

UNITED STATES INTERNATIONAL TRADE COMMISSION

In the matter of:)
EXPANDED, UNSINTERED)
POLYTETRAFLUOROETHYLENE)
IN TAPE FORM)

Investigation No. 337-TA-4

COMMISSIONERS' OPINIONS IN
SUPPORT OF THE COMMISSION ACTION



USITC Publication 769
Washington, D. C.
April 1976

UNITED STATES INTERNATIONAL TRADE COMMISSION

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.
April 3, 1976

In the Matter of:)
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EXPANDED, UNSINTERED) Investigation No. 337-TA-4
POLYTETRAFLUOROETHYLENE)
IN TAPE FORM)

Opinion of Commissioners
Leonard, Minchew, and Ablondi

We find and determine that there is no violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337; 88 Stat. 2053; hereinafter referred to as "section 337") in respect of U.S. Patent No. 3,664,915 of the complainant W. L. Gore & Associates, Inc. (hereinafter "Gore"), for the reason that this patent, which is the basis for the allegation of an unfair trade practice under section 337, is unenforceable for purposes of section 337. Since we find the patent unenforceable, we do not need to address whether injury has been shown in this case.

For purposes of this opinion, we adopt the description by Judge Renick of the "Procedural Background" of this case. 1/ Moreover, after carefully considering the record, we adopt Judge Renick's "Findings" in respect of the identity of parties (R.D. findings 1, 2, and 3) and the "Patent in Issue" (hereinafter "the Gore patent") (R.D. findings 4, 5, 6, 7, 8, and 9), with the modification that finding 6 would show that the extrusion process occurs before calendaring; thereafter, the record shows, the kerosene is driven off by heating. As far as these preliminary matters go, no party takes substantial exception to Judge Renick's decision. Moreover, no party takes substantial exception to Judge Renick's conclusions

1/ Recommended Decision filed Feb. 4, 1976, at pp. 1-5. The Recommended Decision is hereinafter cited as "R.D."

that infringement by imports has occurred if the patent in issue, the Gore patent, is valid, and we adopt these findings with the modification in finding 11 that TBA Industries, Ltd. (TBA) "infringes" claims 4, 5, 6, and 9, which follows necessarily from the nature of this product. (R.D. 11 and 12.)

This case therefore resolves itself--at least initially--to the question of the enforceability of the Gore patent. We find that the patent is unenforceable for section 337 purposes, for the reason that it was "anticipated" (35 U.S.C. 102(a)) and because a product meeting the claims of the Gore patent was "on sale" in the United States more than 1 year ago.

Anticipation

On December 5, 1975, counsel for Gore filed a pleading asking that an additional agenda item be discussed at the prehearing conference on December 12, 1975:

Complainant W. L. Gore & Associates, Inc., on December 3, 1975, became aware of the existence of Russian Certificate of Invention 240997. This document should be made of record in this investigation and complainant will want to present evidence showing conception and reduction to practice prior to the effective date of this Russian publication.

This document, hereinafter called the "Russian reference," was later identified as an attachment to exhibit SX-19. 1/

1/ See memorandum of the Investigative Attorney dated Jan. 20, 1976. Exhibits will hereinafter be cited as "Exh."

The law provides that foreign patents may invalidate U.S. patents.

35 U.S.C. 102(a) provides:

A person shall be entitled to a patent unless--
 (a) the invention was . . . patented or described
 in this or a foreign country, before the invention
 thereof by the applicant for patent

Complainant Gore has admitted that the Russian reference "discloses a porous polymeric material based on tetrafluoroethylene-4D and describes process steps involved in making a porous, low-density product"; that the reference had an "effective date" of August 19, 1969; that the reference "can be considered either [a foreign patent or a printed publication]"; and that it "would be a significant reference against the '915 patent [the Gore patent] if the Certificate is a part of the prior art." 1/ (Complainant's "Supplemental Brief" filed January 23, 1976, at pp. 16-19.) We find the Russian reference anticipates the teachings of the Gore patent. Therefore, Gore must establish that his date of invention was earlier than August 19, 1969, in order to overcome the Russian reference. Normally, such a reference would have to have been antedated for the Gore patent to be issued, but in this case the Russian reference was never cited to the United States Patent and Trademark Office (PTO) nor discovered by the patent examiner.

Judge Renick held that Gore succeeded in antedating the Russian reference by virtue of the "whole" of a body of notes and accompanying affidavits Gore submitted to him. (R.D. finding 27.) Gore maintains these papers establish that Gore had the invention reduced to practice

1/ The record contains a letter from the Patent and Trademark Office which seems to demonstrate Russian authors' certificates are available to the public on the date of publication indicated on the document itself. Exh. SX-9.

prior to June 20, 1969, and that mere "optimum parameters of commercial production" were being established on and after August 19, 1969.

Evidence needed for antedating.--Gore's evidence to antedate the Russian reference consists of copies of pieces of paper purporting to be W. L. Gore & Associates' laboratory notes and affidavits of Gore employees. A part of these documents was presented at the hearing of September 9, 1974, in this investigation; Gore, as well as TBA, later waived a further hearing in this matter when the Russian reference was brought to light. 1/ (See, Prehearing Conference Report dated December 17, 1975.) Gore maintains it may rely on this evidence, even though the evidence is unsworn and unauthenticated, because it is the sort of evidence accepted for this purpose at the PTO and even by the Court of Customs and Patent Appeals. (37 CFR 1.131(b) and complainants' "Supplemental Brief" filed January 23, 1976, at p. 27.) This was apparently Judge Renick's view because he decided on this basis. (See, R.D. finding 27.) Indeed, TBA seems to agree that oral testimony and affidavits may antedate a reference, so long as corroborating documentary evidence is convincing. ("Supplemental Brief of TBA Industrial Products, Ltd." filed January 23, 1976, at pp. 24-29.) In fact, Gore admits its evidence of prior invention must be corroborated, but argues that the notes it has offered do corroborate the affidavits and testimony of Gore employees. 2/

1/ There are two main groups of such papers. One, marked as Exh. 52, was accepted at the hearing of Sept. 9, 1974, as "a compendium of documents . . . which confirm the reduction to practice of the scaling material invention They predate the filing date of the application." Tr. 491-92. The others are documents from Gore's files submitted by agreement on Dec. 24, 1975, marked as Exhs. CX-5-000001-000364.

2/ Complainant's Brief to the Commission filed March 8, 1976, at p. 12. Complainant cites no case for this procedure.

It is still the law, so far as we can tell, that to carry back the date of invention to a time before the date of application requires extremely reliable proof. United Shoe Machine Corp. v. Brooklyn Wood Heel, 77 F.2d 263 (2d Cir. 1935). However, courts have held that an inventor's notes may corroborate the facts of conception and reduction to practice. Ritter v. Rohm & Haas Co., 271 F. Supp. 313 (S.D.N.Y. 1967). Since Gore's notes appear authentic, we consider them to serve as "corroboration."

Gore maintains that it is sufficient to show inventorship that at the date of the Russian reference, the patentee (Mr. W. L. Gore) had conceived of his invention and pursued his concept diligently toward a reduction to practice; Judge Renick, in his finding No. 27, agreed with this view. Gore contends further that by June 18, 1969, it had actually reduced its invention to practice, at least in the sense the invention could be practiced by those of ordinary skill in the art from the Gore work. (Complainant's brief filed March 8, 1976, at p. 17.) TBA, on the other hand, contends that only conception and reduction to practice may antedate an application date and that, in any event, not even conception and mere diligence have here been demonstrated. (TBA Brief filed March 8, 1976, at pp. 28-32.)

We do not accept TBA's argument on the need for actual reduction to practice. It is based on the assumption that the words "before the invention" in 35 U.S.C. 102(a) require a showing of both conception and reduction to practice. A reading of TBA's cases cited on this point reveals that the possibility of antedating a reference by a combination of conception

and diligence was not even discussed. In fact, the Court of Customs and Patent Appeals has on several occasions considered diligence from the time of conception to the time of a patent application as a basis for backdating the time of invention, evidently in reliance on section 102(g); 1/ sometimes the court has found the diligence evidence winning and sometimes not. Reed v. Tornquist, 436 F.2d 501 (CCPA 1971); Gould v. Schawlow, 363 F.2d 908 (CCPA 1966) at p. 911. See, generally, 69 CJS 399 (1951 Ed. supp.).

The case at hand.--Applying the standards we have set forth above, we find that Gore has not proved conception prior to the date of the Russian reference.

Gore has alleged that certain identified documents corroborate the inventor's conception of the invention prior to August 19, 1969. TBA and the staff have merely asserted these documents are not probative of conception (or diligence, for that matter), although TBA has attempted detailed rebuttal of the Robert W. Gore affidavit. (TBA brief filed January 23, 1976, at p. 35; Investigative Staff Brief filed March 8, 1976, at p. 5.). Thus, we are forced to evaluate Gore's claims without the benefit of detailed refutation of his assertions. (Complainant's Supplemental Brief filed January 23, 1976, at pp. 22-27.)

1/ 35 U.S.C. 102(g), which provides,

. . . . In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.

After carefully reviewing the evidence, we believe the keynote of the Gore invention--if it be invention--is claim 9, "dimensional stability." Claims 1, 2, and 4-6, relating to an unsintered product, its structure (fibrillation), specific gravity, coefficient of friction, self-adhesion and conformability were all well-known advantages of expanded tape. This does not mean these elements are not patentable, but simply that prior to Gore's patent or some other stabilizing means, these qualities could only be achieved for brief interludes, after which the tape would relax and lose the qualities. 1/ In this connection, Judge Renick looked for the "critical concepts" of stretching and heating. For this reason the "conception" of the Gore invention means knowing that the product may not be sintered (which establishes an upper temperature limit) and that the product must be heated and stretched to get the other desirable characteristics of the invention. A person who had these ideas, in our view, would have had the invention sufficiently complete to enable the inventor or one skilled in the art to understand it and to reduce it to practice without the exercise of inventive skill, since finding the quantities of the Gore patent would be simply a matter of experimentation.

Under this test, the evidence is that W. L. Gore himself told this Commission he worked on the expansion of polytetrafluoroethylene (PTFE) in tape form for several years. (Tr. 259-261.) Obviously that gives us no idea of the date of conception.

Gore's employee Dauerty testified in a court deposition (see below) that in "the spring" of 1969 he was trying to find out if a Gore stretching

1/ Obviously, a sintered tape is not in question here.

process was feasible, and he (or he and his fellow workers) "had a considerable problem" with retraction of the tape that came off the machine "cold" (unheated). They tried various solutions to this problem, but the problem ceased to exist when they added heating-element portions to their machine. At that point, the "development of the product" went back to the development group and Dauerty lost track of the progress. (Exh. CX-101 (Dauerty Deposition in CA4334/4389 (D. Del.) at pp. 105-112)). Gore argues this is corroborated by exhs. CX-52-68, -49, and -60, as well as other documents that suggest the parameters of the invention had been established at a date prior to August 19, because they contain elaborate test data dated before then. (See, Gore Brief filed January 23, 1976, at pp. 23-24)

Gore makes the following comments on these exhibits in its brief to us (at pp. 16-17): CX-52-68 shows a series of relaxation and sealing tests performed as early as February 6, 1969. At the bottom of that document are notes indicating the direction of future testing, including the phrases "heat addition to fibril [sic: fibrillation] process" and "heat cycle after fibrillation."

CX-52-49 presents the results of a test wherein Gore's "stretch machine" was used at an "elevated operating temperature" to produce a tape product with 20.4 percent actual stretch (29 percent theoretical), corresponding to a specific gravity of less than 1.4.

The affidavit of Robert Gore suggests he took over the project of stabilizing the tape with heat after the events described by Dauerty. After June 27, 1969, and continuing through October 3, 1969, Robert Gore

directed Mr. Hubis to heat tape before and after stretching. This affidavit cites no portions of the Gore documentation to support this, except to say that after August 19, 1969, he instructed an employee to quantify the stress relief of heating (See, CX-5-000064 through -000066). Indeed, Gore itself contends the time after June 18, 1969, was devoted only to determining parameters for commercial production. (Gore's Brief to the Commission filed March 8, 1976, at p. 17.)

Under the conditions of this proof and the uncertainties we have identified, we do not find the high level of proof necessary to antedate the Russian reference.

Since we find no "conception" of the Gore product prior to August 19, 1969, we do not deal with the question of whether the conception was diligently pursued. Moreover, there is no evidence that we can identify of a reduction to practice. The Russian reference antedates the constructive date of invention of the Gore product, making the Gore patent unenforceable under 35 U.S.C. 102(a).

On sale

The sale of tape by John W. Cropper, Ltd., of New Zealand more than 1 year prior to October 3, 1969, which is the application date for the Gore patent, is alleged by TBA and the Commission's Investigative Staff to invalidate the patent. Under 35 U.S.C. 102--

A person is entitled to a patent unless--
the invention was . . . on sale in this country,
more than 1 year prior to the date of application
for patent in the United States

In this case evidence has been presented to the Commission that tape was sold by Cropper prior to October 3, 1968, and that the tape sold was within the scope of the claims of the Gore patent. Therefore, we find that this sale makes the patent unenforceable for section 337 purposes, as it is sufficient to meet the test set forth in 35 U.S.C. 102(b).

Tape sold by Cropper

TBA's evidence to prove that a sale of tape was made consists of the deposition of John W. Cropper taken in a related action (Exh. RX-65) along with various receipts and letters. The import of this evidence is that Cropper, the owner of the New Zealand facility which manufactured PTFE tape, provided free samples of tape made in New Zealand to employees of E. I. dePont de Nemours & Co. for testing in 1967 (Exh. RX-68) and to the Budd Co. in 1968 (Exh. RX-69). In June 1969, Cropper sold 25 rolls of tape to Budd (Exhs. RX-65 p. 57, RX 71 and 73).

Tape sold in United States was within scope of the claims of Gore patent

The deposition of John W. Cropper shows that he was producing PTFE tape in 1967 and 1968 (Exh. RX-65, p. 27). The process for making it included stretching the tape as it was being drawn between heated rollers (Exh. RX-65, pp. 21, 27, 33-36; Exh. RX-67). The material used to make the tape sold to Budd was "Teflon powder, 3194," and a lubricant (Shell white spirits) (Exh. RX-65, p. 55), which are the necessary ingredients to make a product which falls within the claims of the Gore patent. (R.D. Finding 6). Thus, the critical elements of heating, stretching, and the proper materials were used by Mr. Cropper in producing his tape.

While Cropper made none of the measurements which Gore subsequently made concerning the qualities of the tape he produced, there is sufficient corroborative evidence that Budd or dePont made measurements which placed the tape within the ranges required by the Gore patent. Exh. RX-69 and RX-4-5.

Based on this evidence we find that the sale of tape to Budd by Cropper prior to October 3, 1968, was a sale of an article falling within the claims of the Gore patent.

Sale invalidates Gore patent

The sole remaining question is whether the sale to Budd of a small amount of the tape would be sufficient to create the bar contemplated in 35 U.S.C. 102(b). The courts have long held that even one unrestricted sale of the product prior to the critical date is sufficient to invalidate the patent. See Kalvar Corporation v. Xidex Corporation, 384 F. Supp. 1126, 1129 (1973) and Smith & Gripps Mfg. Co. v. Sprague, 123 U.S. 249, 257 (1887). A restricted sale may fall within the experimental use exception, but we have no evidence, nor does any party claim, that the sale by Cropper to Budd was for the purposes of experimental use. Therefore, we find that the single sale to Budd was sufficient and on that basis we find the Gore patent unenforceable for section 337 purposes.

Other defenses

The defenses of obviousness, on sale and found, have also been raised by the Investigative Staff and TBA. Although we have considered these issues, we do not reach them since we have already found two grounds for the invalidity of the Gore patent.

For the foregoing reasons, we find the Gore patent is unenforceable for section 337 purposes, and, further, that since infringement of that patent is the only unfair act alleged here, no unfair act has been proven in this investigation. Having concluded that no unfair act or unfair method is being engaged in, we conclude that no violation of section 337 has been established.

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of:)
)
EXPANDED, UNSINTERED) Investigation No. 337-TA-4
POLYTETRAFLUORETHYLENE IN)
TAPE FORM)

OPINION OF COMMISSIONERS BEDELL,
MOORE, AND PARKER

We concur in the Commission decision finding violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337; hereinafter referred to as "section 337"), on the grounds set forth in the Recommended Decision of the Administrative Law Judge. 1/ We therefore adopt the Administrative Law Judge's findings, conclusions of law, and Recommended Decision, as modified below.

1. Procedural history (R.D. pp. 1-5)

The procedural history since Judge Renick's opinion is as set out the opinion of Commissioners Leonard, Minchew, and Ablondi issued this same day in the investigation.

2. The parties (R.D. findings 1-3)

We will hereinafter refer to the complainant W. L. Gore and Associates, Inc., as "Gore"; the patent in issue, U.S. No. 3,664,915, as "the Gore patent"; and the respondent TBA Industrial Products, Ltd. as "TBA".

1/ The Recommended Decision is hereinafter cited as "R.D.," with a page or "findings" number. References to the record are abbreviated as "Exh." for exhibit No. and "Tr." for transcript pages of the hearing record.

3. The patent in issue (R.D. findings 4-10) and infringement (R.D. findings 11 and 12)

No substantial exception is taken from these findings by any person or party. We accept in part the suggestion of the Commission Investigative Staff (hereinafter, Staff) set forth as Alternative Findings filed February 23, 1976, as finding No. 6. The record supports the Staff's conclusion that the extrusion process occurs before calendaring, and that after calendaring, the kerosene is driven off by heating. The staff comment with respect to Judge Renick's finding 8, that claims 3, 7, and 8 are not in issue here, is adequately covered in Judge Renick's opinion, findings 5 and 8. We find no error in the comment, but we simply find no reason to modify the Recommended Decision in this respect.

We agree with the Staff suggestion in respect of R.D. finding 11, which appears to be that if TBA has made and exported to the United States a product meeting the claims of the Gore patent, then it is necessarily in the nature of the article that TBA's imports also meet claims 4, 5, 6, and 9 of the Gore patent. We would so modify R.D. finding 11.

4. Validity

(a) Obviousness (R.D. finding 13-15).--We find the Gore patent is enforceable for purposes of section 337, and adopt so much of the Recommended Decision of the Administrative Law Judge as is not inconsistent with the following:

In view of the sophisticated nature of the art in question, we are unable to infer the necessary facts in this case, Graham v. John Deere, 383 U.S. 1, without expert testimony. No evidence was here submitted by any expert in the art to provide guidance through what

we believe to be a complex art. For that reason, and for the reasons given by Judge Renick in the above-cited findings, we decline to find the Gore patent obvious in view of the prior art.

(b) On sale (R.D. findings 16-22, 31, 32).--We find the evidence summarized in Judge Renick's Recommended Decision regarding sales by Alenco-Hilyn and Cropper insufficient to prove that there were invalidating sales of a product which meets claims 1, 2, 4, 5, 6, and 9 of the Gore patent. We therefore adopt Judge Renick's Conclusions of Validity Nos. 31 and 32. Exceptions and briefing filed by TBA as to two of these findings and their conclusions fail to point to evidence offered on the tape sold by either Alenco-Hilyn or Cropper that meets the standard of proof required to establish that a product equivalent to Gore's tape was sold more than 1 year prior to the Gore patent application. The law requires a showing beyond a reasonable doubt to support such a finding, whereas the evidence here that the tape sold falls within the claims of the Gore patent is merely circumstantial.

(c) Prior patenting (R.D. findings Nos. 23-27, 33).--In regard to the Russian reference, we would adopt the findings of Judge Renick, Nos. 23-26, and conclusion No. 33. However, as to finding No. 27 we find that there was conception of the Gore invention at least by June 10, 1969, when a machine which both heated and stretched the tape was used to produce tape. (Exh. CX-101.) After this conception, there was due diligence toward reducing the invention to practice until the date the patent application was filed. (Exh. CX-64, pp. 574-77; CX-5-000001-00364; CX-101-104; Tr. 207). Finally, we find that the notes and

papers produced by Gore, which are evidently authentic, corroborate the June 1968 conception of the invention because they show notes about a stretched and heated polytetrafluoroethylene (PTFE) material on various pages dated about this time. It is to us no infirmity that these notes are not neat, narrative statements of the conception as long as they corroborate the main evidence of conception, which consists of the testimony of witnesses in affidavits and by deposition in parallel litigation. (Exh. CX-64, CX-101).

(d) Fraud (R.D. finding No. 28).--We adopt finding 28 of Judge Renick's opinion; however, we believe an expanded consideration of the defenses grouped under this finding is appropriate. The evidence presented on this issue by TBA now consists solely of the allegation that Gore knew of a Japanese patent to Sumitomo and withheld it from the patent office. (TBA brief filed Oct. 7, 1974, at 21.) We believe that the standards for proof of fraud, including proof of intent, have not been met. Norton v. Curtiss, 167 USPQ 532 (C.C.P.A., 1970). We are convinced by Mr. Gore's testimony as to the reasons for failing to bring the Japanese Sumitomo patent to the attention of the patent examiner, and we therefore reject this ground for invalidating the Gore patent.

(e) Known.--Again, as above, we believe that additional consideration should be given to this allegation, which was grouped under finding No. 28 by Judge Renick. The Gore invention was conceived at least by June 10, 1969, as found above. Under 35 U.S.C. 102 a person shall be entitled to a patent unless--

- (a) the invention was known or used by others in this country . . . before the invention thereof by the applicant for patent

Therefore, the invention would have to have been known in the United States prior to June 10, 1969, for this section to act as a bar to the validity of the Gore patent. The only evidence which we find worthy of consideration is Cropper's supplying samples of tape to the Budd and duPont companies, the study of the Cropper tape by employees of those companies and the sale by the United Kingdom firm Alenco-Hilyn. These occurred prior to the date we have found to be the date of conception. However, nothing probative of the qualities of the tape sold by Alenco-Hilyn has been offered. (See Staff Proposed Finding No. 75, filed January 23, 1976.) Moreover, the only evidence of the qualities of Cropper's tape given to Budd is testing of 5 of the 60 or so rolls Cropper sent to Budd. As we have already determined, Cropper's processes and results were so inexact that the evidence of these tests was not sufficient to be convincing that the tape later sold to Budd was of a density of less than 1.4 specific gravity. For the same reason, Cropper's giving tape to Budd and duPont, without firm proof that the density of the tape was known by at least all these parties to be of a specific gravity consistently below 1.4, fails to convince us that this product was known or used in the United States prior to Gore's conception.

5. Substantial injury (R.D. 35-48)

We have found and concluded, above, that there has been importation of articles meeting claims 1, 2, 4, 5, 6, and 9 of the Gore patent, and that this patent is enforceable for purposes of section 337. However, there is, in our opinion, as found by Judge Renick, insufficient evidence in this record that the importation or sale

of these imports has the effect or tendency 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, and we now so find and conclude. For this reason, we have concluded there is no violation of section 337 in this case.

Complainant Gore excepts to R.D. findings 35-37 on the ground that although the 1974 Trade Act (Public Law 93-618) retained the wording of the injury standard under former section 337, language in the report of the Committee on Ways and Means suggests that the standard is lower than a "tendency . . . to destroy or substantially injure". We disagree and would therefore adopt Judge Renick's position. In citing the decision of the Court of Customs and Patent Appeals, we believe the Committee signaled that existing standards were to remain in effect, even though they paraphrased language from the decision In re Von Clemm, 229 F.2d 441 (C.C.P.A. 1955) that might be construed to describe an even lower standard than "tendency" to destroy or substantially injure.

Gore excepts to Judge Renick's findings on the amount of "harm" suffered by Gore (we use the term "harm" to distinguish the statutory "injury", which is harm that is effected by or is tended toward by the existence of section 337 unfair acts of methods). We find Gore's arguments unpersuasive on injury.

As to the substantialness of the injury, Gore essentially cites Exh. CX-24, consisting of data compiled by the Staff as of June 5, 1974. As Gore correctly points out, CX-24 shows that import sales of both

expanded and unexpanded, unsintered PTFE tape increased as a percentage of U.S. consumption through 1971 (when the percentage was 10.5). The Staff tentatively estimated ("Note" on page 2 of Exh. CX-24) that expanded tape amounted to only about one-half of such 1971 sales, or something over 5 percent of U.S. consumption. Gore appeared successful through this period, and there is no convincing evidence of or tendency to injure substantially.

Moreover, Gore assumes these sales were losses to Gore, although an active and competitive, but noninfringing, industry for pipe thread sealant exists side by side with Gore. (R.D. finding 42, to which Gore does not except.) While there is evidence that the expanded Gore product is of better quality than competing products on this record, we are given no idea by the record what the relative sales of the pipe thread sealant industry were during the relevant period.

Gore has therefore failed to show the injury required by the statute or that imports had the "effect" of causing the requisite harm. Indeed, Gore's main argument on injury is that the infringing imports have a tendency to injure. Judge Renick found otherwise, and we agree with him.

Gore's theory of "tendency" is also derived from Exh. CX-24, which quite clearly shows an increase in imports of both infringing and non-infringing products until roughly the year of this investigation, when the total of such imports began to fall away. Gore joined in the following stipulation at Judge Renick's Prehearing Conference:

. . . the parties are not now aware of any increase in volume of imports, either since the hearing or since the submission of the last economic data (Prehearing Conference Report issued Dec. 17, 1975, at p. 3.)

In spite of this evidence, Gore's argument is that this investigation has reduced the trickle of 1971 competition to the virtual zero it has been since 1972. In aid of this argument (and as exceptions to R.D. findings 39-40, 43, and 44), Gore notes that TBA, early on in its participation in this proceeding, threatened to increase its sales in the United States. (Exh. CX-21.) Gore also notes that Alenco-Hilyn--whose facilities for production of this product are now owned by TBA under a covenant not to compete for 10 years--appears in 1972 to have delayed the sale of tape by Gore to Cadillac Plastics Co. until after this investigation began. Judge Renick nevertheless found no tendency to injure Gore, for reasons which are well stated in his opinion and which we adopt.

In light of our conclusions above, we do not, however, adopt Judge Renick's finding 48.

Based upon the foregoing, we adopt Judge Renick's Conclusions of Law 1-6 (Conclusion 7, respecting "all other questions raised" has, we believe, been adequately met by our modifications of the Recommended Decision), and would now adopt his Recommended Determinations, R.D. p. 21.

Library Cataloging Data

U.S. International Trade Commission.

Commissioners' opinions in support
of the Commission action in the
matter of expanded, unsintered
polytetrafluoroethylene in tape
form. Washington, 1976.

20 p. 27 cm. (USITC Pub.
769)

1. Plastics. 2. Plastics in plumbing.
I. Title.

