Final rule 210.45(c), which relates to review of IDs on matters other than temporary relief, describes the specific kinds of action that may be taken as a result of a review (viz., that the ID may be affirmed, reversed, remanded for further proceedings, modified, or set aside, in whole or in part). Final rule 210.45(c) says nothing, however, about what happens in the event that there is a tie vote on the disposition of the ID. The relevant statutes—i.e., section 330 of the Tariff Act of 1930 (19 U.S.C. § 1330), section 337, and the Administrative Procedure Act (APA) (5 U.S.C. § 551 et seq.)—are similarly silent on that specific issue.

On August 19, 1994, the Commission's Inspector General (IG) issued Audit Report No. IG–03–94, *Review of Ways to Increase the Economy and Efficiency of the Process for Conducting Section 337 Investigations,* which recommended that the Commission amend its section 337 rules to provide that in order for a review to be conducted or a request for oral argument to be granted, one-half of the participating Commissioners must vote in favor of the review or oral argument. The IG further recommended that the Commission amend the rules to ''clarify a tie vote situation,'' e.g., to provide that a tie vote on the disposition of an ID will have the effect of affirming the ID. The IG cited several reasons for recommending that the Commission abolish the one-vote-triggers-review-or-oral argument rules. She noted first that section 330 of the Tariff Act provides that an investigation may be instituted and a hearing may be conducted only if one-half of the participating Commissioners vote in favor of the investigation or hearing.[3] The IG went on to say that, in her opinion, Commission decisions on whether to review an ID and whether to grant a request for oral argument are comparable to the statutory decisions on whether to institute an investigation and whether to conduct a hearing and, thus, should be subject to the same requirements as those imposed statutorily on institution and hearing decisions. The IG added that requiring one-half of the participating Commissioners to vote in favor of review or oral argument in order for such review or argument to be conducted would aid in accomplishing the Commission's goal of streamlining its operations and reducing the burden on its ''customers.''[4]

In support of her recommendation that the Commission ''clarify a tie vote situation,'' the IG noted that the Commission had successfully avoided tie votes in the past, but that it would not feel the need to do so in the future if there were a Commission rule stating the effect of such votes. She also expressed the opinion that the existence of such a rule would be beneficial to the parties to section 337 investigations.[5]

The Commission notes that there is a question as to whether the Commission has the authority to promulgate a regulation stating that a tie vote would have the effect of affirming an ID under the current law. Section 337(c) requires that the Commission's section 337 determinations ''shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of [the APA].''[6] The APA provision concerning hearings requires that, when the agency itself does not preside at the reception of evidence, a qualified ''presiding employee,'' such as an administrative law judge (ALJ), preside at the reception of evidence and render an ID. The APA further provides that:

> When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.[7]

The limited applicable case law suggests that this provision may be given either of two conflicting interpretations.

The first interpretation would be that an ID becomes the agency decision unless the agency decides to review it. If, however, the agency decides to review an ID, the agency must take some affirmative action to issue its decision. The common law rule for multiple-member administrative 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.[8] Under this view, once the Commission determines to review an ID, a tie vote would not constitute Commission action. Instead, a majority of a Commission quorum would be required to take some affirmative action with respect to the reviewed ID.[9]

The second possible interpretation of the APA provision is that an ID becomes the agency decision unless the agency takes affirmative action to render another decision in its place.

Interested persons should also note that a tie-breaker rule would not necessarily succeed in resolving all questions arising from Commission tie votes in section 337 investigations. A tie vote resulting in adoption of an affirmative ID would not be sufficient for issuance of an agency remedial order; majority action would be required.[10] Consequently, a tie-breaker rule concerning IDs on violation of section 337 which provided that a tie-vote should constitute an affirmative determination would not solve a potential deadlock among the Commissioners as to whether a remedy should be issued on a tie-vote affirmative.

In order to aid the Commission in determining whether to proceed with the proposed rulemaking, the Commission would like to have all commenters address the following issues:

1. Whether the Commission should revise final rule 210.43(d)(3) to provide that the Commission will review an ID on a matter other than temporary relief when at least one-half of the participating Commissioners vote in favor of a review.

2. Whether the Commission should revise final rule 210.45(a) to provide that the Commission will grant a request for oral argument in connection with review of an ID on a matter other than temporary relief when at least one-half of the participating Commissioners vote in favor of such argument.

3. Whether the Commission should revise final rule 210.45(c) to state what effect a tie-vote will have on the Commission's disposition of an ID on a matter other than temporary relief—e.g., that a tie-vote on the disposition of an ID after a review will constitute an affirmance of the ID. The Commission is especially interested in receiving comments on the question of whether this change could be effected without statutory changes.

If the Commission decides to proceed with this rulemaking after reviewing the

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subject to the one-vote-triggers-review-or-oral-argument rules. *See* final rule 210.66.

[3] *See* 19 U.S.C. § 1330(d)(5).

[4] *See* Report No. IG–03–94 at pages 12–13.

[5] *Id.* at pages 13–14.

[6] 19 U.S.C. § 1337(c).

[7] 5 U.S.C. § 557(b).

[8] *Frischer & Co.* v. *Bakelite Corp.*, 39 F.2d 247, 254–55 (C.C.P.A.), *cert. denied,* 282 U.S. 852 (1930). *Bakelite* rejected the argument that the Commission could not render a section 337 determination on a 3–2 vote because three Commissioners did not constitute a majority of the full six-member Commission. The ''majority of a quorum'' rule of *Bakelite* was subsequently adopted by the Supreme Court in *Federal Trade Commission* v. *Flotill Products, Inc.,* 389 U.S. 179 (1967).

[9] Under 19 U.S.C. § 1330(c)(6), ''[a] majority of the commissioners in office shall constitute a quorum. * * *''

[10] *See Frischer & Co. v. Bakelite Corp.,* 39 F.2d at 254–55.