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**United States International Trade Commission:
Co-Equal of the FTC in Regulating Unfair
Methods of Competition**

FOREWORD

In the few years since section 201 of the Trade Act of 1974 liberalized the criteria governing the U.S. International Trade Commission's (U.S.I.T.C.) findings in import relief cases, a number of these cases, involving such basic commodities as sugar, steel, footwear and televisions, have received affirmative determinations from the Commission. When viewed against the backdrop of consistently negative findings by the U.S.I.T.C. in industry cases brought forward under the Trade Expansion Act of 1962, these recent determinations stand out in rather high relief. As a result, public attention has been turned away from what I feel is a more significant set of statutory changes. I am referring to the new Act's amendments to section 337 of the Tariff Act of 1930, dealing with unfair trade practices.

It is important to realize that these amendments are not just modifications of criteria, as in the case of section 201, but are instead fundamental clarifications of legislative intent, making what was once considered to be looked on as a limited set of provisions against patent infringement into a considerable piece of antitrust legislation. The original section 337 did contain language which could have been interpreted as being antitrust in nature. However, the U.S. Tariff Commission, the predecessor of the U.S.I.T.C., chose to construe the section as applying almost exclusively to patent cases, and left the larger possibilities of section 337 virtually unexplored.

With the passage of the 1974 Trade Act, amendments to this section clearly provided for an increased emphasis on the regulation of nonpatent unfair competitive acts. "Unfair methods of competition," reads 337 (a), as amended, "and unfair acts in the importation of articles into the United States, or in their sale . . . the effect or tendency of which is to destroy or substantially injure an industry efficiently and economically operated in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist, shall be dealt with . . . as provided in this section." The instructions of the Senate Finance Committee Report on the Trade Act of 1974 are absolutely clear: section 337 is to be considered a statute addressing acts that are anticompetitive. I quote: "The Committee believes that the public health and welfare and the assurance of competitive conditions in the United States

economy must be the overriding considerations in the administration of this statute." This language echoes the Act itself, which, in the remedy provisions of section 337, directs the Commission to consider "competitive conditions in the United States economy." Section 337, as amended, provides that the Commission shall consult with and seek advice and information from the Department of Justice and the Federal Trade Commission. The Finance Committee Report also notes that these Government agencies will often have significant information, as well as sound advice, about the impact of U.S.I.T.C. exclusion or cease and desist orders on the conditions of competition mentioned above. Section 337 (b) (2) enjoins the U.S.I.T.C. to consult with these, and other, agencies during the course of the investigation itself. Thus, the Statute leaves no doubt at all as to the Congress' intention that 337, as amended, be used as a piece of antitrust legislation.

In fact, the 1930 Act is further amended to provide the U.S.I.T.C. with the necessary tools to use in remedying anticompetitive acts. The harshness of the prior collection of remedies had greatly limited the usefulness of 337. The anticompetitive effect of a remedy requiring exclusion of the offending articles did not, for example, lend the section to proper application as an antitrust statute. The new Act has greatly ameliorated this situation by providing the U.S.I.T.C. with the option of issuing cease and desist orders, the traditional regulatory weapon of antitrust. The Commission may issue such orders and may, at any time, upon such notice and in such manner as it deems proper, modify or revoke them. Thus, it is now feasible to attack anticompetitive actions without using anticompetitive remedies.

The Commission has also sought to fill out its remedy options in such cases by using consent orders. Implied in statutory powers envisaged in section 337 and sanctioned by the Administrative Procedure Act, such orders were issued by the U.S.I.T.C. in *Certain Color Television Receiving Sets*, (see text, *infra* at note 29). These orders, negotiated by the parties including the U.S.I.T.C. investigative staff, were taken as the basis for terminating the investigation. The U.S.I.T.C. has drafted and published for comment proposed rules for the settlement and termination of investigations by means of consent orders. It may well be that other remedy provisions will be found necessary as section 337 provisions are put to greater use. Thus far, Congressional reaction to U.S.I.T.C. activities under this section would indicate a willingness to provide the U.S.I.T.C. with whatever new remedies might be necessary to carry out the intent of the Act.

Finally, there has been still another major amendment to section 337, correcting a large obstacle to the use of the section as an antitrust statute. Under earlier acts, the U.S.I.T.C. was not subject to provisions of the Administrative Procedure Act. Its own rules, therefore, contained no provision for prehearing discovery, and the decisions of the Commission were often based on confidential information which was not "on the record." The in-

adequacy of Commission procedures caused one well known antitrust expert to describe the thought of an antitrust trial at the U.S. Tariff Commission as "mind boggling." By placing section 337 hearings under the Administrative Procedure Act, the new statute closed a major procedural gap and brought the U.S.I.T.C. closer to being a true regulatory agency. For its part, the U.S.I.T.C. has promulgated new rules, further enhancing the opportunities for reasonable antitrust or unfair act proceedings. In addition, there are now two Administrative Law Judges, before whom hearings are generally held, and who will then certify the record with their recommendations to the Commission for its decision.

While it would be incorrect to say that the U.S.I.T.C. has perfected its procedures, the agency has largely solved the problems of due process which must be dealt with before complex antitrust cases can be conducted properly. In my view, the administration of section 337 will be of great importance to the nation over the next decade. I do not believe that the U.S. International Trade Commission, an independent agency, will necessarily be bound by precedents set by other regulatory bodies, but that it will establish its own boundaries, reflecting the unique character of international trade, and thereby provide a new voice in the world of international antitrust law.

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Chairman, United States International

Trade Commission

Washington, D.C.

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The United States International Trade Commission: Co-Equal of the FTC in Regulating Unfair Methods of Competition

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I. INTRODUCTION.

In 1974 Congress passed the Federal Trade Act of 1974,¹ which, in part, amended the Tariff Act of 1930.² The most noticeable effect of the new legislation was to change the name of the United States Tariff Commission to the United States International Trade Commission, as the primary agency empowered under the statute³ (hereinafter U.S.I.T.C.). This name change was symbolic, for the U.S.I.T.C. assumed increased regulatory powers under the Federal Trade Act of 1974. In particular, by expanding the scope of Section 337,⁴ the U.S.I.T.C. was thrust into a role of regulating competition in international commerce similar to that enjoyed by the Federal Trade Commission in proscribing unfair trade practices in commerce, generally, pursuant to Section 5⁵ of the Federal Trade Commission Act.⁶ Some commentators have suggested that Section 5 of the Federal

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1. 19 U.S.C. § 2101 (Supp. 1977).

2. 19 U.S.C. § 1337, (1965).

3. 19 U.S.C. § 2231 (Supp. 1977).

4. Section 337(a) of the Tariff Act of 1930 gave the Tariff Commission authority merely to make recommendations to the President regarding unfair trade practices. This section provided: "Unfair methods of competition and unfair acts in the importation of articles into the United States or in their sale by the owner, importer, consignee, or agent of either, the effect of or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful *and when found by the President to exist shall be dealt with in addition to any other provisions of law, as hereinafter provided*" (emphasis added).

19 U.S.C. § 1337 (1965 & Supp. 1977) of the Federal Trade Act of 1974 is commonly referred to as Section 337 (hereinafter Section 337).

5. 15 U.S.C. § 45 (1973 & Supp. 1977).

6. Exemplary of the U.S.I.T.C.'s expanded role in regulating international unfair competition under Section 337 is Subsection (b) which states that: "(i) The Commission shall investigate any alleged violation of this section on complaint under oath or *upon its initiative*." 19 U.S.C. § 1337 (b)(i) (emphasis added). As the Tariff Commission, the agency had no such prerogative.

Trade Commission Act subsumes Section 337, and hence that U.S.I.T.C. regulation is unnecessary.⁷

Section 337, despite its similarity to Section 5 of the Federal Trade Commission Act, has, by granting the U.S.I.T.C. authority to regulate unfair trade practices in international trade, while leaving domestic and foreign commerce generally within the province of the FTC, unquestionably cast the U.S.I.T.C. as the FTC's co-equal in regulating unfair methods of competition.

II. JURISDICTION OF THE U.S.I.T.C. UNDER SECTION 337 OF THE FEDERAL TRADE ACT OF 1974.

A. *Jurisdiction Over Property and Persons.*

Section 337(a) of the Federal Trade Act of 1974 proscribes unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the "owner, importer, consignee, or agent of either. . . ."⁸ The Act does not specifically authorize the Commission to proceed against foreign parties. Since a temporary or permanent exclusion order under Subsections (d) and (e) of section 1337 of 19 U.S.C. are remedies *in rem*, the threat of exclusion of the imported articles from the stream of American commerce is often sufficient inducement to coax a foreign manufacturer into a U.S.I.T.C. proceeding. Under the procedural

7. Musrey, *Tariff Act's Section 337 — Vehicle for the Protection and Extension of Monopolies*, 5. Law & Pol'y. Int'l. Bus. 56, 84 (1973).

15 U.S.C. § 45 provides: "(a)(i) *Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful*" (emphasis added).

Section 337 of the Federal Trade Act of 1974 states: "(a) *Unfair methods of competition declared unlawful — Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section*" (emphasis added).

While it is true that Section 45's proscription of unfair methods of competition in commerce includes the importation of goods that have entered the "stream of American commerce," Section 337 is unique in that it: (1) Is addressed solely to the importation of articles into the United States, thereby carving out an area of expertise for the U.S.I.T.C. in the field of unfair trade practices; (2) creates a defense to charges of unfair methods of competition by requiring that the complainant's industry be "efficiently and economically operated." 19 U.S.C. § 1337(a) (1965 & Supp. 1977); (3) provides the remedies of a permanent and temporary exclusion order, 19 U.S.C. §§ 1337(d), (e), in addition to a cease and desist order, 19 U.S.C. § 1337(e) (as in Section 45); (4) sets a one year (or eighteen months in more complicated cases) time limitation for U.S.I.T.C. investigations, 19 U.S.C. § 1337(b); (5) gives the President of the United States veto power over a U.S.I.T.C. determination, 19 U.S.C. § 1337(g). For a recent case discussing the "Stream of American Commerce" criteria, see note 44, *infra*.

8. 19 U.S.C. § 1337(a) (1965 & Supp. 1977).

rules to the Federal Trade Act of 1974⁹ an interested party *may* intervene if consented to by the Commission. In the absence of intervention, a person whose valuable property or contract rights are to be adjudicated in an administrative proceeding should be joined as a necessary party.¹⁰ Presently there is no formal rule granting the Commission authority to join a foreign manufacturer or exporter as a necessary party to a U.S.I.T.C. investigation.¹¹

Section 337 has an additional remedy against unfair trade acts in the cease and desist order.¹² Because the remedy is in the nature of an *in personam* action, if it were applied against a foreign manufacturer, due process would require his joinder in a U.S.I.T.C. proceeding (in the absence of the company's intervention).

Commission rules would insure that the foreign manufacturer, as a respondent, be accorded due process of law by receiving formal notice of the nature and scope of the Commission's investigation,¹³ have maximum opportunity to respond to the allegations of complainant and to participate in the Commission's investigation,¹⁴ and be assured of receiving all relevant documents filed in the course of the Commission's proceeding.¹⁵

Notwithstanding due process considerations, there are other compelling reasons why a foreign manufacturer should be named as a respondent to a U.S.I.T.C. proceeding. Primarily, Commission rules¹⁶ provide that interrogatories may be served only upon parties to the investigation. The failure or inability to name the foreign manufacturer as a respondent

9. 19 C.F.R. § 210.6.

10. See *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197 (1938); *NLRB v. Sterling Elec. Motors*, 109 F.2d 194 (9th Cir. 1940); *NLRB v. Cowell Portland Cement Co.*, 108 F.2d 198 (9th Cir. 1939).

11. See 19 U.S.C. § 1337(a) (1965 & Supp. 1977). In the absence of a statutory provision or rule *a propos* the naming of necessary parties, an administrative agency may apply general procedural rules in making such a determination. See *United States v. N.L.R.B.*, 118 F.2d 486 (3d Cir. 1949); *Gibbs v. N.L.R.B.*, 315 U.S. 797 (1942). Since the U.S.I.T.C. has no rule concerning the naming of individuals or corporations as necessary parties, the Commission may follow Fed.R.Civ.P. 19. Rule 19(a) lists three criteria in determining whether a person should be joined in a proceeding as "necessary."

- (1) [If] . . . in his absence complete relief cannot be accorded among those already parties, or;
- (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest, or;
- (3) (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

12. 19 U.S.C. § 1337(f) (1965 & Supp. 1977).

13. 19 C.F.R. § 210.13 (1977).

14. 19 C.F.R. § 210.21 (1977).

15. 19 C.F.R. § 210.33 (1977).

16. 19 C.F.R. § 210.32 (1977).

deprives the Commission investigative attorney, as well as other parties, of pre-investigation discovery over the foreign manufacturer or exporter. Service of interrogatories on the foreign manufacturer is desirable for the following reasons: Without an appropriate response to a party's¹⁷ interrogatories, it may be impossible to complete pre-investigation discovery in order to ascertain whether the foreign exporter or manufacturer is an "owner, importer, consignee or agent of either" and therefore within the scope of Section 337's regulatory powers.¹⁸ Service of interrogatories may also be important because foreign manufacturers who refuse to answer interrogatories (like other parties refusing to answer interrogatories) may cause such refusals to be construed to be admissions or to be adverse testimony, documents or other evidence.¹⁹

It may also be necessary to name a foreign manufacturer or exporter to a U.S.I.T.C. proceeding to avoid the risk that the other (American) parties incur "double, multiple, or otherwise inconsistent obligations" as a result of the foreigner's claimed interest.²⁰ Should the Commission issue a permanent or temporary exclusion order, or demand that the American importer cease and desist its unfair trade practice(s) pursuant to Section 337, such remedies might conflict with contracts between American importers and foreign

17. 19 U.S.C. § 1337(b)(i) provides that "[T]he Commission shall investigate any alleged violation of this section or complaint under oath or upon its [own] initiative" (emphasis added). Parties to Section 337 investigations therefore include "each complainant and respondent in the investigation, the Commission investigative attorney, and each person designated as a party pursuant to § 210.6 of this part." 19 C.F.R. § 210.4. Should the U.S.I.T.C. institute an investigation upon its own initiative it is possible that, absent intervention, it will be the only complainant to the proceeding. Under the Federal Trade Act of 1974, the Commission has yet to institute an investigation upon its own initiative.

18. If the foreign manufacturer or exporter is an "owner, importer, consignee, or agent of either" as defined in 19 U.S.C. § 1337(a) (1965 & Supp. 1977), the foregoing argument that he is a necessary party and must therefore be joined becomes moot. See *Certain Welded Stainless Steel Pipe and Tube*, Investigation No. 337-TA-29 (Recommended Determination), (hereinafter *Stainless Steel Pipe and Tube*), for argument that foreign manufacturers can often be classified as owners under the statute.

19. 19 C.F.R. § 210.36. Pursuant to a prehearing order in *Certain Above-Ground Swimming Pools*, Investigation No. 337-TA-25 (hereinafter *Swimming Pool Case*), a Japanese swimming pool manufacturer was named as a respondent for the purposes of discovery only (Administrative Law Judge reserved right to name manufacturer as full respondent at later date) in order to facilitate the service of interrogatories.

The argument was advanced that unless the foreign manufacturer was named as a respondent for the purposes of discovery, the U.S.I.T.C. investigation would be severely delayed and might therefore be unable to meet its one-year deadline, 19 U.S.C. § 1337(b). See also, Pre-Hearing conference in *Certain Monolithic Catalytic Converters*, Investigation No. 337-TA-18 (hereinafter *Certain Catalytic Converters*) (U.S.I.T.C. Commissioner Minchew urged that foreign manufacturer be named as a party in order to avoid delay in implementing discovery).

20. Fed.R.Civ.P. 19(a)(2)(ii).

manufacturers.²¹ The potential therefore exists for a foreign manufacturer to sue on the contract, possibly before a foreign tribunal.²² Since a foreign court is more likely to honor a Commission determination to which foreign manufacturers or exporters have been joined as parties, this possibility presents yet another reason to name foreign manufacturers as necessary parties.²³

A foreign manufacturer or exporter should also be named as a party to a U.S.I.T.C. investigation because it is in the *public interest*. Inclusion of the foreign manufacturer as a party would encourage the fullest participation of interested parties and therefore create a forum for the widest possible presentation of arguments and defenses.²⁴ A Section 337 proceeding may often require the naming of the foreign manufacturer as a party because the foreign manufacturer, or his agent, may be a necessary witness in cases involving infringement of process patents.²⁵

In sum, for a full adjudication of the parties'²⁶ rights and interests under Section 337, it is incumbent that the U.S.I.T.C. have the power to name a foreign manufacturer or exporter as a party to the investigation. Notwithstanding intervention by the foreign manufacturer pursuant to Commission rules,²⁷ the Commission has, in the past, been hesitant to name a foreign concern as a respondent, absent an affirmative showing that it is

21. *See generally* United States v. Bayer Co., 105 F. Supp. 955 (S.D.N.Y. 1952); 135 F. Supp. 65 (S.D.N.Y. 1955); General Aniline & Film Corp. v. Bayer Co., 188 Misc. 929, 64 N.Y.S. 2d 492 (Sup. Ct. N.Y. Co., 1946) *aff'd.*, 281 App. Div. 668, 117 N.Y.S. 2d 497 (1952), *aff'd* 305 N.Y. 479, 113 N.E.2d 845 (1953) (consent judgment between United States and respondent had the effect of voiding respondent's contract with third party. Dicta recognized possible breach of contract action by third party against respondent). *See also* National Licorice Co. v. NLRB, 309 U.S. 350, 365 (1946) (breach of contract suit might result from fully litigated determination as well).

22. *See generally* Farbenfabriken Bayer v. Sterling Drug, Inc., 307 F.2d 207 (3d Cir. 1962) *cert. denied*, 372 U.S. 929 (1963).

23. Fed. R. Civ. P. 19(a) (3) (ii). *See generally* Kintner, An International Antitrust Primer, 62 (1974).

24. Public interest factors are intended to play a large role in Section 337 proceedings. Subsection (d) prescribes exclusion of the foreign manufacturer's goods from entry only after: "[C]onsidering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it [U.S.I.T.C.] finds that such articles should not be excluded from entry."

The Senate Finance Committee has stated that: "[T]he public health and welfare and the assurance of competitive conditions in the United States economy must be the overriding considerations in the administration of this statute. S. Rep. No. 93-1298, on H.R. 10710, Trade Reform Act of 1974, 93rd Cong., 2nd Sess. 197 (1974).

25. *See* discussion of *Swimming Pool Case*, note 19 *supra*.

26. 19 C.F.R. § 210.4 (1977) provides: "(b) 'Party' means each complainant and respondent in the investigation, the Commission investigative attorney, and each person designated as a party pursuant to § 210.6 of this part."

27. 19 C.F.R. § 210.6 (1977).

an "owner, importer, consignee, or agent of either" ²⁸ Recently the U.S.I.T.C. has taken a bolder approach and has named foreign manufacturers and exporters as respondents, apparently in disregard of their classification under Subsection (a) of Section 337. ²⁹

To name a foreign manufacturer to a Section 337 proceeding the Commission must have jurisdiction over his person. *In personam* jurisdiction over foreign persons may be asserted under either of two theories.

1. *The Territorial Principle.*

In the landmark case of *American Banana Co. v. United Fruit Co.*, ³⁰ the Court held only that a nation has jurisdiction to prescribe and enforce a rule of law that relates to conduct within its territory. ³¹ This rigid concept of territorial jurisdiction was later expanded by Justice Holmes in *Strassheim v. Daily* to include "[A]cts done outside a jurisdiction but intended to produce and producing detrimental effects within it." ³² This concept justifies a State's proscribing the cause of harm as if it had actually occurred within the physical boundaries of the jurisdiction. This territorial principle has recently evolved into the "effects" theory.

2. *The "Effects" Theory.*

The "effects" theory was first expressed in *United States v. Hamburg-Amerikanische P.F.A. Gessellschaft*. ³³ In regard to a contract initiated abroad by foreign persons, the court ruled:

Citizens of foreign countries are not free to restrain or monopolize the foreign commerce of this country by entering into combinations abroad, Such combinations are to be tested by the same standards as similar combinations entered into here by citizens of our country. The vital question in all cases is the same, is the combination to so operate in this country as to directly and materially *affect* our foreign commerce. ³⁴

²⁸ 19 U.S.C. § 1337(a) (1965 & Supp. 1977).

²⁹ See *Certain Catalytic Converters*, note 18 *supra* *Certain Reclosable Plastic Bags*, Investigation No. 337-TA-22; *Certain Color Television Receiving Sets*, Investigation No. 337-TA-23 (hereinafter *Color Television Case*); *Chicory Roots: Crude and Ground or Otherwise Prepared*, Investigation No. 337-TA-27 (hereinafter *Chicory Roots*). *Stainless Steel Pipe and Tube* *supra* note 18. See also *Swimming Pool Case*, *supra* note 19 (Foreign manufacturer held to have *de facto* intervened by including his name on response by American importers, and participating in pre-investigative hearings).

³⁰ 213 U.S. 347 (1909).

³¹ See Restatement (Second) of Foreign Relations Law §§ 17, 20 (1965).

³² 221 U.S. 280, 285 (1916).

³³ 200 F. 806 (S.D.N.Y. 1911); 216 F.2d 971 (S.D.N.Y. 1914), *rev'd. as moot*, 239 U.S. 466 (1916).

³⁴ *Id.* at 807 (emphasis added).

The "effects" principle was broadened by Judge Hand in *United States v. Aluminum Company of America* to include foreign acts (*i.e.*, contracts, licensing agreements, cartels, etc.) which apart from *actually* affecting domestic commerce, might merely *intend* "to restrict imports to the United States."³⁵ "[I]f there is a contract abroad which on its face indicates an intent³⁶ and purpose to affect U. S. trade, the burden appears to be on the participants to show that there has been no effect."³⁷

In *United States v. Watchmakers of Switzerland Information Centers, Inc.*³⁸ the "effects" theory was further expanded in order to assert *in personam* jurisdiction over Swiss watchmakers who had entered into a contract intended to restrict U. S. trade, even though no American firm was directly involved.³⁹ The doctrine has become so broad that some courts have held that the place where the contract is made, or where it is to be performed, is inconsequential. The sole criterion is the agreement's "effect" on U. S. commerce.⁴⁰

The "effects" doctrine is, in reality, a corollary to the interstate concept of minimum contacts developed in *International Shoe Co. v. Washington*.⁴¹ In order for the U.S.I.T.C. to be able to assert *in personam* jurisdiction over a foreign entity, there must be sufficient minimum contacts with the forum so as to warrant proper service of process.⁴² Fed. R. Civ. P. 4(i) provides for service of process in a foreign country. Section 12 of the Clayton Act⁴³ outlines proper venue and service of process under the antitrust laws of the United States:

Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district

35. 148 F.2d 416, 447 (2d Cir. 1945).

36. Absent a contract, or some other direct expression of intent, intent may be inferred from the natural consequences of one's actions. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). See also *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956), *cert. denied*, 352 U.S. 871 (1956). See *Restatement (Second) of Foreign Relations Law* §418 (1965).

37. W. Fugate, *Foreign Commerce and the Antitrust Laws*, 74 (2d ed. 1973).

38. 1963 Trade Cases 70,600 (S.D.N.Y. 1962).

39. *Accord. Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247 (C.C.P.A. 1930) (Tariff Commission case).

40. *But see United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *modified and aff'd.*, 332 U.S. 319 (1947); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

41. 326 U.S. 310 (1945).

42. Minimum contact with the United States *in general* is sufficient to allow service of process upon a foreign concern in a federal proceeding. See *Holt v. Klosters*, 355 F. Supp. 354 (W.D. Mich. 1973); *Edward J. Moriarty & Co. v. General Tire & Rubber Co.*, 289 F. Supp. 381 (S.D. Ohio 1967); *First Flight Co. v. National Carloading Corp.*, 209 F. Supp. 730 (E.D. Tenn. 1963). See note 18 *supra*, for general discussion by U.S.I.T.C. Administrative Law Judge in *Stainless Steel Pipe and Tube*.

43. 15 U.S.C. § 22 (1970).

whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

In order to effect extraterritorial service of process the party must therefore have transacted business or be located within the forum where the action is to be brought.

Recently the concept of transacting business, or minimum contacts, has been enlarged. In *Honeywell, Inc. v. Metz Apparaterwerke*,⁴⁴ a case where an American patentee of electronic photographic flash equipment brought an infringement action against a German manufacturer, the court held that under the Illinois long-arm statute:

Direct contact with the forum state is not essential to the exercise of personal jurisdiction. Metz may not have physically entered the State of Illinois, but it placed its flash devices in the stream of commerce under such circumstances that it should reasonably have anticipated that injury through infringement would occur there

We look to the economic and commercial realities of this case, and in our view, it is not within the contemplation of the concepts of fairness and due process to allow a wrong-doing manufacturer to insulate himself from the long-arm of the courts by using an intermediary [*i.e.*, importer, consignee or agent] or by professing ignorance of the ultimate destination of his products.⁴⁵

By placing his goods into the stream of American commerce, the foreign manufacturer is therefore vulnerable to U.S.I.T.C. *in personam* jurisdiction. Should the Commission find his presence in a Section 337 investigation necessary, the foreign manufacturer may be named as a respondent.

B. Subject Matter Jurisdiction Under Section 337: The U.S.I.T.C.'s Concurrent Powers With Other Administrative Agencies.

Concurrent jurisdiction between administrative agencies is not necessarily a "congressional aberration":

44. 509 F.2d 1137 (7th Cir. 1975).

45. *Id.* at 1144. *Accord*, *Crucible Inc. v. Stora Kopparbergs Bergs*, 403 F. Supp. 9 (W.D. Pa. 1975); *Knoll International, Inc. v. Continental, Inc.*, 278 PTCJ A-21 (5-13-76) (Eastern District of Pennsylvania case holding that mere knowledge of sale of company's product in United States is sufficient to warrant long-arm jurisdiction over foreign manufacturer).

[C]ongress may provide authority for more than one agency, administrative or judicial, to act with respect to a particular matter. It has done so both inadvertently and by design, on a number of occasions.⁴⁶

It is clear from the language of Section 337 that the statute is designed to regulate anticompetitive conduct which also falls within the scope of the Sherman Act,⁴⁷ the Clayton Act,⁴⁸ and the Antidumping Act of 1921.⁴⁹ Accordingly the U.S.I.T.C., the Federal Trade Commission, the Department of Justice, and the Department of the Treasury, *et al.*, could potentially be litigating the same case at any one moment, notwithstanding "gentleman's agreements" between the agencies.⁵⁰

Although it is generally understood that Section 337 of the Federal Trade Act of 1974 has granted the U.S.I.T.C. jurisdiction to regulate "unfair trade practices in the importation of articles into the United States,"⁵¹ most recently a dispute has arisen between the Commission and the Department of the Treasury with regard to dumping complaints under the statute.

Subsection (b) (3) of Section 337 provides:

Whenever, in the course of an investigation under this section, the Commission has reason to believe, based on information before it, that the matter may come within the purview of section 303 or of the Antidumping Act, 1921, it shall promptly notify the Secretary of the Treasury *so that such action may be taken as is otherwise authorized by such section and such Act.*⁵²

Dumping is defined as "price discrimination between national markets."⁵³ Its practice is proscribed by the Antidumping Act of 1921,⁵⁴ which states in relevant part:

(a) Whenever the secretary of the Treasury . . . determines that a class or kind of foreign merchandise is being, or is likely to be, sold

46. T.H. Sewell, *Administrative Jurisdiction and Authority*, 6 Ind. L. Rev. 446, 472 (1973).

47. 15 U.S.C. § 1 (1973 & Supp. 1977).

48. 15 U.S.C. §§ 14, 18 (1973 & Supp. 1977).

49. 19 U.S.C. § 160 (Supp. 1975).

50. Agencies with concurrent jurisdictional powers often enter into "gentleman's agreements" to avoid duplication of actions and resulting double liability to the parties involved. For example, the FTC and the FDA have taken this course with regards to claims of false advertising and mislabeling. See Note, *Res Judicata and Administrative Jurisdiction — A Proposal for Resolving Conflicts Between Agencies with Over-Lapping Jurisdiction*, 35 Geo. Wash. L. Rev. 1056, 1060 (1967). See *FTC v. Cement Institute*, 333 U.S. 683 (1948) (concurrent jurisdictions between FTC and Justice over claims of unfair competition). See also, *United States v. New York Great A. & P. Tea Co.*, 67 F. Supp. 626 (E.D.Ill. 1940), *aff'd* 173 F.2d 79 (7th Cir. 1949).

51. 19 U.S.C. § 1337(a) (1965 & Supp. 1977).

52. 19 U.S.C. § 1337(b) (3) (emphasis added) (1965 & Supp. 1977).

53. See J. Viner, *Dumping: A Problem in International Trade*, at 3 (1966).

in the United States or elsewhere *at less than its fair value*, he shall so advise the United States International Trade Commission, and the Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established by reason of the importation of such merchandise into the United States. . . .⁵⁵

According to past practice, the Department of the Treasury, after making a determination that a class of imports is being, or is likely to be, sold at less than fair market value, refers the inquiry to the U.S.I.T.C. in order to determine whether an industry in the United States is being, or is likely to be, injured.⁵⁶ The question arises as to whether the U.S.I.T.C. may institute a dumping investigation on its own initiative under Section 337, and whether after making an injury determination it must refer the matter back to the Treasury pursuant to Section 160 of the Antidumping Act of 1921, in order to implement the appropriate relief.⁵⁷

The U.S.I.T.C. has recently maintained that it can institute a dumping investigation on its own initiative when the claim falls within the purview of Section 337. Under such circumstances, the U.S.I.T.C. investigative staff has taken the position that all it must do is "notify" the Department of the Treasury of its actions, pursuant to Subsection (b) (3) of the statute.⁵⁸

In recently completed investigations⁵⁹ the Commission's Administrative Law Judge held that the U.S.I.T.C., pursuant to Section 337 of the Trade Act of 1974, has jurisdiction to consider claims of predatory pricing under the Robinson-Patman Act.⁶⁰ Although prior to these investigations no case had yet arisen where Section 337 had been applied to predatory pricing, the presiding officer, drawing from the substantial body of law under Section 5 of the Federal Trade Commission Act, reasoned that

54. 19 U.S.C. § 160 (1965 & Supp. 1977).

55. *Id.* (emphasis added).

56. See *Tariff Commn. Pocket Pencil Sharpeners from West Germany*, PUB NO. 3, AA, 1971-73 (1955). (Tariff Commission found no injury and referred proceeding back to Department of the Treasury).

57. 19 U.S.C. § 160(a) of the Antidumping Act of 1921 also states: "The Commission, after such investigation as it deems necessary, shall notify the Secretary [of the Treasury] of its determination, and if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in this Act called a 'finding') of his determination and the determination of the Commission."

58. See discussion of *Swimming Pool Case*, *supra* note 19 see also *Color Television Case*, *supra* note 29. The Commission Memorandum Opinion stated that, "it is our opinion that section 337 embraces dumping and all other unfair methods of competition and unfair acts in the importation of articles or in their sale."

59. *Color Television Case*, *supra* note 29. *Swimming Pool Case*, *supra* note 19. *Stainless Steel Pipe and Tube*, *supra* note 18.

60. 15 U.S.C. § 13(a) (1973).

the statute is sufficiently broad so as to proscribe this form of unfair competition.⁶¹

It is well established that the tests for predatory pricing are: (1) a competitor is charging a price below his average variable cost in the competitive market; or (2) the competitor is charging a price below its short-run profit maximizing price, and barriers to entry are great enough to enable the discriminator to reap the benefits of his predation before new entry is possible.⁶² Predation may occur when a seller prices his commodities well above cost in one geographic area in order to generate sufficient profit to price his articles below cost in another geographic market, thereby injuring competition in the latter market.⁶³

An injury determination under the Antidumping Act of 1921 may be found when the seller is pricing his goods at less than fair value.⁶⁴ Fair value represents the equivalent of "foreign market value."⁶⁵ If a foreign seller is pricing his merchandise at below the foreign market value (of his own or third countries) in the United States, he is therefore dumping. Should the U.S.I.T.C. find that a foreign manufacturer's dumping creates "more than a *de minimus* injury" to United States competition, the Department of the Treasury shall customarily impose special dumping duties under the Antidumping Act of 1921.⁶⁶

61. See *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945); *Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967) (FTC action for predatory pricing under 15 U.S.C. § 45(a)); *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir. 1945) (claims of predatory pricing pursuant to 15 U.S.C. § 45) (1973 & Supp. 1977).

62. *International Air Industries v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975). Citing *Arceada & Turner, Predatory Practices under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 716 (1975) the court stated that average variable cost is substituted for marginal cost in predatory pricing determinations because: "It is frequently quite difficult to calculate the incremental cost of making and selling the last unit (*i.e.*, marginal cost) from a conventional business account. . . . Consequently, the firm's average variable cost (average variable cost is the cost that varies with changes in output divided by the output) may be effectively substituted for marginal cost in predatory pricing analysis. . . . Thus a firm's pricing behavior can be considered anti-competitive when it sells at a price below its average variable cost," *Id.* at 724. See Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv.L.Rev. 869 (1976).

63. See *Utah Pic Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

64. 19 U.S.C. § 160 (Supp. V 1975).

65. 19 U.S.C. § 164 (1970 & Supp. V 1975).

66. 19 U.S.C. § 161 (1970 & Supp. 1977). This section provides in relevant part: "if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the constructed value), there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference."

See *Northern Bleached Hardwood Kraft Pulp From Canada*, 38 Fed. Reg. 87 (Tariff Commission 1973); *Instant Potato Granules From Canada*, 37 Fed. Reg. 18505 (Tariff Commission 1972), (pre-Federal Trade Act of 1974 cases dealing with injury determination by Tariff Commission).

Because a claim of predatory pricing under Section 337⁶⁷ involves a finding that the seller has been pricing *below cost*, the U.S.I.T.C. has recently asserted that a dumping determination of lower than fair value is necessarily included in (or subsumed by) any investigation of predation. On these grounds the Commission has argued that it may initiate a dumping inquiry pursuant to Section 337 and need only “notify” the Department of the Treasury under Subsection (b) (3) of U.S.I.T.C. action.⁶⁸ Predictably, Customs has balked at this interpretation, claiming that only the Department of the Treasury has jurisdiction to initiate dumping claims pursuant to the Antidumping Act.

The Department of the Treasury has countered the assertion of U.S.I.T.C. jurisdiction of dumping claims falling within the purview of Section 337 (predatory pricing) by citing the legislative history of Section 337 before the Senate Finance Committee.⁶⁹ The Commission also cites legislative history in support of its view that Section 337 is an “antidumping statute.”⁷⁰ There is little indication at this time as to whether the U.S.I.T.C. or the Department of the Treasury will accede to the other’s jurisdictional claims pursuant to predatory pricing and dumping under Section 337 and the Antidumping Act of 1921. The matter may be headed for a confrontation in the federal courts.

This conflict is exemplary of the growing pains of the U.S.I.T.C. under its new powers granted by Section 337 of the Federal Trade Act of 1974. The

67. See Robinson-Patman Act, 15 U.S.C. § 13a (1973).

68. 19 U.S.C. § 1337(b)(3). See *Color Television Case*, *supra* note 29 *Swimming Pool Case*, *supra* note 19.

69. Senate Report on H.R. 10710, *supra* note 24, at 195 states: “Section 337(b)(3), as amended by this bill, would provide that the Commission, when it has reason to believe based on information available to it that the subject matter of an investigation it is conducting may come within the purview of Section 303 of the Tariff Act of 1930 or of the Antidumping Act, 1921, shall notify the Secretary of the Treasury so that such action may be taken as is otherwise authorized by Section 303 or the Antidumping Act. *It is expected that the Commission’s practice of not investigating matters clearly within the purview of either Section 303 or the Antidumping Act will continue*” (emphasis added).

70. Regarding Section 316 of the Tariff Act of 1922, a forerunner to Section 337 of the Federal Trade Act of 1974, The Report of the Senate Committee on Finance (S. Rep. No. 595, Pt. 1, 67th Cong., 2d Sess. (1974)) asserts: “[T]he provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice and is, therefore, a more adequate protection to American industry *than any antidumping statute the country has ever had*.” (emphasis added).

In a Senate debate Senator Smoot elucidated on this point: “*We have in this measure an antidumping law with teeth in it — one which will reach all forms of unfair competition in importation. This Section 316 not only prohibits dumping in the ordinary accepted meaning of the word; that is, the sale of merchandise in the United States for less than its foreign market value or cost of production; but also bribery, espionage, misrepresentation of goods, full-line forcing and other similar practices frequently more injurious to trade than price cutting.*” (emphasis added.) 62 Cong. Rec. 5879 (1922). See *Color Television Case*, *supra* note 29.

Act has provided the once fledgling agency (Tariff Commission) with greater powers. The U.S.I.T.C. must now confront the concurrent jurisdictional power of the established governmental agencies. It can no longer hide behind the executive power of the President, as it once did pursuant to Section 337 of the Tariff Act of 1930.⁷¹ This is no small task considering that such governmental entities as the Department of the Treasury, the FTC and the Department of Justice have been asserting jurisdiction over unfair trade practices for decades.

Needless to say, respondents in U.S.I.T.C. Section 337 actions are disturbed at the prospect of being sued in more than one administrative agency on the same set of facts. Such a result is not, however, unique in the American system of administrative law.⁷²

The fact that a U.S.I.T.C. Section 337 respondent may be involved in similar proceedings before two or more administrative agencies does not mean that the doctrine of *res judicata* can be invoked should one agency reach a final determination before the other:

*The moral of the story . . . seems to be that a determination under one statute is not binding when the same question arises under another statute, even when the provisions of the two statutes are identical. Because the legislative history of two statutes is always different, because the purposes of the two statutes are never the same, and because the context of provisions must be taken into account, the conclusion is probably sound that a determination under one statute need not necessarily be res judicata when the same question arises under the identical words of another statute.*⁷³

Should the Department of the Treasury reach a final determination in a case involving dumping pursuant to the Antidumping Act of 1921⁷⁴ before the U.S.I.T.C. completes a similar investigation of predatory pricing and

71. See note 2 *supra*.

72. See *New York Cent. Ry. Co. v. Public Serv. Comm'n.* 237 Ind. 544, 147 N.E. 2d 547 (1958) (dual regulation of street crossings by Town Board and the Public Service Commission held permissible); *Fresh Grown Preserve Corp. v. FTC.* 125 F.2d 917 (2d Cir. 1942) (FTC's exercise of jurisdiction over a false advertising claim held not to preclude the FDA from investigating and proscribing remedy to false labeling claim regarding same misrepresentation); *Mendez v. Faber, Coe & Gregg, Inc.*, 345 F. Supp. 527 (S.D.N.Y. 1972) (agencies concurrent jurisdiction to impose remedies under differing statutes regarding trademark infringement, pursuant to the Tariff Act of 1930, 19 U.S.C. § 1526 and the Lanham Trademark Act, 15 U.S.C. §§ 32(1) (a), 43 (a), 1114(1) (a), 1124, 1125 held permissible).

73. 2 Davis, *Administrative Law*, § 18.04 at 577-87 (emphasis added) (1958). See generally *United States v. Chicago N.S. & M. Ry. Co.*, 288 U.S. 1 (1933), 219 ICC 135 (1936), 234 ICC 13 (1939); *Sprague v. Woll*, 122 F.2d 128 (7th Cir. 1941); *Gen. Tel. Co. v. Robinson*, 132 F. Supp. 39 (E.D. Ark. 1955); *Vajta v. Watkins*, 88 F. Supp. 51 (S.D.N.Y. 1949); *Otis & Co. v. Pennsylvania Ry. Co.*, 61 F. Supp. 905 (E.D. Pa. 1945).

74. 19 U.S.C. § 160 (1965 & Supp. 1977).

dumping under Section 337 of the Federal Trade Act of 1974, the prior Treasury ruling would therefore not act as a bar to a subsequent Commission decision. Appropriate relief could be sanctioned by either or both governmental entities.⁷⁵

III. THE REGULATORY SCOPE OF SECTION 337.

As is true with Section 5 of the Federal Trade Commission Act, the scope of Section 337 encompasses nearly the entire body of antitrust law. In the Commission Memorandum Opinion in *Chicory Roots*⁷⁶ it was held:

Although there are [as yet] no judicial precedents involving non-patent cases arising under Section 337, judicial determinations under *other antitrust and unfair competition statutes are persuasive* in determining what constitutes an unfair method or act *under Section 337*. The Commission has in previous investigations both under the prior Section 337 and under Section 337 as it exists today, used the antitrust laws and the practice thereunder as the standard for unfair methods of competition and unfair acts.⁷⁷

75. See Kleinfeld & Goding, *Res Judicata and Two Coordinate Federal Agencies*, 95 U. Pa. L. Rev. 388 (1947).

76. See note 29 *supra*.

77. *Id.* (emphasis added) *Accord, In Re Von Clemm*, 229 F.2d 441 (C.C.P.A. 1955) (Tariff Commission).

The scope of Section 337 may also extend beyond the anticompetitive conduct proscribed by the antitrust statutes.⁷⁸

Within the language of Section 337(a) is found an abbreviated reference to the Sherman Antitrust Act.⁷⁹ Section 337(a) states that an owner, importer, consignee or agent of either may not "restrain or monopolize trade

78. In *Frischer & Co., Inc. v. Bakelite Corp.*, 39 F.2d 247, 259 (C.C.P.A. 1930), *cert. denied*, 282 U.S. 852 (1930) the Court of Customs and Patent Appeals outlined the scope of Section 337: "What constitutes unfair methods of competition or unfair acts is ultimately a question of law for the court and not for the Commission. . . . Each case of unfair competition must be determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such schemes."

The court in *In re Northern Pigment Co.*, 71 F.2d 447, 454-55 (C.C.P.A. 1934) similarly held: "We are of the opinion that when Congress used the phrase, in Section 337(a) of the Tariff Act of 1930, 19 U.S.C. § 1337(a), 'unfair methods of competition and unfair acts in the importation of articles into the United States,' it did not intend that before such methods or acts could be stopped, the act had to fall within the technical definition of unfair methods of competition as it had been defined in some of the decisions, but we think that if unfair methods of competition or unfair acts in the importation of articles into the United States are being practiced or performed by any one, they are to be regarded as unlawful, and the section was intended to prevent them."

The court further stated in *In re Amtorg Trading Corp.*, 75 F.2d 826, 831 (C.C.P.A. 1935): "The words 'unfair methods of competition' may include acts which have never been specifically declared by the courts to be unfair."

In *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 533 (1935) the Supreme Court, comparing the scope of Section 5 of the Federal Trade Commission Act to Section 337 of the Tariff Act of 1930, stated that unfair methods of competition are "to be determined in particular instances, upon evidence, in the light of particular competitive conditions of which is found to be a specific and substantial public interest." *Accord*, *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FTC v. Texaco, Inc.*, 393 U.S. 233 (1968); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953).

The terms "unfair methods of competition" or "unfair acts" of Section 337 have a broader based meaning than the words "unfair competition" at common law. *In re Orion Co.*, 71 F.2d 458 (C.C.P.A. 1934) states: "In discussing the meaning of the phrase 'unfair methods of competition,' the Supreme court, speaking through Sutherland, Justice, called attention to the fact that the words 'unfair competition' had a well-settled meaning at common law, and that to obviate a narrow construction, the words 'unfair methods of competition' were substituted by the Congress. As to this term, the Court said, 'It belongs to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'"

For Commission decisions concerning the scope of Section 337, see, *Certain Electronic Audio and Related Equipment, Investigation No. 337-TA-7*, U.S.I.T.C. Publication 768 (April 1976) (opinions of Commissioners Moore, Bedell, and Parker and the concurring opinion of Chairman Leonard). See also, *Tariff Comm., Tractor Parts: Report to the President on Investigation No. 337-22*, Pub. No. 443 (1971) (statement of Commissioner Leonard).

79. 15 U.S.C. §§ 1, 2 (1974 & Supp. 1977).

and commerce in the United States”⁸⁰ Although sections 1 and 2 of the Sherman Act have not been as frequently applied in the international arena as they have to unfair trade practices occurring within the physical boundaries of the United States, relevant case law does establish the law’s potency in regulating competition within the stream of American (foreign) commerce.⁸¹

Sections 3 and 7 of the Clayton Act of 1914⁸² also fall within the pur-

80. The reference to restraint of trade directs one to § 1 of the Sherman Act, while the Act’s inclusion of the word “monopolize” activates § 2 of the Sherman Act.

The Sherman Act §§ 1, 2 provides:

“Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy in *restraint* of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding 3 years, or by both said punishments in the discretion of courts.” (emphasis added.)

“Sec. 2. Every person who shall *monopolize*, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony and, on conviction thereof, shall be punished by a fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding 3 years, or by both said punishments in the discretion of courts.” (emphasis added.)

81. See *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963) (§ 2 conspiracy to monopolize American sewing machine market by American, Swiss and Italian manufacturers); *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio 1949) (§ 1 restraint of trade — world market division affecting U.S. commerce constitutes per se violation of Sherman Act); *United States v. Bausch & Lomb Optical Co.*, 34 F. Supp. 267 (S.D.N.Y. 1940) (§ 1 restraint of trade — world market division affecting U.S. commerce constitutes per se violation of Sherman Act); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (§ 2 monopolization of American sisal market by Mexican and American manufacturers).

Recent U.S.I.T.C. cases under Section 337 have alleged Sherman § 1 and § 2 violations. See *Color Television Case*, note 29 *supra* (§ 1 allegations: restraint of trade, conspiracy in restraint of trade; § 2 allegations: monopolization, attempt to monopolize, complaint filed against Japanese color television manufacturers and their United States importers); *Chicory Roots*, note 29 *supra* (§ 1 allegations: refusal to deal [per se], boycotting [per se], conspiracy to monopolize. § 2 allegations — attempted monopolization).

Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 also encompassed Sherman § 1 and § 2 violations. See *Certain Watches, Watch Movements and Watch Parts from Switzerland*, Investigation No. 337-19, Tariff Comm’n. Pub. 171 (June 1966) (§ 1 allegations: restraint of trade; § 2 allegations: monopolization of United States watch industry. Tariff Commission terminated investigation when foreign party and American importers held to have conspired to monopolize trade in Justice Department suit); *Certain Tractor Parts*, Investigation No. 337-22, Tariff Comm’n. Pub. 401 (June 1971) (§ 1 allegations of conspiracy to monopolize American tractor parts industry between Italian manufacturer and United States distributor; settled before final determination).

82. 15 U.S.C. §§ 14, 18 (1973).

view of Section 337 of the Federal Trade Act of 1974.⁸³ Although the U.S.I.T.C. has yet to receive a Section 337 complaint pursuant to either of these antitrust statutes, it is clear that Section 3 exclusive dealing or tying arrangements between a foreign manufacturer, or exporter, and an American importer, would violate the Federal Trade Act.⁸⁴ Similarly, under Section 7, acquisitions by one corporation of the stock or assets of another could be prohibited where the effect of such acquisitions may be substantially to lessen competition or tend to create a monopoly.⁸⁵

83. Section 3 of the Clayton Act of 1914 provides: "It shall be unlawful for any person engaged in commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented . . . for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14 (1973).

Section 7 of the Clayton Act of 1914 states: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share of capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition or tend to create a monopoly." 15 U.S.C. § 18 (1973).

84. See generally *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953) (tying); *International Salt Co. v. United States*, 332 U.S. 392 (1947) (tying); *Kirihara v. Bendix*, 306 F. Supp. 72 (D.C. Hawaii 1969) (exclusive dealing) *Judson L. Thomson Mfg. Co. v. FTC*, 150 F.2d 952 (1st Cir. 1945) (exclusive dealing) (non-Section 337 cases).

85. See *United States v. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal. 1966) *aff'd.*, 385 U.S. 37 (1966), rehearing denied, 385 U.S. 1021 (1967) (horizontal acquisition by American beer company of Canadian beer company held § 7 violation as having the tendency to eliminate competition in the domestic market); *In re Litton Industries, Inc.*, FTC Dkt. 8778 (FTC April 10, 1969) (horizontal acquisition by American typewriter company of German typewriter company held § 7 violation as it foreclosed potential competition by German company in U.S. market); *United States v. Standard Oil Co.*, 1970 Trade Cases. 72,988 (N.D. Ohio 1969) (consent decree; proposed horizontal merger between Standard Oil of Ohio and British Petroleum Company held to have tendency to substantially lessen competition in domestic oil market); *United States v. Aluminum Ltd.*, 268 F. Supp. 758 (D.N.J. 1966) (consent decree; vertical acquisition by large Canadian aluminum producer of American fabricating plant seen as violating § 7); *United States v. Asiatic Petroleum Corp.*, 1971 Trade Cases. 73,689 (D. Mass. 1971) (consent decree; vertical acquisition by Dutch fuel oil supplier of American fuel distributor seen as violating § 7).

Although the U.S.I.T.C. under Section 337 of the Federal Trade Act of 1974 can neither enjoin nor order dissolution of acquisitions (mergers), it is conceivable that where a vertical merger between a foreign manufacturer and an American importer has the tendency to lessen competition in American commerce the Commission could, under Subsections (e) and (d), issue a temporary or permanent exclusion order barring foreign imports from the American market. The same reasoning might apply to horizontal mergers between American and foreign firms.

It is arguable that a Section 337(f) cease and desist order could be used to prevent a merger that might have the tendency or effect of lessening competition in the importation of articles into the United States.⁸⁶

Whether Section 337 may be employed now to regulate mergers is speculative. Pending the outcome of the U.S.I.T.C.'s "concurrent jurisdictional squabble" with the Department of the Treasury over antidumping policy, the Commission will have to decide whether it wishes to challenge the Department of Justice and the FTC's traditional role in policing mergers affecting the stream of American commerce.

As previously stated, the provisions of the Robinson-Patman Act,⁸⁷ outlawing price discrimination in American commerce, also fall within the purview of Section 337 of the Federal Trade Act of 1974.⁸⁸

Claims of predatory pricing under Section 13a of the Robinson-Patman Act have been the subject of several recent U.S.I.T.C. Section 337 investigations.⁸⁹

86. See generally Rosenthal, *Imports and Section 7 of the Clayton Act*, 60 Cornell L. J. 600-636 (1975).

87. 15 U.S.C. § 12-27 (1970 & Supp. V 1975).

88. See *Baysoy v. Jessup Steel Co.*, 90 F. Supp. 303 (W.D. Pa. 1950) (Robinson-Patman Act applies to imports). See also Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 Yale L.J. 1155, 1170 (1958).

89. See *Color Television Case*, note 29 *supra*; *Swimming Pool Case*, note 19 *supra*; *Chicory Roots*, note 29 *supra*; *Stainless Steel Pipe and Tube*, note 18 *supra*.

Section 72 of the Unfair Competition Act of 1916⁹⁰ also provides a basis for a Section 337 predatory pricing investigation. This obscure enactment of the early tariff laws of the United States has somehow survived legislative remodeling to offer a Section 337 complainant a cause of action for predation otherwise unavailable in certain factual settings pursuant to the Robinson-Patman Act.⁹¹ Whereas predation requires a showing of sales below cost, or unreasonably low priced sales under the Robinson-Patman Act,⁹² Section 72 merely requires that the imported articles be sold at a "price substantially less than the actual market value or wholesale price"⁹³ in order to constitute predatory pricing.⁹⁴ However, unlike Section 13a of the Robinson-Patman Act, Section 72 stipulates that a complainant must prove predatory intent.

Because of the inherent difficulty in showing *intent* to predatorily price, as well as the general misunderstanding among the international antitrust bar that Section 72 of the Unfair Competition Act was repealed by the Tariff Act of 1930,⁹⁵ this provision has seldom been used in Section 337

90. 15 U.S.C. § 72 states: *Importation or sale of articles at less than market value or wholesale price.* It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: Provided, that such act or acts be done with the *intent* of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder (emphasis added).

91. 15 U.S.C. § 13a (1973).

92. 15 U.S.C. § 13a (1973). See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

93. 15 U.S.C. § 72 (1973).

94. This standard is similar to the one employed in antidumping violations. Antidumping Act of 1921, 19 U.S.C. § 160 (1965 & Supp. 1977).

95. 19 U.S.C. § 2101 (1977).

proceedings. Given the "right" set of factual circumstances, however, Section 72 of the Unfair Competition Act could be quite helpful in proving predatory pricing.

Dumping violations may also come within the purview of Section 337 of the Federal Trade Act of 1974.⁹⁶

From the U.S.I.T.C.'s era as the United States Tariff Commission to the present, claims of patent infringement have always been the most frequent unfair trade practice investigated under Section 337. As was true under the Tariff Act of 1930, the Federal Trade Act of 1974 allows the Commission to reach determinations concerning patent infringement, not patent invalidity.⁹⁷

The Commission does not therefore possess authority to declare a patent invalid, deeming it unenforceable. In *In Re Von Clemm*,⁹⁸ the court held:

We have repeatedly held that in cases of this character, involving alleged unfair acts in connection with a patented article or process, the validity of the patent or patents involved may not be questioned by the Tariff Commission [U.S.I.T.C.] nor by this court on appeal therefrom, but that a regularly issued patent must be considered valid unless a court of competent jurisdiction has held otherwise.⁹⁹

Because it lacked authority to declare a patent invalid, the Tariff Commission would often stay an investigation in order to await a ruling on patent validity by a court of competent jurisdiction.¹⁰⁰ With the U.S.I.T.C.'s new time limit of one year for Section 337 investigations (or eighteen months in

96. See generally Tariff Comm., Ann. Rep. (1971-74) (pre-U.S.I.T.C. antidumping policy) (1965 & Supp. 1977).

97. 19 U.S.C. § 1337(a). See *Frischer & Co. v. Elting*, 60 F.2d 711 (2d Cir. 1932), cert. denied, 287 U.S. 649 (1932) (Tariff Commission); *Synthetic Star Sapphires and Synthetic Rubies*, Investigation No. 337-13 (1954) (Tariff Commission); *In re Furazolidone*, Investigation No. 737-21, Tariff Comm'n. Pub. 299 (Nov. 1969) (Tariff Commission).

In re Northern Pigment Co., 71 F.2d 447 (C.C.P.A. 1932) exemplifies the underlying policy of Section 337; that acts not constituting infringement under applicable United States law may still be considered an unfair act by the Commission. In this case, the importation of an unpatented product produced under a valid United States process patent, was held illegal pursuant to § 1337(a). The court held "The importation for use, sale, or exchange of a product made, produced, processed, or mined under or by means of a process covered by the claims of any unexpired valid United States letters patent, shall have the same status for the purposes of section 1337 of this title as the importation of any product or article covered by the claims of any unexpired valid United States letters patent."

98. 229 F. 2d 441 (C.C.P.A. 1955) (Tariff Commission).

99. *Id.* at 444.

100. See Tariff Comm., *Electron Tubes and Component Parts Thereof*, Ann. Rep. 27 (1957).

more complicated cases),¹⁰¹ it is less likely that the Commission would suspend a proceeding to await a judicial determination of patent validity.

Although patent validity may not be considered by the U.S.I.T.C. under Section 337 of the Federal Trade Act of 1974, all legal and equitable defenses going to this claim may, however, be raised by the respondent.¹⁰² Such defenses may include patent invalidity, patent misuse and fraud on the Patent Office.¹⁰³

Commission patent infringement determinations are not binding for purposes other than Section 337 proceedings.¹⁰⁴ U.S.I.T.C. decisions regarding claims of infringement under the patent laws of the United States therefore do not enjoy *res judicata* or collateral estoppel effect when appealed to the U. S. Court of Customs and Patent Appeals.¹⁰⁵

Although the Commission's history under Section 337 consists primarily of investigations conducted pursuant to the antitrust and patent statutes of the United States, "[t]he courts have endorsed the principle that the statute is 'broad and inclusive' and that 'Congress intended to allow wide discretion in determining what practices are to be regarded as unfair.'"¹⁰⁶ As stated in *Korber Hats, Inc. v. FTC*,¹⁰⁷ "what is an unfair 'method' of competition can only be assayed in the environmental and marketing context of the particular practice put in issue." In *Schechter Poultry Corp. v. United States*,¹⁰⁸ the Court stated: "What are unfair methods of competition are thus to be determined in particular instances upon evidence in light of the particular competitive conditions and what is found to be a specific and substantial public interest."

Recently in *Solder Removing Wicks*,¹⁰⁹ the Commission instituted a Section 337 investigation involving claims of patent infringement, passing-off, false advertising, and false labeling. The cause was unique in that claims of false labeling and advertising characteristically fall within the jurisdiction of the FTC and the FDA, when food and drugs are involved. No conflict,

101. 19 U.S.C. § 1337(b)(1) (1965 & Supp 1977).

102. See *Lear Inc v. Adkins*, 395 U.S. 653 (1969).

103. See *Ram, Patent Fraud: A New Defense?*, 54 *J. Pat. Off. Soc'y.* 363, 371 (1972).

104. *In re Von Clemm*, 229 F.2d 441 (C.C.P.A. 1955) (Tarriff Commission).

105. Trade Reform Act of 1974, Report of the Senate Committee on Finance, Together With Additional Views on H.R. 10710, S.Doc. No. 93-1298, 93rd Cong., 2d Sess. 196-197 (1974). *But see* *Kaye and Plaia, Revitalization of Unfair Trade Causes in the Importation of Goods: An Analysis of the Amendments to Section 337*, 57 *J. Pat. Off. Soc'y.* 208, 284-85 (1975).

106. T. Silberger, *Trade Act of 1974: New Remedies Against Unfair Trade Practices in International Trade*, 5 *Den. J. Int'l. L. & Pol'y.* 77, 97 (1975) (hereinafter Silberger). See *In re Von Clemm*, 229 F.2d 441 (C.C.P.A. 1955) (Tarriff Commission).

107. 358 F.2d, 361 (1st Cir. 1962).

108. 295 U.S. 495, 533 (1935).

109. Investigation No. 337-TA-26 (hereinafter *Solder Removing Wicks Case*).

however, is envisioned with these agencies over concurrent jurisdiction.¹¹⁰ *The Solder Removing Wicks Case*¹¹¹ is also important because it exemplifies, perhaps more than any other investigation to date, the expanding regulatory scope of the U.S.I.T.C. under Section 337.

A. *Passing Off Claim.*

Imitation of a non-functional characteristic of a competitor's product, for the sole purpose of passing one's goods off for those of another, constitutes an unfair trade practice.¹¹² In *Luminous Unit Co. v. R. Williamson & Co.*,¹¹³ it was established that passing off consisted of "[m]isrepresenting the origin of the goods, or their source of manufacture or distribution" The court added that:

[M]isrepresentation as to the origin of the goods may, of course, be either express or implied. If a manufacturer makes the labels or boxes so similar in appearance, or unnecessarily colors or ornaments his article so much like the other article that purchasers are likely to be deceived as to the origin or source, this fact may be an element of evidence that he has adopted those colors or labels or outward appearances for the purpose of assisting him in misrepresenting the origin of the goods and in palming off his goods as those of the other manufacturer.¹¹⁴

A claim of passing off will usually lie where the imitation of the physical details and designs of a competitor's product are nonfunctional and have acquired a secondary meaning, "but where [the] features are functional

110. From the U.S.I.T.C.'s inception under the Federal Trade Act of 1974, the FTC has understood that Section 337 has granted the Commission similar powers to those authorized by 15 U.S.C. § 45 (1970 & Supp. 1975) of the Federal Trade Commission Act, but limited them to regulating articles introduced into the American stream of commerce through importation. Whether the Food and Drug Administration will accede to similar concurrent jurisdiction (over food and drugs), without objecting, at this point in time, is conjecture. Because the FDA has reached a "gentleman's agreement" with the FTC over claims of mislabeling and false advertising, the likelihood is that it will also reach an accord with the U.S.I.T.C.

What makes jurisdictional over-lap between the U.S.I.T.C. and the FDA all the more duplicative is that the remedy proscribed by the Federal Food, Drug and Administration Act, 21 U.S.C. § 331(a) is similar to a temporary or permanent exclusion order under Section 337(e) and (d) of the Federal Trade Act of 1974. Section 331(a) prohibits "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

111. See note 109 *supra*.

112. See *Wawack Co. v. Kaiser*, 90 F.2d 694 (7th cir. 1937); *Lektro-Shave v. General Shaver Corp.*, 92 F.2d 435 (2d Cir. 1937).

113. 241 F. Supp. 265, at 268, 269 (N.D. Ill. 1917).

114. *Id. Accord*, *Elastic Stop Nut Corp. of America v. Greer*, 62 F. Supp. 363 (N.D. Ill. 1945); *Thiefeld v. Postman's Fifth Avenue Corp.*, 37 F. Supp. 958 (S.D.N.Y. 1941); *Joyce, Inc. v. Fern Shoe Co.*, 32 F. Supp. 401 (S.D. Cal. 1940).

there is normally no right to relief."¹¹⁵ Some cases have held that, while imitation of a functional design of a competitor's product will not ordinarily constitute an unfair trade practice, should this functional characteristic also have a secondary meaning, the manufacturer must take reasonable steps to avoid confusion.¹¹⁶ The standard of taking reasonable steps to avoid confusion *might* be met where the foreign producer or importer identifies the article by inscribing its name in bold lettering on the goods.¹¹⁷

Should it be determined that an importer or foreign manufacturer is passing off goods as those of another, the Commission may, pursuant to Section 337(d), (e), or (f), issue a temporary or permanent exclusion order, or a cease and desist order to halt this unfair trade practice.¹¹⁸

B. False Advertising and False Labeling Claim.

False advertising as an unfair competitive practice occurs where a promotional act creates a "likelihood of deception."¹¹⁹ Deception in advertising may be by innuendo, as well as by explicit false statement.¹²⁰ The Commission may look not only to the meaning of the words used, but also to all that is reasonably implied.¹²¹ In considering whether an advertisement constitutes an unfair act, the entirety of the advertisement must therefore be considered.¹²² Representations capable of being construed in both a false and a truthful fashion will be interpreted against the advertiser.¹²³

False labeling as an unfair trade practice is generally treated in the same manner as false advertising. Several cases hold, however, that labeling

115. *Paglicro v. Wallace China Co., Ltd.*, 198 F.2d 339 (9th Cir. 1952). *Accord*, *Schwinn Bicycle Co. v. Murray Ohio Mfg. Co.*, 339 F. Supp. 973 (M.D. Tenn. 1971).

116. *See* *Vaughan Novelty Mfg. Co. v. G. G. Greene Mfg. Corp.*, 202 F.2d 172 (3d cir. 1953). *Accord*, *Interlego A.G. v. The Leslie-Henry Co., Inc.*, 214 F. Supp. 238 (M.D. Pa. 1963).

117. *Vaughan*, *supra* note 116.

118. In the early Tariff Commission case of *Cigar Lighters*, Investigation No. 6, the agency issued an exclusion order on grounds that the foreign lighter had infringed upon the patent of the American lighter. Several years after the patent had expired on the United States lighter, an importer again tried to bring the foreign cigar lighter into the American market. The Collector of Customs again refused entry. *S. J. Charia & Co.*, as the importer of record, appealed to the Customs Court. The court found continued "simulation" of the American product and upheld the ruling of the Collector of Customs. *S. J. Charia & Co. v. United States*, 103 U.S.P.Q. 252 (Cust. Ct. 1954).

119. *See* *Montgomery Ward & Co. v. FTC*, 379 F.2d 666 (7th Cir. 1967); *National Bakers Services, Inc. v. FTC*, 329 F.2d 365 (7th Cir. 1964).

120. *Id.* *See* *Aronberg v. FTC*, 132 F.2d 165 (7th Cir. 1942).

121. *See* *Niresk Industries, Inc. v. FTC*, 278 F.2d 337 (7th Cir. 1960); *Gold Seal Co. v. Weeks*, 129 F. Supp. 928 (D.C. Cir. 1955).

122. *See* *Continental Way Corp. v. FTC*, 330 F.2d 475 (2d Cir. 1964); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270 (2d Cir. 1962).

123. *See* *Country Tweeds, Inc. v. FTC*, 326 F.2d 144 (2d Cir. 1964); *United States v. Barrels of Vinegar*, 265 U.S. 438 (1924).

should meet a higher standard of veracity than advertising.¹²⁴ In *Korber Hats, Inc. v. FTC*,¹²⁵ the Court reasoned:

While advertising and labeling are frequently considered together, there is good reason to insist upon a higher degree of veracity in the latter. It may be argued that consumers accept labeling statements literally while perhaps viewing with a more jaundiced eye the vaunted claims of the advertising media. . . . In the final analysis the validity of a label should be judged by the predictable inference a prospective customer will draw from it.¹²⁶

Claims of false labeling and advertising may arise in several situations. In the *Solder Removing Wicks Case*¹²⁷ complainants alleged that where respondents had labeled their solder wicks with the trademark registration symbol®, and circulated an advertising brochure containing the phrase “patent applied for,” these misrepresentations of false labeling and advertising constituted an unfair method of competition pursuant to Section 337.

Because the right to use a trademark is not acquired through registration,¹²⁸ but through continual use,¹²⁹ it is unlikely that a misrepresentation of trademark registration would lead to an injury determination under Section 337. Similarly, it may be difficult to find the requisite Section 337 “injury to an industry” from a false claim of “patent applied for,” in an adver-

124. See *Berkey & Gray Furniture Co. v. FTC*, 42 F.2d 427 (6th Cir. 1930).

125. 358 F.2d 358 (1st Cir. 1962).

126. *Id.* at 361.

127. See note 109, *supra*.

128. See *Emerson Elec. Mfg. Co. v. Emerson Radio & Phonograph Corp.*, 105 F. 2d 908 (2d Cir. 1939); *Dixie-Cola Laboratories, Inc. v. Coca-Cola Co.*, 117 F.2d 352 (4th Cir. 1941).

129. See *Great W. Financial Corp. v. Savings & Loan Ass'n. of Okla.*, 406 F. Supp. 1287 (W.D. Okla. 1975); *Curtis-Stephens-Embry Co., v. Pro-Tek-Toe Skate Stop Co.*, 199 F.2d 407 (8th Cir. 1952).

tising brochure.¹³⁰ However, unfair trade practices have been found, where false claims of trademark registration are made in addition to other false representations, as having "the tendency and capacity to increase the effect of false representations."¹³¹

Although claims of false labeling and false advertising in the *Solder Removing Wicks Case*¹³² were never actually considered by the Commission, the very filing of these allegations before the U.S.I.T.C. is important because it represents an increased awareness by the international bar of the

130. A misrepresentation of "patent applied for" is clearly a violation of 35 U.S.C. § 292: "(a) Whoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article, the word "patent" or any word or number importing that the same is patented, for the purposes of deceiving the public; or

Whoever marks upon, or affixes to, or uses in advertising in connection with any article, the words "patent applied for," "patent pending," or any other word importing that an application for patent has been made, or if made, is not pending, for the purpose of deceiving the public;

Shall be fined not more than \$500.00 for every such offense.

(b) Any person may sue for the penalty, in which event one-half shall go to the personal suing and the other to the use of the United States.

False representations with regards to trademarks and patents *might* also come within the purview of 15 U.S.C. § 1125 of the Lanham Trade-Mark Act. The Act provides:

(a) Any persons who shall affix, apply or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description of representation cause or procure the same to be transported or used . . . shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

(b) Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have recourse by protest or appeal that is given by this chapter in cases involving goods refused entry or seized.

See generally *Florida v. Real Juices, Inc.*, 370 F. Supp. 428 (D.C., Fla. 1971); *Société Comptoir De L' Industrie Cotonniere Etablissements Boussac v. Alexander's Dept. Stores, Inc.*, 299 F.2d 33 (2d Cir. 1962).

Clearly violations under 35 U.S.C. § 292 (1954) and 15 U.S.C. § 1125 (1974) might be held to bear on a determination of an unfair trade act pursuant to Section 337 of the Federal Trade Act of 1974. Since 15 U.S.C. § 1125 prescribes the same remedy as a temporary or permanent exclusion order, 19 U.S.C. § 1337 (c), (d), a violation under this section might diminish the U.S.I.T.C.'s motivation in making a determination pursuant to Section 337. However, 15 U.S.C. § 1125 has seldom been used. See Grimes, *Control of Advertising in the United States and Germany — Volkswagen has a Better Idea*, 84 Harv. L. Rev. 1769, 1774 (1971).

131. *In re White Light Distributing Corp.*, 18 FTC 158 (1934). See *In re Ritter Brothers, Inc.*, 45 FTC 596 (1949).

132. See note 109, *supra*.

U.S.I.T.C.'s expanding role in regulating unfair methods of competition in foreign commerce.¹³³

IV. SECTION 337 INJURY DETERMINATION

“Unfair methods of competition and unfair acts in the importation of articles into the United States” are proscribed by Section 337 when their “effect or tendency . . . is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry. . . .”¹³⁴

As is true with several antitrust statutes,¹³⁵ Section 337 seeks to remedy anticompetitive practices in their incipiency. The court in *In Re Von Clemm*,¹³⁶ defined the injury standard: “[W]here unfair methods and acts have resulted in *conceivable* losses of sale,¹³⁷ a *tendency* to substantially in-

133. These allegations were dropped in investigational stages of the proceeding. Also note that in the early Tariff Commission case of *Manila Rope*, Section 316, Docket No. 5, April 1927, an unfair trade act was found where imported rope labeled as “manila” or “bolt” rope also contained other fibers. The Commission issued a final exclusion order.

134. 19 U.S.C. § 1337(a) (1974).

135. See Federal Trade Commission Act, 15 U.S.C. § 45 (1973 & Supp. 1977), Clayton Act of 1914, 15 U.S.C. §§14, 18 (1973).

136. 229 F.2d. 441 (emphasis added) (C.C.P.A. 1955) (Tariff Commission).

137. The Commission also recognized in Chain Door Locks, Investigation No. 337-TA-5, U.S.I.T.C. Publ. No. 770 (1976), that where a domestic product has become “substantially less profitable” as a result of the importation of foreign goods in the same line of commerce, a “tendency to substantially injure” an American industry might be established.

An industry’s decline in employment, the idling of machinery, and reduced production may also bear on injury determinations pursuant to Section 337. See Meproamate P.J., T.C. Pub. 389, April 1971; Articles Comprised of Plastic Sheets Having an Openwork Structure, F.I., T.C. Pub. 44, December 1971.

In antidumping inquiries, which arguably may fall within the purview of Section 337, injury determinations have characteristically hinged on several factors: (1) loss of domestic sales; (2) foreign market penetration; (3) price depression or suppression; (4) increasing domestic inventories or idle capacity; (5) loss of customers; (6) market disruption. Silberger, *supra* note 95, at 99 (criteria for Section 337 injury determination “include many of the factors present in dumping investigations.”) See Synthetic Star Sapphires and Rubies, Investigation No. 337-13, Tariff Comm’n. Publ. (Sept. 1954); *aff’d.*, *In re Von Clemm*, *supra* note 70. See Racing Plates from Canada, Investigation No. AA-1921-37, Tariff Comm’n. Publ. 645 (Jan. 1974); Metal Punching Machines, Single-End Type, Manually Operated, From Japan, Investigation No. AA-1921-123, Tariff Comm’n. Publ. 640 (Jan. 1974).

jure such industry has been established."¹³⁸

Under both the Tariff Act of 1930 and the Federal Trade Act of 1974, the Commission has applied this incipency standard to injury determinations. Under the former statute, however, the Tariff Commission referred the injury determination to the President, who then could order exclusion of the articles from entry at United States customs houses.¹³⁹ Presently, a U.S.I.T.C. finding of injury is directly "implemented" by the Commission,¹⁴⁰ pursuant to presidential approval.¹⁴¹

Unlike such antitrust statutes as the Robinson-Patman Act,¹⁴² Section 337 of the Federal Trade Act of 1974 does not proscribe injury to competition. Instead, Section 337 seeks to prevent competitive harm to "an industry."¹⁴³ In patent cases the domestic industry has long been held to be the industry legally entitled to manufacture and sell the patented item.¹⁴⁴ If the patent is licensed to other domestic manufacturers,¹⁴⁵ they also will be

138. In his brief on behalf of the Tariff Commission in *In re Von Clemm*, ex-Assistant Attorney General [now Chief Justice] Warren Burger reasoned that: "The answer to appellant's contention is that the statute does not require the Commission to wait until the domestic industry has been wholly destroyed or substantially injured before it takes action. Section 337 authorizes the Commission to act if the unfair methods or acts have a 'tendency' to bring about the destruction or injury. There can be no doubt that the importation in ever increasing quantities of the offending stones and their sale at prices so low that the domestic product cannot possibly meet them will eventually bring about a substantial injury to the domestic industry if indeed it does not cause its entire destruction." [Record at 29, 30.]

In re Certain Electronic Audio and Related Equipment, Investigation No. 337-TA-7, U.S.I.T.C. Publ. No. 768 (1976), the Commission stated that a Section 337 "tendency to injure" might result where the "undesirable conduct will [might] eventually blossom into a restraint of trade . . ."

A "tendency to injure" has also been held to exist where a trade practice "threatens in any significant way" to impair "the ability of the domestic industry to carry on business. *In re Furazolidone*, Investigation No. 337-21, Tariff Comm'n. Publ. 299 (Nov. 1969).

139. 19 U.S.C. § 1337(a) (1965 & Supp. 1977).

140. 19 U.S.C. § 1337(d), (e), (f) (1965 & Supp. 1977).

141. 19 U.S.C. § 1337(g) (1965 & Supp. 1977) provides: "REFERRAL TO THE PRESIDENT — (1) If the Commission determines that there is a violation of this section, or that, for purposes of subsection (e), there is reason to believe that there is such a violation, it shall — (A) Publish such determination in the Federal Register, and (B) Transmit to the President a copy of such determination and the action taken under subsection (d), (e), or (f), [permanent, temporary exclusion order, or cease and desist order] with respect thereto, together with the record upon which such determination is based. (2) *If, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such determination, the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken under subsection (d), (e), or (f) of this section with respect thereto shall have no force or effect . . .*" (emphasis added).

142. 15 U.S.C. § 13a (1973).

143. 19 U.S.C. § 1337(a) (1965 & Supp. 1977).

144. *In-the-Ear-Hearing-Aids Tariff Comm'n*. Publ. No. 182 (1966). Silberger, *supra* note 106, at 99.

145. *Certain Ultra-Microtome Freezing Attachments*, Investigation No. 337-TA-10.

included within the definition of "industry."¹⁴⁶ With regards to foreign patents, the "industry" will consist of the domestic licensee.¹⁴⁷

In non-patent cases, "an industry" is considered to be the manufacturing facilities in the United States devoted to the production of the articles in question.¹⁴⁸

Imported goods are held to compete with the domestic industry, when the foreign product is either identical to the domestic article,¹⁴⁹ or substantially similar (cross-elasticity).¹⁵⁰ Since its early days as the Tariff Commission, the U.S.I.T.C. has therefore defined the relevant "line of commerce" in a fashion similar to the approach taken under other American antitrust statutes.¹⁵¹

The Commission has been less conventional in defining the relevant geographic market under Section 337 of the Federal Trade Act of 1974. Historically, the geographic scope of a Section 337 "injury to an industry" determination has been held to be the entire national output of the product in question.¹⁵² In more recent years, however, the Commission has regionalized injury determinations to relevant geographic markets within the United States.¹⁵³

In some investigations the U.S.I.T.C. has gone so far in regionalizing relevant geographic markets in the United States that Section 337 injury

146. *Id.* See Self-Closing Containers, Investigation No. 337-18, Tariff Comm'n. Publ. 55 (Apr. 1962); In-the-Ear-Hearing Aids, Tariff Comm'n. Publ. No. 182 (1966).

147. See Push Button Puppets, Tariff Comm'n. Publ. Notice of Oct. 31, 1958.

148. See Wrenches, Pliers, Screwdrivers and Metal Cutting Snips and Shears from Japan, Investigation No. 1921-141, Tariff Comm'n. Pub. 696 (Oct. 1974) (antidumping inquiry).

149. See Bicycles from Czechoslovakia, 25 Fed. Reg. 9782 (Tariff Comm'n. 1960).

150. See Nepheline Syenite from Canada, 26 Fed. Reg. 956 (Tariff Comm'n. 1961) (cross-elasticity found between Canadian nepheline syenite and American feldspar, both used in the production of glass).

151. See generally A. C. Coudert, *The Application of the United States Antidumping Law in the Light of a Liberal Trade Policy*, 65 Colum. L. Rev. 189 (1965).

152. See Titanium Dioxide from France, 28 Fed. Reg. 10467, 10468 (Tariff Comm'n. 1963); Hot-Rolled Carbon Steel Wire Rods from France, 28 Fed. Reg. 7368 (Tariff Comm'n. 1963); Bicycles from Czechoslovakia, 25 Fed. Reg. 9782 (Tariff Comm'n. 1960).

153. See *Orlowitz v. United States*, 200 F. Supp. 302 (Cust. Ct. 1961) (Customs Court endorsed Tariff Commission's "regionalizing" of cast-iron soil pipe industry to comprise six pipe producers in California; antidumping action). See generally *Chromic Acid from Australia*, 29 Fed. Reg. 2919 (Tariff Comm'n. 1964) (antidumping action); *Portland Cement from Dominican Republic*, 128 Fed. Reg. 4047 (Tariff Comm'n.) (1963) (antidumping action).

Although these three cases represent antidumping inquiries, the "injury to an industry" criteria for dumping may bear on Section 337 investigations. Silberger, *supra* note 106, at 99. The Antidumping Act of 1921, 19 U.S.C. § 160 uses the equivalent language of Section 337 with regards to injury determinations: ". . . and the Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured or is prevented from being established . . ." (emphasis added.)

determinations have been criticized as going beyond injury to *an industry*, to hold that competitive harm to a domestic competitor(s) is enough.¹⁵⁴

A Section 337 determination of injury to an industry can only result if the domestic industry is "efficiently and economically operated." This requisite to a Section 337 claim of unfair competition is unique to the Federal Trade Act of 1974. A similar provision is not found in Section 5 of the Federal Trade Commission Act, Section 337's counterpart.

Although a U.S.I.T.C. complainant must show that its industry is "efficiently and economically operated" before the Commission may rule on an alleged unfair trade practice,

[r]ecent cases generally have not belabored this requirement, perhaps because the presence of a potential product subject to import competition has been deemed at least to illustrate that some technological advances have been achieved — or employed — by the complainant.¹⁵⁵

However, in *Electronic Pianos*¹⁵⁶ the Commission found the domestic industry to be efficiently and economically operated using three evidentiary bases: (1) The consolidation of complainant's manufacturing facilities contributing to its modernity and efficiency of operation; (2) complainant's use of management consultants to improve the efficiency of its manufacturing process; and (3) complainant's implementation of an incentive labor program, which had a heightened impact on labor performance.

In *Chain Door Locks*¹⁵⁷ the Commission held the advanced automation of the domestic industry's production process sufficient to meet the "efficiently and economically operated" requirement.

The findings of fact in support of the presiding officer's recommended determination in *Reclosable Plastic Bags*¹⁵⁸ represent the most complete discussion of the relevant criteria in showing a domestic industry "efficiently and economically operated." Such factors include: (1) An upward trend in domestic sales of United States produced products; (2) an upward trend in export sales of United States produced products; (3) increased output of United States products; (4) increased labor production force within

¹⁵⁴ See generally Northern Bleached Hardwood Kraft Pulp from Canada, 38 Fed. Reg. 87 (Tariff Comm'n. 1973); Instant Potato Granules from Canada, 37 Fed. Reg. 18, 505 (Tariff Comm'n. 1972). See also *Swimming Pool Case*, supra note 19; *Chicory Root*, supra note 29; *Solder Removing Wicks*, Investigation No. 337-TA-26 (U.S.I.T.C. investigations where complaints have focused on injury to a competitor in an otherwise concentrated market).

¹⁵⁵ Silberger, supra note 106, at 100.

¹⁵⁶ Investigation No. 337-TA-31.

¹⁵⁷ Investigation No. 337-TA-15, U.S.I.T.C. Publ. No. 770 (1976).

¹⁵⁸ Investigation No. 337-TA-22.

domestic industry; (5) average annual man hours per production of domestically produced goods; (6) output per man hour for the domestic industry over the past five years; (7) a stipulation by the parties to an investigation that the complainant is an efficiently and economically operated industry; (8) expansion of production facilities; (9) square footage of production plant; (10) net sales, net operating profit (or loss), and ratio of net operating profit (or loss) to net sales for total company operations and for operations of domestically produced product; (11) net sales, manufacturing expenses, and ratio of manufacturing expenses to net sales for total company operations and for operations of domestically produced product; (12) efficiency in manufacturing process, *i.e.*, improvement of facilities, administration, process, etc.; (13) steps taken to increase volume of sales, efforts in advertising, direct mail, product promotion, and direct sales to potential buyers; (14) patentee and licensee exchange of technology pursuant to licensing and franchising agreements; and (15) profit and loss data of licensees.

To date, the Commission has not definitively ruled which, if any, of these criteria are crucial to a finding that a domestic industry is "efficiently and economically operated." The efficacy of a Section 337 respondent defending solely on grounds that the complainant is not "efficiently and economically operated" is therefore suspect.

Although an injury determination pursuant to Section 337 may result when an alleged unfair trade practice has "the effect or tendency . . . to destroy or substantially injure an industry efficiently and economically operated . . ." the statute also seeks to prohibit restraints of trade which "prevent the establishment of [such] an industry."¹⁵⁹ A similar standard is found in the Antidumping Act of 1921.¹⁶⁰ Under both statutes this criterion for injury is seldom, if ever, alleged.

In *Certain Regenerative Blower/Pumps*¹⁶¹ the Commission considered the "prevention of an industry" standard as one of first impression. The Commission majority held that an industry which was already established could not be prevented from being established. A different interpretation of the injury standard was proffered by the dissent:

[I]f an industry has made a commitment, and if it has the capability of becoming established, the requirement of the Antidumping Act is satisfied if LTFV sales frustrate or forestall the development of a stable and viable U.S. industry.¹⁶²

¹⁵⁹ 19 U.S.C. § 1337(a) (1965 & Supp. 1977).

¹⁶⁰ 19 U.S.C. § 160(a) (1965 & Supp. 1977).

¹⁶¹ Investigation No. AA-1921-140, Tariff Comm'n. Publ. 676 (May 1974) (hereinafter *Regenerative Blower/Pumps*).

¹⁶² *Id.*

In *Certain Ultra-Microtome Freezing Attachments*,¹⁶³ the Commission adopted the minority view in *Regenerative Blower/Pumps* by broadening the injury standard to include two classes of parties:

(1) [P]arties which have just begun manufacturing operations and for which section 337 violations would have the effect or tendency of frustrating efforts to stabilize such operations;

(2) [P]arties which are about to commence production and for which section 337 violations would have the effect or tendency of frustrating efforts to found a business.¹⁶⁴

In general, the Commission held that parties seeking redress “under the prevention clause of Section 337 must show a readiness to commence production.”¹⁶⁵ However, where “patent infringement forms the basis of the complaint, ownership of, or license to produce under the patent is not in itself a sufficient showing of such readiness for a remedy to issue.” Policy considerations dictate that a remedy could not issue in such a situation, because Commission action “might remove all incentive to establish a domestic industry.”¹⁶⁶ Beyond *Regenerative Blower/Pumps* and *Freezing Attachments*, little additional analysis concerning the “prevention of an industry” standard has been forthcoming from the Commission.¹⁶⁷

V. REMEDIES UNDER SECTION 337 OF THE FEDERAL TRADE ACT OF 1974.

A. *The Temporary Exclusion Order*

Subsection (e) of Section 337 grants temporary relief:

[I]f, during the course of an investigation under this section, the Commission determines that there is *reason to believe* that there is a violation of this section, it may direct that the articles concerned . . . be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and the United States consumers, it finds that such articles should not be excluded from entry . . . except that such articles shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary [of the Treasury].¹⁶⁸

163. Investigation No. 337-TA-10 (Commission Memorandum Opinion) (hereinafter *Freezing Attachments*).

164. *Id.* at 10.

165. *Id.*

166. *Id.* at 11.

167. See Silberger, *supra* note 106, at 100.

168. 19 U.S.C. § 1337(e) (1970 & Supp. V 1975).

Subsection (f)¹⁶⁹ of Section 337 offers an additional means of temporary relief through the issuance of a cease and desist order, “unless after taking into account the same public interest factors as enumerated in Subsection (e) it finds that such order should not be issued.”¹⁷⁰

Subsections (e) and (f) of Section 337 require the Commission to make three determinations before it can issue temporary relief.¹⁷¹ The Commission must find that:

- (1) There is a reason to believe that there is a violation of Section 337;
- (2) there is a need for temporary relief; and
- (3) the public interest factors do not outweigh the need for temporary relief.¹⁷²

The “reason to believe” standard of finding (1) involves determining that “there is an unfair method of competition or unfair act, and also finding a reason to believe that there is the requisite effect or tendency as a result of such unfair practice.”¹⁷³ “Failure of the Commission to determine that there is reason to believe that there is a violation of Section 337 would, of course, render unnecessary the need to consider whether there should be temporary relief and whether the public interest factors would outweigh the need for such temporary relief.”¹⁷⁴

Because temporary relief was designed to prevent possible further injury to a domestic industry *pending a final U.S.I.T.C. determination*, complainants in Section 337 proceedings have argued that the “reason to believe” standard is less strict than a finding of tendency to injure pursuant to Subsections (d) and (f) regarding “final” remedies. Past precedent under an equivalent section of the Tariff Act of 1930¹⁷⁵ establishes that the “Commission interpreted ‘reason to believe’ to require a showing of the existence of a ‘prima facie’ violation.”¹⁷⁶ The Commission Memorandum Opinion in *Chicory Root* states:

In other words, the Commission at least in later cases under the old provision, did not make a finding of reason to believe the statute was being violated until after seeking and considering responses, defenses, and information from alleged violators and

169. 19 U.S.C. § 1337(f) (1970 & Supp. V 1975).

170. *Chicory Root*, *supra* note 29. (Commission Memorandum Opinion)

171. 19 C.F.R. § 210.41(e)(2), Chapter II, provides that all temporary relief hearings “. . . shall be completed within three (3) months after publication in the *Federal Register* of the notice instituting the investigation.”

172. *Chicory Root*, *supra* note 29.

173. *Id.*

174. *Id.*

175. 19 U.S.C. § 1337(f) (1965 & Supp. 1977).

176. *Chicory Root*, *supra* note 29. (Commission Memorandum Opinion)

interested parties weighing the information before it, and determining that there was a preponderance of the information on the side of complainant for each element necessary for showing there to be a violation and regarding each proper defense, though the information available did not satisfy it that there was a violation.¹⁷⁷

The amendments to Section 337 made by the Tariff Act of 1974 which established the present "reason to believe" language did not, it appears, intend to disturb the meaning given to such phrase by the Commission under the prior provision. The addition of new Section 337(c)(1) requires the Commission to consider equitable and legal defenses and to hold a hearing that conforms with the requirements of the Administrative Procedure Act (APA) prior to directing temporary relief. The new requirements thus are consistent with the Commission practice of weighing all the evidence before it and determining where the weight of the evidence lies before deciding that temporary relief is warranted.¹⁷⁸

. . . . It is our view that the basic standard actually used by the Commission under the prior provisions . . . that of probability of a violation, or alternatively stated, preponderance of the evidence . . . is still applicable to temporary relief proceedings.¹⁷⁹

Although the standard for temporary relief might seem less strict than what otherwise is required for relief pursuant to a final injury determination, in practice temporary exclusion orders and/or cease and desist orders are every bit as difficult to obtain as final remedies.¹⁸⁰ In light of the policy behind temporary relief, that is, to eliminate the potential for harm to U.S.I.T.C. complainants (domestic industry) pending a final Commission determination, it would appear that a motion for temporary relief pursuant to Subsections (e) and (f) merely accelerates the time-schedule for Section 337 determinations. A motion for temporary relief therefore puts an added burden on all parties to the proceeding by creating the necessity for two full-blown administrative hearings, instead of one. It also makes the twelve month time limit (eighteen months in more complicated cases) of Subsection (b)(1) more difficult to meet.¹⁸¹ Accordingly, many practitioners feel that the strict burden of proof required for Subsections (e) and (f) temporary relief was fashioned to dissuade litigants from seeking this remedy.

The confusion over the injury standard in Section 337 temporary relief hearings has prompted the suggestion that "[p]erhaps a better standard than

177. *Id.*

178. *Id.*

179. *Id.*

180. Subsequent to the enactment of the Federal Trade Act of 1974, the Commission found "injury" in a non-patent based Section 337 investigation only once. See Commission Memorandum Opinion in *Stainless Steel Pipe and Tube*, *supra* note 18.

181. 19 U.S.C. § 1337(b)(1) (1965 & Supp. 1977).

the *prima facie* one would be one which more closely approximates the court test of whether or not to issue a preliminary injunction, *i.e.*, probability of success on the merits.¹⁸² Whether this standard would make it easier for Section 337 complainants to obtain temporary relief, without putting an increased burden on the Commission to meet its statutory time limit, is pure conjecture. Since temporary relief pursuant to Section 337(e) permits bonded entry of the imported goods in an "amount which would offset any competitive or unfair act enjoyed by persons benefiting from the importation of the article,"¹⁸³ perhaps a lower injury standard for temporary relief determinations is warranted.

B. *Permanent Exclusion Orders*¹⁸⁴

(d) EXCLUSION OF ARTICLES FROM ENTRY. — If the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.¹⁸⁵

Exclusion of imported articles pursuant to Subsection (d) are in the nature of *in rem* proceedings.¹⁸⁶ Upon a Commission decision to issue a permanent exclusion order, entry may be permitted under bond, pending the sixty day period awaiting Presidential approval rendering the determination final.¹⁸⁷ To date, the Commission has yet to issue a permanent exclusion order in a non-patent based Section 337 proceeding under the new Federal Trade Act of 1974.

C. *Cease and Desist Orders*¹⁸⁸

182. Kaye Plaia, *Revitalization of Unfair Trade Causes in the Importation of Goods: an Analysis of the Amendments to Section 337*, 57 J. Pat. Off. Soc'y. 208, 270 (1975)

183. See note 24, *supra*.

184. 190 U.S.C. § 1337(d) (Supp. 1977).

185. *Id.* See 19 C.F.R. § 210.41, Chapter II (hearing for permanent relief).

186. See text accompanying notes 8-45 *supra*.

187. 19 U.S.C. § 1337(g)(3) (1965 & Supp. 1977).

188. 19 U.S.C. § 1337(f) (1965 & Supp. 1977).

Section 337, Subsection (f) states:

(f) CEASE AND DESIST ORDERS. — In lieu of taking action under subsection (d) or (e), the Commission may issue and cause to be served on any person violating this section, or believed to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved, unless after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued. The Commission may at any time, upon such notice and in such manner as it deems proper, modify or revoke any such order, and, in the case of a revocation, may take action under subsection (d) or (e), as the case may be.¹⁸⁹

Unlike the temporary or permanent exclusion order, a Section 337 cease and desist order is an *in personam* remedy. The issuance of a cease and desist order by the Commission against a foreign manufacturer would require his presence at a U.S.I.T.C. investigation.¹⁹⁰ As is true with exclusion orders, entry of the imported goods "shall be entitled to entry under bond . . ." pending Presidential approval of the Commission's determination.¹⁹¹

VI. CONCLUSION: THE FUTURE ROLE OF THE U.S.I.T.C. IN SECTION 337 PROCEEDINGS.

On January 15, 1976, American television manufacturers filed a Section 337 complaint before the Commission alleging unfair trade practices by certain Japanese television importers and manufacturers.¹⁹² In terms of pure dollar amount, the television case has been termed the largest U.S.I.T.C. investigation to date. This investigation may represent the first in a series of large-scale Section 337 cases to be brought before the Commission.¹⁹³ As foreign imports have entered the stream of American commerce in ever increasing quantities, several key United States industries have suffered serious losses in sales. A corresponding decrease in production has laid off thousands of workers. In the American shoe industry alone, over the last fifteen years the number of domestic operations has dropped from a high of one thousand to a present low of three hundred and fifty.¹⁹⁴ Twenty-six

189. *Id.*

190. See text accompany notes 8-45 *supra*.

191. 19 U.S.C. § 1337(g)(3).

192. See *Color Television Case*, *supra* note 29.

193. See also *Stainless Steel Pipe and Tube*, *supra* note 18.

194. *Free Trade or "Protection": A Hot Potato For Carter*, U.S. News & World Rep., Feb. 14, 1977, at 66-67.

thousand leather workers have lost their jobs.¹⁹⁵ Notwithstanding the American shoe and television industry, large in-roads have been made by foreign manufacturers as well in the United States audio and electronics, textiles, automobile, and iron and steel industries.¹⁹⁶ Domestic manufacturers and labor unions are lobbying hard for a protectionist stance by United States judicial institutions and agencies.

Despite the clamor among several United States industries and labor unions for increased protection against foreign imports, the reality is that the U.S.I.T.C. has only recently found injury to a domestic industry in a non-patent based Section 337 inquiry under the Federal Trade Act of 1974. The Commission is understandably concerned that its past failure to hold for the domestic industry in non-patent based U.S.I.T.C. Section 337 investigations has diminished its viability as an antitrust regulatory agency.

195. *Id.*

196. *Id.* See U.S. Dep't of Comm., Commerce America, Vol. II, No. 4, at 16 (1977) for an accounting of the recent increase in major U.S. imports:

MAJOR U.S. IMPORTS

(f.a.s. transaction values in millions of dollars)

	1974	1975	1976
Import total	100,251	96,116	120,677
Industrial supplies, total	51,306	48,820	60,902
Petroleum, total	24,668	25,197	32,226
Crude oil	15,332	18,374	25,480
Chemicals	4,018	3,696	4,772
Iron and steel-mill products	4,756	4,037	3,809
Nonferrous metals	3,922	2,581	3,501
Newsprint	1,503	1,427	1,742
Lumber	1,141	866	1,452
Consumer goods, total	25,260	24,081	32,503
Passenger cars			
From Canada	2,626	2,803	3,477
From other countries	4,673	4,321	5,451
Automotive parts and engines			
From Canada	1,023	1,045	1,560
From other countries	476	428	533
Clothing	2,331	2,562	3,634
Consumer electronics	2,354	1,985	3,242
Footwear	1,134	1,275	1,686
Capital goods, total	10,754	10,857	13,007
Machinery	8,666	9,007	10,540
Trucks	515	489	695
Foods, feeds, beverages, total	10,570	9,645	11,549
Coffee	1,505	1,561	2,632
Fish	1,500	1,356	1,855
Meat	1,353	1,141	1,447
Sugar	2,247	1,865	1,154

However, the U.S.I.T.C. is aware that increased efficiencies by foreign manufacturers and the corresponding benefit which lower prices for imports bestow upon the American consumer, have necessitated Commission "no-injury" determinations in past non-patent based cases. Whether the U.S.I.T.C. is to become a full-fledged antitrust regulatory agency in the style of the FTC must not depend on its becoming the lackey of American industry, but instead on an even-handed and rational decision-making process in Section 337 investigations. To date, the Commission has not compromised these high standards.