

Dated: September 24, 2002.

**Charlie Powell,**

*Acting Regional Director, Southeast Region.*

[FR Doc. 02-24762 Filed 9-27-02; 8:45 am]

BILLING CODE 4310-70-P

## INTERNATIONAL TRADE COMMISSION

[Inv. No. 337-TA-469]

### In the Matter of Certain Bearing and Packaging Thereof; Order

The Commission instituted this investigation on April 9, 2002, on the basis of a complaint filed by SKF USA, INC. ("SKF"). 67 FR 18632 (April 16, 2002). The complaint alleged that certain respondents had violated section 337 of the Tariff Act of 1930 by the unlawful importation into the United States, sale for importation, and/or sale within the United States after importation of certain bearings and packaging thereof by reason of: (1) Infringement of U.S. Trademark Registration Nos. 502,839, 502,840, 1,944,843, and 2,053,722; (2) infringement of common law trademarks; (3) dilution of registered and common law trademarks; (4) false representation of source; (5) false advertising; (6) passing off; and (7) unfair pecuniary benefits. The last claim alleges that respondents derive unfair pecuniary benefits by availing themselves of SKF's antidumping duty deposit rates and by failing to request antidumping duty administrative reviews to obtain their own rates. Complainant SKF describes the unfairness as being twofold. First, gray market importers of SKF bearings do not need to adjust their U.S. prices upwards to obtain a lower rate; they can keep their U.S. prices low and still get a low duty rate. Second, the gray market importers do not expend any resources to keep rates low; they merely "free ride" on SKF's rates. SKF analogizes this situation to the free riding problem recognized under the antitrust laws. On May 16, 2002, the Commission investigative attorney ("IA") filed a motion for summary determination as to the "unfair pecuniary benefits" claim, arguing that the claim is not cognizable under section 337 because it does not allege an unfair method of competition or an unfair act. Certain respondents supported the IA's motion. SKF filed an opposition to the motion. On June 14, 2002, in Order No. 11, the presiding administrative law judge ("ALJ") denied the IA's motion for summary determination. The ALJ explained that he was declining to decide whether the

"unfair pecuniary benefits" claim alleges an "unfair act" cognizable under section 337 because the claim presents a novel issue not appropriate for summary determination. The ALJ found that the risk of prematurely dismissing the claim outweighed the potential burden of additional discovery. On June 21, 2002, the IA filed a motion with the ALJ for leave to seek interlocutory review of Order No. 11 by the Commission. Respondents Bearings Limited and McGuire Bearing Company filed similar motions. On July 10, 2002, in Order No. 16, the ALJ granted these motions for leave to seek interlocutory review. The ALJ found that the motions met the requirements of Commission rule 210.24(b)(1), which provides that an ALJ may grant leave to seek interlocutory review of an order by the Commission if the order "involves a controlling question of law or policy as to which there is substantial ground for difference of opinion" and "subsequent review [of the order] will be an inadequate remedy." 19 CFR 210.24(b)(1). On July 18, 2002, the IA filed an application for interlocutory review, and on July 22, 2002, respondents Bearings Limited and McGuire Bearing Company did the same. The Commission has determined to grant the applications for interlocutory review of Order No. 16. Section 337(a)(1)(A) proscribes "unfair methods of competition and unfair acts" in the importation of articles, and/or sale thereof within the United States after importation. In order for the Commission to find that conduct involves an unfair method of competition or unfair act, it must be able to identify some sort of legally cognizable "unfairness" in that conduct. SKF's unfair pecuniary benefits claim does not allege the requisite legally cognizable unfairness. SKF alleges that respondents are engaging in an unfair method of competition by "availing themselves of SKF USA's antidumping duty rates." SKF's Amended Complaint at ¶ 157. SKF also describes the unfairness in respondents' conduct as lying in "[r]espondents' affirmative choice not to participate in Commerce's antidumping duty review process, and their free riding off SKF's rates." SKF USA's Opposition to the Commission Investigative Staff's Motion for Partial Summary Determination at 21. Respondents' practices with respect to antidumping duties apparently conform to the relevant Department of Commerce ("Commerce") regulations and Commerce's instruction to the U.S. Customs Service. SKF does not dispute this. Respondents enter their bearings at

the antidumping duty deposit rate specified by Commerce. When the bearings are liquidated, again the appropriate antidumping duty assessment rate is specified by Commerce. The Commission fails to see how following Commerce's specific directions with regard to antidumping duty deposit and assessment rates can constitute an unfair method of competition or unfair act. There is of course no per se prohibition on the importation of merchandise subject to an antidumping duty order by resellers (*i.e.*, entities other than the foreign manufacturer of the merchandise). SKF argues that respondents should request antidumping administrative reviews in order to obtain their own deposit rates. There is, however, no requirement that importers request an administrative review of their entries; such reviews are conducted only if "a request for such a review has been received." 19 U.S.C. 1675(a)(1). Having reviewed the arguments made by the IA, Bearings Limited, and McGuire Bearing Company on the one hand, and by SKF on the other, the Commission finds no basis to recognize SKF's unfair pecuniary benefits claim under section 337. SKF relies on antitrust cases addressing the "free rider" phenomenon. SKF's Amended Complaint at ¶ 169. However, those cases—to the extent that they discuss free riding at all—refer to it as a phenomenon that could excuse behavior that could otherwise violate the antitrust laws. The cases do not establish a cause of action based on free riding. Moreover, the courts have not extended the law of unfair competition to encompass free riding generally. SKF's attempt to liken respondents' conduct to misappropriation also is not persuasive. For there to be misappropriation, a property right or interest created by the skills, labor, and expenditure of another must be involved. SKF does not have such a right or interest in the antidumping duty rates that Commerce calculates for it. In essence, SKF's "unfair pecuniary benefits" claim has to do with the question of which antidumping duty deposit rates and assessment rates should be applied to resellers of merchandise subject to an antidumping duty order. This question is within Commerce's jurisdiction.

Having examined the relevant ALJ orders, the submissions of the parties, and the authorities cited therein, it is hereby *ordered that*:

1. Order No. 11 is reversed and the motion of the IA for summary determination as to the "unfair pecuniary benefits" claim is granted.

2. This investigation is terminated with respect to the "unfair pecuniary benefits" claim.

3. The Secretary shall serve copies of this Order on the parties of record and publish notice thereof in the **Federal Register**.

Issued: September 23, 2002.

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 02-24675 Filed 9-27-02; 8:45 am]

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## INTERNATIONAL TRADE COMMISSION

[Investigation No. 731-TA-991 (Final)]

### Silicon Metal From Russia

**AGENCY:** United States International Trade Commission.

**ACTION:** Scheduling of the final phase of an antidumping investigation.

**SUMMARY:** The Commission hereby gives notice of the scheduling of the final phase of antidumping investigation No. 731-TA-991 (Final) under section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act) to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of less-than-fair-value imports from Russia of silicon metal, provided for in subheadings 2804.69.10 and 2804.69.50 of the Harmonized Tariff Schedule of the United States.<sup>1</sup>

For further information concerning the conduct of this phase of the investigation, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

**EFFECTIVE DATE:** September 20, 2002.

#### FOR FURTHER INFORMATION CONTACT:

Diane Mazur (202-205-3184), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting

the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000. General information concerning the Commission may also be obtained by accessing its internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS-ON-LINE) at <http://dockets.usitc.gov/eol/public>.

#### SUPPLEMENTARY INFORMATION:

##### Background

The final phase of this investigation is being scheduled as a result of an affirmative preliminary determination by the Department of Commerce that imports of silicon metal from Russia are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. 1673b). The investigation was requested in a petition filed on March 7, 2002, by Globe Metallurgical Inc., Cleveland, OH; SIMCALA, Inc., Mt. Meigs, AL; the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers (I.U.E.-C.W.A., AFL-CIO, C.L.C., Local 693), Selma, AL; the Paper, Allied-Industrial Chemical and Energy Workers International Union (Local 5-89), Boomer, WV; and the United Steel Workers of America (AFL-CIO, Local 9436), Niagara Falls, NY.

##### Participation in the Investigation and Public Service List

Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of this investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigation need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigation.

##### Limited Disclosure of Business Proprietary Information (BPI) Under an Administrative Protective Order (APO) and BPI Service List

Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of

this investigation available to authorized applicants under the APO issued in the investigation, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigation. A party granted access to BPI in the preliminary phase of the investigation need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

##### Staff Report

The prehearing staff report in the final phase of this investigation will be placed in the nonpublic record on January 23, 2003, and a public version will be issued thereafter, pursuant to section 207.22 of the Commission's rules.

##### Hearing

The Commission will hold a hearing in connection with the final phase of this investigation beginning at 9:30 a.m. on February 5, 2003, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before January 28, 2003. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on January 31, 2003, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 days prior to the date of the hearing.

##### Written Submissions

Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.23 of the Commission's rules; the deadline for filing is January 30, 2003. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.25 of the Commission's rules. The deadline

<sup>1</sup> For purposes of this investigation, the Department of Commerce has defined the subject merchandise as "silicon metal, which generally contains at least 96.00 percent but less than 99.99 percent silicon by weight. The merchandise covered by this investigation also includes silicon metal from Russia containing between 89.00 and 96.00 percent silicon by weight, but containing more aluminum than the silicon metal which contains at least 96.00 percent but less than 99.99 percent silicon by weight."