COVINGTON & BURLING LLP

BEIJING BRUSSELS LONDON NEW YORK
SAN DIEGO SAN FRANCISCO SEOUL
SHANGHAI SILICON VALLEY WASHINGTON

1201 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20004-2401
T 202.662.6000
www.cov.com

Interactions Between the USITC, Other Trade Agencies, and the Courts: Examples from AD/CVD and Section 337 Investigations*

Shara L. Aranoff
Covington & Burling LLP[1]

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I. ITC-DOC INTERACTIONS IN AD/CVD INVESTIGATIONS

A. Scope, Domestic Like Product, and Domestic Industry

(1) ITC must accept the determination of DOC as to the scope of imported merchandise subsidized or sold at LTFV and may not modify or enlarge the scope.

USEC, Inc. v. United States, 34 F. App'x 725, 730 (Fed. Cir. 2002) ("The ITC may not modify the class or kind of imported merchandise examined by Commerce.").

Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China, Inv. Nos. 701-TA-470-471, 731-TA-1169-1170, USITC Pub. 4108 at 14-15 n.90 (Nov. 2009) (Preliminary) (Where domestic like product is broader than scope, the Commission does not include in its measure of total imports the volume of the imported counterpart to domestic like products beyond the scope); Certain Wax and Wax/Resin Thermal Transfer Ribbons from France and Japan, Inv. Nos. 731-TA-1039-1040, USITC Pub. 3683 at 16 (Apr. 2004) (Final).

Coated Free Sheet Paper from China, Indonesia, and Korea, Inv. Nos. 701-TA-444-446, 731-TA-1107-1109, USITC Pub. 3965 at 14 n.92 (Dec. 2007) (Final). Commerce defined the scope as certain free sheet paper which was "produced from not more than 10 percent by weight mechanical or combined chemical/mechanical fibers." After the petition was filed, certain respondents began adding enough mechanical pulp to their

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paper to put it over the 10% limit, reporting those imports as non-subject. Petitioner asked Commerce to "clarify" that this product was within the scope, but Commerce declined. 72 Fed. Reg. 60639, 60640 (Oct. 26, 2007). Petitioner then asked the ITC to reject interim 2007 import data provided by the relevant respondents, because products containing more than 10% mechanical pulp were not reported as subject imports. Because DOC had declined to include this product in the scope, the Commission did not disregard respondents' 2007 import data on this basis.

(2) The Commission may define a domestic like product that is broader than the scope, or may find two or more DLPs corresponding to one class or kind of imports.

Frozen Warmwater Shrimp from China, Ecuador, India, Indonesia, Malaysia, Thailand, and Vietnam, Inv. Nos. 701-TA-491-497, USITC Pub. 4380 at 10 (Feb. 2013) (Preliminary) (domestic like product expanded beyond scope to include fresh as well as frozen shrimp).

Certain Lined Paper School Supplies from China, India, & Indonesia, Inv. Nos. 701-TA-442-443, 731-TA-1095-1097, USITC Pub. 3811 at 8 (Oct. 2005) (Preliminary) (expanding like product beyond scope to include certain note pads and legal pads).

Certain Sodium and Potassium Phosphate Salts from China, Inv. Nos. 701-TA-473 and 731-TA-1173, USITC Pub. 4110 at 11 (Nov. 2009) (Preliminary) (finding each of the 4 salts within the scope to be a separate domestic like product).

(3) The ITC can also find one domestic like product corresponding to several classes or kinds of imports, although this rarely happens.

Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1567-68 (Fed. Cir. 1996).

(4) The ITC may not define a DLP that is narrower than the scope. If there is no domestic production of a product within the scope, the Commission must identify the next most similar product that is made domestically. Nor can the Commission remove or exclude a product from the scope (and from the corresponding domestic like product) when that in-scope product is not actually imported.

Artists Canvas from China, Inv. No. 731-TA-1091, USITC Pub. 3777 at 5-6 (May 2005) (Preliminary) (kits are within scope, so even if no domestic production of kits, ITC must find the next most similar product that is domestically produced).

Carbon & Certain Alloy Steel Wire Rod from China, Germany, and Turkey, Inv. Nos. 731-TA-1099-1101, USITC Pub. 3832 at 10-11 (Jan. 2006) (Preliminary) (where no domestic producer makes 1080 or 1090 grade tire cord wire rod, the domestic like product is the next most similar product that is domestically produced).

Certain Lined Paper School Supplies from China, India, and Indonesia, Inv. Nos. 701-TA-442-443, 731-TA-1095-1097, USITC Pub. 3811 at 8 n. 23 (Oct. 2005) (Preliminary) (declining a respondent's request to "remove" fashion notebooks from the scope and noting that respondent needed to direct its request to Commerce).

(5) Exception: ITC negligibility determinations are made with respect to subject imports "corresponding to a domestic like product identified by the Commission." 19 U.S.C. § 1677 (24)(A)(i). If the ITC finds two or more DLPs corresponding to a single class or kind of imported merchandise, the relevant subject imports for assessing negligibility are those corresponding to each DLP, not the total volume of within-scope imports from that country.

Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam (Shrimp I), Inv. Nos. 731-TA-1063-1068, USITC Pub. 3748 (Jan. 2005) (Final) (finding two like products, frozen and canned shrimp, and finding imports from 3 subject countries negligible with respect to canned shrimp).

(6) What happens when the scope is ambiguous? ITC is supposed to decide what the scope is for purposes of its injury determination, while still deferring to the language and intent of DOC's rulings on scope.

Certain Silicon Photovoltaic Cells & Modules from China, Inv. Nos. 701-TA-481, 731-TA-1190, USITC Pub. 4295 (Dec. 2011) (Preliminary). Certain Silicon Photovoltaic Cells & Modules from China, Inv. Nos. 701-TA-481, 731-TA-1190, USITC Pub. 4360 (Nov. 2012) (Final) (Solar I): The scope definition in DOC's notice of initiation was unclear as to whether modules made in China from 3d country cells or modules made in 3d countries with Chinese cells were included. After filing but before initiation, Petitioner asked DOC to modify the scope to include both categories of products, stating that it always intended the scope to cover these categories, as well as cells and panels wholly made in China. DOC did not adopt the change in the notice of initiation, indicating that it couldn't resolve the matter in the few days it had between the request and the deadline. ITC had to go ahead with Petitioner's original scope and resolve, for purposes of its preliminary injury determination, Petitioner's claim that these categories of products were included. The Commission characterized the scope as "unclear." It made its decision on what to include based on available data. Different importers and foreign producers interpreted the scope differently. This led the Commission to reject the questionnaire data and rely on official import statistics, even though official statistics could include non-subject products. Official statistics included modules made in China from 3d country cells, but did not include modules made in 3d countries from Chinese cells. Prior to ITC's final determination, DOC clarified the scope, ruling that the country of origin of the cell determines the country of origin of the panel. Thus, modules produced in China from 3d country cells were not within the scope (although ITC had

treated them as in-scope in its preliminary determination), but modules produced in 3d countries from Chinese cells were within the scope (although ITC had treated them as outside the scope in its preliminary determination). ITC had to collect data differently in the final phase.

Certain Crystalline Silicon Photovoltaic Prods. from China & Taiwan, Inv. Nos. 701-TA-501, 731-TA-1246-1247, USITC Pub. 4454 (Feb. 2014) (Preliminary) (Solar II): Petitioners from Solar I filed a new petition, in which they defined the scope as including modules assembled in a subject country (i.e. either China or Taiwan) consisting of cells completely or partially manufactured in a country other than that subject country using ingots that are manufactured in the subject country, wafers manufactured in the subject country, or cells where the manufacturing process began in the subject country and was completed in a nonsubject country. This is known as the "2 out of 3" rule (origin determined by where 2 out of 3 stages were performed out of inputs, cell, module). Petitioner expressly excluded from the scope products covered by orders issued in Solar I. ITC sent out questionnaires based on petitioner's proposed scope. At time of ITC's preliminary phase vote, DOC had not clarified the scope. ITC noted that if it relied on DOC's country of origin ruling from Solar I, then there were no subject imports from China in the current investigation. Respondents advocated for that interpretation, under which subject imports from China would be negligible. Commission did not agree. Because the Commission's questionnaire did not ask parties to quantify the volume of Taiwan or 3d country CSPV cells made from Chinese ingots, wafers or partly manufactured cells, the Commission was not able to quantify subject imports from China based on petitioner's preferred scope interpretation and use it to calculate negligibility, and consequently relied on American Lamb (negative preliminary determination requires no likelihood contrary evidence will arise in final phase) to reach its preliminary affirmative determination. The ITC's final phase questionnaires used the scope from the preliminary phase to define the subject imports parties must report. As of this writing, however, DOC has proposed but not finalized a significant change to the scope (all modules, laminates or panels assembled in China containing CSPV cells produced outside China; all modules, laminates or panels assembled in Taiwan of CSPV cells produced in Taiwan or third country modules, laminates or panels made with CSPV cells from Taiwan) that comes too late to be reflected in the ITC's prehearing report. Letter from Howard Smith to All Interested Parties (Oct. 3, 2014).

Frozen Warmwater Shrimp from China, Ecuador, India, Indonesia, Malaysia, Thailand, and Vietnam, Inv. Nos. 701-TA-491-497, USITC Pub. 4380 at 10 (Feb. 2013) (Preliminary): Petitioner argued that the word "frozen" in the scope did not include "brine frozen" shrimp. Brine freezing is a method used by fishermen to temporarily freeze shrimp on board a fishing vessel prior to processing, to allow the vessel to remain at sea longer. The petitioning coalition of shrimp processors asked the Commission to define the domestic industry as processors and not to include fishermen in the industry (despite having done so in an earlier shrimp investigation). Shrimp were not imported in

brine frozen form, but if the scope included brine frozen shrimp, that would make it difficult for the Commission to define the domestic industry as Petitioner preferred. In its preliminary determination, the Commission had to make its own interpretation of "frozen," concluding that the scope included brine frozen shrimp -- a conclusion with which DOC ultimately agreed in a ruling prior to the ITC's final determination.

Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia, Inv. Nos. 701-TA-470-471, 731-TA-1169-1170 (Final), USITC Pub. 4192 (Nov. 2010). The scope referred to "certain coated paper and paperboard in sheets suitable for high quality print graphics using sheet-fed presses . . . " meeting certain brightness, basis weight, and other physical limitations. Id. at 4. The parties disagreed over whether "suitable for high quality print graphics" limited in-scope paperboard to such applications and excluded paperboard used for packaging. Id. One notable aspect of this case is that the parties took inconsistent positions at DOC and ITC. Before DOC, Petitioner argued that the language was surplusage and didn't limit the scope, while Respondents argued it was a limiting physical characteristic. Before the ITC, Petitioner argued the language was "essential" to define the subject merchandise, while Respondents argued it didn't exclude anything from the scope. The investigation is also unusual in that the scope ambiguity persisted into the final phase of the ITC's investigation. Because ITC final phase questionnaire responses were due before DOC ruled on the scope issue, had DOC decided it was necessary to divide paperboard imports by end use ITC would not have had the means to do so. In its final determination, citing a DOC scope memo, the ITC said "[w]e rely on Commerce's own explanation for why it has retained this phrase in the scope definition." Id. at 5. ITC reasoned that because DOC found that the disputed phrase "does not have a particular meaning in the industry and provided no clarification, and because the parties have not construed it consistently," it could look to the "plain and ordinary meaning" of the term. Id. at 6. It found that the term did not limit the scope to paperboard used in commercial printing applications because a product can be "suitable" for such use but put to another use. Id. ITC's scope/domestic industry analysis was not at issue in the appeal that affirmed the determination. Gold East Paper (Jiangsu) Co. v. United States, 896 F. Supp. 2d 1242 (Ct. Int'l Trade 2012).

(7) What sort of deference should the ITC get in judicial review when it has been forced to interpret ambiguous scope language?

Multilayered Wood Flooring from China, Inv. Nos. 701-TA-476, 731-TA-1179, USITC Pub. 4278 (Nov. 2011) (Final). MLWF is produced from veneers of hardwood attached to a core that can be made of plywood, high-density fiberboard, or other materials. In their briefs in the final phase, importer Respondents argued that, if "hardwood plywood for flooring" were within the scope, the Commission would need to include U.S. producers of that product in the domestic industry. ITC said the scope did not include "hardwood plywood for flooring." It did include "unfinished" MLWF, which could

include hardwood plywood partially processed into MLWF. Respondents never asked the ITC to define a domestic like product broader than the scope that would include hardwood plywood for flooring, so the Commission did not include hardwood plywood producers in the domestic industry or send them domestic producer questionnaires.

On appeal, the importers conceded that they didn't ask the ITC to include hardwood plywood for flooring in the domestic like product, but argued that the ITC should have issued producer questionnaires to U.S. hardwood plywood producers so that they could indicate whether they produced products within the scope, i.e. "unfinished" MLWF. The CIT concluded that "hardwood plywood for flooring" could be within the scope, because plywood is composed of veneers, and ordered the ITC to reopen the record. On remand, the ITC sent domestic producer questionnaires to all 20 known U.S. hardwood plywood producers. It was the exact questionnaire used in the final phase, quoting the scope with no further explanation, although respondent had argued the ITC should further clarify the instructions. All 20 said they did not produce MLWF as defined in the scope. The ITC again reached an affirmative determination. The CIT affirmed, saying there was no evidence the 20 hardwood plywood producers did not understand the product definition in the scope. Swiff-Train Co. v. United States, No. 12-00010, slip op. 13-38 (Ct. Int'l Trade Mar. 20, 2013) (remanding the decision), *aff'd after remand*, No. 12-00010, slip op. 14-82 (Ct. Int'l Trade July 16, 2014).

Co-Steel Raritan, Inc. v. ITC, 244 F. Supp. 2d 1349 (Ct. Int'l Trade 2002). In preliminary investigation of steel wire rod from 12 countries, ITC terminated investigation as to 3 countries with negligible imports. Three days before the ITC vote, Petitioner asked DOC to narrow the scope. If adopted, the scope modification would reduce the volume of imports from a 4th country below the negligibility threshold, which petitioner argued would raise the level of imports from the four negligible countries collectively to more than 7%, precluding the ITC from finding any of them negligible. The CIT reversed the ITC's negligibility findings, but the CAFC reinstated them. The CAFC focused on the statutory provision allowing the ITC to rely on DOC's scope published prior to vote day and deferred to the ITC's conclusion that American Lamb did not require it to proceed to a final phase investigation based on speculation about the possible consequences of petitioner's last minute scope change request.

B. Margins

(1) By statute, the ITC has to "consider" dumping margins as part of its injury analysis, but the statute and legislative history are vague about what kind of consideration is due and Commission practice is to not put much focus on margins.

19 U.S.C. § 1677(7)(C)(iii)(V), added in the Uruguay Round Agreements Act of 1994, requires the ITC to consider "the magnitude of the margin of dumping" in AD investigations among a list of factors relevant to the "impact" of subject imports.

The Statement of Administrative Action to the Uruguay Round Agreements Act, H.R. Rep. No. 103-826(I), at 850 (1994), explains that the dumping margin is only one of a list of factors the ITC must consider as part of its analysis of the impact of subject imports and is not necessarily dispositive.

Altx, Inc. v. United States, 26 C.I.T. 1425 (Ct. Int'l Trade 2002), aff'd, 370 F.3d 1108 (Fed. Cir. 2004). Upholds ITC negative determination premised in part on ITC's rejection of COMPAS model results, for which AD margins are a key input. Court holds that ITC must consider the dumping margin, but "COMPAS is merely one tool available to the Commission" to do so, Altx, Inc. v, United States, 26 C.I.T. at 1432. In this case, the Commission found that the very high margin created anomalous model results that were inconsistent with record pricing information. The Federal Circuit said the ITC was not rejecting the margin, but considering it as required, Altx, Inc. v, United States, 370 F.3d 1108 at 1123. **This case appears to set the bar very low on what fulfills the Commission's statutory duty to "consider" the margin of dumping.**

Comm. of Domestic Steel Wire Rope Mfrs., 201 F. Supp. 2d 1287, 1304 n.12 (Ct. Int'l Trade 2002) (in dictum, stating that "implicit" consideration of margins was "acceptable" in this case but might not be in all cases, and that "explicit discussion of the role of the dumping margin in injury determinations would better serve the statute"). The Court focused on three ways in which the Commission addressed the dumping margin in the underlying investigation: (1) by reciting the statutory obligation to consider the dumping margin and listing DOC's final margins; (2) in the Staff Report, where presentation of the COMPAS model uses the final margins as an input to measure the economic effects of subject imports (demonstrating, according to the Court, little change to the domestic industry's performance absent dumping); and (3) by Commissioners asking questions about the margins at the hearing. "The Commission did not have to directly address the dumping margin because it was implicit in its competition and injury analysis. In essence, dumping margins were not dispositive because the prices charged by the foreign importers did not affect the prices, volume, or market share of the domestic industry," because competition between the DLP and the subject imports was attenuated. **This case, which predates the Altx opinion, arguably sets the bar higher.**

Currently, it is unusual for the Commission to do more than note the dumping margins in a footnote, unless responding to a specific party argument. *But see* Multilayered Wood Flooring from China, Inv. Nos. 701-TA-476, 731-TA-1179, USITC Pub. 4278 at 48 (Nov. 2011) (Final), (Dissenting Views of Chairman Okun and Commissioner Pearson) (describing the dumping margins as "unusually low for the Chinese industry as a whole" and concluding that such margins "accord with the pricing data collected by the Commission that shows mostly Chinese overselling in the domestic industry's highest volume products").

(2) The Commission will generally decline to "look behind" DOC's margins, which it views as tantamount to usurping DOC's authority to calculate margins.

Polyethylene Terephthalate Film, Sheet, & Strip from Brazil, China, Thailand, and the U.A.E., Inv. Nos. 731-TA-1131-1134, USITC Pub. 4040 at 26 n.170 (Oct. 2008) (Final) (rejecting the argument that it should ignore rates for companies related to domestic producers, because "the statute . . . does not allow the Commission to calculate such margins or to decline to consider margins for individual companies").

Carbon & Certain Alloy Steel Wire Rod, Inv. Nos. 701-TA-417-421, 731-TA-953-963, USITC Pub. 3456 at 8 n.39 (Oct. 2001) (Preliminary) (ITC does not have authority to "exclude" certain imports as non-subsidized or sold above normal value where DOC has not so indicated. The relevant volume of subject imports includes all imports as to which DOC has made an affirmative determination).

Individually Quick Frozen Red Raspberries from Chile, Inv. No. 731-TA-948, USITC Pub. 3524 at 15 n.109 (June 2002) (Final) (declining to "look behind" Commerce's weighted average dumping margin and determine that all non-organic subject imports were not sold at LTFV and should be excluded from the injury analysis, even though DOC found only respondent's sales of organic raspberries to be at LTFV; "[n]othing in the statute or the legislative history authorizes the Commission to compute LTFV margins . . . Nor is there anything in the statute or legislative history that directs the Commission to go behind the specific dumping margins provided by Commerce, under the guise of conducting a more thorough investigation.").

Another way of saying this is that the Commission considers the impact of the subject imports, not the impact of the dumping or subsidies. Titanium Metal Corp. v. United States, 155 F. Supp. 2d 750, 757 (Ct. Int'l Trade 2002) ("the statutory language does not 'require that ITC demonstrate the dumped imports, through the effects of particular margins of dumping, are causing injury. Rather, ITC must examine the effects of imports of a *class or kind* of merchandise which is found to be sold at LTFV and make its conclusion about causation accordingly.'").

(3) But the Federal Circuit has raised some doubts about the separation of powers between the agencies.

In Certain Lightweight Thermal Paper from China and Germany, Inv. Nos. 701-TA-451, 731-TA-1126-1127, USITC Pub. 4043 at 31 n.201 (Nov. 2008) (Final), the Commission rejected Respondents' argument that it should rely on Commerce worksheets which Respondents claimed illustrated that a particular product within the scope -- 48 gram basis weight paper -- was not sold at LTFV, where the Commission's affirmative threat determination was premised on sales of that product. The Commission said that this would be tantamount to computing a margin, which only DOC can do, and that the

Commission had to rely on Commerce's determination that the entire class or kind of LWTP, of which 48 gram paper was a part, was being sold at LTFV. The CIT affirmed, but the CAFC remanded, saying that the Commission could consider raw data in DOC printouts in some circumstances and that in this case it should do so. Papierfabrik August Koehler AG v. United States, 413 F. App'x 227 (Fed. Cir. 2011), *reh'g or reh'g en banc denied*, 646 F.3d 904, 909 (Fed. Cir. 2011)(dissenting opinion of Judges Reyna, Newman and O'Malley states that the panel opinion "opens the doors for mischief in trade cases and will likely result in outcomes prohibited by statute.").

On remand, the Commission reopened the record to seek further information from DOC that might explain the document cited by Respondents (which was just a list of numbers that underlay DOC's calculations). The Commission found that even if the paper did show that 48g paper was not sold at LTFV, that information was legally and factually irrelevant to the Commission's determination. Certain Lightweight Thermal Paper from China and Germany, Inv. Nos. 701-TA-451, 731-TA-1126-1127, USITC Pub. 4334 (Sept. 2011). The CIT affirmed the remand determination. Papierfabrik August Koehler AG v. United States, No. 08-00430, slip op. 12-5 (Ct. Int'l Trade Jan. 10, 2012) (per CAFC remand order, ITC has to consider the DOC worksheets, but CAFC left to ITC what weight to give them).

The Commission has not so far taken up the CAFC's invitation to start looking behind DOC's margin calculations.

(4) Timing Coordination: What happens when DOC revises margins close to (or after) an ITC vote?

It is common for DOC to make ministerial corrections to its final determinations either before or even after the ITC makes its final determinations. Usually these are minor changes in the margin and don't change the result at the ITC. But occasionally, the change is outcome determinative.

19 U.S.C. § 1677(35)(C)(ii) defines magnitude of the margin of dumping to be used by the ITC in a preliminary determination as the dumping margin(s) published in DOC's notice of initiation of the investigation and in a final determination the margin(s) published by DOC prior to the closing of the ITC's record. If DOC revises the margin(s) after the ITC's record closing date, the ITC can proceed based on the margin published before the record closed or, if possible within the statutory deadline for completing the investigation, reopen the record to accept the new margin (in which case it must also allow for party comments on the new margins).

Certain Oil Country Tubular Goods from India, Korea, the Philippines, Taiwan, Thailand, Turkey, Ukraine, & Vietnam, Inv. Nos. 701-TA-499-500, 731-TA-1215-1217, 1219-1223, USITC Pub. 4489 (Sept. 2014) (Final) -- DOC's final determinations were

published July 18, 2014, and included an affirmative determination on imports from Saudi Arabia. ITC's votes were scheduled for August 14. On August 12 DOC made ITC aware that it had issued a document, dated Aug. 11, correcting ministerial errors in its final determination with respect to Saudi Arabia, finding that there were no sales at LTFV, and terminating its investigation with respect to imports from Saudi Arabia. On August 13, the ITC reopened its record for the limited purpose of receiving DOC's amended final determination and then permitting party comments on the new factual information. The vote was postponed to August 22. Because Saudi Arabian imports were removed from the case, the other countries whose imports were individually negligible could no longer be added to those from Saudi Arabia for purposes of assessing collective negligibility and, consequently, the Commission found imports from the Philippines and Thailand to be negligible and terminated those investigations. Note that, in this instance, had the ITC relied on its statutory authority to vote based on DOC's most recently published margin prior to the date on which it closed its record, that would have changed the results on negligibility.

Goss Graphic Sys., Inc. v. United States, 33 F. Supp. 2d 1082 (Ct. Int'l Trade 1998). Respondent argues the ITC's affirmative threat determination was heavily influenced by the dumping margin, currently on appeal, and contends that if DOC changes the margin on remand the CIT must also remand to the ITC to reconsider its affirmative determination. The court rejects the argument, citing legislative history supporting finality of injury determinations and the frequency with which DOC adjusts margins. In cases where it really matters, Respondent can request a changed circumstances review.

Borlem S.A. - Empreedimentos Industriais v. United States, 913 F.2d 933 (Fed. Cir. 1990). On remand, DOC reduced the margin for one of two large subject producers from 20% to *de minimis*. The CIT remanded to the ITC to decide whether to reconsider its affirmative determination based on the change in the volume of subject imports. ITC said it had no authority to reconsider, but CIT and CAFC disagreed. CAFC urged the CIT to make its order to reconsider mandatory.

C. Scheduling

(1) "Staggered" Investigations: When DOC extends the schedule for some countries but not others or for AD but not CVD for the same country, ITC must calculate its determination due date from the date of DOC's final determination for each investigation. 19 U.S.C. § 1673d(b)(2)-(3). Staggering ITC votes can affect the ability to cumulate and potentially change outcomes.

Polyvinyl Alcohol from China, Germany, Japan, Korea, and Singapore, Inv. Nos. 731-TA-1014-1018, USITC Pub. 3553 (Oct. 2002) (Preliminary) (finding imports from Singapore negligible and terminating investigation as to Singapore; cumulating imports from all other subject countries). After the ITC's preliminary determinations, the

investigation schedules became staggered when DOC extended deadlines for China and Korea, but not for Germany and Japan. In final determinations for imports from Germany and Japan, ITC made affirmative threat determination for Japan (cumulated with imports from Korea), but declined to cumulate imports from Germany due to no reasonable overlap of competition with imports from Japan or Korea and made a negative determination on imports from Germany. Imports from the principal exporter from China were not eligible for cumulation, because DOC had made a negative preliminary determination with respect to imports from that company. Polyvinyl Alcohol from Germany and Japan, Inv. Nos. 731-TA-1015-1016, USITC Pub. 3604 (June 2003) (Final). In the final determinations for China and Korea, imports from China were eligible for cumulation, because DOC made an affirmative final determination on the main exporter. Polyvinyl Alcohol from China and Korea, Inv. Nos. 731-TA-1014, 1017, USITC Pub. 3634 (Sept. 2003) (Final). It is possible that, had all cases been decided at the same time, the Commission might have found a basis for cumulating imports from China with those from Japan and Korea (for Japan changing threat into a present injury determination) and/or with those from Germany (turning the negative into an affirmative determination if there were a reasonable overlap of competition).

BIC Corp. v. United States, 964 F. Supp. 391 (Ct. Int'l Trade 1997) (negative determination in first of two staggered votes means ITC cannot cumulate for the second vote; in this case not outcome-determinative because the first negative vote was based on cumulated data).

(2) Staggering schedules may jeopardize the ITC data collection process. When vote dates are staggered, the ITC's practice is not to extend its period of investigation or issue supplemental questionnaires. But when staggered schedules spread votes months apart, is the ITC vulnerable to claims that its later-in-time determinations are based on stale data that do not reflect "present" injury?

Carbon & Certain Alloy Steel Wire Rod from Canada, Inv. No. 731-TA-954, USITC Pub. 3730 (Oct. 2004) (Final)(Remand). Binational panel remands to ITC to "provide its reasoning as to why it did not collect second quarter 2002 data" after DOC extended its deadline and moved back the ITC vote. Id. at 2. ITC explained that, given the burden involved on the government and questionnaire recipients, it had a "longstanding general practice" of not extending the POI or issuing supplemental questionnaires when DOC extends its schedule absent unusual circumstances suggesting that the new data would be materially different. Id. at 4. The explanation worked in this case.

II. ITC-CBP INTERACTIONS IN SECTION 337 INVESTIGATIONS

A. Exclusion of Articles Under Section 337

(1) Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337(a)(1)(A), prohibits "unfair methods of competition and unfair acts in the importation of articles . . . into the United States," including importation of articles that infringe United States patents, trademarks, and copyrights. If the Commission finds a violation of § 337, it "shall direct that the articles concerned . . . be excluded from entry into the United States" except in rare cases where the Commission finds that exclusion is not in the public interest. 19 U.S.C. § 1337 (d)(1).

The vast majority of cases filed in every recent year involve claims of patent infringement.

(2) There are 2 types of exclusion orders: a limited exclusion order ("LEO") which applies only to respondents whose articles were found to infringe and a general exclusion order ("GEO") which reaches all infringing articles regardless of their source and regardless of whether the importer or foreign manufacturer was a respondent before the ITC. Complainants seeking a GEO must make additional evidentiary showings. 19 U.S.C. § 1337(d)(2).

(3) Exclusion orders can sometimes reach downstream products that contain infringing articles, but only if the order is a GEO or, in the case of a LEO, the product is manufactured by a named respondent in the investigation.

Kyocera Wireless Corp. v. ITC, 545 F.3d 1340 (Fed. Cir. 2008) (reversing ITC issuance of a limited exclusion order covering imported telephone handsets made by non-respondents that contain Respondent Qualcomm's infringing chip and holding that, to obtain an exclusion order covering downstream products, Complainant must either name the manufacturers of those products as respondents and prove infringement or must meet the heightened evidentiary showing for a GEO).

Hyundai Elecs. Indus. v. ITC, 899 F.2d 1204 (Fed. Cir. 1990) (upholding ITC LEO directed to downstream products of the named respondent).

(4) ITC exclusion orders are worded very broadly; they are typically directed to articles "that infringe" or are "covered by" specific claims of specific patents. This is deliberate, to avoid circumvention by changing model numbers or minor features.

See, e.g., Certain Tires and Products Containing Same, Inv. No. 337-TA-894, Limited Exclusion Order at 5, ¶1 (July 24, 2014) (Doc ID 538838) (excluding "tires and products containing same covered by the '424 patent"); Certain Electronic Devices Having

Placeshifting or Display Replication Functionality and Products Containing Same, Inv. No. 337-TA-878, Limited Exclusion Order at 2, ¶1 (Dec. 2, 2013) (Doc ID 523315) (excluding "electronic devices having placeshifting or display replication functionality and products containing the same that infringe one or more of claims 18-24, 26, 28-30, 32-40, 42, and 43 of the '776 patent").

Certain Hardware Logic Emulation Systems and Components Thereof, Inv. No. 337-TA-383, USITC Pub. 3089, Commission Op. at 15-16 (Mar. 1998) ("the Commission's long-standing practice is to direct its remedial orders to all products covered by the patent claims as to which a violation has been found, rather than limiting its orders to only those specific models selected for the infringement analysis.").

Certain Flash Memory Circuits and Products Containing Same, Inv. No. 337-TA-382, USITC Pub. 3046, Commission Op. at 17-18 n.37 (June 1997) (rejecting respondent's request that the order be limited to the specific models of flash memory chips adjudicated as infringing before the ALJ "because we believe it would [be] too easy to circumvent such an order by simply changing model numbers.").

Certain Agricultural Tractors Under 50 Power Take-Off Horsepower, Inv. No. 337-TA-380, USITC Pub. 3026, Commission Op. at 21-22 (Mar. 1997) (GEO should not be limited to specific models found to infringe asserted trademarks where "there are over a hundred existing . . . models, new models are introduced every year, and respondents do not appear to use model numbers accurately in some instances").

B. Mechanics of Interpretation and Enforcement

(1) In theory, it's easy. The ITC writes the order and hands it off to CBP for enforcement: "The Commission shall notify [U.S. Customs and Border Protection] of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, [Customs and Border Protection] shall, through the proper officers, refuse such entry." 19 U.S.C. § 1337(d)(1).

(2) In practice, it can be difficult, because ITC exclusion orders frequently require interpretation before they can be enforced by CBP. The need for interpretation generally arises when:

(a) Respondent seeks to import a model or product that existed at time of ITC investigation but was not accused by complainant before the ITC;
(b) Respondent seeks to import a product it has redesigned so as to no longer infringe the asserted patent(s); or
(c) A non-party seeks to import a product that may be within the scope of a GEO.

(3) Available procedures at CBP for interpretation and enforcement of exclusion orders: a respondent or non-party importer can seek a ruling on whether product falls within an exclusion order from CBP prior to importation, 19 C.F.R. § 177, or attempt to import and use CBP's protest procedure to challenge an exclusion, 19 C.F.R. § 174.

In re Ruling Request; U.S. ITC; Gen. Exclusion Order; Investigation No. 337-TA-829, CBP Headquarters Ruling H248814 (June 3, 2014) (holding that a product of a party not named as a respondent at the ITC was not covered by a GEO based on an infringement analysis done by CBP).

In re Protest 3001-11-100146; U.S. ITC; Gen. Exclusion Order; Investigation No. 337-TA-691; Gen. Exclusion Order in Investigation No. 337-TA-565, CBP Headquarters Ruling H164838 (Dec. 6, 2013) (denying protest challenging exclusion of inkjet cartridges of a party not named as a respondent at the ITC as having been properly found to be covered by a GEO).

In re AFR of Protest 1901-1310-0002; U.S. ITC; Gen. Exclusion Order; Investigation No. 337-TA-780, CBP Headquarters Ruling H237817 (Mar. 29, 2013) (granting protest of named respondent that its redesigned product was not within the scope of GEO).

If either ruling is unfavorable to the Respondent/Importer, it may appeal to the CIT. 28 U.S.C. §§ 1581(a) & (h).

Jazz Photo Corp. v. United States, 353 F. Supp. 2d 1327 (Ct. Int'l Trade 2004), *aff'd* 439 F.3d 1344 (Fed. Cir. 2006) (reversing CBP's denial of a protest and holding that certain products were outside the scope of the ITC's exclusion order).

Corning Gilbert, Inc. v. United States, 896 F. Supp. 2d 1281 (Ct. Int'l Trade 2013) (reversing CBP's denial of a protest and holding that non-party importer's products were not covered by an exclusion order).

But the ITC complainant is not entitled to notice or an opportunity to be heard before CBP, where pre-importation ruling and post-exclusion protest proceedings are (usually) conducted *ex parte*. Nor does the complainant have standing to appeal an adverse CBP ruling to the CIT.

Funai Elec. Co. v. United States, 645 F. Supp. 2d 1351 (Ct. Int'l Trade 2009) (CIT lacks jurisdiction to hear ITC complainant's request for TRO and preliminary injunction preventing CBP from implementing its pre-importation ruling that certain Vizio models are not within the scope of the exclusion order).

Corning Gilbert, Inc. v. United States, No. 11-00511, slip op. 12-62 (Ct. Int'l Trade May 14, 2012) (denying motion of ITC complainant to appear as *amicus curiae* in appeal of CBP's denial of a protest involving a non-party to the ITC investigation seeking to demonstrate that its product is not within the scope of the GEO).

But see In re U.S. ITC; Ltd. Exclusion Order; Investigation No. 337-TA-744, CBP Headquarters Ruling H242026 (June 24, 2013) (ITC complainant may request revocation of prior CBP *ex parte* ruling that certain redesigned mobile devices are not subject to exclusion under a LEO; in this case, however, CBP determined that its prior ruling in respondent's favor was not in error and would not be revoked).

See also Microsoft Corp. v. United States, Case No. 1:13-1063-RWR (D.D.C.). In this case, filed in 2013, Microsoft turned to the District Court, rather than the CIT, seeking review of a CBP decision to permit importation of certain redesigned Motorola mobile devices that Microsoft contends are covered by an exclusion order. CBP moved to dismiss the suit for lack of jurisdiction, arguing that Microsoft's remedy is to bring an ancillary proceeding before the ITC. The ITC filed an amicus brief arguing that, while it took no position on the merits, CBP's motion to dismiss should be granted because the ITC has primary jurisdiction over the issue, which should be raised in an enforcement proceeding. The motion is still pending.

(4) Available procedures at the ITC for interpretation and enforcement of exclusion orders: the ITC offers 3 types of "ancillary" proceedings. A complainant can request a formal enforcement proceeding to investigate alleged violations of a remedial order, such as continued importation of products subject to exclusion. Any party may request modification proceedings to consider whether to modify or rescind a remedial order based on changed conditions of fact or law, or the public interest, such as when new Federal Circuit precedent undermines the legal basis for the order. Respondents typically request advisory opinion proceedings to assess whether a proposed course of action, such as importing a redesigned product, would violate a Commission remedial order.

Ancillary proceedings are provided for in the Commission's rules at 19 C.F.R. §§ 210.75(b), 210.76, and 210.70. All such proceedings are *inter partes*. Enforcement and modification decisions are appealable to the Federal Circuit, but advisory opinions are not considered final agency decisions and therefore not subject to appeal.

Certain GPS Devices and Products Containing Same, Inv. No. 337-TA-602, Advisory Op. (Apr. 20, 2010) (products proposed to be imported by non-party Atheros were not within the scope of the Commission's GEO).

Certain Ink Cartridges and Components Thereof, Inv. No. 337-TA-565, Recommended Determination Concerning Consolidated Advisory and Modification Proceedings,

adopted by the Commission (Feb. 21, 2012) (recommending modification of the GEO directed to ink cartridges to include "components of ink cartridges" based on importation of components of ink cartridges after issuance of the GEO).

(5) CBP and ITC authorities overlap. There is no roadmap telling interested parties which route to take. Sometimes the processes at the two agencies can be complementary and sometimes they can operate at cross purposes.

(a) At least in theory, the ITC Complainant can use ITC enforcement proceedings to effectively overrule a CBP decision that a particular product is outside the scope of an exclusion order. Although the ITC might take into consideration that an importer was acting in good faith pursuant to a CBP decision on admissibility, the CBP ruling does not insulate the importer from enforcement proceedings at the ITC after the product is imported. Nor is CBP's interpretation of the exclusion order binding on the ITC.

(b) Respondents can use both CBP and ITC proceedings simultaneously.

For example, in Certain Automated Mechanical Transmissions Systems for Medium-Duty and Heavy-Duty Trucks and Components Thereof, Inv. No. 337-TA-503, the Commission issued a LEO excluding certain products of respondent AMT. Respondent redesigned its product and sought both a pre-importation determination of non-infringement from CBP and an advisory opinion from the ITC. *See* Eaton Corp. v. United States, 395 F. Supp. 2d 1314, 1319 (Ct. Int'l Trade 2005); Notice of Commission Decision Not to Review an Enforcement ID and an Initial Advisory Opinion, 71 Fed. Reg. 16345 (Mar. 31, 2006).

(**c) It is difficult to predict which process is likely to provide an answer -- and business certainty -- sooner. While conventional wisdom holds that CBP proceedings are faster, that may not be the case, particularly if the CBP decision is appealed.**

The average duration of ITC ancillary proceedings varies widely depending on the complexity of the issues and whether the ruling request is contested. *See* USITC Annual Performance Plan, FY 2014-2015 & Annual Performance Report, FY 2013 at 49 (Mar. 2014) ("2013 Performance Report"), *available at* http://www.usitc.gov/press_room/documents/2013_APP_APR_FINAL.pdf.

By way of comparison, the ITC issued an advisory opinion 45 days after it was requested in Certain GPS Devices and Products Containing Same, Inv. No. 337-TA-602, Advisory Op. (Apr. 20, 2010), whereas the Corning Gilbert case took over 14 months from when Corning Gilbert filed its protest until the CIT found CBP improperly excluded the imports. Even then, CBP could have pursued an

appeal to the Federal Circuit. *See* In re Protest 2704-11-102660; U.S. ITC; Gen. Exclusion Order; Investigation No. 337-TA-650, CBP Headquarters Ruling H194336 (Dec. 9, 2011); Corning Gilbert, Inc. v. United States, 896 F. Supp. 2d 1281 (Ct. Int'l Trade 2013).

C. Are There Workable Alternatives to the Status Quo?

(1) What would be best for private parties? The takeaway from the recent IPEC public comment exercise is that litigants would like a process for interpreting and enforcing ITC exclusion orders that provides: (a) clearly delineated agency responsibilities; (b) expeditious results that foster business certainty; (c) transparency and due process; and (d) expertise in resolving complex patent issues.

See OMB, Request for Public Comment: Interagency Review of Exclusion Order Enforcement Process, 78 Fed. Reg. 37,242 (June 20, 2013); responsive comments are *available at* http://www.regulations.gov/#!docketDetail;D=OMB-2013-0003 (last accessed July 14, 2014) ("IPEC Comments").

(2) What are the roadblocks to getting there from the standpoint of the agencies? For decades, ITC and CBP have periodically discussed reallocating responsibilities or improving cooperation. Resources are one important factor in each agency's calculus, but there are others:

(a) CBP would like the ITC to write orders that more clearly identify the products to be excluded, or alternately for the ITC to be the agency that performs any necessary infringement analysis.

Meanwhile, CBP has indicated that it is considering changing its pre-importation ruling process from *ex parte* to *inter partes*. Letter from Michael J. Yaeger, Assistant Commissioner, Office of Congressional Affairs, U.S. Customs and Border Protection, to Senator Ron Wyden (Nov. 20, 2013) (indicating CBP's "review of its rulings process with a view to implementing an *inter partes* proceeding . . . that would enable it to make decisions in a manner akin to that employed by the ITC.").

(b) ITC has so far shown no interest in narrowing its order language, except with respect to redesigns ruled non-infringing by the ALJ. While it has sometimes provided additional information to CBP to assist in CBP's interpretation of exclusion orders, either through a letter sent to CBP along with a new exclusion order or in response to a later question from CBP, the ITC has generally been reluctant offer any explanation that goes beyond the plain language of the Commission opinion, except in the context of an ancillary proceeding.

Certain Electronic Digital Media Devices and Components Thereof, Inv. No. 337-TA-796, Limited Exclusion Order (Aug. 15, 2013) (carving out design-around models from the LEO based on the ALJ's finding that they did not infringe).

Certain Digital Televisions and Certain Products Containing Same and Methods of Using Same, Inv. No. 337-TA-617, Modified Limited Exclusion Order (Dec. 21, 2010) (LEO modified to carve out "work-around" products in response to a decision from the Federal Circuit).

Certain Automated Mechanical Transmissions for Medium-Duty and heavy-Duty Trucks and Components Thereof, Inv. No. 337-TA-503, Letter from Marilyn R. Abbott, Secretary to the Commission, to Michael T. Schmitz, Assistant Commissioner, U.S. Customs and Border Protection (Aug. 26, 2005) (providing substantive response to CBP's letter seeking clarification of the meaning of a certification provision in the ITC exclusion order).

But see In re U.S. ITC; Ltd. Exclusion Order; Investigation No. 337-TA-744, CBP Headquarters Ruling H242025 at 10 (June 24, 2013) (ITC complainant Microsoft sought to have CBP revoke a ruling that determined that certain redesigned mobile devices imported by Motorola were not subject to the exclusion order in 337-TA-744. CBP explained that admissibility "depends exclusively on whether Microsoft specifically accused these features in the Motorola mobile devices of satisfying the particular claim limitation from the" patent at issue before the ITC. CBP therefore "contacted the Office of General Counsel at the ITC for guidance and clarification of the agency's own record. However, the General Counsel's office was unable to provide the clarification requested. When asked for confirmation regarding the record it developed and the precise infringement findings that resulted in the exclusion order's issuance, the ITC reiterated that it took no position on the matter and suggested an approach for CBP to resolve the issue that it declined to consider.").

On the other hand, ITC has a goal to reduce the average length of its ancillary proceedings to make them more useful to businesses. 2013 Performance Report at 12-13 (setting goals for reducing the average length of ancillary proceedings).

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