

Chapter 12

Intellectual Property Investigations

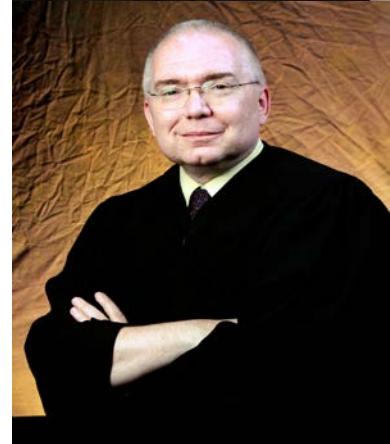
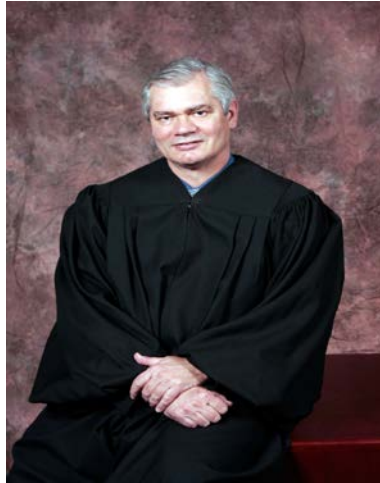


Photo: The Commission's Administrative Law Judges in 2016: Chief Judge Charles Bullock, Judge Theodore Essex, Judge Sandra Lord, Judge MaryJoan McNamara, Judge Thomas Pender, Judge David Shaw.

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Abstract

The U.S. International Trade Commission (Commission or USITC) was created by Congress in 1916 as the U.S. Tariff Commission (Tariff Commission or USTC).⁷⁷² As the relative importance of tariffs has declined and other obstacles to international trade have gained importance, the agency's functions have increased and expanded.⁷⁷³ Intellectual property investigations have comprised a variable portion of the Commission's workload over the past 100 years. In 1922, Congress granted the Commission authority to investigate alleged unfair acts and recommend trade remedy actions to the President, but activity under the statute has followed more general patterns of global economic competition: in periods of lower economic interactivity or when the U.S. economy had a comparative advantage, fewer claims of unfair acts were brought before the Commission, whereas in times of greater economic and technological competition, activity under the statute increased. The agency has promulgated regulations to implement U.S. laws relevant to protecting U.S. industries from unfair competition and has undertaken institutional and procedural changes in response to significant new responsibilities conferred as a result of amendments to those laws.

Intellectual property investigations most frequently allege patent infringement, but the Commission's governing statute grants it the authority to investigate a broad range of unfair acts in importation, including copyright and trademark infringement, theft of trade secrets,

⁷⁷¹ This chapter was provided by former Chairman Deanna Okun and practitioners James Adduci, Sarah Hamblin, Louis Mastriani, and Tom Schaumberg.

⁷⁷² Revenue Act of September 8, 1916, Pub. L. No. 64-271, § 702, 39 Stat. 796 (1916).

⁷⁷³ Senate Finance Committee, *Trade Reform Act of 1974: Report of the Committee on Finance*, 93d Cong., 2d sess., S. Rep. No. 93-1298 (November 26, 1974), 115.

false designation of origin, and other forms of unfair competition. In the contemporary global market, with its concomitant drives for increased efficiency and higher productivity at lower costs, intellectual property rights holders increasingly rely on the ITC for protection against unfair competition. As a result, intellectual property investigations continue to grow increasingly complex, and occupy a central role in the Commission's work.⁷⁷⁴

Introduction

Intellectual property (IP) has played an important role in this country's economic system since the nation's founding.⁷⁷⁵ Early intellectual property debates reflected the divided history that has permeated the U.S. political system from its inception.⁷⁷⁶ As a net importer of goods covered by intellectual property in the first half of the 19th century, copyright and patent rights were limited.⁷⁷⁷ Consequently, the courts soon faced challenges to those laws and began formulating a more nuanced body of law on intellectual property.⁷⁷⁸ By the 1840s, patent

⁷⁷⁴ In 2016, intellectual property-based activities at the ITC accounted for approximately 31% of the Commission's resources. U.S. International Trade Commission (USITC), Budget Justification: Executive Summary, Fiscal Year 2017 (Washington, DC: USITC, 2016), 13, https://www.usitc.gov/documents/2017_cbj_exec_summ_v15.pdf.

⁷⁷⁵ The Constitution granted Congress the power to "promote the progress of science and useful arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Constitution, Article I, Section 8. The Patent Act of 1790, 1 Stat. 109 (April 10, 1790) and Copyright Act of 1790, 1 Stat. 124 (May 31, 1790) were among the first pieces of legislation passed by the U.S. Congress. Within 40 years, Congress issued new and significantly more complex legislation on both copyrights and patents. Copyright Act of 1831, 4 Stat. 436 (February 3, 1831); Patent Act of 1836, 5 Stat. 117 (July 4, 1836). The 1836 Patent Act introduced the examination system that remains in use today.

⁷⁷⁶ In 1791, Alexander Hamilton, then Secretary of the Treasury, delivered his "Report on Manufactures" to Congress. Hamilton advocated for promoting manufacturing, encouraging immigration, and enacting modest tariffs to protect America's fledgling industries. Alexander Hamilton, "Report on Manufactures," Communicated to the House of Representatives, December 5, 1791, http://constitution.org/ah/rpt_manufactures.pdf. Notably, Britain forbade both the exportation of machines and the emigration of skilled labor (see Peter Andreas, *Smuggler Nation: How Illicit Trade Made America* (New York: Oxford University Press, 2013)). In 1792, Congressional votes on Hamilton's proposed tariffs broke along North-South fault lines: representatives of Northern states largely approved; Southern states largely disapproved; and mid-Atlantic states were divided. See Douglas A. Irwin, "The Aftermath of Hamilton's 'Report on Manufactures,'" *The Journal of Economic History*, vol. 64, no. 3 (September 2004), 800.

⁷⁷⁷ The Copyright Acts of 1790 and 1831 protected against little more than verbatim copying of an author's work. See, e.g., *Stowe v. Thomas*, 23 F. Cas. 201, 208 (CCED Pa. 1853) (No. 13,514). Both the Patent and Copyright Acts of 1790 failed to extend protection to foreign intellectual property rights holders. Rampant American piracy of British publications and technologies throughout the first half of the 19th century led to considerable tension between the countries. See Susan Sell, "Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement," *Loyola of Los Angeles Law Review* vol. 38, no. 267 (2004), 285–286; Sidney Moss, *Charles Dickens' Quarrel with America* (Whitson Pub. Co, 1984); and Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967). In 1887, the U.S. acceded to the Paris Convention for the Protection of Industrial Property (1883), granting reciprocal recognition of IP rights.

⁷⁷⁸ See, e.g., *Lowell v. Lewis*, 15 Fed. Cas. 1018 (C.C. D. Mass. 1817); *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841); *Prouty v. Ruggles*, 41 U.S. (16 Pet.) 336, 341 (1842); *Winans v. Denmead*, 56 U.S. (15 How.) 330 (1853).

protection had been extended to industrial designs,⁷⁷⁹ and trademark infringement was recognized as a distinct cause of action.⁷⁸⁰ Trademark law especially, as an outgrowth of the commercialization of intellectual property, was tied to notions of unfair competition, which also included allegations of price fixing, price discrimination, palming off, and counterfeiting.⁷⁸¹

Following the Civil War, the American economy became increasingly dependent on industry; technological developments led to petitions in the courts for broader interpretations of IP rights.⁷⁸² The United States had shifted from a net importer to a net exporter of goods dependent on intellectual property, and required a more sophisticated international trade policy. Congress frequently debated tariffs and unfair competition in the late 19th century, but those debates rarely produced substantive policy changes.⁷⁸³ Experts advised that lower tariffs and stronger intellectual property protection would benefit the country economically, but Congress remained heavily protectionist. Tariffs constituted the primary tool of international

⁷⁷⁹ Act of August 29, 1842, Ch. 263 § 3, 5 Stat. 543.

⁷⁸⁰ See, e.g., *Taylor v. Carpenter*, 11 Paige Ch. 292 (N.Y. Ch. 1844); *Coats v. Holbrook, Nelson & Co.*, 3 N.Y. Leg. Obs. 404, 405, 2 Sandf. Ch. 586, 594, 7 N.Y. Ch. Ann. 713 (N.Y. Ch. 1845); *Amoskeag Manufacturing Company v. Spear*, 4 N.Y. (2Sandf.) 599, 604 (Sup. Ct. 1849).

⁷⁸¹ For contemporary discussions of the definition of unfair competition and the various forms thereof, see Tim W. Dornis, *Trademark and Unfair Competition Conflicts: Historical-Competitive, Doctrinal, and Economic Perspectives* (New York: Cambridge University Press, 2017), 89, fn. 39, 41–42.

⁷⁸² New technologies became potential subjects of protection, but many new technologies, such as photography and lithography, lowered the cost of infringement. Kenneth L. Sokoloff and B. Zorina Khan, “Intellectual Property Institutions in the United States: Early Development and Comparative Perspective,” World Bank Summer Research Workshop on Market Institutions (July 17–19, 2000), 5, <http://www.dklevine.com/archive/sokoloff-kahn.pdf>. See, e.g., *United States v. Burns*, 79 U.S. 246 (1871) (institutional R&D provisions); *Wallace v. Holmes*, 29 F. Cas. 74 (No. 17,100) (C.C.D. Conn. 1871) (indirect infringement); and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (photographs could be copyrighted).

⁷⁸³ See, e.g., 7 Cong. Rec. App. 147–70, 226–29 (May 1878) (unfair competition); 7 Cong. Rec. H3725 (unfair competition); 13 Cong. Rec. S55–63 (Dec. 1881) (tariff commission); 13 Cong. Rec. H4536 (tariff commission); 14 Cong. Rec. App. 143 (sugar tariff); 14 Cong. Rec. S1759 (sugar tariff); 14 Cong. Rec. S2679 (ore tariffs); 15 Cong. Rec. S3329 (tariffs; free trade; income tax); 17 Cong. Rec. S4825 (dairy; unfair competition); 19 Cong. Rec. S3237 (copyright protection); Senate Finance Committee, Subcommittee on Tariff, Hearings in Connection with H.R. 9051, 50th Cong., 1st sess., HRG-1888-FNS-0009 (1888); House Committee on Ways and Means, *Report to Accompany H.R. 4864*, 53d Cong., 2d sess., H. Rep. No. 53-234 (1893) (tariffs); Senate Finance Committee, *Replies to Tariff Inquiries*, 53d Cong., 2d sess., S. Rep. No. 53-702 (1894).

trade policy,⁷⁸⁴ while intellectual property and unfair competition policy continued to develop in commercial law, especially in the areas of interstate commerce and antitrust legislation.⁷⁸⁵

Around the turn of the century, the courts dealt with a number of important unfair competition cases.⁷⁸⁶ Similarly, the early 20th century brought significant legislative and governmental developments in the areas of intellectual property protection and unfair competition.⁷⁸⁷ In 1914, Congress created the Federal Trade Commission as an “expert body to analyze and define unfair methods of competition” in domestic commerce.⁷⁸⁸ In international trade, tariffs

⁷⁸⁴ Congress first used an outside body to aid it in tariff legislation in 1865. Congress found the Special Commissioner of the Revenue’s 1866 tariff recommendations politically distasteful, and did not make use of a Tariff Commission again until 1882. With the Act of May 15, 1882, 22 Stat. 64, Congress created the Tariff Commission of 1882. Congress attempted to affect the outcome of the Commission’s recommendations in favor of protectionist tariffs by forbidding the Commission from proposing a “radical or subversive change in the present general economical policy of the country.” The Commission’s report recommended the creation of a customs court, and the reduction of tariff duties. The protectionist Congress disregarded the report. Joshua Bernhardt, *The Tariff Commission: Its History, Activities and Organization* (New York: D. Appleton and Company, 1922), 3–8. See also 71 Cong. Rec. H2113–14.

⁷⁸⁵ Act of February 4, 1887 (Interstate Commerce Act), Pub. L. No. 49-41 (February 4, 1887); Sherman Anti-Trust Act, 26 Stat. 209, July 2, 1890, 15 U.S.C. 1–7. See J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition, 4th Ed.*, (Thomson Reuters, 2015), 23, fn. 8 and 25–27 regarding the Congressional debates on antitrust issues leading up to the Sherman Act. Congress’ first attempt to protect trademarks (An Act to revise, consolidate, and amend the statutes relating to patents and copyrights, 16 Stat. 198 (July 8, 1870)) was struck down by the Supreme Court in 1879 (*In re Trademark Cases*, 100 U.S. 82 (1879)). The Court held that most trademarks were unoriginal and thus deemed the trademark provisions unconstitutional. The Sherman Act was rendered largely impotent by *United States v. E.C. Knight*, 156 U.S. 1 (1895) (American Sugar trust case).

⁷⁸⁶ For a survey of the types of patent-related cases and issues before the Patent Office and Courts in the late 19th century, see Department of the Interior, *Decisions of the Commissioner of Patents and of United States Courts in Patent Cases, Together with Decision of the Secretary of the Interior in Regard to Appellate Jurisdiction of the Secretary of the Interior, Important Decisions of State Courts, and Decisions in Trade-Mark Cases*, 54th Cong., 2d sess., H. Doc 354 (1896). See also *Kidd v. Pearson*, 128 U.S. 1, 20 (1888) (price fixing); *Edison v. Lubin*, 122 F. 240, 242 (3d Cir. 1903) (copyright protections extended to developments within previously protected categories); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904) (principle of competition central to U.S. antitrust law); *Lochner v. New York*, 198 U.S. 45 (1905); *Leeds & Catlin Co. v. Victor Talking Mach. Co.*, 213 U.S. 325 (1909); *Standard Oil Co. v U.S.*, 221 U.S. 1, 65-68 (1911); *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911) (price fixing).

⁷⁸⁷ In 1909, Congress revised the Copyright Act, specifically balancing the rights of the intellectual property holder with the public interest. House Committee on Patents, *Report on the Copyright Act of 1909*, H. Rep. No. 60-2222, 60th Cong., 1st sess. (1909), 7. In the same year, the Court of Customs Appeals was created (Payne-Aldrich Tariff Act, Ch. 105, 36 Stat. 11 (August 5, 1909)). In the antitrust arena, the 1914 Clayton Act addressed many of the issues that had rendered the Sherman Act impotent. Clayton Act, Ch. 323, 38 Stat. 730 (October 15, 1914), 15 U.S.C. § 12; Senate Committee on the Judiciary, *Amendments to Sherman Antitrust Law and Related Matters*, 63d Cong., 2d sess., HRG-1908-SJS-0003 (1914).

⁷⁸⁸ An Act to create a Federal Trade Commission, Pub. L. No. 63-203 (September 26, 1914); 51 Cong. Rec. S11455. In the debate prior to the enactment of the Federal Trade Commission Act, Senator Newlands pronounced that “it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices.” 51 Cong. Rec. 12136 (1914); quoted in Gilbert Holland Montague, “Unfair Methods of Competition,” *Yale Law Journal* 25 (1915–16), 20, <https://archive.org/details/jstor-787527>.

remained the leading device for dealing with unfair competition. In the early years of the 20th century, Congress again considered the merits of a permanent tariff commission. Members of the business community argued that political imperatives⁷⁸⁹ were outweighing economic considerations in the formulation of the tariffs, and numerous trade associations testified in favor of the creation of a body to provide “scientific” tariff analysis.⁷⁹⁰

The U.S. Tariff Commission was created by the Revenue Act of 1916, effectuating the convergence of jurisprudence and foreign policy in the fields of tariffs, IP, and unfair trade.⁷⁹¹ From its inception, the Tariff Commission was granted broad authority to investigate matters relating to international trade, but the Tariff Commission’s early activities focused largely on tariffs.⁷⁹² Soon after the Tariff Commission’s establishment, however, Congress acknowledged an increasing threat from unfair competition in international trade—such as patent infringement, false labeling, and the deceptive use of trademarks—and crafted legislation expanding the Tariff Commission’s investigative authority to include a broader range of unfair acts in importation.⁷⁹³

⁷⁸⁹ High tariffs were an important political device, frequently cited in election campaigns by protectionist members of Congress. With the ratification of the Sixteenth Amendment in 1913, the income tax had supplanted tariffs as the country’s primary source of revenue. Although no longer of central importance to the economy, political tensions over tariffs remained high. For a discussion of use of tariffs in electoral politics, see, e.g., Karen E. Schnietz, “The 1916 Tariff Commission: Democrats’ Use of Expert Information to Constrain Republican Tariff Protection,” *Business and Economic History*, vol. 23, no. 1 (Fall 1994).

⁷⁹⁰ See generally House of Representatives, *Report of the Industrial Commission on the Relations and Conditions of the Capital and Labor Employed in the Mining Industry*, 57th Cong., 1st sess., H. Doc. 181 (1901); House of Representatives, *Report of the Industrial Commission on the Relations and Conditions of the Capital and Labor Employed in Manufactures and General Business*, 57th Cong., 1st sess., H. Rep. No. 57-183 (1901); *Journal of the House of Representatives*, 60th Cong., 1st sess., 5217 H. Jnl. 60-1 (December 2, 1907); Department of Commerce and Labor, Bureau of Manufactures, *Monthly and Consular Trade Reports*, 60th Cong., 1st sess., H. Doc. 593 (1908); House Committee on Ways and Means, *A Permanent Tariff Commission: Hearings Before the Speaker of the House of Representatives and the Chairman of the Committee on Ways and Means*, 60th Cong. 1st sess., HRG-1908-WAM-0012 (February 4, 1908); *Journal of the House of Representatives*, 61st Cong., 3d sess., 5839 H. Jnl. 61-3 (December 5, 1910); House Committee on Ways and Means, *Tariff Commission: Hearings on H.R. 26232 and H.R. 28433*, 61st Cong., 3d sess. (December 13, 1910); Senate Committee on the Judiciary, *Hearings on the Maintenance of a Lobby to Influence Legislation*, 63d Cong., 1st sess. HRG-1913-SJS-0006–HRG-1913-SJS-0010 (1913).

⁷⁹¹ Only 10 years earlier, I. Street wrote: “Though the law concerning infringement of trade-marks and that concerning unfair competition have a common conception at their root . . . the infringement of a trade-mark . . . is conceived of as an invasion of property. . . . Unfair competition, on the other hand, cannot be placed on the plane of invasion of property right. This tort is strictly one of fraud, and a fraudulent intent or its equivalent is essential to liability.” I. Street, *Foundations of Legal Liability* (1906), 421, cited in Irvin H. Fathchild, “Statutory Unfair Competition,” *Missouri Law Review*, vol. 1, iss. 1 (January 1936), 3–4.

⁷⁹² Senate Finance Committee, *Trade Reform Act of 1974: Report of the Committee on Finance*, 93d Cong., 2d sess., S. Rep. No. 93-1298 (November 26, 1974), 115.

⁷⁹³ The Commission’s first investigation alleging patent infringement was *Synthetic Phenolic Resin* (filed December 16, 1925, instituted April 16, 1926). The Court of Customs and Patent Appeals affirmed the Commission’s jurisdiction to consider patent infringement as an unfair act in 1930 (*Frischer & Co., Inc., v. Bakelite Corporation*, 39 F.2d 247 (CCPA 1930), cert. denied, 282 U.S. 852 (1930)).

The Problem of Unfair Imports

The 1916 Revenue Act included the following investigatory duties of the Tariff Commission: (1) to maintain and update the tariff schedule “and, in general, to investigate the operation of customs laws”;⁷⁹⁴ (2) to “make such investigations and reports as may be requested by the President or by either of said committees [the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate] or by either branch of the Congress”;⁷⁹⁵ and (3) “to investigate . . . conditions, causes, and effects relating to competition of foreign industries with those of the United States, including dumping.”⁷⁹⁶

Recognizing a threat from low-cost imports, the U.S. House of Representatives Committee on Ways and Means recommended the adoption of a dumping provision to place importers “in the same position” as domestic manufacturers.⁷⁹⁷ Accordingly, under the heading “Unfair Competition,” section 801 of the 1916 Revenue Act decreed:

That it shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell, or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation into the United States, in the principal markets of the country of their production or of other foreign countries to which they are commonly exported, after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof into the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.⁷⁹⁸

While Congress explicitly addressed dumping in the 1916 Act,⁷⁹⁹ it was the 1919 report of an investigation conducted by the Tariff Commission that would advance Congress’ consideration of other forms of unfair competition in import trade.

⁷⁹⁴ Pub. L. No. 64-271, § 702.

⁷⁹⁵ *Ibid.*, § 703.

⁷⁹⁶ *Ibid.*, § 704.

⁷⁹⁷ House Committee on Ways and Means, *Report to accompany H.R. 16763*, 64th Cong., 1st sess., H. Rep. No. 64-922 (July 5, 1916).

⁷⁹⁸ Pub. L. No. 64-271, § 801.

⁷⁹⁹ As in the case of the Federal Trade Commission Act (Pub. L. No. 63-203), the Revenue Act of 1916 did not define “unfair competition.”

Section 316—An Antidumping Law “with Teeth”

The Tariff Commission first recommended legislative action to the House Committee on Ways and Means to address the prevalence of unfair acts in importation in a 1919 report *Dumping and Unfair Foreign Competition in the United States: Characteristics of Dumping and Certain Other Foreign Competitive Practices (1919 Report)*. After criticizing aspects of the contemporary U.S. antidumping law, the *1919 Report* stated with regard to potential legislation:

These defects of the statute somewhat support the contention that administrative remedies to prevent dumping are superior to criminal laws. If the act of 1916 is adhered to, attention should be given to the careful revision and strengthening of its provisions. Such amendment would not be inconsistent with the enactment of definite and authoritative instructions to the Federal Trade Commission to deal with dumping as a phase of unfair competitive methods.⁸⁰⁰

In addition to dumping, the Tariff Commission evaluated a range of potentially unfair commercial practices. In a section of the *1919 Report* entitled “Deceptive Use of Trade-Marks, Imitation of Goods and Advertising; False Labeling; Exploitation of Patents; Commercial Threats and Bribery,” the report delineated:

In the same way, unmistakable differences from dumping are evident where the deceptive use of trade-marks, deceptive imitation of goods, false labeling, exploitation of patents, deceptive advertising and commercial threats and bribery are involved. In these latter instances it is clear, without either argument or detailed analysis, that distinguishable phases of unfair competition require divergent legislative treatment from that which is indicated if the consequences of dumping are to be avoided.⁸⁰¹

Congress recognized the need for additional legislation, and on June 29, 1921, the House of Representatives introduced H.R. 7456 “to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes.”⁸⁰² In the floor debate, members of the Senate expressed concern about the perils of unfair competition: “Dumping and other unfair methods of competition in importation have been recognized as a menace, particularly under postwar conditions, to American industries.”⁸⁰³ The Senate

⁸⁰⁰ U.S. Tariff Commission (USTC), *Dumping and Unfair Foreign Competition in the United States: Characteristics of Dumping and Certain Other Foreign Competitive Practices* (Washington, DC: USTC, 1919), 33–34; USTC, *Sixth Annual Report of the USTC, 1922* (Washington, DC: GPO, December 4, 1922), 3–4 (commenting on passage of section 316).

⁸⁰¹ USTC, *Dumping and Unfair Foreign Competition in the United States*, 1919, 11.

⁸⁰² An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes, 67th Cong., 1st sess., H.R. 7456 (June 29, 1921).

⁸⁰³ 67 Cong. Rec. 5879 (April 24, 1922).

amended the bill, adding section 316 to address such concerns.⁸⁰⁴ As enacted, section 316 of the Tariff Act of 1922 declared unlawful:

unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States.⁸⁰⁵

The new provision authorized the Tariff Commission to investigate alleged unfair methods of competition and unfair acts⁸⁰⁶ and to recommend action to the President. Should the President determine a violation had occurred, the statute directed the President to impose additional duties allowing flexibility within limits, or, in extreme cases, to exclude the product at issue from importation into the United States.⁸⁰⁷

Speaking about section 316 specifically, Senator Reed Smoot (R-UT) explained how the Senate’s proposed statute was preferable to a general tariff hike: “In the economic uncertainty of the present, manufacturers in some lines of merchandise have asked for high tariff rates more because of what they fear than because of what they are experiencing. Such law as I have suggested would assure American producers that they will not be subjected to unfair competition from countries abroad.”⁸⁰⁸

Congress clearly envisioned that section 316 would supplement existing antidumping laws, better protecting American industries from a wide range of unfair practices: “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 and is, therefore, a more adequate protection to American industry than any antidumping statute the country has ever had.”⁸⁰⁹ Senator Smoot famously declared: “If any doubt whatever exists to the effectiveness of the tariff rates and the provisions of the elastic tariff . . . the addition of this effective unfair competition statute should

⁸⁰⁴ Senate Finance Committee, *Report to Accompany H.R. 7456*, 67th Cong., 2d sess., S. Rep. No. 67-595 (1922).

⁸⁰⁵ Tariff Act of 1922, Pub. L. No. 67-318, § 316(a), 42 Stat. 858 (1922).

⁸⁰⁶ The statute granted that “an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such articles” and that “the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon *certiorari* applied for within three months after such judgment of the United States Court of Customs Appeals.” *Ibid.*, § 316(c).

⁸⁰⁷ *Ibid.*, § 316(b)–(e).

⁸⁰⁸ 67 Cong. Rec. 5879 (April 24, 1922).

⁸⁰⁹ S. Rep. No. 67-595 (1922), 3.

remove it. We have in this measure an anti-dumping law with teeth in it—one which will reach all forms of unfair competition.”⁸¹⁰

In 1923, the Tariff Commission reported that, following the general suggestions of the *1919 Report*, Congress had enacted section 316, which “extends to import trade practically the same prohibition against unfair methods of competition which the Federal Trade Commission Act provides against unfair methods of competition in interstate trade.” Thus, section 316 made it “possible for the President to prevent unfair practices, even when engaged in by individuals residing outside the jurisdiction of the United States.”⁸¹¹

Section 316 of the Tariff Act also set a lower standard for finding a violation of the statute compared to that required for dumping under section 801 of the 1916 Revenue Act. The Tariff Commission’s *1919 Report* had “highlighted the difficulty of proving that dumping is practiced with the intent of destroying a United States industry, or of monopolizing trade of a certain article.”⁸¹² As set forth in the *1919 Report*:

It should also be observed that economic conditions are more significant in the development of dumping practices than is any particular intent. In conducting private industry, the prevailing motive is profit. Ordinarily, therefore, it must be extremely difficult to establish as an essential element of the offense a separate and destructive purpose, as specified in the congressional act of 1916. In dumping, the intent to injure, destroy, prevent the establishment of industry, or restrain or monopolize trade or commerce in the United States is not necessarily present. Certainly when the practice is resorted to, motives other than those enumerated may, and, at times, do exist.⁸¹³

Section 316 took into consideration the Tariff Commission’s *1919 Report* by dropping “intent” and creating an injury standard: “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.”⁸¹⁴

Despite the broad protections offered by the statute, it was used infrequently in the 1920s. This likely was due in part to a lack of defined procedures and a poor understanding of the new law. Additional authority allowable at the time likely played a role as well: under the original rules,

⁸¹⁰ 67 Cong. Rec. 5879 (April 24, 1922).

⁸¹¹ USTC, *1922 Annual Report*, 3–4.

⁸¹² Brian G. Brunsvold, Charles F. Schill, and Ursula Schwendemann, “Injury Standards in Section 337 Investigations,” *Northwestern Journal of International Law and Business* 4, no. 1 (1982): 77–78.

⁸¹³ USTC, *Dumping and Unfair Foreign Competition in the United States*, 1919, 20.

⁸¹⁴ Brunsvold, Schill, and Schwendemann, “Injury Standards in Section 337 Investigations,” 1982, 77–79.

the Commission had discretion as to whether to institute an investigation.⁸¹⁵ Moreover, if a full investigation was ordered, “private parties often had to argue the same issues twice: once before the Tariff Commission and once before representatives of the President. The result was that early investigations took an average of three years to complete and were very costly.”⁸¹⁶ Nevertheless, for those cases where the Tariff Commission deemed a full investigation warranted, the results revealed the statute’s benefits. During the time section 316 was in effect, the Tariff Commission conducted six full investigations, including one based on patent infringement. Four of those investigations concluded with recommendations that the President exclude the unfairly imported article, all of which the President approved.⁸¹⁷

The Statute Evolves: Section 316 Becomes Section 337

In 1929, Congress undertook a large-scale revision of U.S. tariff policies, including the portions of the Revenue Act of 1916 and the Tariff Act of 1922 that related to the U.S. Tariff Commission. As part of the resultant Smoot-Hawley Tariff Act of 1930, section 316 was re-designated section 337 as the statute regulating unfair trade practices.⁸¹⁸ The section remained largely unchanged, but included two amendments: (1) the elimination of the Presidential authority to issue additional duties, because such duties were considered to be an inadequate remedy,⁸¹⁹ and (2) the elimination of Supreme Court review.⁸²⁰

In 1940, Congress enacted section 337a, establishing definitively that importation of an article manufactured abroad by a process that infringed a U.S. process patent was an unfair act within

⁸¹⁵ “No investigation shall be ordered by the [tariff] commission unless such application or preliminary investigation discloses to the satisfaction of the [tariff] commission there are good and sufficient reasons therefor under the law.” USTC, *1922 Annual Report*, 64. For a more detailed description of the agency’s rules and procedures, see section below, “Agency Rules and Procedures for Unfair Import Investigations.”

⁸¹⁶ S. Alex Lasher, “The Evolution of the Domestic Industry Requirement in Section 337 Investigations before the United States International Trade Commission,” *University of Baltimore Intellectual Property Law Journal* 18, no. 2 (2010): 2.

⁸¹⁷ J. Stephen Simms, “Scope of Action against Unfair Import Trade Practices under Section 337 of the Tariff Act of 1930,” *Northwestern Journal of International Law and Business* 4, no. 1 (1982): 241.

⁸¹⁸ See House of Representatives, H.R. 2667 [*Report No. 7*], 71st Cong., 1st sess., H. Rep. No. 71-7 (May 9, 1929): “The committee felt that it was desirable to have all the provisions of law relating to the United States Tariff Commission incorporated in the Tariff Act of 1929 where they properly belong. Consequently, sections 700 to 709 of the Revenue Act of 1916, as amended, which provided for the organization, general powers, and procedure of the commission, and section 318 of the Tariff Act of 1922, which imposed certain additional duties upon the commission, have been included in the bill with certain amendments as sections 330 to 335, inclusive, of Part II of Title III. The so-called flexible tariff provisions, contained in section 315, together with sections 316 and 317, of the Tariff Act of 1922, have been incorporated as sections 336, 337, and 338 of the bill with certain amendments hereinafter noted.”

⁸¹⁹ USTC, *Twelfth Annual Report of the USTC*, 1928 (Washington, DC: USTC, December 3, 1928), 21.

⁸²⁰ See *supra*, fn. 37; Tariff Act of 1930, Pub. L. No. 71-361, § 337, 46 Stat. 590 (1930).

the Tariff Commission's jurisdiction.⁸²¹ This amendment overruled the holding of the U.S. Court of Customs and Patent Appeals in *In re Amtorg Trading Corp* that importation of articles into the United States made under U.S. process patents was not an unfair method of import competition,⁸²² and firmly established the Tariff Commission's jurisdiction over patent-related unfair acts.⁸²³

World War II and its aftermath consumed most of the 1940s. In 1939, the Tariff Commission had reported: "The Tariff Commission . . . now submits its Twenty-third Annual Report amid the disturbances created by the outbreak of war in Europe. This war has already produced important changes in actual movements of trade and commercial policies."⁸²⁴ From 1940 to 1943, the Tariff Commission's annual reports concerned primarily work in support of the war effort,⁸²⁵ and in 1944 and 1945, the Tariff Commission focused on anticipated changes in international trade patterns following the cessation of hostilities.⁸²⁶

There continued to be few or no Section 337 cases in the years immediately following World War II, chiefly due to the predominant position of the United States in the postwar global economy:

The United States emerged from World War II as the preeminent industrialized nation in the world. In that role, American industries had much to gain from liberalized trade policies that would permit free access for American goods to European and Asian markets. Indeed, by 1950, the United States produced over 40% of the world's gross national product (GNP), as compared to Europe's 21% and Japan's 1.6%. From 1950–1970, the United States was the world's biggest creditor, with a trade surplus of roughly

⁸²¹ An Act to limit the importation of articles, products, and minerals produced, processed, or mined under process covered by outstanding United States patents; to define unfair trade practices in certain instances; and for other purposes, Pub. L. No. 76-710, H.R. 8285, 76th Cong. (July 2, 1940).

⁸²² Simms, "Scope of Action against Unfair Import Trade Practices," 1982, 242.

⁸²³ *In re Amtorg Trading Corp.*, 22 C.C.P.A. 558, 75 F.2d 826, 24 U.S.P.Q. 315 (1935). The legislative history clearly expresses the intent of Congress: "This bill is designed to correct the present problem which was created when the Court of Customs and Patent Appeals in the case *In re Amtorg Trading Corporation* reversed its former decisions and held that the importation of products made abroad in accordance with a United States process patent without consent of patentee was not regarded as an unfair method of competition." House Committee on Mines and Mining, *Reference to Certain Mining Practices and Defining Unfair Trade Practices in Certain Instances: Report to accompany H.R. 8285*, 76th Cong., 3d sess., H. Rep. No. 76-1781 (1940).

⁸²⁴ USTC, *Twenty-Third Annual Report of the USTC, 1939* (Washington, DC: GPO, December 1, 1939), 1.

⁸²⁵ See generally USTC, *Twenty-Fourth Annual Report of the USTC, 1940* (Washington, DC: GPO, December 1, 1940); *Twenty-Fifth Annual Report of the USTC, 1941* (Washington, DC: GPO, December 1, 1941); *Twenty-Sixth Annual Report of the USTC, 1942* (Washington, DC: GPO, January 6, 1943); *Twenty-Seventh Annual Report of the USTC, 1943* (Washington, DC: GPO, January 1, 1944).

⁸²⁶ USTC, *Twenty-Eighth Annual Report of the USTC, 1944* (Washington, DC: GPO, January 1, 1945); *Twenty-Ninth Annual Report of the USTC, 1945* (Washington, DC: GPO, January 3, 1946).

1% GNP. Under these conditions, there was no pressure from American manufacturers to aggressively enforce protectionist trade laws such as Section 337.⁸²⁷

From the mid-1950s through the 1960s, section 337 activity was low, with only a few cases pending or complaints considered each year. There was renewed interest in Section 337 by the late 1960s, continuing into the 1970s.⁸²⁸ In 1968, the President issued a temporary exclusion order based on the Commission's recommendation⁸²⁹ in a section 337 investigation related to the patented drug furazolidone.⁸³⁰ The *Furazolidone* order⁸³¹ was the first exclusion order

⁸²⁷ Lasher, "The Evolution of the Domestic Industry Requirement," 2010, 2, (citing Thomas Prusa, "An Economic History and Analysis of Section 337," in *Technology, Trade, and World Competition: Protecting Intellectual Property with Trade Sanctions* (Japanese Electronic Industry Development Association, 1990), 140, on economic data).

⁸²⁸ Harvey Kaye and Paul Plaia, Jr., "The Filing and Defending of Section 337 Actions," *North Carolina Journal of International Law and Commercial Regulation*, vol. 6, no. 3 (1981); Harvey Kaye and Paul Plaia Jr., "The Tariff Commission and Patents: Anatomy of a 337 Action (Part I)," *Journal of the Patent Office Society*, vol. 55, no. 6 (June 1973), 347.

⁸²⁹ Notably, the Commissioners were equally divided on both the question of recommending a temporary exclusion order and whether to institute a full investigation. Section 330(d) of the Tariff Act of 1930 provides that "(1) Whenever . . . a majority of the commissioners voting are unable to agree upon findings or recommendations, the findings (and recommendations, if any) unanimously agreed upon by one-half of the number of commissioners voting may be considered by the President as the findings and recommendations of the Commission: Provided, That if the commissioners voting are divided into two equal groups each of which is unanimously agreed upon findings (and recommendations, if any), the findings (and recommendations, if any) of either group may be considered by the President as the findings (and recommendations, if any) of the Commission. In any case of a divided vote referred to in this paragraph the Commission shall transmit to the President the findings (and recommendations, if any) of each group within the Commission with respect to the matter in question (2) Whenever . . . one-half of the number of commissioners voting agree that the investigation should be made, such investigation shall thereupon be carried out . . ." § 330(d), Act August 7, 1953, ch. 348, title II, §201, 67 Stat. 472 (cited in *USTC Annual Report of the USTC, FY 1969*, TC Publication 301 (Washington, DC: GPO, November 1970), 16–17).

⁸³⁰ *Furazolidone*, Investigation No. 337-21, USTC Publication 299, Comm'n recommendation at 7–8 (November 1969). The exclusion order remained in effect until April 26, 1973 (38 Fed. Reg. 10824 (1973)), when it was canceled "pursuant to an order issued by the President on April 17, 1973 because the patent involved expired on that date." Kaye and Plaia, "The Tariff Commission and Patents: Anatomy of a 337 Action (Part II)," *Journal of the Patent Office Society*, vol. 55, no. 6 (July 1973), 422, fn. 106.

⁸³¹ 33 Fed. Reg. 12680 (1968).

issued since the mid-1930s.⁸³² By the 1970s, the trade gap between the United States and its major trading partners had narrowed significantly, and for the first time in the years following World War II, the United States ran a trade deficit. As a result, economists noted that American industries became more vulnerable to import competition, and expressed a renewed interest in section 337.⁸³³ Moreover, the issuance of several other exclusion orders in the early 1970s increased activity under the statute.⁸³⁴

The Modern Statute

As pressure from foreign imports increased, American industries lobbied Congress to revise the U.S. trade laws. With the enactment of the Trade Act of 1974, section 337 was overhauled to

⁸³² On December 25, 1935, the President issued an exclusion order in the investigation with respect to coilable metal rules (instituted February 8, 1934) (USTC, *Twentieth Annual Report of the USTC, 1936* (Washington, DC: GPO, December 1, 1936), 44). In the third formal investigation under section 337 regarding cigar lighters (docket no. 11, instituted August 14, 1936), the Commission recommended a temporary exclusion order, which the President issued on November 9, 1936. Related U.S. District Court action prompted the Commission to recommend that the President terminate the temporary order of exclusion. The President did so on July 22, 1937, and the Commission terminated the investigation on July 27, 1937 (USTC, *Twenty-First Annual Report of the USTC, 1937* (Washington, DC: GPO, December 1, 1937), 37). The Commission recommended an exclusion order in *Self-closing containers* (1962), but the President decided not to issue such an order USTC. *Outcome or Current Status of Complaints Filed with the United States Tariff Commission Under the Provisions of Section 337 of the Tariff Act of 1930 Between January 1, 1949 and July 1, 1964*, USTC Publication 130 (Washington, DC: USTC, 1964), 8–9, <https://www.usitc.gov/publications/337/pub130.pdf>. Kaye and Plaia cite the issuance of the exclusion order in the furazolidone investigation as the beginning of the “modern era of this statute.” Harvey Kaye and Paul Plaia, Jr., “The Filing and Defending of Section 337 Actions,” 1981, 465.

⁸³³ Prusa, “An Economic History and Analysis of Section 337,” 1990, 140. The Commission completed 1 investigation in fiscal year 1970, and initiated 3 preliminary inquiries (USTC, *Annual Report of the USTC, FY 1970*, TC Publication 356 (Washington, DC: GPO, January 1971), 27–28). In fiscal year 1971, the Commission had 7 cases before it, 6 of which were new investigations, and initiated 2 preliminary investigations (USTC, *1971 Annual Report*, TC Publication 467 (Washington, DC: GPO, March 1972), 14). Fiscal year 1972 continued the upward trend in interest in section 337: the Commission had 9 preliminary investigations in progress throughout the year (4 were completed and dismissed; 5 were pending at the close of the fiscal year), and 6 full investigations in progress throughout the year. Additionally, in fiscal year 1972, the Commission reopened 1 investigation that was completed in fiscal year 1971, in response to a request for re-hearing (USTC, *1972 Annual Report*, TC Publication 536 (Washington, DC: GPO, January 1973), 14–15). By fiscal year 1973, the Commission had 7 cases before it under section 337, and initiated 13 new cases (USTC, *1973 Annual Report*, TC Publication 648 (Washington, DC: GPO, January 1974), 14). At the beginning of fiscal year 1974, the Commission had 18 cases before it under section 337, and 8 new cases were initiated (USTC, *1974 Annual Report*, TC Publication 710 (Washington, DC: GPO, January 1975), 12). There were 16 investigations pending at the beginning of fiscal year 1975, and another 11 investigations were instituted that year (USITC, *Annual Report, 1975*, Publication 790 (Washington, DC: GPO, November 1976), 13).

⁸³⁴ The President issued exclusion orders in *Panty Hose*, Investigation No. 337-25 on February 17, 1972; *Lightweight Luggage*, Investigation No. 337-28 on December 13, 1971 (USTC, *1972 Annual Report, 1973*, 15); and *Convertible Game Tables*, Investigation No. 337-34 on May 2, 1974 (USTC, *1974 Annual Report, 1975*, 13). However, Kaye and Plaia noted that in the early 1970s, “Presidential involvement and the time delays caused by the slow moving administrative process of the Tariff Commission dissuaded many from using the statute.” Kaye and Plaia, “The Filing and Defending of Section 337 Actions,” 1981, 465.

put it substantially in its modern form.⁸³⁵ The determination whether section 337 was violated was made subject to the requirements of the Administrative Procedure Act (APA), including notice and hearing on the record.⁸³⁶ The 1974 Act included the right to raise all legal and equitable defenses, clarifying that the USITC could consider patent validity and enforceability for purposes of determining violation of section 337. Findings of patent invalidity or unenforceability, however, were not *res judicata*.⁸³⁷ Investigations were to be completed within specific time limits, i.e., 12 months, or 18 months if the investigation was determined to be more complicated.⁸³⁸

To support the Commission's independence,⁸³⁹ Congress granted the Commission, rather than the President, authority to determine violation of section 337 and to determine relief, including cease and desist orders.⁸⁴⁰ Before granting such relief, however, Congress directed the Commission to consider the effect of said relief on certain public interest factors,⁸⁴¹ weighing any negative impact on the public health and welfare against the positive effects of protecting U.S. intellectual property rights:

Should the Commission find that issuing an exclusion order would have a greater adverse impact on the public health and welfare; on competitive conditions in the United States economy; on production of like or directly competitive articles in the United States; or on the United States consumer, than would be gained by protecting the patent holder (within the context of U.S. patent laws) then . . . such exclusion order should not be issued.⁸⁴²

The shift in primary authority from the President to the Commission was significant. Leading practitioners, testifying before the Senate's Committee on Finance, had argued that the effort expended to bring investigations to a conclusion under the authority of the President was unnecessary compared to any actual benefit from "permit[ting] the President to use a section 337 proceeding as one of the means by which he could shape and influence trade."⁸⁴³ The Finance Committee's report, on the other hand, "recognized . . . that the granting of relief

⁸³⁵ Trade Act of 1974, Pub. L. No. 93-618, §§ 171–175, 88 Stat. 2009–2011 (January 3, 1975). Prior to the passage of the 1974 Act, the Commission instituted 72 preliminary investigations and 35 full investigations under Section 337. USTC, 1974 Annual Report, 1975, 13.

⁸³⁶ *Ibid.*, § 337(c); Administrative Procedure Act, 5 U.S.C. § 551 et seq.

⁸³⁷ S. Rep. No. 93-1298 (1974), 196.

⁸³⁸ Pub. L. No. 93-618, § 337.

⁸³⁹ S. Rep. No. 93-1298 (1974), 115, 193–199.

⁸⁴⁰ Pub. L. No. 93-618, §§ 201–203.

⁸⁴¹ *Ibid.*, § 337.

⁸⁴² S. Rep. No. 93-1298 (1974), 197.

⁸⁴³ Harvey Kaye and Paul Plaia, Jr., "Revitalization of Unfair Trade Causes in the Importation of Goods: An Analysis of the Amendments to Section 337," *Journal of the Patent Office Society* 57, nos. 4 and 5 (1975).

against imports could have a very direct and substantial impact on United States foreign relations, economic and political.”⁸⁴⁴

Ultimately, Congress balanced a continued need for Presidential input with procedural efficiencies inherent in vesting primary authority in the Commission by granting the President 60 days after receipt of a final Commission determination to intervene and disapprove the Commission’s action for policy reasons⁸⁴⁵ Notably, “the President’s power to intervene would not be for the purpose of reversing a Commission finding of a violation of section 337; such finding [would be] determined solely by the Commission, subject to judicial review.”⁸⁴⁶

One of the practitioners who testified before Congress regarding the lack of need for presidential involvement later predicted that future Presidents rarely would invoke the authority to disapprove Commission action on violation.⁸⁴⁷ That statement has proven prescient, as the President exercised that authority only five times from the enactment of the 1974 Trade Act through the end of 1987.⁸⁴⁸ In 2013, the United States Trade Representative (USTR), on behalf of the President, did so again, for the first time since 1987.⁸⁴⁹

⁸⁴⁴ S. Rep. No. 93-1298 (1974), 199.

⁸⁴⁵ Pub. L. No. 93-618, § 337(g).

⁸⁴⁶ S. Rep. No. 93-1298 (1974), 199.

⁸⁴⁷ Kaye and Plaia, “Revitalization of Unfair Trade Causes,” 1975.

⁸⁴⁸ *Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same*, Investigation No. 337-TA-242 (December 3, 1987); *Certain Alkaline Batteries*, Investigation No. 337-TA-165 (January 11, 1985); *Certain Molded-In Sandwich Panel Inserts and Methods for Their Installation*, Investigation No. 337-TA-099 (July 9, 1982); *Certain Multi-Ply Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper, and Components Thereof*, Investigation No. 337-TA-082 (June 22, 1981); *Certain Welded Stainless Steel Pipe and Tube*, Investigation No. 337-TA-029 (April 22, 1978).

⁸⁴⁹ In 2013, the USTR, under authority delegated by the President in 2005, disapproved the remedy in *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Investigation No. 337-TA-794, an investigation in which Apple products were subject to exclusion. The USTR decision relied heavily on a joint policy statement from the Department of Justice and the U.S. Patent and Trademark Office (SEP Policy Statement), citing concerns regarding injunctive remedies in cases involving standard essential patents (SEPs). (Letter from Michael B.G. Froman, U.S. Trade Representative, to Irving A. Williamson, Chairman, USITC (August 3, 2013)). Importantly, the USTR decision quotes from the SEP Policy Statement, explaining that exclusion orders are not an inappropriate remedy *per se* in SEP cases. Shortly after the 794 investigation, USTR refused to disapprove a Commission remedy in an investigation filed by Apple against Samsung, citing the absence of SEPs in the investigation (USTR, “Statement of the U.S. Trade Representative Regarding the Determination of the United States International Trade Commission in the Matter of Certain Electronic Digital Media Devices and Components Thereof, Investigation No. 337-TA-796,” press release, October 2013, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2013/October/Froman-decision-USITC-investigation>).

In response, in part, to growing trade deficits throughout the 1980s,⁸⁵⁰ as well as the increasing importance of intellectual property rights to the U.S. economy,⁸⁵¹ Congress amended section 337 as part of the Omnibus Trade and Competitiveness Act of 1988. Section 337 was amended specifically to strengthen the enforcement of intellectual property rights. Congress found that “the existing protection under section 337 of the Tariff Act of 1930 against unfair trade practices is cumbersome and costly and has not provided United States owners of intellectual property rights with adequate protection against foreign companies violating such rights,”⁸⁵² and thus amended section 337 “to make it a more effective remedy for the protection of United States intellectual property rights.”⁸⁵³

Most notably, the injury requirement, which had been included in section 316 in 1922 and had remained unchanged by subsequent amendments,⁸⁵⁴ was eliminated for investigations in which the asserted unfair act is the infringement of a federally registered intellectual property right. This requirement was eliminated because previously, in some patent-based investigations, although there was infringement, no violation was found due to the inability to prove injury.⁸⁵⁵ As part of the 1988 amendments, the Committee on Ways and Means recognized that:

unlike dumping or countervailing duties, or even other unfair trade practices such as false advertising or other business torts, the owner of intellectual property has been granted a temporary statutory right to exclude others from making, using, or selling the protected property. The purpose of such temporary protection, which is provided for in Article I, Section 8, Clause 8 of the United States Constitution, is “to promote the

⁸⁵⁰ 134 Cong. Rec. S10653–54 (August 3, 1988).

⁸⁵¹ Senate Finance Committee, *Report of the Committee on Finance on S. 490*, 100th Cong., 1st sess., S. Rep. No. 100-71 (June 12, 1987), 127; House Committee on Ways and Means, *Trade and International Economic Policy Reform Act of 1987: Report of the Committee on Ways and Means to Accompany H.R. 3*, 100th Cong., 1st sess., H. Rep. No. 100-40 (April 6, 1987), 153; *see also* 134 Cong. Rec. S10713-15 (August 3, 1988), in which Senators mentioned the relationship between innovation, intellectual property rights, and American competitiveness several times during the floor debates. For example, Sen. Lautenberg said, “Mr. President, a recent International Trade Commission study found that America’s most competitive industries are losing over \$40 billion a year in sales as a result of inadequate protection of intellectual property. . . . America’s economic edge is its technology and its innovation. But, if we are to enjoy the fruits of our labor—the jobs and growth that are to come from innovation—we need to stop the piracy of American intellectual property. . . . Mr. President, our trade deficit cannot be erased overnight. We need to remove unfair trade practices. We need to promote American competitiveness. American innovation is key to American competitiveness. That innovation is tied up in our patents, copyrights, trademarks, and semiconductor mask works. We need to protect those rights, and take action to gain respect for those rights abroad.”

⁸⁵² Omnibus Trade and Competitiveness Act of 1988, 100th Cong., 2d sess., H.R. 4848, § 1341 (July 25–26, 1988), 106.

⁸⁵³ *Ibid.*; *see also* S. Rep. No. 100-71 (1987), 128.

⁸⁵⁴ Brunsvold, Schill, and Schwendemann, “Injury Standards in Section 337 Investigations,” 1982, 12.

⁸⁵⁵ *Certain Optical Waveguide Fibers*, Investigation No. 337-TA-189, Comm’n action and order (April 1985); *Corning Glass Works v. U.S. Int’l Trade Comm’n*, 799 F.2d 1559 (Fed. Cir. 1986).

Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries.”⁸⁵⁶

The resulting bargain with the inventor creates a public interest in patent protection, thus making infringement itself an injury:

In return for temporary protection, the owner agrees to make public the intellectual property in question. It is this trade-off which creates a public interest in the enforcement of protected intellectual property rights. Any sale in the United States of an infringing product is a sale that rightfully belongs only to the holder or licensee of that property. The importation of any infringing merchandise derogates from the statutory right, diminishes the value of the intellectual property, and thus indirectly harms the public interest.⁸⁵⁷

Accordingly, Congress determined that injury presumed from proof of infringement by the imported articles was sufficient, and no additional proof of injury was required.⁸⁵⁸ However, the requirement that the domestic industry be “efficiently and economically operated” was eliminated from the statute in its entirety. Title 19 U.S.C. § 1337a, establishing process patent infringement as an unfair act, first added in 1940, was repealed and reincorporated into section 337 as section 337(a)(1)(B)(ii).⁸⁵⁹

In addition, Congress recognized that non-manufacturing industries that create and exploit intellectual property also should have the ability to establish a domestic industry and obtain relief under the statute. Prior to 1988 there were no explicit criteria for domestic industry set forth in the statute. The 1988 Act codified the criteria for establishing a domestic industry that had been established through precedent—significant investment in plant and equipment and significant employment of labor or capital—and expanded the criteria by adding “substantial investment in its exploitation, including engineering, research and development, or licensing.”⁸⁶⁰ With these amendments, Congress specifically overturned precedent that a complainant could not base a domestic industry on licensing:

The third factor . . . goes beyond the ITC’s recent decisions in this area. This definition does not require actual production of the article in the United States if it can be demonstrated that substantial investment and activities of the type enumerated are taking place in the United States. . . . The definition could . . . encompass universities

⁸⁵⁶ H. Rep. No. 100-40 (1987), 156.

⁸⁵⁷ *Ibid.*

⁸⁵⁸ *Ibid.*

⁸⁵⁹ Pub. L. No. 76-710; 19 U.S.C. § 1337a (1940); 19 U.S.C. § 1337(a)(1)(B)(ii).

⁸⁶⁰ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342(a)(3), 102 Stat. 1212–13 (August 23, 1988).

and other intellectual property owners who engage in extensive licensing of their rights to manufacturers.⁸⁶¹

The 1988 amendments clearly evince an intent by Congress to broaden access to section 337. However, Congress balanced that action with limits inherent in the domestic industry requirement: “This domestic industry requirement was maintained in order to preclude holders of U.S. intellectual property rights who have no contact with the United States other than owning such intellectual property from utilizing Section 337.”⁸⁶²

Also in the late 1980s, the statute was subject to a challenge by the European Economic Community (EEC). On April 29, 1987, the EEC “informed contracting parties that it had requested Article XXIII: 1 consultations with the United States concerning the application of Section 337 of the United States Tariff Act of 1930.”⁸⁶³ The EEC contended that section 337 was inconsistent with U.S. obligations under the General Agreements on Tariffs and Trade (GATT). In this challenge, filed in response to the USITC determination in *Certain Aramid Fiber*, Investigation No. 337-TA-194, the EEC contended that section 337 violated the GATT’s national treatment requirements in that it “subjected imported goods to a treatment which was less favourable than the treatment accorded by United States federal district courts to goods of national origin in patent infringement suits.”⁸⁶⁴ On January 16, 1989, a GATT panel issued a report finding that section 337 violated U.S. national treatment obligations under GATT. The specific aspects of section 337 found to violate GATT were (1) time limits for completion of investigations; (2) the unavailability of counterclaims; and (3) the ability of the complainant to file a parallel complaint in district court. The report was subsequently adopted on November 7, 1989. Thus, under GATT, the United States had three options: eliminate section 337; amend section 337 to make it GATT compliant; or face GATT-approved retaliation by the EEC. From 1988 to 1995, section 337 investigations continued as the future of section 337 was debated.

Contemporaneous with these discussions was the Uruguay Round of negotiations under GATT, which led to the creation of the World Trade Organization. As a part of the implementing legislation—the Uruguay Round Agreements Act—Congress amended section 337 to address the issues raised by the GATT Panel Report. First, the statutory time limits for completing investigations were eliminated. However, a Senate report noted that Congress expected the

⁸⁶¹ S. Rep. No. 100-71 (1987), 129.

⁸⁶² H. Rep. No. 100-40 (1987), 156–57; *see also* S. Rep. No. 100-71 (1987), 129; 19 U.S.C. § 1337(a)(2) and (3) (2012).

⁸⁶³ “United States Section 337 of the Tariff Act of 1930: Report by the Panel adopted on 7 November 1989” (L/6439–36S/345) (GATT Panel Report) at 1.1, https://www.wto.org/english/tratop_e/dispu_e/87tar337.pdf; L/6160 (29 April 1987), <https://docs.wto.org/gattdocs/g/.%5CGG%5CL6199%5C6160.PDF>.

⁸⁶⁴ “United States Section 337 of the Tariff Act of 1930: Report by the Panel Adopted on 7 November 1989” (L/6439–36S/345) (GATT Panel Report) at 3.1(i), https://www.wto.org/english/tratop_e/dispu_e/87tar337.pdf.

USITC to be able to continue to complete investigations in an expeditious manner.⁸⁶⁵ Consistent with the new statutory changes, the Commission adopted the practice of setting target dates for completion of investigations. Second, counterclaims were permitted to be filed, but they were to be immediately transferred to U.S. district court. Third, Congress established 28 U.S.C. § 1659(a), granting parties named both as a respondent in a section 337 investigation and as a defendant in a U.S. district court action involving the same subject matter the right to have the district court action stayed, pending completion of the section 337 investigation. Upon completion of the section 337 investigation, the record may be transferred to the U.S. district court pursuant to 28 U.S.C. § 1659(b).⁸⁶⁶ Section 337 has remained generally unchanged since the Uruguay Round Agreements Act.

Institutional Implementation of the Congressional Mandate

Unfair Competition Investigations Pre-1974

Section 316 of the Tariff Act of 1922 vested the President with authority to deal with violations of the section “when found by the President to exist.”⁸⁶⁷ To assist the President, the still-new Tariff Commission was empowered to investigate any alleged violation “on complaint under oath or upon its own initiative.”⁸⁶⁸ Within weeks of the 1922 Tariff Act becoming law, President Warren G. Harding set forth by Executive Order that:

All requests, applications, or petitions for action or relief under the provisions of sections 315, 316, and 317 of Title III of the tariff act approved September 21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation as shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such commission.⁸⁶⁹

⁸⁶⁵ Senate, *Uruguay Round Agreements Act: Joint Report to accompany S. 2467*, 103d Cong., 2d sess., S. Rep. No. 103-412 (November 22, 1994), 118–19.

⁸⁶⁶ Uruguay Round Agreements Act, Pub. L. No. 103-465, §§ 261 and 321, 108 Stat. 4908–4910, 4943–4946 (1994); To amend section 337 of the Tariff Act of 1930, 102d Cong., 2d sess., S. 3172 (August 11 (legislative day, August 5), 1992).

⁸⁶⁷ Pub. L. No. 67-318, § 316(a).

⁸⁶⁸ *Ibid.*, § 316(b).

⁸⁶⁹ USTC, *1922 Annual Report, 1923*, 61, (quoting Exec. Order No. 3746 (October 7, 1922)).

Consistent with the statute’s direction and President Harding’s order, in 1922 the Tariff Commission promulgated certain rules of procedure applicable to section 315, 316, and 317 investigations.⁸⁷⁰

The statute also provided that in section 316 cases, the Tariff Commission “shall afford such hearing . . . with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation.”⁸⁷¹ While the statutory language was somewhat equivocal, the Tariff Commission reported in 1925 that “it has been the practice of the commission to accord a full public hearing in every such investigation.”⁸⁷² In addition to final public hearings, the Tariff Commission also appears to have exercised discretion in holding preliminary hearings at the outset of some investigations “to assist the commission in defining more precisely the subject matter of the investigation, to ascertain as far as practicable the scope of the field work required, and to permit an expression of opinion by interested parties as to the best methods of obtaining full information upon the subject matter under investigation.”⁸⁷³

Complaints [were] investigated in approximately the same manner as [were] applications for cost investigations. The major efforts of the economist [were] directed to an ascertainment of whether the domestic industry [was] efficient, and whether a prima facie case of substantial injury to the industry ha[d] been presented. The General Counsel [took] an active part in the investigation, particularly in connection with those phases of the case relating to the unfair practices. The importers involved [were] interrogated as to their activities and, if necessary, an examination [was] made of their books and records.⁸⁷⁴

The Tariff Commission reported that the volume of time and labor it consumed related to such investigations, as well as to the scrutiny of complaints and preliminary inquiries to determine whether to institute formal investigations, greatly exceeded that required for a hearing itself. The Commission would assign a staff investigation team including a lawyer, an economist, and at least one technical expert to review the Complaint and responses from interested parties and in fulfilling its investigatory function, the Commission independently gathered information

⁸⁷⁰ *Ibid.*, 64–66. For a detailed discussion of the evolving rules of procedure, see section below, “Agency Rules and Procedures for Unfair Import Investigations.”

⁸⁷¹ Pub. L. No. 67-318, § 316(c).

⁸⁷² USTC, *Ninth Annual Report of the USTC, 1925* (Washington, DC: GPO, December 8, 1925), 15.

⁸⁷³ *Ibid.*, 14.

⁸⁷⁴ U.S. Department of Justice (USDOJ), *Monograph of the Attorney General’s Committee on Administrative Procedure: Part 14: Administration of the Customs Laws, United States Tariff Commission, Bureau of Customs, 77th Cong., 1st sess., S. Doc. No. 10 (1941)*, 25.

to assist it in making a preliminary decision, including through questionnaires and field trips.⁸⁷⁵ In support of the Commission's work in this area, the Attorney General's Committee on Administrative Procedure reported that "the Tariff Commission conducts one of the most elaborate fact-gathering systems in the Government, involving both continuous accumulation of data and investigation and report upon special problems, with resort to field work at home and abroad where necessary."⁸⁷⁶ "Aided by the information and views brought forward at the hearing" and the information gathered through its investigatory work, the Commission examined all the information received during the investigation and made a preliminary determination.⁸⁷⁷

The pre-institution responsibilities the Tariff Commission referenced are set forth in its original rules of procedure: "No investigation shall be ordered by the commission unless such application or preliminary investigation disclose to the satisfaction of the commission there are good and sufficient reasons therefor under the law." In the early days of the statute, the Tariff Commission regularly rejected or, after preliminary inquiry, dismissed complaints.⁸⁷⁸ In addition to formal rejection or dismissal, many unfair practice cases were disposed of informally during the preliminary investigation.⁸⁷⁹ The rudimentary pleading requirements, a lack of familiarity with a new statute, and the format of the proceedings may have been partly responsible.

At the conclusion of a preliminary investigation, the Tariff Commission made recommendations to assist the President to fulfill the statutory requirement:

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

⁸⁷⁵ Harvey Kaye and Paul Plaia, Jr., "The Tariff Commission and Patents: Anatomy of a 337 Action (Part I)," *Journal of the Patent Office Society*, vol. 55, no. 6 at 360-62 (June 1973).

⁸⁷⁶ USDOJ, Attorney General's Committee on Administrative Procedure, *Final Report of the Attorney General's Committee* (Washington, DC: USDOJ, 1941), 111-12, <https://www.regulationwriters.com/downloads/apa1941.pdf>.

⁸⁷⁷ USTC, *1925 Annual Report, 1926*, 14-16.

⁸⁷⁸ USTC, "Letter and Report of the United States Tariff Commission" (March 30, 1929) (reporting that 16 complaints had been dismissed without prejudice after preliminary investigation over the life of the statute to that point). The report of the Attorney General's Committee on Administrative Procedure noted that "in the great majority of cases an investigation and a preliminary decision suffice to settle the matter. Comparatively few cases flower into controversies in which the parties take conflicting positions of such moment to them that resort is necessary to the procedure of the courtroom." USDOJ, *Final Report of the Attorney General's Committee*, 1941, 35.

⁸⁷⁹ The Attorney General's Committee on Administrative Procedure noted that "because these proceedings have been shaped by the Commission in the form of a private controversy, the effectuation of a 'settlement' depends upon the efforts of the parties." S. Doc. No. 10 (1941), 25.

permit entry under bond upon such conditions and penalties as he may deem adequate.⁸⁸⁰

Subsequent full investigations focused on presentations at a hearing, with the hearing transcript providing the only opportunity for participating parties to insure their evidence was included on the record, as material presented during the preliminary inquiry was not recognized unless presented again at the hearing.⁸⁸¹ The General Counsel did not take an active role in the hearings; the parties were “invariably” represented by counsel, who directed the hearing through the introduction of evidence and the cross-examination of witnesses. The standard for admissibility of evidence was broad: the Commission freely admitted hearsay testimony and *ex parte* statements.⁸⁸² Similarly, the Commission adopted a liberal policy with regard to the treatment of confidential business information:

Considerable evidence is received in confidence which, while relating to individual business data, is not encompassed by even a liberal definition of “trade secrets or processes.” The inability of the opposing party to cross-examine or introduce rebutting evidence with respect to such information may be a serious obstacle in the path of the ascertainment of the veracity of the data. . . . One may suggest, therefore, that the Commission alter its standard of confidentiality in unfair practice cases so as to permit for the nondisclosure only of evidence encompassed within the scope of “trade secrets or processes.”⁸⁸³

As early as 1925, the Tariff Commission recognized that “hearings in investigations under section 316 have, by reason of the nature of the subject matter, a *quasi* judicial character.”⁸⁸⁴ The Tariff Commission’s findings after a full investigation were deemed conclusive if supported by evidence.⁸⁸⁵ However, the finality of such findings was subject potentially to (1) the Tariff Commission granting a request for rehearing, or, to (2) an appeal on questions of law brought by importers to the U.S. Court of Customs Appeals. (This court was one precursor to the U.S.

⁸⁸⁰ Pub. L. No. 67-318, § 316(f).

⁸⁸¹ Harvey Kaye and Paul Plaia, Jr., “The Tariff Commission and Patents: Anatomy of a 337 Action (Part II—Conclusion),” *Journal of the Patent Office Society*, vol. 55, no. 7 (July 1973), 425.

⁸⁸² Hearing procedures constituted one area where the Attorney General’s Committee saw room for improvement: “The outstanding feature of this process is the refusal of the Commission to be bound by the contents of the record. It has taken the position that all the evidence upon which it relies need not be introduced at the hearing, but may be ascertained from the *ex parte* investigations of its staff both before and during the hearing. . . . If the Commission were to shoulder the burden of presenting the case against the importer, gaps in the record would not be likely to occur and the need for reference to the results of *ex parte* investigations would no longer exist except insofar as the accuracy of confidential data was involved; in the latter situation, it would continue to be necessary to check on the correctness of such information by *ex parte* investigations.” S. Doc. No. 10 (1941), 27–28.

⁸⁸³ *Ibid.*

⁸⁸⁴ USTC, 1925 Annual Report, 1926, 14.

⁸⁸⁵ Pub. L. No. 67-318, § 316(c).

Court of Customs and Patent Appeals, now the U.S. Court of Appeals for the Federal Circuit (Federal Circuit)).⁸⁸⁶ In addition, until 1930, a judgment of the U.S. Court of Customs Appeals on U.S. Tariff Commission findings was subject to review by the Supreme Court upon successful application for *certiorari*.⁸⁸⁷ Final findings, together with the official record, were transmitted to the President for a decision on violation. The Commission's findings were not made public until the President approved the Commission's recommendation.⁸⁸⁸

If a violation was found, the President was required to impose additional duties at a rate "not exceeding 50 nor less than 10 per centum of the value of such articles" to offset the unfair method or act, or, in extreme cases, to exclude "such articles as [the President] shall deem the interests of the United States shall require, imported by any person violating the provisions of this act."⁸⁸⁹ Additional duties were eliminated by amendment in the Tariff Act of 1930, because such duties were considered to be an inadequate remedy, leaving an exclusion order as the only remedy.⁸⁹⁰ Once entered, a remedy would continue in effect until the President found that the conditions that led thereto no longer existed.⁸⁹¹

⁸⁸⁶ *Ibid.*, § 316(c).

⁸⁸⁷ Pub. L. No. 71-361, § 337. Regarding the elimination of Supreme Court review, see S. Rep. No. 71-37 (September 4, 1929): "Under the existing law the President is in nowise bound by any decision of the courts in the matter. As a result of this lack of finality to the decision of the Supreme Court, appellate proceedings before it upon writ of certiorari do not present a 'case or controversy' within the meaning of Article III of the Constitution. Such proceedings are, therefore, of such character that Congress can not constitutionally give the court jurisdiction over them. . . . The committee has, therefore, omitted the provisions of law giving jurisdiction to the United States Supreme Court upon certiorari." The elimination of Supreme Court review had the ancillary effect of expediting the transmission of the Commission's final findings to the President. USTC, *Fourteenth Annual Report of the USTC, 1930* (Washington, DC: GPO, December 1, 1930), 2.

⁸⁸⁸ Pub. L. No. 71-361, § 337(d); S. Doc. No. 10 (1941), 19.

⁸⁸⁹ USTC, *1922 Annual Report, 1923*, 61-62; Pub. L. No. 67-318, § 316(e).

⁸⁹⁰ In a report submitted on March 30, 1929, to the chairman of the Committee on Ways and Means, the U.S. Tariff Commission addressed the practice of issuing additional duties under section 316: "Subdivision (e) of this section by its present language permits the continuance of the unfair and unlawful practices against which the section is directed, upon payment of an additional duty to 'offset' such practices, not exceeding 50 nor less than 10 per cent ad valorem. . . . A form of competition which is found and declared to be unfair and unlawful can not be 'offset' by increasing the import duty. The methods or acts complained of under this section are either a violation of the statute or they are fair and lawful. There is no middle ground. If the statute is violated, then the proper remedy is to stop the unfair and unlawful competition by excluding the article in question from importation, and that has been the commission's recommendation to the President in every proceeding under this section where the existence of any such unfair method or act was established." ("Letter and Report of the United States Tariff Commission," March 30, 1929); see also USTC, *1928 Annual Report, 1929*, 21.

⁸⁹¹ Pub. L. No. 67-318, § 316(g).

From Tariff Commission to Trade Commission: Unfair Competition Investigations Post-1974

The Trade Act of 1974 was signed into law on January 3, 1975.⁸⁹² After almost 60 years, the Tariff Commission was renamed the United States International Trade Commission in recognition of the Commission’s evolving role in trade.⁸⁹³ Following the enactment of the 1974 Trade Act, the Commission’s role in section 337 investigations changed from advisory to adjudicatory. Looking back in 1982, practitioners observed that:

The Commission no longer analyzes facts developed at a slow pace by staff researchers, with a little assistance from the parties, to prepare a final report to the President recommending some action. The Commission was thrust into a rigorous adjudicative process where it had to participate in litigating a case under the Administrative Procedure Act to determine the existence of an unfair act, consider the effect of such an act on a domestic industry, and also conduct a non-adjudicative policy oriented review of public interest issues to decide whether to issue a remedy.⁸⁹⁴

In its new adjudicatory role, the Commission would be required to determine for each investigation whether there had been a violation and the appropriate remedy therefor, “on the record after notice and opportunity for a hearing,” in accordance with provisions of the Administrative Procedure Act (APA).⁸⁹⁵ Remedies would be entered by the Commission and “would become effective unless overturned by the President for policy reasons.”⁸⁹⁶ Final determinations by the Commission would be subject to judicial review by the Court of Customs and Patent Appeals (CCPA).⁸⁹⁷

At the end of FY 1974, the Commission had pending before it 16 section 337 investigations instituted in the preceding two years.⁸⁹⁸ Those pending investigations were re-designated Investigation Nos. 337-TA-1 through 337-TA-16, for which the new statutory time limits would

⁸⁹² “The amendments made by this section shall take effect on the 90th day after the date of the enactment of this Act, except that, for purposes of issuing regulations under section 337 of the Tariff Act of 1930, such amendments shall take effect on the date of enactment of this Act.” Pub. L. No. 93-618, § 337(c).

⁸⁹³ Over the years, the Commission’s functions had been enlarged to include “varied aspects of international trade and economics.” Additionally, the Trade Act of 1974 further strengthened the Commission’s independence from the Executive Branch. S. Rep. No. 93-1298 (1974), 115.

⁸⁹⁴ Brunsvold, Schill, and Schwendemann, “Injury Standards in Section 337 Investigations,” 1982, 103.

⁸⁹⁵ Pub. L. No. 93-618, § 337(c); Administrative Procedure Act, 5 U.S.C. § 551 et seq.

⁸⁹⁶ USITC, *1975 Annual Report*, 1976, 4.

⁸⁹⁷ Pub. L. No. 93-618, § 337(c).

⁸⁹⁸ USTC, *1974 Annual Report*, 1975, 12; USITC, *1975 Annual Report*, 1976, 13.

run from the date the amendments took effect.⁸⁹⁹ The first investigation instituted after the effective date of the amendments was *Certain Record Players Incorporating Straight Line Tracking Systems*, Investigation No. 337-TA-17, on July 7, 1975.⁹⁰⁰

As an institution, the Commission took swift action to implement the Trade Act of 1974, noting in its 1976 *Annual Report* that:

On the administrative side, the Commission embarked on some bold new innovations which promise to have considerable impact on its activities in the years to come. A complete reorganization of the Commission staff, with an emphasis on substantive responsibilities, is intended to put the structure of the Commission more in line with its expanded functions, make it more responsive to the requirements levied upon it, and make it more efficient in terms of human and fiscal resources.⁹⁰¹

By the end of FY 1976, the Commission had hired a permanent Administrative Law Judge (ALJ), created the forerunner of the Office of Unfair Import Investigations (OUII), and completed a revision and expansion of the rules for adjudication and enforcement under section 337. In the years immediately following these initial changes, reorganization continued on a smaller scale, particularly with respect to section 337's investigative functions, for which there were a number of changes before the USITC settled on OUII for that function.

Initially, the Commissioners continued to preside over investigations incorporating the new APA requirements, although Administrative Law Judges (ALJs) likely also were brought in on an *ad hoc* basis from other agencies to handle some early cases before the first permanent ALJ was hired in 1976.⁹⁰² The Commission apparently had long viewed itself as having the option to utilize ALJs. Back in 1939, reporting on a new addition to the rules of general application, the

⁸⁹⁹ “[W]ith respect to investigations being conducted . . . on the day prior to the 90th day after the date of the enactment of this Act, such investigations shall be considered as having been commenced on such 90th day.” Pub. L. No. 93-618, § 337(c).

⁹⁰⁰ USITC, *1975 Annual Report*, 1976, 8.

⁹⁰¹ USITC, “Message from the Chairman,” *Annual Report, 1976* (Washington, DC: GPO, 1977).

⁹⁰² USITC, *1976 Annual Report*, 1977, 22. From 1976 to 2016, the Office of the ALJs has seen 18 ALJs. The first full-time ALJ was Judge Myron R. Renick, who served from 1976 to 1977. The first Chief Judge, starting in 1978, was Donald K. Duvall, the original author of the treatise on section 337, *Unfair Competition and the ITC*. Chief Judge Janet Saxon followed Chief Judge Duvall and served as Chief Judge from 1984 until 1995. After a long period without a Chief Judge, the Commission in 2008 appointed Judge Paul J. Luckern to the post. The current Chief Judge, Charles E. Bullock, was appointed in 2011 after Judge Luckern's retirement. The two longest-serving ALJs, who both started in 1984, were Judges Luckern and Sidney Harris. Judge Harris served 23 years before his retirement in 2007. Judge Luckern served 27 years before his retirement in 2011. Completing the full list of ALJs that have served or continue to serve at the Commission are: Judge John J. Mathias, Judge Debra Morriss, Judge Delbert Terrill, Judge Robert R. Barton, Jr., Judge Carl C. Charneski, Judge Theodore R. Essex, Judge Robert K. Rogers, Judge Edward J. Gildea, Judge Thomas B. Pender, Judge David P. Shaw, Judge Sandra Dee Lord, and Judge MaryJoan McNamara.

Commission stated: “Since its creation the Commission has had the authority to designate agents to hold hearings but has heretofore not exercised that power in the administration of sections 336 and 337 and their predecessor statutes.”⁹⁰³ That rule provided that “hearings may be conducted by . . . any duly authorized agent or agents of the Commission, and the record shall be presented for consideration of the Commission.”⁹⁰⁴ The enactment of the Trade Act of 1974, and the resultant implementation of the APA, led the Commission to use ALJs to preside over hearings and issue recommended determinations for review by the Commission.⁹⁰⁵

In addition, during 1976, the Commission undertook an extensive reorganization of its functions.⁹⁰⁶ The Commission was authorized by statute “to adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties.”⁹⁰⁷ The USITC’s regulations provided that the Commission might “by such agents as it may designate, prosecute any inquiry necessary to its duties.”⁹⁰⁸ Thus, the Commission created new offices and reassigned existing personnel to handle section 337 investigations under its revised mandate to complete unfair import investigations under the APA, as well as other functions for which the newly designated U.S. International Trade Commission was responsible.

Prior to the reorganization, the Office of the General Counsel used a team approach for handling the Commission’s investigative role in section 337 investigations. Each team included an attorney from the General Counsel’s office and an economist and/or commodity specialist from other offices within the Commission. This team of three or more people would run the investigation and investigate the industry on their own and with the parties in the case.⁹⁰⁹ The team would “look at the economic and efficient operation of that domestic industry, study the injury that was alleged to have occurred during the course of the unfair act and also study the patents and come up with [their] own view of what the patent validity and infringement were.”⁹¹⁰

The General Counsel’s participation in unfair competition investigations dated back to section 316. In 1928, the Commission described the role of its legal division:

The most obvious participation of the legal division as the agent in work of the commission arising under the tariff act of 1922 is the administration of section 316. . . .

⁹⁰³ USTC, *1937 Annual Report*, 1937, 45.

⁹⁰⁴ 19 C.F.R. 201.15 (1939 printing).

⁹⁰⁵ David Foster, Wayne Herrington, Tom Schaumberg, and Charles Schill, “Major Developments in Section 337 from 1922 to Today: An Overview, Milestones, and Implications,” transcript of panel presentation at meeting, *The History and Development of Section 337 Practice at the ITC* (Washington, DC: USITC, March 30, 2016), 34–36.

⁹⁰⁶ USITC, *1976 Annual Report*, 1977, 21.

⁹⁰⁷ 19 U.S.C. § 1335.

⁹⁰⁸ 19 C.F.R. § 201.4(a) (1976).

⁹⁰⁹ Foster *et al.*, “Major Developments in Section 337,” 2016, 35.

⁹¹⁰ *Ibid.*

The legal division, assisted by the division of international relations, passes upon all complaints of alleged unfair competition, and, if a hearing be had before the commission, follows everything that takes place in the hearing. After the hearing the legal division formulates for the commission the findings of law and fact which serve as the basis of the commission's report to the President.⁹¹¹

In or around 1976, questions arose about the role of the General Counsel's Office in section 337 investigations. Concerns were raised as to whether the General Counsel should maintain dual functions, acting first in an investigative role and advocating as a party, and second in an advisory role, working with the Commissioners on the final opinions of the Commission. Such concerns found support in the APA:⁹¹² under APA section 554(d)(2), the employee who presides at the reception of evidence may not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency."⁹¹³ Accordingly, it was argued that the investigatory functions of section 337 should be separated from the Offices of the Commissioners, who are the final decision makers under section 337, in order to avoid any potential conflict. In any event, one result of the 1976 reorganization was the creation of the Office of Legal Services (OLS), which was given responsibility for the investigatory portion of section 337 investigations. To fulfill these duties, a number of attorneys moved from the General Counsel's office in 1977 to form the core of the newly-created OLS.⁹¹⁴

The role of the General Counsel in section 337 investigations remained significant after the reorganization. In fact, the office gained new responsibilities during this time. The General Counsel's office retained, and still performs, its advisory role with the Commissioners and its

⁹¹¹ USTC, *1928 Annual Report, 1928*, 26–27; USTC, *Eleventh Annual Report of the USTC, 1927* (Washington, DC: GPO, December 5, 1927), 22. Speaking specifically about injury, practitioners wrote: "Prior to the institution of this requirement [APA compliance], the Commission's opinions often contained very little information which could lead to an understanding of how injury was determined in an investigation. Before the effective date of the Trade Act of 1974, the Commission obtained information primarily through inquiries by its staff (questionnaires, plant inspections and interviews). The information obtained in this manner was untested by the parties to any significant degree. The APA, by contrast, requires that the facts used by the Commission in making its determination be adversary-tested. . . . On the whole . . . the application of the APA has encouraged the presentation of a greater variety and amount of information." Brunsvold, Schill, and Schwendemann, "Injury Standards in Section 337 Investigations," 1982, 98.

⁹¹² Foster *et al.*, "Major Developments in Section 337 from 1922 to Today," 2016, 35–36.

⁹¹³ 5 U.S.C. § 551 et seq.

⁹¹⁴ USITC, *Annual Report, 1977*, USITC Publication 868 (Washington, DC: USITC, March 1978).

participation in crafting the final opinions of the Commission.⁹¹⁵ In addition, the 1974 Trade Act authorized the Commission to represent itself in legal court proceedings; this new function was delegated to the General Counsel's Office.⁹¹⁶ Just a few years earlier, upon authorization from the U.S. Department of Justice, the General Counsel's office had represented the Commission related to a show cause order and restraining order aimed at preventing the Commission from initiating judicial proceedings to enforce a subpoena in Investigation No. 337-24 related to ampicillin alleged to be imported in violation of a U.S. patent.⁹¹⁷ Those proceedings were the first time the Commission was represented in litigation by its own counsel.⁹¹⁸ Following the 1976 reorganization, the General Counsel's office had primary responsibility for defending the Commission's decisions.

The new Office of Legal Services was modeled on offices in other agencies having investigative powers. Organizationally, it was placed under the new Office of Operations, reporting through the deputy director.⁹¹⁹ Among the initial goals for the office was to expand the types of unfair methods of competition and unfair acts investigated under section 337.⁹²⁰ In furtherance of this goal, staff from OLS and others, with institutional encouragement, gave presentations around the country to educate practitioners about section 337 and explain its uses, among other efforts.⁹²¹ In addition, OLS attorneys conducted preliminary investigations under the new section 603(a) of the Trade Act of 1974, which provides that "in order to expedite the performance of its functions under this Act, the International Trade Commission may conduct preliminary investigations, determine the scope and manner of proceedings, and consolidate proceedings before it."⁹²² OLS attorneys also participated as a party in full section 337

⁹¹⁵ From 1980–87, the Commission annually identified the Assistant General Counsel designated for section 337 investigations. USITC, *Annual Report, 1980*, USITC Publication 1084 (Washington, DC: USITC, July 1981); USITC, *1981 Annual Report*, USITC Publication 1352 (Washington, DC: USITC, February 1983); USITC, *1982 Annual Report*, USITC Publication 1412 (Washington, DC: USITC, August 1983); USITC, *1983 Annual Report*, USITC Publication 1580 (Washington, DC: USITC, September 1984); USITC, *1984 Annual Report*, USITC Publication 1718 (Washington, DC: USITC, July 1985); USITC, *Annual Report, 1985*, USITC Publication 1847 (Washington, DC: USITC, April 1986); USITC, *Annual Report, 1986*, USITC Publication 1935 (Washington, DC: USITC, January 1987); USITC, *Annual Report, 1987* (Washington, DC: USITC, February 1988).

⁹¹⁶ "The Commission shall be represented in all judicial proceedings by the attorneys who are employees of the commission, or, at the request of the commission, by the Attorney General of the United States." Pub. L. No. 93-618, § 174. In practice, the Commission has asked the Solicitor General to represent the Commission in proceedings before the U.S. Supreme Court.

⁹¹⁷ U.S. Tariff Commission (USTC), *Ampicillin: Report to the President on Preliminary Inquiry into Complaint Under Section 337 of the Tariff Act of 1930* (Washington, DC: USTC, 1970).

⁹¹⁸ USTC, *1972 Annual Report*, 1973, 15–16.

⁹¹⁹ USITC, *1977 Annual Report*, 1978, 28.

⁹²⁰ Patents had long been established as a basis for section 337 investigations in cases under the original statute. See *Synthetic Phenolic Resin* (filed December 16, 1925, instituted April 16, 1926); see also Pub. L. No. 76-710.

⁹²¹ Foster *et al.*, "Major Developments in Section 337," 2016, 44.

⁹²² Pub. L. No. 93-618, § 603(a).

investigations arising out of both section 603 preliminary investigations and section 337 complaints drawn from the public.⁹²³

The USITC's reorganization related to section 337 investigations continued throughout the 1970s and early 1980s. In 1979, OLS was redesignated as a division under a larger office, becoming the Unfair Import Investigations Division (UIID). The new UIID reported to the Office of Investigations, placed under the Office of Operations.⁹²⁴ However, in 1985, that group was again redesignated, and elevated to the level of an office when it became OUII. The office first known as OLS, then UIID, and finally OUII was headed by a series of directors and chiefs as it evolved.⁹²⁵

In its annual report to Congress for 1985, the Commission stated regarding the creation of OUII:

During the fiscal year, the Commission made an administrative change affecting the conduct of section 337 investigations. In recognition of the increasing role of these cases in ensuring free and fair trade, the Unfair Import Investigation Division, formerly a part of the Office of Investigations, became a separate office of the Commission (the Office of Unfair Import Investigations).⁹²⁶

That expanded role reflected the increasing number of investigations. In 1985, there were 60 active section 337 investigations. In addition, some credit was perhaps due to the earlier outreach by OLS, with the USITC reporting in 1985 that the most common methods of unfair competition alleged were infringement of patent, copyright, or trademark; theft of trade secrets; passing off; or violation of the antitrust laws.⁹²⁷ The Commission also reported that

⁹²³ Pub. L. No. 93-618, § 603. Regarding section 603 preliminary investigations, see Italo H. Ablondi and H. Henning Vent, "Section 337 Import Investigations—Unfair Import Practices," *Loyola of Los Angeles International and Comparative Law Review* vol. 4, no. 1 (1981), 30–31.

⁹²⁴ USITC, *1980 Annual Report*, 1980, 47.

⁹²⁵ Director Harold Brandt opened OLS in 1976. Edward M. Lebow and Talbot Lindstrom each served as Acting Chief of then-UIID in 1979 and 1980, respectively. David I. Wilson was Chief of UIID from 1981 to 1983. Arthur B. Wineberg took over as acting chief of UIID in 1984 and was elevated to Director in 1985, at the same time that UIID was re-designated OUII (an office in its own right). He continued as Director of OUII through 1987. Lynn Levine took over OUII in 1988, and continued as Director for 25 years until her retirement from government service in 2012. In 2013, Margaret Macdonald, an experienced section 337 litigator in private practice, became Director of OUII.

⁹²⁶ USITC, *1985 Annual Report*, 1986, 10.

⁹²⁷ *Ibid.*

year that it “continued to be at the forefront of legal and technological issues” in section 337 investigations.⁹²⁸

In addition to the institutional changes discussed above, a number of issues of first impression were decided. For example, 1981 marked the first temporary exclusion order since the 1974 Trade Act amendments, issued in *Certain Apparatus for the Continuous Production of Copper Rod*, Investigation No. 337-TA-89.⁹²⁹ Also in 1981, the USITC issued its first limited exclusion order in *Large Video Matrix Display Systems*, Investigation No. 337-TA-75.⁹³⁰ Before that time, “all Commission exclusion orders had applied to all potentially infringing products regardless of the foreign manufacturers.”⁹³¹ The heightened requirements that must be satisfied to obtain a general exclusion order under the current statute had not yet been added. However, taking into consideration the product at issue, stadium scoreboards, the Commission determined “in cases which concern a large capital good item made to specific order, it would be inappropriate to exclude similar products of other manufacturers since there had been no showing that other products infringed the patent in question.”⁹³²

Also in 1981, the Commission self-initiated its first section 337 investigation, based on a complaint by UIID, in *Certain Airtight Cast-Iron Stoves (Stoves III)*, Investigation No. 337-TA-106.⁹³³ Two years later, the Commission self-initiated its first patent-based investigation in *Certain Apparatus for Flow Injection Analysis and Components Thereof*, Investigation No. 337-TA-151. Commission Secretary Kenneth R. Mason filed the Complaint “[b]y order of the Commission.”⁹³⁴ Interestingly, the investigation was based on a patent held by the U.S. Department of Agriculture. The Commission ultimately terminated the investigation before a final determination on the merits.⁹³⁵ In addition, an impactful procedural change occurred

⁹²⁸ High-technology products of the time for which producers sought protection of alleged infringement of intellectual property rights included aramid fibers, amorphous metals, optical wave-guide fibers, computer-related equipment (e.g., rotary wheel printers and double-sided floppy disks), medical devices (e.g., artificial kidneys and apparatus for disintegration of urinary calculi), and capital equipment (e.g., motor graders and stretch-wrapping apparatus). Consumer products depicting the *Gremlins* characters and Duracell batteries also sought protection under section 337. USITC, *1985 Annual Report*, 1986, 10.

⁹²⁹ USITC, *1981 Annual Report*, 1983, 11; Regarding motions for temporary relief, see Tom M. Schaumberg, *A Lawyer's Guide to Section 337 Investigations before the U.S. International Trade Commission*, 3rd ed. (Chicago, IL: American Bar Association, 2016), 93, fn. 132.

⁹³⁰ *Certain Large Video Matrix Display Systems and Components Thereof*, Investigation No. 337-TA-75, USITC Publication 1158, Comm'n op. at 28 (June 1981); USITC, *1981 Annual Report*, 1983, 11.

⁹³¹ USITC, *1981 Annual Report*, 1983, 11.

⁹³² *Ibid.*

⁹³³ *Ibid.*, 11–12; see also Schaumberg, *A Lawyer's Guide to Section 337 Investigations*, 2016, 75, fn. 1.

⁹³⁴ *Certain Apparatus for Flow Injection Analysis and Components Thereof*, Complaint, Investigation No. 337-TA-151 (June 4, 1983).

⁹³⁵ *Certain Apparatus for Flow Injection Analysis and Components Thereof*, Investigation No. 337-TA-151, Comm'n action and order at 1 (November 1984); USITC, *1983 Annual Report*, 1984, 11. The Secretary of Agriculture appealed, but the Federal Circuit held that the Commission's decision was not a final determination, and thus, not appealable. *Block v. U.S. Intern. Trade Comm'n*, 777 F.2d 1568 (Fed. Cir. 1985).

when the USITC amended its rules in 1982 to enable the current practice in which ALJs issue initial determinations on violation, subject to discretionary review by the Commission, instead of recommended determinations.⁹³⁶

OUII's functions and responsibilities also have varied somewhat since its initial formation as OLS. OUII was briefly responsible for the Trade Remedy Assistance Center from 1985 to 1988.⁹³⁷ After the Omnibus Trade and Competitiveness Act eliminated injury for most investigation types in 1988, OUII shifted its focus from analyzing the threat or effect of injury to analyzing complex patent infringement issues.⁹³⁸ The January 2011 supplement to the Commission's *Strategic Human Capital Plan, 2009–2013*, changed the staffing of investigations:

Once an investigation is instituted, OUII will place the highest priority on issues unique to section 337, including the domestic industry requirement, remedy, the public interest, and bonding, as well as any other issues uniquely affecting Commission policy. OUII will also continue its efforts: a) to ensure that the investigation record is fully developed, b) to resolve procedural disputes between the other parties without the need to resort to the presiding administrative law judge, and c) to facilitate settlement.⁹³⁹

Most recently, added to OUII's duties is the office's fact-finding role in one class of cases in a pilot program designed to expedite advisory and modification proceedings. Under the pilot program, investigative attorneys will be responsible for requests requiring minimal fact-finding and submit their recommendations directly to the Commission for potential action thereon.⁹⁴⁰

Overall, OUII has served—and continues to serve—three primary functions in original investigations and ancillary proceedings, such as enforcement proceedings. First, OUII provides an informal service to the public by offering a draft review for complaints before filing. The advice from OUII at this stage is not binding on complainant(s) and, indeed, no such review before filing is required. Second, after a complaint is filed, OUII takes on a new role and

⁹³⁶ 47 Fed. Reg. 25134 (1982).

⁹³⁷ A function based on a requirement in 19 U.S.C. 1339; USITC, *1985 Annual Report*, 1986, 38; USITC, *1986 Annual Report*, 1987, 42; USITC, *1987 Annual Report*, 1988, 31; USITC, *1988 Annual Report* (Washington, DC: USITC, 1989), 23; USITC, *Annual Report, 1989*, USITC Publication 2264 (Washington, DC: USITC, March 1990), 28.

⁹³⁸ USITC, *Supplement to the Strategic Human Capital Plan, 2009–2013*, 2011, 19, https://www.usitc.gov/press_room/documents/human_capital_plan_supplemental_1-18-2011.pdf.

⁹³⁹ USITC, *Supplement to the Strategic Human Capital Plan*, 2011, 23–24.

⁹⁴⁰ USITC, *USITC Pilot Program for Rulings on Redesigned Products in Commission Post-Order Proceedings: Background and Facts*, n.d. (accessed August 1, 2016), http://www.usitc.gov/press_room/documents/featured_news/337modprocpilot_fs_final.doc and USITC, *Pilot Program Will Test Expedited Procedures for USITC Modification and Advisory Opinion Proceedings*, n.d. (accessed August 1, 2016), https://www.usitc.gov/press_room/featured_news/pilot_program_will_test_expedited_procedures_usitc.htm.

formally examines the complaint for sufficiency and compliance with the Commission’s rules, in order to make a recommendation to the Commission as to whether to institute an investigation based on the complaint. OUII may request supplemental information or suggest the complaint be amended before the Commission issues a decision on institution. Third, after institution of a complaint, an OUII investigative attorney, if designated, becomes a party to the investigation.⁹⁴¹ OUII may interact with private parties, as any other party would, but—also like the private parties—it may not engage in *ex parte* communication with the offices included in the decision-making process: the ALJs, the General Counsel, and the Commissioners.

Litigation of claims under section 337 in its present form is generally attributed to the Trade Act of 1974. The reorganization undertaken following its enactment is responsible for the agency structure we recognize today, with OUII, the office of the ALJs, the General Counsel, and the Commissioners each playing an important role in the process. While Congress again made significant amendments to section 337 in 1988 and 1994, with the possible exception of eliminating statutory deadlines in 1988, none of those amendments changed procedure related to section 337 to the same degree as the 1974 Trade Act.

Agency Rules and Procedures for Unfair Import Investigations

The Early Rules

Section 316 of the Tariff Act of 1922 gave the Tariff Commission authority to investigate unfair methods of competition and unfair acts in import trade “under and in accordance with such rules as it may promulgate.”⁹⁴² Consistent with the statute, and with the support of President Warren G. Harding, the Tariff Commission promulgated the first rules of procedure applicable to investigations under sections 315, 316, or 317 in 1922.⁹⁴³

⁹⁴¹ In its 2011 Supplement to the Human Capital Plan, the Commission noted that “although the statute does not require that the Commission maintain an independent office, the APA requires that the prosecutorial/investigative functions, such as the pre-institution work, and presenting arguments and evidence before an ALJ, be separated from the Commission decision-making,” and that “in cases with significant issues peculiar to section 337 (such as domestic industry or public interest) . . . the participation of OUII is likely to aid the decision-making process.” OUII attorneys have developed “particular expertise and institutional knowledge” on issues of public interest, and “act as a party to the litigation with no commercial interest in the outcome.” USITC, *Supplement to the Strategic Human Capital Plan*, 2011, 3, 19–20; See also USITC, *Section 337: Building the Record on the Public Interest*, n.d. (accessed March 1, 2017), https://usitc.gov/press_room/documents/featured_news/publicinterest_article.htm and 76 Fed Reg. 64803–64810 (2011), https://www.usitc.gov/secretary/fed_reg_notices/rules/finalrules210.pdf.

⁹⁴² USTC, *1922 Annual Report*, 1922, 61 (referencing § 316(c)).

⁹⁴³ USTC, *1923 Annual Report*, 1923, 34; USTC, *1925 Annual Report*, 1925, 91.

These first rules were few in number and provided little additional guidance beyond the mandate in the statute itself.⁹⁴⁴ Interestingly, the original rules provided the Commission discretion in choosing whether to institute a full investigation: “No investigation shall be ordered by the commission unless such application or preliminary investigation discloses to the satisfaction of the commission that there are good and sufficient reasons therefor under the law.”⁹⁴⁵

Prior to the implementation of the Trade Act of 1974, the Tariff Commission revised these rules several times. While most of the changes were small—updating references, tweaking language, etc.—a few changes provide insight into the development of the Commission’s practices and procedures.

The 1922 rules provided for the Tariff Commission to routinely conduct an inquiry into whether a temporary exclusion should be ordered “pending further investigation.”⁹⁴⁶ By 1930 the rules specified the inquiry would only be carried out if requested in the complaint.⁹⁴⁷

With respect to responses to complaints, parties would have to wait for a rule until 1930. The rules reproduced in the *1930 Annual Report* specified that “after an investigation shall have been ordered” and the complaint served on “any owner, importer, consignee, or agent of either,” 30 days were provided in which to submit a “written answer under oath and to show cause, if any there be, why the provisions of section 337 should not be applied.”⁹⁴⁸

In 1937, the Tariff Commission first separated “provisions of general application,” common to all investigations, from provisions applying specifically to section 336 and 337 investigations (previously sections 315 and 316, respectively), to avoid duplications.⁹⁴⁹

Reporting to Congress in 1937, the Tariff Commission identified as “probably the most important change in procedure . . . the question of furnishing interested parties, and the public, information concerning the Commission’s activities in matters pending before it.” Section 337 complaints would be publicized “at the time of filing” and made available for inspection, with the goal of facilitating information gathering and expediting Tariff Commission decisions concerning complaints.⁹⁵⁰

⁹⁴⁴ USTC, *1922 Annual Report*, 1922, 64–66.

⁹⁴⁵ *Ibid.*, 64.

⁹⁴⁶ *Ibid.*

⁹⁴⁷ USTC, *1930 Annual Report*, 1930, 24.

⁹⁴⁸ *Ibid.*

⁹⁴⁹ USTC, *1937 Annual Report*, 1937, 45.

⁹⁵⁰ *Ibid.*

In 1938, the Tariff Commission's rules became more generally accessible. That year, the government began publishing the Code of Federal Regulations (CFR). The CFR put the Tariff Commission's rules—along with the rules of other agencies—on a standard publication schedule, with updates published in the daily *Federal Register* in the interim periods.⁹⁵¹

On June 11, 1946, after unanimous adoption by both houses of Congress, the President approved the Administrative Procedure Act, marking the end of an effort—interrupted by World War II—that was initiated in 1938 in response to criticism of federal administrative agencies.⁹⁵² The new APA would apply, with limited exceptions, to every agency and authority of the government.⁹⁵³ The Tariff Commission qualified for a number of the referenced exceptions before section 337 was later amended by the Trade Act of 1974.

On the APA's effective date, the Tariff Commission issued a complete restatement of its rules, which included “new material . . . in the nature of public information as to the organization and functions of the Tariff Commission,” and published them in the *Federal Register*, complying with the APA requirement to “keep the public currently informed of their organization, procedures and rules.”⁹⁵⁴ Otherwise, its previous rules were “retained in substance, and no changes in basic procedure were adopted,” consistent with the APA allowance that “an agency need not invent procedures where it has no reason to establish any procedures.”⁹⁵⁵

Unless required by statute, “the rules of agency organization, procedure or practice,” “interpretive rules,” and “general statements of policy” were exempt from APA rulemaking.⁹⁵⁶ Application of the APA's “uniform standards” for “adjudicatory proceedings” also required an express statement in the enabling statute of the relevant agency, which Congress did not add to section 337 until the Trade Act of 1974.⁹⁵⁷ Similarly, the APA requirement relating to judicial review applied “except so far as . . . agency action is by law committed to agency discretion,” and section 337 at the time provided for action only if the existence of an unfair method or act was “established to the satisfaction of the President.”⁹⁵⁸

In 1958, as part of the Trade Agreements Extension Act, Congress amended the Tariff Act to revise the Commission's authority to issue rules. Congress deleted from section 337 the words

⁹⁵¹ CFR §§ Preface and 1.0 at iii and 1 (1938).

⁹⁵² USDOJ, *Attorney General's Manual on the Administrative Procedure Act*, Prepared introduction by the United States Department of Justice Tom C. Clark, Attorney General (Washington, DC: USDOJ, 1947), Introduction, 5–6. <https://archive.org/details/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947>.

⁹⁵³ USITC, *Thirtieth Annual Report of the USITC*, 1946 (Washington, DC: GPO, January 3, 1947), 10; USDOJ, *Attorney General's Manual*, 1947, 9.

⁹⁵⁴ *Ibid.*

⁹⁵⁵ USITC, *1946 Annual Report*, 1947, 10; USDOJ, *Attorney General's Manual*, 1947, 21.

⁹⁵⁶ USDOJ, *Attorney General's Manual*, 1947, 19–21, 30.

⁹⁵⁷ *Ibid.*, 40–41.

⁹⁵⁸ *Ibid.*, 94 (citing House Hearings (1945), 38 (Sen. Doc., 84)); 19 U.S.C. § 1337(e) (1946).

“under and in accordance with such rules as [the Tariff Commission] may promulgate,” and added new section 335 (19 U.S.C. § 1335) authorizing the Tariff Commission “to adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties.”⁹⁵⁹ Section 335 appears to have been first cited with reference to section 337 rules on December 7, 1962, in a notice of final rules of practice and procedure in the *Federal Register*.⁹⁶⁰

By 1962, the long-standing concept that complaints “need not be drawn in any particular form,” as the statement appeared the prior year, had been eliminated entirely.⁹⁶¹ It is well established today that the USITC requires detailed fact pleading, for which specific information is required by rule.⁹⁶² However, the original 1922 rules specified that, “an application [was] not required to be in any special form.”⁹⁶³ Also in 1962, the Tariff Commission carved out and supplemented prior provisions related to disclosure to create a new rule for “confidential business data.”⁹⁶⁴

1976: Rules Implementing the Trade Act of 1974

The rules of practice and procedure governing investigations of alleged unfair practices in import trade remained essentially the same from 1962 through April 1975, when new and amended rules were introduced. The Trade Act of 1974 had left section 337 jurisdiction unchanged: “No change has been made in the substance of the jurisdiction conferred under section 337(a) with respect to unfair methods of competition or unfair acts in the import trade.”⁹⁶⁵ However, the statutory amendments making the APA applicable to section 337, among other changes relevant to the conduct of investigations, prompted the USITC to overhaul its rules, putting them substantially in a form recognizable to current practitioners.⁹⁶⁶

Under part 201, the USITC proposed amendments relating to definitions, filing of documents, timing, service, and attendee fees and mileage.⁹⁶⁷ The USITC also added part 210 (replacing part 203).⁹⁶⁸ The proposed additions to new part 210 demonstrated the transition to APA

⁹⁵⁹ Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 335, 72 Stat. 680 (1958).

⁹⁶⁰ 27 Fed. Reg. 12117, 12118 and 12120 (1962).

⁹⁶¹ 27 Fed. Reg. 12117, 12120 (1962); 19 CFR § 203.2 (1961).

⁹⁶² In 2016, requirements for the content of complaints can be found in 19 C.F.R. § 210.12.

⁹⁶³ USTC, *1922 Annual Report*, 1922, 64.

⁹⁶⁴ 27 Fed. Reg. 12117, 12118 (1962).

⁹⁶⁵ S. Rep. No. 93-1298 (1974), 194.

⁹⁶⁶ On September 2, 1975, the USITC published its notice of proposed rulemaking in the *Federal Register* to “implement sections 337 and 337a of the Tariff Act of 1930, as amended by Section 341 of the Trade Act of 1974.” The short time was allotted for comments due to “the urgency of proceeding under section 337 in the investigation of complaints pending before the Commission.” (40 Fed. Reg. 40173 (1975)). Final rules were published on April 27, 1976, with an effective date of May 27, 1976 (41 Fed. Reg. 17710 (1976)). The revised rules first appeared in a *Code of Federal Regulations* volume in 1977.

⁹⁶⁷ *Ibid.*

⁹⁶⁸ 40 Fed. Reg. 40173 (1975).

adjudication of alleged unfair practices. The new or amended rules provided for discovery, for the orderly presentation of information at hearings and preservation in the record, and for decisions and associated procedures, among other things.⁹⁶⁹

Looking Forward from the Trade Act of 1974

The 1976 amendments are remarkable because they helped usher in the current due-process era through APA determinations on the record after notice and opportunity for hearing. However, periodic and even major rules packages continue to shape the rules governing section 337 within the limits of the Commission's statutory authority. While not exhaustive, a discussion highlighting some post-1976 changes to the USITC's rules and procedures follows.

Early Post-1975 Additions and Changes to Procedure

In 1981, the Commission added procedures for consent orders, which were already in use, and for certain non-adjudicative proceedings. The new rules relied in part on the USITC's original jurisdiction under section 337 as the basis "to conduct proceedings supplemental to the formal adjudicative investigations provided for by Part 210 of the Commission's Rules of Practice and Procedure."⁹⁷⁰

Of particular importance to current practice were changes in 1982 regarding ALJ determinations. The Commission first brought in ALJs to preside over investigations in 1976, as part of its implementation of the APA. At that time, the ALJs were directed to issue their opinions as recommended determinations which would be reviewed by the Commission.⁹⁷¹ Final rules issued in 1982 permitted ALJs to issue initial determinations on violation, for both summary determination and permanent relief, as well as termination of investigations, instead of issuing recommended determinations.⁹⁷² The amendments also made Commission review of those initial determinations discretionary, thus providing a procedural vehicle for selective review and modification of issues decided by the presiding ALJ. After a set period of time, if not reviewed, the initial determination would become the Commission's determination.⁹⁷³

Conformity with the Statute

Amendments to section 337 made by the Omnibus Trade and Competitiveness Act in 1988 (OTCA) and the Uruguay Round Agreements Act (URAA) in 1994 necessitated many conforming changes to the Commission's rules of practice and procedure. In both cases, amendments to

⁹⁶⁹ 40 Fed. Reg. 40173, 40174–183 (1975).

⁹⁷⁰ 46 Fed. Reg. 17526 and 17527 (1981).

⁹⁷¹ 47 Fed. Reg. 25134 (1982).

⁹⁷² *Ibid*; 48 Fed. Reg. 20225 (1983).

⁹⁷³ 47 Fed. Reg. 25134 (1982).

the rules required by the statutory changes were first issued as interim rules due to the immediate or nearly immediate effective dates of the OTCA and URAA, respectively. The Commission also noted in both cases “that interim regulations should not respond to anything more than the exigencies created by the new legislation.” The APA itself allowed for exceptions to notice and comment rule making under the circumstances presented, thus allowing for the adoption of interim rules.⁹⁷⁴

Selected Initiatives for Improving Section 337 Investigations

In 2011, the USITC issued final rules after comment to implement electronic filing of most documents with the Commission. The Commission anticipated both reducing costs and improving the “efficiency and effectiveness of the filing process,” the latter of which is evident from the smooth transition to the new filing methods.⁹⁷⁵

Also in 2011, the USITC issued final rules after comment to assist the Commission in identifying investigations requiring further development of public-interest issues and to improve information gathering on public interest “at each stage of the investigation.”⁹⁷⁶ The importance of the public interest had been highlighted by the 1974 Trade Act, and already was considered by the Commission in every section 337 investigation.⁹⁷⁷ The amended rules supplemented procedures to enable collection of more and better information to support that consideration.

In 2013, the Commission issued two sets of final rules after comment, making a large number of changes that were identified as procedural. The notice categorized these amendments as necessary technical, clerical, or harmonization changes.⁹⁷⁸ Amendments therein limiting certain discovery responded to some criticism of the Commission. Thus, in addition to the limits on Commission discovery inherent in the short time available to complete discovery, compared to district court, the Commission limited the number and type of depositions and capped the number of interrogatories, consistent with the limit already ordered by many ALJs.⁹⁷⁹ Additionally, the 2013 amendments further strengthened the Commission’s strong fact pleading requirements, which already exceeded district court notice pleading requirements, to require additional pleading for domestic industry and accused products.⁹⁸⁰

⁹⁷⁴ 53 Fed. Reg. 33044–5 (1988); 59 Fed. Reg. 32125 (1994).

⁹⁷⁵ 76 Fed. Reg. 61937 (2011).

⁹⁷⁶ 76 Fed. Reg. 64803 (2011).

⁹⁷⁷ Pub. L. No. 93-618, § 337(d), (e), and (f); S. Rep. No. 93-1298 (1974), 193, 197.

⁹⁷⁸ 78 Fed. Reg. 23474 (2013); 78 Fed. Reg. 29618 (2013).

⁹⁷⁹ 78 Fed. Reg. 23474, 23483–84 (2013). Interestingly, in 1984, the Commission “considered and rejected a formal quantitative limitation on interrogatories and depositions.” Noting that the ALJs often placed limits in practice, the Commission left the limit to the ALJs’ discretion (49 Fed. Reg. 46123, 46125 (1984)).

⁹⁸⁰ 78 Fed. Reg. 23474 (2013).

Lastly, no discussion of the rules would be complete without noting the ground rules published by individual ALJs. The ground rules are akin to local rules in district court and were put into use soon after ALJs started handling unfair import investigations. Together with the Commission’s procedural rules, the ALJs’ ground rules provide the parties with details and instructions regarding matters such as the handling of motions and the taking of discovery.⁹⁸¹ Ground rules not only provide guidance regarding the details of practice before each ALJ, they play an important role in expediting cases and in protecting against abuses of the discovery process.⁹⁸²

Key Issues in the Litigation of Section 337 Investigations

In the litigation of section 337 investigations, the “record in each investigation must be developed and analyzed in an objectively unbiased manner, and the resulting determinations must be well-reasoned, timely, and consistent with the law.”⁹⁸³ As previously discussed, section 337 itself, as well as the rules and internal organization associated with section 337 investigations, has undergone a number of changes over the years. However, since the provision’s enactment in 1922 as section 316, the core elements that must be proven to establish a violation of section 337 have remained the same: an importation, a domestic industry, and an unfair act (including a continued need to show injury to a domestic industry for investigations not based on federally registered IP identified in section 337). As section 337 is a trade remedy statute, both importation and domestic industry are critical elements of a violation. With limited—although important—exceptions, importation is rarely litigated.⁹⁸⁴ Domestic industry in particular has been strictly construed in recent years. Lastly, while patent infringement has long been recognized as an unfair act and continues to be the most prevalent unfair act asserted, the USITC accepts all generally recognizable forms of unfair competition as a basis for an investigation under section 337.

⁹⁸¹ USITC, *Section 337 Investigations: Frequently Asked Questions* (Washington, DC: USITC, 2009), 2, https://www.usitc.gov/intellectual_property/documents/337_faqs.pdf.

⁹⁸² For example, ALJs include ground rules requiring parties to propose a procedural schedule that is consistent with the Target Date set by the ALJ. *See, e.g., Certain Flash Memory Devices & Components Thereof*, Investigation No. 337-TA-1034, order no. 4 at 2–3 (February 6, 2017) (providing target date and hearing date; requesting parties submit procedural schedule addressing all other events set forth in Ground Rules); *see also Certain Liquid Crystal eWriters & Components Thereof*, Investigation No. 337-TA-1035, order no. 4 at 2–3 (February 2, 2017) (setting some procedural schedule dates & requesting that parties jointly propose dates for other events listed in the order). In addition, some ALJs require parties to submit statements addressing potential narrowing of the claims at issue, as well as the scope of discovery. *See, e.g., Certain Footwear Products*, Investigation No. 337-TA-936, order no. 2 at Attachment A (Joint Discovery Statement checklist) and Exhibit A (Discovery Statement Checklist) (November 17, 2014) (seeking proposed limitations to document production, interrogatories, depositions, etc.; requiring identification of dispositive issues that should be resolved early).

⁹⁸³ USITC, *Annual Performance Plan, FY 2016–2017 and Annual Performance Report, FY 2015*, 9, https://www.usitc.gov/documents/usitc_2016_2017_app_and_2015_apr.pdf.

⁹⁸⁴ Schaumberg, *A Lawyer’s Guide to Section 337 Investigations*, 2016, 47.

Importation

For the USITC to exercise its authority in a section 337 investigation, there must be evidence of an importation into the United States, a sale for importation into the United States, or a sale after importation into the United States of the accused article. Importation is considered both a jurisdictional and substantive requirement. The Federal Circuit has held that “the jurisdictional requirements of section 1337 mesh with the factual requirements necessary to prevail on the merits”; however, the Federal Circuit has held that even when elements of violation and jurisdiction intertwine, the USITC should assume jurisdiction and decide the case on the merits.⁹⁸⁵

The Commission has given a broad interpretation to the importation requirement holding, for example, that the importation of one article is sufficient for jurisdiction and there need not be a commercial sale—i.e., importation of a promotional sample is sufficient.⁹⁸⁶ Re-importation of an article made in the United States that was shipped abroad for further manufacturing or finishing constitutes an importation under section 337.⁹⁸⁷ Furthermore, a prior importation may support a finding of violation.⁹⁸⁸ As to sale for importation, which is intended to reach foreign manufacturers of imported products who may not be directly involved in the importation, a contract for sale of an accused article, as defined by the Uniform Commercial Code, intended for importation is sufficient, even absent an actual importation.⁹⁸⁹

⁹⁸⁵ *Amgen, Inc. v. U.S. Int’l Trade Comm’n*, 902 F.2d 1532, 1536 (Fed. Cir. 1990). The Federal Circuit affirmed this position in *Amgen, Inc. v. U.S. Int’l Trade Comm’n*, 519 F.3d 1343, 1350–1352 (Fed. Cir. 2008), but following a rehearing *en banc*, the Federal Circuit withdrew the section of the 2008 opinion discussing jurisdiction because the Court held that a decision on that issue was unnecessary based on the facts of the case (*Amgen, Inc. v. Int’l Trade Comm’n*, 565 F.3d 846, 853–854 (Fed. Cir. 2009)).

⁹⁸⁶ *Certain Trolley Wheel Assemblies*, Investigation No. 337-TA-161, USITC Publication 1605, Comm’n op. at 8 (November 1984).

⁹⁸⁷ *Certain Sputtered Carbon Coated Computer Disks & Prods. Containing Same, Including Disk Drives*, Investigation No. 337-TA-350, USITC Publication 2701, Comm’n op. at 9 (November 1993).

⁹⁸⁸ *Certain Rotary Printing Apparatus Using Heated Ink Composition, Components Thereof, & Systems Containing Said Apparatus & Components*, Investigation No. 337-TA-320, order no. 1 (January 14, 1991): “Neither importation nor sale during the pendency of the investigation is required to support a Section 337 violation, and discontinuance of an unfair practice is not an adequate defense.”

⁹⁸⁹ *Certain Variable Wind Speed Turbines*, Investigation No. 337-TA-376, initial determination, at 7–19 (June 20, 1996), *aff’d on appeal*; *Enercon GmbH v. U.S. Int’l Trade Comm’n*, 151 F.3d 1376, 1383 (Fed. Cir. 1998).

Domestic Industry

Another statutory requirement for section 337, as a trade remedy statute, in addition to importation, is whether the complainant can establish that a domestic industry exists or is in the process of being established. Prior to the 1988 amendment, this required evidence of significant domestic investments by the complainant and/or its licensees in manufacturing or manufacturing-related activities such as quality control, packaging, and service and repair.⁹⁹⁰ In general, these investments must be in plants or facilities, equipment, and employees. The USITC has never set forth the specific amount of investment required to show significance, but rather has made this determination on a case-by-case basis using a flexible, market-oriented approach.

For intellectual property (IP)-based investigations, the investments must relate to a domestic article that “practices” the asserted IP right. In other words, if the complainant is not making investments in the United States, and thus not exploiting or utilizing their IP right in the United States, section 337 will not provide a remedy for infringement of the IP right. After the Federal Circuit decision in *Schaper*, there was not a substantial amount of litigation related to the domestic industry requirement until the late 1980s and the enactment of the Omnibus Trade and Competitiveness Act of 1988.

The Omnibus Trade and Competitiveness Act of 1988 codified and delineated the domestic industry requirement for section 337 investigations based on infringement of certain federally registered IP rights. In addition to providing for a domestic industry based on manufacturing, Congress recognized that there could be an IP-based domestic industry demonstrated through the substantial exploitation in the United States of the IP right through engineering, research and development, or licensing.⁹⁹¹ As previously discussed, Congress noted that this provision would assist such innovators and owners of IP rights as startup companies and universities, who may not engage in manufacturing.⁹⁹² Since that time, much of the debate regarding domestic industry rule has focused on the requirements for demonstrating the substantial exploitation of an IP right.⁹⁹³

⁹⁹⁰ See, e.g., *Schaper Mfg. Co. v. Int’l Trade Comm’n*, 717 F.2d 1368, 1372 (Fed. Cir. 1983) (“The patent must be exploited by production in the United States”); see also *Certain Cube Puzzles*, Investigation No. 337-TA-112, Views of Chairman Eckes and Commissioner Haggart at 26–30 (December 30, 1982).

⁹⁹¹ Pub. L. No. 100-418, § 1342(a).

⁹⁹² S. Rep. No. 100-71 (1987), 129.

⁹⁹³ In response in part to the USITC decision in *Gremlins* finding that a domestic industry could not be based on licensing of an asserted IP right. In 1988, Congress added section 337(a)(3)(C), which provides that “substantial investment in [the asserted IP right’s] exploitation, including engineering, research and development, or licensing,” could be the basis for a domestic industry.

Following the enactment of the Omnibus Trade and Competitiveness Act of 1988, as the parameters of the domestic industry requirement were clarified, once again, challenges to domestic industry subsided somewhat for the next 20 years. The early years of the 21st century, however, presented questions about the business models of non-practicing entities (NPEs).⁹⁹⁴ The Commission recognized that “[n]o generally accepted definition of an NPE exists.”⁹⁹⁵ Therefore, for analytical purposes, the Commission uses the following categories:

Category 1 NPEs. Entities that do not manufacture products that practice the asserted patents, including inventors who may have done R&D or built prototypes but do not make a product covered by the asserted patents and therefore rely on licensing to meet the domestic industry requirement; research institutions, such as universities and laboratories, that do not make products covered by the patents, and therefore rely on licensing to meet the domestic industry requirement; start-ups that possess IP rights but do not yet manufacture products that practice the patent; and manufacturers whose own products do not practice the asserted patents. *Category 2 NPEs.* Entities that do not manufacture products that practice the asserted patents and whose business model primarily focuses on purchasing and asserting patents.⁹⁹⁶

Although the extent of the use of section 337 by Category 2 NPEs to obtain favorable licensing agreements has been debated, a number of important Commission opinions demonstrate strict scrutiny by the USITC to ensure that alleged domestic industries were closely examined and

⁹⁹⁴ See, e.g., “Abusive Patent Litigation: The Issues Impacting American Competitiveness and Job Creation at the International Trade Commission and Beyond,” hearing before the House Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet, April 16, 2013, <https://judiciary.house.gov/hearing/hearing-on-abusive-patent-litigation-the-issues-impacting-american-competitiveness-and-job-creation-at-the-international-trade-commission-and-beyond-0/> and https://judiciary.house.gov/files/hearings/printers/113th/113-24_80459.PDF. See also “International Trade Commission Patent Litigation,” hearing before the same subcommittee, <https://judiciary.house.gov/hearing/international-trade-commission-patent-litigation/> and https://judiciary.house.gov/wp-content/uploads/2016/04/114-67_99782.pdf; and https://www.usitc.gov/press_room/documents/featured_news/337facts.pdf.

⁹⁹⁵ USITC, *Section 337 Statistics: Number of Section 337 Investigations Brought by NPEs (Updated Quarterly)*, n.d., Accessed January 27, 2017,

https://www.usitc.gov/intellectual_property/337_statistics_number_section_337_investigations.htm.

⁹⁹⁶ *Ibid.*

specific requirements for establishing a licensing-based domestic industry were met.⁹⁹⁷ In 2011, the USITC addressed the statutory parameters for the types of investments that could constitute a licensing-based domestic industry under section 337(a)(3)(C). Questions had arisen as to what types of investment were relevant, i.e., whether expenditures on outside counsel, particularly for enforcement of the patent through litigation, were relevant or how to allocate expenditures made to license a portfolio rather than a specific patent.

In *Coaxial Cable Connectors*, the Commission found that “litigation activities (including patent infringement lawsuits) may satisfy these requirements if a complainant can prove that these activities are related to licensing and pertain to the patent at issue, and can document the associated costs.”⁹⁹⁸ In *Certain Multimedia Display & Navigation Devices*—the USITC’s opinion establishing a framework for evaluating investments related to a license portfolio—the Commission held as a threshold matter that in order to qualify as an investment in a licensing-based domestic industry, an alleged investment must (1) have a nexus to the exploitation of the asserted patent, (2) relate to licensing, and (3) occur in the United States.⁹⁹⁹ If the alleged investments met these parameters, the USITC would then consider whether the investments were substantial.¹⁰⁰⁰ Applying this analysis, the USITC found that the complainant had failed to establish a licensing-based domestic industry.

Another issue for a licensing-based domestic industry was whether the complainant had to satisfy the technical prong, i.e., whether there had to be an article that practices the patent. The USITC had long taken the position that there was no technical prong requirement for a licensing-based domestic industry. Consistent with the legislative history of the 1988 amendments, the Commission interprets the “its” in “substantial investment in its exploitation”

⁹⁹⁷ After the U.S. Supreme Court decision in *eBay Inc. v. MercExchange, LLC* (*eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006)), which held that to obtain a preliminary injunction in U.S. district court, a patent owner had to meet the standards for a preliminary injunction in non-patent cases, including a demonstration of irreparable harm, there was speculation that Category 2 NPEs would turn to the USITC as an alternative forum because Category 2 NPEs likely would not meet the District Court’s irreparable harm standard. The decision in *eBay* does not apply to issuance of relief in section 337 investigations because the USITC’s remedy is specific to imported goods: “Given the different statutory underpinnings for relief before the Commission in Section 337 actions and before the district courts in suits for patent infringement, this court holds that *eBay* does not apply to Commission remedy determinations under Section 337” (*Spansion, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1359 (Fed. Cir. 2010)). In addition, the ability to name multiple unrelated respondents in one investigation became important after Congress enacted the America Invents Act, which established stricter requirements for joinder in patent litigation in district court (Pub. L. No. 112-29, 125 Stat. 284, H.R. 1249 (September 16, 2011)). This requirement was also expected to cause an increase in filings by Category 2 NPEs. These fears appear not to have been realized. See, e.g., “USITC Section 337 Investigations—Facts and Trends Regarding Caseload and Parties, June 10, 2104 Update,” https://www.usitc.gov/press_room/documents/featured_news/337facts.pdf.

⁹⁹⁸ *Certain Coaxial Cable Connectors & Components Thereof & Prods. Containing Same*, Investigation No. 337-TA-650, Comm’n op. at 42–44 (April 14, 2010).

⁹⁹⁹ *Certain Multimedia Display & Navigation Devices & Sys., Components Thereof, & Prods. Containing Same*, Investigation No. 337-TA-694, Comm’n op. at 7–8 (August 8, 2011).

¹⁰⁰⁰ *Ibid.*, 8.

in 337(a)(3)(C) to refer to “the patent, copyright, trademark, mask work or design.”¹⁰⁰¹ Relying substantially on the legislative history, “[USITC] practice [had] been not to require a complainant to demonstrate for purposes of a licensing-based domestic industry the existence of protected articles practicing the asserted patents.”¹⁰⁰² However, in 2013, the Federal Circuit, in *InterDigital Commc’ns, LLC v. Int’l Trade Comm’n*, found to the contrary:

The “substantial investment in [the patent’s] exploitation, including engineering, research and development, or licensing” must be “with respect to the articles protected by the patent,” which means that the engineering, research and development, or licensing activities must pertain to products that are covered by the patent that is being asserted. Thus, just as the “plant or equipment” referred to in subparagraph (A) must exist with respect to articles protected by the patent, such as by producing protected goods, the research and development or licensing activities referred to in subparagraph (C) must also exist with respect to articles protected by the patent, such as by licensing protected products.¹⁰⁰³

Subsequently, the Commission in *Certain Computers and Computer Peripheral Devices & Components Thereof & Products Containing Same*, Investigation No. 337-TA-841, reversed the ALJ and terminated an investigation with a finding of no violation, holding that respondents “failed to demonstrate . . . that the domestic industry articles practice the asserted patents. The existence of articles is, in view of recent Federal Circuit authority, a requirement for demonstrating the existence of a domestic industry.”¹⁰⁰⁴

Since that time, many NPEs have failed in their efforts to litigate at the USITC, demonstrating that the Commission has, through its application of carefully crafted standards, denied relief to multiple complainants based on failure to establish the required domestic industry.

Although the evolution of the licensing-based domestic industry has proven to be the most controversial, other aspects of the domestic industry requirement have evolved as well. The USITC clarified the requirements for establishing a domestic industry based on research and development, providing not only that there must be a product that practices the asserted patent, but also that the complainant must demonstrate a nexus between the investments and

¹⁰⁰¹ *Certain Computers and Computer Peripheral Devices & Components Thereof & Products Containing Same*, Investigation No. 337-TA-841, Comm’n op. (public version) at 27 (January 9, 2014).

¹⁰⁰² *Ibid.*, 27–28.

¹⁰⁰³ *InterDigital Commc’ns, LLC v. Int’l Trade Comm’n*, 707 F.3d 1295 (Fed. Cir. 2013); see also *Microsoft Corp. v. Int’l Trade Comm’n*, 731 F.3d 1354 (Fed. Cir. 2013) (addressing the same question with respect to a domestic industry based on engineering research and development).

¹⁰⁰⁴ *Certain Computers and Computer Peripheral Devices & Components Thereof & Products Containing Same*, Investigation No. 337-TA-841, Comm’n op. (public version) at 44 (January 9, 2014).

the asserted patent.¹⁰⁰⁵ In other words, a complainant cannot rely solely on research and development investment in the product that practices the patent, unless it is a physical embodiment of the patent. For all types of domestic industry investment, the USITC clarified that investments need only be “with respect to articles protected by the patent”; the investments may relate to components specifically designed or intended for use as a part of the patented product.¹⁰⁰⁶ Additionally, in recent years, the USITC has inquired more deeply into the investments alleged to support a domestic industry: successful claims have required more evidence as to the nature of the alleged domestic industry activities and their significance to the domestic industry product.¹⁰⁰⁷

The existence of a domestic industry, or one in the process of being established, is an essential component of a section 337 violation and is central to section 337’s purpose as a trade remedy statute. As the U.S. economy has evolved, this requirement has evolved, recognizing different types of economic activity as demonstrating the existence of a domestic industry. Originally designed to protect the United States’ manufacturing base, section 337 now also protects the United States’ growing IP-based industries centered around such activities as research and development, engineering, or licensing. The USITC has recognized, however, that Congress did not define exploitation, but instead identified these activities as examples of exploitation, explaining “that by using the term ‘including’ and the conjunction ‘or,’” Congress indicated they are not exclusive, leaving open the possibility that other activities exploiting IP rights may provide a basis for a domestic industry.¹⁰⁰⁸ As the U.S. economy evolves, the domestic industry requirement of section 337 is likely to also evolve.

Unfair Acts

Patent Infringement

Most section 337 investigations involve unfair acts of infringement of IP specified in the statute, or “statutory IP”—that is, registered patents, copyrights, trademarks, semiconductor mask works, or boat hull designs. The vast majority of all complaints filed since 1974 have asserted claims of patent infringement, either alone or with other statutory IP claims.

¹⁰⁰⁵ *Certain Integrated Circuit Chips & Prods. Containing the Same*, Investigation No. 337-TA-859, Comm’n op. (August 22, 2014).

¹⁰⁰⁶ *Certain Beverage Brewing Capsules, Components Thereof, & Prods. Containing the Same*, Investigation No. 337-TA- 929, Comm’n op. at 82–83 (April 5, 2016).

¹⁰⁰⁷ *Certain Printing & Imaging Devices & Components Thereof*, Investigation No. 337-TA-690, Comm’n op. at 26 (February 17, 2011).

¹⁰⁰⁸ *Certain Coaxial Cable Connectors & Components Thereof & Prods. Containing Same*, Investigation No. 337-TA-650, Comm’n op. 45 (April 14, 2010).

The first complainant to allege that patent infringement was an unfair act under section 316 was the Bakelite Corporation in 1926.¹⁰⁰⁹ The Tariff Commission agreed, and held that importation and sale of articles that infringed U.S. patents, including articles made by a patented process, was, in fact, an unfair method of competition or unfair act under section 316, and proceeded to consider the validity of the patent.¹⁰¹⁰ On appeal, the CCPA affirmed the Commission's consideration of patent infringement as an unfair act, but held that addressing validity was beyond the Commission's duties.¹⁰¹¹ Subsequent cases established the boundaries of patent infringement under the statute.¹⁰¹² Ultimately, the scope of unfair methods of competition and unfair acts that the Commission could consider was established to be very broad. By 1955, after the CCPA heard its final appeal from the *Synthetic Star Sapphires and Synthetic Star Rubies* investigation, it was clear to the court that "the importation of articles may involve questions which differ materially from any arising in purely domestic competition, and it is evident from the language used that Congress intended to allow wide discretion in determining what practices are to be regarded as unfair."¹⁰¹³

As mentioned above, considerations beyond infringement initially were limited: "The validity of the patent or patents involved may not be questioned by the Tariff Commission nor by this court on appeal therefrom, but . . . a regularly issued patent must be considered valid unless and until a court of competent jurisdiction has held otherwise."¹⁰¹⁴ Section 337 is a trade statute, not a patent statute. The Commission now considers validity and enforceability defenses along with patent infringement, but these determinations are solely for the purpose of the section 337 investigation at issue and are not *res judicata*, nor do the determinations provide collateral estoppel in district court.¹⁰¹⁵

¹⁰⁰⁹ *Synthetic Phenolic Resin* (filed December 16, 1925, instituted April 16, 1926).

¹⁰¹⁰ *Ibid.*

¹⁰¹¹ *Frischer & Co., Inc., v. Bakelite Corporation*, 39 F.2d 247 (CCPA 1930), *cert. denied*, 282 U.S. 852 (1930).

¹⁰¹² See *In re Orion Co.*, 71 F.2d 458 (CCPA 1934) (applying section 337 to address articles that infringe patents); *In re Northern Pigment Co.*, 71 F.2d 447 (CCPA 1934) (applying section 337 to address articles made abroad using a patented process). The Commission's authority as to articles made abroad using a patented process was rescinded in 1935 in *In re Amtorg Trading Corporation*, which overturned *Northern Pigment* and held that there was no infringement because the patented process was not practiced in the United States (22 CCPA 558, 75 F.2d 826 (1935)). Shortly thereafter, however, legislation in 1940 specifically overruled *Amtorg* and affirmatively stated that importation of a product made abroad using a process covered by a U.S. patent is considered an unfair act (19 U.S.C. § 1337a).

¹⁰¹³ *In re Von Clemm*, 229 F.2d 441, 444 (CCPA 1955) (affirming Tariff Commission findings regarding patents with product and process claims).

¹⁰¹⁴ *Ibid.*, 444 (citing *Frischer & Co., Inc., v. Bakelite Corporation*, 39 F.2d 247 (CCPA 1930)); *In re Orion Co.*, 71 F.2d 458 (CCPA 1934); *In re Northern Pigment Co.*, 71 F.2d 447 (CCPA 1934).

¹⁰¹⁵ The Second Circuit has found that this is only true as to patent determinations. See *Union Mfg. Co. v. Han Baek Trading Co.*, 763 F.2d 42, 46 (2d Cir. 1985) ("ITC adjudications of unfair trade practice and trademark infringement causes of action are entitled to *res judicata* effect").

The prevalence of patent-based claims under section 337 demonstrates the central role of IP rights in U.S. trade in an increasingly interconnected world. For the first decade following the enactment of the Trade Act of 1974, when businesses increasingly availed themselves of section 337, low-tech items, such as tools and basic consumer products, constituted most of the articles involved in section 337 investigations. The rapid rise of the electronics, computer, and other high-tech industries in the late 1980s led to a change both in the products commonly involved in section 337 investigations¹⁰¹⁶ and in the number of average cases filed and instituted per year.¹⁰¹⁷ The rapid pace of investigations at the USITC makes the forum particularly attractive to high-tech industries, whose product “life cycle” in the market may last only a few months or years. From 2009 to 2013, the “smartphone wars” raged at the USITC, contributing to the record number of investigations instituted in FY 2011.¹⁰¹⁸ By early 2014, the disputes were largely resolved by a series of global settlements between the major players, and the complaints of several pending institutions were withdrawn as a result. In the years since the smartphone wars, the Commission has returned to a more historically consistent caseload and

¹⁰¹⁶ Schaumburg, *A Lawyer’s Guide to Section 337 Investigations*, 2016, 4–5.

¹⁰¹⁷ The substantial percentage increase in the Commission’s case load in 2010 and 2011 is generally attributed to several factors, including the smartphone wars, which included many retaliation countersuits; the Supreme Court’s 2006 decision in *eBay* (*eBay v. MercExchange*, 547 U.S. 388 (2006)), which made obtaining a permanent injunction for patent infringement in district court less certain; and the increase in the importance of IP to the economy generally.

¹⁰¹⁸ These disputes first reached the USITC when Nokia filed a complaint naming Apple as respondent and alleged infringement of seven patents (*Certain Electronic Devices, Including Mobile Phones, Portable Music Players, & Computers*, Investigation No. 337-TA-701, notice of institution, 75 Fed. Reg. 4583 (January 28, 2010)). In 2010, seven additional investigations were instituted based on complaints filed by Apple, HTC, Motorola, and Microsoft (*Certain Mobile Communications & Computer Devices & Components Thereof*, Investigation No. 337-TA-704 (Apple); *Certain Personal Data & Mobile Communications Devices & Related Software*, Investigation No. 337-TA-710 (Apple); *Certain Portable Electronic Devices & Related Software*, Investigation No. 337-TA-721 (HTC); *Certain Mobile Devices, Associated Software, & Components Thereof*, Investigation No. 337-TA-744 (Microsoft); *Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof*, Investigation No. 337-TA-745 (Motorola); *Certain Mobile Devices & Related Software*, Investigation No. 337-TA-750 (Apple); and *Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Investigation No. 337-TA-752 (Motorola)). Apple, Nokia, HTC, Samsung, and Microsoft filed additional complaints in 2011, including *Certain Handheld Electronic Computing Devices, Related Software, & Components Thereof*, Investigation No. 337 TA-769 (Microsoft); *Certain Electronic Devices, Including Mobile Phones, Mobile Tablets, Portable Music Players, & Computers, & Components Thereof*, Investigation No. 337-TA-771 (Nokia); *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music & Data Processing Devices, & Tablet Computers*, Investigation No. 337-TA-794 (Samsung); *Certain Electronic Digital Media Devices & Components Thereof*, Investigation No. 337-TA-796 (Apple); *Certain Portable Electronic Devices & Related Software*, Investigation No. 337-TA-797 (Apple); and *Certain Electronic Devices with Communication Capabilities, Components Thereof, & Related Software*, Investigation No. 337-TA-808 (HTC). Samsung, Motorola, and Nokia filed one complaint each in 2012: *Certain Electronic Devices, Including Mobile Phones and Tablet Computers, & Components Thereof*, Investigation No. 337 TA-847 (Nokia); *Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof*, Investigation No. 337-TA-856 (Motorola); and *Certain Wireless Communication Equipment & Articles Therein*, Investigation No. 337-TA-866 (Samsung). Complaints continued into 2013 (*Certain Portable Electronic Communications Devices, Including Mobile Phones & Components Thereof*, Investigation No. 337-TA-885 (Nokia)), when the President vetoed an order excluding Apple’s products, the first time such a veto had been issued in three decades.

remains an important forum for intellectual property rights holders in both low-tech and high-tech industries.

Trademark Infringement

Although an overwhelming majority of 337 investigations include allegations of patent infringement, the Commission has conducted investigations involving a variety of other causes of action. The most common of the non-patent statutory causes of action is infringement of federally registered trademarks. Trademark infringement was first asserted after passage of the 1974 Trade Act in Investigation No. 337-TA-22, instituted in early 1976.¹⁰¹⁹

The USITC analyzes trademark infringement under a two-pronged test: “first . . . whether [complainants’] mark merits protection, and second, whether [respondents’] use of a similar mark is likely to cause consumer confusion.”¹⁰²⁰ Federal registration is prima facie evidence of validity, ownership, and the exclusive right to use the mark.¹⁰²¹ The test for trademark infringement is whether the accused mark is “likely to cause confusion, or to cause mistake or to deceive.”¹⁰²²

Trademark infringement frequently is alleged in conjunction with patent infringement. In several recent investigations, however, it has been a stand-alone cause of action.¹⁰²³ Trademark investigations have allowed section 337 to reach a range of industries beyond the technology-related industries likely to seek remedies for patent infringement.¹⁰²⁴ Unsurprisingly, trademark investigations often involve other visual IP relating to the products at issue. Thus, many

¹⁰¹⁹ *Certain Reclosable Plastic Bags*, Investigation No. 337-TA-22, notice of institution (January 15, 1976).

¹⁰²⁰ *Certain Handbags, Luggage, Accessories & Packaging Thereof (Handbags)*, Investigation No. 337-TA-754, order no. 16 (initial determination) (public version) at 6 (March 13, 2012) (not reviewed) (quoting *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 115 (2d. Cir. 2006)).

¹⁰²¹ See 15 U.S.C. § 1057(b); see also *Handbags*, Investigation No. 337-TA-754, order no. 16 at 6.

¹⁰²² *Ibid.*, citing 15 U.S.C. § 1114(1); *Certain Digital Multimeters and Products with Multimeter Functionality*, Investigation No. 337-TA-588, initial determination at 11 (January 14, 2008).

¹⁰²³ See, e.g., *Handbags*, Investigation No. 337-TA-754, notice of investigation, 76 Fed. Reg. 24522 (May 2, 2011) (instituting investigation based on claims of infringement of 7 registered trademarks by 14 respondents); *Certain Laundry & Household Cleaning Products & Related Packaging*, Investigation No. 337-TA-891, notice of institution, 78 Fed. Reg. 53479 (August 29, 2013) (instituting investigation based on claims of infringement of 24 registered trademarks); *Certain Footwear Products*, Investigation No. 337-TA-936, notice of institution, 79 Fed. Reg. 68482 (November 17, 2014) (instituting investigation based on claims of infringement of 3 registered trademarks by 32 respondents).

¹⁰²⁴ For example, complainant Fabri-Kal sought exclusion of disposable food service products bearing its registered trademarks (*Certain Food Containers, Cups, Plates, Cutlery, & Related Items, & Packaging Thereof*, Investigation No. 337-TA-835, notice of institution, 77 Fed. Reg. 20846 (April 6, 2012) (terminated on basis of settlement agreements). In a landmark ruling for the fashion industry, the Commission issued a general exclusion order after finding a violation based on infringement of 5 of complainant Louis Vuitton’s registered trademarks (*Handbags*, Investigation No. 337-TA-754, Comm’n op. (Pub. Version) at 1-9 (June 13, 2012)). The ALJ similarly recommended a general exclusion order based on infringement of complainant Converse’s sneaker trademarks (*Certain Footwear Products*, Investigation No. 337-TA-936, Comm’n op. (public version) at 29–34 (July 7, 2016)).

complainants pursue trademark infringement claims in conjunction with trade dress, and design patents.¹⁰²⁵

Non-Statutory Intellectual Property Investigations

Unfair acts often concern non-federally registered IP and include, but are not limited to, common law trademark infringement, passing off, trade secret misappropriation, and false designation of origin.¹⁰²⁶ To prevail on a claim of a non-statutory unfair act, however, a complainant must also establish that the act, in either threat or actuality, destroys or substantially injures the domestic industry, or prevents the establishment of a domestic industry.¹⁰²⁷

Common law trademark infringement may be asserted as a non-statutory unfair act. The cause of action, however, requires an additional element beyond the elements in a claim involving a registered mark. For this cause of action, the complainant must first establish common law trademark rights. To do so, the alleged mark holder must demonstrate its right to use the mark; the mark's inherent distinctiveness or acquired secondary meaning; that the mark has not become generic; and that the mark is not functional. After the right is established, the complainant must also demonstrate a likelihood of confusion.¹⁰²⁸

Trademark owners may also face infringement of trade dress by their competitors. Historically, only a small number of complainants have sought relief for trade dress violations, but a few

¹⁰²⁵ See, e.g., *Certain Agricultural Vehicles & Components Thereof*, Investigation No. 337-TA-487, notice of investigation, 68 Fed. Reg. 7388 (February 13, 2003) (instituting investigation based on trademark infringement and dilution claims); *Certain Ink Markers & Packaging Thereof*, Investigation No. 337-TA 522, notice of institution, 69 Fed. Reg. 52029 (December 16, 2004) (instituting investigation based on infringement of two registered trademarks and trade dress); and *Certain Digital Multimeters, & Products with Multimeter Functionality (Multimeters)*, Investigation No. 337-TA-588, notice of institution, 71 Fed. Reg. 661940 (November 13, 2006) (instituting investigation based on infringement of a registered trademark and trade dress).

¹⁰²⁶ See *In re Von Clemm*, 229 F.2d 441, 443–444 (CCPA 1955): “Congress intended to allow [the Commission] wide discretion in determining what practices are to be regarded as unfair.”

¹⁰²⁷ This injury requirement previously applied to statutory IP investigations as well, but was removed in 1988 by the Omnibus Trade and Competitive Act. See 19 U.S.C. § 1337(a)(1); see also *Multimeters*, Investigation No. 337-TA-588, initial determination, at 16–17 (January 14, 2008) (discussing injury requirement as to trade dress).

¹⁰²⁸ See *Certain Endoscopic Probes for Use in Argon Plasma Coagulation Systems*, Investigation No. 337-TA-569, Order No. 20 (May 21, 2007).

recent investigations have included such claims.¹⁰²⁹ Other non-statutory causes of action pursued under section 337 include gray market trademark, passing or palming off, false advertising, and false designation of origin. Gray market goods are genuine, foreign-made goods that bear a foreign-affixed trademark that is the same as the mark that is registered in the United States, but are imported without authorization. In such situations, the broad reach of a general exclusion order makes the USITC an attractive forum for mark holders.¹⁰³⁰

Other less common non-statutory causes of action pursued under section 337 include passing or palming off, false advertising, and false designation of origin.¹⁰³¹ Passing off is a somewhat amorphous unfair act, as it has been applied to situations involving unauthorized substitution of one product for another, trademark infringement with an intent to defraud or confuse the buyer, or even non-fraudulent trademark infringement with a likelihood of confusion. At the USITC, however, passing off is used to describe intentional acts of deception: the “essential

¹⁰²⁹ See *Certain Food Waste Disposers & Components & Packaging Thereof*, inv. no. 337-TA-838, notice of institution, 77 Fed. Reg. 23751 (Apr. 20, 2012) (terminated by withdrawal of the complaint); *Certain Electric Skin Care Devices, Brushes, & Chargers Therefor, & Kits Containing Same*, inv. no. 337-TA-959, notice of institution, 80 Fed. Reg. 36576 (Jun. 25, 2015) (Commission review pending); *Certain Carbon Spine Board, Cervical Collar & Various Medical Training Manikin Devices, and Accompanying Product Catalogues, Product Inserts, Literature & Components Thereof*, inv. no. 337-TA-1008, 81 Fed. Reg. 41349 (June 4, 2016) (pending). See also *Certain Ink Markers*, inv. no. 337-TA-522, Comm’n op. (public version) at 1, 7–8 (Dec. 3, 2007) (issuing general exclusion order excluding “any ink markers or packaging that ‘bear’ the SHARPIE trademark or Sanford’s protected trade dress” and any marks or trade dress “confusingly similar thereto”).

¹⁰³⁰ For example, in *Certain Energy Drink Products*, complainant Red Bull sought relief against imports that violated its trademark and copyrights. The Commission found that numerous unspecified entities were producing and importing gray market energy drinks. The Commission noted that Red Bull had filed multiple cases in federal courts and had identified 250 suspected parties that were engaged in gray market activities across the United States. The Commission issued a general exclusion order—relief that Red Bull could not obtain from its multitude of district court actions, but needed in order to deal with the complaints and notifications Red Bull had received from consumer protection agencies and police enforcement (Investigation No. 337-TA-678, Comm’n op. on remedy, the public interest, and bonding (public version) (September 8, 2010)). Similarly, in *Certain Hydraulic Excavators*, complainant Caterpillar sought relief against the importation of gray market excavators that infringed its trademarks. A pattern of violation was shown by the identification of thousands of gray market excavators within the United States. Caterpillar proved that it could not establish the sources of these infringing products and that multiple foreign manufacturers were involved in the supply chain, resulting in the Commission issuing a general exclusion order prohibiting the importation of the infringing excavators (Investigation No. 337-TA-582, Comm’n op. (public version), at 2 (February 3, 2009)).

¹⁰³¹ These causes of action were pursued more frequently in the early 1980s than in the past decade. See, e.g., *Certain Hand-Operated, Gas-Operated Welding, Cutting & Heating Equipment & Component Parts*, Investigation No. 337-TA-132 (false designation of origin; passing or palming off) (1983); *Certain Vertical Milling Machines & Parts, Attachments & Accessories Thereto*, Investigation No. 337-TA-133 (passing or palming off; false advertising or unfair use of promotional/advertising material), USITC Publication 1512 (1984); *Certain Marine Hardware & Accessories*, Investigation No. 337-TA-136 (passing or palming off; false advertising or unfair use of promotional/advertising material; false representation of origin) (1983); *Certain Heavy-Duty Staple Gun Tackers*, Investigation No. 337-TA-137 (passing/palming off), USITC Publication 1506 (March 1984); *Certain Caulking Guns*, Investigation No. 337-TA-139 (passing or palming off; false advertising or unfair use of promotional/advertising material; false designation of origin), USITC Publication 1507 (1984); *Certain Copper-Clad Stainless Steel Cookware*, Investigation No. 337-TA-141 (false designation of origin, passing off/palming off, false advertising or unfair use of promotional/ advertising material) (1983).

component in a case of passing off lies in an act of deception, beyond mere copying.”¹⁰³² Complainants may also bring claims of false advertising, which concerns deceptive claims made by respondents about their own product, and is pled under section 43(a) of the Lanham Act.

Although only approximately 40 investigations have involved false advertising—most occurring before 1988—this cause of action has experienced a recent resurgence.¹⁰³³ Complainants have alleged false designation or representation of origin in fewer than 40 investigations.¹⁰³⁴

While trade secret claims constitute a relatively small proportion of section 337 investigations, “the Commission has long interpreted section 337 to apply to trade secret misappropriation.”¹⁰³⁵ In the 1979 investigation *Certain Apparatus for the Continuous Production of Copper Rod*,¹⁰³⁶ the Commission, citing relevant state law, explained that four elements must be proven to establish trade secret misappropriation:

- (1) the existence of a trade secret which is not in the public domain; (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.¹⁰³⁷

¹⁰³² *Certain Vacuum Bottles & Components Thereof*, Investigation No. 337-TA-108, Comm’n op. at 28 (November 1982).

¹⁰³³ See, e.g., *Certain Light Emitting Diode Products and Components Thereof*, Investigation No. 337-TA 947; See, e.g., *Certain Woven Textile Fabrics and Products Containing Same*, Investigation No. 337-TA 976, notice of institution, 80 Fed. Reg. 79094 (December 18, 2015); *Certain Automated Teller Machines & Point of Sale Devices & Associate Software Thereof*, Investigation No. 337-TA-958, notice of institution, 80 Fed. Reg. 32605 (June 9, 2015); *Certain Motorized Self-Balancing Vehicles*, Investigation No. 337-TA-1000, 81 Fed. Reg. 33548 (May 26, 2016).

¹⁰³⁴ A recent complaint alleges false designation of origin, along with other alleged unfair acts. See *Certain Carbon & Alloy Steel Products*, Investigation No. 337-TA-1002, notice of institution, 81 Fed. Reg. 35381 (June 2, 2016).

¹⁰³⁵ *TianRui Group Co. Ltd. v. Int’l Trade Comm’n*, 661 F.3d 1322, 1326 (Fed. Cir. 2011).

¹⁰³⁶ The first investigation involving trade secrets, instituted in 1977, was *Certain Dot Matrix Impact Printers*, Investigation No. 337-TA-32. However, because the investigation did not reach the hearing stage and no violation was found, the most frequently cited early trade secret investigation is *Certain Apparatus for the Continuous Production of Copper Rod*, Investigation No. 337-TA 52, 43 Fed. Reg. 21951 (May 22, 1978).

¹⁰³⁷ *Ibid.*, 38 (referencing the Restatement of the Law of Torts § 757 and Roger M. Milgrim, *Milgrim on Trade Secrets* (Albany: Bender, 1992), §7.07(1)).

Although in *TianRui*, the CAFC held that a “single federal standard,”¹⁰³⁸ rather than the trade secret law of any state, should be applied in Section 337 investigations, the Commission continues to use virtually the same language in opinions assessing misappropriation.¹⁰³⁹

Similarly, the definition of “trade secret” that is cited today originated from the Restatement of the Law of Torts § 757, comment b, and was noted over 30 years ago, in the 1984 investigation *Skinless Sausage Casings*:

Any formula, pattern, device or compilation of information which is used in one's [a person's] business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . . It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business.¹⁰⁴⁰

Furthermore, *Skinless Sausage Casings* frequently is cited for outlining the six factors relevant to determining whether a trade secret exists, and defining what matters are not eligible for trade secret protection (i.e., matters of general knowledge, matters disclosed in patents).¹⁰⁴¹

Perhaps the most significant investigation for trade secret owners seeking remedies for misappropriation at the USITC, and for the development of current USITC trade secret law, was *Cast Steel Railway Wheels*.¹⁰⁴² After the Commission found a violation of section 337 based on importation of railway wheels manufactured abroad using a trade secret manufacturing process, the respondent TianRui Group appealed to the Federal Circuit.¹⁰⁴³ TianRui argued that (1) the USITC lacked authority to apply domestic trade secret law to conduct in a foreign country, based on the presumption against extraterritorial application of U.S. law; and (2) the

¹⁰³⁸ *TianRui*, 661 F.3d at 1322.

¹⁰³⁹ See, e.g., *Rubber Resins*, Comm'n op. (public version) at 10 (February 26, 2014) (citing *Skinless Sausage Casings* and the Uniform Trade Secrets Act (UTSA), §1(4)). The elements in *Skinless Sausage Casings* are the same but for the addition of detail to element (1): the existence of a process that is protectable as a trade secret (e.g., that is (a) of economic value, (b) not generally known or readily ascertainable, and (c) that the complainant has taken reasonable precautions to maintain its secrecy).

¹⁰⁴⁰ *Rubber Resins*, Investigation No. 337-TA-849, initial determination (public version) at 30 (February 26, 2014) (citing *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Investigation No. 337-TA-148/169, USITC Publication 1624, initial determination (July 31, 1984)).

¹⁰⁴¹ *Ibid.*, 93–94.

¹⁰⁴² *Certain Cast Steel Railway Wheels, Processes for Manufacturing or Relating to Same and Certain Products Containing Same*, Investigation No. 337-TA-655, Comm'n op. (public version) (March 19, 2010). In the most recent appeal, of *Rubber Resins*, Investigation No. 337-TA-849, the Court simply affirmed the Commission under rule 36 (*Sino Legend (Zhangjiagang) Chemical Co. v. International Trade Comm'n*, case no. 14-1478 (Fed. Cir. December 11, 2015)). On May 3, 2016, the Federal Circuit denied petitions for rehearing and rehearing *en banc* of the *Sino Legend v. ITC* appeal. The Supreme Court denied *Sino Legend's* petition for writ of *certiorari* on January 9, 2017. *Sino Legend (Zhangjiagang) Chem. Co. Ltd. et al. v. Int'l Trade Comm'n et al.*, No. 16-428.

¹⁰⁴³ *TianRui*, 661 F.3d at 1322.

USITC erred in finding a domestic industry when complainant Amsted did not use the asserted trade secret manufacturing process in the United States. The Federal Circuit rejected these arguments and upheld the Commission.

TianRui's holdings include:

1. The USITC should apply a “single federal standard,” rather than the trade secret law of any state.
2. The presumption of extraterritoriality does not apply because section 337 addresses importation of articles, an inherently international transaction, and the USITC has authority not because of the foreign contact alone, but because of the importation of the goods that result in harm to a domestic industry.
3. There is no statutory requirement that the domestic industry *use* the asserted trade secrets: the fact that the imported wheels directly *competed* with the complainant’s domestically manufactured wheels was sufficient, in contrast to the “technical prong” requirement applicable in patent cases.¹⁰⁴⁴

Although only 45 investigations involving trade secret claims have been instituted since 1972, trade secret misappropriation is currently of heightened interest in the legal community,¹⁰⁴⁵ likely due to concerns about corporate espionage and cyber theft in the increasingly global economy.¹⁰⁴⁶ Because trade secrets do not have a clear expiration date like patents, the length of an exclusion order for misappropriation of trade secrets is a Commission determination based on the length of time it would have taken a respondent to engineer the process or product without the trade secret information.¹⁰⁴⁷

¹⁰⁴⁴ *Ibid.*, 1327.

¹⁰⁴⁵ The most recent complaint alleging trade secret misappropriation, *Certain Carbon & Alloy Steel Products*, was terminated on February 22, 2017 when U.S. Steel withdrew its trade secret allegations (*Certain Carbon & Alloy Steel Products*, Investigation No. 337-TA-1002, order no. 56 (February 22, 2017)).

¹⁰⁴⁶ Very few investigations have alleged trade secret misappropriation alone, and the most recent of such cases did not reach the hearing stage. See *Certain Robotic Toys & Components Thereof*, Investigation No. 337-TA-869, initial determination (corrected public version) at 2 (July 9, 2013) (unreviewed) (terminating investigation based on settlement agreement and consent order).

¹⁰⁴⁷ See, e.g., *Viscofan, S.A. v. U.S. Int’l Trade Comm’n*, 787 F.2d 544 (CAFC March 18, 1986); *Certain Electric Fireplaces, Components Thereof, Manuals for Same, Certain Processes for Manufacturing or Relating to Same & Certain Prods. Containing Same*, Investigation No. 337-TA-791/826 (Consolidated), Comm’n op. (public version) at 15–16 (May 29, 2013) (granting a 5-year limited exclusion order based on complexity of trade secret manufacturing process); *Crawler Cranes*, Investigation No. 337-TA-887, Comm’n op. (public version) at 70–74 (May 6, 2015) (granting a 10-year limited exclusion order and cease and desist order due to long development time for the trade secret information). Commissioner Schmidlein provided a lengthy dissent explaining why the appropriate duration of the remedies in *Crawler Cranes* should be 25 years. *Ibid.*, 72–73.

Recently, the Commission determined to review the initial determination in *Certain Crawler Cranes & Components*.¹⁰⁴⁸ Though the ALJ found misappropriation of only four trade secrets, the Commission determined to review all of the trade secret findings in the initial determination, and following the supplemental briefing, the Commission found that six of the asserted trade secrets were protectable and had been misappropriated.¹⁰⁴⁹ These secrets included embodiments of products, but also market plans, cost and pricing information, and manufacturing processes and procedures.¹⁰⁵⁰ Notably, the Commission considered, for the first time in several years, what business practices constitute reasonable efforts to protect trade secrets, what constitutes sufficient specificity to distinguish the trade secret from what is known in the industry, and what is protectable as a trade secret.¹⁰⁵¹

In 2016, President Obama signed the Defend Trade Secrets Act, the first law creating a federal cause of action for trade secret misappropriation.¹⁰⁵² The Act is largely similar to the Uniform Trade Secrets Act, which has been adopted by all but two states; however, the Defend Trade Secrets Act may require the Commission to redefine the “single federal standard” that has been in use since *TianRui* in 2011. Due to the increased digitization of confidential information, the U.S. Department of Defense has found that every year, “an amount of intellectual property larger than that contained in the Library of Congress is stolen from networks maintained by U.S. businesses, universities, and government departments and agencies.”¹⁰⁵³ As a trade agency that has determined that foreign trade secret misappropriation occurring entirely abroad is subject to its remedial powers, the USITC is uniquely positioned to provide remedies in cases of international trade secret misappropriation.

Conclusion

In the Commission’s first century, the importance of protecting domestic industries from unfair competition in import trade grew significantly. The USITC’s activities reflect its stated values: independence, objectivity, accuracy, transparency, and timeliness.¹⁰⁵⁴ The statutory mandate granting the Commission authority to investigate allegations of unfair competition has evolved in response to changes in the U.S. and global economies, and the USITC has adapted accordingly. The Commission’s statutory obligation to complete section 337 investigations at

¹⁰⁴⁸ Investigation No. 337-TA-887, notice of review, 79 Fed. Reg. 57566 (September 24, 2014); notice of the Commission’s determination to extend the target date; request for written submissions (December 3, 2014).

¹⁰⁴⁹ *Ibid.*, Comm’n op. (public version) at 35–67 (May 6, 2015).

¹⁰⁵⁰ *Ibid.*, 9–10.

¹⁰⁵¹ *Ibid.*, 38–41, 45–46, 48–51.

¹⁰⁵² Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (May 11, 2016).

¹⁰⁵³ Senate Judiciary Committee, *Report to Accompany S. 1890*, 114th Cong., 2d sess., S. Rep. No. 114-529 (April 26, 2016), 3.

¹⁰⁵⁴ USITC, *Strategic Plan, FY 2014–2018*, 5 (Washington, DC: USITC, 2014), https://www.usitc.gov/press_room/documents/usitc_2014-2018_strategicplan_final.pdf.

the earliest practicable time, combined with the remedies available, make the USITC an expeditious and effective forum for domestic industries seeking relief from infringing imports. Moreover, the Commission's role in "applying these laws to allegations of unfair trade has remained a mechanism on which U.S. firms can rely to compete effectively."¹⁰⁵⁵

In the coming years, the rapid pace of technological development will continue to pose challenges for U.S. IP rights holders facing infringement from imported articles, because changing technology can lead to swift product obsolescence. Congress has identified, among other goals, the following principal negotiating objectives regarding trade-related IP: (1) "to further promote adequate and effective protection of intellectual property rights"¹⁰⁵⁶ and (2) "to secure fair, equitable, and nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection."¹⁰⁵⁷ Through its administration of section 337 investigations, the Commission rigorously protects U.S. IP rights from unfair competition. As high-tech products pervade the global marketplace, the Commission's protection of IP rights in international trade through section 337 investigations remains central to the protection of U.S. economic and national security interests.

¹⁰⁵⁵ USITC, *Annual Performance Plan, FY 2016–2017*, 2016, 4, https://www.usitc.gov/documents/usitc_2016_2017_app_and_2015_apr.pdf.

¹⁰⁵⁶ Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26 § 102(b)(5), 129 Stat. 319, 114th Cong., 1st sess., June 29, 2015; 19 U.S.C. 4201.

¹⁰⁵⁷ *Ibid.*, § 2102(4)(B).

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Part V

Analysis

