part) on the basis of other firms' prices; the extent to which consumers consider various categories of sellers . . . as substitutes; and whether a sizeable price disparity between the different types of . . .

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[33] Copier Toner, supra, at 25 (views of Vice Chairman Brunsdale and Chairman Liebeler). The ITC currently uses this factor only to distinguish products for which there is no supply substitutability. The ITC might consider broadening the industry definition to include products that are good substitutes in production. Thus, if dumped or subsidized imports of a product may easily induce domestic producers of that product to shift production to some other product, domestic producers of that other product may be injured by the imports, and could be included in the domestic industry. Vertically integrated firms that produce the product for captive consumption might also be included since these firms could decide to both purchase their needs in the market and either sell the product they produce in the market or shift production to an alternative product.

[34] B.F. Goodrich Co., supra, at 16.

> sellers . . . persists over time for equivalent amounts of comparable goods and services.[35]

The ITC could make "like product" and "domestic industry" determinations on the basis of similar factors. Domestic industries could be defined by the degree of substitutability between a product and potential alternatives (whether covered by the investigation or not). Thus the ITC might consider focusing on evidence of buyers' perceptions of the degree to which products are substitutes; historical differences (or similarities) in price movements of the products holding common input prices constant; similarities (or differences) in the products' uses, designs and physical compositions; and evidence of sellers' perceptions of the degree to which the products are substitutes (including whether firms monitor each other's actions). These factors are, of course, similar to those the ITC already considers. Recognizing that the purpose of considering these specific factors is to define economically sound markets, however, is an important step.

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[35] Grand Union Co., 102 F.T.C. 812, 1041 (1983) (emphasis added). See also Hospital Corp. of America, 106 F.T.C. 361, 464, 466 (1985), aff'd, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 107 S. Ct. 1975 (1987); Federal Trade Commission Statement Concerning Horizontal Mergers, 4 Trade Reg. Rep. (CCH) ¶ 13,200 at 20,905-906 (June 14, 1982); Justice Department Merger Guidelines ¶¶ 2.11, 2.12, 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,556-557 (1984).

E. Bearings Industries Distinguished By Roller Element Are Supported By A Market Approach

In the preliminary investigation, the petitioner, Torrington, urged the ITC to adopt a single "like product" definition, including all antifriction bearings other than tapered roller bearings. Torrington argued that, as the petitioner, it has the right to define the scope of the investigation, and that the ITC is bound by that definition to base its determination on the effect of imports on domestic producers of all bearings other than tapered roller bearings. Torrington also urged a single "like product" definition as a factual matter because it claims bearings have the same four characteristics, the same basic manufacturing processes, and are put to the same broad end use. Nevertheless, Torrington would have the ITC exclude tapered roller bearings from its analysis.

The ITC preliminarily rejected petitioner's arguments and found six separate "like products": (1) ball bearings, (2) spherical roller bearings, (3) cylindrical roller bearings, (4) needle roller bearings, (5) plain bearings, and (6) other antifriction devices such as ball screws and linear guides. Each category was defined to include parts and components and housed and mounted bearings.

Dividing bearings into several industries on the basis of the type of rolling element, as the ITC did in its preliminary

determination, appears to be consistent with a market approach.[36] It is in accord with the FTC's findings in a fully litigated matter that "the manufacture of [tapered roller bearings] is a relevant market . . . distinct from markets consisting of other roller bearings or ball bearings" and that the manufacture of ball bearings is a relevant market.[37] The FTC explained:

> TRB [tapered roller bearings] manufacture is sophisticated, expensive, and requires special machinery. TRB have unique performance characteristics and are not sensitive to price changes among other types of bearings. Once a product is designed to require use of TRB, another type of bearing cannot be substituted without effecting basic design changes, an expensive and infrequently undertaken process."[38]

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[36] The Commission was clearly correct in rejecting Torrington's first argument. Industry definitions that make no economic sense and which increase the likelihood of finding injury by including only ailing companies are undesirable. Petitioners can of course define the scope of the imports investigated, but that does not prevent the ITC from defining a domestic industry which is economically sound to consider whether those imports have caused injury. The cases cited in Torrington's own brief make it clear that the Commission has not always followed the petitioner's proposed market definition. See Post-Conference Brief of the Petitioner, the Torrington Company, at 28-48 (April 26, 1988).

[37] SKF Industries, supra, 94 F.T.C. at 40, 78, 86. That decision primarily addresses tapered roller bearings, which were excluded from the petition in this matter. Nevertheless, the principle that it is appropriate to define bearings markets on the basis of rolling element is established by the decision.

[38] 94 F.T.C at 78. A Commission administrative law judge explained the reasoning in more detail:

> Separate technical standards for TRB have been established by industry-wide groups. TRB manufacture, which is much more difficult to accomplish than the production of ball bearings, requires the use of special machinery to control precisely the roller angles and surfaces. TRB is manufactured either in separate plants or on separate machines in the plants which produce other bearings. The manufacturers of TRB are a small, well-defined group, TRB producers respond to

(continued...)

Dividing producers of antifriction bearings into separate industries based on the rolling element is also consistent with more recent FTC staff analyses in nonpublic investigations which similarly identified needle roller bearings and spherical roller bearings as separate markets. In the latter investigation, staff specifically found that naked spherical bearings and unit and split mounted spherical bearings should be in the same market because of ease of supply substitution.

In another investigation, superprecision aircraft bearings of ABEC/RBEC 5 and above[39] were identified by FTC staff as a market on the basis of their use of specialized raw materials, dedicated production facilities, exacting manufacturing process, high quality standards, and lack of demand substitutability. The

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[38](...continued)
competitive initiatives of each other, and do not respond to competition from producers of other bearings. The price of TRB is not sensitive to changes in the prices of other bearings, nor do the prices of other bearings respond to TRB prices. The unique characteristic of TRB -- its ability to withstand thrust and radial load -- has resulted in its use in low speed-high load applications, including various automotive applications such as the front wheel position. In contrast, ball bearings are used in applications in which dual direction load is not a crucial factor. Once a piece of equipment has been designed for TRB, a change to ball bearings or other forms of roller bearings is not feasible.
94 F.T.C. at 40, n. 183.

[39] Quality standards are set by the Annular Bearing Engineers Committee (ABEC) and Roller Bearing Engineers Committee (RBEC) of the Anti-Friction Bearing Manufacturers Association.

ITC should similarly consider distinguishing superprecision bearings.[40]

We suggest that the ITC consider all of the factors discussed in part II.D. of this brief in reaching its final decision. Unless the petitioner can demonstrate significant substitutability, the Commission should uphold its finding that different types of bearings constitute distinct "like products."

Assuming the Commission adheres to its preliminary finding of different "like products," the petitioner, in order to prevail in this matter, must prove -- for each product -- that the domestic industry producing that product is materially injured by reason of imports from the countries under investigation found to have dumped or subsidized that particular product.[41]

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[40] In SKF, the FTC found that there was a single ball bearing market, and refused to distinguish precision ball bearings of ABEC-1 or better quality and commercial grade ball bearings of less than ABEC-1 quality. The FTC noted that the facts before it showed that such bearings typically were manufactured on similar equipment, although manufacture of the former required a greater level of skill than the latter. The FTC said there was little evidence of significant cross-elasticity of demand or price sensitivity among most precision and commercial ball bearings but said there was overlap and potential interchangeability in the range of quality near ABEC-1 and said companies that sell ABEC-1 bearings monitor sales of bearings below ABEC-1 quality. On balance the FTC decided not to divide ball bearings into separate markets but said it would require a stronger showing of anticompetitive effect in considering a merger between companies producing precision and commercial grade ball bearings since the market definition issue was such a close question. 94 F.T.C. at 85-86. Similarly, the ITC might require stronger showings of injury or causation where like product definitions are questionable.

[41] At the preliminary stage, the ITC lacked evidence to analyze each like product, and therefore focused on all bearings and found injury. See 19 U.S.C. § 1677(4)(D). Additional data should be available for the final determination.

III. Conclusion

For the foregoing reasons, the FTC respectfully suggests that the Commission consider adopting a market approach to defining like product and domestic industry.

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