Office of
INSPECTOR GENERAL

Audit Report

Review of Ways to Increase the Economy and Efficiency of the Process for Conducting Section 337 Investigations

Report No. IG-03-94

UNITED STATES INTERNATIONAL TRADE COMMISSION

August 1994

Date issued

INSPECTOR GENERAL

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

August 19, 1994

REVIEW OF WAYS TO INCREASE THE ECONOMY AND EFFICIENCY OF SECTION 337 INVESTIGATIONS

The Office of Inspector General has completed a review of the process for conducting investigations of infringements of patents, trademarks, copyrights, or mask works and other unfair practices in import trade, hereafter called section 337 investigations. The objective of this review was to evaluate ways to increase the economy and efficiency of the process.

The Commission is required, upon the filing of a complaint, or authorized on its own initiative to investigate alleged violations of section 337 of the Tariff Act of 1930. The investigation is assigned to an Administrative Law Judge who conducts the proceedings in accordance with the Administrative Procedure Act. The Office of Unfair Import Investigations acts as an independent party representing the public interest in these proceedings. The Commission voted to institute 11 investigations in Fiscal Year 1992 and 17 in Fiscal Year 1993.

We found that the process to conduct 337 investigations could be improved in three areas -- paperwork, physical evidence, and voting procedures -- as follows:

- -- The paperwork process could be improved by decreasing the number of Federal Register notices, better coordination with other Federal agencies, issuing reports in a timely manner, and simplifying the distribution and filing systems.

- -- The Commission does not have a written policy that specifically addresses retention of physical evidence; in practice, the Commission stored physical evidence that was part of the record for 337 investigations for lengthy periods, sometimes far longer than was necessary.

- -- The Commission rules need to be changed to address two voting procedures - the provision that one Commissioner can initiate certain actions and the absence of definitive guidance on the resolution of tie votes.

Recommendations to address the above findings are made to the General Counsel and Secretary on pages 8, 11, and 14 of the report.

The General Counsel took no position on two recommendations, agreed with two recommmendations, had no disagreement with one recommendation, said one recommendation was moot, and had no comment on two recommendations. She agreed to prepare action requests in order for the Commission to formally address the issues needing policy decisions on all but three of the recommendations. She agreed to prepare an action request for two recommendations if so directed by the Commission. One recommendation was moot.

The Secretary fully supported the recommendation to coordinate a Commission-wide effort to develop an electronic filing system and agreed with the recommendation to provide input for the revision of the retention schedule in accordance with the Federal Records Act. She proposed an alternative system to our recommendation for disposal of property which we concurred was acceptable; she transferred virtually all eligible property to the Office of Management Services for disposal in conformance with this policy.

A summary of the General Counsel's and/or Secretary's comments are presented on pages 9, 12, and 14 of the report. Their comments are presented in entirety as appendices to the report.

Janet E. Altenhofen

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Inspector General

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Attachment - Statistics on 337 Investigations

Appendix

A - Memorandum from the Secretary to the Chairman, dated July 27, 1994, on Response to Inspector General's June 1994 Draft Report

B - Memorandum from the General Counsel to the Inspector General, dated August 8, 1994, on Comments of the OIG on the Inspector General's Draft Report

INTRODUCTION AND SCOPE

The Office of Inspector General has completed a review of the process for conducting investigations of infringements of patents, trademarks, copyrights, or mask works and other unfair practices in import trade, hereafter called section 337 investigations. The objective of this review was to evaluate ways to increase the economy and efficiency of the process.

Our review was conducted in June 1993 through February 1994. The fieldwork was performed at the Commission offices in Washington, D.C. We identified investigations initiated and/or completed in Fiscal Years (FYs) 1992 and 1993 and reviewed various Commission documents to develop background and statistical information on these investigations. According to the Activity Reporting System, 44,163 hours and $1,233,655 were expended in FY 1992 and 44,087 hours and $1,304,737 in FY 1993 to conduct section 337 investigations.

We interviewed officials in the three offices with primary roles in section 337 investigations - the Office of the Administrative Law Judges (ALJ), Office of General Counsel (OGC), and the Office of Unfair Import Investigations (OUII) - concerning their roles and responsibilities. We interviewed officials in the Office of the Secretary and Office of Management Services (OMS) concerning their roles relating to official records and evidence. We also contacted a member of each Commissioners' office to discuss problems and/or potential improvements in the 337 process.

We contacted representatives from the Department of Health and Human Services (HHS), Department of Justice, Federal Trade Commission (FTC) and the Customs Service. We discussed how these agencies used copies of documents that were provided during the course of each section 337 investigation.

We reviewed the law authorizing 337 investigations, Commission rules, and Commission practices. We compared the documents to identify mandatory versus voluntary Commission practices. We evaluated the costs and benefits of the voluntary practices.

As part of this review, we planned to evaluate the role of OUII as a third party in the section 337 proceedings since its role to represent the public interest has changed. However, the Commission's action at the budget hearing on November 17, 1993, indicated an affirmation of the role played by OUII, even if different from that originally established by the law. Therefore, this part of our review was deleted.

We reviewed the Federal Managers' Financial Integrity Act report for the assessable unit "Investigations Under Section 337" for FY 1992 when an internal control review was conducted and the FY 1993 letter of assurance. No weaknesses relevant to this report were identified.

This review was performed in accordance with applicable generally accepted government auditing standards. Accordingly, the review included an examination of internal controls and other auditing procedures that were considered necessary under the circumstances.

BACKGROUND

The Trade Act of 1974 gives the power to enforce section 337 of the Tariff Act of 1930 to the Commission. Section 337 (19 U.S.C. § 1337) declares unlawful:

-- imports that infringe on valid U.S patents and registered trademarks, copyrights and mask work; and

-- unfair methods of competition and unfair acts in importation that have the threat or effect of destroying or injuring an industry in the United States or restraining trade and commerce in the United States.

The Commission is required, upon the filing of a complaint, or authorized on its own initiative to investigate alleged violations of section 337. The investigation is assigned to an Administrative Law Judge (judge hereafter) who conducts the proceedings in accordance with the Administrative Procedure Act (APA). OUII acts as an independent party representing the public interest in these proceedings.

An investigation can last up to twelve to eighteen months, depending on whether the Commission determines the investigation to be more complicated. During the proceeding, the judge issues orders and notices and makes the evidentiary record. As a general rule, the judge issues orders with initial determinations (IDs) in response to motions. The findings of fact on the investigation are set forth in a final ID that is not issued as an order. The Commission can choose to review IDs in part or in whole and can schedule hearings or oral arguments as part of their review.

IDs become effective when acted upon by the Commission 30 or 45 days after the final ID is issued by the ALJ. If the Commission finds a violation, it may issue an exclusion or cease and desist order. The President may disapprove "for policy reasons" the Commission's determination within 60 days of notification, in which case the Commission's order will have no effect. A party can appeal a final determination to the United States Court of Appeals for the Federal Circuit. The OGC defends all appeals on behalf of the Commission. Investigations can also be terminated by a settlement agreement, consent orders, summary determination, or by a finding of default.

The Commission voted to institute 11 investigations in FY 1992 and 17 in FY 1993. Statistics concerning these investigations such as the number designated more complicated, the disposition, and number of days to complete are presented in the attachment.

During the time of this review, the Commission was operating under interim rules governing investigations and enforcement procedures pertaining to Unfair Practices in Import Trade that were issued on August 29, 1988, and effective immediately. Minor revisions to the interim rules were adopted in November and December 1988 and October 1993. A proposed final rule was published in November 1992 for comments. OGC sent an analysis of comments and a revised version of the rules to the Commission in April and August 1993. A final version of the rules was approved by the Commission on June 15, 1994, and published in the Federal Register on August 1, 1994. The regulations have an effective date of August 31, 1994.

FINDINGS AND RECOMMENDATIONS

We found that the process to conduct 337 investigations could be improved in three areas: paperwork, physical evidence, and voting procedures. The paperwork process could be improved by decreasing the number of Federal Register notices, better coordination with other Federal agencies, issuing reports in a timely manner, and simplifying the distribution and filing systems. The Commission does not have a written policy that specifically addresses retention of physical evidence; in practice, the Commission stored physical evidence that was part of the record for 337 investigations for lengthy periods, sometimes far longer than was necessary. The Commission rules need to be changed to address two voting procedures, the provision that one Commissioner can initiate certain actions and the absence of definitive guidance on the resolution of tie votes.

PAPERWORK REDUCTION

The most frequent comment that we heard during our review concerned the extent of paperwork associated with the 337 process. Even at a minimum level, the process requires a great deal of paper. However, we identified four areas where the paperwork burden could be improved. 1) The Commission published multiple notices in the Federal Register for each investigation, many of which were not required by law or regulation. 2) Documents were routinely sent to other Federal agencies for coordination even though the other agencies rarely commented and often did not even review the documents. 3) Section 337 reports were issued sporadically and often long after the Commission's decision. 4) The dissemination and retention of official documents included distributing many documents for information purposes, sending duplicate copies of documents, and maintaining filing systems in three offices.

Federal Register Notices

The Commission published multiple notices in the Federal Register for each investigation, many of which were not required by law. We believe the practice of publishing notices other than those required by law should be discontinued considering the fee to publish, the separate notice to parties, and the availability of notices from sources other than the Federal Register.

Federal law and Commission rules set forth that the Commission will publish notices in the Federal Register when an investigation is instituted, designated more complicated, or has a finding of violation (the Sunshine Act requires a notice of all Commission hearings). Commission rules also require that a notice be published when the investigation involves a licensing or other agreement, a complaint of a violation, or a petition to modify or rescind a Commission action. In practice, a notice of all Commission decisions, determinations, designations, and conferences are published.

We reviewed 72 Federal Register notices issued for investigations 337-TA-331 to 358 and found that over half of the notices, 38, were not required by law or regulation. Another 22 notices were required by regulation but not law. Only 12 notices were required by law.

An Assistant General Counsel said that the rules, which were written around 1975, and the practices reflect the Commission's desire to keep the public informed. Publication in the Federal Register also facilitates research. We believe that the law reflects what the public's interest is: when an investigation is instituted, designated more complicated, has a finding of violation, or there is a hearing. The parties receive a copy of the notices irrespective of the Federal Register notices. Other interested parties can access the notices on LEXIS and/or WESTLAW.

We believe that the Commission should discontinue publishing notices in the Federal Register except for those required by law to save staff time and the publication fee. For every notice to be published in the Federal Register, Commission staff must submit to the Secretary the following: one single spaced copy, three double-spaced copies, and a computer diskette or E-Mail transmission. Federal Register notices cost the agency $100 per column (not prorated for partial columns) or $300 per page. The Commission spent $86,050 in FY 1993 on Federal Register notices. The cost for section 337-related publications was not available, but is probably a substantial portion of the expenses. Our file of section 337 notices issued between April 1, 1992, and October 28, 1993, which was not comprehensive, had 133 pages.

ALJ agreed that the Federal Register notices were not needed and suggested that the law be changed to delete all requirements except for initiating investigations and hearings. OUII said that publication could be limited to the documents specified in the law if the revised regulations provided that revisions as well as original notices were published. The Secretary had no opinion on what should be published, but concurred that fewer notices would save the Commission time and money.

Coordination with Other Federal Agencies

In accordance with Commission rules, documents were routinely sent to other Federal agencies for coordination even though the other agencies rarely commented and often did not even review the documents. We believe that the rules should be revised to reduce requirements for routinely providing documents and that a system should be established to generate meaningful input to fulfill the Commission's legal mandate to consult and coordinate with other Federal agencies.

Federal law requires that during the course of each section 337 investigation, the Commission shall consult with, and seek advice and information from, the Department of Health, Education and Welfare (HEW), the Department of Justice, FTC, and such other departments and agencies as it considers appropriate (the U.S. Customs Service of the Treasury Department is the only other department or agency routinely considered appropriate). 19 U.S.C. §1337 (b) (2). The Commission has adopted the following rules implementing this mandate:

> The Commission, upon institution of an investigation, shall serve copies of the complaint and notice of investigation (and any accompanying motion for temporary relief) upon HHS (which replaces HEW), the Department of Justice, the FTC, and such other agencies and departments as the Commission considers appropriate. 19 CFR 210.13 (b).

HHS, the Department of Justice, the FTC, and such other departments and agencies as the Commission deems appropriate shall be served with a copy of the initial determination. 19 CFR 210.53 (e).

The notice that the Commission has granted the petition for review shall be served by the Secretary on all parties, HHS, the Department of Justice, the FTC, and such other departments and agencies as the Commission deems appropriate. 19 CFR 210.54 (b) (3).

The Commission shall consult with and seek advice and information from HHS, the Department of Justice, the FTC, and such other departments and agencies as it considers appropriate, concerning the subject matter of the complaint and the effect its actions (general or limited exclusion of articles from entry and/or a cease and desist order, or exclusion of articles from entry under bond and/or a temporary cease and desist order) under section 337 of the Tariff Act shall have upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. 19 CFR 210.58 (a) (2).

The law also states that the Commission shall in appropriate matters act in conjunction and cooperation with the Treasury Department, the Department of Commerce, the FTC, or any other departments, or independent establishments of the Government. 19 U.S.C. §1334.

HHS, the Department of Justice, the FTC, and the Customs Service each receive one copy of the public version of every complaint and notice of investigation (and any accompanying motion for temporary relief), all initial determinations with a request for written comments, and a notice of completion. The White House, Treasury Department, and U.S. Trade Representative each receive copies (one, one and two respectively) of any Commission decision of a violation.

We contacted representatives from HHS, Justice, FTC and the Customs Service, who all had similar comments. They said that resource constraints had severely limited their ability to review the 337 documents; two said that the documents were immediately discarded. The HHS representative said that he thought HHS was receiving the documents because an attorney who is no longer with HHS had been interested in the investigations; he was not aware of the statutory provisions. Several representatives also said that, even if they had time, they could only perform a limited review because they receive the public versions of the documents which do not include all of the necessary information. The representatives said that comments were rarely, if ever, submitted.

We discussed the development of an alternative system to meet the requirements of the law to consult with, and seek advice and information from, other Federal agencies in some meaningful manner. All agency representatives indicated that a better system than the current one should be developed. Commission offices also agreed that the current system was not meaningful.

Report Publication

The Commission does not have a policy on printing reports on 337 investigations; however, a practice had developed regarding which of the investigations decided by Commission vote were printed as reports. In January 1994, the practice was

memorialized in an internal OGC memorandum that stated a report is not published for investigations which are terminated by settlement agreement or consent order and a report generally will be published for determinations for which the Commission issues an opinion. The memorandum does not include timeframes for publishing the report.

At the time of our review, the Commission had decided 25 investigations in FYs 1992 and 1993. Reports were issued for five investigations with a finding of violation and two temporary relief decisions. Reports were not issued for the 20 investigations that were terminated other than by a Commission vote (18) or a vote for no violation (2). The reports, which consisted of documents issued during the course of the investigation, were sometimes printed months after the investigation was completed.

The Commission had no timeframes for issuing 337 reports, so sometimes the documents were published months after the Commission's decisions were issued. The publication dates for the eight reports issued in FYs 1992 and 1993 ranged from two weeks to eight months after the date of the Commission's decision. The Assistant General Counsel said publication is not a high priority because the documents that make up the report (the final notice, the public version of Commission order(s), Commission opinion(s), and the ALJ final ID) are available from the Secretary and services such as LEXIS and WESTLAW.

In 1993, the final reports were sent to 395 entities on the Commission's mailing list. The list was mostly law firms, universities, and libraries, but also had multiple Federal agencies, publications, 16 embassies, product associations (e.g. peanut butter and nut association, American Ski Federation), and private businesses (e.g. Peoria Tube Forming Co., IBM, and Sears Roebuck). After being validated in late 1993, instead of decreasing, the list increased to 623 entities in March 1994.

We discussed with Commission staff whether section 337 reports need to be issued at all since the distribution to parties, Federal Register notices, availability of public versions of documents, and press releases provide a significant amount of information to the public. The Secretary and OUII said that there is a definite demand for the publications and the report format facilitates requests and distribution. The Secretary said that they would prefer that the report be prepared immediately following the investigation as are the Title VII reports to reduce the demands for individual documents. Several offices suggested that a service, such as Commerce Clearing House, could be used to make the documents available to the public.

Commission Distribution and Filing Systems

The dissemination and retention of official documents includes distribution of many documents for information purposes, sending duplicate copies of documents, and maintaining filing systems in three offices. Making documents available electronically to all authorized users would enable the Secretary to reduce hard copy distribution and possibly reduce the number of copies that parties have to submit.

Distribution

To initiate a 337 investigation, the complainant must submit the original plus 14 copies of the complaint to the Commission. These documents are distributed as follows:

4 - Dockets, original in official file, copy in public file, two used for distribution to other agencies (latter two were distributed to the Offices of Industries and Executive and International Liaison until approximately a year ago).
2 - OGC, one to the attorney and one to files.
2 - OUII, one to attorney and one to files.
6 - Commission, one to each Commissioner.
1 - ALJ, to the Chief or designated judge.

For matters before the judge, the party must submit the original plus 6 copies which are distributed as follows:

2 - Dockets, original in official file and copy in public file.
2 - OGC, one to attorney and one to files.
2 - OUII, one to attorney and one to files.
1 - ALJ, one to designated judge.

During the course of the investigation, all notices, IDs and motions before the Commission receive the same distribution as the complaint. (Note: The ALJ delivers one copy of initial determinations to the Secretary who makes copies for distribution.)

The Commissioners' staff described themselves as being swamped with paper. Most of the documents were sent to the Commission to keep staff members aware of how an investigation is progressing. Often, these documents were skimmed and discarded. The Commission also receives a copy of documents requiring Commission action (e.g., IDs and motions) from the Secretary and a full or partial copy attached to the analysis prepared by OGC. The distribution from the Secretary provided the Commissioners' offices with an immediate opportunity to review the document. But in practice, a review was usually not done until the OGC memorandum was received.

Filing

We found that three offices maintained filing systems for section 337 documents (we did not consider the document files maintained by the ALJ judges or OGC and OUII attorneys as filing systems). The Dockets Section in the Office of the Secretary maintained the official Commission files. OGC and OUII maintained unofficial filing systems with many identical documents in their offices, primarily for use by staff conducting reseach. The three offices had many of the same documents in their files. As a rule, hard copy documents for active investigations were physically maintained in each of the three offices. The Secretary stored hard copy documents on lektrievers by investigation number and periodically transferred documents to microfiche which was stored in the main building. OGC stored hard copy documents, except work product, on a lektriever by investigation number and periodically sent the hard copy documents for closed investigations to storage. OGC also maintained work product files (privileged memoranda) on a WordPerfect system. OUII stored hard copy

documents of orders, notices and certain filings in binders by investigation number. OUII also has an electronic database of approximately 8,700 of the most significant documents issued for 337 investigations that is available to the Commission, ALJ, OGC and the Trade Remedy Assistance Office; input into the OUII electronic database was about a year behind at the time of our review.

At a February 1994 meeting of the Information Resources Management Steering Committee, the Secretary expressed interest in obtaining an imaging system that could scan documents and provide access to the public and Commission staff. We believe that such a system would be preferable to maintaining filing systems in three offices and could be designed to limit and provide access appropriately to Commission employees and the public. We agree that the Secretary, who is responsible for maintaining official Commission files, should be the lead office on this project.

After an electronic filing system is in place, we believe the paperwork could be reduced by revising the distribution system. For example, the Secretary could discontinue the hard copy distribution of documents solely for informational purposes and possibly even for action purposes as they would be available for review on the system. This change, in conjunction with the recommendation to revise the distribution to other agencies, may also enable the Commission to reduce the number of copies parties are required to submit which would be a benefit to the parties.

The Secretary said that they would like to cut down on distribution in any way that was acceptable to the Commissioners and offices involved; however, any revision to the distribution system would have to be agreed upon by all Commissioners and all Commissioners would have to be treated the same. OUII said that receipt of a copy from the Secretary was important in managing the investigations, but one copy would be sufficient in the majority of cases when OUII was also served as a party. OGC stated, and we agree, that some hard copy documents would still be necessary for effective review.

Recommendations

We recommend that the:

1. General Counsel, with the assistance of the Secretary, prepare an Administrative Order or Notice for the Chairman's signature to cease publication of any notices except those required by law and or regulation;

2. General Counsel propose amending the rules to delete requirements for publishing notices that are not required by law, after which time the Secretary would cease to publish these;

3. General Counsel propose amended rules for consulting and coordinating with other Federal agencies to eliminate requirements for providing documents and establish a system to generate meaningful input;

4. General Counsel develop a Commission policy, possibly a revision of Administrative Order 85-6, on publishing section 337 reports that includes guidance on issuing the reports in a timely manner;

5. Secretary coordinate a Commission-wide effort to develop an electronic filing system and then revise the distribution system to minimize the number of hard copy documents distributed for information or are duplicates; and

6. General Counsel, in consultation with the Secretary after recommendations 2 and 5 are implemented, determine the appropriate number of copies to be submitted with a complaint and during the course of the investigation and propose appropriate language to amend the Commission rules.

Commission Comments

The General Counsel took no position on recommendations 1 and 2, agreed with recommmendations 3 and 6, and had no disagreement with recommendation 4. She agreed to circulate an action request containing proposed rules in order to implement these recommendations.

The General Counsel stated that she could recommend a policy on publishing section 337 reports, but that the Commission would have to adopt it. We agree that her memorandum of January 1994 could serve as a starting point for developing a more fully articulated Commission policy. Since issuing the draft report, we have spoken with OMS about printing policies and procedures. The section 337 reports were specifically identified as publications whose appearance could be improved and for which cost savings were possible by using the interleaf system adopted for other publications. These issues should be addressed in the Commission policy.

The General Counsel also stated that recent section 337 reports have been published in a timely fashion due in large measure to the fact that one staff person has been assigned responsibility for insuring the prompt publication of such reports. We found that the six investigations decided by the Commission in FY 1994 were published, on average, in a little over a month.

The Secretary fully supports recommendation 5 and is participating on two committees that are working toward determining the range of capabilities of optical imaging and text retrieval systems and identifying capabilities that the agency requires and the best system to fulfill agency needs in a cost effective manner.

PROPERTY RETENTION

We found that the Commission stored physical evidence that was part of the record for 337 investigations, sometimes for periods far longer than was necessary. Items stored were evidence for investigations terminated with no violation and investigations for which the exclusion orders had expired. These items were stored pending return to the parties or sufficient accumulation to be turned over to OMS for disposal. The remaining items were stored pending expiration of the patent on an outstanding exclusion order or were nonpatent items relating to an exclusion order.

The Commission does not have a written policy that specifically addresses retention of physical evidence. The Commission's Records Disposal Schedule (currently being updated by the Office of Information Services) provides guidance on the retention of official docket case files, which technically includes the physical evidence; however, the guidance only applies to paper copies. According to the Secretary, the practice is to retain the physical evidence until there is a finding of no violation and the time for appeals has elapsed or until the patent to which the exclusion order applies expires (nonpatent items are kept forever). When the physical evidence was no longer needed, the Secretary notified the party either by mail or telephone. The Secretary periodically notified OMS of items that were not claimed. OMS disposed of the items in accordance with federal property management guidelines for abandoned property.

When we reviewed the property in July 1993, we found that the Commission was storing a substantial amount of property that should have been disposed of years ago. This property included:

-- Items for 24 investigations with findings of no violation that were decided from 1977 through 1989 such as 5 boxes of parts from television sets (also used on a Title VII investigation) and 13 boxes with track lighting systems; and

-- Items for 11 investigations for which the exclusion orders expired between 1987 and 1993 such as 6 electric slow cookers and 3 boxes of lighting switches.

The Office of the Secretary had copies of letters sent to parties for 15 of the 36 investigations although other parties may have been called but no documentation was maintained. All of the letters were dated September 1991 and advised the parties that the items would be destroyed in November 1991.

The file had 21 responses of which 17 parties asked that property be returned from 10 investigations. At the time we took an inventory, none of the property had been returned. A legal documents clerk said that after the responses were received, a decision was made to get signed releases for the items. This effort was not pursued due to a lack of manpower.

After we sampled the inventory of items on July 29, 1993, the Office of the Secretary called a party who had requested that 17 boxes of double sided floppy disk drives be returned. The party picked up the boxes on August 30, 1993.

Prior to October 1993, the last time the Secretary notified OMS in writing of items needing disposal was in September 1987. Even after items were given to OMS, disposal was a lengthy process. The items were not disposed of before the Commission's move in December 1987 and January 1988 which necessitated moving the abandoned property from the Commission's old building to the Navy Yard. In March 1990, OMS notified the General Services Administration (GSA) of the abandoned property and GSA accepted the items in May 1990.

The Secretary's staff said that OMS had not been notified of items for disposal between 1987 and 1993 pending sufficient accumulation. They understood that the Commission had to hire a contractor to transport the items to the GSA property center and that one large shipment was preferable to multiple small ones. Eleven boxes were given to OMS for destruction at the end of March 1994; the items had not been destroyed as of June 3, 1994, pending fund availability.

The Secretary said that items are stored approximately seven years since most patent items in Commission investigations have a life of 14 to 17 years and the investigations are initiated sometime after the patent is effective. We found that the seven year estimate was reasonably accurate for the investigations with expired outstanding exclusion orders (average retention period from date of order to patent expiration was 6.3 years). However, the items for the 18 investigations with current outstanding exclusion orders have an average retention period of 12.5 years. These items include 11 boxes of amorphous metal and 15 boxes of DRAMs. The exclusion orders for the nonpatent items were issued from 1980 through 1988, 5 to 13 years already and no provisions for disposing of this property. The 10 investigations have 30 boxes of items including a cast iron stove.

The Commission incurs various expenses in storing the physical evidence. The Secretary has approximately 1,100 square feet of storage space at an estimated annual cost of $7,200. Staff must input and track the items, notify parties, and arrange for disposal.

We believe that provisions should be incorporated into the Commission regulations to facilitate disposal of the property. For example, the Commission could require parties to claim property within 30 days of the completion of an investigation, which would be defined as including any appeals, or the evidence will be disposed of as abandoned property. If additional notification is considered necessary, a notice could be included in the announcement of the final decision. These changes would eliminate the need to maintain items for long periods, delete the special notice to parties, and eliminate costs to return items. OMS should be notified promptly (within 30 days) when property becomes available for disposal and OMS should notify GSA within 30 days of the abandoned property. Excessing the items in smaller increments should allow for much of it to be transported in the minivan to the GSA property center. Promptly excessing property should allow the Commission to reduce the amount of storage space needed.

According to the Secretary and OGC, the reason for retaining physical evidence through the life of the patent is to have the item in case of subsequent appeals or enforcement actions. OUII said that the ideal situation would be to have the physical evidence available in case of an enforcement proceeding or to give advisory opinions, although in some instances the physical evidence was not necessarily relevant to the order (e.g., an entire personal computer for a case on computer chips). The ALJ said that if orders were written clearly, there would be no need for physical evidence even in the case of an enforcement proceeding and they knew of no other agency that followed this practice. OGC also said that the Federal Records Act has guidance concerning the disposition of Federal records which would have to be considered in any policies adopted by the Commission.

Recommendations

We recommend that the:

7. Secretary ensure that all property has been returned to the parties who wanted items, or notify OMS that property is ready for disposal;

8. General Counsel propose changes to the Commission rules concerning retrieval or abandonment of physical evidence; and

9. Secretary provide input to the Office of Information Services for a policy on retention of physical evidence to be included in the Commission's Records Disposal Schedule.

Commission Comments and OIG Analysis

The Secretary agreed with recommendation 7. The Secretary has had parties pick up property or transferred responsibility to OMS for the property on all but one of the investigations referenced in the finding as eligible for disposal. In August 1994, the Secretary notified OMS that the property for 31 investigations was ready for disposal. The disposition of the property transferred before August 1994 could not be ascertained, but OMS intends to move all excess property from the Navy Yard to the Cryden Center in the near future for disposal. The property for 1 investigation with no violation is a bottle containing formaldehyde; this is being moved to the storage facility at Waldorf, Maryland pending determination of the proper method for disposal.

In addition, the Secretary established office procedures to ensure proper disposal in the future of exhibits after the appeals process or patent expiration. In this system, the Commission bears the burden of sending notices to parties. Furthermore, no changes were proposed for the disposal of non-patent items which are kept indefinitely. We believe regulatory changes requiring parties to claim exhibits and providing for disposal of non-patent items would be a more efficient system. However, on the basis that the Chairman's approval of the Secretary's response is an indication that the Commission agrees with her approach, we will concur that the system is an acceptable alternative.

The General Counsel said that recommendation 8, changes to the Commission rules concerning retrieval or abandonment of physical evidence, is a moot issue due to the adoption of the above procedures by the Secretary.

The Secretary agreed with recommendation 9 and will provide input for the revision of the retention schedule in accordance with the Federal Records Act.

VOTING PROCEDURES

We identified two voting procedures which we believe need to be addressed by changing the Commission rules. The rules provide that one Commissioner can initiate reviews of initial determinations and oral arguments, rather than at least half of the Commissioners which is a standard for other decisions. Conversely, the Commission rules do not, and we think they should, provide definitive guidance on the resolution of tie votes in the final disposition of section 337 investigations which is not addressed in the Commission statutes.

The statutes governing Commission activities do not specifically address voting to initiate reviews or tie votes. Commission rules address voting to initiate reviews but not tie votes. The common law rule for multiple - member adminis-

trative agencies, articulated in the frequently-cited 1930 Bakelite decision arising from a Commission section 337 determination, is that a majority of a quorum is necessary to act for the agency.

One Commissioner Votes

Since 1982, Commission rules have provided that several significant actions, reviewing initial determinations and scheduling oral arguments, can be initiated by one Commissioner. We believe that changing the requirement to at least half of the Commissioners voting would demonstrate a strong Commission interest in an issue and reduce the burden on parties when such interest does not exist.

Until the early 1980s, the ALJ issued recommended determinations which were reviewed in entirety by the Commission. This process was inefficient in that all issues were reviewed by the Commissioners. Regulations drafted in May 1981, which were not approved for publication, provided for review when at least a majority less one of the participating Commissioners so votes, which is the standard used by the Supreme Court to review cases. Draft regulations published in December 1981 for comment provided for review when at least one of the participating Commissioners so votes. As suggested by one Commissioner, a similar provision was added to the final rules issued in June 1982.

Reportedly, the draft regulations of May 1981 were changed because one Commissioner thought that she might be the sole vote for reviews concerning the requirement for substantial injury in deciding an investigation. Since 1981, that Commissioner has left and the injury requirement has been reduced significantly, but the provisions for one vote have been carried forward into the current interim rules and proposed final rules.

The statutes governing Commission activities do not specifically address these voting issues; however, we believe that some provisions are useful as guidance. The statutes provide that the Commission is authorized to initiate investigations and hold hearings when one-half of the Commissioners voting agree. 19 U.S.C. §1330 (d) (5). We believe that initiating review of issues and oral arguments are comparable decisions that should follow the same guidance.

We agree with an opinion expressed by a past Commissioner in an October 1992 memorandum that the practice of reviewing an initial determination even if only one Commissioner wants to do so is not a good idea. At a time when the Commission is reviewing its operations to see what processes could be streamlined and how to reduce the burden on its customers, we believe that it is not only reasonable but a responsible decision to require that at least half of the Commissioners vote for review or oral arguments.

Tie Votes

Several Commissioners' staff members expressed concern with the lack of definitive guidance on the resolution of tie votes in the final disposition of section 337 investigations. Neither the Commission statutes nor the regulations address tie votes. In practice, the Commission has always avoided a tie vote, but according to the Commissioners' staff, this has sometimes required that a Commissioner agree to change a vote. If definitive guidance was issued on tie votes, Commissioners would not feel pressured to avoid a tie situation.

The General Counsel researched the issues of tie votes and issued a memorandum in December 1992. In summary, she stated that existing law could be given two conflicting interpretations; that she doubts that the Commission has the authority to promulgate a rule stating that a tie vote affirms the judge's ID; and that a tie breaker rule could result in difficulties in issuance of an agency remedial order.

The Commission has obviously managed to resolve any tie votes on 337 questions, but we believe clarification of the tie vote issue would be beneficial. Preferably, clarification could be made in Commission regulations. We believe that an interpretation that a tie vote affirms the ID is a reasonable interpretation of the law which requires the Commission to utilize APA procedures. The General Counsel states in her memorandum that there is some judicial authority to support the view that a tie vote would serve to affirm the ID. She also states that at least one agency has adopted rules to clarify a tie vote situation, so the Commission would not be setting a precedent. As to the difficulty in issuing a remedial order, we think that the Commission would properly address the issue.

We think that it would be a service to the parties to clarify this issue. OUII said that they have received inquiries from parties as to what happens when there is a tie vote and they respond that such a situation has never occurred. Due to their significance, such regulations should be published for comment before adoption. If comments questioning the Commission's authority to adopt such regulations are submitted, the Commission could change from a regulatory clarification to requesting a technical clarification in the law.

Recommendations

We recommend that the General Counsel propose language to revise the Commission rules to:

10. Incorporate provisions requiring that one-half of the Commissioners voting agree for review or oral arguments; and

11. Clarify a tie vote situation.

Commission Comments

The General Counsel had no comments on recommendations 10 and 11 and planned no action absent further direction from the Commission. On August 10, 1994, the Chairman requested that each Commissioner consider the relevent recommendations and provide the General Counsel with guidance as to whether they believe it would be useful to prepare proposed rules.

Attachment

STATISTICS ON 337 INVESTIGATIONS
(As of July 31, 1994)

	FY 1992	FY 1993
Number of Investigations		
Initiated	11	17
Designated more Complicated	6	8
By Commission	3	1
By Administrative Law Judge	3	7
Completed	11	15
Terminated other than by Commission vote (e.g. settlement agreement)	8	12
Commission vote for no violation	1	1
Commission vote for violation	2	2
Number of Months to Complete		
All investigations	10.5	10.1
Designated more complicated (maximum 18 months)	13.0	10.6
Not designated more complicated (maximum 12 months)	7.4	9.6
Terminated other than by Commission vote (e.g. settlement agreement)	8.9	9.8
Commission vote	14.5	11.5

OFFICE OF THE SECRETARY

Appendix A

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

MEMORANDUM

July 27, 1994
SE-R-025

TO: CHAIRMAN PETER S. WATSON

FROM: The Secretary Donna R. Koehnke

SUBJECT: Response to Inspector General's June 1994 Draft Report: "Review of Ways to Increase the Economy and Efficiency of the Process for Conducting Section 337 Investigations"

The following comments are being provided in response to the recommendations in the above draft report:

1. **General Counsel, with the assistance of the Secretary, prepare an Administrative Order or Notice for the Chairman's signature to cease publication of any notices except those required by law and or regulation.**

   o Assuming the Inspector General's proposal to limit publication of notices would cause a significant savings in staff time and Federal Register costs, the Secretary believes it should be implemented, provided that

   1. It would be the primary responsibility of the originating office to submit only the required notices for publication, while the Secretary's staff would be responsible for final review of notices submitted.

   2. The savings is not offset to the extent that service to the public is excessively and unnecessarily diminished. It should be noted that although parties are notified personally, the Federal Register is a reliable source that many people depend on for vital information.

   3. The Commission is in full agreement with the cutback.

o If, upon his further review, a decision is made by the Chairman to limit publication of notices, the Secretary will provide assistance to the General Counsel at that time.

o In making a decision to approve this recommendation, however, the Chairman should be aware that in early 1993, procedures were put in place by the Office of the Secretary which resulted in a significant cost savings to the Federal Register account, and consequently, the Commission. This office now provides the Federal Register with an electronic version of our notices, so that they can reformat the information rather than retyping the complete document, as was done previously.

5. **Secretary coordinate a Commission-wide effort to develop an electronic filing system and then revise the distribution system to minimize the number of hard copy documents distributed for information.**

o The Secretary fully supports this proposal, and in fact, has been working toward that goal since she came on board the Commission a little over a year ago.

o There now exists an Executive Committee for Imaging, consisting of Lynn Levine, Chair, Mark Garfinkel, Lyn Schlitt and Donna Koehnke, and also an Imaging Working Committee, consisting of Tom Jarvis, Paul Bardos, Ruby Dionne and Kevin Richards. These two committees are working toward determining the range of capabilities of optical imaging and text retrieval systems and identifying capabilities that the agency requires and the best system to fulfill agency needs in a cost effective manner. The work schedule for completion of this assignment is being finalized.

7. **Secretary ensure that all property has been returned to the parties who wanted items, or that OMS has been notified that property is available for disposal.**

o The Secretary agrees that the Commission has had problems with exhibits which were kept for an unreasonable length of time, and within the past six months, has revised the procedures to ensure proper disposal of such exhibits. They are:

1. Once all appeals are exhausted, a letter is sent to the parties advising them of physical exhibits and offering to return such exhibits. (See attached)

2. If there is an exclusion order, the exhibits are kept until the patent expires and then the party is contacted for return of the physical exhibits.

3. If after a reasonable time (30 days) the party has not responded, a list of exhibits available for disposal is forwarded to the Office of Management Services for proper disposal.

o These new procedures should do much to alleviate the past problems, and may, in fact, render moot the Inspector General's proposal. The Secretary, however, will continue to monitor in order to ensure these procedures continue to be effective.

9. Secretary provide input to OMS for a policy on retention of physical evidence to be included in the Commission's Records Disposal Schedule.

o The Secretary agrees that the Commission's retention schedule should be revised, clearly identifying the proper disposal of exhibits and physical evidence in 337 cases.

o The responsibility of this now comes under the Office of Information Services, rather than the Office of Management Services, and if approved by the Chairman, the Secretary will provide input for the revision of that retention schedule, in accordance with the Federal Records Act.

Attachment

cc: The Commission
Inspector General
General Counsel
Director, Office of Administration

ATTACHMENT

SAMPLE

Dear:

The Office of The Secretary is in possession of physical exhibits, titled_____ in investigation _____. We are in the process of returning or destroying all physical exhibits involving exclusion order cases which has reached the expiration date, and cases without appeal rights.

The Commission has completed the investigation and has no further need for the physical exhibits. We would like to dispose of these exhibits and wish to know if you desire to have them returned to you.

If you choose to have them disposed of, we will do so in the appropriate manner. If you choose, however, to have them returned , we will need to have:

(1) A letter within 30 days stating you desire to have them returned.

(2) You must make arrangements with your staff, as well as the staff in the Docket Section, to have the exhibits picked up at your expense.

If you have any questions concerning this matter, please do not hesitate to call me at 202-205-2799.

Sincerely,

Ruby J. Dionne
Chief, Docket Section

MEMORANDUM

TO: THE INSPECTOR GENERAL [1]

August 8, 1994
GC-R-429

FROM: The General Counsel [2]

SUBJECT: Comments of the Office of the General Counsel on the Inspector General's Draft Report: "Review of Ways to Increase the Economy and Efficiency of Section 337 Investigations," dated June 17, 1994. [3]

This memorandum provides the comments of the Office of the General Counsel on the above-referenced draft IG report. The report concludes that the process of conducting section 337 investigations can be improved in three areas - - paperwork reduction, retention of physical evidence, and voting procedures - - and makes recommendations for effecting such improvements. Our comments on the IG's recommendations in each area are given below.

I. Paperwork Reduction

The IG's draft report identifies four areas where the paperwork burden of section 337 investigations could be reduced:

> 1) The Commission published multiple notices in the Federal Register for each investigation, many of which were not required by law or regulation. 2) Documents were routinely sent to other Federal agencies for coordination even though the other agencies rarely commented and often did not even review the documents. 3) Section 337 reports were issued sporadically and often long after the Commission's decision. 4) The dissemination and retention of official documents included distributing many documents for information purposes, sending duplicate copies of documents, and maintaining filing systems in three offices. [4]

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[1] Copies to the Commission, Secretary Koehnke, Chief Judge Saxon, Lorin Goodrich, Lynn Levine, and Phyllis Smithey.

[2] This memorandum was prepared by Tim Yaworski (rm. 707F, tel. 205-3096).

[3] Law Library References: Section 337 process, IG.

[4] Draft IG Report ("Report") at p. 3.

a. Federal Register notices

The IG's draft report notes that the Commission publishes many section 337 notices in the Federal Register that are not required by statute, and recommends that the publication of such notices be discontinued. [5] Specifically, the draft report recommends (1) that OGC, with the assistance of the Secretary, prepare an Administrative Order or Notice for the Chairman's signature to cease the publication of any notices except those required by law or by regulation, and (2) that OGC propose amending the Commission's section 337 rules to delete requirements for publishing notices not required by statute.

OGC takes no position on these recommendations except to note that the publication of notices not required by statute serves the useful purpose of keeping the public informed about section 337 investigations. Whether the expense of continuing to publish such notices outweighs the benefits of a better informed public is a policy judgment for the Commission.

If the Commission decides to implement the draft report's recommendation to publish only notices required by statute, then several Commission rules will need to be amended. Given the impending need for OGC to devote time to drafting rules to implement the expected statutory amendments to section 337, we do not believe that work on such amendments could be initiated by this office until after January 1, 1995. Of course, if it becomes possible for this office to begin work prior to next year, we will do so. We note that the recommended amendments cannot be included in the rules needed to implement the

[5] The draft report notes that (1) notices of institution of an investigation, (2) notices designating an investigation "more complicated," and (3) notices of a Commission finding of violation of section 337 are required by statute. The publication of certain other notices is required by Commission rule.

expected statutory changes because the latter are likely to be interim rules promulgated without notice and comment. As such, the interim rules will have to be limited to only those necessary for implementing the statutory changes.

OGC Action To Be Taken: OGC will circulate an action request containing proposed rules that cover any of the draft report's recommendations on this issue that the Commission wishes to implement.

b. Service of section 337 documents on other federal agencies

The IG's draft report notes that certain nonconfidential section 337 documents are routinely sent to other federal agencies (the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the U.S. Customs Service) despite the fact that those agencies rarely comment on or even review the documents. The draft report recommends that "a system . . . should be established to generate meaningful input to fulfill the Commission's legal mandate [6] to consult and coordinate with other Federal agencies." [7] Specifically, the draft report recommends that OGC propose amending the rules for consulting and coordinating with other federal agencies "to eliminate requirements for providing documents and establish a system to generate meaningful input." [8]

OGC agrees that the present system for complying with the statutory mandate to consult with other federal agencies in the course of section 337

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[6] Section 337(b)(2) provides as follows:

> During the course of each investigation under this section, the Commission shall consult with, and seek advice and information from, the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as it considers appropriate.

[7] Report at p. 4.

[8] Report at p. 9.

investigations needs improvement. Too many resources are expended in serving documents on other federal agencies in relation to the amount of useful information and comment provided by those agencies. We concur with the IG that an improved system for obtaining other agency input needs to be devised. Implementation of such an improved system will require, at a minimum, revision of some section 337 rules. [9] For the reasons discussed in the preceding section of this memorandum, we do not believe it feasible to start work on such rule revisions until after January 1, 1995. As noted previously, if it becomes possible to commence work earlier, we will do so.

OGC Action To Be Taken: OGC will circulate an action request containing proposed rules that cover any of the draft report's recommendations on this issue that the Commission wishes to implement.

c. Publication of Commission section 337 reports

The IG's draft report notes that no written guidance on the publication of reports of section 337 investigations existed until January 1994, when an internal OGC memorandum was issued to OGC staff memorializing prior practice in this regard. The draft report also notes that the Commission has issued no written guidance on the issuance of section 337 reports in a timely manner. The draft report recommends that OGC "develop a Commission policy . . . on publishing section 337 reports that includes guidance on issuing the reports in a timely manner."

OGC has no disagreement with the draft report's recommendation. We note, however, that absent a delegation of authority, OGC can recommend a policy but the Commission would have to adopt it. The OGC memorandum of

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[9] At least the following current rules may need revision: 210.13, 210.53, 210.54, 210.58, 211.21, and 211.59.

January 1994 could serve as the starting point for developing a more fully-articulated Commission policy on the publication of section 337 reports. Finally, we note that recent section 337 reports have been published in timely fashion, due in large measure to the fact than an OGC staff person ** has been assigned responsibility in OGC for insuring the prompt publication of such reports, and we have every expectation that the timely publication of section 337 reports will continue.

OGC Action To Be Taken: OGC will circulate an action request proposing implementation of any of the draft report's recommendations on this issue that the Commission wishes to implement.

d. Internal distribution and filing of section 337 documents

The IG's draft report reviews the current distribution and filing of section 337 documents within the Commission, and suggests that installation of an electronic filing system could allow a reduction in the amount of paper that is currently distributed and filed.

OGC agrees with the draft report to the extent that we believe the feasibility of an electronic storage system should be explored, but we note several additional points that the Commission should consider. The records in question are working documents. They are used by OGC to prepare memoranda and appellate briefs and by OUII to prepare pleadings while cases are before an administrative law judge. Moreover, Commissioner staff persons may wish to use the records in working on cases to which they are assigned.

The practical problems that we foresee in working with electronically-stored documents include the facts that (1) only one electronically-stored page at a time can be viewed on a PC monitor, thus precluding direct comparison of one page against another; (2) electronically-stored documents

**Name deleted.

cannot be highlighted, tabbed, or otherwise marked or annotated for ease of reference, so users will continue to want hard copies to read and mark; and (3) it may be difficult to retrieve an electronically-stored document once it has been entered in the system because of problems with identifying such documents in the data base. We therefore agree with the view expressed in the draft report that, for the foreseeable future, it will be necessary for the Commission to retain some hard copy documents for effective review. However, the idea of using an electronic filing system appears to have merit and should be pursued.

OGC Action To be Taken: None at the present time, pending guidance and instruction from the Technical Review Committee and the Information Resources Management Steering Committee

II. Retention of Physical Evidence from Section 337 Investigations

The IG's draft report notes that items of physical evidence from completed section 337 investigations are sometimes retained by the Commission longer than necessary. Specifically, the draft report states that physical evidence from investigations terminated on the basis of a finding of no violation of section 337 is sometimes kept after the exhaustion of all appeals, and that physical evidence from investigations that result in the issuance of a patent-based exclusion order is sometimes retained after the underlying patent has expired. [10]

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[10] We note that physical evidence from all section 337 investigations needs to be retained until the exhaustion of all appeals, and that physical evidence from section 337 investigations that result in the issuance of remedial orders needs to be retained while those orders are in force. As noted in the draft report, patent-based exclusion orders expire when the underlying patent expires. Other types of exclusion orders, such as, for example, those based on trademarks, can last indefinitely.

The IG's draft report notes that the Commission has no written policy specifically addressing the retention of physical evidence from section 337 investigations. The draft report recommends that "provisions . . . be incorporated into the Commission regulations to facilitate disposal of" section 337 physical evidence, and proposes that OGC suggest changes to the Commission's rules concerning retrieval or abandonment of physical evidence.

OGC agrees that formulation of a written policy on the retention of physical evidence from section 337 investigations may be desirable, assuming the measures outlined in the Secretary's memorandum of July 27, 1994 (SE-R-025) do not resolve the problem. We question, however, whether the implementation of such a policy will require that the Commission's rules be amended. It may be preferable to set forth Commission policy on retention of physical evidence in the form of a Commission Directive. [11] In any event and as noted in the draft report, any such rules or directives will have to be consistent with the requirements of the Federal Records Act (44 U.S.C. §§ 3301 et seq.).

OGC Action To Be Taken: Further action is considered moot due to the adoption by the Secretary of the measures outlined in SE-R-025.

III. Commission Voting Procedures

The IG's draft report identifies two Commission section 337 voting procedures that the IG believes can be addressed by changing the Commission's rules. These procedures are the rule that a single Commissioner can initiate

[11] The "originating office" for preparation of such a directive would be the Office of the Secretary or the Office of Administration, and the procedures set forth in USITC Directive 0001.3, Directive Management System (April 5, 1993), would have to be followed. The estimated time for preparation and approval of such a directive is about six months.

oral arguments before the Commission and trigger review of initial determinations, and the absence of a rule providing definitive guidance on the resolution of tie votes in the final disposition of section 337 investigations.

a. One Commissioner votes

The draft report notes that under the Commission's current rules the vote of only a single participating Commissioner is required (1) to initiate oral argument before the Commission (19 C.F.R. § 210.56(a)) and (2) to initiate review of initial determinations (IDs) issued by Commission administrative law judges (19 C.F.R. § 210.54(b)(3)). The draft report recommends changing the rules to require that at least one-half of the participating Commissioners vote to hold oral argument or to review IDs. It states that "it is not only reasonable but a responsible decision to require that at least half of the Commissioners vote for review or oral arguments." [12]

OGC has no comment on the draft report's recommendations on this issue except to note that the issue is one of Commission policy having to do with the deference to be accorded by the Commission to each of its members. We do note, however, that the present rules seem to have worked reasonably well since their inception in the early 1980s. This office is unaware of any dissatisfaction among Commissioners or their staffs with respect to the above-mentioned Commission rules. If such dissatisfaction exists, it will presumably be brought to the attention of the IG and/or OGC.

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[12] Report at 13.

b. Tie votes

The IG's draft report states that several Commissioner staff persons expressed concern with the lack of definitive guidance on the resolution of tie votes in the final disposition of section 337 investigations. The draft report correctly notes that neither statute nor Commission rule addresses this issue, and states that "clarification of the tie vote issue would be beneficial." [13] The draft report recommends that OGC propose amendments to the Commission's rules to "clarify" tie vote situations. The report does not express a preference as to how tie vote situations should be resolved. [14]

OGC has four comments on the draft report's recommendation. First, as noted in the draft report, this office prepared a memorandum on the legality of a "tie-breaker" regulation in December 1992, [15] and concluded that there are "serious doubts" that the Commission has the authority to promulgate such a regulation under the current law. The memorandum also pointed out certain practical problems with a tie-breaker regulation. [16] We have not changed our

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[13] Id.

[14] One obvious possibility is a rule providing that in the event that the Commission is equally divided as to its disposition of a final ID under review, the ID will be affirmed.

[15] GC-P-371, dated Dec. 11, 1992. Copies of this OGC memorandum were attached to the copies of the IG's draft report distributed to the Commission.

[16] In brief, our memorandum noted that a "tie breaker" regulation would not address remedy because under the Commission's rules ALJ initial determinations on violation of section 337 do not address remedy. Thus, in cases where application of a "tie breaker" regulation results in a Commission finding that a violation of section 337 exists, a Commission that is evenly-divided on violation would still have to consider remedy. The memorandum went on to note the unlikelihood of Commissioners who had found no violation of section 337 voting to impose a remedy. As a result, the combination of an evenly-divided Commission and a "tie breaker" regulation could merely exchange the "procedural limbo" of an impasse on the question of violation for a different type of limbo in which the Commission is deadlocked over whether to issue a

(continued...)

views on these matters in the interim.

Second, we question the need for a tie-breaker regulation, assuming the Commission has the authority to promulgate one. The draft report correctly notes that the Commission has always avoided missing a statutory deadline because of a deadlock caused by a tie vote. In one fairly recent case, [17] the Commission was for several months deadlocked on whether to reverse an ID granting summary determination of no violation of section 337. However, the investigation was ultimately completed within statutory deadlines, although it was necessary to declare the case "more complicated" and extend the statutory deadline to 18 months. This case is the only one of which we are aware where a tie vote caused a significant problem.

Third, Congress is, as noted previously, now in the process of amending section 337. To our knowledge, none of the current proposals for amending the statute include a provision addressing the tie-vote issue, and we are advised by personnel at USTR that the prospect of getting such a provision added at this late stage of the legislative process is virtually nil.

Finally, we note again that while the IG and/or OGC could recommend a new policy on tie votes, only a majority of the Commission can adopt such a policy.

OGC Action To Be Taken: None, absent further direction from the Commission.

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[16](...continued)
remedy. See GC-P-371 at p. 11.

[17] Inv. No. 337-TA-334, Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles.