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Unfair Competition in U.S. Import Trade: Developments Since the Trade Act of 1974

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INTRODUCTION

Section 337 of the Tariff Act of 1930 with its subsequent amendments is a regulatory provision enabling the International Trade Commission (ITC) to determine whether unfair methods or acts of competition are being employed in U.S. import trade. The ITC is an independent federal agency broadly authorized to investigate U.S. foreign trade, concentrating upon the competitive impact of imported products on U.S. domestic producers.[1] Prior to 1975, the ITC's jurisdiction was strictly confined to investigation and fact-finding but with the amendment of § 337 in 1975, the ITC was permitted to take regulatory action to prevent unfair methods of competition in import trade.[2] Subsequent to these amendments, the ITC has instituted over eighty investigations. These cases raise questions concerning regulatory policy, adjudicative burdens, jurisdictional conflicts with other agencies under different statutes,[3] and the scope of judicial review. More recently, the Trade

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1. The ITC is an unusually independent federal agency with six members, not more than three of which may belong to the same political party. 19 U.S.C. § 1330 (1970). A commissioner is appointed by the President and confirmed by the Senate for not more than one nine-year term. *Id.* The presidential designation of the chairman and vice-chairman is circumscribed by legislation Pub. L. No. 95-106, 2(a), 91 Stat. 86, 7 (1977). The Executive branch has no control over the Commission's budget submissions. 19 U.S.C. § 2232 (1975), or the litigation in which it chooses to represent itself. Pub. L. No. 93-618, § 174 (1975) amending 19 U.S.C. § 1333 (1970). Commission requests for information in adjudicative agency proceedings are exempt from Executive branch monitoring. Office of Management and the Budget (OMB) Circular No. A-40, § 9(c) February 10, 1976. The responsibility of the ITC ranges from preparing advisory studies, *see* § 332 of the Tariff Act of 1930, to making final determinations with regard to import injury to domestic industries. *See* §§ 201, 406 of the Trade Act of 1974 and §§ 701-778 of the Tariff Act of 1930.

2. 19 U.S.C. § 1337 (1974). For the test of § 337 with the 1979 amendments thereto, *see* appendix p. 206 *infra*.

3. See Kaye and Plaia, Jr., *The Relationship of Countervailing Duty and Antidumping Law to Section 337, Jurisdiction of the U.S. International Trade Commission*, 2 INT'L TRADE L. J. 3 (1977); and Easton and Laing, *A Comment — Kaye and Plaia on Section 337 — Pricing Jurisdiction*, 3 INT'L TRADE L. J. 359 (1978).

Agreements Act of 1979[4] amended § 337, affecting limited jurisdictional issues and civil penalty authority.

AN HISTORICAL SURVEY

The basis for the enactment of § 337 and its predecessor section, § 316 of the Tariff Act of 1922[5] was § 5 of the Federal Trade Commission Act of 1914 which provided that "unfair methods of competition are declared unlawful."[6] In 1919, the U.S. Tariff Commission[7] submitted a report to the House Ways and Means Committee which emphasized the obstacles confronting domestic manufacturers from obtaining legal remedies for unfair competition from abroad.[8] The Commission noted that "some official body moving along lines sanctioned by Congress in the Federal Trade Commission Act, may reasonably be specifically instructed to deal with dumping as a manifestation of unfair foreign competitive methods."[9]

In 1921 the Congress enacted the Antidumping Act[10] and, a year later, § 316 of the Tariff Act of 1922,[11] a predecessor to § 337 of the Tariff Act of 1930, concerning unfair competition. This section provided that the Tariff Commission was to investigate alleged violations of its provisions, and was to make findings and recommendations which were appealable to the Court of Customs and Patent Appeals (C.C.P.A.) and from there, by way of *certiorari,* to the Supreme Court. Upon the completion of the procedure, the record developed by the Tariff Commission was transmitted to the President, who, if satisfied that the act had been violated, could levy an additional duty or impose an embargo on goods being imported in violation of the Act. The findings and recommendations were advisory only. The statute authorized

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4. For the text of § 337, *see* Appendix p. 236 *infra.*

5. Ch. 356, § 316, 42 Stat. 943 (1922).

6. The language "unfair or deceptive acts or practices in commerce" was added to § 5 in 1938.

7. The U.S. Tariff Commission is the predecessor of the present day International Trade Commission. The Tariff Commission was renamed in § 171(a) of the Trade Act of 1974. *See* p. 205 *infra.*

8. U.S. Tariff Commission, *Information Concerning Dumping and Unfair Foreign Competition in the United States and Canada's Antidumping Law* (Washington, D.C. 1919).

9. Third Annual Report of the U.S. Tariff Commission (Washington, D.C. 1919).

10. Pub. L. No. 96-39, 93 Stat. 193 (1979). This Act provided that when a foreign company sells goods in the United States for less than the price on the country of exportation, and the U.S. sales are injurious or likely to be injurious to an U.S. industry, a special duty will be assessed to equal the margin of underselling. This law was repealed by § 106 of the Trade Agreements Act of 1979.

11. Ch. 356, § 316, 42 Stat. 943 (1922).

the President to take provisional measures while investigative information was being developed.

With very few changes, § 316 was reenacted as § 337 of the Tariff Act of 1930.[12] The Tariff Commission interpreted § 316 and its successor provision as a parallel provision to § 5 of the Federal Trade Commission Act. The 1922 annual report of the Commission stated that "section 316 extends to import trade practically the same prohibition against unfair methods of competition which the Federal Trade Commission Act provides against unfair methods of competition in interstate commerce."[13]

With the passage of the 1974 Trade Act however, the ITC was enabled to determine whether certain behavior constituted a statutory violation, thereby amending the plenary authority of the president to determine a statutory violation. Subsection (c) specifically authorizes the ITC to determine whether the behavior investigated violates § 337[14] while subsections (d) through (f) grant the Commission the jurisdiction to impose sanctions against the violating party. If the ITC determines that the Act was violated, subsection (g) provides that the agency transmit to the President its determination and the sanction ordered. The President may disapprove the ITC's determination for "policy reasons" within sixty days after he receives the determination, thereby invalidating any remedial action ordered by the ITC.[15]

The Commission was not in a position to enforce § 337 prior to the 1974 amendments because it did not have the authority to declare trade practices

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12. The House eliminated the provision authorizing the president to impose duties. H.R. REP. No. 7, 71st Cong., 2d Sess. 6 (1929). The Senate eliminated the provision for certiorari to the Supreme Court. S. REP. No. 37, 71st Cong., 1st Sess. 67 (1929).

13. Sixth Annual Report of the U.S. Tariff Commission (Washington, D.C. 1922).

14. *See* appendix p. 236 *infra*.

15. The Senate Committee on Finance, which was responsible for the "presidential veto," explained the provision:

> It is recognized by the Committee that the granting of relief against imports could have a very direct and substantial impact on United States — foreign relations, economic and political. Further, the President would often be able to best see the impact which the relief ordered by the Commission may have 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.
>
> Therefore, it was deemed appropriate by the Committee to permit the President to intervene before such determination and relief become final, when he determines that policy reasons require it. The President's power to intervene would not be for the purpose of reversing a Commission finding of a violation of section 337; such finding is determined solely by the Commission, subject to judicial review. S. REP. No. 93, 1298, 93rd Cong., 2d Sess. 199 (1974).

For further discussion on presidential veto power, *see* p. 232 *infra*.

as violative of the statute. Now that the ITC is authorized to declare that certain behavior constitutes unfair methods or unfair acts within the meaning of the statute, the ITC's role is that of a regulator rather than fact-finder and advisor. Presidential disapproval merely deprives the ITC's remedial orders of legal effect; they cannot affect the review of the ITC's determinations of the fairness of the trade practices investigated. The ITC may even have the power to fashion a new remedy after a presidential veto on the theory that the latter remedy would be acceptable to the President. Such authority has not yet been tested.

The most recent amendments to § 337 were imposed by Section 1105 of the Trade Agreements Act of 1979.[16] Subsection (a) of Section 1105 amended a notification provision in the 1974 Act for the coordination of antidumping and countervailing duty investigations by the executive branch and § 337 investigations by the ITC.[17] Subsection (c) provides explicitly that the Commission determinations resulting in the issuance of a cease and desist order shall be made on the record after notice and an opportunity for a hearing.[18] Finally, Subsection (b) introduced a civil fine penalty for the violation of cease and desist orders.[19]

ELEMENTS OF A STATUTORY VIOLATION

Section 337(a) provides that all unfair trade practices in U.S. import trade are unlawful if such practices have the tendency to destroy or substantially injure U.S. industry or restrain or monopolize U.S. trade and commerce. The ITC has formally taken the position that Section 337 embraces a wide variety of unfair trade practices.[20] The legislative history of

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16. Pub. L. No. 96–39, 93 Stat. 310 (1979).

17. 19 U.S.C. § 1337(b)(3). For discussion of jurisdictional overlap of 337 with other Statutes, *see* p. 207 *infra*.

18. 19 U.S.C. 1337(c).

19. 19 U.S.C. 1337(f).

20. *See* In re Certain Color Television Receiving Sets, U.S.I.T.C. Memorandum Opinion, Inv. No. 337 TA–23, 11–1–12 (December 20, 1976). The meaning of the phrase "unfair methods of competition" as it appears in § 5 of the Federal Trade Commission Act, *see supra* at 204, has been left to that agency to define from its regulatory experience. *See* FTC v. Motion Picture Advertising Service Co., Inc., 344 U.S. 392 (1953). The phrase as it is used in § 337 will probably be left to the ITC to define from its experience. *See* In re Von Clemm, 229 F.2d 441 (D.C. Cir. 1955). The ITC could have the discretion to apply the rulings of the FTC under § 5 whenever applicable to the regulation of U.S. import trade. *See* 1957 Annual Report of the Federal Trade Commission 73–78 (Washington, D.C. 1957) for a list of various methods of unfair competition and unfair or deceptive acts or practices which have resulted in FTC cease and desist orders.

this section supports the Commission's interpretation. The Senate Finance Committee report on the predecessor to § 337 stated that "[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 trade practice and is therefore a more adequate protection to American industry than any antidumping statute the country has ever had."[21]

The Statute has been interpreted by the Commission as granting it the authority to investigate all unfair trade practices — regardless of whether there is some discernible nexus between unfair methods or acts and the importation of the subject merchandise into the United States.[22]

Jurisdictional overlap with other statutes.[23]

The question as to whether § 337 should apply to commercial behavior which is subject to the jurisdiction of other statutes, specifically the recently repealed Antidumping Act of 1921, has been a topic of controversy. Prior to amendment by the 1974 Trade Agreements Act, subsection 337(b)(3) provided:

> 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.

The report of the Senate Finance Committee on the 1974 Act described this provision in the following manner:

> 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

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21. S. REP. NO. 67-696, 67th Cong., 2d Sess. 3 (1922).

22. The Commission has interpreted the language "in their sale" as encompassing merchandise withdrawn from customs for consumption. *See* Convertible Game Tables and Components Thereof, Inv. No. 337-TA-7, 7 (December 1975).

23. *See supra* note 3.

> the Commission's practice of not investigating matters clearly within the purview of either section 303 or the Antidumping Act will continue.[24]

The Commission interpreted this provision as requiring the ITC to notify the Department of Treasury of matters which may come within the purview of the Antidumping Act or the countervailing duty statute. The ITC did not interpret the provision as limiting its authority to investigate or to reach appropriate determinations.[25] Most recently however, the Commission has met with disapproval from the White House which has interpreted the 1974 amendment of Section 337(b)(3) as eliminating pricing matters from ITC jurisdiction.[26] President Carter has emphasized "the need to avoid duplication and conflicts in administration of the unfair trade practice laws of the United States."[27]

The Trade Agreements Act of 1979[28] and the international agreements[29] negotiated under the aegis of the Tokyo Round of multilateral trade negotiations have both affected the relationship of § 337 to the antidumping and countervailing duty laws. The 1979 amendment to Section 337(b)(2) explicitly provide that the ITC should not institute or should terminate an investigation already instituted when it has reason to believe the matter is within the scope of the antidumping and countervailing duty statutes. In cases where the matters before the ITC are partly related to the antidumping and countervailing duty statutes, the amendment authorized the ITC to suspend its investigation until the Department of Commerce has determined whether the imports are dumped or subsidized. The amendment also provides that any final decision on the issues referred by the ITC to the Department of Commerce shall be binding on the Commission.

U.S. obligations under the international agreements concerning the application of antidumping and countervailing duties also affect the possible application of § 337 in price-related investigations. The so-called "International Anti-Dumping Code" (Article 16.1) contains the following provisions: No specific action against dumping of exports from another party can be taken except in accordance with the provisions of the General Agreement [on Tariffs and Trade],

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24. *See supra* note 15, at 195.

25. 19 CFR 201.4(d) (1979).

26. Easton and Laing, *supra* note 3, at 27.

27. Speech by President Jimmy Carter on ITC's action on Welded Stainless Steel Pipe and Tube Investigation, Inv. No. 337-TA-29 (1978) (April 22, 1978). *See supra* note 10. *See also* In re Certain Color Television Receiving Sets, U.S.I.T.C. Memorandum Opinion, Inv. No. 337-TA-23, 12 (December 20, 1976).

28. *See supra* note 16.

29. *See* 19 U.S.T. 2083 (1979).

as interpreted by this Agreement.[30] Similarly, the Code on Subsidies and Countervailing Measures, Article 19.1, provides that: No specific action against the subsidy of another signatory can be taken except in accordance with the provisions of the General Agreement [on Tariffs and Trade], as interpreted by the Agreement.[31]

The International Anti-Dumping Code only interprets GATT article VI which authorizes the imposition of a tariff duty to countervail a margin of dumping or the net amount of an offending subsidy as a remedial measure. Because § 337 does not authorize the imposition of a duty consistent with the provisions of GATT article VI, the institution of an investigation under § 337, based upon either price discrimination among international markets or upon import product pricing allegedly influenced by the subsidy practices of the exporting nation's government, could be considered to violate these respective Code obligations. This possibility of an alleged code violation is significant because § 337(g) authorizes the President to disapprove Commission orders under § 337 for "policy" reasons. The report of the Senate Finance Committee on the bill which became the Trade Act of 1974, creating the provision in § 337(g) for presidential intervention, stated that granting relief from imports under the authority of § 337 could have a direct and substantial political impact on U.S. foreign relations.[32] Accordingly, any Section 337 order affecting price discrimination differentials or the subsidy practices of signatories to the above codes could be disapproved under Section 337(g). It is unclear whether the Executive branch would disapprove Section 337 investigations concerning the pricing of imports from countries which were not signatories to these codes or have a status equivalent to such signatories.[33]

Unfair pricing of imports

The problem of dealing with import pricing is common in many statutes concerning U.S. import trade.[34] If import pricing appears "unreasonably" low,

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30. Agreement on Implementation of Article VI of the General Agreement on Tariff and Trade (relating to antidumping measures). *See* 19 U.S.C. 2503(c)(6) (1979).

31. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (relating to subsidies and countervailing measures). *See* 19 U.S.C. 2503(c)(5) (1979).

32. *See supra* note 15.

33. In addition to the code signatories, benefits of the agreements are extended to parties which have accepted the obligations of the agreement with respect to the United States. *See* Appendix p. 236 *infra* (2(b)(2)).

34. *See* Dickey, *A Guide for Pricing Commodities to Enter the Commerce of the United States*, 11 LAW & POL'Y INT'L BUS. 491 (1979).

an unfair trade practice may be alleged. If, on the other hand, complained-of imports are priced below the competitive domestically manufactured products to any significant degree, the pricing may be a cause of the injury suffered by a domestic industry. In petitions for relief under various trade statutes, the lower prices of competitive imports are often cited as a demonstration of the petitioner's injury. Also, businessmen often perceive underlying cost differentials to be "unfair." In general, however, foreign competitors need to price below domestic producers to compensate for delivery uncertainties, longer lead times, difficulties in adjusting for damaged or defective merchandise, and other costs associated with depending on foreign suppliers. Indeed, should a particular imported product become involved in agency proceedings concerning alleged unreasonably low pricing, it is conceivable that U.S. customers "may demand further price concessions to offset this new uncertainty factor as a condition of doing business with the foreign manufacturer."[35]

Section 337 investigations necessarily involve the problems associated with competitive and anticompetitive pricing and underlying costs.[36] If dissatisfaction with the administration of the antidumping and countervailing duty laws continues, complaints based on below-cost selling may continue to be filed with the ITC.[37]

While the unfair trade practice most frequently alleged in antitrust-type investigations under § 337 is predatory pricing, few of these cases have been fully litigated. In the *Certain Welded Stainless Steel Pipe & Tube* investigation,[38] the ITC determined that sustained sales below average variable costs[39] raised a rebuttable presumption[40] of predatory intent. The rationale for the determination was based, in part, on the work of Professors

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35. *See* Prosterman, *Withholding of Appraisement Under the United States Antidumping Act: Protectionism or Unfair-Competition Law*, 41 WASH. L. REV. 315, 324 n.30 (1966).

36. The prevalence of government subsidies and flexible exchange rates render the calculation of foreign costs a Herculean task.

37. *See supra* at 207.

38. Inv. No. 337-TA-29 (1978). *See supra* note 27.

39. The presiding officer defined average variable cost as "the sum of all costs that vary with changes in output divided by output." Finding No. 25, Recommended Determination (November 14, 1977). Variable costs are those which bear a direct relationship to the volume of output; *e.g.*, raw materials and labor in the case of stainless steel pipe and tube producers. As output increases the percentage of such costs to each unit of production cannot be significantly reduced. *Id.* at 19.

40. Commercially justifiable reasons for selling below average variable costs may overcome the presumption, for instance, going out of business inventory sales or meeting the predatory prices of competitors to remain in business.

Areeda and Turner.[41] In the other litigated pricing cases to date, the ITC has made negative determinations. Among the policies that the ITC appears to have adopted is a reluctance to apply the principles of case law under the Robinson-Patman Act to find violations of § 337 in international trade.[42]

Patents

In investigations conducted under the 1922 Act, the Commission determined that the imposition and sale of unlicensed imported articles which infringed U.S. patents constituted an unfair act.[43] The Court of Customs and Patent Appeals (C.C.P.A.) upheld the authority of the Commission to recommend patent infringement as an unfair method or act but declared that the Commission had no authority to recommend whether a patent was valid.[44] To the extent that the president accepted the Commission's advice on infringement, the C.C.P.A.'s ruling operated to transform a rebuttable legal presumption of patent validity into an irrebuttable presumption under the 1922 Act and, later, under § 337.[45] The practical effect of this ruling was to remove the defense normally raised by persons accused of patent infringement: patent invalidity. This development, in combination with other factors, resulted in the great bulk of commission investigations concerned with allegations of patent infringement by unlicensed imports. Other factors which influenced this result included the relative ease of demonstrating that a given product infringes the literal language of a patent;[46] the high level of U.S. tariffs from 1922 through the late 1940s which, in turn, tended to conceal any unfair competitive behavior;[47] and, the issuance of presidential exclusion orders in such cases.

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41. Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HAR. L. REV. 697 (1975). This work has been relied upon in federal antitrust litigation. *See* International Air Ind., Soc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. den.*, 424 U.S. 934 (1976).

42. *See* Recommended Determination of the Presiding Officer in the Matter of Certain Above-Ground Swimming Pools, Inv. No. 337-TA-25, 67-71 (February 10, 1977). *See also* Easton and Laing, *supra* note 3, at 373-75.

43. For a description of the unfair trade practices declared in the investigations conducted by the Tariff Commission prior to the 1974 amendments, *see* Musrey, *Tariff Act's Section 337: Vehicle for the Protection and Extension of Monopolies*, 5 LAW & POL. INT'L BUS. 56, 64-65 (1973).

44. Frischer Co. v. Bakelite Corp., 39 F.2d 247 (C.C.P.A.), *cert. den.*, 282 U.S. 852 (1930).

45. *See* Musrey, *supra* note 43.

46. *Id.* at 68-69.

47. Section 315 of the Tariff Act of 1922 established a "flexible tariff" mechanism to equalize "costs of production" to remove any disadvantage of U.S. producers in com-

Another development served to further emphasize patent-based investigations. In a 1934 investigation, the Commission recommended exclusion of a foreign product since it had been manufactured in accordance with the claims of a U.S. process patent.[48] Although the C.C.P.A. held that there could be no infringement of a process patent in the sale of a product which was not patented,[49] the Congress subsequently enacted legislation to extend protection to domestic process patent holders in such situations.[50]

The 1974 amendments to the Trade Act directed the Commission to review the validity and enforceability of patents in § 337 investigations.[51] Legal and equitable defenses have been litigated in virtually all the contested patent-based investigations since these amendments. Neither the 1974 nor the 1979 amendments changed the statutory protection afforded process patents.

Effect of Unfair Trade Practices

In order for relief to be granted under § 337, the unfair methods of competition or acts alleged must produce results which are proscribed by the statute. Section 337(a) specifically states that methods of competition will be declared unfair and therefore unlawful if such practices have the tendency: a) "to destroy or substantially injure an industry, efficiently and economically operated, in the United States;" or b) "to prevent the establishment of such industry;" or c) "to restrain or monopolize trade and commerce in the United States."

1. Injury to an efficiently and economically operated industry.

The elements of this first unlawful "tendency" are threefold: what is an industry; is it efficiently and economically operated; and finally, what constitutes the injury? As to the first element, the Commission investigates domestic product markets which are competitive with the complained-of imports. The investigations focus on those resources of the domestic firm whose product is functionally interchangeable with, or otherwise a commer-

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peting with imports. Theoretically, the functioning of this mechanism could only be thwarted if foreign exporters resorted to unfair methods of competition. Section 316 was designed to offset that possibility. The relationship of those provisions was reenacted in the Tariff Act of 1930 in § 330 (cost of production) and § 337. *Id.* at 60–61.

48. Phosphates and Apatile, Inv. No. 337–3 (1934).

49. In re Amtorg Trading Corp., 75 F.2d 826 (C.C.P.A.), *cert. denied.*, 296 U.S. 576 (1935).

50. 19 U.S.C. 1337a (1940).

51. *See* Sterne, *Patent Infringement Practice Before the United States International Trade Commission*, 2 INT'L TRADE L.J. 190 (1977).

cial rival of, the imported article.[52] In non-patent investigations, the resources of the domestic firms devoted to the production of products competing with the complained-of imports constitutes the domestic industry. In patent-based investigations, the Commission has consistently limited the domestic industry to those domestic facilities of the patentee and his business licensee devoted to the production of the patented product or the practice of the patented method.[53]

Turning to the second factor, the Commission has never based a negative determination on a finding that the domestic industry was not being efficiently and economically operated. As commentators have noted, however, a respondent could demonstrate the existence of an inefficient and uneconomic operation.[54] Given the scope of discovery in a § 337 investigation, such a showing is possible. Financial ratios are a comparative technique available to a complainant to demonstrate an efficient and economic operation. For example, expert witnesses could calculate liquidity, leverage, activity and profitability ratios for the complainant's industry and then compare the ratios with those of other domestic manufacturers in similar product categories.

Finally, nearly all of the affirmative relief granted under § 337 for injury to efficiently operated U.S. industry has been to protect U.S. manufacturers from patent infringement.[55] Tests for injury in patent infringement cases under § 337 are similar to those employed by the ITC under different statutes to assess the impact of imports on domestic industries. For instance, the ITC identified the following eight criteria which recurred in antidumping investigations between 1954 and 1977.[56]

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52. *See generally* ASCH ECONOMIC THEORY AND THE ANTITRUST DILEMMA 169 (1970).

53. *See, e.g.*, Meprobamate, T.C. Pub. No. 337 (1971).

54. *See* Kaye and Plaia, *Tariff Act Section 337 Revisited: A Review of Developments Since the amendments of 1975,* 59 J. PATENT OFFICE SOC'Y 3, 20 (1977).

55. Other exclusion orders were issued in response to product simulation and mislabeling situations. *See supra* note 43, at 65–66, 71–72 n.87. Because a patent is a legal right to a monopoly and exclusion orders are an effective means for protecting the monopoly from unlicensed imports, the meaning of the statutory language "tendency . . . to . . . substantially injure" may be distorted from the patent experience. The report of the House Committee on Ways and Means on the bill which became the Trade Act of 1974 characterized a dissenting opinion in the C.C.P.A. decision in In Re Von Clemm, 229 F.2d 441 (C.C.P.A. 1955) as follows: "Where unfair methods and acts have resulted in conceivable losses of sales, a tendency to substantially injure such industry has been established." H.R. REP. NO. 93–571, 93d Cong., 1st Sess. 78 (1973).

56. Attachment to a letter from former Chairman Daniel Minchew, U.S. International Trade Commission, to Chairman Vanik, House Subcommittee on Trade (Novem-

1. Price depression of the impacted competitive products. When an attempt is made to demonstrate an absolute decrease in price, the articles must be of the same quality for the measure to have any validity.

2. Price Suppression. Price suppression occurs when the complained-of import prevents the price increase of domestic goods even though the production costs have increased. Essentially, price suppression is demonstrated by the price of the impacted domestic article increasing less rapidly than an index of comparable industrial articles. In choosing an index, the classification of the articles is extremely important; for example, if the impacted domestic article was fishing tackle, an index of recreational goods would be of no utility if it included recreational vehicles.

3. Market penetration. The amount of market penetration is calculated by determining the ratio of the complained-of imports to domestic consumption. The calculation consists of adding domestic shipments to imports, subtracting exports and dividing the result into the quantity of complained-of imports. The figure is always approximate because it does not include the inventories of both wholesalers and retailers. The resulting ratio is limited for other reasons. Domestic manufacturers do not lose sales to imports directly, but to domestic sales of the imported products to their customers or potential customers. In addition, the ratio does not disclose whether the imports are from large foreign producers attempting to compete in the U.S. market or from foreign suppliers with dispersed customers in the U.S. market. In the latter case, the imports will reach the same ratio as in the former but the competitive posture of the imports in the U.S. market is entirely different.[57]

4. Documented lost sales of domestic manufacturers. Allegations of lost sales are documented by finding witnesses to explain why customers of domestic suppliers shifted from the impacted domestic product to the imported article. The practice is necessary to isolate the factors responsible for the selection of the complained-of imports. For instance, uncontroverted testimony about large quality differences would defeat an injury argument based on price depression.

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ber 16, 1977), *reprinted in Hearings on the Oversight of the Antidumping Act of 1921 Before the House Subcommittee on Trade of the Committee on Ways and Means*, 95th Cong., 2d Sess. 60, 62 (1977). The Trade Agreements Act of 1979 directs the ITC to take into account certain enumerated indicia of injury in antidumping and countervailing duty investigations. *See* 19 U.S.C. 1677(7)(c)(iii) (1979). Such indicia have also been legislated in other statute provisions relating to relief from import injury. *See* 19 U.S.C. § 201(b)(2) (1979).

57. *Cf.* Sichel, *The Foreign Competition Omission in Census Concentration Ratios: An Empirical Evaluation*, 20 THE ANTITRUST BULL. 89, 91–92 (1975).

5. Operation of domestic production facilities at less than normal capacity. Capacity is measured in terms of man-hours and output. Trends rather than absolute numbers must be relied upon in those cases where the plants are multi-product.

6. Plant closures and unemployment. Unemployment is based on the segment of the industry producing only the product under investigation and essentially consist of a head count. Underemployment is estimated on the basis of decreasing trends in hourly work.

7. Foreign capacity to produce for export. This is especially significant where there are important barriers to the subject exports in other markets and the United States is virtually a market of last resort.

8. Lost profits. Determining the profitability of the operations devoted to the production of a particular product presupposes that the firm's financial data can be reasonably allocated on a product basis. In this connection the use of operating margins is desirable because they relate to the product and can be compared with both the margins of all of the products manufactured in the subject plants and the margins of similar businesses as reported in different financial services. In patent-based investigations the loss of potential royalties would be considered a possible indicator of injury.

In non-patent investigations, the tendency to injure language has been likened to the incipiency doctrine under § 5 of the Federal Trade Commission Act. As noted in the investigation of *Certain Welded Stainless Steel Pipe and Tube*, "[b]oth the legislative history and pre-1922 judicial gloss on section 5 indicates that the FTC Act was intended to stop trade restraints and other undesirable methods of competition in their incipiency."[58] The opinion further noted that "[i]t is reasonable to assume that the framers of section 316 [1922 predecessor of section 337] were cognizant of the legislative and judicial history of section 5 of the FTC Act and the 'tendency' language was provided in section 316 to make explicit the incipiency doctrine implicit in that section."[59]

As antitrust commentators have argued, however, the use of incipiency theories can have anticompetitive consequences when applied in conjunction with exclusionary practices.[60] The use of an incipiency theory necessarily requires extrapolation from the trends discernable to the fact-finder. A finding of an incipient lessening of competition assumes that the court or

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58. In the Matter of Certain Welded Stainless Steel Pipe and Tube, Inv. No. 337–TA–29, 38 (1978).

59. *Id.* at 38–39.

60. *See* W. BOWAN, JR., PATENT AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL 60–61 (1973).

agency has been able to distinguish between aggressive competition and a predatory intent "to impose greater costs on rivals."[61]

2. Prevention of establishment of an industry.

Relief under § 337 will also be granted if the complained-of import was preventing the establishment of an industry. The ITC addressed the interpretation of this phrase for the first time in the context of § 337 in a recent investigation:[62]

> [T]he prevention clause of section 337 protects two categories of parties: (1) parties which have just begun manufacturing operations and for which section 337 violations would have the effect or tendency of frustrating efforts to stablilize such operations; and (2) parties 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.

The ITC's interpretation protects infant industries as well as those persons with a commitment to commence production in the United States. Among the activities which might evidence a commitment are product engineering studies, patent applications, marketing surveys indicating an adequate demand, and pricing studies suggesting that the products could be sold at reasonable prices, *i.e.*, providing a reasonable return on the investment.

An examination of the legislative history of this language indicates that the origin of the "prevented from being established" language is the Revenue Act of 1916,[63] the first congressional attempt to cope with the post-war threat of German chemical cartels re-establishing U.S. markets by underselling the "infant" U.S. coal-tar dyestuffs industry. The U.S. industry had experienced tremendous growth during the embargo of German products. The difficulties with proving intent under this statute led to the passage of the recently repealed Antidumping Act of 1921, which also contained the prevention

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61. *Id.* at 61.
62. Ultra-Microtome Freezing Attachments, Inv. No. 337-TA-10, 10 (1976).
63. Ch. 463, § 801, 39 Stat. 798 (1916); 15 U.S.C. § 72 (1916).

language.[64] The legislative history of § 316 of the 1922 Act, § 337's predecessor, indicates that it was also intended to protect the U.S. coal-tar dyestuffs industry.[65]

3. Restraint or monopolization of trade and commerce in the United States.

Finally, relief under § 337 may be granted if the complained-of import and the alleged unfair trade practice causes a restraint of U.S. trade and commerce. Although several antitrust-like investigations have been conducted by the Commission since the mid-1960s,[66] only one such investigation — *Certain Welded Stainless Steel Pipe and Tube* — resulted in the issuance of a remedial order.[67]

Other investigations have been significant in terms of ITC policy. In an *Electronic Audio Equipment*, the Commission announced the incorporation by reference of the existing state of the antitrust laws for the purpose of determining legal precedent.[68] In *Certain Angolan Robusta Coffee*, the ITC investigative staff took the position that exclusion orders were inappropriate as a remedy in antitrust proceedings because such action could result in more

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64. A colloquy between Senator Simmons and the Chief of the Bureau of Ordinance, Navy Department, indicated that the provision of the 1921 act was also intended to protect this industry:

Admiral Earl:	The only way to get distillation of by-products, and so forth . . . and increase production in this country, is by protecting the dye industry.
Senator Simmons:	In connection with your use of the work, "protecting" you mean by permitting the industry to become established."
Admiral Earl:	Yes sir.
Senator Simmons:	I like that very much better.

Tariff Hearings Before the Committee on Finance, 66th Cong., 1st Sess. 14 (1920).

65. *See supra* note 43, 59–60.

66. *See*, Watches, Watch Movements and Watch Parts, T.C. Pub. 177 (June 1966); Tractor Parts, T.C. Pub. 401 (June 1971) and T.C. Pub. 443 (Dec. 1971); Certain High Fidelty Audio and Related Equipment, Notice and Order of Termination, 41 F.R. 9010 (March 2, 1976); Certain Angolan Robusta Coffee, Notice and Order of Termination, 41 F.R. 13418 (March 30, 1976); Certain Electronic Audio and Related Equipment, U.S.I.T.C. Pub. 768 (April 1976); Chicory Root: Crude and Prepared, U.S.I.T.C. Memorandum Opinion (Oct. 1, 1976).

67. In that investigation, a plurality of commissioners found a tendency to restrain U.S. trade and commerce in exclusionary pricing practices which resulted in substantially reducing the U.S. market share of the foreign competitors of respondent firms. *See supra* note 38, at 31. *See also supra* note 27.

68. Certain Electronic Audio and Related Equipment, Inv. No. 337-TA-7, 31 (April 1976).

harm to competition than an alleged violation of the statute.[69] As a variety of factual situations confront the agency, additional policies will be drawn and enforcement standards articulated.

COMMISSION INVESTIGATIONS

Initiation of Investigations

As instructed by § 337 (b)(1) an investigation is normally initiated with the filing of a complaint with the agency.[70] To be "properly filed" within the meaning of the ITC's rules, a complaint must aver an unfair trade practice as well as plead both specific types of detailed information and transmit certain documentary information[71] to the agency. Upon receipt of a complaint, the matter is referred to the ITC's investigative staff, the Unfair Imports Investigation Division. This office advises the ITC on the sufficiency of the complaint's compliance with the rules[72] and becomes a party for the purpose of representing the public interest in each initiated investigation.[73] The Division's functions are investigative and prosecutional in nature and are separate from those offices in the agency which advise the Commission.[74]

The ITC has interpreted § 337(b) and the pertinent legislative history[75] to direct the institution of an investigation after receipt of a properly filed complaint which alleges matters within the jurisdiction of the statute. Among the statutory references which appear to discourage the avoidance of exercising such jurisdiction are: a) subsection (a) which provides that unfair methods of competition and unfair acts are "to be dealt with, in addition to any other provision of law, as provided in [section 337]"; b) subsection (b)(1) which states that the ITC shall investigate any alleged violation of § 337 on complaint or upon its initiative; and c) subsection (c) which states that the

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69. Brief of the Commission, Inv. No. 337–TA–16, 3 n. 1, *citing* LaRue, *Section 337 of the 1930 Tariff Act and its Section 5 FTC Act Counterpart*, 43 ANTITRUST L.J. 608 (1975). *Contra*, Tractor Parts, U.S.I.T.C., Pub. L. No. 401 (1971).

70. 19 C.F.R. 210.10(a). (1979).

71. In patent-based complaints, detailed information is required. 19 C.F.R. 210.20 (1979). In preparing a patent-based complaint regarding patent infringement from imported merchandise, the owner of a U.S. patent may apply for an import survey by the Customs Service. The survey provides the names and addresses of the importers of merchandise which appear to infringe the patent. 19 C.F.R. 12.39a(a). The procedures for applying for the import survey are set out in 19 C.F.R. 12.39(b). Import surveys can be made for two, four or six months at the option of the patent-owner applicant. 19 C.F.R. 12.39(c).

72. 19 C.F.R. 210.11(a).

73. 19 C.F.R. 210.4(b).

74. *U.S.I.T.C. Policy Manual*, Part 1, Ch. 4, subchap. 8.

75. *See supra* note 15, at 194.

Commission shall determine, with respect to each investigation conducted under § 337, whether or not there is a violation of the statute.[76]

The ITC may institute an investigation under § 337 on its own motion.[77] As of the date of this writing, the ITC has not instituted any formal section 337 investigations on its own initiative. The Unfair Imports Investigation Division has, however, conducted preliminary investigations under the authority of § 603 of the Trade Act of 1974 and has projects in process that may result in formal investigations.[78]

The Unfair Imports Investigation Division must perform its investigative responsibilities within its limited resources; it is impossible to prosecute all § 337 violations. If the ITC's informal preliminary inquiries are any guide, the prosecutorial function of the Division will probably be exercised in three areas: a) cases in which the complainant's resources to prosecute a complaint are limited; b) cases where the magnitude of import trade involved indicates that possible violations are serious and/or continuous; and c) cases which establish the jurisdiction of the agency in new areas of import regulation.

The regulatory function is a new responsibility for the ITC. Experience with the administration of the statute and case law of precedents should clarify standards for the enforcement of § 337. Although adjudication is necessary to the enforcement of § 337, the promulgation of substantive rules and experimentation with an advisory rulings system would help to establish

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76. This approach to the institution of investigations does not preclude preemptory motions. For example, motions to dismiss for lack of jurisdiction have been entertained after the institution of an investigation in situations in which the facts upon which the motion was based may have been known to both the ITC and the parties prior to the initiation of the investigation. *See* Welded Stainless Steel Pipe and Tube, *supra* note 38. Moreover, in complaint of Snytex Agribusiness, Inc., regarding Calcium Pantothenate from Japan (filed June 1, 1979) and Complaint of Superior Coal Co., *et al.* regarding Coke from West Germany (filed January 15, 1979), in which institution of an investigation could have resulted in the exercise of a presidential disapproval of a Commission order for the same reasons that were articulated in the Stainless Steel Pipe and Tube matter, the ITC did not institute an investigation in response to an otherwise properly filed complaint.

77. 19 C.F.R. 210.10(b).

78. Subsections (a) and (b) of § 603 of the 1974 act provide:

(a) In order to expedite the performance of its functions under this Act, the International Trade Commission may conduct preliminary investigations, determine the scope and manner of its proceedings, and consolidate proceedings before it.

(b) In performing its functions under this Act, the Commission may exercise any authority granted to it under any other Act.

an enforcement policy.[79] Finally, pre-prosecution procedures could be farther developed which use consent decrees and compliance audits to avoid the heavy burdens of litigation on both the ITC and potential § 337 parties. The use of a consent order in lieu of initiating a § 337 investigation was employed for the first time in the recent consideration of *Certain Replica Black Powder Firearms*.[80]

The ITC's regulations require that notices be issued when an investigation is initiated. A notice to this effect is published in the Federal Register and press releases are issued, as with most official agency action. ITC notices and press releases are not used to sanction or threaten.[81] Rather, notices concerning the institution of either a formal preliminary investigation or an investigation under § 337 merely reflects the policy to inform the public of the alleged existence of unfair trade practices.

Adjudicative phase of an investigation.

After the initiation of an investigation, the case is referred to a presiding officer which, in most cases, is an administrative law judge. On occasion, a commissioner has functioned as a presiding officer. The role of the presiding officer is to render a recommended decision on the question of whether the evidence supports a finding that that statute has been violated.[82] Between the time a case is referred to a presiding officer and the time the recommended determination is made, the presiding officer controls the prehearing aspects

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79. *See* Easton and Laing, *supra* note 3, at 371. The first proposal for substantive regulations received by the Commission was in the form of a petition concerning deceptive practices in the marketing of imported steel wire rope. *See* petition of the Committee of Domestic Steel Wire Rope and Speciality Cable Manufacturers (filed February 9, 1979).

80. *See* Notice of Issuance of Consent Order and Termination of Investigation, No. 603–TA–4. Certain Replica Black Powder Firearms, 43 F.F. 60673 (1973). For discussion on the I.T.C.'s use of consent decrees, *see* p. 224 *infra*.

81. Some commentators have expressed concern that adverse publicity might cause consumers to shift purchases from imports subject to investigation. *See* Rosenthal and Sheldon, *Section 337: A View From Two Within the Department of Justice*, 8 GA. J. OF INT'L AND COMP. L. 47, 59 (1978); and Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 *Harv. L. Rev.* 1380 (1973). In those cases instituted on the basis of a complaint, the ITC rules provide for a thirty day period between the receipt of the complaint and the institution of an investigation. 19 C.F.R. 210.11. During this time, the conducts informal Unfair Import Investigation Division inquiries to determine that a cause of action exists.

82. 19 C.F.R. 210.53(a). The termination of an investigation is handled as a recommended determination. 19 C.F.R. 210.51(c).

of the investigation, presides over an on-the-record evidentiary hearing and receives posthearing motions.[83]

Of particular significance to the authority of the presiding officer to control discovery in the pre-hearing phase of an investigation is his or her authority to issue orders to compel discovery and to issue sanctions for failure to comply with the discovery order which include but are not limited to the following:

> 1. Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;
>
> 2. Rule that for the purposes of the investigation the matter or matters concerning the order or subpoena issued be taken as established adversely to the party;
>
> 3. Rule that the party may not introduce into evidence or otherwise rely upon testimony by the party, officer, or agent, or documents or other material, in support of his position in the investigation;
>
> 4. Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown; or
>
> 5. Rule that a motion or other submission by the party concerning the order or subpoena issued be stricken, or that a determination in the investigation be rendered against the party, or both.[84]

The severely limited time frame and the frequency with which a presiding officer is involved in resolving discovery disputes may lead to the adoption of a policy of deterrence for violations of discovery orders to ensure both the efficient administration of the statute and to prevent unfair consequences which prejudice the interests of the innocent parties.[85]

The evidentiary hearing is similar to a trial. Witnesses testify and exhibits are sponsored for admission. Hearings before the presiding officer are to be completed within seven months of the date of Federal Register publication of notice of the institution of the investigation.[86] In cases where temporary relief is sought during the course of an investigation, a complete

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83. 19 C.F.R. 210.30(c). During the time that an investigation is before a presiding officer, all motions are addressed to such officer. 19 C.F.R. 210.24(a).

84. 19 C.F.R. 210.36.

85. *See* Welded Stainless Steel Pipe and Tube Investigation, *supra* note 38, at 4–6. *See The Emerging Deterence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1044–55 (1978).

86. 19 C.F.R. 210.41(e).

trial-type hearing is required on the question of whether there is a "reason to believe" the statute is being violated. The burden of establishing either the "reason to believe" or "violation" standards is on the complainant or, in case of an investigation initiated by the Commission on its own motion, the Commission's Unfair Imports Investigation Division.[87] The presiding officer may also consider two types of issues in an interlocutory manner. The presiding officer relies on issues which would alter the "scope" of an investigation such as a change in the formal notice of investigation or the addition or deletion of parties to the proceeding.[88] The presiding officer may also permit the interlocutory appeal of any ruling which raises a question of "law or policy."[89]

Legislative Phase of an Investigation

The ITC's rules provide for the filing of exceptions from the recommended determination of a presiding officer.[90] In addition, the ITC is required to consider the effect of a proposed remedy — a cease and desist order or an exclusion order, whether final or provisional, including statutory bonding requirements — 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."[91] In connection with these inquiries, § 337(b)(2) mandates that the ITC consult with the Department of Health and Human Resources, the Department of Justice, the Federal Trade Commission and any other departments or agencies which may have pertinent information.

Upon receipt of the recommended determination of a presiding officer, the administrative practice of the ITC has been to publish a notice in the Federal Register establishing a schedule for a) oral argument on the subject of the exceptions to the recommended determination and b) oral presentations concerning the remedy, bonding and public interest considerations. The notice also provides for a pre-hearing briefing schedule for the parties and solicits the written views of any persons interested in the investigation.[92] A

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87. 5 U.S.C. 556(d) (1970).
88. *See* 19 C.F.R. 210–24.
89. *Id.*
90. 19 C.F.R. 210–54.
91. Subsection 337(d)–(f) of the Trade Act of 1974. *See* appendix p. 236 *infra*.
92. *See, e.g.*, Notice and Order Concerning Procedure for Commission Action In the Matter of Certain Exercising Devices, Inv. No. 337–TA–24, 42 F.R. 12932 (March 7, 1977). This notice established a schedule for oral argument on exceptions to the recommended determination and oral presentations concerning relief, bonding and public in-

transcript is made of the oral arguments and oral presentations which, together with the briefs and other written comments, comprise an administrative record for this phase of the investigation.

The ITC is not bound by an evidentiary standard in making its determinations with regard to the choice of remedy, amount of the bond or the public interest factors although it must take the administrative record into account.[93]

Statutory time limitations

Section 337 provides for faster determinations than federal or state court litigation. Section 337(b)(1), in relevant part, provides that "[t]he Commission shall conclude any such investigation, and make its determination under this section, at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication of such notice of investigation." The statutory time limits for the disposition of investigations conducted under § 337 requires that hearings be completed within seven months of the date the notice instituting an investigation is published.[94] This requirement is very important in the litigation of individual cases. For instance, discovery schedules are much shorter than those provided for in the Federal Rules of Civil Procedure.[95] Further pressure is placed on the parties in a § 337 proceeding by the statutory requirement that the ITC consider all legal and equitable defenses in all cases.[96] This presents the possibility that even uncomplicated patent-based complaints will result in full-scale investigations of antitrust issues raised in defense of respondents.

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terest factors. The notice allocated time for such oral presentations, ordered the complainant to file a proposed remedial order, established a schedule for the filing of written statements with their service, and ordered the ITC's Unfair Imports Investigation Division to file and serve a report on the public interest factors.

93. In a challenge to the Commission's public interest determination not to impose a remedy even though the statute had been violated, appellant argued that cross-examination ought to be afforded participants in this phase of an investigation. Landis Tool Division of Litton Industrial Products, Inc. v. The U. S. International Trade Commission, 614 F.2d 766 (C.C.P.A., 1980).

94. 19 C.F.R. 210–15.

95. Depositions in the United States require 10 days notice to other parties. 19 C.F.R. 210.31(c). Interrogatories must be answered within 10 days or objections filed within 10 days. 19 C.F.R. 210–32(b)(2). Parties are allowed 10 days to respond to requests for the production of documents. 19 C.F.R. 210.33. With respect to request for admissions, the matter may be deemed to be admitted unless a sworn, written answer or objection is filed within 10 days. 19 C.F.R. 210.34(b).

96. Subsection 337(c) of the Trade Act of 1974. *See* appendix p. 236 *infra*.

Although the statute provides that the agency may extend the one-year deadline to eighteen months if it determines that the case is a "more complicated one," the ITC has no other authority to extend these deadlines. Normally the ITC issues determinations in accordance with these deadlines in its administration of § 337 investigations. The provisions raise, however, the question of what action would be available to a participant if the agency did not act within the prescribed time limits and whether any agency action taken after the expiration of the statutory time limits was valid. It would appear that the failure of the statute to provide for any consequences in the event that ITC action was taken after the expiration of the statutory period may be interpreted to mean that the time limits are directory rather than mandatory.[97] A conclusion that the time limits were mandatory could result in penalizing private parties.[98]

REMEDIES

Consent Decrees

The Commission is now considering the adoption of procedural rules concerning the use of consent decrees in § 337 cases. On January 20, 1978, the ITC published for comment proposed amendments and additions to the Commission's rules (19 C.F.R. 210 and 211).[99] Although final rules have yet to be adopted, several issues have already emerged as controversial. Comments concerning the rulemaking procedure have emphasized that the ITC prevent collusive activities between complainants and respondents in the negotiation of such orders. The possibility of settlements which fix prices or allocate markets at the expense of U.S. consumers is always present in the settlement of unfair competition cases.[100] One proposal to protect the public interest is to require that the ITC's Unfair Imports Investigation Division agree to any consent order arrangement before it is submitted to the Commission for agency approval.

An issue which appears to have been resolved is whether consent orders which have been approved by the Commission will be submitted to the president for possible disapproval. In August 1977, the Commission issued its first consent order in the investigation concerning *Certain Color Television Receiving Sets*. The ITC vote on whether to submit the orders for presidential

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97. *See* Ft. Worth Nat. Corp. v. Federal Savings and Loan Corp., 469 F.2d 47 (5th Cir. 1972).

98. *See* Report Prepared for the Administrative Conference of the United States on *The Experience of Various Agencies with Statutory Time Limits Applicable to Licensing or Clearance Functions and to Rulemaking* 24 (April 1978).

99. 43 F.R. 288 3 (1978).

100. *See* Rosenthal and Sheldon, *supra* note 81, at 61.

review was evenly divided and the orders were not submitted to the president. In a transmittal letter informing the Executive branch of this action, the then ITC Chairman stated that the action in that case should not be interpreted as precedent for further investigations.[101] When the proposed rules were published in the Federal Register, the provisions pertaining to the transmittal of consent orders to the president were enclosed in brackets to indicate that the Commission had not adopted a position on the issue. The comments received by the Commission from representatives of importing interests unanimously advised that such transmittal be made to the president. The termination of a Commission action by consent decrees with reporting obligations may have the same impact on U.S. foreign economic relations as a final affirmative determination on the merits. Nonetheless, all consent orders issued subsequent to those in *Color Televisions* have been submitted to the president for review.[102]

Parties entering into consent orders should be aware that major changes in circumstances may lead to a modification of the consent order without the need for further consent on the part of those parties. The proposed rules provide for modification or revocation of consent orders "in the same way as it provided in section 337 and parts 210 and 211 for other Commission action, upon becoming final."[103] Such modification finds support in case law. For instance, the Supreme Court has stated that: "the test to be applied . . . is whether the change served to effectuate or to thwart the basic purpose of the original consent decree."[104] The Commission may want to use this power sparingly in order to avoid discouraging parties from entering into consent agreements.

The adoption of consent order rules by the ITC should provide a framework for remedial actions that will avoid the time and expense of a full § 337 investigation. Experience with consent decrees at the Federal Trade Commission has shown the usefulness of such procedures. As long as the public interest is protected, consent order agreements should provide added flexibility to § 337 cases.

Provisional measures

After an investigation has been instituted, the ITC has been given certain powers to temporarily exclude goods, pending a final determination, in order to prevent abuses by importers who could otherwise flood the

101. Letter to the Honorable Robert S. Strauss, (former) Special Representative for Trade Negotiations (July 29, 1977).

102. *See* Certain Replica Black Powder Firearms, *supra* note 80.

103. Proposed 19 C.F.R. 210.15(b). *See supra* note 99.

104. Chrysler Corp. v. United States, 316 U.S. 556, 562 (1942).

American market with their products in anticipation of a permanent exclusion order. Under § 337(e) the standard to be applied by the Commission is as follows:

> 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 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 in the United States. . . .

Section 337(e) also lists the so-called "public interest" factors which may prevent the Commission from ordering a temporary exclusion order (TEO).[105]

A temporary exclusion order may be lifted if a bond is paid. As provided by § 337(e), the setting of the bond is an ITC determination. Before the Trade Act of 1974, the amount of the bond was set by the Secretary of the Treasury who, by regulation, had provided that a full value bond was to be posted.[106] The ITC has not to date adopted regulations on the determination of an appropriate level of bonding. The Senate Finance Committee stated a criterion to be used in determining the level of bonding: "In determining the amount of bond, the Commission shall determine, to the extent possible, the amount which would offset any competitive advantage resulting from the unfair method of competition or unfair act enjoyed by persons benefiting from the importation of the article."[107]

The factors that the ITC will examine in determining whether to grant a temporary exclusion order have recently been enumerated in *Certain Luggage Products*.[108] In that case, the ITC stated that "a TEO is an extraordinary measure and should only be issued in the most compelling of circumstances." [Several factors weighed against the issuance of a TEO except in the most extraordinary cases.] The initial hearing in a TEO case must be held within three months, thus interfering with discovery and lengthening the determination process; an ITC ruling is usually not made until the sixth or seventh month of an investigation and most final determinations are made within twelve months. In addition, the TEO places a burden on the resources of the Commission.

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105. For discussion on the public interest considerations, *see* p. 231 *infra*.

106. 19 C.F.R. 12.39(b), 133.14(2).

107. *See supra* note 15, at 198.

108. *See* In re Certain Luggage Products, Inv. No. 337-TA-39, 43 F.R. 35401 (1978).

Prior to *Certain Luggage Products,* the ITC had only addressed the issue of whether temporary relief should be granted on one occasion. The majority in *Certain Luggage Products* believed that the standards announced were consistent with the TEO standards previously stated in an earlier case concerning *Chicory Root.*[109] In determining whether there is "reason to believe" that a violation of the statute exists, the ITC must weigh the evidence "to determine whether there is a preponderance of the evidence in support of the allegations."[110] This evidentiary standard is higher than that contemplated by the Senate Finance Committee in its report on the bill which became the Trade Act of 1974.[111] The "reason to believe" inquiry in *Certain Luggage Products,* a patent case, focused on whether there was reason to believe the patent was valid, whether the patent was infringed, and whether there was injury to the domestic industry.

Having determined that there was "reason to believe" a violation of the statute existed, the ITC is to then focus on the discretionary factors in granting a TEO. The equitable principles involved in this portion of the analysis are similar to those involved in granting preliminary injunctive relief. Specifically, the ITC cited the factors found in *Virginia Petroleum Jobbers v. F.P.C.*:[112]

1. the likelihood of success on the merits;
2. the certainty of irreparable injury;
3. the likelihood of harm to other parties of interest if relief is granted; and
4. the public interest.

In the context of a § 337(e) temporary exclusion order, the second and third factors were viewed as particularly important.[113]

Although the practitioner representing the complainant may desire a TEO, the limited time period for which the TEO would be effective in combination with the time taken from discovery may make the effort a very costly endeavor. The high standards enunciated by the ITC probably make the effort worthwhile only in cases of extreme peril for the domestic industry or where a complainant does not need discovery.

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109. *See supra* note 66.
110. *See supra* note 108, at 43 F.R. 35402.
111. *See supra* note 15, at 197–98.
112. 259 F.2d 921, 925 (D.C. Cir. 1958).
113. *See supra* note 108, at 43 F.R. 35401–02.

Exclusion Orders

Section 337(d) provides that:

> 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.

An absolute bar on the importation of certain goods violating § 337(a) may be ordered under § 337(d). Such a remedy "shall" be ordered unless the ITC determines, based on the so-called "public interest factors" in the statute,[114] that such articles should not be excluded from entry or that a cease and desist order is a more appropriate remedy.[115]

During an investigation, the articles allegedly being imported in violation of § 337 are identified by their classification in the Tariff Schedules of the United States (TSUS). Exclusion orders are policed by the U.S. Customs Service. In cases in which the ITC's final exclusion order takes effect, bond obligors would have the option of: a) arranging a "spot" license with the complainants; b) reexporting the offending merchandise to a foreign country; or c) destroying the merchandise under the supervision of Customs officials.[116]

Cease and desist orders

The ITC is authorized under § 337(f) to issue cease and desist orders "in lieu of" exclusion orders after considering the same "public interest" factors considered before issuing an exclusion order under § 337(d).[117] Again as stated in § 337(f), the Commission is given broad powers to deal with changed circumstances: "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."

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114. *See* p. 231 *infra* for a discussion on the public interest factors.
115. *See* p. 228 *infra* for a discussion on cease and desist orders.
116. 19 C.F.R. 12.39.
117. For a discussion on the public interest factors, *see* p. 231 *infra*.

The specific terms of a Commission cease and desist order will of course vary from case to case. The effectiveness of such orders as remedies from a complainant's viewpoint may be dependent on the diligence of the Commission staff and the complainant's own diligence in monitoring compliance with the order. The proposed enforcement rules for the ITC would make use of the powers of the Commission under § 337(f) to obtain reports, modify information requirements and institute compliance investigations.[118] Included in the proposed Commission rules is a provision which would permit the ITC to immediately order the exclusion of complained-of imports or the modification of a cease and desist order pending enforcement proceedings.[119]

As provided by § 337(f), the consequences of a violation of a cease and desist order may be the issuance of a civil fine or exclusion order. The ITC can recover a fine for violation of the greater of $10,000 on each day of violation or the domestic value of the articles imported or sold in violation of the order.[120] As to the imposition of an exclusion order, the Commission could act rapidly since a determination of a violation has already been made. The harsh nature of an exclusion order explains why the ITC was given authority to impose more flexible remedies under the Trade Act of 1974. As expressed in the report of the Senate Finance Committee on the 1974 Act:

> It is clear to [the] committee that the existing statute, which provides no remedy other than exclusion of articles from entry, is so extreme or inappropriate in some cases that it is often likely to result in the Commission not finding a violation of this section, thus reducing the effectiveness of section 337 for the purposes intended."[121]

Although the ITC has issued both product exclusion and cease and desist orders, it has not issued both types of orders in the same case. In a recent investigation concerning *Doxycycline*, the commissioners were divided on the appropriateness of excluding unlicensed imports not yet withdrawn from customs and regulating the domestic sale of inventoried articles with the cease and desist authority.[122]

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118. For a discussion on administrative enforcement, *see* p. 230 *infra*.
119. Proposed 19 C.F.R. 211.57. *See* 43 F.R. 2883 (1978).
120. *See* appendix p. 236 *infra*.
121. *See supra* note 15, at 198.
122. Inv. No. 337-TA-3 (1979).

Administrative Enforcement

The January 20, 1978 rules published for comment in 43 F.R. 2883 provide for administrative remedies for enforcement of both cease and desist and consent orders. Under these proposed rules, after receipt of a complaint alleging a violation of a final Commission action, the ITC will undertake an enforcement proceeding to determine if the cease and desist order to consent order should be modified or revoked. The enforcement proceedings may also lead to exclusion of the article being ordered.[123] Section 337 authorizes the Commission to "modify" cease and desist orders or to revoke the order and impose an exclusion order.[124] A corollary of this power is the ITC's authority to lift an exclusion order under § 337(h), which provides:

> Except as provided in subsections (f) and (g), any exclusion from entry or order under this section shall continue in effect until the Commission finds, and in the case of exclusion from entry notifies the Secretary of the Treasury that the conditions which led to such exclusion from entry or order no longer exist.

These provisions give the ITC a great deal of flexibility in dealing with changes in circumstances. Whether that flexibility is to be somewhat limited by a requirement for presidential review is still undecided. As with the issue of submission of consent orders to the president for possible disapproval, there is a strong argument that the congressional intent behind § 337(g)(1), which applies to affirmative "determinations," also compels the submission for Executive branch review of an exclusion order used to enforce a cease and desist order.

The degree of due process safeguards that should be provided in enforcement hearings under the proposed rules is a controversial subject. Traditionally, there has been no vested right in the importation of goods into the United States.[125] Thus, § 337 cases have not been brought within the substantive constitutional requirement of due process under the Fifth Amendment. The proposed rules do not contain any requirement that public hearings be held which would provide a right for parties to appear and be heard. If required hearings are adopted for all enforcement proceedings in the ITC's final rules, the decision may reflect the judgment that such hearings

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123. Proposed 19 C.F.R. 211.55. *See* 43 F.R. 2883 (1978).

124. 19 U.S.C. 1337(f) (1979).

125. *See supra* note 38, at 6–7. *See also* Buttfield v. Stranaham, 192 U.S. 470 (1964), and the Board of Trustees of the University of Illinois v. United States, 289 U.S. 48 (1933).

can result in more effective fact-finding rather than a belief that such hearings are required by constitutional due process.

The administrative enforcement powers available to the ITC under § 337 give it an important weapon to deter the violation of cease and desist or consent orders. The ITC need not wait until another full investigation is completed or until a court acts. It may act immediately to prevent the subject goods from entering the United States. The ITC may also lift an exclusion order under § 337(h) if it finds that conditions have changed. The degree of flexibility provided in § 337(h) allows the Commission to lift an exclusion order when changed circumstances have resulted in such an order being harmful to competition.

Section 337 Bonds

Subsection 337(g)(3) provides that, during the sixty-day period provided for presidential review, the ITC may permit entry into the United States of articles it had determined to be violative of the statute. No standards for the amount of bond are provided in the law. The Senate Finance Committee report on the 1974 amendments suggests that the bond be set at a level sufficient to "offset any competitive advantage resulting from the unfair method of competition or unfair act enjoyed by the persons benefiting from the importation."[126] This standard is relatively easy to implement in patent-based cases where the patent owner is legally entitled to a monopoly. The competitive positions of the licensed and violating articles are made equivalent by establishing the bond at an amount which raises the wholesale price of the imported infringing article to at least that of the patented article.[127] There are no such formulae for applying a bond in cases in which cease and desist orders are issued. Moreover, it is difficult to justify establishing any bond in such circumstances.

Public interest considerations.[128]

Even where the Commission finds a violation of § 337, it may decline to issue a remedy if it also finds that certain "public interest" factors do not warrant an effective remedy. The "public interest" factors set out in § 337(d)–(f) are:

1) the effect of an order upon the public health and welfare;
2) the effect on competitive conditions in the U.S. economy;

126. *See supra* note 15, at 198.

127. *See, e.g.*, Certain Flexible Foam Sandals, Inv. No. 337–TA–47, 10 (February 1979).

128. *See supra* at p. 218.

3) the effect on production of like or directly competitive articles in the United States; and

4) the effect on U.S. consumers.

The "public interest" considerations are also the rationale for requiring the ITC under § 337(b)(2) to consult and seek advice and information from the Department of Health and Human Resources, the Department of Justice, the Federal Trade Commission, and other departments it considers appropriate. The Senate Finance Committee made clear 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."[129] The Senate Finance Committee believed that the order should not be issued if the benefit of granting relief to the complainant was not greater than the adverse affect upon the public interest.[130]

Hypothetically, an appropriate cease and desist order might have consequences more anticompetitive than the violative behavior. In this situation, the ITC is authorized to issue no remedy. Recently, in the case of *Certain Automatic Crankpin Grinders*,[131] the Commission for the first time declined to impose a remedy, after finding a violation, on the basis of public interest factors. In that case, the Commission believed that the domestic industry could not supply the demand for orders of the product in question within a commercially reasonable time and that the imposition of a remedy would hamper the production of energy efficient automobiles by domestic automobile manufacturers.

REFERRAL TO THE PRESIDENT

Section 337(g) requires that the Commission's determination that the Act has been violated be submitted to the president, accompanied by the administrative record and the remedy ordered. Only affirmative determinations are required to be referred to the President. These determinations include both the "reason to believe" determination for temporary exclusion orders and the final determination of violation. As provided in subsection (2), the president then has sixty days within which to disapprove the determination "for policy reasons." Commission orders are effective immediately, pending presidential review. If the President does not disapprove the

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129. *See supra* note 15, at 197.

130. The Committee stated: "This would be particularly true in cases where there is any evidence of price gouging or monopolistic practices in the domestic industry." *See supra* note 15, at 197. The concept of price gouging was deleted by the Conference Committee. SEE H.R. REP. NO. 93-1644, 93d Cong., 2d Sess. 46 (1974).

131. Inv. No. 337-TA-60 (December 1979).

determination within the sixty day period or if he notifies the Commission that he approves of the determination, the determination shall become final.[132] In § 337 cases, it appears certain that the president *must* act within sixty days. If he does not, the ITC's orders will take effect.

Section 337(g)(2) provides that presidential disapproval of the ITC's determination may only be for "policy reasons." A recent presidential disapproval of a Commission determination in the *Welded Stainless Steel Pipe and Tube*[133] investigation raised the issue of what properly constitutes "policy reasons" for the purposes of the statute. The President cited four policy reasons for his disapproval of the ITC order:

> 1. the detrimental effect of the remedy on the national economic interest;
>
> 2. the detrimental effect of the remedy on the international economic relations of the United States;
>
> 3. the need to avoid duplication and conflicts in the administration of unfair trade practices law of the United States; and
>
> 4. the probable lack of significant benefit to U.S. producers or consumers to counterbalance the first three considerations.[134]

In a letter to the Executive branch, the ITC's General Counsel explained his Office's understanding of the proper scope of Presidential review: "the jurisdictional interpretation of section 337 is not a matter which is appropriate for Presidential review since, as already indicated the Commission, not the President, is charged with finding violations of the statute."[135] The "policy reasons" that may form the basis of a disapproval are those which are examined by the ITC in the first instance. These "policy reasons" are the "public interest" factors found in § 337(d)–(f), namely, the impact on 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." The paramount "policy reason" in the view of the ITC's Office of the General Counsel is the possible impact of a Commission order "on United States foreign relations, economic and political."

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132. Subsection (g)(4) of the Trade Act of 1974. *See* appendix p. 236 *infra*.

133. *See* 43 F.R. 17789 (1978).

134. *Id.* at 17789–90.

135. Letter from the General Counsel USITC to Chairman, Section 337 Subcommittee, Trade Policy Staff Committee, Office of the Special Representative for Trade Negotiations (April 7, 1978).

The factors set forth in the letter as those appropriate for presidential review are also supported by the legislative history of the Trade Act of 1974. The Senate Finance Committee report states that the president may "often be able to best see the impact the relief ordered" would have on the public interest factors.[136] There is no doubt, however, that the President has a great deal of discretion for disapproving those decisions he does not favor.

JUDICIAL REVIEW

Court of Customs and Patent Appeals (C.C.P.A.)

Section 337(c) provides for review of final determinations by the C.C.P.A. which "shall have jurisdiction to review such determination[s] in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Customs Court." The Senate Finance Committee defined "final determinations" in the following manner:

> By final determination, as used in this section, the Committee means a Commission determination which has been referred to the President under amended section (g) of section 337 and has been approved by the President or has not been disapproved for policy reasons by the President within the 60 day period after referral of the determination.[137]

The standard of review used by the C.C.P.A. when reviewing § 337 determinations is an issue about which initial doubts may have been resolved. Two recent cases have dealt with the problem — *Coleco Industries Co., Inc. v. United States International Trade Commission,*[138] and *Solder Removal Co. v. U.S. International Trade Commission.*[139] In *Coleco,* the C.C.P.A. suggested that it would review the ITC's record in a plenary fashion and would not be bound to follow any Commission findings. In *Solder Removal,* the C.C.P.A. appears, however, to have adopted the "weight of the evidence" standard as the standard to be applied in review of § 337 determinations. The Court focused on the language in § 337(c) which subjects

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136. *See supra* note 15, at 199.

137. *Id.* at 197. *See also* Import. Motors Ltd. v. U.S. International Trade Commission, 530 F.2d 940 (C.C.P.A. 1976) and FMC Corp. v. U.S. International Trade Commission, C.C.P.A., Appeal No. 80–6 (filed November 7, 1979). There is a strong argument that the Court of Customs and Patent Appeals' jurisdiction over the I.T.C.'s "final determinations" makes the court the proper forum for the review of compliance disputes concerning cease and desist or consent orders. This jurisdiction has not yet been tested.

138. 573 F.2d 1247 (C.C.P.A. 1978).

139. Civ. Appeal No. 77–25 (C.C.P.A. 1978).

ITC determinations on review to the same limitations and conditions as in the case of appeals from decisions of the U.S. Customs Court.

The possible res judicata and collateral estoppel effects of ITC determinations were of concern to the Congress when it passed the Trade Act of 1974. The Senate Finance Committee stated:

> The Commission's findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws in particular factual contexts. Therefore, it seems clear that any disposition of a Commission action by a Federal Court should not have a res judicata or collateral estoppel effect in cases before such courts.[140]

Whether the Finance Committee intended to imply that a C.C.P.A. decision upholding an ITC determination on review would also have no collateral effect is unclear. The better view, however, seems to be that a C.C.P.A. decision cannot be collaterally attacked.[141] If the C.C.P.A. finds an ITC decision to be supported by weight of the evidence, the C.C.P.A. decisions may very well be adopted by the district courts. Indeed, the instruction of the C.C.P.A. requiring the ITC to make a determination on the issue of patent validity in each final determination[142] necessitates that a complainant consider the risk of a finding of patent invalidity by the ITC and, in the case of an appeal, by the C.C.P.A.[143]

CONCLUSION

The Commission recently published revised proposed rules concerning consent orders and the enforcement of § 337 orders.[144] The revised proposed rules reflect both the experiences of the Commission with issuing consent orders and cease and desist orders and the public comments received on the proposed rules published in January 1978.[145] The experience of the Commis-

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140. *See* Kaye and Plaia, *Revitalization of Unfair Trade Courses in the Importation of Goods; An Analysis of the Amendments to Section 337*, 52 J. OF PATENT OFFICE SOC'Y 269, 284–88 (1978).

141. *Id.*

142. *See supra* note 112.

143. Commentators have indicated that the risk may be less than that found by a patent owner in a federal district court. *See* Brunsvold, *Analysis of the United States International Trade Commission as a Forum for Intellectual Property Disputes*, 60 J. OF PATENT OFFICE SOC'Y 505, 526 (1978).

A study of 292 Court of Appeals holdings concerning the validity of challenged U.S. patents between 1967 and 1971 found only 89% of the patents upheld. *See* DUNNER, GAMBRILL AND KAYTON, PATENT LAW PERSPECTIVES, 1971 DEVELOPMENTS 38 (1971).

144. 45 F.R. 24192–24198 (April 9, 1980).

145. *See supra* at 230 for a discussion of administrative enforcement.

sion with consent orders,[146] cease and desist orders,[147] and petitions for advisory opinions[148] indicates that compliance and enforcement considerations will be a principal concern for § 337 jurisdiction in the foreseeable future.

APPENDIX

SEC. 337. UNFAIR PRACTICES IN IMPORT TRADE.

(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.

(b) INVESTIGATIONS OF VIOLATIONS BY COMMISSION; TIME LIMITS. — (1) The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative. Upon commencing any such investigation, the Commission shall publish notice thereof in the Federal Register. The Commission shall conclude any such investigation, and make its determination under this section, at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication of notice of such investigation. The Commission shall publish in the Federal Register its reasons for designating any investigation as a more complicated investigation. For purposes of the one-year and 18-month periods prescribed by this subsection, there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

(2) During the course of each investigation under this section, the Commission shall consult with and seek advice and information from, the department of Health, Education and Welfare, the Department of Justice, the

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146. For a discussion on consent orders, *see supra* at 224.

147. *See* Certain Apparatus for the Continuous Production of Copper Rod, Inv. No. 337–TA–52, issued November 23, 1979.

148. On April 2, 1980, Fried. Krupp Gmbtt and Krupp International, Inc. requested an advisory opinion regarding compliance of the design of a system which it proposes to import and sell in the United States with the cease and desist orders. *See supra* note 147.

Federal Trade Commission, and such other departments and agencies as it considers appropriate.

(3) Whenever, in the course of an investigation under this section, the Commission has reason to believe, based on information before it, that a matter, in whole or in part, may come within the purview of section 303 [701, or 731] or of the Antidumping Act, 1921, [sic] it shall promptly notify the secretary of the Treasury [sic] so that such action may be taken as is otherwise authorized by such section and such Act. If the Commission has reason to believe the matter before it is based solely on alleged acts and effects which are within the purview of section 303, 701, or 731 of this Act, it shall terminate, or not institute, any investigation into the matter. If the Commission has reason to believe the matter before it is based in part on alleged acts and effects which are within the purview of section 303, 701, or 731 of this Act, and in part on alleged acts and effects which may, independently from or in conjunction with those within the purview of such section, establish a basis for relief under this section, then it may institute or continue an investigation into the matter. If the Commission notifies the secretary or the administering authority (as defined in section 771(1) of this Act) with respect to a matter under this paragraph, the Commission may suspend its investigation during the time the matter is before the Secretary or administering authority for final decision. For purposes of computing the 1-year or 18-month periods prescribed by this subsection, there shall be excluded such period of suspension. Any final decision of the Secretary under section 303 of this Act or by the administering authority under section 701 or 731 of this Act with respect to the matter within such section 303, 701, or 731 of which the Commission has notified the Secretary or administering authority shall be conclusive upon the Commission with respect to the issue of less-than-fair-value sales or subsidization and the matters necessary for such decision.

(c) DETERMINATIONS; REVIEW. — The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section. Each determination under subsection (d) or (e) shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5, United States Code. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) may appeal such determination to the United States Court of Customs and Patent Appeals. Such court shall have jurisdiction to review such determination in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Customs Court.

(d) EXCLUSION OF ARTICLES FROM ENTRY. — If the Commission determines, as a result of an investigation under this section, that there is 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.

(e) EXCLUSION OF ARTICLES FROM ENTRY DURING INVESTIGATION EXCEPT UNDER BOND. — 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 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, 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, except that such articles shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary.

(f) CEASE AND DESIST ORDERS. — (1) 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.

(2) Any person who violates an order issued by the Commission under paragraph (1) after it has become final shall forfeit and pay to the United

States a civil penalty for each day on which an importation of articles, or their sale, occurs in violation of the order of not more than the greater of $10,000 or the domestic value of the articles entered or sold on such day in violation of the order. Such penalty shall accrue to the United States and may be recovered for the United States in a civil action brought by the Commission in the Federal District Court for the District of Columbia or for the district in which the violation occurs. In such actions, the United States district courts may issue mandatory injunctions incorporating the relief sought by the Commission as they deem appropriate in the enforcement of such final orders of the Commission.

(g) 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), 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) with respect thereto shall have no force or effect.

(3) Subject to the provisions of paragraph (2), such determination shall, except for purposes of subsection (c), be effective upon publication thereof in the Federal Register, and the action taken under subsection (d), (e), or (f) with respect thereto shall be effective as provided in such subsections, except that articles directed to be excluded from entry under subsection (d) or subject to a cease and desist order under subsection (f) shall be entitled to a cease and desist order under subsection (f) shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary until such determination becomes final.

(4) If the President does not disapprove such determination within such 60-day period, or if he notifies the Commission before the close of such period that he approves such determination, then, for purposes of paragraph (3) and subsection (c) such determination shall become final on the day after the close of such period or the day on which the President notifies the Commission of his approval, as the case may be.

(h) PERIOD OF EFFECTIVENESS. — Except as provided in subsections (f) and (g), any exclusion from entry or order under this section shall continue in effect until the Commission finds, and in the case of exclusion

from entry notifies the Secretary of the Treasury, that the conditions which led to such exclusion from entry or order no longer exist.

(i) IMPORTATIONS BY OR FOR THE UNITED STATES. — Any exclusion from entry or order under subsection (d), (e), or (f), in cases based on claims of United States letters patent, shall not apply to any articles imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government. Whenever any article would have been excluded from entry or would not have been entered pursuant to the provisions of such subsections but for the operation of this subsection, a patent owner adversely affected shall be entitled to reasonable and entire compensation in an action before the Court of Claims pursuant to the procedures of section 1498 of title 28, United States Code.

(j) DEFINITION OF UNITED STATES. — For purposes of this section and sections 338 and 340, the term 'United States' means the customs territory of the United States as defined in general headnote 2 of the Tariff Schedules of the United States.