

**UNITED STATES INTERNATIONAL TRADE COMMISSION**  
**Washington, D.C. 20436**

**In the Matter of**

**CERTAIN CIGARETTES AND  
PACKAGING THEREOF**

**Investigation No. 337-TA-643**

**NOTICE OF COMMISSION DETERMINATION TO REVIEW  
THE PRESIDING ADMINISTRATIVE LAW JUDGE'S INITIAL SUMMARY  
DETERMINATION OF VIOLATION; SCHEDULE FOR WRITTEN SUBMISSIONS**

**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 administrative law judge's ("ALJ") initial summary determination ("ID") (Order No. 19) in the above-captioned investigation, in which he granted the complainant's motion for a summary determination of violation.

**FOR FURTHER INFORMATION CONTACT:** Jonathan J. Engler, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3112. Copies of the ALJ's IDs and all other non-confidential 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 at <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:** On April 4, 2008, the Commission instituted this investigation, based on a complaint filed by Philip Morris USA Inc., naming Alcesia SRL; Emarket Systems Ltd. (d.b.a. all-discount-cigarettes.com); Jamen Chong (d.b.a. asiadfs.com); Tri-kita (d.b.a. cheapcigarettes4all.com); Mr. Eduard Lee (d.b.a. cigarettesonlineshop.com); Zonitech Properties Limited (d.b.a. cigline.net); Zonitech Properties Limited (d.b.a. shopping-heaven.com); Cendano (d.b.a. galastore.com); Ms. Svetlana Trevinska (d.b.a. save-on-cigarettes.com); LMB Trading SA (d.b.a. k2smokes.ch); G.K.L. International SRL (d.b.a. all-cigarettes-brandsxom); G.K.L. International SRL (d.b.a. smokerjim.net); and Best Product Solution Ltd. as respondents. The complainant alleges violations of Section 337 of the

Tariff Act of 1930, 19 U.S.C. § 1337, in the importation into the United States of certain cigarettes and packaging thereof that infringe registered trademarks owned by complainant.

On December 12, 2008, the ALJ issued an ID, Order No. 13, in which he determined to extend the target date in this investigation from July 6, 2009, to September 21, 2009. No petitions for review were filed, and the Commission determined not to review Order No. 13.

On November 25, 2008, the complainant moved for an initial determination finding 11 respondents in default for failing to show cause why they should not be found in default with regard to 14 trademarks listed in the Commission's Notice of Investigation and one additional respondent in default for failing to participate in the proceeding. On January 9, 2009, the ALJ issued an initial determination, Order No. 17, granting Phillip Morris' motion for entry of default as to these 12 respondents. No petitions for review were filed, and on February 5, 2009, the Commission determined not to review Order No. 17.

On February 3, 2009, the ALJ issued Order No. 19, an initial determination granting Phillip Morris' motion for summary determination that Alcesia had violated Section 337 of the Tariff Act with respect to three trademarks: U.S. Trademark Registration Nos. 68,502; 378,340; and 894,450. On February 17, 2009, Alcesia filed a petition for review of Order No. 19. Both Phillip Morris and the Commission's Office of Unfair Import Investigations filed responses on February 23, 2009. On February 26, 2009, Alcesia filed a motion requesting leave to file a reply, which Phillip Morris opposed on March 2, 2009. On March 4, 2009, the Commission extended the deadline for determining whether to review Order No. 19 until April 9, 2009.

On February 3, 2009, the ALJ also issued Order No. 20, in which he denied Phillip Morris' request for a recommended determination on remedy and bonding on grounds that Phillip Morris' November 26, 2008 motion for summary determination did not, in fact, resolve the issues in the investigation with respect to all 14 trademarks, but only with respect to three: U.S. Trademark Registration Nos. 68,502; 378,340; and 894,450. The ALJ declined to terminate the violation phase of the investigation until Phillip Morris withdrew the 11 trademarks not addressed in its motion for summary determination.

On February 9, 2009, Phillip Morris filed a motion withdrawing the 11 trademark claims. On February 23, 2009, the ALJ issued Order No. 21 in which he granted the motion. Order No. 21 was not reviewed by the Commission. On March 18, 2009, the ALJ issued his recommendations on remedy and bonding.

The Commission has determined to review Order No. 19 in its entirety. It has also determined to deny Alcesia's motion for leave to file a reply. The Commission requests briefing by the parties to the investigation on the following questions:

- (1) Does the Commission have the authority to find a foreign entity in violation of 19 U.S.C. § 1337 (a) (1) (C) if that entity is not an "owner, importer or consignee" of the alleged gray market goods?

- (2) What is the appropriate standard for the Commission to apply in gray market cases to determine whether two entities are affiliated for purposes of its “all or substantially all” analysis? More specifically, where the Commission is seeking to determine whether all or substantially all of a complainant’s sales in the United States are of goods that contain the alleged material differences, and there is evidence that other entities in the United States or abroad have a corporate relationship with the complainant, under what circumstances should gray market sales by those other entities be imputed to the complainant?
- (3) Is Phillip Morris International authorized and/or licensed to use the specific Phillip Morris USA trademarks at issue in this investigation in the manufacture and sale of cigarettes abroad? Please make specific reference to documents in the record. If Phillip Morris International was not so authorized, was this case properly brought as a gray market case?

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 the respondent 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 U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission’s action. *See* Presidential Memorandum of July 21, 2005. *70 Fed. Reg.* 43251 (July 26, 2005). 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 if a remedy is ordered.

**WRITTEN SUBMISSIONS:** Parties to the investigation are asked to file written submissions on the questions posed by the Commission. Parties to the investigation, interested government agencies, and any other interested parties and on the issues of remedy, the public interest, and bonding. Complainants and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the HTSUS numbers under which the accused products are imported.

Briefing must be filed no later than close of business on May 8, 2009. Reply submissions must be filed no later than the close of business on May 29, 2009. Such submissions should address the recommended determinations on remedy and bonding which were made by the ALJ in Order No. 23 (March 18, 2009). No further submissions on any of 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 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* 19 C.F.R. § 210.6. 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 section 210.42-46 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.42-46).

By order of the Commission.

/s/  
Marilyn R. Abbott  
Secretary to the Commission

Issued: April 9, 2009