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Section 337 Import Investigations—Unfair Import Practices

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I. INTRODUCTION

Among the provisions of American law concerning foreign trade, few have as potentially damaging an impact on foreign manufacturers, exporters, and American importers as section 337 of the Tariff Act of 1930, which grants jurisdiction to the United States International Trade Commission ("ITC") to conduct investigations of unfair trade practices. In certain instances, the ITC can, before completing its full investigation, temporarily prohibit further imports of the articles allegedly involved in unfair import trade practices. In the last five years, articles ranging from fabricated steel plate products, doxycycline, high voltage circuit breakers, and color TV sets to cattle whips and combination locks have been the subject of section 337 investigations. Many of these products have been excluded from further importation. While the majority of unfair import trade cases have involved allegations of patent infringement, an increasing number of complaints have involved allegations of other unfair practices such as misappropriation of trade secrets, trademark violation, misleading packaging, copying of trade dress, collusive bidding, attempts to monopolize, below-average variable cost pricing, and falsification or inadequate disclosure of country of origin. In July 1979, Congress strengthened the enforcement powers of the ITC by enacting laws which permit fines of up to $10,000 per day for section 337 violations.

Section 337 has thus become an increasingly important weapon in the arsenal available to American industries seeking to reduce


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foreign competition. This article sets forth significant aspects of section 337 investigations which could have a far-reaching impact on domestic and foreign manufacturers, importers, wholesalers, and retailers.

II. OVERVIEW OF LAW

Section 337 of the Tariff Act of 1930 states: "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, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States" are unlawful. The ITC is authorized to follow certain procedures in its investigation of alleged violations of section 337. If the ITC determines that there is reason to believe that unfair import practices have taken place, it may issue a temporary exclusion order prohibiting further entry of the articles except under bond.

When the Commission finds a section 337 violation, it may issue an exclusionary order directing the Secretary of the Treasury to deny entry to the offending articles or it may require persons violating the statute to cease and desist from engaging in the unfair methods or acts. An ITC order, whether exclusionary or cease and desist, will take effect unless the President makes known his disapproval on policy grounds within sixty days.

The 1974 amendments have made section 337 investigations adjudicative in nature. They must be conducted on the record in

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5. 19 U.S.C. § 1337(e) (1979). It has been pointed out by several Commissioners, however, that the temporary exclusion remedy has not been used because the amendment to the Trade Act 1974 places strict time limitations upon investigations. Also, the International Trade Commission [hereinafter cited as ITC] has been thwarted by the high standard of "immediate and substantial harm" it must meet to impose an exclusion order. See Certain Luggage Products, Inv. No. 337-TA-39 (Nov. 1978); Doxycycline, Inv. No. 337-TA-3, 25 (Apr. 1979).
6. 19 U.S.C. § 1337(d) and (f) (1979). The Commission considered and rejected the possibility of combining the so-called "in rem" exclusionary orders with the "in personam" cease and desist orders in Doxycycline, Inv. No. 337-TA-3 (Apr. 1979).
8. Trade Act of 1974, P.L. 93-618, § 341, 88 Stat. 2053 (1974). However, a major shift in section 337 and foreign trade regulatory posture may be underway. In early 1980, the ITC invited public comment on a proposed rule-making proceeding with respect to unfair
accord with the Administrative Procedure Act. In addition to a full "due process" hearing, the Act requires that the ITC consult with the Department of Health, Education and Welfare, the Department of Justice, the Federal Trade Commission, and other appropriate agencies during the course of its investigation. If a determination is made that a violation exists, the Commission must consider the effect of its order on public health and welfare, competitive conditions of the economy of the United States, domestic consumers, and the production of competitive articles in the United States.

The statute requires that investigations be concluded within twelve months or, in the case of more complicated cases, eighteen months. ITC regulations set forth the procedural time tables which must be followed. The period during which a case is stayed or on appeal is not included within the time limitations. Persons adversely affected by a final determination of the ITC are given an opportunity to seek judicial review in the Court of Customs and Patent Appeals (C.C.P.A.).

III. PROCEDURAL ASPECTS OF SECTION 337 INVESTIGATION

A. Initiation of Investigation

Usually, a section 337 investigation is initiated by a complaint filed by one or more domestic companies with the Secretary of the ITC. However, the Commission itself may initiate an investigation on its own motion. In considering whether to institute an investigation, the Commission is not to be deterred by the fact that there may be ongoing court or agency proceedings involving similar par-

acts (misleading marks and trade dress) in the importation and sale of steel wire rope. The proceeding would involve a quasi-legislative hearing. See Transcript of ITC Meeting (Jan. 31, 1980).

10. 19 U.S.C. § 1337(b)(2) (1979). In certain cases, the Energy Department, NASA, and the Department of Defense have also been consulted and have submitted comments. Certain Welded Stainless Steel Pipe and Tube, Inv. No. 337-TA-29 (Feb. 1978).
11. 19 U.S.C. § 1337(d) and (f) (1979). In at least one case, the Commission refused to exclude infringing articles because it determined that continued importation would be in the public interest. Certain Automatic Crankpin Grinders, Inv. No. 337-TA-60 (Dec. 1979).
13. See 19 C.F.R. §§ 210.21(a), .41(e), and .53(a) (1979).
ties, issues, or commodities. The 1979 amendments provide for an exception: the Commission must refrain from investigating allegations resting solely on acts and effects within the purview of the Antidumping and Countervailing Duty Laws; it may refrain from investigating allegations based partly on such acts and effects. The Commission carefully reviews the complaints to determine whether the information provided is sufficient to put a respondent on notice of unlawful acts. The ITC regulations set forth the required content of a complaint.

B. Section 603 Informal Inquiry

Section 603 of the Trade Act of 1974 permits the ITC to make preliminary investigations to collect information necessary to institute a full-scale section 337 action. The Commission relied on section 603 authority in the case of an informal inquiry into the special financing terms under which the European A300 Airbus was leased to Eastern Airlines. After interviews and a review of pertinent documents, the Commission chose not to institute a formal section 337 investigation. In another case, the Commission requested a Report on an Informal Inquiry with respect to alleged below-cost sales of imported West German coke before filing a formal complaint.

17. The ITC and the federal courts, in rejecting arguments against duplicative proceedings, have relied on the language of 19 U.S.C. § 1337(a) (1979), which states that § 337 remedies are "in addition to any other provision of law . . . ." See Pfizer, Inc. v. Int'l Rectifier Corp., M.D.L., 74 (C.D. Cal. 1978); Dennison Co. v. Ben Clements & Sons, Inc., 74 Civ. 949 (S.D.N.Y. 1977) (the costs of hiring additional counsel for overlapping proceedings in federal court are not such injury as would support an injunction of the ITC investigations). Accord, In re Vom Clemm, 229 F.2d 441, 43 C.C.P.A. 56 (1955) (a concurrent investigation). Nevertheless, the Commission agreed to stay the investigation in Certain High Voltage Circuit Interrupters, Inv. No. 337-TA-64 (1979) pending the completion of certain Patent and Trademark Office proceedings.

18. Publ. L. No. 96-39, § 1105(a), 93 Stat. 310 (1979). These amendments responded to the problems which arose when the ITC initiated § 337 investigation into predatory below-cost pricing of television receivers. [Certain Color Television Receiving Sets, Inv. No. 337-TA-23 (1977)] and of stainless steel pipe and tube [Certain Welded Stainless Steel Pipe and Tube, Inv. No. 337-TA-29 (Feb. 1978)], despite arguments that such investigations would usurp the exclusive jurisdiction of the Treasury Department over actions resting on dumping and the authority of the Justice Department in antitrust matters.

23. Id.
24. ITC Office of Legal Services, Report on Informal Inquiry, Coke from West Germany (1979) and Transcript of ITC Meeting (June 12, 1979).
Thus, an early awareness of the section 337 investigations can provide opportunities for potential respondents to remove the complaint from the section 337 purview and bring it within the scope of a section 603 informal inquiry. No penalties or formal discovery obligations attach to a section 603 informal inquiry. By contrast, once a section 337 investigation has been initiated, the Commission may seek a temporary exclusion order which would prohibit further entry of the subject articles or permit entry only under bond during the course of the investigation.  

C. Responding to Service

Upon initiation of a section 337 investigation, notice of investigation and the underlying complaint are served on all respondents, which usually include foreign manufacturers, exporters, and importers. To the extent that the Commission has relied on the domestic industry's complaint for the names of potential respondents, a degree of overkill may be present in the Commission's service list. Some respondents served may have discontinued manufacture, switched to different articles, or obtained licenses. Nevertheless, upon service of the complaint and notice, each respondent served has twenty days within which to file a response. The time period is relatively short, considering that respondents usually must marshal the documents, analyze the issues, and prepare the strategy for defending an alleged violation. In many cases, persons served are tempted to ignore the entire proceeding rather than become involved. A course of deliberate abstention may result in a finding of default with all issues resolved against the respondent. In recent cases, persons who have been served, but have not answered or appeared to defend the case, have found that their products were subsequently excluded, based solely on the allegations of the

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25. See note 5 infra.


Most respondents who have responded have been either dismissed from the proceedings or found not to be violating the statute. Thus, significant market shares may be unnecessarily relinquished by ignoring a section 337 notice of investigation. It should be noted that the presiding officer or the Commission can extend the time within which to respond on an *ex parte* basis, and a needless default for lack of response within twenty days can be avoided in appropriate circumstances by an informal motion for extension of time to respond.

Despite the twelve-to-eighteen-month investigatory time period, a named respondent can, in certain cases, obtain expeditious advance dismissal from the proceeding. A properly framed showing that no importations of the subject articles have taken place by the given party, or that importations have been pursuant to a license, may be sufficient to permit early termination of the proceedings with respect to such party. This has been accomplished in several recent cases.

### D. Proceedings Before Administrative Law Judges

Upon initiation of an investigation by the Commission, the case is assigned to an Administrative Law Judge ("ALJ" or "presiding officer"), who supervises the investigation, rules on motions concerning issues arising out of the investigation, holds conferences and an evidentiary hearing, and makes recommendations for Commission review.

#### 1. Discovery

One of the first issues to confront the parties and the Adminis-
Unfair Import Practices

The discovery process can be very burdensome and can raise the risk of disclosure of trade secrets, distribution channels, production processes, profits and losses, quality control, and research and development. The Commission's investigative staff is also authorized to issue subpoenas. For these reasons, a protective order spelling out the conditions of discovery is usually issued at the outset by the Administrative Law Judge. In some cases, protective orders set forth in detail the manner in which certain documents are to be handled, including restricting access to outside counsel, special marking of documents, and destruction or return thereof at the conclusion of the case.

Several exchanges of interrogatories and depositions may be required for counsel to isolate the evidence they deem necessary to their allegations and defenses. Failure to comply with the discovery process, such as failure to respond to the notice of investigation, may result in the following:

1. an inference that the admission, testimony, documents, or other evidence would have been adverse to the party;
2. a ruling that, for the purposes of the investigation, issues be decided adversely to a party;
3. a ruling that a party may not introduce into evidence specific evidence in support of his position in the investigation;
4. a ruling that the party may not object to specified secondary evidence which shows what the withheld evidence would have shown; and
5. a ruling that a motion or other submission by a party be stricken, or a ruling that a determination in the investigation be rendered against a party, or both.

Thus, in Certain Multicellular Plastic Film, a non-complying manufacturer/exporter who responded to the service of the complaint and notice of investigation but did not comply with discovery was subsequently subjected to an exclusion order with respect to his products. The exclusion order was based on inferences drawn against him. In the same case, a party which responded and com-

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42. See 19 C.F.R. § 210.30(d) (1979) for some of the possible provisions of protective orders. The sanctions for violation of a protective order could be extremely severe.
43. 19 C.F.R. § 210.36(b) (1979).
44. Inv. No. 337-TA-54 (June 1979).
plied with discovery was able to develop a successful defense on non-infringement and thereby preserve its market share. By contrast, in another case, most of the respondents deliberately abstained from discovery proceedings on the ground that the ITC had no jurisdiction over them, yet the ITC permitted and considered at least one subsequent submission from a non-complying respondent.

2. Evidentiary hearing and recommended determination

Except in very complicated cases, the Administrative Law Judge will require that discovery be completed within seven months of publication of the notice of investigation. The ALJ will hold a prehearing conference to identify the issues and witnesses that are to be presented at the formal hearing, and he will conduct an evidentiary hearing. At the formal hearing, the parties introduce evidence, examine witnesses, and make oral arguments. While some hearings are very short, other have lasted over seventy days. In one recent case, the investigation was designated "more complicated" because of the complexity of the subject matter, the difficulty in obtaining information, and the large number of parties involved.

Within sixty days after the hearing (unless an extension has been granted), the Administrative Law Judge issues a recommended determination of his findings of fact and conclusions of law which is transmitted to the full Commission for consideration.

E. Commission Review of Recommended Determination and Public Policy Factors

Parties to the investigation may file exceptions to the findings of fact and conclusions of law which were presented in the recom-

45. Id.
48. 19 C.F.R. § 210.41(d) (1979). A source of controversy has been the occasional determination of a presiding officer to exclude certain persons from the proceedings because of a policy to proceed expeditiously and cut costs and also because the persons will have an opportunity to present their points of view during the Commission review of public interest, bonding, exceptions, and remedy matters. Import Motors, Ltd. v. ITC, 530 F.2d 937 (C.C.P.A. 1976) (appellate court upheld Commission's discretion to exclude persons from the first stage of the proceedings).
50. Id.
mended determination. In response, the Commission may hold another hearing. The findings of fact and conclusions of law of the ALJ are not automatically adopted. In a recent case, the ALJ found no infringement of the patent involved, but the Commission reversed his finding. In another case, the ALJ made a recommendation based on the default of certain named persons, but the Commission remanded for fuller development of the record before adopting the ALJ's recommendation, stating that a Commission determination must be supported by "reliable, probative or substantial evidence."

Either during or after the hearing of the recommended determination, the Commission may receive arguments and presentations on other issues such as: (1) whether a cease and desist order or an exclusion order is a more appropriate remedy; the effect of the remedy on public health and welfare, on competitive conditions in the economy of the United States, on the domestic production of competitive articles, and on interests of the American consumer; and the amount of the bond required for articles entering during the sixty-day period during which the President considers whether to approve an affirmative determination.

56. Some commissioners have argued that a combination exclusionary order and limited cease and desist order is necessary in certain circumstances. Thus, in Doxycycline, injunctive relief was required to combat distribution of stockpiles of infringing imports brought in during the investigatory period. See also Certain Welded Stainless Steel Pipe and Tube, Inv. No. 337-TA-29, at 411-44 with respect to jurisdictional issues. Issuance of the cease and desist order in Copper Rod has prompted a request for an advisory opinion and for public comments. This procedure, like the proposed steel wire rope rule-making proceeding, foreshadows increasing regulatory functions for the ITC.
57. In Certain Automatic Crankpin Grinders, the ITC for the first time determined that public interest factors precluded the imposition of a remedy. Relying in part on evidence that exclusion of the grinders would prevent Ford Motor Company from meeting automotive fuel economy goals and would increase an existing domestic delivery backlog, the Commission made no remedy despite the finding of patent infringement. The C.C.P.A. rejected the domestic manufacturer's petition for a writ of mandamus against the ITC. Landis Machine Tool Co. v. ITC, No. 80-10, slip op. (C.C.P.A. Dec. 1979). One issue raised is the extent to which the Commission's consideration of public policy factors should reflect a developed adjudicative record at the risk of being found arbitrary.
58. 19 C.F.R. §§ 210.14-.55 (1979). With respect to the issue of a proper bond, the Commission has relied on the legislative history of the § 337 amendments to the Trade Act of 1974. "In determining the amount of the bond, the Commission shall determine, to the
F. Licensing and Settlement Agreements

Not every case is concluded by Commission determination after full hearings. Some patent cases are terminated upon request of the parties after negotiation of license agreements.\textsuperscript{59} The Commission has the option of making settlement agreements while not issuing licenses in patent cases.\textsuperscript{60} Such settlement agreements have specified, for example, that the parties assign no liability for past practices, that the subsequent importations will be authorized by license, or that unfair trade practices will be stopped.\textsuperscript{61} If the settlement agreements are not found to be anti-competitive and no adverse comments are received by the Commission from members of the public or interested federal agencies,\textsuperscript{62} the Commission has been inclined to accept settlement proposals because they are usually cost efficient.\textsuperscript{63}

G. Consent Orders

Another way to terminate cases without a full determination is by means of the consent order. The consent order is specifically provided for in the statutory language, but it has been developed as a means of expediting a proceeding while providing safeguards for all parties. Recently, the first patent infringement case to be terminated by a consent order was reported.\textsuperscript{64} The respondents did not concede infringement, but they did agree to cease importing the offending products. The respondents also agreed to file statements with the Commission describing the extent of their compliance with

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\textsuperscript{60} See, e.g., Certain Swivel Hooks and Mounting Brackets, Inv. No. 337-TA-53 (June 1979).


\textsuperscript{62} E.g., the ITC, Department of Justice, or Department of Health, Education and Welfare.

\textsuperscript{63} Certain Swivel Hooks and Mounting Brackets, Inv. No. 337-TA-53, 2-3 (June 1979). But see dissent as well as reference to objections by the Department of Justice with respect to the need for Presidential review of settlement agreements. Id. at 4.

the consent order. This decision may indicate a trend.65 Since consent orders are not formal determinations, they are not transmitted to the President for review.

IV. ISSUES RELATED TO SECTION 337 CRITERIA

In considering whether the elements of the statute have been met by the complainant, the following issues arise.

A. Unfair Act or Method of Competition

1. Patent infringement

Allegations that an imported article infringes the claims of existing United States patents are the most frequently encountered charges. Prior to 1974, the Commission could not examine patent validity in making a determination of patent infringement; it had to assume that the patent was valid.66 A presumption of patent validity in section 337 cases still exists,67 but the Trade Act of 1974 empowered the Commission to receive "all legal and equitable defenses."68 Thus, proof of disclosure in prior art, obviousness, lack of ornamentality, double patenting, insufficient disclosure of means to produce and use the patented article can now be received into evidence, and in some cases, such proof has been sufficient to overcome the presumption of patent validity. In at least two cases to date, the Commission has found the patent to be invalid in light of obviousness.69 In these cases, the Commission's determination is not a binding interpretation of United States patent law, nor is it a precedent for purposes of subsequent court cases.70

2. Other unfair acts

Although patent cases make up the bulk of the section 337 caseload of the ITC, other unfair acts and methods of competition

65. Id. at 5 (commissioners are concerned with unnecessary government expense when parties are essentially in agreement).
have been recently alleged. The Commission has pointed out that the terms "unfair methods of competition and unfair acts" have a broad meaning.71 Recent complaints to the Commission have included allegations of predatory and below-average variable cost pricing,72 violations of common law trademarks,73 misleading or imitative trade dress,74 collusive bidding, falsification or inadequacy of disclosure of country of origin,75 packaging and passing off,76 and misappropriation of trade secrets.77

3. Restraint of trade

In one controversial case, the Commission determined that there had been no injury to the American industry as a result of the unfair method or act, but it found that the unfair method or act had a tendency to restrain trade in the United States.78 Stating that section 337 was designed to preserve competition in the United States, the Commission found that the increasing market share of certain foreign firms accomplished by the unfair method or act tended to decrease competition among importers, and therefore, it tended to restrain trade in the United States.79

4. Effect or tendency to destroy or substantially injure

In most cases in which the Commission has found an unfair act, it has also found a tendency or effect to substantially injure an industry which is efficiently and economically operated. In one excep-

74. Id.
76. Certain Apparatus for the Continuous Production of Copper Rod, Inv. No. 337-TA-52 (Mar. 1979). Misappropriation of a trade secret depended on the following findings: (1) that a trade secret not within the public domain exists; (2) that the complainant is the owner of the trade secret or possesses a proprietary interest therein; (3) that the complainant disclosed the trade secret to respondent while in a confidential relationship or that the respondent wrongfully took the trade secret by unfair means; and (4) that the respondent has used or disclosed the trade secret causing injury to the complainant. In the last instance, the Commission used its cease and desist order power to fashion a different remedy than the exclusionary order more typically employed. The President has approved this cease and desist order with the proviso that the ITC keep in mind the needs of domestic manufacturers for spare parts.
78. Id.
79. Id.
tion, *Certain Combination Locks*, the Commission determined that the complainant’s patent was valid and that the importer’s patent infringed, but the complainant’s sales profits and capacity utilization were both found to be healthy. Moreover, the complainant could not prove that he had lost any customers to the infringing respondents. Thus, no tendency or effect to injure was found.

Typically, it is easier to find injury in the presence of unfair acts than in other import relief actions. Some of the indicia used by the Commission to find injury in a section 337 investigation are: loss of customers or sales to respondents; ratio of imported units sold to patented units sold; decreases in complainant’s production, sales, employment, or profits; large outstanding orders for infringing units; and low prices and underutilization of capacity.

5. An industry

The Commission has held that the relevant industry protected by section 337 is the domestic industry that is lawfully manufacturing the articles that are the subject of the investigation. In patent-based cases, the industry may consist solely of the patentee and his licensees, which may be a single company. The mere ownership or licensing of patent rights, however, is not sufficient to comprise an industry; there must also be domestic manufacture under the patent. Nevertheless, where an apparatus patent has been involved,

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81. Id.
82. The relevant legislative history reads: "Where unfair methods and acts have resulted in conceivable losses of sales, a tendency to substantially injure such industry has been established." House Comm. on Ways & Means, Report on H.R. 10710, Trade Reform Act of 1973, H.R. Rep. No. 571, 93d Cong., 2d Sess. 78 (1973) (emphasis added). Cf. In re Von Clemm, 229 F.2d 441, 43 C.C.P.A. 56 (1955) (record failed to disclose substantial injury but court found actions to have such a tendency).
84. Certain Roller Units, Inv. No. 337-TA-44 (Feb. 1979) (the ratio exceeded fifty percent in a three month period).
87. Id.
88. In re Von Clemm, 229 F.2d 441, 444, 43 C.C.P.A. 56 (1955) ("There is nothing in the statute which requires that an industry must be of any particular size, or that more than one company must be involved before the protection provided by the statute may be invoked.")
the Commission has found a narrow industry definition inappropriate.\textsuperscript{90}

In non-patent-based cases, the importance of the relevant industry is illustrated by the section 603 informal inquiry conducted to determine whether anthracite coal producers could be considered to be a section 337 "industry" injured by below-cost coke imports.\textsuperscript{91}

6. Efficiently and economically operated

To date, no case has turned exclusively on whether the domestic industry has been efficiently and economically operated. The issues relevant to this part of the statute were recently addressed in Certain Centrifugal Trash Pumps.\textsuperscript{92} The Commission concluded that the relevant industry was efficiently and economically operated based on testimony and evidence of:

- a) the use of modern automated production facilities;
- b) an employee productivity incentive program;
- c) substantial profits on the patented item;
- d) expanded sales;
- e) balanced ledgers;
- f) an acceptable level of retained earnings;
- g) sufficient working capital;
- h) a national distribution network;
- i) high investment in research and development;
- j) an ability to fill orders; and
- k) reasonable business judgment on market expansion efforts.\textsuperscript{93}

V. Judicial Review of Commission Actions

By its terms, the statute confers the right of judicial review of ITC final determinations on persons adversely affected thereby. The Court of Customs and Patent Appeals has jurisdiction to conduct such review.\textsuperscript{94} Other federal courts have been wary about intruding into the statutory channel of review of ITC determinations.\textsuperscript{95} Challenges to exclusionary orders in lower fed-

\textsuperscript{90} Certain Apparatus for the Continuous Production of Copper Rod, Inv. No. 337-TA-52 (Mar. 1979).
\textsuperscript{91} See note 25 \textit{supra}.
\textsuperscript{92} Inv. No. 337-TA-43 (Feb. 1979).
\textsuperscript{93} \textit{Id.} at 22-23.
\textsuperscript{94} 19 U.S.C. § 1337(c) (1979).
eral courts have failed as invalid exercises of constitutional power.\textsuperscript{96} Likewise, efforts by federal district courts to enjoin the enforcement by customs officials of section 337 exclusion orders have failed.\textsuperscript{97}

The C.C.P.A. has upheld the propriety of section 337 in the face of arguments that the section is void for vagueness or constitutes a grant of judicial powers to the Executive.\textsuperscript{98} The unfair acts deemed by the courts to be included within the statute's purview include infringement of United States patents by imported articles. The court has held that the language of the statute is broad and not to be narrowly defined.\textsuperscript{99}

The original standard of review applied by the C.C.P.A. to Commission proceedings was whether there existed “substantial evidence” to support the Commission’s conclusions.\textsuperscript{100} However, additional language inserted in 1974 has changed this standard of review.\textsuperscript{101} A recent case has explained the standard more fully. In \textit{Solder Removal Co. v. United States International Trade Commission},\textsuperscript{102} the C.C.P.A. heard arguments from the ITC that the standard of review should remain one of “substantial evidence” to support the conclusion, but the court rejected this standard, reasoning that there would always be some evidence to counter patent validity. The court argued that the “substantial evidence” standard was different from that used by the court to review Customs Court decisions. The new standard for review of ITC determinations became whether the determination was “not contrary to the weight of the evidence.”\textsuperscript{103} The C.C.P.A. later distinguished \textit{Solder Removal} and its standard as being inapposite where the issue is not the correctness of factual determinations, but rather the adequacy of legal conclusions drawn from factual data.\textsuperscript{104} The C.C.P.A. rejected the

\textsuperscript{97} Frischer & Co. v. Elting, 60 F.2d 711 (2d Cir.), \textit{cert. denied}, 287 U.S. 649 (1932).
\textsuperscript{99} \textit{See} \textit{In re Northern Pigment Co.}, 71 F.2d 447, 22 C.C.P.A. 166 (1934); \textit{In re Von Clemm}, 229 F.2d 441, 43 C.C.P.A. 56 (1955).
\textsuperscript{100} 39 F.2d at 257.
\textsuperscript{101} The addition of “in some manner and subject to same limitations and conditions as in the case of appeals from decisions of the United States Customs Court” into 19 U.S.C. § 1337(c) (1979) underlies the shift in judicial review standards.
\textsuperscript{102} 582 F.2d 628, 65 C.C.P.A. 120 (1978).
\textsuperscript{103} \textit{Id.} at 632.
\textsuperscript{104} Stevenson v. ITC, No. 79-12, slip op. (C.C.P.A. Dec. 1979) (overturning the Commission determination of patent invalidity in \textit{Certain Skateboards}).
Commission arguments that the standard should be whether the Commission’s decision was "not clearly contrary to the weight of evidence before it." It pointed out that the court must make an "independent determination" as to the legal conclusions and inferences which should be drawn from the Commission’s findings of fact. Thus, a full review of all testimony is necessary.

Another issue which awaits C.C.P.A. determination is the appropriate standard of review for public policy factors in a section 337 investigation.105

VI. CONCLUSION

The use of section 337 by domestic manufacturers to combat unfair trade has increased over the last five years. Judicial interpretations of the relevant standards will further increase the utility of the section 337 investigation by lending more certainty to Commission procedures. Recent proposals to transfer the ITC’s investigative authority to the Commerce Department have not materialized.106 The Commission has developed considerable expertise in handling these cases, and more can be expected.

105. See Landis Machine Tool Co. v. ITC, No. 80-10, slip op. (C.C.P.A. Dec. 1979), in which complainant sought a writ of mandamus requiring the Commission to provide a remedy where it had found a patent infringement injury, but had refused to impose an order based on public policy grounds. See also Certain Automatic Crankpin Grinders, Inv. No. 337-TA-60 (Dec. 1979).

106. See Initial Position of Carter Administration: Hearings Before House Comm. on Ways and Means (Sept. 6, 1979) (reorganization of the Executive Branch's foreign policy structure was omitted from final reorganization plans).