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SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 15 | Number 2

Article 4

Spring 1990

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Recommended Citation

Joseph A. Vicario Jr., *The Anatomy of Antidumping Proceedings: A Case Study of the Antrifraction Bearings Investigations*, 15 N.C. J. INT'L L. & COM. REG. 249 (1990).

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The Anatomy of Antidumping Proceedings: A Case Study of the Antifriction Bearings Investigations

*Joseph A. Vicario, Jr.**

I. Introduction

On May 15, 1989, the Department of Commerce (DOC) issued antidumping duty orders covering imports of certain antifriction bearings (AFBs) from nine different countries.¹ These orders represent the culmination of the administrative process which commenced on March 31, 1988, when the Torrington Company, a subsidiary of Ingersoll-Rand, filed a petition purportedly on behalf of a U.S. industry alleging that certain imports of AFBs were being sold in the United States in violation of the antidumping and countervailing duty laws.² According to the DOC's press release announcing its final determinations, these antidumping proceedings were "the most technical and complex" investigations conducted by the DOC in "several years" with more than twenty-five foreign companies subject to investigation.³

Because of the complexity of these proceedings and the myriad issues involved, the AFBs investigations provide unusual insights into the administration of the U.S. antidumping duty law by the DOC and the International Trade Commission (ITC or Commission). This Article dissects these cases to provide greater insight into the "anatomy" of an antidumping proceeding.⁴ Most of the participants in the AFBs investigations have filed suit in the Court of International Trade challenging the final determinations made by the DOC

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¹ 54 Fed. Reg. 20,900-12 (1989).

² "Petition Requesting Imposition of Antidumping Duties on Imports of Antifriction Bearings (Other Than Taper Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom and Requesting Imposition of Countervailing Duties on the Same Merchandise from Singapore and Thailand," dated March 31, 1988 [hereinafter *Petition*].

³ U.S. DEP'T COM. NEWS, ITA 89-19, Mar. 27, 1989.

⁴ While the petition sought the imposition of both antidumping and countervailing duties, the focus of this Article will be on the antidumping duty aspects of the investigations.

and the ITC;⁵ therefore, conducting a "post-mortem" may be premature. Nevertheless, it is hoped that an autopsy at this time may further understanding of this intricate body of law. The Article is divided into five major sections, each of which corresponds to the major steps in an antidumping investigation: (1) the petition and the initiation of the investigations; (2) the ITC's preliminary injury determination; (3) the DOC's preliminary determination of sales at less than fair value; (4) the DOC's final determination of sales at less than fair value; and (5) the ITC's final material injury determination.

The antidumping duty law is implemented through a bifurcated statutory scheme.⁶ The DOC must determine whether the merchandise imported into the United States is sold at less than fair value (LTFV)⁷ while the ITC must determine whether "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of [LTFV] merchandise."⁸ The bifurcated statutory scheme dictates that the DOC and the ITC conduct portions of their investigations concurrently. For example, at the same time that the DOC is assessing the sufficiency of the petition, the ITC is collecting data for use in its preliminary material injury determination. Also, the ITC initiates its final material injury investigation once the DOC makes an affirmative preliminary determination of LTFV sales.⁹ Although this Article is organized in chronological or-

⁵ See, e.g., *The Torrington Co. v. United States*, No. 89-06-00359; *SKF, USA, Inc. v. United States*, No. 89-06-00330; *Koyo Seiko Co. v. United States*, No. 89-06-00340; *NTN Bearing Co. v. United States*, No. 89-06-00350.

⁶ The applicable statute and regulations are codified at 19 U.S.C. § 1673-1673(i) (1988), and 19 C.F.R. § 207.1-207.51 (1988). The antidumping law was formerly codified in the Antidumping Act of 1921, 19 U.S.C. §§ 160-171 (1928). The Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified at 19 U.S.C. § 2501 (1988)), amended the antidumping statute and recodified it as part of Title VII of the Tariff Act of 1930, as amended. The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1207-08 (codified at 19 U.S.C. § 2901-06 (1988)), made certain changes to the antidumping law which affect antidumping investigations.

⁷ A producer or exporter sells merchandise at less than fair value when the price at which the merchandise is sold in the United States is less than the price at which the merchandise is sold in the home country market, or, if there are insufficient sales in the home country market, the price in a third country market. Sales at less than fair value may also occur in certain circumstances when the price of the merchandise in the United States is less than its cost of production.

⁸ 19 U.S.C. §§ 1671, 1673 (1988). For a general discussion of the ITC's application of the material injury test, see Jameson, *Recent International Trade Commission Practice Regarding the Material Injury Standard: A Critique*, 18 *LAW & POL'Y INT'L BUS.* 517 (1986); Victor, *Injury Determinations by the United States International Trade Commission in Antidumping and Countervailing Duty Proceedings*, 16 *N.Y.U. J. INT'L L. & POL.* 749 (1984). In this Article, the term "material injury" will be used as an abbreviated form of the statutory phrases "material injury," "threat of material injury," or the "retardation of the establishment of an industry."

⁹ For further discussion of the procedures and the statutory filing deadlines, see Vicario, *The Domestic Industry in Antidumping and Countervailing Duty Proceedings Involving Imports of Processed Agricultural Commodities: Legal Fiction Versus Commercial Reality*, 14 *SYR. J. INT'L L. & COM.* 363 (1988).

der consistent with the date of each agency decision under the bifurcated statutory scheme, the reader should not lose sight of the fact that participants in an antidumping investigation are often required to collect data and prepare their cases for both the DOC and the ITC simultaneously.

II. The Petition and the Initiation of the Investigations

On March 31, 1988, the Torrington Company, a subsidiary of Ingersoll-Rand Company, filed a petition on behalf of a domestic industry consisting of "U.S. producers" of certain AFBs. The petition, which totalled 1293 pages, was filed in order "to seek relief from material injury caused by unfair trade practices of trading partners in nine countries."¹⁰ The petitioner alleged that AFBs from Japan, Federal Republic of Germany (FRG), France, Italy, United Kingdom, Sweden, Singapore, Thailand, and Romania were being sold in violation of the U.S. antidumping duty law.¹¹

The AFBs petition raised four key issues that were hotly contested during the course of the investigations. The first issue involved the definition of the domestic industry on whose behalf the petition was filed. According to the petitioner, those producers of AFBs located in the United States and owned by companies based in foreign countries subject to investigation should be excluded from the domestic industry for determining the petitioner's standing to file the petition on behalf of the domestic AFBs industry.¹² In addition, the petitioner asserted that such domestic producers should also be excluded from the domestic AFBs industry for purposes of determining material injury by the ITC.¹³ Thus, in effect, the petitioner would be the only major company that was part of the domestic AFBs industry.¹⁴

The second significant issue raised by the petition was the assertion that the single class or kind¹⁵ of foreign merchandise subject to

¹⁰ Petition, *supra* note 2, at 1.

¹¹ *Id.*

¹² *Id.* at 11. Thus, for example, under the approach advocated by petitioner, INA Bearing Company, Inc. ("INA"), FAG Bearing Corp. ("FAG"), SKF-USA, Inc. ("SKF"), NTN-Bower ("NTN"), and NSK Corporation ("NSK"), all of whom produced AFBs in the United States, would have been excluded from the domestic industry because of their foreign ownership.

¹³ *Id.* at 12.

¹⁴ It should be noted that other U.S. firms, such as Federal Mogul and McGill Manufacturing, produced certain, but not all, of the AFBs under investigation. These companies, however, did not join in the filing of the petition.

¹⁵ Antidumping duties are levied against a "class or kind" of merchandise as to which the DOC and the ITC have made affirmative final LTFV and injury determinations respectively. 19 U.S.C. § 1673 (1988). The antidumping statute provides, in relevant part:

If—

- (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

investigation included all AFBs (other than tapered roller bearings) imported from the nine countries.¹⁶ The petitioner's assertion of a single class or kind of merchandise subject to investigation was closely tied to the third issue of the ITC's definition of the "like product."¹⁷ The petitioner argued that the DOC should define a single class or kind of merchandise and the ITC should find a single like product and define a single domestic industry.¹⁸ The petitioner alleged that there was a single "like product" consisting of all AFBs and parts, finished and unfinished, except tapered roller bearings, and that the domestic industry included only certain companies located in the United States which produce and sell these types of AFBs.¹⁹

The fourth major issue arose over the petitioner's allegation that, for a number of countries, the home market prices of the products subject to investigation were below full cost of production in the relevant home market, requiring the DOC to conduct a cost of production investigation.²⁰ To support its allegation, the petitioner submitted cost of production information premised upon its own U.S. cost experience allegedly modified by an analysis of likely labor, raw material, and other costs in each of the foreign countries identified.²¹

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- (2) the Commission determines that
- (a) an industry in the United States
 - (i) is materially injured, or
 - (ii) is threatened with material injury . . . by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty.

Id. Although, in a strict legal sense, the term "dumped imports" refers to merchandise that the DOC determines was sold at less than fair value, and has caused or threatened material injury to an industry in the United States, the term often is used to refer to sales of LTFV merchandise. While the use of the term in this latter context is technically incorrect, the author acknowledges that use of the term "dumped" imports in this Article may not always be in accordance with its pure legal meaning.

¹⁶ According to the petitioner, included within the scope of the petition and the single class or kind of merchandise were ball bearings, cylindrical roller bearings, spherical roller bearings, spherical plain bearings, needle roller bearings, thrust bearings, tappet bearings and all mounted bearings such as set-screw housed units, bushings, pillow block units, flange, cartridge and take up units and parts of antifriction bearings, including balls, rollers, cages, or retainers, cups, shields, and seals. Petition, *supra* note 2, at 13.

¹⁷ Section 771(4)(A) of the Tariff Act of 1930 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) (1988). "Like product" 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 investigation." *Id.* § 1677(10).

¹⁸ Petition, *supra* note 2, at 3.

¹⁹ *Id.* Petitioner claimed that tapered roller bearings should not be considered the same class or kind of merchandise as other AFBs or as a like product since imports of this specific type of AFBs were already subject to an outstanding antidumping duty order. *See, e.g.*, 41 Fed. Reg. 34,974 (1976).

²⁰ Petition, *supra* note 2, at 100.

²¹ *Id.*

At the initiation stage, a petitioner has a great deal of input regarding the conduct of a dumping investigation because potential targets of the investigation are not permitted to contact the DOC prior to the initiation of an investigation.²² Not surprisingly, in its notice of the initiation of an investigation, the DOC treated the merchandise subject to investigation as a single class or kind of merchandise, and it also initiated investigations to determine whether certain companies in the respective home markets were selling merchandise at prices below the cost of production.²³ Thus, this initiation phase only set the groundwork for these and other significant issues.

III. The ITC's Preliminary Injury Determination

Once the DOC decided to accept the petition, the next major step in the proceedings was the ITC's preliminary injury determination.²⁴ At this stage, the ITC determines whether there is a "reasonable indication" that material injury to a domestic industry exists by reason of the alleged LTFV imports.²⁵ Unlike the DOC's initiation stage of the proceedings, certain respondents named in the petition had an opportunity to participate in the ITC proceedings, and these respondents challenged certain positions taken by Torrington in its petition.²⁶

²² In assessing the sufficiency of a petition, the DOC has a limited ministerial function. See *Republic Steel Co. v. United States*, 544 F. Supp. 901 (1982). The standard for reviewing the sufficiency of a petition was interpreted by the Court of Appeals for the Federal Circuit in *United States v. Roses, Inc.*, 706 F.2d 1563 (Fed. Cir. 1983). The lower court's decision in *Roses* has been relied upon by the DOC as the basis for not entertaining comments or accepting submissions from potential targets prior to the initiation of an investigation. *Roses, Inc. v. United States*, 538 F. Supp. 418, 420-21 (Ct. Int'l Trade 1982) (DOC erred in soliciting information from potential respondents during the 20-day preinvestigation period). See also *Citrosuco Paulista, S.A. v. United States*, 704 F. Supp. 1075, 1084 (Ct. Int'l Trade 1988), *aff'd*, 708 F. Supp. 1333 (Ct. Int'l Trade 1989). In a more recent decision, the Court of International Trade stated unequivocally that "it is inappropriate [for the DOC] to accept submissions by respondents" at the petition sufficiency stage. *Florex v. United States*, 705 F. Supp. 582, 586 (Ct. Int'l Trade 1989). The decision in *Roses*, however, may be followed more in its breach. For example, in the investigations involving Certain Table Wine from Italy and France, 49 Fed. Reg. 6778-79 (1984), consultations took place between E.C. representatives and U.S. government representatives. The Commission of the European Communities submitted a memorandum to the DOC challenging the sufficiency of the petition during the 20 days following the petition's filing and prior to the DOC's decision to initiate the investigation.

²³ 53 Fed. Reg. 15,076 (1988).

²⁴ 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, USITC Pub. 2083, Inv. Nos. 303-TA-19, 303-TA-20, 731-TA-391 to -399 (Preliminary) (May 1988) [hereinafter ITC Preliminary Determination].

²⁵ 19 U.S.C. §§ 1671b(a), 1673b(a) (1988).

²⁶ The ITC's rules provide for the filing of briefs and, if appropriate, the holding of a hearing ("conference") prior to the ITC's preliminary determination. 19 C.F.R. § 207.15 (1989). The conferences are normally held sometime during the week in which the DOC formally initiates an investigation. As part of its preliminary investigations in the AFBs cases, the ITC held a conference, which was presided over by the Commission's Director

During the ITC's preliminary injury determination, the following key issues surfaced: (1) whether the petitioner correctly defined the like product; (2) whether U.S. production companies who were owned by foreign firms should be excluded from the domestic industry for purposes of determining the existence of material injury; and (3) whether cumulation of imports from different sources was appropriate. The manner in which the ITC addressed these issues, as well as other issues in its preliminary determinations, raises certain problems inherent in all preliminary investigations conducted by the Commission.

A. Like Product

To determine whether a "reasonable indication of material injury" exists, the ITC must first define the "like product" and "domestic industry."²⁷ Although the analysis of the like product is made on a case-by-case basis, the ITC considers the following factors: (1) physical appearance, (2) interchangeability of articles, (3) channels of distribution, (4) customer perceptions of the articles, and (5) common manufacturing facilities and production employees.²⁸

In applying the statutory criteria in previous cases, the ITC has looked for clear dividing lines among products and has asserted that "minor variations are an insufficient basis for defining separate like products."²⁹ Specifically, the ITC has attempted to follow congressional intent by interpreting the like product requirement in such a fashion as to permit minor differences in physical characteristics and uses within like products.³⁰ Because the ITC's like product determinations are factually specific, even apparently similar investigations

of the Office of Operations. At the conference, the petitioner had one hour to present its case and a number of respondents were given a total of two hours to present their arguments. After the conference, the parties were permitted to file post-hearing briefs addressing both factual and legal issues.

²⁷ 19 U.S.C. § 1677(7)(B), (7)(C)(iii), (10) (1988). It should be noted that the ITC's definition of the "like product" may be narrower than the DOC's determination as to the "class or kind" of merchandise subject to investigation. Accordingly, it is not that unusual for the ITC to find that there is more than one "like product" within the "class or kind of merchandise" defined by the DOC. See, e.g., Certain Valves, Nozzles, and Connectors of Brass from Italy for Use in Fire Protection Systems, USITC Pub. 1649, Inv. No. 731-TA-165 (Final) at 4-6 (Feb. 1985); Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel and The Netherlands, USITC Pub. 1956, Inv. Nos. 701-TA-275 to -278 and 731-TA-327 to -331 (Final) at 8-13 (Mar. 1987).

²⁸ ITC Preliminary Determination, *supra* note 24, at 6-7 (citing Certain Forged Steel Crankshafts from the Federal Republic of Germany and the United Kingdom, USITC Pub. 2014, Inv. Nos. 731-TA-351, 731-TA-353 (Final) (Sept. 1987); Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers from Italy and Yugoslavia, USITC Pub. 1999, Inv. Nos. 731-TA-342, 731-TA-346 (Final) (Aug. 1987) [hereinafter *Tapered Roller Bearings II*]; 64K Dynamic Random Access Memory Components from Japan, USITC Pub. 1862, Inv. No. 731-TA-270 (Final) (June 1986)).

²⁹ *Id.* at 8 (citing, e.g., Operators for Jalousie and Awning Windows from El Salvador, USITC Pub. 1934, Inv. Nos. 701-TA-272 and 731-TA-319 (Final) at 4, n.4 (Jan. 1987)).

³⁰ *Id.* (citing S. REP. NO. 249, 96th Cong., 1st Sess., 90-91 (1979)).

have limited precedential value, according to the ITC.³¹

The ITC's prior legal analysis of the like product issue is designed to ensure that the Commission has sufficient discretion to address unique factual circumstances that arise on a case-by-case basis. Thus, for example, the Commission has reserved the right to define what constitutes minor variations between two products or clear dividing lines among products. While Commission precedent maximizes the ITC's ability to address the factually grounded like product issue on a case-by-case basis, it is very difficult for counsel to advise clients with any degree of certainty how the ITC will resolve the like product issue in any particular case due to the Commission's unfettered discretion. Since the like product issue is the foundation of the ITC's analysis of the economic performance of the domestic producers of the like product, this uncertainty also forces counsel to develop the facts in order to present a cogent legal and factual argument for its client's like product position.

Torrington's argument that all the items within the scope of the investigations constituted a single like product was based on both legal and factual grounds.³² First, the petitioner insisted that, as a matter of law, the Commission must find only one like product and one domestic industry in every investigation.³³ Second, the petitioner argued, as a factual matter, that all items within the scope of the investigations should be classified as one like product since they have similar characteristics, manufacturing processes, and end uses.³⁴

The ITC rejected the petitioner's legal argument because many ITC decisions as well as the legislative history of the statute clearly gave the ITC authority to make like product and domestic industry rulings on a case-by-case basis.³⁵ The ITC also found that the underlying logic of the petitioner's factual argument contradicted its position because the petitioner's one like product included ball screws, linear guides, and plain bearings that did not share the same characteristics and uses as other AFBs, while it excluded tapered roller bearings that did.³⁶

The ITC next addressed the various like product arguments of the other parties to the proceedings. Several respondents argued for various combinations of like products.³⁷ Nevertheless, the ITC con-

³¹ *Id.* at 9 (citing *Armstrong Bros. Tool Co. v. United States*, 483 F. Supp. 312, 328 (Cust. Ct. 1980)).

³² *Id.* at 10.

³³ *Id.* (citing Post-Conference Brief of Petitioner at 19-24).

³⁴ *Id.* at 10-11 (citing Post-Conference Brief of Petitioner at 24-65).

³⁵ *Id.* at 11 (citing S. REP. NO. 249, 96th Cong., 1st Sess., 90-91 (1979)).

³⁶ *Id.* at 12.

³⁷ *Id.* at 13. The existence of numerous respondents with individual concerns and the need to respond quickly to the legal and factual issues raised by the petitioner high-

cluded that each of the various combinations espoused by the respondents implicitly suggested that certain types of products subject to investigation should be treated separately.³⁸ For example, a number of respondents separated AFBs into ball bearings and roller bearings based on the different application of each bearing.³⁹

Additionally, certain respondents categorized AFBs based on the type of rolling element: ball, cylindrical roller, spherical roller, and needle roller.⁴⁰ Although the ITC concluded that there was some support in the record for the distinction based on rolling element, and that the distinction on the basis of roller bearing was similar to the implicit distinction drawn in its previous investigations of tapered roller bearings,⁴¹ the ITC admitted that it did not have clear evidence on the ability to substitute at the design stage.⁴²

Respondents also made several arguments regarding components and housed and mounted products. For example, several respondents argued that components were separate like products because their commercial markets, channels of distribution, and physical appearances differed from finished bearings.⁴³ In assessing these arguments, the ITC noted that "[c]uriously the respondents argue for one separate category for components, while dividing the finished bearings into two or more categories."⁴⁴

In response to these arguments, the ITC held that the AFBs covered by these investigations differed in their physical appearance because of their different rolling elements.⁴⁵ The Commission also

light the type of problems respondents' counsel often face in preparing their case prior to the ITC's preliminary determination.

³⁸ *Id.*

³⁹ *Id.* These respondents also argued that ball and roller bearings have separate production facilities; therefore, producers usually produce only one of the two types. *Id.*

⁴⁰ These distinctions were based on the fact that production occurs in separate plants or on separate equipment designed for particular types of bearings and that these bearings are not readily interchangeable, even at the design stage. *Id.* at 14 (citing Post-Conference Brief of American NTN at 42-67).

⁴¹ *Id.* (citing *Tapered Roller Bearings II*, *supra* note 28).

⁴² *Id.* at 14.

⁴³ *Id.* at 14-15 (citing Post-Conference Brief of American NTN at 15-42).

⁴⁴ *Id.* at 15. There was a very practical reason for this apparently inconsistent argument. Specifically, a number of the respondents imported components for further manufacture or assembly into bearings. If all imported components could be considered together and excluded from any ITC affirmative material injury determination, especially at the preliminary stage, these parties would have won a significant victory. These parties, however, did not provide any cogent reasons for treating components differently from the various types of AFBs subject to investigation. Nevertheless, it is important to note that the petitioner also imported certain bearing components. However, the petitioner carefully drafted the petition in a manner to ensure that these components would not be covered by any antidumping order. Certain respondents also asserted that housed and mounted bearings should be treated as separate "like products" and several respondents argued for a specific breakout for wheel hub units based on the obvious physical differences between a wheel hub unit and a bearing. *Id.* at 15-16. The ITC noted that a visual inspection of a wheel hub unit did not reveal the presence of a bearing.

⁴⁵ *Id.* at 17.

concluded that use is generally determined by the type of rolling element employed.⁴⁶ In addition to their differing uses, these AFBs were manufactured with varying types of facilities and employees.⁴⁷ The ITC also decided that in these preliminary investigations it could not separate AFBs based on precision rating and size or on housed and mounted bearing units because there was not enough information in the record.⁴⁸ Therefore, for the purposes of its preliminary determinations, the ITC decided not to treat super precision bearings separately.

Because the record was inconclusive, the ITC also refused to answer the question of whether there were clear size distinctions between products or only a size continuum instead.⁴⁹ Finally, the ITC concluded that housed and mounted bearing units, including wheel hub units, did not constitute separate like products based upon the available information.⁵⁰ The ITC indicated it would seek additional information in any final investigations regarding the treatment of housed and mounted units.⁵¹ In particular, the ITC indicated it would then address the issue as to whether wheel hub units should be treated separately from other types of housed and mounted units.⁵² For purposes of its preliminary determinations, the ITC held that the type of bearing incorporated within housed and mounted bearings determined their respective like product classifications.⁵³

The ITC admitted that the essential characteristics of bearing parts and components, as opposed to the finished bearings, were significant. However, according to the ITC, components and finished bearings should not be treated differently because the parts of the bearing nonetheless allow friction reduction when they are assembled.⁵⁴ The ITC also noted that different operations are performed on the various unfinished parts and components even though no other significant materials are added to the components in the production of finished bearings.⁵⁵ Finally, the ITC concluded that there

⁴⁶ *Id.*

⁴⁷ *Id.* at 18.

⁴⁸ *Id.* at 19. Regarding precision and super precision bearings, the ITC found some evidence of a clear dividing line for bearings rated ABEC 5 and below (precision) and those rated ABEC 7 and above (super precision). Nevertheless, the ITC concluded that it would endeavor to develop additional information as to whether super precision bearings constituted a separate "like product" for each type of bearing if any final investigation arose. *Id.*

⁴⁹ *Id.* at 19-20.

⁵⁰ *Id.* at 20.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 21.

⁵⁵ *Id.* at 21-22. The operations consist principally of grinding, finishing, and assembly. *Id.* at 22.

were no other independent uses for unfinished components apart from their use in finished bearings. The ITC therefore determined that parts and components did not constitute separate like products.⁵⁶ Instead, it included the parts and components within the respective finished bearing types for purposes of its like product determinations in these preliminary investigations.

The treatment of components in the Commission's like product analysis illustrates an interesting issue that arises frequently in antidumping investigations. The ITC's treatment of components has become increasingly important because there are increasing numbers of foreign-owned entities that have established "screwdriver" type assembly operations whereby various components are exported to the United States for mere assembly into a finished article of commerce. The Commission's resolution of the issue concerning the treatment of components appears to hinge on whether there is an independent market for the components. Where such a market exists, the ITC is more likely to treat the components as a separate like product. Conversely, where there is only a captive market for these components, the ITC usually concludes that the components should be treated in the same manner as the finished product.

In summary, for the purposes of its preliminary investigations, the Commission 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.⁵⁷ The ITC also held that there were six separate domestic industries based on each of the six like products.⁵⁸

The ITC's detailed analysis and resolution of all the like product issues in the preliminary determinations is instructive. The ITC noted that the like product issues were "extraordinarily complicated and pervade[d] all the remaining issues."⁵⁹ In particular, the ITC stated that "limitations in the data available in these preliminary investigations make analysis of the condition of the industries and the effect of imports from the nine countries subject to investigations on those industries extraordinarily difficult."⁶⁰ It therefore concluded that it could only analyze the condition of the domestic industries and the effect of imports for all AFBs given the available data. The ITC analyzed the condition of the domestic industries and the effect

⁵⁶ *Id.*

⁵⁷ *Id.* The above categories included parts and components that were used in the particular type of bearing, housed and mounted bearings containing the specified rolling element, and finished and unfinished bearings. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 16.

⁶⁰ *Id.*

of imports on a product line basis.⁶¹ Thus, for example, the ITC could not analyze the financial and employment data for the needle roller bearing industry because it had financial and employment data for the production of all AFBs, and did not have such information on a disaggregated basis.⁶² For ball bearings, all types of roller bearings, parts, and other bearings, the ITC had disaggregated data on domestic capacity, production, capacity utilization, and shipments.⁶³ Accordingly, the ITC was not able to assess specifically the production and related data for each of the six domestic industries. Because the ITC's data did not correspond to its industry definitions, the ITC noted that in any final investigations it would seek information for the record that more closely corresponded to the definitions of the like products and domestic industries under consideration.⁶⁴

The ITC's inability to collect and analyze industry-specific data for its preliminary determination demonstrates that a petitioner, through its preinstitution contacts with the ITC's Office of Investigation, can greatly affect how the preliminary investigation is conducted and, to a certain extent, can tie the Commission's hands during the preliminary investigation. In the instant case, the results reached by the ITC were dictated, to a great extent, by the database compiled during the preliminary investigation. As will be seen in connection with the final material injury determination, once the ITC collected industry-specific data, the final outcome of these investigations was quite different than the results of the preliminary investigations. However, during the period of investigation, which in this case ran for approximately one year, trade in certain products may have been unjustly restricted merely because of the ITC's reliance upon data and information presented by the petitioner and the ITC's inability to collect product-specific data from the domestic producers and importers within the short statutory time period allowed for the preliminary investigation. Nevertheless, the ITC's willingness to define more than one like product was a significant victory for respondents during this stage of the proceedings, and may also have

⁶¹ The ITC's authority to conduct a product line analysis is codified in 19 U.S.C. § 1677(4)(D) (1988), which provides:

The effect of subsidized or dumped imports shall be assessed in relation to the United States production of a like product if available data permit the separate identification of production in terms of such criteria as the production process or the producer's profits. If the domestic production of the like product has no separate identity in terms of such criteria, then the effect of the subsidized or dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes a like product, for which the necessary information can be provided.

Id.

⁶² *Id.* at 24.

⁶³ *Id.*

⁶⁴ *Id.*

influenced the DOC's final resolution of the class or kind of merchandise issue.

B. Related Parties

The ITC had to decide whether any of the eight "foreign-owned producers" of AFBs in the United States⁶⁵ should be excluded from the definition of the domestic industry because they were a "related party."⁶⁶ In applying the related parties provision, the ITC generally considers a number of factors: (1) whether the company qualifies as a domestic producer; (2) whether the firm is a "related party" within the meaning of the statute; and (3) whether, in view of the producer's "related" status, there are appropriate circumstances for excluding the company in question from the definition of the domestic industry.⁶⁷ The related parties provision enables the ITC to avoid any distortion in the aggregate data in the domestic industry by including related parties whose operations are protected from the effect of the imports subject to investigation.⁶⁸

The ITC's ability to resolve the related parties issue in the preliminary phase of these proceedings was "complicated by the various permutations and combinations presented to the Commission in defining the like product and the number of domestic industries."⁶⁹ Based on the time limitations of preliminary investigations, together with their broad scope, the ITC concluded that there was "insufficient data available to address the related parties issue for each of

⁶⁵ These companies were NSK Corporation, American NTN, NTN-Bower, SKF Industries, New Hampshire Ball Bearings (NHBB), FAG Bearings, American Koyo, and INA Bearing Company, Inc. *Id.* at 25.

⁶⁶ *Id.* If a domestic producer is either related to exporters or importers of the product or itself imports that product, the ITC may exclude such producers from the domestic industry "in appropriate circumstances." 19 U.S.C. § 1677(4)(B) (1988). The ITC may apply the related parties provision according to its own judgment based on the facts in each case. *Empire Plow Co., Inc. v. United States*, 675 F. Supp. 1348, 1352 (Ct. Int'l Trade 1987).

⁶⁷ ITC Preliminary Determination, *supra* note 24, at 26. *See, e.g.*, Color Television Receivers from the Republic of Korea and Taiwan, USITC Pub. 1514, Inv. Nos. 731-TA-134 to -135 (Final) at 17 (Apr. 1984).

To determine whether appropriate circumstances existed to exclude related parties, the ITC followed its prior approach of examining three factors: (1) the percentage of domestic production attributable to the importing producer; (2) the reasons the U.S. producer has decided to import the product subject to investigation, i.e., whether the firm benefits from the LTFV sales or subsidies; and (3) whether inclusion or exclusion of the related party will skew the data for the rest of the industry. ITC Preliminary Determination, *supra* note 24, at 26 (citing Rock Salt from Canada, USITC Pub. 1798, Inv. No. 731-TA-239 (Final) at 11 (Jan. 1986)).

⁶⁸ *See* Granular Polytetrafluorethylene Resin from Italy and Japan, USITC Pub. 2043, Inv. Nos. 731-TA-385 and 731-TA-396 (Preliminary) at 9 (Dec. 1987). *See also* Erasable Programmable Read Only Memories from Japan, USITC Pub. 1927, Inv. No. 731-TA-288 (Final) (Dec. 1986); Rock Salt from Canada, USITC Pub. 1798, Inv. No. 731-TA-239 (Final) (Jan. 1986).

⁶⁹ ITC Preliminary Determination, *supra* note 24, at 27.

the six domestic industries."⁷⁰ Thus, the ITC's discussion of the related parties issue focused on all AFBs.⁷¹

Although the ITC found that, as a general matter, each of the foreign-owned producers clearly qualified as a related party, it concluded that no related parties appeared to benefit from the alleged LTFV or subsidized sales.⁷² A key basis of this conclusion was the finding that the financial performance of the related parties was "significantly worse than the non-related U.S. producers."⁷³ The ITC determined that the record indicated that the inclusion of the related parties would not skew the data. Although the inclusion of the related parties partially affected production, capacity, capacity utilization, and shipments, it did not have a significant effect on overall economic trends utilized to determine the existence of material injury.⁷⁴ Accordingly, the ITC decided not to exclude any related parties for the purposes of its preliminary investigations.⁷⁵

C. Cumulation

If two or more countries' imports compete with each other and with like products of the domestic industry in the U.S. market, then the ITC must assess cumulatively the effect and volume of these imports.⁷⁶ The ITC stated that imports are to be cumulated if: (1) they compete with other imported products and the domestic like product; (2) they are marketed within a reasonably coincidental period; and (3) they are subject to investigation.⁷⁷

⁷⁰ *Id.* at 27-28.

⁷¹ *Id.* at 28.

⁷² *Id.*

⁷³ *Id.* at 28-29. *See id.* at A-37, Table 13. Interestingly, it would seem that the related parties may have benefitted if the ITC had excluded their financial data from the database used to assess the condition of the domestic industry. However, this may have been true with respect only to the financial data of the related parties. The related parties obviously believed that the exclusion of their data on production, capacity, and capacity utilization would be detrimental to their case.

⁷⁴ *Id.* at 29.

⁷⁵ *Id.*

⁷⁶ *Id.* at 30 (citing Section 612(a)(2)(A) of the Trade and Tariff Act of 1984, amending the Tariff Act of 1930, as amended, § 771(7)(C)(iv) (codified at 19 U.S.C. § 1677(7)(C)(iv) (1988)). Although the ITC is specifically prohibited from considering whether the imports from a particular country are a contributing cause of injury, the ITC concluded that the cumulation decision must be based on more than a finding that several countries produce imports like the domestic product. *Id.*

⁷⁷ ITC Preliminary Determination, *supra* note 24, at 30. The ITC considered the following factors:

- (1) the degree of fungibility between imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;
- (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;
- (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and
- (4) whether the imports are simultaneously present in the market.

Id.

Certain Japanese respondents argued that imports from Japan should not be cumulated with imports from other countries subject to investigation because the volume of Japanese imports were large enough to warrant independent analysis.⁷⁸ These respondents argued that "Congress intended the provision requiring cumulation to apply only where imports from each of several countries account individually for a very small or insubstantial percentage of penetration."⁷⁹ The ITC held that its precedent as well as the legislative history did not support the respondents' position.⁸⁰

In contrast to the argument that Japanese imports were of a sufficient volume to warrant independent consideration, some respondents argued that their imports could not cause material injury because they were *de minimus* or in decline.⁸¹ According to the ITC, however, "the volume and trend of imports on an individual country basis are not a consideration in determining whether or not to cumulate."⁸² The ITC asserted that this conclusion was mandated by the statute and legislative history.⁸³ The ITC did recognize that resolution of the cumulation issue was complicated by its determination that there were at least six like products. A complete cumulation discussion would separate imports of each type of like product from each country.⁸⁴

There has been much debate over the years involving both the legal and factual underpinnings of the practice of cumulating imports for purposes of the ITC's material injury analysis. Over this period, Congress has repeatedly attempted to address the cumulation issue by providing more statutory guidance.⁸⁵ The Commission has enthusiastically seized this statutory guidance and resolved the cumulation issues raised by various parties by using the statutory provisions and legislative history. Unless the statute is modified in

⁷⁸ *Id.* at 31 (citing Post-Conference Brief of NTN, at 92-95).

⁷⁹ *Id.* (quoting Post-Conference Brief of NTN, at 94).

⁸⁰ *Id.* (citing H.R. REP. No. 725, 98th Cong., 2d Sess. 37 (1984); Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan, USITC Pub. 1845, Inv. Nos. 731-TA-278 to -280 (Final) at 10, n.38 (May 1986)).

⁸¹ *Id.* at 31-32.

⁸² *Id.* at 32.

⁸³ *Id.* (citing H.R. REP. No. 1156, 98th Cong., 2d Sess. 173 (1984)). In this regard, it should be noted that Section 1330 of the Omnibus Trade and Competitiveness Act of 1988 (the Trade Bill of 1988) provides that "negligible" imports need not be cumulated. 19 U.S.C. § 1677(7)(C)(v) (1988). The same section also specifies that imports from any country that is a party to the free trade agreement with the United States, which entered into effect before January 1, 1987, need not be cumulated. *Id.* Pursuant to this provision, imports from Israel do not qualify for cumulation.

⁸⁴ ITC Preliminary Determination, *supra* note 24, at 33. Because such disaggregated data were not available for its preliminary determination, the ITC decided that it would seek import data by product type in order to fully address the cumulation issue in any final investigation. *Id.*

⁸⁵ The Trade and Tariff Act of 1984 mandated cumulation in most circumstances for purposes of assessing the volume and effect of imports. Pub. L. No. 98-573, Tit. VI, § 616, 98 Stat. 3037.

some way, it now appears that the Commission has developed a clear policy for addressing the cumulation issue. The ITC's resolution of the cumulation issue in the AFBs investigation is consistent with that policy.

D. Reasonable Indication of Material Injury

To assess the condition of the domestic industry, the ITC analyzes many factors including domestic consumption, domestic production, capacity, capacity utilization, shipments, employment, inventories, and profitability.⁸⁶ While the ITC differed on the method of analyzing the data of record, the ITC applied the "reasonable indication" standard⁸⁷ and made an affirmative determination at this stage of the proceedings.⁸⁸ The ITC concluded that there was a reasonable indication of material injury to the domestic industries producing all AFBs because no "clear and convincing" evidence of the lack of material injury to the domestic industries was presented. Also, a likelihood existed that sufficient evidence in support of a finding of material injury could be developed in the final investigation.⁸⁹

The ITC's analysis in this regard is consistent with congressional intent. In most complicated investigations involving multiple products from a number of different sources, multiple transactions with numerous customers in the U.S. market, and multiple problems inherent in collecting thorough and reliable data in a preliminary investigation, the ITC will err on the side of caution and continue the investigations. The ITC's affirmative preliminary determinations only represent the skeleton of the injury case. In the vast majority of investigations, the substantive issues raised during the preliminary stage of an investigation can be "fleshed out" only during the course of the ITC's final investigation. Nevertheless, the ITC's resolution of these issues is important because the ITC normally follows the rationale and conclusions reached in a preliminary investigation in any final investigation.⁹⁰

⁸⁶ ITC Preliminary Determination, *supra* note 24, at 36.

⁸⁷ This standard has been followed in preliminary investigations and has been approved by the Federal Circuit. See *American Lamb Co. v. United States*, 785 F.2d 994 (Fed. Cir. 1986).

⁸⁸ ITC Preliminary Determination, *supra* note 24, at 38.

⁸⁹ *Id.* at 38-39.

⁹⁰ This is not to say, however, that there are not cases in which the ITC reached different conclusions on certain issues in some cases. A prime example is the ITC's like product and domestic industry determinations in the fresh cut flowers cases where the ITC found a single domestic industry producing all the fresh cut flowers subject to investigation in its preliminary determination, but then defined multiple domestic industries in its final investigation. Compare *Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, and the Netherlands*, USITC Pub. 1956, Inv. Nos. 701-TA-275 to -278 and 731-TA-327 to -331 (Final) (Mar. 1987), with the preliminary determination in the same investigation, *Certain Fresh Cut Flowers from Canada, Chile, Columbia,*

IV. The DOC's Preliminary Determination of Sales at LTFV

A. *DOC Questionnaire*

On May 31, 1988, the DOC presented its antidumping duty questionnaire to respondents. The DOC's questionnaire covered a period of investigation from October 1, 1987, through March 31, 1988. Although the DOC had defined only a single class or kind of merchandise in its initiation notice and in its questionnaire, it divided the products under investigation into five "such or similar"⁹¹ categories: (1) ball bearings and parts thereof, (2) spherical roller bearings and parts thereof, (3) cylindrical roller bearings and parts thereof, (4) needle roller bearings and parts thereof, and (5) plain bearings and parts thereof. The type of information requested by the DOC in its questionnaire, and the manner in which information had to be submitted, portended the many problems respondents would encounter in attempting to comply with the DOC's detailed and numerous requests for information and data.

B. *Standing of Petitioner*

After initiating the investigation, the DOC received numerous submissions from various respondents challenging Torrington's standing to file the petition and requesting dismissal of the petition because it was not filed by "an interested party" and on behalf of the U.S. industry.⁹² In a preliminary determination, the DOC accepts the petitioner's representation that it has filed on behalf of the domestic industry until a majority of the domestic industry affirmatively opposes the petition.⁹³ Upon a challenge to the petitioner's assertion, the DOC requires that the opponent present affirmative evidence of a majority of the domestic industry's opposition to the petition.⁹⁴ Once domestic industry members provide a clear indication that there is some basis for doubting a petitioner's standing, the DOC will assess the challenge to ascertain whether the opposition represents the views of a majority of the domestic industry.⁹⁵

In the AFBs investigations, to determine whether a major portion of the domestic industry opposed the petition, the DOC issued a questionnaire to those parties who challenged the standing of Tor-

Costa Rica, Ecuador, Israel, Kenya, Mexico, the Netherlands, and Peru, USITC Pub. 1877, Inv. Nos. 701-TA-275 to -278 and 327-TA-324 (Preliminary) (July 1986).

⁹¹ 19 U.S.C. § 1677b(a)(1)(A) (1988) provides that merchandise exported to the United States will be compared with "such or similar" merchandise in the home market.

⁹² Section 771(9)(c) of the Act defines interested party to include "a manufacturer, producer, or wholesaler in the United States of a like product." 19 U.S.C. § 1677(9) (1988). This is another example where the ITC's like product determination impacts an issue that the DOC may have to resolve.

⁹³ 53 Fed. Reg. 45,353, 45,354 (DOC 1988) (Preliminary).

⁹⁴ *Id.*

⁹⁵ *Id.*

rington to file a petition on behalf of domestic producers of AFBs.⁹⁶ However, the responses to the "standing questionnaires" were due by October 28, 1988, which was subsequent to the date the DOC made its preliminary determinations.⁹⁷ In the context of its preliminary LTFV determinations, the DOC only indicated that it would continue to examine the standing issue for purposes of its final determinations and concluded that Torrington had demonstrated that it was a manufacturer, producer, or wholesaler in the United States of the like products under investigation.⁹⁸ Accordingly, as an "interested party," Torrington had standing to file the petition.⁹⁹

The unwillingness to address at an early stage of the proceedings standing arguments timely raised by respondents evidences a reluctance on the part of the DOC to dismiss a case filed by a legitimate member of the relevant domestic industry. This reluctance appears to reflect the DOC's internal policy conclusion that the political fallout would be too great if a sufficiently large domestic company was precluded from invoking the trade laws to address import competition that allegedly is unfair. The DOC's position on standing only reinforces the opinion held by many that the administration of the antidumping law is politically sensitive with domestic industries and their congressional supporters.

C. *Class or Kind of Merchandise*

In its preliminary determination, the DOC indicated that it treated the merchandise subject to investigation as one class or kind of merchandise in its notice of initiation.¹⁰⁰ Following the initiation, however, the DOC received a wide array of comments from the petitioner and respondents, as well as other interested parties, regarding the inquiry into whether the subject merchandise represented one or more classes or kinds of merchandise.¹⁰¹ On July 13, 1988, the DOC issued a decision memorandum which stated that the subject merchandise constituted the following five separate classes or kinds of merchandise: (1) ball bearings, (2) spherical roller bearings, (3) cylindrical roller bearings, (4) needle roller bearings, and (5) plain bearings.¹⁰² Thus, one of the major legs of the petitioner's case, that

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 45,353.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 45,354.

¹⁰¹ *Id.* See 53 Fed. Reg. 15,076 (1988).

¹⁰² 53 Fed. Reg. at 45,354. The DOC consulted product experts at the U.S. Customs Service, the ITC, and within the DOC itself. The DOC's willingness to consult with the ITC on this issue should be viewed as a significant development. In the past, it seemed that the ITC and the DOC were more concerned with protecting their discretion to resolve issues that fell within their respective jurisdictions than consulting with each other to ensure that the bifurcated administrative process led to consistent results. The two agencies

there existed a single class or kind of merchandise, was rejected by the DOC during the early stages of its preliminary investigation. The decision by the DOC to divide the products subject to investigation into five separate classes or kinds of merchandise, however, continued to be controversial throughout the proceedings.

D. Reporting Requirements

Pursuant to its regulations, the DOC "normally will examine at least sixty percent of the dollar volume of exports to the United States from any country subject to an antidumping investigation."¹⁰³ Due to the respondents' enormous sales volume that had to be investigated, the DOC sent a letter on July 15, 1988, to all interested parties requesting comments on two alternatives to their standard reporting methodology.¹⁰⁴

The first alternative involved a random selection of certain merchandise sold in the United States followed by a comparison of the U.S. prices of such products with the domestic prices of comparable or identical products.¹⁰⁵ The second alternative was to examine only U.S. sales of merchandise that were identical to merchandise sold in the home market if at least thirty-three percent by volume of an individual respondent's U.S. sales could be compared to home market sales of identical products.¹⁰⁶ Under this second alternative, the fair value comparison in most cases would be limited to identical merchandise.¹⁰⁷ The two options proposed by the DOC represented its attempt to reduce the reporting requirements for the respondents while maintaining the integrity of its LTFV investigation.

After reviewing comments from interested parties, the DOC selected the second alternative.¹⁰⁸ This decision was made approximately three months into the investigation and two months after the antidumping questionnaires had been forwarded to the parties. Although intended to reduce the volume of respondents' sales sub-

now appear to appreciate more fully the fact that their respective decisions could, and do, impact how each administers the antidumping law.

¹⁰³ *Id.* (citing 19 C.F.R. § 353.38 (1989)).

¹⁰⁴ *Id.* By way of background, prior to 1984, the use of sampling in antidumping investigations was authorized only for the computation of foreign market value. See 19 U.S.C. § 1677b(f) (1982). In order "to expand the instances" in which sampling and averaging techniques could be used, Congress explicitly provided the DOC with the additional authority to use generally recognized sampling techniques in calculating U.S. price in the Trade and Tariff Act of 1984, Pub. L. No. 98573, Tit. VI, § 620(9), 98 Stat. 3039 (codified at 19 U.S.C. 1677(a) (1988)). See H.R. REP. NO. 725, 98th Cong., 2d Sess. 45-46 (1984). The legislative history of this provision makes it clear that this section was intended to permit the DOC to investigate dumping more efficiently and to ease the administrative burdens in meeting the strict time limits imposed by the law. *Id.* at 46.

¹⁰⁵ 53 Fed. Reg. at 45,354.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* The DOC notified the parties on Aug. 5, 1988, of the new procedures necessary to satisfy the reporting requirements of the questionnaire.

ject to investigation, the change in the reporting requirements placed an enormous burden on the respondents to change their database, including their computer tape database, to comport with the DOC's new reporting requirements. Despite the obvious drawback of the timing of the DOC's decision, the DOC was more willing than normal to use sampling techniques to facilitate the investigatory process.¹⁰⁹

E. Cost of Production Allegations

As indicated previously, based on the information presented in the petition, the DOC initiated an investigation of whether sales in the home market were being made at prices below the cost of production. On July 22, 1988, the DOC requested the petitioner to provide evidence of sales below the cost of production for the five classes or kinds of merchandise.¹¹⁰ In addition, on August 22, 1988, in response to several respondents' objections to the DOC's decision to initiate a cost of production investigation, the DOC discontinued the cost of production investigations.¹¹¹ Nevertheless, the DOC granted the petitioner an extension to submit company-specific home market price information to support its allegation of sales below the cost of production.¹¹² After analyzing the petitioner's new allegations, the DOC determined that the petitioner had provided sufficient company-specific allegations with respect to certain producers and certain products. Therefore, the DOC reinstated cost of production investigations for certain companies and for certain classes or kinds of AFBs.¹¹³

The DOC's initial decision to institute cost of production investigations, its rescission of the cost of production investigations, and its reinstatement of certain cost of production investigations placed an undue burden on the respondents. Specifically, because of the complex and extensive nature of the information needed for submission in a cost of production investigation, companies may have considered not participating in the DOC's investigations if the DOC adhered to its initial decision to require the submission of cost of

¹⁰⁹ According to a recent decision of the Court of International Trade, the only circumstance under which the DOC has averaged U.S. sale prices is when the exporters have shown that they have "no control over the prices at which their [merchandise is] sold in the United States." *NAR, S.p.A. v. United States*, 707 F. Supp. 553, 559 (Ct. Int'l Trade 1989) (citing *Rock Salt from Canada*, 50 Fed. Reg. 49,741, 49,744 (1985)). It should also be noted that, in the past, the DOC limited its utilization of sampling techniques primarily to investigations that involved agricultural products. *See, e.g.*, *Certain Fresh Cut Flowers from Colombia*, 52 Fed. Reg. 6842 (1987); *Fall Harvested Round White Potatoes from Canada*, 48 Fed. Reg. 51,669 (1983); and *Certain Fresh Winter Vegetables from Mexico*, 45 Fed. Reg. 20,512 (1980).

¹¹⁰ 53 Fed. Reg. at 45,354-55.

¹¹¹ *Id.* at 45,355.

¹¹² *Id.*

¹¹³ *Id.*

production data on the basis of general evidence of sales at below the cost of production. When the DOC discontinued its cost of production investigations, these companies may have completed the remainder of the DOC's questionnaire and rightfully ignored any need to compile cost of production information. Once the DOC reinstated the cost of production investigations, however, these companies were required to compile and submit detailed cost data within a very short time. If they failed to do so, the DOC could reject their entire response and resort to the best information available in calculating the company-specific LTFV margins. Although it appeared that the DOC acted in good faith in resolving this difficult question, the DOC's methods and timing placed enormous burdens on the respondents.

V. The DOC's Final Determination of Sales at LTFV

The true complexity of these investigations can be appreciated only by examining the DOC's final determinations of sales at LTFV. The final determinations were published in a total of 133 pages of the Federal Register.¹¹⁴ Because of the many issues raised by the petitioner and the respondents, the DOC grouped a number of common "general issues" in Appendix B of its notice covering the imports of AFBs from the FRG.¹¹⁵ Although this Article focuses only on certain of these issues, readers should review carefully the entire Federal Register notice because of the wealth of knowledge one can gain through examining the DOC's handling of the panoply of issues raised in the AFBs investigations.

A. Class or Kind of Merchandise

As noted above, the issue concerning the appropriate class or kind of merchandise subject to investigation was controversial throughout the proceedings. The resolution of this single issue dominated the time and attention of all the parties and the DOC in particular. Subsequent to the DOC's preliminary determination and prior to the DOC's final determination, the petitioner contended that the record developed by the DOC demonstrated that the host of products subject to investigation constituted a single class or kind of merchandise.¹¹⁶ The respondents, however, asserted that the DOC had an enormous body of evidence from numerous sources which

¹¹⁴ 54 Fed. Reg. 18,992-19,125 (DOC 1989) (Final).

¹¹⁵ *Id.* at 18,992. Appendix B contains a detailed discussion of eight general issues raised by the various parties to the proceedings in each of the nine concurrent investigations. Appendix B contains the DOC's treatment of the following general issues: (1) Class or Kind of Merchandise; (2) Standing; (3) Products Covered; (4) Basis for Cost of Production Investigation; (5) Market Viability; (6) Alternative Reporting Requirements; (7) Critical Circumstances; and (8) Administrative Protective Order Issues. *Id.*

¹¹⁶ *Id.* at 18,998.

contradicted petitioner's allegation.¹¹⁷ The parties to these proceedings briefed the class or kind issue extensively. After considering all the arguments presented, the DOC finally concluded that it had no reason to alter its earlier decision of July 13, 1988.¹¹⁸

In support of its final position, the DOC noted that more than 80,000 bearing part numbers were used in the United States.¹¹⁹ The DOC found that AFBs employ a variety of rolling elements such as balls, as well as needle, spherical, or cylindrical rollers. Some AFBs use sliding contact surfaces instead of rolling elements.¹²⁰ According to the DOC, the merchandise subject to investigation was manufactured in sizes ranging from a mere fraction of an inch to more than forty feet in diameter and was finished to a wide array of tolerances. Also, the subject merchandise was produced in different designs, often with special features, and was applied in different environments.¹²¹

The DOC stated that:

Despite the enormous breadth of the merchandise covered by the petition, petitioner has argued throughout these proceedings that a single class or kind of merchandise exists on the basis that all AFBs have the same general physical characteristics . . . and serve the same general function. . . . Respondents, on the other hand, collectively have contended that numerous classes or kinds exist on the basis of differences in size, type, precision, and application.¹²²

Given these extremely different analyses, the DOC decided to apply the *Diversified Products* criteria in this case.¹²³

According to the DOC, the petitioner's analysis failed to account for the different functional capabilities of the AFBs.¹²⁴ In addition, the DOC found that the petitioner's common function definition (the reduction of friction between moving parts) covered lubricants including oil, nonstick surfaces such as Teflon, and a variety of products in addition to the subject merchandise.¹²⁵ In contrast, the DOC concluded that "respondents' collective analysis [did] account for physical and application-specific differences of the subject merchandise, but to a degree that would lead to absurd results in determining the number of classes or kinds."¹²⁶ Thus, the DOC also rejected the

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 18,999.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* (citing *Diversified Products Corp. v. United States*, 572 F. Supp. 883 (Ct. Int'l Trade 1983) (endorsing the use of the following criteria for product scope rulings: general physical characteristics of the merchandise, the expectation of the ultimate purchaser, the channel of trade in which the merchandise moves, the ultimate use of the merchandise, and cost)).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

arguments made by certain respondents that there were more than five classes or kinds of merchandise. The DOC's attempt to find the appropriate middle ground between the two divergent positions espoused by the petitioner and various respondents is commendable.

The petitioner argued that the DOC could alter the class or kind of merchandise under investigation only when the petition contained inadequate allegations or was not supported by the available evidence. In response to this argument, the DOC explicitly held that such authority is within the DOC's inherent power.¹²⁷ Agreeing with the assertions made by respondents INA and NSK, the DOC ruled that it has the inherent authority to establish the parameters of an investigation so as to carry out its mandate to administer the law effectively and in accordance with congressional intent.¹²⁸

The petitioner argued that the *Diversified Products* criteria should be applied only to the issue of whether a particular product is within the scope of an already existing antidumping duty order. However, the DOC concluded that, in recent years, it had relied on the *Diversified Products* criteria in defining and clarifying the scope of several of its investigations.¹²⁹ The DOC's position in response to the petitioner's argument was sound. While traditionally the DOC had relied on the *Diversified Products* criteria to determine whether a product was covered under the scope of an outstanding order, the Court of International Trade endorsed the DOC's use of the *Diversified Products* criteria in defining and clarifying the class or kind of merchandise in its investigation on cellular mobile telephone and subassemblies.¹³⁰ Also, the DOC stated that it normally will accept the class or kind of merchandise defined by the petitioner.¹³¹ However, according to the DOC, "where respondents argue that the class or kind is overly broad," or "where the Department develops information in the course of its investigation to this effect, it is appropriate for the Department to apply the *Diversified Products* analysis."¹³²

¹²⁷ *Id.* at 18,999-19,000 (citing *Royal Business Machines v. United States*, 507 F. Supp. 1007 (Ct. Int'l Trade 1980), *aff'd*, 669 F.2d 629 (C.C.P.A. 1982)).

¹²⁸ *Id.* The DOC, however, made clear that it did not alter or narrow the overall scope of merchandise under investigation, as described in the petition. The DOC determined that the petitioner's description encompassed more than one class or kind of merchandise only after the parties briefed the DOC and after the DOC consulted with its Office of Industrial Resource Administration, the U.S. Customs Service, and the ITC. *Id.* at 19,000.

¹²⁹ *Id.* See, e.g., *Cellular Mobile Telephones from Japan*, 50 Fed. Reg. 42,447 (1985). In this case the DOC included cellular mobile telephones (CMTs), CMT transceivers, CMT control units and major CMT subassemblies within the scope of its investigation. *Id.* at 45,448. Subsequently, the DOC has applied the same criteria to make pre-order scope determinations. See, e.g., *Erasable Programmable Read Only Memories from Japan*, 51 Fed. Reg. 39,680 (1986); *Certain Forged Steel Crankshafts from the Federal Republic of Germany*, 52 Fed. Reg. 28,170 (1987).

¹³⁰ 54 Fed. Reg. at 19,000-01. See, e.g., *Mitsubishi Electric Corp. v. United States*, 700 F. Supp. 538, 556 (Ct. Int'l Trade 1988).

¹³¹ 54 Fed. Reg. at 19,001.

¹³² *Id.*

The petitioner also argued that its single class or kind of merchandise position was supported by the DOC's past administrative determinations that treated as a single class or kind of merchandise a variety of products, different in physical characteristics and uses.¹³³ The DOC adroitly concluded that "it is extremely difficult to use the class or kind analysis from one investigation as precedent for another investigation, unless the products are quite similar and, therefore, closely analogous."¹³⁴ The DOC specifically disagreed with the petitioner's assertion that the DOC must accept a broadly-defined class or kind of merchandise simply because previous orders allegedly included a wide range of products within a single class or kind of merchandise.¹³⁵ The DOC's apparent unwillingness to reconcile its class or kind determination in the AFBs investigations with prior determinations could pose a problem for the agency in the context of a judicial review of its findings. A basic precept of administrative law is that an agency must conform to precedent or explain the reasons for its departure from such precedent.¹³⁶ As stated in *Miner v. FCC*, "if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."¹³⁷ It remains to be seen whether the DOC's attempt to reconcile prior determinations will withstand judicial scrutiny.

In further support of its single class or kind of merchandise argument, the petitioner asserted that the DOC erred in its preliminary determination by finding five classes or kinds of merchandise under investigation because the relevant "general" physical characteristics that should be examined are not the specific, internal components of a given article, but are the general attributes that define its essential character.¹³⁸ Furthermore, the petitioner argued that there was no evidence to support the DOC's initial determination that the physical differences between each of the proposed categories are substantially more significant than any difference among products within the categories.¹³⁹

The DOC disagreed with the petitioner's analysis. The real question, according to the DOC, was "whether the physical differences are so material as to alter the essential nature of the product and, therefore, rise to the level of class or kind distinctions."¹⁴⁰ The

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See *Miss. Valley Gas Co. v. Fed. Energy Reg. Comm'n*, 659 F.2d 488, 506 (5th Cir. 1981). See also *Miner v. FCC*, 663 F.2d 152, 157 (D.C. Cir. 1980).

¹³⁷ *Miner*, 663 F.2d at 157 (citing *Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1392 (D.C. Cir. 1976)).

¹³⁸ 54 Fed. Reg. at 19,001. Specifically, the petitioner argued that an AFB is defined by its rolling elements, its inner and outer races, and its cage. *Id.*

¹³⁹ *Id.* at 19,001-02.

¹⁴⁰ *Id.* at 19,002.

DOC concluded that the physical variations were "fundamental" and were "more than simply minor variations on a theme."¹⁴¹ The DOC found that the difference in rolling elements was significant.¹⁴² In so doing, however, the DOC also rejected the arguments raised by certain respondents who sought a further delineation of the class or kind of merchandise subject to investigation.¹⁴³

To further support its position on the single class or kind issue, the petitioner contended that the various bearing types distinguished by the DOC were in fact interchangeable and suitable for many of the same uses.¹⁴⁴ The DOC disagreed with the petitioner, noting that all of the AFBs under investigation were not equally interchangeable and suitable for the same uses because a variety of types of AFBs are currently produced.¹⁴⁵ For the above reasons, the DOC concluded that its determination with respect to ultimate use in these investigations did not conflict with the earlier cases cited by the petitioner.¹⁴⁶ The lack of a substantial degree of substitutability and interchangeability, however, was not the only ground for finding that the AFBs under investigation were distinct products.¹⁴⁷ It was instead an independent factor that supported the determination.¹⁴⁸

The petitioner also contended that AFBs manufacturers use the same channels of trade advertising for all bearing types.¹⁴⁹ On this issue, the DOC admitted that the general criteria was similar for most AFBs under investigation. However, it held that these similarities could not justify treating the subject merchandise as a single class or kind of merchandise given the large differences in general physical characteristics, ultimate uses, and customer expectations among products.¹⁵⁰

Finally, the petitioner argued that the DOC should not limit the classes or kinds of products because such a holding would allow par-

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ The DOC's rejection of these assertions highlights the fact the DOC will examine the respondents' arguments in the overall context of its investigation, even though the arguments appear to be sound and logical viewed in isolation. Thus, it is not surprising that the DOC rejected the numerous proposed classes or kinds advocated by various respondents. This is another example of where respondents' counsel may be better off trying to coordinate their strategy.

¹⁴⁴ 54 Fed. Reg. at 19,002.

¹⁴⁵ *Id.* at 19,002-03. The petitioner also argued that there is a significant amount of interchangeability between the bearings in question, especially at the design stage of products which utilize such bearings. The DOC, however, specifically found that only within certain narrow limits may other AFB types be fashioned to satisfy the application without significantly compromising performance. While examples of interchangeability at the design stage may be found, the DOC concluded that they are "comparatively" rare and interchangeability at the replacement stage is "almost nil." *Id.* at 19,003.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 19,004.

ties to avoid the previously issued antidumping duty order. According to this line of reasoning, anything less than a single order covering all AFBs would create "a tremendous incentive for multinational companies to shift their production to those products and plants where duties are the lowest" or where no duty was due.¹⁵¹ The DOC felt that this problem would not be solved by using a broad definition of class or kind.¹⁵² Respondents could choose to produce a different class or kind of bearing or to use a plant located in a country with a low cash deposit rate. However, the DOC could then assess appropriate duties on the dumping of the covered products from countries covered under the orders during any administrative review of those particular orders.¹⁵³ Furthermore, according to the DOC, monitoring relief would be available for production that was shifted to countries that were not included in the orders.¹⁵⁴ Accordingly, the DOC concluded that these other administrative remedies would be available if parties attempted to circumvent the orders.¹⁵⁵

As the above analysis indicates, the DOC's conclusion regarding the class or kind of merchandise issue involved the resolution of numerous subissues relating to the criteria that may be properly employed. In resolving these issues, the DOC struck a compromise between two very divergent positions. On the one hand, the DOC rejected the petitioner's assertion of a single class or kind of merchandise as being overly simplistic. On the other hand, however, the DOC did not subdivide the merchandise subject to investigation into an indeterminable number of classes or kinds based on insignificant distinctions.

The DOC's exhaustive and detailed analysis of the class or kind of merchandise issue should be commended irrespective of whether one agrees with the DOC's final resolution of the issue. The DOC's analysis appears to establish new precedent in a number of different areas. It will be interesting to see how counsel for both petitioners and respondents utilize this precedent in future investigations that raise the issue of the proper class or kind of merchandise. It will be more interesting to see in future cases involving other products whether the DOC will try to follow or distinguish its newly established precedent in this area.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* Under 19 U.S.C. § 1673a(a)(2)(B) (1988), the provision which addresses persistent dumping of merchandise covered by an outstanding order on imports from certain countries, the DOC may initiate, under certain circumstances, an antidumping investigation on imports from a country not covered by the outstanding order.

¹⁵⁵ 54 Fed. Reg. at 19,004.

B. Standing

Several parties argued that Torrington did not have standing to file the petition. These parties asserted that the petition should be dismissed because the petitioner was not an "interested party" and because the petition was not filed "on behalf" of the U.S. industry as required by statute.¹⁵⁶ During the same time period, however, several parties also argued that Torrington did have standing to file the petition.¹⁵⁷ In resolving the standing issue in its final investigation, the DOC stated that "to require a petitioner to establish affirmatively that it has the support of a majority of the industry on whose behalf it has filed the petition would, in many cases, 'be so onerous as to preclude access to import relief under the antidumping and countervailing duty law.'"¹⁵⁸ To establish that a petition is not filed on behalf of the domestic industry, a party must prove that a majority of the domestic industry does not support the petition.¹⁵⁹

The DOC indicated in its final determination that it must "exercise its discretion and judgment based upon an assessment of all factors and circumstances peculiar to each case presented to the Department."¹⁶⁰ To help determine whether a major proportion of the domestic industry opposed the petition, the DOC sent a questionnaire to all parties that had objected to the standing of the petitioner.¹⁶¹

The DOC's position that the standing issue must be resolved on a case-by-case basis sends a clear signal that previous cases will have little, if any, precedential value. Nevertheless, the DOC's analysis of the standing issue in the AFBs investigations should not be ignored in that the DOC articulated some interesting positions on how it may approach and resolve standing controversies in future investigations.

In response to the standing questionnaires, six parties submitted data on their total volume and value of production for each of the five types of AFBs during the investigation.¹⁶² To determine whether these six parties constituted a majority of the domestic industries, the DOC cumulated the quantity and value of their U.S. production for each class or kind and then divided these figures by

¹⁵⁶ 19 U.S.C. § 732(b)(1) (1988).

¹⁵⁷ 54 Fed. Reg. at 19,004.

¹⁵⁸ *Id.* at 19,005 (citing *Frozen Concentrated Orange Juice from Brazil*, 52 Fed. Reg. 8,324, 8,325 (1987)). The Court of International Trade has examined the standing issue and determined that "[n]either the statute nor Commerce's regulations require a petitioner to establish affirmatively that it has the support of a majority of a particular industry, and the Court decline[d] to impose such a requirement." *Citrosuco Paulista S.A. v. United States*, 704 F. Supp. 1075, 1085 (Ct. Int'l Trade 1988), *aff'd*, 708 F. Supp. 1333 (Ct. Int'l Trade 1989).

¹⁵⁹ 54 Fed. Reg. at 19,005.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

the respective quantity and value of total U.S. production.¹⁶³ Based on the above calculations, the DOC held that these six parties did not constitute a majority of the domestic industry based on the quantity and value of production.¹⁶⁴ Specifically, the DOC concluded that Congress required a majority for both value and volume of U.S. production.¹⁶⁵ Thus, the DOC appears to have implemented a dual-pronged test that the parties opposing the standing of the petitioner in an antidumping investigation must meet. Unfortunately, the DOC did not expand upon its conclusion that such a dual-pronged test is consistent with congressional intent.

After holding that there was no majority opposition, the DOC then side-stepped another standing issue by not deciding whether related parties or importers should be excluded from each domestic industry.¹⁶⁶ The DOC noted that many of the firms opposing the petition were wholly owned U.S. subsidiaries of foreign respondent firms. Therefore, the DOC concluded that these companies "may be so wed to the foreign respondents and allegedly dumped imports that their interest would run counter to the imposition of antidumping duties."¹⁶⁷

In resolving the standing issue, the DOC articulated a number of interesting positions. For example, the DOC indicated that the DOC and the ITC do not necessarily use the same criteria to decide the issue of whether domestic firms with foreign connections are part of the domestic industry.¹⁶⁸ According to the DOC, the ITC analyzes the possibility that related parties or importers will minimize the domestic injury that is found. The DOC, on the other hand, analyzes what effect the imposition of antidumping duties has on interests of related parties or importers.¹⁶⁹ While the DOC's statement concerning the focus of the ITC's analysis seems rational, its position concerning the focus of its own analysis appears much too simplistic.

¹⁶³ *Id.* In calculating total U.S. production of ball, spherical, and cylindrical bearings, the DOC used the data collected by the Antifriction Bearing Manufacturers Association (AFBMA). *Id.* Because the AFBMA could not provide the DOC with statistical data on U.S. production of needle and plain bearings, the DOC calculated total U.S. production of needle and plain bearings using the 1987 Census Current Industrial Report. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* The DOC supported this conclusion by finding that there was no demonstrable evidence on the record to establish either volume or value of U.S. production as the more appropriate manner to measure market share. *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* The author believes that the DOC would have excluded related parties for standing purposes if it was forced to address this issue, and if it adhered to its past precedent. For example, in one investigation involving foreign concentrated orange juice from Brazil, the DOC found that domestic producers who opposed the petition did not represent a majority of the processing sector of the industry. The DOC, however, reached this conclusion only after excluding from the domestic industry those processors whose imports exceeded 50% of their production. See 50 Fed. Reg. 8,324, 8,326 (1987).

¹⁶⁸ 54 Fed. Reg. at 19,006.

¹⁶⁹ *Id.*

Obviously, related parties who argue against the standing of the petitioner have interests that run counter to the imposition of antidumping duties on their own products. Yet, these companies would probably gain an advantage if antidumping duties were imposed on imports from their competitors located in other countries. The question remains open as to whether the DOC will take this fact into consideration in answering the question of whether the imposition of antidumping duties does in fact run counter to a related party's interest.¹⁷⁰

A second interesting point involves the DOC's methodology for determining whether or not opposition within the industry exists. One respondent argued that without responses from U.S.-owned domestic producers as well as foreign-owned domestic producers, the DOC "lacks a reliable denominator for measuring" the opposition.¹⁷¹ However, consistent with its standard practice, the DOC decided to send questionnaires only to parties which opposed the petition.¹⁷² The DOC then calculated the total production of these companies and divided it by independently developed denominators.¹⁷³ The DOC specifically rejected a comparison between the petitioner's U.S. production and the opponents' production.¹⁷⁴ Unless proven otherwise, the DOC assumed that all parties not explicitly opposing the petition supported the petition or did not have an opinion.¹⁷⁵

Thus, the DOC articulated a double standard. On the one hand, the parties who oppose the petition must supply data, yet on the other hand, all other members of the domestic industry do not have to do anything. At a minimum, the DOC should seek production information from all members of the domestic industry and base its standing determination on the data received. If certain members of the domestic industry elect to remain silent, the DOC should disregard these firms in its calculation of what percentage of domestic producers either support or oppose the petition.

As can be seen from the above discussion, the DOC's resolution of the standing issue only reinforces the position that it will be very difficult for respondents to prove that a petition is not filed on the behalf of the domestic industry unless there is open opposition to the petition by domestic producers who clearly account for the vast majority of domestic production in terms of both quantity and value.

¹⁷⁰ Congress may have to address the standing issue within the broad context of determining what specific interests are intended to be protected by the antidumping duty law. See Vicario, *supra* note 9, at 389-92.

¹⁷¹ 54 Fed. Reg. at 19,006.

¹⁷² *Id.*

¹⁷³ *Id.* Thus, the DOC did not require information from other parties on the extent of their production or their estimates of their shares of U.S. production.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

This conclusion is supported by the DOC's decision to send a standing questionnaire only to those firms who oppose the petitioner's standing and its position that a majority industry opposition based on both quantity and value of U.S. production is necessary before ending an investigation.

C. Product Coverage

Many parties asked the DOC to clarify which products were included in the scope of the investigations.¹⁷⁶ In resolving this scope issue, the DOC relied upon the petition and accompanying exhibits as evidence of the petitioner's intent to include such products within the scope of the investigations.¹⁷⁷ When these documents are unclear, the DOC must make a factual determination whether the merchandise falls within the classes or kinds of merchandise subject to investigation.¹⁷⁸ Interestingly, the DOC did not have to use the *Diversified Products* criteria in making its scope exclusion determinations because the accompanying exhibits proved dispositive.¹⁷⁹ Finally, the DOC concluded that if it excluded a product from the scope of the investigation, it would not consider any separate class or kind of merchandise argument raised by the parties.¹⁸⁰

The DOC's handling of the issue of whether plain bearings were covered by the scope of the AFBs investigations is an interesting example of how the DOC resolved the scope issues. The petitioner contended that all plain bearings similar to those it produced were included by the petition.¹⁸¹ However, nine interested parties argued that the DOC should exclude plain bearings, except for spherical plain bearings, based on their dissimilarity with both ground AFBs and spherical plain bearings.¹⁸² Based on the information it examined, the DOC held that spherical plain bearings as well as rod ends were included in the investigation.¹⁸³ However, the DOC also excluded plain bearings that were not spherical.¹⁸⁴ This latter group of products represented more than an insignificant volume of trade; therefore, the exclusion of these products from the scope of the

¹⁷⁶ *Id.* These submissions ranged from importers requesting exclusion of a specific product to other parties requesting that a particular product category be treated as a separate class or kind of merchandise.

¹⁷⁷ *Id.* at 19,006-07.

¹⁷⁸ *Id.* at 19,007.

¹⁷⁹ *Id.* This result is odd in light of the DOC's position that it would rely upon the *Diversified Products* criteria in making its class or kind of merchandise determination. See *supra* notes 129-32 and accompanying text.

¹⁸⁰ 54 Fed. Reg. 19,007 (1989). For an interesting analysis of past DOC scope determinations, see Kamark & Harr, *Current Issues Relating to the Scope of Antidumping and Countervailing Duty Orders*, 2 THE COM. DEP'T SPEAKS 1987 at 13 (1987).

¹⁸¹ 54 Fed. Reg. at 19,007.

¹⁸² *Id.*

¹⁸³ *Id.* at 19,008.

¹⁸⁴ *Id.*

DOC's investigation was an important victory for certain respondents.

To resolve this particular issue, the DOC noted that it examined in detail the petition and the accompanying exhibits, petitioner's clarifications, petitioner's and interested parties' submissions, its own research, and the ITC staff report.¹⁸⁵ This examination convinced the DOC that spherical plain bearings, which were the only types of plain bearings listed in the petition, differed greatly from the excluded plain bearings mentioned by the petitioner and other interested parties.¹⁸⁶ Given these differences, the DOC reasoned that the petitioner would have specifically listed in the petition plain bearings other than spherical plain bearings if it wanted to include them.¹⁸⁷ In addition, the DOC conducted its own examination of the products and concluded that plain bearings more closely resembled oil film plain bearings, which were expressly excluded from the petition.¹⁸⁸ This finding further supported the determination that the petitioner did not intend to include nonspherical plain bearings.¹⁸⁹

In resolving the product coverage issue on plain bearings, the DOC specifically disagreed with the argument that the petitioner intended the petition to include all plain bearings that were similar to its own.¹⁹⁰ The DOC asserted that its regulations require that an antidumping petition contain a "detailed description of the imported merchandise in question, including its technical characteristics and uses, and, where appropriate, its tariff classification."¹⁹¹ It was irrelevant that the petitioner manufactures some nonspherical plain bearings.¹⁹² Otherwise, a petitioner could include its products within the scope of the investigations even though it failed to identify these products in the petition.¹⁹³

It remains to be seen whether the DOC will apply the same type of analysis it applied in the context of resolving the plain bearing product coverage issue in future investigations. The DOC appears to have taken the position that, if it is able to make its product coverage determinations based upon the evidence included in the record, it is not necessary to place undue reliance upon the *Diversified Products* criteria in making its scope exclusion determinations in the context

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* During the course of the proceedings, the petitioner conceded that oil film bearings (a particular type of plain bearings) purchased by a major U.S. producer of heavy equipment were not intended to be covered by the petition. In the author's opinion, this concession by the petitioner was the crack in the dike that led to the DOC's conclusion that other plain bearings were not covered by the petition.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 19,008-09.

¹⁹¹ *Id.* at 19,009 (citing 19 C.F.R. §§ 355.26(4) and 353.36(4) (1989)).

¹⁹² *Id.*

¹⁹³ *Id.*

of resolving product coverage issues prior to the issuance of an antidumping duty order. In addition, the DOC's resolution of this particular issue could be interpreted as requiring the petitioner to specifically include a listing of each and every product in the petition in order to make it clear to the DOC what products are intended to be included by a petitioner who produces a fairly diverse product line, such as AFBs. Importantly, the DOC's decision makes it clear that the mere fact that a product is produced by the petitioner and that product falls within the general scope of the product description in the petition is not conclusive evidence that the product was intended to be covered by the petition itself.¹⁹⁴

The DOC's resolution of the issue of whether linear motion bearings and linear motion devices (LMDs) were covered by the scope of the investigations also supports the above conclusions. To determine whether LMDs were within the scope of the investigations, the DOC primarily relied upon the petition's description and the definition of the subject merchandise.¹⁹⁵ The DOC found that while the petition was silent with respect to LMDs, it expressly included certain products which otherwise might not be understood to be encompassed by the phrase "antifriction bearings."¹⁹⁶ Although the petitioner stated in the petition that "this petition covers *all* types of bearings and parts, except tapered roller bearings, regardless of whether they are depicted in Exhibit 3 or listed in Exhibit 4 [of the petition], and regardless of whether the foreign producers used different designations for the products," the DOC found that the cited exhibits (which included petitioner's product list) did not mention linear motion bearings or linear motion guides.¹⁹⁷ Furthermore, the DOC concluded that LMDs are substantially different from the AFBs described in the petition.¹⁹⁸ Therefore, the DOC held that LMDs were not within the scope of these investigations.¹⁹⁹

The most interesting product coverage subissue was whether slewing rings were covered by the investigations. In the DOC's June 13, 1988, scope memorandum, the DOC explicitly excluded slewing rings at an early stage of the investigations.²⁰⁰ Despite its previous

¹⁹⁴ This conclusion is supported by the recent decision of the Court of International Trade. See *Floral Trade Council v. United States*, 716 F. Supp. 1580, 1582 (Ct. Int'l Trade 1989) (ITA's conclusion that daisies were not covered by an order covering certain fresh cut flowers supported by petitioner's failure to discuss daisies in the petition as a product to be investigated).

¹⁹⁵ 54 Fed. Reg. at 19,013.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (emphasis in original).

¹⁹⁸ *Id.* For example, LMDs do not contain the four basic components contained in most AFBs. In addition, LMDs primarily facilitate precise linear movement and linear positioning while AFBs generally reduce friction and support a rotating load. *Id.*

¹⁹⁹ *Id.* Again, the magnitude of trade in these products was more than insignificant, and the exclusion of these products benefitted certain respondents greatly.

²⁰⁰ *Id.* at 19,015.

position, the DOC concluded in its final determination that slewing rings were within the scope of investigation even though the petitioner did not specifically refer to slewing rings in the petition.²⁰¹ The DOC cited the petitioner's May 26, 1988, submission, which pointed out that "the [p]etition also covered bearing products referred to by one or more respondents as . . . slewing rings," to support its conclusion that the petitioner intended to include slewing rings in the scope of these investigations.²⁰²

In response to the due process argument that a reversal of the DOC's previous exclusion decision would be unfair, the DOC admitted that it initially indicated in its June 13, 1988, memorandum and in its contacts with certain respondents that slewing rings were outside the scope of investigation.²⁰³ However, the DOC stated that it warned these respondents in its June 13, 1988, memorandum that the scope decision was not final and could change.²⁰⁴ The DOC concluded that it had no compelling reason to depart from the petitioner's definition of scope and, therefore, was only "clarifying that slewing rings [were] included in these investigations."²⁰⁵

Again, it is very difficult to determine what impact the DOC's handling of the slewing rings issue will have on future investigations. One can only surmise that the DOC may be very reluctant in future investigations to provide any indication that it will exclude products until it has clear and convincing evidence that the product was not intended to be covered by the petition. In the absence of such evidence, respondents would be well advised to assume that a product will be covered unless counsel convinces the DOC to exclude the product in its final determination. In view of the DOC's reversal of its position on slewing rings in the AFBs investigations, parties would be wise not to rely even upon a specific exclusion decision made prior to the DOC's final determination, unless such a decision is unequivocal and beyond reproach.

Unfortunately, the handling and the final outcome of the slewing rings issue may make the DOC even more reluctant to exclude

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* The DOC indicated that it specified that its decision was based in part on the "lack of convincing evidence by petitioner that these products are the same class or kind of merchandise as the bearings under investigation." *Id.* The DOC further indicated that it "did not at that time close the door to petitioner to provide information at a later date that slewing rings were intended to be covered by the petition . . ." *Id.* This statement by the DOC is interesting in light of the fact that the DOC relied on petitioner's submission of May 26, 1988, to support its final conclusion that slewing rings were included in these investigations. Since this submission was part of the record at the time the DOC made its initial determination to exclude slewing rings, the DOC's final determination must have been based on additional information supplied by petitioner. Yet, the DOC did not cite any new information.

²⁰⁵ *Id.*

products during the preliminary stages of future investigations. The increasing reluctance of the DOC to address at an early stage specific product scope issues will translate into additional burdens placed on respondents to raise product coverage issues as early as possible and to pursue a resolution of those issues throughout the entire investigatory proceedings. This conclusion is also reinforced by the DOC's separate resolution in the AFBs case of the issue of whether a particular respondent's database was inadequate because it failed to report sales of certain types of bearings.

Specifically, the DOC concluded that Minebea's database was inadequate because Minebea failed to report sales of rod ends, spherical plain bearings, and bushings.²⁰⁶ Minebea contended that the DOC had a responsibility and obligation to notify them regarding the product scope well in advance of the date established for submission of the questionnaire responses.²⁰⁷ Minebea also argued that the DOC should not hold respondents accountable for changes to the specification of products made after the preliminary determination. The DOC should notify the respondents of a scope change and then allow them a reasonable time to submit an updated response.²⁰⁸ Unfortunately for Minebea, the DOC disagreed with its argument. In so doing, the DOC reiterated its basic position that all products included in the petition are within the scope of an investigation until the DOC officially excludes them.²⁰⁹ According to the DOC, it never excluded spherical plain bearings or rod ends from the scope of these investigations.²¹⁰ Accordingly, because Minebea failed to submit a complete questionnaire response, the DOC used the best information otherwise available.²¹¹ The DOC asserted that:

It is important to emphasize that Minebea took a calculated risk in not reporting these sales and then arguing that such products should not be included within the scope of the investigations. By contrast, other respondents who were unsure whether a particular product was included initially reported such sales in their questionnaire responses and then argued that such products should be excluded.²¹²

In resolving this particular issue, the DOC reinforced its early position that the petition is the key document in determining the scope of an investigation. The moral of the DOC's handling of this specific issue is that a doubtful respondent should include data in its response and not assume, irrespective of how persuasive the arguments may be, that the DOC will ultimately agree with its unilateral

²⁰⁶ *Id.* at 19,018.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

decision not to include in its responses information on certain products.

D. Basis for Cost of Production Investigations

In response to the DOC's decision to initiate only cost investigations on certain products for certain respondents, the petitioner asserted that the DOC had applied an incorrect standard.²¹³ The correct standard, according to the petitioner, is whether the evidence submitted provides a specific and objective basis for believing that sales were made at prices below cost.²¹⁴ The petitioner cited *Connors Steel Co. v. United States*,²¹⁵ which, according to the petitioner, held that more evidence is required to initiate an antidumping investigation than a cost investigation.²¹⁶ The DOC concluded that it could not justify initiating country-wide cost investigations "based on broad speculative allegations" made by the petitioner.²¹⁷ For example, after the cost investigations of INA-France were discontinued, the DOC refused to make a second cost investigation of INA-France's sales because the petitioner did not submit any new allegations against INA-France.²¹⁸

Thus, in both its preliminary and final determinations, the DOC clarified the standard to support the initiation of cost investigations. The petitioner in the future will be required to provide company-specific data in support of its cost allegations. According to the DOC, this standard is consistent with *Al-Tech Specialty Steel Corp. v. United States*, wherein the Court of International Trade concluded that "absent a *specific* and *objective* basis for suspecting that a *particular* foreign firm is engaged in home market sales at prices below its cost of production, section 773(b)'s threshold requirement of 'reasonable grounds to believe or suspect' has not been satisfied."²¹⁹

The DOC's willingness to articulate a standard concerning the sufficiency of sales below cost allegations should be welcomed. In the past, the DOC has not specified with regularity in its notices why a petitioner's allegations were or were not sufficient. The DOC has been criticized for its failure to rule on below cost of production allegations in each proceeding so that the grounds for such an investiga-

²¹³ *Id.* at 19,019. In support of its position, petitioner cited *Al-Tech Specialty Steel Corp. v. United States*, 575 F. Supp. 1285 (Ct. Int'l Trade 1983).

²¹⁴ 54 Fed. Reg. at 19,019.

²¹⁵ 527 F. Supp. 350, 357 (Ct. Int'l Trade 1981), *modified*, 566 F. Supp. 1521 (Ct. Int'l Trade 1982).

²¹⁶ *Connors*, 527 F. Supp. at 357.

²¹⁷ 54 Fed. Reg. at 19,020. In response to the petitioner's contention that the requirement as well as the ten day deadline for resubmission of data supporting below-cost allegations were unreasonable, the DOC stated that the petitioner must support its cost allegations with company-specific data that is included in its petition. *Id.*

²¹⁸ *Id.*

²¹⁹ *Al-Tech*, 575 F. Supp. at 1282.

tion are made known to the public.²²⁰ Hopefully, the DOC will adhere to the standards set forth in the AFBs investigation in future investigations.

E. Market Viability

To determine home market viability, the DOC first must assess whether there are enough sales in the home market to properly calculate foreign market value. Normally, this determination is made by comparing the volume of home market sales to the volume of third country sales for each such or similar category of merchandise.²²¹ The DOC uses this approach when it is able to clearly establish such or similar categories of merchandise.²²² However, in the AFBs cases, the DOC based its home market viability determination on the class or kind of merchandise.

The DOC did not determine home market viability based on such or similar categories within each class or kind of merchandise in the AFBs investigations because this determination could not be made within the statutory time limit due to the large volume of products and the many physical differences among them.²²³ Therefore, the DOC decided to calculate home market viability based on each class or kind of merchandise category, which included both finished bearings and parts.²²⁴ The DOC attempted to take into consideration the effect of sales of parts on the viability calculation. Where the inclusion of parts did skew the results of the calculation, the DOC adopted a flexible approach on the viability issue. Such an approach should be commended because it ensures the ultimate objective of an equitable and accurate basis for establishing fair market sales.

One respondent, INA, argued that home market viability should be calculated on a product-by-product basis.²²⁵ INA cited *Red*

²²⁰ See Bryan & Harty, *Recent Developments in the Calculation of U.S. Price and Foreign Market Value and Proposals for Change in Antidumping Procedures*, 1 THE COM. DEP'T SPEAKS 1987 479-85 (1987).

²²¹ 54 Fed. Reg. at 19,021.

²²² *Id.* See, e.g., *Lightweight Polyester Film & Fiber from Japan*, 49 Fed. Reg. 472 (1984).

²²³ 54 Fed. Reg. at 19,021.

²²⁴ *Id.* Certain respondents argued that parts were different from complete bearings and that the DOC should not include them as such or similar merchandise for the home market viability determination. A single complete bearing consists of many different parts; therefore, these respondents argued that the inclusion of parts skewed the results. In response to these concerns, the DOC made a second viability determination without parts for those companies and classes or kinds of merchandise where the inclusion of parts made the home market non-viable. With respect to three companies, the second test revealed that the inclusion of parts did skew the results because the second test showed a substantial increase in the ratio of home market to third country sales. *Id.* For each of these companies, the DOC determined that better results would be achieved by basing foreign market value on the market where it would obtain the largest number of comparisons within the limited pool. *Id.*

²²⁵ *Id.* at 19,023. This respondent argued that the DOC should not use home market

Raspberries,²²⁶ in which the DOC rejected certain home market sales, even though they satisfied the home market viability test, because they were "negligible" compared to the volume of sales to the United States.²²⁷ In response, the petitioner asserted that INA misread the DOC's determination in *Red Raspberries*.²²⁸ The exclusion of these sales from price comparisons would not necessarily cause reported sales to fall below the thirty-three percent threshold of comparison sales.²²⁹ In response to these arguments, the DOC concluded that it could not realistically calculate home market viability based on such or similar categories within these classes or kinds of merchandise,²³⁰ nor could it follow INA's suggestion of calculating viability for each individual product basis.²³¹

The DOC's rejection of INA's arguments illustrates the agency's tendency to draw fine distinctions between prior cases cited as precedent by parties to the proceeding. The facts cited by INA appear to be consistent with the facts underlying *Red Raspberries*. For example, INA cited the fact that certain home market transactions were being used for comparison purposes under the circumstances where only one or two transactions took place in the home market compared with hundreds of transactions in the U.S. market for an identical product.²³² INA argued that these sales were "negligible" in terms of both the number of transactions and the quantity of products sold in the home market compared to the U.S. market. Furthermore, the DOC had a computerized database which could easily be programmed to perform a viability test on a bearing-by-bearing basis.

transactions when the volume of sales for a particular product in the home market did not exceed five percent of the volume of sales of the same product in the U.S. market. *Id.*

²²⁶ *Red Raspberries from Canada*, 54 Fed. Reg. 6,559 (DOC 1989) (Final).

²²⁷ *Id.* INA also argued that these home market sales should be disregarded because they were not made in the "ordinary course of trade" and in "the usual commercial quantities." To support its position in this context, INA cited the decision of the Court of International Trade in *Monsanto Co. v. United States*, 698 F. Supp. 275 (Ct. Int'l Trade 1988). The Court in *Monsanto* stated that sales of identical merchandise should not be considered in the ordinary course of trade "if the ordinary conditions of trade are different . . . than they are generally for the merchandise which is in the class or kind defined by the ITA [DOC] so as to make the sales unsuitable for comparison purposes." *Id.* at 279. The sales in questions were sales of inch-size bearings sold in the predominantly metric-size, West German home market. These inch-size bearings, according to INA, did not appear in its home market catalogue and no discounts were offered on sales, as was the case with respect to sales of metric bearings in the West German home market. The DOC, however, concluded that these sales should be included without addressing the applicability of the *Monsanto* case.

²²⁸ 54 Fed. Reg. at 19,023.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* The DOC stated that it normally determines viability by comparing home market and third country sales within each such or similar category of merchandise. *Id.* It then analyzes identical or similar products within that group, regardless of the quantity sold. *Id.* Otherwise the DOC would have to make thousands of individual viability determinations which would prevent the DOC from meeting its statutory deadlines.

²³² See Pre-Hearing Brief of INA.

Finally, INA indicated that it would have satisfied the DOC's thirty-three percent identical test even if these transactions were excluded. Thus, INA argued that the DOC did not need to compare both identical and similar products. Nevertheless, the DOC was reluctant to take this additional step because it had already resolved a number of other controversial issues. The DOC may have been more sympathetic to this type of argument if it was raised as an isolated issue in a less complicated investigation.

F. Alternative Reporting Requirements

In the final investigation, only one respondent requested that the DOC abandon the "identical sales match" sampling technique and compute margins based on all of its U.S. sales.²³³ This company argued that the identical sales match approach was contrary to the U.S. law and to the General Agreements on Tariffs and Trade²³⁴ because it yields "unrepresentative and unfair results" for the company.²³⁵ In particular, the company argued that the identical sales match sampling compared only the less sophisticated products of the company instead of most of the more sophisticated products which generated a large portion of the company's sales revenue.²³⁶ The DOC concluded that a better representative sample would not arise by capturing products based on sales revenue rather than on volume sold. In addition, the DOC agreed that once it adopted an approach, it could not be swayed by persons who believed that a different approach would be more beneficial.²³⁷

Again, the DOC displayed flexibility in face of certain realities it confronted in conducting these complex investigations. The alternative reporting requirements somewhat reduced the burden on all parties, including the DOC. However, if the decision had been made at an earlier stage of the proceedings, the burden on the parties would have been reduced more significantly.

G. Critical Circumstance Determinations

To determine whether there had been massive imports in these investigations, the DOC compared the level of imports in the seven months after the filing of the petition with the level of imports in the seven months before the filing of the petition.²³⁸ The DOC felt that this time period covered from the beginning of the investigations until the preliminary determinations. During this period, the respon-

²³³ 54 Fed. Reg. at 19,029.

²³⁴ General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

²³⁵ 54 Fed. Reg. at 19,029.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

dents could have used their knowledge of the dumping investigations to increase exports to the United States when no antidumping duties existed.²³⁹

Based on the DOC's regulations, the petitioner argued that the time period should start three months before the initiation of the investigation and continue until three months after the initiation.²⁴⁰ At another point, the petitioner argued that a broad reading of the regulations would require the DOC to examine the seven month period between the initiation and the preliminary determination.²⁴¹ On the other hand, certain respondents emphasized that the DOC should also consider historical trends and sporadic shipment levels instead of focusing solely on a specific period. In addition, other respondents asserted that the DOC should assess the increased demand for AFBs in the United States during the relevant time period. According to these respondents, the DOC should not hold that there are critical circumstances if imports increased simply because of increased demands. Although the DOC recognized that some increases in shipments to the United States may have been tied to increased demand, it concluded that these increases were not consistent for one particular country or company.²⁴² Accordingly, the DOC concluded that the data did not conclusively show that a greater demand caused the increased shipments.²⁴³

Another interesting aspect of the DOC's critical circumstance determination was INA's argument that the DOC should analyze import levels based on both volume and value.²⁴⁴ Based solely on value, INA's imports after initiation were actually lower than those levels before initiation.²⁴⁵ The DOC agreed with INA that an analysis based on import volume may create some distortions, especially when loose bearing components are included in the volume figures.²⁴⁶ To avoid distortion, the DOC decided to include components and finished bearings in the imports shipped prior to the initiation of the investigation and then use this same product mix after initiation.²⁴⁷ Moreover, the DOC argued that value data created similar distortions as did volume data and thus did not provide a

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Not surprisingly, the petitioner changed its position after it had the benefit of receiving data submitted by the respondents to the DOC under an administrative protective order.

²⁴² 54 Fed. Reg. at 19,029.

²⁴³ *Id.*

²⁴⁴ *Id.* at 19,030.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* This conclusion by the Department begs the issue inasmuch as the DOC failed to determine whether there had been a change in the product mix of a company during the relevant time period.

better solution.²⁴⁸ The DOC showed some willingness to examine more than one type of data base in its critical circumstance determination. Whether the DOC will use value data in future investigations cannot be predicted.

In summary, a significant common thread in the DOC's resolution of these "general issues" was the sheer complexity of these investigations which compelled the DOC to address the many issues raised with an enormous amount of flexibility. In general, the DOC exercised this flexibility with the objective of reaching conclusions that approximated some degree of fairness for all parties concerned. In most cases, the results were equitable. In other cases, especially where the DOC refused to address directly the issues raised and to demonstrate some flexibility, the results were more arbitrary. It is hoped, however, that the DOC will venture further and increase the amount of flexibility it employs in conducting antidumping investigations, especially investigations of a complex nature that may require some deviation from what is considered the norm. As long as the DOC explains its reasoning in some detail and in a logical manner in its public notices, the DOC has a safe harbor under its statutorily granted administrative discretion.

V. The ITC's Final Material Injury Determination

As discussed previously, the ITC's preliminary injury determination left unresolved a number of important issues. In its final determination,²⁴⁹ the ITC addressed these issues with the benefit of a more complete record.²⁵⁰

A. Like Product

The ITC identified four fundamental like product issues in its final investigations:

1. Is there one like product consisting of most [AFBs], except

²⁴⁸ *Id.*

²⁴⁹ 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, USITC Pub. 2185, Inv. Nos. 303-TA-19 to -20, 731-TA-391 to -399 (Final) (May 1989) [hereinafter ITC Final Determination].

²⁵⁰ *Id.* at 9. The Commission majority (the Commission) consisted of Commissioners Eckes, Lodwick, Rohr, and Newquist on all products except cylindrical roller bearings where Commissioner Lodwick dissented and reached a negative determination. *Id.* at 7. Commissioner Cass made negative determinations for all five product categories and wrote his own dissenting views. *See id.* at 81-226. In its final views, the Commission initially noted that the DOC had modified the scope of the investigations significantly in its final LTFV determinations. *Id.* at 9. The Commission also noted that, contrary to its preliminary determination, the DOC decided that "slewing rings" were within the scope of the petition. As the ITC's questionnaires were not designed with slewing rings considered within the scope, the Commission staff required additional data on slewing rings. *Id.* This is a good example where the two agencies' reluctance to consult with each other throughout the various investigatory stages can make each agency's tasks more difficult.

tapered roller bearings, or should the like products be classified by the type of rolling element incorporated within the bearing?

2. Should the Commission treat wheel hub units and slewing rings as separate like products, primarily because they are not really bearings?

3. Should the Commission find major like product subdivisions of the bearing industries corresponding to (a) aerospace or super-precision bearings of all types or (b) miniature and instrument or commodity ball bearings?

4. Should the Commission further carve out like product categories for certain narrowly defined specialty bearings, such as Cooper bearings, tenter bearings, angular contact bearings, "special" roller bearings used in continuous casting mills, or crowned bearings?²⁵¹

As discussed above, in the preliminary investigations, the ITC determined that there were six separate like products based on the type of rolling element employed in the bearings.²⁵²

Although the ITC subdivided the like product by type of rolling element in the preliminary investigations, it noted that it would not reject petitioner's one like product argument in a final investigation if the record supported such a finding.²⁵³ In the final investigations, the petitioner continued to urge the ITC to find a single like product based on factual grounds.²⁵⁴ Consistent with its preliminary determination, the ITC held that within AFBs, there are separate like products based upon the type of rolling element,²⁵⁵ the key physical characteristic that determines the bearing's functional capability, and its use.²⁵⁶ The ITC found that interchangeability of bearings con-

²⁵¹ *Id.* at 11-12. The Commission noted in its final determination that, in the preliminary investigations, it had discussed and resolved two additional like product issues. *Id.* at 12 n.10. First, it noted that none of the parties challenged the finding that parts for anti-friction bearings should not be considered separately. Therefore, the Commission adopted the approach to this issue that it followed in the preliminary investigations. See ITC Preliminary Determination, *supra* note 24, at 20-22. Second, the Commission noted that it had determined that housed and mounted bearings (bearings that had been incorporated into a forging for attachment to a piece of machinery or equipment) should not be considered separately, but should be classified by the type of bearing incorporated within it. ITC Final Determination, *supra* note 249, at 12 n.10. Although one respondent argued for separate like product treatment for housed and mounted units, the Commission did not believe that such treatment was warranted because housed and mounted units merely incorporate forgings as outer raceways on a bearing to facilitate attachment to a piece of machinery. *Id.* Although the Commission noted that the housed or mounted units are dedicated to incorporation in a particular piece of machinery, it concluded that these units perform the same function as other bearings of the same type. *Id.*

²⁵² ITC Preliminary Determination, *supra* note 24, at 22.

²⁵³ *Id.* The Commission indicated that the respondents all agreed that there should be at least five like products corresponding to the ITC's preliminary determination and the DOC's final class or kind determination.

²⁵⁴ *Id.* The petitioner apparently abandoned the legal theory espoused in the preliminary investigation in favor of a single like product argument based solely on factual grounds. For a discussion of this theory, see *supra* note 33 and accompanying text.

²⁵⁵ ITC Final Determination, *supra* note 249, at 16.

²⁵⁶ *Id.* at 16-17. In this regard, the Commission's findings were consistent with the findings of the DOC.

taining different rolling elements was extremely limited and many producers either make only one type of bearing or rationalize their production of AFBs by the type of rolling element employed.²⁵⁷ The ITC noted that the petitioner's decision to enter the ball bearing market by acquiring Fafnir, an "acknowledged problem producer," rebutted its argument that production processes for the various types of bearings were similar and that shifting production was an easy process.²⁵⁸

A number of respondents also argued that certain imports should be "excluded" either from the investigation or from any ITC determination.²⁵⁹ The ITC indicated that these arguments were premised on one of three different theories: (1) the "market niche" theory, (2) the "no like product" theory, or (3) the "two like products/no domestic industry" theory.²⁶⁰ Under the "market niche" theory, the ITC may exclude certain imports, even though they are "like" the domestic product, if those imports do not compete with the domestic product.²⁶¹ The ITC indicated that the "market niche" theory has been specifically rejected by the Court of International Trade.²⁶²

The "no like product" theory seeks to exclude those imports without a domestic counterpart from further analysis and from any affirmative determination.²⁶³ The Commission noted, however, that it rejected the "no domestic like product" form of exclusion in *Lime*

²⁵⁷ *Id.* at 17. The Commission also noted that, because the production process was rationalized, data, including financial information, on a rolling element basis was not difficult to obtain. *Id.* at 17 n.19. The Commission's ability to obtain product- or industry-specific data reinforced the Commission's conclusion that there was more than one industry in both a legal and economic sense. It is submitted that, if a reliable database for each "industry" could not have been created, the Commission could have easily concluded that there was only a single AFBs industry.

²⁵⁸ *Id.* at 17 n.18. Although in this context the Commission recognized that the petitioner did encounter problems in connection with its acquisition of Fafnir, the Commission gave short shrift to those problems in its causation analysis.

²⁵⁹ *Id.* at 34. The ITC on several occasions had stated that it could "exclude" particular imports from an affirmative determination. *Id.* (citing Color Television Receivers from the Republic of Korea and Taiwan, USITC Pub. 1514, Inv. Nos. 731-TA-134 to -135 (Final) at 16-18 (Apr. 1984); Sodium Nitrate from Chile, USITC Pub. 1357, Inv. No. 731-TA-91 (Final) at 3-6 (Mar. 1983); Motorcycle Batteries from Taiwan, USITC Pub. 1228, Inv. No. 731-TA-42 (Final) at 3-7 (Mar. 1982)). See also Synthetic L-Methionine from Japan, USITC Pub. 1167, Inv. No. 751-TA-4 at 5-9 (July 1981). More recently, however, the ITC has consistently rejected exclusion arguments. ITC Final Determination, *supra* note 249, at 34 (citing Certain All-Terrain Vehicles from Japan, USITC Pub. 2017, Inv. No. 731-TA-388 (Preliminary) at 9 n.30 (Mar. 1988); Certain Brass Sheet and Strip from Japan and the Netherlands, USITC Pub. 2099, Inv. Nos. 731-TA-379 to -380 (Final) at 6 n.9 (July 1988)).

²⁶⁰ ITC Final Determination, *supra* note 249, at 34.

²⁶¹ *Id.* at 34-35.

²⁶² See *Sony Corp. of America v. United States*, 712 F. Supp. 978, 983-84 (Ct. Int'l Trade 1989) (Trinitron picture tube could not be excluded from the ITC determination based upon "market niche" theory).

²⁶³ See, e.g., *Motorcycle Batteries from Taiwan*, USITC Pub. 1228, Inv. No. 731-TA-42 (Final) at 3-7 (Mar. 1982). See also *Synthetic L-Methionine from Japan*, USITC Pub. 1167, Inv. No. 751-TA-4 (July 1981).

Oil from Peru,²⁶⁴ wherein it reasoned that a finding of no like product "runs counter to the statute's definition of 'like product' as 'a product like, or in the absence of like, most similar in characteristics and uses with, the article subject to investigation.'" ²⁶⁵

According to the "two like products/one domestic industry" theory, different imported products are divided into two or more groups. For groups of imports with no like product the ITC would identify a domestic product "most similar in characteristics and uses,"²⁶⁶ and also "like" one of the other imported product groups. The ITC then considers the impact of the different groups of imports on the single domestic industry.²⁶⁷

Since the DOC has jurisdiction over antidumping and countervailing duty determinations, the ITC's recent practice has been to defer to the authority of the DOC.²⁶⁸ The Commission stated that parties to the ITC investigation should not be allowed to use exclusion arguments in order to seek ITC review of DOC determinations regarding the scope of the investigation.²⁶⁹ The Commission's self-defined statutory role is to define "the relevant domestic industries and evaluate the impact of imports on them."²⁷⁰

The ITC's analysis represents a very clear and rational approach to the exclusion issues raised in these particular cases, as well as similar issues raised in many previous cases. The ITC's views illustrate how the ITC extensively addressed an extremely difficult issue that impacts directly upon the administration of the antidumping law. By so doing, the ITC provides valuable guidance to parties involved in future proceedings. Also, the ITC has given clear notice to the DOC

²⁶⁴ USITC Pub. 1723, Inv. No. 303-TA-16 (Preliminary) at 5 (July 1985) (applying the "most similar in characteristics and uses" from the definition in 19 U.S.C. § 1677(10) (1982)).

²⁶⁵ ITC Final Determination, *supra* note 249, at 36 (citing Lime Oil, *supra* note 264, at 5).

²⁶⁶ *Id.* at 36-37.

²⁶⁷ *Id.* at 37. The Commission noted that it applied this form of "exclusion" in *Sodium Nitrate from Chile*, USITC Pub. 1357, Inv. No. 731-TA-91 (Final) at 3-6 (Mar. 1983).

²⁶⁸ ITC Final Determination, *supra* note 249, at 37. See *All-Terrain Vehicles from Japan*, USITC Pub. 2017, Inv. No. 731-TA-388 (Preliminary) at 9 n.30 (Mar. 1988); *Certain Brass Sheet and Strip from Japan and the Netherlands*, USITC Pub. 2099, Inv. Nos. 731-TA-379 to -380 (Final) at 6 n.9 (July 1988).

²⁶⁹ ITC Final Determination, *supra* note 249, at 39. Review of DOC determinations is more appropriately within the jurisdiction of the Court of International Trade. *Id.*

²⁷⁰ *Id.* The ITC recognized, however, that it "may affect indirectly the scope of any antidumping or countervailing duty order through its like product analysis by finding multiple products and industries and reaching negative determinations as to some of those industries." *Id.* The Commission concluded that results sought via "exclusion" could not be achieved in any other manner which would be consistent with the statute. In addition, it stated that the ITC must find a product "like or most similar in characteristics and uses" to the imported products in every investigation. *Id.* Further, it reasoned that there is no statutory basis for dividing imports into several groups, while separately assessing the impact of each group of imports on the producers of a single domestic product. *Id.* According to the Commission, "[t]his effectively and obviously allows for undue fragmentation of the causation analysis." *Id.*

that exclusion requests should be addressed in the context of the DOC's proceedings. Hopefully, this will force the DOC to tackle exclusion requests as it did in the AFBs case and abandon its all too common past practice of not reaching a decision with the expectation that the ITC would address the problem prior to the DOC's issuance of any antidumping order.

The ITC's analysis and conclusion in the AFBs cases undercuts the soundness of raising these types of exclusion arguments with the ITC in future investigations. The ITC's position on exclusion requests, however, only means that the like product and domestic industry issues will assume even greater importance in future investigations. The rationale of the ITC in the AFBs case presents a challenge to counsel's resourcefulness in arguing these issues.

B. Related Parties

As noted by the Commission, the related parties provision is complicated because of the number of industries involved and because virtually every producer is either a subsidiary of an exporter or is itself an importer.²⁷¹ The ITC stated that the petitioner provided no meaningful rationale for its position that all foreign-owned producers should be excluded, while other producers should be included even though they import the products subject to investigation.²⁷²

The Commission analyzed the related parties issue on a producer-by-producer basis for each separate industry found to exist.²⁷³ The Commission's public analysis of the exclusion of each related producer for each of the six domestic industries could not be set forth in detail because of the danger of revealing proprietary company data.²⁷⁴ Nevertheless, the Commission noted that the ratio of import to domestic shipments for larger related parties was relatively insignificant, while smaller related parties had little or no effect on the aggregate data.²⁷⁵ Moreover, for some industries, the ITC found only two or three major producers, all of whom were related parties.²⁷⁶ When there is no evidence that such producers are

²⁷¹ *Id.* at 41. Significantly, the related parties provision includes both foreign-owned and domestic-owned related parties. *Id.*

²⁷² *Id.* at 41-42.

²⁷³ *Id.* at 42-43. According to the Commission, discussion of the "skewing" effect of including the related parties was "somewhat problematic in these investigations as almost all the major domestic producers, whether foreign- or U.S.-owned, are related parties. Thus, consideration of data for domestic producers who are not related parties is often meaningless for many of the subject industries. The skewing effect analysis is essentially a comparison of data for individual related parties to the data for all related parties, since there was no significant unrelated domestic industry to use for purposes of a comparison.

Id. at 43.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

“shielded” from the impact of unfairly traded imports, the Commission noted that exclusion is particularly difficult.²⁷⁷ Further, the Commission found that none of the related parties significantly benefitted from unfairly traded imports, or that they unfairly skewed the industry data.²⁷⁸ Therefore, the ITC concluded that it would not exclude any related parties from any of the domestic industries.²⁷⁹

While the Commission had ample justification for not excluding the related parties, its analysis failed to address adequately a very cogent argument made by the respondents. Respondents argued that, in deciding whether a related party was shielded from the impact of the LTFV imports, the ITC should examine carefully whether it was even possible for a domestic producer who was also an importer of products from Germany to be shielded from the alleged adverse impact of imports from Japan made by another domestic producer. The obvious answer to this inquiry, according to the respondents who raised this issue, was no. Therefore, because the Commission unfairly cumulated traded imports from all sources, there was no legitimate way to reach a conclusion that a related party (domestic producer) importer was shielded from the impact of the cumulated LTFV imports. If the Commission had not cumulated imports from various countries and conducted its inquiry on a country-by-country basis, it possibly could have reached a different conclusion as to whether in fact a related party was shielded from import competition. Thus, in this case the cumulation principle actually benefitted the respondents. Since the ITC did not address this specific argument in any detail, it remains to be seen whether the ITC will rely upon this type of analysis in future cases.

Furthermore, the Commission's analysis of the related parties issue in this and other cases glosses over the policy issue of how the law should be administered in light of the trend of increasing foreign investment and production in the United States. The antidumping law may be colored by the presumption that “industries” in the United States produce merchandise that contains only U.S. resources and labor and competes directly with an identical foreign product produced overseas. It may be necessary for Congress to re-examine our trade remedy laws in order to address the new realities of increasing transborder investments which is a major aspect of the globalization of production and marketing. Thus far, Congress has not been willing to tackle the issues surrounding the application of our trade laws to globalized industries.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 43-44.

²⁷⁹ *Id.* at 44.

C. *Material Injury and Causation Issues*

Unlike its preliminary determination, the Commission analyzed six like products on an industry-by-industry basis.²⁸⁰ Because the Commission determined that the domestic industries producing spherical roller bearings, needle roller bearings, and slewing rings were not experiencing material injury, its causation analysis was limited to the ball bearing, cylindrical roller bearing, and spherical plain bearing industries. Most of the arguments presented by the respondents centered on the role of Torrington's purchase of Fafnir. The respondents argued that any material injury experienced by the domestic ball bearing industry was self-inflicted as a result of Torrington's acquisition of Fafnir, a trouble-plagued producer of ball bearings.

The Commission's statement that it must focus only on the condition of the domestic industry as a whole and not on the condition of the individual companies that comprise the domestic industry ignored the cogent arguments that the performance of the petitioner was adversely impacted by its acquisition of Fafnir. While the Commission paid lip service to these arguments in its causation analysis, its decision did not examine and discuss this issue in detail.²⁸¹ The record of the investigation was replete with testimony that highlighted the problems Torrington encountered because of its acquisition of Fafnir. Yet, the Commission gave the impression in its written views that this was the same type of argument raised by respondents in many cases where an attempt is made to shift blame from import competition to other factors unrelated to imports. In light of the evidence, which included the petitioner's own admissions concerning its problems with Fafnir and the resulting self-inflicted negative impact on Torrington, the Commission should have discussed more extensively this particular issue in its opinion.

The AFBs investigations also highlighted the increasing role that economic consultants play in ITC injury investigations. At least four different economic consultants were utilized by the various par-

²⁸⁰ *Id.* Further, in response to the avalanche of testimony provided by purchaser of AFBs, the Commission noted that the relevant inquiry is the condition of the industry as a whole, rather than the condition of individual producers. *Id.* (citing Prehearing Brief of Sullair at 1-3; Prehearing Brief of Deere at 5-14; Prehearing Brief of Airpax at 3-4; Prehearing Brief of Alcoa at 2-9). All of these domestic purchasers of bearings were opposed to the petition and argued, in many cases quite convincingly, that any problems encountered by Torrington in selling in the U.S. market were self-inflicted.

²⁸¹ The Commission is not permitted to weigh the various causes of material injury. *LMI-LA La Metallic Industriale, S.p.A. v. United States*, 712 F. Supp. 959, 971 (Ct. Int'l Trade 1989). Nevertheless, the legislative history of the statute indicates clearly that the Commission should consider any information demonstrating that the alleged material injury is the result of causes other than import competition. S. REP. NO. 249, 96th Cong., 1st Sess. 75 (1979).

ties to the proceedings, including the petitioner.²⁸² The use of economic consultants has evolved to the point where such consultants have become an integral aspect of ITC proceedings that involve trade of any significant magnitude.

D. Critical Circumstance Determinations

The petitioner alleged that massive imports from certain countries created "critical circumstances."²⁸³ As indicated previously, the DOC made affirmative critical circumstance determinations on a company-specific basis with respect to certain AFBs from these countries.²⁸⁴ Based on the DOC's finding of affirmative critical circumstances, the Commission concluded that it was required to determine, for each injured domestic industry, "whether the material injury is by reason of massive imports to an extent that, in order to prevent such material injury from recurring, it is necessary to impose [antidumping duties] retroactively on these imports."²⁸⁵

The Commission stated that the provision relieves the effects of massive imports and deters importers from circumventing the antidumping laws by making massive shipments immediately after the filing of an antidumping petition.²⁸⁶ The ITC indicated that this application of the critical circumstance provision had been upheld by the Court of International Trade in *ICC Industries, Inc. v. United States*.²⁸⁷

Although the DOC determinations were made on a company-specific basis for each product from each subject country, the Commission interpreted the statute in terms of aggregate imports and total import volumes.²⁸⁸ Consequently, where the DOC made nega-

²⁸² Suffice it to say, the apparent need for the use of economic consultants increases the expenses associated with prosecuting or defending an antidumping case. The questionable impact that the economic consultants have on the outcome of a case raises an interesting issue concerning the necessity or advisability of utilizing economic consultants.

²⁸³ ITC Final Determination, *supra* note 249, at 75.

²⁸⁴ See 53 Fed. Reg. 45,312-67 (1988).

²⁸⁵ ITC Final Determination, *supra* note 249, at 75 (citing 19 U.S.C. § 1673d(b)(4)(A) (1988)). If the ITC finds either no material injury, or only a threat of material injury, the issue of critical circumstances is irrelevant. See *In-Shell Pistachio Nuts from Iran*, USITC Pub. No. 1875, Inv. No. 731-TA-287 (Final) at 1 n.3 (July 1986); *Natural Bristle Paint Brushes from the People's Republic of China*, USITC Pub. 1805, Inv. No. 731-TA-244 (Final) (Jan. 1986). According to the ITC, an affirmative critical circumstances determination is a finding that, absent retroactive relief, the surge of imports that has occurred after the case has been filed, but before Commerce has issued its preliminary determinations, will prolong or will cause a recurrence of material injury to the domestic industry. ITC Final Determination, *supra* note 249, at 76.

²⁸⁶ ITC Final Determination, *supra* note 249, at 76. See H.R. REP. No. 317, 96th Cong., 1st Sess. 63 (1979).

²⁸⁷ 632 F. Supp. 36 (Ct. Int'l Trade 1986), *aff'd*, 812 F.2d 694 (Fed. Cir. 1987).

²⁸⁸ ITC Final Determination, *supra* note 249, at 77 (citing 19 U.S.C. §§ 1673d(b)(4)(A), 1677(7)(C)(i) (1988)). Additionally, in prior investigations the ITC analyzed the combined imports for which the DOC had made affirmative determinations. *Id.* (citing *Internal Combustion Engine Forklift Trucks from Japan*, USITC Pub. 1936, Inv.

tive critical circumstance determinations with respect to a particular company, the Commission's adjusted country-aggregated data excluded import data from those companies.²⁸⁹ The Commission reasoned that a critical circumstance allegation finding is a factual determination based on recent import trends and their effects on the domestic industry.²⁹⁰ The ITC is also allowed to consider importers' inventories, the volume of imports in relation to both domestic demand and historical import levels, and the margin of underselling.²⁹¹

Based upon its evaluation of the relevant data in the AFBs investigations, the Commission did not find critical circumstances to exist with respect to relevant imports.²⁹² As the Commission found import volume and market share for ball bearings and spherical plain bearings either had been stable or had declined after the petition was filed,²⁹³ "such a trend belies any attempt to circumvent the antidumping laws."²⁹⁴ For cylindrical roller bearings, the Commission found an increase in shipments, but also a decline in inventory ratios.²⁹⁵ The Commission indicated that, given annual contracts, long lead times, and increased demand, such an increase resulted from normal market factors and was not an avoidance of antidumping duties.²⁹⁶ The Commission also noted that the volume increase was not significant enough to establish a "recurrence" of material injury.²⁹⁷

The Commission's determination on critical circumstances contradicts certain findings made by the DOC. Specifically, the Commission found that the increase in imports was the result of "normal market factors." The DOC specifically rejected the same arguments when made by certain respondents in the context of the DOC's critical circumstance determination. The only plausible explanation for the conflicting results is that the ITC may be better situated to evaluate the objective and subjective factors that underlie the critical circumstance determination.

No. 731-TA-337 (Final) at 151 (May 1988); Top-of-the-Stove Stainless Steel Cooking Ware from Korea and Taiwan, USITC Pub. 1936, Inv. Nos. 731-TA-304 to -305 (Final) at 14-15 (Jan. 1987); Tapered Roller Bearings and Parts Thereof and Certain Housings Incorporating Tapered Rollers from Italy and Yugoslavia, USITC Pub. No. 1999, Inv. Nos. 731-TA-342 and -346 (Final) (Aug. 1987)).

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 78.

²⁹¹ *Id.* (citing Certain Silica Filament Fabric from Japan, USITC Pub. 2015, Inv. No. 731-TA-355 (Final) at 10-13 (Sept. 1985)). The Commission found it appropriate to analyze any other factors which may bear on the ability of the massive imports to postpone prompt and effective relief to the domestic industry.

²⁹² *Id.* at 79.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

VI. Conclusion

The detailed analysis of the DOC's and ITC's handling of the extremely complex AFBs investigations demonstrates that the antidumping law can be applied even to the most difficult and complicated cases. This conclusion is not so obvious in light of the fact that a number of complex cases in the past, such as those involving steel and semiconductors, have not resulted in the final negative determinations on the issuance of an order. The parties involved in these cases, including their respective governments, reached certain accommodation agreements, which moved these particular trade disputes out from under the ambit of the antidumping law.

While all parties surely believed they were aggrieved in some form by certain decisions of the DOC and ITC, the unrefutable fact remains that the cases were completed within the prescribed statutory time limits. The agencies also displayed an unusual amount of flexibility in handling the cases and with few exceptions reached results that, at least in part, comport with the realities of the situation.

In February 1989, the DOC published an Advanced Notice of Proposed Rulemaking—Amendments to the Antidumping Regulations.²⁹⁸ The DOC invited interested parties to address any issue of law, policy, or procedure, and to suggest appropriate amendments to the antidumping regulations which the DOC should consider in connection with its responsibility to administer the antidumping law. According to the DOC, the goal of this rulemaking is to find ways in which to streamline and simplify antidumping proceedings for all parties, including the DOC, without sacrificing "substantial procedural fairness."²⁹⁹ Domestic industries, exporters, importers, and members of the trade bar should welcome the efforts of the DOC to simplify its procedures, codify its practices, and resolve inconsistencies in its administration of the antidumping duty law. In fact, numerous comments have been filed with the DOC by a representative cross-section of domestic industries, exporters, and importers.³⁰⁰

The author believes that the AFBs investigations provide useful guidance to the DOC in pursuing the laudable objective of administering the antidumping law in a manner that is procedurally and substantially fair, predictable, and practical. One lesson from the AFBs investigations that should not be lost is that, since each investigation conducted involves unique factual circumstances, the DOC needs flexibility to respond to the various factual situations that may arise

²⁹⁸ 54 Fed. Reg. 5,092 (1989).

²⁹⁹ *Id.*

³⁰⁰ Despite a March 20, 1989 deadline for public comments, the Department may not propose possible changes in the antidumping regulation until some time in 1990. Inside U.S. Trade, Sept. 15, 1989, at 17. As of the writing of this Article, the DOC still had yet to publish its new regulations.

during the course of a particular investigation. Accordingly, it would not be appropriate for the DOC to enact rigid regulations mandating a particular methodology that the DOC would have to follow in each and every investigation. The author believes that the DOC needs to ensure that flexibility can be maintained while giving domestic industries, exporters, importers, and trade practitioners notice of the DOC's normal methods and general policy in connection with its administration of the antidumping law.

A key aspect in obtaining this objective is the need for the DOC to adopt and follow a practice of explaining in detail the basis for its determinations in each and every case. Not only would these detailed public notices benefit practitioners involved in the particular case, but they would also provide useful guidance as to the agency's practice for subsequent investigations. Although the same methodology should be followed in every case, the DOC should maintain the flexibility to deviate from a particular methodology. If the DOC decides that the factual circumstances dictate that it should deviate from its normal methodology, it should explain in detail the reasons for its actions. To a certain extent, this is what the DOC did in the AFBs investigations. Thus, the DOC's experiences in the AFBs investigations should give the DOC a critical perspective on the antidumping process and offer a number of valuable lessons for the DOC to consider in connection with the proposed rulemaking.

