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**PRAGMATISM, PERSPECTIVES, AND TRADE:
AD/CVD, PATENTS, AND ANTITRUST
AS MOSTLY PRIVATE LAW**

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I. INTRODUCTION

This Article explores some common themes across three fields within the broader domain of trade law: international trade’s antidumping and countervailing duty (“AD/CVD”), intellectual property (“IP”), and antitrust. It uses some concrete examples to show how these fields’ essential attributes allow them to be appropriately designated as a type of private law, rather than public law. It also explores some ways in which those private law attributes make vital contributions to the overall success of these fields. The Article highlights three main pragmatic payoffs likely to flow from following a mostly private law approach to these fields: (1) helping each field constructively engage legal mechanisms that are premised upon both rules and standards;¹ while at the

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1. For a general discussion of rules versus standards, see, e.g., Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000).

same time (2) mitigating the efficiency-eroding and fairness-eroding effects studied by the public choice school of thought;² and (3) strengthening the opportunity for democratic review.

While the distinction between private law and public law is itself open to debate, one well accepted set of definitions is illustrative:

Private law defines the rights and duties of individuals and private entities as they relate to one another. It stands in contrast to public law, which establishes the powers and responsibilities of governments, defines the rights and duties of individuals in relation to governments, and governs relations between and among nations.³

Trade law's numerous fields meet both definitions to some extent because each field depends to a large degree on its ability to modulate interactions among private actors as well as interactions between private actors and state actors. While trade law encompasses many distinct fields,⁴ this Article focuses on the following subset as representative: AD/CVD, patents, and antitrust.⁵ Within each of these fields, there are countless echoes of the familiar debates between contrasting perspectives, such as between private law and public law, between legal realists and legal positivists, between rules and standards, and between efficiency and fairness, including perspectives that question whether such conceptual distinctions are actually without practical difference.⁶ This Article borrows from the many helpful contributions from all sides of these debates by using explicit labels when embracing particular goals or insights.

For a discussion of the economic tradeoffs between rules and standards, see, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

2. Public choice studies how decisions made by government officials and bureaucracies are impacted by their interactions with and the interactions among the voting population, interest groups, and organizations such as companies, unions, political action committees, and political parties. For a general discussion of public choice, see DENNIS C. MUELLER, PUBLIC CHOICE II 1 (1989) ("Public choice can be defined as the economic study of nonmarket decision making, or simply the application of economics to political science . . . [including] the theory of the state, voting rules, voting behavior, party politics, the bureaucracy, and so on.")

3. John C. P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640 (2012).

4. Examples include various international treaties, as well as various areas of domestic law such as secured transactions law, securities regulation law, commercial bankruptcy law, and the like.

5. AD/CVD refers to the body of law known as antidumping and countervailing duties, as provided in TITLE VII of The Tariff Act of 1930, updated through Pub.L. 103-465 (Uruguay Round Agreements Act-12/8/94).

6. See, e.g., Goldberg, *supra* note 3 (summarizing debates over distinctions between private law and public law and collecting sources).

This Article explores some concrete examples across these three representative fields to sketch a pragmatic approach to integrating diverse perspectives, including those outlined above. It develops some modest recommendations about how to conceptualize trade law and its implementation. It shows how trade law works well when it operates mostly as private law within the positivist tradition, with the aim of increasing efficiency, while remaining open to public law goals such as fairness. The basic intuition is that this approach explicitly employs the skepticism of the realist tradition to further three distinct goals: (1) enabling the constructive use of legal frameworks of both rules and standards; while (2) mitigating the efficiency-eroding and fairness-eroding effects of public choice; and (3) strengthening the opportunity for democratic review.⁷ The Article explores a rules-based,⁸ good government approach to trade law that takes seriously the familiar toolkit of procedural safeguards for openly engaging diverse perspectives. Chief among these safeguards is basing decisions on a detailed factual record, while explicitly setting forth the details of any analytical reasoning grounded in that record. Although each of the legal regimes explored here includes as a primary goal the protection of a level economic playing field on which to foster economic efficiency, economic growth, and dynamic competition, each also has long been understood to embrace considerations of broader public interest.⁹ Following the familiar procedural safeguards may seem either overly legalist or proceduralist, but it furthers the private law goals of fostering efficiency-enhancing private ordering and the public law goals of transparent democratic review by showing when broader public law goals such as an increased sense of fairness to a particular group or interest are in play.

This Article begins in Part II with analysis of an example from the field of international trade's AD/CVD law. This example focuses on a seemingly simple question — what counts as material injury caused by imports — that could leave room for immense flexibility and discretion, ripe for a public law approach. The discussion below then shows how the case-law has evolved crucial restraints on this otherwise immense zone of flexibility that foster the core private law features of the

7. In so doing, this Article builds on prior works that have offered a “basics matter” approach to sketching out how these private law systems can operate at their best and at their worst. *See, e.g.*, F. Scott Kieff & Troy A. Paredes, *The Basics Matter: At the Periphery of Intellectual Property*, 73 *GEO. WASH. L. REV.* 174 (2004); Stephen H. Haber, F. Scott Kieff, and Troy A. Paredes, *On the Importance to Economic Success of Property Rights in Finance and Innovation*, 26 *WASH. U. J.L. & POL'Y* 215 (2008).

8. The U.S. generally expresses preference for a rules-based approach to adjudication of disputes within the domain of international trade for a range of reasons. *See, e.g.*, Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 *VA. L. REV.* 251 (2006).

9. *See, e.g.*, Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. § 2191) (adding subsections 337(d) and (f), which require the ITC to consider the “public interest” before issuing a remedy in an IP case).

AD/CVD regimes while permitting some room for public law values. Part III provides additional examples of a private law approach from the fields of patent and antitrust law. Lastly, Part IV explores some underappreciated structural features of the different tribunals that adjudicate around the patent-antitrust interface to elucidate how they may play a key role in facilitating a private law approach. Part V concludes.

II. INTERNATIONAL TRADE AND THE AD/CVD SYSTEMS

The basic structure of current AD/CVD law in Title VII¹⁰ remains anchored in the Smoot-Hawley Tariff Act of 1930,¹¹ which is often viewed as having imposed the highest protective tariff rates in U.S. history.¹² This body of law is notoriously but understandably subject to concern for being implemented in ways that make it ill suited for the label of private law by inhibiting private parties from efficiency-enhancing private ordering. Some commentators see AD/CVD law as amenable to an unduly broad range of approaches.¹³ Some see it as inherently incoherent, perhaps by design.¹⁴ Some see it as especially likely to cause significant reduction in domestic and international economic efficiency.¹⁵ Some see it as biased against particular countries, such as China.¹⁶

Before addressing these understandable concerns, a brief review of the AD/CVD framework provides background. The basic concept behind AD/CVD law is to protect domestic markets from harm caused by

10. Peter D. Ehrenhaft, *Book Review: The Role of Federal Courts in U.S. Customs & International Trade Law*, 31 GEO. WASH. J. INT'L L. & ECON. 323, 327, n.14 (1997–1998).

11. Tariff Act of 1930 (Smoot-Hawley Tariff Act), Pub. L. No. 71-361, ch. 497, 46 Stat. 590 (1930). (codified in various sections of 19 U.S.C.).

12. Chantal Thomas, *Challenges for Democracy and Trade: the Case of the United States*, 41 HARV. J. LEGIS. 1, 5 (2004).

13. See e.g. Seth Kaplan, *Injury and Causation in USITC Antidumping Determinations: Five Recent Approaches*, in POLICY IMPLICATIONS OF ANTIDUMPING MEASURES (P.K.M. Tharakan ed., 1991); Michael Knoll, *Legal and Economic Framework for the Analysis of Injury by the U.S. International Trade Commission*, 23 J. WORLD TRADE 95 (1989); Michael Knoll, *An Economic Approach to the Determination of Injury Under United States Antidumping and Countervailing Duty Law*, 22 N.Y.U. J. INT'L L. & POL. 37 (1989). Cf. Alan O. Sykes, *The Economics of Injury in Antidumping and Countervailing Duty Cases*, 16 INT'L REV. L. & ECON. 5 (1996).

14. Ronald Cass and Warren Schwartz, *Causality, Coherence and Transparency in the Implementation of International Trade Laws*, in FAIR EXCHANGE: REFORMING TRADE REMEDY LAWS 24, (Michael Trebilcock and Robert York eds., 1990).

15. See, e.g., Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199 (1989).

16. Benjamin H. Liebman, *ITC Voting Behavior on Sunset Reviews*, 140 REV. WORLD ECON. 446 (2004) (claiming bias against Chinese imports in decisions by ITC on AD/CVD matters). Cf. 731-TA-1205, USITC Pub. 4443 January 2014 (unanimous negative determination by ITC, declining to impose order against imports from China, despite having received letter advocating affirmative determination from ranking member of Senate oversight committee, the Senate Committee on Finance). Letter from Hatch (EDIS Doc 522949, Nov 21, 2013).

foreign producers who are selling into the domestic market at less than fair value. The intuition on which these regimes are premised is that a foreign producer only rationally pursues such underselling if it is otherwise able to unfairly recoup through some improper means any losses it suffers by selling at such a low price. In the case of the AD regime, the basic idea is to defend against a foreigner's reliance on short-term predatory pricing in furtherance of a long-term strategy in which profits are recouped later as a winning monopolist who has driven all competitors, including domestics, out of the market.¹⁷ In the case of the CVD regime, the short-term tactic is an inappropriate subsidy by the foreign producer's own government. Of course, both AD and CVD regimes, as well as their underlying intuitive premise, are subject to debate.

Both AD and CVD investigations begin with the simultaneous filing of petitions at the U.S. Department of Commerce ("Commerce") and at the U.S. International Trade Commission ("ITC").¹⁸ These petitions may be filed by interested domestic parties such as individual producers or growers, trade associations, or labor organizations.¹⁹ Responsibilities in the AD/CVD investigations are divided between Commerce and the ITC.²⁰ Commerce determines whether the imports subject to investigation are dumped²¹ or subsidized²² and at what margins, with the size of the margins later used as the size of the corresponding tariff if an ultimate affirmative determination is made by the ITC.²³ That ITC determination is whether a domestic industry is mate-

17. Cf. Alden Abbott, *U.S. Antidumping Law Needs a Dose of Free-Market Competition*, Heritage Foundation Background Paper #3030 on Trade (July 17, 2015) (arguing that actual predatory pricing should be proven before antidumping investigations should be allowed to proceed).

18. 19 U.S.C. § 1673a(b) (AD); 19 U.S.C. § 1671a(b) (CVD).

19. 19 U.S.C. § 1673a; 19 U.S.C. § 19671a; 19 U.S.C. § 1677(9). AD and CVD investigations may be initiated by Commerce, 19 U.S.C. §§ 1671a(a), 1673a(a), but this is extraordinarily rare and has not occurred in at least the last 20 years.

20. 19 U.S.C. § 1673; 19 U.S.C. § 1671.

21. "Dumping" is defined as "the sale or likely sale of goods at less than fair value." 19 U.S.C. § 1677(34). The dumping margin is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35). For more on Commerce's practices for calculating dumping margins, see *Glossary of Terms, ENFORCEMENT AND COMPLIANCE*, <http://enforcement.trade.gov/glossary.htm> [<https://perma.cc/GHH7-NYQR>].

22. 19 U.S.C. § 1677(5).

23. The margins are calculated by Commerce. See, e.g., 19 U.S.C. § 1673b(3); 19 U.S.C. § 1673d(a); 19 U.S.C. § 1671b(d); 19 U.S.C. § 1671d(a). Those calculations are completed before the ITC makes its final injury determinations. 19 U.S.C. § 1673d(b)(2); 19 U.S.C. § 1671d(b)(2). The ITC considers the impact of subject imports and not the effect of the dumping or subsidies *per se*. See, e.g., *Softwood Lumber from Canada*, Inv. Nos. 701-TA-414 and 731-TA-928 (Final), USITC Pub. 3509 (May 2002) at 30. The ITC is directed to consider the magnitude of the margin of dumping. 19 U.S.C. § 1677(7)(C)(iii). The ITC is also directed to consider the nature of any countervailable subsidy in determining whether an industry is threatened with material injury. 19 U.S.C. § 1677(7)(F)(i)(I). The ITC is not a

rially injured, or threatened with material injury, by reason of the subject imports.²⁴ Thus, AD or CVD duties, or tariffs, will be imposed only if both Commerce and the ITC make affirmative determinations.²⁵

Most nations' AD/CVD regimes, including ours in the U.S., are premised on a basic public tradeoff. On the one hand, affirmative determinations lead to tariffs being imposed on the imports, which protect particular domestic producers and members of their production team²⁶ by allowing them to earn more from the higher price they can charge than if the prices on imports did not include the tariffs. On the other hand, all members of the U.S. market who purchase these same goods pay a higher price. In some cases, the domestic purchasers are different people than those who are involved in producing the domestic good. In some cases, the individuals are the same, as is the case when an individual is both an employee (or investor) in a domestic producing firm and also a customer of the products produced.

Turning back to the ITC, its central determination is whether the imports caused (or threaten) material injury to the domestic industry.²⁷ That ITC determination is based upon a very detailed factual record developed through months of extensive investigation about the relevant industry by ITC staff, as well as what is typically a day-long evidentiary

policymaking entity, and is directed to determine only whether a domestic industry is suffering, or is threatened with, a specified degree of injury by reason of subject imports. It is not tasked with determining whether there might be any benefits to the economy at large. Abbott, *supra* note 17, at 2–3 (dumping as international price discrimination benefitting consumers).

24. 19 U.S.C. § 1673; 19 U.S.C. § 1671. The petition sets the basic contours of an investigation by defining what is called the “scope,” which is those imported goods that are to be subject to an investigation. 19 U.S.C. § 1673a(b)(1), 19 U.S.C. § 1671a(b)(1). Once the scope is proposed by the petition and set after investigation by Commerce, the ITC has no authority to expand the scope. *Algoma Steel Corp. v. United States*, 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989). While the definition of the scope is left to Commerce, the definition of the domestic products and industry to be investigated is left to the ITC. *Id.* The ITC uses the scope to determine what domestically produced products are most like the products that are subject to investigation because they are defined to be within the scope. 19 U.S.C. § 1677(10). The definition of a domestic like product in turn drives the definition of the relevant industry whose performance will be evaluated to determine whether there is material injury by reason of those subject imports. 19 U.S.C. § 1677(4).

25. 19 U.S.C. § 1673 (AD), 19 U.S.C. § 1671 (CVD). Margins are subject to regular administrative review at Commerce upon request, 19 U.S.C. § 1675(a), and reviews of both may be instituted if changed circumstances are found to warrant such reviews. 19 U.S.C. § 1675(b). Both Commerce and the ITC review all orders at five-year intervals, 19 U.S.C. § 1675(c)(1), with the ITC determining whether revocation would likely lead to a continuation or recurrence of material injury by reason of subject imports. 19 U.S.C. § 1675a(a)(1). There is no limit to the lifespan of an AD or CVD order. *See, e.g., Barium Chloride from China*, Inv. No. 731-TA-149 (Fourth Review), USITC Pub. 4574 (Oct. 2015), at 3 (finding that revocation of an order first imposed in October 1984 would likely lead to continuation or recurrence of material injury).

26. According to the “team production” theory of business enterprise, a broad range of stake-holders make important firm-specific investments in the enterprise, including shareholders, laborers, creditors, and many others. *See* Margaret M. Blair & Lynn A. Stoudt, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 248 (1999).

27. *See supra* note 25.

hearing involving witness testimony and advocacy by lawyers, business representatives, and economists, and on many occasions by Members of Congress and by ambassadors and other officials from foreign embassies to the U.S.²⁸ Underlying the ITC's process is its statutorily mandated inquiry about whether there has been or would be "material injury," which is broadly defined in the statute as "harm which is not inconsequential, immaterial, or unimportant."²⁹ The statute provides minimal constraints on how this vague standard should be interpreted or applied. While the statute does specify that the Commission must consider volume, price, and impact of the subject imports, and further identifies specific items within that framework that the Commission must consider,³⁰ the same statute allows the Commission to also consider "such other economic factors as are relevant to the determination."³¹ This extensive leeway is increased by the low standard of proof, which is the mere presence of substantial evidence in the record.³² It is increased further through companion doctrines such as "reasonable overlap in competition" and "cumulation", which allow for the consideration of multiple imports in aggregate.³³ Indeed, the legislative history strongly suggests this apparently low threshold was intended. According to a staffer involved in the legislation:

28. *Antidumping and Countervailing Duty Handbook (Fourteenth Edition)*, USITC Pub. 4540 (June 2015), at II-1-II-26, https://www.usitc.gov/trade_remedy/documents/handbook.pdf [<https://perma.cc/Y59C-2AMX>]; 19 C.F.R. Part 207. For a representative ITC determination, including opinion, record, and hearing calendar, see *Cold-Rolled Steel Flat Products from China and Japan*, Inv. Nos. 701-TA-541 and 731-TA-1284 and 1286 (Final), USITC Pub. 4619 (July 2016), https://www.usitc.gov/publications/701_731/pub4619.pdf [<https://perma.cc/7XWB-84V2>].

29. 19 U.S.C. § 1677(7)(A).

30. 19 U.S.C. § 1677(7)(B) and (C).

31. 19 U.S.C. § 1677(7)(B). The most recent amendment does not appear to provide any added constraint and may alleviate some constraints by explicitly allowing the "Commission to not determine that there is no material injury or threat of material injury to an industry in the United States merely because that industry is profitable or because the performance of that industry has recently improved." 19 U.S.C. § 1677(7)(J).

32. *ALTX, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004), *U.S. Steel Corp. v. United States*, 33 C.I.T. 1935, 1357 (2009). Reviewing courts consider this to be "less than a preponderance, but more than a scintilla." *Novosteel SA v. United States*, 25 C.I.T. 2, 16, 128 F. Supp. 2d 720, 725 (2001) (quotation marks & citation omitted), *aff'd*, 284 F.3d 1261 (Fed. Cir. 2002).

33. Cumulation is a very low standard. See *Goss Graphic System, Inc. v. United States*, 33 F. Supp. 2d 1082, 1087 (Ct. Int'l Trade 1998), *aff'd* 216 F.3d 1357 (Fed. Cir. 2000) (cumulation does not require two products to be highly fungible). Products only tend to be found to be not fungible when there is virtually no overlap between them in the marketplace. See, e.g., *Static Random Access Memory Semiconductors from the Republic of Korea and Taiwan*, Inv. Nos. 731-TA-761-762 (Final), at 15 (no cumulation for lack of a reasonable overlap of competition where 96.7 percent of subject imports from Korea were slower SRAMs, while 97.8 percent of subject imports from Taiwan were faster SRAMs); *Certain Lightweight Thermal Paper from China, Germany, and Korea*, Inv. Nos. 701-TA-451 (final) and 731-TA-1126-1127 (Final), USITC Pub. 4043 (November 2008) at 12-14 (no cumulation for lack of reasonable overlap of competition where all imports from Germany were jumbo rolls and all

I was the Republican staff director of the Finance Committee when we put the material injury standard into place, and I can assure you it was not meant to be this huge threshold. . . . They said material injury means any injury that's not spiritual.³⁴

On its face, this articulation of the injury standard might suggest the public budget allocated to the ITC's highly trained investigative staff of economists, industry experts, and lawyers might be better spent on a smaller staff of psychological counselors tasked to quickly determine whether complainants are suffering more than harm to their spirit. Yet no such suggestion has been made by Congressional appropriators over the ITC's past century of investigations, suggesting that Congress intends the question of injury to be more grounded in economics and legal reasoning than in psychology.³⁵

Leaving aside a deep discussion of the legal test for injury under U.S. AD/CVD law, this Article instead offers merely an overarching perspective that highlights some of its key private law attributes, while also accommodating some key public law values. Put differently, even within AD/CVD's broad statutory framework about injury, the totality of the jurisprudence has evolved to give a fair amount of predictability to private parties, in furtherance of private law goals, while embracing

imports from China were slit rolls, but no party disputed the Commission's preliminary finding that these products were not functionally interchangeable at time of importation).

34. Investigation Nos.: 731-TA-711 and 713-716, Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico (Second Review) April 12, 2007, pp. 185–86. 125 Cong. Rec. 20, 163 (“It is clear from the relevant statutory language, legislative history, case law, and administrative precedents that the ‘injury’ test in the Antidumping Act was not intended by Congress to be a rigorous one . . . [it is enough that there be a] quantum of injury (actual or threatened) which is merely more than *de minimis*.”); 125 Cong. Rec. 20, 165 (“Obviously, the law will not recognize trifling, immaterial, insignificant or inconsequential injury. Immaterial injury connotes spiritual injury, which may exist inside of persons not industries. Injury must be a harm which is more than frivolous, inconsequential insignificant, or immaterial.”).

35. Prior to the Trade Agreements Act of 1979, no statutory provision modified the term “injury” or attempted to define the nature of the injury required before a remedy was to be imposed, although it was recognized that the law did not cover “trifling, immaterial, insignificant or inconsequential injury.” Sen. Rep. 93-1298 at 180 (1974). The 1979 Trade Act imposed a “material injury” standard and defined “material injury” as “harm which is not inconsequential, immaterial, or unimportant,” but the addition of the term “material” was understood to imply no real change in the degree of injury. H.R. Rep. 96-317 at 46 (1979). The 1979 Trade Act not only defined material injury but also directed the Commission to collect and consider specific information to reach a determination. 19 U.S.C. §§ 1677(7)(B), (C), (F). Since 1979, Congress has provided further guidance as to what factors the Commission must review, 19 U.S.C. § 1677(7)(C)(iii)(I), and indicated that certain conditions did not mandate the absence of material injury, 19 U.S.C. § 1677(7)(J).

important public law interests other than dynamic economic efficiency.³⁶ The case law accomplishes these two different goals by requiring each decision to be very explicit in its analysis.³⁷ This allowance for both private law and public law values, so long as the underlying opinion is itself explicit in setting forth its own logic, is helpful in allowing the reviewing courts, the political branches of government, and the public to have an easier time seeing the detailed analytical workings underlying the tradeoffs of costs and benefits within each decision, as well as which factors count as costs and as benefits.³⁸

The point thus far is to highlight one instructive example of a legal regime that, despite appearing to be a totally open-textured standard, in application generally operates mostly like a private law system while accommodating some degree of public law values. The price that must be paid for that flexibility is the obligation to write a very detailed logical analysis. The payoff from that requirement for such admittedly expensive-to-produce explanation³⁹ is more predictability, greater opportunity for democratic review, and lower public choice pressures by tethering the decision from the kind of political influence that thrives in textual subterfuge or obfuscation.

Whether this tradeoff is worth it is of course a policy question left to Congress and the President as they cooperate in any statutory enactment. The discussion here merely highlights the ways in which this tradeoff furthers the typical private law goal of fostering efficient private ordering while accommodating broader public law values, even in the context of a seemingly very broad legal standard — injury caused by imports — as an introduction to the Article’s overall approach.

36. See, e.g., Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1238–39 (1982) (describing the public values theory of agencies).

37. Such transparency is consistent with the Federal Circuit’s line of cases that collectively allow for flexibility in reasoning surrounding the ITC’s causation analysis of material injury, so long as there is a clear logic to the particular reasoning employed. See *Gerald Metals, Inc. v. United States*, 132 F.3d 716 (Fed. Cir. 1997); *Bratsk Aluminium Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006); *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867 (Fed. Cir. 2008); *Swiff-Train Co. v. United States*, 793 F.3d 1355 (Fed. Cir. 2015).

38. For more on optimal design for an administrative law system, see, e.g., David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446 (2014); RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* (Aspen Publishers, 5th ed., 2010).

39. The detailed record on which the explanation is built requires months of work by ITC staff and by members of the relevant industry and their counsel, which of course all require the ordinary costs of monetary budgets. The analysis set forth in the explanation itself carries more nuanced costs of showing how the decision was reached, which sometimes may be something individual government decision-makers may wish to avoid.

III. THE SUBSTANCE OF THE PATENT-ANTITRUST INTERFACE

The core substantive interface between patent law and antitrust law glaringly demonstrates a fundamental tension that suggests the implementation of either or both of these fields is appropriately open to a broad range of discretion. As Lord Justice Robin Jacob colorfully put it in reference to the entire broad field of IP (not just patents):

To call it “intellectual” is misleading. It takes one’s eye off the ball. “Intellectual” confers a respectability on a monopoly which may well not be deserved. A squirrel is a rat with good P.R. . . . [H]owever justified the cry, “what we need here is protection” may be for an anti AIDS campaign, it is not self evident for a process of the creation of new or escalated kinds of monopoly.⁴⁰

This perceived tension between IP and antitrust leads to the advocacy for diametrically opposed analytical frameworks that are prone to hyperbole: one sees each IP right as so powerful that it constitutes a monopoly that must be regulated, while the other sees each IP right as otherwise conveying so little net social value (IP skeptics might recognize some positive social value but fear it to be small, or degraded or even offset by fears of market power, of the *in terrorem* effect of litigation costs, of the lock-in effect of implementers’ decisions to infringe, or of the network effects of standardization) that the IP right should not be enforced with injunctions or high damages awards.⁴¹

It has been very popular — across administrations from both major political parties — to use this tension between patents and antitrust as a primary justification for following a public law model for both patents and antitrust. That approach focuses mostly on the relationship between the private parties and the government (the Patent Office, the courts, or the antitrust regulators), in which the government carefully titrates the optimal amount of benefit or restraint to give each private actor.⁴² In

40. Lord Justice Robin Jacob, Royal Courts of Justice, London, England, *Industrial Property-Industry’s Enemy*, The Intellectual Property Quarterly, Launch Issue, (Sweet & Maxwell), 1997, pp. 3–15.

41. Compare Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 GEO. L.J. 2055 (2012) (arguing that Coke and Pepsi each constitute their own monopoly, and don’t experience economic competition from each other or from other beverage brands and types) with Mark Lemley & Carl Shapiro, *Patent Holdup & Royalty Stacking*, 85 TEX. L. REV. 1991, 2002–03 (2007) (“the patented feature adds no value”).

42. For example, under both the administrations of President George W. Bush and Barack H. Obama, there was a decade-long set of reports and related hearings held by antitrust regulators in the Department of Justice and the Federal Trade Commission that largely followed this approach. See, e.g., FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER

contrast, a private law approach sees both patents and antitrust as fostering the parallel goals of innovation and competition. Furthermore, it focuses on the different government role in setting predicable rules to foster private ordering between private parties and increase dynamic efficiency.

Despite the popularity of the opposing and public-law-oriented views of the patent-antitrust interface, there are at least three basic reasons they are appropriate to question.⁴³ First, they are inconsistent with the set of repeated positive law actions (statutory enactments and court decisions focused directly on point) designed to make clear that the antitrust concerns about market power for each IP right are not properly invoked absent distinct evidence of such market power that is based on something other than the mere existence of an underlying IP right.⁴⁴

BALANCE OF COMPETITION AND PATENT LAW & POLICY (2003), <https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf> [<https://perma.cc/5LEE-KMSX>] (set of hearings held jointly with Antitrust Division, with accompanying report by the Commission). Transcripts of the hearings are available at *Competition and IP Law and Policy in the Knowledge-Based Economy Hearings*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/events-calendar/2002/02/competition-ip-law-policy-knowledge-based-economy-hearings> [<https://perma.cc/GTL6-4M7T>]; *The Evolving IP Marketplace*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/events-calendar/2008/12/evolving-ip-marketplace> [<https://perma.cc/SF7S-VMQS>] (set of hearings); FEDERAL TRADE COMMISSION, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (March 2011), <https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf> [<https://perma.cc/642H-BNDN>] (report); DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf> [<https://perma.cc/W7BN-AEJC>]; *Public Workshop: The Intersection of Patent Policy and Competition Policy Workshop*, THE UNITED STATES DEP'T OF JUSTICE (May 26, 2010), <https://www.justice.gov/atr/events/public-workshop-intersection-patent-policy-and-competition-policy-workshop> [<https://perma.cc/3VKZ-FS2P>].

43. These public law-oriented views are not the only perspectives in the literature. See F. Scott Kieff, *An Inconvenient School of Thought*, 61 ALA. L. REV. 591 (2010); Additional Views of Commissioner Kieff, in U.S. Int'l Trade Commission, *Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors*, Publication Number: 4607 Investigation Number: TPA-105-001, at pp. 535–38 (May 2016); Additional Views of Commissioner Kieff, in U.S. Int'l Trade Commission, *Economics Impact of Trade Agreements Implemented Under Trade Authorities Procedures*, 2016 Report, Publication Number: 4614 Investigation Number: 332-555, at pp. 117–20 (Jun. 2016); Views of the Honorable F. Scott Kieff, Commissioner, United States International Trade Commission, on the United States Federal Trade Commission's and the United States Department of Justice Antitrust Division's Joint Guidelines for the Licensing of Intellectual Property (August 2016), <https://www.justice.gov/atr/file/883941/download> [<https://perma.cc/AB8F-7V8H>].

44. For example, in 1952 Title 35 (Patents) was codified containing Section 271 to explicitly make clear that absent market power, it is perfectly within the statutory rights of an IP holder to either sue or license to enforce their IP. See *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 199–215 (1980) (reviewing legislative history of this statutory decision to re-align the patent-antitrust interface and rejecting antitrust arguments about putative patent misuse). Soon after the Supreme Court's 1980 *Dawson* decision, Congress amended Section 271 with the addition of sub-parts (d)(4–5) to make explicit that a showing of market power is required before a proper antitrust claim could be brought against a patentee for committing

Second is the rare politically bipartisan concurring opinion of Chief Justice Roberts joined by Justices Scalia and Ginsburg in the 2006 *eBay* case, in which they pointed out that the courts had long awarded injunctions in patent cases and that “a major departure from the long tradition of equity practice should not be lightly implied.”⁴⁵ Third is antitrust law’s own long-recognized principle that antitrust does not prohibit market power or monopoly if they are achieved through lawful competitive means. As Judge Learned Hand put it, “The successful competitor, having been urged to compete, must not be turned upon when he wins.”⁴⁶

Building upon prior work, this Article explores a contrasting approach to the patent and antitrust systems that is grounded in a more private law tradition. This more private law-oriented approach was elaborated in detail in the 1940s through a set of law review articles authored by Judge Giles S. Rich, who was a principal drafter of the 1952 Patent Act, which codified the US patent system,⁴⁷ and embraced in the 1950s by other major commercial jurists of the time including Judge Hand and Judge Jerome Frank.⁴⁸ As Judge Pauline Newman has

patent misuse. See Patent Misuse Reform Act of 1988 (sec. 201). And the Supreme Court reaffirmed in the 2006 *ITW v. III* case that a patent does not create a presumption of market power. *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

45. *eBay v. MercExchange*, 547 U.S. 388, 394–95 (2006) (Roberts, C.J., joined by Scalia, J., and Ginsburg, J., concurring) (citation omitted). See also, Mark P. Gergen, John Golden, & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203 (2012) (exploring past practice of issuing injunctions).

46. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

47. Act of July 19, 1952, Pub. L. No. 82-593, 1952 U.S.C.A.N. (66 Stat. 792): An Act to revise and codify the laws relating to patents and the Patent Office and to enact the laws into Title 35 of the United States Code. Giles Rich was a primary drafter of the 1952 Act. See, e.g., Jon Thurber, *Obituaries — Judge Giles Rich*; Patent Law Authority, L.A. TIMES, June 14, 1999, at A22; Richard A. Oppel Jr., *Obituary — Giles S. Rich, Oldest Active Federal Judge, Dies at 95*, NEW YORK TIMES, June 12, 1999, at Section A. Rich provided a detailed discussion of his views about the patent-antitrust interface a decade before the statute was enacted. See Giles S. Rich, *The Relation Between Patent Practices and the Anti-Monopoly Laws*, 24 J. PAT. & TRADEMARK OFF. SOC'Y 159 (1942), reprinted in 14 FED. CIR. B.J. at pages 5, 21, 37, 67, and 87 (2004–2005) (five-part series of articles). The other principal drafter, who also wrote a great deal about the statute, was Pat Federico. See Giles S. Rich, *In Memoriam: P.J. (Pat) Federico and His Works*, 64 J. PAT. OFF. SOC'Y 3 (1982), reprinted in 85 J. PAT. & TRADEMARK OFF. SOC'Y 83 (2003).

48. See *Reiner v. I. Leon Co.*, 285 F.2d 501, 503 (2d Cir. 1960) (Hand, J.) (“There can be no doubt that the Act of 1952 meant to change the slow but steady drift of judicial decision that had been hostile to patents.”); *Picard v. United Aircraft Corp.*, 128 F.2d 632, 643 (2d Cir. 1942) (Frank, J., concurring) (discussing the role of predictable rules for patent enforcement in helping a smaller “David” compete with a larger “Goliath”). Such a private law approach also underlies key features of the early U.S. patent system that distinguished it from the British patent system at the same time. B. Zorina Khan & Kenneth L. Sokoloff, *History Lessons: The Early Development of Intellectual Property Institutions in the United States*, 15 J. ECON. PERSP., 233, 233–35 (2001); Naomi R. Lamoreaux & Kenneth L. Sokoloff, *Intermediaries in the U.S. Market for Technology, 1870–1920*, in FINANCE, INTERMEDIARIES, AND ECONOMIC DEVELOPMENT 209, 210–11 (Stanley L. Engerman et al. eds., 2003).

noted, a politically diverse pair of U.S. Presidents also adopted this approach at the end of the 1970s and early 1980s, when the economy was in difficult times, as it had been during the period leading up to the 1952 Act.⁴⁹ President Carter, a Democrat, decided, after a careful study, to promote a bill designed to strengthen the private law aspects of the patent system by creating the U.S. Court of Appeals for the Federal Circuit.⁵⁰ President Reagan, a Republican, signed the bill to much fanfare after Congress passed it.⁵¹

A. Patents

A private law approach to patents emphasizes a different target for the patent's incentive effects than is emphasized by a public law approach, as well as a correspondingly different set of detailed mechanisms for the various positive law components of the system. At the same time, the private law and public law approaches all share the broader goals of promoting innovation, including increased public access to innovation's fruits and competition in its commercialization, as well as overall economic growth.

While a public law approach to patents focuses on the use of patents as regulatory entitlements to provide direct incentives to inventors to invent, which uses a public law emphasis on the relationship between the government and private parties, a private law approach focuses on the use of patents as property rights which emphasizes indirect incentives fostered by direct interactions among private actors. In essence, public law approaches focus on getting inventions made on one hand while keeping market power low on the other hand. Private law approaches focus on the commercialization of inventions, to increase both competition and access to patented technologies.

Judge Rich, one of two principal drafters of the statute that implemented the patent system that operated in the United States from 1952 through the end of the twentieth century, explicitly focused on the role of patents in facilitating coordination among many diverse market participants in order to commercialize innovation, rather than on getting

49. Judge Pauline Newman, *Foreword: The Federal Circuit in Perspective*, 54 AM. U. L. REV. 821, 822–23 (2005) (reviewing history of the 1982 statute designed to strengthen private law attributes of the U.S. patent system and included as a major domestic policy initiative of the Carter Administration before being signed into law by the Reagan Administration); see also Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended at 28 U.S.C. § 171) (creating the U.S. Court of Federal Claims); The Indus. Advisory Subcomm. on Patent & Info. Policy, Report on Patent Policy, in ADVISORY COMMITTEE ON INDUSTRIAL INNOVATION: FINAL REPORT 147, 155 (1979).

50. The relevant conclusions of the study can be found at Industry Subcommittee for Patent & Information Policy, Advisory Committee on Industrial Innovation, Report on Patent Policy, 155 (1979).

51. Federal Courts Improvement Act of 1982, P.L. 97–164, 96 Stat. 25 (April 2, 1982).

inventions made.⁵² As Abraham Lincoln described it, the patent system “added the fuel of interest to the fire of genius, in the discovery *and production* of new and useful things.”⁵³

Focus on targeted incentives to get inventions made generally treats patents as interchangeable with alternatives such as tax credits, prizes, grants, rewards, and the like, all of which are emblematic of public law in that they depend upon modulating the relationship between private actors and the state.⁵⁴ Yet, providing such targeted incentives requires the government to have an immense amount of information about who exactly should be targeted and how large the incentive should be, including when and what other positive and negative incentives may be acting on those same targets. At the same time, those operating under such regimes have strong incentives to seek their own rewards yet little incentive to provide the government with information that would restrain it from rewarding others, suggesting the government will be flooded with claims.⁵⁵ In such public law relationships it is likely that large, established market actors will be better able than smaller market entrants to wield the political influence needed to get the government to act.⁵⁶ With public law come the increased perils of political economy, public choice, sense of unfairness, and related risks.⁵⁷

In contrast, a focus on commercializing inventions sees patents more in the tradition of private law property rights, facilitating the coordination among diverse market actors, including investors (such as venture capitalists and others), managers, marketers, laborers, and often

52. *See supra* note 47.

53. Abraham Lincoln, Second Lecture on Discoveries and Inventions (Feb. 11, 1859), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 356, 363 (Roy P. Basler ed., 1953) (emphasis added and omitted).

54. *See, e.g.*, Michael Kremer, *Patent Buyouts: A Mechanism for Encouraging Innovation*, 113 Q.J. ECON. 1137 (1998) (suggesting the government buy out patents after conducting an auction to determine an appropriate buyout price to better address these same fields and others); Steven Shavell & Tanguy van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525 (2001) (suggesting government-sponsored cash rewards as partial or full replacements for patents and to better address fields where the disparity between average cost and marginal cost is typically large, citing as examples biotechnology and computer software, which are both focal points in today’s debates about patentable subject matter).

55. For a general critique of rewards-focused approaches to patents, including the powerful incentives a private law approach to patents can deploy for both patent seekers and potential patent infringers to bring this information to the government, see F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697, 705–17 (2001); and Daniel F. Spulber, *Should Business Method Inventions Be Patentable?*, 3 J. LEGAL ANALYSIS 265, 298–304 (2011).

56. *See* FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 14–15 (1997) (providing examples of similar political dynamics in the context of securities regulations pushed by larger firms to the detriment of smaller firms).

57. *See supra* note 2.

the owners of other tangible and intangible assets, including other inventions. Such coordination among diverse actors can be greatly facilitated by allowing inventions to be patented and then using dispute resolution procedures to enforce those patents that have relatively low administrative costs and less reliance on flexible discretion over subjective factors.⁵⁸

When an inventor has a patent backed up by credible enforcement in court, that patent can act like a beacon in a dark room to draw to itself all of those interested in that technology and to start conversations among them.⁵⁹ These diverse private actors can then bargain among themselves to determine what investments to make in each other, or otherwise, including through formal contracts, all without having to reveal to the government or each other extensive information about themselves. Through the enforcement of that patent and any resulting contracts, the government is able to help patentees and their contracting parties appropriate the returns to any of their own rival inputs to developing and commercializing innovation — labor, lab space, capital, etc. — without the government itself having to trace and evaluate the relative contributions of each participant and with less risk that political influence will affect outcomes.⁶⁰

A private law approach to patents also helps elucidate some key differences between the use of court adjudication and administrative agency examination to assess patents. While litigation in court is more expensive and time-consuming, it is also less open to political influence and its link among issues of patent validity, infringement, remedy, and public interest factors including antitrust provides important, self-disciplining effects on the arguments presented to the tribunal by both patentees and alleged infringers.⁶¹ The deeper pockets, broader contractual relationships, and larger numbers of employees and shareholders that more often characterize larger firms than smaller ones provide sound reasons for thinking the larger firms will be more likely to be effective in bringing political influence to bear in general, including in agency determinations.

58. F. Scott Kieff, *On Coordinating Transactions in Intellectual Property: A Response to Smith's Delineating Entitlements in Information*, 117 YALE L.J. POCKET PART 101, 102 (2007); see also Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1745, 1751–52 (2007).

59. *Id.*

60. *Id.*

61. See F. Scott Kieff, *The Case for Preferring Patent-Validity Litigation over Second-Window Review and Gold-Plated Patents: When One Size Doesn't Fit All, How Could Two Do the Trick?*, 157 U. PA. L. REV. 1937, 1949–50 (2009) [hereinafter Kieff, *The Case for Preferring*]; F. Scott Kieff, *The Case for Registering Patents and the Law and Economics of Present Patent-Obtaining Rules*, 45 B.C. L. REV. 55, 118–22 (2003) [hereinafter Kieff, *The Case for Registering*].

B. Antitrust

A private law approach can also meaningfully inform the current debates about matters that fall more squarely on the antitrust side of the patent-antitrust interface. Consider two current examples. One involves basic theories about the power of the Federal Trade Commission (FTC) under Section 5 of its 1914 statute.⁶² The second concerns the Supreme Court decision in *FTC v. Actavis*, on March 25, 2013, a case initially brought by the FTC asserting its Section 5 power.⁶³

FTC Commissioners Maureen Ohlhausen and Joshua Wright propose a set of guidelines designed to articulate a clear framework for determining when Section 5 has been violated and when it has not.⁶⁴ Their focus is on how to enable relatively easy determinations about what lies within the zone of legality, and what falls within the zone of illegality. They suggest focus be placed on identifying both particular harms to competition as well as particular countervailing efficiencies of suspect conduct. That gives effect to the notion that Section 5 power does reach beyond the other antitrust statutes while also mitigating risk of significant collateral costs to its use. It also helps ensure some particularized statement of costs and benefits is included in any decision to act under this statute. This not only helps private parties plan their

62. Section 5, which is codified as 15 U.S.C. § 45, gives the FTC broad power to regulate “unfair methods of competition.” More well known antitrust provisions include Sections 1 and 2 of the Sherman Act of 1890, 26 Stat. 209 (1890), 15 U. S. C. §§1–40 (1934), which target particular, well recognized categories of evidence of market power, the Clayton Act of 1914, Pub.L. 63–212, 38 Stat. 730, enacted October 15, 1914, codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53, which targets particular, well recognized categories of collusive anticompetitive behavior, and even the more recent 1976 Hart-Scott-Rodino Act, Pub. L. No. 94-435 § 201, 90 Stat. 1390, codified as amended at 15 U.S.C. § 18a (1983), which refines the particularized behavior-based approach of the Clayton Act to require procedures for review of certain categories of transactions like mergers and acquisitions. Section 5, on the other hand, is much more open-ended. It has been long recognized that FTC’s Section 5 must cover something more than these other antitrust statutes. The debate has been over what exactly this “something more” is — in other words, over the scope of Section 5. See, e.g., *FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute*, FED. TRADE COMM’N (Aug. 13, 2015), <https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act> [<https://perma.cc/8QQ4-8K8E>] (press release reporting FTC statement and dissenting statement). And today’s uncertainty about this Section 5 power stems from current actions that test its limits.

63. *FTC v. Actavis, Inc.*, 133 S.Ct. 2223 (2013).

64. For a more detailed outline of the approaches suggested by Commissioners Ohlhausen and Wright, see Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, J. ANTITRUST ENFORCEMENT 1 (2013) https://www.ftc.gov/system/files/documents/public_statements/section-5-ftc-act-principles-navigation/131018section5.pdf [<https://perma.cc/XG9R-V6D8>]; Joshua D. Wright, *Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, FED. TRADE COMM’N, https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf [<https://perma.cc/6TDD-SKSP>].

affairs, it also improves democratic review and decreases the opportunity for hidden political influence. Although the FTC Section 5 power extends far beyond IP, the Ohlhausen & Wright approach to it is very much in keeping with the private law approach to the patent-antitrust interface explored in this Article, as well as an approach labeled in prior work as “basics matter”.⁶⁵ The essence of such a private law approach to antitrust requires a mindfulness of the important goals and concerns of the diverse perspectives that have informed the development of different areas of law for which there is broad consensus. It does not make the strong claim that current legal regimes are perfect or cannot be improved upon and accommodates the need for policy makers to strike different balances over time.

Consider an example premised on two or more sophisticated business parties in an ongoing voluntary commercial relationship, so that concerns about substantive and procedural unfairness are largely avoided or mitigated. A private law approach to antitrust encourages careful attention to the full contours of what a law student might call the “black letter law” (positive law) relating to property and contract, including the rules about what makes a property right or contract valid and enforceable and on what terms, as well as the same basic features of the “black letter law” of antitrust, including, for example, attention to factual evidence about actual market power or its threat.

In the context of the FTC’s Section 5 power when used to assess a case involving potential fraud or failure to live up to one’s particular commitments (FRAND or otherwise), the idea is to require full consideration of existing positive law regimes, such as “fraud” and “contract,” or existing bodies of well accepted economic concepts such as “hold up,” as well as the history of the normative debates leading to their evolution.⁶⁶ This takes into account the diverse perspectives of experts

65. Kieff & Paredes, *supra* note 7.

66. Consider as a legal example the common law test for fraud, which requires factual evidence of four factors: (1) misrepresentation of a material fact; (2) intent; (3) justifiable or reasonable reliance; and (4) injury. A private law approach to FTC’s Section 5 would begin by asking which particular element of the legal test for common law fraud is being overlooked in order to bring the case under the FTC’s Section 5. It would also ask for an explanation about why the reasons offered by those who had advocated for the inclusion of this element in the legal test for fraud should be overcome in the setting of a Section 5 case. In so doing, it would endeavor to elucidate the full set of costs and benefits of essentially changing the balance struck by an existing legal rule so that attention can be paid to the well-founded reasons for having not done so in the past. Consider as an economics example a setting in which “hold up” is seen as a particular problem arising out of the interaction between asset-specificity and opportunism, as Oliver Williamson has discussed in his Nobel Prize winning work on transaction cost economics. *See, e.g.,* OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 61–63 (1985). Given this view of “hold up,” in the context of remedies for patent infringement, a private law approach would be open to decreasing or eliminating patent remedies in particular cases based on specific factual evidence of these two factors (asset specificity and opportunism), including evaluating the interaction between them, rather than allow open textured policy debates about the

within each of these particular fields of law — including judges, policy makers, academics, lawyers, and others — before finding that there are penumbras that might obscure each field’s clear boundaries. Doing so can help mitigate the risk that attention to one concern does not inadvertently eclipse or elide countervailing concerns, in the hope that broadly informed, deliberate choices can play out better than a single-minded effort to address just one perceived need.

Doing so also would require decision makers to expressly identify the perceived failures of the established regimes before creating new doctrines and approaches. The mere formality of identifying and rigorously considering the different bodies of law and the diverse goals that motivated their creation can result in greater respect for the dignity of those bodies of law and the widely recognized expertise embedded within diverse perspectives that informed them. It also helps ensure that, if the law is to change, there is transparency into the reasons why, accountability on the part of those making the change, and guidance for governmental and private actors to follow going forward. This fosters the skepticism of the realist tradition to mitigate the efficiency-eroding and fairness-eroding effects of public choice, while strengthening the opportunity for democratic review.

In the context of the Supreme Court’s 2013 *Actavis* decision, the private law approach would look to carefully understand the particular inefficiency alleged in similar cases. Regardless of outcome, this may provide more detailed guidance to private parties as well as across the government.

Actavis involved the settlement of a patent case that occurred within the complicated statutory framework called the Hatch-Waxman Act.⁶⁷ The Hatch-Waxman Act governs disputes between branded and generic pharmaceutical businesses and sits at the interface between the fields of patent law and food and drug law.⁶⁸ That case involved what some antitrust regulators call a “reverse-payment” from the plaintiff-patentee to the generic infringer in exchange for the generic’s commitment to stay out of the market for a particular period of time.⁶⁹ The antitrust concerns arise because it looks at first glance like the patentee and infringer may be colluding against the rest of the market in keeping the court from reaching a result that occurs in roughly half the patent

possibility of holdup in general to drive outcomes in particular cases without any factual underpinnings adjudicated in those cases. See Richard A. Epstein, F. Scott Kieff & Daniel F. Spulber, *The FTC, IP, and SSOs: Government Hold-Up Replacing Private Coordination*, 8 J. COMPETITION L. & ECON. 19 (2012); F. Scott Kieff & Anne Layne-Farrar, *Incentive Effects from Different Approaches to Holdup Mitigation Surrounding Patent Remedies and Standard-Setting Organizations*, 9 J. COMPETITION L. & ECON. 19 (2013).

67. *FTC v. Actavis*, 133 S.Ct. 2223, 2227–29 (2013).

68. Drug Price Competition and Patent Term Restoration Act of 1984, 98 Stat. 1585, as amended (Hatch–Waxman Act).

69. *Actavis*, 133 S.Ct. at 2227 (explaining reverse payment).

litigations:⁷⁰ the patentee would have lost, either because the patent would have been adjudicated invalid or so narrow that infringement would be easy to avoid. The FTC essentially argued such settlements are illegal or subject to close scrutiny *per se* based largely on this appearance of collusive anticompetitive effect.⁷¹ The parties to the underlying patent suit argued the settlement should generally be left alone.⁷² Worried that the amount of the payment may simply have been too much to represent the risk-adjusted value of the underlying patent dispute, the Supreme Court reached what might be seen as a middle ground and decided that these settlements have to be evaluated under antitrust law's "rule of reason" standard, which generally requires specific evidence particularly tied to problems most economists generally agree are associated with competitive inefficiencies.⁷³

It is tautological that "too much" of something (or "too little" for that matter) is problematic — the modifier "too" conveys excess. The key question is what constitutes "too much." A private law approach would begin by recognizing that "too much" is itself too vague. Consider just two reasons why a particular financial payment by one side to settle a dispute may look to an outside observer to be out of proportion or "too much."

First, while each particular U.S. court adjudicating a dispute is restrained by subject matter and personal jurisdiction, when exploring settlement the parties themselves can consider using all resources they actually control (including those not at issue in a given lawsuit) and may consider a broader range of business interests. As mediators often remind parties, this broader scope offers more opportunities for gains from trade. The disputing parties may be better off entering into a voluntary deal when there is enough value that can be created by transferring assets or liabilities to the other party through a settlement agreement. Yet the magnitude and the sign of the nominal financial settlement amount paid between sophisticated parties may be merely one component of the deal's overall effect, thereby conveying little information on its own. Put differently, a deal denominated in dollars may involve transfers in both directions of many types of value and the net flow in value may be very hard to determine, for even the parties themselves. To be sure, the value may be the direct result of purely anticompetitive collusion and good evidence of such behavior should inform

70. For patent litigation, like many forms of litigation, the plaintiffs (or defendants) may be expected to win only half the cases, because the more certain parties are about the dispute's outcome, the more likely they will settle to avoid the uncertainty, delay, expense, and public outcome of litigation. *See, e.g.*, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL. STUD. 1 (1984). *Cf.* Jason Rantanen, *Why Priest-Klein Cannot Apply to Individual Issues in Patent Cases*, working draft (March 31, 2013).

71. *Actavis*, 133 S.Ct. at 2229, 2231.

72. *Id.* at 2230.

73. *Id.* at 2234–39.

the rule of reason analysis. But that was the practice before the *Actavis* case. Just as evidence of other particular harms also should be considered when available, so should evidence that other aliquots of value actually drove the nominal settlement amount, which may then militate against antitrust liability. At the same time, a searching analysis during antitrust review of all the detailed merits of the underlying patent dispute in every case in which there is settlement would risk eroding the social benefits normally associated with allowing settlements, including the opportunity costs of the courts and agencies time not spent doing other work in furtherance of justice. This approach is somewhat analogous to that taken in the common law of contracts regarding the doctrine of consideration, which merely attempts to ensure some more than merely nominal consideration is flowing in both directions; and does not even try to specifically balance out each component of consideration flowing one way against each component flowing the other way, or ensure equality in the magnitudes of the total flows in each direction.

Second, as those familiar with U.S. trademark law well know, trafficking in a “naked” mark is not allowed and renders the mark legally invalid.⁷⁴ Because a U.S. trademark must be something that signifies a particular quality of the underlying good or service, any sale or license of the mark must be accompanied by the associated indicia of quality.⁷⁵ As a result, many trademark deals can look like a payment to buy or take a license combined with a requirement that the one paying subject itself to the control of the other. A casual observer might wonder why one party would pay a large sum only to also subject itself to the control of the other. But rather than being a payment that is “too much” and “reverse,” this is the best way for both parties to maintain the value of the trademark, the very basis of the transaction. This trademark example is just one particular application of the broader insight that sometimes it is prudent to pay more for some types of assets, like machinery or livestock, perhaps also including payment for the asset’s care so that the asset is fully operational and therefore presumably more valuable to the buyer.

A private law approach should be mindful of such concerns while also searching for evidence of actual anticompetitive effect. Absent mindfulness about categories of value that might be harder to see, the

74. In the context of a trademark for a bakery, for example, any sale or license of the mark must be accompanied by requirements that particular recipes be followed, often including that particular types of ingredients and equipment be used. *See, e.g., Dawn Donut Co. v Hart’s Food Stores, Inc.*, 267 F.2d 358 (2d Cir. 1959); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892, 918 (S.D.N.Y.1968) (“a ‘naked’ license *may* be the basis for an *inference* of abandonment where the licensor maintains no control over the quality of goods made by the licensee”) (emphasis added; citation omitted), *aff’d as modified*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971).

75. *See, e.g., Robinson Co. v Plastics Research & Development Corp.*, 264 F. Supp. 852 (W.D. Ark. 1967).

incomplete picture can allow more open-textured, discretion-based enforcement systems to become too persuaded by political considerations.

This should not be taken as criticism of antitrust enforcement in general, which does serve good ends, including at the IP-antitrust interface. Nor does it suggest that expanded antitrust is necessarily bad. But fostering competition and economic growth among private parties also depends on legal rules like FTC's Section 5 being predictable and fact-based, rather than vague, ambiguous, or subject to the undue discretion of government actors.⁷⁶

IV. CONTRASTING AGENCIES IN THE U.S. PATENT AND ANTITRUST SYSTEMS

Implementing the private law approaches to the patent and antitrust systems that are sketched above can be helped by attention to some seemingly mundane differences among the many courts and agencies that operate in these systems. The discussion that follows builds on prior work⁷⁷ to highlight two key implications of these differences. One is the benefit of more extensive logical reasoning in published government opinions (that may itself be embraced or criticized by reviewing courts, Congress, and the public) when written with more independence from politics and fashion. Another is the benefit of receiving more self-disciplined and less hyperbolic arguments and evidence from the private parties with greatest access to relevant information and strongest incentives to provide it. Because each of the distinctions highlighted here can be seen as mere matters of degree, Figure 1 sketches a comparative example across several agencies of the U.S. patent and antitrust systems. These range from the group on the left, which comprises ordinary Executive Branch agencies including the U.S. Patent and Trademark Office (“USPTO”) and Department of Justice Antitrust Division (“DoJ”),⁷⁸ to the group in the middle of independent commissions comprising the FTC and ITC, and the group on the right of courts comprising the many district courts, the U.S. Court of the Appeals for

76. See *supra* notes 47–51, and accompanying text.

77. See James E. Daily & F. Scott Kieff, *Benefits of Patent Jury Trials for Commercializing Innovation*, 21 GEO. MASON L. REV. 865 (2014).

78. While the Food and Drug Administration (“FDA”) is another Executive Branch agency in the innovation ecosystem with its own regulatory regime, at least two ITC Commissioners have reserved judgment in an orphan drug matter on whether claims based on the Food, Drug, and Cosmetic Act may be cognizable under Section 337 (a)(1)(A). Joint Memorandum with concurring views of Commissioners Broadbent and Pinkert (Memorandum CO-KK-005/CO84-KK-001, Re: Complaint of KV Pharmaceutical Company Concerning Hydroxyprogesterone Caproate and Products Containing Same, USITC Docket No. 2919, EDIS Doc. ID 499899 (Dec. 21, 2012)).

the DC Circuit (“CADC”),⁷⁹ the U.S. Court of Appeals for the Federal Circuit (“CAFC”),⁸⁰ and the Supreme Court (“SCT”).

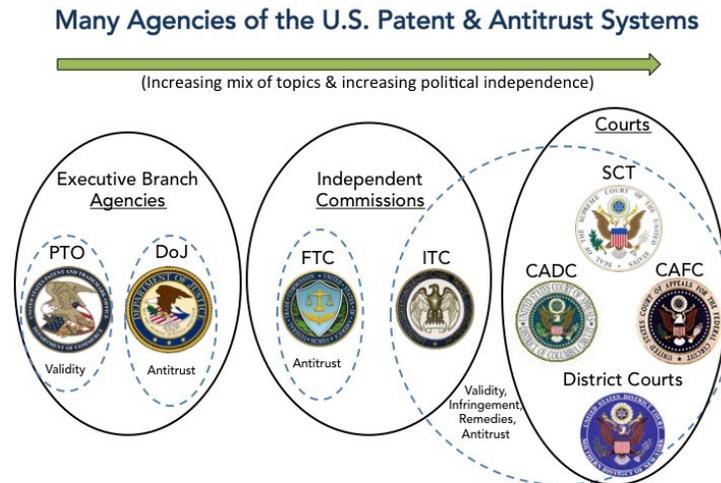


Figure 1: Independence and Breadth of Jurisdiction

The first key shift moving from left to right across Figure 1 is an increase in independence from politics and fashion. A crucial inflexion point can be highlighted by beginning the discussion with the one agency in Figure 1 (just right of the middle of the figure) that is likely least familiar to most readers: the ITC. Rising from the shadow of the Civil War’s violent political divisions, when the country was funded almost entirely by import tariffs rather than the modern income tax, the essential structure of the ITC traces its intellectual roots to the famous Harvard economics professor Frank W. Taussig, who was appointed the first Chair of the ITC’s predecessor (the Tariff Commission).⁸¹ After having long advocated for an independent commission to de-politicize the import component of U.S. international trade, Taussig oversaw the creation of an agency structured to do only fact-finding, analysis, adjudication, and technical advising, leaving policy-making to the political branches of government.⁸²

The ITC’s structure meaningfully insulates it from ordinary public choice pressures that act on the political branches of government. The

79. This court is marked with an asterisk because it reviews only the FTC among the other tribunals in the figure.

80. This court reviews the PTO, ITC, and District Court patent decisions.

81. See generally JOHN. M. DOBSON, TWO CENTURIES OF TARIFFS, THE BACKGROUND AND EMERGENCE OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION (1976).

82. *Id.* at 86.

ITC is somewhat like the many other more familiar independent administrative agencies, such as the FTC and Securities and Exchange Commission (“SEC”). Each is often seen as less subject to political pressure than typical Executive Branch departments and agencies, such as the DOJ and the USPTO, because each of these independent commissions is not within any executive branch department.⁸³

But unlike almost all of the other independent commissions, there are several essential features of the ITC’s internal structure that statutorily enable significantly greater independence, most of which date back to the statute advocated by Taussig at the time the ITC’s predecessor was set up:⁸⁴ six members, appointed by the President and confirmed by the Senate, with no more than three from any one political party;⁸⁵ nine-year staggered terms for each member;⁸⁶ the position of Chair rotates among the members every two years, switching party every time;⁸⁷ each member has the same vote on substantive matters;⁸⁸ any four members can overrule the Chair on administrative matters;⁸⁹ and analytical studies assigned by and technical assistance provided to both political branches, including both houses of Congress.⁹⁰

As a result of these structural features, the Commission Staff generally work closely with all six of the Commissioners’ offices, recognizing that every two years the Chair will have to rotate and that many of the Commissioners are likely to serve as Chair. This incentivizes close coordination among the six members and the Commission Staff even when votes are not unanimous, which has long helped the ITC ordinarily operate by consensus on internal administrative matters as well as frequently on substantive decisions. It also forces a constructive confrontation of disparate perspectives, thereby increasing the chance that alternative viewpoints are thoroughly considered. This helps ensure the best record is assembled and that resulting published work product, including those for the majority as well as and minority dissents and concurrences, is written with moderation as well as careful

83. *See generally* STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

84. DOBSON, *supra* note 81, at 87–89. The Federal Election Commission was created almost a century later to follow the model of the ITC’s structure for independence, but because its docket is so inherently political (elections!), it is widely recognized as more vulnerable to partisan politics.

85. The other commissions have five members.

86. The members of the other commissions have five-year or seven-year terms.

87. Chairmanships of other commissions can span a Presidential term or be terminated by the President.

88. On most other commissions, the Chair and the two other members are of the President’s political party and all-together control the majority on most votes.

89. At other commissions the Chair has a greater administrative role.

90. The other commissions typically are closer to one of the major political parties, political branches, or one of the houses of Congress, depending on the overall power-dynamics in government at the time.

explanation and citation to the law and factual record. This all, in turn, strengthens external confidence in the agency's expertise and independence among reviewing courts as well as both elected branches of government including both houses of Congress, across the political spectrum.

The second key shift moving from left to right across Figure 1 is an increase in the complexity of the basic topics in a patent-antitrust dispute that are actually decided by each agency. For the USPTO, this includes only the basic requirements for a valid patent, often collectively called validity.⁹¹ For the DOJ and the FTC, this includes only antitrust issues.⁹² But for the ITC and the courts, this includes all aspects of patent disputes, including topics relating to (1) validity; (2) infringement; (3) remedy; and (4) public interest, including antitrust, or potential anti-competitive effects. The simultaneous presence of all four sets of topics harnesses each side of a typical dispute with its own strong incentive to use self-restraint in presenting less hyperbolic arguments to the governmental decision-makers. For example, while the patentee has the selfish incentive when arguing about infringement and remedy to argue that the patent claims are broad (thereby sweeping in more infringements), it has the countervailing selfish incentive when arguing about validity and antitrust to assert that the patent claims are narrow (thereby avoiding the prior art and avoiding excessive market power). At the same time the opposing party has the exact opposite set of mutually countervailing incentives. As a result, each side engages in self-restraint, providing the tribunal with a much more elaborate and thoughtfully presented (less hyperbolic) set of evidence and arguments.⁹³

The combined impact of the two key shifts sketched in Figure 1 increases the chance that the government decision-makers in the tribunals towards the right side of that figure have the benefit of a more diverse set of ideas, arguments, and facts, as well as their own internal

91. The USPTO's power is limited to questions of patent validity because USPTO functions are limited to patent examination and issuance, reexamination, inter-partes review, post-grant review, and the like. The USPTO has no authority to determine infringement, remedy, or antitrust issues. *See, e.g.*, 35 U.S.C. § 2 (a) (1) (setting forth basic functions of the office); 35 U.S.C. § 131 (examination); 35 U.S.C. § 151 (issue); U.S.C. § 302 (reexamination); 35 U.S.C. § 311 (inter-partes review); and 35 U.S.C. § 321 (post grant review).

92. The DOJ power is limited to questions of antitrust enforcement. *See, e.g., Chapter II: Statutory Provisions and Guidelines of the Antitrust Division*, THE UNITED STATES DEP'T OF JUSTICE, <https://www.justice.gov/atr/file/761131/download> [<https://perma.cc/SL7F-MTR4>] (listing of the various statutes enforced by the Antitrust Division includes only antitrust statutes, not the statutes governing patent validity, patent infringement, or patent remedy). Similarly, the FTC enforcement power is limited to consumer protection and antitrust. *See, e.g.*, 15 U.S.C. § 45(a)(1) (Section 5(a) of the FTC Act providing power over "unfair or deceptive acts or practices" and ("unfair methods of competition").

93. Kieff, *The Case for Preferring*, *supra* note 62, at 1949.

incentives to more completely and transparently elaborate the analytical reasoning that underlies their decisions. Of course, thoughtful and independent decision-making also occur within the agencies towards the left side of the figure, which are more political and focus on only a subset of the same issues. But special vigilance is needed in those settings to adopt and adhere to additional procedural safeguards that are structured to provide added assurance of independence and effectiveness.⁹⁴

Of course, the ITC itself is a work in progress. As needs have shifted in its IP-antitrust docket to include increasing controversy over public interest issues (including potential anticompetitive effects) arising out of cases involving standard-essential-patents (“SEPs”), the ITC has explored a range of procedures for increasing transparency, fairness, and a range of substantive economic frameworks. For example, in the *Broadcom v. Qualcomm* “baseband processors” case, the ITC voted⁹⁵ to conduct a public hearing on the public interest factors relating to possible harm to competition if an exclusion order were awarded.⁹⁶ Similarly, in the *Samsung v. Apple* “smartphone wars” case, the ITC made supplemental solicitations for input about public interest to address, among other things, concerns about anticompetitive effects of patents in the context of technological Standard Setting Organizations (“SSOs”) and putative commitments to issue licenses on so-called RAND or FRAND terms.⁹⁷ More recently, in the *Amkor v. Carsem* “encapsulated integrated circuits” case involving the SSO called “JEDEC”, four of the six Commissioners provided additional views exploring various procedural safeguards akin to waiver and estoppel to maximize fairness and the ways specific conduct of both the IP owner and the IP user can give rise to symmetrical concerns about holdup and reverse

94. While the DoJ and FTC of course do consider ordinary patent issues of validity, infringement, and patent remedy (as distinct from antitrust remedy) on their way to adjudicating their core antitrust docket, they don’t enter final judgments of patent invalidity, infringement, or patent remedy (such as damages or injunction against infringement or exclusion from importation). For more on mechanisms for fostering independence, see, e.g., William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085 (2015).

95. Pursuant to 19 C.F.R. § 210.43 (majority vote of the Commission to conduct a hearing).

96. (337-TA-543, 2007), https://www.usitc.gov/press_room/news_release/2007/er0607ee1.htm [<https://perma.cc/7EZJ-U6K5>].

97. (337-TA-794, 2013), see <http://www.essentialpatentblog.com/2013/07/itc-releases-public-version-of-the-commission-opinion-and-dissent-in-samsung-apple-case-337-ta-794/> [<https://perma.cc/AFG2-JU4F>]. The ITC issued a detailed decision spanning roughly 150 pages, including approximately 35 pages devoted to the analysis of this evidence, and an accompanying thoughtful dissenting opinion of approximately 10 pages setting forth detailed reasoning closely tied to the factual record that focuses largely on a different reading of the facts relating to the specific actions of the parties regarding their particular negotiating behaviors. See 337-TA-794 Commission Opinion (Public Version), July 18, 2013 (including pp. 41–66 focusing on affirmative defenses relating to the SSO, and pp. 105–119 focusing on the remedy, the public’s interest in the remedy, and how the remedy was tailored to address the public’s interest).

holdup.⁹⁸ Similar symmetrical concern for such procedural and substantive nuances is elaborated in the European Court of Justice's ("ECJ") *Huawei v. ZTE* decision, which may suggest the emergence of an international norm.⁹⁹ A striking parallel has thereby emerged in the co-evolved approaches employed by the ITC as a U.S.-based organization and the ECJ as an E.U.-based organization. Further transparency and opportunity for increased clarification of diverse complex arguments may be available at the ITC if parties request oral argument before the Commission and one of the Commissioners votes to grant it, whether such an oral argument is focused on issues relating to SEPs or any other topic for which the analytical and decision-making processes would be aided by open conversations between the parties and the Commission and among the Commissioners in compliance with the Sunshine Act.¹⁰⁰

V. CONCLUSION

Using some concrete examples from the fields of AD/CVD law, patent law, and antitrust law, this Article highlights the mostly private law attributes of these fields and sketches mechanisms by which these private law attributes contribute to trade law's overall success. It also elucidates some core structural features of a tribunal that can meaningfully reinforce these private law aims, while also constructively accommodating public law values. The Article shows how private law approaches to trade can facilitate a field's ability to constructively engage both rules and standards while mitigating the efficiency-eroding and fairness-eroding effects of public choice and strengthening the opportunity for democratic review.

98. (337-TA-501, 2014) (with additional views of Aranoff, Broadbent, Kieff, and Pinkert), <http://www.essentialpatentblog.com/2014/05/itc-issues-limited-exclusion-order-upon-finding-patent-was-not-essential-to-jedec-standard-337-ta-501/> [<https://perma.cc/CSF8-MQUL>].

99. Case C-170/13 *Huawei Technologies Co. Limited v. ZTE Corp.* (Fifth Chamber, 16 July 2015), <http://curia.europa.eu/juris/document/document.jsf?docid=165911&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=893133> [<https://perma.cc/NX4G-VDTS>]. See also Dina Kallay, *The ECJ Huawei-ZTE Decision: En Route to Ending Hold-Out?*, CPI ANTITRUST CHRONICLE, Oct. 2015 (2).

100. See 19 C.F.R. § 210.45(d); see also David Long, *Litigating Standard Essential Patents at the U.S. International Trade Commission*, ESSENTIAL PATENT BLOG, <http://www.essentialpatentblog.com/wp-content/uploads/sites/64/2012/12/2016.01.28-SEP-Litigation-in-ITC-D.-Long.pdf> [<https://perma.cc/24LS-P6UK>]. The Government in the Sunshine Act prevents Commissioners from discussing as a group off-the-public-record matters pending for decision. (Pub.L. 94-409, 90 Stat. 1241, enacted September 13, 1976, 5 U.S.C. § 552b). Oral argument on the record before a Commission Hearing would allow for such dialogue in compliance with the Sunshine Act.