I. Introduction

In 2010, the diverse field of international trade experienced considerable activity in some areas, and predictably few developments in other areas. Members of the World Trade Organization (“WTO”) initiated twelve new disputes in 2010, the same number as in 2009. Although it was a relatively slow year for WTO dispute settlement decision-making overall, a panel at the WTO issued its ruling in one of the biggest disputes on the WTO docket – EC – Large Civil Aircraft. On the negotiations side, 2010 yielded no significant progress on the Doha Development Round and no new accessions to the WTO. The U.S. remained active in bilateral and multilateral negotiations including the conclusion of the Anti-Counterfeiting Trade Agreement, the revision to the U.S.-Korea FTA, three rounds of negotiation on the Trans-Pacific Partnership Agreement, and a review of the 2004 U.S. Model Bilateral Investment Treaty.

In NAFTA dispute settlement, a binational panel issued a surprising ruling against the U.S. Department of Commerce practice of “zeroing.” In the U.S. courts, both the Federal Circuit and the U.S. Court of International Trade advanced their jurisprudence regarding injunctions, liquidations, and re-liquidations. The Federal Circuit also circumscribed Commerce’s latitude in applying dumping margins based on adverse facts available.

Notable developments in domestic trade remedies practice included the continued development of a “targeted dumping” methodology by Commerce, continued scrutiny of China under the countervailing duty laws, and the initiation of a Section 301 investigation on a wide range of acts, policies, and practices that appear to protect domestic producers of green technology.

Finally, the year 2010 saw tremendous changes in Section 337 practice and precedent at the U.S. International Trade Commission (ITC) with a record number of complaints and several major developments regarding ITC law and procedure including. This subject is covered in the International Trade article for the first time this year.

II. Negotiation Developments

A. WTO Negotiations

* Mr. Laroski (co-editor) is Associate General Counsel at the Office of the U.S. Trade Representative. Mr. Povarchuk (co-editor) is an Associate at Arent Fox LLP. Mr. Bentes (WTO Dispute Settlement Activity) is a Legal Officer with the Appellate Body Secretariat of the World Trade Organization. Ms. Davis (U.S. Trade Remedies, Administrative Determinations) is an Associate at King & Spalding LLP. Mr. Ryan (NAFTA Dispute Settlement Activity and U.S. Trade Remedies, Court Decisions) is Counsel at Hughes Hubbard & Reed LLP. Ms. Sales (Negotiation Developments) is an Associate with Mayer Brown LLP. Ms. Underwood (Section 337 Developments) is a Partner at Adduci, Mastriani & Schaumberg LLP.
1. **Doha Round**

Doha Development Round negotiations continued at a glacial pace in 2010. Part of this was undoubtedly due to the fact that the United States lacked a chief WTO negotiator until April. Republicans in the Senate held up the confirmation of the President’s nominee for the post, Michael Punke, for over 200 days, and President Obama eventually made a recess appointment of Mr. Punke to the position.\(^1\) The United States continued its last year’s approach of holding bilateral and small group negotiations in order to build consensus on issues, but achieved no significant breakthroughs.\(^2\) WTO Members planned a “re-start” of intensive negotiations for January 2011.\(^3\)

2. **Accession Negotiations**

Although there are thirty countries in various stages of the accession process, the WTO acquired no new members in 2010. However, Russia’s 17-year bid for membership gathered steam this year. As part of the U.S. administration’s efforts to “reset” relations with Russia, President Obama and Russian President Medvedev agreed in June to accelerate U.S.-Russian negotiations on accession and pressed negotiators to resolve outstanding bilateral issues by September.\(^4\) The unresolved issues included agricultural subsidies, intellectual property rights, import tariffs on pork and cars, and export duties on copper and nickel. Although some issues remain, such as Russia’s import quotas on meat and its desire for the United States to appeal the Jackson-Vanik amendment,\(^5\) U.S. and Russian officials have indicated that the September deadline had been largely met.\(^6\) Based on the apparently fruitful progress of negotiations, including a commitment by Russia to reduce its agricultural subsidies, White House Economic Council director Larry Summers stated in October that the hope was to have Russia join the WTO in 2011.\(^7\)

B. **Bilateral/Regional Negotiations**

1. **Bilateral Investment Treaties**

In 2009, the U.S. Department of State and the Office of the U.S. Trade Representative (“USTR”) began a review of the 2004 U.S. Model Bilateral Investment Treaty (“BIT”), which they had hoped to complete by the end of that year. Neither agency released any reports on the progress of the review in 2010. However, it is believed a major issue under consideration is the extent to which labor rights and environmental protections will be included in the new model.

---

\(^1\) Press Release, White House Office of the Press Secretary, President Obama Announces Recess Appointments to Key Administration Positions (March 27, 2010), available at http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions.


\(^5\) Part of the Trade Act of 1974, the Jackson-Vanik amendment is a provision that ties normal permanent trade relations with the United States on emigration rights for religious minorities in now-former Soviet countries.


\(^7\) Jacqueline Bell, *Russia Likely to Join WTO Within a Year: Summers*, LAW360, Oct. 20, 2010.
BIT. In November, a State Department official revealed that a revised model would not be made final until the Administration held consultations with the incoming Congress. Although Congressional approval of the model is not legally required, Senate consent is needed for any BIT that is negotiated. BIT negotiations with India, China, Pakistan, and Georgia have been put on hold until the review of the model BIT is completed.

2. Anti-Counterfeiting Trade Agreement

The United States concluded negotiations of the Anti-Counterfeiting Trade Agreement (“ACTA”) and released the final text in November 2010. Other parties to the agreement are Australia, Canada, the European Union, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea, and Switzerland. The Agreement creates “an international framework that will assist Parties to the agreement in their efforts to effectively combat the infringement of intellectual property rights, in particular the proliferation of counterfeiting and piracy….”

A key element of agreement is its enforcement provisions that provide for civil, criminal, and border enforcement of intellectual property rights, including digital copyright piracy. However, the enforcement provisions either explicitly exclude patents or allow countries to choose to exclude patents, an approach that the United States had insisted on to prevent inconsistency with domestic law. USTR will request public comments on ACTA, but maintains it is an executive agreement that does not need U.S. Senate approval because it can be implemented with no change to U.S. law. ACTA will go into effect when six countries have ratified it.

3. Trans-Pacific Partnership Agreement

After announcing its intent to participate in the Trans-Pacific Partnership (“TPP”) Agreement in late 2009, the United States engaged in three rounds of negotiations in 2010. The Obama Administration hopes the broad-based regional trade agreement will help increase U.S. exports to Asia-Pacific and contribute to its goal of doubling exports by 2014. The TPP is also seen as a potential vehicle for wider economic integration in the Asia-Pacific region. The other TPP members are Australia, Brunei Darussalam, Chile, New Zealand, Peru, Malaysia, Singapore, and Vietnam.

---

8 Hormat Says Administration To Seek Further Vetting With Congress on Model BIT, WORLD TRADE ONLINE (Daily News), Nov. 16, 2010.
9 Id.
12 Id.
Canada, Indonesia, and the Philippines have expressed interest in joining TPP talks. There was much speculation during 2010 about whether Japan would also join. The main stumbling block to Japan’s participation has been its agricultural policy. In November, the Japanese government announced it would complete the first stage of a study on agricultural reform in June 2011. Observers believe Japan would decide whether to join TPP negotiations at that point.

On the domestic front, USTR embarked on a 50-state outreach strategy for the TPP and held events in several cities in 2010. It also initiated an environmental review of the proposed TPP agreement and invited public comments on the scope of this review.

Although few details about the TPP talks have not been made public, a disagreement over goods market access has emerged. The United States favors bilateral negotiations between TPP members, while other countries prefer multilateral goods market access negotiations. The U.S. approach would require it to only conduct goods market access negotiations with the four TPP countries (Brunei, Malaysia, New Zealand, and Brunei) with which it does not already have FTAs. TPP members are expected to submit goods market access offers in January 2011, between the fourth and fifth rounds of talks. This and other issues will need to be resolved expeditiously if the parties want to meet their stated goal of completing negotiations by November 2011.

4. U.S.-Korea Free Trade Agreement

In the hope of finally getting Congressional approval, the Obama Administration attempted to revise the U.S.-Korea FTA in advance of the President’s trip to Seoul for the G-20 Summit in November 2010. The talks with Korea broke down over autos and beef, the two issues that have posed the biggest obstacles for Congressional support of the FTA since it was concluded three years ago. Complicating the negotiations were the election in November of many new lawmakers to Congress whose views on trade were unknown. Nevertheless, on December 3 the United States and Korea achieved a significant breakthrough in the negotiations by signing a supplemental deal on automotive trade.

---

16 TPP Officials to Meet Reps from Countries Interested in Joining at APEC, INSIDE U.S. TRADE, Nov. 5, 2010.
17 Japan To Decide By Next June Whether To Seek To Join TPP Negotiations, INSIDE U.S. TRADE, Nov. 12, 2010.
18 Id.
19 Id.
23 Id.
III. WTO and NAFTA Dispute Settlement Activity

A. WTO Dispute Settlement Activity

The number of new WTO disputes initiated in 2010 was commensurate with the average of previous years, with twelve new disputes initiated at the time of writing. This represents the same number of disputes initiated in 2009, but a slight decrease from a total of eighteen disputes initiated in 2008.26 A majority of the disputes initiated in 2010 involved trade remedy measures adopted by WTO Members in the wake of the 2008-2009 global economic crisis, thus involving complaints under the Anti-Dumping Agreement (“AD Agreement”), the Subsidies and Countervailing Measures Agreement (“SCM Agreement”), and the Agreement on Safeguards (“Safeguards Agreement”).27 Four of the new disputes initiated in 2010 involved challenges by CAFTA-DR Members against safeguard measures imposed by the Dominican Republic.28 The fact that these complaints were brought under the WTO disciplines rather than the regional disciplines may suggest a preference for the multilateral forum even in case of disputes of a regional nature.

In WTO dispute settlement decision-making, 2010 was a relatively slow year. A total of nine Panel Reports and two Appellate Body Reports were issued at the time of writing, which represents a significant decrease in comparison to the thirteen Panel Reports and eight Appellate Body Reports that were issued in 2009. In 2010, the U.S. obtained significant victories both as complainant and respondent in WTO dispute settlement proceedings, as the decisions discussed below illustrate.

1. Panel and Appellate Body Reports

a. EC – Large Civil Aircraft

The most significant decision by WTO panels in 2010 was EC – Large Civil Aircraft, issued on June 30, 2010.29 In that dispute, the United States successfully challenged numerous instances of subsidization by the European Union (“EU”) and four of its Member States – France, Germany, Spain, and the UK – with respect to large civil aircraft (“LCA”) developed, produced and sold by Airbus. In particular, the Panel agreed with the U.S. that a variety of measures such as launch aid financing, infrastructure grants, investments by the French and

---

27 U.S. – AD Measures on Certain Shrimp from Vietnam (complaint by Vietnam) (DS 404); EU – AD Measures on Certain Footwear from China (complaint by China) (DS405); China – Provisional AD Duties on Iron and Steel Fasteners from the EU (complaint by the EU) (DS407); Argentina – AD Duties on Fasteners and Chains from Peru, (complaint by Peru) (DS410); China – CVD and AD Duties on Grain-Oriented Flat-Rolled Electrical Steel from the U.S. (complaint by the U.S.) (DS414); and Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric (complaints by Costa Rica, Guatemala, Honduras and El Salvador) (DS415, 416, 417 and 418).
28 Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric (complaints by Costa Rica, Guatemala, Honduras and El Salvador) (DS415, 416, 417 and 418).
29 See Panel Report, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, WT/DS316/R, (June 30, 2010).
German governments, and research and technological grants by the four Member States, were specific subsidies that caused serious prejudice to the U.S.’ interests within the meaning of Article 5(c) of the SCM Agreement.

Before the Panel, the U.S. had argued that the subsidies provided to Airbus caused serious prejudice to its interests under Article 5(c) of the SCM Agreement, in the form of: (i) displacement or impedance of imports of Boeing LCA from the market of the EU under Article 6.3(a); (ii) displacement or impedance (or threat thereof) of exports of Boeing LCA from the markets of Australia, Brazil, China, Chinese Taipei, India, Korea, Mexico, and Singapore under Article 6.3(b); and (iii) significant price undercutting, significant price suppression, price depression, and lost sales in the same market under Article 6.3(c), of the SCM Agreement.

The main focus of the U.S. claims was the provision by the four European Member States of launch aid financing for the development of each model of Airbus LCA. The Panel largely agreed with the U.S. that various instances of launch aid financing were specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement. In so finding, the Panel rejected the EU’s preliminary argument that launch aid measures granted before the entry into force of the SCM Agreement in 1995 were not subject to the disciplines of that Agreement. The Panel reasoned that the legal obligation contained in Article 5 of the SCM Agreement focuses on the effects of the subsidies, which suggests that panels are not precluded from examining the WTO consistency of subsidies granted before the entry into force of the SCM Agreement, so long as the effects of those subsidies manifest themselves after the entry into force of the SCM Agreement.30

The U.S. further argued that the provision of launch aid to the A380, the A340-500/600 and the A330-200 constituted prohibited export subsidies under Article 3.1(a) of the SCM Agreement. Of the seven launch aid measures challenged by the U.S., the Panel found that only the German, Spanish and UK launch aid measures for the A380 constituted subsidies that were de facto export contingent. The Panel reasoned that the sales-dependent repayment terms under those measures suggested that they were at least in part conditional upon anticipated export sales.31 Pursuant to Article 4.7 of the SCM Agreement, the Panel recommended that the EU withdraw these subsidies without delay, and specified that the EU should do so within 90 days.32

Turning to the U.S. claims that the subsidies provided to Airbus caused adverse effects to the U.S.’ interests under Articles 5 and 6 of the SCM Agreement, the Panel conducted a “bifurcated” analysis of the United States claims under Article 6.3 (a), (b) and (c) of the SCM Agreement. Under this approach, the Panel sought to determine first the existence of the volume and price effects under Article 6.3, and second whether those effects were caused by the challenged subsidies. At the first step of its analysis, the Panel found that the volume and market share data submitted by the United States sufficiently demonstrated that between 2001 and 2006 Boeing LCA was displaced by Airbus LCA from the markets of the EU, Australia, Brazil, China,
Chinese Taipei, Korea, Mexico and Singapore.\textsuperscript{33} The Panel also made an affirmative finding for threat of displacement of Boeing LCA from the market of India, on the basis of order data.\textsuperscript{34} The Panel rejected the U.S. claims of significant price undercutting, because it considered that anecdotal evidence provided by the United States in relation to the role of prices in specific sales campaigns won by Airbus did not allow it to conduct a proper price comparison between Airbus and Boeing LCA.\textsuperscript{35} Nevertheless, the Panel relied on the same evidence to conclude that several sales campaigns that Boeing lost to Airbus constituted significant lost sales under Article 6.3(c).\textsuperscript{36} In addition, the Panel considered that indexed annual order prices for Boeing LCA suggested the existence of both significant price suppression and price depression of Boeing LCA over the 2001-2006 reference period.\textsuperscript{37}

Having found in the affirmative for the existence of all volume and price effects claimed by the U.S. except significant price undercutting, the Panel turned to the question of causation. The Panel found that the U.S. sufficiently established that launch aid shifted the risk of an LCA programme to the lender governments, thus making the launch of a programme more likely.\textsuperscript{38} The Panel also found that learning curve economies of scope and scale suggested that the launch of each subsequent model of Airbus LCA was dependent on launch aid provided for earlier models.\textsuperscript{39} On this basis, the Panel found that but for the subsidies provided to Airbus, Boeing would not have lost the sales and market share that it did in the relevant third country markets. Accordingly, the Panel concluded that the effect of the subsidies provided to Airbus was to cause the displacement of Boeing LCA from the EU and third country markets, and significant lost sales in the same market, within the meaning of Article 6.3 (a), (b) and (c) of the SCM Agreement.\textsuperscript{30} In contrast, the Panel found that the U.S. failed to establish that the effect of the subsidies provided to Airbus was the significant price suppression and price depression under Article 6.3(c) of the SCM Agreement.\textsuperscript{41} The Panel reasoned that the U.S. did not demonstrate that the alleged effects of the subsidies on Airbus’ creditworthiness and cost of capital resulted in a decrease in the actual prices of Airbus LCA.\textsuperscript{42}

On July 21, 2010, the EU appealed practically all of the Panel’s findings in EC – Large Civil Aircraft. The U.S. also cross-appealed, but its challenge of the Panel’s findings was mostly focused on the four launch aid programmes which the Panel did not find to constitute prohibited export subsidies under Article 3.1(a) of the SCM Agreement. The Appellate Body Report in this dispute is expected in the first quarter of 2011.

\textsuperscript{33} See id., at 7.1790 and 7.1791.
\textsuperscript{34} See id., at 7.1784.
\textsuperscript{35} See id., at 7.1839 and 7.1840.
\textsuperscript{36} See id., at 7.1845.
\textsuperscript{37} See id., at 7.1855 and 7.1861.
\textsuperscript{38} See id., at 7.1912.
\textsuperscript{39} See id., at 7.1936.
\textsuperscript{40} See id., at 7.1993.
\textsuperscript{41} See id., at 7.2025.
\textsuperscript{42} See id., at 7.2023.
b. **U.S. – AD CVD**

In another significant victory, on October 22, 2010 the U.S. prevailed over China in **U.S. – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China**.\(^{43}\) The complaint brought by China concerned four concurrent countervailing and anti-dumping duty measures imposed by the U.S. on products from China. The Panel rejected China’s claims that the imposition of a “double remedy,” that is, of countervailing duties concurrently with anti-dumping duties calculated pursuant to the USDOC’s non-market economy methodology (“NME”), was both “as such” and “as applied” inconsistent with Articles 10, 12.1, 12.8, 19.3, 19.4, and 32.1 of the SCM Agreement, as well as with Articles I:1 and VI of the GATT 1994. The Panel found that the measure challenged “as such” by China was outside of the Panel’s terms of reference, because it had not been properly identified in China’s request for consultations.\(^{44}\)

Turning to China’s “as applied” claims, the Panel dismissed China’s claims under Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement, as well as Article VI:3 of the GATT 1994. Although the Panel recognized that the simultaneous imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties could result in subsidies bestowed on a product being offset more than once (the “double remedy”), the Panel did not consider that any of the provisions of the SCM Agreement cited by China prohibited the imposition of both anti-dumping and countervailing duties in respect of domestic subsidies. The Panel read the prohibition in Article VI:5 of the GATT 1994 on the simultaneous application of anti-dumping and countervailing duties “to compensate for the same situation of dumping or export subsidization” as one applying exclusively to export subsidies, and not to domestic subsidies.\(^{45}\) The Panel considered it significant that the SCM Agreement does not reproduce Article 15 of the Tokyo Round Subsidies Code, which expressly prohibited the concurrent use of anti-dumping and countervailing measures in respect of imports of NME. The Panel also observed that China’s Protocol of Accession does not address the issue of “double remedies,” but does contemplate the use of countervailing duties while China remains an NME.\(^{46}\)

The Panel also found that Articles 12.1 and 12.8 of the SCM Agreement did not require the USDOC to adopt a set of criteria to assess the occurrence of double remedies.\(^{47}\) The Panel further rejected China’s claims under Article I:1, because in its view China failed to establish that the USDOC maintained a policy or practice of avoiding offsetting the same subsidies through anti-dumping and countervailing duties in the case of market economy imports.\(^{48}\)

Finally, the Panel declined to take account of a recent CIT decision that concluded that U.S. law required the USDOC to avoid offsetting the same subsidies twice when it uses its NME

---


\(^{44}\) See id., para. 14.42.

\(^{45}\) See id., para. 14.117.

\(^{46}\) See id., para. 14.120 and 14.121.

\(^{47}\) See id., para. 14.149.

\(^{48}\) See id., para. 14.182.
methodology in countervailing duty and anti-dumping investigations. The Panel emphasized that its task was limited to determining the WTO-consistency of the imposition of double remedies.

China appealed these and other findings related to the four specific countervailing duty and anti-dumping determinations at issue on December 1, 2010. The Appellate Body will circulate its report on March 11, 2011.

c. Other Disputes

Other noteworthy decisions were issued by both panels and the Appellate Body in 2010. In another major victory to the U.S., the Panel in U.S. – Safeguard Measures on Tyres from China upheld the Obama Administration’s decision to impose a safeguard measure on imports of tyres under the “Transitional Product-Specific Safeguard Mechanism” set out in China’s Protocol of Accession to the WTO. The Panel concluded that the USITC properly evaluated that imports of tyres from China met the “increasing rapidly” threshold provided in China’s Protocol of Accession. The Panel also disagreed with China that the “contribute significantly” causation standard articulated in the statutory provision implementing the China Safeguard Mechanism into U.S. law was inconsistent with the “a significant cause” causation standard articulated in China’s Protocol of Accession. Finally, the Panel considered that the USITC properly established that rapidly increasing imports of tyres from China were a “significant cause” of the material injury to the U.S. domestic industry. The Panel Report in U.S. – Safeguard Measures on Tyres from China was circulated on Dec. 13, 2010. At the time of writing, China has already indicated its intention to appeal the Panel’s findings.

The U.S., together with the Chinese Taipei and Japan, also prevailed against the EU in EC – IT Products. This dispute involved the imposition by the EU of import duties on: (i) flat panel display devices; (ii) set top boxes with communication functionality; and (ii) digital multifunctional printing/scanning/copying and faxing machines. The Panel upheld the U.S. claims that the imposition of import duties on these products was inconsistent with the EU’s duty-free commitment in its Schedule of Concessions, and therefore was inconsistent with Article II.1(b) of the GATT 1994. The Panel also found that such tariff treatment amounts to less favourable treatment and is thus inconsistent with Article II.1(a) of the GATT 1994. The EU did not appeal the Panel’s findings, and the Panel Report in EC – IT Products was adopted by the DSB on Sep. 21, 2010.

Finally, following the trend of recent years, a considerable portion of WTO decision-making in 2010 dealt with measures adopted by Members under the SPS Agreement. In Australia – Apples, the Appellate Body upheld the Panel’s findings that Australia’s import restrictions on New Zealand apples were not based on proper risk assessments and therefore

were inconsistent with Articles 2.2, 5.1 and 5.2 of the *SPS Agreement*.\(^{52}\) In essence, the Appellate Body dismissed Australia’s arguments that the Panel misapplied the standard of review articulated in the *U.S. – Continued Suspension* case; that the Panel required too high of a standard of transparency in the use of expert judgment; and that the Panel failed to assess how material were some of the flaws it identified in Australia’s risk assessment. Crucially, however, the Appellate Body reversed the Panel’s finding that two of Australia’s measures were inconsistent with Article 5.6 of the *SPS Agreement*. The Appellate Body held that the Panel failed to make affirmative findings that the alternative measures proposed by New Zealand would meet Australia’ appropriate level of protection. However, the Appellate Body was unable to complete the legal analysis and determine what would be the level of protection that would be achieved by New Zealand’s alternative measures. The Panel and Appellate Body Reports in *Australia – Apples* were adopted by the DSB on December 17, 2010.

On September 29, 2010 the Panel in *U.S. – Poultry* upheld China’s claims concerning the WTO-consistency of Section 727 of the Agriculture, Rural Development, Food and Drug Administration and Related Appropriations Act of 2009 (“AAA”), which prohibited the U.S. Food and Safety Inspection Service (“FSIS”) from using appropriated funds to establish or implement a rule allowing poultry products from China to be imported into the U.S. The Panel found that Section 727 was inconsistent with Articles 2.2, 5.1 and 5.2 of the *SPS Agreement*, because it was not based on a risk assessment which took into account the factors provided in Article 5.2 of the *SPS Agreement*. The Panel further found that Section 727 was inconsistent with Articles 2.3 and 5.5 of the *SPS Agreement*, because the distinction in the appropriate level of protection applicable for poultry imports from China *vis-à-vis* that applicable to other WTO Members resulted in arbitrary or unjustifiable discrimination against imports from China. On the basis of the discriminatory element of Section 727, the Panel also found a violation of Article I:1 and XI:1 of the GATT 1994. Despite these findings of inconsistency, to the extent that Section 727 has expired, the Panel made no recommendations that the U.S. bring its measure into conformity with its obligations under the *SPS Agreement* and the GATT 1994. The U.S. did not appeal the Panel Report in *U.S. – Poultry*, and it was adopted by the DSB on September 29, 2010.

**B. NAFTA DISPUTE SETTLEMENT ACTIVITY**

A NAFTA binational panel found Commerce’s zeroing practice, which had been affirmed on several occasions by the Federal Circuit, to be contrary to the statute, largely due to the panel’s finding that the statute should be interpreted in a manner consistent with U.S. international obligations under the WTO Agreements. In the NAFTA panel review of the Commerce Department’s antidumping administrative review determination regarding Stainless Steel Sheet and Strip in Coils from Mexico,\(^{53}\) the binational panel held that Commerce practice

---


of “zeroing” of negative antidumping margins is contrary to the statute. The panel found that the statute requires that Commerce employ a methodology which includes all sales. The panel recognized that the Federal Circuit had previously held that the statute was silent or ambiguous with regard to zeroing, and that the Federal Circuit had previously upheld Commerce’s zeroing practice. The panel reasoned, however, that there were two lines of cases in the Federal Circuit: one that ignored WTO-consistency, and another that gave credence to WTO-consistency in the interpretation of the U.S. statute. The panel decided to follow the later line of cases, and found that Chevron deference accorded to Commerce’s reasonable interpretation of a statute did not trump the Charming Betsy doctrine that the statute be interpreted as consistent with U.S. international obligations. The panel remanded the administrative review determination back to Commerce to recalculate the respondent’s antidumping margin without zeroing. Two panelists dissented in a strongly worded critique of the majority’s decision regarding zeroing. On several other antidumping calculation issues, the panel affirmed Commerce’s determination.

Two other NAFTA panel decisions concerned Light-Walled Rectangular Pipe and Tube from Mexico. One binational panel affirmed Commerce’s “offsetting” methodology as a replacement to zeroing in original investigations. The Panel’s reasoning closely parallels but predates the Federal Circuit’s reasoning in United States Steel Corporation v. United States. Another binational panel decision affirmed the International Trade Commission’s (“ITC’s”) rejection of new information submitted after the close of the Commission’s briefing, but remanded the ITC’s final determination for failure to provide sufficient explanation for reducing the weight accorded to evidence on the record regarding the most recent period.

IV. U.S. Trade Remedy Cases

A. ADMINISTRATIVE DETERMINATIONS

1. Targeted Dumping Methodology

Commerce is permitted to find “targeted dumping” in cases where “there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly

54 Id. at 10.
55 Id. at 20-21 (citing Timken Co. v. United States, 354 F.3d. 1334 (Fed. Cir. 2004); and Corus Staal B.V. v. United States, 395 F.3d 1343 (Fed. Cir. 2005); as compared to Allegheny Ludlum Corp. v. United States, 367 F.3d 1339 (Fed. Cir. 2004)).
56 Id. at 11.
57 Id. at 24.
58 Id. at 53.
among purchasers, regions, or periods of time. In such cases, Commerce may calculate margins using an “average-to-transaction” methodology. The targeted dumping provision addresses cases where an “average-to-average” or “transaction-to-transaction” methodology fails to account for “a pattern of prices that differ significantly among purchasers, regions, or time periods, i.e., where targeted dumping may be occurring.”

The 2008 Year-in-Review discussed Commerce’s targeted dumping methodology and the withdrawal of the targeted dumping regulations. The 2009 edition provided an update and explained that in the Preliminary Determination of the Polyethylene Retail Carrier Bags from Indonesia, Commerce had applied a targeted dumping analysis. Recognizing the withdrawal of its regulations, however, Commerce continued to explore its options regarding its targeted dumping methodology.

In March 2010, Commerce established its new targeted dumping methodology in the Final Determination of the Polyethylene Retail Carrier Bags from Taiwan. In previous determinations, Commerce had applied an “average-to-transaction” methodology only to those sales found to have been “targeted.” After withdrawing its targeted dumping regulations, Commerce shifted its approach. Commerce determined that the “average-to-average” methodology applied to all sales masked the dumping margins attributable to targeted sales by averaging those higher-priced sales with the lower-priced, non-targeted sales of the same product. Applying the “average-to-transaction” methodology to all sales, however, unmasked such targeted dumping. Furthermore, Commerce determined in PRCBs from Taiwan that the statute permitted application of the “average-to-transaction” methodology to all sales and not just targeted sales.

Although Commerce’s new “targeted dumping” methodology has a significant impact in

---

   The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise.
65 Pablo M. Bentes et al., International Trade, 43 Int’l Law. 335, 348 (2009).
66 Pablo M. Bentes et al., International Trade, 44 Int’l Law. 93, 105 (2010).
67 Int’l Trade Administration, Polyethylene Retail Carrier Bags from Indonesia, 74 Fed. Reg. 56,807 (Nov. 3, 2009).
68 Id.
69 Int’l Trade Administration, Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value, 75 Fed. Reg. 14,569, 14,570 (Mar. 26, 2010) (“PRCBs from Taiwan”).
72 Id.
73 Id.
74 Id.
cases where there is a pattern of price differences among purchasers, regions, or periods of time, there will be no impact in cases where all sales are dumped or no sales are dumped. In cases where a pattern of price differences is not established, Commerce will apply its standard “average-to-average” methodology.

Commerce’s previous approach of applying an “average-to-transaction” methodology only to “targeted” sales resulted in little change to the weighted average margin, because non-dumped sales effectively offset the margins attributable to dumped sales. The new “targeted dumping” methodology means that where targeted dumping is found to have occurred, a dumping margin will be calculated for each U.S. sale and non-dumped sales having “negative” margins will not be allowed to offset the margins attributable to the dumped sales. Commerce’s new approach, however, may face criticism from parties who have disputed Commerce’s practice of “zeroing” before the World Trade Organization.

2. Application of CVD Law to Vietnam

On May 1, the first CVD order was imposed on imports of goods from Vietnam, making it the second NME country to have the CVD law applied to it. As discussed in the 2009 edition of the INTERNATIONAL LAWYER Year-in-Review, Commerce found the CVD law to be applicable to Vietnam in the preliminary determination. In the final determination, Commerce determined that application of both the CVD law and the AD law using the NME methodology was appropriate and consistent with Congressional intent.

In its determination, Commerce noted that Congressional statements of its intent with respect to the application of the CVD law contained no indication that the NME antidumping methodology might be abandoned. Instead, the statements “contemplate that the Department’s application of the CVD law to NMEs would take place simultaneously with the continued

---

75 See, e.g., Int’l Trade Administration, Polyethylene Retail Carrier Bags from Indonesia: Final Determination of Sales at Less Than Fair Value, 75 Fed. Reg. 16,431 (Apr. 1, 2010).
77 The first NME country to have the CVD law applied was the People’s Republic of China. See Int’l Trade Administration, Coated Free Sheet Paper from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, 72 Fed. Reg. 60645 (Oct. 25, 2007).
78 Pablo M. Bentes et al., International Trade, 44 INT’L LAW. 93, 103 (2010).
application of the Department’s NME antidumping methodology.”

In *CVD PRCBs from Vietnam*, Commerce also addressed arguments relying on the Court of International Trade decision in *GPX Int’l Tire Corp. v. United States*. The Government of China argued that, in accordance with the Court of International Trade’s decision in *GPX Tire*, Commerce should “terminate [the] proceeding until its methodology is modified to avoid double counting when simultaneously applying CVD and AD remedies calculated pursuant to the Department’s NME methodology.” Commerce responded by stating in its final determination that the *GPX Tire* decision had not been finalized. Commerce also noted that in previous cases it had determined that the application of countervailing duty law to non-market economy countries was consistent with China’s commitments contained in China’s WTO accession protocol. Commerce stated that because Vietnam’s WTO accession protocol contained commitments similar to China’s commitments, the application of CVD law to Vietnam, likewise, was consistent with Vietnam’s WTO Accession Protocol commitments. Finally, Commerce found that its determinations regarding application of the CVD law to an NME are made on a country-by-country basis and that Vietnam had progressed sufficiently such that subsidies could be both measured and identified.

Until appellate rights in *GPX Tire* have been exhausted, Commerce’s current practice allows for the application of CVD law to non-market economies. Commerce does not appear to have the same concerns regarding double-counting as the CIT.

### 3. Initiation of Section 301 Investigation

On October 20, the Office of the United States Trade Representative initiated an investigation in response to a petition filed by the United Steel Steelworkers (“USW”) pursuant to Section 302(a) of the Trade Act of 1974 (the “Act”). The investigation was initiated to address acts, policies, and practices affecting trade and investment in green technologies of the People’s Republic of China (“China”). The petition alleges that China employs a wide range of...
acts, policies, and practices that protect domestic producers of green technology in a manner that is inconsistent with its WTO commitments. The petition further alleges that China’s export restraints, prohibited subsidies, discrimination against foreign companies and imported goods, technology transfer requirements, and domestic subsidy programs have resulted in “serious prejudice to U.S. interests.” The petition also alleges that China’s policies have increased the U.S. trade deficit with China in green technology goods.

U.S. Trade Representative, Ron Kirk, responded that USW’s claims were being thoroughly investigated because green technology is “a vitally important sector for the United States” and that “this Administration is committed to ensuring a level playing field for American workers, businesses and green technology entrepreneurs.” The U.S. Trade Representative further stated that claims by USW that are supported by sufficient evidence will be pursued through WTO dispute settlement. There will be a 90-day period allowed by the statute, during which the claims will be examined and verified to determine whether the acts, policies, and practices of the Chinese government “deny U.S. rights or benefits under the GATT 1994, under the Subsidies and Countervailing Measures Agreement (SCM Agreement), and under China’s Protocol of Accession to the WTO.” Section 301 of the Act permits the U.S. Trade Representative to request consultations with the foreign country implicated by the investigation.

Section 301 has not been widely utilized in recent years. On December 22, 2010, the Office of United States Trade Representative (“USTR”) announced that it had requested formal WTO consultations with China regarding subsidies on wind power equipment.

4. Determinations Not To Initiate CVD Investigation With Respect to China’s Undervaluation of its Currency

On September 7, Commerce determined in the Preliminary Determination of Aluminum Extrusions that it would not initiate an investigation relating to petitioners’ currency manipulation allegation. Commerce stated that it would defer “initiating on petitioners’ allegation that the [Government of China], in an effort to benefit domestic producers, intervenes in the currency market in order to ensure that the RMB/U.S. dollar exchange rate understates the

91 Green Technology Investigation, 75 Fed. Reg. 64776. “Green technology” is defined as wind and solar energy products, advanced batteries, and energy-efficient vehicles, among others. Id.
92 Id.
93 Id.
95 Id.
96 Id.
97 Id.
value of the RMB.” A similar determination was made in the *Final Determination of Certain Coated Paper*, where Commerce stated that it had determined not to investigate a new subsidy allegation regarding currency undervaluation. Given recent developments regarding legislation concerning currency manipulation, it is unclear whether Commerce will consider currency manipulation as a trade subsidy in the future.

5. **Chinese Government Procurement as a Countervailable Subsidy**

In the *Preliminary Determination of Aluminum Extrusions*, Commerce countervailed Chinese government procurement for the first time. The Chinese government’s “Government Procurement Law of the PRC” covers materials used in government projects. The law allows the government “to procure imported goods or services only when domestic goods or services are either unavailable or cannot be obtained under ‘reasonable commercial conditions.’” The “Implementing Measures on the Government Procurement Law of the PRC” (“Implementing Measures”) specify that the unavailability of “reasonable commercial conditions” occurs when the “lowest offered price for domestic goods, construction, or services, that meet the requirements of procurement documents, exceeds the lowest offered price for foreign goods, construction, or services by more than 20 percent.”

In the Preliminary *Determination of Aluminum Extrusions*, one respondent failed to report 30 percent of its sales. Commerce determined, as adverse facts available, that these sales were made to the Government of China authorities. Although Commerce noted that the Government of China had denied that the respondent sold the subject merchandise under a procurement program, it maintained that the failure to provide adequate information regarding the unreported sales warranted the assumption that the sales were to government authorities under a procurement program and constituted a financial contribution under 19 U.S.C. § 1677(5)(D)(iv). Commerce also determined that the respondent received a benefit under 19 U.S.C. § 1677(5)(E)(iv).

The other respondent provided complete sales information, including information identifying which customers were Government of China authorities. The Government of China provided ownership information for a portion of the respondent’s customers. Based on these submissions, Commerce determined that the respondent sold aluminum extrusions to

---

100 Id. at 54,303.
102 Id.’
103 Id.
104 Id.
105 Id.
106 Id.
107 Id.
108 Id. at 54,320.
109 Id. at 54,319.
110 Id.
government authorities, constituting a financial contribution under 19 U.S.C. § 1677(5)(D)(iv). Commerce then examined whether a benefit was conferred under 19 U.S.C. § 1677(5)(E)(iv). Commerce used the respondent’s sales to privately-owned customers as a benchmark and compared the benchmark sales price to the prices charged to the government authorities. Based on this comparison, Commerce determined that the respondent received a benefit.

Commerce determined that the procurement program is specific under 19 U.S.C. 1677(5A)(C), because it is contingent on the use of domestic goods over imported goods, as demonstrated by the price premium set forth in the Implementing Measures. Commerce, therefore, was able to calculate a net subsidy rate for both respondents, resulting in the countervailing of the Chinese Government procurement.

Commerce’s finding that Chinese Government procurement is a countervailable subsidy is significant to the application of CVD law to non-market economies. It is the first time that such a program has been determined by Commerce to be countervailable.

**B. COURT APPEALS OF INTERNATIONAL TRADE REMEDY CASES**

In 2010, the Court of Appeals for the Federal Circuit (“CAFC” or Federal Circuit) in several decisions approved the Commerce Department’s methodologies and statutory interpretations, even though in two cases the Court of International Trade (“CIT”) had found that Commerce’s interpretation was contrary to clearly expressed Congressional intent. The Federal Circuit, however, circumscribed Commerce’s latitude in applying adverse facts available to non-cooperative respondents, holding that Commerce’s determination on this issue must be grounded in commercial reality. The Federal Circuit clarified the situations under which re-liquidation may be an appropriate remedy, and also found that the availability of re-liquidation did not eliminate irreparable harm when considering whether to issue an injunction against liquidation pending appeal.

The Court of International Trade likewise advanced its jurisprudence regarding injunctions and liquidation. Among other things, the court held that Commerce’s policy of issuing liquidation instructions within fifteen days of a final determination was contrary to law. The court upheld Commerce’s practice of giving its section 129 determinations complying with WTO report only prospective effect, and Commerce’s practice of zeroing antidumping margins in administrative reviews, despite not doing so in original investigations. The court, however, overturned Commerce’s determination to apply both countervailing duties and antidumping duties concurrently to a product from a non-market economy.

---

111 Id.
112 Id. at 54,319 - 54,320.
113 Id.
114 Id.
115 Id.
1. Federal Circuit Decisions

In United States Steel Corporation v. United States,\(^{116}\) the issue before the Federal Circuit was whether Commerce’s section 129 determination, which modified Commerce’s “zeroing” methodology in response to a WTO Appellate Body decision, was consistent with the statute. Commerce adopted an “offsetting” methodology in original investigations that replaced the “zeroing” of negative dumping margins in its average-to-average calculations in original investigations. As a result of the change in methodology, the respondent’s margins were reduced to de minimis. The Federal Circuit, citing several of its prior decisions, held that the statute was “silent or ambiguous” as to Commerce’s zeroing methodology. The Court accorded Commerce Chevron deference and upheld the new methodology as a reasonable interpretation of the statute. In ThyssenKrupp Acciai Speciali Terni S.p.A. v. United States,\(^{117}\) the Federal Circuit affirmed Commerce’s decision to limit section 129 determinations to those issues affected by the WTO report.

In earlier decisions regarding the zeroing issue, the Court had declined to give any weight to the WTO-inconsistency of Commerce’s zeroing practice.\(^{118}\) But in Thai I-Mei Frozen Foods Co. Ltd. v. United States,\(^{119}\) the Federal Circuit affirmed the Court of International Trade’s use of the WTO Agreements “as context, informing its analysis of the Congressional intent behind the statutory provisions.” Nevertheless, the Federal Circuit reversed the lower court and held Commerce’s decision to exclude sales outside the ordinary course of trade in determining profit margins based on companies other than the respondent company was permissible under the statute. Similarly, in Ad Hoc Shrimp Trade Action Committee v. United States,\(^{120}\) the Federal Circuit upheld Commerce’s decision that the statutory multinational corporation provision was inapplicable when the affiliates at issue were in two non-market economies. However, a strong dissent reasoned that “Congress need not explicitly negate all potential exceptions to a given statute in order to ensure that the plain language of the statute is given effect.”\(^{121}\)

In Gallant Ocean (Thailand) Co. Ltd v. United States,\(^{122}\) the Federal Circuit circumscribed Commerce’s latitude in applying dumping margins based on adverse facts available. The Court found that Commerce’s adverse facts available margins, which were set at the rate alleged in the petition and at ten times the average rate of the cooperative respondent, were “punitive, aberrational, or uncorroborated.”\(^{123}\) The Court reasoned that Commerce’s adverse facts were “unrelated to commercial reality” and therefore not a reasonable estimate.\(^{124}\) In Kyd, Inc. v. United States, the Federal Circuit distinguished Gallant Ocean in upholding

---

\(^{116}\) 621 F.3d 1351 (Fed. Cir. 2010).
\(^{117}\) 603 F.3d 928 (Fed. Cir. 2010).
\(^{118}\) See, e.g., Timken Co. v. United States, 354 F.3d. 1334, 1341-43 (Fed. Cir. 2004); and Corus Staal B.V. v. United States, 395 F.3d 1343, 1345-47 (Fed. Cir. 2005).
\(^{119}\) 616 F.3d 1300, 1307 (Fed. Cir. 2010) (emphasis added).
\(^{120}\) 596 F.3d 1365 (Fed. Cir. 2010).
\(^{121}\) Id. at 1373 (emphasis added).
\(^{122}\) 602 F.3d 1319 (Fed. Cir. 2010).
\(^{123}\) Id. at 1324 (emphasis added).
\(^{124}\) Id. at 1324.
Commerce’s application of a 121 percent adverse facts based antidumping margin.\textsuperscript{125} The Court found that Commerce had corroborated the information in the petition from which the adverse facts were taken.\textsuperscript{126} The Court concluded that the magnitude of the margin alone did not make it punitive.\textsuperscript{127}

In \textit{Agro Dutch Industries Limited v. United States},\textsuperscript{128} the Federal Circuit delineated the situations under which re-liquidation may be appropriate. The Federal Circuit upheld the Court of International Trade’s decision to extend its injunction against liquidation pending appeal to include the five-day period between the issuance of the injunction and its stated effective date. On the fifth day of this five-day period, Customs was served with notice of the injunction, but also on the same day, Customs liquidated most of respondent’s imports.\textsuperscript{129} The Federal Circuit held that while the \textit{Zenith} rule ordinarily renders moot court actions in which liquidation has already occurred, there are exceptions to that general rule in which \textit{Shinyei} re-liquidation relief may be appropriate.\textsuperscript{130} The Court found that the \textit{Zenith} rule would not apply when re-liquidation is required to enforce a valid injunction, where liquidation occurred because of a clerical or typographical error in the injunctive order, where re-liquidation may be required to challenge Commerce’s liquidation instruction, or where despite liquidation the issue has ongoing legal consequences related to the possible revocation of the underlying antidumping order.\textsuperscript{131}

In \textit{American Signature, Inc. v. United States},\textsuperscript{132} the Federal Circuit reversed the Court of International Trade’s denial of a preliminary injunction against liquidation, finding that the lower court’s reasoning that the \textit{Shinyei} re-liquidation remedy undercut respondent’s contention that it would suffer irreparable harm if its entries were liquidated. The Federal Circuit also reversed the lower court’s decision that Commerce may correct ministerial errors in its final determination through Customs’ instructions. The Federal Circuit reasoned that Commerce’s regulations, as interpreted by Commerce itself, require the correction of ministerial errors within 30 days through an amended determination.\textsuperscript{133} Incorporating ministerial error corrections into liquidation instructions would convert the usual 1581(c) challenges into 1581(i) residual jurisdiction challenges, which the Court found to be unreasonable.\textsuperscript{134} Finally, in \textit{Deseado International, Ltd., v. United States},\textsuperscript{135} the Federal Circuit upheld Commerce’s decision to refuse to consider, in the context of an administrative review, the scope of the antidumping order that had been previously addressed in a scope review.

\textsuperscript{125} 607 F.3d 760, 767 (Fed. Cir. 2010).
\textsuperscript{126} \textit{Id.} at 765.
\textsuperscript{127} \textit{Id.} at 767-68.
\textsuperscript{128} 589 F.3d 1187 (Fed. Cir. 2009).
\textsuperscript{129} \textit{Id.}. at 1189-90.
\textsuperscript{130} \textit{Id.} at 1191-92, citing \textit{Zenith Radio Corp. v. United States}, 710 F.2d 806 (Fed. Cir. 1983); and \textit{Shinyei Corp. of Am. v. United States}, 524 F.3d 1271 (Fed. Cir. 2008).
\textsuperscript{131} \textit{Id.} at 1191-92.
\textsuperscript{132} 598 F.3d 816 (Fed. Cir. 2010).
\textsuperscript{133} \textit{Id.} at 827.
\textsuperscript{134} \textit{Id.} at 825.
\textsuperscript{135} 600 F.3d 1377 (Fed. Cir. 2010).
In reviewing an ITC decision, the Federal Circuit in *Diamond Sawblades Manufacturers Coalition v. United States*\(^\text{136}\) sustained the Court of International Trade’s initial remand to the Commission under an abuse of discretion standard. The Federal Circuit reasoned that although the CIT had stated at times the ITC’s negative threat determination was not supported by substantial evidence, the purpose of its initial remand was to request that the ITC provide additional reasoning or clarification to support its determination. On remand, the composition of the International Trade Commission changed, and the two new Commissioners joined the original dissent in finding a threat of material injury, which then became the determination of the Commission. Both the Court of International Trade and the Federal Circuit sustained the affirmative remand determination as having addressed the further explanations requested by the CIT’s initial determination.\(^\text{137}\)

2. **Court of International Trade Decisions**

Like the Federal Circuit, the Court of International Trade’s jurisprudence regarding injunctions and liquidation evolved over 2010. In *Ames True Temper v. United States*,\(^\text{138}\) the Court declined to order re-liquidation of entries that were deemed liquidated by operation of the 6-month statutory deemed liquidation provision when the plaintiff failed to serve the injunction. Later in the year, however, in *Clearon Corp. v. United States*,\(^\text{139}\) the Court, in keeping with the Federal Circuit’s decision in *Agro Dutch*, held that deemed liquidation, even if caused by plaintiff’s failure to serve the injunction, did not moot plaintiff’s claims. The Court, instead, modified the injunction to eliminate the service requirement. In *NSK Ltd. v. United States*\(^\text{140}\) and *NSK Bearings Europe Ltd v. United States*,\(^\text{141}\) the court denied injunctions against liquidation on the grounds that plaintiffs’ claim against Commerce’s zeroing practice had no likelihood of success on the merits – which contrasts sharply with the NAFTA binational panel’s *Stainless Steel Sheet and Strip* decision on the issue of zeroing. In *SKF USA Inc. v. United States*, the court found that Commerce’s policy to issue liquidation instructions within fifteen days after publication of an administrative review was unlawful, considering that plaintiff’s may appeal the Commerce determination within thirty days may deprive plaintiffs of their right to judicial review.\(^\text{142}\)

The CIT also had occasion to review Commerce implementation of WTO decisions. In *Andaman Seafood Co. v. United States*,\(^\text{143}\) the Court upheld Commerce’s decision to give only prospective effect to its antidumping decision, which was issued to bring the United States into compliance with its WTO commitments. Consistent with the Federal Circuit’s decision in *Kyd*, the CIT in the underlying *Kyd, Inc. v. United States* decision,\(^\text{144}\) as well as in *Essar Steel Limited*

\(^{136}\) 612 F.3d 1348, 1358 (Fed. Cir. 2010).

\(^{137}\) *Id.* at 1360-61.


\(^{139}\) 717 F. Supp. 2d 1366 (Ct. Int’l Trade 2010).


\(^{141}\) 2010 WL 4055929 (Ct. Int’l Trade, Oct. 15, 2010).

\(^{142}\) 675 F. Supp. 2d 1264 (Ct. Int’l Trade 2009).

\(^{143}\) 675 F. Supp. 2d 1363 (Ct. Int’l Trade 2010).

\(^{144}\) 704 F. Supp. 2d 1323 (Ct. Int’l Trade 2010).
hold that Commerce may not apply uncorroborated and punitive adverse facts available antidumping rates.

Regarding the perennial issue of zeroing, the Court, in *Dongbu Steel Co. Ltd. v. United States*, affirmed Commerce’s continuation of zeroing in administrative reviews, despite its adoption of the offsetting methodology in original investigations. The Court rejected plaintiff’s argument that Commerce’s dichotomous interpretation of the same statutory provision, to mean one thing in administrative reviews and another in original investigations, was unsustainable. Continuing its review of whether countervailing duty law may be applied to non-market economies (including China) without any change in Commerce’s antidumping practice regarding non-market economies, the CIT in *GPX International Tire Corp. v. United States*, found that Commerce must forgo imposition of countervailing duties because its remand determination failed to clearly demonstrate to what degree double-counting occurs when NME antidumping remedies are imposed. The issue is now on appeal to the Federal Circuit, and concurrently a WTO panel report finding Commerce methodology to be WTO-consistent on appeal to the WTO Appellate Body.

Regarding countervailing duties and adverse facts available, the Court in *United States Steel Corporation v. United States*, found that Commerce’s decision not to apply adverse facts available when the Indian national and state governments failed to respond to the questionnaire, but instead to rely on the respondent company’s reported benefits under the governmental programs in question, was consistent with the statute.

On other methodological issues, the Court, in *Fischer S.A. Comercio, Industria and Agricultura v. United States*, upheld Commerce’s application of the 90/60 contemporaneity rule to match U.S. market sales with home market sales ninety days after or sixty days before the month in which the U.S. sale was made, even when the rule results in matching U.S. sales with sales that occurred in the home market outside the period of review. And in *PSC VSMPO AVISMA Corp. v. United States*, the Court reviewed Commerce’s valuation of co-products, which the Court characterized as an issue of first impression. It remanded Commerce’s “severing” of respondent’s production process, despite respondent’s financial and operational

---

147 *Id.* at 1363.
153 *Id.* at *4.
cohesiveness, and ordered Commerce to take into account respondent’s ordinary course of business by focusing on its entire production process.\textsuperscript{154}

V. Developments in Section 337 Investigations at the U.S. International Trade Commission

The year 2010 saw tremendous changes in practice and precedent at the U.S. International Trade Commission (“ITC” or “Commission”). The number of complaints filed broke all records, with a total of fifty-one investigations instituted in fiscal year 2010.\textsuperscript{155} It is not surprising that this wellspring of new cases brought to the forefront major developments regarding ITC law and procedure. Three such developments involve: (1) clarification as to what activities constitute “exploitation” of intellectual property for purposes of establishing a domestic industry under 19 U.S.C. § 1337 (“Section 337”); (2) the use and treatment of Markman decisions at the Commission; and (3) the manner in which public interest information is collected for ITC matters.

A. Clarification As To What Activities Constitute “Exploitation” Of Intellectual Property For Purposes Of Establishing Domestic Industry

The nature of Section 337 as a trade statute, as opposed to one for enforcement of intellectual property rights, explains the importance attached to the requirement that the relief provided by the statute be available only to entities maintaining an industry in the United States.\textsuperscript{156} The domestic industry requirement is imposed “to prevent the ITC from becoming a forum for resolving disputes brought by foreign complainants whose only connection with the United States is ownership of a U.S. patent.”\textsuperscript{157} As the United States continues to move further from an economy based on manufacturing to one based on information, however, complainants are relying more and more on investments in the “exploitation” of their intellectual property.\textsuperscript{158}

Since amending the statute in 1988 to allow such expenditures to count toward domestic industry in a Section 337 investigation, there has been some ambiguity as to the parameters of 19 U.S.C. § 1337(a)(3)(C).\textsuperscript{159} In particular, practitioners question whether litigation activities alone constitute “exploitation” of the subject intellectual property, especially when offered by a non-

\textsuperscript{154} Id. at **5-6.
\textsuperscript{159} Congress added subsection (C) in 1988 to permit the Commission to consider engineering, research and development, and licensing activities in the domestic industry analysis. This subsection does not require “actual production of the article in the United States if it can be demonstrated that substantial investment and activities of the type enumerated are taking place in the United States.” Certain Microlithographic Mach. & Components Thereof, Inv. No. 337-TA-468, ID, at 345-46 (Apr. 1, 2003) (quoting H.R. REP. NO. 100-40, pt. 1, at 157 (1987)).
practicing entity ("NPE"). The Commission provided clarification on this issue in *Coaxial Cable Connectors & Components Thereof & Products Containing Same.* After analyzing the legislative history of the domestic industry requirement, the Commission determined that, under certain circumstances, litigation expenses (of an NPE or any other type of complainant) could be considered part of domestic industry, and then remanded the investigation back to the administrative law judge ("ALJ"). The remand opinion, however, demonstrates that, just because it is possible to establish domestic industry based on such expenses, does not mean that it is easy to do so.

For one of the patents at issue in *Coaxial Cable Connectors,* the complainant primarily relied on litigation expenses to fulfill the economic prong of the domestic industry requirement under 19 U.S.C. § 1337(a)(3)(C). The ALJ determined that, based on those expenditures, the complainant demonstrated that a domestic industry existed. Somewhat unusually, the Office of Unfair Import Investigations ("OUII"), rather than any private party, filed the sole petition for review on this issue. The Commission chose to take up the challenge and, in doing so, solicited comments from the parties and the public on several questions related to the scope of licensing and litigation expenditures that should be counted as exploiting the intellectual property under subsection (C) for purposes of domestic industry. Several third parties filed comments. "[S]ome suggested that litigation activities can never constitute exploitation of an intellectual property right no matter how closely linked to licensing," while other entities “asserted that litigation activities, regardless of whether they are connected with licensing, should always be considered by the Commission in determining the existence of a domestic industry.

In its opinion, the Commission determined that litigation or any other activities may be used by a complainant to satisfy the domestic industry requirement under 19 U.S.C. § 1337(a)(3)(C), but only if: (1) the activities relate to licensing; and (2) the activities relate to the patent(s) at issue; and (3) the complainant can document the costs for said activities. Mere patent ownership and patent infringement litigation is not enough without this nexus. The Commission also made clear that licensing expenditures aimed solely at deriving revenue can be used to establish domestic industry, stating unequivocally that, “in assessing whether the domestic industry requirement has been met, we will also consider licensing activities for which the sole purpose is to derive revenue from existing production.” Thus, in its clarification on the outer limits of “exploitation,” the Commission indicated that the business model of NPEs is not a bar to establishing domestic industry and provided NPEs with a road map to establish the

---

161 See id. at 41-56.
164 Id. at 114.
165 *Coaxial Cable Connectors,* Inv. No. 337-TA-650, Comm’n Op., at 4-5. Because the patent at issue was only asserted against defaulting respondents, OUII was the only party to seek review on the ALJ’s finding of a domestic industry. Id. at 42.
167 *Coaxial Cable Connectors,* Inv. No. 337-TA-650, Comm’n Op., at 46.
168 Id. at 44, 54.
169 Id. at 45-46.
170 Id. at 50 (emphasis added).
domestic industry requirement for a Section 337 investigation under 19 U.S.C. § 1337(a)(3)(C) based on their own (non-manufacturing) activities (as opposed to those of their licensees).

Coaxial Cable Connectors comports with longstanding Commission precedent that domestic industry expenses, including those related to licensing, should be “broken down into their constituent parts.”171 The decision reminds complainants that “[t]he mere fact [] that a license is executed does not mean that a complainant can necessarily capture all prior expenditures to establish a substantial investment in the exploitation of the patent. A complainant must clearly link each activity to licensing efforts concerning the asserted patent.”172

In the opinion, the Commission provided several examples of licensing activities that, depending on the circumstances, may be used to satisfy the domestic industry requirement, including drafting and negotiating licensing agreements.173 Such licenses should list the patent at issue if expenses for the development of those licenses are to be credited toward domestic industry.174 If a complainant chooses to prove domestic industry through litigation expenses, including those expenses related to settlement and/or licensing negotiations, it can show the requisite nexus between the litigation and licensing of the patents at issue by demonstrating that “the patentee and accused infringer were in licensing negotiations before the suit was filed or while it was ongoing, if the patentee made a concerted effort to license the patent, or if the patentee has an established licensing program.”175 With regard to whether expenditures for cease and desist letters may be counted toward domestic industry, the Commission stated that such letters “are not inherently related to licensing, as they may simply instruct the recipient to cease the infringing activity.”176 Nonetheless, “they may be related to licensing if, for example, they offer the recipient the option of taking a license or they form part of a concerted licensing program or effort.”177

Not only must a complainant provide domestic industry expenditures, it must also prove that those expenditures are “substantial.” To do so, Coaxial Cable Connectors instructs that “[t]he Commission may take into account, among other things, the type of activity, the relationship between the activity, licensing, and the patent at issue, and the amount of the investment.”178 In addition, “[t]he Commission may also consider whether the activity is of a type that Congress explicitly indicated may establish a domestic industry; namely, activities that serve to encourage practical applications of the invention or bring the patented technology to the market.”179

That the Commission has charted a course by which a complainant can satisfy the

---

171 Id. at 54.
172 Id. at 50-51.
173 Coaxial Cable Connectors, Inv. No. 337-TA-650, Comm’n Op., at 50.
174 Id. at 54.
175 Id.
176 Id. at 55.
177 Id. at 55-56.
178 Id. at 51.
179 Coaxial Cable Connectors, Inv. No. 337-TA-650, Comm’n Op., at 51.
domestic industry requirement based on litigation expenses does not mean that it will be a simple task for NPEs, or any other complainant, to accomplish. The opinion makes plain that a complainant must establish a sufficient nexus between litigation expenditures and licensing the patents at issue in order to count those expenditures toward domestic industry. Because the complainant failed to do this on remand, the ALJ would not apportion 100% of the expenditures for each of the six legal actions offered up as evidence. For some actions, there was no indication that the complainant actually sent any cease and desist letters relating to the patent at issue or otherwise pursued licensing offers for the patent at issue prior to bringing the ITC investigation. For other actions, the patent at issue simply was not the subject of the litigation.

On the other hand, the ALJ did consider specific litigation expenses related directly to licensing and settlement of cases involving the patent at issue. He also considered expenses attributable to settlement or licensing negotiations that took place after a specific time period for any of the six actions (even those not directly related to the patent at issue), when testimony showed that the complainant made efforts to resolve all six actions using these tools. The ALJ explained that any negotiation efforts that took place after December 2003 were “inextricably intertwined” with the complainant’s licensing program. Finally, the ALJ took into account litigation expenses attributable to drafting and reviewing the global Settlement Agreements, which provided a license for the patent at issue, among others. Although the ALJ noted that a precise accounting of the litigation expenses was not necessary, it is clear from the many pages of annotated attorney billing entries that he broke down the expenditures, as instructed by the Commission. In the end, the ALJ credited less than $43,000 in attorneys’ fees toward the complainant’s domestic industry.

Using the Commission’s criteria, the ALJ concluded ultimately that a domestic industry did not exist for the patent at issue because:

- The complainant had only one license for the patent at issue, of which only a portion actually dealt with that patent.
- The complainant had no established licensing program, let alone one that promoted the patent at issue.
- Notwithstanding evidence that it was the complainant’s common practice to send cease and desist letters and offer licenses to potential infringers before bringing suit, the complainant had failed to show that it had sent cease and desist letters with offers to license the patent at issue prior to filing the ITC complaint.

---

180 See, e.g., id. at 44, 50-51, 54.
182 Id. at 12.
183 Id.
184 Id. at 13.
185 See id. at 19-25; see also Coaxial Cable Connectors, Inv. No. 337-TA-650, Comm’n Op., at 54.
186 Coaxial Cable Connectors, Inv. No. 337-TA-650, Remand ID, at 19-25.
The complainant had not had any other licensing discussions with anyone other than those involved with the single license for the patent at issue.\textsuperscript{188}

While the long-term effects of this decision remain to be seen, there are at least two lessons that practitioners can take from Coaxial Cable Connectors. First, while the Commission opinion provides a means by which NPEs may satisfy the domestic industry requirement, the opinion does not give them carte blanche to file complaints at the ITC, as is exemplified in the remand determination. Second, the nexus component will likely be strictly enforced, requiring even more detailed preparation before filing at the ITC, particularly with regard to NPEs.

The Commission opinion in Coaxial Cable Connectors may also preview an important domestic industry question for the ITC in 2011. In the opinion, it states that “only activities that occurred before the filing of a complaint with the Commission are relevant to whether a domestic industry exists or is in the process of being established under sections 337(a)(2)-(3).”\textsuperscript{189} This bright-line test has already been applied in subsequent matters,\textsuperscript{190} notwithstanding the fact that, prior to Coaxial Cable Connectors, the Commission had analyzed domestic industry at other points during the investigation.\textsuperscript{191} The discordant determinations will have to be resolved in short order. Indeed, the Commission already has before it the vehicle to do so in Flash Memory Chips, where review has been requested due to “an apparent conflict in recent precedent regarding the proper timing for examining whether a domestic industry exists.”\textsuperscript{192}

\section*{B. THE USE AND TREATMENT OF MARKMAN DECISIONS AT THE COMMISSION}

Although it was 1996 when the United States Supreme Court issued its opinion in Markman v. Westview Instruments,\textsuperscript{193} it was not until the 2001-2003 time period that ALJs at the ITC began issuing Markman decisions, setting forth constructions of disputed patent claim terms in advance of a final ID.\textsuperscript{194} The expedited pace of investigations as well as the absence of juries

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{188} Id. at 25.
\item\textsuperscript{189} Coaxial Cable Connectors, Inv. No. 337-TA-650, Comm’n Op., at 51 n.17 (citing Bally/Midway v. U.S. Int’l Trade Comm’n, 714 F.2d 1117, 1121 (Fed. Cir. 1983)).
\item\textsuperscript{191} See, e.g., Certain Variable Speed Wind Turbines & Components Thereof, Inv. No. 337-TA-376, Comm’n Op., at 10-13 (Nov. 1996) (holding that activities occurring after the target date may be relevant when evaluating the existence of domestic industry); Certain Concealed Cabinet Hinges & Mounting Devices, Inv. No. 337-TA-289, Comm’n Op., at 21 (Jan. 8, 1990) (assessing the existence of the domestic industry as of the discovery cutoff date).
\item\textsuperscript{192} See Inv. No. 337-TA-664, Pet. of OUII for Review of the ID, at 1 (Nov. 8, 2010).
\item\textsuperscript{193} 517 U.S. 370 (1996) (explaining that patent claim construction was a matter of law for the judge to decide rather than a question of fact for a jury).
\item\textsuperscript{194} Judge Terrill was the first to conduct Markman hearings at the ITC. See Peter Kimball, Finding The Time To Be More Efficient: Markman Hearings And Appeals In Section 337 Proceedings, 21 337 REPORTER 101, 101 & n.4 (2005) (citing interview with Judge Terrill); see also Certain Home Vacuum Packaging Machs., Inv. No. 337-TA-496, Order No. 36, at 7, 18 n.4 (Jan. 29, 2004) (Pub. Version); Certain Abrasive Prods. Made Using A Process For Making Powder Preforms, & Prods. Containing Same, Inv. 337-TA-449, Tutorial Tr. (Oct. 3, 2001)).
\end{itemize}
\end{footnotesize}
to educate have factored into the limited use of Markman decisions at the ITC. Over the years, however, Markman decisions have become more prevalent in this forum. Today, four of the six ALJs--Chief Judge Luckern and Judges Bullock, Essex, and Gildea--have held Markman hearings, a number of which occurred in 2010.

Even though the majority of Section 337 investigations still do not include Markman decisions, discussions over whether to include Markman hearings and/or briefing are occurring more regularly. Indeed, five of the six ALJs now address Markman issues in their Ground Rules. As Markman considerations become more integrated into ITC practice, one outstanding question has been whether such decisions by an ALJ should be handled via an ID or an order. Using an ID as the vehicle for a Markman decision means that claim construction must be accomplished far enough in advance of trial in order to allow for Commission review (and potential remand to the ALJ and re-review by the Commission). Otherwise, the ID will lack

195 See, e.g., A LAWYER’S GUIDE TO SECTION 337 INVESTIGATIONS BEFORE THE U.S. INTERNATIONAL TRADE COMMISSION 151 (Tom M. Schaumberg ed., 2010) (“At the Commission, however, the ALJ decides both legal and factual issues, so one of the primary rationales for conducting a separate claim-construction hearing is absent in a Section 337 investigation.”); Carl C. Charneski, The Role Of The Office Of The Administrative Law Judges Within The United States International Trade Commission, 8 J. MARSHALL REV. OF INTELL. PROP. L. 216, 224 (2009) (“In view of the relatively short discovery phase of section 337 investigations . . . and the fact that an administrative law judge’s constructions of asserted patent claims are subject to Commission review, the advance issuance of claim constructions and Markman-type hearings have not become the norm at the ITC.”).


199 See Kimball, supra note 40, at 107-08; see also Coe, supra note 42.
finality, and the ALJ could risk conducting a full hearing based on an erroneous claim construction, requiring a second hearing and wasting significant time and money.\textsuperscript{200} Alternatively, the target date of the investigation could be moved, which could come in conflict with the dictates of Congress that “[t]he Commission shall conclude any such investigation and make its determination under this section at the earliest practicable time . . . .”\textsuperscript{201} An order, on the other hand, is not subject to immediate Commission consideration unless it has been certified for interlocutory review, resulting in delayed adjudication (or readjudication) of claim terms that are potentially case dispositive.\textsuperscript{202}

The Commission resolved the ID/order question in \textit{Mobile Telephones}.\textsuperscript{203} In that investigation, on June 22, 2010, Judge Luckern issued his first Markman decision on claim construction in the form of an ID, rather than an order.\textsuperscript{204} The Commission reviewed the ID, focusing on whether claim construction could be considered an “issue” or “part of” an issue within the meaning of Commission Rule 210.18(a).\textsuperscript{205} If so, then the decision could be handled on summary determination via an ID.\textsuperscript{206}

On October 20, 2010, the Commission disagreed with the Chief Judge’s designation and determined that his ruling would be treated as an order.\textsuperscript{207} Accordingly, the Commission would not consider the merits of the claim constructions contained in the newly deemed order until the Commission had before it the final ID for the investigation. Specifically, the Commission held that:

Commission rule 210.42 does not include claim construction in the list of issues that must be decided in the form of an initial determination. Nor is claim construction properly the subject of a motion for summary determination under Commission rule 210.18 since claim construction, standing alone, is not an “issue” or “any part of an issue” within the meaning of that rule. While

\textsuperscript{200} See generally 19 C.F.R. § 210.42(b)(3). In issuing the Markman ID discussed \textit{infra}, Chief Judge Luckern recognized the potential for such an inefficient result. See \textit{Mobile Tel.}, Inv. No. 337-TA-703, Notice to the Parties, at 92 (“Hence a final determination on claim construction . . . before the commencement of the evidentiary hearing on violation . . . would lead to efficiencies at the violation hearing.”). The Chief Judge made a similar observation in \textit{Certain 3G Mobile Handsets \\& Components Thereof}:

[\textit{A}t the ITC a determination of an administrative law judge on any claim construction is subject to review by the Commission who can make new findings of fact based on the generated record. Thus it is conceivable . . . the Commission would not agree with a claim construction by an administrative law judge and hence remand the investigation for a decision by the administrative law judge on a claim construction the Commission deems proper. Such could affect the target date and result in another evidentiary hearing and hence increase the expenses of a section 337 investigation.]


\textsuperscript{201} 19 U.S.C. § 1337(b)(1).

\textsuperscript{202} See 19 C.F.R. § 210.24.

\textsuperscript{203} \textit{Mobile Tel.}, Inv. No. 337-TA-703, Comm’n Notice, at 2 (Oct. 20, 2010) (“June 22nd Notice”).

\textsuperscript{204} \textit{Mobile Tel.}, Inv. No. 337-TA-703, Notice to the Parties, at 91-92.

\textsuperscript{205} \textit{Mobile Tel.}, Inv. No. 337-TA-703, June 22nd Notice, at 2; see 19 C.F.R. § 210.18(a) (instructing that “[a]ny party may move with any necessary supporting affidavits for a summary determination in its favor upon all or any part of the issues to be determined in the investigation”) (emphasis added).

\textsuperscript{206} 19 C.F.R. § 210.42(c).

\textsuperscript{207} \textit{Mobile Tel.}, Inv. No. 337-TA-703, June 22nd Notice, at 2.
the Commission finds that the rules are unambiguous, to the extent interpretation is required, the Commission determines in its discretion and in the interest of the expeditious conclusion of section 337 investigations that a ruling on claim construction is properly issued in the form of an order. 208

While immediate Commission review of a Markman decision is not readily available under the Commission’s dictates in Mobile Telephones, the ruling allows an ALJ to base his claim construction determinations on a full evidentiary record. 209 Moreover, the Commission’s determination that the proper mechanism for a Markman decision is an order, rather than an ID, increases the likelihood that the ITC will be able to continue its recent trend of setting shorter target dates for investigations. 210

Interestingly, the Commission’s determination that claim construction decisions are orders, rather than IDs, has postponed review of another noteworthy ITC issue. In Touchpads, Chief Judge Luckern issued an ID, determining that the complainant was barred by collateral estoppel from arguing a different claim construction than that found by a district court in prior litigation. 211 The complainant petitioned for review, which the Commission granted. 212 Rather than opining on the substantive collateral estoppel issue, however, it determined that the ID should have been issued as an order. 213 Accordingly, the ALJ’s collateral estoppel opinion was not ripe for Commission adjudication. 214 The hearing in Touchpads is set for February 2011 215 with the due date for the final ID coming shortly thereafter. 216 Thus, review and resolution of this collateral estoppel question will be an issue to watch in 2011.

C. PROPOSED CHANGES TO COMMISSION RULES GOVERNING PUBLIC INTEREST

Newly proposed changes to Commission Rules of Practice and Procedure in 2010 may boost the role of public interest in Section 337 actions. On October 1, 2010, the Commission published a Notice of Proposed Rulemaking (“NPRM”) in the Federal Register, indicating that it was seeking to amend its rules as they relate to the handling of public interest materials. 217 The stated goal for these proposed changes is to “aid the Commission in identifying investigations that require further development of public interest issues in the record, and to identify and

208 Id.
210 The Federal Circuit views this as an advantage. See, e.g., Pitney-Bowes, Inc. v. Hewlett Packard Co., 182 F.3d 1298, 1309 (Fed. Cir. 1999) (stating that “consultation of extrinsic evidence is particularly appropriate to ensure that his or her understanding of the technical aspects of the patent is not entirely at variance with the understanding of one skilled in the art”).
211 See Greene, supra note 1, at 1.
212 Inv. No. 337-TA-714, Order No. 16, at 10 (Sept. 28, 2010).
214 Id.
215 Id.
216 Touchpads, Inv. No. 337-TA-714, Order No. 9, at 3 (June 22, 2010).
217 See Touchpads, Inv. No. 337-TA-714, Order No. 3, at 3 (May 21, 2010) (noting that the due date for the final ID is April 4, 2011).
develop information regarding the public interest at each stage of the investigation.”

Further, according to the Federal Register announcement, the proposed rules were meant to assist the Commission “in determining when to delegate part of the development of the record on the public interest to the administrative law judge.”

The public interest has always been an important component to any Section 337 investigation. Indeed, Congress mandated that “the public interest must be paramount in the administration of this statute.” The Commission cannot issue a remedy if it adversely affects “the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and/or United States consumers.” Notwithstanding the significance placed on public interest, only four times in the history of the statute have public interest considerations impinged upon the issuance of a remedy where the Commission has found a violation of Section 337, and most of these investigations occurred many years ago. Nonetheless, the NPRM reflects the view that the proposed changes are “necessary,” although it does not set forth the specific bases for this determination.

Under the current framework, the Commission may only consider public interest after it finds a violation and after it has identified an appropriate remedy. The ALJ cannot take evidence on public interest absent a directive from the Commission. The areas of proposed changes include:

- The NPRM proposes the addition of paragraph 19 C.F.R. § 210.12(a)(12) to require a complainant to include in its complaint information on the effects that the requested remedy would have on the public interest factors. Such information should:
  - Explain how the articles potentially subject to the order(s) are used in the United States;
  - Identify any public health, safety, or welfare concerns in the United States relating to the potential order(s);
  - Indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles

---

219 Id.
220 Id. at 60672.
222 19 U.S.C. §§ 1337 (d), (f).
224 75 Fed. Reg. at 60671.
225 Id. at 60673; 19 C.F.R. § 210.50 (b)(1).
226 19 C.F.R. § 210.50(b)(1).
potentially subject to the order(s); and

- Indicate whether a complainant, a complainant’s licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the order(s) within a commercially reasonable time.\(^{227}\)

- The NPRM proposes the addition of paragraph 19 C.F.R. § 210.12(k) to require that, upon the filing of a complaint, the ITC Secretary will publish a notice in the Federal Register soliciting comments from proposed respondents and/or the public on any public interest issues generated by that complaint, and that any such comments must be received within five days of the notice’s publication.\(^{228}\)

- The NPRM proposes the addition of paragraph 19 C.F.R. § 210.13(b)(4) to require a respondent to address any public interest issues identified in the complaint or in third party submissions made pursuant to the complaint.\(^{229}\)

- The NPRM proposes amending 19 C.F.R. § 210.50(b)(1) to allow an ALJ to take public interest evidence in order to provide a recommended determination (“RD”) on that issue when so ordered by the Commission. Further, the amendment provides that, under such circumstances, the extent of the discovery would be at the discretion of the ALJ.\(^{230}\)

- The NPRM proposes amending 19 C.F.R. § 210.50(a)(4) to require that, within thirty days of the ALJ’s issuance of his RD, the parties file with the Commission any additional updates or information on the public interest issues in the investigation.\(^{231}\)

Comments on the proposed rules were due on November 30, 2010.\(^{232}\) To date, the Commission has received a number of responses, including from the law firm of Adduci, Mastriani & Schaumberg LLP; the Computer & Communications Industry Association (“CCIA”); Intellectual Ventures LLC; Microsoft Corporation; the ITC Trial Lawyers Association (“ITCTLA”); economists at NERA Economic Consulting; CCCLA; the Bureau of Fair Trade for Imports and Exports in the Ministry of Commerce for the People’s Republic of China (“MOFCOM”); Steven Beard, an individual; and EKU. Further, the American Intellectual

\(^{227}\) 75 Fed. Reg. at 60672.
\(^{228}\) Id. Over the summer, the Commission began a pilot program that included this procedure. See Comm’n Notice (July 8, 2010); see also Comm’n Notice (July 16, 2010) (using for the first time public interest pilot program procedures in Certain Flat Panel Digital Televisions & Components Thereof). The latest NPRM seeks to codify this interim practice.
\(^{229}\) 75 Fed. Reg. at 60673.
\(^{230}\) Id.
\(^{231}\) Id.
\(^{232}\) Id. at 60671.
Property Law Association ("AIPLA") and the Intellectual Property Owners Association ("IPO") are expected to supply comments by January 7, 2011, pursuant to an extension that the Commission granted these organizations.\textsuperscript{234}

While several submissions laud the goals of the NPRM,\textsuperscript{235} on balance, the comments reveal concern over the proposed rules. Some of these concerns include, but are not limited to, the following:

- **Time period in which to respond to a complaint.** Several groups have suggested that the Commission extend the five-day response period contained in the proposed paragraph § 210.12(k).\textsuperscript{236}

- **Inability to respond.** The ITCTLA highlighted at least three instances in which an entity does not have an appropriate means of response under the NPRM:
  - The NPRM does not give a complainant a right to submit a formal response to any public interest submissions made by the general public.\textsuperscript{237}
  - The NPRM does not make clear whether a respondent has any right to amend or supplement the early public interest statement contained in its response to the complaint prior to the issuance of the ALJ’s RD.\textsuperscript{238}
  - Currently, the non-confidential version of an ALJ’s RD may not issue in enough time for third parties to submit public interest comments pursuant to the NPRM’s proposed addition to § 210.50(a)(4). Moreover, because an RD is not published in the Federal Register, third parties may not be given sufficient notice that the RD in an investigation has issued and the comment period has been triggered.\textsuperscript{239}

- **Wasting resources.** Multiple entities believe that, “[u]ntil the precise nature of the violation and the contemplated remedy is determined, any public interest analysis would be either entirely unnecessary or speculative,” costing the Commission and the parties resources without any offsetting benefits.\textsuperscript{240}


\textsuperscript{235} See ITCTLA Letter, at 1-2; CCCLA Letter, at 1; MOFCOM Letter, at 1; EKU Email, at 1.

\textsuperscript{236} See Adduci Letter, at 2; ITCTLA Letter, at 5; CCCLA Letter, at 1-2; MOFCOM Letter, Attach. at 2; EKU Email, at 1.

\textsuperscript{237} See ITCTLA Letter, at 6, 9.

\textsuperscript{238} See id. at 8-9.

\textsuperscript{239} See id. at 2-3.

\textsuperscript{240} Intellectual Ventures Letter, at 2-3; see ITCTLA Letter, at 2-3, 11.
➢ **Overburdening complainants/respondents.** Several comments question whether the NPRM imposes too great a burden at the outset of an investigation on private parties.\(^{241}\)

➢ **Specificity regarding public interest information sought.** Some commentators recommend that, should the Commission require parties to submit public interest representations at the beginning of an investigation, more details are needed on the precise type of information it seeks, so that the inquiry is sufficiently narrow.\(^{242}\)

➢ **Implications for allowing ALJs to take evidence.** A number of entities are concerned that the proposed provisions are vague and/or will expand the scope of discovery too far, particularly as it relates to third parties. Such a development, these entities argue, will render Section 337 actions less efficient in terms of both cost and speed.\(^{243}\) Others take the opposite position, advocating that an ALJ’s ability to take public interest evidence should be even less restricted that the NPRM contemplates.\(^{244}\)

➢ **Scope of public interest.** Certain responses advocate broadening the notion of what can be considered part of the public interest, while others desire to tailor the definition even more conservatively than its current usage.\(^{245}\)

The Commission will review all of the submitted comments and then decide whether to pursue the proposed rule changes. If the process moves forward, “the proposed rule revisions will be promulgated in accordance with the applicable requirements of the Administrative Procedure Act (‘APA’) (5 U.S.C. 553), and will be codified in 19 CFR part 210.”\(^{246}\) Consequently, the rule-changing process for provisions that govern the public interest will continue to be a topic of interest in the coming year.

\(^{241}\) See Adduci Letter, at 3; Intellectual Ventures Letter, at 3-4; Microsoft Letter, at 1-3.

\(^{242}\) See Microsoft Letter, at 1, 3-4; ITCTLA Letter, at 5-6.


\(^{244}\) See MOFCOM Letter, Attach. at 2; Beard Email, at 1.

\(^{245}\) Compare ITCTLA Letter, at 6 (suggesting an expanded definition of public interest); CCCLA Letter, at 2 (similar); NERA Letter, at 2-5 (similar); MOFCOM Letter, Attach. at 1 (similar), with CCIA Letter, at 1 (narrowing public interest and remedy at the ITC by adopting factors in *eBay Inc. v. MercExchange LLC*, 547 U.S. 388 (2006)); Microsoft Letter, at 3 (requesting that the ITC make clear that the NPRM is not altering the breadth of public interest).

\(^{246}\) 75 Fed. Reg. at 60672.