

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN RUBBER ANTIDEGRADANTS,
COMPONENTS THEREOF, AND
PRODUCTS CONTAINING SAME**

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) **Inv. No. 337-TA-533**
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**NOTICE OF COMMISSION DETERMINATION TO REVIEW A
FINAL INITIAL DETERMINATION; SCHEDULE FOR FILING WRITTEN
SUBMISSIONS ON THE ISSUES UNDER REVIEW AND ON REMEDY,
THE PUBLIC INTEREST, AND BONDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in its entirety the final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) on February 17, 2006, in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Wayne Herrington, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3090. Copies of the ALJ’s ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this section 337 investigation on March 29, 2005, based on a complaint filed by Flexsys America LP. *70 Fed. Reg.* 15885 (March 29, 2005). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain rubber antidegradants, components thereof, and products containing same that infringe claims 30 and 61 of U.S. Patent

No. 5,117,063 (“the ‘063 patent”), claims 7 and 11 of U.S. Patent No. 5,608,111 (“the ‘111 patent”), and claims 1, 32, and 40 of U.S. Patent No. 6,140,538 (“the ‘538 patent”). The complaint and notice of investigation named five respondents. The investigation was subsequently terminated as to two respondents and as to the ‘538 patent.

On February 17, 2006, the ALJ issued his final ID finding a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), by respondents Sinorgchem Co., Shandong, and Sovereign Chemical Company, but finding no violation of section 337 by respondent Korea Kumho Petrochemical Co., Ltd. The ALJ recommended that the Commission issue limited exclusion orders, but did not recommend that any bond be imposed for importations during the Presidential review period. All parties petitioned for review of various parts of the final ID.

Having examined the record in this investigation, including the ALJ’s final ID, the petitions for review, and the responses thereto, the Commission has determined to review the final ID in its entirety. The Commission’s review includes the issue of whether the ALJ properly determined that the issue of infringement by the P1 and P2 processes of Korea Kumho Petrochemical Co., Ltd. was not before him, but that review is only for the purpose of making a correction to the final ID, i.e., to substitute “Motion No. 533-61” for “Motion No. 533-57” on page 96 of the final ID. The Commission has otherwise concluded that the ALJ was correct in his determination on this issue.

On review, the Commission requests briefing based on the evidentiary record. While the Commission has determined to review the final ID in its entirety, it is particularly interested in briefing on the issues of claim construction and indefiniteness, especially with respect to the term “controlled amount of protic material,” which appears in all the asserted claims. In addressing the question of claim construction, each party should specifically identify those portions of the claim language, specification, and prosecution history (and other evidence, if appropriate) which support the construction it advocates. The Commission is also interested in receiving answers to the following questions:

1. With respect to the ID’s construction of the term “controlled amount of protic material,” what is the basis for including “the desired selectivity,” given that col. 4, ll. 48-50 (‘063 patent) states: “A ‘controlled amount’ of protic material is an amount up to that which inhibits the reaction of aniline with nitrobenzene...,” a statement which does not contain the term “selectivity”?
2. Given that the ‘111 patent is based on a continuation-in-part application, what is the legal basis for using matter in the claims and specification of that patent not common to the disclosure of the ‘063 patent to construe the claims of the ‘063 patent? What is the legal basis for using the prosecution history of the ‘111 patent to construe the claims of the ‘063 patent?
3. Referring to the ALJ’s definition of “controlled amount of protic material” in

the ID at 78-79, what is the meaning of the terms “inhibited” and “desired selectivity”? How are these terms applied to determine infringement by the accused processes? With respect to the claim construction of “controlled amount of protic material” adopted in the ID, what is the evidence that the claims, specification, and prosecution history would provide a person of ordinary skill in the art with knowledge of what constitutes “inhibition” and the “desired selectivity”?

4. With respect to the licensing issues raised by Korea Kumho Petrochemical Co., Ltd., which are stated to be subject to Korean law, state the applicable Korean law and discuss how it applies.

5. With respect to the estoppel issue raised by Korea Kumho Petrochemical Co., Ltd., state what law (Korean, U.S., or other) applies and how it applies.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission’s action. During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues under review. The submissions should be concise and thoroughly

referenced to the record in this investigation. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the February 17, 2006, recommended determination by the ALJ on remedy and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. The written submissions and proposed remedial orders must be filed no later than close of business on April 24, 2006. Reply submissions must be filed no later than the close of business on May 1, 2006. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.42-.46 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42-.46).

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: April 13, 2006