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Commentary

"IMPAIRING U.S. TRADE THROUGH U.S. TRADE LAW"

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A central purpose of modern U.S. trade law is to prevent unfair foreign competition -- be it in the realm of closed markets, government subsidies, dumping, monopolistic practices, infringement of intellectual property, etc. -- from weakening the vitality of the American economy. Since at least the Trade Act of 1934, the intent of American lawmakers in formulating U.S. trade law has generally been to strengthen the American economy through a legal framework that encourages competition, innovation and trade. [n1]

As a watchdog of our country's competitiveness, the former United States Trade Representative Carla Hills stated before the United States Senate Committee on Finance:

". . . for the denial of adequate and effective protection of intellectual property rights is not only harmful to the economic interests of the United States, but such denial also undermines the creativity, investment and invention that are essential to the economic and technological growth of all countries" [n2]

Unfortunately, efforts are now being made to use U.S. trade law in such a way as to weaken the American economy. Not only is it being used by domestic interests to undermine competitive U.S. forces, but the greatest irony is that soon it may be used by foreign interests to constrain American competition -- the very opposite of the law's intent.

*170 A prime example of the abuse of U.S. trade law can be found in current efforts to reverse the intent of Section 337 of the Tariff Act of 1930, which is supposed to strengthen American competitiveness by providing U.S. manufacturers with intellectual property protection against infringing foreign imports. Instead, some parties have been attempting to use Section 337 to weaken the competitive strength of the U.S. manufacturing base.

This article will review the historical background of Section 337, analyze its appropriate uses and survey current efforts to undermine its original purpose. It will also explore the possibility of reform to ensure that Section 337 conforms to its original goal of preventing unfair foreign trade practices from harming a productive American economy.

Legislative History

Section 337

"Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337) makes unlawful any unfair methods of competition or unfair acts, such as patent infringement, in the importation of articles 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." [n3]

Section 337 and its predecessor, Section 316 of the Tariff Act of 1922 (42 Stat. 943), were originally designed "to cover a broad range of acts not yet then covered by other unfair import laws." [n4] Over time, the scope of Section 337 was narrowed so that it only dealt with imports infringing U.S. intellectual property rights; other unfair trading practices were addressed by different statutes.

The intent of this statute, as interpreted in case precedents, was to protect American industry from illegal foreign competition. The goal was to enable American manufacturers to flourish by disallowing imports that cause injury to U.S. industry by competing unfairly, especially through infringing U.S. patents, copyrights and trademarks. [n5]

*171 1974 Amendments

To facilitate the use of Section 337 by American manufacturers against foreign imports causing injury, Congress amended the statute in the Trade Act of 1974. Before this amendment, Section 337 had rarely been used. Section 337 was originally administered by the U.S. Tariff Commission (USTC), a nonpartisan, fact-finding agency for trade matters created by Congress in 1916 and placed under the authority of the President. The USTC looked into complaints filed by U.S. industries against unfair or damaging imports resulting from practices such as foreign dumping, foreign government export subsidies or foreign infringement of intellectual property. Only in a fraction of the cases the USTC investigated did it recommend relief for import-affected industries. [n6]

The 1974 Trade Act renamed the USTC to United States International Trade Commission (ITC). It also lengthened the term of its six members, who are appointed by the President with the advice and consent of the Senate, from six to nine years. [n7] Four amendments in the 1974 Trade Act strengthened the authority of the Commission, which made the Commission easier and more effective to use in behalf of Section 337.

First, the Act shortened the decision-making process of the Commission. In intellectual property cases under Section 337, the ITC was now required to render its final decision within 12 months, or 18 months in cases containing complex issues. This offered injured

parties the possibility of quick relief. [n8] Second, ITC decisions to offer relief from infringing imports changed from mere recommendations to the President to final decisions, subject to Presidential veto only when he determined that "provision of such relief is not in the national economic interest of the United States." [n9] Third, the available remedies were expanded beyond an exclusion order to bar the importation of infringing products to include a cease and desist order to deal with domestic distributors of previously imported infringing products. [n10] Finally, the ITC hearing was professionalized through the Administration Procedure Act (5 U.S.C., Sec. 556), which required a type of trial before a federal *172 administrative law judge (ALJ) who would render a written decision, including findings of fact and rulings of law. [n11]

1988 Amendments

The latest amendments to Section 337 are part of the Omnibus Trade and Competitiveness Act of 1988. [n12] As was the case with the 1974 amendments, the purpose of the 1988 amendments was to make Section 337 not only easier to use, but also to make it a more effective instrument to protect U.S. intellectual property rights against the growing number of infringing imports that are causing serious financial losses to American companies. [n13]

Perhaps the most important amendment was the elimination of the injury requirement for certain types of intellectual property, e.g., patents, copyrights, registered trademarks and maskworks. Prior to this change, Section 337 declared unlawful

"unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale . . ., 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. . . ." [n14]

All that was now needed to prosecute a case before the ITC was proof of infringement of a valid intellectual property right; proof of injury to a domestic industry was no longer necessary.

A second amendment removed the requirement that the domestic industry be "efficiently and economically operated." This requirement had constituted a large portion of the costs of litigation before the ITC and had discouraged companies from seeking relief through Section 337.[n15]

It was still necessary to demonstrate that a domestic industry exists or is in the process of being established. A third amendment clarified *173 for the first time the definition of what constitutes a U.S. industry for Section 337. It was to be based on the following three indices:

1) significant investment in plant and equipment in the U.S.;

2) significant employment of labor and capital in the U.S.; or

3) substantial investment in the exploitation of the intellectual property right, including engineering, research and development or licensing in the U.S.

Further clarification of legislators' intent regarding the concept of domestic industry can be found in the Report of the House Committee on Ways and Means on this legislation:

"This definition does not require actual production of the article in the United States if it can be demonstrated that significant investment and activities of the type enumerated are taking place in the United States. Marketing and sales in the United States alone would not, however, be sufficient to meet the test. . . . [With this definition, the intent of Congress is] to protect from infringement those holders of U.S. intellectual property rights who are engaged in activities genuinely designed to exploit their intellectual property within a reasonable period of time." [n16]

Appropriate Uses of Section 337

The evolution of Section 337 has given the ITC authority that differentiates it from the U.S. court system. As an administrative tribunal appointed by the President, it has, of course, always been independent of the judicial branch. However, its character has increasingly been shaped by the growing need for expedited procedures, as seen in the 1974 and 1988 Trade Acts.

Compared to the two to three years it usually takes a Federal District Court to decide on an intellectual property case, the ITC must decide a case within 12 months after the filing of a petition. [n17] Such quick decisions are only possible through streamlined processes. For example, the ITC imposes strict limits on the discovery period, which lasts about five months, in contrast with an unrestricted period for gathering relevant *174 information for trial at a District Court (subject to the judge's discretion). [n18]

The rules governing procedure and evidence are also different. In District Court, the defense may file counterclaims and raise additional relevant intellectual property issues. [n19] At the ITC, the respondent has no such recourse. Other defenses available in District Court, such as the hearsay rule, are not strictly applied at the ITC.

The duration of the hearing at the ITC, usually less than one to two weeks, is also much less than at a District Court. And, finally, while the defendant in District Court may have recourse to a jury trial, an ITC case is an administrative hearing before an ALJ alone.

The shortcuts in due process taken by the ITC are justified by the need for quick action under special circumstances where a District Court would not suffice to protect a domestic industry.

One such circumstance is based on the inability of a District Court to gain personal, or in personam jurisdiction over the defendant. In order for a District Court to begin a

proceeding, the defendant has to be identified and he must have adequate "contacts" with the domestic forum. In many cases of foreign infringement of intellectual property, these jurisdictional requirements cannot be met. An example might be an importer of fake brand-name jeans who simply attaches false labels to inferior products before bringing them into the United States. With low overhead, he might be able to move from country to country, constantly changing the company's name to avoid identification and altering the location of importation and sales to avoid ongoing contacts with a given district.

Another special circumstance is encountered when a damage award cannot be enforced against a defendant because he does not have sufficient assets within reach of a District Court to satisfy the judgment. This is clearly the case with foreign infringers of U.S. intellectual property who only employ minimal resources in the U.S. to import and sell foreign-manufactured products. Such an instance might be a foreign company that makes pharmaceuticals outside the U.S. according to a recipe stolen from a U.S. firm and imports them into the U.S. in small quantities with low stockpiles.

*175 A third exceptional condition is associated with short life-cycle products. In the case of foreign infringement of short life-cycle products, a District Court is inadequate because substantial -- possibly irreparable -- damage may be inflicted upon the U.S. industry before a decision is reached and remedies applied. A classic example of such a short life-cycle product is the semiconductor. In the semiconductor industry,

"the life cycle of each product generation is short (often less than five years) and overlaps with the life cycles of prior and succeeding generations. . . . The development of 'future generations' is an ongoing (and increasingly expensive) activity in which a producer must engage if it is to remain in the business of producing that product. Most U.S. producers must rely on revenues from sales of current generation products to fund development of future generations. It is essential, therefore, that cost recovery in competing generations not be interrupted or limited by sales of unfairly traded infringing imports if multi-generational R&D investments are to be feasible. Where import infringement is allowed to depress prices and supplant sales, not only are current revenues immediately impacted [sic], but the multi-generational R&D process is interrupted and the producer is less and less capable of making the transition to the succeeding product generation. If the producer lags too far behind its competitors in introducing the succeeding product generation, its customers will defect and it will be forced out of business." [n20]

The Semiconductor Industry Association (SIA) argues that situations involving short life-cycle products exacerbate

"the jurisdictional, timing and enforcement difficulties that necessitate expedited relief in import cases generally . . . . Section 337's expedited procedures serve to compensate for these disadvantages and help to ensure the continuing ability of U.S. short life cycle product producers to participate in the market." [n21]

In sum, recourse to the ITC, with its expedited procedures and special remedies -- especially its ability to block all imports of an infringing product -- can be justified only in special circumstances where the Federal District Courts are not effective, owing to

factors such as the inability to gain personal jurisdiction, the inability to enforce a decision and slow relief relative to the product life cycle.

If these special obstacles connected with foreign infringement do not exist, then the court system, with its full due process rights, should be the vehicle by which to seek redress. As the SIA puts it --

*176 "In the case of domestic infringement where there are no similar barriers to obtaining effective jurisdiction and enforcement, the procedures for relief in a district court are acceptable and no special circumstances warrant special treatment." [n22]

The Abuse of Section 337

The expedited procedures and broad relief provided by the ITC have made Section 337 a powerful weapon to use against intellectualproperty infringement. Employed properly, it can help maintain the competitiveness of U.S. industries threatened by theft of valuable resources -- knowledge -- that could not be protected through the courts. Employed improperly, it could be used to stifle innovation and growth offered by smaller American companies in order to line the coffers of corporate empires -- both American and foreign -- with monopolistic aspirations. Unfortunately, current practice is moving in the direction of the latter.

Potential Danger

Various aspects of Section 337 lend themselves to abuse by larger companies that are more interested in halting competition than in protecting and building on their investments. For example, a complainant may file two cases -- one at the ITC and one in District Court -- on the same issue against the same defendant simultaneously. Based on the discussion above, if a case can be filed with the District Court, it should suffice. Increasingly, however, large companies are pursuing simultaneous filings in order to drain the resources of their smaller competitors or to intimidate them into paying exorbitant royalties.

Second, because the ITC has no res judicata effect -- that is, it does not result in a permanent ruling on the validity of an intellectual property claim -- a company can file a petition with the ITC repeatedly for the same claim against different products of the same defendant or against different defendants, even if the claim is declared invalid by the ITC for a particular case. Needless to say, this permits endless harassment by larger companies seeking to extort royalties from defendants with less resources. Finally, the 1988 amendment eliminating the requirement to show injury to a U.S. industry has made it easier for complainants to file frivolous petitions.

Reality Hits

The potential for abuse of Section 337 has turned into reality in the semiconductor industry as large companies have started turning to *177 intellectual property warfare in the late 1980s and 1990s. From the invention of the transistor in 1947 until the mid-1980s, intellectual property was licensed liberally at marginal fees in order to spread technology and markets. Companies also engaged in extensive cross-licensing as a defense mechanism to enable themselves to continue to do business in unfettered fashion. Cross-licensing was a necessity in the semiconductor industry because the plethora of overlapping patents essentially enable any one company to shut everybody else down.

In the late 1980s, some of the larger companies, perhaps worried by increasing international competition, began to depart from this standard way of doing business and instead sought to use their intellectual property as a weapon to halt their competitors or to extract large sums of money from them. Much of this activity has found its way into the courts, for example with the successive Intel and Advanced Micro Devices (AMD) engagement in incessant battles over microprocessor patents and copyrights and Motorola and Hitachi also fighting over microprocessor rights, among others. [n23] This new adversarial stance has also begun to invade the ITC, with grave consequences. [n24] Leading the charge to use the ITC as a tool in an extortion racket is Texas Instruments (TI).

The TI Threat

TI has taken the hostile approach to intellectual property to the extreme: it uses its intellectual property rights as a weapon to extract profits at the expense of other companies rather than as a means to protect its technology investments so as to grow in the marketplace. Over *178 the past three to four years, TI's legal department has been its only consistent profit-making center. [n25]

To stay afloat, TI has attempted to obtain significant fees -- an order of magnitude higher than royalty rates typical in the industry -- through its patent portfolio. It also sought to use the ITC against foreign companies (Korean and Japanese) that were not forthcoming. [n26] It subsequently pursued a similar strategy against American companies when it filed patent infringement suits simultaneously in Federal District Court and with the ITC. These suits were filed in 1990 against Analog Devices, Cypress Semiconductor, Integrated Device Technology, LSI Logic and VLSI Technology over the issue of alleged infringement of a TI patent on a certain process used to encapsulate microchips in plastic. [n27] It clearly appeared to the defendants, who were from one-tenth to one-fifth the size of TI, that TI was trying to intimidate them into paying royalties with the threat of the excessive costs of defending themselves in two legal forums and the possibility of continuing harassment through repeated filings. Nevertheless, they stood their ground by sharing the legal efforts and expenses.

TI's decision in this case to seek relief through the ITC had finally turned Section 337 on its head, perverting its original intent. Specifically, none of the special circumstances justifying the ITC's expedited procedures existed in this case. First, although the

defendants were performing the encapsulation offshore, as did TI (often with the same vendors) they are all American companies with headquarters in the U.S. Personal jurisdiction could easily be obtained, and was obtained for the District Court cases. Second, they all manufacture in the U.S. and have significant assets against which a judgment could be enforced. Third, the patent in question covered not a product with a short life cycle, but a manufacturing process that was almost 30 years old.

*179 The SIA, of which TI is a member, had submitted its position on Section 337 to the USTR in March 1990, containing its three conditions justifying the use of the ITC; four months later TI turned to the ITC in the absence of all of these conditions. Clearly, TI was using the ITC in this instance as just another weapon to harass smaller companies rather than as the only available means to preserve its technology investments.

TI not only contradicted the rationale for seeking expedited procedures through the ITC, but it also perverted the ultimate purpose of Section 337: the encouragement of economic growth, innovation and competition. The language of Section 337 from the outset through its various amendments is very concerned with the preservation of a competitive domestic industry. It sought to outlaw foreign infringement that (before 1988) was injuring a U.S. industry or was preventing its establishment. It opposed restraint of trade and favored (until 1988) efficiently and economically operated U.S. industries.

Section 337 also specifies an obligation on the part of the intellectual property rights holder, namely, he must significantly invest in manufacturing or R&D activities in the U.S. that are closely related to his claim. In other words, he must exploit and build on his intellectual property. The notion of maintaining a market position derived by one's intellectual property in order to continue innovating along the same line, was also central to the SIA's discussion of generational continuity and development in semiconductors. Preventing an erosion of market position owing to foreign infringement was, in addition, a "fundamental purpose" for the 1988 amendments to streamline ITC procedures. [n28]

In TI's plastic encapsulation case brought before the ITC, it could neither demonstrate the existence of a competitive U.S. industry it was helping to preserve, nor could it argue that ITC protection would enable it to maintain and build on a market position derived from the technology in question. First, there is no commercial U.S.-based industry for plastic encapsulation. Almost all plastic encapsulation -- including that done for TI -- occurs outside the U.S. Indeed, when asked at the ITC to show the domestic industry in question, TI responded by citing the physical size, employment and budget of its legal/licensing department! Apparently the only thing TI is capable of manufacturing effectively is lawyers -- not exactly what Section 337 has in mind as the basis for a vibrant economy.

Second, TI has not demonstrated in 30 years any ability to maintain market share connected with this technology -- let alone the capability of innovating on it. It could be argued, of course, that the technology *180 in question is really a manufacturing process and not a product (which is all the more reason to reject its use of the ITC). Perhaps by

some stretch of the imagination one could suggest that revenue derived from this technology was used to develop products whose revenue stream or market position is being threatened by the combination of plastic encapsulation and product technologies. Unfortunately for TI, this argument is rather tenuous since TI has not introduced a successful or innovative new product line in emerging CMOS technology in the last five years relying instead on high volume, low margin older product lines and clones. Whatever TI is doing with its technology-based revenues, it is not to create a product market position that competes in the global high-technology marketplace in any significant way.

Undermining the Role of the ITC

The threat from TI is not that it will prevent innovative American companies from performing plastic encapsulation or stop the importation of all plastic- encapsulated products at the border. TI lost that battle at the ITC. [n29] Rather, it is that TI may be creating dangerous precedents by (a) using the ITC as just another vehicle to harass and extort smaller companies and (b) using the ITC against American companies.

The problem with the former is that by suing smaller firms enough times in multiple venues, it just may be able to bankrupt them, even if they can win the legal battles. The tragedy is that TI, and other large companies that follow its lead, will have used the ITC to maintain their legal revenue stream, while weakening the technological competitiveness and market position of the firms that really are innovating and growing. By restraining competition and stifling growth, TI will accomplish the opposite of what was intended by Section 337.

The second problem is just as serious. TI is not the first U.S. company to use the ITC against other American companies. For example, Intel filed a suit in 1989 with the ITC against nine firms, some of which were American. [n30] A central allegation by Intel was that Hyundai, a Korean corporation, infringed certain Intel patents by manufacturing erasable programmable read-only memory (EPROM) chips for General Instrument, a U.S. company. Hyundai only served as a "foundry" for manufacturing EPROMS based on designs, process technology and technical assistance provided by General Instrument. Moreover, it was General Instrument, not Hyundai, that was responsible for importing them into *181 the United States. Since the principal source of technology and the importer was General Instrument, Intel's ITC case was really a patent dispute between two U.S. companies. The result of this case, in which, incidentally, Intel did not have to prove injury to a U.S. industry due to a change in the law during the actual trial, at the last moment, was that the ITC found in Intel's favor and issued an exclusion order barring the importation of EPROMs manufactured by Hyundai for General Instrument.

Presaging TI's strategy, Intel also simultaneously filed another suit in District Court. [n31] This suit should have been sufficient against General Instrument. The added suit at the ITC not only created expensive burdens that were especially onerous for the smaller defendants, but it may also have scared away their potential customers, which may have

been their intended purpose. [n32] The problem, in a nutshell, is that this kind of superfluous use of the ITC against American companies is an abuse of a forum that is supposed to protect American industries from foreign competition, not from their own domestic competition.

The use of the ITC by American companies against other American companies to stifle domestic competition may serve as a model for foreign firms to use against U.S. companies. The greatest irony is that it is possible, even probable, that in the near future a foreign company will file a complaint against a U.S. company at the ITC based on patents purchased in the United States. In other words, foreign firms will be able to use "good old American know-how" to shut down good old American companies.

The prospect of foreign firms using the ITC to overwhelm their American competitors becomes ever greater as the hostile legal tactics of the larger U.S. firms continue and foreign firms amass huge portfolios of U.S. intellectual property rights. For example, the majority of the top ten U.S. patent earners are now foreign firms, and many foreign firms are buying U.S. patent portfolios wholesale. [n33] If they ever choose *182 to replicate their larger American counterparts' approach to the ITC -- that is, use it as a means to shut down or intimidate American competitors -- U.S. industry is in for big trouble.

Prospects for Reform

Demands are now being heard for reform of Section 337. Most prominent is the call of the European Community (EC) for changes in Section 337 to make it conform to the General Agreement on Tariffs and Trade (GATT). Specifically, the EC requested a GATT inquiry into Section 337 based on its alleged violation of the "national treatment" provision of Article III of the GATT, that is, the notion that there should be uniform national treatment of all parties -- foreign and domestic alike -- in intellectual property disputes. The EC claimed that foreign importers to the U.S. were treated less favorably (by the ITC) than domestic U.S. manufacturers of similar products were treated (by the District Courts). In 1989, a GATT Panel ruled in favor of the EC and requested that Section 337 be made GATT-compatible. [n34]

A solution that the Europeans would probably favor is the elimination of Section 337 and the ITC altogether. This would require all intellectual property cases to be decided in the District Courts. Such an approach is neither politically feasible in the U.S., nor is it even desirable from the standpoint of equity. Additionally, European (foreign) companies have availed themselves of the use of the ITC in actions against other foreign companies. The fact of the matter is that under the special circumstances discussed above, foreign importers are more immune from the jurisdiction and remedies applied by District Courts than are domestic manufacturers. Consequently, the legal procedures and remedies must be differentiated to fit the different circumstances of foreign versus domestic alleged infringers.

*183 There are other alternatives for making Section 337 conform more closely with the GATT's requirements that do not necessitate the wholesale elimination of Section 337 and the ITC. For example, all cases could originate in District Court and then be subsequently assigned to a different forum depending on the nature of the case. Or, the GATT could alter its intellectual property codes. Such possibilities are currently being explored by U.S. and foreign GATT negotiators within the context of the Uruguay Round.

From the American perspective, however, it is much more important to seek reform of Section 337 in such a way as to overcome the present trend toward abuses that undermine American competition and economic growth. Basically, we have gone too far in trying to create expedited procedures at the expense of the American economy. We ought, therefore, to consider the possibility of reinstituting in some form an injury requirement as well as the expectation of an efficiently and economically run industry.

We can and should go even further than re-establishing the status quo ante. The fundamental problem with our approach to intellectual property litigation is that, aside from the President's last-minute review of an ITC decision, we never consider the implications of a decision on the country's overall ability to compete in the international marketplace. Would, for example, TI's ability to halt the importation of five U.S. companies' products at the border (or to extract exorbitant royalties from them) really contribute more to the national well-being by encouraging greater innovation and competition, or would the country benefit more by restricting the ability of that technological dinosaur to shut down or intimidate the smaller, entrepreneurial companies? This kind of question was central to the formulation of Section 337 and its various amendments in the first place; it should also play a vital role in the deliberations of the ITC to administer the statute in specific cases.

The suggestion being made here, in other words, is that the ITC incorporate a national competitiveness-impact estimate in its decision-making process. Furthermore, we should consider incorporating such a procedure in the District Courts and in public agencies in general insofar as their decisions affect the country's economic health -- be it not only in the Commerce Department or the USTR, but also in the Justice Department, the Defense Department, the Energy Department, the Treasury Department and so on.

Our competitiveness and standard of living have slipped drastically in the last few decades, not just because other nations are trying hard to catch up, but also and especially because nobody was manning the watch in America. It's high time we acquired the national leadership and policies to reverse this trend.

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[n1]. For an analysis of U.S. trade politics which suggests that, starting with the 1934 Reciprocal Trade Agreements Act, congressmen came to support trade law in order to lower international trade barriers, encourage a growing domestic and international economy, and to gain more independence from domestic protectionist interests. See, I.M. Destler, American Trade Politics: System Under Stress (Institute for International Economics and The Twentieth Century Fund, 1986). The 1934 Trade Act began a movement to reverse a century of protectionist general tariff laws leading up to the Smoot Hawley Tariff Act of 1930.

[n2]. Statement of Carla A. Hills, former United States Trade Representative, before the United States Senate Committee on Finance (June 14, 1989).

[n3]. Judge Donald Knox Duvall, Federal Unfair Competition Actions: Practice and Procedure Under Section 337 of the Tariff Act of 1930 1 (Clark Boardman Company, Ltd. 1990).

[n4]. See, 133 Cong.Rec. H2577-01, (April 28, 1987) and 133 Cong Rec. H2642-02 (April 29, 1987); See also, House Ways and Means Committee Report on H.R.3, Sec. 172, p. 155 (1987) (This report eventually became the section of the 1988 amendments to Section 337 that abolished the injury requirement).

[n5]. In re Northern Pigment Company et. al., 21 U.S.P.Q. 573, 578-579, 581 (C.C.P.A. 1934) (citing Senate Report on H.R. 7456); See also, In re Orion, 71 F.2d 458, 465 (C.C.P.A. 1934) (Section 337 was "[a]n [a]ct . . . to encourage the industries of the United States, to protect American labor, and for other purposes.").

[n6]. Destler, supra note 1, at 13, 112-113.

[n7]. Id. at 114.

[n8]. Duvall, supra note 3, at 1-2.

[n9]. Destler, supra note 1, at 118.

[n10]. Duvall, supra note 3, at 2.

[n11]. The ALJ has career tenure, pursuant to the Civil Service Act and Administrative Procedure Act, 5 U.S.C. § 7521 (1980). The ALJ adjudicates the case by overseeing a fact-finding process and then issuing an initial determination, which can be appealed to the whole Commission.

[n12]. Omnibus Trade and Competitiveness Act of 1988, Pub.L. No. 100-418, 102 Stat. 1107 (1988).

[n13]. Duvall, supra note 3, at 3, citing ITC Publication 2065 (Feb. 1988) (Judge Duvall cites estimates as high as $20-61 billion, per year, in lost sales resulting from foreign infringement of U.S. intellectual property rights); See also, 112 F.R.D. 439, 535 (1986).

[n14]. 19 U.S.C. 1337(a) (1980). Emphasis added.

[n15]. Duvall, supra note 3, at 4.

[n16]. H.R.Rep. No. 100-40, 100th Cong., 1st Sess., pt.1, p.157 (1987). Emphasis added.

[n17]. Duvall, supra note 3, at 33-34 (The ALJ must render a decision within 12 months (for uncomplicated cases). If it is not reviewed by the whole Commission, it becomes final within 45 days. After a final decision is reached by the ITC, the President has 60 days within which to review it. A decision can be appealed to the Court of Appeals for the Federal Circuit (CAFC) within 60 days after the Presidential review period expires or after the President issues a decision, whichever comes sooner).

[n18]. Incidentally, it should be pointed out that the truncated discovery at the ITC tends to favor the petitioner, or "complainant," more than the "respondent," or party alleged to be importing an infringing product. This is because the complainant has an unlimited amount of time to gather evidence and prepare his case before petitioning the ITC, while the respondent is limited to five months.

[n19]. In a patent case, for example, the defense may raise related issues such as mislabeling or unfair advertising.

[n20]. 55 Fed.Reg. 3503 (1990). This quote was taken from pages 12-13 of a response by the Law Committee of the Semiconductor Industry Association (SIA) dated March 26, 1990, to a request for public comments on Section 337 issued by the U.S. Trade

Representative's (USTR) office in 55 Fed.Reg. 3503. It was signed by the Committee chair, William Cray, and sent to Dorothy Balaban at USTR. It will subsequently be cited as "Cray."

[n21]. Cray, supra note 20, at 13, 14.

[n22]. Id. at 11.

[n23]. Motorola, Inc. v. Hitachi, Ltd., 750 F.Supp. 1319, 14 U.S.P.Q.2d 1769 (W.D.Tex., 1990); see also, Advanced Micro Devices, Inc. v. Intel Corp., 16 Cal.App. 4th 346, 20 Cal.Rptr. 2d 73, 1993; Intel Corp. v. Advanced Micro Devices, Inc., 756 F.Supp. 1292, 21 U.S.P.Q.2d 1623 (N.D.Cal. 1991); Intel Corp. v. Advanced Micro Devices, Inc., No. C-90-20237-WAI, 1992 WL 439749, (N.D.Cal., Dec. 2, 1992); Intel Corp. v. Advanced Micro Devices, Inc., No. C-90-20237-WAI, 1993 WL 135953 (N.D.Cal., Apr 15, 1993); Intel Corp. v. Advanced Micro Devices, Inc., No. C-90-20237-WAI, 1993 WL 280567 (N.D.Cal., Jul 20, 1993); see also, Advanced Micro Devices v. C.A.B., 742 F.2d 1520 (D.C.Cir.1984) (this case involved Intel); IDT v. AT&T, No. MO92CA057LDB (W.D.Tex.); Micron Semiconductor, Inc. v. Texas Instruments, Inc., 815 F.Supp. 994 (E.D.Tex. 1993) (Case stayed in Texas rather than transfered to Idaho); See also, No. 92-352-S-MJC (D.Idaho 1992).

[n24]. Hyundai Electronics Industries Co., Ltd. v. United States International Trade Commission, 899 F.2d 1204 (Fed.Cir.1990) (In the Matter of Certain Integrated Devices, Processes for Making the Same, Components Thereof, and Products Containing the Same ITC Investigation, National Semiconductor Corp., Complainant, Mitsubishi Electric Corp., Mitsubishi Electric America, Inc. and Mitsubishi Electronics America, Inc, Respondents, and others).

[n25]. "Though over the last three years the Dallas-based company has laid off more than 4,600 workers and suffered $249 million in operating losses, it has also collected $968 million from a novel patent licensing program-$257 million in 1991 alone, according to the company's 1991 annual report." Texas Instruments's $250 Million-A-Year Profit Making Center, The American Lawyer March 1992, at 56.

[n26]. In The Matter Of Certain Plastic Encapsulated Integrated Circuits, ITC Investigation No. 337-TA315, In The Matter Of Certain Dynamic Random Access Memories Components Thereof and Products Containing The Same, Texas Instruments, Inc. v. United States International Trade Commission, 851 F.2d 342 (Fed.Cir.1988).

[n27]. Texas Instruments, Inc. v United States Trade Commission, 988 F.2d 1165, 26 U.S.P.Q.2d 1018 (Fed.Cir.1993), Texas Instruments v Analog Devices, Inc. et. al., No. CA3-90-1590-H (N.D.Tex. 1990).

[n28]. Duvall, supra note 3, at 2-3.

[n29]. Texas Instruments, 998 F.2d at 1168.

[n30]. Hyundai, 899 F.2d at 1204.

[n31]. Intel Corp. v. General Instrument Corp., No. 87-1635 PHXRGS (D.Ariz. 1987).

[n32]. Intel has been sued on antitrust grounds by small U.S. companies such as Cyrix, and Japanese Companies such as Sanyo who alleged that Intel filed suits against them to deter potential customers from designing these companies' competing microchips into their future electronic systems. The resulting legal uncertainty of Intel's pending cases ostensibly forced customers to rely on Intel as the sole source. Intel, however, was cleared by the Federal Trade Commission on Antitrust grounds on Wednesday July, 14, 1993. FTC finds no Intel violations, San Jose Mercury News, July 15, 1993.

[n33]. The top ten patent earners in the United States in 1992 were: Canon Kabushiki, 1,106; Toshiba Corporation, 1,020; Mitsubishi Denki, 957; Hitachi, 951; General Electric Company, 937; International Business Machines Corp., 842; Eastman Kodak Company, 775; Motorola Inc., 658; Fuji Photo, 640; and Matsushita Electric, 608. United States Department of Commerce News, February 25, 1993.

[n34]. The EC request for a GATT inquiry into Section 337 was in response to a petition it had received from Akzo, a Dutch company, which had lost an ITC case to DuPont Chemical Company. In 1984 DuPont had filed a Section 337 suit with the ITC, claiming that Akzo had infringed its patent for Aramid fibre. In 1986, the ITC ruled in favor of DuPont, granting it a limited exclusion order to bar the importation of Aramid fibre that Akzo made using a process patented by DuPont. DuPont and Akzo subsequently settled their dispute by signing a licensing agreement allowing Akzo to import a certain amount of Aramid fibre into the U.S. Since the conflict was terminated, the EC withdrew its request for specific findings in that case by the GATT Panel, but it continued to seek an advisory report on the consistency of the application of Section 337 with the GATT. On this case, See Cray, supra note 20, at 4-7. Azko v. United States International Trade Commission, 808 F.2d 1471 (Fed.Cir.1986), cert. den'd., 107 S.Ct. 2492; See also, 133 F.R.D. 245 (1990).