

Northwestern Journal of International Law & Business

Volume 4
Issue 1 *Spring*

Spring 1982

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Recommended Citation

Brian G. Brunsvold, Charles F. Schill, Ursula Schwendemann, Injury Standards in Section 337 Investigations, 4 Nw. J. Int'l L. & Bus. 75 (1982)

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Injury Standards In Section 337 Investigations

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INTRODUCTION

In this article the authors analyze the impact of the Trade Act of 1974 on Section 337 cases. They focus on the standards the International Trade Commission (ITC) uses in making its injury determinations in Section 337 cases. The authors also address the limited nature of judicial review over final ITC determinations, and conclude that the enhanced role of the ITC in Section 337 proceedings brought about by the Trade Act of 1974 creates a need for private litigants to build a thorough record on the issue of actual or incipient injury in proceedings before the ITC.

The United States International Trade Commission (the "ITC" or "Commission") administers various trade statutes, including Section 337 of the Tariff Act of 1930, as amended.¹ The purpose of this statute is to prevent unfair methods of competition and unfair acts in import trade. In investigations under the statute, the Commission is required to determine whether unfair trade practices exist and whether those unfair trade practices have the effect or tendency to destroy or injure sub-

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¹ 19 U.S.C. § 1337 (1976 & Supp. IV 1980).

stantially a domestic industry.² The Commission has developed standards for determining injury on a case-by-case basis. This article will analyze trends appearing in these injury determinations.

The statute has included an injury standard with the same phraseology since 1922. No clear analytical guidelines have emerged, however. The large increase in Section 337 cases since the Trade Act of 1974 has brought into sharp relief the need for a more definite injury test. This article describes and analyzes the legislative, judicial, and Commission history of the injury standard in Section 337 investigations; the differences between temporary and permanent injury standards; and will explore federal court considerations in determining damages in patent infringement cases. Finally, some observations will be made on the development of more definite standards for making injury determinations in Section 337 actions.

Statutory Requirements

To find a violation of Section 337(a),³ the United States International Trade Commission must investigate: (1) whether there exists an unfair trade practice in the importation of goods into the United States or in the sale of such goods; (2) whether these methods or acts have the effect or tendency to destroy or injure substantially a United States industry; and (3) whether that industry is efficiently and economically operated. The Commission may also find a violation if an industry is prevented from being established by the unfair acts or if such acts restrain or monopolize trade and commerce in the United States. Remedies are provided in subsections (d), (e), and (f).⁴

² For a general discussion of the requirements of Section 337 investigations, see Brunsvold, *Analysis of the United States International Trade Commission As A Forum For Intellectual Property Disputes*, 60 J. PAT. OFF. SOC'Y 505 (1978).

³ 19 U.S.C. § 1337(a) (1976) (unfair methods of competition declared unlawful). Section 1337(a) provides that:

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.

⁴ 19 U.S.C. § 1337(d)-(f) (1976 & Supp. IV 1980). Sections (d)-(f), in relevant part, provide that:

(d) 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

(e) If, 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

Under Section 337, the Commission may either investigate complaints brought by interested persons or initiate its own complaints. If it finds the elements required by the statute, it may issue: (1) temporary or permanent exclusion orders against specific goods; or (2) temporary or permanent cease and desist orders against the persons believed to be or found in violation of Section 337.⁵ The Commission's final determination of any remedy is subject to review by the President who may overturn the remedy for policy reasons.⁶ Final Commission determinations are also subject to review by the Court of Customs and Patent Appeals.⁷

Legislative History

The Commission was first granted power to conduct investigations into unfair trade practices by Section 316 of the Tariff Act of 1922.⁸ The forerunner of this provision appeared in Section 801 of the Revenue Act of 1916 (Revenue Act),⁹ which established the United States Tariff Commission.¹⁰ During the debate on the bill, which became the Revenue Act of 1916, the Senate proposed an amendment making it unlawful to import or cause to be imported into the United States articles in unfair competition. This proposal was rejected by the House.¹¹

In 1918, the Commission began a study relating to dumping and

articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States
(f) (1) In lieu of taking action under subsection (d) or (e) of this section 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

⁵ *Id.*

⁶ 19 U.S.C. § 1337(g)(2) (1976).

⁷ 19 U.S.C. § 1337(c) (Supp. IV 1980).

⁸ Tariff Act of 1922, Pub. L. No. 318, § 316, 42 Stat. 858, 943.

⁹ Revenue Act of 1916, Pub. L. No. 271, § 801, 39 Stat. 756, 798 (1916). Section 801 provided that:

[I]t 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 into 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 both 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.

The Revenue law also provided for criminal penalties and for private suits by any person injured to recover treble damages.

¹⁰ *Id.* § 700, 39 Stat. at 795.

¹¹ H.R. REP. NO. 1200, 64th Cong., 1st Sess., (1916).

unfair competition in the United States. A report on the study and proposals was submitted to the Committee on Ways and Means.¹² The report highlighted the difficulty of proving that dumping is practiced with the intent of destroying a United States industry, or of monopolizing trade of a certain article.¹³ The Commission recognized the difficulty that would result in determining whether an offense has been committed,¹⁴ and drew the distinction between dumping and unfair competition practices.¹⁵

The bill which became the Tariff Act of 1922 was introduced in Congress in 1921¹⁶ but did not contain any of the several amendments the Commission suggested in its report.¹⁷ However, the Senate Finance Committee inserted Section 316 on unfair trade practices. This section incorporated the amendment to the Revenue Act of 1916 proposed by the Senate. Section 316 eliminated the intent requirement and established the "injury" standard. In addition, it broadened the proscribed activities beyond the activity prohibited by Section 801 of the Revenue Act.¹⁸

¹² UNITED STATES TARIFF COMMISSION, INFORMATION CONCERNING DUMPING AND UNFAIR FOREIGN COMPETITION IN THE UNITED STATES AND CANADA'S ANTI-DUMPING LAW, 66th Cong., 1st Sess. (1919).

¹³ *Id.* at 18-21.

¹⁴ It should also be observed that economic conditions are more significant in the development of dumping practices than is any particular intent. In conducting private industry, the prevailing motive is profit. Ordinarily, therefore, it must be extremely difficult to establish as an essential element in the offense a separate and destructive purpose, as specified in the congressional act of 1916. In dumping, the intent to injure, destroy, prevent the establishment of industry, or restrain or monopolize trade or commerce in the United States is not necessarily present. Certainly, when the practice is resorted to, motives other than those enumerated may, and, at times, do exist. *Id.* at 20.

¹⁵ The Commission noted:

[U]nmistakable differences from dumping are evident where the deceptive use of trade marks, deceptive imitation of goods, false labeling, exploitation of patents, deceptive advertising and commercial threats and bribery are involved. In these latter instances, it is clear, without either argument or detailed analysis, that distinguishable phases of unfair competition require divergent legislative treatment from that which is indicated if the consequences of dumping are to be avoided.

Id. at 11.

¹⁶ H.R. 7456, 67th Cong., 1st Sess. (1921).

¹⁷ *Id.*

¹⁸ See *supra* note 9 and accompanying text. Section 316(a) provided:

That unfair methods of competition and unfair acts in the importation of merchandise 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 hereby 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.

Tariff Act of 1922, Pub. L. No. 318, § 316, 42 Stat. 858, 943. See also H.R. REP. NO. 7456, 67th Cong., 2d Sess., 95-96 (1922).

The Finance Committee noted in its report concerning the amendments:

[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 anti-dumping statute the country has ever had.¹⁹

With this provision, it was no longer necessary to prove intent to destroy or injure an industry. Instead, it was sufficient to show that the industry involved was injured by the unfair methods of competition and unfair acts or that such acts restrained or monopolized trade and commerce in the United States. In effect, this law prohibited unfair trade practices which "threaten[ed] the stability or existence of American industry."²⁰

The injury standard in Section 316 of the Tariff Act of 1922 was carried into Section 337 of the Tariff Act of 1930,²¹ and remained unchanged by the subsequent amendments of that Act by the Trade Act of 1974²² and the Trade Agreements Act of 1979.²³

During debate on the Trade Act of 1974, substantial revisions of Section 337 were proposed, but none were added.²⁴ Various proposals for revision were considered in Senate and House versions of the 1974 Trade Act. However, the Committee on Ways and Means ultimately brought back the existing injury requirement. In its report, the Committee commented on the level of injury required to meet the terms of the statute. It stated:

Where unfair methods and acts have resulted in conceivable losses of sales, a tendency to substantially injure such industry has been established. (*Cf.*, *In re Von Clemm*, 229 F.2d 441 (C.C.P.A. 1955).²⁵

The Committee on Ways and Means recognized that there was a

¹⁹ S. REP. NO. 595, 67th Cong., 2d Sess. 3 (1922).

²⁰ H.R. REP. NO. 1223, 67th Cong., 2d Sess. 146 (1922) (amend. no. 1666). *See also* UNITED STATES TARIFF COMMISSION, SIXTH ANNUAL REPORT, H.R. DOC. NO. 480, 67th Cong., 4th Sess. 4 (1922).

²¹ Tariff Act of 1930, Pub. L. No. 361, § 337, 46 Stat. 590, 703.

²² Trade Act of 1974, Pub. L. No. 93-618, § 341, 88 Stat. 1978, 2053 (1975).

²³ Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 106, 1105, 93 Stat. 144, 193, 310 (1979).

²⁴ Section 350, H.R. 6767, 93d Cong., 1st Sess. (1973). The original proposal made by the Administration's bill would have limited the unfair acts proscribed by Section 337 to patent infringements and would not have required a showing of injury or the prevention of the establishment of an industry, nor did it require proof of an efficiently and economically operated domestic industry. A companion statute proposed by the Administration would have authorized the Federal Trade Commission to investigate and regulate certain methods of competition (other than patent infringement) in the import trade.

²⁵ HOUSE COMMITTEE ON WAYS AND MEANS, TRADE REFORM ACT OF 1973, H.R. REP. NO. 571, 93d Cong., 1st Sess. 78 (1973).

low threshold for the proof of injury. This is also a recognition that the conceivable loss of sales shown in the case cited by the Committee, accompanied by proof of importation of goods in increasing quantities and the sale of those goods at prices lower than the prices charged by the domestic industry, was sufficient to find a tendency to injure substantially the domestic industry. In other words, injury sufficient to find violation of the statute does not have to be already fully manifest: the Commission can also stop an unfair trade practice in its incipency.²⁶

The Senate Finance Committee, in its report accompanying H.R. 10710,²⁷ which became the Trade Reform Act of 1974, stated:

[S]ubsection (a) of section 337, as amended by the Committee in this bill, would remain unchanged except for providing that violations of section 337 are to be found by the Commission instead of by the President. No change has been made in the substance of the jurisdiction conferred under section 337(a) with respect to unfair methods of competition or unfair acts in the import trade.²⁸

Thus, the ITC has jurisdiction to consider all types of unfair methods of competition and unfair acts and to issue remedies if there is a sufficient showing of injury.

The Committee also stated that the purposes of the bill as a whole were "to provide greater access and more effective delivery of import relief to industries, firms and workers which are seriously injured or threatened with serious injury by increased imports . . . [t]o improve procedures for responding to unfair trade practices in the United States and abroad."²⁹

This statement, viewed in light of the other statements made by Congress during consideration of the Trade Act of 1974, implies that there must be a showing of injury to the domestic industry, but that the threshold of proof necessary for the Commission to determine that injury exists can include conceivable injury from established actions of the respondents.

The Trade Agreements Act of 1979³⁰ did not change Section 337(a) and no comments were made during debate on this Act bearing on the injury issue. Therefore, the injury requirement of the statute

²⁶ Certain Copper Rod Production Apparatus, U.S. Int'l Trade Comm'n Inv. No. 337-TA-89 at 6-7 (Nov. 1980), 2 INT'L TRADE REP. DEC. (BNA) 5597, 5600 (opinion on Temporary Exclusion Order).

²⁷ COMMITTEE ON FINANCE, TRADE REFORM ACT OF 1974, S. REP. NO. 1298, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7186.

²⁸ *Id.* at 194, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 7327.

²⁹ *Id.* at 3-4, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 7187.

³⁰ Pub. L. No. 96-39, 93 Stat. 193 (1979).

should be interpreted in light of the legislative intent as passed on by the Trade Act of 1974.

INJURY TO A DOMESTIC INDUSTRY

In making a determination of a violation of Section 337, the Commission must determine the question of injury in relation to a particular domestic industry. The definition of the domestic industry, therefore, is of critical importance. The factors which the Commission considers or emphasizes in determining injury are a direct result of the definition of the industry.

Section 337 investigations conducted by the ITC and the injury determinations required fall into two broad categories of unfair methods of competition and unfair acts: (1) those where the Commission must measure the effect or tendency to injure a domestic industry or prevent the establishment of one, and (2) those where the Commission must determine where the effect or tendency is to restrain or monopolize trade and commerce in the United States. The Commission has had a great deal of experience in the type of injury determinations required in the first category. Considerations used by the Commission for finding such injury in Section 337 actions are similar to the analysis the Commission uses in the injury determinations it makes in anti-dumping, countervailing duty, and escape clause investigations.³¹ The second category of unfair practices is similar to traditional antitrust analysis and the Commission has adopted such analysis on its forays into cases of this type.³²

Definition of a Domestic Industry

All investigations conducted by the Commission under the various trade laws mentioned share a requirement of a determination of injury to a domestic industry. While the definition of injury and the extent of injury required are different for each type of action, each requires definition of a domestic industry and each shares with the others similar injury considerations. The investigations for these various trade actions, including Section 337, are defined in terms of a single product.

³¹ Respectively, 19 U.S.C. §§ 1673, 1671, 2251-53 (1976 & Supp. IV 1980).

³² Watches, Watch Movements, and Watch Parts, U.S. Tariff Comm'n Inv. No. 337-19, Pub. No. 177 (June 1966); Certain Electronic Audio and Related Equipment, U.S. Int'l Trade Comm'n Inv. No. 337-TA-7, Pub. No. 768 (Apr. 1976), 1 INT'L TRADE REP. DEC. (BNA) 5211; Certain Welded Stainless Steel Pipe and Tube, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, *disapproved by President*, 43 Fed. Reg. 17,789 (1978); Certain Airtight Cast-Iron Stoves, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 (Dec. 1980), 3 INT'L TRADE REP. DEC. (BNA) 1158.

Rarely, if ever, is there a domestic industry which is composed of companies producing only the product in question. However, to analyze the effect of imports on the industry as required by the statutes, the Commission has traditionally defined for analytic purposes a domestic industry which is involved only in the product under investigation. This artificially divides or separates the companies in the domestic industry so that comparisons of just the portions of those businesses involved with the product can be made, regardless of the various business considerations involved in supporting or producing the product.³³ This is done to approximate, as closely as possible, comparable statistics on a product basis.

The majority of cases brought before the Commission under Section 337 have been patent-based causes of action. The Commission has, in these cases, generally defined the domestic industry by the scope of the patent in question. This, of course, is understandable in terms of the statutory language and also the other import laws which the Commission administers. Unfair acts complained of always involve a particular product and that product, whether or not the subject of a patent, defines the boundaries of the relevant domestic industry for Commission consideration. If the particular product in question is only one of a number of products manufactured by a company, only that portion of the company which is devoted to the manufacture and sale of the particular product is considered as a relevant part of the domestic industry for purposes of analyzing injury.³⁴ The Commission has, in some cases, extended the industry definition beyond the precise product in question to include similar products, thereby measuring injury against a more broadly defined market.³⁵ However, it is likely that the Commission will continue to define industries in patent-based causes of action as that portion of the complainant company, and of any licensees under the patent, devoted to the manufacture and sale of the patented product. Where a patent covers a method rather than an article, the

³³ Synthetic Star Sapphires and Synthetic Star Rubies, U.S. Tariff Comm'n Inv. No. 337-13 at 19-20 (Nov. 1954); Certain Luggage Products, U.S. Int'l Trade Comm'n Inv. No. 337-TA-39, Pub. No. 932 at 10-11 (Nov. 1978).

³⁴ Certain Roller Units, U.S. Int'l Trade Comm'n Inv. No. 337-TA, Pub. No. 944 at 9-10 (Feb. 1979), 1 INT'L TRADE REP. DEC. (BNA) 5503, 5505; Certain Combination Locks, U.S. Int'l Trade Comm'n Inv. No. 337-TA-45, Pub. No. 945 at 8-9 (Feb. 1979), 1 INT'L TRADE REP. DEC. (BNA) 5462, 5465; Certain Automatic Crankpin Grinders, U.S. Int'l Trade Comm'n Inv. No. 337-TA-60, Pub. No. 1022 at 14 (Dec. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5121, 5127.

³⁵ Expanded, Unsintered Polytetrafluoroethylene in Tape Form, U.S. Int'l Trade Comm'n Inv. Pub. No. 337-TA-4, Pub. No. 769 at 18-19 (Apr. 1976) [hereinafter cited as *PFTE Tape*]; Certain Surveying Devices, U.S. Int'l Trade Comm'n Inv. No. 337-TA-68, Pub. No. 1085 at 29-30 (July 1980), 2 INT'L TRADE REP. DEC. (BNA) 5409, 5422.

Commission considers those persons authorized to operate under the patented method to be the persons comprising the domestic industry, and an infringement of the process abroad may be found to be an unfair act under Section 337(a).³⁶

Since the domestic industry in either of these two types of investigations is defined according to the products involved in the investigation, it is not possible to define injury with a precision that will survive for an across the board application to all investigations. The amount of injury and even the factors which the Commission should consider in each case vary depending upon the business factors relevant to the industry in question.

The definition of the market in non-patent or non-intellectual property-based investigations is more difficult for the Commission. The more-or-less neat boundaries of the scope of the patent are not there for guidance, which leaves open the morass of traditional antitrust market definition problems. This definitional problem has not been of great concern to the Commission because of the relatively few antitrust-type cases it has handled. The Commission's traditional product definition formula has been applied and has worked adequately.³⁷ This may not always be the case for the Commission, and the field is certainly open for respondents to avoid a determination of injury to a domestic industry or injury to competition by broadly defining the industry to dilute injury arguments.

Injury Indicators

The Commission conducts a variety of investigations in which it considers "injury" issues. In dumping and countervailing duty cases, for example, the Commission has to determine if there is injury to a domestic industry and if such injury is "by reason of" the imports—a causation test. In these investigations it considers factors such as volume of imports, price level of imports, price suppression, price depres-

³⁶ Certain Multicellular Plastic Film, U.S. Int'l Trade Comm'n Inv. No. 337-TA-54, Pub. No. 987 (June 1979), 2 INT'L TRADE REP. DEC. (BNA) 5056, *aff'd*, Canadian Tarpoly v. United States Int'l Trade Comm'n, 640 F.2d 1332 (C.C.P.A. 1981).

³⁷ See Certain Welded Stainless Steel Pipe and Tube, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, *disapproved by President*, 43 Fed. Reg. 17,789 (1978); Certain Novelty Glasses, U.S. Int'l Trade Comm'n Inv. No. 337-TA-55, Pub. No. 991 (July 1979), 2 INT'L TRADE REP. DEC. (BNA) 5400; Electronic Audio and Related Equipment, U.S. Int'l Trade Comm'n Inv. No. 337-TA-7, Pub. No. 768 (Apr. 1976), 1 INT'L TRADE REP. DEC. (BNA) 5211; and Cast Iron Stoves, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126, (Dec. 1980), 3 INT'L TRADE REP. DEC. (BNA) 1158.

sion, and lost sales. These same factors are employed to some extent in injury determinations in Section 337 cases.

In Section 337 investigations based upon the restraint or monopolization of trade and commerce language, the Commission has less transferable experience on the "injury" issue from the other types of investigations which it conducts. In these cases, it has been guided by the standards of the federal courts. For example, in the *Tractor Parts*³⁸ case, the Commission applied federal court precedent in finding a group boycott illegal *per se* without a separate showing of injury. In *Certain Welded Stainless Steel Pipe and Tube*,³⁹ it found a violation of Section 337 based on an unfair act of below cost pricing which injured competition. However, it also made an injury determination, according to its usual tests of injury, and found the domestic industry to be healthy and not injured.

Before analyzing its injury determinations, the Commission's view of its own role should be considered. The Commission views Section 337 as an international trade statute which incorporates considerations of government trade policy. It does not view the law merely as a private remedy for patent infringement⁴⁰ or other unfair acts or methods of competition, regardless of the consequences of such remedy's effect on United States trade.

In making its determinations of injury, the Commission is faced with sometimes competing legal and policy considerations. Does the Commission have a legal duty to stop the unfair trade practices that are causing some injury no matter what the level of injury to the domestic industry? Should the Commission use the power of government to issue a remedy where there is not a significant threat to the domestic industry?

The Commission has experience in balancing factors concerning injury, not only from Section 337 investigations, but from its determinations in dumping, countervailing duty, and escape clause investigations. This experience and its ability to obtain information on the state of the domestic industry through its staff economists and commodity analysts should enable it to make informed decisions on whether the effect of an unfair trade practice found in a Section 337 investigation should lead to relief for the domestic industry.

³⁸ U.S. Tariff Comm'n Inv. No. 337-22, Pub. No. 401 (June 1971).

³⁹ U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, *disapproved by President*, 43 Fed. Reg. 17,789 (1978).

⁴⁰ *Certain Surveying Devices*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-68, Pub. No. 1085 at 46 (July 1980), 2 INT'L TRADE REP. DEC. (BNA) 5409, 5424; *In-the-Ear Hearing Aids*, U.S. Tariff Comm'n Inv. No. 337-20, Pub. No. 182 at 28-31 (July 1966).

There exists today, however, a definite split in the thinking of the existing Commissioners on the level of injury needed to sustain a finding of "tendency to substantially injure."⁴¹ The resulting lack of predictability of the Commission in injury determinations is perhaps an outgrowth of its function to provide relief quickly under statutory deadlines. By not relying on quantifiable factors, the Commission has flexibility to consider a broad spectrum of policy and economic criteria. Many of these criteria may contribute contrary influences to the economic criteria, which are subject to quantification and which would otherwise add predictability to forecasting Commission determinations.

The factors which the Commission has traditionally considered in making injury determinations include: (1) loss, or potential loss of sales, royalties and/or loss of profits;⁴² (2) decline in production and/or declining rate of employment;⁴³ (3) underselling;⁴⁴ (4) the volume of

⁴¹ Certain Surveying Devices, U.S. Int'l Trade Comm'n Inv. No. 337-TA-68, Pub. No. 1085 (July 1980), 2 INT'L TRADE REP. DEC. (BNA) 5409.

⁴² Oxides of Iron Suitable for Pigment Purposes, Sec. 337, Doc. No. 4, Rep. No. 88 (1934); Coilable Metal Rules and Holders, Sec. 337, Doc. No. 8, Rep. No. 106 at 8-9 (1936); Self-Closing Containers (Squeeze-Type Coin Purses), U.S. Tariff Comm'n Inv. No. 337-78, Pub. No. 55 at 20-21 (Apr. 1962); Furazolidone, U.S. Tariff Comm'n Inv. No. 337-21, Pub. No. 299 at 19-20 (Nov. 1969) (Chairman Sutton and Commissioner Newson); Panty Hose, U.S. Tariff Comm'n Inv. No. 337-25, Pub. No. 471 at 7 (Mar. 1972); Lightweight Luggage, U.S. Tariff Comm'n Inv. No. 337-28, Pub. No. 463 (Feb. 1972); Chain Door Locks, U.S. Int'l Trade Comm'n Inv. No. 337-TA-5, Pub. No. 770 at 38-39 (Apr. 1976); Certain Apparatus for the Continuous Production of Copper Rod, U.S. Int'l Trade Comm'n Inv. No. 337-TA-52, Pub. No. 1017 at 60-62, (Nov. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5006, 5033; Certain Multicellular Plastic Film, U.S. Int'l Trade Comm'n Inv. No. 337-TA-54, Pub. No. 987 at 21-22 (June 1979), 2 INT'L TRADE REP. DEC. (BNA) 5056, 5064, *aff'd*, Canadian Tarpoly v. United States Int'l Trade Comm'n, 640 F.2d 1322 (C.C.P.A. 1981); Certain Automatic Crankpin Grinders, U.S. Int'l Trade Comm'n Inv. No. 337-TA-60, Pub. No. 1022 at 15-16 (Dec. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5121, 5127; Certain Rotary Scraping Tools, U.S. Int'l Trade Comm'n Inv. No. 337-TA-62, Pub. No. 1027 at 13 (Jan. 1980), 2 INT'L TRADE REP. DEC. (BNA) 5233, 5239.

⁴³ Lightweight Luggage, U.S. Tariff Comm'n Inv. No. 337-28, Pub. No. 463 (Feb. 1972); Certain Electric Slow Cookers, U.S. Int'l Trade Comm'n Inv. No. 337-TA-42, Pub. No. 994 at 5-6 (Aug. 1979); Certain Roller Units, U.S. Int'l Trade Comm'n Inv. No. 337-TA-44, Pub. No. 944 at 9-10 (Feb. 1979), 1 INT'L TRADE REP. DEC. (BNA) 5503, 5505-06; Certain Apparatus for the Continuous Production of Copper Rod, U.S. Int'l Trade Comm'n Inv. No. 337-TA-52, Pub. No. 1017 at 60-62 (Nov. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5006, 5033; Certain Thermometer Sheath Packages, U.S. Int'l Trade Comm'n Inv. No. 337-TA-56, Pub. No. 992 at 26 (July 1979), 1 INT'L TRADE REP. DEC. (BNA) 5466, 5478; Certain Automatic Crankpin Grinders, U.S. Int'l Trade Comm'n Inv. No. 337-TA-60, Pub. No. 1022 at 15-16 (Dec. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5121, 5127; Certain Rotary Scraping Tools, U.S. Int'l Trade Comm'n Inv. No. 337-TA-62, Pub. No. 1027 at 13 (Jan. 1980), 2 INT'L TRADE REP. DEC. (BNA) 5233, 5239.

⁴⁴ Slide Fasteners, Sec. 337, Doc. No. 2, Rep. No. 86 at 4-5 (1934); Coilable Metal Rules and Holders, Sec. 337, Doc. No. 8, Rep. No. 106 at 3-4 (1936); Synthetic Star Sapphires and Synthetic Rubies, U.S. Tariff Comm'n Inv. No. 337-13 at 21 (Nov. 1954); Panty Hose, U.S. Tariff Comm'n Inv. No. 337-35, Pub. No. 471 at 7-8 (Mar. 1972); Lightweight Luggage, U.S. Tariff Comm'n Inv. No. 337-28, Pub. No. 463 at 7 (Feb. 1972); Chain Door Locks, U.S. Int'l Trade Comm'n Inv. No.

imports and ability of the respondents to increase their market penetration;⁴⁵ and (5) the capacity of foreign manufacturers or exporters to increase the volume of imports to the United States and the number of willing importers.⁴⁶

In most Section 337 determinations, the Commission has found several of the above factors to be present and to have adversely affected the relevant domestic industry. However, none of these cases provide an absolute rule by which to measure future situations. Any number of these factors may be present in an individual case which, when combined, may be sufficient to provide a basis for an injury determination in one investigation, whereas the same factors present in another investigation may give rise to a finding of no injury. For example, in the case of *Reclosable Plastic Bags*,⁴⁷ the Commission found injury despite the fact that the imports comprised approximately one and one-half percent of domestic production. The Commission found that the significant fact was that there were numerous foreign manufacturers with a substantial combined capacity, as well as numerous willing importers in the United States.⁴⁸ In addition, the Commission found that there was a small but decidedly growing level of imports.⁴⁹ Based on these factors, the Commission found a tendency for substantial injury to the domestic industry.

337-TA-5, Pub. No. 770 at 40 (Apr. 1976); *Certain Rotary Scraping Tools*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-62, Pub. No. 1027 at 13 (Jan. 1980), 2 INT'L TRADE REP. DEC. (BNA) 5233, 5239.

⁴⁵ *Coilable Metal Rules and Holders*, Sec. 337, Doc. No. 8, Rep. No. 106 at 8-9 (1936); *Synthetic Star Sapphires and Synthetic Rubies*, U.S. Tariff Comm'n Inv. No. 337-13 at 21 (Nov. 1954); *Panty Hose*, U.S. Tariff Comm'n Inv. No. 337-25, Pub. No. 471 at 7-8 (Mar. 1972); *Chain Door Locks*, U.S. Tariff Comm'n Inv. No. 337-TA-5, Pub. No. 770 at 38-39 (Apr. 1976); *Reclosable Plastic Bags*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-22, Pub. No. 801 at 14 (Jan. 1977), 1 INT'L TRADE REP. DEC. (BNA) 5284, 5288; *Certain Roller Units*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-44, Pub. No. 944 at 9-10 (Feb. 1979), 1 INT'L TRADE REP. DEC. (BNA) 5503; *Certain Thermometer Sheath Packages*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-56, Pub. No. 992 at 26 (July 1979), 1 INT'L TRADE REP. DEC. (BNA) 5466, 5478; *Certain Rotary Scraping Tools*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-62, Pub. No. 1027 at 13 (Jan. 1980), 2 INT'L TRADE REP. DEC. (BNA) 4233, 4239.

⁴⁶ *Panty Hose*, U.S. Tariff Comm'n Inv. No. 337-25, Pub. No. 471 at 7-8 (Mar. 1972); *Reclosable Plastic Bags*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-22, Pub. No. 801 at 14 (Jan. 1977), 1 INT'L TRADE REP. DEC. (BNA) 5284, 5288; *Certain Roller Units*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-44, Pub. No. 944 at 9-10 (Feb. 1979), 1 INT'L TRADE REP. DEC. (BNA) 5503, 5505-06; *Certain Multicellular Plastic Film*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-54, Pub. No. 987 at 21-22 (June 1979), 2 INT'L TRADE REP. DEC. (BNA) 5056, 5063, *aff'd*, *Canadian Tarpoly v. U.S. Int'l Trade Comm'n*, 640 F.2d 1322 (C.C.P.A. 1981).

⁴⁷ U.S. Int'l Trade Comm'n Inv. No. 337-TA-22, Pub. No. 801 at 14 (Jan. 1977), 1 INT'L TRADE REP. DEC. (BNA) 5284, 5288.

⁴⁸ *Id.*

⁴⁹ *Id.*

On the other hand, in cases where there have been relatively large volume import penetrations, the Commission has found no injury. For example, in the case of *Certain Centrifugal Trash Pumps*,⁵⁰ the concurring opinion pointed out that there were facts sufficient to indicate substantial injury, such as declining profits, loss of customers, and increasing ratio of sales of the pumps in question.⁵¹ But, to counterbalance this, the opinion stated there was no tendency to injure substantially the industry because change in consumer demand for the type of pumps, rather than the infringement, was the reason for the complainant's shrinking market.⁵² Although causality is always implicit in injury determination (i.e., the injury to the domestic industry must be caused by the unfair trade practice found to exist), this may portend an avenue of inquiry the Commission will pursue more strongly in the future.

The Commission has inconsistently afforded significance to other factors relating to injury. The concept of underselling the imported goods has been found to be a factor in a number of cases. In one of the earliest cases, the Commission stated:

Evidence of underselling is material to show the injury resulting to the domestic industry . . . but taken alone, in the opinion of the Commission need not be considered. It seems clear that the mere underselling . . . does not in itself constitute an unfair method of competition or an unfair act.⁵³

This was reiterated in the *Slide Fastener* case, the Commission stating:

Underselling, however, unaccompanied with representations or other acts which have a capacity or a tendency to injure or discredit competitors or to deceive purchasers has been held not to constitute an unfair method of competition.⁵⁴

The Commission has found underselling as an indicia of injury in a variety of other Section 337 investigations, but always in combination with other indicia of injury.⁵⁵ In two investigations, *Sphymomanome-*

⁵⁰ U.S. Int'l Trade Comm'n Inv. No. 337-TA-43, Pub. No. 943 (Feb. 1979), 1 INT'L TRADE REP. DEC. (BNA) 5314.

⁵¹ *Id.* Pub. No. 943 at 20, 1 INT'L TRADE REP. DEC. (BNA) at 5321 (Vice Chairman Alberger, concurring).

⁵² *Id.* Pub. No. 943 at 21, 1 INT'L TRADE REP. DEC. (BNA) at 5321 (Vice Chairman Alberger, concurring).

⁵³ Synthetic Phenolic Resin, Form C, Sec. 316, Doc. No. 4, Rep. No. 3 at 16 (1931).

⁵⁴ Parts of Slide Fasteners, Sec. 337, Doc. No. 5, Rep. No. 86 at 4-5 (1934).

⁵⁵ Certain Welded Stainless Steel Pipe and Tube, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, *disapproved by President*, 43 Fed. Reg. 17,789 (1978); Certain Novelty Glasses, U.S. Int'l Trade Comm'n Inv. No. 337-TA-55, Pub. No. 991 (July 1979), 2 INT'L TRADE REP. DEC. (BNA) 5400.

ters⁵⁶ and *Certain Combination Locks*,⁵⁷ the Commission held that a lower price of the imported product, without further evidence to show injury to the domestic industry, would not be enough evidence to find "injury" or a tendency to injure.

The majority of cases in which the Commission has found no injury have occurred as a result of a finding that there was a very small market penetration of the imported products.⁵⁸ Although import penetration is a key factor, the percent of the market penetration is not always determinative of a Commission finding of injury. For example, the import penetration in the *Plastic Bags*⁵⁹ investigation was approximately 1.5% and in *Certain Surveying Instruments*⁶⁰ was about five percent. Because of other factors, the Commission found a tendency to injure in both cases. In fact, in a significant number of investigations, injury has been found where the import penetration was under five percent.⁶¹ In other cases decided at the same time, the Commission found no injury when the ratio of imports was in the same range. For example, in *Certain Combination Locks*,⁶² the import ratio was approximately two percent; in *Certain Writing Instruments*,⁶³ the imports during the period under investigation never accounted for less than ten percent of the domestic market; and in *PTFE Tape*,⁶⁴ the respondent imported and sold about five percent of United States consumption of the patented tape.

In cases where the Commission did not find injury, despite more than a *de minimus* level of imports, it usually did so because of the state of the domestic industry's business. If the industry is healthy and growing, e.g., exhibiting an increase in profits, continuation of sales volume, high utilization of capacity, and full employment, the Com-

⁵⁶ U.S. Tariff Comm'n Inv. No. 337-26, Pub. No. 468 (Mar. 1972).

⁵⁷ U.S. Int'l Trade Comm'n Inv. No. 337-TA-45, Pub. No. 945 (Feb. 1979), 1 INT'L TRADE REP. DEC. (BNA) 5462.

⁵⁸ See *In the Matter of Sphygmomanometers*, U.S. Tariff Comm'n Inv. No. 337-26, Pub. No. 468 (Mar. 1972).

⁵⁹ *Reclosable Plastic Bags*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-22, Pub. No. 801 (Jan. 1977), 1 INT'L TRADE REP. DEC. (BNA) 5284.

⁶⁰ U.S. Int'l Trade Comm'n Inv. No. 337-TA-68, Pub. No. 1085 (July 1980), 2 INT'L TRADE REP. DEC. (BNA) 5409.

⁶¹ See generally *Reclosable Plastic Bags*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-22, Pub. No. 801 (Jan. 1977), 1 INT'L TRADE REP. DEC. (BNA) 5284.

⁶² U.S. Int'l Trade Comm'n Inv. No. 337-TA-45, Pub. No. 945 (Feb. 1979), 1 INT'L TRADE REP. DEC. (BNA) 5462.

⁶³ *Certain Writing Instruments and Nibs Therefore*, U.S. Tariff Comm'n Inv. No. 337-30, Pub. No. 678 (June 1974).

⁶⁴ U.S. Int'l Trade Comm'n Inv. No. 337-TA-4, Pub. No. 769 (Apr. 1976).

mission is less likely to find injury.⁶⁵ However, there are enough exceptions to this to make it tenuous to focus entirely on the recent economic health of the domestic industry.⁶⁶

In the *Sphygmomanometers* investigation, the Commission found that the net selling prices of the respondents' imported articles were much lower than complainants' selling prices and that the respondents had successfully bid for customers against complainant in several instances. The overriding factor of importance was that the level of imports was too small to have affected substantially the level of complainants' production. That evidence, together with evidence that the imports would not increase in the future, dissuaded the Commission from finding injury. Similarly, in *Certain Writing Instruments and Nibs Therefore*,⁶⁷ the Commission found that less than .1% of the total number of the pens in question were attributable to sales by the imports.

In *PTFE Tape*, the first case decided under the newly amended Section 337,⁶⁸ the Commissioners found insufficient evidence on the record that the importation or sale of the infringing product had the effect or tendency to injure substantially or destroy the domestic industry. The basis for this decision was that the importation of infringing PTFE tape only amounted to slightly over five percent of United States consumption, while at the same time, the complainant's business was successful. The complainant's business was growing at a consistent rate, was profitable, had a forty-five to fifty percent share of the tape sealant market, and a ninety-five percent share of the expanded tape sealant market.

The Commission was not certain that sales of the infringing imported product would actually create lost sales for the complainant. The patented product was a low-density PTFE tape that was competing with and replacing a higher density and more expensive PTFE tape produced by other United States manufacturers.⁶⁹ The Commission in the PTFE tape investigation looked to the existence of a relevant market in which the patented PTFE tape competed. The existence of the competing non-infringing tape influenced the opinion of three Com-

⁶⁵ See *Certain Combination Locks*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-45, Pub. No. 945 (Feb. 1979), 1 INT'L TRADE REP. DEC. (BNA) 5462.

⁶⁶ See *Reclosable Plastic Bags*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-22, Pub. No. 801 (Jan. 1977), 1 INT'L TRADE REP. DEC. (BNA) 5284.

⁶⁷ U.S. Tariff Comm'n Inv. No. 337-30, Pub. No. 678 (June 1974).

⁶⁸ *PTFE Tape*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-4, Pub. No. 769 (Apr. 1976).

⁶⁹ *Id.* Pub. No. 769 at 19.

missioners who found no injury.⁷⁰

In Commission cases where no injury is found, the most important factors appear to be: (1) that the amount or quantity of imports is small when compared with the output of the domestic industry, and there is declining import tendency without evidence of intent to penetrate the United States market;⁷¹ (2) that the complainant could not show a causal link between the unfair imports and lost sales or lost customers; (3) that the complainant, despite a low volume of imports, seemed to be prospering with increasing output, sales, and profits; (4) that evidence of a lower priced imported product without further indicia of injury such as lower sales, profits, or price erosion is not sufficient to find injury or a tendency to injure; and (5) that even when the domestic industry establishes lost sales, the lost sales must be connected to the unfair acts. This connection is particularly important where the respondent shows the existence of a changing market and/or consumer preferences or competition from domestic non-infringing products.

INJURY IN NON-PATENT BASED SECTION 337 INVESTIGATIONS

Some of the very early cases considered by the Commission were non-patent based unfair methods of competition. A small, but recently increasing, number of such investigations have been concluded or are underway at the Commission.⁷² In deciding whether there is a tendency to injure the domestic industry, the Commission uses the indicia of injury it has applied in patent-based cases. The Commission most prominently considers: (1) ratio of infringing imports to production by

⁷⁰ The Commission's consideration of the *PTFE* case was probably influenced by its handling of dumping investigations where the concept of "like or directly competitive" goods is used in analysis of injury to the domestic industry.

⁷¹ However, the Commission should not rely heavily on sales data generated after the start of its investigation. The Respondent can too easily create an injury defense if primary reliance is placed on post-investigative economic data.

⁷² *Chicory Root—Crude and Prepared*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-27, *investigation terminated*, 42 Fed. Reg. 17,923 (1977); *Certain Color Television Receiving Sets*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-23, *investigation terminated on the basis of consent orders*, 42 Fed. Reg. 39,492 (1977); *Certain Welded Stainless Steel Pipe and Tube*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, *disapproved by President*, 43 Fed. Reg. 17,789 (1978); *Certain Novelty Glasses*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-55, Pub. No. 991 (July 1979), 2 INT'L TRADE REP. DEC. (BNA) 5000; *Certain Replica Black Powder Firearms*, U.S. Int'l Trade Comm'n Inv. No. 603-TA-4, *issuance of consent order and termination notice*, 43 Fed. Reg. 673-74 (1978); *Certain Airtight Cast-Iron Stoves*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-96, Pub. No. 1126 (Jan. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1158; *Coin Operated Audio-Visual Games and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-42, Pub. No. 1160 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1212; *Surface Grinding Machines*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-95, *consent order published*, 46 Fed. Reg. 47,895 (1981), *termination notice*, 46 Fed. Reg. 62,969 (1981).

the domestic industry; (2) the volume of imports; (3) import prices compared with domestic prices; and (4) sales and profits of the domestic industry. The non-patent based causes of action have primarily centered around passing off or copying domestic articles and actual deception of customers in the description of the products being imported.⁷³

The Commission has also considered antitrust based unfair methods of competition and unfair acts. For example, the Commission has investigated allegations of conspiracy to restrain and monopolize trade and commerce, to manipulate and fix prices, price discrimination, and group boycotts. Although a violation was not found in any of these cases, the Commission opinions recognize that acts which have the effect or tendency to create a monopoly or to form a group boycott are *per se* unlawful under Section 337. The Commission stated that a *per se* unlawful act would have the effect or tendency to restrain or monopolize trade and commerce in the United States and that no further inquiry need be made into the economic motivation of violators, nor into the precise harm resulting from their conduct.⁷⁴

Since the passage of the Trade Act in 1974, the Commission has considered a number of antitrust issues based on complaints, many of which contained both patent and antitrust based causes of action. Although several antitrust based cases have been settled prior to Commission determination,⁷⁵ the Commission has had opportunity to comment on the standards of injury in at least two investigations.

In *Certain Welded Stainless Steel Pipe and Tube*,⁷⁶ the Commission found that there was a violation of Section 337 as a result of importations and sales of welded stainless steel pipe and tube by respondents at prices below reasonably anticipated marginal costs of production without commercial justification and with the resultant tendency to restrain trade and commerce in the sales of such articles in the United States. The Commission did not adopt a *per se* rule after finding that there were sales at less than average variable cost by the respondents. It did, however, hold that sales at less than average variable cost of production

⁷³ Revolvers, Sec. 316, Doc. No. 1 (1927); Manila Rope & Bolt Rope, Sec. 316, Doc. No. 5 (1927); Cigar Lighters, Sec. 337, Doc. No. 6, Rep. No. 72 (1934).

⁷⁴ Watches and Watch Movements and Watch Parts, U.S. Tariff Comm'n Inv. No. 337-22, Pub. No. 401 (June 1971); Tractor Parts, U.S. Tariff Comm'n Inv. No. 337-22, Pub. No. 443 (Dec. 1971).

⁷⁵ Certain Color Television Receiving Sets, U.S. Int'l Trade Comm'n Inv. No. 337-TA-23, *investigation terminated on the basis of consent orders*, 42 Fed. Reg. 39,492 (1977); Certain Monumental Wood Windows, U.S. Int'l Trade Comm'n Inv. No. 337-TA-40, *termination after finding of no violation*, 44 Fed. Reg. 2437-38 (1979).

⁷⁶ U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) S245, *disapproved by President*, 43 Fed. Reg. 17,789 (1978).

raised a rebuttable presumption of predatory intent. The Commission found that this presumption was not rebutted by the respondents and it then measured the effect or tendency of the act on the domestic industry. The Commission, rather than finding injury to the domestic industry, found injury to competition due to an exclusion of other foreign steel products from the United States market by the unfair trade practices of the Japanese respondents. Accordingly, the Commission found that there was a tendency to restrain United States trade and commerce.

In interpreting the "tendency" language of Section 337(a), the Commission in the *Pipe and Tube* case turned to parallels between Section 337 and Section 5 of the FTC Act and judicial interpretations of that section. Observing that Section 5 was intended to stop trade restraints and other undesirable methods of competition in their incipency, the Commission accepted the concept of incipient unfair trade practices as forming a basis for finding a tendency within the meaning of Section 337.⁷⁷

A further case in which the Commission found a violation of Section 337 and discussed the injury question was the case of *Certain Novelty Glasses*.⁷⁸ The Commission found as factors contributing to injury that imported novelty glasses copied the trade dress of the complainant's glasses and that this was an unfair trade practice. The Commission found that the imports had amounted to a significant proportion of the complainant's sales; that complainant's sales and profits had decreased since the introduction of the imported glasses; that substantial orders obtained by the complainant were cancelled because of the imported glasses; and that there was evidence of substantial margins of underselling by the respondents. Based on these factors, the Commission found at least a tendency to cause substantial injury.

INJURY STANDARD FOR TEMPORARY ORDERS

The Commission has authority to issue temporary remedies during the pendency of an investigation under both Sections 337(e) and (f).⁷⁹ These sections authorize the issue of temporary exclusion orders (TEO) and temporary cease and desist orders. The provisions for temporary exclusion orders have been in the statute since the Tariff Act of 1922⁸⁰

⁷⁷ *Id.* Pub. No. 863 at 38-39, 1 INT'L TRADE REP. DEC. (BNA) at 5262.

⁷⁸ U.S. Int'l Trade Comm'n Inv. No. 337-TA-55, Pub. No. 991 (July 1979), 2 INT'L TRADE REP. DEC. (BNA) 5400.

⁷⁹ See *supra* note 4.

⁸⁰ Pub. L. No. 318, § 316(f), 42 Stat. 858, 944.

and appear almost verbatim in the Tariff Act of 1930.⁸¹ Under Section 337 of the Tariff Act of 1930, the Commission had used the test of immediate and substantial harm in determining whether a temporary exclusion order should be recommended. This standard evolved from a series of cases⁸² in which the Commission consistently held its immediate and substantial harm standard was in addition to, and more stringent than, the injury standard set forth in the statute which required only "the . . . tendency . . . to substantially injure."

The Trade Act of 1974 revised the temporary relief provisions by: (1) giving the Commission the authority to make its own determination rather than a recommendation to the President; (2) requiring the Commission to consider public interest issues before granting temporary relief; (3) providing for a temporary cease and desist order; and (4) allowing the Commission to establish the bond under which goods could enter during the pendency of the investigation. Despite these changes, the terminology of "reason to believe" there is a violation did not change, and, therefore, the substantive determinations of unfair methods of competition and unfair acts and effect or tendency to injure substantially the domestic industry are still required. These standards, coupled with the requirement of immediate and substantial harm, defeated the requests for temporary orders until recently.

A determination in the second *Copper Rod*⁸³ investigation has opened up the probability of obtaining temporary relief. For the first time since the Trade Act of 1974, the Commission granted a temporary exclusion order. The Commission's opinion shows it specifically reconsidered its standard for granting such relief.⁸⁴ In considering complainant's requests for a temporary exclusion order, the Commission reviewed the legislative history of Section 337(e),⁸⁵ which stated that

⁸¹ Pub. L. No. 361, § 337(f), 46 Stat. 590, 704 provided:

That whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: Provided, that the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

⁸² Meprobamate, U.S. Tariff Comm'n Inv. No. L-37, Pub. No. 389 (Apr. 1971), 1 INT'L TRADE REP. DEC. (BNA) 5049; Ampicillin, U.S. Tariff Comm'n Inv. No. 337-24, Pub. No. 345 (Nov. 1970); Panty Hose, U.S. Tariff Comm'n Inv. No. 337-25, Pub. No. 337 (Mar. 1971).

⁸³ Certain Copper Rod Production Apparatus, U.S. Int'l Trade Comm'n Inv. No. 337-TA-89, Pub. No. 1132 (Oct. 1980), 2 INT'L TRADE REP. DEC. (BNA) 5597.

⁸⁴ Chicory Root—Crude and Prepared, U.S. Int'l Trade Comm'n Inv. No. 337-TA-27, *investigation terminated*, 42 Fed. Reg. 17,923 (1977); Certain Luggage Products, U.S. Int'l Trade Comm'n Inv. No. 337-TA-39, Pub. No. 932 (Nov. 1978) (exclusion order issued), *temporary exclusion order issued*, 43 Fed. Reg. 35,399, 35,400 (1978).

⁸⁵ Certain Copper Rod Production Apparatus, U.S. Int'l Trade Comm'n Inv. No. 337-TA-89,

when the Commission has reason to believe that an article is entering the United States in violation of Section 337, but "does not have sufficient information to establish to its satisfaction that this Section is being violated," it may direct a temporary exclusion order. This led the Commission to conclude that only in a final determination must a complainant "show violation by a preponderance of the evidence."

As its current test, the Commission has adopted substantially the same standard used in federal district courts for preliminary injunctions. The Commission will determine: (1) whether there is evidence of a violation, and (2) whether the complainant is equitably entitled to relief by showing that the domestic industry would suffer immediate and substantial harm. These factors are to be balanced against: (1) adverse impact of an order on the other parties, and (2) the public interest factors which the law requires the Commission to consider.

In the *Copper Rod* case, the Commission found reason to believe that there was a violation,⁸⁶ and concluded that the complainant must demonstrate that immediate and substantial harm will occur if the temporary exclusion order is not issued. The Commission found that the loss of the pending sale of a copper rod manufacturing system would cause immediate and substantial harm to the complainant and that the sale would be irretrievably lost to the complainant if the temporary exclusion order was not issued. Because of the infrequent sales and the large magnitude of each sale, the loss of even one sale would, in the Commission's opinion, result in substantial losses to the domestic industry. The Commission then weighed the harm to the respondent and the public interest issues and issued a TEO with a requirement of a 100% value bond. Apparently, the Commission will balance the amount of evidence necessary to show a violation of the statute against the harm to the domestic industry resulting from the alleged unfair acts and allow an order to issue if it finds that either one or both of these factors are in favor of the complaining party. It should be noted that the Commission had issued findings that the patent at issue in the second *Copper Rod* investigation was valid in an earlier investigation.

JUDICIAL REVIEW OF SECTION 337 CASES

The United States Court of Customs and Patent Appeals (C.C.P.A.) has had only a few opportunities to rule on Commission determinations. In these reviews, the court has rarely commented on

Pub. No. 1132 (Oct. 1980), 2 INT'L TRADE REP. DEC. (BNA) 5597 (opinion of the Commission on temporary exclusion order).

⁸⁶ *Id.* Pub. No. 1132 at 15, 2 INT'L TRADE REP. DEC. (BNA) at 5605.

the injury standard. No ITC injury determination has ever been overturned by the C.C.P.A., and the court's treatment of the injury issue is ascertainable only from the dicta in its opinions and comparison with the Commission opinions.

The appeals beginning with *Frischer & Co. v. Bakelite Corp.*⁸⁷ fully support the Commission's injury findings. In the *Bakelite* case, the court argued that the unfair practices of patent and trademark infringement had greatly reduced the sales of complainant's product and had the tendency and effect of destroying and substantially injuring the industry.

The first case of significance with respect to injury standards reviewed by the C.C.P.A. was *In re Orion Company*.⁸⁸ The unfair act found by the Commission was infringement of certain patents owned by the complainant. The Commission also determined that the respondents sold the imports at less than the complainant's cost of production of the same product and that the underselling had injured and, if permitted, would continue to injure the industry in the United States.

The court found that the Commission had substantial evidence on which to make its determinations; that the evidence showed respondents and others had imported goods which infringed the patents owned by the complainant; that the importers were selling the goods in the United States for prices less than the price for which they could be produced and sold by the complainant; and that the business of the complainant was being destroyed by such practices.

In the *Northern Pigment*⁸⁹ case, the respondent foreign manufacturer appealed the Commission's finding that imports of its iron pigment were produced by methods covered by two United States patents. The appellant specifically raised the issue of injury.⁹⁰ The Commission found that the foreign manufacturer made sales in the United States which represented a substantial portion of consumption in the United States and that the importation had the effect or tendency to render substantial injury to the domestic industry.⁹¹

The court found that the Commission's record on the facts, including the location of the respondent, its lack of advertising expense, lack of patent royalty expense, and conditions of labor, indicated that the respondent had sold in certain quantities the products at a price which

⁸⁷ 39 F.2d 247 (C.C.P.A. 1930), *cert. denied*, 282 U.S. 852 (1930).

⁸⁸ 71 F.2d 458 (C.C.P.A. 1934).

⁸⁹ *In re Northern Pigment Co.*, 71 F.2d 447 (C.C.P.A. 1934).

⁹⁰ *Id.* at 452.

⁹¹ *Id.* at 452-53.

was less than the actual cost of production of the domestic complainant.⁹² It also found that by reason of importation and offers to sell the pigment to customers of the domestic complainant at a lower price than the cost of production of the domestic company, the business of the domestic industry during the years in question was a failure. The Court found that these facts were not only substantial evidence supporting the finding that the importation of the pigment tended to destroy or injure substantially an industry of the United States, but conclusively showed this fact.

The next court determination directly involving an injury determination was *In re Von Clemm*.⁹³ This case arose from a Commission investigation concerning synthetic star sapphires.⁹⁴ The C.C.P.A. enunciated its standard of review of Commission decisions: does the record contain substantial evidence to support the findings of fact of the Commission?⁹⁵

The Commission found that the complainant, Linde, owned a patent covering a synthetic star stone and a process of making the stone. It determined that imports of infringing stones had been made by Von Clemm in ever-increasing quantities and that they had been sold at prices below those at which Linde sold its stones. These were determined to be unfair methods of competition and unfair acts and were held to have the tendency to injure substantially Linde's industry.

The court specifically found that while the record did not show that Linde had "been *substantially* damaged by Von Clemm's action, in our opinion it sufficiently supports the holding that such actions have a *tendency* to injure substantially Linde's Synthetic Crystal Division, within the meaning of § 337 of the Tariff Act of 1930."⁹⁶

The finding of injury in this case is put in perspective by the dissenting opinion of Judge Cole, in which he stated that there had been no finding of actual injury to the patent owner. He stated that according to the majority the mere fact that there had been substantial sales established a *tendency* to injure sufficient to support an exclusion order. Cole argued that this finding was beyond the scope intended by Congress in Section 337.⁹⁷

The court decisions involve review of cases covering a broad spec-

⁹² *Id.* at 452-53.

⁹³ 229 F.2d 441 (C.C.P.A. 1955).

⁹⁴ Synthetic Star Sapphires and Synthetic Rubies, U.S. Tariff Comm'n Inv. No. 337-13 (Nov. 1954).

⁹⁵ *In re Von Clemm*, 229 F.2d at 443-44.

⁹⁶ *Id.* at 445.

⁹⁷ *Id.* at 446 (Cole, J., dissenting).

trum of injury levels, from the Commission findings of significant destruction and injury to the domestic industry in cases such as *In re Northern Pigment Company*, to a much lower standard of tendency to injure, as illustrated in the *In re Von Clemm* case. In its review of cases prior to the Trade Act of 1974, the court primarily recapped the Commission findings on injury and held that there was an adequate record for the Commission to reach its determination of injury in each case.

More recently, in *Astra-Sjuco v. United States International Trade Commission*,⁹⁸ the C.C.P.A. reviewed a Commission finding of violation based on infringement of a patent and injury to the domestic industry. In finding injury, it was clear from the Administrative Law Judge's (ALJ's) recommendation and the Commission's final opinion that the volume of imports was approximately forty percent of the domestic industry's sales of the article in question, and that there had been at least some direct lost sales as well as potential loss of sales. On this record, the C.C.P.A. found sufficient evidence of injury. It specifically relied on the selling of infringing products to customers of the domestic industry, decline in profitability of the domestic industry, high import penetration, loss of long term contracts with customers, recognition that it is difficult to switch customers back from a new product, and the capacity of a foreign company to produce the infringing article. These factors were all included by the Commission in support of its injury determination and cited by the court in its opinion. Apparently, the C.C.P.A. will follow the conclusions and findings of the Commission so long as they are supported by substantial evidence in the record.

IMPROVING THE SUBSTANCE OF COMMISSION OPINIONS ON INJURY

Analyzing the injury issue in Commission opinions is difficult because the decisions are often based on confidential business data not cited in the public version of the opinion. In addition, the Commission frequently cites to findings in the Recommended Determination of the Administrative Law Judge and does not incorporate the findings directly into its opinion. Therefore, it is often necessary to consult both the Commission's opinion and the ALJ's recommended determination in order to get a full understanding of the facts.⁹⁹ Because of the overlapping statements by the Commission in its determination as to what

⁹⁸ 629 F.2d 682 (C.C.P.A. 1980).

⁹⁹ This problem is one which should be addressed by the Commission in the upcoming review of its rules. Requiring initial decisions from the ALJs rather than the current recommended determinations should make it easier to follow the decisions of the Commission.

factors are sufficient to constitute injury in any particular investigation, there can be little certainty in predicting the outcome of future investigations.

Subsection (c) of Section 337 requires that the Commission conduct its Section 337 investigations in accord with the Administrative Procedure Act (APA).¹⁰⁰ Prior to the institution of this requirement, the Commission's opinions often contained very little information which could lead to an understanding of how injury was determined in an investigation. Before the effective date of the Trade Act of 1974, the Commission obtained information primarily through inquiries by its staff (questionnaires, plant inspections and interviews). The information obtained in this manner was untested by the parties to any significant degree. The APA, by contrast, requires that the facts used by the Commission in making its determination be adversary-tested.

In several cases, respondents have chosen to avoid participating in investigations. The Commission then makes its record on the best available evidence, which is often collected by the staff or the complaining party.¹⁰¹ On the whole, however, the application of the APA has encouraged the presentation of a greater variety and amount of information, and has made injury information more reliable.

Although the range of injury factors which the Commission has considered in past investigations should not be curtailed, there are some factors which appear to be subject to quantification on a regular basis. A complainant who follows the rigorous exercise of marshalling proofs of the quantum of injury would automatically introduce the evidence of the other factors that the Commission wants to see in addition to underselling before it decides that a substantial tendency to injure exists.

In assisting the Commission to formulate its determinations on injury, parties could advantageously present evidence that would enable at least an estimate of the quantum of injury. Quantum of damage examples are available from federal court determinations in patent and trademark accounting. The factors relied on in these accountings are usually applicable in the Commission's injury analysis, as well as the injury portion of its temporary exclusion order determinations and could be useful in assessing the amount of a bond which would "offset

¹⁰⁰ 19 U.S.C. § 1337(c) (Supp. IV 1980).

¹⁰¹ Certain Welded Stainless Steel Pipe and Tube, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, *disapproved by President*, 45 Fed. Reg. 17,789 (1978).

any competitive advantage"¹⁰² under temporary and final orders. In addition, since the Commission has adopted the federal court standards of weighing the factors of proof of injury and proof of a violation for its temporary exclusion order hearings, court considerations on injury issues may be useful to the Commission.

DAMAGE DETERMINATIONS

In patent based causes of action in United States district courts, a standard for imposition of damages is derived from 35 U.S.C. § 284. This section provides that the damages awarded shall be adequate to compensate for patent infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer. In applying this section, courts have looked to three primary tests for determination of damages. The three tests include: (1) lost profits, (2) an established royalty, and (3) a reasonable royalty.

Lost profits includes the amount of profit the patentee would have achieved by making, using, or selling the invention which the infringer pirated.¹⁰³ Some courts have also permitted recovery of profits lost through price erosion. If a patent owner lowers his price to meet the infringing competitor's price, he is damaged with respect to sales he makes because of the lower profitability of each sale at the lowered prices.¹⁰⁴

The determination of damages based on an established royalty includes determination of the royalty paid by existing licensees for rights under the patent in suit to make use or sell the same invention which the infringer has been found to be infringing.¹⁰⁵ A reasonable royalty is a hypothetical royalty rate determined by assuming that the patentee and the infringer were negotiating at the time of the infringement as a willing seller and buyer.¹⁰⁶ It is used when the patentee is unable to establish lost profits or an established royalty rate.¹⁰⁷

¹⁰² 19 C.F.R. § 210.14(a)(3) (1981).

¹⁰³ *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 507 (1964); *American Safety Table Co. v. Schreiber*, 415 F.2d 373 (2d Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970).

¹⁰⁴ *Yale Lock Mfg. Co. v. Sargent*, 117 U.S. 536 (1886); *Saf-Gard Products, Inc. v. Service Parts, Inc.*, 491 F. Supp. 996 (D. Ariz. 1980); *W.L. Gore & Associates, v. Carlisle Corp.*, 198 U.S.P.Q. 353 (D. Del. 1978).

¹⁰⁵ *Seymour v. McCormick*, 57 U.S. (16 How.) 479 (1853); *Saint Regis Paper Co. v. Bemis Co.*, 403 F. Supp. 776 (S.D. Ill. 1975), *rev'd on other grounds*, 549 F.2d 833 (1977), *cert. denied*, 434 U.S. 833 (1978).

¹⁰⁶ *Georgia-Pacific Corp. v. United States Plywood-Champion Papers, Inc.*, 446 F.2d 295, 296 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971).

¹⁰⁷ *Hughes Tool Co. v. G.W. Murphy Indus.*, 491 F.2d 923 (5th Cir. 1973); *Tektronix, Inc. v. United States*, 552 F.2d 343 (Ct. Cl. 1977), *cert. denied*, 439 U.S. 1048 (1978).

A determination of lost profits allocates to the patent owner all the profit the patentee could have obtained but for the infringer's acts. The determination of damages based on an established royalty or reasonable royalty contemplates allowance of at least some of the profit to the infringer.

Lost Profits

A common procedure for determining lost profits is to determine the number of items made, used, or sold by the infringer and to multiply this number by the expected profit of the patentee per unit to arrive at a total damage figure.¹⁰⁸ In order to be entitled to use the test of lost profits as the basis for recovery of damages, a patentee must show that he would have been entitled to all or at least some definite portion of the sales made by the infringer. The patent owner's damages are generally limited to the number of infringing sales which he can demonstrate he would have made.¹⁰⁹ In order to show this, courts have required detailed market information concerning the demand for the product, availability of substitutes, and the number of actual and potential suppliers of the product or substitutes.¹¹⁰ Additionally, to recover lost profits, the patentee must be able to show that if he had been able to secure the business, he would have had the capacity to make the sales.¹¹¹ In order to counteract this information, the infringer may show that the patentee did not bid against it for some or all of the infringing sales made,¹¹² that customers preferred the product of the infringer due to some unpatented feature,¹¹³ or that the infringer's superior skill in marketing or selling was responsible for the sales rather than the patented aspect of the product. However, if the patented feature of the product is what constitutes the substantial value of the product, the entire profit on the product may be available for use in determining damages.¹¹⁴

Damages due to price erosion caused by an infringer have been

¹⁰⁸ *American Safety Table Co. v. Schreiber*, 415 F.2d 373 (2d Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970).

¹⁰⁹ *Id.* See also *Livesay Window Co. v. Livesay Indus.*, 251 F.2d 469 (5th Cir.), *cert. denied*, 358 U.S. 882 (1958); *Tektronix v. United States*, 552 F.2d 343 (Ct. Cl. 1977), *cert. denied*, 439 U.S. 1048 (1978).

¹¹⁰ *Electric Pipe Line, Inc. v. Fluid Systems, Inc.*, 250 F.2d 697 (2d Cir. 1957); *Broadview Chem. Corp. v. Loctite Corp.*, 311 F. Supp. 447 (D. Conn. 1970).

¹¹¹ *Seymour v. McCormick*, 57 U.S. (16 How.) 479 (1853); *Broadview Chem. Corp. v. Loctite Corp.*, 311 F. Supp. 447 (D. Conn. 1970).

¹¹² *Hughes Tool Co. v. G.W. Murphy Indus.*, 491 F.2d 923 (5th Cir. 1973).

¹¹³ *Saulnier v. United States*, 314 F.2d 950 (Ct. Cl. 1963).

¹¹⁴ *Hurlbut v. Schillinger*, 130 U.S. 456 (1889); *Goulds Mfg. Co. v. Cowing*, 105 U.S. 253

awarded in several cases.¹¹⁵ The proof of damages under this theory includes two basic requirements: (1) linking the price erosion to the infringement, and (2) assessing the amount of the erosion and the total lost profits attributable to the infringement. Proof of the first element includes proving that the patent owner actually made the sales and that the infringer caused the patentee to drop its prices. The fewer the competitors in the market, the easier such proof is likely to be. This element may be proven by information possessed by the patent owner, e.g., bidding records, sales calls made, or prior sales to the infringer's customer. It can also come from experts in the commercial setting in which the products are sold and from customers or other manufacturers.

In proving the second element, the amount of erosion and lost profits, the patent owner may be permitted to simply compare his pre-infringement price with his lower post-infringement prices. The time period of the infringement, the history of the price level of the product starting from before the infringer entered the market, and the consequences of this price erosion on profitability are all relevant factors in this determination.

These factors can be proven by a combination of documentary evidence and fact, and expert witnesses. Employees of the parties to the suit who are knowledgeable about the cost, profits, pricing, manufacturing, and marketing facets of their businesses are able to testify about the records of the company relating to these factors. Expert witnesses in accounting, statistics, economics, and the technological aspects of the case may be used to establish the record on such factors as the incremental cost structure of the parties' businesses, lost profit projections,¹¹⁶ capacity to manufacture additional product, and the uniqueness of the product or existence of suitable non-infringing alternatives.¹¹⁷

Determining Established Royalties

The courts in awarding damages based on established royalties

(1881); *American Safety Table Co. v. Schreiber*, 415 F.2d 373 (2d Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970); *Electric Pipe Line, Inc. v. Fluid Systems, Inc.*, 250 F.2d 697 (2d Cir. 1957).

¹¹⁵ *Yale Lock Mfg. v. Sargent* 117 U.S. 536 (1886); *Saf-Gard Products, Inc. v. Service Parts, Inc.*, 491 F. Supp. 996 (D. Ariz. 1980). Other cases citing this as a proper measure of damages but failing to find the evidence to support such award include *Cornely v. Marckwald*, 131 U.S. 159 (1889); *Boesch v. Graff*, 133 U.S. 697 (1890); *Power Specialty Co. v. Connecticut Light & Power Co.*, 80 F.2d 874 (2d Cir. 1936).

¹¹⁶ *W.L. Gore & Assocs. v. Carlisle Corp.*, 198 U.S.P.Q. 353 (D. Del. 1978).

¹¹⁷ *Livesay Window Co. v. Livesay Indus.*, 251 F.2d 469 (5th Cir.), *cert. denied*, 358 U.S. 882 (1958).

primarily look to royalties paid by licensees of the patentee, and particularly to licensees which are in substantially similar circumstances. For example, when they look to licensees using the patent to produce the same or very similar products, the courts would not look to licensees who only have the right to use a device or are producing an entirely different product than those produced by the infringer.¹¹⁸ Additional factors should be taken into consideration by the court since existing licensees may have taken a license at a very early stage of development of a market for the patented product. Such licensees are frequently granted a lower royalty rate due to their willingness to participate in the risks of market development.

Reasonable Royalty Determinations

If damages cannot be determined on the basis of established lost profits or an established royalty, they are assessed on the basis of a reasonable royalty. A damage award based on a reasonable royalty depends on the assumption that the patentee and infringer were willing negotiators at the time of the infringement for rights to the invention. Courts recognize that both parties would have anticipated profits in arriving at a license under these negotiated circumstances.¹¹⁹ Therefore, it is contemplated that the infringer would still be able to make some profit on his use of the invention. The factors considered in determining a reasonable royalty include: the nature of the invention; the available substitutes; the royalty rates customarily paid for nonexclusive rights for patents in the field; the commercial relationships of the licensor and the infringer; the life of the patent; the established profitability or projected profit of the patentee; the supply and demand situation relating to the patented product or substitutes for it; the ability of the infringer to produce, market and sell the product; the actual sales and profits of those selling the invention, including the patentee and any licensees and also the infringer; and any license royalties received by the patentee from other licensees.¹²⁰

¹¹⁸ *Colgate v. Western Elec. Mfg. Co.*, 28 F. Supp. 146 (S.D.N.Y. 1886).

¹¹⁹ *Georgia-Pacific Corp. v. United States Plywood-Champion Papers*, 446 F.2d 295 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971); *Jenn-Air Corp. v. Penn Ventilator Co.*, 394 F. Supp. 665 (E.D. Pa. 1975). However, it is not necessary that the infringer relates to anticipated profits at the time of the hypothetical negotiations.

¹²⁰ *Columbia Broadcasting System, Inc. v. Zenith Radio Corp.*, 537 F.2d 896 (7th Cir. 1976); *Georgia-Pacific Corp. v. United States Plywood-Champion Papers, Inc.*, 446 F.2d 295 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971).

CONCLUSION

The Trade Act of 1974 drastically changed the nature of Section 337 investigations. The Commission no longer analyzes facts developed at a slow pace by staff researchers, with a little assistance from the parties, to prepare a final report to the President recommending some action. The Commission was thrust into a rigorous adjudicative process where it had to participate in litigating a case under the Administrative Procedure Act to determine the existence of an unfair act, consider the effect of such an act on a domestic industry, and also conduct a non-adjudicative policy oriented review of public interest issues to decide whether to issue a remedy. In addition, investigations have to be completed within one year or eighteen months. The Commission has responded over the past six years under this statute by developing a body of case law concerning a broad range of unfair acts.

The law and its legislative history require that the Commission not grant a remedy for every unfair act found. There has to be some measure of certainty to the evidence presented that the unfair method of competition or unfair act found has caused some injury or is likely to injure a domestic industry if left unremedied. Due to the existence of the "tendency to injury" language in the statute, the Commission can consider incipient as well as existing injury. The Commission decisions seem to be tending toward requiring significant levels of proof of the various factors relevant to injury and the causal link between these factors and the injury. An unfair act without the requisite level of injury and causal link to the injury will not lead to a determination of violation.

Although the Court of Customs and Patent Appeals (C.C.P.A.) has rendered its recent opinions using a "weight of the evidence" test,¹²¹ the substantial evidence standard required by the revision of Section 337 from the Customs Court Act of 1980¹²² will probably be used by the C.C.P.A. in reviewing future Commission cases. Precedent shows that the C.C.P.A. will probably not reverse the Commission on injury determinations so long as the Commission spells out in its record the factors providing the basis for the injury determinations.

The range of factors considered by the Commission are broad and should be retained to give the flexibility necessary to deal with diverse factual circumstances found in these investigations. However, the Commission could produce clearer determinations on the injury issue if

¹²¹ *Astra-Sjuco v. United States Int'l Trade Comm'n*, 629 F.2d 682 (C.C.P.A. 1980).

¹²² Customs Courts Act of 1980, Pub. L. No. 96-417, § 604, 94 Stat. 1727, 1744.

parties presented more complete information. The standards used by district courts in determining damages seem to be transferrable to injury determinations, especially for cases involving intellectual property. By expanding Commission consideration of such issues, the parties can put the Commission in a better position to provide clear statements of the reasons behind its evaluation of the injury issue.