Section 337 as a Force for "Good"? Exploring the Breadth of Unfair Methods of Competition and Unfair Acts Under § 337 of the Tariff Act of 1930

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Introduction

Commentators have suggested that § 337 of the Tariff Act of 1930 has untapped statutory capacity to remediate a variety of "[u]nfair methods of competition and unfair acts" heretofore not raised before the United States International Trade Commission ("ITC"). In particular, they extol the potential of § 1337(a)(1)(A) to redress certain "methods" or "acts" not only harmful to the operation of a free and fair marketplace, but also arguably objectionable on moral or ethical grounds (e.g., child labor).[1] This Article evaluates the

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[1] Jonathan J. Engler, *Section 337 of the Tariff Act of 1930: A Private Right-of-Action to Enforce Ocean Wildlife Conservation Laws*, 40 Envtl. L. Rep. 10513, 10513 (2010); Gary M. Hnath, *The Use of Section 337 in Non-Patent Matters*, 26 ITR 1786, 1786 (2009); Bryan A. Edens, *An Expanded Perspective: Child Labor Claims Under Section 337*, 337 Reporter Vol. XXIII 13, 13–14 (2007); Tom M. Schaumberg, *A Revitalized Section 337 to Prohibit Unfairly Traded Imports*, 77 J. Pat. & Trademark Off. Soc'y 259, 270 (1995).

promise of § 337 as such an instrument—one that potentially could serve as a force for "good" in the world.

Section 337 is a trade statute that permits private parties to initiate litigation-style investigations, much like federal district court litigation, to redress "[u]nfair methods of competition and unfair acts" ("unfairness") incident to the importation of articles of commerce into the United States.[2] The primary remedies for a prevailing complainant are an exclusion order barring the importation of offending articles and a cease and desist order restricting U.S. activities regarding such articles,[3] but such remedies are issued only after the ITC considers their effects on certain public interest factors: "public health and welfare; competitive conditions in the United States economy; the production of like or directly competitive articles in the United States; and U.S. consumers."[4] In most investigations, the public interest analysis has been inconsequential.

The statute explicitly recognizes infringement of a U.S.-registered patent, copyright, trademark, mask work or hull design as de jure unfairness.[5] In recent years, several notable companies, including Apple, Samsung, and Microsoft, have availed themselves of § 337, particularly § 1337(a)(1)(B), in the patent infringement context.[6] Yet, the ITC has construed unfairness under § 1337(a)(1)(A) to include a variety of other unlawful behaviors associated with importation—inter alia, false designation of origin, misappropriation

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[2] Tariff Act of 1930, Pub. L. No. 71-361, § 337, 46 Stat. 590, 703 (1930) (codified as amended at 19 U.S.C. § 1337 (2006)).

[3] *See id.* § 1337(d)–(f); *see also In re* Certain Integrated Repeaters, Switches, Transceivers and Prods. Containing Same, Inv. No. 337-TA-435, USITC Pub. 3547, Comm'n Op. on Remedy, the Pub. Interest, and Bonding Procedural Background, at 3–5 (Aug. 16, 2002) (citing Viscofan v. ITC, 787 F.2d 544, 548 (Fed. Cir. 1986) (granting the ITC "broad discretion in selecting the form, scope, and extent of a particular remedy.")); *see also, e.g.*, *In re* Certain Ground Fault Circuit Interrupters & Prods. Containing the Same, Inv. No. 337-TA-615, USITC Pub. 4146, Order to Cease & Desist, at 4 (Mar. 9, 2009) (noting remedies typically include a reporting requirement, directing respondent to file statements with the ITC at regular intervals describing any activity that has occurred with respect to the subject goods).

[4] *Viscofan*, 787 F.2d at 548.

[5] § 1337(a)(1)(B)–(E).

[6] *See* Eric Schweibenz & Lisa Mandrusiak, *ITC Issues Public Version of Opinion in Certain Electronic Devices Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers (337-TA-794)*, ITC 337 Law Blog (July 17, 2013), http://www.itcblog.com/20130717/itc-issues-public-version-of-opinion-in-certain-electronic-devices-including-wireless-communication-devices-portable-music-and-data-processing-devices-and-tablet-computers-337-ta-794/; Susan Decker, *Microsoft Cleared of Infringing Google Patents with Xbox*, Bloomberg (Mar. 23, 2013, 12:00 AM), http://www.bloomberg.com/news/2013-03-22/microsoft-wins-ruling-in-xbox-case-brought-by-google-s-motorola.html.

of trade secrets, false labeling, false advertising, violation of the Digital Millennium Copyright Act, and antitrust violations.[7] Indeed, "unfairness" is not even defined in the statute or its legislative history, affording the ITC broad discretion in the term's construction and the bounds of § 337's jurisdiction.[8] In other words, although more than 90% of § 337 litigation in recent years has involved at least one patent infringement claim,[9] the statute exists to cover a broad range of unfairness and is not confined to the protection of intellectual property ("IP").[10]

The Article is presented in four parts. Part I provides an overview of § 337, including its legislative history. Part II describes the elements of a prima facie case under § 1337(a)(1)(A), including unfairness and its contours as delineated by judicial and administrative authorities. Part III highlights ancillary considerations associated with redressing unfairness under § 1337(a)(1)(A), including the extraterritorial reach of the statute, the free-trade commitments implicated by the General Agreement on Tariffs and Trade ("GATT"), and the legal doctrines of comity, conflict of law, and standing. Finally, Part IV applies the principles discussed in Parts I-III to four hypothetical categories of unfairness potentially remediable under § 1337(a)(1)(A)—trading in conflict minerals, use of child labor, environmental degradation, and unsafe

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[7] *See, e.g.*, *In re* Certain Universal Transmitters for Garage Door Openers, Inv. No. 337-TA-497, USITC Pub. 3670, Initial Determination Concerning Temp. Relief on Violation of Section 337, at 8–10 (Nov. 4, 2003); *see also In re* Certain Universal Transmitters for Garage Door Openers, Inv. No. 337-TA-497, USITC Pub. 3670, Notice of Comm'n Determination to Affirm Initial Determination Denying Temporary Relief, at 3 (Nov. 24, 2003) (affirming Administrative Law Judge's initial determination); *In re* Certain Electronic Audio & Related Equip., Inv. No. 337-TA-7, USITC Pub. 768, Comm'n Determination, at 2–4 (Apr. 2, 1976) (involving predatory pricing); *In re* Certain Alkaline Batteries, Inv. No. 337-TA-165, USITC Pub. 1616, Views of Vice Chairman Liebeler, Comm'r Eckes & Comm'r Lodwick, at 1 (Nov. 1984) (involving false labeling and false designation of origin); *In re* Certain Floppy Disk Drives & Components Thereof, Inv. No. 337-TA-203, USITC Pub. 1756, Comm'n Memorandum Op., at 2 (Sept. 1985) (involving breach of contract).

[8] *See In re* Von Clemm, 229 F.2d 441, 443–44 (C.C.P.A. 1955) ("Congress intended to allow [the Commission] wide discretion in determining what practices are to be regarded as unfair.").

[9] *See* U.S. Int'l Trade Comm'n, Year in Review: Fiscal Year 2009, at 14 (2009) (noting approximately 93% of investigations active in 2009 involved patent infringement claims); *see also* U.S. Int'l Trade Comm'n, Year in Trade 2007: Operation of the Trade Agreements Program, 59th Report, at 2-10 (2008) (noting 100% of investigations initiated in 2007 involved patent infringement claims).

[10] *See* Corning Glass Works v. ITC, 799 F.2d 1559, 1567 (Fed. Cir. 1986) ("[S]ection 337 does not function merely as an international extension of private rights under the patent statute.").

food and drug practices, insofar as each is associated with articles imported into the United States.

I. Background

The unfairness language of § 1337(a)(1)(A) debuted in § 316 of the Tariff Act of 1922.[11] Section 316 was a compromise spawned during contentious congressional debate between free traders and protectionists stoked by Europe's industrial resurrection after World War I.[12] It sought to protect U.S.-based industries[13] against importers of articles associated with unfairness, due to the difficulty of obtaining jurisdiction over foreign manufacturers in U.S. courts and the lack of effective remedies provided under the laws of countries hosting the manufacturers.[14] Yet, under § 316, the Tariff Commission (predecessor to the ITC), served an advisory role—if it found a violation, it could only recommend to the President exclusion of articles or imposition of duties not in excess of 50% or less than 10% of the value of the articles imported in violation of the Section as would offset the unfair method or act employed.[15] The President, on the other hand, had discretion not only to ignore or follow the Tariff Commission's recommendations (powers the President retains under the current statute) but also to revise them as he or she saw fit.[16] In the Tariff Act of 1930, § 316 was renumbered as § 337 without significant modification.[17]

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[11] *See* Tariff Act of 1922, Pub. L. No. 67-318, § 316, 42 Stat. 858, 943 (1922) (prohibiting "unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, [or] consignee . . . .") (evolving into its current version under the Tariff Act of 1930, Pub. L. No. 71-361, § 337, 46 Stat. 590, 703 (1930) (codified as amended at 19 U.S.C. § 1337 (2006))).

[12] *See Ex parte* Bakelite Corp., 279 U.S. 438, 446 (1929) (recognizing that § 316 was "not happily drafted.").

[13] *See* Frischer & Co. v. Bakelite Corp., 39 F.2d 247, 259 (C.C.P.A. 1930), *cert. denied*, 282 U.S. 852 (1930) (opining that, because "one of the express objects of the Tariff Act of 1922, as stated in its title, was 'to encourage the industries of the United States,' it is very obvious that it was the purpose of [§ 316] to give to industries of the United States, not only the benefit of the favorable laws and conditions to be found in this country, but also to protect such industries from being unfairly deprived of the advantage of the same and permit them to grow and develop.")

[14] Tom M. Schaumberg, A Lawyer's Guide to Section 337 Investigations Before the U.S. International Trade Commission 266 (2d ed. 2012).

[15] Tariff Act of 1922 § 316(c), (e), 42 Stat. at 943–44.

[16] *Id.* at § 316(e)–(g).

[17] *See* Tariff Act of 1930, § 337, 46 Stat. at 703; *see also* J. Stephen Simms, *Scope of Action Against Unfair Import Trade Practices Under Section 337 of the Tariff Act of 1930*, 4 NW. J. INT'L L. & BUS. 234, 241 (1982) (stating that § 337 "struck Section 316's excess duty provision[,] . . . eliminated the provision of direct Supreme Court review of Tariff

Between 1930 and 1974, § 337 was sparsely used.[18] The first reason for this was paradigmatic—the Tariff Commission saw itself as primarily a fact-finding body, not an adjudicative one.[19] To this end, the Tariff Commission asked Congress to revoke its § 337 authority in 1936[20] and, when Congress refused, the Tariff Commission imposed an onerous standard for complainants to show injury, and thus obtain relief.[21] The second reason for limited use of § 337 during this era arose from the time and expense associated with § 337 litigation, occasioned by the Tariff Commission taking an average of three years to complete an investigation.[22] Other factors affecting its utilization included a lack of understanding of the statute in the business and legal communities and the absence of formal procedures for obtaining relief.[23]

Congress removed most of these impediments in 1974. The Trade Act of 1974 attempted to depoliticize the Tariff Commission and gave it a new name, which it holds to this day—the United States International Trade Commission.[24] In particular, the Act imposed statutory terms of office for commissioners and made the ITC's budget dependent only on congressional approval.[25] The Act also, inter alia, gave the ITC the power to "investigate any alleged violation" of § 337[26] and declared its determinations final and not merely advisory, thus stripping the President of revisionary power and leaving him or her with only an effective veto of the determination for "policy reasons"[27] (which has been invoked on only six occasions).[28] The Act also allowed respondents in § 337 investigations to present all "legal and equitable defenses" and parties adversely affected by ITC determinations to appeal to

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Commission determinations, and provided for the Secretary of the Treasury to admit goods under bond which the President suspected to be unfairly imported.").

[18] Simms, *supra* note 17, at 241.

[19] *Id.* at 242 (citing 19 U.S. Tariff Comm'n Ann. Rep. 13 (1935)).

[20] *Id.*

[21] Elliott R. Treby, *The Revitalization of Section 337 of the Tariff Act of 1930 Under the Trade Act of 1974*, 11 J. INT'L L. & ECON. 167, 189 (1976).

[22] Harvey Kaye & Paul Plaia, Jr., *Tariff Act Section 337 Revisited: A Review of Developments Since the Amendments of 1975*, 59 J. PAT. OFF. SOC'Y 3, 31–32 (1977).

[23] Schaumberg, *supra* note 14, at 5.

[24] Trade Act of 1974, Pub. L. No. 93-618, § 171, 88 Stat. 1978, 2009 (1975) (codified as amended at 19 U.S.C. § 2231 (1976)).

[25] *See id.* §§ 172(b), 175, 88 Stat. at 2010–11 (codified as amended at 19 U.S.C. § 2232 (1976)).

[26] *Id.* § 341, 88 Stat. at 2053 (codified as amended at 19 U.S.C. § 1337(b)(1) (1976)).

[27] *See id.* at 2055 (codified as amended at 19 U.S.C. § 1337(g)(2) (1976)).

[28] Schaumberg, *supra* note 14, at 220 n.90; *see also* Letter from Ambassador Michael B.G. Froman, Office of the U.S. Trade Representative, Exec. Office of the President, to Irving A. Williamson, Chairman, USITC (Aug. 3, 2013).

the United States Court of Customs and Patent Appeals (predecessor to the United States Court of Appeals for the Federal Circuit ("Federal Circuit")).[29] Perhaps most significantly, the Act required the ITC to decide most cases under § 337 within 12 months.[30] Finally, § 337 investigations became subject to due process requirements under the Administrative Procedure Act,[31] thus mandating an adjudicative hearing.[32]

The passage of the Omnibus Trade and Competitiveness Act of 1988 ushered in further changes to the statute.[33] This bill removed injury as an element of a prima facie case under § 337 for alleged infringement of federally registered IP.[34] Additionally, it markedly relaxed the definition of domestic industry, removing the requirement that the industry be "efficiently and economically operated."[35] Recognizing that the American economy, once manufacturing-based, was becoming increasingly dependent upon services and high-tech innovation,[36] the 1988 Act also allowed a complainant to establish a domestic industry, in a case involving alleged infringement of statutory IP, based on engineering, research and development, or licensing activities, in addition to the longstanding independent grounds of "significant investment in plant and equipment" and "significant employment of labor or capital."[37] The 1988 amendments made § 337 a much more attractive statute, and the ITC a much more attractive venue, for domestic industries seeking protection from unfairly traded imports.[38]

Section 337 has endured for nearly 100 years, evolving as necessary to address the political and economic challenges of the times, yet largely unchanged in spirit from § 316 of the Tariff Act of 1922. Prior to its amendments in

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[29] Trade Act of 1974 § 341, 88 Stat. at 2054.

[30] *Id.* § 341, 88 Stat. at 2053.

[31] *Id.* at 2054.

[32] 5 U.S.C. § 554 (2006) (governing the manner in which federal administrative agencies create and enforce regulations in order to implement legislation). Section 337 is unique among trade remedy laws in that it is the only such law subject to the APA. *See* §§ 551–59.

[33] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342, 102 Stat. 1107, 1212–16 (1988) (codified as amended at 19 U.S.C. § 1337 (2006)).

[34] *Id.* § 1342, 102 Stat. at 1212.

[35] *Id.* 1212–13.

[36] *See* 134 Cong. Rec. S10713 (daily ed. Aug. 3, 1988) (statement of Sen. Lautenberg) ("America's economic edge is its technology and its innovation."); *see also* H.R. Rep. No. 100-40, pt. 1, at 154 (1987) (stating that the changes to § 337 were part of "an overall strategy to ensure adequate and effective international protection for U.S. persons that rely on protection of intellectual property rights.").

[37] 19 U.S.C. § 1337(a)(3).

[38] *See* Schaumberg, *supra* note 14, at 3, 6.

1974, § 337 saw limited use.[39] Between 1974 and 1988, it was primarily used, albeit sparingly, to redress manufacturing-oriented patent infringement associated with articles imported from developed economies.[40] From 1988 to the present, it has been used liberally to remedy high-tech electronics-oriented patent infringement associated with articles imported from rapidly developing economies such as China.[41] Although it appears this trend will continue,[42] it behooves us to gaze forward and contemplate the next chapters of the statute's existence.

The fundamental inquiry of this Article is whether there will be an era during which products are excluded by the ITC not only for infringing a patent or other IP right, but for damaging the U.S. marketplace by an unfair act deemed morally or ethically objectionable. To evaluate this contingency, this Article starts by taking a detailed look at what a complainant inclined to pursue such litigation would need to prove.

II. Prima Facie Elements of a § 1337(a)(1)(A) Investigation

To establish a prima facie case under § 1337(a)(1)(A), a complainant must demonstrate: (1) unfair methods of competition or unfair acts; (2) relating to imported merchandise; and (3) injury to an industry in the United States, prevention of the establishment of such an industry, or restraint or monopolization of trade and commerce in the United States.[43] Each of these elements is addressed below.

A. Unfairness

"What is unfair under § 1337(a)(1)(A)?" is a threshold question for any party seeking to enlist the power of § 337 to halt the harmful effects of imports, particularly those that do not infringe statutory IP. In the debate immediately prior to the passage of the 1922 Act debuting the unfairness language, Senator Smoot, the Act's primary sponsor, declared § 316 to be a law "which will reach all forms of unfair competition in importation [including] . . . bribery, espionage, misrepresentation of goods, full-line forcing, and other similar practices frequently more injurious to trade than price cutting."[44]

Likewise, the Senate report on the 1922 Act explained that "[t]he provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice and is, therefore,

[39] *See id.* at 5.
[40] *Id.* at 5–6.
[41] *Id.* at 6.
[42] *See id.* (citing the "skyrocketing" volume of § 337 cases being brought at the ITC).
[43] 19 U.S.C. § 1337(a)(1)(A) (2006).
[44] Simms, *supra* note 17, at 240 n.21 (citing 62 Cong. Rec. 5874, 5879 (1922)).

a more adequate protection to American industry than any antidumping statute the country has ever had."[45]

1. Comparable Language in FTCA

For interpretive purposes, various authorities have compared the subject matter jurisdiction of § 337 to that of Article 5 of the Federal Trade Commission Act ("FTCA").[46] Addressing the FTCA, the Supreme Court had held that unfairness does not encompass

> practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.[47]

Yet, "[l]ater [Supreme Court] cases . . . have rejected [this] view and it is now recognized . . . that the Commission has broad powers to declare trade practices unfair."[48] Citing § 337 in a discussion of the FTCA, the Supreme Court has found that "[w]hat are 'unfair methods of competition' are . . . to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest."[49]

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[45] S. Rep. No. 67-595, pt. 1, at 3 (1922).

[46] Tom M. Schaumberg, *Section 337 of the Tariff Act of 1930 as an Antitrust Remedy*, 27 Antitrust Bull. 51, 51, 53 (1982); *see In re* Certain Apparatus for the Continuous Prod. of Copper Rod, Inv. No. 337-TA-89, USITC Pub. 1132, Comm'n Determination & Order, at 7 (Oct. 29, 1980); *In re* Certain Welded Stainless Steel Pipe & Tube, Inv. No. 337-TA-29, USITC Pub. 863, Op. of Comm'rs Minchew, Moore & Alberger, at 39 (Feb. 1978); 6 U.S. TARIFF COMM'N ANN. REP. 4 (1922); *see also In re* Amtorg Trading Corp., 75 F.2d 826, 830–31 (C.C.P.A. 1935), *cert. denied,* 296 U.S. 576 (1935) (acting as a FTCA case defining those practices which the Tariff Commission could remedy under § 337); 1 Int'l Trade Rep. Dec. (BNA) 5245, 5262, *disapproved by President*, 43 Fed. Reg. 17,789 ("It is reasonable to assume that the framers of Section 316 were cognizant of the legislative and judicial history of Section 5 of the FTC Act . . . .").

[47] FTC v. Gratz, 253 U.S. 421, 427–28 (1920).

[48] FTC v. Brown Shoe Co., 384 U.S. 316, 320–21 (1966).

[49] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 532–33 (1935); *see In re* Orion, 71 F.2d 458, 466 (C.C.P.A. 1934) (quoting FTC v. Raladam Co., 283 U.S. 643, 648 (1931):

> In discussing the meaning of the phrase "unfair methods of competition," the Supreme Court . . . called attention to the fact that the words "unfair competition" had a well-settled meaning at common law, and that to obviate a narrow construction, the words "unfair methods of competition" were substituted by the Congress. As to this term, the court said: "It belongs to that class of phrases which does not admit of precise

Importantly, the Federal Circuit's predecessor court recognized that § 337 might be even broader than the FTCA in terms of behavior deemed actionable since the prohibition under § 337 of unfair methods of competition and unfair acts in the importation of articles is deemed

> broad and inclusive and should not be held to be limited to acts coming within the technical definition of unfair methods of competition as applied in some decisions. The importation of articles may involve questions which differ materially from any arising in purely domestic competition, and it is evident from the language used that Congress intended to allow wide discretion in determining what practices are to be regarded as unfair.[50]

2. Agency Deference

The ITC's interpretation of the scope of unfairness actionable under § 1337(a)(1)(A), while not necessarily determinative, is entitled to great weight.[51] Despite the statute's theoretical breath, the ITC has exercised caution when faced with opportunities to recognize and redress novel forms of unfairness. During oral argument before the Federal Circuit in 2010, an attorney in the ITC Office of General Counsel offered her opinion (non-binding on the ITC) that paying overseas workers wages that are low relative to those of American workers does not, by itself, qualify as unfairness under § 337.[52] Similarly, the ITC recently refused to institute an investigation where the alleged unfairness involved prescription drug competition from compounding pharmacies, which

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> definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.").

[50] *In re* Von Clemm, 229 F.2d 441, 443–44 (C.C.P.A. 1955).

[51] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); Enercon GmbH v. ITC, 151 F.3d 1376, 1381 (Fed. Cir. 1998); Corning Glass Works v. ITC, 799 F.2d 1559, 1565 (Fed. Cir. 1986); *see* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) ("This Court has frequently stated that the [FTC's] judgment is to be given great weight by reviewing courts."); *see also* VastFame Camera, Ltd. v. ITC, 386 F.3d 1108, 1111 (Fed. Cir. 2004) ("As the agency charged with the administration of § 1337, the Commission is entitled to appropriate deference to its interpretation of the statute.").

[52] *See* Oral Argument at 22:59, TianRui Grp. Co. Ltd. v. ITC, 661 F.3d 1322 (Fed. Cir. 2011), *available at* http://www.cafc.uscourts.gov/oral-argument-recordings/all/TianRui.html (declaring during oral argument, Judge Moore stated that "My concern is that suppose somebody at the border gets a bug in their ear about minimum wage, and they decide it's an act of unfair competition in China if they pay people 10 cents an hour to build this because then they can bring the product in a lot cheaper and that hurts our domestic industry. Well, that wouldn't be the kind of unfair competition that could then allow the border to stop those imports, correct?" Andrea Casson, Assistant General Counsel, Office of the General Counsel, ITC: "Correct.").

the Food and Drug Administration ("FDA") had previously condoned.[53] Although such an investigation under § 337 would have arguably encroached on the FDA's authority to exercise its discretion under the Food, Drug, and Cosmetic Act,[54] two of six commissioners wrote a concurring opinion clarifying that the ITC did not "reach the issue of whether properly pleaded claims based on the Food, Drug, and Cosmetic Act may be cognizable under § 1337(a)(1)(A)."[55] It is intriguing to consider whether "properly pleaded claims" would include actions or omissions deemed unlawful by the FDA, such as failure to comply with regulations governing the safety of imported food and medicine.

Such circumspection by the modern ITC is part of a larger historical trend. In the early twentieth century, the ITC (then known as the U.S. Tariff Commission) conducted an investigation into Russian asbestos, which complainants alleged was imported into the United States through several modes of unfairness.[56] Addressing each in turn, the ITC recommended termination of the investigation, emphasizing the necessity of "establish[ing] definite unfair acts" or "an actual unfair practice," as opposed to conditions under which those acts or practices can occur, such as oversight or participation by a Communist regime.[57]

The ITC's current inclination to tread cautiously in its interpretation of unfairness under § 1337(a)(1)(A) is explicable in light of modern international

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[53] Letter from Lisa R. Barton, Acting Sec'y to the Comm'n, USITC, to Adam Gordon, Esq., Wiley Rein LLP, Counsel for Complainant, K-V Pharm. Co. Lisa R. Barton (Dec. 21, 2012) (regarding Docket No. 2919).

[54] *See id.* ("The Commission also notes that the Food and Drug Administration ('FDA') is charged with the administration of the Food, Drug and Cosmetic Act.").

[55] Concurring Memorandum from Dean A. Pinkert & Meredith M. Broadbent, Comm'rs, USITC (Dec. 21, 2012).

[56] U.S. Tariff Comm'n, Report to the President, Russian Asbestos, Report No. 67, at 4–5 (Jan. 16, 1933).

[57] *See id.* (finding the following particularly insufficient to qualify as de facto unfairness: (1) the form of government of Russia; (2) the facts that the United States has not given official recognition to the government of a foreign nation and that the United States does not have a commercial treaty with a foreign nation; (3) political or economic conditions (e.g., a foreign government operating its money and banking system as a State monopoly, or that has an unsound system of moneys, credits, and banking, from the point of view of the United States, or merely that its financial system is different from that maintained by the United States); (4) foreign government permitting the organization of monopolies or cartels or other associations within its own boundaries, either under or free from regulation or supervision by the government, contrary to the principles maintained in the United States under the Sherman antitrust law, or other laws; and (5) underselling, including price cutting, unaccompanied by representations or other acts which have a capacity or a tendency to injure or to discredit competitors and to deceive purchasers).

agreements. If the ITC veers too widely from what courts have previously found unfair under statutory or common law, it risks placing the United States in violation of its obligations under Articles I and III of GATT, which require that imported products be treated under U.S. law no less favorably than domestic products.[58]

However, the strictures of GATT do not explain the fate of antitrust claims under § 337. While not the focus of this Article, antitrust clearly falls within the purview of § 1337(a)(1)(A),[59] as at least ten antitrust investigations

[58] *See* Gen. Agreement on Tariffs and Trade art. I, III, Oct. 30, 1947, 55 U.N.T.S. 188 ("The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use."); S. Rep. No. 103-412, at 120 (1994); Uruguay Round Agreements Act, H.R. Rep. No. 103-826, at 140–42 (1994) ("The amendments are necessary to ensure that U.S. procedures for dealing with alleged infringements by imported products comport with GATT 1994 'national treatment' rules, while providing for the effective enforcement of intellectual property rights at the border.").

[59] *See In re* Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69, USITC Pub. 1126, Op. of the Comm'n, at 5–6 (Jan. 1981) ("unfair methods [of competition]" in § 337 "is generally modeled after section 1 of the Sherman Antitrust Act (15 U.S.C. 1)"); *see also In re* Certain Welded Stainless Steel Pipe & Tube, Inv. No. 337-TA-29, USITC Pub. 863, Op. of Comm'rs Minchew, Moore & Alberger, at 39 (Feb. 1978) ("It is reasonable to assume that the framers of Section 316 [the predecessor to § 337] were cognizant of the legislative and judicial history of Section 5 of the FTC Act and the 'tendency' language was provided . . . to make explicit the incipiency doctrine implicit in Section 5."); *see also In re* Chicory Root–Crude & Prepared, Inv. No. 337-TA-27, *investigation terminated*, 1977 WL 52340, at *4 (Mar. 30, 1977) (noting that "judicial determinations under other antitrust and unfair competition statutes are persuasive in determining what constitutes an unfair method or act under section 337"); *see also* Syntex Agribusiness, Inc. v. ITC, 659 F.2d 1038, 1044–45 (C.C.P.A. 1981).

have been instituted at the ITC,[60] though none since 1988.[61] Nine of those investigations ended with no relief—three terminated pursuant to settlement between the parties[62] and six terminated after a finding of no violation.[63] The ITC found a violation in only one investigation, in 1978, where the unfair act was predatory pricing.[64] However, that violation was disapproved upon Presidential review largely because the underlying facts evinced an act of dumping, and thus the matter fell under the purview of another statute, as discussed infra.[65]

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[60] *See In re* Certain Electrically Resistive Noncomponent Toner & "Black Powder" Preparations Therefor, Inv. No. 337-TA-253, USITC Pub. 2069, Views of the Comm'n, at 6 (Mar. 1988); *In re* Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69, USITC Pub. 1126, Op. of the Comm'n, at 5–7; Certain Precision Resistor Chips, Inv. No. 337-TA-65, 44 Fed. Reg. 25,522, 25,522–53 (May 1, 1979); Welded Stainless Steel Pipe & Tube, Inv. No. 337-TA-29, 42 Fed. Reg. 10,348, 10,348–49 (Feb. 22, 1977); Certain Color Television Receiving Sets, Inv. No. 337-TA-23, 41 Fed. Reg. 14,014, 14,014 (Apr. 1, 1976); *In re* Chicory Root–Crude & Prepared, Inv. No. 337-TA-27, *investigation terminated*, 1977 WL 52340, at *4; Certain Electronic Audio & Related Equipment, Inv. No. 337-TA-7, USITC Pub. 768, Recommended Determination, at 30 (Apr. 1976); Certain Angolan Robusta Coffee, Inv. No. 337-TA-16, 40 Fed. Reg. 58,899, 58,899 (Dec. 15, 1975); Tractor Parts, Inv. No. 337-TA-22, USITC Pub. 443, Report to the President, at 1, 6 (Dec. 1971); Watches, Watch Movements, & Watch Parts, Inv. No. 337-TA-19, USITC Pub. 177, Report to the President, at 3 (June 1966).

[61] *See In re* Certain Electrically Resistive Noncomponent Toner & "Black Powder" Preparations Therefor, Inv. No. 337-TA-253, USITC Pub. 2069, Comm'n Action & Order, at 1 (Feb. 22, 1988).

[62] *See* Certain Angolan Robusta Coffee, Inv. No. 337-TA-16, 40 Fed. Reg. 13,418, 13,418 (Mar. 30, 1976); Certain Color Television Receiving Sets, Inv. No. 337-TA-23, 42 Fed. Reg. 39,495, 39,495 (Aug. 4, 1977); Certain Precision Resistor Chips; Comm'n Request for Comments Concerning Settlement Agreement, Inv. No. 337-TA-63/65, 45 Fed. Reg. 16,360, 16,360 (Mar. 13, 1980).

[63] *In re* Certain Electrically Resistive Noncomponent Toner & "Black Powder" Preparations Therefor, Inv. No. 337-TA-253, USITC Pub. 2069, Comm'n Action & Order, at 1; *In re* Chicory Root–Crude & Prepared, Inv. No. 337-TA-27, *investigation terminated*, 1977 WL 52340, at *9; Certain Electronic Audio & Related Equipment, Inv. No. 337-TA-7, USITC Pub. 768, Notice & Order, at 10 (Apr. 2, 1976); Tractor Parts, Inv. No. 337-TA-22, USITC Pub. 443, Report to the President, at 9–10; Watches, Watch Movements & Watch Parts, Inv. No. 337-TA-19, USITC Pub. 177, Report to the President, at 6.

[64] Welded Stainless Steel Pipe & Tube, Inv. No. 337-TA-29, 42 Fed. Reg. at 10,349.

[65] Presidential Determination of Apr. 22, 1978: Welded Stainless Steel Pipe & Tube, 43 Fed. Reg. 17,789, 17,789–90 (Apr. 26, 1978) (listing four policy considerations as the bases for disapproval of the Commission's determination:

> (1) The detrimental effect of the imposition of the remedy on the national economic interest; (2) The detrimental effect of the imposition of the remedy on international

Although commentators have suggested several explanations for the ITC's antitrust drought, it is baffling (and indicative of § 337's underutilization) that the ITC attracts so few antitrust cases as compared to U.S. district court.[66] Both venues apply the same standard for liability and seek to ensure the efficient operation of a free and fair marketplace.[67] Although district courts, unlike the ITC, offer monetary damages to successful antitrust plaintiffs, the ITC can nevertheless issue cease and desist and exclusion orders to discourage anticompetitive conduct, as appropriate, within a fraction of the time required for a district court remedy.[68] While exclusion orders are of dubious value in investigations where anticompetitive conduct does not lead to underpricing or other forms of competitive harm to domestic industries, they may provide the most effective remedy where overseas monopolies use ill-gotten economies of scale (not below-market prices) to supply the United States with artificially low-priced products. Indeed, in this situation, § 337 exclusion orders might provide the most effective relief.[69]

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economic relations of the United States; (3) The need to avoid duplication and conflicts in the administration of the unfair trade practice laws of the United States; and (4) The probable lack of any significant benefit to U.S. producers or consumers to counterbalance the [other policy] considerations.).

[66] *See* Ting-Tang Kao, *Reexamining Antitrust Claims Under Section 337*, 337 Reporter Vol. XXIII, 1, 6 (2007) ("While antitrust claims' historical lack of success under Section 337 might partly explain the few number of antitrust claims brought under Section 337, other features of Section 337 have been cited for the low numbers," including lack of a monetary damages remedy at the ITC, requirement that cease and desist orders be enforced in federal district court, uncertainty whether an injury showing is required, unfamiliarity with the ITC, Presidential review, and tension between antitrust and trade policy goals. It should be noted, however, that of these factors, only unfamiliarity with the ITC distinguishes the markedly different usage of the ITC as a venue for patent infringement and antitrust investigations).

[67] *In re* Chicory Root–Crude & Prepared, Inv. No. 337-TA-27, *investigation terminated*, 1977 WL 52340, at *4; *see In re* Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69, USITC Pub. 1126, Op. of the Comm'n, at 5–6 (Jan. 1981) (noting that the important distinction that Section 337, unlike the Sherman Act, requires is that only that a restraint be shown and contains no requirement of concerted action).

[68] *See* Kao, *supra* note 66, at 6–7; *see also* Schaumberg, *supra* note 46, at 73-74.

[69] *See In re* Orion, 71 F.2d 458, 466–67 (C.C.P.A. 1934) (explaining the purpose of § 337:

It will be borne in mind that many of the decisions . . . were rendered under statutes intended to prevent unfair methods of competition in the internal commerce of the country. Much more reason appears for the prevention of such practices in the case of importations from foreign countries. In this latter class of cases, manufactured products, produced in a foreign country where the producer is beyond the control of the courts of the United States, are imported into this country. Up until the time when they are released from customs custody into the commerce of this country, no opportunity is presented to the manufacturer of the United States to protect himself against unfair methods of competition or unfair acts. After the goods have been so released into the

Antitrust claims notwithstanding, there is no requirement that a complainant allege a familiar and well-trodden tort in litigation under § 337.

> While it may be persuasive in making the legal argument that certain practices are "unfair" to refer to other federal statutes or laws under which similar practices have been found to be unfair, Section 337 is not merely eclectic. The Commission is not limited to finding unfair acts only when others have found them to be unfair.[70]

While recognizing without further analysis the existential nature of the debate over what is fair versus unfair in the world, for the purposes of § 337, it appears that the ITC is prepared to intervene now, as was its predecessor a century ago, where alleged unfairness in the importation of articles threatens "the assurance of competitive conditions in the United States economy,"[71] even for the purpose of halting such unfairness in its incipiency.[72] In this respect, § 337 is a noble ilk of protectionist statute—one that encourages fair competition by protecting against unfair competition.[73]

3. Statutory Limits

Section 337 is not a blanket protector against all unfairness. Certain established forms of unfairness incident to importation—particularly dumping under 19 U.S.C. § 1673[74] and subsidization under 19 U.S.C.

> commerce of the country, the American manufacturer may assert his rights against any one who has possession of, or sells, the goods. However, this method of control must be, and is, ineffective, because of the multiplicity of suits which must necessarily be instituted to enforce the rights of the domestic manufacturer. This phase of the matter obviously was in the minds of the Congress at the time of the preparation of said section 337 (19 USCA § 1337).).

[70] *See In re* Certain Hand-Operated, Gas-Operated Welding, Cutting & Heating Equip. & Component Parts Thereof, Inv. No. 337-TA-132, Initial Determination to Amend Notice (Order No. 22) (Feb. 10, 1983); *see also* Restatement (Third) of Unfair Competition § 1 cmt. g (1995) (limiting liability to acts that "substantially interfere[] with the ability of others to compete on the merits of their products or otherwise conflicts with accepted principles of public policy recognized by statute or common law.").

[71] *See In re* Certain Cast-Iron Stoves, Inv. No. 337-TA-69, USITC Pub. 1126, Op. of the Comm'n, at 9–10 (citing *Trade Reform Act of 1974: Report on the Committee on Finance*, S. Rep. No. 93-1298, at 197 (1974)).

[72] *See In re* Certain Welded Stainless Steel Pipe & Tube, Inv. No. 337-TA-29, USITC Pub. 863, Op. of Comm'rs Minchew, Moore & Alberger, at 38–9 (Feb. 1978).

[73] *See id.* at 12 (observing "our statute has a protective function, in that it protects the domestic market from those products sold in the United States, which are the fruits of unfair competition").

[74] *See* 19 U.S.C. § 1673(1) (2006) (mandating that dumping occurs when "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value . . . .").

§ 1671[75]—can exact insidious damage on U.S. markets but are often beyond § 337's reach.[76] Under § 1337(b)(3), the ITC must "promptly notify the Secretary of Commerce" whenever the ITC "has reason to believe . . . that a matter, in whole or in part, may come within the purview of" the dumping and subsidization statutes.[77] Whenever the action "is based solely on alleged acts and effects which are within the purview of" these statutes, the ITC "shall terminate, or not institute, any investigation into the matter."[78] When dumping or subsidization harms or threatens to harm a U.S. industry, the United States Department of Commerce ("DOC") is statutorily empowered to impose duties on offending goods.[79]

Yet, § 1337(b)(3) also acknowledges overlap between §§ 1337, 1671, and 1673. In particular, it states that when the matter before the ITC is based in part on alleged acts and effects which are within the purview of dumping and subsidization statutes "and in part on alleged acts and effects which . . . establish a basis for relief under [§ 337], then [the ITC] may institute or continue an investigation into the matter."[80]

It is from this jurisdictional nebulousness that a debate arises regarding currency manipulation. Governments engage in currency manipulation by imposing an exchange rate that makes goods originating from their countries artificially cheap on international markets and goods originating from other countries artificially expensive within the manipulator's markets.[81] Pursuant to conditions imposed by the International Monetary Fund ("IMF")[82] and the

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[75] *See* § 1671(a)(1) (noting that subsidization occurs where a "government of a country or any public entity within the territory of a country is providing, directly or indirectly, a . . . subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States . . . .").

[76] *See* § 1337(b)(3) (2006).

[77] *Id.*

[78] *Id.*

[79] *See* §§ 1671, 1673.

[80] § 1337(b)(3)(B).

[81] *See* C. Fred Bergsten & Joseph E. Gagnon, *Currency Manipulation, the US Economy, and the Global Economic Order*, 2012 Peterson Inst. for Int'l Econ., Pol'y Brief No. 12-25, at 1–2 (Dec. 2012).

[82] *See* Int'l Monetary Fund, Articles of Agreement art. IV, § 1 (1944) ("[E]ach member shall . . . avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members . . . ."); *see also* art. VIII, § 3 ("No member shall engage in, or permit any of its fiscal agencies referred to in Article V, Section 1 to engage in, any discriminatory currency arrangements or multiple currency practices, whether within or outside margins under Article IV or prescribed by or under Schedule C, except as authorized

World Trade Organization ("WTO")[83] on the member countries of each, the practice is arguably unfair, in law if not in spirit, and facilitates the exportation of artificially cheap goods to markets operating under a free-floating exchange rate regime. Commentators have argued that currency manipulation affecting the United States be treated as subsidization under § 1671.[84]

It is unclear whether currency manipulation could be addressed under § 337. Unlike most unfairness remedied thereunder, currency manipulation is orchestrated not by private market participants but instead by sovereign governments implementing monetary policy.[85] In this sense, the unfairness resembles unlawful subsidization, largely the domain of the DOC.[86] However, private actors exporting from currency manipulating countries benefit from the unfair policies of their governments and, thus, are complicit in the unfairness. Further, as a statute exerting in rem jurisdiction, § 337 does not require that named respondents intend or cause the unfairness, only that (as explained in the next section) there is a nexus between the unfairness and

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under this Agreement or approved by the Fund."); *see also* Jonathan E. Sanford, Cong. Research Serv., RS22658, Currency Manipulation: The IMF and WTO 5 (2011) (noting that the IMF lacks the power to enforce art. VIII, § 3).

[83] *See* 27 Uruguay Round of Multilateral Trade Negotiations, Agreement on Subsidies and Countervailing Measures, art. 3 (1994) (specifying that countries may not provide subsidies to help promote their national exports); *see also* Sanford, Cong. Research Serv., RS22658, Currency Manipulation: The IMF and WTO at 1 ("Most analysts agree that an undervalued currency lowers a firm's cost of production relative to world prices and therefore helps to encourage exports. It is less clear, however, whether intentional undervaluation of a country's currency is an export subsidy under the WTO's current definition of the term.").

[84] *See* Bergsten & Gagnon, *Currency Manipulation, the US Economy, and the Global Economic Order*, 2012 Peterson Inst. for Int'l Econ., Pol'y Brief No. 12-25, at 20 (stating that countervailing duties "would offer a remedy at least to those industries and firms that were affected most adversely by manipulation (and could prove that they were injured as a result). Their adoption, hopefully by other importing countries as well as the United States, would also send a signal to the manipulators that their manipulation would no longer be costless to their own economies and their relations with key trading partners."); *see also* Sanford, *supra* note 82, at Summary, 3:

> Recently, some have argued that an earlier ruling by a WTO dispute resolution panel might be a way that currency issues could be included in the WTO prohibition against export subsidies. . . . In the past, most legal analysts have found that intentional undervaluation of a currency is not a subsidy that is "contingent on export performance" and not "industry specific" because everyone who exchanges currency gets the same rate even if they are not exporting.

[85] *See generally* Sanford, *supra* note 82, at 1 (explaining the origins of currency manipulation).

[86] *See* 19 U.S.C. § 1671(a)(1) (2006).

importation of articles into the United States.[87] Yet, whatever the legal merits of a currency manipulation claim under § 337, as a practical matter it would be extremely difficult to obtain the discovery needed to prove manipulation. ITC subpoena power does not extend to foreign entities,[88] and without being named as respondents, the true culprits—foreign governments and banks—would have little incentive to cooperate.

The ITC has also found that § 337 does not apply to products "produced by convict, forced, or indentured labor."[89] In *Russian Asbestos*,[90] it explained that "[m]erchandise produced by [such] . . . labor is expressly forbidden from importation into the United States by section 307 of the Tariff Act of 1930," and § 337 "can have no operation as to a case coming within section 307."[91] "[A]pplication of section 307, however, is limited," and "[i]ts provision respecting forced or/and indentured labor does not apply unless there is production in the United States in quantities sufficient to meet domestic consumptive demands."[92] Since 1930, Congress has amended § 307 only once, clarifying that "[f]or purposes of this section, the term 'forced labor or/and indentured labor' includes forced or indentured child labor."[93]

It is unclear from the ITC's guidance in *Russian Asbestos* whether, and the extent to which unfairness under, § 337 includes unforced or non-indentured child labor.[94] Tellingly, in an annual report entitled "List of Goods Produced by Child Labor or Forced Labor," the United States Department of Labor ("DOL") clearly distinguishes between child labor and forced labor, applying a definition of forced labor coterminous with § 307 and noting that "[s]ome goods are listed as produced with both child labor and forced labor, but this does not necessarily mean that the goods were produced with *forced child*

[87] *See* § 1337(a)(1)(A) ("Unfair methods of competition and unfair acts in the importation of articles (other than articles provided for in subparagraphs (B), (C), (D), and (E)) into the United States, or in the sale of such articles . . . .").

[88] § 1333 ("Such attendance of witnesses and the production of . . . evidence may be required from any place in the United States . . . .").

[89] *See* U.S. Tariff Comm'n, *supra* note 56, at 5.

[90] I*d.*

[91] *Id.*

[92] *Id.*

[93] § 1307 (defining forced labor "shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily.").

[94] *See* U.S. Tariff Comm'n, *supra* note 56, at 5 (showing that complainants did not explicitly present child labor to the Commission as an alleged unfair act, only forced or indentured, and presumably adult, labor).

labor."[95] This supports the notion that unforced child labor, discussed infra, is reachable under § 337.

In sum, in light of its broad scope as written and interpreted, and notwithstanding discrete statutory barriers erected to tailor its reach, § 1337(a)(1)(A) remains unbounded in terms of actionable unfairness.

B. Nexus Between Unfairness and Importation

As the ITC has explained:

> It is obvious from our traditional role, not to mention our remedial provisions, that Congress intended section 337 to attack only unfair trade practices which relate to imported products. It then becomes crucial to discern some nexus between unfair methods or acts and importation before this Commission has power to act.[96]

While this nexus is rarely disputed in § 337 litigation, it is easy to imagine scenarios where the absence of such a nexus could undermine a complainant's case. For example, a Chinese company manufacturing widgets for the U.S. market would ostensibly engage in unfairness by defrauding its suppliers and subcontractors into providing it goods and services for free or at an unconscionable below-market rate. Such fraud might permit the manufacturer to import the widgets into the United States at an artificially low price. Yet, if the manufacturer pockets the ill-gotten gains and imports the widgets into the United States at a fair price, the unfairness, while tragic for the foreign suppliers and subcontractors, is arguably too removed from the United States to justify § 337's involvement. Likewise, if a retailer of the Chinese manufacturer's widgets commits fraud only in the post-importation sale of widgets on the U.S. market, Americans will suffer, but § 337 and the ITC will stand idle, deferring to the jurisdiction of domestically oriented federal and state courts.[97] In these instances, the ITC seemingly lacks "power to act."[98]

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[95] U.S. Dep't of Labor, The Dep't of Labor's List of Goods Produced by Child Labor or Forced Labor 10 (2009).

[96] *In re* Certain Welded Stainless Steel Pipe & Tube, Inv. No. 337-TA-29, USITC Pub. 863, Op. of Comm'rs Minchew, Moore & Alberger, at 11 (Feb. 1978).

[97] *See id.* at 12 ("What possible basis would there be for invoking exclusion powers to remedy unfair acts in the subsequent sale by domestic owners? Our whole remedial scheme is designed to attack unfair acts before the goods reach our shores . . . ."); *see also In re* Certain Molded-In Sandwich Panel Inserts & Methods for Their Installation, Inv. No. 337-TA-99, USITC Pub. 1246, Comm'n Op., at 4 (Apr. 1982) (recognizing nexus where companies purchased infringing goods directly from importer; decided prior to 1988 amendment to § 337, which introduced distinct unfairness-importation nexus language for statutory intellectual property infringement and other unfair acts).

[98] *See In re* Certain Welded Stainless Steel Pipe & Tube, Inv. No. 337-TA-29, USITC Pub. 863, Op. of Comm'rs Minchew, Moore & Alberger, at 11.

C. Domestic Industry and Injury

As explained by the Federal Circuit in *TianRui Group Co. Ltd. v. ITC*,[99] in the context of domestic industry, "[s]ection 337 contains different requirements for statutory intellectual property (such as patents, copyrights, and registered trademarks) than for other, nonstatutory unfair practices in importation (such as trade secret misappropriation)."[100] For the former, "[s]uch an industry will be deemed to exist if there is significant domestic investment or employment *relating to the protected articles*."[101] For the latter, "there is *no express requirement* . . . that the domestic industry relate to the intellectual property involved in the investigation."[102] In *TianRui*, the railway wheel domestic industry established by complainant did not practice complainant's trade secrets that the Chinese respondents misappropriated and used to manufacture competing railway wheels.[103] Instead, the domestic industry practiced distinct trade secrets for making railway wheels, which complainant had not licensed abroad and had not been misappropriated.[104]

A complainant under § 1337(a)(1)(A) must nevertheless have a domestic industry that is "the target of the unfair acts and practices."[105] Pursuant to ITC precedent, under § 1337(a)(1)(A), "[t]he Commission does not adhere to any rigid formula in determining the scope of the domestic industry as it is not precisely defined in the statute, but will examine each case in light of the realities of the marketplace."[106] In *TianRui*, for example, the Federal Circuit

[99] 661 F.3d 1322 (Fed. Cir. 2011).

[100] *Id.* at 1335.

[101] *Id.* (emphasis added).

[102] *Id.*

[103] *Id.* at 1324, 1335.

[104] *Id.* at 1324.

[105] *In re* Certain Nut Jewelry & Parts Thereof, Inv. No. 337-TA-229, USITC Pub. No. 1929, Views of the Comm'n, at 8 (Nov. 6, 1986); *see In re* Certain Cast Steel Ry. Wheels, Processes for Mfg. or Relating to Same & Certain Prods. Containing Same, Inv. No. 337-TA-655, USITC Pub. 4265, Initial Determination, at 76 (Oct. 16, 2009) (citing *In re* Certain Processes for the Manufacture of Skinless Sausage Casings & Resulting Prod., Inv. No. 337-TA-148/169, USITC Pub. 1624, Initial Determination, at 341 (Dec. 1984)) [hereinafter *In re Certain Cast Steel Ry. Wheels*].

[106] *See TianRui Grp. Co. Ltd.*, 661 F.3d at 1336 (citing *In re* Certain Floppy Disk Drives and Components Thereof, Inv. No. 337-TA-203, USITC Pub. No. 1756, Initial Determination, at 44–45 (May 9, 1985)); *see also In re* Certain Apparatus for the Continuous Production of Copper Rod, Inv. No. 337-TA-52, USITC Pub. 1017, at 54–55 (Nov. 1979) (rejecting a narrow definition of "domestic industry" practiced by patent and instead looking to the "realities of the marketplace" in terms of competing goods).

recognized that "the imported TianRui wheels could directly compete with wheels domestically produced" by complainant.[107]

After demonstrating the existence of a domestic industry under § 1337(a)(1)(A), a complainant must, broadly speaking, show substantial injury—real or threatened.[108] In particular, a complaint must demonstrate unfairness, "the threat or effect of which is to destroy or substantially injure an industry in the United States" or "to prevent the establishment of such an industry."[109] The ITC takes a case-by-case approach in making an injury determination.[110] Nevertheless, over the years, it has examined several indicia[111] and, in recent years, focused on five: "(1) the respondent's volume of imports and penetration into the market, (2) the complainant's lost sales, (3) underselling by the respondent, . . . (4) the complainant's declining production, profitability and

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[107] *TianRui Grp. Co. Ltd.*, 661 F.3d at 1337.

[108] *See* 19 U.S.C. § 1337(a)(1)(A) (2006) (although under a plain reading of the statute, a complainant can prevail on an antitrust claim by showing "[u]nfair methods of competition and unfair acts . . . the threat or effect of which is . . . to restrain or monopolize trade and commerce in the United States," without first establishing the existence of a domestic industry. As a category of claims previously adjudicated by the ITC, antitrust is outside the boundaries of this article).

[109] *Id.*

[110] *See, e.g.*, *In re* Certain Surveying Devices, Inv. No. 337-TA-68, USITC Pub. 1085, Op. of Vice Chairman Michael J. Calhoun & Comm'rs George M. Moore & Catherine Bedell, at 34 (July 1980); *see Corning Glass Works*, 799 F.2d at 1568 ("[T]he determination of injury necessarily must be based upon the particular facts of each case.").

[111] *See* Schaumberg, *supra* note 14, at 82–83 (noting that these include:

> (1) significant direct displacement of the complainant's customers by the infringing imports (lost sales); (2) increasing importation of infringing articles and increasing sales of such articles; (3) declining production of the patented article resulting from sales lost to the imported article; (4) declining profits of the complainant resulting from the imported infringing article; (5) sales of the infringing article at prices lower than the complainant's prices; (6) declining employment and declining productivity in the domestic industry; (7) declining prices obtained by the complainant resulting from its efforts to compete with the infringing imported article; (8) lost potential sales to customers that the complainant might have obtained if the infringing imported article were not being sold to these customers; (9) loss of royalties or potential income from licensees caused by either reduced sales of the articles made by the domestic industry due to the sale of the imported infringing article or the lack or reduction of licensees due to such sales; (10) foreign capacity to produce significant quantities of the infringing article, including a showing of intent by foreign manufacturer to further penetrate the U.S. market; (11) significant market penetration by the imported infringing article; and (12) presence of direct competition between the complainant's article and the imported infringing article without the presence of similar non-patented articles produced by other competition.).

sales," and (5) harm to goodwill and reputation.[112] The ITC considers three additional indicia in assessing threat of substantial injury: (1) foreign cost advantages and production capacity; (2) the ability of the imported product to undersell the domestic product; or (3) substantial foreign manufacturing capacity combined with the respondent's intention to penetrate the U.S. market.[113] Injury and threat of injury are not mutually exclusive, and either will suffice for a prima facie case under § 337.[114]

In evaluating substantiality, important factors are market share and sales volume of the accused articles, either actual or threatened, or both.[115] While market share is particularly meaningful for comparative purposes, the dollar amount of sales alone will not establish substantiality.[116] Instead, to provide analytical value, sales figures must be placed in the context of the market from which they arose.[117] While showing actual, or threat of, substantial injury can entail complex economic analyses, thereby providing respondents myriad opportunities to raise doubts regarding complainants' injury assertions, in practice, the ITC has not imposed a high threshold for satisfying the injury element of § 337.[118]

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[112] *In re* Certain Digital Multimeters, & Prods. with Multimeter Functionality, Inv. No. 337-TA-588, USITC Pub. 4210, Order No. 22: Initial Determination Granting Fluke Corp.'s Motion for Summary Determination of Violation & Terminating the Investigation, at 16–17 (Jan. 14, 2008); *see also In re* Certain Cast Steel Ry. Wheels, Processes for Mfg. or Relating to Same & Certain Prods. Containing Same, Inv. No. 337-TA-655, USITC Pub. 4265, Initial Determination, at 81 (Oct. 16, 2009) (citing *In re* Certain Elec. Power Tools, Battery Cartridges & Battery Chargers, Inv. No. 337-TA-284, USITC Pub. 2389, Initial Determination, at 246 (June 1991)).

[113] *In re* Certain Digital Multimeters, & Prods. with Multimeter Functionality, Inv. No. 337-TA-588, USITC Pub. 4210, Order No. 22: Initial Determination Granting Fluke Corp.'s Motion for Summary Determination of Violation & Terminating the Investigation, at 17; *see In re* Certain Methods for Extruding Plastic Tubing, Inv. No. 337-TA-110, USITC Pub. 1287, Comm'n Action & Order, at 20 (Sept. 2, 1982); *see also In re* Certain Air Impact Wrenches, Inv. No. 337-TA-311, USITC Pub. 2419, Initial Determination, at 139 n.78 (May 29, 1991) (stating that the 1988 Act did not affect the evaluative factors).

[114] *In re* Certain Digital Multimeters, & Prods. with Multimeter Functionality, Inv. No. 337-TA-588, USITC Pub. 4210, Order No. 22: Initial Determination, at 18.

[115] Corning Glass Works, 799 F.2d at 1559.

[116] *See id.* at 1569 ("[T]he amount of sales is highly relevant to the injury determination; however, whether the amount is 'significant' cannot be determined by the dollar amount *in vacuo*. 'Significant' requires some further inquiry once the amount of sales is found.").

[117] *See id.*

[118] *In re* Certain Prods. with Gremlins Character Depictions, Inv. No. 337-TA-201, USITC Pub. 1815, Comm'n Action & Order, at 14, 16 (Jan. 16, 1986); *In re* Certain Rotary Wheel Printing Sys., Inv. No. 337-TA-185, USITC Pub. 1857, Comm'n Action & Order, at 56 (Aug. 12, 1985); *see* Schaumberg, *supra* note 14, at 86 ("Direct economic competition is

D. Nexus Between Unfairness and Injury

Through the language "the threat or effect of which," § 1337(a)(1)(A) requires direct causation or the threat thereof between the unfairness, on the one hand, and "destr[uction] or substantia[l] injur[y] [to] an industry in the United States" or prevention of the establishment of such an industry, on the other hand.[119] One can imagine various scenarios where failure to satisfy this requirement would jeopardize a complainant's case.

For example, returning to our previous hypothetical of a Chinese manufacturer who imports widgets to the U.S. market at a below-market price due to fraudulent business practices, a complainant would satisfy this nexus requirement only by demonstrating a causal chain between the fraud, the low prices, and the injury (e.g., lost sales because a sizeable number of consumers chose to buy the foreign manufacturer's widget over complainant's widget based primarily on its lower price—in other words, price aside, the competing widgets were strong substitutes). However, if consumer surveys demonstrate that customers prefer the Chinese-made widgets, regardless of price (e.g., general perception that China makes the best widgets), the complainant has a nexus problem and should rethink its use of § 337. Likewise, complainant might lack the required nexus where its domestic industry suffers not from competing products, but its inability to satisfy domestic demand[120] or an overall decline in demand for the article(s) at issue.[121]

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typically a *sine qua non* of a finding of substantial injury, existing or threatened.") (emphasis added) It should be noted, however, that lackluster injury showings have contributed to respondents prevailing over complainants; *see, e.g.*, *In re* Certain Limited-Charge Cell Culture Microcarriers, Inv. No. 337-TA-129, USITC Pub. 1486, Comm'n Action & Order, at 44 (Nov. 18, 1983) (finding no injury by loss of royalties); *see also In re* Certain Combination Locks, Inv. No. 337-TA-45, USITC Pub. 945, Comm'n Determination, Order, & Memorandum Op., at 9–12 (Feb. 16, 1979) (finding no tendency to substantially injure on basis of increasing sales trend and lack of market penetration).

[119] *See In re* Certain Digital Multimeters, & Prods. with Multimeter Functinality, Inv. No. 337-TA-588, USITC Pub. 4210, Order No. 22: Initial Determination Granting Fluke Corp.'s Motion for Summary Determination of Violation & Terminating the Investigation, at 1, 16 (complainant bears the burden of proving that the respondent's unfair act or acts have "caused substantial injury to the domestic industry or that the presence of the accused imported products demonstrate relevant conditions or 'circumstances from which probable future injury can be inferred.'").

[120] *Corning Glass Works*, 799 F.2d at 1559.

[121] *In re* Certain Vertical Milling Machs. & Parts, Attachments, & Accessories Thereto, Inv. No. 337-TA-133, USITC Pub. 1512, Views of the Comm'n, at 45 (Mar. 1984); *In re* Certain Large Video Matrix Display Sys. & Components Thereof, Inv. No. 337-TA-75, USITC Pub. 1158, Comm'n Op., at 25 (June 1981).

Sophisticated companies, as a business practice, gather market intelligence illuminating price sensitivity of consumer demand and whether they are losing business to competitors, who among competitors are most problematic in this regard, and why the lost business is occurring. Such intelligence should be thoroughly vetted before filing a complaint under § 1337(a)(1)(A).

III. Ancillary Considerations in a § 1337(a)(1)(A) Investigation

Below is a non-exclusive list of considerations for any complainant seeking to activate § 337's unused capacity by adding a cause of action to the long list of torts already redressed by the ITC.

A. Extraterritoriality

Over the last 30 years, the Supreme Court has urged caution in the extraterritorial application of American law, ruling against the extraterritorial application of § 10(b) of the Securities Exchange Act of 1934[122] and Title VII of the Civil Rights Act of 1964.[123] "It is a longstanding principle of American law," according to the Court, "'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[124] The justification for this principle is that it "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord"[125] and "preserv[es] a stable background against which Congress can legislate with predictable effects."[126] "[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[127] Nevertheless, a statute need not say, "this law applies abroad," to graduate from domesticity—instead, context is important.[128]

In *TianRui*, the Federal Circuit definitively ruled that the presumption against extraterritoriality does not apply to § 1337(a)(1)(A).[129] The two-judge majority (over a vigorous dissent from the third judge on the panel) gave three reasons for its decision: (1) § 337 governs importation, an "inherently

[122] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2875 (2010).
[123] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 246–47 (1991).
[124] *Id.* at 248 (citation omitted).
[125] *Id.*
[126] *Morrison*, 130 S. Ct. at 2881.
[127] *Id.* at 2884.
[128] *Id.* at 2883.
[129] TianRui Grp. Co. Ltd. v. ITC, 661 F.3d 1322, 1329–30 (Fed. Cir. 2011).

international transaction;" (2) § 337 was not being applied by complainant to sanction "purely extraterritorial conduct" because the foreign activity resulted in the importation of goods into the United States;" and (3) the legislative history of § 337 supports the ITC's consideration of conduct that occurs abroad.[130] The majority explained, however, that the ITC's "broad and flexible authority" under § 1337(a)(1)(A) "cannot be used to circumvent extraterritorial limitations" admittedly applicable to § 1337(a)(1)(B), namely the Supreme Court's admonition that the presumption against extraterritoriality "applies with particular force in patent law."[131] This is consistent with the notion that patent law is more a matter of policy than of fundamental fairness, and thus countries can and should be allowed (absent accession to harmonizing IP treaties) to design patent systems that reflect their unique national circumstances.[132]

While *TianRui* stands as a strong pronouncement of the ability of § 1337(a)(1)(A) to sanction foreign behavior that directly affects U.S. markets,[133] it has not been endorsed by our country's highest court. Nevertheless, for legal and pragmatic reasons, it is difficult to imagine § 337 without at least some extraterritorial credentials.[134] After the enactment of the Tariff Act of 1922 (predecessor statute to § 337), the Tariff Commission (predecessor to the ITC) advised Congress that the new provisions "make it possible for the President to prevent unfair practices, even when engaged in by individuals residing outside the jurisdiction of the United States."[135] From a practical perspective, § 337 would be a feckless sentry enlisted to protect the U.S. marketplace if it ignored tortious acts (e.g., fraud, collusion, misuse of market power,

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[130] *Id.*

[131] *Id.* at 1333–34.

[132] *See, e.g.*, Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 455 (2007) (affirming that validity of the U.S. government's position that "'[f]oreign conduct is [generally] the domain of foreign law,' and in the area here involved, in particular, foreign law 'may embody different policy judgments about the relative rights of inventors, competitors, and the public in patented inventions.'").

[133] *See TianRui Grp. Co. Ltd.*, 661 F.3d at 1329 ("[T]he Commission has not applied section 337 to sanction purely extraterritorial conduct; the foreign 'unfair' activity at issue in this case is relevant only to the extent that it results in the importation of goods into this country causing domestic injury. In light of the statute's focus on the act of importation and the resulting domestic injury, the Commission's order does not purport to regulate purely foreign conduct.").

[134] *See In re* Orion, 71 F.2d 458, 465 (C.C.P.A. 1934) (In creating § 337, "the legislative power of the Government, through the United States Tariff Commission and the President, was *regulating the foreign commerce of the country* along lines of a general policy expressed by it.") (emphasis added).

[135] 6 U.S. Tariff Comm'n Ann. Rep. at 4.

trade secret theft) occurring outside the United States, which resulted in the production of goods that were subsequently imported into the United States to the detriment of domestic industries.[136] As the Federal Circuit explained, "[w]e think it highly unlikely that Congress, which clearly intended to create a remedy for the importation of goods resulting from unfair methods of competition, would have intended to create such a conspicuous loophole for misappropriators."[137]

B. Comity

"Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."[138] Comity counsels that any laws "carried into execution, within the limits of any government, are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of the other governments, or their citizens."[139] Notably, the ITC has recognized that "United States courts ordinarily refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United States."[140]

Factors set forth in the Restatement of Foreign Relations Law are relevant to a comity analysis insofar as they elucidate whether "exercising that jurisdiction to prescribe law with respect to a person or activity having connections with

[136] *See In re* Certain Steel Rod Treating Apparatus & Components Thereof, Inv. No. 337-TA-97, USITC Pub. 1210, Comm'n Op., at 7 (Jan. 1982) ("Congress enacted Section 337 because in many instances foreign individuals or firms committing unfair acts to the detriment of an American industry are beyond the *in personam* reach of the U.S. courts and not amenable to a suit for money damages or injunctive relief.").

[137] *TianRui Grp. Co. Ltd.*, 661 F.3d at 1330.

[138] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 544 n.27 (1987).

[139] *Id.*

[140] Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997); *see also* McCook Metals L.L.C. v. Alcoa Inc., 192 F.R.D. 242, 256 (N.D. Ill. 2000) ("[I]f an attorney-client privilege exists in a country, then comity requires us to apply that country's law to the documents at issue.").

another state" is reasonable.[141] Comity "is a matter neither of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."[142]

As a concept, comity is broad enough to cover not only judicial comity, but what Justice Scalia has labeled prescriptive comity.[143] Examples of the former are litigations in which the ITC applied German bankruptcy law,[144] and the Federal Circuit deferred to the judgment of a French court,[145] to determine the ownership of asserted patents. Similarly, in *TianRui*, the Federal Circuit recognized that employees misappropriating trade secrets in China after signing contracts in China agreeing to protect such trade secrets implicated Chinese law.[146]

Prescriptive comity, by contrast, is "the respect sovereign nations afford each other by limiting the reach of their laws."[147] According to Justice Scalia, prescriptive comity is readily apparent (at least in spirit) from the Restatement factors.[148] As a practical matter, a party opposed to the recognition of new-to-the-ITC unfairness under § 1337(a)(1)(A) may advance prescriptive comity

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[141] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting) (citing Restatement (Third) of Foreign Relations Law § 403(2) (1986), which lists reasonableness factors as:

> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.).

[142] Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

[143] *Hartford Fire Ins. Co.*, 509 U.S. at 817 (Scalia, J., dissenting).

[144] *See In re* Certain Semiconductor Integrated Circuits & Prods. Containing Same, Inv. No. 337-TA-665, USITC Pub. 4269, Initial Determination on Violation of § 337 & Recommended Determination on Remedy & Bond, at 31 (Oct. 9, 2009).

[145] *Id.*; Int'l Nutrition Co. v. Horphag Research Ltd., 257 F.3d 1324, 1329 (Fed. Cir. 2001).

[146] TianRui Grp. Co. Ltd. v. ITC, 661 F.3d 1322, 1333 (Fed. Cir. 2011).

[147] *Hartford Fire Ins. Co.*, 509 U.S. at 817 (Scalia, J., dissenting).

[148] *See id.* at 818 (Scalia, J., dissenting) ("[A] nation having some 'basis' for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction 'with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.'").

as a justification for maintaining the status quo. In so doing, the party might echo Justice Scalia, who dissented vociferously against the international reach of the Sherman Act in 1995[149] and (sitting on a Court with different interpretive dynamics) authored the majority opinion in 2010 that limited the international reach of the Securities Exchange Act.[150] However, the *TianRui* majority was unimpressed by the arguments of prescriptive comity,[151] and it is impossible to know how, if at all, the contemporary Supreme Court would rule differently before a case squarely presents the issue to the Court.

C. GATT

In 1988, a GATT panel ruled that § 337 violated the national treatment provisions of Article III:4[152] of the GATT and that, contrary to U.S. assertions, the violations could not be justified under Article XX(d)[153] as "measures to secure compliance with" U.S. patent law.[154] Focusing on differences between ITC trade litigation and U.S. district court general litigation, the panel found that § 337 unlawfully discriminated in favor of domestic interests by:

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[149] *Id.* at 801, 813–22.

[150] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2885 (2010).

[151] *See TianRui Grp. Co. Ltd.*, 661 F.3d at 1332 ("[W]e conclude that the Commission's longstanding interpretation is consistent with the purpose and the legislative background of the statute, and we therefore hold that it was proper for the Commission to find a section 337 violation based in part on acts of trade secret misappropriation occurring overseas.").

[152] Gen. Agreement on Tariffs and Trade art. III, Oct. 30, 1947, 55 U.N.T.S. 188:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.

[153] *See id.* at art. 10:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices . . . .

[154] *See* Panel Report, *United States–Section 337 of the Tariff Act of 1930*, L/6439, at § 2.9 (Nov. 7, 1989) (stating that the GATT proceeding stemmed from the ITC's determination in *Certain Aramid Fibers*, Inv. No. 337-TA-194, in which a limited exclusion order was issued based on findings that a Netherlands corporation had imported into the United States aramid fiber that had been manufactured abroad by a process that infringed a U.S. process patent).

(1) providing not only a forum, but by virtue of its speedy adjudication, a complainant-friendly forum, in which to challenge only imported products; (2) not allowing respondents at the ITC to raise counterclaims, a common district court practice; and (3) inappropriately issuing general exclusion orders,[155] for which no analogue existed in district court.[156]

In addressing these concerns, Congress adopted a minimalist approach that strove to accommodate the findings of the GATT Panel while preserving the effectiveness of § 337 as a border enforcement measure.[157] In 1994, shortly after the Agreement on Trade Related Aspects of Intellectual Property ("TRIPS"), for which the United States was a major supporter and beneficiary, was signed under the auspices of the newly created WTO,[158] Congress passed legislation to bring § 337 into compliance with all GATT provisions.[159] The principal changes were: (1) to complete ITC investigations "at the earliest practicable time," instead of by a fixed 12 to 18 month deadline; (2) to permit ITC respondents to raise counterclaims, subject to the requirement that they be removed immediately to a U.S. district court with proper venue; and (3) to codify the ITC's practice regarding the issuance of exclusion orders.[160] The ITC, however, retained its ability to issue general exclusion orders.[161]

Section 337 currently enjoys a reprieve from GATT challenges. Yet, any changes to § 337, in letter or application, could trigger a resurgence. This is particularly true for § 1337(a)(1)(A), which appears to have evaded scrutiny in 1988 and thereafter by a world focused on § 337 as a patent infringement statute.[162] For over six years in the late 1980s and early 1990s, before the 1994 Congressional amendments, GATT cast a long shadow over

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[155] *See* Schaumberg, *supra* note 14, at 15–17 (noting that a general exclusion order "applies to all infringing goods, regardless of source. That is, the order is enforceable against infringing products imported by or from entities that were not parties to the investigation. Thus, such an order protects a complainant's market against all known and unknown infringers, both at the time of the order's issuance and in the future.").

[156] *See id.* at 53–58.

[157] Schaumberg, *supra* note 1, at 262.

[158] *See generally* Raj Bhala, International Trade Law: Interdisciplinary Theory and Practice 10 (3d ed. 2008).

[159] *See* Uruguay Round Agreements Act, H.R. Rep. No. 103-826, at 140 (1994).

[160] *Id.* at 7.

[161] *See* 19 U.S.C. § 1337(d)(2) (2006).

[162] *See* Panel Report, *United States–Section 337 of the Tariff Act of 1930*, L/6439, at § 2.8 ("Much of the argumentation developed before the Panel concerned the relationship and differences between patent-based Section 337 actions and litigation in federal district courts under United States patent law."); *see also* Uruguay Round Agreements Act, H.R. Rep. No. 103-826, at 142 (1994) ("The amendments are necessary to ensure that U.S. procedures for dealing with alleged infringements by imported products comport with GATT 1994

the viability of § 337.[163] With this still in the minds of ITC personnel and § 337 practitioners, it remains to be seen how an action that might upset the current equilibrium would be received.

For example, each of the hypothetical examples considered at the end of this Article—trading in conflict minerals, use of child labor, environmental degradation, and unsafe food and drug practices—potentially involves a private party's use of the ITC as a venue to redress unfairness that cannot be reached by that party in U.S. district court. Importantly, however, in each hypothetical the U.S. government in federal courts could reach the unfairness. While this might cause grief for GATT purists, it would give rise to discriminatory treatment only with respect to the party prosecuting the action, not the substantive standard of law under which an alleged perpetrator of unfairness is prosecuted. In other words, it is arguably a distinction without a difference and akin to the ITC's practice in § 337 litigations of enforcing 19 U.S.C. § 1304, a customs marking statute that lacks a private right of action in federal district court.

Critically, if a respondent wanted to challenge a § 337 investigation based on an alleged GATT violation, it would likely fail. The ITC is a creature of statute, not GATT.[164] While academics have debated the extent to which GATT is self-executing or otherwise worthy of federal law status, and thus potentially applicable to § 337 investigations, the Uruguay Round Agreements Act ("URAA") forecloses this argument. In particular, it provides that no provision of the WTO agreements will have effect within the United States if it is "inconsistent with any law of the United States . . . ."[165] It further provides:

> No person other than the United States–(A) shall have any cause of action or defense under any of the [WTO] Agreements or by virtue of congressional approval of such an agreement, or (B) may challenge . . . any action or inaction by any department, agency, or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with such agreement.[166]

Consequently, a § 337 respondent cannot raise an affirmative defense based on the alleged violation of GATT.[167]

'national treatment' rules, while providing for the effective enforcement of intellectual property rights at the border.").

[163] Schaumberg, *supra* note 1, at 259.

[164] *See* VastFame Camera, Ltd. v. ITC, 386 F.3d 1108, 1112 (Fed. Cir. 2004) ("The Commission is a creature of statute[,] . . . [t]hus, it must find authority for its actions in its enabling statute.").

[165] § 3512(a)(1).

[166] § 3512(c)(1).

[167] *See also In re* Certain Commercial Food Portioners, Components Thereof, Including Software, & Process Thereof, Inv. No. 337-TA-339, Order No. 15: Denying Complainant's Motion to Strike, 1992 WL 811721, *3 (Oct. 16, 1992) (existing as a pre-URRA order,

Instead, such a grievance is reserved for the political process. After a § 337 complaint is filed, the ITC normally has thirty days to determine whether the complaint is properly filed and if the investigation should be instituted.[168] Pre-institution comments about the public interest are also solicited from the public and potential respondents via a Federal Register notice.[169] A respondent or other interested party could try to raise its GATT concerns in a public interest submission in the hope of convincing the ITC not to institute an investigation.[170] However, the ITC has rejected previous attempts by parties to conflate GATT provisions and public interest factors.[171] Likewise, even prior to the enactment of URAA, the Federal Circuit made clear that "if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy."[172] In sum, the influence of GATT at the ITC lies not in GATT's standing as positive law, but in the ITC's aversion to political fallout caused by an ITC decision that implicates GATT concerns for Congress, imaginable in the event of overt trade discrimination favoring domestically produced goods over imports. This makes GATT relevant, though not decisive, in the discussion that follows.

D. Conflicts of Law

Substantive conflicts of law, occurring on national and international levels, can arise in § 337 litigation.[173] On the national level, conflicts arise

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noting that "[u]nder existing law and policy, there is a strong argument to the effect that the GATT panel report on section 337 cannot serve as an adequate defense to this or any section 337 investigation").

[168] 19 C.F.R. § 210.10(a)(1) (2012).

[169] § 210.8(c)(1).

[170] § 210.8(b).

[171] *See In re* Certain Integrated Circuit Telecommunication Chips & Prods. Containing Same Including Dialing Apparatus, Inv. No. 337-TA-337, USITC Pub. 2670, Comm'n Op. on the Issues Under Review & On Remedy, the Public Interest, & Bonding, at 41 (Aug. 1993) ("Similarly, the question of the United States' compliance with its GATT obligations in light of the Panel decision is a policy matter for President and Congress to decide in the first instance in amending section 337. We do not believe it is a matter of public interest . . . .").

[172] Suramerica de Aleaciones Laminadas, C.A. v. ITC, 966 F.2d 660, 668 (Fed. Cir. 1992).

[173] *See In re* Certain Hand-Operated, Gas-Operated Welding, Cutting & Heating Equip. & Component Parts Thereof, Inv. No. 337-TA-132, Initial Determination to Amend Notice (Order No. 22), at 3 (Feb. 10, 1983) (serving as an example of how the law is inherently reactive, and thus sometimes lacks explicit coverage of new forms of unfairness. Still, for the purposes of this section, unlawfulness (i.e., violation of a statutory or common law standard) serves as a useful proxy for "unfairness"); *see also* Certain Welded Stainless Steel Pipe & Tube, Inv. No. 337-TA-29, USITC Pub. 863, Op. of Comm'rs Minchew, Moore & Alberger, at 39 (the mandate of the ITC under § 337 is broad enough to capture such "unfairness" in its

where state law governs a particular form of unfairness, such as trade secret misappropriation, and the ITC, a trade venue with national jurisdiction, must decide which state-based standard to apply.[174] On the international level, once the ITC settles upon a prevailing U.S. standard of unfairness for a particular litigation, conflicts arise over whether the alleged unfairness is also considered legally unfair at the overseas situs of named respondents and, if not, whether and how to reconcile applicable U.S. and foreign standards.[175]

1. Intra-U.S. Conflicts

As for national conflicts of law, the ITC has traditionally applied federal standards[176] and, in rare instances where state law governed, chosen an applicable state standard, as would a federal district court applying the *Erie* doctrine.[177] That is what the Administrative Law Judge ("ALJ") did in *Certain Cast Steel Railway Wheels, Certain Processes for Manufacturing or Relating to Same & Certain Products Containing Same*,[178] the underlying ITC litigation that, on appeal, produced the *TianRui* decision.[179] Yet, in *TianRui,* which involved allegations of trade secret misappropriation, the Federal Circuit rejected this longstanding policy in favor of fashioning a single federal standard because "where the question is whether particular conduct constitutes 'unfair methods

incipiency, prior to legislative or judicial recognition in other quarters, although, for reasons articulated above, the ITC has tread lightly in recognizing new forms of actionable unfairness).

[174] *See, e.g.*, *In re* Certain Cast Steel Ry. Wheels, Processes for Mfg. or Relating to Same & Certain Prods. Containing Same, Inv. No. 337-TA-655, USITC Pub. 4265, Initial Determination, at 17 (Oct. 16, 2009) (recognizing that the Federal Circuit held that trade secret misappropriation was a matter of state law, and thus applying Illinois trade secret law to investigation).

[175] *See* TianRui Grp. Co. Ltd. v. ITC, 661 F.3d 1322, 1333 (Fed. Cir. 2011) (noting that the Court "cannot discern any relevant difference between the misappropriation requirements of TRIPS article 39 [applicable in China] and the principles of trade secret law applied by the administrative law judge in this case" and "therefore detect[ing] no conflict between the Commission's actions and Chinese law," while explicitly not "address[ing] whether policy choices in a foreign jurisdiction can nullify a contractually imposed duty for the purposes of section 337.").

[176] *See, e.g.*, *In re* Certain Cast Steel Ry. Wheels, Initial Determination, at 17 ("In earlier section 337 investigations based on allegations of trade secret misappropriation, the Commission has looked to general principles of tort or commercial law to determine whether a violation has occurred.").

[177] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 80 (1938) (noting that in diversity jurisdiction cases, a federal district court must apply the law of the state in which it sits, including the judicial doctrine of the state's highest court).

[178] *In re* Certain Cast Steel Ry. Wheels, Initial Determination.

[179] *Id.*, *aff'd*, *TianRui Group. Co.*, 661 F.3d at 1322.

of competition' and 'unfair acts' in importation, in violation of section 337, the issue is one of federal law . . . ."[180]

While that was an appealing approach in *TianRui* because of the lack of interstate variation in trade secret law, it might not produce copacetic results in every litigation.[181] If, for example, there were substantive interstate variations regarding the legality of particular unfairness such that the outcome of a litigation could change depending upon which state law, or features of various state laws, was chosen in fashioning a "federal standard," the ITC could trigger a GATT challenge because the treatment of domestically produced goods (in state or federal district courts applying a particular state standard) and imported goods (at the ITC applying a "federal" standard) could differ depending on the standard of unfairness applied.

2. International Conflicts

In the international context, four distinct conflict scenarios arise.

a. Unfair in United States and Foreign Sovereign

In the first scenario, the alleged unfairness is considered unfair (perhaps because it is baldly unlawful) not only in the United States, but also in the sovereign governing the respondents. An international treaty ratified by the United States and the sovereign, for example, would create this condition, as would a foreign entity's violation of an applicable foreign law (e.g., payment of a minimum wage) that, while not identical to a corresponding U.S. law (e.g., in terms of hourly wage), is nevertheless violated, giving rise to inherently unfair competitive conditions in the marketplace, where a quid pro quo of participation is "playing by the rules."[182] Here, in the absence of conflict, an ITC complainant can make its strongest case for the application of § 337 to respondents' unfair "acts" or "methods."

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[180] *TianRui Grp. Co.*, 661 F.3d at 1327.

[181] *See id.* at 1328 ("[T]he choice of law issue, although it could be important in other cases, does not affect the outcome of this case.").

[182] Schaumberg, *supra* note 14, at 266 (describing that § 337's "original purpose was to provide relief to U.S. industries against unfair competition from importers in light of the inability to obtain jurisdiction over foreign manufacturers in U.S. courts and *the absence of effective remedies under the laws of the countries where the importers were located*.") (emphasis added); *see also* Fed. R. Civ. P. 44.1 (setting out the process by which federal courts interpret foreign law); *but see TianRui Grp. Co. Ltd*, 661 F.3d at 1337 n.8 (Moore, J., dissenting):

> The issue here is the Commission's authority to punish TianRui, whose acts in the importation of its wheels give rise to no cause of action, based on wholly extraterritorial acts carried out in China. Even if Chinese trade secret laws were identical to our laws, this does not give the Commission the power to interpret and apply Chinese laws to TianRui's unfair acts in China. If there has been some violation of Chinese law, any remedy must come from Chinese courts.

b. Not Unfair in United States or Foreign Sovereign

In the next scenario, neither country recognizes the allegedly unfair "acts" or "methods" as unfair, and thus § 337 cannot apply to enjoin the importation of goods without triggering a potential GATT challenge because, if § 337 did apply, imported goods would receive discriminatory treatment vis-à-vis domestically produced goods.

c. Unfair in a Foreign Sovereign but Not in the United States

The third scenario is very unusual—a foreign sovereign governing the respondents recognizes their behavior as unfair, yet the United States does not. Two problems arise in applying § 337 in this situation—the "acts" or "methods" are not unfair in the United States, and thus do not infect the U.S. marketplace when such goods are imported, and applying the foreign sovereign's unfairness standard to enjoin imported goods, but not domestically produced goods, would presumably violate GATT. The best course of action for an aggrieved party in this situation would likely be to file an action in a court of the foreign sovereign.

d. Unfair in the United States but Not in a Foreign Sovereign

The last scenario—"unfair" in the United States, but not the foreign sovereign—is the trickiest to analyze. In *TianRui*, the Federal Circuit avoided this issue, explaining that "this case is not the result of the imposition of legal duties created by American law on persons for whom there was no basis to impose such duties" because trade secret misappropriation is prohibited under Chinese law (consistent with China's accession to the TRIPS agreement) and the misappropriation occurred in abrogation of employment contracts that, pursuant to Chinese law, were legally enforceable.[183] As the court disclaimed, "we do not presently address whether policy choices in a foreign jurisdiction can nullify a contractually imposed duty for the purposes of section 337."[184] Note, however, that it is unclear whether the court was referencing the doctrines of judicial comity, conflict of law, or both.[185]

This scenario implicates two types of presumptive conflicts. The first type is domestic in nature, insofar as only domestic authorities—the ITC, Federal Circuit, and Supreme Court—delineate the boundaries of § 337 unfairness. This inquiry is distinct from the comity analysis supra, whereby foreign laws were applied to reach foundational facts (e.g., patent ownership) relevant to overarching unfairness (e.g., patent infringement), not substantively to inform the discussion regarding what is or is not unfair.

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[183] *TianRui Grp. Co.*, 661 F.3d at 1333.

[184] *Id.* at n.7.

[185] *Id.*

The second type of potential conflict is international and truly confrontational in nature, whereby one sovereign explicitly makes a particular action or inaction illegal and another sovereign explicitly requires the action or inaction, thereby making it impossible for a respondent to satisfy both standards. This type is exceedingly rare in a world of negative rights regimes, and, even if it were common, a respondent could resolve the conflict on its own initiative by limiting the situs and impacts of its business practices to only one of the sovereigns.

These presumptive conflicts warrant resolution in favor of U.S. law. As for the first type of conflict, for the purposes of defining unfairness under § 337, the ITC must apply U.S. law because only the U.S. Congress, courts, and agencies illuminate what is considered "unfair" or unlawful within the context of the U.S. marketplace.[186] Further, if the ITC were to vary its notions of unfairness, depending on the *situs* of respondents, to accommodate competing public policies of sovereigns, the practice would likely violate GATT because domestically produced goods and imports would receive differing treatment, as would imports from different countries. In lieu of implicating GATT, U.S. law prevails and true conflict is averted—"[n]o conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.'"[187]

As for the second type of presumptive conflict, as the Supreme Court said in the context of antitrust law, "the fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States . . . laws," even where the foreign state has a strong policy to permit or encourage such conduct.[188] Indeed, when the French passed statutes explicitly forbidding compliance with U.S. laws regarding foreign discovery, thereby creating the clearest of sovereign law conflicts, the Supreme Court ruled that U.S. law should prevail, explaining that "the enactment of such a statute by a foreign nation [cannot] require American courts . . . to provide the nationals of such a country with a preferred status in our courts. It is clear that American

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[186] *See* U.S. Const. art. I, § 8, cl. 3 (giving Congress broad power "[t]o regulate Commerce with foreign Nations . . . ."); *see also, e.g.*, Ford v. United States, 273 U.S. 593, 621–623 (1927) (upholding the Supreme Court's power to make laws applicable to persons or activities beyond our territorial boundaries where U.S. interests are affected); *see also* United States v. Bowman, 260 U.S. 94, 98–99 (1922); *see also* American Banana Co. v. United Fruit Co., 213 U.S. 347, 359 (2009); *see also* Medellín v. Texas, 552 U.S. 491, 498 (2008).

[187] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993) (quoting Restatement (Third) Foreign Relations Law § 403 cmt. e (1986)).

[188] Restatement (Third) Foreign Relations Law § 415 cmt. j; Continental Ore Co v. Union Carbide & Carbon Corp., 370 U.S. 658, 706–707 (1962).

courts are not required to adhere blindly to the directives of such a statute."[189] The same would presumably be true for any foreign statutes blocking the ability of § 337 to promote "the public health and welfare and the assurance of competitive conditions in the United States economy."[190]

As an agency tasked with evaluating the unfairness of articles of commerce purposefully directed into the United States, the ITC has appropriately resolved purported conflicts in favor of U.S. law.[191] Under § 1337(a)(1)(A), the ITC has consistently applied U.S. law to acts occurring abroad without addressing the significance, if any, of foreign laws.[192] Moreover, at least two ALJs have noted that deference to foreign governments is not appropriate where a foreign law "is contrary to the public policy of the United States."[193] As the Federal Circuit explained in *TianRui*, § 337's statutory prohibition "naturally contemplates that the unfair methods of competition and unfair

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[189] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 544 n.29 (1987).

[190] Report on the Comm. on Fin., Trade Reform Act of 1974, S. Rep. No. 93-1298, at 197 (1974).

[191] *See In re* Orion, 71 F.2d 458, 464 (C.C.P.A. 1934) (noting that, in the predecessor to § 337:

> [T]he legislative power of the Government, through the United States Tariff Commission and the President, was *regulating the foreign commerce of the country along lines of a general policy expressed by it* . . . The importer has no right to complain as to the operation of the machinery, for the act of importation, even to our citizens, is not a vested right, but an act of grace.

(emphasis added) (citing Buttfield v. Stranahan, 192 U.S. 470, 493 (1904)); *see also* Restatement (Second) of Conflict of Laws § 6(1) (1969) (comporting with the previous statement and declaring that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."). The Restatement also identifies several factors that weigh in favor of applying U.S. law to regulate goods infiltrating the U.S. marketplace**:**

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6(2)(a)–(g).

[192] *See generally In re* Certain Nut Jewelry and Parts Thereof, Inv. No. 337-TA-229, USITC Pub. 1929 (Nov. 1986) (dealing with foreign respondents); *In re* Certain Processes for the Manufacture of Skinless Sausage Casings & Resulting Prod., Inv. No. 337-TA-148/169, USITC Pub. 1624 (Dec. 1984) (dealing with foreign respondents). .

[193] *In re* Certain Diltiazem Hydrochloride & Diltiazem Preparations, Inv. No. 337-TA-349, Order No. 24: Granting In Part Motion No. 349-38; & Requiring In Camera Inspection (Oct. 29, 1993).

acts leading to the prohibited importation will include conduct that takes place abroad," and the ITC "does not purport to enforce . . . [U.S.] law in other countries generally, but only as that conduct affects the U.S. market."[194]

E. Standing

Standing presents at least two considerations for aspiring complainants under § 1337(a)(1)(A), each arising from the "case or controversy" requirement in Article III courts.[195] The first—injury-in-fact, in Supreme Court parlance—is whether the complainant is sufficiently impacted by the allegedly unlawful conduct to warrant standing.[196] Although it is debatable whether a complainant seeking to litigate at the ITC must possess a domestic industry that can be injured (or the means to establish one),[197] the complaint must include "a description of the complainant's business and its interests in the relevant domestic industry or the relevant trade and commerce."[198] Further, the ITC is subject to review by Article III courts,[199] and a complainant would ostensibly need to satisfy the injury-in-fact requirement to appeal an adverse ITC determination. GATT also supports this interpretation, as it could be discriminatory to apply differing standing requirements in litigations involving imports and domestically produced goods, insofar as pursuing litigations involving imports would be less onerous, and thus more inclusive in terms of potential complainants.[200] Such a de facto "case-or-controversy" requirement may account for the dearth of ITC investigations independently initiated by complainants, such as interest groups, lacking a domestic industry, but purportedly acting in the interest of others possessing such an industry.

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[194] TianRui Grp. Co. Ltd. v. ITC, 661 F.3d 1322, 1332, 1335 (Fed. Cir. 2011); *see also* Restatement (Third) of Foreign Relations Law, § 402 ("[A] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory . . . .").

[195] 19 U.S.C. § 1337(a)(1)(B)–(D) (2006) (treating standing differently in that complainant must be an intellectual property rights holder).

[196] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[197] *See* § 1337(a)(1)(A) (redressing

> [u]nfair methods of competition and unfair acts in the importation of articles . . . the threat or effect of which is—(i) to destroy or substantially injure an industry in the United States; (ii) to prevent the establishment of such an industry; or (iii) to restrain or monopolize trade and commerce in the United States.

Yet, it does not require that the complainant own a stake in or control the industry harmed or stunted, nor the trade or commerce monopolized or restrained).

[198] 19 C.F.R. § 210.12(a)(7) (2009).

[199] § 1337(c).

[200] Gen. Agreement on Tariffs and Trade art. III, Oct. 30, 1947, 55 U.N.T.S. 188.

Nevertheless, in § 337 litigation, complainants are theoretically obsolete. The ITC "shall investigate any alleged violation of this section on complaint under oath or *upon its initiative*."[201] Yet, this has occurred on only two occasions in the history of the ITC,[202] and if the ITC were to find that a complainant lacked standing and to proceed on its own initiative, a complainant would lose control over the investigation. At best, before the Commission issues any remedial order in the investigation, such a complainant would be allowed to submit briefing on remedy, "the public interest, and bonding,"[203] an undesirable role for an interest group seeking intimate participation.

The second standing issue—redressability, in Supreme Court parlance[204]—relates not to the complainant, but its cause of action and, in particular, whether a tort exists that covers the alleged unfairness and contemplates the complainant's participation. In theory, the ITC can investigate and redress almost any unfairness under § 337, regardless of whether the unfairness is already recognized as unlawful under statutory or common law.[205] However, as explained supra, the ITC's recognition of novel unfairness theories could trigger a political feud over a potential GATT violation.

To a lesser degree, the same might be true were the ITC effectively to broaden the parties recognized to possess redressability under a particular statute. The Fair Labor Standards Act ("FLSA"), for example, allows aggrieved employees, not business competitors, to bring an action against a company that fails to follow the law in terms of compensating its employees, even though competitors might be adversely affected by the practice.[206] If the ITC allowed competitors to initiate investigations against one another based on FLSA-based claims of unfairness, imports would receive discriminatory treatment vis-à-vis domestically produced goods, such that the former, but not the latter, could be challenged in a lawsuit brought by a competitor under the FLSA. As noted supra, however, the application of GATT's national treatment rule in this instance is arguably unwarranted.

In sum, it behooves interest groups seeking to harness the power of § 337, before financing an investigation, to partner with a domestic industry complainant and verify the injury-in-fact and redressability of that complainant.

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[201] § 1337(b)(1) (emphasis added).

[202] Donald K. Duvall et al., Unfair Competition and the ITC: Actions Before the International Trade Commission Under Section 337 of yhe Tariff Act of 1930, § 3:16 n.2 (2007).

[203] § 210.50(a)(4).

[204] Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992).

[205] *See In re* Certain Hand-Operated, Gas-Operated Welding, Cutting & Heating Equip. & Component Parts Thereof, Inv. No. 337-TA-132, Initial Determination to Amend Notice (Order No. 22), at 3 (Feb. 10, 1983).

[206] 29 U.S.C. § 201 (2006).

In so doing, acting through de jure complainant and counsel, the interest group could operate in the background as a de facto complainant, thereby avoiding standing challenges raised by respondents.

F. Anthropological Sensitivity and Unintended Consequences

After finding a violation of § 337, but before issuing an exclusion order, the ITC must consider the impact of the order on the public interest.[207] Additionally, after finding a violation and issuing a remedy, these determinations are transmitted to the United States Trade Representative ("USTR"), under authority delegated by the President of the United States, for 60 days of review.[208] Although public interest factors focus on U.S. citizens and their marketplace and are theoretically apolitical, executive branch review is inherently political, and thus subject to cooption by domestic and international interest groups.[209] Although it is rare for the USTR to disapprove an ITC exclusion order,[210] politicization of his or her review could be problematic for a complainant seeking to utilize § 1337(a)(1)(A) to redress new-to-the-ITC unfairness. This is because, to some extent, the inquiry is culturally loaded, having arisen from a pro-Western worldview and arguably lacking a strong normative grounding in an international context where fairness and public interest can be slippery concepts.

As referenced in the comity discussion supra, there is some room in U.S. jurisprudence for the accommodation of differing, and sometimes divergent, worldviews. At the very least, there is perhaps an acknowledgement that the Western, individualistic, and pluralistic worldview, reliant on adherence to

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[207] 19 U.S.C. § 1337(d)–(f) (2006) (mandating that, specifically, the ITC must consider the effect that relief under the statute would have on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers).

[208] *See* Assignment of Certain Functions Under Section 337 of the Tariff Act of 1930, 70 Fed. Reg. 43,251 (July 26, 2005) (delegating presidential authority to disapprove Commission exclusion orders initiated under § 337 to the U.S. Trade Representative).

[209] *See* Schaumberg, *supra* note 14, at 221–22.

[210] *See id.* at 220 n.90 (noting that the President has exercised his authority to disapprove a Commission remedy for violation of § 337 "for policy reasons" in only six instances–the fifth instance was more than two decades ago); *see also* Letter from Ambassador Michael B.G. Froman, Office of the U.S. Trade Representative, Exec. Office of the President, to Irving A. Williamson, Chairman, USITC (Aug. 3, 2013) (disapproving of an exclusion order issued by the ITC in an investigation involving the alleged infringement of a standard-essential patent subject to licensing on terms that are fair, reasonable, and non-discriminatory in lieu of an exclusion order–the sixth instance, and the first in 25 years).

law-based political and economic systems, is not ubiquitous.[211] Instead, a non-Western, collectivist approach prevails in much of the world, extolling less tangible and conspicuous values such as unwritten obligations arising from cultures and traditions.[212] That said, at some level, business principles often transcend local custom, and it is here where Americans can find some level of comfort—people rarely undertake business-oriented activities without an expectation of payment. Business, not love, might be the true international language.

China provides an apropos example. Undergoing profound upheaval in the wake of China's historic economic growth, Chinese culture traces many of its roots to the teachings of Confucius.[213] Some have argued that pursuant to Confucianism, copying is a sincere form of flattery, positing that this explains why China is one of the world's most prolific copiers of IP and, consequently, one of the biggest targets of § 337 investigations over the years.[214] While such anthropological speculation has appeal and offers useful insights into China's struggles to implement a first-class IP system, modern Chinese industries are hardly engaging in widespread IP theft to flatter IP powerhouses such as the United States.[215] Instead, Chinese industries are primarily interested in making money.[216]

As for unintended consequences, as the sayings go, "the road to hell is paved with good intentions" and "for every action, there is an equal and opposite reaction." While a complainant might not appreciate the potential consequences of obtaining an exclusion order on goods made by a foreign

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[211] *See* Wei Shi, *The Paradox of Confucian Determinationism: Tracking the Root Causes of Intellectual Property Rights Problem in China*, 7 J. Marshall Rev. Intell. Prop. L. 454, 456 (2008) (noting that the Western perspective underscores the individual, rather than the organization to which he or she belongs).

[212] *See id.* at 455 (noting that Confucian ethics emphasizes the virtues of austerity, hard work, teamwork, and submission to authority).

[213] *See id.* at 454, 455 (noting that Confucianism is acknowledged as the foundational philosophy of civilizations in China, Japan, and Korea).

[214] *See* William P. Alford, to Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization 29 (1995) (arguing that the Confucian disdain for the profit motive prevailed over the capitalistic drive which propelled intellectual property reform in the West); *see also* Wei Shi, *supra* note 211, at 463 ("Chinese society has traditionally viewed private rights as individualization, which is considered immoral.").

[215] Wei Shi, *supra* note 211, at 467 (arguing that IP theft in China results not from Confucianism but a decline in Confucian values and from a unique set of socioeconomic conditions that originate from dysfunctional institutional regimes characterized by bureaucracy, "collectivist ideology, decentralized responsibilities, the lack of transparencies and the inadequate judiciary").

[216] *See id.* at 460, 461.

company that uses child labor—such as loss of income for the children's families, an uptick in crime caused by idle and unsupervised, laid-off children, or a diversion of cheap goods to other countries and away from cash-strapped U.S. consumers—our USTR (under the President's authority) might be more circumspect in his or her analysis.

On the other hand, as the largest sovereign market on Earth, the U.S. economy is a powerful carrot for global behavior change and will remain so for the foreseeable future. In this vein, should a party seek to promote values consistent with the American experience (e.g., human rights), § 337 could serve as a powerful bully pulpit. Because the party's goals at the ITC would be limited to making the U.S. marketplace freer and fairer and other countries could choose to send their business elsewhere, such an action would hardly smack of cultural imperialism.

IV. Hypothetical § 1337(a)(1)(A) Investigations

In light of the above, the ITC is a compelling venue for an interest group that is opposed to an overseas practice incident to importation (e.g., child labor in garment factories) and interested in financing a ligation to challenge that practice. After identifying an unfair act (e.g., treaty violation) and partnering with a company with U.S. operations harmed by imported garments to act as a domestic industry complainant, the interest group could orchestrate the filing of a § 337 complaint, launching a worldwide campaign targeting multiple companies, myriad factories, and diverse garment offerings across several continents. Also, it cannot be understated that in the process of litigating such a § 337 investigation, a complainant's counsel would likely obtain (in the absence of defaulting respondents) discovery further explaining the strategy of the targeted industry (although the use of any such discovery designated as confidential business information would be subject to limitations set forth in an applicable protective order).[217]

Upon the ITC's institution of the investigation as published in the Federal Register, the complainant could immediately serve domestic and overseas parties who qualify as respondents (e.g., manufacturers overseas, importers, and U.S.-based wholesalers and retailers) with discovery requests seeking information about their business practices. Under ITC rules of procedure, respondents failing to appear could be held in default, and sanctions (similar to those set forth in Rule 37 of the Federal Rules of Civil Procedure) could be imposed for failure to comply with discovery requests.[218] Because the

[217] 19 C.F.R. §§ 210.30(a)(1), 210.34(a) (2009).

[218] § 207.109(b).

jurisdiction of the ITC in § 337 investigations is nationwide and in rem,[219] the statute is a very powerful tool for this complainant.

Of course, whether interest groups can harness the power of § 1337(a)(1)(A) to redress activities occurring overseas will depend on the specific legal and factual contours of each potential case. By way of illustration, below are cursory overviews of the merits of § 337 actions falling under a non-exclusive list of four broad categories of allegedly objectionable activities: trading in conflict minerals, use of child labor, products resulting from environmental degradation, and unsafe food and drugs.

A. Conflict Minerals

There are currently few legislative tools for confronting the civil unrest associated with global trade in conflict minerals. In August 2012, the Securities and Exchange Commission ("SEC") issued a rule implementing § 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requiring all publicly traded companies, beginning in 2013, to disclose their use of certain minerals[220] associated with conflict and used in consumer goods, such as electronic devices.[221] Assuming, arguendo, that the rule remains effective (its legality is currently being challenged by industry groups), failure to comply could give rise to a § 337 action, to the extent that companies save money by not complying and, thus, are able to import and sell goods to U.S. consumers at prices below those of competitors who expend the money required to comply with the law. The incentive to shirk compliance is significant—according to even the SEC, it will cost $3-4 billion for U.S. industry to comply with the Act, and projections from industry groups reach as high as $16 billion.[222]

Another possible justification for invoking § 337 is acquisition and use of such minerals in derogation of a foreign sovereign's law. According to advocacy group Global Witness, the government of the Democratic Republic of the Congo ("DRC") issued a directive in September 2011 requiring all mining and mineral trading companies operating in the country to perform supply

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[219] *See* Sealed Air Corp. v. ITC, 645 F.2d 976, 985–86 (C.C.P.A. 1981):

> An exclusion order operates against goods, not parties. Accordingly, that [limited exclusion] order was not contingent upon a determination of personal or "*in personam*" jurisdiction over a foreign manufacturer. The Tariff Act of 1930 (Act) and its predecessor, the Tariff Act of 1922, were intended to provide an adequate remedy for domestic industries against unfair methods of competition and unfair acts instigated by foreign concerns operating beyond the *in personam* jurisdiction of domestic courts.

[220] *See* Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2218 (2010) (including the minerals Columbite-tantalite, Cassiterite, Wolframite and Gold (aka "the 3T's and gold" or 3TG)).

[221] *Id.* at 2214.

[222] Conflict Minerals 77 Fed. Reg. 56674, 56334, 56338 (Sept. 12, 2012).

chain due diligence, in accordance with standards set by the Organisation for Economic Cooperation and Development ("OECD"), "to ensure their purchases are not supporting warring parties in eastern DRC."[223] In February 2012, the Congolese government codified this requirement.[224] In theory, § 337 could reach companies operating in the DRC and trading in certain minerals without performing the required Congolese compliance, where those activities result in an importation into the United States.

B. Child Labor

The illegality of child labor is widely recognized. The United Nations Convention on the Rights of the Child is a treaty that defines a child as anyone below the age of 18 and recites basic human rights for all children, including the right to protection from economic exploitation and the right to education.[225] To date, 193 countries have ratified the Convention, and although the United States is not among them for political, not philosophical, reasons, it advocated for the Convention.[226]

Additionally, the Minimum Age Convention, 1973, developed by the International Labour Organization ("ILO"), requires countries to undertake a legal promise to stop child labor and to ensure that children below a certain "minimum age" (which varies depending on the activity) are not employed.[227] At the end of 2010, this Convention had been ratified by 156 of the 183 member States of the ILO, including most Asian and African countries, but not the United States or India. Similarly, the ILO developed the Worst Forms

[223] Congo government enforces law to curb conflict mineral trade, Global Witness (May 12, 2012), http://www.globalwitness.org/library/congo-government-enforces-law-curb-conflict-mineral-trade.

[224] *Id.*

[225] Convention on the Rights of the Child art. I, Sept. 2, 1990, 1577 U.N.T.S. 44.

[226] *Id.*

[227] Convention (No. 138) Concerning Minimum Age for Admission to Employment art. III, June 30, 1973, 1015 U.N.T.S. 297.

of Child Labour Convention, 1999.[228] At the end of 2010, this Convention had been ratified by 173 of the 183 member States.[229]

U.S. law regarding child labor is complex. In general, for non-agricultural jobs, federal law sets 14 years of age as the minimum age for employment, and limits the number of hours worked by minors under the age of 16.[230] Several exceptions to this rule exist, however, such as employment by parents, newspaper delivery, and child acting.[231] Moreover, children between the ages of 16 and 18 may be employed for unlimited hours in non-hazardous occupations.[232] Restrictions on agricultural employment are more lenient, allowing children under the age of 12 to work in non-hazardous jobs on small farms for unlimited hours outside of school hours with parental permission.[233]

The DOL issues a periodic report entitled "List of Goods Produced by Child Labor or Forced Labor."[234] The report reveals domestic and international uses of child labor, which is defined as all work performed by a person below the age of 15.[235] As discussed supra, the DOL also distinguishes (albeit not

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[228] *See* Convention (No. 182) Concerning the Prohibition & Immediate Action for the Elimination of the Worst Forms of Child Labour art. III, June 17, 1999, 2133 U.N.T.S. 162. (forbidding:

> (a) [a]ll forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) [t]he use, procuring or offering of a child for prostitution, for the production of pornography or pornographic performances; (c) [t]he use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; (d) [w]ork which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children).

[229] International Training Centre of the International Labour Organization, Worst Forms of Child Labour on Conflict and Post Conflict Settings 23 (2010).

[230] *See* 29 U.S.C. § 213 (2006).

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] U.S. Dep't of Labor, The Dep't of Labor's List of Goods Produced by Child Labor or Forced Labor 33 (2009).

[235] *See id.* at 9 (including additionally,

> all work performed by a person below the age of 18 in the following practices: (A) All forms of slavery or practices similar to slavery, such as the sale or trafficking of children, debt bondage and serfdom, or forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict; (B) the use, procuring, or offering of a child for prostitution, for the production of pornography or for pornographic purposes; (C) the use, procuring, or offering of a child for illicit activities in particular for the production and trafficking of drugs; and (D) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, or morals of children.);

perfectly) between categories of child labor and the forced or indentured labor outlawed in § 307 of the Tariff Act of 1930, the latter presumably falling outside the subject matter jurisdiction of § 337.[236]

Section 337 is well situated for claims arising from illegal labor practices involving the voluntary work of children. While the extraterritorial application of U.S. labor standards is legally suspect,[237] "nations that violate [their own] fair labor laws and accepted standards . . . [can] accrue an unfairly gained competitive advantage through unfair reduction of the cost of labor, a major input in the cost of production, thereby distorting trade."[238] "This practice has been labeled 'social dumping,' which is defined as the 'export of products that owe their competitiveness to low labour standards.'"[239] The worst offenders are the rising markets of today in Asia and those of tomorrow in Africa.[240] Between 1999 and 2004, the top seven countries by per capita percentage of working 5-14 year-olds were in Africa.[241] Indeed, between 2000 and 2004, 26.4% of children aged 5-14 worked in sub-Saharan Africa, while 18.8% of children between those ages worked in Asia and the Pacific.[242] A § 337 complaint could potentially help these children by threatening import-driven segments of the U.S. marketplace trafficking in goods made by them.

C. Environmental Degradation

The Lacey Act is a powerful weapon for potentially demonstrating unfairness related to environmental degradation under § 337.[243] Stunningly broad, the Act makes it unlawful (and thus unfair when undertaken for business advantage) "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife[,] . . . any plant," or "any prohibited wildlife species" that has been "taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of

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Notice of Procedural Guidelines for the Development & Maintenance of the List of Goods From Countries Produced by Child Labor or Forced Labor; Request for Info., 72 Fed. Reg. 73,374, 73,378 (Dec. 27, 2007).

[236] U.S. Dep't of Labor, The Dep't of Labor's List of Goods Produced by Child Labor or Forced Labor 9-10 (2009).

[237] *See* § 213(f) (providing that the FLSA expressly "shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country . . . .").

[238] Edens, *An Expanded Perspective: Child Labor Claims Under Section 337*, 337 Reporter Vol. XXIII at 19.

[239] *Id.*

[240] *See id.* at 21 n.55.

[241] *Id.*

[242] *Id.*

[243] 16 U.S.C. § 3371 (2006); Engler, *supra* note 1.

any foreign law."[244] "Taken" encompasses "captured, killed, or collected and, with respect to a plant, also means harvested, cut, logged, or removed."[245] Collectively, these terms encompass a considerable number of product lines covered by the Harmonized Tariff Schedule of the United States.

A § 337 investigation involving the Lacey Act is easy to envision. It would likely involve an allegation that complainant's competitors have flouted U.S. or foreign environmental law for the purpose of bringing a particular commodity to market at an artificially low price. For example, companies might be accused of illegally felling and using endangered lumber harvested opportunistically because it was easy to access without significant cost (e.g., tree groves close to highway infrastructure) or easy to shield from mandatory, but costly, reporting requirements.

According to the Congressional Research Service, "demand for illegal wildlife in the United States is likely to parallel U.S. demand for legal wildlife."[246] Estimates suggest that the United States purchases nearly 20% of all legal wildlife and wildlife products on the international market and that the value of U.S. legal wildlife trade grew from $1.2 billion in FY2000 to $2.8 billion in FY2007.[247] "If this is the case, the United States may be a significant destination for illegal wildlife, and the magnitude of the illegal trade may be increasing."[248] According to the ocean conservation group Oceana, illegal, unregulated, and unreported ("IUU") fishing accounts for 20% of the global catch annually, amounting to 11 to 25 million metric tons of fish.[249]

Although § 337 could be used in conjunction with the Lacey Act to stem illicit wildlife and plant trade, its power has not yet been harnessed for this purpose. To date, the Lacey Act has been primarily utilized for piecemeal

[244] 16 U.S.C. § 3372(a)(2) (2012); § 3371(a) (defining "fish or wildlife" as "any wild animal, whether alive or dead . . . whether or not bred, hatched, or born in captivity, and includes any part, product, egg, or offspring thereof." "[P]lant" refers to "any wild member of the plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands." "[P]rohibited wildlife species means any live species of lion, tiger, leopard, cheetah, jaguar, or cougar or any hybrid of such species.").

[245] § 3371.

[246] Liana Sun Wyler & Pervaze A. Sheikh, Cong. Research Serv., Rl34395, International Illegal Trade in Wildlife: Threats and U.S. Policy 3 (2008).

[247] *Id.*

[248] *Id.* ("U.S. demand stems primarily from two sources: (1) wildlife items for personal use, such as tourist souvenirs or exotic pets, and (2) products for commercial use and products related to hunting (e.g., trophies).").

[249] Margot L. Stiles et al., *Stolen Seafood: The Impact of Pirate Fishing on our Oceans* 4 (2013).

criminal prosecutions.[250] Perhaps the most publicized Lacey Act criminal proceeding to date involved an iconic company—Gibson Guitar.[251] In 2009, federal marshals raided three Gibson facilities in Tennessee, and the federal government launched a criminal investigation against Gibson.[252] In August 2012, Gibson and the United States entered into a criminal enforcement agreement whereby Gibson admitted to illegally purchasing and importing ebony from Madagascar and rosewood and ebony from India and agreed to pay a $300,000 penalty and provide a community service payment of $50,000 to the National Fish and Wildlife Foundation.[253] Gibson also agreed to a program designed to strengthen its compliance controls and procedures for monitoring its global supply chain.[254] Under § 337, a complainant could potentially litigate alleged Lacey Act violations against many companies like Gibson at once.

D. Food and Drug Safety

"The United States imports 91% of its seafood,"[255] but only 2% is inspected by the FDA before it enters the U.S. market.[256] Oceana found, based on the analysis of 1,200 seafood samples taken across 21 states, that 33% of samples were mislabeled, and thus sold to unsuspecting consumers under false, and potentially dangerous, pretenses.[257] Sushi vendors and grocery stores, in particular, were likely to sell mislabeled food, and snapper and tuna had the highest mislabeling rates.[258]

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[250] *See generally* Stephen A. Wade*, Stemming the Tide: A Plea for New Exotic Species Legislation*, 10 J. Land Use & Envtl. L. 343, 348 (1995) (arguing the Lacey Act has been ineffective partially because the Fish and Wildlife Service's efforts to enforce the Act have been piecemeal).

[251] *See* James R. Hagerty & Kris Maher, *Gibson Guitar Wails On Federal Raid Over Wood*, Wall St. J. (Sept. 11, 2011), http://online.wsj.com/news/articles/SB10001424053111903895904576542942027859286.

[252] *See id.*

[253] *See* Press Release, Dep't of Justice, Gibson Guitar Corp. Agrees to Resolve Investigation into Lacey Act Violations (Aug. 6, 2012).

[254] *Id.*

[255] *Fishwatch: U.S. Seafood Facts*, Nat'l Oceanic & Atmospheric Admin., , http://www.fishwatch.gov/farmed_seafood/outside_the_us.htm (last visited Apr. 9, 2014).

[256] U.S. Gov't Accountability Office, Seafood Fraud: FDA Program Changes and Better Collaboration Among Key Federal Agencies Could Improve Detection and Prevention 1 (2009).

[257] Kimberly Warner et. al, *Oceana Study Reveals Seafood Fraud Nationwide*, OCEANA 1 (Feb. 2013), http://oceana.org/sites/default/files/reports/National_Seafood_Fraud_Testing_Results_FINAL.pdf.

[258] *Id.*

According to FDA estimates, the number of drug products made outside of the United States doubled from 2001 to 2008.[259] In 2008, 80% of active ingredients and 40% of finished drugs used by U.S. patients were manufactured abroad.[260] Increasingly, the United States imports pharmaceutical materials from emerging economies such as India and China, yet the FDA cannot conduct sufficient oversight visits to foreign sites to ensure compliance with U.S. law.[261] Indeed, FDA inspected only 5.6% of Chinese sites in fiscal year 2009 (with 52 inspections that year, up from 19 in 2007).[262] However, inspections are critical because good manufacturing practices are costly and thus prone to circumvention, as compliance with internal quality systems and regulations can represent up to 25% of a finished drug manufacturer's operating costs.[263] To offer more competitive pricing and gain market share, at the expense of compliant companies, some overseas plants have foregone good manufacturing practices and thereby caused adulteration of the U.S. drug supply.

Nothing is more quintessentially § 337 than protecting the U.S. marketplace against unfairness to domestic industries following the law, and incurring the attendant expense, where overseas operations skirt the law at a considerable cost savings and produce mislabeled or illegally harvested food or shoddy drugs that are imported into the United States to the detriment of U.S. consumers.

Conclusion

Today, as a mature and powerful statute used mostly to redress the infringement of statutory IP, § 337 appears to have ample room within its tent for protection against "[u]nfair methods of competition and unfair acts" never before litigated at the ITC.[264] While there is inherent tension in using a trade statute to drive a social agenda, § 337 is broad enough to cover the common ground where these seemingly strange bedfellows overlap. Indeed, the ethos of § 337, rooted in governmental investigation of "unfairness,"

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[259] Pew Health Group, After Heparin: Protecting Consumers From the Risks of Substandard and Counterfeit Drugs 7 (2011), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Health/Pew_Heparin_Final_HR.pdf.

[260] *Id.*

[261] *See id.* at 46–48.

[262] *Id.* at 48.

[263] *Id.* at 27.

[264] *See generally In re* Orion, 71 F.2d 458, 464 (C.C.P.A. 1934) (standing for the proposition that, as an initial matter, "unfair methods of competition or unfair acts" should be read in the disjunctive).

extends beyond patent infringement to cover a plethora of unfair acts and "the assurance of competitive conditions in the United States economy."[265]

In short, a complainant seeking to use § 337 to redress ethically or morally objectionable practices has a home at the ITC, so long as the complainant (alone or in partnership with another) can establish a prima face case—unfairness, nexus between unfairness and importation, domestic industry and injury, and nexus between unfairness and injury. Prior to filing a complaint, however, it is important to scrutinize ancillary considerations such as extraterritoriality, comity, GATT, conflicts of law, and anthropological considerations and unintended consequences. Having done so, the complainant can effectively pursue the types of global justice—for example, peaceful communities, liberated children, healthy ecosystems, and safe food and pharmaceuticals—that also happen to promote free and fair competition within the U.S. marketplace.

[265] *In re* Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69, USITC Pub. 1126, Op. of the Comm'n, at 9 (Jan. 1981)