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Joseph A. Laroski Jr.

Valentin A. Povarchuk

Pablo M. Bentes

Sarah K. Davis

John M. Ryan

See next page for additional authors

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Authors

Joseph A. Laroski Jr., Valentin A. Povarchuk, Pablo M. Bentes, Sarah K. Davis, John M. Ryan, Margaret-Rose Sales, and Jamie D. Underwood

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EDITED BY: JOSEPH A. LAROSKI, JR. AND VALENTIN A. POVARCHUK

AUTHORED BY: PABLO M. BENTES, SARAH K. DAVIS, JOHN M. RYAN, MARGARET-ROSE SALES, AND JAMIE D. UNDERWOOD*

I. Negotiation Developments

A. WTO NEGOTIATIONS

1. *Doha Round*

Doha Development Round negotiations continued at a glacial pace in 2010. Part of this slowness was undoubtedly because the United States lacked a chief World Trade Organization negotiator until April.[1] The United States held bilateral and small group negotiations to build consensus on issues but achieved no significant breakthroughs.[2] WTO Members plan to "re-start" intensive negotiations in 2011.[3]

2. *Accession Negotiations*

Although thirty countries are in various stages of the accession process, the WTO acquired no new members during 2010. Russia's 17-year bid for membership gathered steam. As part of efforts to "reset" relations with Russia, President Obama and Russian President Medvedev agreed to accelerate U.S.-Russian negotiations on accession and

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

2. *Talking Substance in Geneva*, 19 WASH. TRADE DAILY 213, Oct. 27, 2010.

3. *Preparing for Intensive DDA Negotiations*, 19 WASH. TRADE DAILY 232, Nov. 22, 2010.

pressed negotiators to resolve outstanding bilateral issues by September.[4] Unresolved issues included agricultural subsidies, intellectual property rights, import tariffs on pork and cars, and export duties on copper and nickel.

B. BILATERAL/REGIONAL NEGOTIATIONS

1. *Bilateral Investment Treaties*

In 2009, the State Department and the U.S. Trade Representative ("USTR") began a review of the 2004 U.S. Model Bilateral Investment Treaty ("BIT"). Neither agency released any reports on the progress of the review in 2010. But, a major issue under consideration is likely the extent to which labor rights and environmental protections will be included in the new model BIT.[5] BIT negotiations with India, China, Pakistan, and Georgia have been put on hold until the model BIT review 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.[6] Other parties to the agreement are Australia, Canada, the European Union, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea, and Switzerland. ACTA creates a framework to assist treaty parties in their efforts to "combat the infringement of intellectual property rights, in particular the proliferation of counterfeiting and piracy."[7] A key element of the agreement is its enforcement provisions that provide for civil, criminal, and border enforcement of intellectual property rights, including digital copyright piracy.[8] 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 will contribute to its goal of doubling exports by 2014.[9] 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

4. *U.S.-Russia Relations: "Reset" Fact Sheet*, WHITE HOUSE OFFICE OF THE PRESS SEC'Y, June 24, 2010, http://www.whitehouse.gov/the-press-office/us-russia-relations-reset-fact-sheet.

5. *Hormat Says Administration To Seek Further Vetting With Congress on Model BIT*, WORLD TRADE ONLINE (Daily News), Nov. 16, 2010.

6. *Anti-Counterfeiting Trade Agreement (ACTA)*, OFFICE OF U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/acta.

7. *U.S., Participants Finalize Anti-Counterfeiting Trade Agreeement Text*, OFFICE OF U.S. TRADE REPRESENTATIVE, Nov. 15, 2010, http://www.ustr.gov/about-us/press-office/press-releases/2010/november/us-participants-finalize-anti-counterfeiting-trad.

8. *Id.*

9. *Trans-Pacific Partnership*, OFFICE OF U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/tpp (last visited Feb. 25, 2011).

Darussalam, Chile, New Zealand, Peru, Malaysia, Singapore, and Vietnam. Canada, Indonesia, Japan, and the Philippines have expressed interest in joining TPP talks.[10]

Although few details about the TPP talks have 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.[11] TPP members are expected to submit goods market access offers in January 2011, between the fourth and fifth rounds of talks.[12] This and other issues will need to be resolved expeditiously if the parties want to complete negotiations by November 2011.

II. 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. This number of disputes is the same as in 2009 but is less than the eighteen disputes initiated in 2008.[13] Most disputes initiated in 2010 involved trade remedy measures adopted by WTO Members after the 2008-2009 global economic crisis, thus involving complaints under the Antidumping Agreement ("AD Agreement"), the Subsidies and Countervailing Measures Agreement ("SCM Agreement"), and the Agreement on Safeguards ("Safeguards Agreement").[14]

1. *Panel and Appellate Body Reports*

a. EC–Large Civil Aircraft

The most significant decision by a WTO panel ("Panel") in 2010 was *EC–Large Civil Aircraft*, issued on June 30, 2010.[15] The United States successfully challenged subsidization by the European Union ("EU") and four of its Member States–France, Germany, Spain, and the U.K.–with respect to large civil aircraft ("LCA") developed, produced, and sold by Airbus. The Panel agreed that a variety of measures such as launch aid financing, infrastructure grants, investments by the French and German governments, and research and technological grants by the four Member States, were specific subsidies that caused serious prejudice to U.S. interests within the meaning of Article 5(c) of the SCM Agreement.

Before the Panel, the United States 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 E.U. 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, Mex-

10. *TPP Officials to Meet Reps from Countries Interested in Joining at APEC*, Inside U.S. Trade, Nov. 5, 2010.

11. *TPP Countries Aim To Table Goods Market Access Offers in January*, Inside U.S. Trade, Oct. 22, 2010.

12. *Id.*

13. *See Chronological List of Disputes Cases*, WTO, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Feb. 25, 2011).

14. *Id.*

15. *See* Panel Report, *European Communities and Certain Member States–Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, (June 30, 2010).

ico, 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).

The Panel largely agreed with the United States that various instances of launch aid financing were specific within the meaning of Articles 1 and 2 of the SCM Agreement. In so finding, the Panel rejected the E.U.'s preliminary argument that launch aid measures granted before the SCM Agreement's entry into force 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 can examine the WTO consistency of subsidies granted before the SCM Agreement's entry into force, so long as the effects of those subsidies manifest themselves after entry into force.[16]

Of the seven launch aid measures challenged by the United States, the Panel found that only the German, Spanish, and U.K. 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.[17] Pursuant to Article 4.7 of the SCM Agreement, the Panel recommended that the E.U. withdraw these subsidies without delay and specified that the E.U. should do so within ninety days.[18]

Turning to the U.S. claims that the Airbus subsidies caused adverse effects to U.S. interests under Articles 5 and 6 of the SCM Agreement, the Panel conducted a "bifurcated" analysis of the U.S. claims under Article 6.3 (a), (b), and (c) of the SCM Agreement. 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 E.U., Australia, Brazil, China, Chinese Taipei, Korea, Mexico, and Singapore.[19] The Panel also made an affirmative finding for threat of displacement of Boeing LCA from the Indian market, based on order data.[20]

After finding all volume and price effects claimed by the United States, the Panel then found that the United States sufficiently established that launch aid shifted the risk of an LCA program to the lender governments, thus making the launch of a program more likely.[21] 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.[22] The Panel thus found that, but for the Airbus subsidies, Boeing would not have lost the sales and market share that it did in the relevant third country markets. The Panel concluded that the Airbus subsidies caused the displacement of Boeing LCA from the E.U. and third country markets, and significant lost sales in the same markets, within the meaning of Article 6.3 (a), (b) and (c) of the SCM Agreement.[23]

16. *See id.* ¶ 7.64.
17. *See id.* ¶¶ 7.652, 7.656, 7.659.
18. *See id.* ¶ 8.6.
19. *See id.* ¶¶ 7.1790-91.
20. *See id.* ¶ 7.1784.
21. *See id.* ¶ 7.1912.
22. *See id.* ¶ 7.1936.
23. *See id.* ¶ 7.1993.

On July 21, 2010, the E.U. appealed practically all of the Panel's findings in *EC–Large Civil Aircraft*. The United States cross-appealed, but its challenge largely focused on the four launch aid programs that the Panel did not find to constitute prohibited export subsidies. The Appellate Body Report is expected in 2011.

b. U.S.–AD CVD

In another significant victory, the United States prevailed over China in *U.S.–Definitive Antidumping and Countervailing Duties on Certain Products from China*.[24] The complaint concerned four concurrent U.S. countervailing and antidumping duty measures imposed on products from China. The Panel rejected China's claims that the imposition of a "double remedy," that is, of countervailing duties concurrently with antidumping duties calculated pursuant to Commerce'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 or 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.[25]

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 and Article VI:3 of the GATT 1994. Although the Panel recognized that the simultaneous imposition of antidumping duties calculated under an NME methodology and of countervailing duties could result in subsidies 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 antidumping and countervailing duties with respect to domestic subsidies. 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.[26]

The Panel also found that Articles 12.1 and 12.8 of the SCM Agreement did not require Commerce to adopt criteria to assess the occurrence of double remedies.[27] The Panel rejected China's claims under Article I:1, because in its view China failed to establish that Commerce maintained a policy or practice of avoiding offsetting the same subsidies through antidumping and countervailing duties in the case of market economy imports.[28]

Finally, the Panel declined to take account of a recent CIT decision that concluded that U.S. law required Commerce to avoid offsetting the same subsidies twice when it uses its NME methodology in countervailing duty and antidumping investigations.[29] 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 on December 1, 2010. The Appellate Body will circulate its report on March 11, 2011.

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24. *See* Panel Report, *United States–Definitive Antidumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, (Oct. 22, 2010).

25. *See id.* ¶ 14.42.

26. *See id.* ¶¶ 14.120-21.

27. *See id.* ¶ 14.149.

28. *See id.* ¶ 14.182.

29. GPX Int'l Tire Corp. v. United States, 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009).

B. NAFTA Dispute Settlement Activity

A NAFTA binational panel found Commerce's zeroing practice to be contrary to the statute, largely due to its finding that the statute should be interpreted in a manner consistent with U.S. obligations under the WTO Agreements. In the NAFTA panel review of Commerce's antidumping administrative review determination regarding *Stainless Steel Sheet and Strip in Coils from Mexico*,[30] the binational panel held that the practice of "zeroing" of negative antidumping margins is contrary to the statute. The panel found that the statute requires that Commerce employ a methodology that includes all sales.[31] The panel reasoned 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.[32] 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 statue be interpreted as consistent with U.S. international obligations.[33] The panel remanded the administrative review determination back to Commerce to recalculate the respondent's antidumping margin without zeroing.[34] Two panelists dissented in a strongly worded critique of the majority's decision.[35]

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.[36] The Panel's reasoning closely parallels but predates the Federal Circuit's reasoning in *U.S. Steel Corp. v. United States*.[37] Another binational panel decision affirmed the ITC's rejection of new information submitted after the close of the ITC's briefing, but remanded for failure to provide sufficient explanation for reducing the weight accorded to evidence regarding the most recent period.[38]

30. Article 1904 Binational Panel Review, *Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of 2004/2005 Antidumping Review*, Secretariat File No. USA-MEX-2007-1904-01 (Apr. 14, 2010), *available at* http://registry.nafta-sec-alena.org/cmdocuments/edce701c-9720-424b-b232-1fd714d318ba.pdf.

31. *Id.* at 10.

32. *Id.* at 20-21.

33. *Id.* at 11.

34. *Id.* at 24.

35. *Id.* at 53.

36. Article 1904 Binational Panel Review, *Light-walled Rectangular Pipe and Tube from Mexico, Final Determination of Sales at Less Than Fair Value*, Secretariat File No. USA-MEX-2008-1904-03 (July 20, 2010).

37. U.S. Steel Corp. v. United States, 621 F.3d 1351 (Fed. Cir. 2010).

38. Article 1904 Binational Panel Review, *Light-walled Rectangular Pipe and Tube from Mexico, Final Determination of Material Injury to a U.S. Industry*, Secretariat File No. USA-MEX-2008-1904-04 (Nov. 26, 2010), *available at* http://registry.nafta-sec-alena.org/cmdocuments/0263a90b-7544-48fc-a80b-50b814291e5a.pdf.

III. U.S. Trade Remedy Cases

A. Administrative Determinations

1. *Targeted Dumping Methodology*

Commerce is permitted to find "targeted dumping" where "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time."[39] In such cases, Commerce may calculate margins using an "average-to-transaction" methodology.[40] The 2008 *Year-in-Review* article discussed Commerce's targeted dumping methodology and the withdrawal of the targeted dumping regulations.[41] Recognizing the withdrawal of its regulations, however, Commerce continued to explore its options regarding its targeted dumping methodology.[42]

In March 2010, Commerce established its new targeted dumping methodology in the *Polyethylene Retail Carrier Bags from Taiwan*.[43] In previous determinations, Commerce had applied an "average-to-transaction" methodology only to those sales found to have been targeted.[44] After withdrawing its targeted dumping regulations, Commerce shifted its approach, determining 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.[45] Applying the "average-to-transaction" methodology to all sales, however, unmasked such targeted dumping.[46] 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.[47]

The new targeted dumping methodology means that where targeted dumping is found, non-dumped sales having "negative" margins will not be allowed to offset the margins attributable to the dumped sales, resulting in higher dumping margins. Commerce's new approach may face criticism from the WTO Members who have disputed its practice of zeroing.

2. *Application of CVD Law to Vietnam*

On May 1, the first CVD order was imposed on imports of goods from Vietnam,[48] making it the second NME country to have the CVD law applied to it. In the final determination, Commerce determined that application of both the CVD law and the AD law

39. 19 U.S.C. § 1677f-1(d)(1)(B)(i) (2010).
40. 19 U.S.C. § 1677f-1(d)(1)(B).
41. Pablo M. Bentes et al., *International Trade*, 43 Int'l Law. 335, 348 (2009).
42. Polyethylene Retail Carrier Bags from Indonesia, 74 Fed. Reg. 56,807 (Nov. 3, 2009).
43. Polyethylene Retail Carrier Bags from Taiwan, 75 Fed. Reg. 14,569-70 (Mar. 26, 2010) [hereinafter PRCBs from Taiwan].
44. *See, e.g.*, Certain Steel Nails From the United Arab Emirates, 73 Fed. Reg. 33,985 (June 16, 2008).
45. 75 Fed. Reg. 14,569-70.
46. *Id.*
47. *Id.*
48. Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam, 75 Fed. Reg. 23670 (May 4, 2010) (Countervailing Duty Order) [hereinafter PRCBs from Vietnam].

using the NME methodology was appropriate and consistent with Congressional intent.[49] 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.[50] Commerce also addressed arguments relying on the Court of International Trade ("CIT") decision in *GPX Int'l Tire Corp. v. United States*,[51] pointing out in its final determination that the *GPX Tire* decision had not been finalized.[52] 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.[53] 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.[54] 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 so subsidies could be both measured and identified.[55]

Until appellate rights in *GPX Tire* have been exhausted, Commerce's current practice allows for the application of CVD law to non-market economies.

3. *Initiation of Section 301 Investigation*

On October 20, the USTR 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").[56] Section 301 of the Act permits the USTR to request consultations with the foreign country implicated by the investigation[57] but has not been widely utilized in recent years.

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49. Issues and Decision Memorandum for PRCBs from Vietnam, 75 Fed. Reg. 16,428, cmt. 1 (Apr. 1, 2010).

50. Issues and Decision Memorandum for Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China, 74 Fed. Reg. 29,180, cmt. 1 (June 19, 2009).

51. GPX Int'l Tire Corp. v. United States, 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009).

52. The decision in *GPX Tire* is now final, although appellate rights have not been exhausted. *See* GPX Int'l Tire Corp. v. United States, Slip Op. 10-84, 2010 Ct. Int'l Trade LEXIS 88 (Aug. 4, 2010) (remanding to Commerce with instructions to forego the imposition of the CVD law, because Commerce had not demonstrated that it could determine the degree of double counting that occurred when both the CVD law and non-market economy antidumping law are applied); GPX Int'l Tire Corp. v. United States, Slip Op. 10-112, 2010 Ct. Int'l Trade LEXIS 114 (Oct. 1, 2010) (sustaining Commerce's remand determination foregoing the imposition of the CVD law and acknowledging that Commerce had made its determination under protest and had stated an intention to appeal).

53. PRCBs from Vietnam, 75 Fed. Reg. 16,428, cmt. 1.

54. *Id.*

55. *Id.*

56. Initiation of Section 302 Investigation and Request for Public Comment: China-Acts, Policies and Practices Affecting Trade and Investment in Green Technology, 75 Fed. Reg. 64,776 (Oct. 20, 2010) [hereinafter Green Technology Investigation].

57. *Id.*

The investigation was initiated to address acts, policies, and practices affecting trade and investment in green technologies in China.[58] The petition alleged that China protects domestic producers of green technology in a manner that is inconsistent with its WTO commitments[59] and that 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."[60]

On December 22, 2010, the USTR announced that it had requested formal WTO consultations with China regarding subsidies on wind power equipment.[61]

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

On September 7, Commerce determined in the *Aluminum Extrusions* that it would not initiate an investigation relating to petitioners' currency manipulation allegation.[62] 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 value of the RMB."[63] A similar determination was made in the *Certain Coated Paper*, where Commerce stated that it had "determined not to investigate a new subsidy allegation regarding currency undervaluation."[64] 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 *Aluminum Extrusions*, Commerce countervailed the Chinese government procurement for the first time.[65] One respondent provided complete sales information, including information identifying which customers were Government of China authorities.[66] Commerce determined that the respondent sold aluminum extrusions to government authorities, constituting a financial contribution under 19 U.S.C. § 1677(5)(D)(iv).[67] 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 com-

58. *United States Launches Section 301 Investigation Into China's Policies Affecting Trade and Investment in Green Technologies*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, Oct. 15, 2010, http://www.ustr.gov/node/6227.

59. Green Technology Investigation, 75 Fed. Reg. 64,776. "Green technology" is defined as wind and solar energy products, advanced batteries, and energy-efficient vehicles, among others. *Id.*

60. *Id.*

61. *See U.S. Requests WTO Consultations With China Over Wind Power Subsidies*, INSIDE U.S. TRADE, Dec. 23, 2010.

62. Aluminum Extrusions From the People's Republic of China, 75 Fed. Reg. 54,302 (Sept. 7, 2010).

63. *Id.* at 54,303.

64. Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China, 75 Fed. Reg. 59,212-13 (Sept. 27, 2010).

65. Aluminum Extrusions From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 75 Fed. Reg. 54,302, 54,307 (Sept. 7, 2010).

66. *Id.* at 54,319.

67. *Id.*

pared the benchmark sales price to the prices charged to the government authorities.[68] Based on this comparison, Commerce determined that the respondent received a benefit.[69] Commerce found 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.[70]

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 Commerce found such a program to be countervailable.

B. Court Appeals of International Trade Remedy Cases

1. *Federal Circuit Decisions*

In *U.S. Steel Corp. v. United States*,[71] 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 antidumping 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*,[72] the Federal Circuit affirmed Commerce's decision to limit section 129 determinations to the those issues affected by the WTO report.

In earlier decisions regarding the zeroing issue, the Court declined to give any weight to the WTO-inconsistency of Commerce's zeroing practice.[73] But in *Thai I-Mei Frozen Foods Co. Ltd. v. United States*,[74] the Federal Circuit affirmed the use of the WTO Agreements "as context, informing its analysis of the Congressional intent behind the statutory provisions."[75] Nevertheless, the Federal Circuit reversed 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.

In *Gallant Ocean (Thailand) Co. Ltd. v. United States*,[76] the Federal Circuit circumscribed Commerce's latitude in applying antidumping 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,

68. *Id.* at 54,319-20.
69. *Id.*
70. *Id.*
71. U.S. Steel Corp. v. United States, 621 F.3d 1351 (Fed. Cir. 2010).
72. ThyssenKrupp Acciai Speciali Terni S.p.A. v. United States, 603 F.3d 928 (Fed. Cir. 2010).
73. *See, e.g.*, Timken Co. v. United States, 354 F.3d. 1334, 1341-43 (Fed. Cir. 2004); Corus Staal B.V. v. United States, 395 F.3d 1343, 1345-47 (Fed. Cir. 2005).
74. Thai I-Mei Frozen Foods Co., Ltd. v. United States, 616 F.3d 1300, 1307 (Fed. Cir. 2010) (emphasis added).
75. *Id.*
76. Gallant Ocean (Thailand) Co. Ltd. v. United States, 602 F.3d 1319 (Fed. Cir. 2010).

were "punitive, aberrational, or uncorroborated."[77] The Court reasoned that Commerce's adverse facts were "unrelated to commercial reality" and not a reasonable estimate.[78] In *Agro Dutch Indus. Ltd. v. United States*,[79] the Federal Circuit delineated the situations under which re-liquidation may be appropriate. The Federal Circuit upheld the CIT'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.[80] The Federal Circuit held that while the *Zenith* rule ordinarily renders moot court actions in which liquidation has already occurred, there are exceptions to that general rule in which *Shinyei* re-liquidation relief may be appropriate.[81] The Court found that the *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 underling antidumping order.[82]

In *American Signature, Inc. v. United States*,[83] the Federal Circuit reversed the CIT's denial of a preliminary injunction against liquidation, finding that the lower court's reasoning that the *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 thirty days through an amended determination.[84] 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.[85]

In reviewing an ITC decision, the Federal Circuit in *Diamond Sawblades Mfrs. Coal. v. United States*[86] sustained the CIT's initial remand to the Commission under an abuse of discretion standard. The Federal Circuit reasoned that although the CIT had stated at times that 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 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 Commission determination.

77. *Id.* at 1324 (emphasis added).

78. *Id.* at 1324.

79. Agro Dutch Indus. Ltd. v. United States, 589 F.3d 1187 (Fed. Cir. 2009).

80. *Id.* at 1189-90.

81. *Id.* at 1191-92.

82. *Id.*

83. American Signature, Inc. v. United States, 598 F.3d 816 (Fed. Cir. 2010).

84. *Id.* at 827.

85. *Id.* at 825.

86. Diamond Sawblades Mfrs. Coal. v. United States, 612 F.3d 1348, 1358 (Fed. Cir. 2010).

Both the CIT and the Federal Circuit sustained the affirmative remand determination as having addressed the further explanations requested.[87]

2. *Court of International Trade Decisions*

Like the Federal Circuit, the CIT's jurisprudence regarding injunctions and liquidation evolved over 2010. In *Ames True Temper v. United States*,[88] the Court declined to order re-liquidation of entries that were deemed liquidated by operation of the six-month statutory deemed liquidation provision when the plaintiff failed to serve the injunction. Later in the year, however, in *Clearon Corp. v. United States*,[89] 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*[90] and *NSK Bearings Europe Ltd. v. United States*,[91] 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. 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.[92]

The CIT also had occasion to review Commerce's implementation of WTO decisions. In *Andaman Seafood Co. v. United States*,[93] 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.

Regarding the perennial issue of zeroing, the Court, in *Dongbu Steel Co. Ltd. v. United States*,[94] 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.[95]

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*,[96] 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

87. *Id.* at 1360-61.
88. Ames True Temper v. United States, 700 F. Supp. 2d 1352 (Ct. Int'l Trade 2010).
89. Clearon Corp. v. United States, 717 F. Supp. 2d 1366 (Ct. Int'l Trade 2010).
90. NSK Ltd. v. United States, 2010 WL 4055932 (Ct. Int'l Trade, Oct. 15, 2010).
91. NSK Bearings Europe Ltd. v. United States, 2010 WL 4055929 (Ct. Int'l Trade, Oct. 15, 2010).
92. SKF USA Inc. v. United States, 675 F. Supp. 2d 1264 (Ct. Int'l Trade 2009).
93. Andaman Seafood Co. v. United States, 675 F. Supp. 2d 1363 (Ct. Int'l Trade 2010).
94. Dongbu Steel Co. Ltd. v. United States, 677 F. Supp. 2d 1353 (Ct. Int'l Trade 2010).
95. *Id.* at 1363.
96. GPX Int'l Tire Corp. v. United States, 715 F. Supp. 2d 1337 (Ct. Int'l Trade 2010); 2010 WL 3835022 (Ct. Int'l Trade, Oct. 1, 2010).

Federal Circuit, and concurrently a WTO panel report finding Commerce methodology to be WTO-consistent on appeal to the WTO Appellate Body.[97]

Regarding countervailing duties and adverse facts available, the Court in *United States Steel Corporation v. United States*,[98] 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.

IV. Section 337

The number of complaints filed at the U.S. International Trade Commission (ITC) in 2010 broke all records, with fifty-one investigations instituted in the fiscal year.[99] This wellspring of new cases brought major developments regarding ITC practice and precedent. Three such developments are described below.

A. Litigation Expenses As "Exploitation" Of Intellectual Property

The genesis 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.[100] Indeed, the domestic industry requirement is imposed to prevent those "who have no contact with the United States other than owning . . . intellectual property rights from utilizing section 337."[101] As the United States continues to move further from an economy based on manufacturing to one based on information, however, to establish a Section 337 violation, complainants rely less on expenditures involving production of articles and more on those that "exploit" their intellectual property.[102] With the increased use of 19 U.S.C. §1337(a)(3)(C), ambiguities have arisen regarding the parameters of this subsection, such as whether litigation activities alone constitute "exploitation" of intellectual property, especially when offered by a non-practicing entity ("NPE").

The Commission clarified this issue in *Coaxial Cable Connectors & Components Thereof & Products Containing Same*, determining that litigation or any other activities *may* demonstrate the existence of a domestic industry under 19 U.S.C. §1337(a)(3)(C), but only if: (1) the activities relate to licensing; (2) the activities relate to the patents at issue; *and* (3) the

97. Panel Report, *United States–Definitive Antidumping and Countervailing Duties on Certain Products from China*, WT/DS379/R (Oct. 22, 2010), *available at* http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/379R-01.doc; Notification of an Appeal by China under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the *Working Procedures for Appellate Review*, WT/DS379/6 (Dec. 6, 2010), *available at* http://docsonline.wto.org:80/DDFDocuments/t/wt/ds/379-6.doc.

98. U.S. Steel Corp. v. United States, 2009 WL 5125921 (Ct. Int'l Trade, Dec. 30, 2009).

99. *See Section 337 Statistics*, U.S. Int'l Trade Comm'n, http://www.usitc.gov/press_room/337_stats.htm (last visited Dec. 7, 2010).

100. *See* Certain Microsphere Adhesives, Process for Making Same, & Prods. Containing Same, Including Self-Stick Repositionable Notes, USITC Pub. 2949, Inv. No. 337-TA-366, Comm'n Op. at 13-14 (Jan. 1996).

101. *Id.* at 14.

102. *See* 19 U.S.C. § 1337(a)(3)(C) (2010).

complainant can document costs for those activities.[103] Mere patent ownership and patent infringement litigation is not enough.[104] The Commission also clarified 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."[105] Thus, in clarifying 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 do so using their own (non-manufacturing) activities, as opposed to the production activities of their licensees.

Practitioners can take at least two lessons from *Coaxial Cable Connectors*. First, although 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 exemplified in the remand finding no domestic industry.[106] Second, based on the numerous pages of annotated attorney billing in the remand opinion,[107] the nexus component will likely be strictly enforced, requiring expenses to be "broken down into their constituent parts,"[108] particularly when the complainant is an NPE.

B. Markman Decisions At The Commission

Although the United States Supreme Court issued its opinion in *Markman v. Westview Instruments* in 1996,[109] it was not until the 2001-2003 period that Administrative Law Judges ("ALJs") at the ITC began issuing *Markman* decisions, setting forth constructions of disputed patent claim terms in advance of a final Initial Determination ("ID").[110] The expedited pace of investigations and the absence of juries to educate have factored into the limited use of *Markman* decisions at the ITC. Today, however, 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.

Although most Section 337 investigations still do not include *Markman* decisions, discussions over whether to include *Markman* hearings occur more regularly. 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.[111]

The Commission resolved this question in *Certain Mobile Telephones & Wireless Communication Devices Featuring Digital Cameras, and Components Thereof.*[112] In that investigation, on June 22, 2010, Chief Judge Luckern issued his first *Markman* decision in the form of an

103. Inv. No. 337-TA-650, Comm'n Op. at 44, 54 (Apr. 14, 2010) (Pub. Version).
104. *Id.* at 45-46.
105. *Id.* at 50 (emphasis added).
106. *See Coaxial Cable Connectors*, Inv. No. 337-TA-650, Remand Initial Determination ("ID"), at 25 (June 15, 2010) (Pub. Version).
107. *Id.* at 19-25.
108. *See Coaxial Cable Connectors*, Inv. No. 337-TA-650, Comm'n Op. at 54.
109. Markman v. Westview Instruments, 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).
110. 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).
111. *Id.* at 107-08.
112. Inv. No. 337-TA-703, Comm'n Notice, at 2 (Oct. 20, 2010).

ID.[113] On October 20, 2010, the Commission disagreed with the Chief Judge's designation, determining that his ruling would be treated as an order.[114] Accordingly, the Commission would not consider the merits of the claim constructions 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 because claim construction, standing alone, is not an "issue" or "any part of an issue" within the meaning of that rule. While 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.[115]

Although immediate Commission review of a *Markman* decision is not readily available under the Commission's dictates in *Mobile Telephones*,[116] the ruling allows an ALJ to base claim constructions on a full evidentiary record. 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 can continue setting shorter target dates for investigations.[117]

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 public interest.[118] 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 develop information regarding the public interest *at each stage of the investigation*."[119] Under the current framework, the Commission may consider public interest only *after* it finds a violation and *after* it has identified an appropriate remedy.[120] Moreover, the current rules do not allow an ALJ to take evidence on public interest absent a directive from the Commission.[121]

The public interest has always been an important component of any Section 337 investigation. Indeed, Congress mandated that "the public interest must be paramount in the administration of this statute."[122] The Commission cannot issue a remedy if it adversely

113. *Id.*
114. *Id.*
115. *Id.*
116. *See* 19 C.F.R. § 210.24 (2010).
117. *See* Jenna Greene, *Welcome to Patent Law's Hottest Venue*, NAT'L L.J., Dec. 13, 2010, at 1.
118. 75 Fed. Reg. 60671 (Oct. 1, 2010).
119. *Id.* (emphasis added).
120. *Id.* at 60673; *see* 19 U.S.C. §§ 1337 (d)(1), (f)(1) (2010).
121. 19 C.F.R. § 210.50(b)(1).
122. S. REP. NO. 1298, at 193 (1974).

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."[123] Although public interest considerations have impinged upon the issuance of a remedy in only a handful of investigations, the NPRM reflects the view that the proposed changes are "necessary" for the effective future administration of the statute.[124]

Comments on the proposed rules were due on November 30, 2010, and the Commission received a number of responses.[125] While several submissions laud the goals of the NPRM, the comments also reveal concern as to whether the current proposal was effective. The Commission will review the comments and decide whether to move forward with this rule-changing initiative.

123. 19 U.S.C. §§ 1337 (d)(1), (f)(1).
124. 75 Fed. Reg. at 60,671.
125. *Id.*