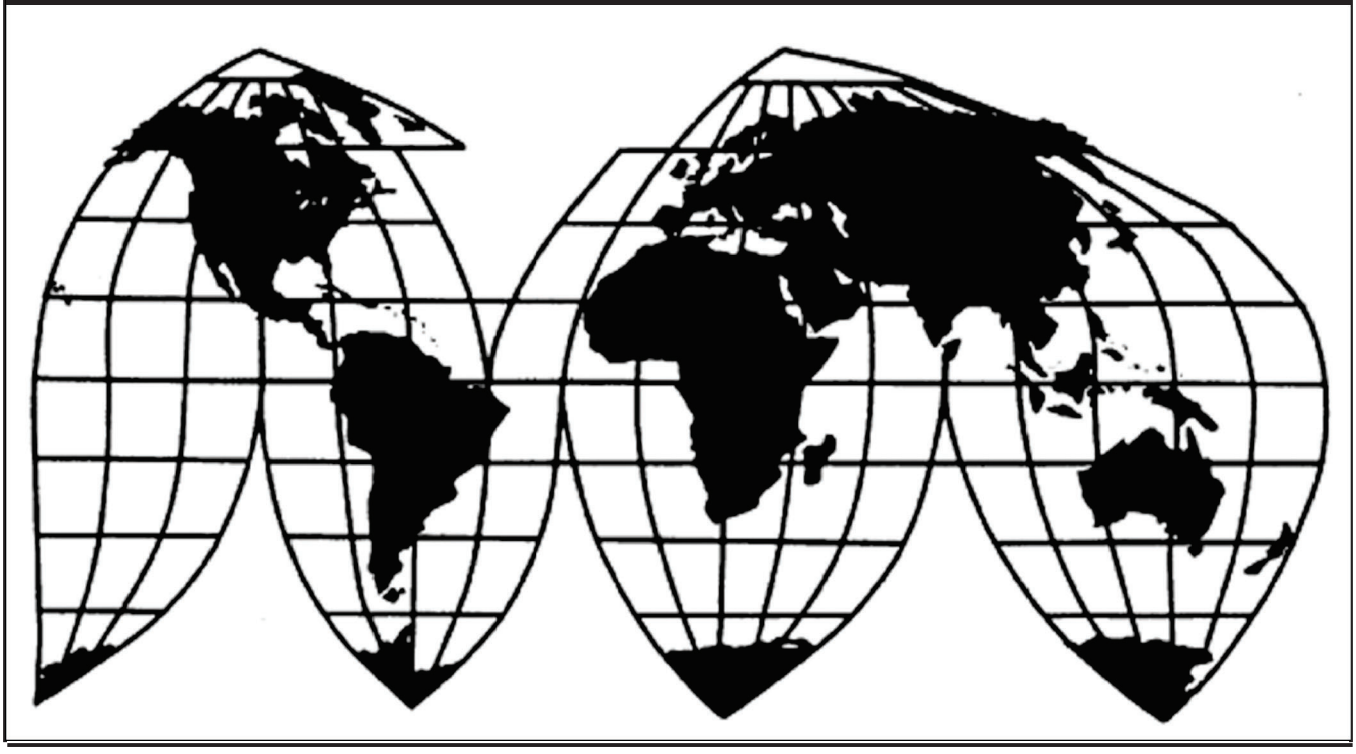
In the Matter of

CERTAIN CARBON AND ALLOY STEEL PRODUCTS

Investigation No. 337-TA-1002

Publication 4947 **August 2019**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

COMMISSIONERS

Rhonda Schmidtlein, Chairman
David Johanson, Vice Chairman
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Meredith Broadbent, Commissioner

Address all communications to
Secretary to the Commission
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U.S. International Trade Commission

Washington, DC 20436
www.usitc.gov

In the Matter of

CERTAIN CARBON AND ALLOY STEEL PRODUCTS

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August 2019

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	
CERTAIN CARBON AND ALLOY STEEL PRODUCTS	**Investigation No. 337-TA-1002**

NOTICE OF COMMISSION DETERMINATION TO TERMINATE THE INVESTIGATION IN ITS ENTIRETY

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to terminate the investigation in its entirety.

FOR FURTHER INFORMATION CONTACT: Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2301. Copies of 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 https://www.usitc.gov. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at https://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 Inv. No. 337-TA-1002 on June 2, 2016, based on a complaint filed by complainant United States Steel Corporation of Pittsburgh, Pennsylvania ("U.S. Steel"), alleging a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337"). See 81 FR 35381 (June 2, 2016). The complaint alleges violations of section 337 based upon the importation into the United States, or in the sale after importation of certain carbon and alloy steel products by reason of: (1) a conspiracy to fix prices and control output and export volumes, the threat or effect of which is to restrain or monopolize trade and commerce in the United States; (2) misappropriation and use of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States; and (3) false designation of origin or manufacturer, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id*. The notice of investigation identified forty (40) respondents that are Chinese steel manufacturers or distributors, as well as some of their Hong Kong and United States affiliates. *Id*. In addition, the Office of Unfair Import Investigations is also a party in this investigation. *Id*. Eighteen (18) respondents participated in the investigation and all other respondents were found in default,

including fifteen (15) respondents that are subject to the false designation of origin claim ("Defaulting Respondents"). See Comm'n Notice (Oct. 14, 2016), Comm'n Notice (Oct. 18, 2016), Comm'n Notice (Nov. 18, 2016).

On August 26, 2016, the participating respondents filed a motion to terminate U.S. Steel's antitrust claim under 19 CFR 210.21. On November 14, 2016, the presiding administrative law judge ("ALJ") issued an initial determination ("ID"), granting Respondents' motion to terminate Complainant's antitrust claim under 19 CFR 210.21 and, in the alternative, under 19 CFR 210.18. Order No. 38 (Nov. 14, 2016). On December 19, 2016, the Commission issued a Notice determining to review Order No. 38. See 81 FR 94416-7 (Dec. 23, 2016). On April 20, 2017, the Commission held an oral argument on the issue of whether a complainant alleging a violation of section 337 based on antitrust law must show antitrust injury.

On February 15, 2017, U.S. Steel filed a motion to partially terminate the investigation on the basis of withdrawal of its trade secret allegations, which were alleged against only certain of the participating respondents. On February 22, 2017, the ALJ issued an ID, granting U.S. Steel's motion to terminate the investigation with respect to its trade secret allegations. Order No. 56 (Feb. 22, 2017). On March 24, 2017, the Commission determined not to review Order No. 56. Comm'n Notice (Mar. 24, 2017).

On October 2, 2017, the ALJ issued an ID, granting the remaining participating respondents' motions for summary determination of no section 337 violation based on false designation of origin. Order No. 103 (Oct. 2, 2017). On November 1, 2017, the Commission determined not to review Order No. 103. Comm'n Notice (Nov. 1, 2017).

On March 19, 2018, the Commission terminated the investigation as to the antitrust claim. Notice (Mar. 19, 2018). In the same notice, the Commission requested briefing on remedy, public interest, and bonding concerning the previously defaulted respondents subject to the false designation of origin claim. *Id.*

On March 30, 2018, U.S. Steel submitted a letter indicating that it did not intend to file a response to the Commission's request for briefing on remedy, public interest, and bonding concerning the previously defaulted respondents subject to the false designation of origin claim. Also on March 30, 2018, OUII filed a response to the Commission's notice, recommending that the Commission decline to issue remedial orders against the Defaulting Respondents under the circumstances.

The Commission is authorized to issue relief against defaulters pursuant to section 337(g)(1) "upon request" from the complainant. 19 U.S.C. 1337(g)(1). Because U.S. Steel has abandoned its request, as stated in the complaint, for a remedy against the Defaulting Respondents, the Commission has determined to terminate the investigation in its entirety.

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 Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: April 9, 2018

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Monica Bhattacharyya, Esq., and the following parties as indicated, on **April 9, 2018**.

Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainant United States Steel Corporation:

Debbie L. Shon
QUINN EMANUEL URQUHART & SULLIVAN, LLP
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On Behalf of Respondents Baosteel America Inc., Shanghai Baosteel Group Corporation, and Baoshan Iron & Steel Co., Ltd.:

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On Behalf of Respondents Hebei Iron and Steel Group Co., Ltd., Hebei Iron & Steel Group Hengshui Strip Rolling Co., Ltd., and Hebei Iron & Steel (Hong Kong) International Trade Co., Ltd.:

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On Behalf of Respondents Magang (Group) Holding Co. Ltd. and Maanshan Iron and Steel Co. Ltd.:

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On Behalf of Respondents Shougang Corporation and China Shougang International Trade & Engineering Corporation:

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On Behalf of Respondents Anshan Iron and Steel Group, Angang Group International Trade Corporation, Angang Group Hong Kong Co. Ltd., Wuhan Iron and Steel Group Corp., Wuhan Iron and Steel Co., Ltd., and WISCO America Co., Ltd.:

Tom M. Schaumberg, Esq.
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On Behalf of Respondents Jiangsu Shagang Group and Jiangsu Shagang International Trade Co., Ltd.:

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	
CERTAIN CARBON AND ALLOY STEEL PRODUCTS	Investigation No. 337-TA-1002

NOTICE OF COMMISSION DETERMINATION TO TERMINATE THE INVESTIGATION WITH RESPECT TO THE ANTITRUST CLAIM; REQUEST FOR WRITTEN SUBMISSIONS ON REMEDY, THE PUBLIC INTEREST, AND BONDING WITH RESPECT TO DEFAULTING RESPONDENTS

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to terminate the investigation with respect to a claim by complainant United States Steel Corporation of Pittsburgh, Pennsylvania ("U.S. Steel") for violation of section 337 based on a conspiracy to fix prices and control output and export volumes in violation of the antitrust laws of the United States. The Commission requests written submissions, under the schedule set forth below, on remedy, public interest, and bonding concerning the previously defaulted respondents subject to the false designation of origin claim.

FOR FURTHER INFORMATION CONTACT: Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2301. Copies of 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 https://www.usitc.gov. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at https://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 Inv. No. 337-TA-1002 on June 2, 2016, based on a complaint filed by complainant U.S. Steel, alleging a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337"). See 81 FR 35381 (June 2, 2016). The complaint alleges violations of section 337 based upon the importation into the United States, or in the sale after importation of certain carbon and alloy steel products by reason of: (1) a conspiracy to fix prices and control output and export volumes, the threat or effect of which is to restrain or monopolize trade and commerce in the United States; (2) misappropriation and use of trade secrets, the threat or effect of which is to destroy or

substantially injure an industry in the United States; and (3) false designation of origin or manufacturer, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* The notice of investigation identified forty (40) respondents that are Chinese steel manufacturers or distributors, as well as some of their Hong Kong and United States affiliates. *Id.* In addition, the Office of Unfair Import Investigations is also a party in this investigation. *Id.* Eighteen (18) respondents participated in the investigation and all other respondents were found in default, including fifteen (15) respondents that are subject to the false designation of origin claim: 1) Shandong Iron and Steel Group Co. Ltd. of Jinan City, China; Shandong Iron and Steel Co., Ltd. of Jinan City, China; Jigang Hong Kong Holdings Co., Ltd. of Hong Kong, China; and Jinan Steel International Trade Co., Ltd. of Jinan City, China; 2) Benxi Iron and Steel (Group) International Economic and Trading Co. Ltd. and Benxi Steel (Group) Co. Ltd., both of Benxi City, China; and 3) Tianjin Tiangang Guanye Co., Ltd. of Tianjin, China; Wuxi Sunny Xin Rui Science and Technology Co., Ltd. of Wuxi Province, China; Taian JNC Industrial Co., Ltd. of Tai'an City, China; EQ Metal (Shanghai) Co., Ltd. of Shanghai, China; Kunshan Xinbei International Trade Co., Ltd. of Jiangsu, China; Tianjin Xinhai Trade Co., Ltd. of Tianjin, China; Tianjin Xinlianxin Steel Pipe Co., Ltd. of Tianjin, China; Tianjin Xinyue Industrial and Trade Co., Ltd. of Tianjin, China; and Xian Linkun Materials (Steel Pipe Supplies) Co., Ltd. of Xi'an City, China (collectively, the "Defaulting Respondents"). See Comm'n Notice (Oct. 14, 2016), Comm'n Notice (Oct. 18, 2016), Comm'n Notice (Nov. 18, 2016).

On August 26, 2016, the participating respondents filed a motion to terminate U.S. Steel's antitrust claim under 19 CFR 210.21. On November 14, 2016, the presiding administrative law judge ("ALJ") issued an initial determination ("ID"), granting Respondents' motion to terminate Complainant's antitrust claim under 19 CFR 210.21 and, in the alternative, under 19 CFR 210.18. Order No. 38 (Nov. 14, 2016). On December 19, 2016, the Commission issued a Notice determining to review Order No. 38. See 81 FR 94416-7 (Dec. 23, 2016). On April 20, 2017, the Commission held an oral argument on the issue of whether a complainant alleging a violation of section 337 based on antitrust law must show antitrust injury.

On February 15, 2017, U.S. Steel filed a motion to partially terminate the investigation on the basis of withdrawal of its trade secret allegations, which were alleged against only certain of the participating respondents. On February 22, 2017, the ALJ issued an ID, granting U.S. Steel's motion to terminate the investigation with respect to its trade secret allegations. Order No. 56 (Feb. 22, 2017). On March 24, 2017, the Commission determined not to review Order No. 56. Comm'n Notice (Mar. 24, 2017).

On October 2, 2017, the ALJ issued an ID, granting the remaining participating respondents' motions for summary determination of no section 337 violation based on false designation of origin. Order No. 103 (Oct. 2, 2017). On November 1, 2017, the Commission determined not to review Order No. 103. Comm'n Notice (Nov. 1, 2017).

Having examined the record of this investigation, including Order No. 38, the petitions for review, the responses thereto, the parties' submissions on review, and the parties' statements at the oral argument, the Commission has determined that a complainant alleging a violation of section 337 based on antitrust law must show antitrust injury, which is a standing requirement. The Commission finds that U.S. Steel has failed to plead antitrust injury and U.S. Steel has taken the position that, if given the opportunity to amend the complaint, it will not be able to plead or

demonstrate antitrust injury. Accordingly the Commission has determined to terminate the investigation with respect to U.S. Steel's antitrust claim. Commissioner Broadbent dissents and has filed a dissenting opinion.

Section 337(g)(1) and Commission Rule 210.16(c) authorize the Commission to order relief against any defaulting respondent against which U.S. Steel alleged false designation of origin, unless, after considering the public interest, the Commission finds that such relief should not issue. Given the disposition of the underlying false designation of origin claims for the participating respondents in Order No. 103, any relief issued in this investigation would not apply to the participating respondents.

In connection with the final disposition of this investigation, the Commission may: (1) issue an order that could result in the exclusion of articles manufactured or imported by the Defaulting Respondents; and/or (2) issue cease and desist orders that could result in the Defaulting 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 *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 7-10 (December 1994).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors that the Commission will consider include the effect that the exclusion order and/or cease and desists 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 FR 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, including the Office of Unfair Import Investigations, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Complainant and the Office of Unfair Import Investigations are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to state the HTSUS numbers under which the accused products are imported and any known importers of the accused products. The written submissions and proposed remedial orders must be filed no later than close of business on March 30, 2018. Initial submissions are limited to 50

pages, not including any attachments or exhibits related to discussion of the public interest. Reply submissions must be filed no later than the close of business on April 6, 2018. Reply submissions are limited to 25 pages, not including any attachments or exhibits related to discussion of remedy, the public interest, and bonding. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-1002") in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, https://www.usitc.gov/secretary/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel[1], solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

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 Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: March 19, 2018

[1] All contract personnel will sign appropriate nondisclosure agreements.

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Monica Bhattacharyya, Esq., and the following parties as indicated, on **March 19, 2018**.

Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainant United States Steel Corporation:

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On Behalf of Respondents Baosteel America Inc., Shanghai Baosteel Group Corporation, and Baoshan Iron & Steel Co., Ltd.:

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On Behalf of Respondents Hebei Iron and Steel Group Co., Ltd., Hebei Iron & Steel Group Hengshui Strip Rolling Co., Ltd., and Hebei Iron & Steel (Hong Kong) International Trade Co., Ltd.:

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On Behalf of Respondents Magang (Group) Holding Co. Ltd. and Maanshan Iron and Steel Co. Ltd.:

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On Behalf of Respondents Shougang Corporation and China Shougang International Trade & Engineering Corporation:

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On Behalf of Respondents Anshan Iron and Steel Group, Angang Group International Trade Corporation, Angang Group Hong Kong Co. Ltd., Wuhan Iron and Steel Group Corp., Wuhan Iron and Steel Co., Ltd., and WISCO America Co., Ltd.:

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On Behalf of Respondents Jiangsu Shagang Group and Jiangsu Shagang International Trade Co., Ltd.:

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of	Investigation No. 337-TA-1002
CERTAIN CARBON AND ALLOY STEEL PRODUCTS	

NOTICE OF COMMISSION DETERMINATION NOT TO REVIEW AN INITIAL DETERMINATION GRANTING SUMMARY DETERMINATION OF NO SECTION 337 VIOLATION BASED ON FALSE DESIGNATION OF ORIGIN

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination ("ID") of the presiding administrative law judge ("ALJ") granting summary determination of no section 337 violation based on false designation of origin (Order No. 103).

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708-4716. Copies of 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 SW., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at *https://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://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 investigation on June 2, 2016, based on a complaint filed by Complainant United States Steel Corporation of Pittsburgh, Pennsylvania ("U.S. Steel" or "Complainant"), alleging a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 ("Section 337"). *See* 81 FR 35381-2 (June 2, 2016). The complaint alleges violations of Section 337 based upon the importation, the sale for importation, or the sale after importation into the United States of certain carbon and alloy steel products by reason of: (1) a conspiracy to fix prices and control output and export volumes, the threat or effect of which is to restrain or monopolize trade and commerce in the United States; (2) misappropriation and use of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States; and (3) false designation of origin ("FDO") or manufacturer, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* The notice of investigation identified forty respondents that are Chinese

steel manufacturers or distributors, as well as some of their Hong Kong and United States affiliates, including: Baosteel America, Inc.; Shanghai Baosteel Group Corporation; Baoshan Iron & Steel Co., Ltd.; Anshan Iron and Steel Group; Angang Group International Trade Corporation; Angang Group Hong Kong Co. Ltd.; Wuhan Iron and Steel Group Corp.; Wuhan Iron and Steel Co., Ltd.; WISCO America Co., Ltd.; Shougang Corporation; China Shougang International Trade & Engineering Corporation; Maanshan Iron and Steel Co. Ltd.; Magang (Group) Holding Co. Ltd.; Hebei Iron and Steel Group Co., Ltd.; Hebei Iron & Steel Group Hengshui Strip Rolling Co., Ltd.; Hebei Iron & Steel (Hong Kong) International Trade Co., Ltd.; Jiangsu Shagang Group; and Jiangsu Shagang International Trade Co., Ltd. (collectively, "Active Respondents"). *Id.* In addition, the Office of Unfair Import Investigations is also a party in this investigation. *Id.* All other respondents were found in default. *See* Comm'n Notice (Oct. 14, 2016), Comm'n Notice (Oct. 18, 2016), Comm'n Notice (Nov. 18, 2016).

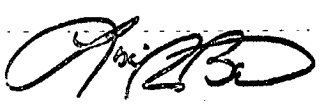
The ALJ terminated the claim based on a conspiracy to fix prices and control output and export volumes, *see* Order No. 38 (Nov. 14, 2016) and that decision is presently under Commission review. *See* Comm'n Notice (Dec. 19, 2016). The ALJ also terminated U.S. Steel's FDO claims for failure to state a claim upon which relief can be granted. *See* Order No. 46 (Jan. 11, 2017). On March 6, 2017, the Commission issued an Opinion reversing Order No. 46 and determining that the complaint was sufficient to state a claim for FDO under section 337. *See* Comm'n Op. (Mar. 6, 2017). U.S. Steel withdrew the claim based on trade secret misappropriation on February 15, 2017. *See* Order No. 56 (Feb. 22, 2017), *unreviewed*, Comm'n Notice (Mar. 24, 2017).

Between July 18, 2017 and August 8, 2017, the Active Respondents filed motions for summary determination of no section 337 violation based on FDO. Complainant U.S. Steel and the Commission Investigative Attorney filed responses to the Active Respondents' motions between August 4 and 18, 2017. The Active Respondents also filed reply briefs in support of their motions between August 9 and 23, 2017. On October 2, 2017, the ALJ issued the subject ID, granting the Active Respondents' motions for summary determination of no section 337 violation based on FDO. *See* Order No. 103 (Oct. 2, 2017). No petitions for review of the subject ID were filed.

The Commission has determined not to review the subject ID.

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 part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: November 1, 2017

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Monica Bhattacharyya, Esq., and the following parties as indicated, on **November 1, 2017**.

Lisa R. Barton, Secretary
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PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of	
CERTAIN CARBON AND ALLOY STEEL PRODUCTS	**Inv. No. 337-TA-1002**

ORDER NO. 103: INITIAL DETERMINATION GRANTING SUMMARY DETERMINATION OF NO VIOLATION FOR FALSE DESIGNATION OF ORIGIN

(October 2, 2017)

All of the active respondents in this investigation have moved for summary determination of no violation based on false designation of origin ("FDO"). These motions are granted and the investigation is terminated as to U.S. Steel's allegations of FDO, for the reasons discussed below.

I. INTRODUCTION

Complainant United States Steel's ("U.S. Steel") FDO claim arises out of the long history of illegal trade practices concerning Chinese steel. As alleged by U.S. Steel: "The Commerce Department has imposed anti-dumping and countervailing duties or deposits on many types of Chinese steel, including hot-rolled, cold-rolled, corrosion-resistant, and OCTG steel products." Amended Complaint ¶ 127 (Sept. 22, 2016). Anti-dumping and countervailing duties ("AD/CVD") orders apply broadly to a class or kind of imported product and are not directed against any particular manufacturer or exporter. *See, e.g.*, Notice of the Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China, 66 Fed. Reg. 59561-62 (Nov. 29, 2001). In accordance with title VII of the Tariff Act of 1930,

these AD/CVD orders target a foreign government's conduct with respect to a class or kind of product. *See* 19 U.S.C. § 1671(a)(1) (describing a determination "that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States") ; *see also* 19 U.S.C. § 1673(1) (referencing "a class or kind of foreign merchandise").[1]

Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, in contrast, makes unlawful "unfair methods of competition and unfair acts in the importation of articles . . . or in the sale of such articles by the owner, importer, or consignee." Under section 337, to prevail on its claims of unfair importation due to false designation of origin, U.S. Steel must present facts to support a finding of violation by each individual respondent in connection with the importation or sale of particular articles.

The record before me, viewed in the light most favorable to U.S. Steel, lacks the necessary evidence against any respondent. U.S. Steel presents evidence it terms "circumstantial." The circumstantial evidence consists of general import/export trends, allegations of "relationships" with distributors who are "known" to transship illegally, and statements by various respondents' employees, unlinked to any actual importation, indicating willingness or intent to avoid U.S. duties. Under well-established Commission precedent, U.S. Steel's evidence does not satisfy the jurisdictional and substantive requirement to show unfair acts by particular respondents in the actual importation or sale of articles. Even assuming that sufficient evidence has been presented to link some of the respondents to an actual importation, U.S. Steel has produced little to no evidentiary support for its allegations that respondents'

[1] *See* Staff Combined Response, Ex. 1 (Bonner Expert Report) at 11 (citing 19 U.S.C. § 1673)).

products were imported under FDO. In its oppositions to the respondents' motions for summary determination, U.S. Steel has produced no false documentation that actually was presented to Customs in connection with any alleged shipment.

U.S. Steel also has presented no evidence against these respondents of false designation or other deceptive practices causing consumer confusion, as required under section 43(a) the Lanham Act, 15 U.S.C. § 1125(a)(1). U.S. Steel maintains that Customs is deceived by false documents designed to circumvent tariffs imposed on Chinese steel, but U.S. Steel in its opposition does not point to any document that actually was provided to Customs in connection with any instance of alleged unfair importation, or any document indicating action taken by Customs based on false designation. It cannot be assumed that documents provided to Customs were false: this must be demonstrated with evidence. Similarly, U.S. Steel presents no evidence of false documentation or any other representation to consumers that would cause confusion, as required by the Lanham Act.

Accordingly, U.S. Steel cannot prevail as a matter of law and summary determination must be granted to the respondents.

II. BACKGROUND

A. Pertinent Procedural Background

The Commission instituted this investigation to determine, *inter alia*, whether there is a violation of section 337(a)(1)(A)(i) in the importation, the sale for importation, and the sale within the U.S. after importation of certain carbon and alloy steel products by reason of false designation of origin or manufacturer in violation of the Lanham Act. 81 Fed. Reg. 35381-82;

Notice of Investigation (May 26, 2016) at 2.[2] In its complaint, U.S. Steel alleges that the manufacturer respondents (with "the help of" certain distributor respondents) evade U.S. AD/CVD orders on Chinese steel imports by submitting false documents and transshipping products "through other countries to disguise the steel's country of origin and manufacturing mill from U.S. Customs and to deceive domestic steel consumers." Amended Complaint at ¶ 126.[3] U.S. Steel alleges that "[t]hese constitute unfair acts in violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)." *Id.*

On December 6, 2016, I issued an order to show cause regarding U.S. Steel's failure to allege specific facts showing actual importation for its Lanham Act claim. Order No. 41. On January, 11, 2017, I issued an initial determination ("ID") terminating U.S. Steel's FDO claims under the Lanham Act on the ground that the complaint failed to set forth "specific instances of alleged unlawful importations or sales" as required by Commission Rule 210.12(a)(3). Order No. 46. On February 27, 2017, the Commission issued a notice of its determination to review the ID and on review to reverse and remand for further proceedings.

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[2] The Commission also instituted this investigation to determine whether there is a violation of section 337 by reason of a conspiracy to fix prices and control output and export volumes, the threat or effect of which is to restrain or monopolize trade and commerce in the United States, and misappropriation and use of trade secrets. 81 Fed. Reg. 35381-82; Notice of Investigation (May 26, 2016) at 2. On November 14, 2016, the pricing-fixing claim was terminated for failure to state a claim on which relief can be granted. Order No. 38, *review granted*, 81 Fed. Reg. 94416-17 (Dec. 23, 2016). On February 15, 2017, U.S. Steel withdrew its claim based on misappropriation of trade secrets. Order No. 56 (Feb. 22, 2017), *not reviewed by* Comm'n Notice (March 24, 2017).

[3] The distributor respondents are EQ Metal (Shanghai) Co., Ltd.; Kunshan Xinbei International Trade Co., Ltd.; Taian JNC Industrial Co., Ltd.; Tianjin Tiangang Guanye Co., Ltd.; Tianjin Xinhai Trade Co., Ltd.; Tianjin Xinlianxin Steel Pipe Co., Ltd.; Tianjin Xinyue Industrial and Trade Co., Ltd.; Wuxi Sunny Xin Rui Science and Technology Co., Ltd.; and Xian Linkun Materials (Steel Pipe Supplies) Co., Ltd. Compaint ¶¶ 60-68. All of the distributor respondents were defaulted pursuant to Order No. 32 (Sept. 14, 2016), *not reviewed by* Comm'n Notice (Oct. 14, 2016).

On review, the Commission determined that the complaint was sufficient to state a claim for FDO under section 337. *Certain Carbon and Alloy Steel Products,* Inv. No. 337-TA-1002, Comm'n Op. at 8-12 (Mar. 27, 2017). "Under the circumstances described in the Complaint," the Commission stated, "circumstantial evidence of the kind that U.S. Steel presented in support of its importation allegation is sufficient to satisfy Rule 210.12(a)(3)." *Id.* at 11. The Commission added that "[t]he role of discovery here, therefore, is to find support for the Complaint's FDO allegations necessary to prove the importation element for the accused products." *Id.* at 12. The Commission reviewed the manufacturing respondents' contentions and concluded: "Even if there is a possibility that U.S. Steel will not be able to ultimately prove actual importation or sales that were unlawful, these factual disputes should be decided by the ALJ after the parties have had a reasonable opportunity for further investigation and discovery." *Id.* at 13.

Since the Commission's remand, the parties have engaged in nearly four months of written and oral discovery on the FDO allegations, in the United States and overseas. Fact discovery closed on July 14, 2017, following a two-week extension of time granted at the request of U.S. Steel. Order No. 77 (June 28, 2017).

B. Summary Determination Briefing

On July 18, 2017, Respondents Baosteel America, Inc., Shanghai Baosteel Group Corporation, and Baoshan Iron & Steel Co., Ltd. ("Baosteel") filed a motion for summary determination that there is no violation of section 337 based on FDO (Motion Docket No. 1002-082, the "Baosteel Motion"). On July 20, 2017, Respondents Anshan Iron and Steel Group, Angang Group International Trade Corporation, and Angang Group Hong Kong Co. Ltd. ("Angang"), and Wuhan Iron and Steel Group Corp., Wuhan Iron and Steel Co., Ltd., and WISCO America Co., Ltd., ("WISCO") filed a motion for summary determination that there is

no violation of section 337 based on FDO (Motion Docket No. 1002-083, the "Angang/WISCO Motion"). On July 28, 2017, Respondents Shougang Corporation and China Shougang International Trade & Engineering Corporation ("Shougang") filed a motion for summary determination of no violation of section 337 based on the use of FDO (Motion Docket No. 1002-088, the "Shougang Motion"). On July 28, 2017, Respondents Maanshan Iron and Steel Co. Ltd. and Magang (Group) Holding Co. Ltd. ("Masteel") filed a motion for summary determination that there has been no violation of section 337 based on FDO (Motion Docket No. 1002-089, the "Masteel Motion"). On August 1, 2017, Respondents Hebei Iron and Steel Group Co., Ltd., Hebei Iron & Steel Group Hengshui Strip Rolling Co., Ltd., and Hebei Iron & Steel (Hong Kong) International Trade Co., Ltd. ("Hesteel") filed a motion for summary determination that there has been no violation of section 337 based on FDO (Motion Docket No. 1002-090, the "Hesteel Motion"). On August 8, 2017, Respondents Jiangsu Shagang Group's and Jiangsu Shagang International Trade Co., Ltd. ("Shagang") filed a motion for summary determination that there has been no violation of section 337 based on FDO (Motion Docket No. 1002-093, the "Shagang Motion").[4]

[4] All of the active respondents have thus moved for summary determination. The other named respondents have defaulted. Respondents Bohai Iron and Steel Group, Tianjin Pipe (Group) Corporation, Tianjin Pipe International Economic & Trading Corporation, TPCO America Corporation, and TPCO Enterprise, Inc. ("Bohai") were defaulted along with the distributor respondents in Order No. 32. Respondents Shandong Iron and Steel Group Co. Ltd., Shandong Iron and Steel Co., Ltd., Jigang Hong Kong Holdings Co., Ltd., and Jinan Steel International Trade Co., Ltd. ("Shandong") and Hunan Valin Steel Co. Ltd. and Hunan Valin Xiangtan Iron and Steel Co. Ltd. ("Hunan Valin") were defaulted pursuant to Order No. 33 (Sept. 16, 2016), *not reviewed by* Comm'n Notice (Oct. 18, 2016). Respondents Benxi Iron and Steel (Group) International Economic and Trading Co. Ltd. and Benxi Steel (Group) Co. Ltd. (the "Benxi Respondents") were defaulted pursuant to Order No. 37 (Oct. 20, 2016), *not reviewed by* Comm'n Notice (Nov. 18, 2016).

On August 4, 2017, the Commission Investigative Staff ("Staff") filed a combined response to the Baosteel Motion, the Angang/WISCO Motion, the Shougang Motion, the Masteel Motion, and the Hesteel Motion ("Staff Combined Response").[5] U.S. Steel filed a timely response to the Baosteel Motion and the Angang/WISCO Motion and on August 14, 2017, U.S. Steel filed a corrected opposition to the Baosteel Motion and the Angang/WISCO Motion ("U.S. Steel Baosteel Opp.").[6] On August 9, 2017, U.S. Steel filed an opposition to the Shougang Motion and the Masteel Motion ("U.S. Steel Shougang Opp."). On August 11, 2017, U.S. Steel filed an opposition to the Hesteel Motion ("U.S. Steel Hesteel Opp."). On August 18, 2017, U.S. Steel filed an opposition to the Shagang Motion ("U.S. Steel Shagang Opp."). Also on August 18, 2017, Staff filed a response to the Shagang Motion ("Staff Shagang Response").

On August 9, 2017, Baosteel filed a reply brief ("Baosteel Reply"). On August 9, 2017, Angang and WISCO filed a reply brief ("Angang/WISCO Reply"). On August 14, 2017, Shougang filed a reply brief ("Shougang Reply"). On August 14, 2017, Masteel filed a reply brief ("Masteel Reply"). On August 16, 2017, Hesteel filed a reply brief ("Hesteel Reply"). On August 23, 2017, Shagang filed a reply brief ("Shagang Reply").

In general, Baosteel and the other respondents, who join in and incorporate by reference Baosteel's motion, maintain that U.S. Steel has failed to identify any instance of actual importation or sale for importation of falsely designated steel, to show any evidence of consumer confusion, or to show evidence of injury from the alleged violations. A summary of Baosteel's motion follows. Specific allegations with respect individual respondents are discussed below.

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[5] Pursuant to Order No. 90 (July 26, 2017), the deadline for responding to the Baosteel Motion and the Angang/WISCO Motion was extended to August 4, 2017.

[6] U.S. Steel was granted leave to file a corrected opposition pursuant to Order No. 93 (Aug. 10, 2017).

1. Baosteel's Motion

Baosteel says that after wide-ranging discovery, including more than 375,000 pages of documents produced by Baosteel, there is no evidence "of one actual importation or sale by Baosteel." Baosteel Motion at ii. Baosteel asserts that there is no evidence of any false advertisement, customer confusion, or injury "specifically attributable to" FDO. *Id.* Baosteel asserts that U.S. Steel had more than one year of discovery (not including the period when Order No. 46 was under review), and "is no closer to proving its speculative FDO claim than at filing" because it has no evidence of key elements of proof required to make out a claim under section 337. *Id.* at 2-3.

Baosteel says section 337 "empowers the Commission to investigate and render a determination only when an unfair act has been tied to an importation or sale," and that whether this requirement is viewed as a matter of jurisdiction or a statutory element of violation makes no difference. *Id.* at 4-5. Baosteel says the Lanham Act requires proof of (1) use of FDO or making a false statement about FDO in advertising, (2) that is likely to cause confusion, and (3) that is likely to cause injury. *Id.* at 6-7. Baosteel alleges that U.S. Steel's witnesses have [redacted]. Baosteel says U.S. Steel's discovery responses also fail to identify any evidence of "an actual FDO importation or sale by Baosteel or anyone else." *Id.* at 13. Baosteel says evidence that trading companies unrelated to Baosteel offered to falsely designate Chinese steel does not raise a genuine issue of material fact. *Id.* at 15-19.

Baosteel asserts that "U.S. Steel admits that it has no evidence of a single advertisement misrepresenting the origin of Baosteel's steel," and argues that without such evidence Baosteel cannot be liable under section 1125(a)(1)(B) of the Lanham Act. *Id.* at 20. Baosteel contends that [redacted]

[redacted] does not raise a genuine issue of material fact from which a reasonable fact finder could conclude that Baosteel has engaged in FDO in the importation or sale of steel. *Id.* at 23-27. Other witnesses who provided anecdotal information had no documentation to back up their views on Chinese steel importation, Baosteel says, and in any event the witnesses were not aware of any sales by Baosteel in the U.S. *Id.*

Baosteel maintains that "macro trade flow" information showing "increases in imports from other Asian countries after trade remedies were imposed against China" fails to provide information on specific importation or sale transactions. *Id.* at 27. Such information is needed, Baosteel says, to "prove that any actual FDO importation occurred, not to mention that Baosteel was associated with any such import or sale." *Id.* Baosteel says the Commission never has relied on "purely circumstantial evidence in finding that an alleged unfair act" occurred. *Id.* at 28. Baosteel says that "circumstantial evidence showing how a predicate unfair act might have occurred is too speculative to support a finding of a section 337 violation." *Id.* at 29.

Baosteel asserts that U.S. Steel has produced no evidence of likely purchaser confusion from Baosteel's alleged FDO importation or sale, and that the absence of evidence of actual confusion indicates there is no likelihood that purchasers have been deceived. *Id.* at 31-34. Baosteel asserts that steel import buyers are likely to know the true country of origin of their purchases. *Id.* at 33-34. Baosteel argues that the required showing of confusion cannot be presumed in the absence of evidence of particular statements or representations accompanying particular shipments, "such as literally false entry documents." Baosteel Reply at 18. Baosteel says, "U.S. Steel offers no import documents as examples of literally false statements, and no other communications or records tied to 'highly likely' and 'inherently' confusing transactions." *Id.* at 19.

Baosteel alleges that without evidence of any FDO importation or sale, it is impossible for U.S. Steel to satisfy the injury requirement in section 337(a)(1)(A)(i). Baosteel Motion at 36-41. Baosteel asserts further that, even assuming U.S. Steel could identify an importation or sale, U.S. Steel has admitted it cannot identify the amount of alleged injury attributable to FDO imports or to any specific respondent. *Id.* at 41-42

Baosteel says U.S. Steel's "circumstantial" evidence is really "expert's or attorney's speculation" and "not a substitute for fact," and asserts that the Commission and ALJs have repeatedly found such evidence insufficient to satisfy the requirements of section 337. Baosteel Reply at 4. Baosteel maintains that U.S. Steel's proposed "should have known" standard regarding illegal transshipments to the United States applies only with respect to "upstream" parties after proof of an actual unfair act. *Id.* at 6-7. Baosteel asserts that the cases Staff relies on relate to a "very narrow element of the proof required for a showing of infringement of a method patent," and do not support U.S. Steel's reliance on circumstantial evidence for all the required elements of its FDO allegations. *Id.* at 10. With respect to the two "likely" transshipments identified by U.S. Steel, Baosteel maintains that the alleged shipments involved "at least two different third countries," were not *per se* illegal, and the second such alleged transshipment "involved a stainless steel product that is not at issue in this Investigation." *Id.* at 15.

2. U.S. Steel's Oppositions

U.S. Steel filed four opposition briefs addressing respondents' motions for summary determination. In essence, U.S. Steel argues that, based on circumstantial evidence (including statements made by employees of respondents concerning the entrepôt trade and avoidance of U.S. tariffs, as well as planning documents obtained from various respondents generally discussing transshipping), it is likely respondents knew or should have known that their steel was

being transshipped to the U.S. by distributors with whom the respondents did business. A summary of each of U.S. Steel's oppositions follows.

U.S. Steel's Combined Opposition to the Baosteel, Angang, and WISCO Motions

U.S. Steel says "genuine factual disputes exist" concerning each of the issues on which the respondents move for summary determination. U.S. Steel Baosteel Opp. at 1. U.S. Steel also says the analyses of its importation and economics experts "raise genuine disputes of material fact." *Id.* at 1-2. U.S. Steel says the respondents' "alleged fraud" can be proven by circumstantial evidence, citing the Commission's remand opinion. *Certain Carbon and Alloy Steel Products*, Comm'n Op. at 11.[7] U.S. Steel maintains that liability under section 337 can be predicated on sales of the accused products with knowledge or constructive knowledge that products are being illegally transshipped. U.S. Steel Baosteel Opp. at 2 ("Respondents knew or should have known. . . .").

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[7] U.S. Steel maintains that this case should be treated differently for purposes of summary determination "[b]ecause U.S. Steel alleges that Respondents have committed fraud." U.S. Steel Baosteel Opp. at 7 (quoting Chief Judge Prost's dissent in *Rambus Inc. v. Infineon Techs. Ag,* 318 F.3d 1081, 1107 (Fed. Cir. 2003) (quotation marks omitted)). U.S. Steel's complaint contains no claim of fraud. The allegation of fraud is raised for the first time in U.S. Steel's oppositions to the motions for summary determination. *See, e.g.,* U.S. Steel Baosteel Opp. at 6, 10, 13 n. 8, 15, 16. Accordingly, U.S. Steel's argument is inapposite, because the Commission has not held that an investigation under section 337 must satisfy the elements of fraud. District courts are divided on the question of whether Lanham Act claims require the heightened pleading standard for fraud. *See Tempur-Pedic Int'l Inc. v. Angel Beds LLC*, 902 F.Supp.2d 958, 966 (S.D. Tex. 2012) (discussing conflicting precedents).

Further, fraud cases are different from investigations under section 337 in ways that U.S. Steel ignores. If U.S. Steel's complaint had alleged fraud, it might have been dismissed for failure to plead with sufficient particularity. *See* Fed. R. Civ. P. 9(b); *see also, e.g., U.S. v. Momence Meadows Nursing Ctr., Inc.,* 2007 WL 685693, at *3 (C.D. Ill. Mar. 2, 2007). Fraud cases, moreover, require a showing of intent and other elements using an enhanced burden of proof (clear and convincing). *See, e.g., Crigger v. Fahnestock & Co.,* 443 F.3d 230, 234 (2d Cir. 2006) (citing *Schlaifer Nance & Co. v. Estate of Warhol,* 119 F.3d 91, 98 (2d Cir.1997)).

U.S. Steel points to the following: (1) respondents have each completed at least one "suspected" FDO importation; (2) current employees of each of the respondents "have participated in discussions" about transshipment, including offering to transship products to U.S. customers to circumvent AD/CVD orders; (3) numerous "presumed transshippers" act as agents for the respondents; and (4) the respondents "have extensive relationships with known transshippers." *Id.* U.S. Steel relies on the opinion of its expert, who concludes "that it is highly likely" that the respondents, "working through their Chinese distributors, have been participating in fraudulent transshipment schemes." U.S. Steel Baosteel Opp. at 3.[8] U.S. Steel argues, "A reasonable factfinder may find the same" and states that the respondents' denials of wrongdoing create credibility issues that must be resolved at hearing. *Id.* at 3, 18, 19.[9]

With respect to the Lanham Act, U.S. Steel maintains that imported steel bearing a false designation of origin establishes confusion as a matter of law. U.S. Steel maintains that injury

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[8] U.S. Steel's importation expert is The Hon. Robert C. Bonner, who led the U.S. Customs Service from 2001 to 2003. Judge Bonner is a former United States District Judge for the Central District of California. *See* Bonner Expert Report at 5 (attached as Ex. 9 to U.S. Steel Baosteel Opp. and as Ex. 1 to Staff Combined Response). Judge Bonner is an expert on many aspects of international relations, including international trade. *See id.* at 4-6.

[9] U.S. Steel says its expert's opinion makes summary determination inappropriate, citing *Vasudevan Software, Inc. v. MicroStrategy, Inc.*, 782 F.3d 671, 683 (Fed. Cir. 2015). An expert's opinion is only as good as the facts he relies on, however. If there are no facts demonstrating an actual illegal importation or sale for illegal importation by any of the accused respondents, Judge Bonner's opinion that such importation or sale is "highly likely" does not create a triable issue. *See Arthur A. Collins, Inc. v. N. Telecom Ltd.*, 216 F.3d 1042, 1047 (Fed. Cir. 2000) ("[T]he affidavit of an expert submitted in opposition to a motion for summary judgment . . . . must set forth the factual foundation for his opinion . . . in sufficient detail for the court to determine whether that factual foundation would support a finding of [a violation] . . . ."); *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1425-26 (9th Cir. 1994) ("[W]here the evidence is as clear as that in this record, the court is not required to defer to the contrary opinion of plaintiffs' 'expert' . . . . An expert's conclusory allegations . . . are insufficient to defeat summary judgment.") (citations omitted).

due to "dumped and subsidized imports" satisfies the injury requirement under section 337. *Id.* at 4.

U.S. Steel's expert testifies that "[t]here [is] no viable way to detect the origin of accused product hot-rolled steel" and FDO schemes in general are difficult to detect. *Id.* at 10-11 (citing Bonner Expert Report at 13 (attached as Ex. 9 to U.S. Steel Baosteel Opp. and as Ex. 1 to Staff Combined Response)). U.S. Steel says that "macro-level data from Customs evidencing import trends" supports its expert's opinion. *Id.* at 12. In addition, U.S. Steel cites "Respondent-specific evidence" including email communications from distributors. *Id.* at 13. U.S. Steel alleges that some of these distributors held themselves out as agents of the manufacturing respondents. *Id.* at 14. U.S. Steel's expert says there are "strong indicia" that respondents "knew or should have known that their accused products have been illegally transshipped" because of respondents' "relationships" with steel distributors. *Id.* at 15. Specifically with respect to Baosteel, U.S. Steel alleges that Baosteel's executives "are willing and able to engage in fraudulent transshipment to evade U.S. AD and CV duties." *Id.* at 17.

U.S. Steel asserts that some of the testimony by the respondents' employees is not credible and that this in itself "is sufficient to create a factual dispute." *Id.* at 18-19.[10] U.S. Steel cites discussions concerning "entrepôt trading" by a Baosteel deponent. *Id.* at 20. U.S. Steel

[10] The fact that a jury could disbelieve the movant's denial of liability does not create a genuine issue of material fact. The non-movant must offer "concrete evidence" of liability to survive a motion for summary determination. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) ("We do not understand *Poller*, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict").

says " 'entrepôt trading' is a term of art that refers to the fraudulent transshipment and accompanying false designation of origin of the nature U.S. Steel has alleged." *Id.* at 15. U.S. Steel cites Baosteel's export of [redacted], a country which, U.S. Steel asserts, "has had little to no domestic need" for such products. *Id.* at 22. U.S. Steel cites communications by a Shagang employee that allegedly show "that Baosteel has used illegal transshipment schemes to evade U.S. duties." *Id.* at 23.

U.S. Steel identifies two alleged shipments of accused products by Baosteel using FDO. *Id.* at 24-29. U.S. Steel's allegations are based on certain factors endorsed by Judge Bonner as indicative of transshipment, *i.e.*, " 'weight or quantity of the items shipped' " and the " 'time period between initial departure from the suspected true country of origin and the final arrival of that shipment in the United States.' " *Id.* at 23-24. U.S. Steel also points to "context about the parties involved" as further evidence that "Baosteel has transshipped accused products using FDO or knows that such illegal transshipment has occurred." *Id.* at 24. The context is that Baosteel and the shipper for the second leg of the alleged transshipment "have an established business relationship," and that Baosteel "has sold the accused products" to the shipper. *Id.* at 26.

With respect to Angang, U.S. Steel relies on documents showing that Angang has sold steel to [redacted]. U.S. Steel Baosteel Opp. at 28. U.S. Steel also says there is evidence that "Angang's subsidiaries in intermediate countries engage in illegal transshipping using FDO." *Id.* at 29. U.S. Steel maintains that "fraudulent transshipment is part of Angang's overall business strategy," citing [redacted] *Id.* at 30 (quoting

U.S. Baosteel Opp. Ex. 38). Other Angang documents, U.S. Steel alleges, show efforts to [redacted] *Id.* at 31 (quoting U.S. Baosteel Opp. Ex. 41).

U.S. Steel alleges one specific illegal shipment by Angang, saying the criteria of weight and timing "suggest the shipments were in fact illegal FDO transshipments to the United States." *Id.* at 32. U.S. Steel maintains that business relationships among the parties involved "make it more likely that they would collude in an effort to evade U.S. Customs." *Id.* 32

With respect to WISCO, U.S. Steel cites discussion among WISCO employees "[redacted]." *Id.* at 33-34 (citation omitted) (interal quotation marks omitted). U.S. Steel contends that such communications create a material dispute of fact. *Id.* at 35.

U.S. Steel alleges one "likely transshipment" by WISCO, again relying on "weight and temporal proximity between the two shipments." *Id.* at 35-36.[11] U.S. Steel says that WISCO has an "[redacted]" with a company that [redacted]," and that this is sufficient to create a dispute of fact that precludes summary determination. *Id.* at 36.

[11] U.S. Steel consistently alleges "at least one" or "at least two" specific instances of transshipment with respect to each manufacturer. *See, e.g.,* U.S. Steel Baosteel Opp. at 24, 32, 35. In each instance, U.S. Steel presents evidence only of one or two specific transshipments. The "at least" is lawyer argument.

On the issue of confusion under the Lanham Act, U.S. Steel says summary judgment is not appropriate because, when "a statement is literally false, further evidence of confusion is not required." *Id.* at 37. U.S. Steel relies on the doctrine of inherent confusion that applies in counterfeiting cases. *Id.* at 38. U.S. Steel cites data from a Commission decision in an AD/CVD case to argue that "country of origin is an important factor in a steel purchaser's decisionmaking." *Id.* at 40. In addition, U.S. Steel cites confusion on the part of Customs officials. *Id.* at 40-41.

U.S. Steel maintains that summary determination is not warranted with respect to the injury requirement under section 337(a)(1)(A)(i), citing [redacted] "as a result of Respondents' unfair acts." *Id.* at 41. U.S. Steel relies on the report of its economic expert and says that he has sufficiently quantified the alleged injury to U.S. Steel.[12] *Id.* at 43-45 (citing Ex. 63 (Expert Report of Christopher Bakewell)).

U.S. Steel's Opposition to the Shougang and Masteel Motions

In opposition to the Shougang and Masteel Motions, U.S. Steel reasserts many of the contentions made in its opposition to the Baosteel motion. U.S. Steel Shougang Opp. at 1 n.1. U.S. Steel alleges that (1) Shougang and Masteel have each completed one FDO importation or sale for importation, (2) numerous "presumed transshippers" act as agents for Shougang and Masteel, and (3) Shougang and Masteel have "extensive relationships with known transshippers that use FDO." *Id.* at 3. U.S. Steel points to Shougang International's website, which states that it has a subsidiary that engages mainly in entrepôt trade. *Id.* at 10. U.S. Steel says that testimony from various Shougang witnesses is untrue or unreliable, that Shougang deponents did not

[12] U.S. Steel alleges that the motions for summary determination are "premature" because they were filed before the factual record was closed. *Id.* at 48. Be that as it may, the factual record now is closed, and all the evidence in support of U.S. Steel's claims is available.

cooperate in discovery, and that this raises factual issues that must be resolved. *Id.* at 11-14. U.S. Steel says there is evidence that fraudulent transshipment "is part of Shougang's overall business strategy." *Id.* at 15. U.S. Steel cites a 2016 "[redacted]" in which Shougang proposed "[redacted]" and then [redacted] before re-exporting those products "to the USA" *Id.* at 15. U.S. Steel alleges that Shougang "was considering its customers' requests to alter shipping documentation to avoid potential AD/CVD duties." *Id.* at 16. The documents cited by U.S. Steel say the customer sought to "[redacted]" to avoid antidumping duties. *Id.* (citation omitted) (quotation marks omitted).

U.S. Steel points to one "likely" importation by Shougang in violation of section 337. *Id.* at 16. With regard to this importation, U.S. Steel alleges that Shougang caused bills of lading to be altered so that Shougang would not appear as the shipper and a Taiwanese company would appear as the shipper instead. *Id.* at 19.

U.S. Steel alleges that there is one likely illegal transshipment by Masteel of corrosion-resistant steel products. *Id.* at 21. U.S. Steel alleges that Masteel shipped the steel to the United States through Thailand and South Korea. *Id.* at 21-22.

U.S. Steel's Opposition to the Hesteel Motion

Again, many of U.S. Steel's previous arguments are incorporated by reference in its opposition to the Hesteel Motion. U.S. Steel Hesteel Opp. at 1 n.1. U.S. Steel claims that (1) Hesteel has completed at least one illegal transshipment, (2) Hesteel employees have discussed using entrepôt trade to increase exports to the U.S, (3) "Some presumed transshippers of the accused products act as agents for Hesteel," and (4) Hesteel has relationships with known transshippers. *Id.* at 3.

U.S. Steel alleges that Hesteel received offers by brokers to transship steel "to evade the anti-dumping duties of the European Union," and set up a "data management system that includes data about the entrepôt trade dimension of its business." *Id.* at 15. "One of the system's 'core functions' is the 'management of re-export business,' " U.S. Steel states. Among similar allegations, U.S. Steel says Hesteel provided its employees with training on "intermediary business." *Id.* at 16.

U.S. Steel alleges that a Hesteel Group subsidiary, [redacted] fraudulently transshipped accused products. U.S. Steel cites a shipment of steel to the United States through Vietnam [redacted]. *Id.* at 17.

U. S. Steel's Opposition to the Shagang Motion

U.S. Steel repeats many of the arguments noted above. *See* U.S. Steel Shagang Opp. at 1 n.2. It alleges that (1) employees of Shagang have participated in discussions about entrepôt trade and offered to transship the accused products to U.S. customers to circumvent AD/CVD orders, (2) a "presumed" transshipper of the accused products acts as an agent for Shagang, and (3) Shagang has "extensive relationships" with [redacted], a distributor in the U.S. U.S. Steel alleges that a Shagang employee offered to export Chinese steel to various destinations, apparently to avoid duties. *Id.* at 2-3. U.S. Steel presents evidence that Shagang advised customers about U.S. duties and offered to ship to [redacted]. *Id.* at 11. U.S. Steel points to an agreement between a Shagang distributor [redacted]. *Id.* at 12. U.S. Steel says Shagang is willing to falsify export documents "to avoid duties and for other reasons." *Id.*

On the issue of confusion, U.S. Steel cites testimony of a U.S. Steel employee, Scott Dorn, who provided anecdotal evidence that a buyer of steel in the U.S. thought he was buying steel produced by U.S. Steel, but which was not. *Id.* at 15. "This transaction demonstrates that steel buyers are likely to be deceived when the origin of steel products is falsely designated," U.S. Steel asserts. *Id.* at 16.

Staff's Responses

Staff filed a combined response to all the manufacturer respondents' motions except the motion filed by Shagang, to which Staff filed a separate response. In its combined response, Staff says that "based on the information currently available to the Staff," there is sufficient evidence to proceed to hearing with respect to the Baosteel, WISCO and Angang respondents, but not with respect to the Hesteel, Shougang, and Masteel respondents. Staff Combined Response at 2.

The focus of Staff's arguments is the "circumstantial evidence" of importation or sale. *Id.* at 8-9. Staff treats as "[t]he further question" of whether there are genuine issues of material fact that would justify proceeding to trial in the case of any of the individual respondent groups. *Id.* at 9.

With respect to the WISCO respondents, Staff cites Judge Bonner's opinions, based on internal documents, showing that WISCO employees were willing to engage in transshipment schemes and distributors of WISCO products similarly were willing. *Id.* at 10. Staff also cites Judge Bonner's analysis of statistical data showing shipment trends of WISCO corrosion-resistant steel. *Id.* With respect to the Baosteel respondents, Staff again relies on Judge Bonner's opinions and his belief that Baosteel employees, based on emails and postings, are willing to engage in improper transshipment. *Id.* at 10-11. The same kind of evidence furnishes

the basis for the facts Staff relies on with respect to the Angang respondents. *Id.* at 11. Staff asserts that there is "significantly less evidence suggesting improper transshipment attributable to" the other respondents with respect to their "actual or constructive knowledge" of improper transshipments. *Id.* at 11-12.

With respect to the Lanham Act's confusion requirement, Staff maintains that confusion is not limited to purchasers of mislabeled goods, and that a claim under the Lanham Act may be based on the confusion of customs officials, "U.S. Steel, and other competitors or public representatives with an interest in AD/CVD enforcement and policy." *Id.* at 14.[13] Staff says summary determination on the question of injury should be denied based on U.S. Steel's expert's estimate of injury due to FDO shipments. *Id.* at 15-16.

The grounds for Staff's opposition to the motion filed by the Shagang respondents are similar to the views expressed by Staff with respect to the other respondents. In terms of specific evidence of improper transshipment by the Shagang Respondents, Staff cites willing distributors and extended communications involving a Shagang employee " 'to construct' " a transshipment scheme. Staff Response to Shagang at 5 (citing Ex. 1 (Bonner Expert Report)).

III. DISCUSSION

A. Summary determination

Commission Rule 210.18(b) states that the summary "determination sought by the moving party shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

[13] Staff agrees with respondents that there is no evidence of commercial advertising or promotion that would constitute a violation of Section 43(a)(1)(B) of the Lanham Act.

any material fact and that the moving party is entitled to a summary determination as a matter of law." 19 C.F.R. § 210.18(b). The rule is patterned on Fed. R. Civ. P. 56.[14]

Under Rule 56, summary judgment is required where a party fails to make a showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The burden of the moving party may be discharged by pointing out to the court the lack of evidence supporting the non-moving party's case. *Id.* at 325. Where the non-moving party bears the burden of proof at trial, that party must produce more than a "scintilla of evidence ...; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986).

The first question is whether this dispute is appropriate for summary determination. This question depends on whether there are historical facts pertinent to the parties' claims that remain in dispute or, on the other hand, whether the controversy can be resolved by determining the appropriate legal standard. "A dispute over historical facts or inferences, if genuine and material within the meaning of Rule 56, precludes summary judgment." William W. Schwarzer, *et al.*, Federal Judicial Center, "The Analysis and Decision of Summary Judgment Motions," 139 F.R.D. 441, 445 (1992).[15] Purely legal issues, on which summary determination may

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[14] *See Certain Integrated Circuits, Chipsets, & Prods. Containing Same Including Televisions,* Media Players, & Cameras, USITC Inv. No. 337-TA-709, Order No. 22, (Oct. 15, 2010) (citing *Certain Digital Processors and Digital Processing Sys., Components Thereof, and Prods. Containing Same*, Inv. No. 337-TA-559, 2006 ITC LEXIS 522, at *6, Order No. 13 (Sept. 6, 2006) (collecting cases)).

[15] This Federal Judicial Center publication, while not binding on federal courts, has been cited many times as authoritative. *See, e.g., PNC Bank, Nat'l Ass'n v. Irvin Family Ltd. P'ship,* No. 3:13-cv-00578-JWD-SCR, 2015 WL 6456566, at *8–9 (M.D. La. 2015); *In re Sharp,* No. 09-13980, 2011 WL 2975512, at *2 (Bankr. N.D. Ca.2011); *Processed Plastic Co. v. U.S.,* 29 C.I.T. 1129, 1135–36 (2005); *Wilson v. Pena,* No. 93-0421-LFO, 1997 WL 31004, at *1 (D.D.C.

appropriately be granted, "include whether an action is barred by a statute of limitations, by res judicata, by collateral estoppel, or by lack of standing or jurisdiction. They also include issues turning on statutory interpretation." *Id.* Courts decide statutory standards as a matter of law to ensure coherence and consistency. *Id.* at 461-473 (reviewing summary judgment decisions in various subject matter areas). The statutory (and jurisdictional) issues here are whether section 337 permits liability absent evidence of an actual importation or sale for importation (or knowledge of same) under FDO by a particular respondent, and whether there can be liability uner the Lanham Act without evidence of FDO and without evidence of consumer confusion. These are questions of law, not fact.

A second key inquiry in summary determination cases is whether any disputed fact is material. This also calls for a legal determination. *Id.* at 476. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson,* 477 U.S. at 248 (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93–95 (1983)). Distinguishing between material and immaterial facts makes it possible for a judge to render a summary determination even in the presence of numerous, unresolved factual disputes. For summary determination it does not matter how many disputed factual issues there may be—if none of those factual disputes need to be decided to render judgment as a matter of law, they are immaterial. "[I]f a suit is resolvable without the necessity of reaching and deciding

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1997); *Pike v. Caldera,* 188 F.R.D. 519, 525 (S.D. Ind. 1999); *Reibold v. Simon Aerials, Inc.,* 859 F. Supp. 193, 196 (E.D. Va. 1994).

some of those [disputed] issues, then summary judgment may still be appropriate." Schwarzer at 476.

As a parallel proposition, it also is true that if a party cannot establish a particular fact that is required to be proven as a matter of law, summary determination is appropriate. If an element of a cause of action deemed essential as a matter of law cannot be proved, summary judgment is appropriate regardless of disputes over other issues. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex,* 477 U.S. at 322-23. Deciding which facts are material requires "analyzing the logic of the case." Schwarzer at 477. "By this process, courts can ascertain which issues may be dispositive of the case, rendering other factual disputes immaterial." *Id.*

Once the legal or statutory requirements have been determined and the court has identified the facts that must be demonstrated in order to prevail, it remains for the court to determine whether there are genuine factual disputes under the appropriate legal standards. "[T]he test of a dispute is whether a reasonable jury could find for the nonmovant." *Id.* In making this determination, the court "must draw all reasonable inferences and resolve all genuine factual disputes in favor of the nonmovant." *Id.* at 480. However, "the substantive law can limit the range of inferences that a jury may draw." *Id.* at 489-490 (citing *Monsanto Co. v. Spray-Rite, Service Corp.,* 465 U.S. 752 (1984).[16]

[16] U.S. Steel and Staff seem to rely on a strangely worded standard for summary determination. U.S. Steel quotes an ALJ decision saying "the record contains facts which, if explored and developed, *might* lead the Commission to accept the position of the non-moving party." U.S. Steel Baosteel Opp. at 4 (citing *Certain Elec. Imaging Devices,* Inv. No. 337-TA-726, Order No. 32, 2011 WL 3156389, at *2 (Mar. 29, 2011) (quoting *Certain Coated Optical Waveguide Fibers & Prods. Containing Same,* Inv. No. 337-TA-410, Order No. 6, at 3 (July 14, 1998)). This *dictum* has been repeated several times by one former ALJ in particular. There is no Commission authority for this standard, and it is not clear what it means. The language cited

B. Section 337 of the Tariff Act

1. Requirement of Importation or Sale for Importation

With this understanding of the law governing summary determination, the first task is to determine the pertinent legal requirements for a complainant to prevail under section 337(a)(1)(A)(i). Section 337 makes clear that what is required is a showing of unfair methods of competition and unfair acts "in the importation of articles . . . or in the sale of such articles." 19 U.S.C. § 1337(a)(1)(A). The "sale of such articles" language in section 337(a)(1)(A) has the same meaning as the "sale for importation" language in subsections (a)(1)(B) and (a)(1)(C), which were added in the 1988 amendments to the statute. Pub.L. 100-418, Title 1 § 1342(a), 102 Stat. 1107, 1215 (Aug. 23, 1988). The language in subsection (a)(1)(A) was unchanged by the 1988 amendment, but the addition of the language "sale for importation" in the new subsections was not intended to change the scope of section 337 but instead to codify existing practice at the Commission regarding the treatment of sales in the context of importation. *See Enercon GmbH v. Int'l Trade Comm'n,* 151 F.3d 1376, 1382-83 (Fed. Cir. 1998). The Commission Rules for pleading "specific instances of alleged unlawful importations or sales" apply to claims under all three subsections of 337(a)(1). 19 C.F.R. § 210.12(a)(3).[17] Facts establishing an importation or

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comes out of a Federal Circuit opinion reversing summary determination. *See Certain Lens-Fitted Film Packages,* Inv. No. 337-TA-406, Order No. 7, 1998 WL 35230715 at *2 (July 10, 1998), citing *Merck & Co. v. Int'l Trade Comm'n,* 774 F.2d 483, 487-88 (Fed. Cir. 1985)). In reversing, the Circuit explained that the decision below erroneously concluded that there were no material issues of fact in dispute. 774 F.3d at 486-87. The parties are wrong if they contend that the language quoted means anything other than that summary determination should not be granted in the presence of facts in the record that could reasonably create a genuine issue of material fact for trial.

[17] There was no change in this rule associated with the 1988 amendment. For the past 80 years, since 1937, section 337 complaints have been required to contain "[s]pecific instances of alleged unlawful importations or sales." 2 Fed. Reg. 2765 (Dec. 10, 1937). Identical language was adopted into Commission Rule 203.2(b) in 1948. 13 Fed. Reg. 6242 (Oct. 23, 1948). When the

sale for importation by the accused respondent are the *sine qua non* of liability under the statute. Without evidence of importation or sale for importation, a complainant cannot prevail. *See Certain Welded Stainless Steel Pipe and Tube,* Inv. No. 337-TA-29, Comm'n Op., USITC Pub. No. 863, 1978 WL 50692, at *8 (Feb. 22, 1978) ("It is obvious from our traditional role, not to mention our remedial provisions, that Congress intended section 337 to attack only unfair trade practices which relate to imported products.")

The requirement to prove an actual importation or sale is grounded in the statute itself. "[S]ection 337 exclusion orders are *in rem* . . . ." *Certain Steel Rod Treating Apparatus and Components Thereof* ("*Steel Rod*"), Inv. No. 337-TA-97, 215 U.S.P.Q. 229, 1981 WL 50444 at *3 (June 30, 1981). The Commission's power rests on the premise that "there is no such thing as a 'vested right' to import goods into the United States," and that Congress (and the Commission through delegation) has the authority to exclude goods from the United States. *Id.* at *3 (quoting *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904)). Without an actual importation or sale for importation, there is no violation under subsection (a)(1)(A) of section 337. Hence the requirement that a complainant establish an importation or sale as a prerequisite to obtaining a remedy under section 337. "The Commission, as a creature of statute, is empowered under section 337 to hear and decide actions involving 'unfair methods of competition or unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee or agents of either . . . .' " *Id.* at *2 (quoting 19 U.S.C. § 1337).

Commission Rules were revised in 1976, Commission Rule 210.20(a)(3) required that a complaint "[d]escribe specific instances of alleged unlawful importations or sales." 41 Fed. Reg. 17712 (Apr. 27, 1976). In 1994, the same requirement was adopted in Commission Rule 210.12(a)(3), and this language remains today. 59 Fed. Reg. 39044 (Aug. 1, 1994); *see* 19 C.F.R. § 210.12(a)(3) (2017) ("Describe specific instances of alleged unlawful importations or sales").

In addition to evidence of actual importation, evidence of an actual sale for importation satisfies the statutory importation requirement. The "imported article [must be] either present in the United States or constructively present by virtue of its sale and imminent importation." *Id.* at *7. In this case, U.S. Steel's allegations necessarily depend on the "sale for importation" prong of the jurisdictional requirement, as there are no facts in the record to indicate that the respondents import steel into the United States using FDO.[18] Indeed, the gravamen of U.S. Steel's claim is that the respondents sell steel made in China to third parties in other countries who then re-ship the product to the U.S. for importation using documentation indicating origin from countries other than China. Thus, to survive a summary determination motion, U.S. Steel must present facts showing that a particular respondent knew or should have known that its sales of steel to third parties would be subsequently imported into the United States. *See Certain Inkjet Ink Cartridges with Printheads & Components Thereof* ("*Ink Cartridges with Printheads*"), Inv. No. 337-TA-723, Initial Determination, 2011 WL 3489151, at *12 (June 10, 2011), *affirmed in relevant part by* Comm'n Op. (Dec. 1, 2011) ("To prove a 'sale for importation,' a complainant must prove that a respondent sold infringing articles and knew or should have known that those articles would be subsequently exported to the United States.").

2. Precedent Under Section 337 Requires Evidence of An Actual Importation or Sale for Importation.

The Commission and its ALJs consistently have upheld the requirement of actual importation or sale for importation by a particular respondent as a predicate to liability under section 337. In *Pump Top Insulated Containers*, an early case addressing liability for a sale

[18] The complaint cites specific instances of importation by each of respondents directly from China with designations of origin that do not appear to be false. Amended Complaint ¶¶ 187-194.

under section 337, the Commission agreed with the ALJ's recommendation that there was no violation of section 337 with respect to a respondent who had offered to export accused products to the United States, but where there was no evidence that any sale was consummated. Inv. No. 337-TA-59, Comm'n Op., 0079 WL 419347, at *3 (Nov. 1979). The Commission found: "The record shows that Rollin offered to export pump top insulated containers to Cut-Rate Toys in the United States, but that this offer was solicited by [the complainant]. No evidence is on the record which would show that sales were actually made." *Id.*

In *Certain Coin-Operated Audio-Visual Games & Components Thereof* ("87 Investigation"), the Commission upheld the ALJ's determination that several foreign respondents should be terminated because the record contained evidence only that they had advertised infringing products without evidence of any importation. Inv. No. 337-TA-87, Comm'n Op., 1981 WL 50518 (June 1981); *see* Recommended Determination, 1981 WL 178477, at *15-17 (Jan. 9, 1981). The 87 Investigation related to allegations of trademark infringement, false designation of origin, trade dress, and copyright infringement of the Midway Galaxian arcade game. *Id.* at *4. There were 24 respondents, some of whom participated, but most others were in default. *Id.* at *1-2. The ALJ issued a determination after a hearing in which no respondent appeared. *Id.* The final determination included specific findings with respect to importation for each respondent. *Id.* at *10-16. The importation requirement was found to have been satisfied for the majority of the respondents, but the ALJ found that there was no evidence of importation for certain named respondents:

- Respondent Bonanza Enterprises, Inc. was a Japanese company that advertised 'Galaxian' games in a magazine and solicited sales in the United States, but the

ALJ found "[t]here is no evidence in the record that any Galaxian-type games made by Bonanza were imported." *Id.* at *15.

- Respondent En'sco was a Taiwanese company who sent a letter offering "Galaxian" kits and Galaxy War Games for sale to a distributor in the United States, but the ALJ found that "[t]here is no evidence that any importation actually occurred." *Id.*
- Respondent Hobby Industries Co., Ltd. of Japan wrote a letter offering 50 "Galaxian" TV games for $688.00 each to a Chicago firm, but the ALJ found that "there is no evidence that these games were imported." *Id.* at *16.
- Respondent Wesco Company was accused of passing off and misappropriation of trade dress based on deposition testimony that a Galaxian-type game circuit board was purchased by Wesco in the United States, but the ALJ found that "[w]ithout the board itself, or a description of the game or attract mode, or direct evidence of importation, there is not enough evidence to show that Wesco violated Section 337." *Id.*
- Respondent KEK Industries advertised 'Japanese manufactured Galaxian' boards and Galaxian games in a magazine, but the ALJ found that "[s]ince there is no evidence of importation of the game in question, the advertising of an imported game alone is inadequate to show a violation of Section 337." *Id.* at *17.
- Respondent International Trademarks also advertised 'Galaxian games' in a magazine, but no evidence of importation was offered and the ALJ found that "[a]dvertising an imported game alone is inadequate to show a violation of Section 337." *Id.*

See also Certain Vacuum Bottles and Components Thereof, Inv. No. 337-TA-108, 4 ITRD 1937, USTIC Pub. No. 1305, 1982 WL 54201, *2 (Oct. 29, 1982) (dismissing two respondents based on "no evidence of actual importation").

In *Certain Integrated Circuit Telecommunication Chips and Prods. Containing Same Including Dialing Apparatus* ("*Integrated Circuit Chips*"), the Commission refused to find a violation by a respondent because "there is no evidence of importation of the single UMC tone dialer chip [] found to be infringing." Inv. No. 337-TA-337, Comm'n Op. at 24-25, USITC Pub. No. 2670, 1993 WL 13033517, at *20 (Aug. 1993). The Commission further stated:

> Importation (or at least a sale for importation) of the infringing articles is an essential element of a violation of section 337. In the absence of evidence of importation or sale for importation of the infringing UMC chip, we conclude that complainant has failed to prove a violation of section 337 against UMC. We decline to assume importation, or conclude that a finding of importation is implicit in the ALJ's determination of violation.

Id.

In *Certain Salinomycin Biomass and Preparations Containing Same*, the administrative law judge granted summary determination of no violation for a domestic respondent, Merck & Co., Inc., who provided services for the accused importer but was not involved in the importation or sale of the accused product. Inv. No. 337-TA-370, Order No. 19, 1995 WL 945787 (Sept. 18, 1995), *not reviewed by* Comm'n Notice (Oct. 10, 1995), *investigation terminated by* Comm'n Notice (Feb. 9, 1996); *see* USITC Pub. No. 2978 (July 1996). The ALJ rejected arguments by the complainant that "despite the absence of Merck's name on [product] labels, customers may be aware that the [product] was shipped by Merck," and arguments that "Merck is involved in the promotion of accused salinomycin through the circulation of technical bulletins" that were sent to Canada. *Id.* at *3. The ALJ determined that there was no genuine issue of material fact because there was no evidence "that Merck is involved in any way in the sale of accused

salinomycin" and "no evidence that Merck is involved in the promotion of accused salinomycin in the United States." *Id.*

In *Certain Mechanical Lumbar Supports and Prods. Containing Same*, the administrative law judge found that there was no evidence of importation with respect to two respondents and unreliable testimony regarding importation for a third respondent. Inv. No. 337-TA-415, USITC Pub. No. 3240, Initial Determination at 68-69 (June 29, 1999), *not reviewed by* Comm'n Notice (Aug. 17, 1999). The complainant argued that these three respondents were "responsible" for the importation and sales of accused products because "they are interrelated and commonly controlled" in relation to other respondents, but the ALJ rejected these arguments, finding that complainant could not "avoid the statutory jurisdictional requirement as to these Respondents." *Id.* More recently, in *Certain Wireless Commc'n Chips & Chipsets, & Prods. Containing Same, Including Wireless Handsets & Network Interface Cards*, the ALJ terminated an investigation where the only remaining products were "test products" for which the complaint contained only general allegations of importation, with no supporting evidence. Inv. No. 337-TA-614, Order No. 5 at 22-23, 2007 WL 3342252 (Oct. 18, 2007), *not reviewed by* Comm'n Notice (Nov. 21, 2007). The ALJ described the complaint as "grossly inadequate and cited Commission rule 210.12(a)(3), emphasizing that "[t]he need to plead specific instances of importation in the complaint is of import because it is those specific instances that confer the Commission with its *in rem* jurisdiction." *Id.* (citing *Enercon GmbH v. Int'l Trade Comm'n*, 151 F.3d 1376, 1380 (Fed. Cir. 1998)).

In *Certain Semiconductor Integrated Circuits Using Tungsten Metallization and Prods. Containing Same* ("*Tungsten Metallization*"), the ALJ found no violation with respect to a named respondent, Spansion Inc., which argued it was merely a holding company and corporate

parent of entities involved in importation. Inv. No. 337-TA-648, Initial Determination at 15-22 (Sept. 21, 2009), *reviewed on other grounds by* Comm'n Notice (Nov. 23, 2009), *investigation terminated on remand by* Comm'n Op. (Apr. 19, 2010). The ALJ held that it was the complainants' burden to show importation: "Spansion bears no burden to show that it did not import products, or to show that it is not responsible for the activities of a subsidiary (absent a showing by complainants that such is in fact the case). Rather, by naming Spansion Inc. as a respondent, complainants assumed the burden of showing that the importation or sale requirement of section 337 is satisfied with respect to Spansion Inc., as it would have to do with respect to any respondent." *Id.* The ALJ found no violation of section 337 with respect to Spansion Inc., because there was no evidence that it was involved in the importation or sale of accused products. *Id.*

Administrative law judges also have refused to add respondents to an investigation where there was insufficient evidence of actual importation. In *Tungsten Metallization*, Order No. 34, 2009 WL 506053 (Jan 14, 2009), the ALJ denied a motion to amend a complaint to add two respondents because of insufficient evidence of importation. 2009 WL 506053 at *2 ("[I]t is not clear that the . . . information upon which complainants base their infringement allegations necessarily relates to imported products. Additionally, the importation allegations . . . remain unsubstantiated."). In *Certain Active Comfort Footwear* ("*Footwear*"), Inv. No. 337-TA-660, Order No. 4 at 2, 2009 WL 434797 (Feb. 11, 2009), the ALJ denied a motion to amend the complaint as to a proposed distributor respondent because the complainant had not demonstrated with sufficient evidence that the proposed respondent "actually imports, sells for importation, or sells products that are alleged to infringe the asserted patent." The ALJ held that the complainant had not presented sufficient evidence that the proposed respondent actually sold

accused products, but "only that it holds itself out as a distributor." *Id.* In *EPROM, EEPROM, Flash Memory, and Flash Microcontroller Semiconductor Devices and Prods. Containing Same* ("*EEPROMs*"), the ALJ denied a motion to amend a complaint to add allegations involving a new patent where the complainant failed to show good cause and where the amended complaint "fail[ed] to describe specific instances of alleged unlawful importations or sales." Inv. No. 337-TA-395, Order No. 18 at 6 n.2, 1997 WL 817748, at *3 n.2 (Aug. 27, 1997).

In *dicta*, administrative law judges also have questioned whether "[t]here may be instances in which the involvement of a foreign manufacturer or seller of an infringing product is so remote from its importation that it would be unfair to say that the manufacturer had violated § 337." *Certain Erasable Programmable Read Only Memories, Components Thereof, Prods. Containing Such Memories, and Processes for Making Such Memories* ("*EPROMs*"), Inv. No. 337-TA-276, Initial Determination, 1988 WL 1524737, at *14 (Nov. 16, 1988), *reversed in part* Comm'n Notice, 1989 WL 609772 (Mar. 16, 1989), *vacated in part,* Comm'n Notice, 1989 WL 608791 (Apr. 28, 1989) (finding that respondent took actions "purposefully directed to the United States" and "has done much more than simply place its EPROM products into the stream of commerce"). The ALJ in *EPROMs* made reference to the Supreme Court's decision on personal jurisdiction in *Asahi Metal Industry Co., Ltd. v. Superior Ct. of Calif., Solano County*, 480 U.S. 102 (1987). In *Certain Integrated Circuits, Processes for Making Same, and Prods. Containing Same*, the ALJ also cited *Asahi*, writing in *dicta*: "Standing alone, placement of a product in the stream of commerce is not sufficient to establish importation." Inv. No. 337-TA-450, Order No. 15 at 7, 2001 WL 1598072, at *4 (Nov. 2, 2001) (finding importation satisfied by the actual importation of sample products).

These decisions show that section 337's requirement of an actual importation or sale by an individual respondent has been applied consistently by the Commission in a wide range of circumstances, including at the summary determination stage of an investigation. It is not enough to prove that a respondent offered to sell products for importation, and a respondent is not liable merely because it does business with other entities that import accused products. To prevail under section 337, a complainant must prove that a respondent actually imported or sold for importation the articles at issue.

3. Liability May Be Predicated On A Sale for Importation, If The Seller Is Shown To Have Knowledge (Or Constructive Knowledge) That Importation Would Occur.

Under Commission precedent, liability may be established not only by evidence of importation but by evidence of sale for importation. In an early case, *Certain Apparatus for the Continuous Production of Copper Rod* ("*Copper Rod*"), there was liability for respondents who had "entered into a contract for sale of a continuous copper rod system to be used . . . at Norwich, Connecticut." Inv. No. 337-TA-89, 214 U.S.P.Q. 892, 1980 WL 42046, at *3 (Oct. 29, 1980). After the 1988 amendment, the Commission affirmed that there is a "sale for importation" in violation of section 337 "when a foreign manufacturer sells infringing goods to a foreign trading company with the knowledge that the goods will subsequently be exported to the United States." *Certain Battery-Powered Ride-On Toy Vehicles and Components Thereof*, Inv. No. 337-TA-314, USITC Pub. No. 2420, Comm'n Op. at 4 (Apr. 9, 1991). This was further affirmed in *Certain Sputtered Carbon Coated Computer Disks and Prods. Containing Same, Including Disk Drives*, where the Commission held that "the requisite nexus exists when a respondent that sold infringing articles knew or should have known that those articles would be subsequently exported to the United States." Inv. No. 337-TA-350, USITC Pub. No. 2701, Comm'n Op. at 13 (Oct. 27, 1993). In *Certain Variable Speed Wind Turbines and Components*

Thereof ("*Wind Turbines*"), the administrative law judge determined that a contract for the delivery of goods in the United States was sufficient to satisfy the "sale for importation" requirement. Inv. No. 337-TA-376, USITC Pub. No. 3003, Initial Determination at 7-19 (May 30, 1996). The Federal Circuit affirmed, holding that "[t]he ITC's determination that the phrase 'sale for importation' includes the situation in which a contract for goods has been formed in accordance with section 2-204(1) of the U.C.C. is a reasonable interpretation of 19 U.S.C. § 1337. . . ." *Enercon*, 151 F.3d at 1383.[19] In *Certain Devices For Connecting Computers Via Telephone Lines* ("*Connecting Computers*"), a sale for importation was inferred where respondents' products were purchased in the United States and there was evidence that respondents "advertised their products in English, directly sold to the United States market, admitted to the exportation of their connectors, or admitted that they had produced connectors in the recent past." *Id.* at *10. Inv. No. 337-TA-360, Initial Determination, 1994 WL 929932, at *6-10 (May 24, 1994), *unreviewed,* Comm'n Op. at 2 (Nov. 18, 1994).

[19] The Commission has enforced the definition of "sale" strictly in accordance with *Wind Turbines* and the U.C.C. In *Certain Prods. Containing Interactive Program Guide and Parental Control Technology*, the complainant pursued allegations of patent infringement against respondent Netflix, which made infringing software that was licensed to downstream respondents. Inv. No. 337-TA-845, Comm'n Op. at 2-3 (Dec. 11, 2013). The ALJ found that Netflix's provision of software to the downstream respondents was a "sale for importation" under section 337, but the Commission reversed. *Id.* at 8-15. The Commission determined that the Netflix software licenses were not a "sale for importation" because the licenses conveyed rights, not title. *Id.* at 9-12. In addition, the Commission affirmed the ALJ's finding that the importation requirement was not satisfied by the actual importation of downstream devices because there was no evidence that the accused software was contained on the imported devices – only evidence that the downstream respondents used Netflix's software in the development of the imported devices. *Id.* at 12-15. In *Certain Semiconductor Devices, Semiconductor Device Packages, and Prods. Containing Same*, the Commission determined not to review a finding that renting accused products in the United States was not a "sale after importation" under section 337. Inv. No. 337-TA-1010, Order No. 69 (Feb. 27, 2017), *not reviewed by* Comm'n Notice (Apr. 4, 2017).

4. U.S. Steel Lacks Evidence of Actual Importation or Sale for Importation.

U.S. Steel has not presented any contract of sale, any purchase of respondents' steel in the United States, or any similar evidence establishing a nexus between the manufacturer respondents and the importation of any particular steel under FDO into the United States. Instead, U.S. Steel relies on statistical import/export data, statements by third-party distributors, and strategizing by some respondents' employees about how to avoid tariffs. Under the Commission's precedent, this type of evidence, unrelated to an actual importation, cannot as a matter of law establish a violation of section 337. To establish liability for a "sale for importation," U.S. Steel must prove that a respondent sold accused steel with actual or constructive knowledge that such steel would be transshipped and imported into the U.S. On the evidence in this record, U.S. Steel cannot fulfill the statute's jurisdictional requirements.[20]

Testimony that it is "highly likely" that respondents performed prohibited acts is not probative of a violation without evidence of actual importation or sale by these respondents or with their knowledge. *See* U.S. Steel Baosteel Opp. at 11 ("Chinese manufacturers of steel products—including the accused products—and their distributors are willing and able to assist in

[20] Staff maintains that U.S. Steel "need not necessarily identify an individualized shipment." Staff Response at 7. In support, Staff cites cases holding that patent infringement can be demonstrated with circumstantial evidence that it is "more likely than not that one person somewhere in the United States has performed the [patented] method." *Id.* at 7 n.6 (citing *Lucent Technologies, Inc. v. Gateway,* 580 F.3d 1301, 1318 (Fed. Cir. 2009)). This precedent is specific to inducement in the context of patent infringement, however, and it has no proper application in the analysis of the jurisdictional fact of importation under section 337. Moreover, the Federal Circuit in inducement cases relies on direct evidence regarding the defendant's sale of infringing products, including "evidence relating to the extensive sales of Microsoft products and the dissemination of instruction manuals for the Microsoft products." 580 F.3d at 1318. Similar evidence of sales or documentation provided to customers is precisely the evidence that U.S. Steel lacks with respect to the respondents in this investigation. The suggestion that, because it is statistically likely that someone somewhere is illegally importing Chinese steel, every Chinese steel manufacturer named in this investigation must be liable under section 337 is untenable.

evading AD/CV duties using fraudulent transshipment."). Under the Commission precedent discussed herein, circumstantial evidence that merely establishes a general pattern and a general awareness of that pattern or even, as alleged by U.S. Steel, a strategy or willingness to engage in prohibited transactions, does not satisfy the requirement to show an actual importation or sale for importation under the statute. There must be facts linking a particular manufacturer to accused articles to demonstrate that the manufacturer respondent knew or should have known that an importation of those articles would occur. The Commission will not presume jurisdictional facts. *Integrated Circuit Telecommunication Chips*, 1993 WL 13033517, at *20. It follows from the foregoing that U.S. Steel's and its expert's "circumstantial" evidence concerning "macro" increases in transshipment of Chinese goods in response AD/CV duties investigations, third-party distributors holding themselves out as agents of the manufacturing respondents (without any manifestation from the manufacturers of an agency relationship), communications with respondents' employees indicating a general willingness and readiness to sell steel for transshipment, the existence of plans by some respondents to use transshipment to foreign countries as a way of avoiding American tariffs, *etc.*, do not, as a matter of law, raise a genuine issue of material fact with respect to violation by any respondent.[21] For the purposes of this motion, I credit all such "circumstantial" evidence: there has been a dramatic increase in shipment of accused steel from countries other than China following the imposition of AD/CV

[21] U.S. Steel repeatedly alleges that various distributors hold themselves out as agents of various respondents. U.S. Steel does not explain why such "holding out" is legally significant and indeed, it is not. Under the law of agency, "[a]pparent authority exists only as to those to whom the principal has manifested that an agent is authorized." *Apple v. Standard Oil, Div. of Am. Oil Co.,* 307 F. Supp. 107, 114 (N.D. Cal. 1969) (citing Restatement, Agency 2d)). U.S. Steel presents no evidence to suggest that any respondent manifested that any of the named distributors was authorized to act for that respondent in connection with the illegal transshipment of steel.

duties; there are third parties who hold themselves out (without authorization) as distributors of Chinese steel in order to evade AD/CVD orders; there are employees of respondents who have indicated a willingness to engage in transshipment schemes; and there are some respondents whose employees have devised plans to use transshipment to avoid American tariffs. None of this evidence, however, establishes a triable issue as to whether an individual respondent actually imported or sold for importation any article under a false designation of origin. The problem is not that U.S. Steel's evidence is circumstantial rather than direct. The problem is that U.S. Steel's circumstantial evidence is not specific or substantial enough to establish a violation of section 337 by any of the named respondents.

5. U.S. Steel Lacks Evidence of Actual Importation Under a False Designation of Origin.

U.S. Steel's allegations in this investigation are predicated on false designation of origin, and accordingly, U.S. Steel must identify evidence of such designation to prove a violation of section 337. According to Judge Bonner, "fraudulent transshipment" means "the practice of transshipping products produced in a country that is threatened with or subject to U.S. Commerce Department AD and/or CV duty orders or the practice of transshipping or causing the transshipment of goods produced in that country that are intended for importation into the United States to a third country *for purposes of generating a false country of origin certification and evading AD and CV duties*." Bonner Expert Report at 2 (emphasis added). There is no "false country of origin certification" in the materials submitted by U.S. Steel in support of any actual instance of importation. Nor is there any evidence that any actual importation resulted in evasion of U.S. AD/CV duties. This record contains no information concerning the duties assessed by Customs and there is no evidence upon which to make even an inference of FDO. Under these circumstances, summary determination must be granted.

Judge Bonner testifies specifically that: "In addition to advance electronic manifest data supplied by the carrier, the importer of record is required to file an entry summary [Customs Form 7501] describing the products for which entry is sought . . . . Shipping documents that must be available for inspection by [Customs] include the oceangoing bill of lading, packing documents, invoice and certification of origin." Bonner Expert Report at 10. None of these documents are attached to any of U.S. Steel's opposition briefs in connection with any instance of transshipment by any respondent. Without such evidence in the record, a reasonable factfinder cannot find that the documents provided to Customs were false.

6. Analysis of Alleged Specific Instances of Importation

U.S. Steel alleges one or two "specific instances" of importation with respect to each respondent. As discussed below, none of these instances satisfies the requirements to prove liability under section 337.

a) Alleged Baosteel Transshipments

Shipment #1: U.S. Steel identifies a shipment of steel from China through two different countries in which "the weights and numbers of coils of the accused product . . . *match exactly*." U.S. Steel Baosteel Opp. at 25, Fig. 2. U.S. Steel says the exact match "is highly unusual and strong indicia that this accused product shipment entered the United States illegally designated as originating from South Korea and without being subject to the applicable AD and CV duties." *Id.* at 25, note 21. U.S. Steel also relies on the timing from "the first shipment of the product from Shanghai and the departure date for the second shipment from South Korea to the United States (just under 2 months)." *Id.* at 26. U.S. Steel says this is long enough for the product to have completed the "transshipment journey" from Shanghai to Vietnam to South Korea to the United States. *Id.* U.S. Steel says transshipment is economical given the steepness of American import duties and that Baosteel's employees have offered to subsidize transshipments. *Id.* U.S.

Steel argues that a "multi-leg transshipment also offers an independent benefit to Baosteel by making it harder to trace the fraudulent transshipment back to its true Chinese origin." *Id.* at 26 n. 22. U.S. Steel asserts as evidence of this alleged specific instance that "Baosteel and Dongbu Steel—the shipper for the second leg of the transshipment—have an established business relationship." *Id.* at 26. According to U.S. Steel, the business relationship suggests a motive and opportunity "to coordinate this fraud." *Id.* at 27.[22]

Shipment #2: U.S. Steel identifies a second Baosteel shipment, alleging that "Baosteel shipped accused product cold-rolled steel to Bangkok, Thailand before the steel was subsequently transported to Taiwan for importation into the United States using a falsified origin." U.S. Steel Baosteel Opp. at 27, Fig. 3. Like the previous instance, U.S. Steel relies on "the exact match between the weight and number of coils . . . although the product descriptions . . . vary slightly." *Id.* U.S. Steel acknowledges that the description of the steel products does not match. U.S. Steel explains: "foreign entities often falsify the product description on shipping documents to evade AD/CV duties." *Id.* U.S. Steel says it is "plausible" that the addition of the word "stainless" to the product description "was intentional and intended to make it more likely that [Baosteel's] fraud would succeed." *Id.*

Viewing the facts in the light most favorable to U.S. Steel, the two instances identified show that steel made by Baosteel in China was shipped to two different countries (Korea and Taiwan) before it was imported into the United States. We do not know what documents were presented to U.S. Customs upon importation of these shipments; there is no evidence showing

[22] U.S. Steel refers to "Baosteel or its co-conspirators." U.S. Steel Baosteel Opp. at 27. There is no allegation of a conspiracy in the complaint. Indeed, a critical flaw in U.S. Steel's case is the lack of any link between Baosteel and alleged instances of importation by other parties. *See infra.*

how the origin of these shipments was designated, or whether the designations were false. U.S. Steel's expert identifies numerous documents that are purportedly supplied to Customs prior to importation, but U.S. Steel does not provide any of these documents in connection with any of the alleged transshipments. *See* Bonner Expert Report at 8-9 (identifying "10 required data elements" that importers must file 24 hours prior to a ship's lading), 10 (identifying shipping documents that "must be available for inspection by CBP").[23] There is thus no factual evidence that these shipments were illegally imported into the United States to evade U.S. duties, and this alone warrants summary determination in Baosteel's favor.

Even assuming for the purposes of summary determination that the origin of the shipments was falsely designated, there is no evidence connecting Baosteel to the alleged transshipment and importation. This is fatal to U.S. Steel's claim, as a matter of law. Notwithstanding the hyperbole in U.S. Steel's briefs, there is no evidence of fraud, conspiracy, or any other improper activity by Baosteel in connection with these shipments. The evidence shows that Baosteel sold steel to customers in Vietnam and Thailand—that is all it shows. U.S. Steel relies on evidence that Baosteel employees discussed transshipment and entrepôt trade, but none of this evidence is tied to the customers or shippers in the two alleged instances of importation. There is no evidence tying Baosteel to the actions of the shippers in Taiwan and

[23] U.S. Steel cites to a large spreadsheet, attached as Exhibit 29 to its opposition, which it describes as containing "records of imports of steel products to the United States from South Korea, Taiwan, and Hong Kong from 2009 to 2016." U.S. Steel Baosteel Opp. at 25 n.21. U.S. Steel does not explain the origin of these records, or whether they reflect information provided to customs. The spreadsheet includes a column titled "Shipment Origin," but U.S. Steel does not explain whether this reflects the product's country of origin that is represented to U.S. Customs or if the origin of the shipment may be different from the origin of the product. Notably, the alleged Baosteel Transshipment No. 1 lists "South Korea" as the "Shipment Origin," while the alleged Baosteel Transshipment No. 2 lists "United States" as the "Shipment Origin." U.S. Steel Baosteel Opp., Ex. 29 ("SOUTH KOREA 2015" tab, row 1743; "TAIWAN 2014 – 2016" tab, row 56663).

Korea such that Baosteel could be deemed to know that the steel it was selling ultimately would be imported into the United States.

Commission precedent does not allow a factfinder to assume without evidence that an illegal importation by a particular respondent, or a sale for importation with the knowledge of a particular respondent, has occurred. To satisfy the requirements of section 337, U.S. Steel must have evidence that Baosteel either actually imported accused steel or knew (or should have known) that the steel it sold would be imported into the United States. Such evidence is not in the record.

b) Alleged Angang Transshipment

U.S. Steel identifies "one specific instance of transshipment using FDO." U.S. Steel Baosteel Opp. at 32, Fig. 4. U.S. Steel relies on the same factors described above to support its allegation: "an *exact match* with regard to the number of items shipped and the gross weight (with a near-exact match for net weight.)" *Id.* U.S. Steel adds that "the dates associated of [*sic*] the legs are far enough apart that the underlying accused products could complete the transshipment journey (*i.e.*, China-to-Singapore-to-South Korea-to-United States) within the time range specified." *Id.* U.S. Steel adds that "the parties involved in these shipments maintain business relationships that make it more likely that they would collude in an effort to evade U.S. Customs." *Id.* U.S. Steel cites various documents concerning the business relationships among the various entities involved in the shipment, allegedly showing their "*motive*" and "*opportunity*" to "collude" with Angang, U.S. Steel Baosteel Opp. at 32-33, but no facts appear that would support a reasonable inference that Angang knew or should have known that steel it sold to Singapore actually would be imported into the United States via South Korea. Commission precedent will not support a finding of liability based only on evidence of motive, opportunity or intent. As discussed above, evidence indicating importation or sale for importation is needed to

raise a genuine issue for hearing. No evidence of such a transaction appears here.[24] Moreover, as with the alleged Baosteel shipments, there is no evidence in the record of the documents presented to Customs with this shipment, and thus no evidence for whether any false designation was made.

c) Alleged WISCO Transshipment

U.S. Steel alleges that there is evidence of one "probable illegal FDO transshipment by WISCO." U.S. Steel Baosteel Opp. at 35, Fig. 5. U.S. Steel identifies a shipment of steel from WISCO to [redacted] Thailand and a later shipment from [redacted] to the United States. Unlike the evidence cited above for Baosteel and Angang, the weights and the number of items in these shipments do not match, but based on the "similarity in weight and temporal proximity between the two shipments," U.S. Steel argues that it is likely that WISCO shipped "the underlying accused product to [redacted] and then—after slitting and repackaging the coils—[redacted] fraudulently transshipped them to the United States using FDO. *Id.* at 35-36. The importation records identified by U.S. Steel for this shipment list "Thailand" as the "Country of Origin." *Id.*, Ex. 23 at 2.[25] U.S. Steel claims that WISCO's

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[24] For the general proposition that a respondent may be liable under section 337 where it knows or should know that importation will occur, Staff cites *Connecting Computers,* Inv. No. 337-TA-360. *See* Staff Response at 10, n.9. While the general proposition certainly is correct, *Connecting Computers* was a far different case than the one before me. In *Connecting Computers*, summary determination was granted for the complainant on an unopposed motion, 1994 WL 929932 at *1. There was an abundance of evidence of importation that is not present in this case. The accused products in *Connecting Computers* were actually purchased in the United States, and there was evidence that the respondents "advertised their products in English, directly sold to the United States market, admitted to the exportation of their connectors, or admitted that they had produced connectors [for import into the U.S.] in the recent past." *Id.* at *10. In the context of the case before me, there is not nearly enough factual information to warrant making the necessary inferences.

[25] Exhibit 23 includes a "Sample Bill of Lading" that appears to have been generated by a company called "Panjiva." A search on the internet reveals that "Panjiva" is an internet global

"[redacted]" and WISCO's recognition "[redacted]" "is sufficient to create a dispute of fact." *Id.* at 36 (citing Ex. 47 (WISCO-3517) at 34; Ex. 48 (WISCO-003517) at 20). U.S. Steel adds that [redacted] *Id.* at 34-35 (quoting Ex. 46 (WISCO-040348)). Again, assertions regarding WISCO's general plans do not raise a reasonable inference that WISCO knew or should have known that any particular steel would be transshipped to the U.S., and although U.S. Steel cites specific evidence of WISCO's knowledge regarding [redacted], the timing of the alleged transshipment precludes any finding of FDO on these facts.

U.S. Steel identifies a bill of lading dated October 29, 2014, describing a shipment of "Hot galvanized coils" from WISCO to [redacted] Thailand. U.S. Steel Baosteel Opp. at 35-36. U.S. Steel alleges that this steel was subsequently shipped [redacted] to Los Angeles, California, as "Steel Coil," arriving on November 6, 2014. *Id.* (citing Ex. 23). U.S. Steel's allegation requires that in no more than eight days, WISCO's steel was transported from China to Thailand, was slit and repackaged in Thailand, and was then shipped to California. This is not consistent with the expected transit time between ports in Asia or across the Pacific Ocean. *See* Bonner Expert Report at 7 ("Vessels that traverse the Pacific Ocean typically have a capacity from 9,500 twenty-foot equivalent units (TEU) to 14,000 TEU, with a travel time of approximately 18 days, port to port. Interestingly, transit on smaller vessels

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trading information resource. Exhibit 23 is not a U.S. Customs document, but on summary determination, this record is viewed in the light most favorable to U.S. Steel.

between Shanghai and Haiphong, for example, can require anywhere from 8 to 19 days.").[26] U.S. Steel's allegations with respect to other respondents reflect transit times of at least two months when there is an alleged transshipment.[27] The short timeframe for the alleged WISCO transshipment is implausible, and when this timeframe is considered in the context of the mismatched weight and the unknown number of coils, no reasonable factfinder could conclude that this evidence reflects a transshipment of WISCO steel [redacted].

Further casting doubt on U.S. Steel's allegations is its admission that this type of steel was not subject to any AD/CVD investigation at the time of the alleged importation. U.S. Steel Baosteel Opp. at 36 n.28. The corrosion-resistant steel investigation identified in the complaint was not initiated until June 2015, more than six months after the alleged shipment. *See* Amended Complaint ¶ 130. There was no reason to falsely designate Chinese steel as originating from Thailand at the time this shipment arrived in the United States, and U.S. Steel cannot sustain an allegation of transshipment against WISCO based on this evidence.

d) Alleged Hesteel Transhipment

U.S. Steel alleges that Hesteel knew or should have known of "a fraudulent transshipment involving [redacted] in

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[26] *See* U.S. Department of Commerce, "Shipping," http://acetool.commerce.gov/shipping (accessed Oct. 2, 2017) ("The average time for a container vessel from Asia to the U.S. is between two weeks and a month").

[27] The alleged transshipments identified above for Boasteel and Angang transpired over a period of two to three months. *See* U.S. Steel Baosteel Opp. 24-28, 32-33. With respect to Hesteel, there was a two month gap between the alleged steel shipment from China to Vietnam and the steel's subsequent arrival in the United States. U.S. Steel Hesteel Opp. at 17-19. With respect to a Shougang shipment that traveled directly from China to the United States, the evidence shows a transit time of one month. *See* U.S. Steel Shougang Opp. at 16-20 (citing Ex. 32 (indicating arrival on June 5, 2015), Exs. 33, 34 (indicating time of shipment as "Aiming: BEFORE 4/30/15"), Exs. 35, 36, 40 (invoice and packing lists dated in late April 2015).

Vietnam before subsequent shipment to the United States." U.S. Steel Hesteel Opp. at 18. U.S. Steel says the duration of the transit from China to Vietnam and subsequently from Vietnam to the U.S. is sufficient to allow for [redacted] in Vietnam. In addition, U.S. Steel says this shipment shows [redacted]. *Id.* at 19.

Table 1 shows shipments of product made by Hesteel [redacted]. U.S. Steel Hesteel Opp. at 18, Table 1. Among other responses, Hesteel says in its reply brief that [redacted] is not a respondent, but Hesteel does not deny that [redacted] is a wholly owned subsidiary. Hesteel says it cannot be held liable as a matter of law for the actions of its subsidiaries unless there is evidence "to show control over the general operation of the subsidiary," and that "[t]he control must extend to the illegal or otherwise tortious activity." Hesteel Mem. at 7 (citing *U.S. v. Bestfoods,* 524 U.S. 51, 61-62 (1998)). U.S. Steel responds that [redacted] "is the key enterprise of Hesteel Group." U.S. Steel Hesteel Opp. at 18, n. 10 (citing Ex. 1).

For the purposes of this motion, I take it as true that Hesteel exercises sufficient control over [redacted] to attribute the acts of [redacted] to Hesteel. U.S. Steel further alleges that the entity that actually imported the steel into the United States, [redacted], is partly owned by Hesteel. Hesteel does not reply to this allegation. Again, the issue of whether Hesteel could be liable for the wrongful acts of [redacted] raises factual questions. Whether these facts raise a genuine issue for hearing is doubtful based on the Commission precedent discussed above, but U.S. Steel has at

least gone some way toward linking up an alleged instance of importation with a particular respondent.

Nevertheless, even if I assume that Hesteel was involved with the shipment of this steel to America, U.S. Steel has presented no evidence of FDO: there are no documents indicating what information was provided to Customs. As with the Baosteel and Angang shipments described above, U.S. Steel relies on a spreadsheet with a column labeled "Shipment Origin" that indicates "Vietnam." U.S. Steel Hesteel Opp, Ex. 19. There is no indication that this spreadsheet reflects any representations made to Customs regarding the country of origin of the steel.[28] Absent such evidence of designation, no reasonable factfinder could conclude that the designation on this shipments was false.

e) Alleged Masteel Transshippment

U.S. Steel alleges that Masteel sold steel coils to an entity called [redacted] in Thailand and that the weight and number of items sold corresponds with a "close-in-time shipment by Dongbu Steel Co. from South Korea to the United States." U.S. Steel Shougang Opp. at 21, Fig. 1. U.S. Steel asserts, based entirely on this "anomalous exact match with respect to weight and number of items shipped, and the temporal proximity of these two shipments, a factfinder could reasonably conclude that" Masteel's product "was fraudulently transshipped to the United States." *Id.* at 22. But there is no evidence of any documents provided to Customs that indicate any false designation.[29] Moreover, there are no facts in U.S. Steel's description of

[28] It is also unclear from this record whether these shipments were entering the United States or were subject to AD/CV duties because the consignees identified for these shipments are banks located in Great Britain and in Switzerland. *Id.*, Ex. 19.

[29] As with the other alleged transshipments, U.S. Steel relies on a large spreadsheet with a column titled "Shipment Origin," but there are is no evidence in the record of any representations made to Customs. *See* U.S. Steel Shougang Opp., Ex. 45. The invoice, bill of lading, and

this alleged instance that indicate Masteel knew or should have known that the steel it sold to Thailand would be shipped to the United States. There is no evidence connecting Masteel to the importer, Dongbu Steel, and in stark contrast to its evidence regarding other respondents, U.S. Steel does not cite any evidence that Masteel employees were engaged in any discussions regarding transshipment. There is a complete failure of proof regarding Masteel's knowledge in connection with any sale for importation.

f) Alleged Shougang Transshipment

U.S. Steel alleges that "[t]here is evidence of at least one likely importation of the accused products using FDO by Shougang." U.S. Steel Shougang Opp. at 16. U.S. Steel says Shougang exported accused products through a Taiwan based company, [redacted]. *Id.* U.S. Steel alleges that Shougang has a close working relationship with these companies, as evidenced by sales contracts with Shougang subsidiaries. *See* U.S. Steel Shougang Opp. Ex. 21. U.S. Steel maintains that changes to bills of lading evidenced by documents between Shougang and [redacted] show an illegal transshipment scheme. U.S. Steel Shougang Opp. at 17. Shougang responds that changes to the bills of lading merely reflect the change in ownership of the shipment from Shougang to [redacted]. Shougang Reply at 15.

U.S. Steel says that a shipment "corresponding to the above-described transaction entered the United States on June 5, 2015." *Id.* at 18-19. U.S. Steel details that the name of the shipper on the bill of lading for this shipment was changed to [redacted] at the request of [redacted]. U.S. Steel Shougang Opp. Exs. 28-31. As evidence of importation, U.S. Steel points to Exhibit 32 to

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certificate of origin for Masteel's shipment to Thailand indicates that the shipment was marked "Made in China." *Id.*, Ex. 43 at Masteel337005142-47.

its Shougang Opposition, an exhibit referenced as "Panjiva Customs Record for Bill of Lading Number PBIHJEBA15210304." *Id.* at 19. Exhibit 32 is entitled "US Imports Customs Record Customs Record." U.S. Steel's Shougang Opp., Ex. 32. Under "Shipment Origin," the document says "Taiwan." *Id.* Under "Port of Lading," the document says "Dagu/Tanggu, China." *Id.* Under "Place of Receipt" the document says "TIANJIN, CHINA." *Id.*[30]

It is unclear whether Exhibit 32 reflects information that was communicated to Customs,[31] but making every possible inference in favor of U.S. Steel, and assuming Customs saw the information on Exhibit 32, that information does not establish a genuine dispute of material fact. Exhibit 32 shows on its face that the origin of the steel is China. The document identifies the place of receipt of the steel as Tianjin, China, and the port of lading as Dagu/Tanggu, China. *Id.* In its description of the transaction, U.S. Steel notably omits any mention of this information. U.S. Steel Shougang Opp. at 18-19.

Judge Bonner testifies that it can be difficult for Customs to determine the true country of origin, *see* Bonner Expert Report at 12, but it would not be difficult to determine that this shipment consisted of Chinese steel, based on the entries on the importation records identified by U.S. Steel. Exhibit 32 indicates that the shipment originated in Taiwan, but the steel did not. No reasonable inference can be drawn concerning false representations made to Customs about the origin of the shipped steel, when its Chinese origin is apparent.

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[30] "Port of Lading," indicates "the port where goods are put on a ship." Cambridge Dictionary (online). "Place of Receipt" indicates the "location where cargo enters the care and custody of the carrier." Transportation Dictionary, Transportation-Dictionary.org.

[31] *See supra*, n.25.

The only alleged transshipment of Shougang steel thus appears to have been shipped with clear indicia of its Chinese origin, and Shougang is therefore entitled to judgment as a matter of law.

g) Alleged Shagang Transshipment

U.S. Steel recounts a number of communications between Shagang employees and entities wishing to export steel through various countries, including "advising customers about U.S. Duties and subsequently negotiating to ship products to non-U.S. ports." U.S. Steel Shagang Opp. at 11. U.S. Steel says Shagang employees "routinely falsify export documents to avoid duties and for other reasons." *Id.* at 12. U.S. Steel offers no allegation (much less any evidence) as to any actual importation of Shagang steel using FDO or any specific sale of Shagang steel for importation using FDO. Shagang is therefore entitled to summary judgment of no violation.

C. Likelihood of Confusion

Respondents move for summary determination on the separate and independent ground that there is no evidence of likelihood of confusion. Baosteel Motion at 31-36; Angang/WISCO Motion at 19 (joining Baosteel Motion); Shougang Motion at 10-12; Masteel Motion at 17-18 (joining Baosteel Motion); Hesteel Motion at 15 (joining Baosteel Motion); Shagang Motion at 18 (joining Baosteel Motion).

1. Legal Standards

U.S. Steel's claim of false designation of origin or manufacturer is predicated upon a violation of section 43(a)(1) of the Lanham Act. *See* Amended Complaint at ¶¶ 2, 126, 182 (citing the Lanham Act). In particular, U.S. Steel alleges that "Respondents intend for their falsely designated products' origin to cause confusion, mistake, or deception in violation of the

Lanham Act, 15 U.S.C. § 1125(a)(1)." *Id.* at ¶ 182. Section 43(a)(1) of the Lanham Act provides:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1). Subsection 43(a)(1)(A) defines a claim of false designation when a respondent is "using, in commerce in connection with goods, any false designation of origin which is likely to cause confusion, cause mistake or deceive as to . . . the origin" of the goods. *Certain Cigarettes & Packaging Thereof*, Inv. No. 337-TA-424, Initial Determination, 2000 WL 1089576, at *17 (Jun. 22, 2000), *not reviewed by* Comm'n Notice, 2000 WL 1230350 (Aug. 28, 2000); *see Thompson v. Haynes*, 305 F.3d 1369, 1378 (Fed. Cir. 2002) ("[I]n order to establish unfair competition under § 43(a) of the Lanham Act, it must be shown (1) that defendant made material false or misleading representations of fact concerning the origin of its product; (2) in commerce; (3) that are either likely to cause confusion or mistake as to (a) the origin, association or approval of the product with or by another, or (b) the characteristics of the goods or services; and (4) injure the plaintiff." (internal quotations omitted)).

Under the Lanham Act, likelihood of confusion is "examined from the viewpoint of the consumer." *Certain Alkaline Batteries*, Inv. No. 337-TA-165, USITC Pub. No. 1616, Comm'n

Op. at 26, 1984 WL 63019, at *14 (Nov. 1984); *see also Certain Plastic Food Storage Containers*, Inv. No. 337-TA-152, USITC Pub. No. 1563, Initial Determination at 53, 0084 WL 951885, at *33 ("Likelihood of buyer confusion is the basic test of federal statutory trademark infringement and false designation of source.") (Apr. 13, 1984), *not reviewed by* Comm'n Notice, 49 Fed. Reg. 21807 (May 23, 1984). In an exemplary Lanham Act claim for false designation origin, the Commission investigated claims that certain nut jewelry was manufactured in Taiwan but labeled "Symbolic of Hawaii." *Certain Nut Jewelry & Parts Thereof* ("*Nut Jewelry*"), Inv. No. 337-TA-229, USITC Pub. No. 1929, Initial Determination at 15-16, 1986 WL 379339, at *8 (July 30, 1986), *not reviewed in relevant part by* Comm'n Op. (Nov. 6, 1986). The administrative law judge examined the relevant labels and packaging to determine whether "the absence of a conspicuous location of the country of origin, the language on the labels, and scenes on certain labels, associating the jewelry with Hawaii, have a tendency *to deceive the purchasing public* as to country of origin of the jewelry and/or its critical components." *Id.* at 25, 1986 WL 379339, at *12 (emphasis added).

2. No Evidence of an Importation or Sale for Importation Under FDO

As discussed above in the context of the importation requirement, U.S. Steel has identified no evidence from which a reasonable factfinder could conclude that any respondent has imported or sold any steel products for importation into the United States under FDO. Accordingly, no customer could be confused by any such imported products, and this alone precludes a finding against any of these respondents under the Lanham Act.

3. No Evidence of Customer Confusion

Even if U.S. Steel had presented sufficient evidence of importation or false designation of origin, there is no evidence of customer confusion with respect to any of the accused products. U.S. Steel fails to identify any customer for imported steel that was confused, and Staff agrees

that there is no genuine issue of fact regarding customer confusion. Staff Combined Response at 14.[32]

U.S. Steel argues that evidence of actual confusion is unnecessary because it alleges that Respondents' designations of origin are literally false. U.S. Steel Baosteel Opp. at 39-40. U.S. Steel cites counterfeiting cases, where courts have held that likelihood of confusion is presumed because "counterfeit marks are inherently confusing." *Phillip Morris USA Inc. v. Shalabi*, 352 F.Supp.2d 1067, 1073 (C.D. Cal. 2004); *see also Gucci America, Inc. v. Duty Free Apparel, Ltd.*, 286 F.Supp.2d 284, 287 (S.D.N.Y.2003) ("[C]ounterfeits, by their very nature, cause confusion"); *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987) ("Where, as here, one produces counterfeit goods in an apparent attempt to capitalize upon the popularity of, and demand for, another's product, there is a presumption of a likelihood of confusion.").

Counterfeiting under the Lanham Act has a specific definition, and "[o]nly registered marks . . . can avail themselves of the counterfeit theory." *Cree, Inc. v. Xiu Ping Chen*, Case No. 16-cv-1065, 2017 WL 3251580, at *4 (E.D.N.Y. July 28, 2017) (dismissing complaint for failure to plead likelihood of confusion); *see* 15 U.S.C. § 1127 ("A 'counterfeit' is a spurious mark which is identical with, or substantially indistinguishable from, a registered mark."). U.S. Steel is not relying on a registered mark and is thus not entitled to any presumption on confusion. U.S. Steel argues that Respondents' alleged transshipments are similar to counterfeiting because "a steel product that is marked as having been 'Made in Vietnam' that in fact was 'Made in China'

[32] U.S. Steel's arguments appear to be limited to Section 43(a)(1)(A) of the Lanham Act. *See* U.S. Steel Baosteel Opp. at 36-41. U.S. Steel does not cite any evidence of false statements in advertising, which would be actionable under Section 43(a)(1)(B) of the Lanham Act if there were evidence of "a false statement of fact . . . in an advertisement," and evidence "that the statement actually deceived or had the tendency to deceive a substantial segment of its audience." *Certain Cigarettes & Packaging Thereof*, Inv. No. 337-TA-424, Initial Determination, 2000 WL 1089576, at *18.

is inherently confusing." U.S. Steel Baosteel Opp. at 38. But there is no evidence that any of the steel at issue is marked "Made in Vietnam" in any way that is visible to consumers. U.S. Steel's allegations of transshipment rely on documents, such as a bill of lading, certificate of origin, or declaration of origin, that are presented to Customs officers for the purpose of avoiding AD/CV duties. *See* Bonner Expert Report at 10-11. In a counterfeiting case, confusion can be presumed because consumers rely on registered marks to determine the origin or sponsorship of products. There is no evidence that the relevant Customs documents are even available to consumers. There is no basis for presuming consumer confusion on this record.

Staff cites cases where evidence of non-purchaser confusion has been recognized under the Lanham Act, Staff Combined Response at 14-15, but like the counterfeiting cases cited by U.S. Steel, these cases all involve registered trademarks. *See Beacon Mutual Ins. Co. v. OneBeacon Ins. Group*, 376 F.3d 8, 10 (1st Cir. 2004) ("Confusion is relevant when it exists in the minds of persons in a position to influence the purchasing decision or persons whose confusion presents a significant risk to the sales, goodwill, or reputation of the trademark owner."); *Mid-State Aftermarket Body Parts, Inc. v. MQVP, Inc.*, 466 F.3d 630, 634 (8th Cir. 2006) (same); *Arrowpoint Capital Corp. v. Arrowpoint Asset Mgmt., LLC*, 793 F.3d 313, 323 (3d Cir. 2015) ("[T]he Lanham Act protects against the use of trademarks which are likely to cause confusion, mistake, or deception of any kind, not merely of purchasers nor simply as to source of origin." (internal quotations omitted)). Moreover, the evidence relied upon in these cases showed confusion by third parties who were closely related to customers, such as service providers, insurers, investors, and purchasers of related services and products. *Id.* at 18 (finding "sufficient evidence of actual confusion relevant to [plaintiff]'s commercial interests"). Courts generally have limited non-consumer confusion to "three specific and overlapping

circumstances—namely where there is confusion on the part of: (1) potential customers; (2) non-consumers whose confusion could create an inference that consumers are likely to be confused; and (3) non-consumers whose confusion could influence consumers." *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190, 1214 (9th Cir. 2012). These limitations are consistent with the text of the Lanham Act, which requires that the alleged false designation or misrepresentation is "use[d] in commerce." 15 U.S.C. § 1125(a)(1).

Staff and U.S. Steel advance arguments based on allegations that Customs officials are confused. Staff Combined Response at 14; U.S. Steel Baosteel Opp. at 40-41.[33] Staff argues that the confusion of Customs officials enables the avoidance of AD/CV duties, and that this should be actionable under the Lanham Act because it "presents a significant risk to U.S. Steel's sales and competitive position." *Id.* at 14. But deception of Customs officials alone cannot be the basis for a Lanham Act claim, according to Commission precedent in *Certain Caulking Guns*, Inv. No. 337-TA-139, USITC Pub. No. 1507, Initial Determination at 44-47, 1983 WL 207157, *21-22 (Nov. 25, 1983), *not reviewed by* Comm'n Notice, 49 Fed. Reg. 670-71 (Jan. 5, 1984). The ALJ in *Certain Caulking Guns* agreed with the complainant that failure to mark the products at issue was a violation of section 304 of the Tariff Act of 1930, 19 U.S.C. § 1304(a), but "the complainant has failed to prove that the failure to designate the country of origin of the subject goods violates the Lanham Act § 43(a)," which requires evidence that the failure to mark "had caused the customer confusion or mistake." *Id.* at 22. The ALJ cited a lack of evidence regarding consumer confusion: "The complainant has introduced no direct or circumstantial evidence that potential customers are confused as to the country of origin of the improperly

[33] Staff also alleges confusion by "U.S. Steel, and other competitors or public representatives with an interest in AD/CVD enforcement policy," but neither Staff nor U.S. Steel cites any evidence of confusion by these additional parties.

marked, imported caulking guns . . . ." *Id.* In *Certain Soft Sculpture Dolls Popularly Known as "Cabbage Patch Kids," Related Literature and Packing Therefor,* the Commission reviewed this precedent, setting a standard that "a violation of section 304, coupled with some evidence of either consumer confusion as a result of the failure to mark conspicuously the country of origin or a consumer preference for a domestically produced item, constitutes an unfair act under section 337." Inv. No. 337-TA-231, USITC Pub. No. 1923, Comm'n Op. at 9-10 (Nov. 1986). Staff cites no case law supporting its contention that the confusion of Customs agents alone can be the basis for a violation of section 337, and this legal theory would conflict with established Commission precedent and cases from other jurisdictions under the Lanham Act. The Supreme Court has cautioned that "[t]he words of the Lanham Act should not be stretched to cover matters that are typically of no consequence to purchasers." *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 32-33 (2003).

Lanham Act claims must be tied to consumer confusion and U.S. Steel appears to concede this legal requirement, arguing that the confusion of Customs officials should be considered as evidence that customers are likely to be confused. U.S. Steel Baosteel Opp. at 40-41. U.S. Steel contends that Customs officials are sophisticated, that customers are unlikely to detect false designations of origin that have passed through Customs, and that purchasers may rely on a designation of origin credited by Customs. *Id.* But U.S. Steel cites no evidence to support these contentions. There is no evidence that customers rely on Customs records, and U.S. Steel does not explain how a customer would obtain such records.

Moreover, the available facts in the record demonstrate that consumers are well aware of the Chinese origin of the steel they purchase. In each of the prospective transshipments that U.S. Steel identified in the Complaint, the distributors explicitly disclosed the Chinese origin of the

steel. *See* Amended Complaint at ¶¶ 134-181, Exs. 46-54. Even while describing a plan to deceive U.S. Customs officials, these distributors provided potential customers with mill test certificates or other assurances that the steel was made in China. *Id.* at ¶¶ 136, 141, 147, 156, 161, 164, 170, 175. Judge Bonner cites evidence from a November 2010 staff report of Senator Wyden that references similar evidence, where transshippers openly advertise Chinese goods and provide evidence of the Chinese origin of their goods to potential purchasers. Bonner Expert Report at 14-16. The other alleged transshippers identified by Judge Bonner make similar representations regarding their relationships with Chinese steel manufacturers. *Id.* at 27-29. Judge Bonner and U.S. Steel identify one allegedly fraudulent mill test certificate prepared by an entity in Vietnam, Borun OCTG Co., Ltd. ("Borun"). U.S. Steel Baosteel Opp., Ex. 55. But there is no evidence that a customer was confused by this certificate or that it was even provided to a customer, as the "Purchaser" field of the certificate is blank. *Id.* Moreover, like the distributors identified in the Complaint, U.S. Steel alleges that Borun "holds itself out as an agent of Baosteel," U.S. Steel Baosteel Opp. at 39 n.29, which makes it unlikely that any customer dealing with Borun would be confused about the Chinese origin of its steel. No reasonable factfinder could find a likelihood of consumer confusion based on this evidence.

The evidence that U.S. Steel cites against each manufacturer respondent further confirms that customers are not likely to be confused about the origin of the steel that is transshipped. The solicitations by a Baosteel salesperson openly offered Chinese-made steel products. U.S. Steel Baosteel Opp., Exs. 11, 12, 13. [redacted]. *Id.*, Ex. 33. In discussions between Shagang and a U.S. distributor regarding transshipment through South America, the distributor confirms that there would be direct communication between the Chinese manufacturers and the American

customers: "You negotiate the price with you [*sic*] clients in USA." *Id.*, Ex. 26 at Shagang0044301. Internal documents from Angang state that "[redacted]." *Id.*, Ex. 40 at USS3700383601. In the alleged transshipment identified by U.S. Steel involving Shougang and U.S.-based customer [redacted], it was [redacted] that requested alterations to shipment documents. U.S. Steel Shougang Opp., Ex. 28. The contracts and other documents provided to [redacted] appear accurately to identify Shougang as the source of the steel and, as discussed above, the shipment appears to have originated from a port in China. *Id.*, Exs. 31, 33-36. For the alleged transshipment involving Hesteel, U.S. Steel identifies the customer, [redacted], as a partially-owned subsidiary of Hesteel that is alleged to be an active participant in misrepresenting the origin of the steel to customs officials. U.S. Steel Hesteel Opp. at 17-19, Ex. 3. U.S. Steel has not identified a single example of a false designation of origin provided to a customer or potential customer, or to a distributor, end-user, or anyone with a commercial interest in the allegedly transshipped steel.[34] Even if U.S. Steel's evidence of transshipment by the respondents were credited, there is no evidence from which a reasonable factfinder could find a likelihood of customer confusion.

U.S. Steel argues that evidence of actual confusion is unnecessary, but U.S. Steel cannot defeat summary judgment by supposition alone; there must be some direct or circumstantial evidence that shows likelihood of confusion. U.S. Steel cites the initial determination in *Nut*

[34] U.S. Steel identifies a falsified mill test report [redacted], and there is no evidence that this steel originated in China or was even imported. [redacted] This document may be evidence for a Lanham Act claim against [redacted], but it does not create a genuine issue of material fact for any of the respondents in the present investigation.

Jewelry for the proposition that "a complainant need not submit survey evidence showing customer confusion." Inv. No. 337-TA-229, USITC Pub. No. 1929, Initial Determination at 12-13, 1986 WL 379339, at *7. But the Administrative Law Judge in *Nut Jewelry* was able to evaluate the labels and booklets packaged with the accused products to decide that there was a likelihood of confusion. *Id.* at 15-25, 1986 WL 379339, at *8-12. Here, the only evidence showing how the steel at issue was actually sold consists of solicitations and communications with customers where the Chinese origin of the steel is explicitly acknowledged. In many cases, the customers appear to cooperate in the alleged false designation and transshipment. It may be the case that the alleged transshipments and misrepresentations to Customs officials violate other federal laws and trade regulations,[35] but U.S. Steel has asserted a violation of the Lanham Act, and this claim cannot be proven without evidence of likelihood of confusion.

Accordingly, Respondents' motions for summary determinations are granted for the separate and independent reason that there is no evidence of the likelihood of confusion required under the Lanham Act.

D. Injury to Domestic Industry

Respondents separately move for summary determination based on a lack of evidence of injury attributable to any imports. Baosteel Motion at 36-42; Angang/WISCO Motion at 20

[35] Judge Bonner identifies several examples of criminal prosecutions and other enforcement actions related to fraudulent transshipments of Chinese goods. *See* Bonner Expert Report at 13-14. The Department of Commerce also has initiated investigations into the circumvention of AD/CVD orders that closely match the allegations in the present investigation. *See Certain Corrosion-Resistant Steel Products from the People's Republic of China*, Initiation of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders, International Trade Administration, A-570-026, C-570-027, 81 Fed. Reg. 19454-58 (Nov. 14, 2016); *Certain Cold-Rolled Steel Flat Products from the People's Republic of China*, Initiation of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders, International Trade Administration, A-570-029, C-570-030, 81 Fed. Reg. 81057-62 (Nov. 17, 2016).

(joining Baosteel Motion); Shougang Motion at 12-13; Masteel Motion at 18 (joining Baosteel Motion); Hesteel Motion at 16 (joining Baosteel Motion); Shagang Motion at 18 (joining Baosteel Motion). As discussed above in the context of the importation requirement, U.S. Steel has identified no evidence from which a reasonable factfinder could conclude that any respondent has imported or sold any steel products for importation into the United States under FDO. Accordingly, U.S. Steel cannot prove any injury attributable to the acts of any respondent and summary determination is also appropriate on this basis.

IV. CONCLUSION

For the foregoing reasons, motion docket nos. 1002-082, 1002-084, 1002-088, 1002-089, 1002-090, and 1002-093, are hereby GRANTED. U.S. Steel's FDO claim is hereby terminated with respect to Baosteel, Angang, WISCO, Shougang, Masteel, Hesteel, and Shagang. The evidentiary hearing scheduled to begin on October 17, 2017, is hereby suspended. All pending motions and applications for subpoenas are hereby DENIED as moot.

This initial determination, along with supporting documentation, is hereby certified to the Commission. This initial determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to Commission Rule 210.43(a), or the Commission, pursuant to Commission Rule 210.44, orders, on its own motion, a review of the initial determination or certain issues contained herein. 19 C.F.R. § 210.43(d).

This order is being issued with a confidential designation, and pursuant to Ground Rule 1.10, each party shall submit to the Administrative Law Judge a statement as to whether or not it seeks to have any portion of this order deleted from the public version within seven (7) days. *See* 19 C.F.R. § 210.5(f). A party seeking to have a portion of the order deleted from the public version thereof must attach to its submission a copy of the order with red brackets indicating the

portion(s) asserted to contain confidential business information.[36] The parties' submissions under this subsection need not be filed with the Commission Secretary but shall be submitted by paper copy to the Administrative Law Judge and by e-mail to the Administrative Law Judge's attorney advisor.

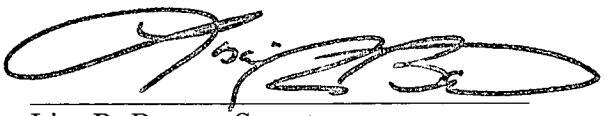
SO ORDERED.

Dee Lord
Administrative Law Judge

[36] Redactions should be limited to avoid depriving the public of the basis for understanding the result and reasoning underlying the decision. Parties who submit excessive redactions may be required to provide an additional written statement, supported by declarations from individuals with personal knowledge, justifying each proposed redaction and specifically explaining why the information sought to be redacted meets the definition for confidential business information set forth in Commission Rule 201.6(a). 19 C.F.R. § 201.6(a).

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, Monica Bhattacharyya, Esq., and the following parties as indicated, on **November 1, 2017**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
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On Behalf of Complainant United States Steel Corporation:

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- ☐ Via Hand Delivery
- ☒ Via Express Delivery
- ☐ Via First Class Mail
- ☐ Other:_____

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- ☒ Via Express Delivery
- ☐ Via First Class Mail
- ☐ Other:_____

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN CARBON AND ALLOY STEEL PRODUCTS**	**Investigation No. 337-TA-1002**

NOTICE OF COMMISSION DETERMINATION TO REVIEW AND ON REVIEW TO REVERSE AN INITIAL DETERMINATION TERMINATING COMPLAINANT'S FALSE DESIGNATION OF ORIGIN CLAIM

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review an initial determination ("ID") (Order No. 46) of the presiding administrative law judge ("ALJ") that terminated Complainant's false designation of origin claim under 19 CFR 210.21 and, in the alternative, under 19 CFR 210.18. On review, the Commission has determined to reverse the ID and remand the investigation to the ALJ for further proceedings.

FOR FURTHER INFORMATION CONTACT: Cathy Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2392. Copies of 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 SW., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at *https://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://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 investigation based on a complaint filed by United States Steel Corporation of Pittsburgh, Pennsylvania ("U.S. Steel"), alleging a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337. *See* 81 FR 35381 (June 2, 2016). The complaint alleges violations of section 337 based upon the importation into the United States, or in the sale of certain carbon and alloy steel products by reason of: (1) a conspiracy to fix prices and control output and export volumes, the threat or effect of which is to restrain or monopolize trade and commerce in the United States; (2) misappropriation and use of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States; and (3) false designation of origin or manufacturer, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* The notice of investigation identified numerous respondents that are Chinese

steel manufacturers or distributors, as well as some of their Hong Kong and United States affiliates. *Id.* In addition, the Office of Unfair Import Investigations (OUII) is a party in this investigation. *Id.*

On December 6, 2016, the ALJ, *sua sponte*, ordered U.S. Steel to show cause why its false designation of origin claim should not be terminated based on U.S. Steel's failure to submit "direct evidence that any named respondent actually imported any steel with a false designation of origin." Order No. 41 at 2. The ALJ stated that the absence of any known importation raises a question of subject matter jurisdiction and violates Commission Rule 210.12(a)(3), which "requires that a complaint 'describe specific instances of alleged unlawful importation[s] or sales . . . .'" *Id.* at 3.

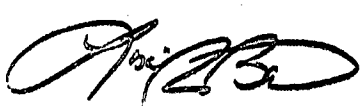
On January 11, 2017, the ALJ, acting *sua sponte*, issued the subject ID (Order No. 46) that terminated U.S. Steel's false designation of origin claim under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1) pursuant to 19 C.F.R. §§ 210.21 and 210.18. Specifically, the ID found that the complaint failed to comply with Commission Rule 210.12(a)(3), 19 C.F.R. § 210.12(a)(3), because the complaint "does not identify a specific instance of importation or sale." ID at 12.

On January 23, 2017, U.S. Steel and OUII filed petitions for review of the ID. On January 30, 2017, the participating respondents filed a joint response to the petitions for review. No party requested an oral argument before the Commission.

Having reviewed the record of the investigation, including the complaint, Order No. 46, the petitions for review, and the response thereto, the Commission has determined to review the ID. On review, the Commission has determined to reverse the ID and remand the investigation to the ALJ for further proceedings. The reasons for the Commission's determination will be set forth in the Commission's forthcoming opinion.

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 part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: February 27, 2017

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Reginald Lucas, Esq., and the following parties as indicated, on **February 28, 2017**.

Lisa R. Barton, Secretary
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On Behalf of Respondents Anshan Iron and Steel Group, Angang Group International Trade Corporation, Angang Group Hong Kong Co. Ltd., Wuhan Iron and Steel Group Corp., Wuhan Iron and Steel Co., Ltd., and WISCO America Co., Ltd.:

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PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN CARBON AND ALLOY STEEL PRODUCTS**	**Investigation No. 337-TA-1002**

COMMISSION OPINION

On January 11, 2017, the presiding Administrative Law Judge ("ALJ"), acting *sua sponte*, issued an initial determination ("ID") (Order No. 46) that terminated Complainant's false designation of origin ("FDO") claim under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1), pursuant to Commission Rules 210.21 and 210.18, 19 C.F.R. §§ 210.21 and 210.18. Specifically, the ID found that the complaint failed to comply with Commission Rule 210.12(a)(3), 19 C.F.R. § 210.12(a)(3), which requires a description of "specific instances of alleged unlawful importations or sales." On February 27, 2017, the Commission issued a notice of its determination to review the ID, and on review, to reverse the ID and remand for further proceedings. For the reasons set forth herein, the Commission has determined that Complainant's FDO claim, as alleged in the complaint, satisfies Commission Rule 210.12(a)(3) and comes within the jurisdiction of the Commission.

I. BACKGROUND

The Commission instituted this investigation on June 2, 2016, based on a complaint filed by United States Steel Corporation of Pittsburgh, Pennsylvania ("U.S. Steel"), alleging a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. 81 *Fed. Reg.* 35381 (June 2, 2016). The complaint, as amended on September 22, 2016 ("Complaint"), alleges violations of section 337 based upon the importation into the United States, or in the sale of certain carbon and

alloy steel products by reason of: (1) a conspiracy to fix prices and control output and export volumes, the threat or effect of which is to restrain or monopolize trade and commerce in the United States; (2) misappropriation and use of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States; and (3) false designation of origin or manufacturer, the threat or effect of which is to destroy or substantially injure an industry in the United States.[1] *Id.*

The notice of investigation named as respondents numerous Chinese steel manufacturers and distributors, as well as certain Hong Kong and United States affiliates.[2] *Id.* The Distributor Respondents and thirteen (13) other respondents have defaulted. *See* ID at 3 n.5; Order No. 32, Commission Decision Not to Review (Oct. 14, 2016); Order No. 33, Commission Decision Not to Review (Oct. 18, 2016); Order No. 37, Commission Decision Not to Review (Nov. 18, 2016). The Office of Unfair Import Investigations ("OUII") is also a party in this investigation. 81 *Fed. Reg.* 35382 (June 2, 2016).

On August 26, 2016, Respondents filed a motion to terminate U.S. Steel's antitrust claim under Commission Rule 210.21 and, in the alternative, under Commission Rule 210.18. On November 14, 2016, the ALJ issued Order No. 38 that granted Respondents' motion to terminate U.S. Steel's antitrust claim. On December 19, 2016, the Commission determined to review Order No. 38. 81 *Fed. Reg.* 94416-417 (Dec. 23, 2016). Order No. 38 remains under Commission

[1] On February 15, 2017, U.S. Steel filed a motion to partially terminate the investigation on the basis of withdrawal of its trade secret allegations and to suspend the procedural schedule. The ALJ suspended the procedural schedule the same day. *See* Order No. 55 at 2. On February 22, 2017, the ALJ issued an ID (Order No. 56) granting the remainder of U.S. Steel's motion.

[2] "Respondents" refers to all respondents that have entered an appearance and are represented by counsel. ID at 2 n.3. "Distributor Respondents" refers to the nine respondents alleged to transship carbon and alloy steel products. *See id.* at 3 n.5. "Manufacturer Respondents" refers to the respondents that allegedly produce the carbon and alloy steel products that are sold and transshipped by the Distributor Respondents.

review.

On September 8, 2016, the Respondents moved pursuant to Commission Rule 210.21(a)(1) and Ground Rule 3.4 to terminate U.S. Steel's FDO claim for failure to allege in the Complaint the following necessary elements of a Section 43(a) claim: "(1) Manufacturer Respondents used any false designations of origin or manufacture, (2) any customer, much less a substantial portion of intended customers, was likely to be deceived by any false designation, (3) any false designation was material to any customer's buying decision, or (4) any alleged deception or confusion of a consumer injured U.S. Steel in any manner." Respondents' Memorandum in Support of Their Motion to Terminate Complainant's Claim of Unfair Acts Under Section 43(a) of the Lanham Act (EDIS No. 590183) at 23 (Sep. 8, 2016). U.S. Steel and the Commission's Investigative Attorney ("IA") filed oppositions to the motion to terminate on September 19, 2016 (EDIS Nos. 590973, 590949). The Respondents filed a reply brief on September 22, 2016 (EDIS No. 591194).

In reviewing the Respondents' September 8, 2016 motion to terminate U.S. Steel's FDO claim, the ALJ "discovered that U.S. Steel's allegations of unfair importation are not supported by direct factual evidence." Order No. 41 at 2 (Dec. 6, 2016). The ALJ noted that U.S. Steel admitted that "based on the facts it is merely 'likely' that the respondents 'have sold Chinese carbon and alloy steel products for importation to the United States,' and that 'a specific importer is currently unknown.'" *Id.* at 2 (citing Compl. ¶ 202[3]). The ALJ found that the "evidence attached to the complaint merely shows that the nine named distributor respondents offered to transship Chinese steel through other countries at the request of a potential customer in March 2016." *Id.* (citing Compl. ¶¶ 134-181; Exs. 46-54). Although the Complaint cites evidence of

[3] All citations to "Complaint" refer to the Amended Complaint filed on September 22, 2016 (EDIS No. 591156). Exhibits to the Amended Complaint are the same as those filed with the original complaint.

actual importation by four distributor respondents, the ALJ found that the dates of importation "precede the offers to transship steel by several months to a year" and "[t]here is no direct evidence at all to indicate that these four importations included a false designation of origin or were otherwise unlawful." *Id.* (citing Compl. Ex. 56). Accordingly, the ALJ, *sua sponte*, ordered U.S. Steel to show cause why its FDO claim should not be terminated based on U.S. Steel's failure to submit "direct evidence that any named respondent actually imported any steel with a false designation of origin." *Id.* The ALJ stated that the absence of any known importation raises a question of subject matter jurisdiction and violates Commission Rule 210.12(a)(3). *Id.* at 3 (citing 19 U.S.C. § 1337(a)(1)(A) and 19 C.F.R. § 210.12(a)(3)). The ALJ instructed that "[n]o matter other than the sufficiency of the allegations of importation shall be argued, and no additional evidence shall be submitted." *Id.* at 5.

Following briefing from the parties in response to Order No. 41, on January 11, 2017, the ALJ issued, *sua sponte*, the subject ID (Order No. 46) terminating U.S. Steel's FDO claim for failure to comply with Commission Rule 210.12(a)(3). ID at 16. The ID asserted that "when a complaint fails to comply with Rule 210.12(a)(3), it fails to state a claim on which relief can be granted and must be dismissed, as a matter of law." *Id.* at 6. The ID asserted that the Commission's rule on pleading is stricter than the jurisdictional requirements under the statute. *Id.* at 7 n. 10. For that reason, the ID did not reach the issue of whether the Complaint satisfies the jurisdictional prerequisite for importation or sale in accordance with section 337(a)(1)(A). *Id.*

The ID acknowledged that "Rule 210.12(a)(3) can be satisfied by circumstantial evidence," but it found that the Rule "has not been satisfied by U.S. Steel's complaint in this case." *Id.* at 12. The ID found U.S. Steel's allegations that it is "likely" that unlawful importations have occurred does not satisfy that Rule. *Id.* at 7 (citing Compl. ¶ 202). The ID stated that the Rule

"requires a description of particular steel which, based on facts or reasonable inferences from facts, was made in China, shipped from another country, and arrived in the United States labelled as steel from that other country." *Id.* The ID found that U.S. Steel's Complaint contains circumstantial evidence including statistical evidence giving rise to an inference that transshipments of Chinese steel occur or have occurred, but no evidence from which one could reasonably infer that a specific transshipment occurred. *Id.* at 11, 12 n. 15. The ID also found that it can be inferred from the allegations in U.S. Steel's Complaint "that particular parties would be willing to import products unfairly or may have done so on some occasion in the past, but such evidence does not identify a specific instance of importation or sale." *Id.* at 12. The ID rejected the Complaint exhibits (*e.g.* Compl. Exs. 50 and 51) as evidence of actual unlawful importation of Chinese steel because the exhibits contain only general statements about the distributor respondents' ability and willingness to transship steel and a statement indicating a past practice of doing so. *Id.* at 13-15. The ID also rejected U.S. Steel's contention that it would be too expensive for the company to import mismarked steel into the United States in order to demonstrate a specific instance of importation. *Id.* at 15-16.

The ID also noted that the ALJs have authority under Commission Rule 210.21(a)(1) to terminate an investigation in whole or in part "at any time . . .for good cause" "as long as the ALJ has not yet issued an initial determination on violation." *Id.* at 18. The ID disagreed with U.S. Steel and the IA that the sufficiency of the Complaint may not be challenged because the Commission has already determined it to be sufficient pursuant to Commission Rules 210.9 and 210.10. *Id.* at 19. The ID explained that "[t]hese rules do not indicate that satisfying pre-institution review for 'sufficiency and compliance with the applicable section of this chapter,' insulates a complaint from a challenge based on failure to state a claim as a matter of law." *Id.*

The ID also disagreed with U.S. Steel and the IA that the legal sufficiency of the Complaint is not subject to review by the ALJ. *Id.*

The ID further found that dismissal is proper under Commission Rule 210.18. *Id.* at 20-22. The ID reasoned that "[a] party may not seek discovery for the purpose of trying to establish a cognizable claim." *Id.* at 21 (citing 2 Moore's Federal Practice § 23.34[4][a] at 12-99-100 (3d ed. 2013)). The ID also found that "[t]he Commission specifically has approved the practice of awarding summary determination after institution of an investigation where the complaint fails to state a claim." *Id.* at 21-22.

Relying on the Administrative Procedure Act ("APA"), the ID found that "the agency's decision to institute this investigation cannot be construed as a determination of the legal sufficiency of the complaint." *Id.* at 25. The ID reasoned that "[i]f agency personnel were permitted to make binding decisions on the legal merits of a complaint, they would be encroaching on the function of the ALJ, in violation of the APA, which requires that an ALJ be insulated from agency 'supervision or direction,' 5 U.S.C. § 554(d)(2)." *Id.* Accordingly, the ID found that dismissal of the FDO claim is proper under Commission Rules 210.21 and 210.18, and for good cause shown. *See id.* at 16-26.

On January 23, 2017, U.S. Steel and the IA filed respective petitions for review of the ID. On January 30, 2017, the Respondents filed a joint response to the two petitions for review.

II. ANALYSIS

The issue presented on review is whether U.S. Steel's allegations in the Complaint with respect to its FDO claim under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1), satisfies Commission Rule 210.12(a)(3), which requires a complaint filed pursuant to section 337 to

"[d]escribe specific instances of alleged unlawful importations or sales."[4] The ID concluded that the Complaint fails to satisfy that Rule. For the following reasons, we determine that U.S. Steel's FDO claim, as alleged in the Complaint, satisfies Rule 210.12(a)(3) and comes within the jurisdiction of the Commission. Accordingly, we reverse the ID's termination of the FDO claim in this investigation and remand the investigation to the ALJ for further proceedings.

As an initial matter, we agree with the ID that the Commission's decision to institute an investigation does not preclude an ALJ from reexamining the sufficiency of a complaint. *See, e.g.*, *Certain Wireless Devices With 3G and/or 4G Capabilities and Components Thereof*, Inv. No. 337-TA-868, Order 25 at 5 (May 10, 2013) (denying respondent's motion for partial termination of the investigation because respondent's belief that the specific instances of importation are authorized does not mean the Commission does not have jurisdiction); *Certain Electronic Devices Including Handheld Wireless Communications Devices*, Inv. No. 337-TA-673, Order 7 at 5 (Apr. 16, 2009) (denying respondents' motion to amend the Notice of Investigation because the complaint meets the requirements of Commission Rules 210.12(a)(3) and 210.12(a)(9)(viii)); *Certain Wireless Communication Chips and Chipsets, and Products Containing Same, Including Wireless Handsets and Network Interface Cards*, Inv. No. 337-TA-614, Order No. 5, at 22-26 (Oct. 18, 2007), *not rev'd by Comm'n Notice* (Nov. 21, 2007) (granting respondent's motion to terminate for arbitration but finding the complaint inadequate to support an investigation based only on "test products" because the complaint does not satisfy Commission Rule 210.12(a)(3)). However, we do not adopt the ID's discussion of the ALJ's authority under the APA in the context of Commission Rules 210.21(a) and 210.18. *See* ID at 22-25.

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[4] In section 337 investigations, the Commission Rules require greater specificity and detail in the complaint than the "notice pleading" standard which applies in federal district court. *Compare* 19 C.F.R. § 210.12 *with* Fed. R. Civ. Proc. 8.

Moreover, we agree with the ID that the Commission's determination to institute an investigation does not preclude an ALJ from terminating a claim for failure to state a viable cause of action.[5] *See Amgen Inc. v. Int'l Trade Comm'n*, 902 F.2d 1532, 1536 (Fed. Cir. 1990) (vacating the Commission's final determination in *Certain Recombinant Erythropoietin*, Inv. No. 337-TA-281, and remanding the case to the Commission with instructions to dismiss the complaint on the merits for failure to state a proper cause of action under section 337); 55 FR 26268 (Jun. 27, 1990) (Federal Register notice dismissing the complaint in Inv. No. 337-TA-281).

However, we reject the ID's interpretation that Commission Rule 210.12(a)(3) is stricter than the jurisdictional prerequisite for importation under section 337(a)(1)(A). *See* ID at 7 n. 10. The statute governing section 337 investigations provides that the "Commission ***shall*** investigate any alleged violation of this section on complaint." 19 U.S.C. § 1337(b)(1) (emphasis added). This unambiguous language does not suggest any basis for contracting the jurisdiction granted by section 337 and there is no reason to read the Commission's Rule concerning pleading requirements to restrict it.

The Commission has jurisdiction to investigate allegations of violations of section 337 on complaints properly filed with the Commission that comply with the statute and regulations.

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[5] Because we find that U.S. Steel's FDO claim, as alleged in the Complaint, satisfies Rule 210.12(a)(3), we do not reach the issues of whether the ALJ gave proper notice and followed proper procedural safeguards before terminating the FDO claim under Commission Rules 210.21 and 210.18. *See* ID at 16-22. Nevertheless, we express our reservations on terminating a claim *sua sponte* under these Rules when no party appears to have challenged the sufficiency of the allegations of unlawful importation before the ALJ issued Order No. 41. *See* Petition of the Office of Unfair Import Investigations for Review of the Initial Determination Terminating False Designation Claim ("IAPet") (EDIS No. 601506) at 10 (Jan. 23, 2017). Moreover, we note that even though a legally defective claim may be terminated under Commission Rule 210.18, proper notice and procedural safeguards must be followed; here, the order to show cause expressly prohibited the parties from presenting any evidence, including affidavits, or arguing any issue other than the sufficiency of the complaint as to importation. *See id.* at 15 (citing 19 C.F.R. §§ 210.18(b), (c), (d)); Order No. 41 at 5.

Under both the governing statute and applicable Commission rules, a complainant seeking relief from unfair practices in import trade before the ITC must allege that unlawful importation or sale has taken place. *See* 19 U.S.C. § 1337(a)(1)(A) (declaring unlawful "[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States, or in the sale of such articles by the owner, importer, or consignee"); 19 C.F.R. § 210.12(a)(3) (requiring a complaint filed pursuant to section 337 to "[d]escribe specific instances of alleged unlawful importations or sales").

U.S. Steel alleges in the Complaint with respect to the FDO claim that "the manufacturer respondents evade U.S. anti-dumping and countervailing duty orders on Chinese steel imports by submitting false documents and transshipping products 'through other countries to disguise the steel's country of origin and manufacturing mill from U.S. Customs and to deceive domestic steel consumers.'" Compl. ¶ 126. U.S. Steel also alleges the following in the Complaint:

- Distributor Respondents and Manufacturer Respondents import accused steel products into the United States, *see id.* ¶¶ 2, 5, 126, 128, 133, 186-201, Exs. 44, 55, 56;

- Distributor Respondents represented that they transshipped their products through third countries and provided U. S. Steel's investigators with sample documents from past transshipments, *see id.* ¶¶ 133-81, Exs. 46-54;

- Distributor Respondents are knowledgeable and freely discussed details of how false origin documents are used and offer to transship accused steel products from a mill in China to the United States via a third country, *see id.*; *see also id.*, Ex. 45 at 5, 41-43;

- Manufacturer Respondents authorize Distributor Respondents to sell accused steel products and Distributor Respondents tout their relationship with Manufacturer Respondents, *see id.* ¶¶ 136, 141-42, 147, 155-56, 158, 162, 164, 170, 175, 180, Ex. 46-54;

- Trade statistics show spikes in imports of accused steel products from known transshipment countries following the imposition of antidumping and countervailing duty orders on China, *see id.* ¶¶ 128-32; and

- A U.S. Steel senior executive declares that Respondents' transshipping practice is commonplace, *see id.*, Ex. 58 at ¶ 9.

Taking these allegations in the Complaint and the accompanying exhibits as true,[6] the Commission finds that U.S. Steel's FDO claim comes within the jurisdiction of the Commission and satisfies Rule 210.12(a)(3). Even the ID found that "U.S. Steel's complaint contains circumstantial evidence that transshipments occur." ID at 12 n. 15; *see also id.* at 12 ("From the additional allegations in U.S. Steel's complaint it can be inferred that particular parties would be willing to import products unfairly or may have done so on some occasion in the past."); *id.* at 13 ("Exhibit 50 contains only general statements about the distributor respondents' ability and willingness to transship steel, and a statement indicating a past practice of doing so."). Under these circumstances, nothing more is required to satisfy Commission Rule 210.12(a)(3). The fact that U.S. Steel's Complaint did not include documentation, such as confidential mill certificates and shipping documents, that shows a specific batch of accused steel was imported using the unlawful transshipment practice alleged in the Complaint does not render the Complaint insufficient to state a cause of action under section 337(a)(1)(A) for the following reasons.

First, as explained above, the Commission rejects the interpretation that Commission Rule 210.12(a)(3) is stricter than the jurisdictional prerequisite for importation or sale under section 337(a)(1)(A).

Second, the nature of the FDO claim asserted under the Lanham Act, which at its core involves allegations of the use of false documents during importation to disguise the accused

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[6] When considering a motion to terminate for failure of a complaint to state a claim upon which relief can be granted, the complaint must be construed in a light most favorable to complainant and complainant's allegations are to be taken as true. *See Certain Plastic Food Storage Containers*, Inv. No. 337-TA-152, Order No. 10, 1983 WL 207325, at *1 (Aug. 11, 1983) (denying a motion to terminate for failure of the complaint to state a claim upon which relief can be granted).

steel's country of origin from U.S. Customs and Border Protection, does not lend itself to the specificity required by the ID. *See* Compl. ¶ 126. The ID correctly recognized that "the application of Rule 210.12(a)(3) can vary depending on the nature of the claim of unfair importation." ID at 11 n.13. Under section 337(a)(1)(A), and FDO claims in particular, it may be the case that specific information on importation is difficult or impossible to obtain because the evidence may only be in the hands of the respondents or such information could be acquired only if the complainant carried out the unlawful importation itself or entered into a sales contract to perform the unlawful importation. *See* Complainant U.S. Steel's Petition for Review of the Initial Determination Terminating False Designation Claim Due to Non-Compliance With Commission Rule 210.12(a)(3) ("CPet") (EDIS No. 601539) at 15 (Jan. 23, 2017); *see* IAPet at 13 n. 5. Moreover, in this investigation, U.S. Steel alleges that it is common practice for Distributor Respondents to redact the names of shipping entities and provide false origin information to U.S. Customs and Border Protection, making it difficult to identify who the actual importers, producers, and consignees are for the accused articles. CPet at 22-23 (citing Compl. ¶¶ 165-66, Exs. 50, 51). Under the circumstances described in the Complaint, circumstantial evidence of the kind that U.S. Steel presented in support of its importation allegation is sufficient to satisfy Rule 210.12(a)(3).

Finally, the ID's heightened pleading standard does not comport with Commission Rule 210.4(c), which allows parties to make "allegations and other factual contentions" in their pleadings as long as they "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." 19 C.F.R. § 210.4(c); *see* CPet at 14 (citing *Certain Inkjet Ink Cartridges with Printheads & Components Thereof*, Inv. No. 337-TA-723, Order No. 24, 2010 WL 5872442, at *5 (Dec. 23, 2010)). Specifically, the ID interpreted the Rule to require allegations of a "particular steel" or a "specific batch of steel" and allegations of "when, where,

[and] by whom" the steel was manufactured and transshipped to the United States. *See* ID at 11 n.14, 12, 14. The Commission agrees that "[t]he role of discovery is to find support for properly pleaded claims, not to find the claims themselves," *id.* at 6-7 n. 9. However, a properly pleaded FDO claim under section 337(a)(1)(A) does not necessarily require the detailed allegations required by the ID. As the ID acknowledged, U.S. Steel's Complaint provided direct evidence that Respondents import accused steel products and circumstantial evidence that transshipments have occurred. The role of discovery here, therefore, is to find support for the Complaint's FDO allegations necessary to prove the importation element for the accused products.

Respondents' submission challenges the credibility of every piece of evidence cited in the Complaint upon which U.S. Steel relies to satisfy Rule 210.12(a)(3). *See* Respondents' Response to Complainant U.S. Steel's and the Office of Unfair Import Investigations' Petitions for Review of Order 46 Terminating U.S. Steel's False Designation of Origin Claim (EDIS No. 602206) at 9-24 (Jan. 30, 2017). Moreover, Respondents argue that recent facts brought to light after the Commission's pre-institution review (and which were the subject of a motion for sanctions filed by Respondents)[7] raise questions as to whether the instances of importation or sales described in the Complaint are, in fact, unlawful. *See id.* at 9. However, questions regarding the lawfulness of any imports go to the merits of the FDO claim, not the Commission's jurisdiction to hear it. *See Amgen Inc. v. Int'l Trade Comm'n*, 565 F.3d 846, 854 (Fed. Cir. 2009) (holding that the parties' dispute as to whether all of the products that the respondent imported were entitled to the protection of the safe harbor provision of 35 U.S.C. § 271(e)(1) goes to the merits of the complaint, not to the Commission's jurisdiction to hear it); *Certain Wireless Devices With 3G and/or 4G*

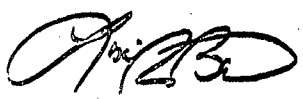
[7] On January 10, 2017, Respondents filed a motion for sanctions (EDIS No. 600645) in light of U.S. Steel's failure to disclose the country of origin for the goods identified in Exhibits 55 and 56 of the Complaint. U.S. Steel and the IA filed oppositions to the motion for sanctions on January 23, 2017. The ALJ denied the motion for sanctions on February 7, 2017. *See* Order No. 52.

Capabilities and Components Thereof, Inv. No. 337-TA-868, Order 25 at 5 (May 10, 2013) (denying respondent's motion for partial termination of the investigation because respondent's belief that the specific instances of importation are authorized does not mean the Commission does not have jurisdiction); *Certain Drill Bits and Products Containing Same*, Inv. No. 337-TA-844, Comm'n Notice (Aug. 22, 2012) (affirming the ALJ's grant of summary determination of no importation but not adopting any statements in the ID to the effect that the determination was on jurisdictional grounds). Even if there is a possibility that U.S. Steel will not be able to ultimately prove actual importation or sales that were unlawful, these factual disputes should be decided by the ALJ after the parties have had a reasonable opportunity for further investigation and discovery.

III. CONCLUSION

For the foregoing reasons, the Commission has reviewed Order No. 46, and on review, reverses and remands to the ALJ for further proceedings.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: March 27, 2017

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **OPINION** has been served by hand upon the Commission Investigative Attorney, Reginald Lucas, Esq., and the following parties as indicated, on **March 27, 2017**.

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of	
CERTAIN CARBON AND ALLOY STEEL PRODUCTS	Inv. No. 337-TA-1002

ORDER NO. 46: INITIAL DETERMINATION TERMINATING FALSE DESIGNATION CLAIM DUE TO NON-COMPLIANCE WITH COMMISSION RULE 210.12(a)(3)

(January 11, 2017)

Pursuant to Commission Rules 210.21 and 210.18 and for good cause shown, Complainant United States Steel Corporation's claim under section 337(a)(1)(A)(i) of the Tariff Act of 1930, as amended, for false designation of origin under the Lanham Act, 15 U.S.C. § 1125(a)(1), is hereby terminated. 19 U.S.C. § 1337(a)(1)(A)(i); 19 C.F.R. § 210.21; 19 C.F.R. § 210.18; 19 C.F.R. § 210.12(a)(3).[1]

I. BACKGROUND

A. The Complaint

The Commission instituted this investigation to determine, *inter alia*, whether there is a violation of section 337(a)(1)(A)(i) in the importation, the sale for importation, and the sale within the U.S. after importation of certain carbon and alloy steel products by reason of false designation of origin or manufacturer. 81 Fed. Reg. 35381-82 (2016); Notice of Investigation

[1] With the exception of the pending motion for sanctions (Motion Docket No. 1002-048), the parties' pending motions and discovery requests that relate to the false designation claim are hereby denied as moot.

(May 26, 2016) at 2.[2] In its amended complaint (the "complaint") Complainant United States Steel ("U.S. Steel") alleges that the manufacturer respondents evade U.S. anti-dumping and countervailing duty orders on Chinese steel imports by submitting false documents and transshipping products "through other countries to disguise the steel's country of origin and manufacturing mill from U.S. Customs and to deceive domestic steel consumers." Compl. at ¶ 126.[3] U.S. Steel alleges that, "These constitute unfair acts in violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)." *Id.*

In support of these allegations, U.S. Steel presents statistical evidence showing that, "After the Commerce Department initiated countervailing duty and anti-dumping investigations in 2009, OCTG shipment volumes from Malaysia, Thailand, Taiwan, and Vietnam began to increase over historical norms." *Id.* at ¶ 129.[4] The complaint alleges that shipments of corrosion-resistant steel from Vietnam also "spiked" after the Commerce Department "began considering duties on Chinese steel." *Id.* at ¶ 130. The complaint alleges that "the same happened with cold-rolled steel." *Id.* at ¶ 131. U.S. Steel says it "is not aware of significant

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[2] The Commission also instituted this investigation to determine whether there is a violation of section 337 by reason of a conspiracy to fix prices and control output and export volumes, the threat or effect of which is to restrain or monopolize trade and commerce in the United States, and misappropriation and use of trade secrets. 81 Fed. Reg. 35381-82; Notice of Investigation (May 26, 2016) at 2. On November 14, 2016, the pricing-fixing claim was terminated for failure to state a claim on which relief can be granted. Order No. 38, *review granted*, 81 Fed. Reg. 94416-17 (Dec. 23, 2016).

[3] The manufacturer respondents participating in this investigation are China Shougang International Trade & Engineering Corporation ("Shougang"), Masteel Iron and Steel Co. Ltd., Magang (Group) Holding Co. Ltd. ("MaSteel"), Anshan Iron and Steel Group, Angang Group International Trade Corporation, Angang Group Hong Kong Co. Ltd. ("AnSteel"), Wuhan Iron and Steel Group Corp., Wuhan Iron and Steel Co., Ltd., WISCO America Co., Ltd., Baosteel America, Inc. ("Wuhan"), Shanghai Baosteel Group Corporation, Baoshan Iron & Steel Co., Ltd. ("Baosteel"), Hebei Iron and Steel Group Co., Ltd., Hebei Iron & Steel Group Hengshui Strip Rolling Co., Ltd., Hebei Iron & Steel (Hong Kong) International Trade Co., Ltd. ("Hebei"), Jiangsu Shagang Group, and Jiangsu Shagang International Trade Co., Ltd. ("Shagang").

[4] "OCTG" stands for oil-country tubular goods. Compl. ¶ 93.

increases in local manufacturing capacity that could account for these countries' changing export volumes," and alleges that, with "the help of" the distributor respondents, the manufacturer respondents create false origin documents and transship Chinese steel through foreign countries to avoid U.S. duties. *Id.* at ¶¶ 132, 133.[5]

The complaint describes a series of electronic communications between individuals identified as prospective customers, who purport to be interested in purchasing steel products, and representatives of distributor respondents, who offer to provide steel made in Chinese mills for import into the United States with false designations of origin. Compl. at ¶¶ 134-138. On the basis of such communications, the complaint alleges, respondents "evade U.S. duties by falsely identifying the country of origin for their products." *Id.* at ¶¶ 138-181.

U.S. Steel alleges that the distributor respondents "were broadly willing to engage in transshipping and falsifying documents," and that "[m]ill certificates provided by" the distributor respondents "demonstrate that they regularly do business with" the manufacturer Respondents. *Id.* at ¶ 184. "Moreover," the complaint continues, "statistics suggest that transshipping occurs on a large scale across multiple countries." *Id.* "U.S. Steel therefore believes that discovery will demonstrate" that the manufacturer respondents "encourage and participate in false labeling." *Id.*

[5] The distributor respondents are EQ Metal (Shanghai) Co., Ltd.; Kunshan Xinbei International Trade Co., Ltd.; Taian JNC Industrial Co., Ltd.; Tianjin Tiangang Guanye Co., Ltd.; Tianjin Xinhai Trade Co., Ltd.; Tianjin Xinlianxin Steel Pipe Co., Ltd.; Tianjin Xinyue Industrial and Trade Co., Ltd.; Wuxi Sunny Xin Rui Science and Technology Co., Ltd.; and Xian Linkun Materiáls (Steel Pipe Supplies) Co., Ltd. Compl. ¶¶ 60-68. All of these respondents were defaulted pursuant to Order No. 32 (Sept. 14, 2016), *not rev'd by* Comm'n Notice (Oct. 14, 2016).

B. Order to Show Cause

On December 5, 2016, I issued an order to show cause regarding U.S. Steel's failure to allege facts showing actual importation for its false designation claim. Order No. 41. The order stated that in reviewing respondents' pending motion to dismiss U.S. Steel's false designation claim, "it was discovered that U.S. Steel's allegations of unfair importation are not supported by direct factual evidence." *Id.* at 2. Order No. 41 discussed the lack of any "direct evidence that any named respondent actually imported any steel with a false designation of origin." *Id.* The order noted that the exhibits attached to the complaint also do not furnish any evidence of a specific instance of importation. *Id.* at 2.[6]

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[6] The pleading defect, which was discovered in the course of reviewing respondents' motion to terminate Complainant's claim of unfair acts under section 43(a) of the Lanham Act, Motion Docket No. 1002-034, is not a mere technicality; it goes to the question whether U.S. Steel has stated a claim under the Lanham Act upon which relief can be granted. The standard for stating a claim upon which relief can be granted is plausibility. To avoid dismissal a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). Plausibility requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The plausibility standard is not akin to a "probability requirement," but asks for more than a sheer possibility a defendant acted unlawfully. *Id.*

To make out a claim under section 337 for violation of the Lanham Act, the complainant must show "some evidence of either consumer confusion as a result of the failure to mark conspicuously the country of origin or a consumer preference for a domestically produced item. . . ." *Certain Soft Sculpture Dolls Popularly Known as "Cabbage Patch Kids," Related Literature and Packing Therefor,* Inv. No. 337-TA-231, Views of the Comm'n at 9-10 (Nov. 1986). "If consumers did not have a preference for the domestic article, then there would be no injury from the improper marking." *Id.* at 28. To state a claim under section 337, therefore, a complaint must allege facts and circumstances bearing on the element of consumer confusion or preference. Due to the absence in the complaint of detailed information concerning importation, it is impossible to discern what allegedly happens when the accused product gets to the consumer. There is no factual basis for finding it plausible that consumers are confused or prefer American steel to the accused Chinese steel. This defect would be an alternative ground for dismissal, but this order does not reach the merits of U.S. Steel's Lanham Act claim, and Motion Docket No. 1002-034 is hereby denied as moot.

In its pleadings in response to Order No. 41,[7] U.S. Steel says the importations referred to under "SPECIFIC INSTANCES OF UNFAIR IMPORTATION" in paragraphs 187-201 of the complaint, *see also* Compl. Exs. 44, 55, and 56, do not, and were not intended to, describe specific instances of unfair importation due to false designation of origin. U.S. Steel's Responsive Br. at 4 ("For purposes of the false designation of origin claim, the Datamyne data [in the referenced exhibits 44, 55, and 56] only show that Respondents traffic in Chinese steel bound for the United States. The Complaint uses other evidence to show that Respondents participate in transshipment and sales for importation of falsely designated Chinese steel to the United States."), 5 ("The omission of Datamyne's country of origin information is immaterial because Datamyne's information is not – and was never intended to be – dispositive for U.S. Steel's false designation claim.") U.S. Steel asserts that Exhibits 44, 55, and 56 apply to "*all* of the unfair acts alleged . . . not solely in relation to false designation."). *Id.* at 4 n.1. The complaint, however, belies this attorney argument.

In the paragraph immediately following paragraphs 187-201, the complaint plainly relates those paragraphs to the false designation claim, summing up the facts alleged in paragraphs 187-201. Compl. ¶ 202. Indeed, U.S. Steel concedes as much. U.S. Steel's Opening Br. at 7 n.4 (quoting ¶ 202 and stating, "That paragraph summarizes the allegations of several prior paragraphs by concluding, '[b]ased on these facts, it is likely that Proposed Distributor Respondents have sold Chinese carbon and alloy steel products for importation to the United States, even where a specific importer is currently unknown.'"). After Order No. 41 pointed out that the importations listed in paragraphs 187-201 disclosed China as the origin of the shipments,

[7] Order No. 41 called for two sets of pleadings by each party. Order No. 41 at 5. Because Order No. 41 did not specify how the parties' submissions were to be styled the style is not uniform, which is confusing. In this decision, I use the various titles given to the pleadings by the respective parties, to make it easier for the reader to identify them.

and therefore could not represent instances of false designation, U.S. Steel conceded that Exhibits 44, 55, and 56 (the exhibits referred to under "SPECIFIC INSTANCES OF UNFAIR IMPORTATION") did not set forth specific instances of unfair importation due to false designation.[8]

Order No. 41 noted that the failure to describe a specific sale or importation raised jurisdictional issues that would be decided by assuming jurisdiction to determine whether U.S. Steel's complaint states a claim on which relief can be granted. Order No. 41 at 4-5 (citing *Amgen, Inc. v. United States Int'l Trade Comm'n (Amgen I)*, 902 F.2d 1532, 1536 (Fed. Cir. 1990). Order No. 41 also specifically referenced Commission Rule 210.12(a)(3) and stated that failure to comply with its requirements "may require termination of this claim." *Id.* at 3-4 (citing *Certain Wireless Communication Chips and Chipsets, and Products Containing Same, including Wireless Handsets and Network Interface Cards ("Wireless Communication")*, Inv. No. 337-TA-614, Order No. 5 at 22-26 (Oct. 18, 2007), *not rev'd by* Comm'n Notice (Nov. 21, 2007)).

On consideration of the submissions made in response to Order No. 41, I have determined that U.S. Steel's false designation claim must be terminated due to U.S. Steel's failure to comply with Commission Rule 210.12(a)(3). As discussed below, when a complaint fails to comply with Rule 210.12(a)(3), it fails to state a claim on which relief can be granted and must be dismissed, as a matter of law.[9] This decision rests on the complaint's failure to comply

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[8] The defect cannot be fixed by rolling three separate claims for relief into one complaint, as U.S. Steel has done. Each distinct claim is subject to the requirements of Rule 210.12(a)(3).

[9] U.S. Steel has not sought to amend the complaint to correct the pleading defect and does not maintain in any of its submissions that it possesses evidence of any specific instance of importation. Under these circumstances, granting leave to amend the complaint, if such leave were requested as required by the Commission, *see* Rule 210.14(b)(1), would be futile. U.S. Steel and Staff argue that U.S. Steel should be permitted to conduct discovery in an effort to find evidence of a specific instance of importation, but permitting discovery for that purpose would be contrary to law. "The role of discovery [] is to find support for properly pleaded claims, not

with Rule 210.12(a)(3), which is more exacting than section 337. *See Syntex Agribusiness, Inc. v. Int'l Trade Comm'n*, 659 F.2d 1038, 1047 (C.C.P.A. 1981) (noting as "persuasive" ITC's argument that "notice pleadings, of the type which are sufficient under Rule 8(a) of the Federal Rules of Civil Procedure . . . are inadequate for ITC purposes; and ITC rule 210.20 reasonably requires much more.") (Nies, J., concurring). A number of issues that were briefed by the parties in response to Order No. 41 need not be decided in light of the narrow ground for this decision.[10]

II. DISCUSSION

A. Commission Rule 210.12(a)(3) requires a description of specific instances of unlawful importation or sale.

The Commission's rules on pleadings appear at 19 C.F.R. § 210.12. Commission Rule 210.12(a) provides under the heading "*Contents of the complaint.*" that "the complaint shall -- . . . (3) Describe *specific instances* of alleged unlawful importations or sales . . . ." 19 C.F.R. § 210.12(a)(3) (emphasis added). On its face, Rule 210.12(a)(3) applies to all complaints at the ITC. U.S. Steel's complaint does not satisfy the rule. The complaint asserts that it is "likely" that unlawful importations have occurred, *see* Compl. ¶ 202, but contains no description of specific instances.

Waiving the requirements of the rule as written would be unprecedented and contrary to law. The Trade Act of 1930 authorizes the Commission "to adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties." 19 U.S.C.

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to find the claims themselves." *Torch Liquidating Trust ex rel. Bridge Assocs. L.L.C. v. Stockstill*, 561 F.3d 377, 391–92 (5th Cir. 2009).

[10] In particular, failure to plead in accordance with the Commission's rules is not jurisdictional, whereas failure to plead importation or sale in accordance with section 337 would be jurisdictional. *See* 19 U.S.C. § 1337(a)(1)(A). I have not decided herein that the complaint fails to satisfy the statute, and I need not reach the statutory question because the Commission's rule on pleading is stricter than the statute.

§ 1335. Pursuant to this authority, the Commission has adopted the rules governing pleading in section 19 C.F.R. § 210.12. These rules have the force and effect of law. "One of the most firmly established principles in administrative law is that an agency must obey its own rules." Charles H. Koch, Jr., Administrative Law and Practice ("Koch") § 4:22 at 305 (3d ed. 2010). "Federal courts accept this notion as a fundamental principle." *Id.* at 306; *see, e.g., Conservancy of Southwest Florida v. U.S. Fish & Wildlife Service*, 677 F.3d 1073, 1078, note 10 (11th Cir. 2012) ("An agency's failure to follow its own regulations is arbitrary and capricious.") (*citing Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1986)); *Wilson v. Comm'r,* 378 F.3d 541, 545 (6th Cir. 2004) ("It is an elemental principle of administrative law that agencies are bound to follow their own regulations."); *Center for Auto Safety v. Dole,* 828 F.2d 799, 805 (D.C. Cir. 1987) (recognizing that "a court will require an agency to follow the legal standards contained in its own regulations despite the fact that a statute has granted the agency discretion in the matter."). These firmly established legal principles apply under section 337. *Syntex,* 659 F.2d at 1046 ("[I]n light of the procedures for Investigations of Alleged Unfair Practices in Import Trade set forth in 19 CFR 210.1 et seq., as authorized by sections 333 and 335 of the Tariff Act of 1930 (19 U.S.C. §§ 1333 and 1335), it is clear that Syntex's revised complaint must comply with 19 CFR 210.20, which sets for the requirements for a section 337 complaint.") (citing *Sealed Air Corp. v. U.S. Int'l Trade Comm'n*, 645 F.2d 976, 987 (Cust. & Pat. App. 1981)).[11]

Administrative law judges, like other agency employees, are required to abide by the agency's rules. "Whatever law emerges about the effect of rules on the agency, it seems that a rule or statement should have equal effect on all units of the agency, including administrative

[11] *Syntex* cites 19 CFR 210.20, which is the predecessor to Commission Rule 210.12, and included a requirement that the complaint "[d]escribe specific instances of alleged unlawful importations or sales." *Syntex*, 659 F.2d at 145 n.4.

judges." Koch, § 4:22 at 313. An agency's ALJs, "although independent, [] are part of the agency for the purpose of determining the law that applies to them." *Id.* at 314.[12]

Commission ALJs must and do apply the Commission's pleading requirements. In *Certain Semiconductor Integrated Circuits Using Tungsten Metallization & Prod. Containing Same*, Inv. No 337-TA-648, Order No. 34, 2009 WL 506053 (Jan 14, 2009), the ALJ denied a motion to amend a complaint to add two respondents because of insufficient evidence of importation. 2009 WL 506053 at *2 (deciding "it is not clear that the . . . information upon which complainants base their infringement allegations necessarily relates to imported products. Additionally, the importation allegations . . . remain unsubstantiated."). In *Wireless Communications,* 337-TA-614, *supra*, the ALJ terminated an investigation "*in toto*" based on several provisions of Rule 210.12 including Rule 210.12(a)(3). 2007 WL 3342252 at *8 (holding that "the broad allegations of importation in the complaint do not comply with Commission Rule 210.12(a)(3), requiring 'specific instances' of importation."). Similarly, the ALJ in *In the Matter of Eprom, Eeprom, Flash Memory, & Flash Microcontroller Semiconductor Devices & Prod. Containing Same*, declined to permit amendment where the proposed amendment "does not meet the requirements of Commission rule 210.12 for the contents of a complaint." Inv. No. 337-TA-395, Order No. 18, 1997 WL 817748 at *3 (Aug. 27, 1997). In *Certain Active Comfort Footwear ("Footwear")*, Inv. No. 337-TA-660, Order No. 4 at 2, 2009 WL 434797 (Feb. 11, 2009), the ALJ denied a motion to amend a complaint as to a

[12] This is not to say that an ALJ is powerless to affect agency policy. "The role of administrative judges in policymaking is considerable." Koch, § 5:26 at 77. The ALJ raises policy issues to the ultimate agency decision-makers by applying "general policy to individual disputes." *Id.* at 78. An ALJ's decisions, "[A]lthough they are subject to administrative and judicial review . . . have a significant role in developing the law and policy of the agency." *Id.* at 73. Of course, the "independence" of ALJs is qualified by the requirement that they abide by agency rules and policies, as discussed above.

proposed distributor respondent because the complainant had not demonstrated with sufficient evidence that the proposed respondent "actually imports, sells for importation, or sells products that are alleged to infringe the asserted patent." The ALJ held that the complainant had not presented sufficient evidence that the proposed respondent actually sold accused products, but "only that it held itself out as a distributor." *Id.*

U.S. Steel cites two cases that it says were instituted on complaints less specific than the one before me. U.S. Steel Opening Br. at 11. With regard to *Certain Bearings and Packaging Thereof ("Bearings")*, Inv. No. 337-TA-469, U.S. Steel cites to paragraphs of the amended complaint that were withdrawn by the complainant, *see* EDIS Doc. 65695 (Mar. 29, 2002); in fact, the investigation was not instituted as to the proposed respondent, Bearing Discount, which was named in those paragraphs. *See* Notice of Investigation, EDIS Doc. 65697 (Apr. 10, 2002). U.S. Steel also cites *Certain Multiple Implement, Multi-Function Pocket Knives and Related Packaging and Promotional Materials ("Pocket Knives")*, Inv. No. 337-TA-398, 1997 WL 34728619, First Amended Compl. ¶ 43 (Mar. 28, 1997) ("'On information and belief, China Light exports such [infringing] knives to distributors and/or retailers who then resell them to customers throughout the United States.'"). U.S. Steel's Opening Br. at 8 n. 5. The first amended complaint in *Pocket Knives* did not go forward until a second amended complaint had been filed at the instigation of Staff. *See* Respondents' Reply Br. at 8, note 5 (citing and quoting *Pocket Knives*, Cover Letter attaching Second Amended Complaint, EDIS Doc. 169539 (May 8, 1997) (noting filing of second amended complaint "'contain[ing] further information requested by the Office of Unfair Import Investigations.'"). The second amended complaint contained more specific information than the first, exhibiting an article from a trade publication that identified Arrow, the specific respondent in the investigation, as the importer of knives "made by

the Shanghai, China, branch of the China Light Industrial Products Import and Export Co. . . . the largest maker of pocketknives in Shanghai." *Pocket Knives*, Second Amended Complaint, EDIS Doc. 169539, at ¶ 43, Exhibit 117. The investigation was instituted only after the second amended complaint was filed. *See* Notice of Investigation, EDIS Doc. 169544 (May 20, 1977).[13]

B. U.S. Steel's arguments regarding circumstantial evidence are unavailing because U.S. Steel's complaint presents insufficient circumstantial evidence of any specific act of importation.

U.S. Steel and Staff maintain that direct evidence is unnecessary under Commission Rule 210.12(a)(3), and that U.S. Steel has presented sufficient circumstantial evidence to satisfy the rule. U.S. Steel Opening Br. at 4-5, citing *Amgen II,* 565 F.3d at 853.[14] This argument fails because Rule 210.12(a)(3) requires more than circumstances that give rise to an inference that some unfair act has occurred somewhere at some time. The Commission's rule in plain words requires a description of specific instances of unfair importation or sale. U.S. Steel has failed to allege facts that, taken as true (as they must be at this stage of the proceeding), describe any specific unfair importation or sale—even circumstantially.

U.S. Steel presents statistical evidence giving rise to an inference that transshipment of Chinese steel has occurred. Statistical evidence by its nature may give rise to an inference that a specific occurrence is likely but cannot by itself describe a specific instance. U.S. Steel says statistical evidence in combination with other evidence in its complaint, "viewed as a whole,"

[13] It may be that the application of Rule 210.12(a)(3) can vary depending on the nature of the claim of unfair importation. But the rule must mean something—it cannot be ignored in the hope that discovery will yield the specific facts that should be described in the complaint.

[14] U.S. Steel's citation to *Amgen II* is inapposite. *Amgen II* was a patent case in which it was undisputed that "Roche has imported EPO," 565 F.3d at 853, and that the imported EPO allegedly violated the Amgen patent. The problem in this case is that U.S. Steel has accused an entire commodity without specifying, even on information and belief, identifiable steel that was sold or imported in violation of section 337, much less when, where, or by whom.

suffices to satisfy the rule. From the additional allegations in U.S. Steel's complaint it can be inferred that particular parties would be willing to import products unfairly or may have done so on some occasion in the past, but such evidence does not identify a specific instance of importation or sale.

Rule 210.12(a)(3) can be satisfied by circumstantial evidence but has not been satisfied by U.S. Steel's complaint in this case.[15] The rule requires a description of particular steel which, based on facts or reasonable inferences from facts, was made in China, shipped from another country, and arrived in the United States labelled as steel from that other country. If those facts could be inferred from the circumstances, allegation of those facts would satisfy the rule. No such factual allegations appear in U.S. Steel's complaint.

Framing its argument about circumstantial evidence slightly differently, U.S. Steel says that pleading "on information and belief" is permissible under Rule 210.12(a)(3). U.S. Steel's Opening Br. at 4. Again, if U.S. Steel had pled specific instances of sale or importation based on information and belief, such allegations might well be sufficient. But U.S. Steel did not do so. Instead, the complaint alleges only that "*it is likely*" that the distributor respondents "have sold Chinese carbon and alloy steel products for importation into the United States, even where a specific importer is currently unknown." Compl. at ¶ 202 (emphasis added). In other words, the complaint concedes that U.S. Steel cannot identify any particular steel that was sold or imported in violation of section 337, even on information and belief.

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[15] Circumstantial evidence is "evidence that tends to prove a fact by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact at issue." Circumstantial evidence. (2017). Merriam-Webster. Retrieved January 10, 2017, from https://www.merriam-webster.com/dictionary/circumstantial evidence. U.S. Steel's complaint contains circumstantial evidence that transshipments occur, but no evidence from which one could reasonably infer that a specific transshipment occurred.

U.S. Steel argues that Rule 210.12(a)(3) does not mean what it says and may be satisfied by alleging that a respondent has placed the accused products "into commerce for, and leading to, importation." U.S. Steel's Opening Br. at 5 (quoting *Certain Key Blanks for Keys of High Sec. Cylinder Locks*, Inv. No. 337-TA-308, Order No. 4, 1990 WL 710656, at *1 (Mar. 16, 1990). The language quoted by U.S. Steel was argument by the complainant (it is unclear from the ALJ's decision how much of this argument he adopted), *see Key Blanks*, 1990 WL 710656, at *3, and the Commission has not embraced a less restrictive alternative for pleading under section 337 than the one set forth in Rule 210.12(a)(3).

U.S. Steel points to complaint exhibits 50 at 14-10 and 51 at 9-10 contending that those exhibits show that one distributor respondent "had *in the past* shipped Chinese steel using documentation showing Thailand as country of origin." U.S. Steel's Responsive Br. at 6-7.[16] But complaint exhibits 50 and 51 do not identify particular steel that was made in China and transshipped through another country to the United States. Exhibit 50 contains only general statements about the distributor respondents' ability and willingness to transship steel, and a statement indicating a past practice of doing so. *See* Exhibit 50 ("Dear John" message dated 4/11/2016) ("Please see attaching documents, these are previous Malaysian copies (Bill of lading, certificate or origin, certificate of marine insurance, Packing list, Invoice) and Chinese MTC [*i.e.*, mill test certificate] we used to do.") The documents referenced by the alleged distributor apparently were intended to convince the purported buyer in the United States that the distributor could generate fraudulent documents to deceive U.S. Customs, but these documents do not describe any specific instance in which Chinese steel was transshipped to the U.S. from a third country. *See* Exhibit 50 (message to "Sun" dated 4/8/2016) ("I will be negotiating with my

[16] The pagination of these exhibits does not appear to match the references to page numbers in U.S. Steel's briefs.

customer about this. Would it be possible to get copies of what the Malaysian B/L and CO will look like for the shipment of steel? The appearance of the quality of the false documents will go a long way to convince my customer entrep6t [*sic*] trade method is worth the risk."). Unnumbered pages at the back of Exhibit 50 show a mill test certificate (MTC) for coiled steel manufactured in China, a bill of lading for candles shipping from Port Klang, Malaysia to Los Angeles, a certificate of origin from the Penang Malay Chamber of Commerce, Malaysia for "Natural Light Candle Supply," a Certificate of Marine Insurance for unspecified cargo, an invoice for "Natural Light Candle Supply," and a packing list for the same.[17] These documents do not describe a specific instance of sale or importation into the United States of Chinese steel products under false designation of origin.

Exhibit 51 shows the same type of correspondence between a putative buyer of transshipped steel and a distributor Respondent. Unnumbered pages at the back of Exhibit 51 show a certificate of origin from the Putrajaya Malay Chamber of Commerce Malaysia for 16 coils of pre-painted aluzinc steel coil shipping from Port Klang, Malaysia to Oakland, CA, a bill of lading dated February 2, 2016, for the same, and a quality certificate dated May 5, 2015, from a Chinese manufacturer for "Carbon structural hot-rolled coil." These documents do not describe an actual importation. Pre-painted aluzinc steel and carbon structural hot-rolled coil are not the same product. These documents do not identify a specific batch of steel that was

[17] Some of the entries in these documents are redacted, even in the confidential copies, but the information that is visible has been provided in this decision. The visible information does not appear to be subject to the protective order.

allegedly transshipped, even circumstantially. There is no evidence at all, whether direct or circumstantial, of a specific instance of unfair importation.[18]

U.S. Steel's complaint also cites the non-specific findings of a Congressional investigation, the efforts of which were similar to the efforts documented in the complaint, into a wide variety of products made in China, including OCTG steel, without reference to any specific importation, U.S. Steel's Opening Br. at 12 (citing Compl. Ex. 45 at 5 ("Foreign suppliers subject to AD/CVD orders and their U.S. importers avoid paying AD/CV duties by a number of unscrupulous schemes, including illegal transshipment and falsified country of origin markings . . . . In sum, they cheat."), and a declaration from a U.S. Steel executive similarly lacking any specificity, *id.* at 13 (citing Compl. Ex. 58 at ¶ 9 ("[I]t is well-known that Chinese steel remains available in the United States. The Chinese steel industry has managed to circumvent antidumping and countervailing duty orders through transshipment and false labeling."). This circumstantial evidence is much too general to satisfy the Commission's rule, which calls for a description of specific instances.[19]

U.S. Steel contends that it would be too expensive for the company to import mismarked steel into the United States in order to demonstrate a specific instance. It is difficult to see why a

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[18] U.S. Steel and Staff confuse the concept of showing circumstantially that some wrongful act occurred with showing circumstantially that a *specific* wrongful act occurred. *See, e.g.,* Staff's Reply Br. at 4 ("Regardless of whether the Thai certificate of origin was for the actual steel shipment discussed or was a sample certificate, it provides circumstantial evidence of an unfair importation.) The error is plain: if the Thai certificate of origin was just a sample of a certificate, it would not furnish circumstantial evidence of any specific importation. Even if the certificate presented in U.S. Steel's exhibit represented a true certificate of origin, moreover, nothing in the exhibit ties the certificated steel to an importation of that steel under a false label.

[19] None of the other exhibits contain documentation evidencing transshipment of Chinese steel to the United States. Compl. Ex. 46 shows a document indicating transshipment of aluminum alloy wheels to Le Havre, France. Compl. Ex. 48 shows the shipment of textiles to Mexico City. Exhibit 52 shows the shipment of seamless steel tubes to Bulgaria.

small shipment or sale could not have been arranged, or why U.S. Steel could not have entered into a contract for the sale of steel and described that sales transaction in the complaint, without necessarily going through with the purchase. *See Certain Variable Speed Wind Turbines and Components Thereof*, Investigation No. 337-TA-376, Initial Determination at 9, 1996 WL 1056189, at *5 (June 20, 1996) (finding a sale for importation where "there is a long and well-established course of conduct, including contemporaneous writings, that demonstrates the existence of a contract" between the parties for the sale of accused products), *unreviewed in pertinent part* (Comm'n Op. Nov. 1996).[20]

In sum, U.S. Steel has presented no persuasive argument that its complaint satisfies Rule 210.12(a)(3). Instead of addressing the real problem with the complaint, U.S. Steel's briefs shoot down a succession of straw men; in the end, U.S. Steel's evasive arguments show that it has no real response to overcome the flaw in its complaint.

C. Commission ALJs have the authority to dismiss on the pleadings.

U.S. Steel and Staff maintain that by instituting this investigation the Commission placed the sufficiency of the complaint beyond the consideration of the ALJ. *See* U.S. Steel's Opening Br. at 6-7 (citing 19 C.F.R. § 210.9(a)). These arguments are inconsistent with the law of this case, the Commission rules, and the principles of administrative law. I have explained at length in Order No. 38 at pp. 30-45 that the rules governing pre-institution review cannot impinge upon the adjudication required by section 337(c) and conducted by an ALJ. I include below in

[20] U.S. Steel maintains that "this false designation practice is astoundingly common." U.S. Steel's Opening Br. at 11. If the practice were that common, it would not be too difficult to find evidence of one specific instance involving Chinese steel. I understand that the proposed distributor respondents are fraud-doers; however, as U.S. Steel affirms, the distributor respondents appear to be quite forthcoming about their smuggling activities.

abbreviated and amended form pertinent excerpts from Order No. 38, for ease of reference. 19 C.F.R. § 1337(c).

1. The Commission instructed respondents to file a 12(b)(6)-type motion.

In its decision to continue this investigation after suspension, the Commission stated: "If dismissal is appropriate on the merits—not because of overlap with the antidumping and countervailing duty law, but because the allegations fail to state a claim upon which relief can be granted—that argument must be presented to the ALJ for determination in the first instance." *Certain Carbon and Alloy Steel Products*, Inv. No. 337-TA-1002, Comm'n Op. at 14 (Aug. 16, 2016). The Commission would not have instructed that a "motion to dismiss based on failure to state a claim" be submitted to the ALJ if motions akin to those made under Fed. R. Civ. P. 12(b)(6) were unavailable under section 337. The Commission's order uses the same terms and the same concept embodied in motions under Fed. R. Civ. P. 12(b)(6), which states that a party may assert a defense by motion for "failure to state a claim upon which relief can be granted." The Commission's order comports with general practice under section 337. While section 337 adjudications are governed by the Commission's rules, the Commission and its ALJs often look to the federal rules for guidance. *Certain Indomethacin*, Inv. No. 337-TA-183, Comm'n Op. at 4 n. 8 (Jun. 30, 1988) ("Although Commission practice is not governed by the Federal Rules of Civil Procedure, it often looks to those rules for guidance.")

2. The Commission's rules provide for termination of an investigation at any time.

Commission Rule 210.21 states:

> (a) *Motions for termination.* (1) Any party may move at any time prior to the issuance of an initial determination on violation of section 337 of the Tariff Act of 1930 to terminate an investigation in whole or in part as to any or all respondents, on the basis of withdrawal of the complaint or certain allegations contained therein, or for good cause other than the grounds listed in paragraph (a)(2) of this section.

19 C.F.R. § 210.21. By its terms, Rule 201.21(a)(1) permits filing a motion to terminate an investigation in whole or in part "at any time . . .for good cause," as long as the ALJ has not yet issued an initial determination on violation.

There is ample precedent for terminating an investigation at the pleadings stage, including under Rule 210.21(a)(1). *See, e.g.*, *Certain Devices with Secure Communication Capabilities, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-818, Order No. 15, 2012 WL 7857467 (Jul. 18, 2012) (terminating the investigation under 19 C.F.R. § 210.21(a)(1) for lack of standing to assert a patent), *unreviewed*, Comm'n Notice, USITC Pub. No. 4550 (Aug. 2012); *Certain Universal Transmitters for Garage Door Openers*, Inv. No. 337-TA-497, 2004 WL 1402568 (Jan. 14, 2004) (terminating investigation under 19 C.F.R. § 210.21(a)(1) on *res judicata* grounds), *aff'd*, Comm'n Order (Mar. 14, 2004); *Certain Apparatus for Flow Injection Analysis and Components Thereof*, Inv. No. 337-TA-151, Comm'n Op., 1984 WL 63180 (Nov. 1984) (terminating investigation based on amendment of patent claims during reexamination proceeding).

3. None of the Commission's rules contemplate pre-investigation determination of the legal sufficiency of a complaint.

The Commission rules provide in pertinent part:

> **Action of Commission upon receipt of complaint.**
> Upon receipt of a complaint alleging violation of section 337 of the Tariff Act of 1930, the Commission shall take the following actions:
> (a) *Examination of complaint.* The Commission shall examine the complaint for sufficiency and compliance with the applicable section of this chapter.

19 C.F.R. § 210.9.

> **Institution of investigation.**
> (a)(1) The Commission shall determine whether the complaint is properly filed and whether an investigation should be instituted on the

> basis of the complaint. That determination shall be made within 30 days
> . . . .

19 C.F.R. § 210.10.

These rules do not indicate that satisfying pre-institution review for "sufficiency and compliance with the applicable section of this chapter," insulates a complaint from a challenge based on failure to state a claim as a matter of law. Rule 210.9(b) permits "informal investigatory activity" but does not provide for formal adjudication of the complaint's legal sufficiency. Rule 210.10 merely sets forth the timing of and procedure for institution. Rule 210.12 sets forth extensive technical requirements for the contents of a complaint under section 337. The requirements include, for example, details concerning the existence of a domestic industry (Rule 210.12(6)) and ownership of a patent (Rule 210.6 (9)).

Rule 210.12 also includes the requirement at issue here to describe specific instances of importation or sale. Obviously, the Commission at some level viewed the complaint as sufficient to satisfy Rule 210.12(a)(3) for purposes of instituting the investigation. It is unknown (the Commission's pre-institution activities are not public) what the standard is under Rule 210.12(a)(3) for instituting an investigation, or what the basis was for finding that the rule was satisfied in this instance for purposes of institution.

Whatever the factors were that led to the decision to institute, the Commission's decision cannot legally preclude a subsequent finding by an ALJ that the complaint is insufficient as a matter of law for failure to comply with the Commission's pleading rules. Such preclusion would conflict directly with section 337's grant of the right to an adjudication in conformity with the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (1976), an enactment that created quasi-independent administrative law judges in part to check the ability of agency personnel to

influence the outcome of administrative adjudications.[21] No one will argue that compliance with the Commission's rules is unnecessary where relief is sought under section 337. When non-compliance with the rules is raised post-institution, the issue must, by law, be subject to adjudication by an ALJ. *See infra.*

4. Rule 210.18 permits dismissal on the pleadings.

Commission Rule 210.18(a) states in pertinent part, "Any party may move with any necessary supporting affidavits for a summary determination in its favor upon all or any part of the issues to be determined in the investigation." 19 C.F.R. § 210.18(a). The rule refers to any necessary supporting affidavits, but does not state that affidavits are necessary to grant summary determination. Commission Rule 18(b) says that a motion for summary determination shall be rendered "if pleadings and any deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law." 19 C.F.R. § 210.18(b). Again, no depositions, answers to interrogatories, admissions or affidavits are required—they are to be considered on motion for a summary judgment only when necessary to determine whether there are any disputed material facts. The Commission Rule comports with Fed. R. Civ. P. 56 and federal practice thereunder. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (noting that under Fed. R. Civ. P. 56 "claimants and defendants . . . may move for summary judgment '*with or without supporting affidavits.*'") (citation omitted; emphasis in

[21] *See Butz v. Economou,* 438 U.S. 478, 513-14 (1978) ("Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work . . . and because they were often subordinate to executive officials within the agency.") (citations omitted).

original); Fed. R. Civ. P. 56(c)(1)(A) (listing the types of material in the record that may be relied upon to support the contention that a fact "cannot be or is genuinely disputed").

As noted above, a party may not seek discovery for the purpose of trying to establish a cognizable claim. *See* 2 Moore's Federal Practice § 23.34[4][a] at 12-99-100 (3d ed. 2013) ("Courts have uniformly held that claims premised on a federal statute, but that fail properly to allege a claim for relief, should be dismissed under Rule 12(b)(6) . . . ."). The determination whether a complaint states a claim "should be made by the court before subjecting the defendants to the 'burdens of broad-reaching discovery.'" *Dean v. Smith*, No. 4:09CV3144, 2009 WL 2710085, at *2 (D. Neb. Aug. 25, 2009) (citing *Janis v. Biesheuvel,* 428 F.3d 795, 800 (8th Cir. 2005)).[22]

The Commission specifically has approved the practice of awarding summary determination after institution of an investigation where the complaint fails to state a claim. *See Bearings*, Inv. No. 337-TA-469, Comm'n Order at 4. More recent Commission precedent likewise approves early dismissal of claims on the pleadings, where appropriate. The Commission determined not to review a series of initial determinations dismissing claims on motions for summary determination due to patent invalidity. *See Certain Automated Teller Machines, ATM Modules, Components Thereof, And Products Containing the Same*, Inv. No. 337-TA-972, Comm'n Notice (Jul. 28, 2016); *Certain Activity Tracking Devices, Systems, and*

[22] U.S. Steel asserts that termination is appropriate only "'if it appears to a certainty that [the complainant] is entitled to no relief under any state of facts which could be proved in support of the claim.'" U.S. Steel's Opening Br. at 7 (citing *Certain Plastic Food Storage Containers*, Inv. No. 337-TA-152, Order No. 10 at 2 (Aug. 11, 1983). That pronouncement echoes a standard under Rule 12(b)(6) that was discarded long ago. For years, it has been well-established that "dismissal for failure to state a claim does not require the appearance that, beyond a doubt, the plaintiff can prove ***no set of facts*** in support of his claim that would entitle him to relief." *Mugworld, Inc. v. G.G. Marck & Assoc., Inc.*, 563 F.Supp.2.d 659, 663 (E.D. Tex. 2007) (citing *Twombly, supra* (emphasis in original).

Components Thereof ("Tracking Devices"), Inv. No. 337-TA-963, Comm'n Notice (Jun. 2, 2016); *Tracking Devices*, Comm'n Notice (Apr. 4, 2016). The initial determinations in these cases were made on the basis of the complaints (and the patents attached to the complaints), without reliance on affidavits, discovery, *etc.* In light of all of the foregoing, it cannot reasonably be disputed that, in appropriate cases and in this case in particular, dismissal on the pleadings after institution of an investigation is available under section 337, whether under Commission Rule 210.21(a), by analogy to Fed. R. Civ. P. 12(b)(6), or under Commission Rule 210.18.

5. U.S. Steel and Staff's arguments raise administrative law issues.

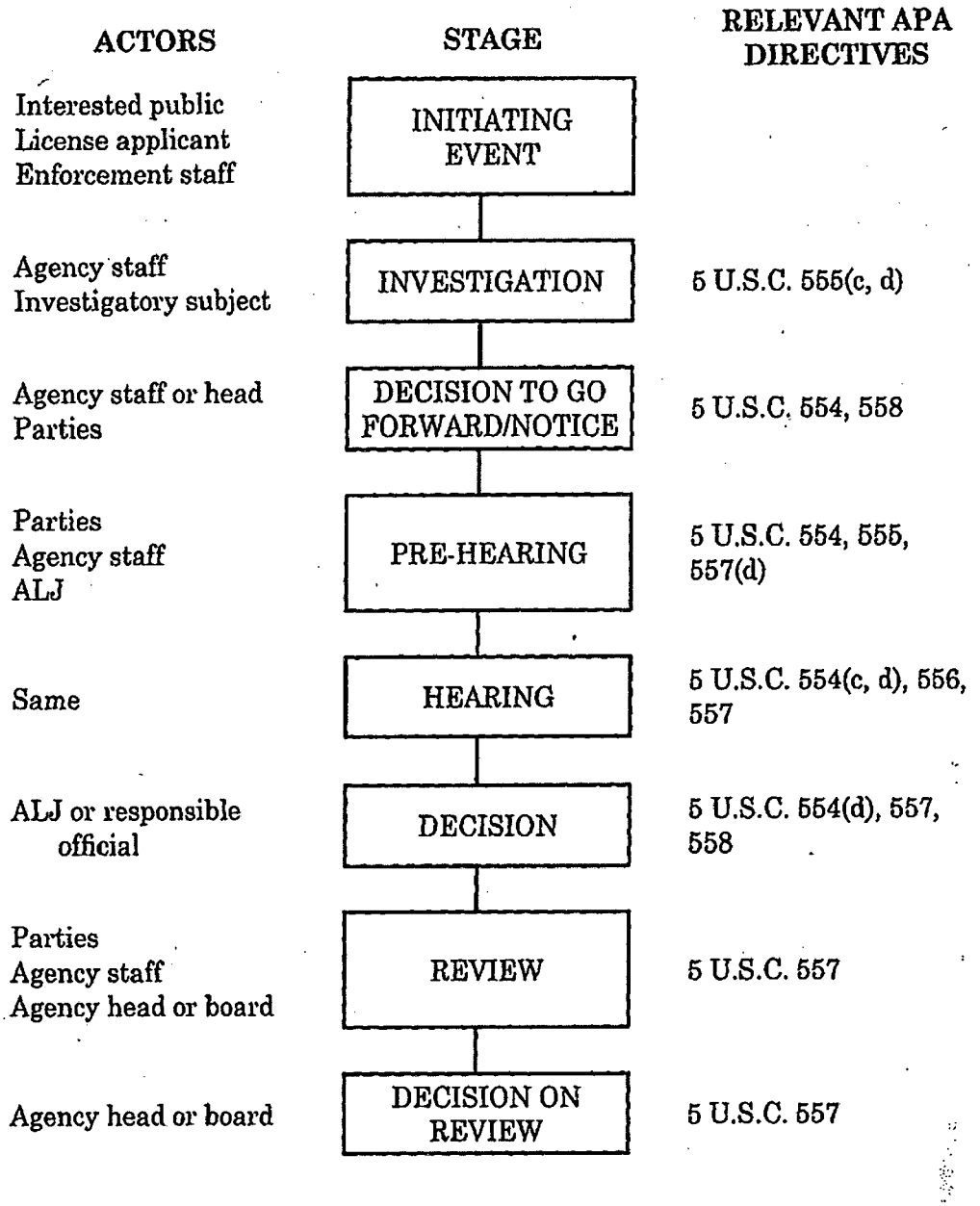
U.S. Steel seeks the remedy of exclusion provided in 19 U.S.C. § 1337(d). Compl. at ¶ 260(c). Under section 337, a determination on whether to issue an exclusion order is expressly subject to subchapter II of chapter 5 of Title 5. 19 U.S.C. § 1337(c); *see also* 19 C.F.R. § 210.36(a)(1) ("An opportunity for a hearing shall be provided in each investigation under this part, in accordance with the Administrative Procedure Act."). Subchapter II of chapter 5 of Title 5 sets forth portions of the APA that govern agency procedures for conducting formal adjudications. *See, generally*, 5 U.S.C. §§ 551-559. The APA's formal adjudication procedures are set forth at 5 U.S.C. § 554. Section 554(a) applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554.

Section 554(c) requires that "all interested parties" have the opportunity to submit facts and arguments and to a hearing in accordance with sections 556 and 557 of the APA (5 U.S.C. §§ 556 and 557). *Id.* It is unclear who has the opportunity to submit facts and arguments in the course of pre-institution activities under section 337. Nothing is disclosed in the Commission's rules concerning the nature of those activities. As a result, pre-institution activity does not comply with §§ 556 and 557 of the APA.

Section 556 provides that the "agency," "one or more members of the body which comprises the agency," or "one or more administrative law judges" shall preside at the taking of evidence. 5 U.S.C. § 556 (b)(1)-(3). When an ALJ presides, as is the case with hearings under section 337, *see* Commission Rule 210.3 (defining "administrative law judge"), the ALJ "shall initially decide the case," and the initial decision "then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency." 5 U.S.C § 557(b). Before any agency decision is issued, "the parties are entitled to a reasonable opportunity" to submit proposed findings and conclusions or exceptions to agency decisions or reasons supporting agency decisions. *Id.* at § 557(c). "The record shall show the ruling on each finding, conclusion or exception presented." *Id.* Since there is no record of pre-institution proceedings under section 337, such proceedings cannot satisfy these provisions of section 556.

"The APA includes numerous provisions to ensure ALJs' impartiality and independence." Gellhorn and Byse's Administrative Law ("Gellhorn") at 309 (11th Ed. 2011). These requirements are especially pertinent here. Under section 554(d), the ALJ "shall make the recommended decision or initial decision required by section 557," and the ALJ "may not . . . be responsible to or subject to the supervision or direction of any employee or agent engaged in the performance of investigative or prosecuting functions for an agency." 5 U.S.C. § 554(d) and (d)(2). In addition, "[a]n employee or agency engaged in the performance of investigative or prosecuting functions for an agency in a case may not . . . participate or advise in the decision, recommended decision, or agency review pursuant to section 557 . . . except as witness or counsel in public proceedings." 5 U.S.C. § 554(d)(2). A schematic of the procedure for conducting formal adjudications under the APA appears below.

FLOW OF FORMAL ADJUDICATION IN AN AGENCY SETTING



Gellhorn at 262.

As appears in the schematic, under the APA, pre-institution events, including investigation and the decision to go forward, are separate from the pre-hearing, hearing, and decision activities over which the ALJ presides. The arguments raised by U.S. Steel and Staff, however, place officials whose job it is to investigate into the area reserved for decision-making.

If agency personnel were permitted to make binding decisions on the legal merits of a complaint, they would be encroaching on the function of the ALJ, in violation of the APA, which requires that an ALJ be insulated from agency "supervision or direction," 5 U.S.C. § 554(d)(2), and that agency officials, other than the ALJ, appear at hearing only as witnesses or counsel (like Staff under section 337, *see* 19 C.F.R. § 210.3 ("*Party* means each complainant, respondent, intervenor, or the Office of Unfair Import Investigations.")).

Under the APA, agency officials decide whether to initiate adjudication by instituting an investigation; they do not adjudicate. *Grolier Inc. v. FTC*, 615 F.2d 1215, 1220 (9th Cir. 1980) ("Congress intended to preclude from decision making in a particular case . . . all persons who had, in that or a factually related case, been involved with ex parte information, or who had developed, by prior involvement with the case, a 'will to win.'"). When an ALJ is not free to reach an independent conclusion because certain issues have purportedly been decided before institution, a violation of the APA occurs. *See Abrams v. Social Security Admin.*, 703 F.3d 538, 545 (Fed. Cir. 2012) ("[T]he APA prohibits substantive review and supervision of the quasi-judicial functions of ALJs.").

It is therefore evident that the agency's decision to institute this investigation cannot be construed as a determination of the legal sufficiency of the complaint. *See FTC v. Standard Oil. Co. of Cal.*, 449 U.S. 232, 241-42 (1980) (holding that initiation of an investigation "represents a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings"). Institution is a determination only "that adjudicatory proceedings will commence," not an adjudication of the merits. *Id.* No decision on the merits can be made until the parties have had an opportunity to present their arguments to the ALJ. *See* 19 U.S.C. § 1337(c) ("Each determination under subsection (d) or (e) of this section shall be made on the

record after notice and opportunity for a hearing . . . ."). In particular, the ALJ's decision may not be directed by the agency or anyone within the agency in advance of a public hearing on the record. 5 U.S.C. § 554(d)(2). This includes the ALJ's decision whether a complaint states a claim upon which relief can be granted.

III. CONCLUSION

For the foregoing reasons, U.S. Steel's claim that respondents have violated section 1337 and the Lanham Act by virtue of falsely designating the origin or manufacturer of carbon and alloy steel products is hereby DISMISSED. This terminates all of the claims that were to be addressed in the hearing scheduled to begin on July 31, 2017, and that hearing is hereby suspended.

In addition, U.S. Steel's Motion to Overrule Respondents' Temporal Objections and Compel Respondents to Produce Documents and Information Responsive to U.S. Steel's First Set of Interrogatories and Document Requests (Motion Docket No. 1002-035) is hereby DENIED as moot. U.S. Steel's Revised Motion To Overrule Respondents' Objections and Compel Respondents to Produce Documents and Information In Response To Interrogatory Nos. 9, 10, 12, 21, 24, and 32 and Request for Production Nos. 3, 17, 25, 34, 38, 46, 51, 60, 67, 71, and 75-81 (Motion Docket No. 1002-042) is also hereby DENIED as moot. In addition, Respondents' Motion for Protective Order (Motion Docket No. 1002-033) is hereby DENIED as moot. Respondents' Motion to Terminate Complainant's Claim of Unfair Acts under Section 43(a) of the Lanham Act (Motion Docket No. 1002-034) is also hereby DENIED as moot.[23]

[23] Respondents' pending applications for subpoenas related to the false designation claim are also DENIED as moot.

This initial determination, along with supporting documentation, is hereby certified to the Commission. This initial determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to Commission Rule 210.43(a), or the Commission, pursuant to Commission Rule 210.44, orders, on its own motion, a review of the initial determination or certain issues contained herein. 19 C.F.R. § 210.42(d).

SO ORDERED.

Dee Lord
Administrative Law Judge

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, Reginald Lucas, Esq., and the following parties as indicated, on **January 11, 2017**.

Lisa R. Barton, Secretary
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On Behalf of Respondents Anshan Iron and Steel Group, Angang Group International Trade Corporation, Angang Group Hong Kong Co. Ltd., Wuhan Iron and Steel Group Corp., Wuhan Iron and Steel Co., Ltd., and WISCO America Co., Ltd.:

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On Behalf of Respondents Jiangsu Shagang Group and Jiangsu Shagang International Trade Co., Ltd.:

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN CARBON AND ALLOY STEEL PRODUCTS**	**Investigation No. 337-TA-1002**

NOTICE OF COMMISSION DECISION TO REVIEW AND ON REVIEW TO REVERSE AN INITIAL DETERMINATION SUSPENDING THE INVESTIGATION; VACATION OF SUSPENSION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review the presiding administrative law judge's ("ALJ") initial determination ("ID") (Order No. 19), which suspended the investigation. On review, the Commission has determined to reverse the ID and to vacate the suspension.

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2532. Copies of 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 TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 2, 2016, based on a complaint filed by United States Steel Corporation of Pittsburgh, Pennsylvania ("U.S. Steel"), alleging a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. 81 *Fed. Reg.* 35381 (June 2, 2016). The notice of investigation named as respondents numerous Chinese steel producers and distributors, as well as certain Hong Kong and United States affiliates. *Id.* at 35381-82. The Office of Unfair Import Investigations was also named as a party. *Id.* at 35382. The alleged violation of section 337 is based upon the importation into the United States, or in the sale of certain carbon and alloy steel products by reason of: (1) a

conspiracy to fix prices and control output and export volumes, the threat or effect of which is to restrain or monopolize trade and commerce in the United States; (2) misappropriation and use of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States; or (3) false designation of origin or manufacturer, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* at 35381.

On July 6, 2016, the presiding Administrative Law Judge ("ALJ") issued, *sua sponte*, an initial determination ("ID") (Order No. 19) that suspended the investigation pursuant to section 337(b)(3), 19 U.S.C. § 1337(b)(3), and Commission Rule 210.23, 19 C.F.R. § 210.23. ID at 4. The ALJ provided two reasons for the suspension: (1) "to allow the Commission to provide the statutorily required notice to the Secretary of Commerce" given that the present matter comes at least "in part" within the purview of the antidumping and countervailing duty laws, *id.* at 7; and (2) due to "the pendency of proceedings before the Secretary of Commerce," *id.* at 1.

On July 11, 2016, the Secretary of the U.S. Department of Commerce, the Honorable Penny Pritzker, sent the Commission a letter, which acknowledged the ALJ's ID to suspend this investigation and which identified two investigations that "potentially could come within the scope of the Commission's investigation." Letter from Hon. Penny Pritzker, Secretary, U.S. Department of Commerce, to Hon. Irving A. Williamson, Chairman, U.S. International Trade Commission (July 11, 2016). The letter has been added to EDIS as part of the record of this investigation.

On July 13, 2016, U.S. Steel filed a petition for review of the ID, followed the next day by the Commission investigative attorney's petition. On July 21, 2016, the respondents filed a joint response to the two petitions for review.

Having reviewed the record of the investigation, including the complaint, the responses to the complaint, Order No. 19, the petitions for review, and the responses thereto, and Secretary Pritzker's submission, the Commission has determined to review the ID. On review, the Commission has determined to reverse the ID, vacate the suspension, and continue the investigation.

The investigation is remanded to the ALJ to resume the investigation. The Commission denies the respondents' request for oral argument. The reasons for the Commission's determinations will be set forth in the Commission's forthcoming opinion.

The Commission hereby directs the Secretary to the Commission to serve a copy of this Notice upon the Secretary of Commerce.

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 Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: August 5, 2016

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Reginald Lucas, Esq., and the following parties as indicated, on **August 5, 2016**.

Lisa R. Barton, Secretary
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Secretary of Commerce:

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN CARBON AND ALLOY STEEL PRODUCTS**	**Investigation No. 337-TA-1002**

COMMISSION OPINION

On July 6, 2016, the presiding Administrative Law Judge ("ALJ") issued an initial determination ("ID") that suspended the investigation pursuant to section 337(b)(3), 19 U.S.C. § 1337(b)(3), and Commission Rule 210.23, 19 C.F.R. § 210.23. On August 5, 2016, the Commission issued a notice of its determination to review the ID, and on review, to reverse the ID and vacate the suspension. For the reasons set forth herein, the Commission has determined that suspension of the investigation under the present circumstances is inappropriate. To the extent that the record of the investigation demonstrates that the unfair acts and methods of competition alleged by complainant may come in part within the purview of the United States antidumping or countervailing duty laws (an issue we do not reach), the relationship may be at most tangential between proceedings at the Department of Commerce and this investigation. In particular, there are no overlapping antidumping or countervailing duty investigations pending before the U.S. Department of Commerce that would affect the alleged unfair acts involved in the present investigation, and no indication that any such proceedings will be commenced at the Department of Commerce. Accordingly, based on the current record, the Commission has determined to continue the investigation.

I. BACKGROUND

The Commission instituted this investigation on June 2, 2016, based on a complaint filed by United States Steel Corporation of Pittsburgh, Pennsylvania ("U.S. Steel"), alleging a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. 81 *Fed. Reg.* 35381 (June 2, 2016). The notice of investigation named as respondents numerous Chinese steel producers and distributors, as well as certain Hong Kong and United States affiliates. *Id.* at 35381-82. The Office of Unfair Import Investigations ("OUII") was also named as a party. *Id.* at 35382. The alleged violation of section 337 is based upon the importation into the United States, or in the sale of certain carbon and alloy steel products by reason of: (1) A conspiracy to fix prices and control output and export volumes, the threat or effect of which is to restrain or monopolize trade and commerce in the United States; (2) misappropriation and use of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States; or (3) false designation of origin of manufacturer, the threat or effect of which is to destroy or substantially injure an industry in the United States.

On July 6, 2016, the presiding Administrative Law Judge ("ALJ") issued, *sua sponte*, an initial determination ("ID") (Order No. 19) that suspended the investigation pursuant to section 337(b)(3), 19 U.S.C. § 1337(b)(3), and Commission Rule 210.23, 19 C.F.R. § 210.23. ID at 4. The ID provides two reasons for the suspension: (1) "to allow the Commission to provide the statutorily required notice to the Secretary of Commerce" given that the present matter comes at least "in part" within the purview of the antidumping and countervailing duty laws, *id.* at 7; and (2) due to "the pendency of proceedings before the Secretary of Commerce," *id.* at 1. The ID also notes that any "response from the Commerce Department or other relevant agencies will aid the

Administrative Law Judge in developing a complete record in this Investigation." *Id.* at 7.

On July 11, 2016, the Secretary of the United States Department of Commerce, the Honorable Penny Pritzker, sent the Commission a letter, which acknowledged the ALJ's ID to suspend this investigation and which reads in part as follows:

> I am writing to confirm that the Department is aware of this investigation. In addition, I note that the Department currently is engaged in two investigations of steel products from China that potentially could come within the scope of the Commission's investigation: *Stainless Steel Sheet and Strip from China*, in which a final determination is scheduled to be issued on November 23, 2016, but may be extended to January 23, 2017, and *Carbon and Alloy Steel Cut-to-Length Plate from China*, in which a final determination is scheduled to be issued on January 30, 2017, but may be extended to March 27, 2017.

Letter from Hon. Penny Pritzker, Secretary, U.S. Department of Commerce, to Hon. Irving A. Williamson, Chairman, U.S. International Trade Commission (July 11, 2016). The letter has been added to EDIS as part of the record of this investigation.

On July 13, 2016, U.S. Steel filed a petition for review of the ID, followed the next day by the Commission investigative attorney's ("IA") petition on behalf of OUII. On July 21, 2016, the respondents filed a joint response to the two petitions for review.

II. SUMMARY OF THE PETITIONS FOR REVIEW AND RESPONSES THERETO

U.S. Steel's petition for review identifies two issues upon which review is sought:

> 1. Whether Order No. 19 erred as a matter of law in suspending this investigation under 19 C.F.R. § 210.23 and 19 U.S.C. § 1337(b)(3) because no related antidumping or countervailing duty ("AD/CVD") matters are currently pending before the Commerce Department.
>
> 2. Whether Order No. 19 erred as a matter of law and fact in suspending this investigation under 19 C.F.R. § 210.23 in order to provide notice of the investigation to the Commerce Department under 19 U.S.C. § 1337(b)(3).

U.S. Steel Pet. 1.

As to the first issue listed above, U.S. Steel contends that the ID's reliance on the completed antidumping or countervailing duty investigations referenced in U.S. Steel's complaint, ID at 2-3 (citing Compl. ¶¶ 214-17) is erroneous because those matters are not pending at the Commerce Department, and thus, do not fall within the scope of section 337(b)(3). U.S. Steel Pet. 3-4. U.S. Steel contends that the two additional investigations referenced in Secretary Pritzker's letter are immaterial: "Stainless steel is not an accused product category and is not identified in the Notice of Investigation," and "U.S. Steel does not manufacture cut-to-length plate for sale and does not seek its exclusion in this investigation." *Id.* at 4. U.S. Steel also noted that it "is not a petitioner in either proceeding referenced in Commerce's letter." *Id.* Even if the two proceedings identified by Secretary Pritzker were relevant, U.S. Steel urges that it would be inappropriate to suspend the present investigation. *Id.* at 5.

As to the second issue it raises, U.S. Steel contends that neither section 337(b)(3) nor "Commission Rule provides authority to suspend an investigation pending notice to Commerce." *Id.* at 5. In essence, U.S. Steel argues that suspension of proceedings must be based on the actual pendency of proceedings at the Commerce Department, and not merely because of the possibility of proceedings or to await a response from the Commerce Department. U.S. Steel also notes that the Commerce Department knows about the present investigation. *Id.* at 6.

OUII's petition argues that "the ID committed legal error in suspending the investigation." OUII agrees with U.S. Steel that the ALJ lacked authority to suspend the investigation "solely because Commerce had not been notified." OUII Pet. 3. OUII also agrees with U.S. Steel that the issue is now moot because of Commerce's actual notice of the investigation. *Id.* at 4. OUII

also argues that the present investigation does not "fall within the purview" of antidumping or countervailing duty laws—either in whole or in part—"because there are no findings that Commerce can make that will resolve any issue under investigation by the Commission." *Id.* at 6; *see also id.* at 6-11. OUII also argues that even if the investigation falls "in part" under the antidumping and countervailing duty laws, it should not be suspended. *Id.* at 11-13. OUII also notes that section 337 at its inception was intended to include antidumping. *Id.* at 13 (citing *In re Northern Pigment Co.*, 71 F.2d 447, 454 (C.C.P.A. 1934) with regard to the 1922 Senate Report).

The respondents filed a joint response. They argue that the ALJ reasonably relied upon "authority provided under Rule 210.23 to suspend the investigation to insure compliance with the statute and to clarify the nature and scope of issues to be litigated in this investigation." Respts' Resp. 1. They contend that the "AD/CVD proceedings and determinations are woven inextricably into the fabric of the Complainant's core case," *id.* at 2-3, for which reason the entire investigation should be suspended to avoid duplicative proceedings, *id.* at 3. They also argue that the antitrust and false designation of origin claims should be dismissed because they "fail to state a prima facie case for anything beyond AD/CVD claims," *id.* at 3. The respondents have also requested oral argument "before the Commission determines whether to review Order No. 19." *Id.* at 4 (emphasis in original).

III. STANDARD OF REVIEW

The Commission may review an ID either upon petition by one of the parties or on its own motion. *See* 19 C.F.R. §§ 210.43 & 210.44. The Commission will grant a petition for review, in whole or in part, where it appears:

(i) that a finding or conclusion of material fact is clearly erroneous;

(ii) that a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or

(iii) that the determination is one affecting Commission policy.

19 C.F.R. § 210.43(b)(1) & (d)(2).

The Commission's review will encompass those issues for which at least one participating Commissioner has voted for review. *See* 19 C.F.R. § 210.43(d)(3). Any issue that is not raised in a petition for review is deemed to have been abandoned by the petitioning party and may be disregarded by the Commission, unless the Commission chooses to review the issue on its own initiative. *See* 19 C.F.R. § 210.43(b)(2).

IV. ANALYSIS

The issue presented on review is the relationship between section 337 investigations and the Department of Commerce's antidumping and countervailing duty investigations. Paragraph (b)(3) of section 337, 19 U.S.C. § 1337(b)(3), controls that relationship and, in most instances vests the Commission with discretion how to proceed. Because interpretation of paragraph (b)(3) is seldom called for, the Commission's application of its discretion under that paragraph seldom arises. In the present investigation, the ALJ operated without the benefit of the Commission's interpretation of paragraph (b)(3). The ALJ also operated without the benefit of a later-submitted letter from the Secretary of the U.S. Department of Commerce to the Commission concerning pending antidumping and countervailing duty investigations. The ALJ concluded that suspension of the investigation was appropriate under paragraph (b)(3), as well as under Commission Rule 210.23, 19 C.F.R. § 210.23, which implements paragraph (b)(3). For the following reasons, we reverse that decision. To explain our determination, we begin with the origin of section 337 itself.

The forerunner to section 337, section 316 of the Tariff Act of 1922, Pub. L. No. 67-318, §

316, 42 Stat. 947 (1922), authorized the Tariff Commission (later the U.S. International Trade Commission) to investigate unfair methods of competition and unfair acts in the importation and sale of articles in the United States. The Senate Report described this new authority conferred upon the Commission: "The provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice and is, therefore, a more adequate protection to American industry than any antidumping statute the country has ever had." S. Rep. No. 67-595 at 3 (1922); *see also* Conf. Rep. No. 67-1223 at 146 (1922). Senator Smoot, the 1922 Act's primary sponsor, explained that section 316 was intended to be "an antidumping law with teeth in it—one which will reach all forms of unfair competition in importation." 62 Cong. Rec. 5874, 5879 (1922). He stated that section 316 "not only prohibits dumping in the ordinary accepted meaning of that word; that is, the sale of merchandise in the United States for less than its foreign market value or cost of production; but also bribery, espionage, misrepresentation of goods, full-line forcing, and other similar practices frequently more injurious to trade than price cutting." *Id.* The Tariff Act of 1930 renumbered the unfair competition portion of the tariff statutes to the familiar section 337, and made certain small changes not relevant here. Pub. L. No. 71-361, § 337, 46 Stat. 703 (1930).

For nearly a half century, the statutory language of section 337 did not address the relationship between section 337 investigations concerning antidumping or countervailing duty matters and proceedings in other fora related to those same acts. The Tariff Act of 1974 added the language that now comprises the first sentence of paragraph (b)(3), concerning notifying the Secretary (then, the Treasury Secretary, later the Commerce Secretary). Pub. L. No. 93-618, § 341, 88 Stat. 1978, 2053-54 (1974). The Trade Agreements Act of 1979 added the language,

which as amended, comprises the rest of paragraph (b)(3).[1] Pub. L. No. 96-39, § 1105, 93 Stat. 144, 310-11 (1979). Paragraph (b)(3) of section 337 presently reads in full:

> Whenever, in the course of an investigation under this section, the Commission has reason to believe, based on information before it, that a matter, in whole or in part, may come within the purview of part II of subtitle IV of this chapter, it shall promptly notify the Secretary of Commerce so that such action may be taken as is otherwise authorized by such part II. If the Commission has reason to believe that the matter before it (A) is *based solely* on alleged acts and effects which are within the purview of section 1671 or 1673 of this title, or (B) relates to an alleged copyright infringement with respect to which action is prohibited by section 1008 of title 17, the Commission shall terminate, or not institute, any investigation into the matter. If the Commission has reason to believe the matter before it is *based in part* on alleged acts and effects which are within the purview of section 1671 or 1673 of this title, and in part on alleged acts and effects which may, independently from or in conjunction with those within the purview of such section, establish a basis for relief under this section, then it may institute or continue an investigation into the matter. If the Commission notifies the Secretary or the administering authority (as defined in section 1677(1) of this title) with respect to a matter under this paragraph, the Commission may suspend its investigation during the time the matter is before the Secretary or administering authority for final decision. Any final decision by the administering authority under section 1671 or 1673 of this title with respect to the matter within such section 1671 or 1673 of this title of which the Commission has notified the Secretary or administering authority shall be conclusive upon the Commission with respect to the issue of less-than-fair-value sales or subsidization and the matters necessary for such decision.

19 U.S.C. § 1337(b)(3) (emphasis added).

Thus, if "the Commission has reason to believe that" this investigation "is based solely on alleged acts and effects which are within the purview of" the countervailing duty and antidumping laws (19 U.S.C. §§ 1671, 1673), then the Commission "shall terminate, or not institute" this investigation. 19 U.S.C. § 1337(b)(3) (second sentence). There is no allegation that the present

[1] The reference to copyright infringement in the current statute is from the Audio Home Recording Act of 1992, Pub. L. No. 102-563, § 3(d), 106 Stat. 4237 (1992).

investigation is "based solely" on "alleged acts and effects which are within the purview" of the antidumping and countervailing duty laws.[2]

If an investigation is based only "in part on alleged acts and effects which are within the purview of" the antidumping and countervailing duty laws, the Commission "may institute or continue" the investigation. 19 U.S.C. § 1337(b)(3) (third sentence). If the investigation at least in part "may come within the purview of part II of subtitle IV of this chapter," *i.e.*, 19 U.S.C. Subtitle IV Part II, §§ 1673-1673h, section 337(b)(3) directs the Commission to "promptly notify the Secretary of Commerce so that such action may be taken as is otherwise authorized by such part II." 19 U.S.C. § 1337(b)(3) (first sentence). If there is such notification, the Commission "may suspend its investigation during the time the matter is before the Secretary." *Id.* (fourth sentence).

The 1979 legislative history of paragraph (b)(3) of section 337 emphasizes the Commission's discretion in deciding what to do so long as a section 337 investigation does not sound entirely in matters under the antidumping or countervailing duty laws. The House Ways and Means Committee report states:

> The Commission is expected to exercise its discretionary authority to suspend its investigation so as to achieve an appropriate balance between the need on the one hand to conserve administration resources and prevent undue burdens upon parties to the Commission proceeding

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[2] Indeed, the respondents do not argue that the trade secret misappropriation allegation has anything to do with dumping or countervailable subsidies. The respondents argue that the present investigation is only in part related to dumping or countervailable subsidies, and in particular that the antitrust claim and false designation of origin claim relate to dumping or countervailable subsidies. Respts' Resp. 17; *see* Compl. ¶ 71 (alleging a conspiracy "to control raw material inputs, production output, export volumes, and prices, violating at least Section 1 of the Sherman Act, 15 U.S.C. § 1"); *id.* ¶ 126 (alleging falsification of the origin of Chinese steel by transshipping products with false documents "through other countries to disguise the steel's country of origin and manufacturing mill from U.S. Customs and to deceive domestic steel consumers").

> and to the countervailing duty or antidumping proceeding, and the need on the other hand to conclude the Commission proceeding in as expeditious a fashion as possible.

H. Rep. No. 96-317 at 190 (1979); *accord* S. Rep. No. 96-249 at 262 (1979) (Finance Committee).

Returning to the present investigation, the ID provides two bases for suspending the investigation. First, the ID states that "the Investigation is hereby suspended to allow the Commission to provide the statutorily required notice to the Secretary of Commerce." Order No. 19 at 7. Second, the ID states that "the Investigation is hereby suspended because of the pendency of proceedings before the Secretary of Commerce." *Id.* at 1. As we will discuss further below, the first basis—to provide notice—is not cognizable under the statute or Commission Rule 210.23 and the second basis—the pendency of proceedings at the Department of Commerce—is inadequate to support suspension in this particular investigation. We address these two bases in turn.

First, as U.S. Steel and OUII have argued, there is no statutory basis for suspending an investigation based upon the absence of notification to the Secretary of Commerce. Suspension in section 337(b)(3) does not exist to provide notice to the Secretary of Commerce, but rather to enable the Commerce Department to complete its own Title VII investigations. Thus, if the Commerce Department's antidumping or countervailing duty investigations appear likely to redress the alleged unfair acts and effects presented in the section 337 investigation, it may be appropriate for the Commission to suspend its investigation to allow the Commerce Department's findings to issue first.

The ID's second basis for suspending the investigation is the pendency of allegedly overlapping antidumping and countervailing duty investigations at the Commerce Department. ID at 6-7. Commission Rule 210.23 provides the ALJ with the authority to suspend the

investigation "because of the pendency of proceedings before the Secretary of Commerce or the administering authority pursuant to section 337(b)(3)." 19 C.F.R. § 210.23. Based on the record before the ALJ, there were no such proceedings pending, because the investigations identified in the Complaint had been completed. As noted above, however, the ID issued before the Secretary of Commerce acknowledged notice of the pending section 337 investigation, and identified pending matters at the Department of Commerce. The letter from the Secretary of Commerce states that the Commerce Department is currently engaged in two investigations of steel products that "potentially could come within the scope of the Commission's investigation: *Stainless Steel Sheet and Strip from China* . . . and *Carbon and Alloy Steel Cut-to-Length Plate from China.*" 7/11/16 Letter.

The two investigations identified by the Secretary of Commerce, however, do not provide an adequate basis for suspending this section 337 investigation under Commission Rule 210.23. Based on the current record, there may be at most a tangential relationship between the two pending proceedings at the Commerce Department and the unfair acts alleged here.[3] The record fails to demonstrate how these two (and any other) pending proceedings at the Commerce Department would affect our investigation of the alleged unfair acts in this investigation, whether antitrust, trade secret misappropriation, or false designation of origin. The trade secret misappropriation in this investigation is unrelated to dumping or countervailing duties. The two other alleged unlawful acts—the price-fixing conspiracy, and the false designation of origin—are at most only partially related to antidumping or countervailing duties. It does not appear, for

[3] In addition, U.S. Steel has stated that "[s]tainless steel is not an accused product category" in the current section 337 investigation and "U.S. Steel does not manufacture cut-to-length plate for sale and does not seek its exclusion in this investigation." Pet. 4.

example, that establishing either the alleged unlawful conspiracy or the false designation of origin claim would require a legal finding of sales at less than fair value or countervailable subsidies. *See, e.g.*, *Certain Color Television Receiving Sets*, Inv. No. 337-TA-23, Comm'n Op., 1976 WL 41442, at *2-3 (Dec. 20, 1976). The record therefore provides no reason to believe that the delay to the section 337 investigation caused by suspension would be outweighed by the resolution of the pending proceedings conducted by the Department of Commerce. *See* H. Rep. No. 96-317 at 190.

Section 337(b)(3) could be read to be broader than the Commission rule: the statute does not cover merely the "pendency of proceedings," 19 C.F.R. § 210.23, but rather permits suspension if the Commission has "reason to believe, based on information before it, that a matter in whole or in part, may come within the purview of" 19 U.S.C. §§ 1673-1673h, and the Commission has notified the Secretary of Commerce about the section 337 investigation.[4] 19 U.S.C. § 1337(b)(3). U.S. Steel and OUII contend that the unfair acts in this case do not "come within the purview" of the antidumping or countervailing duty laws for purposes of section 337(b)(3). The Commission need not reach the issue. To the extent that the present investigation may be based in part on "alleged acts and effects which are within the purview of section 1671 or 1673 of this title," 19 U.S.C. § 1337(b)(3), the record fails to demonstrate how the Commerce Department's ongoing investigations cited in Secretary Pritzker's letter are material to the unfair acts presented in the present section 337 investigation. Moreover, there is no reason to believe that any such proceedings will be commenced at the Department of Commerce so to justify

[4] Notwithstanding the Secretary of Commerce's actual notice of the pending investigation, our notice reversing Order No. 19 directed the Secretary to the Commission to serve it upon the Secretary of Commerce. Moreover, Commission notices related to the public interest and institution of the investigation have already been published in the Federal Register. *See* 81 *Fed. Reg.* 35381 (June 2, 2016); 81 *Fed. Reg.* 26580 (May 3, 2016).

suspension of this investigation. Accordingly, to the extent that the present investigation may be based in part on alleged acts or effects within the purview of the antidumping or countervailing duty laws, the record does not show that suspension of the investigation would achieve efficiencies or avoid undue burdens that would outweigh the benefits gained by continuing the investigation.

The respondents' response to the petitions for review misapprehends the balance struck by Congress in section 337(b)(3) between section 337 investigations and investigations at the Department of Commerce. The respondents seek to suspend this section 337 investigation until such time as it can be determined that there is no overlap with proceedings at the Commerce Department. Respts' Resp. 12 (heading reading the "suspension should be held in place until the extent of the overlap between U.S. Steel's claims and the AD/CVD proceedings can be determined"). The legislative history of section 337(b)(3) clearly indicates that the Commission should not suspend its section 337 investigations merely because of a hypothetical possibility of some overlap in the future. H. Rep. No. 96-317 at 190 (1979); S. Rep. No. 96-249 at 262 (1979).

The respondents also allege that Secretary Pritzker's letter "does not accomplish what the statute intends," Resp'ts Resp. 3, "does not constitute an 'action' as required by the notification provision Section 337(b)(3)," *id.* at 14 n.9, and "fails to provide any accounting for completed investigations, outstanding orders, and ongoing reviews which may overlap with the products within the scope of the Notice of Investigation," *id.* We disagree with the respondents' unsupported assertions about the intent of the statute. There is no statutory requirement for such an "accounting." Moreover, what investigations have been completed, what orders are outstanding, and what reviews are ongoing are all publicly available information. The parties have the proper incentives to bring all pertinent information to the Commission for the purpose of

establishing a record with respect to whether suspension of the pending investigation may be appropriate. As discussed above, the investigations identified in the complaint had been completed and the record fails to demonstrate how the two investigations identified in Secretary Pritzker's letter (or any other investigations) are material to this section 337 investigation.

The respondents argue extensively that the antitrust and false designation of origin claims in this section 337 investigation are nothing more than antidumping claims and that the Commission should dismiss those claims for failure to state a claim upon which relief can be granted. Respts' Resp. 5-12, 20-33. If dismissal is appropriate on the merits—not because of overlap with the antidumping and countervailing duty laws, but because the allegations fail to state a claim upon which relief can be granted—that argument must be presented to the ALJ for determination in the first instance. An opposition to a petition for review of the suspension ID does not provide an opportunity for the respondents to offer arguments to dismiss claims on the merits.

For the reasons stated above, the Commission has determined that suspension of the investigation is inappropriate, and has determined to continue the investigation. The suspension implemented by Order No. 19 is therefore vacated. The Commission has also determined to deny the respondents' request for oral argument, Respts' Resp. 4-5, 33-34, as the Commission has resolved the issues presented based on the written submissions of record.

V. CONCLUSION

For the foregoing reasons, the Commission has reviewed Order No. 19, and on review, reverses it. The suspension is vacated, and the investigation is remanded to the ALJ to resume the investigation.

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: August 16, 2016

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **OPINION** has been served by hand upon the Commission Investigative Attorney, Reginald Lucas, Esq., and the following parties as indicated, on **August 16, 2016**.

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of	
CERTAIN CARBON AND ALLOY STEEL PRODUCTS	Inv. No. 337-TA-1002

ORDER NO. 19: INITIAL DETERMINATION SUSPENDING INVESTIGATION PURSUANT TO SECTION 337(b)(3) AND COMMISSION RULE 210.23

(July 6, 2016)

Pursuant to Section 337(b)(3) of the Tariff Act of 1930 and Commission Rule 210.23, the Investigation is hereby suspended because of the pendency of proceedings before the Secretary of Commerce. 19 U.S.C. § 1337(b)(3); 19 C.F.R. § 210.23.

I. BACKGROUND

On May 26, 2016, the Commission issued a Notice of Investigation in this matter upon a complaint filed by United States Steel Corporation ("U.S. Steel") alleging violations of section 337 of the Tariff Act of 1930, as amended, based on the importation into the United States, or in the sale of certain carbon and alloy steel products. Notice of Investigation (May 26, 2016). The Commission ordered that an investigation be instituted to determine:

> whether there is a violation of subsection (a)(l)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain carbon and alloy steel products by reason of: (1) A conspiracy to fix prices and control output and export volumes, the threat or effect of which is to restrain or monopolize trade and commerce in the United States; (2) misappropriation and use of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States; or (3) false designation of origin or

> manufacturer, the threat or effect of which is to destroy or substantially injure an industry in the United States;

Id. at 2. The Investigation was instituted upon publication of the Notice of Investigation in the *Federal Register* on Thursday, June 2, 2016. 81 Fed. Reg. 35381-82 (2016); *see* 19 C.F.R. § 210.10(b).

On June 30, 2016, several respondents filed timely responses to the Complaint and Notice of Investigation. *See* Order Nos. 4, 5, 6, 7, 8, 9, 10 (granting extensions of time). Seven separate responses were filed by: (1) Respondents Hebei Iron and Steel Group Co., Ltd., Hebei Iron & Steel Group Hengshui Strip Rolling Co., Ltd., and Hebei Iron & Steel (Hong Kong) International Trade Co., Ltd. ("Hesteel"); (2) Respondents Baosteel Group Corporation, Baoshan Iron & Steel Co., Ltd., Baosteel America Inc. ("Baosteel"); (3) Respondent Jiangsu Shagang Group and Jiangsu Shagang International Co., Ltd. ("Shagang"); (4) Respondents Anshan Iron and Steel Group, Angang Group International Trade Corporation, and Angang Group Hong Kong Co. Ltd. ("Ansteel"); (5) Respondents Wuhan Iron and Steel Group Corp., Wuhan Iron and Steel Co., Ltd., and WISCO America Co., Ltd. ("WISCO"); (6) Respondent China Shougang International Trade & Engineering Corporation ("Shougang Trade"); and (7) Respondents Maanshan Iron and Steel Co. Ltd. and Magang (Group) Holding Co. Ltd. ("Masteel").[1]

The Complaint identifies four ongoing investigations at the Department of Commerce related to the steel products at issue in the present Investigation. Complaint ¶¶ 214-217

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[1] Respondents Shandong Iron and Steel Group Co. Ltd., Shandong Iron and Steel Co., Ltd., Jigang Hong Kong Holdings Co., Ltd., and Jinan Steel International Trade Co., Ltd. ("Shandong") and Respondents Hunan Valin Steel Co. Ltd. and Hunan Valin Xiangtan Iron and Steel Co. Ltd. ("Hunan Valin") had also moved for and received extensions to June 30, 2016, to answer the Complaint and Notice of Investigation, but as of the date of this Order, they have not filed answers. *See* Order Nos. 11, 16.

(identifying International Trade Administration Case Nos. A-570-026, C-570-027, A-570-29, and C-570-030). The Commission instituted two Title VII investigations in relation to the Commerce Department investigations: *Certain Corrosion-Resistant Steel Products from China, India, Italy, Korea, and Taiwan*, Inv. Nos. 701-TA-534-538 and 731-TA-1274-1278, 80 Fed. Reg. 32606-07 (June 9, 2015) ("*Corrosion-Resistant Steel*") and *Cold-Rolled Steel Flat Products from Brazil, China, India, Japan, Korea, Netherlands, Russia, and the United Kingdom*, Inv. Nos. 701-TA-540-544 and 731-TA-1283-1290, 80 Fed. Reg. 46047-48 (Aug. 3, 2015) ("*Cold-Rolled Steel*"). The Commission held a hearing in *Cold-Rolled Steel* on May 24, 2016, and a hearing in *Corrosion-Resistant Steel* on May 26, 2016.[2]

II. LEGAL STANDARDS

Section 337(b)(3) of the Tariff Act of 1930 states: "Whenever, in the course of an investigation under this section, the Commission has reason to believe, based on information before it, that a matter, in whole or in part, may come within the purview of part II of subtitle IV of this chapter, it shall promptly notify the Secretary of Commerce so that such action may be taken as is otherwise authorized by such part II." 19 U.S.C. § 1337(b)(3).[3] The referenced part

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[2] Representatives for U.S. Steel and representatives for Chinese steel manufacturers testified at these hearings. *See Cold-Rolled Steel*, Hr'g Tr. at 64-70, 233-236 (May 24, 2016); *Corrosion-Resistant Steel*, Hr'g Tr. at 39-43, 213-217 (May 26, 2016).

[3] Section 337(b)(3) further states:

> If the Commission has reason to believe that the matter before it (A) is based solely on alleged acts and effects which are within the purview of section 1671 or 1673 of this title, or (B) relates to an alleged copyright infringement with respect to which action is prohibited by section 1008 of title 17, the Commission shall terminate, or not institute, any investigation into the matter. If the Commission has reason to believe the matter before it is based in part on alleged acts and effects which are within the purview of section 1671 or 1673 of this title, and in part on alleged acts and effects which may, independently from or in conjunction with those within the purview of such section, establish a basis for relief under this section, then it may institute or continue an investigation into the matter. If

II of subtitle IV of the Tariff Act of 1930 is codified as 19 U.S.C. § 1673 and describes the imposition of antidumping duties.

Commission Rule 210.23 provides that "[a]ny party may move to suspend an investigation under this part, because of the pendency of proceedings before the Secretary of Commerce or the administering authority pursuant to section 337(b)(3) of the Tariff Act of 1930." 19 C.F.R. § 210.23. The Rule further provides that "[t]he administrative law judge or the Commission also may raise the issue sua sponte." *Id.*

III. DISCUSSION

When this Investigation was instituted, the Commission served the Notice of Investigation upon the Antitrust Division of the Department of Justice, U.S. Customs and Border Protection, the Federal Trade Commission, and the National Institutes of Health. *See* Notice of Investigation, Certificate of Service. There is no evidence in the record that the Department of Commerce has been notified of this Investigation pursuant to Section 337(b)(3).

Respondents have cited Section 337(b)(3) in their responses to the Complaint. In particular, Respondents contend that U.S. Steel's claims of price fixing and false designation of origin are outside the scope of Section 337 pursuant to subsection (b)(3), which prohibits the Commission from instituting or continuing a Section 337 investigation based on "acts and effects" which are within the purview of the antidumping and countervailing duty laws. *See*

> the Commission notifies the Secretary or the administering authority (as defined in section 1677(1) of this title) with respect to a matter under this paragraph, the Commission may suspend its investigation during the time the matter is before the Secretary or administering authority for final decision. Any final decision by the administering authority under section 1671 or 1673 of this title with respect to the matter within such section 1671 or 1673 of this title of which the Commission has notified the Secretary or administering authority shall be conclusive upon the Commission with respect to the issue of less-than-fair-value sales or subsidization and the matters necessary for such decision.

19 U.S.C. § 1337(b)(3).

Hesteel Answer at 32-33; Baosteel Answer at 53-54, 58; Shagang Answer at 47-48, 51; Ansteel Answer at 46; WISCO Answer at 43; Shougang Answer at 51-52, 56; Masteel Answer at 39-40, 43. Respondents' affirmative defenses rely on the second sentence of Section 337(b)(3), which requires termination of any investigation that "is based *solely* on alleged acts and effects which are within the purview of" certain antidumping and countervailing duty laws. 19 U.S.C. § 1337(b)(3) (emphasis added). Whether such termination is appropriate is a question that may be addressed by the Commission or the Administrative Law Judge,[4] but it is apparent that the present matter falls within the notice provision of the first sentence of Section 337(b)(3), which is triggered whenever a matter "in whole or in part, may come within the purview of" antidumping laws. 19 U.S.C. § 1337(b)(3).

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[4] This Order makes no determination with respect to Respondents' affirmative defenses, but the Administrative Law Judge has reviewed certain arguments in the record regarding the application of these provisions of Section 337(b)(3). In particular, Baosteel raised this issue in a letter to the Commission dated May 11, 2016, and U.S. Steel filed a response on May 18, 2016. *See* Baosteel America Inc.'s Response to the Commission's Solicitation of Comments Relating to the Public Interest (May 11, 2016); U.S. Steel Noninstitution Response to Comments (May 18, 2016). These letter briefs discussed two investigations from the late 1970s and early 1980s that addressed similar issues. In *Certain Welded Stainless Steel Pipe and Tube*, the Commission proceeded with a Section 337 investigation despite the pendency of an antidumping investigation, and found a violation of Section 337. Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978). This determination was disapproved during Presidential Review, with the President noting the "overlapping investigations and determinations," and stating that "[u]nnecessary duplications and conflicts in the administration of those laws result in confusion and the inefficient use of both private and governmental resources." 43 Fed. Reg. 17789 (Apr. 26, 1978). Section 337(b)(3) was subsequently amended to include the present termination and suspension provisions. *See* Trade Agreement Act of 1979, Pub. L. No. 96-39, § 1105, 93 Stat. 144 (1979). In *Syntex Agribusiness, Inc. v. U.S. International Trade Commission*, the Commission relied upon the amended Section 337(b)(3) to decline institution of a 337 investigation based on antitrust claims related to an antidumping investigation. 659 F.2d 1038 (C.C.P.A. 1981) (*en banc*). The Commission referred the matter to the Treasury Department, and after receiving a response from Treasury, declined to institute a 337 investigation, voting instead to institute a preliminary investigation under section 603 of the Trade Act of 1974. *Id.* at 1040-41. Before lifting the suspension of this Investigation, the Commission may consider whether it is appropriate to wait for a response from the Department of Commerce or to further investigate U.S. Steel's claims before remanding to the Administrative Law Judge for further proceedings.

U.S. Steel's antitrust claims explicitly rely upon determinations by the Commission and the Commerce Department that the Chinese government subsidizes the Chinese steel industry, and that Chinese steel manufacturers sell their products at less than fair value. *See* Complaint ¶ 89 (citing *Hot-Rolled Steel Products from China, India, Indonesia, Taiwan, Thailand, and Ukraine*, Inv. Nos. 701-TA-405, 406, 408 and 731-TA-899-901, 908, USITC Pub. No. 4445 (Jan. 2014) ("*Hot-Rolled Steel*"); *Oil Country Tubular Goods from China*, Inv. Nos. 710-TA-463 and 731-TA-1159, USITC Pub. No. 4532 (May 2015); 66 Fed. Reg. 59561 (Nov. 29, 2001); 79 Fed. Reg. 7425 (Feb. 7, 2014); 75 Fed. Reg. 28551 (May 21, 2010); 80 Fed. Reg. 28224 (May 18, 2015); 81 Fed. Reg. 75 (Jan. 4, 2016); 81 Fed. Reg. 11751 (Mar. 7, 2016)). U.S. Steel's false designation of origin claims are based explicitly upon Respondents' alleged evasion of antidumping and countervailing duty orders issued by the Commerce Department. *See* Complaint ¶¶ 126-132. As discussed above, the Complaint identifies several ongoing Commerce Department investigations, Complaint ¶¶ 214-217, and the Commerce Department recently issued final determinations in these investigations finding countervailing duties and sales at less than fair value. *See* 81 Fed. Reg. 32725-33 (May 24, 2016); 81 Fed. Reg. 35308-10, 35316-19 (June 2, 2016).[5] In addition, the Commission has issued preliminary findings in both *Corrosion-Resistant Steel* and *Cold-Rolled Steel* determining that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of certain steel products from China.[6] 80 Fed. Reg. 44151 (July 24, 2015); 80 Fed. Reg. 55872 (Sept. 17,

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[5] Section 337(b)(3) requires that final decisions by the Commerce Department "with respect to the issue of less-than-fair value sales or subsidization and the matters necessary for such decision" be conclusive upon the Commission. 19 U.S.C. § 1337(b)(3).

[6] The legal standard for injury under the antidumping and countervailing duty statutes is similar to the requirements of Section 337(a)(1)(A). *Compare* 19 U.S.C. § 1337(a)(1)(A)(i) ("the threat or effect of which is – to destroy or substantially injure an industry in the United States") *with* 19 U.S.C. § 1671(a)(2)(A) ("an industry in the United States (i) is materially injured, or (ii) is

2015); *see also Hot-Rolled Steel*, 79 Fed. Reg. 3622-23 (Jan. 22, 2014) (in a five-year review, finding that revocation of countervailing duty and antidumping duty orders would be likely to lead to continuation or recurrence of material injury to an industry in the United States); *Oil Country Tubular Goods from China*, 80 Fed. Reg. 27189 (May 12, 2015) (similar five-year review). The record thus shows that the present matter comes at least "in part" within the purview of the antidumping and countervailing duty laws, and Section 337(b)(3) therefore requires that the Commission notify the Secretary of Commerce.[7] Any response from the Commerce Department or other relevant agencies will aid the Administrative Law Judge in developing a complete record in this Investigation. *See Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (an administrative agency "has an affirmative duty to inquire into and consider all relevant facts.").

Commission Rule 210.23 authorizes the Administrative Law Judge to suspend an investigation pursuant to Section 337(b)(3), and accordingly, the Investigation is hereby suspended to allow the Commission to provide the statutorily required notice to the Secretary of Commerce.

IV. CONCLUSION

For the reasons discussed above, the Investigation is hereby suspended pursuant to Commission Rule 210.23. In light of the suspension of the Investigation, all discovery and

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threatened with material injury"), 19 U.S.C. § 1673(a)(2)(A) ("an industry in the United States (i) is materially injured, or (ii) is threatened with material injury").

[7] The Complaint further references a criminal trade secret prosecution in relation to the trade secret cause of action, and although not required by statute, the Commission may also find it appropriate to notify the Criminal Division of the Department of Justice pursuant to Section 337(b)(2). *See* Complaint ¶ 116 (citing *USA v. Dong et al.*, No. 2:14-cr-00118 (W.D. Pa. May 1, 2014)).

motion practice is hereby stayed. To comply with the requirements of Commission Rule 210.51(a) and Section 337(b)(1), the target date for this Investigation is hereby set for Monday, October 2, 2017, which is sixteen months after the institution of this Investigation. 19 C.F.R. § 210.51(a); 19 U.S.C. § 1337(b)(1).[8]

This Initial Determination, along with supporting documentation, is hereby certified to the Commission. This Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to Commission Rule 210.43(a), or the Commission, pursuant to Commission Rule 210.44, orders, on its own motion, a review of the Initial Determination or certain issues contained herein. 19 C.F.R. § 210.42(d).

SO ORDERED.

Dee Lord

Dee Lord
Administrative Law Judge

[8] There is a pending motion (Motion Docket No. 1002-017) seeking a twenty-month target date. Motion Docket Nos. 1002-021 and 1002-023 are also pending, and the deadlines for responses thereto are stayed during the pendency of the suspension.

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, Lisa M. Kattan, Esq., and the following parties as indicated, on **July 6, 2016**.

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