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Scope of Action against Unfair Import Trade Practices under Section 337 of the Tariff Act of 1930

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Scope of Action Against Unfair Import Trade Practices Under Section 337 of the Tariff Act of 1930

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I. INTRODUCTION

Section 337 of the Tariff Act of 1930¹ and general powers of the United States International Trade Commission (ITC)² provide the Commission with a range of actions in cases of unfair methods of competition or unfair acts involved in importation of articles or in their sale.³ This comment will discuss the actions available to the Commission under Section 337, and suggest how the Commission should apply them.⁴

¹ 19 U.S.C. § 1337 (1976 & Supp. IV 1980), amended by Customs Court Act of 1980, Pub. L. No. 96-417, § 604, 94 Stat. 1727, 1744.

² These include the power to make procedural and substantive rules, 19 U.S.C. § 1335 (1976), power to conduct informal investigations, 19 U.S.C. § 2482 (1976), and implied consent and settlement agreement powers under the Administrative Procedure Act, 5 U.S.C. § 554 (1976).

The United States International Trade Commission is the successor agency to the United States Tariff Commission, which Congress established on September 18, 1916. The powers of both agencies under the several versions of what is now Section 337 are analogous, and this comment will refer to both agencies as the "Commission," unless the distinction is material. It will also refer to the successor agency as the "ITC." For a comprehensive history of the Commission, see J. DOBSON, TWO CENTURIES OF TARIFFS: THE BACKGROUND AND EMERGENCE OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION (1976).

³ 19 U.S.C. § 1337(a) (1976) states that:

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

A range of statutes other than Section 337 accord remedies for specific types of unfair import competition, such as dumping, mislabeling, or product subsidization. For an overview of these statutes and their operation, see Jacobs & Hove, *Remedies for Unfair Import Competition in the United States*, 13 CORNELL INT'L L.J. 1 (1980). See also Silberger, *Trade Act of 1974: New Remedies Against Unfair Trade Practices in International Trade*, 5 DEN. J. INT'L L. & POL'Y 77 (1975).

⁴ The discussion below is confined to Commission action in cases of alleged and proven violations of Section 337. For a concise summary of the overall operation of Section 337, see Garfinkel, *Guide to Import Relief and Unfair Trade Actions Available Under United States International Trade Law*, 15 INT'L LAW. 240, 245-246 (1981). For more detailed summaries of Commission procedure under the statute, see H. KAYE, P. PLAIA & M. HERTZBERG, 1-2 INTERNATIONAL TRADE PRACTICE §§ 4-12 (1981), and Kaye & Plaia, *Tariff Act Section 337 Revisited: A Review of Developments Since the Amendments of 1975*, 59 J. PAT. OFF. SOC'Y 3, 64-80 (1977) [hereinafter cited as Kaye & Plaia, *Section 337 Revisited*]. Discovery procedures in Section 337 actions are discussed in Brunsvold, *Analysis of the United States International Trade Commission as a Forum for Intellectual Property Disputes*, 60 J. PAT. OFF. SOC'Y 505, 514-20 (1978) [hereinafter cited as Brunsvold, *Intellectual Property Disputes*]. The Chief Administrative Law Judge of the Commission has also written an overview of Section 337 adjudications and considerations related to them. Duvall, *The Expeditious Adjudication of Section 337 Unfair Trade Practice Cases at the United States International Trade Commission*, 9 APLA Q. J. 157 (1981). ITC adjudicative procedures under Section 337 are codified at 19 C.F.R. § 210.1 *et seq.* (1981).

There is no violation of Section 337 if there is not an injury to a domestic industry, and the ITC will take no final remedial action in such cases. For an examination of the standard of injury required for the ITC to find a Section 337 violation, see Brunsvold, Schill & Schwendemann,

Section 337 is an increasingly popular statute.⁵ One reason for this is the relief it makes available to complainants, which is effective throughout the United States.⁶ This relief, of course, is the statute's principal strength; yet, at the same time, it is the most difficult part of the statute for the Commission to apply.⁷ Each time the Commission

Injury Standards in Section 337 Investigations, 4 NW. J. INT'L L. & BUS. 75 (1982) [hereinafter cited as Brunsvold, *Injury Standards*]. See also Certain Combination Locks, U.S. Int'l Trade Comm'n Inv. No. 337-TA-45, Pub. No. 945 (Feb. 1979), 1 INT'L TRADE REP. DEC. (BNA) 5462; Certain Attache Cases, U.S. Int'l Trade Comm'n Inv. No. 337-TA-49, Pub. No. 955 (Mar. 1979). In addition, the complainant industry must be efficiently and economically operated before it may obtain relief. 19 U.S.C. § 1337(a) (1976); see Brunsvold, *Intellectual Property Disputes*, *supra* at 510. Finally, the ITC may not take action under Section 337 if such action would be contrary to the public interest. See *infra* note 8; see also *infra* notes 356-66 and accompanying text.

⁵ As of December 1, 1981, for example, fifteen of the seventy-six investigations in progress were Section 337 investigations. OFFICE OF THE SEC'Y, U.S. INT'L TRADE COMM'N, CALENDAR OF HEARINGS AND OF DEADLINE DATES FOR PENDING INVESTIGATIONS 1-8 (Dec. 1, 1981) [hereinafter cited as ITC HEARINGS CALENDAR]. There were eight Section 337 investigations pending on September 30, 1976, 1976 U.S. INT'L TRADE COMM'N ANN. REP. 9; twenty-one cases pending on September 30, 1978, 1978 U.S. INT'L TRADE COMM'N ANN. REP. 14; and fifteen Section 337 cases pending on September 30, 1979, 1979 INT'L TRADE COMM'N ANN. REP. 13. This five year period contrasts with the thirty-two year period from 1936 to 1968, during which the Tariff Commission received only thirty-six Section 337 complaints and recommended three exclusion orders, all of which were rejected by the President. Note, *The Revitalization of Section 337 of the Tariff Act of 1930 Under the Trade Act of 1974*, 11 J. INT'L L. & ECON. 167, 183 (1976) [hereinafter cited as Note, *Section 337 Revitalization*] (citing remarks of Bruce E. Clubb, International Trade Commissioner, before the Industrial Union Department, AFL-CIO, at 9 (Mar. 19, 1970)).

⁶ In contrast, federal district court relief would apply only within the court's jurisdiction.

⁷ The contentions surrounding the Commission's decision in Certain Headboxes and Papermaking Machine Forming Sections, U.S. Int'l Trade Comm'n Inv. No. 337-TA-82, Pub. No. 1138 (Apr. 1981), 2 INT'L TRADE REP. DEC. (BNA) 5481, *disapproved by President*, 46 Fed. Reg. 32,361 (1981) [hereinafter cited as *Headboxes I*], dramatize the tensions involved when the ITC balances what it perceives to be the need to remedy private injury which results from an unfair import trade practice with the need to make ITC actions consistent with the public interest. A headbox is a large, expensive piece of machinery essential to paper manufacture. In its *Headboxes I* investigation, the Commission found that the respondent's imported headbox infringed the product of the complainant United States manufacturer. On the basis of this finding, the ITC issued an order excluding all headboxes which might infringe the patent from importation into the United States.

United States importers criticized the ITC order as being too broad, and charged that it caused difficulties for them with United States Customs officials, who were charged with implementing the order. *Future ITC Recommendations Will Get Closer Look, USTR Official Says*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 77, at A-14, A-15 (May 13, 1981). Also, the United States Paper Institute vigorously lobbied the President to disapprove the ITC's overall determination. Written Comments of the ITC Investigative Attorney 4 (Aug. 11, 1981) (filed with the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C., in connection with Certain Headboxes and Papermaking Machine Forming Sections, U.S. Int'l Trade Comm'n Inv. No. 337-TA-82A, Pub. No. 1197 (Nov. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1992 [hereinafter cited as *Headboxes II*]). The President agreed with the importers and paper producers. Under subsection (g)(1)(B) of Section 337, the Commission must submit its final determinations to the President for review. 19 U.S.C. § 1337(g)(1)(B) (1976). In his letter of disapproval, the President stressed his belief that the Commission's broad exclusion order was unnecessary. United

takes action under Section 337, it must balance the private interest in relief from unfair import trade practices with the public interest in an open United States economy.⁸ If the ITC properly balances its action,

States and foreign manufacturers alike made few headboxes, and the time between order and delivery was long; if the domestically-produced machines became unavailable, a broad exclusion order, as the Commission had issued, should not stand in the way of the importation of machines which the ITC had not actually found to have infringed the complainant's patent. Thus, the President urged the Commission to recommend "an exclusion order directed only to the respondent's [infringing] products, or a narrowly drafted cease and desist order." 46 Fed. Reg. 32,361 (1981).

Since no Commission action applied to the infringing headboxes after the President's disapproval, the Commission took up a new investigation limited to questions of remedy and the public interest. [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 82, at A-16 (June 17, 1981). A month and a half later, the Commission issued a new, narrow exclusion order which applied only to the respondent's infringing headboxes, and to those of its affiliated firms. *Headboxes II*, *supra* at 9-12.

By letter dated January 18, 1982, the President expressly approved the *Headboxes II* order. This was the first time since the Trade Act of 1974 that a President had made such an express approval, rather than simply to let the sixty day approval period run and have the Section 337 order go into effect. An Administration source stressed that the President did not intend his approval as a "pat on the head of the ITC," but noted that the approval was designed to make the Administration's position clear *before* the end of the review period and to expedite the appeals process, should any of the parties have wished to appeal the *Headboxes II* order. *President Approves Modified Exclusion Order by ITC in Headbox Investigation*, [Oct.-Mar.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 112, at 391 (Jan. 27, 1982). The fact that the approval came only a few days before the review period would have run, however, casts doubt on the Administration source's explanation. *Compare, ITC Adopts Narrower Order In Headboxes Case, Presidential Approval Seen, But Stern Critical*, [Oct.-Mar.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 99, at 72-73 (Oct. 21, 1981).

The President recently disapproved of another broad Commission exclusion order, 47 Fed. Reg. 29,919 (1982), which the ITC issued in *Certain Molded-In Sandwich Panel Inserts and Methods for Their Installation*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-99, Pub. No. 1246 (May 1982). *See President Rejects ITC Determination in Sandwich Panel Inserts Case*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 135, at 423-24 (July 7, 1982); *Commission Order Excludes Molded-In Sandwich Panel Inserts from Japan*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 128, at 227-29 (May 26, 1982). The President recommended that the ITC replace the disapproved order with narrowly drawn cease and desist orders, since, in his opinion, the broad order did nothing to protect the infringed process patent in question, and discriminated between foreign and domestic products in preventing infringement. 47 Fed. Reg. 29,919. However, compared to the discussion consequent with the *Headboxes* cases, the *Sandwich Panel Inserts* disapproval has caused little controversy. *See ITC to Weigh Modifications of Inserts Decisions in Response to Disapproval*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 139, at 549 (Aug. 4, 1982).

⁸ Congress intended that the International Trade Commission's consideration of the public interest be foremost when the Commission determines which action to take in Section 337 investigations. COMM. ON FINANCE, TRADE ACT OF 1974, S. REP. NO. 1298, 93d Cong., 2d Sess. 197, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7330 [hereinafter cited as TRADE ACT OF 1974, S. REP. NO. 1298]. Subsections (d) (exclusion orders), (e) (temporary exclusion orders, entry under bond), and (f)(1) (cease and desist orders) of Section 337 provide that when issuing exclusion orders, temporary exclusion orders, or cease and desist orders, the Commission must consider the effect of such orders 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

Section 337 has the potential to play a dynamic role in the elimination of distortions in United States import trade. But, administered as protectionist legislation, Section 337 can only be a hindrance in United States trade policy and an aggravation for the Commission.

Moreover, a discussion of the scope of ITC action under Section 337 is important because of increased presidential and court oversight of that action. Presidential disapproval of a Commission exclusion order, and subsequent Commission reconsideration of those orders, has given rise to fears about the executive's erosion of the Commission's position as an independent agency.⁹ And, under the Customs Court Act of 1980,¹⁰ the United States Court of Customs and Patent Appeals now has the mandate to review fully Commission actions against Section 337 violations.¹¹

Finally, an examination of Commission action under Section 337 is especially relevant at this time because the Commission has revised

United States consumers" 19 U.S.C. § 1337(d)-(e), (f)(1) (1976 & Supp. IV 1980). If the order's effect would be detrimental to these public interest factors, the order may not issue. *Id.*

⁹ The President disapproved of the Commission's decision in *Headboxes I*, in June, 1981. 46 Fed. Reg. 32,361 (1981). See *supra* note 7; see also Commissioner Paula Stern's dissent to the ITC's *Headboxes II* opinion, where she emphasized that by taking action "which the President found more acceptable . . . [t]he Commission has thus placed itself in a position where the basic structure of the statute has been compromised and the appearance of impropriety exists." *Headboxes II*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-82A, Pub. No. 1197 at 8-9 (Nov. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1992, 2001-02 (Stern, Comm'r, dissenting). Trade practitioners voiced similar concerns about threats to the Commission's independence inherent in the President's disapproval of the *Headboxes I* determination, and the events surrounding it. See *Proposed Section 337 Guidelines Arouse Debate Over Executive Branch's Role in Review Process*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 80, at B-1, B-2 (June 3, 1981).

¹⁰ Pub. L. No. 96-417, 94 Stat. 1727. Section 701(a) of the Act provides that the amendments to Section 337 by the Customs Court Act "shall take effect on" November 1, 1980. *Id.*, 94 Stat. at 1747.

¹¹ Section 604 of the Customs Court Act of 1980, *id.*, 94 Stat. at 1744, amended subsection (c) of Section 337 by inserting the words "for review in accordance with chapter 7 of title 5, United States Code" and also inserting the following:

Commission determinations under subsections (d), (e), and (f) with respect to its findings 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 amount and nature of bond, or the appropriate remedy shall be reviewable in accordance with section 706 of title 5, United States Code.

The Administrative Procedure Act sets standards for review of agency decisions. 5 U.S.C. § 706 (1976). Courts must compel agency action unlawfully withheld or unreasonably delayed, *id.* § 706(1), and overturn decisions which are an abuse of agency discretion. *Id.* § 706(2)(A).

Section 337(c) provides for a Court of Customs and Patent Appeals review of final Commission determinations. "Final determinations" include findings that there have been Section 337 violations, and permanent actions against those violations. The court has also ruled that it may review any findings unfavorable to a complainant under subsections (d), (e), or (f) of Section 337 which are not yet referable to the President. *Import Motors Ltd. v. United States Int'l Trade Comm'n*, 530 F.2d 940, 945 (C.C.P.A. 1976). For a discussion of the Court of Customs and Patent Appeals' pleading and practice by Judge Rich of the Court of Customs and Patent Appeals, see

its rules to allow for the ITC to waive review of its Administrative Law Judges' (ALJ) recommended determinations.¹² This change could mean that the Commission will spend increased time on the issues of remedy and the public interest since the Commission may accept the ALJ's findings of fact and thus choose not to hear the parties repeat their factual arguments before the Commission.¹³ Indeed, given the inseparability of Section 337 action from the Section's overall effectiveness, Commissioners, staff, and Section 337 practitioners may spend as much time in considering Section 337 action as they have spent in the past proving violation of the statute.¹⁴

Rich & Duft, *Doing it Better in the U.S. Court of Customs and Patent Appeals*, 9 APLA Q.J. 84 (1981).

In *Sealed Air Corp. v. United States Int'l Trade Comm'n*, 645 F.2d 976, 989 (C.C.P.A. 1981), the court stated that "[i]n view of the ITC's expertise in evaluating the likelihood of injury to American business, and absent a showing of loss of protectable rights, it is not the function of a court to substitute a different remedy of its own design for that chosen by the ITC, or to substitute its view of the public interest for that chosen by the ITC." However, *Sealed Air Corp.* was filed before November 1, 1980—the date after which the amendments expanding Court of Customs and Patent Appeals review of Commission actions took effect. While the Commission still has wide latitude to shape its Section 337 actions, see *Canadian Tarpoly v. United States Int'l Trade Comm'n*, 640 F.2d 1322, 1326 (C.C.P.A. 1981), the 1980 Customs Court Act amendments signal a heightened standard of review for the Commission's Section 337 actions. A discussion of the review of Section 337 determinations is in H. KAYE, P. PLAIA, & M. HERTZBERG, *supra* note 4 at § 13.

In March, 1982, Congress passed H.R. 4482, the "Federal Courts Improvement Act of 1982," which will consolidate the Court of Customs and Patent Appeals and the Court of Claims into a new Court of Appeals for the Federal Circuit. However, the consolidation does not affect review of Section 337 determinations, and, hence, this comment will refer to the Court of Customs and Patent Appeals as the ITC's primary reviewing court. For the text of H.R. 4482, see [Oct.-Mar.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 121, at 678-687 (Mar. 31, 1982).

¹² 47 Fed. Reg. 25,134 (1982), *codified at* 19 C.F.R. §§ 210.21-22, .36, .43, .50-51, .53-56, .60 (1982). Under former rules, the ITC made a complete review of all of its Administrative Law Judges' recommendation determinations. This gave each Section 337 complaint a double hearing within the Commission. See 19 C.F.R. § 210.55 (1981). For a discussion of the Commission's present rules, see *ITC Amended Rules Provide for New Initial Determination Procedure*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 132, at 318 (June 16, 1982).

¹³ See *Alberger Urges Expanded Role for ALJs in Section 337 Cases*, [Apr.-Sept. 1980 Transfer Binder] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 45, at A-6 (Sept. 24, 1980).

¹⁴ A survey of Commission opinions shows that the ITC has devoted much more time to the proof of violations than to the decision on action against those violations. One reason for this is that most Section 337 actions have involved patent infringement and thus have been highly technical. Also, given the demand of making technical assessments in previous Section 337 cases, the ITC has not developed a comprehensive jurisprudence relating to action against violations. Whereas the federal courts have developed extensive tests, standards, and precedents for the evaluation of unfair trade practice and patent infringement cases, the Commission alone has been responsible for developing standards for Section 337 action until the amendment of the judicial review provisions of Section 337 in 1980. As this comment will indicate, the development of such standards is difficult; it is not hard to see why the ITC has concentrated its opinions on already developed areas of law.

This comment first addresses the legislative history which controls the Commission's Section 337 actions.¹⁵ Next, it discusses the Commission's Section 337 subject matter jurisdiction.¹⁶ After an analysis of action available to the Commission under Section 337,¹⁷ the discussion ends with suggestions of what the proper scope of action should be in Section 337 cases.¹⁸

II. HISTORY OF COMMISSION ACTION UNDER SECTION 337

Section 337 is the successor to Section 316 of the Tariff Act of 1922.¹⁹ The 1922 Act was protectionist legislation which Congress designed to insulate United States manufacturers from the post-World War I revitalization of European industry.²⁰ In particular, Section 316 was a catch-all provision for the Act, intended by Congress to ensure the effectiveness of a tariff which it thought could be defeated only by unfair methods of competition.²¹

The Act came at a time when debate between protectionists and free traders was at a high pitch.²² Consequently, Congress passed Section 316 after considerable debate over its role in forming trade policy. Section 316 reflected these contentions, and embodied the goal of pro-

¹⁵ See *infra* text accompanying notes 19-55.

¹⁶ See *infra* text accompanying notes 56-107.

¹⁷ See *infra* text accompanying notes 108-352.

¹⁸ See *infra* text accompanying notes 353-413.

¹⁹ Tariff Act of 1922, ch. 356, sec. 316, 42 Stat. 858, 943 (current version at 19 U.S.C. § 1337 (1976 & Supp. III 1979)). The major difference between Section 316 and the 1930 version of Section 337 is the range of remedies provided. See *infra* text accompanying note 24. For a further discussion of Section 337 history, Brunsvold, *Injury Standards*, *supra* note 4 at 77-81. See also H. KAYE, P. PLAIA & M. HERTZBERG, *supra* note 4, at § 4.

²⁰ In *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247, 259 (C.C.P.A. 1930), *cert. denied*, 282 U.S. 852 (1930), the court noted that since:

one of the express objects of the Tariff Act of 1922, as stated in its title, was "to encourage the industries of the United States," it is very obvious that it was the purpose of [Section 316] to give to industries of the United States, not only the benefit of the favorable laws and conditions to be found in this country, but also to protect such industries from being unfairly deprived of the advantage of the same and permit them to grow and develop.

See also J. DOBSON, *supra* note 2, at 33-35.

²¹ Musrey, *Tariff Act's Section 337: Vehicle for the Protection and Extension of Monopolies*, 5 L. & POL'Y INT'L BUS. 56, 60-61 (1973). In the debate immediately prior to the 1922 Act's passage, Senator Smoot, the Act's primary sponsor, declared that Section 316 was to be:

an antidumping law with teeth in it—one which will reach all forms of unfair competition in importation. This section (316) not only prohibits dumping in the ordinary accepted meaning of that word; that is, the sale of merchandise in the United States for less than its foreign market value or cost of production; but also bribery, espionage, misrepresentation of goods, full-line forcing, and other similar practices frequently more injurious to trade than price cutting.

62 CONG. REC. 5874, 5879 (1922).

²² See J. DOBSON, *supra* note 2, at 31-33.

moting fair trade, as well as that of protecting American industry.²³

The Commission could not take independent action under the 1922 Act. If it found a violation of Section 316, the Commission could only recommend that the President exclude articles imported unfairly. Alternately, the Commission could advise the President to authorize duties "not in excess of 50% or less than 10% of the value of the article imported in violation of the Section as would offset the unfair method or act employed."²⁴ Once the President received the Commission's Section 316 determinations, he followed or ignored them.²⁵

The Tariff Commission received only twenty-three Section 316 complaints while the statute was in effect.²⁶ During this time, the Commission only conducted six Section 316 investigations; four of these ended with recommendations to the President that he exclude the unfairly imported article.²⁷

Congress created a new Section 337 in the Tariff Act of 1930 and struck Section 316's excess duty provision.²⁸ Also, the 1930 revision of Section 337 eliminated the provision of direct Supreme Court review of Tariff Commission determinations,²⁹ and provided for the Secretary of the Treasury to admit goods under bond which the President suspected to be unfairly imported.³⁰

The Tariff Commission heard few Section 337 cases between 1936 and 1974. The primary reason for this was that the Tariff Commission

²³ As the Supreme Court emphasized, Section 316 was "not happily drafted." *Ex parte Bakelite Corp.*, 279 U.S. 438, 446 (1929).

²⁴ Tariff Act of 1922, ch. 356, sec. 316(c), (e), 42 Stat. 858, 943-44.

²⁵ *Id.*

²⁶ Section 316 was in effect from 1922 through 1930. It was repealed by the Tariff Act of 1930, ch. 497, sec. 651, 46 Stat. 590, 762.

²⁷ The affirmative investigations were Revolvers, U.S. Tariff Comm'n Inv. No. 316-1 (1925), *approved by President*, T.D. 41,655, 49 Treas. Dec. 1049 (1926); Manila Rope, U.S. Tariff Comm'n Inv. No. 316-5 (1927), *approved by President*, T.D. 42,257, 51 Treas. Dec. 959 (1927); Synthetic Phenolic Resin, Form C, U.S. Tariff Comm'n Inv. No. 316-4 (1927), *approved by President*, T.D. 44,411, 58 Treas. Dec. 722 (1930); Laminated Products, U.S. Tariff Comm'n Inv. No. 316-6 (1928), *approved by President*, T.D. 42,801, 53 Treas. Dec. 652 (1928). The Tariff Commission found no injury in Sanitary Napkins, U.S. Tariff Comm'n Inv. No. 316-3 (1926), or in Briarwood Pipes, U.S. Tariff Comm'n Inv. No. 316-2 (1926). For a discussion of these decisions, see Musrey, *supra* note 21, at 62-69.

²⁸ Ch. 497, secs. 337, 651, 46 Stat. 590, 703, 762. With this change Congress affirmed the findings of the House Committee on Ways and Means, which had recommended that the excess duty provision "should not be retained for the reason that the imposition of penalty duties to offset violations [was] entirely inadequate to prevent further violations [of Section 337]. The effective remedy is to exclude the article from entry." H.R. REP. NO. 7, 71st Cong., 1st Sess. 166 (1929).

²⁹ Compare Tariff Act of 1922, ch. 563, sec. 356(c), 42 Stat. 858, 944 (authorizing certiorari), with Tariff Act of 1930, ch. 497, sec. 337(c), 46 Stat. 590, 703-04 (Court of Customs and Patent Appeals judgment is final).

³⁰ Tariff Act of 1930, ch. 497, sec. 337(f), 46 Stat. 590, 704.

grew increasingly reluctant to apply the statute in the years leading up to 1936. Not only did the Commission feel that it lacked expertise in the field of unfair competition law, but it also viewed itself as primarily a fact-finding and not as an adjudicative body.³¹ The breaking point was the Court of Customs and Patents Appeals' decision in *In re Amtorg Trading Corporation*³² that importation of articles into the United States made under United States process patents was not an unfair method of import competition. Prior to *Amtorg*, the Commission had maintained that Section 337 was inequitable to importers³³ because it did not allow for a review of patent validity,³⁴ and *Amtorg* gave the Commission reason to restrain all patent-based actions under Section 337. Indeed, in 1936, the Commission attempted to have Congress remove its Section 337 jurisdiction.³⁵ Since Congress refused to do this, the Commission introduced a very high injury standard to Section 337 proceedings under which it was nearly impossible for complainants to obtain relief.³⁶ The Commission did not consistently lower this barrier until the late 1960s.³⁷

The second reason for the paucity of Section 337 cases prior to 1974 was the time and expense involved with Section 337 litigation. A complainant who believed that he had any chance for redress under the statute had to wait an average of three years for the Commission to complete the requisite investigation.³⁸ This long wait made Section 337 actions much less attractive to injured complainants than a speedier but perhaps less comprehensive court action.

The Trade Act of 1974³⁹ significantly changed the Commission's role under Section 337. Historically, the ITC had served as "the adviser of the President or Congress in the business of [international trade] legislation."⁴⁰ Congress intended from the beginning, however, that the Commission be independent from political pressure so that it could act impartially.⁴¹ The 1974 Act enforced this intent by providing

³¹ 1935 TARIFF COMM'N ANN. REP. 12-14.

³² 75 F.2d 826 (C.C.P.A.), *cert. denied*, 296 U.S. 576 (1935).

³³ See *infra* note 45.

³⁴ Note, *Section 337 Revitalization*, *supra* note 5, at 187-88; Musrey, *supra* note 21, at 69-71.

³⁵ 1935 TARIFF COMM'N ANN. REP., *supra* note 31, at 12-14.

³⁶ Note, *Section 337 Revitalization*, *supra* note 5, at 189.

³⁷ Musrey, *supra* note 21, at 72.

³⁸ Kaye & Plaia, *Section 337 Revisited*, *supra* note 4, at 31-32.

³⁹ Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended in scattered sections of 19 U.S.C.).

⁴⁰ *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 321 (1933).

⁴¹ J. DOBSON, *supra* note 2, at 83-93.

for statutory terms of office for Commissioners,⁴² making the Commission's budget dependent only on Congressional approval,⁴³ and symbolically indicating the Commission's new functions by giving it its present name.⁴⁴ Indeed, when Congress passed the 1974 Act, Congressman Al Ullman, one of the bill's sponsors, stressed that Congress "had adopted some rather far-reaching reforms [for the Commission] which in some respects might very well produce a truly independent agency, one that is immune from pressures from the President or anyone else."⁴⁵

The first major change that the Trade Act of 1974 made to Section 337 was to give the Commission the power to "investigate any alleged violation" of Section 337.⁴⁶ Also, while the Commission was to determine injury and remedy in much the same way as it did prior to 1974, the 1974 Act gave the Commission the authority to make its determinations final and not merely advisory. Thus, Congress withdrew from the President all revision power over Commission decisions except for the power to disapprove of Commission decisions for "policy reasons."⁴⁷ The 1974 Act further gave the Commission power to issue cease and desist orders⁴⁸ and the responsibility of setting a bond for the entry of goods during the sixty day presidential review of Commission orders.⁴⁹ Nonetheless, under the 1974 Act, any action which the Commission took against Section 337 violations had to be consistent with the public interest.⁵⁰

Finally, the 1974 additions to subsection (c) of Section 337 provided that respondents in Section 337 investigations could present all "legal and equitable defenses" and that parties who were adversely affected by Commission determinations could appeal to the United States Court of Customs and Patent Appeals.⁵¹

⁴² Trade Act of 1974, Pub. L. No. 93-618, § 172(b), 88 Stat. 1978, 2010 (1975) (codified at 19 U.S.C. § 1330(b) (1976)).

⁴³ *Id.* § 175, 88 Stat. at 2011 (codified at 19 U.S.C. § 2232 (1976)).

⁴⁴ *Id.* § 171, 88 Stat. at 2009 (codified at 19 U.S.C. § 2231 (1975)).

⁴⁵ 120 CONG. REC. 41,796-97 (1974).

⁴⁶ Trade Act of 1974, Pub. L. No. 93-618, § 341, 88 Stat. 1978, 2053 (1975) (codified at 19 U.S.C. § 1337(b) (1976)).

⁴⁷ *Id.* § 337(g), 88 Stat. at 2055 (codified at 19 U.S.C. § 1337(g)(2) (1976)).

⁴⁸ *Id.* § 337(f), 88 Stat. at 2055 (codified at 19 U.S.C. § 1337(f) (Supp. IV 1980)).

⁴⁹ *Id.* § 337(e), 88 Stat. at 2054 (codified at 19 U.S.C. § 1337(e) (1976)). This had previously been the responsibility of the Secretary of the Treasury. See Tariff Act of 1930, ch. 497, sec. 337(f), 46 Stat. 590, 704.

⁵⁰ Trade Act of 1974, Pub. L. No. 93-618, § 341, 88 Stat. 1978, 2054-55 (1975) (codified at 19 U.S.C. § 1337(d)-(f) (1976 & Supp. IV 1980)).

⁵¹ *Id.* § 341, 88 Stat. at 2054. Two court decisions prompted this amendment. First, in *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247 (C.C.P.A. 1930), *cert. denied*, 282 U.S. 852 (1930),

The Trade Agreements Act of 1979⁵² further amended Section 337 when it provided the Commission with civil enforcement mechanisms for its cease and desist orders and set out a number of situations within Treasury Department antidumping and countervailing duty jurisdiction where the Commission was not to take action.⁵³ Finally, in 1980, Congress amended Section 337 to provide for Court of Customs and Patent Appeals review of Commission action against Section 337 violations, including determination of the effect of that action on the public interest.⁵⁴ The court must overturn those actions which are a breach of Commission discretion.⁵⁵

III. SECTION 337 SUBJECT MATTER JURISDICTION

Subsection (a) of Section 337 gives the Commission jurisdiction over "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."⁵⁶ Subsection (b) states that the Commission "shall investigate any alleged violation" of Section 337.⁵⁷ The Commission reads the language of these subsections to give it broad subject matter jurisdiction on which to base remedies for Section 337 violations,⁵⁸ and the Court of Customs and Patent Appeals has

the court held that the Tariff Commission had no power to declare patents invalid. After that decision, complainants whose patents might not have survived in a civil action could ask the Commission for a remedy regardless of whether they had a valid interest to protect. While the Commission still presumes that complainants' patents are valid, the amendment allows respondents to present such defenses as misuse and fraud to challenge validity. See Sterne, *Patent Infringement Practice Before the U.S. International Trade Commission*, 2 INT'L TRADE L.J. 190 (1977).

The second decision was *Glidden v. Zdanok*, 370 U.S. 530, 582 (1962), where the Court stated in dicta that the Court of Customs and Patent Appeals may not have been able to review Tariff Commission determinations since it was an Article III court, and the Commission's determinations were only advice to the President. There were no challenges to Commission determinations in the Court of Customs and Patent Appeals after *Glidden* and before the Trade Act of 1974.

⁵² Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1105, 93 Stat. 144, 311 (codified at 19 U.S.C. § 1337(b)(3), (c)(2) (Supp. IV 1980)).

⁵³ *Id.* See also *infra* notes 99-102 and accompanying text.

⁵⁴ Customs Court Act of 1980, Pub. L. No. 96-417, § 604, 94 Stat. 1727, 1744 (codified at 19 U.S.C. § 1337(c) (Supp. IV 1980)).

⁵⁵ See *supra* notes 10-11 and accompanying text.

⁵⁶ 19 U.S.C. § 1337(a) (1976).

⁵⁷ *Id.* at § 1337(b) (Supp. IV 1980).

⁵⁸ In *Certain Copper Rod Production Apparatus*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-89, Pub. No. 1132 (Oct. 1980), 2 INT'L TRADE REP. DEC. (BNA) 5597, 5600, the ITC noted that under the authority which Congress granted it in Section 337, the Commission may "prevent unfair acts in their incipiency The provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice. . . ." See also *Certain Novelty Glasses*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-55, Pub. No. 991 at

confirmed the Commission's interpretation.⁵⁹ In the past the Commission has likened its jurisdiction over unfair practices in import trade to that of the Federal Trade Commission over domestic unfair trade practices⁶⁰ under Article 5 of the Federal Trade Commission Act.⁶¹ In fact, the Court of Customs and Patent Appeals has suggested that the Commission may have "wide discretion in determining what practices are to be regarded as unfair" since "[t]he importation of articles may invoke questions which differ materially from any arising in purely domestic competition."⁶² Though the court reserves the right to determine what

6 (July 1979), 2 INT'L TRADE REP. DEC. (BNA) 5400 ("The terms 'unfair methods of competition' and 'unfair acts' have been held to have a broad and inclusive meaning."). However, the ITC has also noted that while its jurisdiction over unfair practices is broad, "[i]t behooves the Commission . . . to formulate rational and generally acceptable reasons for treating certain practices as unfair." Certain Welded Stainless Steel Pipe and Tube, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 at 17 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, 5254, *disapproved by President*, 43 Fed. Reg. 17,789 (1978).

⁵⁹ The court stated in *In re Amtorg Trading Corp.*, 75 F.2d 826, 830-31 (C.C.P.A.), *cert. denied*, 296 U.S. 576 (1935):

[i]t is not necessary that a particular act, or method, [or] practice must have been declared by the courts to be unfair before the Commission could properly find such act, method, or practice to be unfair, but, to be unfair, it must fall within the general domain of practices "heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." This language is broad and comprehensive. It covers a large field, as do the words "due process of law," "unjust discrimination," and the like. The words "unfair method of competition" may include acts which have never been specifically declared by the courts to be unfair (citations omitted).

Accord In re Northern Pigment Co., 71 F.2d 447, 454-55 (C.C.P.A. 1934); *In re Von Clemm*, 229 F.2d 441, 443-44 (C.C.P.A. 1955).

⁶⁰ See 6 TARIFF COMM'N ANN. REP. 3 (1922); see also Certain Copper Rod Production Apparatus, U.S. Int'l Trade Comm'n Inv. No. 337-TA-89, Pub. No. 1132 (Oct. 1980), 2 INT'L TRADE REP. DEC. (BNA) 5597, 5600; Certain Welded Stainless Steel Pipe and Tube, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 at 39 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, 5262, *disapproved by President*, 43 Fed. Reg. 17,789 ("It is reasonable to assume that the framers of Section 316 were cognizant of the legislative and judicial history of Section 5 of the FTC Act . . ."). For a list of trade practices which the FTC has found to be unfair, see 1957 FED. TRADE COMM'N ANN. REP. 72.

⁶¹ 15 U.S.C. § 45 (1976 & Supp. IV 1980). The court in *In re Amtorg Trading Corp.*, 75 F.2d 826, 830 (C.C.P.A.), *cert. denied*, 296 U.S. 576 (1935), cited *Federal Trade Comm'n v. Gratz*, 253 U.S. 421, 427 (1925), as defining those practices which the Tariff Commission could remedy under Section 337. *Gratz* was at the time the leading case defining the FTC's subject matter jurisdiction. Also relevant is the Supreme Court's citation of Section 337, otherwise without direct comment, in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 533 n.12 (1935). *Schechter* held unconstitutional the President's delegation to the FTC of power to promulgate industry codes under the National Recovery Act (NRA). Section 337 was cited in a discussion of the definition of unfair methods of competition under the FTC Act; the Court concluded that "[w]hat are 'unfair methods of competition' are . . . to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest." *Id.*

⁶² *In re Von Clemm*, 229 F.2d 441, 444 (C.C.P.A. 1955).

is and is not an unfair trade practice under Section 337,⁶³ it has never overruled a Commission determination on the grounds of inadequate subject matter jurisdiction.

The importation of goods which infringe a United States patent has been the "unfair method of competition" against which the Commission has most often taken action in Section 337 proceedings.⁶⁴ Although patent infringement is generally insufficient to support a count of unfair competition in federal district courts,⁶⁵ both Congress⁶⁶ and

⁶³ *In re Orion Co.*, 71 F.2d 458, 463 (C.C.P.A. 1934); *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247, 259 (C.C.P.A. 1930), *cert. denied*, 282 U.S. 852 (1930) ("Each case of unfair competition must be determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such schemes.").

⁶⁴ For example, twenty out of twenty-two ITC exclusion orders in effect on December 1, 1981 were based on claims under United States letters patent. ITC HEARINGS CALENDAR, *supra* note 5.

⁶⁵ *See, e.g., In re Von Clemm*, 229 F.2d 441, 446 (C.C.P.A. 1955) (Cole, J. dissenting, *citing* *Unit Const. Co. v. Huskey Mfg. Co.*, 241 F. 129 (E.D. Pa. 1917)); *R.R. Donnelly & Sons v. Haber*, 43 F. Supp. 456 (E.D.N.Y. 1942)).

⁶⁶ In 1940, Congress first indicated that it intended the Commission to take jurisdiction over patent infringement cases under Section 337 when it added Section 1337a to Title 19 to provide that:

The importation for use, sale, or exchange of a product made, produced, processed, or mined under or by means of a process covered by the claim of any unexpired valid United States letters patent, shall have the same status for the purposes of section 337 of this title as the importation of any product or article covered by the claims of any unexpired valid United States letters patent.

Act of July 2, 1940, ch. 515, 54 Stat. 724 (codified at 19 U.S.C. § 1337a (1976)). Congress added this section in response to the decision in *In re Amtorg Trading Corp.*, 75 F.2d 826 (C.C.P.A.), *cert. denied*, 296 U.S. 576 (1935), holding that the importation into the United States of goods which were manufactured under a United States process patent was not an unfair trade practice under Section 337, since the actual manufacture abroad was permissible under foreign law. The court found no infringement because United States design patents only covered manufacture in the United States.

More recently, in its report on the Trade Act of 1974, the Senate Finance Committee stated its opinion that the ITC should take jurisdiction under Section 337 over patent infringement cases. TRADE ACT OF 1974, S. REP. NO. 1298, *supra* note 8, at 195-96, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 7328-29. Indeed, several proposed versions of the Trade Act of 1974 would have allowed the ITC to take independent action under Section 337 only in patent infringement cases. The Nixon Administration's original proposed legislation, H.R. 6767, would have amended Section 337 so that a finding of patent infringement alone, without any other proof of injury, would have constituted a Section 337 violation. H.R. 6767, sec. 350(a), § 337(a), *reprinted in Trade Reform, Hearings on H.R. 6767 before the House Committee on Ways and Means*, 93d Cong., 1st Sess. 4, 63 (1973) [hereinafter cited as *H.R. 6767 Hearings*]. For criticisms of this bill, see *id.* at 1353, 1362-63 (statement of Noel Hemmendinger). H.R. 10710, the Ways and Means Committee version of the bill, provided that any Commission determination of an unfair import trade practice other than patent infringement would only be advisory to the President, who would act on the determination at his discretion. Under 10710, the ITC would remedy patent infringement directly, upon finding that the infringement caused immediate and substantial harm to the patent holder. Both H.R. 6767 and H.R. 10710 are reprinted in Kaye & Plaia, *Revitalization of the Unfair Trade Causes in the Importation of Goods: An Analysis of the Amendments to Section 337 (Part*

the Court of Customs and Patent Appeals⁶⁷ have encouraged the Commission to regard the importation of goods produced as a result of the infringement of a United States patent as tantamount to a *per se* violation of Section 337.⁶⁸

Since the enactment of the 1974 Act, the Commission has heard allegations of unfair import practices involving the infringement of common law trademarks,⁶⁹ predatory pricing,⁷⁰ unauthorized use of

II—Conclusion), 57 J. PAT. OFF. SOC'Y 269, 298-300, 302 (1975) [hereinafter cited as Kaye & Plaia, *Amendments Analysis 1975, Part II*].

However, Congress' rejection of the two proposals and its approval of the Senate bill which became the Trade Act of 1974 seems to have confirmed the Commission's broad jurisdiction over unfair import trade practices. See the comments of former ITC Chairman Daniel Minchew in Minchew & Webster, *Regulating Unfair Practices in International Trade: The Role of the United States International Trade Commission*, 8 GA. J. INT'L & COMP. L. 27, 39 (1978), that "[t]he new powers of the Commission were the most significant in the Trade Act for dealing with unfair trade practices. It would seem to be inconceivable that the amendments which were thought to be so important by the Congress were intended only to improve the procedures for handling patent violations."

It is noteworthy that Congress has never specifically stated that patent infringement or any other "unfair trade practice" is within Section 337's subject matter jurisdiction. The Court of Customs and Patent Appeals has emphasized that observations of administrative practice are only as valuable as other "extrinsic aids" in clarifying questions of construction of tariff laws such as Section 337. *Commonwealth Oil Refining Co. v. United States*, 480 F.2d 1352, 1361 (C.C.P.A. 1973). However, it has also held that Congress incorporated long-standing administrative construction into a statute when it reenacted relevant portions of that statute without substantive change. *C.J. Tower & Sons v. United States*, 44 C.C.P.A. (Cust.) 41, 44 (1957). Given the collection of extrinsic aids supporting the ITC's view that importation of goods which infringe United States patents is a Section 337 violation, patent infringement will remain a valid action under Section 337 unless Congress changes the statute. Such a change is unlikely since Section 337 is especially effective against some types of infringing imports. See *infra* note 385 and accompanying text.

⁶⁷ In *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247 (C.C.P.A.), *cert. denied*, 282 U.S. 852 (1930), the court held that patent infringement could constitute an unfair act under Section 316, the predecessor statute to Section 337. Also, in *In re Von Clemm*, 229 F.2d 441 (C.C.P.A. 1955), the court specifically approved the Tariff Commission's view that it could hear claims of patent infringement alone as violations of Section 337, absent any allegations of acts generally considered to be unfair. Finally, in *Canadian Tarpoly Co. v. United States Int'l Trade Comm'n*, 640 F.2d 1322 (C.C.P.A. 1981), the court affirmed an ITC order excluding infringing articles, although the ITC had not specifically determined that unfair methods of competition or unfair acts existed, as subsection (e) of Section 337 requires (*see* 19 U.S.C. § 1337(e)(1976)).

⁶⁸ The ITC reasoned in *Headboxes II*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-82A, Pub. No. 1197 at 13 (Nov. 1981), 3 INT'L TRADE REP. DEC.-(BNA) 1992, 1997, that since patent infringement was unfair competition, competition from infringing goods was not included in the Section 337(e) formula of considering competitive conditions in the United States economy, since the respondent had no competitive right to infringe a valid United States patent. For a discussion of ITC action in patent infringement cases, see *infra* notes 379-93 and accompanying text.

⁶⁹ *Certain Airtight Cast-Iron Stoves*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 at 12 (Jan. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1158, 1159; *Certain Novelty Glasses*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-55, Pub. No. 991 (July 1979), 2 INT'L TRADE REP. DEC. (BNA) 5400; *Certain Vacuum Bottles and Components Thereof*, U.S. Int'l Trade Comm'n Inv.

trade secrets and know-how,⁷¹ passing off or simulation of design,⁷² false designation of origin,⁷³ copyright infringement,⁷⁴ palming off, reverse palming off, trade libel, misappropriation of trade dress and trade name,⁷⁵ trade dress infringement and false designation of origin,⁷⁶ false

No. 337-TA-108, *notice of investigation*, 46 Fed. Reg. 53,543 (1981); Certain Cube Puzzles, U.S. Int'l Trade Comm'n Inv. No. 337-TA-112, *notice of investigation*, 46 Fed. Reg. 62,964 (1981).

⁷⁰ Certain Color Television Receiving Sets, U.S. Int'l Trade Comm'n Inv. No. 337-TA-23, *investigation terminated on the basis of consent order*, 42 Fed. Reg. 39,492 (1977); *see also* Certain Welded Stainless Steel Pipe and Tube, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, 5255, *disapproved by President*, 43 Fed. Reg. 17,789 (1978) (opinion of Commissioners Moore, Minchew, and Alberger); Certain Above-Ground Swimming Pools, U.S. Int'l Trade Comm'n Inv. No. 337-TA-25, Pub. No. 815 (Apr. 1977). In *Certain Welded Stainless Steel Pipe and Tube*, a majority of the Commission agreed that Section 337 was broad enough to cover predatory pricing schemes which violated Section 3 of the Robinson-Patman Act. The majority held that a Section 337 violation could occur when foreign competitors of United States interests engaged in unreasonably low pricing "with an intent, either individually or collectively, to destroy competition in the United States market." 1 INT'L TRADE REP. DEC. (BNA) at 5255. Although the President disapproved of the *Stainless Steel Pipe and Tube* decision, 43 Fed. Reg. 17,789 (1978), he did not specifically disapprove of the ITC taking action against predatory pricing under Section 337. However, the Justice Department stated that "unilateral below cost selling by a non-dominant firm is not an 'unfair method of competition' encompassed by Section 337," and that the Commission should dismiss complaints containing such allegations "as a matter of law and policy." *Certain Welded Stainless Steel Pipe and Tube*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 at 17, 1 INT'L TRADE REP. DEC. (BNA) at 5254 n.37. No Section 337 investigation has dealt with predatory pricing since *Stainless Steel Pipe and Tube*.

⁷¹ Certain Apparatus for the Continuous Production of Copper Rod, U.S. Int'l Trade Comm'n Inv. No. 337-TA-52, Pub. No. 1017 (Nov. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5006; Numerically Controlled Machining Centers and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-34, *investigation terminated based on settlement*, 43 Fed. Reg. 5591 (1978).

⁷² Certain Steel Toy Vehicles, U.S. Int'l Trade Comm'n Inv. No. 337-TA-31, Pub. No. 880 (Apr. 1978); Certain Airtight Cast-Iron Stoves, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 (Jan. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1158. This is analogous to the unlawful copying of trade dress. *See* Certain Novelty Glasses, U.S. Int'l Trade Comm'n Inv. No. 337-TA-55, Pub. No. 991 at 6 (July 1979), 2 INT'L TRADE REP. DEC. (BNA) 5400, 5403. The ITC stated in *Certain Airtight Cast-Iron Stoves* that "[a]lthough the Commission does not necessarily adopt the analogous case law on passing off under the Lanham Act or the Federal Trade Commission Act in total, it does consider passing off an offense cognizable under section 337." U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 at 3-4, 3 INT'L TRADE REP. DEC. (BNA) at 1160.

⁷³ Certain Surface Grinding Machines and Literature for the Promotion Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-95, *request for public comment on proposed termination of respondents based on settlement*, 46 Fed. Reg. 47,895 (1981), 46 Fed. Reg. 61,521 (1981), *termination notice*, 46 Fed. Reg. 62,969 (1981).

⁷⁴ Coin-Operated Audio-Visual Games and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-87, Pub. No. 1160 at 12-23 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1212, 1218-22.

⁷⁵ Certain Surface Grinding Machines and Literature for the Promotion Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-95, *request for public comment on proposed termination based on settlement*, 46 Fed. Reg. 47,895 (1981), 46 Fed. Reg. 61,521 (1981), *termination notice*, 46 Fed. Reg. 62,969 (1981). 47 Fed. Reg. 2957 (1982).

⁷⁶ Certain Novelty Glasses, U.S. Int'l Trade Comm'n Inv. No. 337-TA-55, Pub. No. 991 at 6

and deceptive advertising,⁷⁷ unfair use of advertising and promotional materials,⁷⁸ and tortious interference with the business relationships between a complainant and its dealers.⁷⁹ Before the passage of the 1974 Act, the Tariff Commission considered Section 337 cases involving unfair simulation⁸⁰ and mislabeling a low quality product to indicate higher quality,⁸¹ in addition to cases involving patent infringement and types of passing off.⁸²

Statements by Commissioners further indicate the Commission's opinion that it has broad subject matter jurisdiction under Section 337. Former ITC Chairman Daniel Minchew stated that the 1974 Act empowered the Commission "to extend its investigations into all cases where imports occur in conjunction with false pricing, false advertising, mislabeling, and false representation of source."⁸³ He also suggested that Section 337 action might issue in favor of consumer protection, and against breaches of public international law.⁸⁴

The Commission may also take action under Section 337 against an unfair import trade practice which "has the effect or tendency . . . to restrain or monopolize U.S. Commerce."⁸⁵ Noting the similarity of this portion of Section 337 with Section 1 of the Sherman Act⁸⁶ and

(July 1979), 2 INT'L TRADE REP. DEC. (BNA) 5400, 5403, 5406; Certain Cube Puzzles, U.S. Int'l Trade Comm'n Inv. No. 337-TA-112, *notice of investigation*, 46 Fed. Reg. 62,964 (1981).

⁷⁷ Certain Airtight Cast-Iron Stoves, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 (Jan. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1158; *see also* Convertible Game Tables and Components Thereof, U.S. Tariff Comm'n Inv. No. 337-34, Pub. No. 705 (Dec. 1974), 1 INT'L TRADE REP. DEC. (BNA) 5094, 5101 (additional statement of Commissioners Moore, Leonard, and Ablondi; Chairman Bedell, concurring).

⁷⁸ Alternating Pressure Pads, U.S. Int'l Trade Comm'n Inv. No. 337-TA-48, *investigation terminated on the basis of settlement*, 44 Fed. Reg. 12,286 (1979).

⁷⁹ Woodworking Tools, U.S. Int'l Trade Comm'n Inv. No. 337-TA-115, *notice of investigation*, 47 Fed. Reg. 4165 (1982).

⁸⁰ Revolvers, U.S. Tariff Comm'n Inv. No. 316-1 (1925), *approved by President*, T.D. 41,655, 49 Treas. Dec. 1049 (1926).

⁸¹ Manila Rope, U.S. Tariff Comm'n Inv. No. 316-5 (1927), *approved by President*, T.D. 42,257, 51 Treas. Dec. 959 (1927).

⁸² Frischer & Co. v. Bakelite Corp., 39 F.2d 247, 260 (C.C.P.A.), *cert. denied*, 282 U.S. 852 (1930). For another survey of "unfair acts" which Section 337 might cover, see H. KAYE, P. PLAIA & M. HERTZBERG, *supra* note 4, at § 5.

⁸³ Minchew, *The Expanding Role of the United States International Trade Commission*, 27 MERCER L. REV. 429, 437 (1976).

⁸⁴ Minchew & Webster, *supra* note 66, at 44.

⁸⁵ 19 U.S.C. § 1337(a) (1976).

⁸⁶ In Certain Airtight Cast-Iron Stoves, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 at 58 (Jan. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1158, 1160, the Commission observed that Section 337's prohibition of acts which "restrain . . . trade and commerce in the United States . . . is generally modeled after Section 1 of the Sherman Antitrust Act [15 U.S.C. § 1 (1976)] . . ." However, the ITC found no antitrust violation.

Section 5 of the Federal Trade Commission Act,⁸⁷ the ITC maintains that "if there is found a violation of Section 1 of the Sherman Act . . . or of Section 5 of the Federal Trade Commission Act, there may also be a violation of Section 337."⁸⁸

After Congress gave the Commission the power to issue cease and desist orders under the 1974 Trade Act, the ITC had an appropriate action to pursue when dealing with a situation involving domestic monopoly or oligopoly.⁸⁹ Some commentators have argued that when

⁸⁷ 15 U.S.C. § 45 (1976 & Supp. IV 1980).

⁸⁸ Electronic Audio and Related Equipment, U.S. Int'l Trade Comm'n Inv. No. 337-TA-7, Pub. No. 768 (Apr. 1976), 1 INT'L TRADE REP. DEC. (BNA) 5211, 5222 (recommended determination of Presiding Officer Minchew, incorporated into Commission opinion by reference). Although the ITC found no antitrust violation in this investigation, it announced that it was incorporating into its opinion the corpus of existing antitrust laws as precedent. It also indicated that it was limiting its statement regarding antitrust jurisdiction to this particular proceeding, and in the future, would assess its antitrust jurisdiction on a case by case basis. *Id.* However, in Certain Airtight Cast-Iron Stoves, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 at 3-4 (Jan. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1158, 1160, the Commission stated that it will not adopt all of the analogous case law under Section 1 of the Sherman Act for application in its Section 337 decisions. Noting the differences between Section 1 and Section 337, the ITC stressed that Section 1 requires combination, while Section 337:

requires only that a restraint be shown and contains no requirement of concerted action. It is certainly possible to conceive of the same level of restraint by one company acting alone. However, it obviously is more difficult to show that one company acting alone has the market power to restrain trade than to show market power if there is concerted action. Where an unfair course of conduct is independently pursued by a number of competitors, that conduct may have a cumulative negative effect on competition even though such conduct is not the product of an agreement.

Id. Pub. No. 1126 at 6, 3 INT'L TRADE REP. DEC. (BNA) at 1160-61. Thus, it appears that the Commission regards its antitrust power under Section 337 to be more in the nature of Section 2 of the Sherman Act (monopolization), without that Section's intent requirement.

Commentators disagree over whether it is appropriate for the Commission to apply Section 337 as an antitrust statute. While Congress designed antitrust laws generally to promote competition, Congress conceived Section 337 as protectionist legislation. *See supra* notes 19-23 and accompanying text; *see also* McDermid, *The Trade Act of 1974: Section 337 of the Tariff Act and the Public Interest*, 11 VAND. J. TRANSNAT'L L. 421, 429-31 (1978). However, the language of Section 337, analogous to that of the Sherman and Federal Trade Commission Acts, certainly allows the Commission to apply principles developed under those and similar pieces of antitrust legislation. *Tariff Act Provision Seen as One Possible Avenue for Antitrust Cases*, [Oct.-Mar.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 107, at 275 (Dec. 16, 1981) (reporting remarks of Tom Schaumburg before a Federal Bar Association conference on international antitrust issues). Whether this is advisable is another question altogether. *See infra* text accompanying notes 394-97.

⁸⁹ Subsections (d), (e), and (f)(1) of Section 337 provide that the ITC must consider the effects of Section 337-based action on a number of public interest factors, including "competitive conditions in the United States economy." 19 U.S.C. § 1337(d)-(e), (f)(1) (1976 & Supp. IV 1980). The Senate Report serves as a main source of legislative history for the present Section 337, and explains that the ITC may refuse to issue an order excluding foreign products if the competing domestic industry has engaged in "price gouging" or monopoly practices. TRADE ACT OF 1974, S. REP. NO. 1298, *supra* note 8, at 195-96, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 7328-29. The Senate Finance Committee removed "price gouging" from the final language of the 1974

Congress granted the Commission cease and desist powers,⁹⁰ its specific intent was to allow the Commission to consider antitrust situations and to remedy them since an exclusion order would have been counterproductive if the offending party was in the United States.⁹¹

Under its antitrust jurisdiction, the Commission has dealt with allegations of group boycotts,⁹² refusals to deal,⁹³ conspiracy to restrain trade, predatory pricing,⁹⁴ and pricing below variable cost of production without commercial justification.⁹⁵ The ITC, however, has handled few antitrust cases, and seems reluctant to handle them.⁹⁶ No doubt this is because each time the Commission has taken up an antitrust-based complaint under Section 337, difficult procedural and political problems have arisen.⁹⁷

In addition to the requirement that the Commission may only in-

amendments to Section 337. The Nixon Administration's proposed legislation for what became the Trade Act of 1974, H.R. 6767, would have taken all antitrust jurisdiction away from the ITC leaving it to consider only patent infringement questions under Section 337. See *supra* note 66. Companion legislation, S. 1774, would have amended the Federal Trade Commission Act to deal specifically with cartel or monopoly practices in connection with import trade. See *H.R. 6767 Hearings, supra* note 66, at 101, 108 (message of the President), and at 1364-65 (statement of Noel Hemmendinger).

⁹⁰ 19 U.S.C. § 1337(f)(1) (Supp. IV 1980).

⁹¹ See *Minchew & Webster, supra* note 66 at 31-32. The Trade Agreements Act of 1979 gave the Commission the power to enforce its cease and desist orders in federal courts. See *infra* notes 341-54 and accompanying text.

⁹² *Tractor Parts, U.S. Tariff Comm'n Inv. No. 337-22, Pub. No. 443 (Dec. 1971)*. The two Commissioners stated without comment that group boycotts are a Section 337 violation. See also *Certain Angolan Robusta Coffee, U.S. Int'l Trade Comm'n Inv. No. 337-TA-16, investigation terminated on the basis of settlement, 41 Fed. Reg. 13,418 (1976)*.

⁹³ *Certain Angolan Robusta Coffee, U.S. Int'l Trade Comm'n Inv. No. 337-TA-16, investigation terminated on the basis of settlement, 41 Fed. Reg. 13,418 (1976)*; *Chicory Root—Crude and Prepared, U.S. Int'l Trade Comm'n Inv. No. 337-TA-27, investigation terminated, 42 Fed. Reg. 17,923 (1977)*.

⁹⁴ *Chicory Root, Crude and Prepared, U.S. Int'l Trade Comm'n Inv. No. 337-TA-27, investigation terminated, 42 Fed. Reg. 17,923 (1977)*; *Certain Color Television Receiving Sets, U.S. Int'l Trade Comm'n Inv. No. 337-TA-23, investigation terminated on the basis of consent order, 42 Fed. Reg. 39,492 (1977)*.

⁹⁵ *Certain Welded Stainless Steel Pipe and Tube, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978)*, 1 INT'L TRADE REP. DEC. (BNA) 5245, *disapproved by President, 43 Fed. Reg. 17,789 (1978)*.

⁹⁶ The court in *Syntex Agribusiness, Inc. v. United States Int'l Trade Comm'n*, 659 F.2d 1038 (C.C.P.A. 1981), upheld the ITC's dismissal of a Section 337 complaint which simply alleged, without support, that respondents had committed monopoly practices. The basis for the ITC's dismissal was that the complaint was not properly filed under ITC rule of procedure 210.12, 19 C.F.R. § 210.12 (1981). The Commission's argument was that Section 337 complaints require a minimum of substantive allegations in order to serve as the basis for the commencement of a formal Section 337 investigation by the ITC staff. In the future, before the Commission accepts an antitrust-based complaint, it will require the allegations in the complaint to be thoroughly supported.

⁹⁷ See *infra* text accompanying notes 393-396.

investigate unfair acts or practices which occur "in the importation of articles into the United States or in their sale,"⁹⁸ there are only two statutory limitations on the ITC's Section 337 subject matter jurisdiction. First, the Commission may not initiate, or once initiated, must terminate any investigation of matters which are based solely on alleged acts or effects which are within the purview of the several statutes applying to countervailing duties⁹⁹ or to antidumping.¹⁰⁰ However, if

⁹⁸ This requirement, from subsection (a) of Section 337, related to the acts of owners, importers, consignees, and their agents, who import articles into the United States. Thus, the subsection defines both the instances of unfair practices which the Commission can reach under Section 337 and also defines the ITC's *in personam* jurisdiction under the section. For a discussion of this *in personam* jurisdiction, see *infra* notes 168-183 and accompanying text.

The ITC has developed no clear interpretation of how far Section 337's subject matter jurisdiction extends with respect to the *location* of unfair acts or unfair competition. Indeed, the Commission has appeared to determine this on a case by case basis. One Commission opinion suggested that no violation of Section 337 occurs until there is an importation into the United States, along with an act of importation or sale by an "owner, importer, consignee, or agent of either." *Electronic Audio and Related Equipment*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-7, Pub. No. 768 (Apr. 1976), 1 INT'L TRADE REP. DEC. (BNA) 5211, 5212-13, 5221 (recommended determination of Presiding Officer Daniel Minchew, approved by reference). However, a later opinion emphasized that subsection (a)'s use of the word "or" indicated that Section 337 did not limit the Commission to prosecution of those acts arising during importation. Thus, Section 337 could control the unfair acts of owners, who might be foreign manufacturers, importers, consignees, or their agents, regardless of where those acts took place. The only limit to this application, the Commission noted, was that there had to be some nexus between the unfair method of competition or unfair acts and importation into the United States. *Certain Welded Stainless Steel Pipe and Tube*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 at 11 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, 5252, *disapproved by President*, 43 Fed. Reg. 17,789 (1978).

With respect to acts occurring within the United States after importation, a 1974 ITC opinion held that Section 337 encompassed merchandise withdrawn from Customs and available for direct sale to consumers by importers or retailers. *Convertible Game Tables and Components Thereof*, U.S. Tariff Comm'n Inv. No. 337-34, Pub. No. 705 at 7 (Dec. 1974), 1 INT'L TRADE REP. DEC. (BNA) 5094, 5096-97. Yet, in another case, the ITC dismissed as respondents two distributors of importers who were also respondents in that case. The Commission dismissed the distributors because to be within Section 337, a sale had to be directly concerned with importation. In the Commission's view, distribution was not such a direct concern. Also, the ITC maintained that the respondent importers could adequately represent the distributors' interests. *Monolithic Catalytic Converters*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-18, *investigation terminated by reason of licensing agreement*, 41 Fed. Reg. 41,478 (1976).

⁹⁹ Specifically, Subtitle A of Title VII of the Tariff Act of 1930, *as amended by* The Trade Agreements Act of 1979, 19 U.S.C. § 1671 (Supp. IV 1980), and Section 303 of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1303 (1976 & Supp. IV 1980). For a short description of these statutes, see Garfinkel, *Import Relief Guide*, *supra* note 4, at 243-44.

¹⁰⁰ Subtitle B of Title VII of the Tariff Act of 1930, *as amended by* The Trade Agreements Act of 1979, 19 U.S.C. § 1673 (Supp. III 1979). For a description of this statute, see Garfinkel, *Import Relief Guide*, *supra* note 4, at 241-43.

The entire provision excluding ITC jurisdiction over those "acts or effects . . . [solely] within the purview" of the countervailing duty and antidumping laws appears at 19 U.S.C. § 1337(b)(3) (Supp. IV 1980). Congress added the provision as part of the Trade Agreements Act of 1979 to codify the intent which the Senate Finance Committee expressed in its report on the TRADE ACT OF 1974, S. REP. NO. 1298, *supra* note 8, at 195, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS

the ITC has reason to believe that the countervailing duty or antidumping laws only partially cover the matter before it under Section 337, it may continue its investigation.¹⁰¹ Thus, if a complaint includes allegations of unfair import trade practices other than those which the countervailing duty or antidumping laws cover, the Commission will retain Section 337 jurisdiction. Allegations of unfair import practices would be relatively easy to include in a complaint for the purpose of keeping a matter before the Commission.¹⁰²

The second express limitation on ITC Section 337 jurisdiction is that ITC orders based on United States patent claims do not apply to importations for federal government use.¹⁰³ If there is such importation, the patent holder may gain relief by bringing action in the Court of Claims for "reasonable and entire compensation."¹⁰⁴

The Commission has independently limited its jurisdiction on four occasions. Three of these arose after full determinations early in the Commission's history,¹⁰⁵ while the fourth occurred after the Trade Act of 1974 in a ruling that the complaint was "not properly filed."¹⁰⁶

at 7328, that "[i]t is expected that the Commission's practice of not investigating matters clearly within the purview of either Section 303 [19 U.S.C. § 1303 countervailing duty statute] or the Antidumping Act [of 1921, 42 Stat. 11, *codified at* 19 U.S.C. § 1673 (Supp. IV 1980)] will continue."

¹⁰¹ 19 U.S.C. § 1337(b)(3) (Supp. IV 1980).

¹⁰² See *Certain Color Television Receiving Sets*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-23, *investigation terminated on the basis of consent order*, 42 Fed. Reg. 39,492 (1977), where the complainants alleged both predatory pricing and "unfair economic benefits and incentives by a foreign government." Both of these allegations arguably fall within the purview of the respective antidumping and countervailing duty statutes. But see *Syntex Agribusiness Inc. v. United States Int'l Trade Comm'n*, 659 F.2d 1038 (C.C.P.A. 1981), where the court describes the ITC's refusal to initiate an investigation because the alleged acts were solely within the purview of the Antidumping Act, 19 U.S.C. § 1673 (Supp. IV 1980).

ITC Chief Administrative Law Judge Donald Duvall has noted that the Commission views the limitations under subsection (b)(3) of Section 337 "as constituting merely a procedural obligation rather than a substantive limitation on its subject matter jurisdiction." Duvall, *supra* note 4, at 170. On its face, however, 19 U.S.C. § 1337(b)(3) (Supp. IV 1980) does not support the ITC's view.

¹⁰³ 19 U.S.C. § 1337(i) (1976).

¹⁰⁴ *Id.*

¹⁰⁵ *Sanitary Napkins*, U.S. Tariff Comm'n Inv. No. 316-3 (1926) (importation of articles in cartons similar in size and color to United States manufacturer's cartons not a violation, where size was functional and United States manufacturer had no exclusive right to the color of the carton); *Briarwood Pipes*, U.S. Tariff Comm'n Inv. No. 316-2 (1926) (sales below marginal cost not a violation); *Russian Asbestos*, Docket No. 1, Jan. 16, 1933 (not an unfair trade practice under Section 337 to import goods produced by foreign government monopolies, state trading corporations, or prison labor).

¹⁰⁶ *Crocheted Bootie Sets from Korea*, U.S. Int'l Trade Comm'n Inv. No. 603-TA-2, *investigation terminated*, 41 Fed. Reg. 32,793 (1976). For a discussion of the ITC's use of its investigative power under Section 603 of the Tariff Act of 1930, 19 U.S.C. § 2482 (1976), to informally dispose

Given Section 337's mandate that the ITC *shall* investigate any alleged violations of the statute,¹⁰⁷ however, it is unlikely that the Commission will choose to further limit its subject matter jurisdiction.

IV. ACTIONS AVAILABLE AGAINST SECTION 337 VIOLATIONS

Under Section 337 and related legislation, Congress has provided the Commission with a range of actions in cases involving unfair practices in import trade. Section 337 specifies that when the Commission finds a violation of the Section, it may issue either an exclusion order¹⁰⁸ or a cease and desist order.¹⁰⁹ Moreover, Section 337 provides that during the ITC's investigation of a complaint, the injured complainant may apply for several kinds of temporary orders.¹¹⁰ If the ITC grants such an order, or during the time a final Commission determination issuing an exclusion or cease and desist order is before the President for review, the ITC must allow entry under bond of the imported articles at issue.¹¹¹

The Commission has also taken six other types of action not specified in the statute in connection with Section 337 investigations. First, the parties in Section 337 proceedings have often settled their disputes themselves, and the Commission has based terminations of the proceedings on the settlement orders.¹¹² Second, the ITC has used its position among the parties to negotiate consent orders in which it joins as a party and agrees to supervise the order. Further, the ITC has termi-

of possible Section 337 violations, see *infra* notes 306-312 and accompanying text. Under its rules, the Commission may reject a complaint which is not "properly filed," 19 C.F.R. § 210.12 (1981), and the ITC rejected the *Booties* complaint on this basis. While the rule itself seems to permit the Commission to dispose of complaints which it deems, for apparently substantive reasons, not properly filed, the language of a related rule suggests that "properly filed" means only that a complaint must be sufficient and in compliance with "the applicable rules" of the chapter. 19 C.F.R. § 210.11 (1981). The chapter provides that a complaint must contain the names of parties, "concise and direct pleading," and other information which related to procedural sufficiency. 19 C.F.R. §§ 210.5, 210.20 (1981). Thus, it would appear that the Commission's rules require it to proceed with investigation once a complaint is filed which meets the procedural requirements of its rules. Compare this with the court's ruling in *Syntex Agribusiness Inc. v. United States Int'l Trade Comm'n*, 659 F.2d 1038, 1044 (C.C.P.A. 1981), that the ITC properly dismissed, as "not properly filed," a complaint which did not provide an adequate factual basis for its claims of a conspiracy and monopoly-based violation of Section 337.

¹⁰⁷ 19 U.S.C. § 1337(b)(1) (1976): "The Commission *shall* investigate any alleged violation of this section on complaint under oath or upon its initiative." (emphasis added).

¹⁰⁸ *Id.* § 1337(d); see *infra* text accompanying notes 122-63.

¹⁰⁹ 19 U.S.C. § 1337(f)(1) (Supp. IV 1980); see *infra* text accompanying notes 164-97.

¹¹⁰ 19 U.S.C. § 1337(e) (1976); see *infra* text accompanying notes 198-219.

¹¹¹ 19 U.S.C. § 1337(e), (g)(3) (1976); see *infra* text accompanying notes 220-43.

¹¹² See *infra* text accompanying notes 244-258.

nated Section 337 investigations on the basis of consent orders.¹¹³ The issuance of advisory opinions¹¹⁴ and suspension of proceedings¹¹⁵ have also been ITC responses to questions involved in Section 337 investigations. In addition, the Commission has the power to take informal action to investigate possible Section 337 violations¹¹⁶ and, on the basis of an investigation, to enter into consent settlements with the investigated party.¹¹⁷ Finally, the ITC has modified its orders to cover changed circumstances such as when the basis for the original violation has ceased.¹¹⁸

Substantive rulemaking is an action which may be available to the Commission to aid in the administration of Section 337, but one which it has not used.¹¹⁹ The ITC also has not used the statutory procedures which provide for the enforcement of a Commission cease and desist order.¹²⁰ Equally untested are enforcement mechanisms which the ITC has created through procedural rulemaking.¹²¹

A. Exclusion Orders

Exclusion orders are one of the actions which the Commission may take if it determines that there has been a violation of Section 337.¹²² While the ITC will direct its order toward the complainant's

¹¹³ See *infra* text accompanying notes 259-274.

¹¹⁴ See *infra* text accompanying notes 275-284.

¹¹⁵ See *infra* text accompanying notes 285-305.

¹¹⁶ 19 U.S.C. § 2482 (1976).

¹¹⁷ See *infra* text accompanying notes 306-12.

¹¹⁸ See *infra* text accompanying notes 313-16.

¹¹⁹ See *infra* text accompanying notes 317-35.

¹²⁰ See *infra* text accompanying notes 339-42.

¹²¹ See *infra* text accompanying notes 339-42.

¹²² 19 U.S.C. § 1337(d) (1976). Prior to the Trade Act of 1974, exclusion was the only action which the Commission could take against a Section 337 violation. Under the unamended Tariff Act of 1930, the President could issue an exclusion order upon Commission recommendation, if he agreed that there had been a Section 337 violation, and agreed that exclusion was proper. No criteria guided how broad the exclusion order could be. Tariff Act of 1930, ch. 497, sec. 337(e), 46 Stat. 590, 704.

Section 337 exclusion orders become effective on the date of their publication in the Federal Register, and become final on the day after the close of a sixty-day period of presidential review, or before that time, if the President expressly approves the order. 19 U.S.C. § 1337(g) (1976); 19 C.F.R. § 210.56 (1981) (ITC rules); 19 C.F.R. § 12.39 (1981) (Customs Service rules). When the ITC first issues its order, and later, when the order becomes final through presidential approval or inaction, the Commission transmits notice of the order to the Secretary of the Treasury, who notifies Customs officials of the order. These officials communicate the order to district Customs directors, who inform importers of the excluded goods that the Commission's order is in effect. 19 U.S.C. § 1337(d) (1976); 19 C.F.R. § 210.56(c) (1981) ("An exclusion order shall be enforceable upon receipt of notice thereof by the Secretary of the Treasury."); 19 C.F.R. § 12.39(b)(3) (1981) (Customs Service rules). Importers of excluded goods must destroy or export those goods not

injury, it must also consider "the effect of such exclusion 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."¹²³ Thus, the Commission may exercise its exclusion power if it has subject matter jurisdiction, and if the public interest permits.¹²⁴ An exclusion order will remain in effect until the Commission finds that the conditions which led to the order no longer exist,¹²⁵ and the order may be as broad or as narrow as the ITC determines is necessary.

The main efficacy of exclusion orders is that they are actions *in rem*. Since the orders operate against goods, not parties, their success does not depend on whether or not the Commission can secure *in personam* jurisdiction over respondents.¹²⁶

Another argument often advanced in support of the ITC's use of exclusion orders is that they are uniquely helpful to domestic industries which would otherwise have to bring a multiplicity of actions in order to obtain relief against unfair, shifting imports.¹²⁷ Section 337 exclusion orders are effective throughout the United States, whereas court decrees apply only within the court's smaller jurisdiction. Also, since the Customs Service polices exclusion orders at United States ports of entry, neither complainants nor the Commission must monitor those

accepted into United States commerce through Customs at the time the President approves the exclusion order or the sixty-day period passes without disapproval. If the importer does not do so, and the goods were entered on an import bond (as distinct from the *ad valorem* or similar type bond imposed under Section 337; see *infra* notes 220-43 and accompanying text for a discussion of these bonds), the district director who released the articles "shall assess liquidated damages in the full amount of the bond rider if the importer or consignee fails to export or destroy the released articles under Customs supervision within [a] thirty day period." 19 C.F.R. § 12.39(b)(3) (1981) (Customs Service rules).

¹²³ 19 U.S.C. § 1337(f)(1) (Supp. IV 1980).

¹²⁴ *Id.*

¹²⁵ *Id.* § 1337(h) (1976); see also *Charia & Co. v. United States*, 103 U.S.P.Q. (BNA) 252, 260 (Cust. Ct. 1954) (a patent-based exclusion order may last as long as the patent is in force). Twenty-three Section 337-based exclusion orders were outstanding on December 1, 1981. All but two of these were issued against patent-based violations. ITC HEARINGS CALENDAR, *supra* note 5.

¹²⁶ *Sealed Air Corp. v. United States Int'l Trade Comm'n*, 645 F.2d 976 (C.C.P.A. 1981). In *Sealed Air Corporation*, the court said:

The Tariff Act of 1930 . . . and its predecessor, the Tariff Act of 1922, were intended to provide an adequate remedy for domestic industries against unfair methods of competition and unfair acts instigated against foreign concerns operating beyond the *in personam* jurisdiction of domestic courts Authority to provide such remedy is grounded in Congress' plenary constitutional power to regulate foreign commerce, a portion of which power Congress delegated to the ITC under 19 U.S.C. § 1337. That Congress has wide discretion concerning procedures barring imports has been judicially confirmed in numerous cases."

Id. at 985-86 (footnotes and citations omitted).

¹²⁷ See *infra* notes 384-85 and accompanying text.

orders on an ongoing basis.¹²⁸

Yet critics have viewed the Commission's Section 337 exclusion power as a drastic remedy which the Commission has often applied beyond the scope of necessary relief.¹²⁹ Part of this criticism flows from the belief that the ITC's exclusion power is inflexible because it is applicable against only a general category of goods and is ineffective against the goods of individual manufacturers.¹³⁰ Thus, the argument goes, the Commission should only apply its exclusion power against imports which infringe a United States patent since policy arguments for supporting United States patent rights are strong.¹³¹

There is support for the argument that exclusion orders are inflexible in so far as the argument relates to the Commission's extension of exclusion orders to the components and spare parts of excluded goods.¹³² Such parts may have a lawful use in the United States and their separate importation would not be a Section 337 violation. Thus, relief exceeds injury in the case where the ITC excludes parts of excluded goods since domestic manufacturers not only benefit from protection of their main products, but also from the order's effect of insulating the market for spare parts.¹³³

The Commission has shown, however, that it can use exclusion orders flexibly to address certain situations. For example, the exclusion

¹²⁸ Certain Window Shades and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-83, Pub. No. 1152 (May 1981), 3 INT'L TRADE REP. DEC. (BNA) 1309, 1314.

¹²⁹ TRADE ACT OF 1974, S. REP. NO. 1298, *supra* note 8, at 198, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 7331; *Trade Act of 1973, Hearings Before the Committee on Finance on S. 1447*, 92d Cong., 2d Sess. 1999, 2011 (written statement of Harvey Kaye and Paul Plaia, Jr.) [hereinafter cited as *1974 Trade Act Hearings—Senate*]; Tractor Parts, U.S. Tariff Comm'n Inv. No. 337-22, Pub. No. 443 at 9 (Dec. 1971); Easton & Lang, *A Comment: Kaye and Plaia on Section 337—Pricing Jurisdiction*, 3 INT'L TRADE L.J. 359, 368 (1978).

¹³⁰ Rosenthal & Sheldon, *Section 337: A View From Two Within the Department of Justice*, 8 GA. J. INT'L. & COMP. L. 47, 59 (1978).

¹³¹ *Id.* See *infra* notes 374-90 and accompanying text for a discussion of ITC action under Section 337 in cases of patent infringement.

¹³² For examples of ITC exclusion orders which included an exclusion of parts and components, see *Headboxes II*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-82A, Pub. No. 1197 (Nov. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1992; Certain Large Video Matrix Display Systems and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-75, Pub. No. 1158 at 28 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1474, 1485.

¹³³ The ITC issued one exclusion order which allowed importation of components if the importer presented an affidavit at Customs stating that he did not intend to use the goods in an infringing way. Convertible Game Tables and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-2, Pub. No. 705 (Apr. 1976), 1 INT'L TRADE REP. DEC. (BNA) 5094. There seems to be no other approach than this to regulate the importation of spare parts to items excluded under a Section 337 order. However, it is not reasonable to expect the Customs Service to uniformly assess intent on each occasion of spare parts importation. Thus, no order short of one excluding all spare parts will be totally effective against infringement.

order which the Commission drafted against infringements of a United States process patent in *Certain Multicellular Plastic Film*¹³⁴ called for those who desired to import film to petition the Commission for a determination of whether their film would infringe the process patent. The Commission would allow non-infringing film to be imported. In *Headboxes II*,¹³⁵ as another example, the Commission reconsidered the broad exclusion order it issued in *Headboxes I* and which the President disapproved, and replaced it with a narrow order applying only to the respondent's and related companies' merchandise.¹³⁶

If the Commission applies its exclusion orders narrowly, as it did in *Headboxes II*, it can escape a second set of objections to its exclusion powers. Broad exclusions, according to this criticism, provide a remedy which exceeds the complainant's injury, and unjustifiably expand the complainant's rights.¹³⁷ In addition, such orders may stifle the flow of legitimate trade.¹³⁸ Indeed, subsection (d) of Section 337 arguably precludes such exclusion orders.¹³⁹ Under this subsection, there must be appropriate findings that the "articles concerned" are involved in a violation of Section 337. Therefore, the ITC may not exclude a general class of articles unless it has found that each of the class members has been involved in a Section 337 violation.¹⁴⁰ A related criticism stresses that when the ITC subjects imports to an exclusion order requiring licensing or approval without including those imports in a Section 337 investigation, it creates an unwarranted, unnecessary barrier to

¹³⁴ U.S. Int'l Trade Comm'n Inv. No. 337-TA-54, Pub. No. 987 (June 1979), 2 INT'L TRADE REP. DEC. (BNA) 5056, *aff'd*, Canadian Tarpoly Co. v. United States Int'l Trade Comm'n, 640 F.2d 1322 (C.C.P.A. 1981).

¹³⁵ U.S. Int'l Trade Comm'n Inv. No. 337-TA-82A, Pub. No. 1191 (Nov. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1992.

¹³⁶ *Id.* Pub. No. 1191 at 9-12, 3 INT'L TRADE REP. DEC. (BNA) at 1997-98. *See also supra* note 7.

¹³⁷ *See Headboxes I*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-82, Pub. No. 1138 (Apr. 1981), 2 INT'L TRADE REP. DEC. (BNA) 5481, 5499 (views of ITC Chairman Bill Alberger regarding remedy and the public interest), *disapproved by President*, 46 Fed. Reg. 32,361 (1981).

¹³⁸ *Certain Airless Spray Pumps and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-90, Pub. No. 1199 at 17 (Nov. 1981), 3 INT'L TRADE REP. DEC. (BNA) 2041, 2049. Customs officials might apply broad orders in an overly expansive way, or potential exporters to the United States of related, but non-infringing articles might decide not to export because of the business uncertainties which a broad order would create. *Id.*

¹³⁹ The pertinent portion of subsection (d) of Section 337 states that "[i]f 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 . . . be excluded from entry." 19 U.S.C. § 1337(d) (1976) (emphasis added).

¹⁴⁰ *Canadian Tarpoly Co. v. United States Int'l Trade Comm'n*, 640 F.2d 1322, 1329 n.6 (C.C.P.A. 1981) (Nies, J., dissenting).

trade.¹⁴¹ Such a barrier runs counter to United States obligations under the General Agreement on Tariffs and Trade (GATT)¹⁴² and the GATT Agreement on Import Licensing Procedures.¹⁴³ Hence, the Commission has announced that both the complainant and the ITC Investigative Attorney in Section 337 actions have the affirmative duty to use reasonable efforts to notify, through the Commission Secretary's office, all persons whose goods might be affected by the actions, "serving all with copies of the notice of investigation to insure that they are on notice of the pendency of a Section 337 action."¹⁴⁴

However, if the Commission would limit the scope of all of its exclusion orders to the articles of specific parties, it would remove those orders' effectiveness against injuries to United States industries caused by unfairly imported, easily produced articles. Once the ITC excludes such articles of one foreign producer, another could easily begin importing the articles, and a new Section 337 investigation would be necessary.¹⁴⁵ As a result, there is a need for the ITC to retain its discretion to draft broad exclusion orders in certain cases.¹⁴⁶

In *Certain Airless Spray Pumps*,¹⁴⁷ the Commission announced that it would require complainants who seek broad exclusion orders in patent infringement cases to prove both a widespread pattern of unauthorized use of its patented invention, and "certain business conditions" which indicate that manufacturers other than the named respondents in the investigation might attempt to enter the United States market with infringing articles. Evidence of widespread unauthorized use could include:

- (1) a Commission determination of unauthorized importation into the

¹⁴¹ See Letter from Stephen L. Gibson, Counsel for TVW Paper Machines, Inc., to Hon. William E. Brock, United States Trade Representative (May 14, 1981) (filed in the Docketing Office of the U.S. Int'l Trade Comm'n, Washington, D.C., in connection with *Headboxes I*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-82, Pub. No. 1138 (Apr. 1981), 2 INT'L TRADE REP. DEC. (BNA) 5481, *disapproved by President*, 46 Fed. Reg. 32,361 (1981)).

¹⁴² General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187, arts. XI, XX.

¹⁴³ GATT Agreement on Import Licensing Procedures, *opened for signature* Apr. 12, 1979, 93 Stat. 144, 148 T.I.A.S. No. 9788, — U.N.T.S. —, art. 3(a).

¹⁴⁴ *Certain Steel Rod Treating Apparatus*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-97 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1342, 1345 n.3 (interlocutory appeal of administrative law judge ruling by respondents), *exclusion order issued*, 46 Fed. Reg. 61,352 (1981), *revoked*, 47 Fed. Reg. 2950 (1982).

¹⁴⁵ *Certain Airless Spray Pumps and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-90, Pub. No. 1199 at 18 (Nov. 1981), 3 INT'L TRADE REP. DEC. (BNA) 2041, 2048-49.

¹⁴⁶ See *infra* text accompanying notes 405-14.

¹⁴⁷ *Certain Airless Spray Pumps and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-90, Pub. No. 1199 at 18 (Nov. 1981), 3 INT'L TRADE REP. DEC. (BNA) 2041, 2048-49.

- United States of infringing articles by numerous foreign manufacturers;
or
(2) the pendency of foreign infringement suits based upon foreign patents which correspond to the domestic patent in issue;
(3) other evidence which demonstrates a history of unauthorized foreign use of the patented invention.¹⁴⁸

Evidence to prove "business conditions" could include:

- (1) an established demand for the patented product in the U.S. market and conditions of the world market;
- (2) the availability of marketing and distribution networks in the United States for potential foreign manufacturers;
- (3) the cost to foreign entrepreneurs of building a facility capable of producing the patented article;
- (4) the number of foreign manufacturers whose facilities could be retooled to produce the patented article; or
- (5) the cost to foreign manufacturers of retooling their facility to produce the patented articles.¹⁴⁹

Applying the above criteria in the *Spray Pumps* case, the ITC held that the complainant had proven neither business conditions nor widespread use sufficient for a broad order, and thus directed an order against only the named respondents in the case.¹⁵⁰

Neither the Court of Customs and Patent Appeals nor the Commission has accepted the arguments that the ITC must draft narrow exclusion orders in all cases. Arguments stressing that orders be as narrow as possible are persuasive, though, when one is aware of the potential constraint each exclusion order can have on United States import trade. Thus, even when applying its *Spray Pumps* criteria, the ITC should seek to draft its exclusion orders as narrowly as possible against Section 337 violations.¹⁵¹

¹⁴⁸ *Id.* Pub. No. 1199 at 18-19, 3 INT'L TRADE REP. DEC. (BNA) at 2048-49.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* Pub. No. 1199 at 19, 3 INT'L TRADE REP. DEC. (BNA) at 2049.

¹⁵¹ Significantly, all of the exclusion orders after the President's disapproval of the *Headboxes I* order, 46 Fed. Reg. 32,361 (1981), and until the President's disapproval of the *Sandwich Panel Inserts* order, 47 Fed. Reg. 29,919 (1982), issued against the goods of specific parties. See *Coin-Operated Audio-Visual Games and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-87, Pub. No. 1160 at 28 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1212; *Certain Spring Assemblies and Components Thereof, and Methods for their Manufacture*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-88, Pub. No. 1172 (Oct. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1426 [hereinafter cited as *Spring Assemblies*]; *Certain Airless Spray Pumps and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-90, Pub. No. 1199 (Nov. 1981); *Certain Steel Rod Treating Apparatus and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-97, *exclusion order issued*, 46 Fed. Reg. 61,352 (1981), *revoked*, 47 Fed. Reg. 2950 (1982). The incidence of the change in the scope of ITC exclusion orders after the President's *Headboxes I* disapproval is striking. What is also striking is what seems to be the executive's continued opposition to broad exclusion orders. Yet, the President neither approved nor disapproved of the broad exclusion order which the ITC issued in *Certain Coin-Operated Audiovisual Games and Components*

It is important to note, however, that drafting cannot compensate for certain inherent limitations of exclusion orders. For example, enforcement of exclusion orders falls on the United States Customs Service. Each time an article reaches Customs, officers who enforce the order must determine whether the article falls under it.¹⁵² Thus, within certain bounds, there is no assurance that Customs officers will administer an exclusion order uniformly.¹⁵³ Indeed, past practice seems to indicate that the Service tends to construe exclusion orders broadly in some cases¹⁵⁴ and narrowly in others.¹⁵⁵ In both cases, the need for

Thereof (viz., Pac-Man and Rally-X), U.S. Int'l Trade Comm'n Inv. No. 337-TA-105, Pub. No. 1267 (July 1982). See *Owner of Copyright in 'Pac-Man' Game Wins ITC Exclusion Order*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 138, at 520-22 (July 28, 1982).

¹⁵² For example, when determining whether an imported good falls under an exclusion order entered against design patent infringement, Customs officials apply the "ordinary observer" test of *Gorham v. White*, 81 U.S. 511, 528 (1871). See *Kaye & Plaia, Unfair Competition in Imports: A Review of Developments During the Year 1979 Under Section 337 of the Tariff Act of 1930*, 62 J. PAT. OFF. SOC'Y 582, 606 (1980) [hereinafter cited as *Kaye & Plaia, 1979 Developments*]. The "ordinary observer" test is simply whether an ordinary observer would be able to tell whether an import infringed a design patent. There is always the possibility that a domestic manufacturer will disagree with Customs officials who admit articles under the *Gorham* test. To enforce his patent right, the domestic manufacturer could take any or all of three actions: (1) go back to the Commission for enforcement or modification of its order, see 19 C.F.R. § 211.01 *et seq.* (1981); (2) bring administrative proceedings with Customs at the port where the allegedly infringing articles entered; or (3) bring action in the port's federal district court. Thus, to enforce a Commission order, a manufacturer subject to shifting imports might encounter more litigation than if he had sued particular importers one at a time.

¹⁵³ The ITC and the Customs Service have not implemented any procedure which would allow Customs officials to obtain advice from the ITC as to whether particular articles fall within an ITC exclusion order. In April, 1981, for example, ITC enforcement attorneys received a memorandum from a Customs official in Portland, Oregon inquiring whether the patent-based exclusion order issued in *Certain Rotatable Photograph and Card Display Units and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-74, Pub. No. 1109 (Nov. 1980), 3 INT'L TRADE REP. DEC. (BNA) 1011, applied to articles which an importer was attempting to bring into the United States. Customs Memorandum, April 1981, filed in the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C., in connection with *Rotatable Photograph and Card Display Units*. There is no record of reply to this memorandum. Similarly, importers attempted an entry of articles with the ITC's design patent-based exclusion order in *Certain Luggage Products*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-39, Pub. No. 932 (Nov. 1978), may have covered. The Customs Service District Director at the port of entry requested a ruling from the Director of Entry Procedures and Penalties Division of the Custom Service in Washington, D.C. as to whether the articles infringed the design patent which the exclusion order protected. The Washington director replied that the order did not cover the subject luggage. Customs Service Circular 79-390; see also *Kaye & Plaia, 1979 Developments, supra* note 152, at 605-06.

There seems to be no reason why the Commission cannot adapt its advisory opinion procedure to provide for Customs officials' requests for interpretations of exclusion orders. See generally the discussion of the ITC's advisory opinion procedures, *infra* notes 277-286 and accompanying text.

¹⁵⁴ Before the President disapproved of the *Headboxes I* exclusion order, directed against all imported headboxes, see 46 Fed. Reg. 32,361 (1981), importers of non-infringing related goods complained that the order was causing them delays at Customs. In response, the ITC sent a letter

interpretation of Commission exclusion orders at Customs always involves implications for the free flow of trade into the United States.¹⁵⁶

To facilitate administration of exclusion orders based on findings of common law trademark infringement, the ITC has issued exclusion orders containing pictures and descriptions of the complainant's products,¹⁵⁷ and lists of required changes to make the infringing products acceptable for entry.¹⁵⁸ However, pictures are of little use in the administration of patent-based exclusion orders. When it has communicated those orders to Customs, the Commission has refused to do more than attach a copy of the patent to the exclusion order. Any further description, the ITC maintains, might be overly narrow and deprive the complainant of a remedy, or might be overly broad and result in an overly broad exclusion order.¹⁵⁹

The appeals process available through Customs can further limit the uniform administration of Section 337 exclusion orders. Importers may, for example, obtain a Customs ruling prior to importation on whether the articles they propose to import would be subject to import restrictions. After importation, the importer may require that the Customs Service import specialist at the port of entry seek internal advice from Customs in Washington, D.C. on any questions of import restric-

to Customs clarifying how it intended Customs to enforce the exclusion order. *Future ITC Recommendations Will Get Closer Look*, *USTR Official Says*, *supra* note 7; *President Disapproves ITC's Remedy Determination in Headboxes Case*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 81, at A-4, A-5 (June 10, 1981). See also *Certain Airless Spray Pumps and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-90, Pub. No. 1199 at 17 (Nov. 1981), 3 INT'L TRADE REP. DEC. (BNA) 2041, 2048 (Customs officials might decide, when in doubt, to exclude items related to those covered in exclusion order).

¹⁵⁵ See *Prohibited and Restricted Importations: Solid Molded Golf Balls; Patent Infringement*, C.S.D. 80-154, 14 Cust. B. & Dec. 984 (1980). In this ruling, the Service construed the patent-based exclusion order which the ITC issued in *Certain Molded Golf Balls*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-35, Pub. No. 897 (July 1978). The Service determined that golf balls which had a separate surlyn cover molded to a polymeric solid center were not excluded, because the patented ball was a one-piece ball.

¹⁵⁶ The need to minimize importation delays was one of the reasons that the President disapproved the *Headboxes I* exclusion order. 46 Fed. Reg. 32,361 (1981).

¹⁵⁷ *Certain Airtight Cast-Iron Stoves*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 at 14 (Jan. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1158, 1164; *Certain Novelty Glasses*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-55, Pub. No. 991 at 3 n.4 (July 1979), 2 INT'L TRADE REP. DEC. (BNA) 5400.

¹⁵⁸ *Certain Airtight Cast-Iron Stoves*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 at 14 (Jan. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1158, 1164.

¹⁵⁹ *Headboxes II*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-82A, Pub. No. 1197 at 12 (Nov. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1992, 1998. Section 337 is the only Customs-related statute which requires Customs officials to interpret United States patents at ports of entry. The Court of Customs and Patent Appeals has ruled that this is permissible. *In re Von Clemm*, 229 F.2d 441, 445 (C.C.P.A. 1954).

tions.¹⁶⁰ If a Customs officer excludes the importer's article, the importer may appeal the exclusion administratively,¹⁶¹ and may continue the appeal by filing a civil action in the United States Court of International Trade. The importer, may appeal a Court of International Trade decision to the Court of Customs and Patent Appeals, and from there to the Supreme Court on *certiorari*.¹⁶²

It is not certain whether a court reviewing the exclusion of goods at Customs pursuant to a Section 337 order would be limited to a review of whether the excluded items were covered by the exclusion order, or whether review could extend to the question of whether the unfair import trade practice on which the ITC based the order was actually present in connection with the particular import stopped at Customs.¹⁶³ If the more extensive review takes place, a court could effectively alter the content of the Commission's original exclusion order.

In sum, while exclusion orders may seem to be inclusively powerful actions under Section 337, the need for individual application of the orders at Customs and the needs of administrative due process limit the orders' practical effectiveness.

B. Cease and Desist Orders

In 1974, Congress provided the Commission with the power to impose cease and desist orders "in lieu of" exclusion orders.¹⁶⁴ While the legislative history indicates that Congress intended for the Commission to apply cease and desist orders instead of exclusion orders in non-patent cases,¹⁶⁵ the Commission has viewed cease and desist orders as

¹⁶⁰ 19 C.F.R. § 177.11(b) (1980).

¹⁶¹ 19 U.S.C. § 1514 (1976).

¹⁶² 28 U.S.C.A. § 2601 (West Supp. 1981). The newly-constituted United States Court of International Trade has not reviewed a Section 337 exclusion order in connection with a claim at Customs. However, the United States Customs Court, predecessor of the United States Court of International Trade, reviewed one Section 337 exclusion order, and held that the order included the plaintiff's articles. *Charia & Co. v. United States*, 103 U.S.P.Q. (BNA) 252 (Cust. Ct. 1954).

¹⁶³ See *LaRue, Section 337 of the 1930 Tariff Act and its Section 5 FTC Act Counterpart*, 43 ANTITRUST L. J. 608, 612 (1974); *H.R. 6767 Hearings, supra* note 66, at 1361 (statement of Noel Hemmendinger).

¹⁶⁴ 19 U.S.C. § 1337(f) (Supp. IV 1980). The ITC has interpreted the words "in lieu of" to mean that it may not impose a cease and desist order *and* an exclusion order against a single respondent for a single Section 337 violation. However, the ITC contends that it may impose both kinds of orders where there are several violations, or several respondents. See *infra* notes 188-91 and accompanying text.

¹⁶⁵ The Senate Finance Committee expressed the view that "the existing statute, which provides no remedy other than exclusion of articles from entry, [was] so extreme or inappropriate in some cases that it [was] often likely to result in the Commission not finding a violation of this

an "extraordinary remedy," appropriate only "where an exclusion order is ineffective to redress completely the wrong or is insufficiently precise in its coverage."¹⁶⁶ Seemingly consistent with this view, the Commission has applied cease and desist orders in only three cases.¹⁶⁷

An alternate explanation for the ITC's hesitance to use its cease and desist powers is that the ITC has never figured out how to apply them. Part of this uncertainty stems from the fact that the Commission must have *in personam* jurisdiction over respondents in order to apply effective cease and desist orders. Further, the Commission is uncomfortable with the fact that cease and desist orders only reach specific respondents, whereas exclusion orders, depending on their breadth, can operate against the good of any existing or potential violator of Section

section, thus reducing the effectiveness of section 337 for the purposes intended." TRADE ACT OF 1974, S. REP. NO. 1298, *supra* note 8, at 197, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 7331. A comparison of the Finance Committee's statement with draft versions of the Trade Act of 1974, H.R. 6767, H.R. 10710, and the unamended S. 1774, supports the argument that Congress intended for the ITC to use cease and desist orders in lieu of exclusion in non-patent investigations (see *supra* note 66 for a discussion of H.R. 6767 and H.R. 10710). See McDermid, *supra* note 88, at 421, 443. H.R. 6767 and H.R. 10710 would have only given the Commission power to issue exclusion orders, and then only in cases of patent infringement. The Senate bill, S. 1774, a version of which became the 1974 Trade Act, provided for both exclusion and cease and desist powers. Yet, S. 1774 again limited the use of cease and desist orders *in lieu of* exclusion.

Several former ITC staff attorneys have also noted that the reason the Commission considered few non-patent cases prior to 1974 was that exclusion orders—then the ITC's only power—were inappropriate in non-patent cases. Easton & Lang, *supra* note 129, at 368. Arguably, Congress added cease and desist orders to the Commission's powers to make Section 337 effective against non-patent unfair import trade practices.

¹⁶⁶ Certain Inclined-Field Acceleration Tubes and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-67, Pub. No. 1119 (Dec. 1980), 2 INT'L TRADE REP. DEC. (BNA) 5572, 5581. See also Certain Welded Stainless Steel Pipe and Tube, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, 5250 (opinion of Commissioners Minchew, Moore, and Alberger), *disapproved by President*, 43 Fed. Reg. 17,789 (1978) (Section 337(f) cease and desist power is "ancillary and subordinate to the exclusion power. In most cases, exclusion is our only practical means of enforcement.").

¹⁶⁷ The President disapproved of the ITC's first use of a cease and desist order in Certain Welded Stainless Steel Pipe and Tube, 43 Fed. Reg. 17,789 (1978), on the grounds that the order conflicted with other agencies' antitrust jurisdiction. Additionally, while the President accepted the Commission's application of a cease and desist order in Certain Apparatus for the Continuous Production of Copper Rod, U.S. Int'l Trade Comm'n Inv. No. 337-TA-52, Pub. No. 1017 (Nov. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5006, this acceptance was not complete. After the order became final, the United States Trade Representative sent a letter to the Chairman of the Commission, indicating that ambiguities existed in the order, and that the Commission should explain it to the parties involved, if deemed necessary. See *infra* note 193.

Certain Airtight Cast-Iron Stoves, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 (Jan. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1158, involved the most recent use of permanent Section 337 cease and desist orders. The ITC issued six cease and desist orders against the six domestic respondents, and issued exclusion orders against the offending products of specific foreign respondents. The President took no action on the *Stoves* orders. Significantly, they were the first cease and desist orders against non-patent violations of Section 337 to become final.

337.¹⁶⁸

In personam jurisdiction is a court's or agency's ability to "assert judicial power over the parties and bind them by its adjudication."¹⁶⁹ The Commission has never denied that it would have to secure *in personam* jurisdiction over a respondent in order to enforce a cease and desist order through civil action.¹⁷⁰ On one occasion, however, the Commission expressed the belief that cease and desist orders could operate without any civil enforcement to support them,¹⁷¹ and viewed cease and desist orders as being one step short of its *in rem* exclusion power. Thus, the Commission concluded that there was no need to prove a nexus between an unfair act and an importation by an importer, consignee, owner, or their agents in order for the ITC to bring a cease and desist order to bear against those parties.¹⁷² At the time, this

¹⁶⁸ For example, in *Certain Window Shades and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-83, Pub. No. 1152 (May 1981), 3 INT'L TRADE REP. DEC. (BNA) 1309, 1314, the ITC refused to apply a cease and desist order since the window shade industry in the named respondents' home country (Taiwan) appeared to be fluid, and since there could be "importations or attempted importations before the complainant or the Commission could become aware of them." In another case, the ITC also declined to issue a cease and desist order where the record developed by the Presiding Officer indicated that persons other than the named respondents had imported articles covered by the Section 337 investigation. *Certain Exercising Devices*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-24, Pub. No. 813 at 6 (Apr. 1977).

¹⁶⁹ *Japan Gas Lighter Ass'n v. Ronson Corp.*, 257 F. Supp. 219, 224 (D.N.J. 1966). For a concise description of the concept of *in personam* jurisdiction, see Victor, *In Personam Jurisdiction, Venue, and Service of Process in Antitrust Cases*, in PRACTICING LAW INSTITUTE, 17TH ANNUAL ADVANCED ANTITRUST LAW SEMINAR, INTERNATIONAL TRADE AND THE ANTITRUST LAWS 45, 49-57 (Corp. Law and Practice, Court Handbook Ser. No. 259, 1977) [hereinafter cited as Victor, PLI SEMINAR].

¹⁷⁰ Significantly, while expressing the belief that Section 337 did not require the Commission to have *in personam* jurisdiction to issue a cease and desist order, the Commission, in *Certain Welded Stainless Steel Pipe and Tube*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 at 5, 6 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, 5250 (opinion of Commissioners Minchew, Moore, and Alberger), *disapproved by President*, 43 Fed. Reg. 17,789 (1978), recognized that "[i]n the event that [the ITC] sought a court order to require compliance with [a cease and desist order], it would be incumbent on a court to raise the requirement of due process before providing the full panoply of punitive measures at its disposal." A court would violate due process requirements if it enforced an order against a defendant over whom it had no jurisdiction.

¹⁷¹ The ITC reasoned that there was no vested right to importation into the United States. *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904). Thus, the due process clause of the Constitution only limited congressional exercise of power over foreign commerce insofar as it required that the exercise of power not be arbitrary. Once that standard was met, the ITC asserted, due process requirements of personal service inside the forum jurisdiction, or, in the alternative, minimum contacts with the forum jurisdiction, did not apply. If the ITC notified parties according to the Administrative Procedure Act (APA), 5 U.S.C. § 554 (1976), as required by 19 U.S.C. § 1337(c) (1976), the ITC believed that it would not be acting arbitrarily. Such notice, the ITC maintained, would fully safeguard foreign respondents' constitutional and procedural rights. See Duvall, *supra* note 4, at 171.

¹⁷² See *Electronic Audio and Related Equipment*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-7, Pub. No. 768 (Apr. 1976), 1 INT'L TRADE REP. DEC. (BNA) 5211, 5221 (recommended determi-

conclusion was not clearly wrong; there was some basis for the ITC arguing that Section 337 cease and desist orders operated *in rem*, while such orders in other forums operated *in personam*,¹⁷³ since no statutory provision for civil enforcement of Section 337 cease and desist orders existed and the only enforcement mechanism was exclusion.

When Congress amended Section 337 in 1979 to provide for civil enforcement of cease and desist orders,¹⁷⁴ however, it undermined the ITC's argument that Section 337 exclusion orders operate *in rem*. The amendment codified congressional intent, existing since 1974, that the ITC was to apply cease and desist orders where exclusion was inappropriate.¹⁷⁵ Hence, it became difficult to assert that a cease and desist order could be effective if the ITC did not have jurisdiction over the respondent it wished to apply the order against, since exclusion practically became unavailable for enforcing Section 337 cease and desist orders.¹⁷⁶ Indeed, the ITC has conceded that civil enforcement of a Section 337 cease and desist order requires *in personam* jurisdiction over the person subject to the order. Thus, the Commission has taken the position that it *may* have to find *in personam* jurisdiction to direct cease and desist orders against "certain types of [unspecified]

nation of Presiding Officer Minchew, incorporated into ITC opinion by reference). Former Commission Chairman Leonard remarked that the question of nexus was one which the Commission would "wrestle with" in Section 337 cases. Remarks of Will E. Leonard, Chairman, U.S. Int'l Trade Comm'n, to the Third Annual Judicial Conference of the U.S. Court of Customs and Patent Appeals, Washington, D.C., May 10, 1976, 72 F.R.D. 239, 272 (1977) (question and answer period). See also Easton & Neely, *Unfair Competition in U.S. Import Trade: Developments Since the Trade Act of 1974*, 5 INT'L TRADE L. J. 203, 207 (1980).

¹⁷³ The rationale was that the addition of cease and desist orders to ITC powers under Section 337 did not alter the ITC's jurisdictional base since, at the time, the Commission's cease and desist powers went

no further than allowing the Commission to modify a cease and desist order or to revoke it and replace it with an order of exclusion. The cease and desist order itself merely compels parties to refrain from unfair trade practices or risk exclusion of their products. This Commission has no independent power beyond that of exclusion.

Certain Welded Stainless Steel Pipe and Tube, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 at 5, 6 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, 5250, *disapproved by President*, 43 Fed. Reg. 17,789 (1978).

¹⁷⁴ 19 U.S.C. § 1337(f)(2) (1976 & Supp. IV 1980). The Senate Finance Committee expressed the view that the new civil enforcement mechanism would "provide a more flexible remedy" than enforcing cease and desist orders by means of exclusion orders. TRADE AGREEMENTS ACT OF 1979, S. REP. NO. 249, 96TH CONG., 1ST SESS., at 262 (1979), *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 648 [hereinafter cited as SENATE FINANCE COMMITTEE REPORT, 1979].

¹⁷⁵ See *supra* note 165.

¹⁷⁶ It is unclear whether exclusion is now unavailable as an enforcement mechanism, for example, where there is no question of domestic monopoly, or where there is no possibility that an exclusion order would be a remedy which could exceed the complainant's original injury. See *generally supra* note 165.

activity.”¹⁷⁷

Since the 1979 amendments, the ITC has slowly begun to change its view of the applicability of cease and desist orders to foreign respondents.¹⁷⁸ It has gone as far as admitting that it could not apply a cease and desist order against a foreign respondent who had “no offices or assets in the U.S.”¹⁷⁹ Indeed, the Commission announced that it would not issue an *in personam* cease and desist order against foreign respondents unless it determines that they are within its Section 337 *in personam* and subject matter jurisdiction.¹⁸⁰

If deemed necessary, however, it appears that the Commission can gain *in personam* jurisdiction over foreign respondents on the basis of the “intended effects” language of Section 337.¹⁸¹ However, if the

¹⁷⁷ Certain Steel Rod Treating Apparatus, U.S. Int'l Trade Comm'n Inv. No. 337-TA-97 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1342, 1346-47 n.6 (interlocutory appeal by respondents of administrative law judge order denying their motions to be dismissed as parties), *exclusion order issued*, 46 Fed. Reg. 61,352 (1981), *revoked*, 47 Fed. Reg. 2950 (1982).

¹⁷⁸ See Certain Electric Slow Cookers, U.S. Int'l Trade Comm'n Inv. No. 337-TA-42, Pub. No. 994 at 7 (Aug. 1979); Coin-Operated Audio-Visual Games and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-87, Pub. No. 1160 at 28 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1212, 1225.

¹⁷⁹ Coin-Operated Audio-Visual Games and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-87, Pub. No. 1160 at 28 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1212, 1224.

¹⁸⁰ Certain Large Video Matrix Display Systems and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-75, Pub. No. 1158 at 30 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1474, 1486. Even if it finds that it has personal and subject matter jurisdiction, the ITC announced that it will use its discretion to issue cease and desist orders, depending on the factual circumstances of each case, and also weigh “the likely benefit to the domestic industry to be derived from the proposed relief against the likely harm to consumers and to the general public interest. The availability and adequacy of other forms of relief will also be taken into consideration.” *Id.* Pub. No. 1158 at 31, 3 INT'L TRADE REP. DEC. (BNA) at 1468.

However, the Commission maintains that a separate, *in rem*-based cease and desist order exists which is enforceable through exclusion. This is essentially an exclusion order which requires reporting. *Id.* Pub. No. 1158 at 30 n.10, 3 INT'L TRADE REP. DEC. (BNA) at 1486. In *Canadian Tarpoly Co. v. United States Int'l Trade Comm'n*, 640 F.2d 1322 (C.C.P.A. 1981), the court upheld this type of order (which, in this case, it called an exclusion order).

Presumably, the ITC's reasoning, relating to all cease and desist orders before Congress added civil enforcement provisions to Section 337, applies to this second type of *in rem* “cease and desist” order. It is unclear why the ITC insists on calling this *in rem* order anything other than an exclusion order, given the Court of Customs and Patent Appeals clear statement that *exclusion orders* (as opposed to cease and desist orders) operate *in rem*, and not *in personam*. *Sealed Air Corp. v. United States Int'l Trade Comm'n*, 645 F.2d 976, 985-86 (C.C.P.A. 1981). It would seem to be to the ITC's advantage to draw a clear distinction between cease and desist orders and exclusion orders.

¹⁸¹ Judge Learned Hand best stated the “intended effects doctrine” in *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945): “[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends. . . .”

19 U.S.C. § 1337(a) (1976), similar to Section 1 of the Sherman Act (*see supra* notes 86-89 and

Commission uses this language to gain jurisdiction over foreign respondents, it must also observe the procedural due process considerations of the "minimum contacts" doctrine.¹⁸² Additionally, even where there are sufficient minimum contacts between the United States and the respondents, procedural due process further requires the Commission to decline to exercise its *in personam* jurisdiction, either for reasons of comity or where it has not given the respondent adequate notice of the proceeding.¹⁸³

accompanying text) states that Section 337 applies to any unfair act by an importer, owner, consignee, or their agent which has the *effect or tendency* to injure substantially a United States industry or to *monopolize* within the United States economy. The Commission has applied this language in several investigations to claim *in personam* jurisdiction over respondents under the "intended effects doctrine." See *Certain Welded Stainless Steel Pipe and Tube*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, 5250-53 (opinion of Commissioners Minchew, Moore, and Alberger), *disapproved by President*, 43 Fed. Reg. 17,789 (1978). In one case, while not passing directly on the ITC's reading of 19 U.S.C. § 1337(a), the Court of Customs and Patent Appeals suggested that the Commission's "effects" interpretation may not have been incorrect. The court noted that while the Commission did not have to secure *in personam* jurisdiction over *every* person who was affected by an exclusion order which required reporting, the respondents' conduct could have had sufficient effects on the United States economy for the ITC to have gained personal jurisdiction over them. *Sealed Air Corp. v. United States Int'l Trade Comm'n*, 645 F.2d 976, 986 (C.C.P.A. 1981).

However, commentators have not agreed that the ITC has the power to gain personal jurisdiction over foreign respondents, unless the respondent "is involved in 'importation,' which case law defines as the act of bringing articles into the United States. Under such a reading of Section 337, no cease and desist order could be issued directly against foreign exporters and manufacturers. . . ." Hemmendinger, Barringer & Kossel, *Section 337: A Case for Repeal or Change*, 8 GA. J. INT'L & COMP. L. 81, 102-103 (1978) (footnote omitted). See also *Sealed Air Corp. v. United States Int'l Trade Comm'n*, 645 F.2d 976, 995-98 (C.C.P.A. 1981) (Nies, J., dissenting) ("*In personam* jurisdiction cannot be found in the statute.>").

¹⁸² The basis for this doctrine is the Supreme Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which emphasized that in order to subject a defendant to an *in personam* judgment, due process requires that the defendant have certain "minimum contacts" with the judicial forum. This is so a suit against that party in the forum does not offend "traditional notions of fair play and substantial justice." *Id.* at 316. For a description of the operation and bounds of the minimum contacts doctrine, see Victor, PLI SEMINAR, *supra* note 169, at 50-57. See also Comment, *The Minimum Contacts Standard and Alien Defendants*, 12 L. & POL'Y INT'L BUS. 783 (1980) [hereinafter cited as Comment, *Minimum Contacts*].

Note, however, that the requirement of observing the minimum contacts doctrine applies *only* when the Commission prescribes a cease and desist order against a respondent. It is not necessary to have minimum contacts between a respondent and the United States in a Section 337 action where the ITC issues an *in rem* order. See *Certain Steel Rod Treating Apparatus*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-97 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1342, 1344-48 (interlocutory appeal by respondents of an administrative law judge order denying their motions to be dismissed as parties), *exclusion order issued*, 46 Fed. Reg. 61,352 (1981), *revoked*, 47 Fed. Reg. 2950 (1982).

¹⁸³ See Holmes, *Government Antitrust Actions and Remedies Involving Foreign Commerce: Procedural and Substantive Limitations*, 4 NW. J. INT'L L. & BUS. 105 (1982); see also Victor, PLI SEMINAR, *supra* note 169, at 67-69.

ITC Rule 210.13, 19 C.F.R. § 210.13 (1981), provides only for "service" of Section 337 com-

The Commission must also consider the intrusiveness of cease and desist orders which it applies against foreign respondents. For example, the orders which the ITC attempted to apply against Japanese respondents in *Certain Welded Stainless Steel Pipe and Tube*¹⁸⁴ provided for regular reporting and inspection of Japanese factories. This type of intrusiveness, backed with either the coercive power of civil enforcement or, in limited cases, a potential exclusion order, is a blatant example of the kind of extraterritorial application of United States law which foreign nationals most reprehend.¹⁸⁵ The ITC should thus limit the application of its personal jurisdiction to those foreign respondents who clearly fall within its jurisdiction.

In contrast, there is no question that the Commission may assert personal jurisdiction over domestic respondents who are "importers, owners, consignees," or agents of such persons, as long as they have committed unfair acts in connection with an importation.¹⁸⁶ Indeed, the Commission has indicated that a cease and desist order against such persons is especially appropriate since they are located within the United States and an exclusion order would not, therefore, operate ef-

plaints. It does not specify any particular fashion of service. However, the ITC serves its complaints to foreign respondents through registered mail, and this is an acceptable form of service against such respondents for notice pleading. See *Federal Trade Comm'n v. Compagnie de Saint Gobin-Pont à-Mousson*, 636 F.2d 1300, 1313 (D.C. Cir. 1980) (registered mail service of notice was permissible, but F.T.C. service of subpoenas by registered mail was a violation of international law). Respondents in Section 337 cases have twenty days to respond to a complaint after service, 19 C.F.R. § 210.21 (1981), and may receive extensions of time "for good cause shown." 19 C.F.R. § 201.14(b) (1981). However, the ITC may deem a failure to file a timely response to be a waiver of a respondent's right to appear. 19 C.F.R. § 210.21(d) (1981).

The ITC has never dismissed respondents because of improper service of process. See, e.g. *Certain Steel Rod Treating Apparatus*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-97, *notice of denial of dismissal motion*, 46 Fed. Reg. 53,235 (1981) (motion to dismiss for improper service by two citizens of the Federal Republic of Germany). However, the Commission has designated an investigation as "more complicated," allowing for eighteen months instead of one year to complete the investigation when named foreign respondents did not answer the complaint or make any appearance. *Certain Electric Slow Cookers*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-42, Pub. No. 994 at 10 (Aug. 1979). For an account of the difficulties which the ITC encounters when dealing with unwilling foreign respondents, see Duvall, *supra* note 4, at 165.

¹⁸⁴ *Certain Welded Stainless Steel Pipe and Tube*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, *disapproved by President*, 43 Fed. Reg. 17,789 (1978).

¹⁸⁵ For a discussion of the reaction of the British government to the extraterritorial application of United States antitrust laws, see Comment, *The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement*, 2 Nw. J. INT'L L. & BUS. 476 (1980). For an excellent discussion of the problems generally with the extraterritorial application of United States law, see Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 Nw. J. INT'L L. & BUS. 336 (1980).

¹⁸⁶ 19 U.S.C. § 1337(a) (1976).

fectively against them.¹⁸⁷

Another reason that the ITC has been reluctant to apply cease and desist orders is that they only reach named Section 337 respondents over whom the Commission has jurisdiction.¹⁸⁸ Hence, cease and desist orders are ineffective when there are many foreign respondents, or where there is a high probability of later Section 337 violations by unjoined respondents, as in a case involving easily produceable goods. In the former case, there is a problem of serving all of the parties with notice,¹⁸⁹ as well as a problem of the ITC staff having to separately monitor multiple cease and desist orders which it would have to issue against each of the collective parties.¹⁹⁰ In the latter case of subsequent violations of the same nature by persons not named as respondents, there would be a separate investigation for each Section 337 violation alleged; before the ITC could issue a cease and desist order against any respondent, it would have to find initially that it had personal jurisdiction over the respondent, and then find that the respondent violated Section 337.¹⁹¹

¹⁸⁷ Certain Airtight Cast-Iron Stoves, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 at 14-15 (Jan. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1158, 1164. See also Certain Large Video Matrix Display Systems and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-75, Pub. No. 1158 at 29-30 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1474, 1486 (ITC "does not renounce" its jurisdiction to issue cease and desist orders directed at certain kinds of uses of imported articles after importation).

¹⁸⁸ See *supra* note 168 and accompanying text; see also Certain Copper Rod Production Apparatus, U.S. Int'l Trade Comm'n Inv. No. 337-TA-52, Pub. No. 1017 (Nov. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5031; Certain Novelty Glasses, U.S. Int'l Trade Comm'n Inv. No. 337-TA-55, Pub. No. 991 at 15 (July 1979), 2 INT'L TRADE REP. DEC. (BNA) 5400, 5407.

¹⁸⁹ See *supra* note 184. But see Certain Airtight Cast-Iron Stoves, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 at 7 (Jan. 1981) (ITC required named domestic respondents to "serve" copies of cease and desist orders on a series of parties related to those respondents, but unnamed in the investigation).

While one effect of the *Stoves* orders may be to put persons related to the respondents on notice, "service" by respondents on parties who have never appeared before the Commission does not bind those parties under the ITC's *in personam* jurisdiction. The ITC recognized this fact in *Reclosable Plastic Bags*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-22, Pub. No. 801 (Jan. 1977), 1 INT'L TRADE REP. DEC. (BNA) 5284, 5290. Moreover, the *Stoves* order does not bind nonparties since it was the result of an adjudicatory and not a rulemaking procedure. See Administrative Procedure Act, 5 U.S.C. § 554 (1976).

¹⁹⁰ Commission Investigative Attorney's Written Comments Concerning Violation, Relief, and the Public Interest 3 (Aug. 11, 1981) (filed in the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C., in connection with *Headboxes II*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-82A, Pub. No. 1197 (Nov. 1981)). The effort required to monitor cease and desist orders, of course, also limits the number and effectiveness of the cease and desist orders which the Commission may have outstanding at any one time. See Easton & Neeley, *supra* note 172, at 229.

¹⁹¹ See *Reclosable Plastic Bags*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-22, Pub. No. 801 (Jan. 1977), 1 INT'L TRADE REP. DEC. (BNA) 5284, 5290.

As with exclusion orders,¹⁹² the ITC has had problems in communicating the scope of its cease and desist orders to the parties whom they affect. Hence, the Commission must take care to draft the orders precisely, so that respondents will not be restrained any more than is necessary to address their Section 337 violation.¹⁹³ However, unlike exclusion orders, cease and desist orders do not depend on implementation at Customs.¹⁹⁴ Since the Commission staff supervises cease and desist orders and complainants are likely to supplement this administration by reporting violations of cease and desist orders, the ITC can apply cease and desist orders more uniformly than exclusion orders. This fact, combined with the fact that cease and desist orders only operate against specific respondents, makes cease and desist orders less restrictive than exclusion orders.

In March, 1981, the Commission issued final rules which provide for the enforcement of Commission orders, including cease and desist orders.¹⁹⁵ These rules set out procedures for modifying reporting requirements for cease and desist orders,¹⁹⁶ as well as procedures for enforcing the orders short of civil action.¹⁹⁷ The availability of these rules

¹⁹² See *supra* notes 152-59 and accompanying text.

¹⁹³ After the ITC issued a cease and desist order in *Certain Apparatus for the Continuous Production of Copper Rod*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-52, Pub. No. 1017 (Nov. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5006, for example, the respondents refused to sell spare parts to a nonparty United States manufacturer which owned some of the respondents' machinery. They were afraid that parts sales would violate the cease and desist order. Written Comments Supplied by ASARCO, Inc. Regarding the Advisory Opinion Requested by the Krupp Respondents (Jan. 24, 1981) (filed in the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C., in connection with *Certain Copper Rod Production Apparatus*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-89, Pub. No. 1132 (1980), 2 INT'L TRADE REP. DEC. (BNA) 5597). The United States manufacturer complained to the Secretary of the Commission that the shutdown of his plant because of an inability to obtain parts would drastically affect the economy of the area surrounding the plant. Letter of Alexander J. Gillespie, Jr., Sr. V.P., Sec'y, and Gen'l Counsel, ASARCO, Inc. to Kenneth Mason, Sec'y, U.S. Int'l Trade Comm'n (Jan. 24, 1980) (filed in the Int'l Trade Comm'n Docketing Office, Washington, D.C., in connection with U.S. Int'l Trade Comm'n Inv. No. 337-TA-89, Pub. No. 1132 (1980), 2 INT'L TRADE REP. DEC. (BNA) 5597). Concurrently, the United States Trade Representative wrote the ITC Chairman, requesting the ITC to "proceed as rapidly as possible to advise interested parties on the cease and desist order's applicability, and take action to clarify and modify the orders as it proves necessary." Letter of Reuben O. Askew, United States Trade Representative, to Catherine Bedell, Chairman, U.S. Int'l Trade Comm'n (Jan. 30, 1980) (filed in the Int'l Trade Comm'n Docketing Office, Washington, D.C., in connection with U.S. Int'l Trade Comm'n Inv. No. 337-TA-89, Pub. No. 1132 (1980), 2 INT'L TRADE REP. DEC. (BNA) 5597).

¹⁹⁴ See *Certain Large Video Matrix Display Systems and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-75, Pub. No. 1158 at 35-36 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1474, 1487-88 (Stern, Comm'r, dissenting).

¹⁹⁵ 19 C.F.R. § 211.01 (1981).

¹⁹⁶ *Id.* § 211.55.

¹⁹⁷ *Id.* § 211.56(a), (c).

to guide enforcement and administration of cease and desist orders, along with the ITC's growing awareness of how to apply such orders, may prompt the Commission to use its cease and desist power more often.

C. Temporary Orders

Subsection (e) of Section 337 provides that the Commission may temporarily exclude articles from entry during the course of its investigation if it has reason to believe that there has been a violation of the statute, and if exclusion is consistent with the public interest.¹⁹⁸ The ITC may also issue temporary cease and desist orders.¹⁹⁹ When a violation of a standing cease and desist order is likely and would cause irreparable harm, Commission rules also provide for temporary emergency action in the form of an exclusion order against the violating party's goods.²⁰⁰

The ITC has applied temporary cease and desist orders on one occasion,²⁰¹ and has never taken temporary emergency action. In contrast, the ITC has prescribed a number of temporary exclusion orders, and has developed standards for applying them.²⁰² Temporary exclusion orders are available to complainants after the Commission's initial investigation of injury, when the Commission's investigative attorneys refer the complaint to the Administrative Law Judge for formal proceedings.²⁰³

¹⁹⁸ 19 U.S.C. § 1337(e) (1976).

¹⁹⁹ This is implied from the ITC's powers under 19 U.S.C. § 1337(f) (Supp. IV 1980) (amending 19 U.S.C. § 1337(f) (1974)). Presumably, the same standards as those for final cease and desist orders apply. *See supra* text accompanying notes 164-97.

²⁰⁰ 19 C.F.R. § 211.58 (1981). The ITC may issue an emergency order without a hearing, though the ITC must consider the public interest. It must also prescribe an applicable bond, allow for appeal, submit the order for Presidential review, and proceed with a formal enforcement proceeding. *Id.*; *see also infra* text accompanying notes 341-52.

²⁰¹ Certain Coin-Operated Audiovisual Games and Components Thereof (Viz., Pac-Man and Rally-X), U.S. Int'l Trade Comm'n Inv. No. 337-TA-105, Pub. No. 1220 (Jan. 1982), 3 INT'L TRADE REP. DEC. (BNA) 1899; *see also ITC Issues Temporary Cease and Desist Order in § 337 Coin-Operated Games Case*, [Oct.-Mar.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 112, at 396-97 (Jan. 27, 1982). However, the ITC replaced the temporary cease and desist orders with temporary exclusion orders when the Customs Service informed it that the cease and desist orders would be unenforceable. 47 Fed. Reg. 28,479 (1982). In light of this, it is doubtful that the ITC will prescribe temporary cease and desist orders again.

²⁰² *See Note, Section 337 Revitalization, supra* note 5, at 183-191, for a review of the development of Section 337 temporary exclusion order standards.

²⁰³ *See* 19 C.F.R. § 210.41 (1981).

The ITC has also prescribed a temporary exclusion order to replace a permanent patent-based exclusion order. In that case, it revoked the permanent order (before the sixty day review period had run) pending a district court's finding that the subject patent was invalid. Certain Steel

As with the cease and desist order, the Commission views the issuance of a temporary exclusion order as an extraordinary remedy.²⁰⁴ Although Section 337 requires only a "reason to believe" standard for the issuance of the temporary order,²⁰⁵ the Commission requires a more stringent standard. Complainants must show that they will incur immediate and substantial harm if the temporary order does not issue.²⁰⁶ This standard, however, still falls short of the burden of proving irreparable injury which plaintiffs must meet in a court of equity before the court will grant plaintiffs a preliminary injunction.²⁰⁷ Moreover, to

Rod Treating Apparatus, U.S. Int'l Trade Comm'n Inv. No. 337-TA-97, Pub. No. 1222 (Jan. 1982), 3 INT'L TRADE REP. DEC. (BNA) 2317. Respondents sued in the district court for withdrawal of the temporary order and bonding requirements, and the district court so ordered. *Ashlow, Ltd. v. Morgan Constr. Co.*, Civ. No. 81-936-5 (D.S.C. Jan. 25, 1982). However, the fourth circuit vacated this order, holding that the Court of Customs and Patent Appeals had the sole authority to demand changes in ITC action. *United States Int'l Trade Comm'n v. Ashlow, Ltd.*, No. 82-1050 (4th Cir. Feb. 16, 1982); see also *Appellate Court Rules District Court Lacks Jurisdiction, Vacates Rods Order*, [Oct.-Mar.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 116, at 484 (Feb. 24, 1982). Complicating the entire situation was the Administration's belief that the ITC never effectively revoked the original exclusion order. Hence, the Administration maintained that the sixty day review period had run, and the original order is open for review. At the time, a mandamus action stood against the ITC in the Court of Customs and Patent Appeals, along with an action for review of the entire *Rods* investigation. *White House Takes No Action in Steel Rod Case, Attention Turns to Courts*, [Oct.-Mar.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 115, at 459 (Feb. 17, 1982). The Court of Customs and Patent Appeals denied the writ of mandamus. *CCPA Refuses Writ of Mandamus Motion in Steel Rod Apparatus Case*, [Oct.-Mar.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 119, at 578 (March 17, 1982).

²⁰⁴ *Certain Luggage Products*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-39, Pub. No. 932 (Nov. 1978) (exclusion order issued), *temporary exclusion order issued*, 43 Fed. Reg. 35,399, 35,400 (1978).

²⁰⁵ 19 U.S.C. § 1337(e) (1976).

²⁰⁶ *Certain Luggage Products*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-39, Pub. No. 932 (Nov. 1978) (exclusion order issued), *temporary exclusion order issued*, 43 Fed. Reg. 35,399, 35,400 (1978) ("substantial injury"); *Meprobamate*, U.S. Tariff Comm'n Inv. No. L-37, Pub. No. 389 at 6 (Apr. 1971), 1 INT'L TRADE REP. DEC. (BNA) 5049, 5052; see also *1974 Trade Act Hearings-Senate*, *supra* note 129, at 1588-89 (written statement of Harvey Kaye and Paul Plaia, Jr.).

There is some debate over whether it is proper for the ITC to adhere to the "immediate and substantial harm" standard. While the standard is the one which the House version of the Trade Act of 1974, H.R. 10710, expressed (see TRADE REFORM ACT OF 1973, REPORT OF THE HOUSE WAYS AND MEANS COMMITTEE TO ACCOMPANY H.R. 10710, H.R. REP. NO. 571, 93d Cong., 1st Sess. 78-79 (1973)), the final version of the Trade Act of 1974 removed the standard. Yet, the ITC maintains that Congress never intended to reject the immediate and substantial harm standard, and that it is within the ITC's discretion to use it. Expanded, Unsintered Polytetrafluoroethylene in Tape Form, U.S. Int'l Trade Comm'n Inv. No. 337-TA-4, Pub. No. 769 at 18 (Apr. 1976). One commentator noted that such a reading ignores the protectionist intent behind the Congress' provision of an otherwise low threshold for temporary relief. Note, *Section 337 Revitalization*, *supra* note 5, at 193-95.

²⁰⁷ "Immediate and substantial harm" is the usual prerequisite for judicial and injunctive relief. The only exception to this arises in copyright cases, where the plaintiff need only show a *prima facie* case of infringement to obtain temporary relief. See *Uneeda Doll Co. v. Goldfarb Novelty Co.*, 373 F.2d 851 (2d Cir. 1967), *cert. denied*, 389 U.S. 801 (1967).

obtain a temporary exclusion order in a Section 337 action, complainants need only make a *prima facie* showing that there has been a Section 337 violation.²⁰⁸ Only later, when the Commission makes its final determination, need the complainant prove through a preponderance of the evidence that respondents have violated the statute.²⁰⁹

Temporary exclusion orders, as with the preliminary relief of equity courts, must be in the public interest.²¹⁰ Preliminary relief "may, and frequently does go much further both to give and withhold relief in furtherance of the public interest than [courts] are accustomed to go when only private interests are involved."²¹¹ Similarly, the ITC, before granting a temporary exclusion, considers the following: (1) whether there is reason to believe that a Section 337 violation exists; (2) the complainant's likelihood of success on the merits; (3) the certainty of irreparable injury; (4) the likelihood of harm to other interested parties if the exclusion is granted; and (5) the public interest.²¹² The Commission also applies a balancing test to determine whether temporary action should issue, namely, whether the effect of temporary relief on the importer or other parties outweighs the immediate and substantial harm that would fall on the complainant if the Commission does not

²⁰⁸ Meprobamate, U.S. Tariff Comm'n Inv. No. L-37, Pub. No. 389 (Apr. 1971), 1 INT'L TRADE REP. DEC. (BNA) 5049, 5051.

²⁰⁹ The Commission points to the legislative history of the 1974 amendments to Section 337, which, in its view, make clear "that in order to obtain temporary relief [under 19 U.S.C. § 1337(e)] a complainant need not produce sufficient information to establish a violation under section 337; only in a final determination need a complainant show violation by preponderance of the evidence." Certain Copper Rod Production Apparatus, U.S. Int'l Trade Comm'n Inv. No. 337-TA-52, Pub. No. 1017 (Nov. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5597, 5599-600. Yet, up to 1980, the ITC required complainants to prove, by a preponderance of the evidence, that they were entitled to a temporary exclusion order. While the ITC announced in 1980 that it would no longer follow this standard, *id.*, it suggested in a 1981 case that the preponderance of the evidence standard still operated. Certain Slide Fastener Stringers and Machines and Components Thereof for Producing Such Slide Fastener Stringers, U.S. Int'l Trade Comm'n Inv. No. 337-TA-85, Pub. No. 1141 (Jan. 1981), 2 INT'L TRADE REP. DEC. (BNA) 5646, 5647-48 [hereinafter cited as *Slide Fastener Stringers*].

²¹⁰ However, the ITC has stated that a complainant will not receive a temporary exclusion order simply because the order would not run counter to the public interest. *Slide Fastener Stringers*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-85, Pub. No. 1141 (Jan. 1981), 2 INT'L TRADE REP. DEC. (BNA) 5646, 5656.

²¹¹ *Virginian Ry. Co. v. System Fed'n No. 40*, Ry. Employers Dep't of the Am. Fed'n of Labor, 300 U.S. 515, 552 (1937).

²¹² Certain Luggage Products, U.S. Int'l Trade Comm'n Inv. No. 337-TA-39, Pub. No. 932 (Nov. 1978) (exclusion order issued), *temporary exclusion order issued*, 43 Fed. Reg. 35,399, 35,401 (1978). The ITC based these five factors on those found in *Virginia Petroleum Jobbers v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958), and reiterated them in *Certain Coin-Operated Audiovisual Games (viz., Pac-Man and Rally-X)*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-105, Pub. No. 1220 (Jan. 1982), 3 INT'L TRADE REP. DEC. (BNA) 1899, 1901.

issue the temporary order.²¹³ This “balancing test” is reminiscent of the inclinations of courts of equity to assess and balance competing considerations in order to allow for the least amount of harm if the court’s preliminary ruling later turns out to be erroneous.²¹⁴ Accordingly, the Commission has issued temporary exclusion orders on only three occasions, one prior to the 1974 amendments to Section 337. All three of the occasions involved patent infringement.²¹⁵

Congress’ intent of making a temporary exclusion order easier to acquire than judicial temporary relief is clear in the statutory language. Complainants need only give the Commission “reason to believe” that they are entitled to relief for such relief to issue.²¹⁶ This “reason to believe” standard arguably demands, at most, that the Commission require complainants to show “substantial injury” in order to obtain temporary action. Yet, the “irreparable injury” standard goes far to protect the public interest against temporary orders which might later be shown to have a false basis. If the present scheme was not available and respondents could not enter their goods during a temporary order, there would be more urgency for the Commission to require higher standards of proof from complainants who seek temporary exclusion orders.

At present, however, there is a practical question of whether the

²¹³ Certain Steel Rod Treating Apparatus, U.S. Int’l Trade Comm’n Inv. No. 337-TA-97, Pub. No. 1122 (Jan. 1982), 3 INT’L TRADE REP. DEC. (BNA) 2317, 2323; Certain Copper Rod Production Apparatus, U.S. Int’l Trade Comm’n Inv. No. 337-TA-89, Pub. No. 1132 (Nov. 1979), 2 INT’L TRADE REP. DEC. (BNA) 5597, 5599-600, 5605. The Commission based its balancing test on that of *Washington Metro. Area Transit Comm’n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977).

The ITC applied a similar test in *Slide Fastener Stringers*, U.S. Int’l Trade Comm’n Inv. No. 337-TA-85, Pub. No. 1141 (Jan. 1981), 2 INT’L TRADE REP. DEC. (BNA) 5646, 5647-48, noting that a complainant who “raises serious questions regarding the existence of a section 337 violation, presents a compelling case with respect to immediate and substantial harm to the domestic industry, and shows that the respondents will not suffer significant harm if relief is granted” may be entitled to temporary relief. *Accord* Certain Coin-Operated Audiovisual Games (viz., Pac-man and Rally-X), U.S. Int’l Trade Comm’n Inv. No. 337-TA-105, Pub. No. 1220 (Jan. 1982), 3 INT’L TRADE REP. DEC. (BNA) 1899, 1902.

²¹⁴ D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 488, 490 (1973). The ITC has wide discretion to accord temporary relief. Parties which might otherwise be entitled to such relief, for example, may be denied it because they fail to comply with Commission discovery rules. *See* Certain Ultrafiltration Membrane Systems and Components Thereof, Including Ultrafiltration Membranes, U.S. Int’l Trade Comm’n Inv. No. 337-TA-107, *denial of request for temporary relief*, 46 Fed. Reg. 53,216 (1981).

²¹⁵ Certain Steel Rod Treating Apparatus, U.S. Int’l Trade Comm’n Inv. No. 337-TA-97 Pub. No. 1222 (Jan. 1982), 3 INT’L TRADE REP. DEC. (BNA) 2317, 2323-24; Copper Rod Production Apparatus, U.S. Int’l Trade Comm’n Inv. No. 337-TA-89, Pub. No. 1017 (Oct. 1980), 2 INT’L TRADE REP. DEC. (BNA) 5597; Meprobamate, U.S. Tariff Comm’n Inv. No. L-37, Pub. No. 389 (Apr. 1971), 1 INT’L TRADE REP. DEC. (BNA) 5049.

²¹⁶ 19 U.S.C. § 1337(e) (1976).

Commission can accord adequate temporary relief to *any* complainant making *any* showing. Former ITC Chairman Bill Alberger has noted that hearings in temporary relief cases are time consuming, costly, and often duplicative of final hearing testimony. Even if a petitioner can successfully show the need for a temporary exclusion order, the ITC ordinarily could not grant one until at least the fifth or sixth month of a twelve or eighteen month investigation.²¹⁷ This is because the ITC carries out essentially the same full hearing when considering the issue of a temporary order as it does when it considers a final order.²¹⁸ The Commission could hasten its temporary exclusion order proceedings by not requiring a full evidentiary hearing. Instead, the Commission could base the order on the parties' affidavits, depositions, and informal statements.²¹⁹

D. Bonding

Section 337 empowers the Commission to place a bond on offending goods when it issues a temporary²²⁰ or permanent order.²²¹ The ITC expresses this bond in terms of a percentage of the price of the good, and respondents must forfeit the bond if a Section 337 order becomes final.²²² Hence, by introducing the chance that a bond forfeit will occur, a Section 337 bond deters importation. A bond set when the ITC applies a permanent order operates for a sixty day period, and during this time the President reviews the Commission's overall determination. The bond becomes inoperable after the sixty day period runs or after the President expressly approves or disapproves of the Com-

²¹⁷ *Alberger Urges Expanded Role for ALJs in Section 337 Actions*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 45, at A-6, A-7 (Sept. 24, 1980).

²¹⁸ See Duvall, *supra* note 4, at 161. A side benefit of the full temporary exclusion order hearings, however, is that they can shorten a later hearing on permanent action and lead to settlement agreements. *Id.* at 161 n.22.

²¹⁹ This approach to granting preliminary relief is acceptable in federal courts. See, e.g., *Herbert Rosenthal Jewelry Corp. v. Grossbart*, 428 F.2d 551 (2d Cir. 1970); *D. DOBBS*, *supra* note 214, at 446. Of course, the Commission would have to provide for fuller hearings in cases of non-appearing respondents, in order to fully safeguard the public interest.

The Commission has attempted to expedite temporary relief proceedings by directing its Administrative Law Judge to issue a recommended determination within forty-five days. Observers believe that this could be a signal that the ITC may take quicker action on temporary relief motions. *ITC moves to Expedite Temporary Relief in Toy Vehicle Patent Case*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 128, at 204 (May 19, 1982).

²²⁰ 19 U.S.C. § 1337(e) (1976).

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

²²² 19 U.S.C. § 1337(e) (1976); see also C.S.D. 80-35, 14 Cust. B & Dec. 783 (1980) (when special bond is required pursuant to 19 U.S.C. § 1337, the ITC shall determine the value of the bond).

mission's determination.²²³

Customs regulations provide that Section 337 respondents may secure Commission-imposed bonds in the form of a special rider to their normal entry bonds.²²⁴ This rider must provide for the release of merchandise to the Customs Bureau "pending final determinations of its admissibility," and it must also provide for the goods' "exportation or destruction under Customs supervision if it is determined finally that the merchandise shall be excluded from importation."²²⁵

In its report on the 1974 Trade Act, the Senate Finance Committee emphasized that in setting the amount of an entry bond, "the Commission shall determine, to the extent possible, the amount which would offset any competitive advantage" which persons benefitting from the importation of the bonded article received from their "unfair method of competition or unfair act."²²⁶ Hence, while Congress intended that the ITC use Section 337 bonds to deter importation, it did not intend for the ITC to use Section 337 bonds to make foreign goods artificially more expensive than domestic ones. The Commission incorporated Congress' standard into its rules governing the determination of the amount of the bond.²²⁷ The Commission has on some occasions also used standards different from but related to those which the Senate Finance Committee expressed. For example, where infringing products' prices were higher than those of the domestic product, and where a consumer market existed separately from the market which the domestic patent holder supplied, the Commission determined that it would base the appropriate bond on a "reasonable royalty" to the patentee, which it viewed as ten percent of sales profits.²²⁸ In another situation, the Commission considered that the domestic complainant "appeared

²²³ 19 U.S.C. § 1337(g)(3) (1976); *see also* 19 C.F.R. § 12.39(b)(1) (1981) (Customs Service rules).

²²⁴ 19 C.F.R. § 113.14 (1981); 19 C.F.R. § 12.39(b)(2) (1981).

²²⁵ 19 C.F.R. § 113.14 (1981). This regulation also provides the exact form of the bond rider.

²²⁶ TRADE ACT OF 1974, S. REP. NO. 1298, *supra* note 8, at 198, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 7331.

²²⁷ 19 C.F.R. § 210.14(a)(3) (1981). In several cases, however, the ITC has appeared to depart from the standard by imposing very high percentage bonds. *See* Certain Novelty Glasses, U.S. Int'l Trade Comm'n Inv. No. 337-TA-55, Pub. No. 991 at 16 (July 1979), 2 INT'L TRADE REP. DEC. (BNA) 5400 (482% *ad valorem* f.o.b. Hong Kong); Certain Airtight Cast-Iron Stoves, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 at 18 (Jan. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1158, 1165 (200% *ad valorem*). It is unlikely that any merchandise will be entered under bonds imposed at such high rates; indeed, the practicalities weigh against continued importation since the goods were probably imported initially because they are priced below comparable domestic goods.

²²⁸ Reclosable Plastic Bags, U.S. Int'l Trade Comm'n Inv. No. 337-TA-22, Pub. No. 801 (Jan. 1977), 1 INT'L TRADE REP. DEC. (BNA) 5284, 5291.

to have advantages in market share, marketing, and a well-known product."²²⁹ In that case, the ITC imposed a bond which equalized the prices of the complainant's and respondent's products.

Indeed, the ITC has used bonds as a punitive measure. In *Certain Steel Rod Treating Apparatus and Components Thereof*,²³⁰ the ITC imposed a 100% bond after it determined that respondents had used the complainant's patented invention without authority, that respondents were willing to advance large sums of money and incur large losses in order to secure importation of their goods, and that, once functioning, the respondents' apparatus could serve as a model for future sales, and operate as a loss leader to help the respondents establish a foothold in the United States market.²³¹ This punitive application of a bond is contrary to Congressional intent that the Commission apply bonds only to offset competitive advantage.

The bonding question also arose in another case which involved different configurations of a type of product. The Commission decided not to impose a bond because "it would not serve the purpose of making the price of the imported and domestic articles equivalent unless [the bond] were specially determined for each entry." The Commission also noted that Section 337's objective of "not interfering with trade and commerce" precluded the imposition of a bond.²³² In another case, involving luggage roller units, the ITC found that most of the infringing units entered the United States attached to non-infringing luggage. The Commission imposed a bond on the value of the infringing units, and also assessed a flat eighty-five cent duty on each piece of luggage that the roller units were attached to.²³³ Still another case concerned the infringing products of three separate respondents. The ITC calculated bonding percentages for each product, basing the percentages on the retail price differential between the complainants' and respondents' products.²³⁴ In a final case, the ITC imposed a bond at an

²²⁹ *Certain Surveying Devices*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1085 (July 1980), 2 INT'L TRADE REP. DEC. (BNA) 5409, 5425.

²³⁰ U.S. Int'l Trade Comm'n Inv. No. 337-TA-97, Pub. No. 1222 (Jan. 1982), 3 INT'L TRADE REP. DEC. (BNA) 2317, 2324 (exclusion order suspended, temporary exclusion order entered), *exclusion order revoked*, 47 Fed. Reg. 2950 (1982).

²³¹ *Id.*

²³² *Certain Welded Stainless Steel Pipe and Tube*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, *disapproved by President*, 43 Fed. Reg. 17,789 (1978).

²³³ *Certain Roller Units*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-44, Pub. No. 944 (Feb. 1979), 1 INT'L TRADE REP. DEC. (BNA) 5503, 5506.

²³⁴ *Certain Airless Spray Pumps and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-90, Pub. No. 1199 at 22 (Nov. 1981). Compare this with *Certain Exercising Devices*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-24, Pub. No. 813 at 8 (Apr. 1977), where the ITC declined to

amount lower than that which the complainants requested, since the complainants' product was superior in quality to the foreign infringing product.²³⁵

Generally, the ITC has prescribed Section 337 bonds on a straight *ad valorem* basis,²³⁶ interpreting "*ad valorem*" to be the equivalent of the difference between the selling prices of the domestic and imported articles.²³⁷ The ITC has also levied Section 337 bonds on a cost, insurance, and freight (c.i.f.),²³⁸ landed,²³⁹ and full value basis.²⁴⁰

impose different bonding rates on two similar infringing products since the action would create confusion in the administration of the prescribed exclusion order.

²³⁵ Certain Flexible Foam Sandals, U.S. Int'l Trade Comm'n Inv. No. 337-TA-47, Pub. No. 947 (Feb. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5053, 5055-56.

²³⁶ *Ad valorem* is a latin term meaning "depending on the value of the items;" bonds determined by this standard are based on a fixed percentage of an item's dollar value. See Commission Investigative Attorney's Post Hearing Brief to the Commission, June 17, 1981, at 6, (filed in the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C., in connection with Certain Spring Assemblies, U.S. Int'l Trade Comm'n Inv. No. 337-TA-88, Pub. No. 1172 (Oct. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1426) [hereinafter cited as *Spring Assemblies* Post Hearing Brief].

In several cases, the ITC has determined the *ad valorem* rate in accordance with the standards of what was, at the time, Section 402 of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1401(a) (1976). See, e.g., Pump Top Insulated Containers, U.S. Int'l Trade Comm'n Inv. No. 337-TA-59, Pub. No. 1010 (Nov. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5454 (63% *ad valorem*); Certain Electric Slow Cookers, U.S. Int'l Trade Comm'n Inv. No. 337-TA-42, Pub. No. 994 (Aug. 1979) (50% *ad valorem* bond). However, effective January 1, 1981, Congress completely revised 19 U.S.C. § 1401(a) (1976). See *infra* note 245 and accompanying text.

²³⁷ Coin-Operated Audio-Visual Games and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-87, Pub. No. 1160 at 31 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1212, 1225.

²³⁸ Certain Airless Spray Pumps and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-90, Pub. No. 1199 at 22 (Nov. 1981), 3 INT'L TRADE REP. DEC. (BNA) 2041, 2050 (bonds on three separate infringing goods, ranging from 17.8% to 50.6% c.i.f.); *Headboxes II*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-82A, Pub. No. 1197 at 15 (Nov. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1992, 1999 (100% *ad valorem* c.i.f. port of entry); Certain Spring Assemblies and Components Thereof and Methods of their Manufacture, U.S. Int'l Trade Comm'n Inv. No. 337-TA-88, Pub. No. 1172 (Oct. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1426, 1448 (72% c.i.f.); Coin-Operated Audio-Visual Games and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-87, Pub. No. 1160 at 33 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1212, 1226 (54% c.i.f.). Cost, insurance, and freight basis (c.i.f.) is "a quoted price that includes the handling charges, insurance, and freight costs up to delivery, usually up to the point of entry." *Spring Assemblies* Post-Hearing Brief, *supra* note 236.

²³⁹ Certain Novelty Glasses, U.S. Int'l Trade Comm'n Inv. No. 337-TA-55, Pub. No. 991 at 16 (July 1979), 2 INT'L TRADE REP. DEC. (BNA) 5400, 5407; Certain Exercising Devices, U.S. Int'l Trade Comm'n Inv. No. 337-TA-24, Pub. No. 813 at 7 (Apr. 1977) (350% f.o.b. foreign port); Chain Door Locks, U.S. Int'l Trade Comm'n Inv. No. 337-TA-8, Pub. No. 770 at 44 (Apr. 1976) (50% f.o.b. foreign port). Landed basis, or f.o.b. land (freight free on board), is "a term identifying the point from which a store is to pay transportation on incoming shipments. Where the shipping point is FOB, the store must pay all charges from the vendor's shipping point. When the shipping point is FOB store, the vendor must pay all charges up to the store's receiving dock." *Spring Assemblies* Post Hearing Brief, *supra* note 236.

²⁴⁰ A full value bond is a 100% bond based on the assessed full value of the articles. See

A troublesome feature of the ITC's use of Section 337 bonds, however, has been its random determinations of the value of goods. While Section 337 bonds must be based on value, the ITC has not recognized the thorny problem of customs valuation in its Section 337 bond calculations. Indeed, it has no standards for applying the traditional bases of customs valuation, *e.g.*, *ad valorem*, *c.i.f.*, and so on, to Section 337 bonds. To eliminate competitive advantage, for example, the ITC in two cases prescribed a bond equal to the difference between the wholesale price of the complainant's product and the value of the imported product entered under the appropriate item heading of the Tariff Schedules of the United States.²⁴¹ It based another bond on the difference between the retail selling prices of the domestic and imported articles,²⁴² and computed a more recent bond on the basis of wholesale price differentials.²⁴³ In another case, the ITC calculated the bond on the basis of the median weighted prices of the respondents' and complainants' products.²⁴⁴

January 1, 1981 was the effective date of a complete revision of United States law dealing with the appraisal value of imported articles for purposes of the Tariff Schedules of the United States. The purpose of this revision was to conform United States law to the Customs Valuation Protocol to the Agreement on Implementation of the General Agreement on Tariffs and Trade (GATT).²⁴⁵ The new standards arguably do not apply to Section 337 bonds, yet given the Commission's role in United States trade policy, there is a strong argument for the Commission to take note of the standards.

E. Settlement

ITC rules, supported by the Court of Customs and Patent Appeals decision in *American Telephone & Telegraph v. United States Interna-*

Reclosable Plastic Bags, U.S. Int'l Trade Comm'n Inv. No. 337-TA-22, Pub. 801 (Jan. 1977), 1 INT'L TRADE REP. DEC. (BNA) 5284, 5291 (100% f.o.b. foreign port).

²⁴¹ Certain Flexible Foam Sandals, U.S. Int'l Trade Comm'n Inv. No. 337-TA-47, Pub. No. 947 (Feb. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5053, 5055-56; Certain Exercising Devices, U.S. Int'l Trade Comm'n Inv. No. 337-TA-24, Pub. No. 813 at 7-8 (Apr. 1977).

²⁴² Certain Surveying Devices, U.S. Int'l Trade Comm'n Inv. No. 337-TA-68, Pub. No. 1085 (July 1980), 2 INT'L TRADE REP. DEC. (BNA) 5409, 5425.

²⁴³ Coin-Operated Audio-Visual Games and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-87, Pub. No. 1160 at 31 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1212, 1225.

²⁴⁴ Certain Airtight Cast-Iron Stoves, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 at 18 (Jan. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1158, 1165.

²⁴⁵ 19 U.S.C. § 1401(a) (Supp. IV 1980).

tional Trade Commission,²⁴⁶ provide for the termination of Commission investigations if all complainants and one or more of the respondents reach a settlement by licensing or other agreement. Under the rules, the motion for termination submitted to the Commission must contain "copies of the licensing or other agreement and any agreements supplemental thereto," as well as the parties' affidavit stating that the parties have no other expressed or implied agreement between them concerning the subject matter of the investigation.²⁴⁷ The Commission requires this information when considering a settlement agreement in order to safeguard the public interest, including competitive conditions in the United States economy.²⁴⁸

The Commission has recognized settlement agreements as proper bases for the termination of its investigations.²⁴⁹ According to Commission settlement procedure, the ITC Administrative Law Judge first views all of the complainants' and respondents' motions for termination, and then recommends to the Commission whether it should terminate its investigation.²⁵⁰ The Commission publishes the presiding officer's determination in the Federal Register, along with a nonconfidential summary of the parties' settlement agreement.²⁵¹ Unless the Commission orders otherwise, it will receive public comments on the agreement for thirty days. The Commission will then decide whether to terminate the investigation,²⁵² or, under its independent enforcement

²⁴⁶ 626 F.2d 841 (C.C.P.A. 1980).

²⁴⁷ 19 C.F.R. § 210.51(c) (1981).

²⁴⁸ See 46 Fed. Reg. 17,526, 17,528 (1981) (explanation of 19 C.F.R. § 210.51 (1981)).

²⁴⁹ See generally Glick, *Settling Unfair Trade Practice Cases Under Section 337 of the Tariff Act of 1930*, 21 HARV. INT'L L. J. 129 (1980). This article provides an extensive analysis of the ITC's Section 337 settlement practice and the structuring of Section 337 settlement agreements and consent orders.

²⁵⁰ ITC Chief Administrative Law Judge Donald Duvall has described his use of the ITC's settlement procedure in Duvall, *supra* note 4, at 166-67.

²⁵¹ See, e.g., Proposed Settlement Agreement, Chlorofluorohydrocarbon Drycleaning Process Machines and Components Therefor, U.S. Int'l Trade Comm'n Inv. No. 337-TA-84, 46 Fed. Reg. 58,616 (1981), *investigation terminated on basis of settlement*, 46 Fed. Reg. 58,616 (1981); Proposed Settlement Agreement, Certain Wheel Locks and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-102, 46 Fed. Reg. 46,023 (1981), *investigation terminated on the basis of settlement*, 46 Fed. Reg. 57,776 (1981); Proposed Settlement Agreement, Certain Universal Joint Kits, Components Thereof, and Trunion Seals Used Therewith, U.S. Int'l Trade Comm'n Inv. No. 337-TA-93, 46 Fed. Reg. 38,787 (1981), *investigation terminated on the basis of settlement*, 46 Fed. Reg. 50,866 (1981).

²⁵² See Proposed Settlement Agreement, Certain Universal Joint Kits, Components Thereof, and Trunion Seals Used Therewith, *supra* note 251. Three considerations made by the ITC when deciding to grant termination of a Section 337 investigation based on a settlement agreement are: (1) whether the settlement agreement, within the framework of the relevant law, such as patent law, does not appear to be anticompetitive; (2) whether termination would eliminate further government investigative expense; and (3) whether the ITC has received adverse public comments on

power, whether to require that the parties dissolve the settlement agreement.²⁵³ A decision to terminate an investigation is not a final ITC determination subject to Court of Customs and Patent Appeals review.²⁵⁴ After a termination based on the settlement agreement, the Commission releases the parties from its direct supervision.

The main problem with settlement agreements is that they may be anticompetitive since parties in Section 337 cases are usually competitors. As in civil settlement negotiations, Section 337 parties discuss settlement possibilities free of supervision from any government authority, and those discussions may be opportunities for agreement on prices and market allocations.²⁵⁵ Moreover, in Section 337 cases, complainants have the added leverage of being able to threaten respondents with the possibility of an order which will exclude all of the respondent's products from the United States market.²⁵⁶ To avoid exclusion, for example, respondents might choose to pay a high patent or trademark licensing fee, even though the complainant has weak rights in trademark or patent. However, the Commission is aware of possible anticompetitive settlements, as its rules²⁵⁷ and past practice²⁵⁸ indicate.

the proposed settlement agreement. *Certain Swivel Hooks and Mounting Brackets, U.S. Int'l Trade Comm'n Inv. No. 337-TA-53, Pub. No. 983 (June 1979), 2 INT'L TRADE REP. DEC. (BNA) 5342, 5343.*

²⁵³ For example, the ITC might require that the parties dissolve a settlement agreement which is anticompetitive. *See* 19 C.F.R. § 210.51(c) (1981).

²⁵⁴ The ITC makes no finding in the Section 337 settlement agreement and termination process as to whether there has been a Section 337 violation. Hence, a termination order based on settlement is not a final determination under Section 337. 19 C.F.R. § 210.51(c)(2) (1981); 19 C.F.R. § 210.55 (1981). In *Import Motors, Ltd. v. United States Int'l Trade Comm'n*, 530 F.2d 940 (C.C.P.A. 1975), the court held that the ITC's dismissal of the appellants from a Section 337 investigation was not a reviewable final determination. This was because the dismissal was not an action open to Presidential review under 19 U.S.C. § 1337(g) (1976), and because the dismissal did not have the same effect on the parties as a final action. Since settlement agreements and terminations based thereon are not subject to Presidential review and both a complainant and a respondent must move that the Commission terminate an investigation on the basis of a settlement order, it is unlikely that the Court of Customs and Patent Appeals will hold that termination has such a negative impact on the parties to make the order equivalent to a final order, and hence reviewable.

²⁵⁵ *See* Fishbach, *The Need to Improve Consistency in the Application and Interpretation of Section 337 of the Tariff Act of 1930 and Section 5 of the Federal Trade Commission Act*, 8 GA. J. INT'L & COMP. L. 65, 75-76 (1978).

²⁵⁶ Comments of the Department of Justice on Proposed Rulemaking, Subch. C pts. 210 and 211, 19 C.F.R. pts. 210 and 211, at 7 (1978) (filed with the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C.). The Department suggested that a solution to the problem would be to remove complainants from Section 337 litigation status, limiting them to status as intervenors under ITC rules. *Id.*

²⁵⁷ The Commission has explained the requirement of an affidavit in its settlement procedure as "intended to allow the Commission to safeguard the public interest, including competitive conditions in the United States economy." 46 Fed. Reg. 17,526, 17,528 (1981) (explanation of 19 C.F.R. § 210.51 (1981)).

Consequently, the Commission must approve all settlement agreements which lead to termination of an investigation. Yet, the ITC has never disapproved of any settlement agreement on the grounds that it was anticompetitive.²⁵⁹

The ITC may avoid anticompetitive settlements, however, by using a procedure which is essentially a temporary settlement between the ITC and a respondent. Under this procedure, the ITC will terminate a party as a Section 337 respondent if that party agrees to refrain from importing allegedly infringing goods during the relevant Section 337 investigation, and if the complainant agrees to the termination.²⁶⁰ This informal procedure provides the benefits of flexibility over formal settlement and termination procedures. The drawbacks of the procedure, of course, are that the former respondent becomes unreachable by a cease and desist order unless joined again as a party respondent, and compulsory means of securing information from that respondent are lost for purposes of the investigation. However, for respondents who must ordinarily weigh the costs of a Section 337 defense against those of settlement, and who may be forced into settlement agreements as a result, the procedure represents an attractive alternative. The ITC should encourage complainants to open this alternative to respondents, and should carefully scrutinize the motivations of those complainants who do not do so.

F. Consent Orders

Commission rules provide for all complainants in a Section 337 investigation, one or more of the respondents, and the ITC investigative attorney to make a joint motion to terminate an investigation when that motion is supported by a consent order.²⁶¹ This consent procedure

²⁵⁸ See *Certain Swivel Hooks and Mounting Brackets*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-53, Pub. No. 983 (June 1979), 2 INT'L TRADE REP. DEC. (BNA) 5342, 5343, where the ITC approved a settlement agreement and terminated the investigation, noting that the agreement, "within the framework of our patent system, does not appear to be anticompetitive."

²⁵⁹ One commentator has viewed this fact harshly, stressing that "[i]n view of the Commission's cursory review of the settlement's impact upon the public interest, the rejection of such agreements on public interest grounds appears to be founded more on theory than on practice." McDermid, *supra* note 88, at 429-31.

²⁶⁰ *Certain Vacuum Bottles and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-108, *notice of termination of respondent*, 47 Fed. Reg. 8107 (1982).

²⁶¹ 19 C.F.R. § 211.20(b) (1981). The parties may file a consent-based motion for termination of an investigation at any time before the ITC begins a hearing on a possible Section 337 violation, or during or after that hearing, upon request "and good cause shown." Yet, after the parties submit a consent order to the presiding officer, none may withdraw from the agreement, absent good cause shown. *Id.*

After all three parties (complainant, respondent, and ITC Investigative Attorney) file their

involves the ITC in the pre-termination negotiations between the litigants, as well as in the monitoring of consent orders which the Commission accepts.²⁶²

The Commission has utilized its consent power on several occasions. For example, the ITC concluded a final portion of the *Cast Iron Stoves* case²⁶³ by approving a consent order under which respondents agreed to cease importation of goods infringing a common law trademark and to report to the Commission on the status of their manufacturing. The Commission has also utilized a consent order procedure in cases of patent infringement,²⁶⁴ predatory pricing,²⁶⁵ and

motion with the ITC for termination based on the consent order or with a presiding officer which the Commission designates, the Commission publishes a notice of the order in the Federal Register, along with a nonconfidential summary of the consent agreement. The Commission also "promptly" serves notice on the Department of Health and Human Services, the Department of Justice, and the Federal Trade Commission, along with other agencies which the ITC deems appropriate to receive notice. *Id.* § 211.21(a).

ITC rules provide that a consent order must contain, in addition to the basic consent agreement: (1) an admission of all jurisdictional facts; (2) an express waiver of all rights to seek judicial review or otherwise challenge or contest the validity of the consent order; and (3) the parties' statement of understanding that the ITC will, if necessary, enforce, modify, or revoke the consent order as the Commission's rules provide. *Id.* § 211.22(a). Finally, the consent agreement may contain a statement that the parties' signing of the agreement does not constitute any admission of a Section 337 violation. *Id.*

The ITC may hold hearings on the order after it notifies the various federal agencies of the order. Within twenty days of the time that the Commission publishes the proposed agreement in the Federal Register for comment the Commission must consider all public interest factors, and then decide whether to "(1) accept the [consent] agreement, issue the consent order and terminate the investigation; (2) reject the agreement and deny the motion; or (3) take such other action as it deems appropriate." *Id.* § 211.21(c). The consent agreement does not bind the parties in later ITC proceedings if the Commission rejects it. *Id.*

²⁶² Indeed, the Commission has refused to grant termination based on consent orders where the ITC Investigative Attorney was not a party to negotiations, *Coin-Operated Audio-Visual Games and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-87, Pub. 1160 at 4 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1212, 1215, and where the Investigative Attorney has not signed the consent order. *Certain Airtight Cast-Iron Stoves*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-106 (ITC-initiated action), *termination notice*, 46 Fed. Reg. 50,865 (1981) (reporting the Administrative Law Judge's denial of Termination Motion 92-8 on July 31, 1981).

²⁶³ This was a separate action related to the Commission's original decision, *Certain Airtight Cast-Iron Stoves*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-69, Pub. No. 1126 (Jan. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1158. Significantly, it was the ITC's first self-initiated investigation under Section 337. The consent order will be in effect for seven years. *Certain Airtight Cast-Iron Stoves*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-106 (ITC initiated action), *termination notice*, 46 Fed. Reg. 50,865 (1981); see also *ITC Issues Consent Orders in Self-Initiated Stoves Investigations*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 93, at A-3 (Sept. 9, 1981).

²⁶⁴ *Certain Cattle Whips*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-57, Pub. No. 993 (Aug. 1978), was the first patent infringement investigation under Section 337 to result in termination based on a consent agreement. The second was *Compact Cyclotrons* with a Pre-Septum, U.S. Int'l Trade Comm'n Inv. No. 337-TA-61, Pub. No. 1024 (Dec. 1979), *termination notice*, 44 Fed. Reg. 76,868 (1979). Following was *Plastic Bouquet Holders*, U.S. Int'l Trade Comm'n Inv. No.

false advertising.²⁶⁶

The danger of anticompetitive agreements between parties is not present when the ITC uses its consent order procedure because the Commission is a party to all consent agreements. Indeed, consent orders are one of the Commission's most flexible forms of action since statutory guidelines do not define the types of compliance which the Commission and parties can agree on.²⁶⁷ Further, the Commission's power to modify consent orders allows it to respond to changes in respondents' or complainants' situations or in the United States economy.²⁶⁸ In addition, the ITC may use its consent power to terminate an investigation against any number of a group of respondents, allowing it to focus its investigation on remaining respondents.²⁶⁹ Finally, consent agreements are one of the least troublesome of all ITC actions to enforce since the parties admit ITC jurisdiction over them for purposes of consent.²⁷⁰

Consent orders are not, however, a perfect Section 337 action. One problem related to the ITC's use of consent orders is represented in the lingering disagreement over whether the ITC should submit consent orders for presidential review.²⁷¹ The Commission has refused to

337-TA-80, *consent order published*, 45 Fed. Reg. 66,927 (1980), *termination notice*, 45 Fed. Reg. 83,036 (1980); Certain Adjustable Window Shades and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-83, *consent order published*, 46 Fed. Reg. 9261 (1981), *termination notice*, 46 Fed. Reg. 17,313 (1981); Certain Shell Brim Hats, U.S. Int'l Trade Comm'n Inv. No. 337-TA-86, *consent order published*, 46 Fed. Reg. 16,160 (1981), *termination notice*, 46 Fed. Reg. 24,035 (1981). For a discussion of the *Cattle Whips* order, see Kaye & Plaia, *1979 Developments*, *supra* note 152, at 612-13.

²⁶⁵ Certain Color Television Receiving Sets, U.S. Int'l Trade Comm'n Inv. No. 337-TA-23, *termination notice*, 42 Fed. Reg. 39,492 (1977).

²⁶⁶ Certain Surface Grinding Machines and Literature for the Promotion Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-95, *consent order published*, 46 Fed. Reg. 47,895 (1981), *termination notice*, 46 Fed. Reg. 62,969 (1981).

²⁶⁷ The Commission's consent power flows from its applicable rules promulgated under 19 U.S.C. § 1335 (1976), which allows the ITC to make rules "necessary to carry out its functions and duties."

²⁶⁸ The ITC may modify a consent order in two ways. First, it may change information requirements by simply notifying parties of its intention to do so and giving reasons for the modification. Parties may submit briefs to the Commission in response to the changed requirements and the Commission may hold a hearing on the change. 19 C.F.R. § 211.55(b) (1981). A motion for a major modification of the order, where there are "changed conditions of fact or law, or the public interest," is similarly available through ITC review, publication in the Federal Register, collection of public comments, and final Commission acceptance or rejection of the modification. *Id.* § 211.57.

²⁶⁹ See 19 C.F.R. § 211.20(b) (1981) (all complainants, but not all respondents, must participate in the consent agreement).

²⁷⁰ Parties to a consent order admit the Commission's jurisdiction over them, 19 C.F.R. § 211.22(a) (1981), and all involved parties sign the order. *Id.* § 211.20(b).

²⁷¹ See the Letter from Robert S. Strauss, Special Representative for Trade Negotiations, to

submit the orders in all but one case²⁷² because of its view that termination of a Section 337 investigation based on a consent order is not a finding of a statutory violation and, thus, is not a final determination. The ITC maintains that only final determinations require presidential review.²⁷³ However, critics argue that the President should be able to review the orders since their remedial effect is often the same as final exclusion or cease and desist orders,²⁷⁴ and since the President must be allowed to veto ITC actions which might adversely affect United States policy.²⁷⁵ Thus far, the argument over presidential review remains at a standoff.

A final problem with consent orders is the practicality of commission monitoring. The more often the Commission uses the consent procedure, the more monitoring it must do, and this usually entails the periodic inspection of respondents' facilities and the filing of reports. As with cease and desist orders,²⁷⁶ many active consent orders would put a great strain on the limited Commission staff.

G. Advisory Opinions

Respondents in ITC investigations may obtain advisory opinions from the Commission on whether their "proposed new or altered course of action" would violate either the Commission order against them or Section 337.²⁷⁷ Apparently, Commission advisory opinions are

Daniel Minchew, Chairman, United States International Trade Commission (Feb. 21, 1978) (urging Presidential review of consent orders), submitted in response to Proposed Rules on Enforcement Procedures; Rules of Practice and Procedure, 43 Fed. Reg. 2883 (1978) (filed with the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C.).

²⁷² This case was Certain Compact Cyclotrons with a Pre-Septum, U.S. Int'l Trade Comm'n Inv. No. 337-TA-61, Pub. No. 1024 (Dec. 1979), *termination notice*, 44 Fed. Reg. 76,868 (1979). At the time, the ITC had before it proposed rules which called for submission of consent agreements for Presidential approval. Enforcement Procedures—Rules of Practice and Procedure, Proposed Rule, 19 C.F.R. § 210.56(b)-(c), 43 Fed. Reg. 2883, 2888-89 (1978), *amended and enacted as* 19 C.F.R. § 210.56(b)-(c) (1981). The final rules call for no such review. Compare this with 19 C.F.R. §§ 211.20-211.22 (1981).

²⁷³ See 19 C.F.R. §§ 210.51(d), 210.55, 211.20-.22 (1981); 19 U.S.C. § 1337(g) (1976); see also *supra* note 254.

²⁷⁴ See Letter from the Federal Trade Commission Bureau of Competition to Kenneth R. Mason, Secretary, United States International Trade Commission (1980), submitted in response to Proposed Rules on Enforcement Procedures, Rules of Practice and Procedure, 43 Fed. Reg. 2883 (1978) (filed with the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C.).

²⁷⁵ Glick, *supra* note 249, at 143.

²⁷⁶ See *supra* notes 190-91.

²⁷⁷ 19 C.F.R. § 211.54(b) (1981). The ITC has issued two opinions that it has designated as "advisory." The first of these dealt with the question of whether a respondent had violated a Section 337 cease and desist order. Certain Apparatus for the Continuous Production of Copper Rod, U.S. Int'l Trade Comm'n Inv. No. 337-TA-52, Pub. No. 1017 (Nov. 1979), 2 INT'L TRADE REP. DEC. (BNA) 5006. The opinion was that there was no violation; complainants in the investi-

not available to parties who were not named respondents in a Commission investigation, even though a Commission determination might affect them.²⁷⁸

The Commission will issue an advisory opinion when such opinion would "facilitate enforcement of Section 337, would be in the public interest and would benefit consumers and competitive conditions in the United States."²⁷⁹ In view of these factors, the ITC has set out four requirements that respondents must meet in order to receive an advisory opinion. First, the respondent must demonstrate a "compelling business need" for the advice it seeks:

An example of such need might be the obvious risk of building a productive facility for the manufacture of an article which may or may not be covered by a United States patent. If the Commission ultimately determines that the manufactured article, although modified, infringes a United States Patent, the building of the productive facility may be a costly mistake.

Second, a party seeking the Commission's advice must take care to frame its request as fully and accurately as possible. The Commission relies upon the requester to state the facts accurately in its request; the Commission's advice may be of little value if it is given in response to incomplete or inaccurate information.

Third, the Commission does not wish to become involved in giving a series of advisory opinions in response to reiterated requests based on

gation objected to this finding. Comments and Objections of Complainant Southwire Company, Submitted Pursuant to Notice of Request for An Advisory Opinion, 45 Fed. Reg. 1950 (1980) (filed with the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C., in connection with U.S. Int'l Trade Comm'n Inv. No. 337-TA-52).

The second advisory opinion interpreted an exclusion order entered upon a finding of patent infringement. The respondent sought to import a redesigned version of the excluded product; the ITC advised that the respondent's device fell within the exclusion order. Issuance of Advisory Opinion in connection with Certain Surveying Devices, U.S. Int'l Trade Comm'n Inv. No. 337-TA-68, Pub. No. 1085 (July 1980), 1 INT'L TRADE REP. DEC. (BNA) 5409. See *ITC Renders Advisory Opinion on Scope of Exclusion Order*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 94, at A-1, A-2 (Sept. 16, 1981).

It is noteworthy that prior to issuing the above opinions, the Commission "rejected" a request from the *Copper Rod* respondent for an advisory opinion. This rejection read strikingly like an advisory opinion, however, answering a series of the respondent's questions about interpretation of the cease and desist order against it. The only question which the ITC did not answer in its "rejection" was whether the respondent could change its manufacturing processes without violating the order. The ITC maintained that such a question was inappropriate for the advisory opinion since the question required "very detailed examination of any process and extensive investigation." Memorandum Regarding Krupp's Request for an Advisory Opinion (Feb. 2, 1981) (filed with the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C., in connection with U.S. Int'l Trade Comm'n Inv. No. 337-TA-52).

²⁷⁸ However, non-respondents may bring action against the Commission, which could result in a clarification of their position, by bringing suit as an adversely affected party under 19 U.S.C. § 1337(c) (Supp. IV 1980).

²⁷⁹ 19 C.F.R. § 211.54(b) (1981).

facts which differ only slightly from one request to the next. Therefore, the party seeking advice should fully state its request in its first submission to the Commission.

Finally, the Commission will consider any equitable factor which might affect the balance of interests among the parties and the Commission.²⁸⁰

Indeed, the ITC's observance of the public interest is crucial in advisory opinion proceedings. In contrast to other Section 337 proceedings, only the respondent presents testimony when it seeks an advisory opinion. This would be true even if a respondent requests an advisory opinion during an ongoing investigation, or during the same time period that the respondent is involved in an ITC hearing, since an investigation or hearing on request would be separate from the ongoing Section 337 proceeding. Hence, there is the possibility that a respondent will approach the Commission with an imbalanced set of facts, possibly causing the ITC to give advice which leads to a dilution of its original order or which gives way to new unfair import trade practices. Thus, in cases where complicated questions inhere, the ITC should refuse to issue advisory opinions,²⁸¹ and should reopen the original investigation if necessary.

The Commission reserves the right to reconsider its advisory opinion if the public interest requires.²⁸² In such cases, ITC rules provide that the Commission will give the party who has received the advisory opinion advance notice of the decision, and allow the party to submit its views to the Commission.²⁸³ If the ITC refuses to reconsider its advisory opinions, they are not open to judicial review.²⁸⁴

In addition to the clarifications that it may provide, a Commission advisory opinion is valuable to respondents because they may rely on it in good faith. If the Commission later determines that the respondents are following its advisory opinion yet violating Section 337, the Com-

²⁸⁰ Certain Surveying Devices, U.S. Int'l Trade Comm'n Inv. No. 337-TA-68, *issuance of advisory opinion*, 46 Fed. Reg. 43,120 (1981).

²⁸¹ Analogous is the Federal Trade Commission's practice of not issuing advisory opinions where "an informed opinion cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry." 16 C.F.R. § 1.1(b) (1981).

²⁸² 19 C.F.R. § 211.54(c) (1981).

²⁸³ *Id.*

²⁸⁴ While the Court of Customs and Patent Appeals has not ruled directly on this question, the fact that advisory opinions are not binding on the parties, and are not final determinations subject to presidential review, suggests that they are not reviewable. *See* Analysis of Public Comments on Proposed Rules, 46 Fed. Reg. 17,526, 17,527 (1981), *citing* Floersheim v. Weinburger, 346 F. Supp. 950 (D.D.C. 1972). *But see* Import Motors Ltd. v. United States Int'l Trade Comm'n, 530 F.2d 940 (C.C.P.A. 1976) (actions not referable for presidential review *could* be reviewable if they have strong negative affect on parties).

mission will not proceed against the respondents if they “fully, completely, and accurately” presented all “relevant facts” at the time of the advisory opinion. Respondents must discontinue their unlawful actions once the Commission notifies them that its advisory opinion is no longer valid.²⁸⁵ Thus, advisory opinions can effectively modify Commission actions, especially because respondents can rely on the advisory opinions.

Advisory opinions could alleviate the problem of divergent interpretations of final Commission determinations by Customs and the Commission. Presumably, a respondent could present an advisory opinion to Customs as determinative of the meaning of any Commission order applicable to the respondent.²⁸⁶ In turn, respondents could use the procedure to avoid possible Section 337 action once Customs allows their goods to enter the United States.

H. Suspension of Proceedings

The ITC may suspend Section 337 investigations while judicial or administrative proceedings involving the same subject matter are in process.²⁸⁷ Suspension is discretionary,²⁸⁸ and when an investigation is suspended, the time period within which the ITC must normally complete a Section 337 investigation (twelve or eighteen months) stops running.²⁸⁹ While complainants may use Section 337 at the same time that they institute court and other proceedings to block offending im-

²⁸⁵ 19 C.F.R. § 21.54(c) (1981).

²⁸⁶ The need for the Commission to take all action necessary to avoid imposing hinderances on the free flow of fair trade is a crucial one, given Section 337's public interest standards. The ITC can use its advisory opinion procedure to limit any undue restraints which its orders might cause to parties at Customs, and thus prevent damaging economic distortions in the United States. See Letter of Reuben O. Askew, Special Representative for Trade Negotiations, to Catherine Bedell, Chairman, United States International Trade Commission (Apr. 25, 1980) (filed in the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C., in connection with Certain Apparatus for the Continuous Production of Copper Rod, U.S. Int'l Trade Comm'n Inv. No. 337-TA-52, Pub. No. 1017 (Nov. 1979), INT'L TRADE REP. DEC. (BNA) 5597). The Special Trade Representative asked the ITC to take quick action to issue an advisory opinion since:

The copper rod line subject to the contract, between [respondents in the Copper Rod Production Apparatus investigation] is essential to the completion of the multi-million dollar plant now under construction by [one of the respondents]. It is important that we now avoid impeding the completion of this plant which is located in an area of Connecticut with chronically high unemployment. The economic ramifications of this plant can not be underestimated.

Id.

²⁸⁷ 19 U.S.C. § 1337(b)(1) (1976).

²⁸⁸ *Id.*; see *infra* notes 295-297 and accompanying text.

²⁸⁹ 19 U.S.C. § 1337(b)(1) (1976). The ITC otherwise has one year to complete a Section 337 investigation, unless it designates the case as “more complicated.” If it does so, the ITC may use a total of eighteen months for a Section 337 investigation. *Id.*

ports,²⁹⁰ the Commission must still consider the public interest in its Section 337 proceedings.²⁹¹ This suggests that the Commission may not ignore court or administrative proceedings which involve the same subject matter as an ongoing 337 case, and especially may not ignore the relief provided or the findings made.²⁹² Indeed, there are at least two instances of parallel proceedings where the public interest strongly supports suspension of a Section 337 investigation.

The first instance where suspension should occur arises when parties before the Commission are concurrently litigating the validity of a private right, such as a patent or trademark right, in a forum whose finding of validity is conclusive.²⁹³ Such forums would include the Patent and Trademark Office, the Court of Customs and Patent Appeals, or a United States District Court. At its worst, the Commission's issuance of an order based on an alleged right, later found to be invalid in one of these forums, would be a serious misapplication of Section 337, and would injure the respondent exonerated in another forum. At the very least, a later, conclusive finding of invalidity by another forum would obligate the Commission to dissolve or revise its order. In this type situation, the Commission would have wasted considerable time and effort which could have been saved had the Commission suspended its Section 337 proceedings.²⁹⁴

²⁹⁰ 19 U.S.C. § 1337(a) (1976); *see also* TRADE ACT OF 1974, S. REP. NO. 1298, *supra* note 8, at 197, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 7329; *Federal Trade Commission v. Cement Inst.*, 333 U.S. 683, 694 (1948) (a proceeding initiated in one government agency does not bar concurrent litigation based upon similar facts or other questions of law before another agency).

²⁹¹ Specifically, those enumerated in 19 U.S.C. § 1337(d)-(e), (f)(1) (1976 & Supp. IV 1980).

²⁹² The Commission has not rejected this argument, noting in *Coin-Operated Audio-Visual Games and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-87, Pub. No. 1160 at 12-13 n.19 (June 1981), 3 INT'L TRADE REP. DEC. (BNA) 1212, 1218 n.19, that it "has neither accepted or denied that it has the power to remedy an unfair act or unfair method of competition" without regard to other provisions of law.

For an example of a court ordering a stay of further court proceedings pending the completion of Section 337 proceedings, see *Alberta Gas Chem., Ltd. v. Celanese Corp.*, 650 F.2d 9 (2d Cir. 1981) (complaint alleging fraud and unfair competition).

²⁹³ The Commission's finding as to the validity of these rights would operate only for the purpose of Section 337. *See* Duvall, *supra* note 4, at 160. *But see* *Loctite Corp. v. Ultraseal, Ltd.*, No. 79-C-225, slip op. (E.D. Wisc. 1980) (plaintiff's statements before the ITC that its patent may have been invalid had probative evidence in federal court action).

A Patent and Trademark Office determination that a registered patent or trademark was invalid would make such private rights unenforceable in United States courts.

²⁹⁴ Conversely, a Commission finding of invalidity where a forum whose decisions had wider application held the opposite would either force the complainant to bring a new Section 337 claim, or compel the Commission to initiate its own separate investigation. To protect the complainant, however, the ITC may keep a temporary order in effect through the suspension period. *See* *Certain Steel Rod Treating Apparatus*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-97, Pub. No. 1222

The second instance in which the public interest strongly supports suspension is where complainants have obviously brought action in multiple forums, including the ITC under Section 337, in order to harass the respondents.²⁹⁵ A Section 337 investigation pending in addition to other actions against a respondent has substantial harassment potential for the following three reasons: (1) Section 337 investigations can go forward without regard to any other provisions of law; (2) the addition of the Commission investigative attorney to Section 337 discovery procedure makes complainants' actions under the Section comparatively easier than those in other forums; and (3) Section 337 is a relatively little known statute, especially to foreign respondents. Hence, the ITC should take account of all actions against Section 337 respondents, and if one or several of those actions would give the complainant adequate relief, or later provide the Commission with substantial information which it could apply to the Section 337 investigation, public interest factors favor ITC suspension pending completion of the other actions.²⁹⁶ The ITC could, prior to suspension, prescribe temporary action in order to forestall any injury to the complainant after an investigation has been suspended.²⁹⁷

The Commission has based its decisions to suspend Section 337 proceedings on three factors. It first examines whether continuing Section 337 proceedings will impose undue hardship on one or more of the parties or possibly deprive them of due process. Next, the Commission considers whether there is a relative advantage to consolidating its resources for other investigations. Third, the Commission considers whether concurrent litigation before a court or agency involves similar

(Jan. 1982), 3 INT'L TRADE COMM'N DEC. (BNA) 2317, 2325. For a discussion of temporary orders, see *supra* text accompanying notes 198-219.

²⁹⁵ For example, in *United States v. Singer Mfg. Co.*, 374 U.S. 174, 195-96 (1963), the Court viewed Singer's Section 337 action before the Tariff Commission to exclude infringing sewing machines as part of an overall course of dealing, the aggregate of which was to violate the Sherman Act. Significantly, the Tariff Commission stayed its Section 337 proceedings when the government commenced its antitrust action. See also *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508 (1972) (filing a multiplicity of actions against competitors for the purpose of interfering with their right of access to agencies and courts is a Sherman Act violation). Cf. Rosenthal, *Antitrust Risks in Abusing the Import Relief Laws*, 14 SWISS REV. OF INT'L ANTITRUST L. 31 (1982).

²⁹⁶ This approach could also alleviate the related problem of forum shopping (complainants may seek Section 337 review because they feel that they can obtain more favorable treatment than in federal courts). Forum shopping will remain a problem until the ITC recognizes the need for uniform application of federal case law to Section 337 cases, especially where private rights such as patents and copyrights are involved.

²⁹⁷ For a discussion of available temporary action, see *supra* notes 198-219 and accompanying text.

questions of law, similar parties, or similar industries and articles.²⁹⁸ In the ITC's opinion, apparently, these factors are seldom of sufficient strength when they are present to mandate suspension of Section 337 proceedings. Since 1974, for example, the Commission has seldom granted a stay where there has been concurrent litigation of the private rights involved in an ongoing Section 337 investigation.²⁹⁹ Its practice is similar where there has been a multiplicity of concurrent actions pending against a single respondent.³⁰⁰

Certainly, in some cases, it may be in the public interest for the Commission to allow parties to use Commission procedures concurrently with those of another forum. One aspect of the public interest, for example, could be Section 337's mandate that the ITC expedite Section 337 proceedings.³⁰¹ While the Section provides for the Commission to suspend the running of the twelve to eighteen month period during which it must complete its investigations, the Commission asserts that policy underlying Section 337 forces it to conclude its investigations quickly. Indeed, one of Section 337's most attractive features is that it provides for relatively fast action in response to injuries from unfair import trade practices. The Commission must continue to provide this kind of fast relief so that it may take effective action, when appropriate, against any unfair import trade practices which many United States industries face. The number of investigations before the Commission and the weight of the Commission's overall workload fur-

²⁹⁸ Duvall, *supra* note 4, at 161-62.

²⁹⁹ See Duvall, *supra* note 4, at 161. For example, the ITC refused to grant a stay in a recent case where there was a concurrent challenge to patent validity in the Patent and Trademark Office. Grant of Leave to Review Order No. 7 and of Affirmance of Order No. 7, Certain Stabilized Hull Units and Components Thereof and Sonar Units Utilizing Said Stabilized Hull Units, U.S. Int'l Trade Comm'n Inv. No. 337-TA-103, *investigation instituted*, 46 Fed. Reg. 55,163 (1981), *terminated*, 47 Fed. Reg. 26,048 (1982).

However, the ITC's resistance to suspending its proceedings may be decreasing. See Certain Card Data Imprinters, U.S. Int'l Trade Comm'n Inv. No. 337-TA-104, *grant of application to review order No. 123, reversal of order No. 123, and suspension of investigation*, 47 Fed. Reg. 7348 (1982), where the Commission granted suspension pending concurrent district court litigation. See also Certain High-Voltage Circuit Interrupters, U.S. Int'l Trade Comm'n Inv. No. 337-TA-64, *investigation suspended*, 3 INT'L TRADE REP. DEC. (BNA) 5143, 5146-47, *suspension order continued*, 47 Fed. Reg. 30,667 (1982), where the ITC granted a stay when the primary examiner of the Patent and Trademark Office decided against patentability during reissue proceedings contemporaneous with the ITC's Section 337 investigation.

³⁰⁰ The Commission's current practice contrasts with that during the 1950's when it would defer Section 337 action pending the completion of litigation involving patent validity. See 1957 TARIFF COMM'N ANN. REP. 27-29; *H.R. 6767 Hearings*, *supra* note 66, at 1362-63 (statement of Noel Hemmendinger). However, the Commission was not operating under statutory time constraints in the 1950s. See *supra* note 30.

³⁰¹ The ITC has stayed within these time limits. Duvall, *supra* note 4, at 159. See also Duvall, *Adjudication Under Statutory Time Limits: The I.T.C. Experience*, 32 AD. L. REV. 733, 744 (1980).

ther argue for speedy disposition of Section 337 investigations.³⁰²

However, it is apparent that the Commission's time and resource constraints could be equally strong reasons for the suspension of proceedings when the Commission has difficulty carrying out a complete investigation. Some information may not be within the Commission's reach, but may be within the jurisdiction of a court or other administrative agency. Also, it may be difficult or costly for the Commission to obtain needed information. If the information is available through another body, suspension of proceedings would save Commission resources.³⁰³

Nevertheless, the Commission has resisted suggestions that it stay proceedings in cases other than those for which Section 337(b)(3) provides. Commentators have suggested that the Commission refer anti-trust complaints to the Justice Department or the Federal Trade Commission since these agencies are "established antitrust enforcement agencies with staffs and procedures capable of monitoring and seeking enforcement of their remedies."³⁰⁴ Section 337 conceivably provides for this type of cooperation since it directs the Commission to seek advice from other agencies about Commission investigations.³⁰⁵ The Commission rejected this advice, arguing that:

[W]hile it is somewhat understandable for the Department of Justice to be

³⁰² The ITC had fourteen cases before it in various stages of adjudication on December 1, 1981. See ITC HEARINGS CALENDAR, *supra* note 5, at 9-11.

³⁰³ For example, Section 337 provides that the decisions of the Secretary of the Treasury "with respect to the issue of less-than-fair value sales or subsidization and the matters necessary for such decision" are conclusive on the Commission. 19 U.S.C. § 1337(b)(2) (Supp. IV 1980). Under Reorganization Plan No. 3 of 1979, 46 Fed. Reg. 69,273 (1979), the Secretary of Commerce has received this decision power from the Secretary of the Treasury. Thus, the ITC must incorporate the Secretary's findings into its own decisions which may involve matters within the antidumping or countervailing duty statutes. According to Section 337, the ITC must base any final actions against violations on substantial evidence, in accordance with both the Administrative Procedure Act, 5 U.S.C. § 706 (1976), and the related standards for Court of Customs and Patent Appeals review of all Section 337 actions. See *supra* notes 10-11.

Certainly, the Secretary's findings, which are conclusive on the Commission, would constitute substantial evidence. By analogy, the Commission could use other administrative and judicial findings as a basis for its Section 337 actions.

³⁰⁴ Hemmendinger, Barringer & Kossel, *supra* note 181, at 106. However, the same authors note earlier in their article that:

[t]he legal case that the ITS must defer to the Justice Department and the Federal Trade Commission on matters also within their jurisdiction is decidedly less persuasive than the case for deferral to the Treasury in antidumping and countervailing duty matters. Section 337(a) explicitly provides the ITC with jurisdiction over unfair import practices The general policy arguments, however, such as avoiding duplicate proceedings, conflicting resolutions, or contradictory remedies still apply.

Id. at 101 n.109.

³⁰⁵ See 19 U.S.C. § 1337(b)(2) (Supp. IV 1980). In turn, 19 U.S.C. § 1334 (1976) requires federal agencies to cooperate with the ITC when the President directs them to do so.

asserting their own pre-eminence in matters of Anti-trust law, it is disturbing to find them attempting to limit our jurisdiction under this statute. This continuing opposition to Commission actions clearly within the purview of Section 337 is hardly the kind of 'advice and information' envisioned by sec. 337(b)(2). The Justice Department arguments are not worthy of serious considerations because Section 337 has been 'in addition to other provisions of law' since it was passed in 1922.³⁰⁶

The Commission's reluctance to refer matters to other agencies is politically understandable. The ITC has only begun to develop a Section 337 jurisprudence with respect to the Section's 1974 amendments. Further, Section 337 arguably presents problems which only the Commission can deal with both because of its expertise and because of its unique role in enforcing trade legislation. Yet the Commission must weigh a range of domestic policy factors when it takes action against a Section 337 violation. Considering the cumulative impact which federal administrative agencies have on the United States economy, there is good reason for the Commission to consider the resources and remedies which other agencies can provide as it weighs the scope of its own action.³⁰⁷

I. Informal Investigative Action

Section 603 of the Trade Act of 1974 authorizes the International Trade Commission to "conduct preliminary investigations to determine the scope and manner of proceedings, and to consolidate proceedings before it."³⁰⁸ Preliminary investigations do not require the ITC to have personal or subject matter jurisdiction over parties which the ITC investigates. If a preliminary investigation indicates that a person may have violated Section 337, the Commission may "afford such person the opportunity to have the matter disposed of on an informal administrative basis," provided it deems that informal disposition will not adversely affect the public interest.³⁰⁹

Under its rules, the Commission considers five factors to determine whether to informally dispose of a probable Section 337 violation: (1) the nature and gravity of the practice; (2) whether the practice is likely to recur; (3) the prior record and good faith of the person in-

³⁰⁶ Certain Welded Stainless Steel Pipe and Tube, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, 5253, *disapproved by President*, 43 Fed. Reg. 17,789 (1978).

³⁰⁷ The problem of overlap between the functions and jurisdiction of the ITC and other agencies could become more widespread as the ITC expands its application of Section 337. See Duvall, *supra* note 4, at 169-70.

³⁰⁸ 19 U.S.C. § 2482 (1976).

³⁰⁹ 19 C.F.R. § 211.10 (1981).

volved; (4) the adequacy of assurance of voluntary compliance; and (5) any other relevant factor that the Commission deems appropriate. Informal disposition of the case usually involves a consent-based settlement between the Commission and the accused party.³¹⁰

Although no rules guided the Commission's pre-1981 use of Section 603 to dispose informally of Section 337 violations, the Commission has used the procedure on several occasions before and after that date.³¹¹ An informal settlement must take place before a Commission investigative attorney certifies a Section 337 complaint for hearing before the Commission administrative law judge.³¹² This usually occurs about three weeks after a complaint is filed. Hence, informal disposition can be one of the speediest actions which the Commission can provide.

Section 603 investigations are also useful when it is difficult to obtain information located abroad or when the United States industry is small and the ITC needs more information before it takes up a full Section 337 investigation.³¹³ Finally, informal disposition is flexible since it involves only the Commission and the accused party and does not have to take any specific form, such as an exclusion order or a cease and desist order, as required under formal Section 337 proceedings.³¹⁴ For example, informal investigative action may end with a consent order under which the respondent agrees to cease importation, or with a

³¹⁰ *Id.* §§ 211.10(b), 211.20(a) (opportunity to submit proposed consent order prior to the institution of an investigation).

³¹¹ *See, e.g.,* Steel Jacks from Canada, U.S. Int'l Trade Comm'n Inv. No. 603-TA-6, *issuance of consent order and termination*, 45 Fed. Reg. 81,688 (1980); Certain Replica Black Powder Firearms, U.S. Int'l Trade Comm'n Inv. No. 603-TA-4, *issuance of consent order and termination*, 43 Fed. Reg. 673-74 (1978); Certain Stainless Steel Shears, U.S. Int'l Trade Comm'n Inv. No. 603-TA-8, *termination of investigation*, 47 Fed. Reg. 26,048-49 (1982).

³¹² 19 C.F.R. §§ 210.12, 211.20 (1981).

³¹³ *See* Duvall, *supra* note 4, at 163; Hemmendinger, Barringer & Kossi, *supra* note 181, at 113.

³¹⁴ *Syntex Agribusiness, Inc. v. United States Int'l Trade Comm'n*, 659 F.2d 1039 (C.C.P.A. 1981), in dicta, has cast doubt on the ITC's discretion to substitute an investigation under Section 603 for a Section 337 investigation. In *Syntex*, the majority stated that there is no basis, statutory or otherwise, for a substitution of a Section 603 investigation for one under Section 337. 659 F.2d at 1044. Yet the majority agreed that the ITC may conduct a preliminary investigation under Section 603 in order to decide whether to institute a Section 337 investigation. 659 F.2d at 1044. Judge Nies, concurring, also took this position. *Id.* at 1048. Thus, it seems that the Court of Customs and Patent Appeals will affirm the ITC's use of Section 603 investigative power as long as the ITC does not rule out the possibility of a Section 337 investigation. This is an easy requirement for the ITC to meet.

In contrast, ITC Chief Administrative Law Judge Donald Duvall contends that a Section 603 investigation is permissible, notwithstanding whether the ITC intends to institute a Section 337 investigation. Duvall, *supra* note 4, at 163.

respondent promising to alter the composition of its goods so that their importation would not violate Section 337.

Informal disposition satisfies the Commission's need for judicial economy. However, since the complainant is not involved in an informal disposition, such action does not allow for the complainant to develop its case and argue for a particular Commission action. Yet, the process of informal disposition allows the Commission to address a Section 337 violation with a minimum disruption of trade since the process takes place over a short period of time, and since it allows for the Commission to work directly with the respondent.

J. Modification

As discussed previously,³¹⁵ Commission rules provide for it to modify all actions where it retains jurisdiction over the parties. This allows the Commission to cater its actions to parties' individual situations, specific subject matter, and the public interest; and to change its actions if situations change.³¹⁶ Commission practice has been to modify or vacate its actions if there has been a change of circumstances or new information.³¹⁷ Indeed, if a court or the Patent and Trademark Office declares a patent invalid after the Commission takes action against patent infringement, the Commission is bound to revoke that action.³¹⁸ Of course, whether the Commission will notice changed cir-

³¹⁵ See *supra* note 261.

³¹⁶ The ITC must consider both the public interest and the need to remedy private injury when it takes action under Section. See 19 U.S.C. 1337(d)-(f) (1976 & Supp. IV 1980). Therefore, the ITC should modify its actions when either of these considerations change. For example, in Notice, Office of the Special Representative for Trade Negotiations, Section 337 Case on Doxycycline, 44 Fed. Reg. 40,462 (1979), the Special Representative stated that since future conditions as a consequence of the *Doxycycline* exclusion order might adversely affect the public interest, the administration planned to monitor the order's impact and, if appropriate, would ask the ITC to vacate the order.

³¹⁷ A clear case for the modification of a Commission order would be, for example, when former adversary parties agree on a licensing procedure for goods which the ITC had found to be unfairly imported. Another example, reported in *Safeguards: Alberger Cites Need for Caution in Limiting President's Section 201 Authority*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 92, at A-14 (1981), is the ITC's modification of the exclusion order it issued in Certain Large Video Matrix Display Units and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-75, Pub. No. 1158 (July 1981), 3 INT'L TRADE REP. DEC. (BNA) 1474. The modification allowed for the entry of spare parts for a system located in the United States. Another instance of the ITC's use of its modification power is its acceptance of a motion by respondents in *Doxycycline*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-3, Pub. No. 964 (Apr. 1979), to modify an exclusion order to allow trace amounts of doxycycline to enter the United States for Food and Drug Administration testing. 46 Fed. Reg. 47,897 (1981); 46 Fed. Reg. 62,342 (1981).

³¹⁸ 19 U.S.C. § 1337(h) (1976). The Commission is charged with dissolving its orders if it finds that the unfair import trade practice that gave rise to them has ceased. *Id.* See also the decision of the Court of Customs and Patent Appeals under the pre-1974 version of Section 337 in *In re Orion*

cumstances and modify its actions depends on the Commission's and the parties' diligence. The Commission, however, has a special responsibility to modify actions which later prove to be contrary to the public interest.

K. Substantive Rulemaking

The Commission made its first attempt at substantive rulemaking in response to the requests of United States manufacturers of steel wire rope. These manufacturers claimed injury under Section 337 because their foreign competitors allegedly mismarked the country of origin on foreign-produced steel wire rope.³¹⁹

While it was considering a rulemaking procedure to answer the steel wire rope manufacturers' complaints, the Commission envisioned that it would issue rules at the end of a hearing process. The hearings would consider all of the factors governing the issuance of other Commission actions, including the public interest. If parties proved to the Commission that there was a Section 337 violation, and that public interest factors did not preclude the Commission action, the Commission would promulgate final rules. Afterwards, the ITC would handle individual instances of rules violations through proceedings which would be limited to the question of the applicability of a particular rule and the violation of the rule.³²⁰

The Commission contemplated that rulemaking would differ from other Section 337 action. Promulgation of a rule, and not action directed specifically against a respondent or import, would remedy the complainant's injury. If persons later violated the rule, enforcement

Company, 71 F.2d 458 (C.C.P.A. 1934) (upon a patent being declared invalid, it is the President's duty to correct any order based thereon). *But cf.* Certain Steel Rod Treating Apparatus, U.S. Int'l Trade Comm'n Inv. No. 337-TA-97, Pub. No. 1222 (Jan 1982), 3 INT'L TRADE REP. DEC. (BNA) 2317, 2319-20 (revocation at exclusion order not mandatory when a federal court finds the patent involved to be invalid; however, temporary exclusion order entered instead of a permanent order, based on "sound policy grounds).

Recently, a federal circuit court held that the patent that a Section 337 exclusion order was based on was invalid, and the Supreme Court declined to review the decision. *Stevenson v. Grentec, Inc.* 652 F.2d 20 (9th Cir. 1981), *cert. denied*, — U.S. —, 102 S. Ct. 2008 (1982). On its own initiative, the ITC began consideration of whether it should set aside the exclusion order. *Certain Skateboards and Platforms Therefore*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-37, *request for public comment on possible dissolution of exclusion order*, 47 Fed. Reg. 28,485-86 (1982).
³¹⁹ 45 Fed. Reg. 12,833 (1980).

³²⁰ *Authorization of Appropriations for the U.S. Customs Service, U.S. International Trade Commission, and Office of the U.S. Trade Representative, for Fiscal Year 1981, Hearings Before the Section on International Trade of the Senate Committee on Finance, 96th Cong., 2d Sess. 26-28 (1980) (testimony of ITC Chairman Catherine Bedell) [hereinafter cited as *Authorization of Appropriations*].*

proceedings would only involve the Commission and the violators.³²¹

However, the Commission withdrew its proposed rules in the face of much opposition from the trade community.³²² Practitioners had three main objections to the Commission's substantive rules. First, they questioned whether Section 1335 of Title 19³²³ gave the Commission the power to make substantive rules, as opposed to the procedural rules which the Commission had long promulgated under the statute.³²⁴ Second, they maintained that Section 337 required in each case separate findings of injury, efficient and economic operation, and the public interest, and that, hence, a proof of violation of the statute would always have to be more involved than a simple showing that a respondent had violated an ITC substantive rule.³²⁵ Third, practitioners claimed that the specific rules which the ITC was attempting to promulgate governing country of origin marking violated United States obligations under Article III, Section 4 of the General Agreement on Tariffs and Trade (GATT).³²⁶ The ITC Office of Legal Services and counsel for the steel wire rope manufacturers discounted each of the three objections to Commission substantive rulemaking.³²⁷

Case law and general agency practice support the argument that Section 1335 of Title 19 gives the Commission authority to promulgate

³²¹ *Id.* at 28.

³²² 45 Fed. Reg. 81,605-06 (1980).

³²³ 19 U.S.C. § 1335 (1976) empowers the ITC to "adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties."

³²⁴ See Letter submitted by Christopher Dunn, Counsel, Arter, Hadden, & Hemmendinger, Washington, D.C., on behalf of the Japan Wire Products Exporters' Association at 16 (1980) (on file with the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C., Docket No. 583). The letter was submitted pursuant to Notice of February 27, 1980, Fed. Reg. 12,835 (1980).

³²⁵ See Letter of N. David Palmetier and Thomas Kossel, Daniels, Houlihan & Palmetier, P.C., to Kenneth R. Mason, Secretary, U.S. Int'l Trade Comm'n, on behalf of the Korea Iron and Steel Association of Seoul, Korea (1980) (on file with the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C., Docket No. 583). The letter was submitted pursuant to Commission Notice of February 27, 1980, 45 Fed. Reg. 12,835-37 (1980).

³²⁶ See Letter of N. David Palmetier and Thomas Kossel, *supra* note 325, at 9. See also Letter submitted by Christopher Dunn, *supra* note 324, at 16.

³²⁷ Both the ITC Office of Legal Services and Counsel for the Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers prepared extensive memoranda supporting the ITC's issuance of substantive rules. Memorandum to the Commission from Robert D. Bannerman, Office of Legal Services, on Substantive Rulemaking Under 19 U.S.C. Sections 1335 and 1337 (June 27, 1979) [hereinafter cited as ITC Counsel Rules Memorandum]; Comments of the Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers (April 28, 1980) (submitted in response to Proposed Rule on Country of Origin Marking of Imported Steel Wire Rope, 45 Fed. Reg. 12,835 (1980)) [hereinafter cited as Committee Rules Memorandum]. Copies of both these documents are on file in the offices of the Northwestern Journal of International Law & Business, and with the U.S. Int'l Trade Comm'n Docketing Office, Washington, D.C., (Doc. No. 583).

substantive rules. First, neither Section 1335's language nor its legislative history refutes an inference that Congress gave the ITC authority to make substantive rules.³²⁸ A series of decisions upholding substantive rules of agencies promulgated on the basis of generally worded rulemaking statutes support this reading of Section 1335.³²⁹ Outside of the question of Congressional intent, the only restriction on ITC rulemaking power is that all agency rules must be reasonably related to the statute which empowers them.³³⁰ As long as the ITC relates any substantive rulemaking it might do under Sections 1337 and 1335 to the subject of unfair import competition, there seems to be no reason why the Commission can not issue substantive rules to guide Section 337 administration.³³¹

Section 337's standards of injury and efficient and economic operation, however, prove difficult to express through substantive rules. Indeed, the public interest standards which each Section 337 action must meet further suggest that the ITC must determine injury and economic efficiency relative to each case.³³² The ITC could, nonetheless, use rules to indicate what *might* be an initial violation of the statute. For example, a rule stating simply that importation of items infringing a

³²⁸ Congress enacted Section 1335 in 1958, adding it to the Commission's general powers after deleting from what is now subsection (b)(1) of Section 337 the words "under and in accordance with such rules as it may promulgate [under the Tariff act of 1930, ch. 497, sec. 337(c), 46 Stat. 703 (1930)]." These deleted words followed what is now the first sentence of subsection (b)(1), which begins: "The Commission shall investigate any alleged violation . . ." 19 U.S.C. § 1337(b)(1) (1976). The legislative history of Section 1335 gives no clue as to the reason why Congress removed the language from the investigations portion of Section 337 and created a separate rulemaking section. See TRADE AGREEMENTS EXTENSION ACT OF 1958, S. REP. NO. 1838, 85th Cong., 1st Sess. 1958, reprinted in 1958 U.S. CODE CONG. & AD NEWS 3609, 3621. On its face, however, the change seems to give the Commission general rulemaking power "necessary to carry out its functions and duties," which include Section 337 enforcement and administration. See Committee Rules Memorandum, *supra* note 327, at 2-3.

³²⁹ In *National Petroleum Refiners Association*, the court held that the Federal Trade Commission could promulgate substantive rules based on statutory language which charged it with making rules and regulations "for the purpose of carrying out the provisions" of 15 U.S.C. §§ 41-46, 47-58 (1970). *National Petroleum Refiners Ass'n v. Federal Trade Comm'n*, 482 F.2d 672, 698 (D.C. Cir. 1973). Similar decisions exist upholding a substantive rulemaking power for other agencies on the basis of generally worded statutes; e.g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (Federal Communications Commission); *American Trucking Ass'n v. United States*, 344 U.S. 298, 311 (1953) (Interstate Commerce Commission); *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 696 (2d Cir.), cert. denied, 423 U.S. 827 (1975) (Food and Drug Administration); *Independent Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979) (Comptroller of the Currency); *Pacific Coast European Conference v. Federal Maritime Comm'n*, 376 F.2d 785 (D.C. Cir. 1967) (Federal Maritime Commission). See Committee Rules Memorandum, *supra* note 327, at 2-9.

³³⁰ *Mourning v. Family Publications Serv.*, 411 U.S. 356, 359 (1973).

³³¹ See Committee Rules Memorandum, *supra* note 327, at 9-13.

³³² See 19 U.S.C. § 1337(a), (d)-(f) (1976 & Supp. IV 1980).

valid United States patent is an unfair import trade practice could be the starting point for individual determinations of injury, economic efficiency, and the public interest. In short, substantive rules could eliminate one tier of consideration which the ITC now has to make during each Section 337 investigation.

Finally, the GATT allows country of origin marking.³³³ The GATT only prohibits a country from requiring more than basic marking of country of origin.³³⁴

Commission rulemaking in Section 337 cases could have significant procedural benefits. First, rulemaking could allow the Commission to use its financial resources more efficiently since a determination of what types of practices constituted a Section 337 violation would not be necessary in each case falling within the rules. Second, rules would provide some specific definition of what practices are "unfair," as opposed to the general definition of "unfair practices" which the Commission now applies. Third, the Commission could use its rules along with a Section 603 informal disposition process to take quick action where there are violations of Section 337.³³⁵

In its notice of dismissal of the rules,³³⁶ however, the Commission emphasized that, in its opinion, a number of factors outweighed the benefits which the proposed rulemaking might have brought. First, in the case of the steel wire rope manufacturers, the Commission argued that it had little experience in dealing with allegations of mismarking or the failure to mark country of origin as an unfair act or method of competition. Second, the Commission's use of normal adjudicatory proceedings would not only provide greater procedural rights for the complainant and respondent parties, but would also develop a more thorough record for the Commission. This is especially important in those cases where the Commission is unfamiliar with the unfair acts. Third, the Commission argued that pursuant to Section 337 it would still have to make determinations of injury and economic and efficient operation even if it had rules to guide its investigation. Thus, the Commission concluded, rulemaking would not save Commission resources, since the Commission would still need to carry out a full scale investi-

³³³ General Agreement on Tariffs and Trade, *supra* note 142, art. IX.

³³⁴ The Contracting Parties to the General Agreement on Tariffs and Trade, Geneva (1956) Report of the Working Party on Trade and Customs Regulation, para. 13, GATT Doc. L/595 (1956), *reprinted in* GENERAL AGREEMENTS ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 5th Supp. at 105-06 (1957).

³³⁵ *Authorization of Appropriations*, *supra* note 320, at 27-28. *See also* ITC Counsel Rules Memorandum, *supra* note 327, at 12-20.

³³⁶ 45 Fed. Reg. 81,605 (1980).

gation of the injury.³³⁷

The final reason which the Commission gave for rejecting rulemaking as a remedy, however, was probably the controlling one. As the Commission noted, the new procedures which the Commission would have to adopt to make findings in a rulemaking context would actually make the use of rulemaking more burdensome than adjudication.³³⁸ The difficulty which the Commission has had adopting procedural rules bears this out: the Commission took three years to issue its rules providing for the termination of Section 337 investigations and enforcement of determinations.³³⁹ Making substantive rules and adopting procedural rules to put the substantive rules into action would certainly be "burdensome."

Administrative agencies have faced their greatest opposition when they have formulated and enforced their rules. The ITC, with a smaller budget and a less certain political position than other administrative agencies such as the Federal Trade Commission or the Justice Department, withdrew its rules in the face of criticism. However, substantive rulemaking is legally available to the Commission. Moreover, the Commission has already promulgated rules on regulatory impact, which are a prerequisite to issuing substantive rules.³⁴⁰ Again, substantive rulemaking would be especially desirable because it would help to regularize import trade by informing foreign manufacturers and United States importers of what the Commission expects of them. Rules could inject more certainty into the importation process, and help the Commission direct its action upon finding a Section 337 violation.

L. Enforcement of Actions

Congress amended Section 337 in 1979 to allow the ITC to enforce its cease and desist orders with civil action. Before the amendments, the Commission could only enforce its cease and desist orders through exclusion.³⁴¹ Now, if respondents subject to a final cease and desist order violate that order, they must pay a civil penalty "for each day on

³³⁷ *Id.* at 81,605-06. See also ITC Counsel Rules Memorandum, *supra* note 327, at 21-23.

³³⁸ 45 Fed. Reg. 81,605, 81,606 (1980).

³³⁹ The Commission published its first version of the rules at 43 Fed. Reg. 2886 (1978). The final rules appeared at 46 Fed. Reg. 17,526, 17,530 (1981).

³⁴⁰ 45 Fed. Reg. 12,833 (1980).

³⁴¹ See S. REP. NO. 249, 96th Cong., 2d Sess., reprinted in 1979 U.S. CODE CONG. & AD. NEWS 381, 648. The Senate Finance committee expressed the view that civil enforcement would be more "flexible" than enforcement through exclusion since exclusion was "too draconian" a remedy in some cases, and was not "always to the public benefit." *Id.*

which an importation of articles, or their sale, occurs in violation of the order of not more than \$10,000 of the domestic value of the articles entered or sold on such day in violation of the order."³⁴² The Commission may sue for this penalty in the Federal District Court for the District of Columbia, or in the federal court for the district in which the violation occurs. Moreover, during the action, the court "may issue mandatory injunctions incorporating relief sought by the Commission as they deem appropriate in the enforcement of such final orders of the Commission."³⁴³

The Commission has not used Section 337's provisions for civil action,³⁴⁴ nor has it used any of the other enforcement mechanisms available to it under its rules. These mechanisms include the power to engage in informal enforcement proceedings, to bring federal district court action "pursuant to section 337(f)," to enforce orders other than cease and desist orders, or to institute enforcement proceedings in the Commission.³⁴⁵

Significantly, the Commission maintains that enforcement of its orders is not subject to the Administrative Procedure Act³⁴⁶ since it regards the enforcement hearing as the equivalent of a pre-trial conference.³⁴⁷ Once it considers the hearing officer's recommendation, possibly made without any prior hearing, the ITC must then decide whether to modify the original, violated action, to bring action in a United States District Court, or to revoke the original action "and direct that the articles concerned be excluded from entry into the United

³⁴² 19 U.S.C. § 1337(f)(2) (Supp. IV 1980).

³⁴³ *Id.*

³⁴⁴ *Departments of Commerce, Justice, and State, The Judiciary and Related Agencies' Appropriations for 1982, Hearings Before a Subcomm. of the House Committee on Appropriations, 97th Cong., 1st Sess. 519, 558 (1981)* (statement of ITC Chairman Bill Alberger). Chairman Alberger testified on February 18, 1981; the ITC has brought no civil enforcement actions from that time to date.

³⁴⁵ 19 C.F.R. § 211.56 (1981). Enforcement proceedings within the Commission begin when the ITC docketts a complaint with its hearing officer, setting forth in that complaint the violations of the ITC order. When the complaint is docketed, the Commission must serve it on the alleged violator, who must file a response. If there is no response, the Commission may accept that the facts alleged in the complaint are true or it can proceed without notice and "take evidence on the allegations or charges set forth in the complaint." *Id.* § 211.56(c)(1).

³⁴⁶ *Id.* § 211.56(c)(2). In response to public comments that a failure to apply the Administrative Procedure Act in enforcement hearings would result in unfair hearings, the Commission replied that "a formal trial type proceeding is not warranted since the Commission's interest in effective enforcement proceedings outweighs the parties' interest in being afforded a full hearing. Furthermore, Section 5(b) of the APA, which encourages settlement, does not indicate that it was intended to apply to informal attempts to arrive at and enforce settlements. Additionally, the reviewability of final Commission orders provides a due process safeguard." 46 Fed. Reg. 17,526, 17,527 (1981).

³⁴⁷ 46 Fed. Reg. 17,526, 17,527 (1981).

States.”³⁴⁸ The Commission’s consideration of the public interest controls whatever enforcement decisions the Commission makes.³⁴⁹

Finally, if the Commission determines that a party is about to violate an order so that the violation would prejudice later Commission enforcement, the Commission may “immediately” revoke the order and replace it with “an appropriate exclusion order.”³⁵⁰ The Commission must consider the public interest before it takes such “temporary emergency action,” and must institute a formal enforcement proceeding if it did not do so when it invoked the emergency exclusion order.³⁵¹

No one has yet challenged the Commission’s enforcement rules in civil action. Certainly, there is no question that the Commission may require parties to provide information,³⁵² may within certain bounds modify its own orders, and may bring district court action *if* parties violate an ITC cease and desist order. However, it is not clear whether Congress intended for the Commission to be able to issue an exclusion order when there is a violation of a cease and desist order.³⁵³ Further, the Commission’s power to bring a district court action in cases other than the enforcement of a cease and desist order is questionable. The language of Section 337 suggests that Congress intended to limit the Commission’s ability to seek district court action to those situations involving enforcement of a cease and desist order.³⁵⁴

V. SCOPE OF ACTION AGAINST SECTION 337 VIOLATIONS

A. Public Interest and Policy Considerations

As a result of the 1974 amendments to Section 337, the International Trade Commission gained the potential to play a dynamic role in United States trade policy through its administration of Section 337. The amendments affirmed the Commission’s practice of exercising jurisdiction over a range of unfair import trade practices, and, at the time, increased the Commission’s power to eliminate those practices.

³⁴⁸ 19 C.F.R. § 211.56(c)(3) (1981).

³⁴⁹ *Id.* § 211.56(c)(4).

³⁵⁰ *Id.* § 211.58.

³⁵¹ *Id.*

³⁵² *See id.* § 211.51.

³⁵³ *See* S. REP. NO. 249, *supra* note 341. *See also* 19 U.S.C. § 1337(f) (Supp. IV 1980) (cease and desist orders to be imposed *in lieu of* exclusion orders).

³⁵⁴ The language of Section 337(f)(2) specifically limits Commission civil action to enforcement of cease and desist orders, and provides that the Commission may only take civil action against a party when a cease and desist order operates against that party. *See* 19 U.S.C. § 1337(f)(2) (Supp. IV 1980).

Since it now has the responsibility of taking action in the public interest, the challenge to the Commission is not to simply choose a legally permissible Section 337 action, but an advisable one. Section 337 no longer contemplates "remedies" for the private injuries of individual complainants. The statute as amended recognizes that an unfair import trade practice which may cause immediate injury to a United States industry has an impact on the United States economy as a whole.

In *Canadian Tarpoly v. United States International Trade Commission*,³⁵⁵ the Court of Customs and Patent Appeals heard a challenge to a patent-based exclusion order. The plaintiff claimed that the ITC had exceeded its statutory authority, and had taken "arbitrary and capricious" action that was "a clear abuse of discretion"³⁵⁶ because it included the plaintiff's product in the exclusion order even though the plaintiff was not a respondent to the investigation. The court held against the plaintiff and affirmed the Commission's order, stating that:

Administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority . . . having wide discretion in dealing with problems entrusted to them, and in determining the choice of remedy deemed adequate to cope with unlawful practices The relation of remedy to policy is peculiarly for the administrative agency and its special competence³⁵⁷

Hence, the ITC has considerable authority to take action in administering Section 337. Such authority extends as far as necessary to relieve an injured domestic industry, yet stops when relief to the industry could be detrimental to the United States economy as a whole.

Commission assessment of the public interest controls the scope of the action which it takes after finding a Section 337 violation.³⁵⁸ For example, in some cases, the Commission has prescribed an exclusion order which reaches *all* imported goods similar to the goods of the injured domestic industry. While protecting the industry, such an order may, in many cases, adversely affect "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

³⁵⁵ 640 F.2d 1322 (C.C.P.A. 1981).

³⁵⁶ *Id.* at 1324.

³⁵⁷ *Id.* at 1326. In support of this proposition, the Court of Customs and Patent Appeals cited a series of well known cases which affirmed exercises of administrative discretion: Federal Trade Comm'n v. Mandel Brothers, Inc., 359 U.S. 385, 392 (1959); General Protective Comm. v. Securities & Exchange Comm'n, 346 U.S. 521, 534 (1954); Federal Trade Comm'n v. Cement Inst., 333 U.S. 683, 726 (1948); SEC v. Chenery, 332 U.S. 194, 207-09 (1947) ("Chenery II"); Jacob Siegel Co. v. Federal Trade Comm'n, 327 U.S. 608, 611-613 (1946).

³⁵⁸ See 19 U.S.C. § 1337(e)-(f) (Supp. IV 1980); 19 C.F.R. §§ 210.14, 210.55 (1981).

States consumers.”³⁵⁹ In contrast, an order drawn only against the particular unfairly imported goods which injured the industry may not have a negative effect on the public interest, though may serve to protect the industry against a particular distortion in import trade.

On two occasions, the Commission held that public interest considerations precluded Section 337 action, even though the statute was violated. In the first of these cases, *Certain Automatic Crankpin Grinders*,³⁶⁰ a domestic manufacturer of auto part manufacturing machinery brought a Section 337 action against a Canadian corporation for patent infringement.³⁶¹ The Commission held that the need of the American auto industry for the machinery was foremost since the domestic patentee could not adequately supply the industry, the machines were crucial to the industry’s being able to produce fuel-efficient cars, and fuel efficiency was crucial to the United States economy. The public interest in this case thus outweighed the need to remedy the private injury of the patentee.

The second case in which the ITC withheld action because of public interest considerations is *Certain Inclined-Field Acceleration Tubes*.³⁶² The complainants brought a Section 337 action alleging patent infringement, and the Commission found that the respondent had infringed the complainant’s patent. The ITC also found, however, that acceleration tubes generally had only a limited use in academic research, and were essential to that research. The Commission identified the controlling issue as:

whether the superior performance at lower cost of the Dowlish [respondent’s] tubes in *some* applications justifies overriding the patent owner’s rights. We are not persuaded that High Voltage [complainant] will withdraw from the field if no exclusion order is issued. The patent has but two years to run; High Voltage is reasonably assured of replacement sales to the overwhelming majority of U.S. installations that still use its tubes, not to mention its substantial overseas market. . . . [W]e are not convinced that [financial reward] is the only motivation to engage in the development of basic science research. As we have noted, there is considerable encouragement by the government for research, a necessity in view of the lack of immediately profitable commercial application of the results and the probative expense of the equipment needed to carry it out. Researchers, we believe, are not motivated solely by expectation of a profit in the way that holders of more conventional product and process

³⁵⁹ 19 U.S.C. § 1337(e)-(f) (Supp. IV 1980); 19 C.F.R. § 210.14 (1981).

³⁶⁰ *Certain Automatic Crankpin Grinders*, U.S. Int’l Trade Comm’n Inv. No. 337-TA-60, Pub. No. 1022 (Dec. 1979), 2 INT’L TRADE REP. DEC. (BNA) 5121.

³⁶¹ *Id.*

³⁶² *Certain Inclined-Field Acceleration Tubes*, U.S. Int’l Trade Comm’n Inv. No. 337-TA-67, Pub. No. 1119 (Dec. 1980), 2 INT’L TRADE REP. DEC. (BNA) 5572.

patents are³⁶³

The test which the Commission presented in *Acceleration Tubes* for whether public interest factors preclude remedy in a Section 337 patent violation action might apply generally to Commission determinations of public interest and remedy. The Commission noted that the threshold question is whether there is a public health and welfare interest in the invention, "that is, whether a remedy under section 337 would have an impact on the public health and welfare."³⁶⁴ If the remedy might have a negative impact, the opinion continued, the Commission must balance that impact against the damage to the patentholder's rights which would occur if the remedy did not issue.³⁶⁵ Applying these standards in *Acceleration Tubes*, the ITC concluded that the public interest in permitting research "with a wide range of devices" outweighed the value of ensuring a reward to the patentholder.³⁶⁶

Most Commission determinations do not contain as thorough a discussion of public interest considerations as do the *Crankpin Grinders* or *Acceleration Tubes* decisions. In most decisions, the ITC has based its public interest findings on the fact that no one has opposed its published determinations. Since there has often been no opposition, the ITC has as often concluded that the determinations must not be against the public interest. Following *Crankpin Grinders*, the ITC has most frequently been concerned with whether complainant-manufacturers can meet domestic demand if a Commission order stops some or all of the competing imports. In one case, the Commission satisfied its concern by accepting complainant counsel's statement that his client would not raise prices if the ITC excluded competing imports.³⁶⁷ In another case, the Commission noted that if imported products were excluded, domestic competitors of the complainant could satisfy domestic demand. In this case, the ITC also concluded that exclusion would not harm the public interest, since the complainant's product, a *sterile* thermometer sheath, was more beneficial to public health than the imported *nonsterile* sheath.³⁶⁸

The President may disapprove of ITC final determinations for "policy reasons" within 60 days after the Commission submits those

³⁶³ *Id.*, 2 INT'L TRADE REP. DEC. (BNA) at 5584.

³⁶⁴ *Id.*, 2 INT'L TRADE REP. DEC. (BNA) at 5581.

³⁶⁵ *Id.*

³⁶⁶ *Id.*, 2 INT'L TRADE REP. DEC. (BNA) at 5584.

³⁶⁷ *Certain Surveying Devices*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-68, Pub. No. 1085 (July 1980), 2 INT'L TRADE REP. DEC. (BNA) 5409, 5424.

³⁶⁸ *Certain Thermometer Sheath Packages*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-56, Pub. No. 992 (July 1979), 1 INT'L TRADE REP. DEC. (BNA) 5466, 5478.

determinations to him for review.³⁶⁹ Much debate surrounds whether Congress intended for the President's policy considerations in Section 337 cases to include both domestic and foreign policy.³⁷⁰ On the one hand, the President arguably may reject Commission determinations only for foreign policy reasons. Indeed, Congress intended to remove the issue of the domestic impact of tariff legislation from political considerations by making the ITC an independent agency, and by requiring the ITC to consider the public interest. Leaving the President to consider only foreign policy in connection with Section 337 determinations could, thus, be seen as a proper demarcation, given the President's unique role in directing United States foreign policy.³⁷¹ On the other hand, the executive branch naturally maintains that the President has every right to examine both the domestic and foreign policy impact of Section 337 determinations.³⁷²

While the President may approve or disapprove final ITC determinations, he does not have the power to revise them. Only the Commission can make Section 337 findings and prescribe the action which it will take on the basis of those findings. Furthermore, only the Supreme Court, after petition by *writ of certiorari*, or the Court of Customs and Patent Appeals may overturn the ITC's Section 337 findings and final actions.³⁷³ Yet the President has an undeniable influence over Commission orders because of his approval power. In May, 1981, General

³⁶⁹ 19 U.S.C. § 1337(g) (Supp. IV 1980).

³⁷⁰ See *Proposed Section 337 Guidelines Arouse Debate Over Executive Branch's Role in Review Process*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 80, at B-1-B-3 (June 3, 1981).

³⁷¹ Actions under Section 337 can have significant foreign policy implications. For example, Canada filed a complaint under Article XXIII (national treatment) of the General Agreement on Tariffs and Trade (GATT), *supra* note 142, protesting the ITC's exclusion of infringing Canadian products in *In re* Spring Assemblies and Components Thereof, U.S. Int'l Trade Comm'n Inv. No. 337-TA-88, Pub. No. 1172 (Oct. 1981), 3 INT'L TRADE REP. DEC. (BNA) 1426. The Canadians' general complaint was that Section 337 has built-in discriminatory elements since it is directed solely at foreign infringement, while domestic infringers may go unprosecuted. United States officials responded that if Canada felt so strongly that Section 337 was discriminatory, it was "pretty strange that no other countries [had] associated themselves with the complaint." *GATT Panel Hears U.S. and Canadian Arguments on Article XXIII Complaint*, [Oct.-Mar.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 115, at 462-63 (Feb. 17, 1982). The GATT panel finally dismissed Canada's complaint. *GATT Panel Rejects Canadian Charges of Discrimination in Assemblies Case*, [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 128, at 196 (May 19, 1982).

³⁷² United States Trade Representative General Counsel Donald deKieffer has maintained that the executive branch has every right to examine issues of domestic policy in the Commission's Section 337 determinations. See *Proposed Section 337 Guidelines Arouse Debate Over Executive Branch's Role in Review Process*, *supra* note 370, at B-1.

³⁷³ TRADE ACT OF 1974, S. REP. NO. 1298, *supra* note 8, at 199, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 7331-32. ("The President's power to intervene would not be for the pur-

Counsel to the United States Trade Representative Donald deKieffer circulated a memorandum outlining both the domestic and foreign policy criteria which a subcommittee of the Trade Policy Committee would consider in its review of Section 337 actions.³⁷⁴ The criteria, which the subcommittee was to use to “determine and evaluate domestic policy in a particular case,” included a range of factors related to the public policy considerations which the ITC was supposed to have *already* embodied in its determination. These factors were:

- was the unfair practice found a patent infringement or some other unfair trade practice;
- how many respondents were involved in the practice and what was the finding of violation with respect to each;
- what is the product—*i.e.*, is it readily available, high technology, defense related, etc.
- what is the use of the product—novelty item, medical item, raw material, etc.
- what is the nature of the industry—*i.e.*, labor or capital intensive, high technology, localized regionally, etc.
- how many producers of the product or of like products are there and what are their relative market shares—domestically and abroad;
- what is the market for the product, *i.e.*, individual purchasers, age of purchasers, industry, health care facilities, etc.
- what is the price of the product and what does it cost to produce—both domestic and foreign products; and
- what substitutes for the product are there.³⁷⁵

pose of reversing a Commission finding of violation of Section 337; such finding is determined solely by the Commission, subject to judicial review.”)

³⁷⁴ There is a four step process in the review of final ITC Section 337 determinations. The determination goes first to the Section 337 Subcommittee, an interagency group composed of working staff. The Section 337 Subcommittee's recommendation goes to the Trade Policy Staff Committee, which is an interagency committee of civil service staff. If this latter committee's decision is unanimous regarding the course of action which the President should take on the determination, its decision will often go directly to the United States Trade Representative for transmission to the President. *See* McDermid *supra* note 88, at 470. The third step in review of Section 337 determinations comes before an interagency committee of Assistant or Under Secretaries, the Trade Policy Committee Review Group. This group's recommendations then go to the cabinet level Trade Policy Staff Committee, which transmits its findings to the President. *See id.* For a short summary of the operations of the Trade Policy Committee, see H. KAYE, P. PLAIA & M. HERTZBERG, *supra* note 4 at § 3.05.

The United States Trade Representative (U.S.T.R.) has announced a changed format for collecting public comments on Section 337 final determinations. Under this arrangement, the U.S.T.R. will be reluctant to review domestic policy issues which the parties could have presented to the ITC but did not. The purpose of this change is to develop a more thorough record on domestic policy issues at Commission hearings for the Executive's use in Section 337 review. This would give the Executive more time to consider foreign policy issues which inhere in the Section 337 determination. 46 Fed. Reg. 46,857 (1981).

³⁷⁵ Memorandum of Donald E. deKieffer, General Counsel, Office of the United States Trade Representative, on Review of Section 337 Determinations and Orders, at 2-3 (May 13, 1981) (copy

General Counsel deKieffer emphasized in the memorandum that while the weight which the subcommittee would give the above criteria would vary from case to case, "generally speaking, the determination and the order will be looked at to see whether the practice complained of will be resolved without producing burdensome or adverse side effects or without causing disruption in U.S. trading relations or negotiations abroad."³⁷⁶ Thus, the General Counsel concluded, while complainants should request remedies which do not have "adverse side effects" or cause "distortion," "the government in formulating and in reviewing the determinations and orders, should not lose sight of the need to resolve the problem of the complainant."³⁷⁷

The General Counsel's list of domestic policy criteria represents the kind of extensive policy review which Congress intended for the Commission to undertake when it makes Section 337 determinations. Indeed, this review is quite compatible with the standards which the ITC applied in *Acceleration Tubes*. In each Section 337 investigation, the ITC must balance both the individual complainant's and the public's interest, and when it concludes that it should act against a Section 337 violation, the ITC must determine the appropriate action.

Each complaint which the Commission investigates describes a situation involving a certain combination of unfair trade practices, goods, and parties. The action which the Commission takes as its investigation proceeds in each case depends on the unique combination of practices, goods, and parties in the particular case. However, for the purpose of analysis, it is useful to look separately at each of the three categories of practices, goods, and parties. The combination of each of these categories is unique to each Section 337 case. An understanding of the dynamics of each category gives way to an understanding of how

on file at offices of Northwestern Journal of International Law and Business) [hereinafter cited as deKieffer Memorandum]. The foreign policy considerations which the Memorandum listed (and which the Commission is not charged to take account of under Section 337) were:

- is the determination and order consistent with the international obligations of the United States as expressed in any international agreement to which the U.S. is a party;
- is the determination and order consistent with negotiation positions of the U.S. in bilateral and multilateral negotiations;
- how broad [sic] will the order issued in the case be applied;
- in what country or countries are the imports in question produced;
- what country or countries produce like products which are apt to be affected by the determination and order;
- what is the status of our relations with the above countries;
- what are the attitudes of the above countries toward the determination and order;
- are there any other foreign policy factors which should be considered in any particular case.

Id.

³⁷⁶ *Id.* at 3.

³⁷⁷ *Id.*

combinations of categories must affect the scope of Commission action in order for the Commission to properly administer Section 337.

B. ITC Action and Unfair Import Trade Practices

The types of unfair import trade practices which appear in Section 337 cases can be divided into five groups: (1) patent infringement; (2) antitrust-based allegations; (3) general unfair import trade practices (such as trademark infringement and passing off); (4) underpricing; and (5) allegations of a combination of unfair trade practices.

1. Patent Infringement

Claims of patent infringement present the ITC with a special problem. While the Commission feels compelled to protect patent monopoly rights, no Section 337 action must adversely affect "competitive conditions in the United States economy" or United States consumers.³⁷⁸

The Commission has applied exclusion orders in all but one case where imports have infringed a United States patent, and where an exclusion order was not contrary to the public interest.³⁷⁹ Consistently, the ITC has maintained that:

To argue that [issuing an exclusion order where there is patent infringement] is overly-broad misses the point of the philosophy underlying our patent system and the systems of other countries. Only merchandise which appropriates the idea protected by the patent is excluded from this market. Noninfringing merchandise may be imported into this country. With a narrowly-drawn exclusion order, the burden which is shifted to importers is not an unnecessary burden when compared to the scope of the patentholder's protection.³⁸⁰

Yet, on two occasions, the Commission has decided against issuing exclusion orders on public interest grounds.³⁸¹ Indeed, Congress expressed its intention that a Commission finding of patent infringement not evoke an automatic exclusion order when it refused to require that

³⁷⁸ 19 U.S.C. § 1337(d)-(f) (1976 & Supp. IV 1980).

³⁷⁹ *Certain Apparatus for the Continuous Production of Copper Rod*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-52, Pub. No. 1017 (May 1978), 2 INT'L TRADE REP. DEC. (BNA) 5006. The ITC held that a cease and desist order was most appropriate where there was a Section 337 violation based on the infringement of a method patent since the order would allow for the monitoring of the respondent's operations for further possible infringement.

³⁸⁰ *Headboxes I*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-82, Pub. 1138 (Apr. 1981), 2 INT'L TRADE REP. DEC. (BNA) 5481, 5496, *disapproved by President*, 46 Fed. Reg. 32,361 (1981). See also *Certain Above Ground Swimming Pools*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-26, Pub. No. 815 at 3 (Apr. 1977) ("When an exclusion order is based on a determination of patent infringement . . . the general public benefits because the validity of the patent is upheld.")

³⁸¹ See *supra* notes 360-66 and accompanying text.

there always be exclusion orders in Section 337 patent infringement cases.³⁸² Also, several members of the Commission have pointed out that "Section 337 is not merely a patent-based jurisdiction for the remedying of private rights. The Commission's historical role has been to gauge the effect of unfair acts on the domestic industry as a whole, and to determine the needs to protect otherwise efficient U.S. industries from substantial harm."³⁸³

The Commission has gained most of its Section 337 jurisprudence through the adjudication of patent infringement investigations. However, the ITC developed its patent expertise not by Congressional design but by convenience and Congressional acquiescence.³⁸⁴ The first case which gave rise to the ITC's consideration of patent-based disputes involved an injury to a domestic patentee caused by the large scale importation of infringing articles through a shifting number of ports of entry. This case of shifting importation, the United States Court of Customs and Patent Appeals noted, was distinct from the one which the domestic manufacture of infringing articles presented:

In the case of the sale of articles manufactured in the United States the infringing manufacturer can be proceeded against and thus the unfair practice can be reached at its source. Domestic patentees have no effective means through the courts of preventing the sale of imported merchandise in violation of their patent rights. . . . [The domestic patentee] is required to proceed against each individual dealer selling the infringing articles, which of course would lead to a multiplicity of suits with little likelihood that all infringing dealers could be reached. The cost of numerous suits with the small amount of damages which may be recovered in any one suit discourages resort to the courts. Moreover, a decree obtained against one dealer would have no binding effect upon others, and by the simple expedient of changing the consignees the effect of a decree when secured would be nullified. Unless, therefore, section [337] may be invoked to reach the foreign articles at the time and place of importation by forbidding entry into the United States of those articles which upon the facts in a particular case, are found to violate rights of domestic manufacturer, such domestic manufacturers have no adequate remedy.³⁸⁵

After the Court of Customs and Patent Appeals' declaration, however, the Commission considered patent-based cases in which there was little possibility that imports would shift or arrive in large numbers. Under

³⁸² See *supra* note 66.

³⁸³ Certain Surveying Devices, U.S. Int'l Trade Comm'n Inv. No. 337-TA-68, Pub. No. 1085 (July 1980), 2 INT'L TRADE REP. DEC. (BNA) 5409, 5427 (dissenting opinion of Chairman Alberger and Commissioner Stern).

³⁸⁴ See *supra* notes 66-68.

³⁸⁵ *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247, 260 (C.C.P.A. 1930), *cert. denied*, 282 U.S. 852 (1930).

this application of Section 337, domestic patentees could gain a complete exclusion of articles which might possibly infringe their patents without the inconvenience of proceeding in several federal courts to obtain limited exclusion. Furthermore, the Commission could not consider patent invalidity as a defense until the 1974 Trade Act.³⁸⁶ While a patentee who seeks enforcement from a court risks having his patent declared invalid, patentees who argued before the Commission prior to 1974 risked only the chance of not getting an exclusion order. Indeed, the "risk" to patentees who now proceed before the Commission is similarly low since the ITC's pronouncements on patent validity are for the purposes of Section 337 only, and are not binding in other forums.

Patent infringement is a politically easy issue for the Commission to deal with. It is easy to support the Constitutional guarantee of monopoly rights for patentees, since few disagree that the right should be protected within some geographical area. However, patent rights are *private* rights, while the Commission must accord its actions in the *public* interest under the 1974 amendments. For the Commission to continue to hold that any patent infringement is a *per se* violation of Section 337 runs counter to the Congressional intent behind the present Section. This view is reinforced by Congress' express declaration that the federal district courts have exclusive jurisdiction over patent rights questions.³⁸⁷ The Commission erodes this exclusive patent jurisdiction as the Commission becomes more firmly established as a forum for the adjudication of patent rights.

The Commission may now consider patent validity as a defense to a charge of a Section 337 violation.³⁸⁸ To preserve "competitive conditions in the United States economy," the Commission must be highly critical of whether the complainant's patent is valid. Moreover, since there might be irreparable harm resulting from actions which the ITC later finds to have been based on an invalid patent, the injury standard for gaining temporary relief in patent infringement-based Section 337 cases must be high. If a complainant meets the injury standard and action would not be contrary to the public interest, the ITC should then draw the scope of its orders as closely as possible to the bounds of the patentee's specific patent.³⁸⁹ Any entry bond which the ITC sets should

³⁸⁶ Congress allowed for the defense of patent invalidity or misuse in Section 337 cases by amending subsection (c) of Section 337 to allow for all "legal and equitable defenses" to be presented in ITC hearings. 19 U.S.C. § 1337(c) (Supp. IV 1980).

³⁸⁷ 28 U.S.C. §§ 2201-02 (1976 & Supp. IV 1980).

³⁸⁸ See 19 C.F.R. § 211.56 (1981).

³⁸⁹ ITC rules provide for the Commission to consider the possibility that the domestic patentee/complainant has misused its patent. 19 C.F.R. § 210.21(b)(3) (1981). The ITC should be wary

not exceed an amount which offsets the comparative advantage which the alleged infringer might have in the United States market. Using these standards, the Commission may best balance the patentee's private interest with the public interest of encouraging a free import trade.

Parties or specific goods notwithstanding, the ideal remedial arrangements in patent infringement cases are those which allow for Commission monitoring, yet which limit exclusion to that essential for the protection of the domestic patentee's rights. Consent orders or informal dispositions are the most desirable of such arrangements since they allow for parties to admit ITC jurisdiction and for the Commission to most flexibly address its action to specific cases of infringement. If parties will not agree on consent orders or informal disposition, and the ITC can obtain *in personam* jurisdiction over the respondent,³⁹⁰ the Commission should then apply a cease and desist order. The order would provide not only for monitoring and action directed toward a specific party or parties, but also for enforcement. Only where the Commission can not obtain *in personam* jurisdiction should it issue an exclusion order, preferably one that is narrowly drawn, and which allows for specific determinations of whether the order covers certain articles. This type of *in rem* order would be similar in form to the one which the Commission used in the *Multicellular Plastic Film* case.³⁹¹

Application of a cease and desist order or an exclusion order with a reporting mechanism covering imports would also allow the Commission to depart from its former practices of excluding articles which it suspects might contributorily infringe a United States patent. In contributory infringement cases, *potential* injury is usually alleged since no injury occurs until persons in the United States change the device after it passes through the port of entry. The best approach to the threat of contributory infringement is for the Commission to allow the entry of goods if the respondent certifies that they will not be sold or used for purposes which the complainant's patent covers.³⁹² Any additional ac-

of misuse when the complainant and respondent approach it with a settlement agreement since there are strong possibilities that a foreign manufacturer may feel compelled to settle because of the potential order which the Commission may issue against it. Thus, before the Commission allows for settlement in patent cases, it must fully consider whether the complainant's patent is valid.

³⁹⁰ For a discussion of the problems in the Commission's obtaining personal jurisdiction over foreign manufacturers, see *supra* notes 168-83 and accompanying text.

³⁹¹ U.S. Int'l Trade Comm'n Inv. No. 337-TA-54, Pub. No. 987, 2 INT'L TRADE REP. DEC. (BNA) 5056, 5064, *aff'd*, Canadian Tarpoly v. United States Int'l Trade Comm'n, 640 F.2d 1322 (C.C.P.A. 1981). For a discussion of this order, see *supra* note 134 and accompanying text.

³⁹² The Commission provided for this kind of certification in one case where the infringing good had two pieces which, if not assembled, would not separately infringe the complainant's

tion by the Commission would cause the remedy to exceed the injury.

In a patent infringement investigation, the Commission should issue a broad exclusion order against the goods of unnamed foreign manufacturers only if there is a certain threat of a significant amount of shifting importation. In such case, the rationale behind the broad exclusion order would be that shifting importation, and not primarily the infringement, is the cause of "substantial injury" to the domestic patentee since it would be extremely difficult for the patentee to obtain effective relief from injury by shifting imports in a forum other than the Commission.³⁹³ The broader the exclusion order, however, the more the Commission should consider the public interest. Great numbers of imports are an indication of domestic demand. Patents, on the other hand, are private rights. If the public interest outweighs the Commission's enforcement of such private rights, the Commission should leave the question of action against infringement to federal courts.

2. *Antitrust-based Allegations*

The purpose of American antitrust legislation is to promote competition. Increasingly, the major competition with American industries comes from abroad. Given the Commission's unique role in regulating trade, it must take an affirmative view of its obligation not to flag "competitive conditions in the United States economy"³⁹⁴ by viewing Section 337 as legislation designed to remedy particular private claims.³⁹⁵

When it passed the 1974 amendments to Section 337, Congress emphasized that the public interest must be the overriding consideration when the Commission administers Section 337.³⁹⁶ Attention to the public interest is crucial to the proper application of the statute because of its attractiveness to complainants who might wish to use it to restrict competition. Once a complaint is filed, the Commission investigative staff develops the case. Since the Commission carries out major investigative work for complainants, the cost of obtaining Section 337 relief

patent. *Convertible Game Tables, and Components Thereof*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-2, Pub. No. 705 (Apr. 1976), 1 INT'L TRADE REP. DEC. (BNA) 5094.

³⁹³ See, e.g., *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247, 259 (C.C.P.A. 1930), cert. denied, 282 U.S. 852 (1930).

³⁹⁴ See 19 U.S.C. § 1337(d)-(e) (1976).

³⁹⁵ For example, in *Anheuser-Busch v. Federal Trade Comm'n*, 289 F.2d 835 (7th Cir. 1961), the court emphasizes that "[a]ntitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." *Id.* at 840.

³⁹⁶ TRADE ACT OF 1974, S. REP. NO. 1298, *supra* note 8, at 197, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 7330.

is low compared to the cost of civil litigation. As with any legal action, any time that relief is worth less to a plaintiff than to a defendant, there is a risk that the plaintiff will use the possibility of relief against the defendant in an extortionate way. Thus, the Commission must be wary of complainants who intend only to delay or block *fairly* competing imports.

The Commission should not take action in response to complaints by any domestic industry which carries on price gouging or monopoly practices. Indeed, the ITC must be open to all antitrust defenses which respondents may make, including allegations of the *Noerr* "sham" exception,³⁹⁷ under which a complaint brought in order to restrain trade may be adjudged invalid. If the Commission suspects that a complainant has the intent of restraining trade through a Section 337 action, it should mold its action accordingly. For example, if it issues a consent order, the Commission could require, the domestic industry as well as the respondent to report on their respective pricing policies. If the parties do not agree to settle by consent, a cease and desist order is appropriate. Such an order would allow the Commission to admit complying respondents' goods into the United States economy.

However, there is no reason why the Commission may not apply an exclusion order when it finds that foreign producers have violated Section 337 by entering into a monopoly or conspiracy. In this case, exclusion promotes the public interest of encouraging competitive conditions in the United States economy. It focuses on competition between United States and foreign manufacturers, and allows the United States industry to become competitive with foreign monopolists. The Commission must, of course, not award exclusion if an oligopoly situation exists in the United States industry, though, because the exclusion will have a negative effect on overall competition in the domestic economy. However, if domestic oligopoly does not exist, the ITC should apply an exclusion order which remains in effect as long as it takes for either the United States industry to develop and compete with the foreign monopoly, or for the foreign monopoly to dissolve.

An additional attractive feature of the use of exclusion orders

³⁹⁷ *Eastern R.R. President's Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). While lobbying activities are not illegal, even for anticompetitive purposes, there may be a Sherman Act violation when attempts to influence governmental action amount to nothing more than harassment of a competitor, or a mere "sham." See Rosenthal, *supra* note 295, at 33-38; see generally Applebaum, *Dumping Problems, Voluntary Restraints, and Other Import Relief Problems*, in PRACTICING LAW INSTITUTE, 17TH ANNUAL ADVANCED ANTITRUST LAW SEMINAR, INTERNATIONAL TRADE AND THE ANTITRUST LAWS 135, 144-45 (Corp. Law and Practice Course Handbook Ser. No. 259, 1977).

against the goods of foreign combinations is that exclusion orders, based *in rem*, are the least intrusive of any type of United States anti-trust action, in contrast to cease and desist orders or treble damages awards. The problems of extraterritorial application of United States law would not arise if the Commission applied an exclusion order against the goods of a foreign monopoly, except in the case that manufacturers might have to approach the Commission to prove that they were not part of the alleged monopoly which violated Section 337.

3. *General Unfair Import Trade Practices*

The issues which the Commission must face when it deals with unfair trade practices such as infringement of trademarks and trade dress, mislabeling, and passing off involve much clearer lines of policy than the issues involved in Section 337 patent infringement or antitrust cases. Indeed, private and public interests are coincident in the area of general unfair trade practices. Trademarks, trade dress, and labels identify products' origins to consumers and give them an indication of the nature and quality of the product. As in the case of imports which infringe patents, imported goods which infringe trademarks or trade dress or which are mislabeled injure the domestic manufacturer who has invested in the development and promotion of his product. However, such goods also injure the public, since it cannot count on a certain product and product quality which it expects.

Section 526 of the Tariff Act of 1930 protects registered trademarks at Customs by prohibiting any importation of foreign made merchandise bearing a trademark owned by "a citizen of, or by a corporation or association created or organized within, the United States. . . ." ³⁹⁸ Similar legislation covers the proper labeling of such goods as wool products, ³⁹⁹ hazardous substances, ⁴⁰⁰ textile fiber products, ⁴⁰¹ and gold plated jewelry, ⁴⁰² and makes proper labeling a prerequisite for entry into the United States. There are strict penalties for violating these pieces of legislation, and provisions for exclusion orders and civil relief are common. ⁴⁰³ Thus, where the Commission finds trademark or trade dress infringement or mislabeling, it is especially

³⁹⁸ 19 U.S.C. § 1526(a) (Supp. IV 1980).

³⁹⁹ Wool Products Labeling Act of 1940, 15 U.S.C. §§ 68-68j (1976).

⁴⁰⁰ Hazardous Substances Labeling Act, 15 U.S.C. §§ 1261-1273 (Supp. IV 1980).

⁴⁰¹ Textile Fiber Products Identification Act of 1958, 15 U.S.C. §§ 70-70k (1976).

⁴⁰² Jewelers' Hall Mark Acts of 1905 & 1906, 15 U.S.C. §§ 291-300 (1976).

⁴⁰³ For example, the Jeweler's Hallmark Acts of 1905 & 1906 provide for criminal sanctions, condemnation of nonconforming goods, injunctive relief, and the collection of reasonable attorney's fees from violators of the statute. 15 U.S.C. § 298 (1976).

appropriate for the Commission to apply its strongest measures "in addition to other provisions of law" against the unfair trade practice. Unlike cases of patent infringement, Customs officials can readily discern articles which infringe trademarks or trade dress. Moreover, the basis of trademark and trade dress infringement questions is the courts', or in Section 337 cases, the Commission's subjective judgment of whether a respondent's mark would confuse a "reasonable person" as to origin. Hence, the Commission can appropriately apply a broad exclusion order in the case of trademark and trade dress infringement. The type of order which the Commission issued in *Certain Novelty Glasses*⁴⁰⁴ is highly appropriate in Section 337 cases involving general unfair trade practices. After finding trade dress infringement, the ITC issued an exclusion order to run "until the Commission has determined that the complainants no longer use the trade dress in issue in this investigation." The Commission ordered the complainants to report every six months on whether they continued to use the trade dress, thus assuring that the complainants did not extend their rights over the dress beyond the time that they would have been entitled to them. Similarly, when respondents, would cease trademark infringement or passing off, when complainants would cease using their trademark, or when respondents or complainants would cease manufacturing a good involved in an investigation, the Commission could provide for the exclusion order to become inoperative.

4. *Underpricing*

The Commission has considered several situations of underpricing. All of these involved difficult investigations and had significant evidentiary problems because foreign manufacturers refused to provide the Commission with pricing information.⁴⁰⁵ There are likely to be similar evidentiary problems in future Section 337 investigations of underpricing. Since the Commission must examine the pricing policies of respondents involved in an unfair pricing investigation, the Commis-

⁴⁰⁴ *Certain Novelty Glasses*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-55, Pub. No. 991 (July 1979), 2 INT'L TRADE REP. DEC. (BNA) 5400, 5407.

⁴⁰⁵ In *Certain Welded Stainless Steel Pipe and Tube*, U.S. Int'l Trade Comm'n Inv. No. 337-TA-29, Pub. No. 863 (Feb. 1978), 1 INT'L TRADE REP. DEC. (BNA) 5245, 5270, *disapproved by President*, 43 Fed. Reg. 17,789 (1978), Vice Chairman Parker and Chairman Bedell dissented because the prices on which the ITC based its decision in the case were submitted only under oath by the complainant and related only to the lowest price "paid or charged by an importer for various categories of welded stainless pipe and tube, by quarters, for a period of several years. In general, these prices are of no probative value since they are evidently only of the lowest price charged by an importer in that quarter for a particular category of welded stainless steel pipe and tube supplied by the same unknown Japanese exporter or manufacturer."

sion can properly impose two measures. After the ITC finds "reason to believe" that there is a violation, it can use its cease and desist power to require specific importers to show that the goods they wish to import are not underpriced. Or, the Commission may direct an exclusion against the goods in question, and permit importation if foreign manufacturers show that they have not underpriced their goods. This use of an exclusion order restricts the problem of extraterritorial application of United States law.

If it finds a situation of underpricing, the Commission also may declare that the case falls within the Treasury Department's antidumping jurisdiction, and refer the action to the Department of Treasury. The Treasury Department can then impose incremental pricing remedies and equalize the competitive advantage of the underpricing foreign manufacturer over the long run. This remedy would impose less of a restraint on commerce than would an exclusion or cease and desist order, and, in cases where the United States industry tends toward oligopoly, would have more of an ongoing positive effect on competitive conditions in the United States economy.

5. *Mixed Allegations*

Often, complainants who appear before the Commission allege a combination of unfair trade practices. This presents the ITC with the question of whether to deal with those practices together, or whether to concentrate on one practice alone.

When there are mixed allegations, the scope of a Commission order often depends on which practice the Commission deals with. In *Convertible Game Tables*,⁴⁰⁶ the Commission found that the respondents had infringed the complainant's patent and marketed infringing goods through the advertisement of a fictitious price. The Commission directed its action against the patent infringement, and not against the false advertising. Action against the infringement, the Commission observed, would remain in effect beyond the time that the respondents ceased their fictitious advertising. Additionally, it would be a broader order since it could run against all current and potential infringers of the complainant's patent, and not just the few specific respondents who ran false advertisements.⁴⁰⁷

⁴⁰⁶ *Convertible Game Tables and Components Thereof*, U.S. Tariff Comm'n Inv. No. 337-34, Pub. No. 705 (Dec. 1974), 1 INT'L TRADE REP. DEC. (BNA) 5094.

⁴⁰⁷ Cease and desist orders were not available to the Commission when it considered the *Convertible Game Tables* case. *Id.* Such an order would have been preferable here and in similar cases since the Commission could tailor the order to cover the different types of unfair import trade practices and, at the same time, direct its action to specific parties.

However, the Commission's goal when there are allegations of multiple unfair import trade practices should be to focus on the practice which substantially injures the complainant. It should not base action on a practice because it promotes the most comprehensive order. There may be investigations in which both patent infringement and trademark infringement occur, but where the United States industry is large and not harmed by the particular instance of patent infringement. Such an instance would be one in which the ITC might draw a broad exclusion order against trademark infringement, and a narrow order against patent infringement.⁴⁰⁸

In the past, the Commission has asserted that Section 337(b)(3) allowed it to investigate "alleged acts and effects" which fall under the antidumping⁴⁰⁹ or countervailing duty statutes,⁴¹⁰ provided that the acts and effects occur in the same matter before the Commission as a part of the same investigation which established a basis for Section 337 relief. Subsection (b)(3) of Section 337 requires that in a case where violations of Sections 1303, 1671, or 1673 arise, the Commission must promptly notify the Secretary of Commerce, so that he can take such action as the antidumping and countervailing duty laws provide.⁴¹¹ Decisions which the Secretary or administering authority makes under the sections with respect to the issue of less-than-fair value sales or subsidization and the matters necessary for such decision "shall be conclusive upon the Commission."⁴¹² Certainly, where the Commission encounters complaints which contain incidents of unfair trade practices and the specific unfair practices of less-than-fair value sales or subsidization, the Commission must allow the Secretary of the Treasury or the proper administering authority to take action against those practices. After the Commission defers action to the Secretary, however, it should consider whether the allegations remaining in the original complaint

⁴⁰⁸ Section 337 does not preclude the Commission from issuing more than one exclusion order, all of various breadths, to deal with multiple unfair import trade practices. Section 337 only prohibits the ITC from using both an exclusion order and a cease and desist order against one party who has committed one violation. 19 U.S.C. § 1337(f)(1) (Supp. IV 1980) ("In lieu of [exclusion orders or temporary exclusion] . . . the Commission may issue . . . an order directing such person to cease and desist . . .").

⁴⁰⁹ 19 U.S.C. § 1671 (Supp. IV 1980); 19 U.S.C. § 1303 (1976). For a short description of this legislation, see Garfinkel, *supra* note 4, at 243-44.

⁴¹⁰ 19 U.S.C. § 1673 (Supp. IV 1980). For a short description of this legislation, see Garfinkel, *supra* note 4, at 241-43.

⁴¹¹ 19 U.S.C. § 1337(b)(3) (Supp. IV 1980). While the text of the statute reads that the Secretary of the Treasury shall make determinations under the Countervailing Duty and Antidumping Acts, the Treasury passed this duty on to the Secretary of Commerce. Reorganization Plan No. 3 of 1979, 46 Fed. Reg. 69,273 (1979).

⁴¹² 19 U.S.C. § 1337(b)(3) (Supp. IV 1980).

are sufficient to support Section 337 action.⁴¹³ Furthermore, the ITC should consider whether the Secretary's actions will remedy the general unfair import trade practice allegations before the Commission. Although Commission action under Section 337 is "in addition to any other provisions of law," in certain cases, the incidence of Treasury and Commission measures which bear on the importation of a single product may be contrary to the public interest. The Commission should, accordingly, guide the scope of its action in those situations where the Treasury can also be expected to take action.⁴¹⁴

C. Goods

Section 337 allows for complaints to originate from all types of United States industry, large to small, from manufacturers to importers. The goods which these industries sell range from high technology to simplicity. Deliveries of the goods to consumers may be once a year or once a minute. Thus, when the Commission considers action against an unfair practice, it must also consider the situation of a particular industry, and the situation of that industry in the domestic economy.

Congress gave the Commission *in rem* exclusion power to deal with large numbers of shifting importations that injured otherwise helpless United States industries. Imposition of an exclusion order is uniquely appropriate in such case since the substantial injury to the domestic industry is the absence of effective remedies outside of those available under Section 337. If there are a number of foreign manufacturers whose goods, if imported, would unfairly injure the industry, the Commission should direct a broad order excluding all of the potentially unfairly imported goods. Also, such a broad order is appropriate where a foreign manufacturer can easily cause an unfair injury to a United States industry because it can easily reproduce and export that industry's product in a short period of time. In contrast, if production time is long or if the Commission finds that there is a limited number of foreign producers, it should direct its order only against those producers. This type of action is least restrictive on the flow of trade, and sufficiently answers the needs of injured complainants.

⁴¹³ The Senate Finance Committee specifically contemplated that such consideration would be appropriate. S. REP. NO. 249, *supra* note 341, at 29.

⁴¹⁴ The relationship between the Secretary and the Commission in taking action in situations where there are possible violations of Section 337 and of the countervailing duty or antidumping laws should follow the model of the relationship between the Justice Department and Federal Trade Commission in the administration of concurrent jurisdiction over certain antitrust laws. Fischbach, *supra* note 255, at 67; see also Roll, *Dual Enforcement of the Antitrust Laws by the Department of Justice and the FTC: The Liason Procedure*, 31 BUS. LAW. 2075 (1976).

However, the Commission must always be aware that the importation of a certain good might be beneficial to the United States economy, though it may have been imported as the result of an unfair import trade practice. After a consideration of the public interest, the Commission might consider admitting goods for *particular* uses, while excluding goods destined for general use.⁴¹⁵

D. Parties

Subsection (a) of Section 337 provides that the Commission shall take action against owners, importers, consignees, or their agents who unfairly compete or act in "the importation of articles into the United States." Hence, the parties who appear—or who do not appear—before the Commission often vary as much as the goods they sell.

As this comment has discussed, it is not settled whether Section 337 extends *in personam* jurisdiction over foreign manufacturers who do not import directly into the United States.⁴¹⁶ However, these persons occasionally submit themselves to the ITC's jurisdiction after the Commission serves them with notice of an investigation, or for purposes of a consent order. The Commission should allow this voluntary submission. The foreign manufacturer may view compliance as worth the continued importation of his goods into the United States. In such cases, however, the Commission should make certain that domestic manufacturers do not compel foreign manufacturers to enter into intrusive consent orders when other arrangements, such as informal settlement or exclusion orders allowing for reporting, are available.

When there are foreign manufacturers who do not submit to the Commission's jurisdiction, however, the Commission should also take care in drafting its orders. Though a broad exclusion order may be appropriate in cases of shifting imports, in other cases, the Commission should, whenever possible specify that an exclusion order operates only against the goods of particular manufacturers. Sections 337(d) and (e) strongly suggest this approach by directing that the ITC should exclude the "articles concerned" of persons who violate Section 337. This limited action would reach the injury of the domestic industry, and at the same time minimize possible injury to the public interest.

In contrast, the Commission should apply cease and desist orders against United States citizens who refuse to submit to consent or settlement agreements. While exclusion orders are appropriate where there

⁴¹⁵ See, e.g., *supra* note 317.

⁴¹⁶ See *supra* notes 168-83 and accompanying text.

are many shifting importers, cease and desist orders are most preferable over persons inside the United States since the ITC may easily obtain jurisdiction over them. Cease and desist orders allow for active Commission participation in the provision of relief and also allow for the modification of the order in changed circumstances. At the same time, cease and desist orders compel persons inside the United States to comply with Section 337 under the threat of Commission or civil enforcement.

VI. CONCLUSION

The role of the International Trade Commission in the administration of Section 337 is changing. Slowly, the Commission is moving away from its protectionist view of Section 337 administration and coming to appreciate that the public interest must be the factor which controls the Commission's Section 337 action. Former ITC Chairman Bill Alberger noted that laws such as Section 337 "can be compatible with, and may even promote, a successful competition policy—including improving the international competitiveness of our industries—if those who administer the laws understand their proper scope and objectives."⁴¹⁷ The International Trade Commission has in Section 337 a law which provides for flexible action when the Commission determines that an unfair import trade practice has injured a United States industry. With the goal of the public interest in mind, the ITC can take action which reflects a balance of the private interest in remedy and the public interest in economic well being, and thus administer Section 337 to eliminate import trade distortions, and to promote an open United States trade policy.

J. Stephen Simms

⁴¹⁷ Alberger & Yerxa, *Economic and Regulatory Theories Underlying U.S. Import Relief Statutes*, in AMERICAN BAR ASS'N, CRITICAL ISSUES IN INTERNATIONAL ANTITRUST AND UNFAIR COMPETITION LAW (1981).