

UNITED STATES INTERNATIONAL TRADE COMMISSION

**In the Matter of:
CELEBRATING A CENTENNIAL HISTORY
OF THE UNITED STATES INTERNATIONAL
TRADE COMMISSION**

REVISED AND CORRECTED

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1 Celebrating A Centennial
2 History of the United States
3 International Trade Commission

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5 The First in a Series of Panel Presentations on
6 The History and Development of Section
7 337 Practice at the ITC

8

9 Major Developments in Section 337 from 1922 to Today
10 An Overview, Milestones and Implications

11

12 Presented by the AIPLA ITC Committee and the ITC Trial Lawyers
13 Association

14

15 March 30, 2016 from 2:00 p.m. to 4:00 p.m.

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18 International Trade Commission

19 500 E Street SW

20 Washington D.C. 20436

21 Main Hearing Room

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1 Panelists:

2 David Foster, Wayne Herrington, Tom Schaumberg and Charles

3 Hill. Jim Altman will moderate.

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1 Speaker List

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3 Celebrating A Centennial History of the United States

4 International Trade Commission

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6 Jim Altman-Chair

7 Commissioner Meredith M. Broadbent

8 David Foster

9 Wayne Herrington

10 Charles Schill

11 Tom Schaumberg

12 Theodore Essex

13 Commissioner Irving A. Williamson

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1 CHAIRMAN BROADBENT: I'd like to welcome all of
2 you to the USITC building for your meeting. We appreciate
3 you doing this program and it's great to be included. We
4 are celebrating our 100 years of service anniversary. On
5 September 8th, we will have been in business for 100 years
6 and I know that you all have a keen interest in the history
7 of the Section 337 as practitioners who appear here.

8 We appreciate the professionalism legal prowess,
9 and the expertise in intellectual property law that members
10 of your bar associations exhibit in all of your appearances
11 before the Administrative Law Judges and the Commission on
12 these matters.

13 As part of the celebration of our Centennial, the
14 Commission plans to publish a book entitled, "The Centennial
15 History of the United States International Trade
16 Commission." The book is expected to contain chapters on
17 the creation of the agency in 1916, the evolution of the
18 agency as an institution, and the agency's areas of
19 responsibility including tariff activities, anti-dumping and
20 countervailing duty proceedings, safeguard investigations,
21 intellectual property related proceedings, and industry and
22 economic analysis provided to the legislative and executive
23 branches.

24 A distinguished group of contributors is
25 currently at work on preparing chapters for this book. The

1 group includes academics, practitioners, former
2 Congressional staff, former officials of the U.S. Trade
3 Representative, a few former Commissioners and Commission
4 staff.

5 We are also planning a day-long conference for
6 September 8th, 2016 to celebrate the day of our Centennial.
7 Chapter authors of the Centennial History and other
8 distinguished speakers will be invited to make presentations
9 and to provide comments regarding their experiences at the
10 Commission. So we are hoping that many of you will plan to
11 attend on September 8th.

12 As we have been working in preparation for the
13 Centennial, I have been fascinated to learn how the current
14 337 remedy emerged from a handful of cases in the 1920's and
15 '30's to become the potent tool that it is today in
16 combating unfair trade and unfair acts in international
17 trade, and in particular in the infringement of intellectual
18 property rights by imported goods.

19 As some of you may be aware the Tariff
20 Commission, as the ITC was previously known, is one of the
21 earliest examples of a Congressionally-created independent
22 fact-finding institution. It was established by the Revenue
23 Act of 1916 and it was born of the tug-of-war over high
24 tariffs between Republicans who at that time wanted the high
25 tariffs and Democrats who had some interest in consumer

1 interests.

2 And the idea was to have an independent
3 Commission that could bring objective independent analysis
4 to the table for this debate. The Tariff Commission was
5 created on September 8th, 1916 as I mentioned. It was
6 authorized to investigate conditions, causes and effects
7 relating to competition of foreign industries with those of
8 the United States including dumping.

9 And it is kind of interesting to see that one of
10 the sections of the law that set up the agency, Section 704
11 of the 1916 Revenue Act says, "The Commission shall have the
12 power to investigate the tariff relations between the United
13 States and foreign countries, commercial treaties,
14 preferential provisions, economic alliances, the effect of
15 export bounties and preferential transportation rates, the
16 volume of importations compared with domestic production and
17 consumption, and conditions, causes, and effects relating to
18 competition of foreign industries with those of the United
19 States, including dumping and the cost of production."

20 A few years later the Commission was asked by the
21 Ways and Means Committee to undertake a study on dumping,
22 unfair foreign competition in the United States and also the
23 Canadian anti-dumping law. The Commission delivered its
24 report in 1919 to the House Ways and Means Committee. The
25 study was based on questionnaires sent to 562

1 manufacturers, importers, exporters and other firms and
2 businessmen.

3 We received 281 responses, that's probably about
4 the same as our current response rate. 146 of these
5 responses complained of certain foreign unfair competition
6 including 23 that said the problems were dumping, 97 said
7 severe competition. People complained about deceptive
8 imitation and use of trademarks, that was 5 people. One
9 person complained about patent infringement, 7 people
10 complained about imitation of articles, 4 people complained
11 about deceptive labeling, and under-valuation was listed by
12 8 folks.

13 The report distinguished dumping from other
14 unfair acts and kind of made the point that there was a huge
15 hurdle in the law where you had this burden of proof to
16 establish that someone was dumping and they weren't dumping
17 unless you could establish the intent to injure or destroy
18 or prevent the establishment of an industry or to restrain
19 or monopolize trade or commerce in the United States. The
20 Commission made the point that this is difficult to prove
21 and in fact dumping could occur without such a direct
22 intent.

23 The Commission also recommended at that time
24 certain legislative changes, and told the Ways and Means
25 Committee that they ought to delegate authority to an

1 investigatory body such as the FTC. They didn't suggest
2 themselves. They thought someone else should be doing this.
3 But I guess the ITC got the authority later on. But the
4 report also instructed the President and Secretary of the
5 Treasury to impose additional duties and refuse entry for
6 certain violations.

7 Three years later Congress passed a law, Section
8 316, establishing a lot of these remedies that were
9 suggested in the report. The Senate Finance Committee
10 explained that the reason for the new authority was: "The
11 provision relating to unfair methods of competition in the
12 importation of goods is broad enough to prevent every type
13 and form of unfair practice and is therefore a more adequate
14 protection to American industry than any anti-dumping
15 statute the country has ever had." So that was sort of the
16 big establishment of a lot of the ITC's authority here in
17 this area.

18 Since then we have had a lot of other milestones
19 along the way: the Tariff Act of 1930; the 1974 amendments
20 which brought Section 337 into conforming with the
21 Administrative Procedures Act; and the 1988 amendments which
22 eliminated the injury requirement for intellectual property
23 cases. I am sure the panel today will have a lot of other
24 notable milestones that occurred as the statute evolved.

25 Along the way the Commission has addressed a lot

1 of unfair acts and a great variety of products as you know.
2 You know it is interesting to note that over the years the
3 Commission's activities have spanned the globe. We have had
4 offices in New York, we actually had an office in Brussels
5 very close to where all the tragic explosions were recently
6 and we continue to send delegations to Brussels regularly
7 for meetings of the World Customs Organization.

8 It takes a lot of stamina to work here. It took
9 more stamina to work for the ITC when we were housed in the
10 old Post Office Building, which was kind of a decaying
11 structure. There were a lot of problems there, like rat
12 infestations. There was one employee that was I think, on
13 an unauthorized basis, speaking on the record to the
14 Washington Times saying, "The squeamish cannot survive here
15 long" at the ITC because of the physical defects of the
16 building where we were being housed at that time. But I
17 have no doubt that there is some deeply ingrained strength
18 of character that has sustained us through a lot of these
19 surges in Section 337 cases that have been filed with the
20 agency since 2000 and now we continue to be pretty busy.

21 But we have come a long way and I think the panel
22 here will inform you on a lot of these things. There is a
23 lot of interesting history we are just starting to uncover.
24 We are anxious for good stories and those of you who have
25 been with us for many years I think will have a lot of

1 insights and examples of interesting and funny historical
2 incidents that have occurred over the years.

3 So with that I really appreciate the folks coming
4 here to give their presentations and I look forward to
5 hearing your comments. Thank you very much.

6 MR. ALTMAN: Thank you Chairman Broadbent. Let
7 me start just with a couple of quick things. One is a thank
8 you to the AIPLA ITC Committee and the ITC Trial Lawyers
9 Association and especially to the Commission for helping
10 with the logistics and making this possible.

11 We are doing another panel as most of you know on
12 May 11th as part of the ITC Trial Lawyers Association Spring
13 Meeting and it will sort of carry on from this panel. We
14 are hoping to do a third one that will focus a little bit
15 more on the perspective from outside practitioners, how the
16 practice has evolved over time.

17 We intend this to be fun, we hope, and informal.
18 If you have questions and there are not too many or too
19 disruptive, we can take them during the presentation.
20 Otherwise please save them to the end. I am going to
21 introduce our four panelists more or less in the order that
22 they are going to talk, then I am going to get out of the
23 way.

24 So Dave Foster is going to start. Dave is a
25 senior partner at Foster, Murphy, Altman and Nickel, which

1 some of you have heard of. He started working with Section
2 337 in 1974 while at the General Counsel's Office at the ITC
3 where he assisted in revising Section 337 into what I think
4 we would consider its modern form.

5 He also represented the ITC in working with
6 Congress to pass the Trade Act of 1974. He then chaired the
7 Commission drafting of the 337 implementing regulations and
8 assisted the Chairman of the ITC in presiding over 337 cases
9 as the Chairman's principal legal assistant. Hopefully
10 maybe we will hear a little bit about that.

11 He then served as International Trade Counsel for
12 the Senate Finance Committee where he oversaw the work of
13 the Commission in its early 337 days.

14 Wayne Herrington is the Assistant General Counsel
15 for Section 337 Litigation. He was actually at the General
16 Counsel's Office in the early 1970's when all of this
17 bubbled up and began his experience in those days. He left
18 to serve as a law clerk and technical advisor to Judge Rich
19 but on completion of his clerkship he returned to the
20 Commission and interestingly his first actual litigation
21 case, I understand, was the Schaper v. ITC case, which was
22 the Toy Trucks case in which Tom Schaumberg was on the other
23 side.

24 Tom began his career at the Federal Trade
25 Commission where he worked on merger cases under the Clayton

1 Act including, I understand, that you ended up in private
2 practice with an argument before the Supreme Court which
3 many people will be very jealous of but Tom has been very
4 active in Section 337 right from the start, was the first
5 President of the ITC Trial Lawyers Association and has been
6 involved ever since.

7 And Charles Schill is at Steptoe and Johnson.
8 Charles was hired by the General Counsel's Office in the
9 fall of 1975 to fill Wayne's shoes when he went to clerk at
10 the CCPA. He worked on both Title 7 and Section 337 cases
11 in the early days. He was staff counsel on Inv. 337-TA-3,
12 so I guess he missed the first two.

13 Charles then moved from the General Counsel's
14 Office to the Office of Legal Services. If you are not sure
15 what that was then you will have to ask Charles about it.
16 And he then participated in a number of the seminal cases
17 after that. So then I am just going to turn it over to the
18 panel.

19 Oh sorry, one final comment -- if you have
20 questions Bill Bishop has a microphone or we can use this
21 one but we want to get them on the transcribed record that
22 we will eventually be able to share so if you would let us
23 know, thanks.

24 MR. FOSTER: Thank you Jim and thank the
25 Commission for giving us the space and inviting us to do

1 this. It is a great pleasure for me. I look back now and I
2 realize I have been around for 43 of the 100 years that the
3 Commission has and it makes me shudder. But I have been
4 assigned the task of dealing with the 1922 Act and I think
5 Chairman Broadbent gave a very good overview of the
6 situation that existed at the time when this Tariff Act of
7 22 was enacted.

8 And the main purpose for 337 was the main genesis
9 for 337 was the 1919 report of the Tariff Commission. And
10 also the thought at the time in 1922 when they were working
11 what they call the flexible or scientific tariff which the
12 idea behind this was that the tariff would be set at a rate
13 that equalized cost of production between U.S. manufacturers
14 and the principal foreign manufacturers exporting to the
15 United States and that therefore was scientific and they
16 would look to the Commission to do the work to figure out
17 what is this cost of production, how could the tariff be
18 set.

19 But there was a concern about the unfair trade
20 practices that existed at the time. We were only two or
21 three years after World War I. In fact the Commission
22 opened its doors and 6 days later the U.S. entered World War
23 I so that shows you how close we were at the time to what
24 was going on.

25 And the concern was that if they didn't do

1 something about the unfair practices this could undermine
2 the scientific tariff -- this flexible tariff that they were
3 developing because people would get around the tariff
4 through unfair practices. Dumping was a big issue as the
5 Chairman mentioned the 1960 Dumping Act was largely a
6 failure because of the intent requirement. It really was a
7 criminal statute in terms of the intent and so one of the
8 recommendations of the Commission in the 1919 Act was that
9 we get an administrative procedure and that gave rise to the
10 21 Act which was subsequently amended I think the Commission
11 came into the picture in '54 with the Custom Simplification
12 Act where we first started doing at the Commission the
13 injury case.

14 But they also as was indicated recommended that
15 the FTC or another body be given a broader unfair practice
16 jurisdiction to deal with this issue and this concern that
17 if we didn't deal with the unfair practices we would be
18 undermining what was going on with respect to the scientific
19 tariff.

20 So the section that developed was Section 316 to
21 deal with these unfair practices. It was proposed by the
22 Senate Finance Committee to the House bill, the House
23 receded or accepted I should say in conference and I just
24 picked out a few sort of quotes to show you what some of the
25 thinking was behind it.

1 In the Senate report on the 22 Act it says with
2 respect to Section 316 -- Section 316 extends to import
3 trade practically the same prohibition against unfair
4 methods of competition which the Federal Trade Commission
5 Act provides against unfair methods of competition and
6 interstate trade.

7 Then the conferees in commenting on Section 316
8 said it makes unlawful, unfair methods of competition and
9 unfair acts and the importation of merchandise into the
10 United States which threatens the stability or existence of
11 American industries. Another quote, this is from Senate
12 Smoot the Act's primary sponsor in the Senate -- "Section
13 316 was to be an anti-dumping law with teeth in it, one
14 which will reach all forms of unfair competition and
15 importation."

16 MR. FOSTER: This section not only prohibits
17 dumping and the ordinary accepted meaning of that word --
18 that is the sale of merchandise in the United States for
19 less than its foreign market value or cost of production but
20 also bribery, espionage, misrepresentation of goods, full
21 line forces and other practices.

22 And finally in Fisher v. Bake Light which was the
23 sort of seminal case for the 22 Act and indeed the 30 Act
24 which denied the Supreme Court, the CCPA said, "One of the
25 express objects of the Tariff Act of 1922 as stated in its

1 title was to encourage the industries of the United States.
2 It was very obvious that it was the purpose of Section 316
3 to give it to the industries of the United States, not only
4 the benefit of the favorable laws and conditions to be found
5 in this country, but also to protect such industry from
6 being unfairly deprived of the advantage of the same and
7 permit them to grow and develop."

8 So that was sort of the sense behind the 22 Act.
9 Just as sort of a side -- it is sort of interesting when you
10 -- we look at today with the struggle that we have over what
11 the meaning of articles is and Section 337 and in looking
12 back at the legislative history of the 22 Act it is pretty
13 clear that the Committees and Congress was using the words
14 like goods, articles, merchandise and commodity
15 interchangeably and they obviously meant to give an
16 extremely broad reading to what was covered by Section 337.

17 Indeed in the Conference Report, the House in
18 accepting the Senate Amendment Section 336 and 316 made some
19 technical amendments where they changed the word merchandise
20 as it appeared in the Senate version of Section 316 at some
21 points and with also articles and other points they changed
22 it all to articles for uniformity.

23 So it is very clear that this was meant to be a
24 very broad, expansive law covering international trade and
25 unfair practices and international trade. One of the terms

1 of the law and I think as I go through this you will see
2 that you know -- 316 is the pre-cursor of Section 337 and
3 many of the terms that we use today in Section 337 are found
4 in Section 316.

5 What it was -- it said unfair acts and unfair
6 methods of competition and importation of articles into the
7 United States or in their sale, the effect or tendency which
8 is to destroy or substantially injure or prevent the
9 establishment of an industry efficiently and economically
10 operated in the U.S. or monopolize or restrain trade is
11 unlawful, that was the basic statement as to the
12 jurisdiction, the breadth of jurisdiction of the Commission.

13 Key point it said when found to exist by the
14 President not the Commission, but by the President he may
15 act in addition to any other provisions of law again the
16 same phrase we have in the statute now as provided in the
17 statute. The Tariff Commission was authorized to
18 investigate alleged violations under oath to assist the
19 President in making his determinations.

20 If you promulgate rules to conduct an
21 investigation it could -- it was to give notice and hearings
22 with opportunities to offer evidence both oral and written
23 as it being sufficient. The procedure used -- the
24 proceedings under Section 316 as they were under early
25 Section 337 were not due process type proceedings, they were

1 more what you would call legislative proceedings,
2 legislative hearings and proceedings.

3 There was a record to be made, testimony reduced
4 to writing, findings and recommendations made by the
5 Commission, findings if supported by evidence were
6 conclusive but appeal to the CCPA or the CCA at the time
7 Court of Custom's Appeals but later the CCPA only by the
8 importer or consignee and only on questions of law.

9 The CCPA judgment was final but subject to serve
10 to the Supreme Court. The President's options were under
11 the 16 Act to -- or under the 22 Act Section 316 was to
12 impose duties, a minimum of 10%, a maximum of 10% to offset
13 the unfair practice or in extreme cases of unfair acts or
14 methods to direct the exclusion of the good.

15 The decision of the President shall be
16 conclusive. TTO's were available, in those days the
17 Treasury did not have to provide for bonding but could
18 provide for bonding and the duty or exclusion order would
19 continue until the President finds and instructs that there
20 is no longer a basis for imposing it.

21 I wanted to spend a little time looking at what
22 the rules where that the Commission operated under with this
23 new authority. First of all it accepted applications for
24 proceedings in no particular form but under oath. The
25 Commission would investigate only if it determined that

1 there were good and sufficient reasons under law to
2 investigate. There was no required investigation.

3 They published the nature and scope of the
4 investigation. The issues the Commission decided to
5 investigate were not confined to the issues identified in
6 the application but they could be broadened, limited or
7 modified. This was truly a Commission investigation.

8 Persons with interest in the subject matter could
9 appear, hearings were public unless otherwise ordered. So
10 again you have the recognition of the confidential
11 information from the very beginning being an important
12 aspect of this law. Again written and oral testimony as the
13 Commission deemed necessary. The Commission had nationwide
14 subpoena power as is the case now.

15 The way it was conducted the proceedings were
16 actually conducted -- a Commissioner or an appointed
17 investigator would do the investigative work and then
18 prepare a report in written form for the full Commission.
19 Then a final hearing would -- after receipt of this report
20 the Commission, the entire Commission would get together and
21 hold a final hearing, some of which were quite extensive and
22 the Bake Light case the hearing went on for 8 days in front
23 of the full Commission.

24 Their report would be sent to the President and
25 the President would act as he deemed appropriate. Looking

1 at the cases that actually -- the activity if you will under
2 Section 216 there were 31 complaints filed or applications
3 filed in the period from 1922 to 1930 for the entire period
4 of Section 316 but in reading the annual reports of the
5 Commission it is also clear that there were numerous -- what
6 they describe as numerous communications also received --
7 and so it was a rather informal process at that point in the
8 Commission where people would approach the Commission,
9 describe a problem and the Commission would refer them to
10 other places or discourage them but a lot of informality in
11 how this process was conducted.

12 Those 31 applications that were actually received
13 we would now call complaints, 16 were dismissed without
14 prejudice, 3 were referred to the Treasury Department
15 because they essentially involved dumping that could be
16 handled under the 21 Act.

17 One was referred to the Department of State and I
18 have no idea what was involved in that one but they barely
19 persuade the people to go to the Department of State and
20 there were actually six investigations instituted under
21 Section 316. Docket Number 1 under Section 316 was the
22 Revolver case, it was Smith and Wesson approaching the
23 Commission, filed an application alleging passing off the
24 temporary relief was issued and this is very interesting --
25 the case, the application was received on the same day that

1 the application was received the President authorized
2 temporary relief of the exclusion of imports from the day of
3 the application.

4 Eventually a report went to the President and the
5 Commission or the President ordered what we would now call a
6 Final Exclusion Order in 1924.

7 Another case Sanitary Napkins, again passing off
8 this case was dismissed. A report prepared but dismissed.
9 Another case Briarwood Pipes -- sales below cost of
10 production -- that case was also dismissed. Again it is
11 showing the sort of informality -- Section 315 of the Tariff
12 Act of 1922 was a scientific tariff or flexible tariff
13 provision so in dismissing Briarwood Pipes the Commission
14 said, "Look we could do this investigation but you are
15 better off going under Section 315, because what you are
16 really talking about is a pricing issue and that can be
17 dealt with under the costs of production provisions and so
18 the applicant went and filed a 315 application and so it was
19 handled under that.

20 Synthetic phenolic resin or the Bake Light case
21 -- this was the case that took five months for the
22 Commission to decide to institute. The President did issue
23 a temporary relief after one year of investigation. This
24 remained in effect for at least through 1930 it was issued
25 in 1925 I think it was or 1926, remained in effect through

1 1930 through all of the appeal process that occurred with
2 respect to this case and eventually a Final Order was issued
3 in that case.

4 The fifth case was Manila Rope. The complaint
5 was filed in 1926, this was a misrepresentation case,
6 mislabeling case because the product coming in was labeled
7 as manila rope but actually included manila and hemp. Again
8 temporary relief was ordered and an exclusion order entered
9 in this case.

10 And the final case was the laminated products of
11 paper case an exclusion order issued in this case in 1927 so
12 six cases instituted in the 8 year period, 4 resulted in
13 relief, 2 were dismissed. So you can see again just in
14 conclusion the genesis of 337 is definitely in Section 316
15 of the Tariff Act of 22. Many of the terms that we use are
16 found there.

17 The interesting thing is in my view that it was a
18 much more if you will, relaxed process because it was
19 clearly a legislative process where the Commission was
20 operating as a fact-finder for the President. And indeed I
21 think this is why ultimately the Commission was selected to
22 be the entity that would deal with these unfair practices
23 and not the FTC, because the belief was that this was really
24 a trade issue and we set up the Commission to deal with
25 trade and be a fact finder and to be a neutral fact finder

1 that would be able to arrive at the correct factual
2 decisions based on an investigation.

3 And so they gave it to the Commission to do this
4 and this is the first entry of what later on is the
5 practice and probably the Commission know became a whole
6 range of activities of the Commission in helping enforce the
7 trade laws in the United States, dumping and countervailing
8 and 201 escape clause, all the other provisions. This was
9 sort of the genesis looking at the Commission as Congress
10 felt to be an arm of Congress providing help to Congress and
11 the executives in dealing with unfair trade practices. So
12 that's my presentation.

13 MR. HERRINGTON: Thank you Dave. I just want to
14 say I am very, very happy to be here participating in this
15 panel. I have known these panelists, these gentlemen not
16 just for years but for decades. We worked together --

17 MR. FOSTER: Wayne and I shared an office at the
18 Commission in 1973.

19 MR. HERRINGTON: Yes and that's a whole other
20 story, with a few other people we won't mention. So as I
21 said I am delighted to be here and participating in this
22 panel. I do have to say that my opinions or information
23 that I give are my own. They don't necessarily reflect the
24 views of the Commission or any other federal agency.

25 With that said my task is to go over the Tariff

1 Act of 1930, Section 337 of the Tariff Act of 1930. The
2 Tariff Act of 1930 began with an effort by President Hoover
3 to raise agricultural tariffs. That was sent up to the
4 Congress which decided that they were interested in a
5 wholesale revision of the tariff, and ultimately enacted
6 the highest tariff wall in United States history.

7 Well, the revision of the tariff also entailed
8 revision of Section 316. And Section 316 was re-enacted as
9 Section 337. The House version of Section 316 contained an
10 amendment, a single amendment which was actually suggested
11 to it by the Commission. It was the provision that deleted
12 the additional duties as a penalty.

13 There were a few other amendments that were
14 offered by the Senate and ultimately accepted by the House.
15 One of those was to remove Supreme Court review of CCPA
16 decisions involving the Commission and we will get back to
17 that a little later. There was also a provision that now
18 made mandatory entry under bond where the President had
19 reason to believe articles were violating Section 337. Dave
20 mentioned that in the 22 Act providing importation under
21 bond was discretionary with the Secretary of the Treasury.
22 After this amendment it was mandatory.

23 There was also an amendment which defined the
24 United States and defined it in such a way to include Puerto
25 Rico in the coverage of Section 337 and some other statutes

1 as well.

2 The Senate had a number of other amendments that
3 it proposed but those were not accepted by the House. So
4 that is how Section 337 came about originally. It was very
5 similar to Section 316 and the proceedings under it were
6 very similar to those under Section 316 and let me give you
7 an example of our rules as they existed in those days.

8 These were the first rules that the Commission
9 issued under Section 337. They start here, they go down
10 here and here and they end on this page about, 2 or 3 pages
11 worth of rules. That basically stayed the same during the
12 entire time up to the Trade Act of '74. Here are the last
13 rules that this agency issued under Section 337 before the
14 Trade Act of 1974. Part 203 and it only has 11 sub-parts.
15 It starts here and it ends here, almost nothing. The rules
16 were basically similar to the rules that were originally
17 enacted.

18 And I might add that the Commission's annual
19 reports are an absolute treasure trove of information. If
20 you are really interested in getting into the details of how
21 the Commission operated and what it did and what it's views
22 were at particular points in time, going through those
23 annual reports is a revelation. I mean I had no idea for
24 example that the Commission actually suggested the amendment
25 I just mentioned to you that the House adopted in Section

1 316. This was one of the benefits of participating in a
2 panel like this because you learn things that you didn't
3 know or you unlearn things that you did know that just
4 weren't true.

5 So, and I might add that if you want to get a
6 good idea of our procedure, how we really handled our
7 cases, of course look at our rules and read our reports but
8 there was an article by two gentlemen by the name of Kaye
9 and Plaia, they wrote an article called "The Tariff
10 Commission and Patents: Anatomy of a Section 337 Action,"
11 published in two parts in the Journal of the Patent Office
12 Society in 1973.

13 And it has got a lot of interesting information
14 as to the kind of procedure that we followed very similar to
15 the information that Dave just imparted to you. The
16 procedure didn't really change very much from the 22 Act and
17 the 30 Act and didn't really vary a whole lot during the 30
18 Act but as Dave said it was a very different kind of
19 procedure from the kind that we are used to today.

20 MR. HERRINGTON: And I see Tom you have got two
21 JPOS's there, are those the two? Okay -- all right, I
22 thought he might have actually brought the two articles with
23 him but they are very interesting and they are certainly
24 worth your time reading. And I will just go over -- Dave
25 mentioned what the procedure was I will just recapitulate

1 for a moment here without getting into any detail because it
2 really stayed the same, during the 1930's -- filing of a
3 complaint, Federal Register notice of a filing, preliminary
4 inquiry by the staff, report to the Commission, Commission
5 decision whether to start a full investigation and at the
6 same time whether a temporary exclusion order should be
7 issued.

8 If a full investigation is ordered there is
9 further information gathering by the staff and then a
10 hearing by the Commission followed by briefing and then the
11 Commission decides whether or not there has been a violation
12 of Section 337 and whether they should recommend exclusion.

13 And the way the appeals were set up in that day
14 as Dave mentioned was the same as under the 22 Act. Only
15 the importer or consignee only could take an appeal from a
16 finding of violation to the CCPA and the CCPA would rule
17 whatever way it ruled. If it turned out the Commission was
18 affirmed well then the report -- the Commission's report --
19 would be sent to the President and the President would then
20 decide whether or not he was going to issue relief or not.

21 The case load during the period -- and we are
22 talking 1930 through 1974, so 44 years -- at the beginning
23 there was a fair amount of activity in the '30's, up to
24 maybe 7 complaints would be filed in any one calendar year.
25 And then things fell off and they fell off dramatically.

1 They fell off so dramatically that during some parts of that
2 period the Commission annual reports don't even mention
3 Section 337, so there was no activity.

4 However, that all changed around 1970. The
5 number of complaints went up, they went up beyond the number
6 of complaints that had been filed during the 1930's
7 substantially and that is pointed out in the Kaye and Plaia
8 article. So my independent counting is actually borne out
9 by what they said.

10 Litigation -- as Dave mentioned the kind of
11 litigation we had, there wasn't -- first of all there wasn't
12 a whole lot of it. We didn't have a whole lot of cases and
13 therefore we weren't going to have a whole lot of appeals,
14 but we did have a few, four in particular, and the first two
15 that I want to talk about are In Re Orion and In Re
16 Northern Pigment Company. Those were both decided on the
17 same day in 1934 by the CCPA.

18 The CCPA always sat en banc, so it was the same
19 judges for each case. The Commission was affirmed in both
20 of those cases with one judge, Judge Hatfield not
21 participating, and another judge, Judge Garrett, specially
22 concurring, I think Judge Garrett had an issue with what
23 the CCPA had done in the Fischer case. He went along with
24 what they had decided but he didn't really seem to agree
25 with it.

1 There were four major points that we can get from
2 these cases and most of these points were points already
3 made In Re: Fischer. One Section 337 is not
4 unconstitutional for vagueness or as an unlawful delegation
5 of legislative power to the President.

6 Two -- unfair methods of competition and unfair
7 acts cover articles which infringe patents -- that's the
8 Orion case because all of those patents involved articles
9 or which are made abroad by a process patented in the United
10 States, that's Northern Pigment. There were two patents
11 there, one of them I think had nothing but process claims,
12 the other had both process and article claims.

13 Three -- neither the Commission's nor the court
14 would inquire into the validity of any patents asserted.

15 And four -- the Commission factual findings would
16 be conclusive if supported by substantial evidence which
17 seemed to be a pretty low standard the way it was actually
18 applied by the court. And I think Dave brought this out.
19 Well that was May 23, 1934. Well in February of 1935,
20 February 25th to be exact the very same court, the very same
21 judges (including Judge Hatfield) decided In Re Amtorg.
22 That case involved the importation of apatite made abroad
23 in Russia and processed abroad in accordance with the
24 process claimed in two U.S. patents.

25 The Commission, as was its practice and the law

1 that had developed and as was set out in Northern Pigment,
2 found a violation of Section 337 and recommended an
3 exclusion order. Amtorg appealed. The court decided it was
4 going to revisit its earlier decision in Northern Pigment
5 and did so.

6 And it found because courts had held that
7 manufacture abroad using a patented process was not patent
8 infringement it couldn't be an unfair method competition or
9 unfair act under Section 337 either. Judge Bland issued a
10 rather spirited dissent. He believed that they had missed
11 the whole point of Section 337 and that the terms were broad
12 enough to cover the importation of unpatented articles made
13 abroad by a process protected by a United States patent. He
14 thought that was an unfair method of competition within the
15 meaning of the statute.

16 Well, the Amtorg decision was not popular with
17 the Commission. It was not popular with American
18 manufacturers and it was not popular with the Congress. In
19 its 1935 annual report the Commission stated that the
20 situation created by Amtorg was one that required the
21 consideration of Congress and they had two solutions as
22 possibilities. One: amend the patent law; two -- amend
23 Section 337. Well, what the Congress did was to take the
24 second course by enacting an independent statute, Section
25 337 which referred to Section 337. This is now Section

1 337(a) (1)B2 although the language in the two provisions is
2 different for coverage and is the same.

3 So that took care of that problem and the next
4 litigation was In Re Von Clemm and this was a 3-2 affirmance
5 of Commission findings and recommendation regarding a
6 patent with article and process claims. The majority
7 opinion was written by Judge Worley. There were two judges
8 in dissent.

9 The majority relied on Northern Pigment --
10 remember the case that had been overruled in Amtorg but had
11 been revived by the 1940 Act -- for the proposition that
12 unfair methods of competition and unfair acts in the
13 importation of articles is "broad and inclusive and should
14 not be held to be limited to acts coming within the
15 technical definition of unfair methods of competition that
16 is applied in some decisions" and that "Congress intended to
17 allow wide discretion in determining what practices are to
18 be regarded as unfair."

19 And there were a few other things that I think
20 are worthy of note. The Van Clemm court held that there is
21 nothing in the statute which requires that an industry must
22 be of any particular size or that more than one company must
23 be involved before the protection provided by the statute
24 may be invoked. An argument had been made that the Linde
25 Company which was the domestic industry was just one

1 company so how could you have a domestic industry with one
2 company. Well the court took care of that. The court also
3 confirmed the holdings of Fischer Orion and Northern
4 Pigment that patent validity was not an issue in Section 337
5 cases, that asserted patents had to be considered valid
6 until a court of competent jurisdiction held otherwise and
7 also confirmed that Commission factual findings must be
8 accepted if supported by substantial evidence.

9 There was one more amendment to Section 337 prior
10 to the Trade Act of 1974 and that was a minor amendment in
11 the Trade Agreement Extension Act of 1958 which eliminated
12 the reference to the Commission making rules in Section
13 337(c). The reason why that was done was because there was
14 now a general provision introduced by the same legislation
15 which is now 19 U.S.C. 1335 giving the Commission rulemaking
16 authority.

17 And to close I am just going to make a couple of
18 remarks about the status of the Commission's reviewing court
19 -- the CCPA. The CCPA was the Commission's reviewing court
20 in Section 337 cases until the creation of the Federal
21 Circuit in 1982. There is no question that the Federal
22 Circuit is an Article 3 court but there were questions
23 raised about the status of the CCPA. In fact in 1929 the
24 Supreme Court declared the CCPA (then the CCA) to be an
25 Article 1 court in *Ex Parte Bakelite*.

1 But that is not the end of the story. In 1958
2 Congress enacted legislation providing for circuit judges
3 regional circuit judges, to sit on the CCPA and for CCPA
4 judges to sit on District and Circuit courts by designation.
5 Now Congress recognized there was a little problem because
6 it knew that the Supreme Court had held that the CCPA was an
7 Article 1 court.

8 So in that same legislation it declared the CCPA
9 to be an Article 3 court. It had previously declared the
10 Court of Claims to be an Article 3 court in 1953. Now a
11 short time later a criminal defendant -- a fellow by the
12 name of Benny Lurk was convicted in the United States
13 District Court for the District of Columbia after a trial
14 presided over by Judge Joseph Jackson, a retired CCPA judge
15 sitting by designation.

16 Lurk argued that his conviction should be
17 overturned because Judge Jackson was not a judge of an
18 Article 3 court. The case eventually made its way to the
19 Supreme Court where it was paired with a similar case
20 involving the Court of Claims. The Supreme Court ruled in
21 1962. Benny Lurk he was out of luck because the Supreme
22 Court found that both courts were Article 3 courts, not
23 merely because of the Congressional designation but because
24 also of their nature and their characteristics.

25 However, doubts were expressed as to whether the

1 CCPA could hear appeals under Section 337 because at that
2 time the Commission's findings of recommendations were still
3 subject of Presidential review even after CCPA review.
4 That question was never resolved but it is an interesting
5 coda to what happened in those cases.

6 And that is how Section 337 stood on the eve of
7 the enactment of the Trade Act of 1974, which in my view,
8 without a doubt, stands as the most important legislation
9 affecting Section 337.

10 MR. SCHILL: So I got to the Commission in the
11 fall of 1975 after the Trade Act of 1974 had already gone
12 into effect. At that time I was in the General Counsel's
13 Office along with the "General Counsel for Life" Russ
14 Shoemaker who was quite a legend. He had single-handedly
15 written the tariff schedules that we all know and love so
16 much.

17 At that time we were trying to figure out how to
18 begin these cases and run the cases that were already under
19 way. I was assigned to the Doxycycline case 337-TA-3, it had
20 already been filed prior to the Trade Act of '74 but was
21 carried over so it was going to be decided under the Trade
22 Act of '74 even though it had been filed prior to its
23 enactment.

24 At that time we followed the old system where
25 every case was assigned to a lawyer from the General

1 Counsel's Office, an economist, and a commodity specialist
2 from other parts of the Commission to run these
3 investigations. All three people usually and sometimes
4 there were more, would investigate the industry on their own
5 along with the parties in the case. We would look at the
6 economic and efficient operation of that domestic industry,
7 study the injury that was alleged to have occurred during
8 the course of the unfair act and also study the patents and
9 come up with our own view of what the patent validity and
10 infringement were.

11 But this team approach had certain benefits I
12 think that we don't see in the modern era of running 337
13 cases. It was interesting to get a whole picture of an
14 industry and how the patents fit in to the structure of that
15 industry and that sort of thing. It led to some really
16 good insights as well as visits to the sites where the
17 domestic industry existed.

18 So we got to visit a Chickory plant in New
19 Orleans, a copper rod making plant in South Carolina, all
20 kinds of interesting places and we had good people to hang
21 out with while doing your investigation. The 337 cases
22 went on that way for a couple of years until finally there
23 was a recognition that maybe the General Counsel's Office
24 shouldn't both be investigating and being an advocate in
25 these cases as a party and at the same time advising the

1 Commissioners on the cases as well and working with them on
2 their opinions.

3 So there was a move probably inspired by that
4 issue and partly inspired by internal dynamics at the
5 Commission where the Commissioners wanted to limit the
6 General Counsel's power. Taking people out of the General
7 Counsel's Office was seen as a good thing by some
8 Commissioners so that they created what was called then the
9 Office of Legal Services, I wound up going with that group
10 to investigate these cases and give up my role as a dumping
11 and countervailing lawyer.

12 The crew that handled 337 cases then started
13 trying to write more detailed rules on how to conduct the
14 cases. At first of course the Commissioners did everything,
15 they were the hearing officers so they actually heard the
16 cases as they were presented instead of hiring
17 administrative law judges.

18 I think the first administrative law judge that I
19 recall was Judge Rennock who came from another agency and I
20 forget which one -- was it FTC? The Commissioners handled
21 these cases, so they would sit as Presiding Officers to have
22 an evidentiary hearing. Part of the schedule also included
23 permanent hearings at the end of the case in front of all of
24 the Commissioner's where all of the parties got to come in
25 and argue about what the judge got right, what the judge got

1 wrong, how you wanted things changed, what the remedy should
2 be and the staff argued along with the other parties.

3 Over time that got to be old and perhaps too much
4 work for the Commissioners given the demands on their time.
5 Perhaps they just didn't see themselves in that role any
6 longer and they began to appreciate the idea of hiring
7 administrative law judges to handle the cases and issue the
8 rulings that they could then review.

9 Thinking back, one of the things that may have
10 inspired the Commission to get rid of final hearings was a
11 particular instance one of the more creative legal services
12 attorneys in making his final argument to the Commission
13 started off his argument with the song Your Lying Eyes,
14 since that was his view of one of the parties' presentations
15 to the Commission. That went over well and he continued
16 with his position at the Commission after that.

17 He was trying out different argumentative styles
18 I think at that point in his career. So it was one of the
19 things that Wayne mentioned that I am grateful to be at the
20 Commission that has always been one of the high points of my
21 career as well. We really enjoyed our life as Commission
22 attorneys in those days. There was a good group of people
23 in fact some of the significant international trade bar were
24 in the OLS at that time.

25 People like Jeff Lang who went on to Senate

1 Finance and USTR, Claude Gingrich who was counsel to the
2 House Ways and Means Committee later on, Rufus Yerksa who
3 was U.S.T.R.'s appointment to Geneva, Holm Kapler who was in
4 the Tariff section but eventually was in the World Customs
5 Organization and Jeff Meeks who became the Chief of Staff at
6 Customs.

7 All of these people were in various roles at the
8 Commission at that point in time. It was a real breeding
9 ground for the trade bar. We really enjoyed handling these
10 cases and I don't think I have enjoyed any cases as much
11 since that time. We had a lot of freedom from the
12 Commission, we had a good travel budget to go take
13 depositions all around the world, and we made a lot of new
14 law in those days.

15 I think Tom and I were both on the Copper Rod
16 case. I was still a staff attorney at that point and that
17 was my last significant case before I left the Commission at
18 the end of 1979. We had Judge Saxton as our ALJ and we had
19 an 18 week trial that took place not at the Commission
20 because it was taking up too much of their space for too
21 long a time, but in the Pension Building.

22 I received a lot of comp time for that
23 investigation.

24 Thinking back about the creation of the Section
25 337 rules, we were advised by Jeff Lang who had in different

1 organizations before joining the ITC that that probably the
2 best route to setting up the rules for the Commission would
3 be to write as few rules as possible because that gave the
4 Commission the maximum flexibility to do what they wanted.

5 In hindsight I think that was really good advice
6 that nobody took. We decided that we had to have a rule for
7 everything. Now the rules have proliferated even more. The
8 subject I was going to talk about is the 1988 amendments.

9 In the early 1980's and throughout the whole
10 period, there was a rising feeling in the United States that
11 something was going wrong with trade.

12 There was a lot of foreign investment especially
13 by Japan in the United States. I think some people felt
14 like Japan was trying to buy up America. They had bought a
15 lot of the trophy buildings in the U.S., a lot of other
16 industries, and Japanese companies were benefiting from all
17 of their innovations especially in the electronics areas.

18 That was one of the factors which led to the 1988
19 amendments. The second factor was the Corning case at the
20 ITC. It was based on a fiber optic invention against
21 Sumitomo, for infringement of Corning patents. Corning won
22 on the merits of the patent case, but the Commission found
23 no injury. That case went up to the federal circuit and
24 was affirmed and Corning certainly didn't like that.

25 There was a subsequent case by Textron. That of

1 a trademark case and the Commission found that there was no
2 trademark because they couldn't prove there was a valid
3 common law trademark.

4 The Commission also found that there was no
5 injury to the domestic industry. That case also went all
6 through the Federal Circuit and the Court sustained the
7 Commission. It found that the Commission was required to
8 make a finding on injury.

9 Then the third factor that contributed to the
10 amendments was a rise of the non-manufacturing economy in
11 the United States. There was a recognition that the U.S.
12 didn't make everything in brick and mortar factories
13 anymore, there was a lot of innovation going on and there
14 were a lot of other non-manufacturing ways that the United
15 States was developing its industries.

16 And all of these factors came together with, I am
17 sure, other factors to lead the Congress to decide to change
18 337 to eliminate the injury requirement. That and the
19 change in the definition of domestic industry were the two
20 of the most important factors in the '88 Act.

21 The Act eliminated the injury requirement for all
22 registered intellectual property cases, it shortened the
23 TEO period to 90 days. It clarified that the Cease and
24 Desist Order was in addition to or in lieu of an exclusion
25 order and provided that default proceedings could apply to

1 non-responding parties even up to the point of granting
2 general exclusion orders based on default proceedings.

3 Also, any party found in violation of Section 337
4 had the burden thereafter to prove that it was no longer in
5 violation in order to resume imports. This established that
6 the burden was on the respondent to prove that it was
7 entitled in the future to bring in its imports. The Act
8 also changed the confidential business information
9 procedures and other parts of the statute allowed the
10 issuance of consent orders as a basis for settlement
11 agreements and sanctions for abuse of discovery and abuse of
12 process. It also provided for the seizure and forfeiture of
13 products being imported in violation of an Exclusion Order
14 after the first attempt by a respondent to bring in unfairly
15 traded products that were subject to the Exclusion Order.

16 The other major change was the domestic industry
17 expansion. Previously, the Commission had always found that
18 a manufacturing industry in the United States was required
19 to prove a domestic industry. However, in the Stoves case,
20 which was about 1980, the company complainant made
21 wood-burning stoves in Norway, which were imported into the
22 United States. Thereafter, the complainant created a
23 warehousing operation where it assembled the stoves,
24 performed warranty work on them, and ran a sales and
25 servicing operation.

1 The staff argument presented in that case used
2 the terminology that any "systematic activity which
3 significantly employs the use of American land, labor and
4 capital for the creation of value" -- should be a domestic
5 industry. The staff formulated this argument to support
6 the idea that a complainant didn't have to be a domestic
7 manufacturer in order to use 337.

8 That argument was a creation from the fertile
9 mind of Don Dinan recently back from his Masters program at
10 the London School of Economics. That formulation of
11 domestic industry came to be included in the Commission's
12 thinking and thereafter in the statute as the first two
13 factors in the new domestic industry definition, i.e., the
14 significant investment in plant and equipment, and the
15 significant employment of labor and capital.

16 After the Stores case, there were several other
17 cases that dealt with the domestic industry issue. One was
18 All-terrain vehicles in which the ITC found no domestic
19 industry if there is only ownership or licensing of a
20 patent. In that case the complainant also did product
21 design, repackaging and advertising for the patented product
22 in the U.S., but these activities were not enough to find a
23 domestic industry.

24 Another case on Gremlin characters found that
25 mere licensing of an IP right is not a domestic industry.

1 Rather, the complainant has to have production related
2 activities.

3 Finally, one of my favorites and one of my
4 daughter's favorites, was Cabbage Patch dolls which I
5 worked after leaving the Commission. Several of our
6 clients' samples found their way home which was a lot
7 easier than standing in line for these rare commodities. In
8 this case, licensing was combined with some kind of domestic
9 production activity. Here the Commission found that the
10 test shifts to determine the value added by the domestic
11 production activities.

12 That series of cases led to the thinking that
13 framed the Commission and Congress' creation of the new
14 domestic industry definition and which added the third
15 factor; the "substantial investment in its exploitation,
16 including engineering, research and development or
17 licensing."

18 That's where I see the Trade Act of '88 coming
19 from and some of the ramifications of it. Some of the other
20 things that I was going to talk about was what Tom is going
21 to talk about next which is the GATT challenge to 337 and
22 how the statute survived that challenge hopefully for the
23 last time.

24 Tom and I both think that the GATT ruling was
25 incorrect and that 337 should have been found to be non-GATT

1 violative because it is covered by the "Grandfather Clause"
2 because it was in effect before the GATT went into effect in
3 1947 and was a necessary law for the protection of
4 intellectual property rights in the United States. This is
5 especially the case with the process patents. The only
6 provision in U.S. law that allowed for process patents to be
7 found infringed by imports made by a process which took
8 place abroad was through Section 337.

9 One other comment I have is on the growth of
10 cases during the time that I was at the ITC and afterwards.
11 There was a slow initial growth. To make Section 337 more
12 well known, there was a desire by the staff and others at
13 the Commission talk about the statute. We were invited to
14 speak all over the country, to bar groups and others, but
15 our travel costs were always paid for by the bar groups.

16 It was an interesting way to get the word out
17 that this law existed and was useful to U.S. businesses. I
18 noticed that cases fell off after the late '80's and into
19 the early '90's, I think because of the GATT challenge.
20 People were unsure of what was going to happen and whether
21 337 was still going to be around. Eventually of course,
22 after the Trade Act of '94 where we incorporated the
23 changes that were necessary to deal with the GATT ruling,
24 filings picked back up again.

25 MR. ESSEX: Charles I just have one quick

1 question about the Corning case going back. That was a law
2 firm and all of you know Chief Lawthorn was very detailed.

3 MR. SCHILL: Right.

4 MR. ESSEX: And Corning filed a case here and
5 spent the money on private attorneys while claiming they had
6 no plans to expand, that they were selling all they possibly
7 could, basically admitting they had no damages. And I never
8 understood if you had no damages why did you bring the case?
9 I have never been able to square that up and if you were
10 around at the time I would like to know if you can tell us
11 or give me some insight as to why you are not damaged, you
12 are not going to expand your production facilities, your
13 patent is going to run in 2 years, what the hell are you
14 doing here?

15 MR. SCHILL: I'm happy to answer that but David
16 has got something specific in mind.

17 MR. FOSTER: I was going to say -- in the front
18 row and I actually represented Corning in that case so I
19 could tell you exactly. It was a very interesting case. We
20 spent a huge amount of time going through every alleged lost
21 sale or price suppression that Corning made. We took
22 depositions literally probably 45 days-worth of total
23 depositions of both Corning and their customers that they
24 claimed they lost sales to and I think based on that
25 evidence and the fact that Judge Lawthorn's -- this was his

1 first significant case and the fact that he simply didn't
2 believe the expert who was a Harvard business school
3 professor that Corning brought down and he was terribly
4 prepared for the cross-examination.

5 He basically collapsed on cross-examination. I
6 think Judge Lawthorn was very convinced that there simply
7 was nothing there and he wrote a very detailed opinion and
8 the Commission looked at it very carefully and so I think it
9 was very much factually based. This was just one of those
10 cases where when you swept all away all the histrionics
11 there was simply nothing there and I think when it went up
12 to the CAFC and they looked at the record, they could find
13 nothing either.

14 But I think Corning's belief was and Sturge can
15 correct me was that the standard was so low at that time for
16 finding injury they just felt they could just come in and
17 throw a bunch of dirt up in the air and they would win and I
18 think that was the problem and of course what that led to
19 was Tim Reagan I think from Corning made it his life's work
20 for the next 4 years to have injury removed from the
21 statute, so.

22 MR. SCHAUMBERG: Oh sorry, thank you to the
23 Commission, thank you to Jim Altman for organizing this talk
24 about some of the history and you are getting the oldest
25 history from this group and I think it is going to get

1 younger as time goes forward.

2 I have sort of an ironic point to begin with and
3 that is Jim mentioned that I once worked in fact it was my
4 first job at the Federal Trade Commission. I believe that
5 organization was founded in 1914 so it's even a couple of
6 years older than the Tariff Commission now the ITC.

7 And I worked there for about 3 years and after
8 those 3 years I said to myself you know I don't want to
9 spend my entire career in one area of the law and so I left
10 trade regulation thinking I was going you know to be doing
11 lots of diverse things here in Washington, D.C.

12 Well I did for a few years. I was with a private
13 firm, we did business law and we did other kinds of
14 Washington oriented law. That was the time that I did have
15 the opportunity to take a Freedom of Information Act case to
16 the Supreme Court. It was one of the first. Then I was
17 playing tennis with a guy who was a friend of mine. I think
18 I was playing doubles even at that time and he said, "You
19 know Tom there's a guy you should meet" and I asked, "Why
20 should I meet this guy" and he said, "Well I think he does
21 stuff that you ought to be interested in."

22 I asked, "Why ought I to be interested in that?"
23 And he said, "Well I know what you did at the Federal Trade
24 Commission. I know you have an international background,
25 interest in things international," and this guy keeps

1 talking about stuff that really sounds kind of interesting
2 and I would like to introduce you to him.

3 Well of course I said yes I would love to meet
4 him. That was Paul Plaia and Paul's name was mentioned by
5 Wayne in connection with his series of articles and I will
6 get to that in just a moment. So I met Paul and he had just
7 left the Commission, he had opened his own office up in
8 Kensington, Maryland and I asked "What is it that you are
9 doing; and he described it to me.

10 I said wow, Morty is right this sounds really
11 interesting and it drew on or at least it evoked in me some
12 of the more interesting work I had done at the Federal Trade
13 Commission where we were also concerned about unfair methods
14 of competition, unfair practices and this had, in addition
15 to all of that, a nice international element to it.

16 Well the next thing that happened is we became
17 Plaia, Schaumberg and Taubman (the name of my tennis
18 friend). We formed a firm, and that was in 1978 and that
19 was the beginning of my involvement in Section 337. Hearing
20 Dave say that he has been doing it for 43 years and that
21 Wayne has been doing it for at least that long and Charles
22 even since 1975, I'm the youngster in this crowd. I did
23 want to say something about and this follows on what Wayne
24 was talking about. I was frankly not familiar with the two
25 articles that Wayne was talking about because they pre-dated

1 my involvement but I have always kept these very old
2 articles that were authored by Kaye and Plaia. They
3 appeared in the Journal of the Patent Office Society which
4 changed its name later to Journal of the Patent and
5 Trademark Office. If you ever want to read some
6 interesting materials in addition to the Commission's annual
7 reports, I commend these articles to you.

8 This is one that was from 1975, "Revitalization
9 of Unfair Trade Causes in the Importation of Goods." A
10 couple of years later Tariff Act Section 337 Revisited a
11 Review of Developments Since the Amendments of '75" and then
12 the third one I brought along is from 1979, "Developments in
13 Unfair Trade Practices in International Trade, a review of
14 the third and fourth years under Section 337 as amended by
15 the Trade Act of '74." I trust most of this is available
16 online and you don't need these old copies of these
17 magazines but they are great articles and they really give
18 you an insight into many of the things that we have heard
19 described.

20 In fact if my recollection is correct and it is a
21 recollection based on what I read not what I witnessed, I
22 believe Harvey Kaye is the person who testified before
23 Congress that it was okay to let all legal and equitable
24 defenses be raised in Section 337 even if they dealt with
25 issues of patent validity or even unenforceability because

1 after all, the decisions of the ITC would only count toward
2 a determination of whether or not there is a violation of
3 Section 337. They would not be *res judicata* in District
4 Court. That argument carried the day and helps explain how
5 we find ourselves today where we do.

6 Just a quick rundown the earliest case that I was
7 involved with which was number 40 called Monumental Wood
8 Windows, that was a 1978 case. Don Dinan who was already
9 mentioned and was very much present at the ITC for a number
10 of years was also a partner with the same group of guys that
11 some of us been partners with at one time or another and
12 just an old hand in Section 337 matters.

13 And Judge Duvall, and I don't mean to correct you
14 Charles, but I believe after Judge Renick whom I never knew,
15 who was the first ALJ that the Commission had, I believe the
16 next one was Judge Duvall. Jim Timony whom you mentioned
17 came, I think somewhat later because the case-load had
18 gotten so great they needed to import somebody, and he was
19 available from the FTC.

20 So that was my first case. Paul Plaia was of
21 course a well-known figure at the Commission. He was very
22 much involved and I have to say I learned much of what I
23 learned at that time from Paul because he was very
24 knowledgeable, very experienced and very good. He had been
25 in the General Counsel's Office -- I don't know was he in

1 the Office of Legal Services ever?

2 MR. FOSTER: No, he left in '73.

3 MR. SCHAUMBERG: There you go. The rest is
4 history as they say.

5 MR. FOSTER: I was actually hired to replace
6 Paul.

7 MR. SCHAUMBERG: Is that right? The next case
8 was number 43, Centrifugal Trash Pumps. You know I can't go
9 by a construction site even today without looking at the
10 materials being spewed out of those pumps because that was a
11 case I was involved with. The Commission attorney on that
12 one was one Lou Mastriani, so that's when I got to know Lou.

13 The next one is the case 337-TA-64, High Voltage
14 Circuit Interrupters. That was again a Judge Duvall case
15 with Lou Mastriani. It was 1979 and that was one of those
16 big cases of which we have seen many since. It was a case
17 brought by Westinghouse involving these high voltage towers
18 that move electricity around. Westinghouse went after a
19 number of very large companies, including Siemens, Braun
20 Boveri and others.

21 MR. HERRINGTON: Merlin Jennings, was that one?

22 MR. SCHAUMBERG: Maybe, in any event the
23 interesting part about the story to me at least is that some
24 of the lawyers who participated as parties or as counsel to
25 the various parties were guys like Doug Henderson and Brian

1 Brunswold from Finnegan, Tom McPeak, at that time with
2 Sughrue Mion, Bob Swecker of Burns Doane and, as I said,
3 this happened in the very late 1970's. But this was the
4 group who helped a few years later or actually decided a few
5 years later that it was time to have an association of
6 lawyers who had an interest in Section 337 and that's what
7 led to the ITC Trial Lawyers Association in 1984.

8 And I think you said something to that effect
9 also Charles. I think the comradery among the bar has
10 always been tremendously important. It doesn't matter which
11 side you are on, we have always stayed friends, we have
12 helped one another and I think we have advanced, as you were
13 also talking about, the story about Section 337 and the
14 value of the statute to U.S. industries, how to use it and
15 how to defend yourself should you become involved.

16 Charles invited me to talk about Aramid Fibers.
17 That was a 1984 investigation, roughly 10 years before the
18 1994 amendments. That was a hard fought case between DuPont
19 very well represented by Covington and Akzo that was
20 represented by Cahill Gordon.

21 I had the privilege of working with Cahill at the
22 time and this was a major case that took a long time. There
23 were several issues that went up to the Commission on
24 appeal, including a question of whether a foreign attorney
25 could be under a Protective Order. I remember the

1 gentleman in question who thought it was a matter of honor
2 that he could be trusted as well as any other or any
3 American barred attorney, if he gave his word that he would
4 only use the information that he might glean for purposes of
5 the case. But, of course, that was denied.

6 It went up on review and the ruling stood. Akzo
7 also tried to file a counterclaim against DuPont the sense
8 Barbara Murphy and I worked together on that matter. The
9 Akzo's view was if we are accused of infringing their
10 patents, why can't we counterclaim and say that they are
11 infringing ours.

12 Well it wasn't acceptable because there was no
13 provision in Section 337 to deal with the possibility of a
14 counterclaim, so that was rejected. To make a long story
15 short the case ended with DuPont winning. Akzo was not able
16 to establish its defenses. It went to the CAFC, but more
17 importantly Akzo and DuPont actually settled their
18 differences -- I can't even tell you the details because
19 that happened after the case left the ITC.

20 But in the meantime Akzo had gone to a higher
21 authority, in this case the EU, and complained bitterly
22 about the unfairness of the process that it had been a
23 party to in the ITC because it felt that the deck was
24 really stacked against it. It could not do what it felt it
25 would have been able to do had the case been in District

1 Court where Akzo could have had a counterclaim, where it
2 would not have been subject to the very constrained
3 timeframe of a Section 337 case, and where there would have
4 been different rules with respect to protective orders. As
5 I said, they took those questions, issues to the EU.

6 At that point in time -- this was in the early
7 '80's -- Section 337 cases were focused largely, although
8 not exclusively, on the European companies and somewhat on
9 Japanese.

10 So there was a view at the EU that the statute
11 was being used unfairly against European companies, and the
12 EU took up the case, filed a complaint with the GATT and
13 basically made the arguments on behalf of the EU because
14 Akzo itself was no longer involved. The GATT requires that
15 there not be discrimination against parties from various
16 countries, and it was viewed by the EU that what was going
17 on at the ITC was discriminatory and favored domestic
18 interests.

19 The GATT panel report was November 23rd, 1988.
20 It is an interesting document talking about the various
21 arguments that were made. They got submissions from Canada
22 and Japan, so it wasn't just from the EU. Of course, the
23 U.S. weighed in on the side of the ITC and the fairness of
24 the process. Nonetheless the panel finally ruled that
25 there was discrimination. The former time limit, one year

1 unless it was a so-called more complicated case when it
2 would be 18 months, was considered discriminatory and was
3 taken out of the statute in exchange for the language added
4 in 1994 "at the earliest practicable time."

5 Counter claims were not really introduced into
6 Section 337. You could file one but if you did it would be
7 moved to District Court. Simultaneous proceedings were
8 also complained about by Akzo and other respondents --you
9 could be named in District Court and the ITC at the same
10 time. The GAT found that to be discriminatory because,
11 almost by definition, domestic companies would not be
12 subjected to this double possibility of attack. That
13 resulted in 28 USC 1659 which allows the respondent to stay
14 the District Court proceedings pending the outcome of the
15 ITC investigation, all the way through appeal, which I think
16 is very important.

17 I got to hear some of this discussion first hand
18 and interestingly enough from the U.S. side. By then the
19 Akzo matter was behind us, I was no longer counsel to Akzo,
20 but I did care a whole lot about the preservation of Section
21 337 which was truly in jeopardy at the time. USTR, of
22 course, was very involved in the issue of what to do with
23 the GATT had found the statute to be contrary to its
24 provisions. There were those within USTR who said let's get
25 rid of Section 337.

1 The argument was that we have provisions in the
2 laws right now that would allow us to do the same thing in
3 District Court. If patent laws provide for injunctions,
4 they also provide for bans on importation, they also have
5 process patent provisions -- we don't really need the ITC.
6 At the end of the day that is of course not what happened.
7 There was a general counsel at USTR at the time, Ira Shapiro
8 who had a strong view about the value of having an
9 independent agency, much as Wayne described earlier, to deal
10 with these import issues.

11 And there were others certainly within USTR, the
12 Chamber of Commerce, I mean a lot of organizations who
13 finally got involved in the effort not just to amend Section
14 337 but to preserve it. And of course they did. I think,
15 truth be told, there were maybe only one or two senators who
16 took a real interest, along with their staff. I think I
17 remember Bill Reinsch as such a person, who at the time
18 worked for Senator John Rockefeller who took a real interest
19 in the questions that were being put out there for
20 consideration.

21 And he was very, very involved in helping to
22 craft the language that ultimately found its way into the
23 statute, some of which could have been better written but
24 nonetheless that's what keeps us all kind of busy. So that
25 was an interesting perspective for me, I never thought of

1 myself as a lobbyist but this was one foray that I had into
2 the legislative process and I learned a lot from that
3 experience going back in time, and it goes back to what Dave
4 mentioned before.

5 I don't want to exaggerate but I think it was
6 literally one individual, Tim Reagan, who got the ear of the
7 right people that helped make the '88 amendments what they
8 were. Similarly it was largely one important staffer in the
9 Senate in 1994 who had a lot to do with amending the
10 statute to what it is today.

11 I was trying to check who our Chief
12 Administrative Law Judges have been, and to the best of my
13 ability it was Judge Duvall from 1977 until 1984, Judge
14 Saxon from -- she was there from '78 until '95 and became
15 Chief Judge in 1984. Then Judge Lukern the longest serving
16 judge I believe started in 1984 until he retired in 2011 and
17 he was Chief Judge from 2008 until 2011. Unfortunately we
18 lost him soon thereafter. And Judge Bullock has been an
19 ALJ since 2002 and Chief Judge since 2011.

20 I also dredged up my ITC history folder with
21 hard copies because I get confused with electronics. There
22 was an article about that in the Washington Post this
23 morning that I commend to everybody's reading because
24 electronics are getting just too complicated for
25 everybody.

1 But, in any event, I went to this folder and I
2 found the names of all the Commissioners who became
3 Commissioners during the time that I kept this folder, all
4 the judges who became judges, and it is really an
5 interesting walk through the history, as well as the annual
6 reports would be, if you just take a look at who the
7 important people have been who have been Commissioners and
8 judges at the ITC.

9 And I will finish with one thought. So there I
10 was this -- I was going to say young I wasn't so young --
11 anti-trust lawyer, a trade regulation lawyer who found his
12 way into Section 337 and I read the statute. I'm sure
13 somewhere at that point I focused on the third part of the
14 statute that talks about restrained or monopolizing trade or
15 commerce in the United States.

16 And I thought, well, that sounds like an
17 anti-trust statute to me so back in 1982 I wrote this
18 article that appeared in the Anti-trust Bulletin, and it's
19 called "Section 337 of the Tariff Act of 1930 as an
20 Anti-trust Remedy." I'm here to tell you I don't think
21 anybody ever read it because it never happened, thank you.

22 MR. ALTMAN: I don't know Tom but maybe it's time
23 to re-publish.

24 MR. FOSTER: I've been on three anti-trust cases
25 at the Commission.

1 MR. ALTMAN: We have time for a few questions. I
2 am going to take the moderator's privilege and ask the first
3 question and that is that we sort of skipped a little bit
4 over the 1974 Act Dave or Wayne, do you want to talk for a
5 minute about where that came from and why?

6 MR. FOSTER: In '74 it was sort of a
7 metamorphosis for the Commission, especially in 337 and part
8 of it is the history of the time. The Senate Finance
9 Committee had rejected the anti-dumping international
10 agreement of '68 feeling the Administration had yet gotten
11 ahead of Congress on these issues. There was a lot of
12 distrust of the Administration, there was a belief that the
13 Administration was using our economic wherewithal or
14 geo-political issues that Secretary Kissinger was willing to
15 give away trade goodies in return for political favors.

16 And of course you had Watergate at the time. And
17 so it was a very interesting dynamic between the
18 Administration and the Congress at that point in time and
19 Congress really became of the belief that they needed to put
20 restraints on the executive and so if you read the Trade Act
21 of '74 you see more restraints on the President's ability to
22 do things in international trade than ever had appeared in
23 law before.

24 And one of the areas they looked at was Section
25 337 and up until that time the President had had the

1 authority to make a decision as to whether there was an
2 unfair practice and what should be done about it so what
3 Congress decided was we will take that authority from the
4 President and we will give it to the Commission. We will
5 make the Commission the deciding authority but we will also
6 make it a due process-type proceeding so that it is a
7 proceeding that actually will result in an order that
8 subject to appeal but when it is entered and becomes
9 effective it is a good, solid order based on the law and the
10 facts and so that was largely what occurred in the '74
11 amendment.

12 We became an administrative procedures act
13 proceeding, the Commission had the authority, they had to
14 listen to all equitable defenses. We looked at invalidity
15 for the first time but as Tom was saying in the context of
16 Section 337 without collateral estoppel or raised judicata
17 effect.

18 And so these were very important changes that
19 were made and it really moved 337 into the modern era of a
20 trade law which was ultimately I think accepted by the
21 courts as being a very strong alternative to a District
22 Court action to the point where courts now pay a lot of
23 attention to what Administrative Law Judges say in Section
24 337 cases. They give a lot of deference to the Commission
25 because they know that the process has moved from what prior

1 to '74 was sort of a loosey - goosey legislative type
2 proceeding where the President hardly ever did anything to a
3 situation where okay this is true alternative litigation
4 done in a rigorous fashion and so that really moved Section
5 337 into a whole new era.

6 And I just have one quick question. Charles was
7 talking about where did the Administrative Law Judges come
8 from and as Charles mentioned when the Act became effective
9 January 1, '75 the Commissioners decided well we can be
10 presiding officers let's try this so the Commissioners sort
11 of divided up the cases and I was working in Bill Leonard's
12 office at the time as his legal assistant and so Bill and I
13 got assigned the Labushka Coffee from Angola, an anti-trust
14 matter that had been filed.

15 And so we held our first preliminary conference
16 and we had Provast, and Covington, Lord Day and Lord
17 Sullivan, all of these lawyers come down from the you know
18 very impressive guys, the leading anti-trust bar and they
19 show up and neither Bill or I we didn't know a darn thing
20 about anti-trust law. We were sitting there as presiding
21 officer and he is looking at me and I am looking at him and
22 so we hold a preliminary hearing and it became very apparent
23 to the lawyers that they were dealing with a group that
24 didn't know what the hell they were doing you know and so
25 they settled the case within a month and Bill and I were

1 never more relieved to have a settlement.

2 But that also said you know this is not a good
3 experiment we need to get lawyers, regular judges in here
4 and so that's what -- those sort of experiences I think
5 moved the Commission to say okay let's -- we have to be more
6 rigorous about it. We can't do this. We don't know what we
7 are doing, we don't have the time let's get some judges in
8 here, let's set up this procedure so that it is a true
9 quasi-judicial proceeding in front of Administrative agency.
10 So that's really I think -- well there were a few
11 Commissioners that were convinced they could do it.

12 COMMISSIONER WILLIAMSON: Where did Judge Leonard
13 come from?

14 MR. FOSTER: He came from West Virginia and with
15 the Social Security Administration and he was our first
16 Administrative Law Judge. Irving Williamson, Commissioner?

17 COMMISSIONER WILLIAMSON: I want to follow-up on
18 that. Where did you look for your models for -- and the
19 reason why I am raising the question is I know Jeff Langman,
20 he was an aviation lawyer back in '73 for the Commission. I
21 was in aviation law at the State Department in '78-'79 and
22 there they had already had a separate staff, they split the
23 staffs and they had administrative law judges and I guess
24 the FTC probably had the same thing.

25 So I was wondering to what extent what these

1 other agencies were doing had any influence on the decisions
2 that were made at the Commission regarding ALJ's and setting
3 up the OUYI the way it is now?

4 MR. FOSTER: From my experience it had a great
5 deal to do with it. We were looking at other examples. We
6 knew that ultimately to make it work there needed to be a
7 separation of functions within the Commission that the
8 General Counsel's Office could not sort of institute the
9 case and prosecute the case and then be advising the
10 Commission that under the Administrative Procedure Act that
11 would be a fatal flaw in the whole system.

12 So we needed to have a separation of function so
13 we began looking around to see what were other agencies
14 doing and many of them did have a core dedicated staff that
15 handled the investigations, were separate from the General
16 Counsel's office, so we wrote into the rules basically you
17 know no ex-party contacts and so that we did very much look
18 at those sort of things to figure out how to set it up and
19 how to make it work.

20 COMMISSIONER WILLIAMSON: Because I have been
21 wondering about that for years. And that period was the
22 heyday of the CAB when COM was de-regulating, really the
23 world.

24 MR. ALTMAN: Anyone else? Alright well thank you
25 to the panel very much, we appreciate it.

1 (Whereupon at 4:03 p.m., the meeting was
2 adjourned.)

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