Appeal No. 23-1245

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LASHIFY, INC.,
Appellant

v.

INTERNATIONAL TRADE COMMISSION,
Appellee

QINGDAO HOLLYREN COSMETICS CO. LTD., DBA HOLLYREN, QINGDAO XIZI INTERNATIONAL TRADING CO., LTD., DBA XIZI LASHES, QINGDAO LASHBEAUTY COSMETIC CO., LTD., DBA WORLDBEAUTY, KISS NAIL PRODUCTS, INC., ULTA SALON, COSMETICS & FRAGRANCE, INC., WALMART, INC., CVS PHARMACY, INC., ARTEMIS FAMILY BEGINNINGS, INC., DBA LILAC ST., ALICIA ZENG
Intervenors

Appeal from the United States International Trade Commission
In Investigation No. 337-TA-1226

APPELLEE INTERNATIONAL TRADE COMMISSION'S COMBINED PETITION FOR REHEARING AND REHEARING EN BANC

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STATEMENT OF COUNSEL UNDER FEDERAL CIRCUIT RULE 40(c)

Based on my professional judgment, I believe this appeal requires an answer to the following precedent-setting questions of exceptional importance:

- Under 19 U.S.C. §§ 1337(a)(2) and (a)(3)(B), does the statutory language require that "labor or capital" include only labor or capital that establishes an "industry," consistent with the statute's plain language and purpose to provide trade relief to only U.S. industries, or does the statute require inclusion of all labor or capital?
- Did the panel overlook certain relevant tools of statutory interpretation by reading the terms labor and capital in isolation without regard to the whole text and overall statutory scheme of 19 U.S.C. § 1337, contrary to *King v. Burwell*, 576 U.S. 473 (2015), and *Hibbs v. Winn*, 542 U.S. 88 (2004), thus rendering the statutory term "industry" meaningless?

Date: May 21, 2025

Respectfully Submitted,

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POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED

The panel decision in *Lashify, Inc. v. International Trade Commission*, 130 F.4th 948 (Fed. Cir. 2025), overlooks "the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." *Hibbs*, 542 U.S. at 101 (citation omitted). Specifically, the decision incorrectly holds that "labor or capital" under 19 U.S.C. § 1337(a)(3)(B) covers *all* "'labor' and 'capital' *without any limitation*." 130 F.4th at 958 (emphasis added). This interpretation fails to consider the context of the statute as a whole and the overall statutory scheme, which requires an "industry in the United States" ("domestic industry"). 19 U.S.C. § 1337(a)(2)-(3). Instead, the decision reads the terms "labor or capital" in isolation, ultimately rendering the "industry" requirement meaningless. When "labor or capital" is read in light of the statutory requirement for an "industry in the United States," it becomes clear that *only* labor and capital activities that establish an "industry" are included. *Id.*

Fundamentally, section 337 is a trade statute that protects "covered industries" in the United States facing unfair competition from imports. 19 U.S.C. § 1337(a). The relief, when granted, is exceptional—exclusion of goods from the United States. 19 U.S.C. § 1337(d). Congress has maintained the domestic

industry requirement for over 100 years,[1] because it serves a critical gate-keeping role in unfair trade practices and ensures that this exceptional relief is available to only domestic industries. Indeed, the stated "purpose of the Commission [] is to adjudicate trade disputes between *U.S. industries* and those who seek to *import* goods from abroad." *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 707 F.3d 1295, 1302 (Fed. Cir. 2013) (quoting S. Rep. No. 71, 100th Cong., 1st Sess., 128-29 (1987) ("S.Rep. 100-71"); H.R. Rep. No. 40, 100th Cong., 1st Sess., pt. 1, 156-57 (1987) ("H.Rep. 100-40")) (emphasis added). The *Lashify* decision upends Congress's careful balance between U.S. industries and importers.

The Commission respectfully submits that the statutory interpretation of "labor or capital" in section 337(a)(3)(B) is a question of exceptional importance that directly affects the Commission's analysis of the domestic industry requirement. Rehearing of the decision is necessary to ensure that the statutory interpretation follows Supreme Court and Federal Circuit precedent and to maintain uniform application of section 337 in future Commission decisions.

SUMMARY OF THE APPEALED COMMISSION OPINION

Lashify accused respondents of violating section 337 based on patent infringement and alleged an "industry in the United States" existed due to

[1] Section 337 trade relief was first implemented in the Tariff Act of 1922, Pub. L. No. 67-318, § 316(a), 42 Stat. 858, 943 (1922) (precursor to section 337).

"significant employment of labor or capital." For its alleged domestic industry, Lashify relied substantially on sales and marketing, since Lashify manufactures its products abroad and its quantitative evidence of U.S.-based development was excluded as untimely. Lashify also relied on qualitative evidence of product development to show a domestic industry.

The Commission determined that Lashify failed to show its labor and capital expenditures for U.S. sales and marketing, warehousing, quality control, and distribution should be included in assessing whether it satisfied the domestic industry requirement.[2] Lashify appealed.

SUMMARY OF THE PANEL DECISION

The decision holds that all "'labor' and 'capital' *without any limitation*" is credited under section 337(a)(3)(B) regardless of whether they establish an "industry." 130 F.4th at 958-64. The decision then vacates the Commission's determination to not include Lashify's sales, marketing, warehousing, distribution, and quality control expenditures in the alleged "industry." *Id.*

ARGUMENT

After briefing was completed and before oral argument in this appeal, the Supreme Court decided *Loper Bright Enterprises v. Raimondo*—overruling

[2] Chair Karpel dissented from the majority determination and does not join this combined petition for rehearing.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and reaffirming that courts must employ the "traditional tools of statutory construction" to arrive at the "best reading of the statute." 603 U.S. 369, 400-01 (2024). Accordingly, section 337 is interpreted according to its plain language, in the context of the statute as a whole, and accounting for the overall statutory scheme to protect *only* U.S. industries. *Hibbs*, 542 U.S. at 101 (words of a statute are interpreted in "context" to give effect to all provisions, so no part will be inoperative or superfluous).

I. STATUTORY INTERPRETATION PRECEDENT

A "statute is to be read as a whole…since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citations omitted). The Supreme Court has summarized the Court's role in statutory interpretation as follows:

> If the statutory language is plain, we must enforce it according to its terms. But oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." Our duty, after all, is "to construe statutes, not isolated provisions."

King, 576 U.S. at 486 (citations omitted); *see also Loper Bright*, 603 U.S. at 392 n.4 ("[S]tatutes can be sensibly understood only by reviewing text in context.") (quotation omitted); *In re Forest*, 134 F.4th 1198, 1201-03 (Fed. Cir. 2025).

II. THE PLAIN LANGUAGE OF SECTION 337 MUST BE READ IN THE CONTEXT OF THE STATUTE AS A WHOLE TO GIVE EVERY TERM EFFECT

Section 337 requires "an industry in the United States," which may be shown through "significant employment of labor or capital:"

> (a)(2) Subparagraphs (B), (C), (D), and (E) of paragraph (1) apply only if an *industry* in the United States, relating to the articles protected by the patent, [], exists or is in the process of being established.
>
> (a)(3) For purposes of paragraph (2), an *industry* in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, []—
>
> (A) significant investment in plant and equipment;
>
> (B) significant employment of *labor or capital*; or
>
> (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a) (emphases added). These provisions must be read together such that the terms "labor or capital" in section 337(a)(3)(B) are read in light of section 337 as a whole, including "industry" in sections 337(a)(2)-(3).

When "labor or capital" is properly interpreted, the domestic "industry" required in section 337(a)(2) provides necessary context limiting the scope of "labor or capital" to those that establish an "industry." *See Maracich v. Spears*, 570 U.S. 48, 66 (2013) ("[T]he existence of the separate provision governing solicitation provides necessary context for defining [the relevant provision].").

The decision, however, interprets "labor or capital" in isolation and overlooks that these two terms must be interpreted in light of a third term, "industry."

A. Section 337 Requires "an Industry in the United States" to Meet the Domestic Industry Requirement

Section 337 has always, from inception, required an "industry in the United States." 19 U.S.C. § 1337(a)(2)-(3); Tariff Act of 1930 (19 U.S.C. § 1337 (1934)); Tariff Act of 1922, § 316(a). "Industry" means the systematic use of labor for the creation of value. Webster's Third New Int'l Dictionary, 1155 (1986) ("systematic labor esp. for the creation of value"); Webster's New Int'l Dictionary of the English Lang., 1101 (1928) ("human exertion employed for the creation of value"); *see* Section II.D below. In other words, the plain meaning of "industry" necessitates inclusion of activities that *create (or add) value* with respect to the protected article. Yet, the panel does not even consider the meaning of "industry" or its relevance in interpreting "labor or capital." *Lashify*, 130 F.4th at 958-59 (considering only the "neighboring clauses," sections 337(a)(3)(A) and (C)).

The statutory language, "industry in the United States," is critical to section 337, because it preserves the overall "purpose of the Commission [which] is to adjudicate trade disputes between *U.S. industries* and those who seek to *import* goods from abroad." *InterDigital*, 707 F.3d at 1302 (quoting S.Rep. 100-71 at 129; H.Rep. 100-40 at 157) (emphasis added). "Retention of the requirement that

the statute be utilized on behalf of *an industry in the United States*…retains that essential nexus." *Id.* (emphasis added).

This Court's *Schaper* decision and post-1988 Federal Circuit decisions confirm the importance of the initial inquiry into what activities are to be included in an "industry." *Schaper Mfg. Co. v. Int'l Trade Comm'n*, 717 F.2d 1368, 1370-71 (Fed. Cir. 1983) ("Though the overall problem is whether appellants' domestic business activities constitute an 'industry…in the United States,'…***the initial inquiry is what parts of these activities are to be considered***, in this investigation, ***as included in an 'industry***…in the United States.'") (superseded-in-part by the 1988 Amendments[3]) (emphasis added); *John Mezzalingua Assocs., Inc. v. Int'l Trade Comm'n*, 660 F.3d 1322, 1328 (Fed. Cir. 2011) (agreeing that initial inquiry includes crediting some, but not all, licensing investments and disagreeing with the dissent's per se rule including all); *Motiva, LLC v. Int'l Trade Comm'n*, 716 F.3d 596, 600-601 (Fed. Cir. 2013) (accepting the initial inquiry that certain litigation activities fall within "licensing" and some do not); *Lelo Inc. v. Int'l Trade Comm'n*, 786 F.3d 879, 883 (Fed. Cir. 2015) (agreeing that complainant's domestic investments, which *excluded* marketing and sales, warehousing, and customer support under sections (A) and (B), were quantitatively insignificant).

[3] The "1988 Amendments" removed the "injury" and "efficiently and economically operated" requirements and added sections 337(a)(2)-(3).

Even the title of section 337(a), "Unlawful Activities; ***Covered Industries***; Definitions," confirms that relief is available for only certain "Covered Industries." 19 U.S.C. § 1337(a) (emphasis added); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (quotations omitted). Accordingly, the term "industry" under section 337(a)(2) is the essential starting point for determining which activities may be included under section 337(a)(3).

B. "Labor or Capital" in Section 337(a)(3)(B) Must Be Read in the Context of an "Industry," Not in Isolation

The decision overlooks the context of "industry" and incorrectly concludes that *all* "'labor' and 'capital' without any limitation" related to the protected articles is within the scope of section 337(a)(3)(B). 130 F.4th at 958; *see King*, 502 U.S. at 221; *Maracich*, 570 U.S. at 66. That interpretation, however, renders section 337(a)(3)(C) superfluous. If Congress had understood sections 337(a)(3)(A) and (B) to include *all* "plant and equipment" and "labor or capital," there would have been no reason in 1988 for Congress to add section 337(a)(3)(C), which credits "engineering, research and development, or licensing" activities in an "industry." Those activities would have already been included under the decision's broad interpretation of sections 337(a)(3)(A) and (B). Therefore, the statutory structure and inclusion of section 337(a)(3)(C) further supports the

conclusion that sections 337(a)(3)(A) and (B) cannot include *all* activities; otherwise, section 337(a)(3)(C) is superfluous.

The decision also errs by relying on dictionary definitions of "labor" and "capital," while ignoring that those definitions support, rather than undermine, the Commission's statutory interpretation. For example, the definition of "labor" is "human activity that *produces* goods or provides the services in demand in an economy." 130 F.4th at 959 (quoting Webster's Third New Int'l Dictionary, 1259 (1986)) (emphasis added). The definition of "labor" highlights that the relevant activity "produces" the goods[4], mirroring the Commission's practice of crediting only "labor" that forms an "industry." Here, Lashify's protected articles are goods. Lashify's sales, marketing, warehousing of finished goods, and distribution neither "produce" the goods nor are they "in demand" "services," because Lashify is not selling these activities "in an economy." Accordingly, those activities should not be included in Lashify's "industry," even under the panel's chosen definition of "labor." *See also Lelo*, 786 F.3d at 884 (requiring that the evidence "reflect the magnitude of labor expended to produce the components, or the amount the suppliers invested in their equipment to fulfill" the orders).

[4] Subsection 337(a)(1)(B)(ii) makes clear that "articles" may be "made" (manufactured) or "produced," suggesting differences in scope. 19 U.S.C. § 1337(a)(1)(B)(ii).

The decision also defines "capital" as "'a stock of accumulated goods'—not simply money to finance an enterprise," 130 F.4th at 959, but Webster's Dictionary includes the following in the same definition: "accumulated goods devoted to the *production* of other goods: facilities or goods utilized as factors of *production*…; any accumulated factors of *production* capable of being owned." Webster's Third New Int'l Dictionary, 1259 (1986) (emphasis added). The decision improperly focuses on only part of the definition and overlooks the rest, which aligns better with section 337's requirement that "capital" establish an "industry."

Considering Lashify's alleged "labor or capital" without the limitations inherent in "industry" confirms the decision's misapplication of the dictionary definitions. For example, the decision's overbroad interpretation of "labor" results in confusing Lashify's industry for protected *goods* with protected *services*. 130 F.4th at 959 ("[T]here is no reason to exclude the associated labor costs or those relating to sales, marketing, quality control, and distribution from 'human activity that…*provides the services* in demand in an economy.'") (emphasis added). Thus, these dictionary definitions give effect to "industry" and align with requiring a U.S. "industry" before providing trade relief. *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

Additionally, the decision acknowledges more context is needed to support its analysis, since it relies on new categorizations for sections 337(a)(3)(A), (B), and (C): "enterprise functions," "functionally defined enterprise activity," and "inputs." 130 F.4th at 958-59. These categorizations, however, are neither recited in section 337 nor relevant to the plain meaning of "industry."

C. Interpreting Section 337(a)(3)(B) to Include All Labor or Capital Renders the "Industry" Requirement Meaningless

Reading "labor or capital" to include all activities renders the term "industry" meaningless and could allow most importers to show a domestic industry, which is contrary to section 337's purpose to adjudicate trade disputes between *U.S. industries* and *importers*. *InterDigital*, 707 F.3d at 1302; *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Most, if not all, importers (foreign and domestic) employ U.S. labor when selling, marketing, warehousing, and distributing protected articles in the United States simply to establish a market for their goods. But a "market" is not an "industry" in the trade context or in the eyes of Congress.

Moreover, under this decision crediting *all* labor, a domestic industry could include, for example, attorney labor for prosecuting the patents-at-issue or drafting the underlying section 337 complaint. But Congress never intended to reach such

labor and therefore never intended to reach *all* labor. 19 U.S.C. § 1337(a)(2)-(3); *see* S.Rep. 100-71 at 130 ("The mere ownership…would not be sufficient to satisfy this test."); H.Rep. 100-40 at 156-57 ("[The domestic industry] requirement was maintained in order to preclude holders of U.S. intellectual property rights who have no contact with the United States other than owning such intellectual property rights from utilizing section 337."). Accordingly, the Commission has never interpreted section 337 to cover all activities, but, rather, properly considers which activities add value to the protected article. *See Cathedral Candle Co. v. Int'l Trade Comm'n*, 400 F.3d 1352, 1366 (Fed. Cir. 2005) (Under *Skidmore*[5], courts "defer to an agency interpretation of the statute that it administers" if the agency has "conducted a careful analysis of the statutory issue," if its "position has been consistent and reflects agency-wide policy," and "constitutes a reasonable conclusion as to the proper construction of the statute, even if we might not have adopted that construction without the benefit of the agency's analysis."); *Wuhan Healthgen Biotech. Corp. v. Int'l Trade Comm'n*, 127 F.4th 1334, 1338 (Fed. Cir. 2025) (noting the Commission uses a holistic approach to evaluate domestic industry).

[5] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *see also United States v. Mead Corp.*, 533 U.S. 218 (2001) (holding *Chevron* did not eliminate *Skidmore*).

The decision's interpretation of "capital" also leads to an absurd result, which must be avoided. *Griffin*, 458 U.S. at 575. If "capital" includes a stock of accumulated goods consisting of protected articles manufactured abroad and imported into the United States, there may be no domestic value added. In such cases, counting that "capital" as part of a U.S. industry effectively emasculates the domestic industry requirement. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194-97 (1985) (rejecting unsupported interpretation as "effectively emasculat[ing]" a statutory requirement) (citation omitted).

Finally, the Commission notes that "industry" must be read consistently throughout section 337, including sections 337(a)(1)(A) and (a)(2). *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) ("[I]dentical words used in different parts of the same act are intended to have the same meaning.") (quotations omitted). The inclusion of *all* labor and capital activities eviscerates the meaning of the term "industry" in section 337(a)(1)(A)—every complainant would have an "industry." Such an interpretation is inconsistent with the overall statutory scheme of protecting "covered [U.S.] industries." 19 U.S.C. § 1337(a). Accordingly, when read in the proper context, it is clear that *not all* labor or capital creates value in the protected article or should be included in an "industry."

D. The Statutory History of Section 337 Supports the Commission's Interpretation

The evolution of the statutory language underpins the Commission's interpretation. The term "industry," introduced in 1922, was maintained without change until 1988. In 1988, when the relevant statutory language was introduced, Congress specifically chose to keep the domestic "industry" requirement, lest the Commission become a pure patent forum. 132 Cong. Rec. 30780, 30816 n.5 (Oct. 14, 1986) ("[I]t was postulated that [eliminating the domestic industry requirement] would transform the ITC into an intellectual property court.").

Prior to 1980, the Commission interpreted "industry" to include "plant and equipment" related to manufacturing in the United States. *Interdigital*, 707 F.3d at 1298-1300. The Commission later interpreted "industry" to also include "a significant employment of land, labor, and capital for the *creation of value*." *Airtight Cast-Iron Stoves*, Inv. No. 337-TA-69, 1980 WL 41970, *5-6 (Dec. 31, 1980) ("*Stoves*") (finding an "industry" based on repair and installation) (emphasis added). Subsequently, in 1983, this Court affirmed the Commission's interpretation of "industry" as *excluding* the following five activities: engineering, research and development, licensing, sales, and marketing. *Schaper*, 717 F.2d at 1372-73 (finding that "few importers would fail the test of constituting a domestic industry" if "large expenditures for advertising and promotion" were included in the domestic industry).

The 1988 Amendments added sections 337(a)(3)(A) and (B), which codified the Commission's pre-existing meaning of "industry" and its practice of crediting "plant and equipment" and "labor or capital" that establish a U.S. "industry." 19 U.S.C. § 1337(a)(3); *John Mezzalingua*, 660 F.3d at 1327-28 (citing S.Rep. 100-71 at 129; H.Rep. 100-40 at 157). The 1988 Amendments also added section 337(a)(3)(C), which expanded the scope of an "industry" by crediting investments in "engineering, research and development, or licensing." *Id.*; *Interdigital*, 707 F.3d at 1302-04.

While Congress amended the Tariff Act in 1988, it did not wholly supersede *Schaper*. Congress added only three of the five activities in *Schaper* that the Commission and this Court had previously not included—engineering, reseach and development, and licensing. *Compare* 19 U.S.C. §§ 1337(a)(3)(A), (B), (C) *with Schaper*, 717 F.2d at 1372-73. Had Congress wanted to include the remaining activities (sales and marketing) to supersede all of *Schaper*, or to include other activities (warehousing or distribution), Congress would have done so expressly. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress…does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Congress is wholly capable of changing the Commission's practice as it did in 1988. The panel, however, may not do what Congress declined to do.

While Congress held hearings and took testimony on sales and marketing, Congress ultimately chose not to include those activities. *See* 132 Cong. Rec. 30816 (Oct. 14, 1986) ("The inclusion of 'sales and marketing' activities in the United States was seen by most commentators as being too broad [to include in the domestic industry]."); *Arizona v. United States*, 567 U.S. 387, 405 (2012) (noting that earlier legislation rejecting a proposed interpretation "underscores the fact that Congress made a deliberate choice not to" take that action). Nevertheless, the panel reasons that deleting "sales and marketing" from the statutory text of the first bill[6] affected only section 337(a)(3)(C) because sections 337(a)(3)(A) and (B) did not exist in that first bill. However, the first bill included a single provision that encapsulated (A), (B), and (C) in a single paragraph that included "sales and marketing." 130 F.4th at 960-62. When "sales and marketing" was removed, it was removed from the "industry" as a whole. The panel does not explain why "sales and marketing" is excluded from only one clause of section 337(a)(3) but included in others.

III. THE PANEL MISAPPREHENDS ADDITIONAL KEY POINTS

The decision misapprehends three additional Commission findings. First, the decision incorrectly concludes that the Commission's statutory interpretation requires domestic manufacturing. 130 F.4th at 958-62 (stating that the

[6] H.R. 4539, 99th Cong. (introduced Apr. 9, 1986) (subsection 202(a)(6)).

Commission held, "labor and capital used for warehousing, quality control, and distribution expenditures do not count in the absence of domestic manufacturing"). The Commission, however, has not required domestic manufacturing in decades and did not require it below. Appx00048-00063; ECF No. 59/60 at 33-34. In fact, the Commission has credited non-manufacturing activities since 1980 in *Stoves* (1980 WL 41970, at *5-6).

Second, the decision misapprehends *Stoves*, which dealt with false advertising claims, when reasoning it undermines the Commission's current practice. 130 F.4th at 961-62. In *Stoves*, the Commission found there was an "industry" because:

> there is clearly a significant employment of land, labor, and capital for the creation of value. The industry here is Jotul U.S.A., the importer, and a network of 15 distributors and 750 dealers throughout the United States. The economic activity that they engage in is more than simply selling the stoves. A major part of Jotul's function is to repair and test stoves.

Stoves, 1980 WL 41970, *5-6. While the Commission mentioned that one warehouse facility also did advertising, brochures, and a service manual, the Commission ultimately concluded, "[t]hese *repair and installation aspects* of this retail trade distinguish this industry from many potential industries because the value added domestically is significant." *Id.* (emphasis added). The Commission did not credit sales or marketing towards the alleged "industry," and instead credited activities that added value to the articles.

Third, the Commission did not liken warehousing, quality control, and distribution to mere patent ownership, as the decision suggests, but rather to activities of mere importers who do not typically have an "industry." 130 F.4th at 962. The decision conflates the activity of "patent ownership" with the activities of a "mere importer," neither of which historically resulted in a domestic industry, but both of which might be an "industry" today given the decision's overbroad interpretation of "labor or capital."

CONCLUSION

This appeal poses a question of exceptional importance—whether "labor or capital" includes *only* labor or capital that establishes an "industry"—that should be considered by the full court.

Date: May 21, 2025

Respectfully Submitted,

/s/ Lynde F. Herzbach

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ADDENDUM

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United States Court of Appeals for the Federal Circuit

LASHIFY, INC.,
Appellant

v.

INTERNATIONAL TRADE COMMISSION,
Appellee

QINGDAO HOLLYREN COSMETICS CO. LTD., DBA HOLLYREN, QINGDAO XIZI INTERNATIONAL TRADING CO., LTD., DBA XIZI LASHES, QINGDAO LASHBEAUTY COSMETIC CO., LTD., DBA WORLDBEAUTY, KISS NAIL PRODUCTS, INC., ULTA SALON, COSMETICS & FRAGRANCE, INC., WALMART, INC., CVS PHARMACY, INC., ARTEMIS FAMILY BEGINNINGS, INC., DBA LILAC ST., ALICIA ZENG,
Intervenors

2023-1245

Appeal from the United States International Trade Commission in Investigation No. 337-TA-1226.

Decided: March 5, 2025

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MARK A. MILLER, Dorsey & Whitney LLP, Salt Lake City, UT, for intervenors Qingdao Hollyren Cosmetics Co. Ltd., Qingdao Xizi International Trading Co., Ltd., Qingdao Lashbeauty Cosmetic Co., Ltd. Also represented by ELLIOT HALES; HUI SHEN, Washington, DC.

Before PROST, TARANTO, and CHEN, *Circuit Judges*.

TARANTO, *Circuit Judge*.

Lashify, Inc., an American company with headquarters and employees in the United States, distributes, markets, and sells in the United States eyelash extensions (and cases and applicators for the eyelash extensions) that it arranges to have manufactured abroad. Lashify, having patents on the products, filed a complaint before the International Trade Commission (Commission or ITC)

alleging that certain other importers of like products were violating section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, because (as relevant here) their products infringe (*e.g.*, the products' sale in or importation into the U.S. infringes) claims of three Lashify-owned patents: a utility patent, U.S. Patent No. 10,721,984; and two design patents, U.S. Design Patent Nos. D877,416 and D867,664. Section 337 provides relief against such importation, but "only if an industry in the United States, relating to the articles protected by the patent . . . exists or is in the process of being established." 19 U.S.C. § 1337(a)(2). That domestic-industry requirement demands a showing of "an industry" as defined by section 337(a)(3) (commonly called the "economic prong") and a showing of its "relati[on] to the [patented] articles" (commonly called the "technical prong"), the latter (at least here) requiring the complainant's products to come within the asserted patents.

In this matter, the Commission denied Lashify relief. *Certain Artificial Eyelash Extension Systems, Products, and Components Thereof*, Inv. No. 337-TA-1226, 2022 WL 6403145, at *3–4, 87 Fed. Reg. 62455, 62455–56 (Oct. 14, 2022) (*Commission Order*); *Certain Artificial Eyelash Extension Systems, Products, and Components Thereof*, Inv. No. 337-TA-1226, 2022 WL 15498309, at *37 (Oct. 24, 2022) (*Commission Opinion*). The Commission ruled that Lashify failed to satisfy the economic-prong requirement, a determination that itself sufficed to deny section 337 relief. *Commission Opinion*, at *28; *Commission Order*, at *3. The Commission also ruled that Lashify had satisfied the technical-prong requirement only for the D'416 and D'664 patents, not for the '984 patent. *Commission Opinion*, at *3, *10; *Commission Order*, at *3. Thus, the denial of relief for infringement of the '984 patent was dually supported, but the denial of relief for infringement of the design patents rested solely on the economic-prong analysis.

On Lashify's appeal, we agree with Lashify that the Commission applied a legally incorrect understanding of

the statutory test for the economic-prong requirement. We affirm the Commission's finding that Lashify failed to satisfy the technical-prong requirement for the utility patent. Those conclusions require vacatur of the Commission's decision and a remand regarding the design patents so that the Commission may, using a correct view of the law, reevaluate whether Lashify satisfies the economic-prong requirement.

I

Lashify, founded in 2016, sells artificial eyelash extensions, applicator tools and products, and lash-extension storage containers. Although it conducts its research, design, and development work in the United States, Lashify manufactures its products abroad before shipping them to customers, including U.S. customers, who purchase them through its website. Once customers receive their lash extensions, they can use several Lashify-provided resources to learn how to apply them: educational videos on social media, online chats with its customer advisers, and one-on-one video-call sessions.

A

Lashify owns several patents, of which three are the basis for the Commission proceeding now before us. One is a utility patent, *i.e.*, the '984 patent, which relates to lash extensions (or "lash fusions") consisting of clusters of artificial hairs arrayed along a base that can be applied under the user's natural lashes. '984 patent, col. 1, lines 16–19; *id.*, col. 2, line 60 through col. 3, line 2. Each lash fusion includes multiple clusters (*e.g.*, 3–10 clusters), and each cluster includes approximately 10 to 30 artificial hairs. *Id.*, col. 2, lines 43–45, 55–57; *id.*, col. 4, lines 55–59.

The clusters can be formed with a "hot melt method," which involves heating the individual hairs "to a temperature that is sufficient to cause the individual lashes to begin to melt," *id.*, col. 7, lines 34–36, or with a "heat seal

process," which involves heating the ends of the individual hairs, *id.*, col. 7, lines 38–39. *See also id.*, col. 2, lines 45–51; *id.*, col. 7, lines 24–28. Each of these methods is described as a means of fusing the hairs together. *See*, *e.g.*, *id.*, col. 4, lines 37–39 ("For example, the multiple clusters can be fused together (e.g., via a heat seal process) approximately 1–5 mm above the base via crisscrossing artificial hairs."); *id.*, col. 5, lines 6–7 ("The multiple clusters of each lash fusion can be fused to one another (e.g., during a hot melt process).").

At issue on appeal are independent claims 1, 23, and 28, as well as dependent claims 9, 13, and 27. Claim 1 recites:

> A lash extension comprising:
>
> a plurality of first artificial hairs, each of the first artificial hairs having a first **heat fused connection** to at least one of the first artificial hairs adjacent thereto in order to form a first cluster of artificial hairs, the first **heat fused connection** defining a first base of the first cluster of artificial hairs; and
>
> a plurality of second artificial hairs, each of the second artificial hairs having a second **heat fused connection** to at least one of the second artificial hairs adjacent thereto in order to form a second cluster of artificial hairs, the second **heat fused connection** defining a second base of the second cluster of artificial hairs, the first base and the second base are included in a common base from which the first cluster of artificial hairs and the second cluster of artificial hairs extend, the first cluster of artificial hairs and the second cluster of artificial hairs are spaced apart from each other along the common base, the common base, first cluster of artificial hairs, and second cluster of artificial hairs

collectively forming a lash extension configured to be attached to a user.

Id., col. 9, lines 6–27 (emphases added).

Claim 23 recites:

A lash extension comprising:

a plurality of first artificial hairs having a plurality of first proximal end portions and a plurality of first distal end portions, the first proximal **end portions being heat fused together** such that a first cluster of artificial hairs is defined; and

a plurality of second artificial hairs having a plurality of second proximal end portions and a plurality of second distal end portions, the second proximal **end portions being heat fused together** such that a second cluster of artificial hairs is defined, the first cluster of artificial hairs and the second cluster of artificial hairs being linearly **heat fused** to a common base spanning between the first proximal end portions and the second proximal end portions, the common base, first cluster of artificial hairs, and second cluster of artificial hairs collectively forming a lash extension that is configured to be attached to a user.

Id., col. 10, lines 40–57 (emphases added).

Claim 28 recites:

A lash extension comprising:

a base; and

a plurality of clusters of **heat fused artificial hairs** extending from the base, the base having a thickness between about 0.05 millimeters and about 0.15 millimeters, the base and clusters of artificial hairs collectively forming a lash extension that is configured to be attached to a user.

Id., col. 11, lines 4–11 (emphasis added).

Also asserted are design patents D'416 and D'664. The D'416 patent claims an ornamental design for a storage cartridge for artificial eyelash extensions. The D'664 patent claims an ornamental design for an applicator for artificial eyelash extensions.

B

Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, "declares certain activities related to importation to be unlawful trade acts and directs the Commission generally to grant prospective relief if it has found an unlawful trade act to have occurred." *ClearCorrect Operating, LLC v. International Trade Commission*, 810 F.3d 1283, 1289 (Fed. Cir. 2015) (internal quotation marks omitted) (citing *Suprema, Inc. v. International Trade Commission*, 796 F.3d 1338, 1345 (Fed. Cir. 2015) (en banc)). But a precondition for relief is satisfaction of a domestic-industry requirement. Specifically, as relevant here, section 337 sets forth an unlawfulness standard based on patent infringement in (a)(1), a domestic-industry requirement in (a)(2), and a standard for meeting part of the domestic-industry requirement in (a)(3):

> (a)(1) Subject to paragraph (2), the following are unlawful . . . .
>
> . . .
>
> (B) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that—
>
> (i) infringe a valid and enforceable United States patent . . . ; or
>
> (ii) are made, produced, processed, or mined under, or by means of, a

> process covered by the claims of a valid and enforceable United States patent.
>
> . . .
>
> (2) Subparagraph[] (B) . . . of paragraph (1) appl[ies] only if an industry in the United States, relating to the articles protected by the patent . . . concerned, exists or is in the process of being established.
>
> (3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent . . . concerned—
>
> > (A) significant investment in plant and equipment;
> >
> > (B) significant employment of labor or capital; or
> >
> > (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a). Omitted from the above quotation is language providing similar protection for certain copyrights, trademarks, semiconductor-chip mask works, and vessel-design rights.

Under those provisions, to demonstrate that an unlawful trade act has occurred, a complaining patentee must meet at least the following requirements, as relevant here. First, the respondents named in the Commission proceeding must be importing "articles that . . . infringe" a United States patent. *Id.* § 1337(a)(1)(B). Second, there must be (already or in process of establishment) an industry in the United States that relates to the articles protected by the patent. *Id.* § 1337(a)(2). This second requirement (the domestic-industry requirement) is commonly described as

having two components—"the 'economic prong,' which requires that there be [in existence or in the process of being established] an industry in the United States [pertaining to the patent], and the 'technical prong,' which requires that the industry relate to the articles protected by the patent." *InterDigital Communications, LLC v. International Trade Commission*, 707 F.3d 1295, 1298 (Fed. Cir. 2013); 19 U.S.C. § 1337(a)(2)–(3). For the economic prong, section 337(a)(3) identifies three potentially overlapping but independently sufficient bases for considering the required industry to exist. *See Wuhan Healthgen Biotechnology Corp. v. International Trade Commission*, 127 F.4th 1334, 1338 (Fed. Cir. 2025). For the technical prong, the question "is essentially same as that for infringement, *i.e.*, a comparison of domestic products to the asserted claims." *Alloc, Inc. v. International Trade Commission*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). Here, as is common, it is the complainant's own products that are being compared to the asserted claims. *See Hyosung TNS Inc. v. International Trade Commission*, 926 F.3d 1353, 1361 (Fed. Cir. 2019).

C

On September 10, 2020, Lashify filed a complaint before the Commission, alleging violations of section 337 through infringement of its '984, D'416, and D'664 patents.[1] The Commission instituted an investigation based on Lashify's complaint. *Certain Artificial Eyelash Extension Systems, Products, and Components Thereof*, Inv. No. 337-TA-1226, 2020 WL 6285221, at *2–3, 85 Fed. Reg. 68366, 68366–67 (Oct. 28, 2020). The respondents to be investigated for violating section 337 were (in addition to one party eventually dropped from the proceeding) the intervenors in this court: KISS Nail Products, Inc.; Ulta Beauty, Inc. (later replaced by Ulta Salon, Cosmetics &

[1] Lashify also asserted infringement of U.S. Patent No. 10,660,388. That patent is no longer at issue.

Fragrance, Inc.); Walmart, Inc.; CVS Health Corp. (later replaced by CVS Pharmacy, Inc.); Qingdao Hollyren Cosmetics Co., Ltd. d/b/a/ Hollyren; Qingdao Xizi International Trading Co., Ltd. d/b/a/ Xizi Lashes; Qingdao LashBeauty Cosmetic Co., Ltd. d/b/a Worldbeauty; and Alicia Zeng d/b/a Lilac St. and Artemis Family Beginnings, Inc. *Id.*

1

The assigned administrative law judge (ALJ), after conducting a claim-construction hearing, issued a claim-construction order on April 30, 2021. *Certain Artificial Eyelash Extension Systems, Products, and Components Thereof*, Inv. No. 337-TA-1226, 2021 WL 1885151, at *1 (Apr. 30, 2021) (*Claim Construction*). Relevant here is the construction of "heat fused," which appears in each of the asserted claims of the '984 patent, either directly or through their dependencies. Lashify asked the ALJ to state simply that "heat fused" had its "plain and ordinary meaning" or, alternatively, to construe the phrase to mean "joined using heat." *Id.* at *9. Respondents requested a construction requiring the "[a]pplication of heat of a sufficient temperature to cause melting" such that separate elements "merg[e] . . . into a unified whole." *Id.*

The ALJ adopted a construction incorporating aspects of both proposed constructions, concluding that "heat fused" means "joined by applying heat to form a single entity." *Id.* at *14 (emphasis omitted). The construction incorporated Lashify's proposal of "joined using heat," which the ALJ explained was supported by the intrinsic evidence and "consistent with several of the dictionaries." *Id.* at *12. The ALJ added that gluing fibers together was not enough for "fusion" of the fibers, even if some heat was applied to the glue. *Id.* at *13. The ALJ also incorporated the "unified whole" aspect of respondents' proposed construction by requiring that the joined fibers "form a single entity." *Id.* at *14. Referring to dictionary definitions, the ALJ concluded that "fuse" means "more than simply joining together

structures that could then easily be separated." *Id.* The construction did not, however, include the melting aspect of respondents' proposed construction because "the patents disclose an embodiment in which the temperature used to 'heat fuse' hairs is less than a 'sufficient temperature to cause melting.'" *Id.* at *11; *see* '984 patent, col. 7, lines 36–39 ("For example, artificial hairs made of PBT [polybutylene terephthalate] could be heated to approximately 55–110°C. at one end during a heat seal process (during which the heated ends begin to fuse to one another)."); *Commission Opinion*, at *16 (explaining that melting temperature for PBT is about 225°C).

On October 28, 2021, the ALJ issued a Final Initial Determination (FID), which determined that there was no violation of section 337. *Certain Artificial Eyelash Extension Systems, Products, and Components Thereof*, Inv. No. 337-TA-1226, 2021 WL 6211486, at *1, *4 (Oct. 28, 2021) (*FID*). The ALJ made determinations regarding the domestic-industry requirement that are at issue in the present appeal. We need not summarize the ALJ's findings regarding infringement, which include findings of infringement of the design patents.[2]

First, the ALJ determined that Lashify had not satisfied the economic-prong component of that requirement—a determination that defeated the claim for relief for all three patents. *Id.* at *68. When evaluating whether Lashify had established "significant employment of labor or capital," 19 U.S.C. § 1337(a)(3)(B), the ALJ excluded

---

[2] As eventually summarized by the Commission, *see Commission Order*, at *2; *Commission Opinion*, at *3, the ALJ found infringement of the design patents—a finding not further challenged by respondents—and found infringement of claims of the '984 patent only as to some respondents—a finding that is not material to the outcome on appeal in light of our other rulings.

expenses relating to sales, marketing, warehousing, quality control, and distribution. *Id.* at *63–65. The warehousing, quality-control, and distribution expenses were excluded because there were "no additional steps required to make these products saleable" upon arrival into the United States, and because the quality-control measures were "no more than what a normal importer would perform upon receipt." *Id.* at *62 (internal quotation marks omitted) (citing *Schaper Manufacturing Co. v. United States International Trade Commission*, 717 F.2d 1368, 1372–73 (Fed. Cir. 1983)). And because "Lashify did not meet its burden to establish significant qualifying expenses *in other areas*," sales and marketing expenditures were also excluded. *Id.* at *64 (emphasis added).

Second, the ALJ determined that Lashify had satisfied the technical-prong requirement only for the D'664 and D'416 patents, not for the '984 patent. *Id.* at *37, *49, *53. Specifically as to the '984 patent (which is at issue on appeal), Lashify relied on its own products to satisfy the technical-prong requirement of an industry relating to its patents. *Id.* at *34. But the ALJ found that Lashify's lash extensions do not satisfy the "heat fused" claim limitations under the adopted claim construction. *Id.* at *37. Lashify uses two overseas manufacturers to produce its lashes: Manufacturer 1, which uses ultrasonic welding, and Manufacturer 2, which uses a different heating process.[3] *Id.* at *34. The ALJ found that the lashes in evidence from Manufacturer 1 were not "join[ed] to form a single entity," as solvent testing and imaging revealed that the fibers forming the clusters remained, even after the formation of a cluster, "separate fibers with well-defined boundaries." *Id.* at *35–36. For the Manufacturer 2 lashes, the ALJ made a similar determination, citing images showing "individual

[3] The names of the manufacturers as well as the particulars of the manufacturing processes are confidential.

fibers with well-defined boundaries." *Id.* at *36. The ALJ so found on the evidence as a whole even while recognizing that some of the images were "contradictory" because they "show fibers that may be merging with each other." *Id.* at *37.

2

On Lashify's petition for review, the Commission agreed to review the foregoing findings by the ALJ. *Certain Artificial Eyelash Extension Systems, Products, and Components Thereof*, Inv. No. 337-TA-1226, 2022 WL 279050, at *1, 87 Fed. Reg. 4044, 4044–46 (Jan. 26, 2022). The Commission subsequently agreed with the above-summarized ALJ findings and hence the ultimate rejection of section 337 relief. *Commission Order*, at *3; *Commission Opinion*, at *37. The Commission split on the analysis of and conclusion regarding the economic-prong issue but was unanimous on the sole technical-prong issue presented to it (concerning the utility patent). *See Commission Opinion*, at *1 n.1, *38 (two-member partial dissent).

The Commission majority agreed with the ALJ that Lashify had not satisfied the economic-prong requirement. *Id.* at *28. In so concluding, the majority reasoned that "it is well settled that sales and marketing activities alone cannot satisfy the domestic industry requirement." *Id.* at *18. The majority drew the same conclusion about expenses related to warehousing, quality control, and distribution (without regard to their magnitude), explaining that those expenses are akin to those incurred by mere importers. *Id.* at *30–31, *33–35 (citing *Schaper*, 717 F.2d at 1373). In the Commission majority's view, once those conclusions were drawn, there was no basis for finding the economic-prong requirement to be satisfied.

The dissenting Commissioners, focusing on the design patents, concluded that Lashify had satisfied the economic-prong requirement by establishing "significant employment of labor or capital," 19 U.S.C. § 1337(a)(3)(B).

Commission Opinion, at *38–39. Specifically, they disagreed with the majority's exclusion of expenses relating to warehousing, distribution, quality control, sales, and marketing, reasoning that the statutory language contains no basis for excluding such activities, *i.e.*, for deeming them (regardless of their magnitude) insufficient standing alone. *Id.* at *55–68.

The Commission unanimously affirmed the ALJ's determination that Lashify failed to satisfy the technical-prong requirement for the '984 patent because Lashify's products do not meet the "heat fused" claim limitation. *Id.* at *10. In addition to the ALJ's reasoning discussed above, the Commission found "additional reasons" that Lashify's products do not practice the claims of the '984 patent. *Id.* at *12. For the lashes from Manufacturer 1, the Commission found that "all of the[] lashes use a base string and most of them also use glue" to connect the fibers. *Id.* Additionally, the Commission cited expert testimony indicating that "the glue is added first," that "glue is found between the fibers rather than the fibers being a 'single entity' as required by the ALJ's construction," and that "the ultrasonic welding step would affect only the outer layer of glue and not the individual fibers held together by the glue." *Id.* For the lashes from Manufacturer 2, the Commission found that images of the lashes "clearly show a separate base in addition to the fibers extending up from the base," contrary to Lashify's assertion that, due to the absence of glue, "the *only possible mechanism* holding the lash fibers together is the softening of the artificial fibers such that they join together." *Id.* at *14–15. Instead, the artificial fibers "are pushed into and held in place by the base," eliminating the need for glue. *Id.* at *15. The Commission also found that the images the ALJ deemed "contradictory" (*i.e.*, those appearing to show fibers merging with each other) were "cut through the solid . . . base"—in other words, the purported merged fibers were actually the solid base. *Id.*

Lashify timely petitioned for review of the Commission's decision on December 2, 2022. We have jurisdiction under 28 U.S.C. § 1295(a)(6). Lashify challenges two aspects of the Commission's decision: (1) the determination that Lashify had not satisfied the economic prong of the domestic-industry requirement for the three patents; and (2) the Commission's construction of "heat fused" for the '984 patent, which was the basis for finding a failure to satisfy the technical prong of the domestic-industry requirement. Lashify Opening Br. at 5–6.

II

We first address the Commission's decision about the economic prong of the domestic-industry requirement. Specifically, we address the Commission's statutory interpretation, which excludes several categories of spending from qualifying, standing alone, under section 337(a)(3)(B). We exercise our "independent judgment" about the correctness of that interpretation. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024).

To reiterate, section 337(a)(3) states:

> [A]n industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent . . . concerned—
>
> > (A) significant investment in plant and equipment;
> >
> > (B) significant employment of labor or capital; or
> >
> > (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3). That provision was enacted in 1988. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342, 102 Stat. 1107, 1212–13.

The statute's use of "or" to separate the three clauses means that satisfying any one of the clauses suffices for satisfying the economic prong of the domestic-industry requirement. *See Wuhan Healthgen*, 127 F.4th at 1338. Here, Lashify challenges the Commission's interpretation of clause (B), which states that "significant employment of labor or capital" suffices to establish the existence of an industry as long as such employment is "with respect to" the patented articles. Lashify Opening Br. at 5, 35–53. Specifically, Lashify argues that the Commission adopted an interpretation contrary to clause (B) when it held that even large expenditures for domestic employment of labor or capital pertaining to patented articles are insufficient (1) when the labor or capital is used for selling and marketing, unless there exist "other qualifying expenditures," *Commission Opinion*, at *31, and (2) when the labor or capital is used for warehousing, quality control, and distribution, if the products "are manufactured outside the United States and no additional steps occur in the United States to make them saleable," *id.* at *30. Those holdings are clear in the Commission's decision and not contradicted by the Commission's statement that the exclusions of labor or capital for sales, marketing, warehousing, quality control, and distribution are not even more "categorical[]." *Id.* at *31.

The two holdings, which are closely related for present purposes, define the legal issue before us. It may be, as Lashify suggests, Lashify Opening Br. at 39, that those holdings amount to requiring (where only clause (B) is at issue) that the complainant engage in domestic manufacturing activity in order for labor or capital used for sales, marketing, warehousing, quality control, or distribution to be counted under clause (B). The Commission, though stating that clause (B) might apply if some additional activities are present, did not specify any activity besides manufacturing as potentially supplying the result-changing addition. *See Commission Opinion*, at *31. But whether or not

the Commission's rationale is effectively a demand for domestic manufacturing, we agree with Lashify that the dual insufficiency holdings are contrary to section 337(a)(3)(B).

A

The statutory language is the starting point for analysis and typically controls the outcome. *See*, *e.g.*, *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). Like the Commission's opinion, *see Commission Opinion*, at *18–19, *27–35, the Commission's brief to this court does not meaningfully attempt to square its position with the statutory text, but instead relies on legislative history of the 1988 amendment, the Commission's practice before that amendment, and this court's 1983 decision in *Schaper*, 717 F.2d 1368. Commission Response Br. at 34–44. As that approach implicitly acknowledges, the Commission's interpretation of section 337(a)(3)(B) is contrary to the provision's language.

The provision straightforwardly states that a domestic industry "shall be considered to exist if there is in the United States, with respect to the articles protected by the patent . . . concerned, . . . significant employment of labor or capital." 19 U.S.C. § 1337(a)(3)(B). That language declares "significant employment of labor or capital" (if it is with respect to patented articles, as is not disputed here) to be sufficient to satisfy the economic prong of the domestic-industry requirement. The provision covers significant use of "labor" and "capital" without any limitation on the use within an enterprise to which those items are put, *i.e.*, the enterprise function they serve. In particular, there is no carveout of employment of labor or capital for sales, marketing, warehousing, quality control, or distribution. Nor is there a suggestion that such uses, to count, must be accompanied by significant employment for other functions, such as manufacturing. The Commission's holdings attribute limitations to clause (B) not found there.

The absence of such limitations on the scope of clause (B) is reinforced by the immediate context, *i.e.*, the neighboring clauses. Clause (B) is similar to clause (A) in that both refer directly and only to concretely identified inputs for an enterprise's functioning (plant, equipment, labor, and capital), but they do not limit what enterprise functions the inputs must be used to perform. In this respect, they differ from the third provision, clause (C), which does not specify particular inputs but instead speaks only of a functionally defined enterprise activity (whatever inputs are used). Clause (C) covers "substantial investment in [the patent's] exploitation, including engineering, research and development, or licensing," 19 U.S.C. § 1337(a)(3)(C), *i.e.*, efforts focused directly on putting a patent into practice in the various ways that is done. That functional language is conspicuously missing from clauses (A) and (B). And Congress separated the clauses by "or," making each basis independently sufficient for establishing the required industry.

The terms "labor" and "capital," which are not given a definition in the statute, carry their ordinary meaning in this context as of 1988, the time of enactment. *See*, *e.g.*, *Food Marketing Institute v. Argus Leader Media*, 588 U.S. 427, 433–34 (2019); *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019); *Johnson v. United States*, 559 U.S. 133, 138–40 (2010); *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 476 (1994). We articulated the relevant ordinary meanings in this setting in *Lelo Inc. v. International Trade Commission*, 786 F.3d 879 (Fed. Cir. 2015). "'[C]apital' is 'a stock of accumulated goods'"—not simply money to finance an enterprise—and "'labor' is 'human activity that produces goods or provides the services in demand in an economy'" in an obviously broad sense. *Id.* at 883 (citing Webster's Third New International Dictionary 332, 1259 (1986)).

Under those definitions, section 337(a)(3)(B) allows a complainant to satisfy the economic prong of the domestic-

industry requirement by showing employment of a large enough stock of accumulated goods or of a significant amount of human activity for producing goods or providing the services in demand in an economy. There is no requirement that a "stock of accumulated goods" be manufactured domestically. There is no exclusion from labor when the human activity employed is for sales, marketing, warehousing, quality control, or distribution, which are common aspects of providing goods or services. "Warehousing" on its face involves holding "a stock of accumulated goods"; and there is no reason to exclude the associated labor costs or those relating to sales, marketing, quality control, and distribution from "human activity that . . . provides the services in demand in an economy." *See Commission Opinion,* at *59–60 (partial dissent, noting that "the Commission has included such activities among expenditures it has credited toward satisfaction of the domestic industry requirement in prior determinations"). Ensuring that products, specifically products of desired quality, are provided to customers (*i.e.*, warehousing, quality control, and distribution) is an aspect of, at least, "providing the services in demand." Efforts to sell and market products to customers also are natural aspects of "providing the services in demand": Such efforts spread knowledge of the availability of, and means of using, goods or services offered.

The terms "labor" and "capital" thus provide no support for the Commission's approach. Nor does the term "significant." In *Lelo*, this court determined that the term "significant" referred to "an increase in quantity, or to a benchmark in numbers." 786 F.3d at 883; *see also Wuhan Healthgen*, 127 F.4th at 1339 ("Small market segments can still be significant and substantial enough to satisfy the domestic industry requirement."). Such an ordinary meaning is consistent with the neighboring use of "significant" as a modifier of "investment in plant and equipment." 19 U.S.C. § 1337(a)(3)(A). In sum, clause (B) does not exclude or discount the sufficiency of significant-in-amount labor or

capital that is devoted to the particular enterprise functions the Commission deemed not to count standing alone. Accordingly, the Commission's approach is counter to the statutory text.

B

The Commission argues that the legislative history of the 1988 enactment indicates that Congress did not intend to include uses of labor or capital for certain enterprise functions, *i.e.*, sales, marketing, warehousing, quality control, and distribution. Commission Response Br. at 35 ("[T]he inclusion of *all* domestic activities in the domestic industry analysis is . . . contrary to Congressional intent."). As just discussed, the statutory text clearly establishes that the Commission's approach is contrary to the statute, and the legislative history cannot support a different result here. *See*, *e.g.*, *Food Marketing Institute*, 588 U.S. at 436; *Milner v. Department of Navy*, 562 U.S. 562, 572 (2011). The legislative history—which we have discussed previously, *see InterDigital*, 707 F.3d at 1300–03—does not justify the inference the Commission draws from it.

1

Regarding sales and marketing, the Commission infers congressional intent to exclude expenditures for labor and capital used in performing those functions from two bills introduced in the House, H.R. 4539, 99th Cong. (1986) and H.R. 4747, 99th Cong. (1986)—in particular, the deletion of language in the first bill to arrive at the second. Commission Response Br. at 35–38; *Commission Opinion*, at *18–19. Because the "second bill [H.R. 4747] removed 'sales and marketing' from the list of cognizable activities," the Commission argues, "Congress did not intend to recognize those activities as a basis for a domestic industry." Commission Response Br. at 30. While the Commission is correct that "sales[] and marketing" was present in H.R. 4539 and not in H.R. 4747, a review of the legislative history reveals that the Commission's inference is incorrect.

Before 1988, section 337, as relevant here, had an injury requirement—covering unfair acts of importation of articles or their sale, "the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry." Trade Act of 1974, Pub. L. 93-618, § 341, 88 Stat. 1978, 2053; *see InterDigital*, 707 F.3d at 1300. On April 9, 1986, Representative Kastenmeier introduced H.R. 4539 to expand intellectual-property protections in various ways, including through strengthening section 337. The proposal for section 337(a) was to broaden the above language to read "the effect of which is to destroy or substantially injure an industry in the United States, or to be a threat thereof, or to prevent or substantially impair the establishment of such an industry"; to introduce language specifically addressing intellectual-property infringement; and, of key importance here, to add the following new language about the required domestic industry:

> For purposes of this section, an "industry in the United States" includes a substantial investment in facilities or activities related to the exploitation of patents, copyrights, trademarks, or mask works described in paragraph (2), including research, development, licensing, *sales, and marketing*.

H.R. 4539, § 202(a) (emphasis added); *see also* 132 Cong. Rec. 7119 (1986). Representative Kastenmeier explained that the bill would "assure continued access to the ITC by entities, including universities, who have a substantial stake in the United States" while avoiding the "unfortunate results which have occurred in some recent cases" in which "the ITC has denied relief notwithstanding the existence of a larger service industry exploiting the intellectual property right within the United States." 132 Cong. Rec. 7119 (1986).

A month later, Representative Kastenmeier introduced a new bill, H.R. 4747, which, besides introducing the basic arrangement of intellectual-property provisions now in the statute, proposed three clauses that identified predicates that would suffice (if they pertained to the asserted patent) to establish the required domestic industry:

> (A) significant investment in plant and equipment;
>
> (B) significant employment of labor or capital; or
>
> (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

H.R. 4747, § 2(a)(1). Clauses (A) and (B), focusing simply on the particular identified inputs, were new. Clause (C) was a version of the earlier bill's language, similarly focused not on inputs but on enterprise functions, except that sales and marketing were deleted from the list.

The "sales[] and marketing" language was not removed from a pre-existing clause (B) because there was no such clause in the earlier bill. In this circumstance, there is no basis, in the disappearance of that language, for the Commission's inference that "Congress did not intend to recognize those activities as a basis for a domestic industry" even when the new terms of clause (B) are met. *See* Commission Response Br. at 30. Nor is there such a basis found in the statement made upon the new bill's introduction—that "[t]he inclusion of 'sales and marketing' activities in the United States was seen by most commentators as being too broad." 132 Cong. Rec. 30816 (1986). That statement implies at most that coverage of two entire categories of enterprise functions (sales and marketing) was thought to be too broad, not that the input-focused clause (B) would be too broad. The input-focused clause (B) is distinctly narrower than the language in H.R. 4539, as it excludes, *e.g.*, simply purchasing advertising (without more), even in large amounts.

The committee reports cited by the Commission are similarly limited in their import. When the committees stated that "[m]arketing and sales in the United States alone would not, however, be sufficient to meet this test," they were not discussing "[t]he first two factors," *i.e.*, clauses (A) and (B), but "[t]he third factor," *i.e.*, clause (C). H.R. Rep. No. 100-40, at 157 (1987); S.R. Rep. No. 100-71, at 129 (1987). The statement, then, was simply that not all substantial investments in the functions of "sales and marketing" would suffice. That does not imply the insufficiency of employing the inputs specified in clause (B)—"significant employment of labor or capital"—when used for those functions.

Nor is such an implication to be found in other statements about clause (B) in the legislative history identified to us. Representative Kastenmeier, discussing the proposed amendment, cited to the Commission's decision in *Certain Airtight Cast-Iron Stoves*, Inv. No. 337-TA-69, 1980 WL 41970 (Dec. 31, 1980) (*Stoves*), which was a precursor to clauses (A) and (B). 132 Cong. Rec. 30816 & n.7 (1986); *see also* S. Rep. No. 100-71, at 129 ("The first two factors in this definition have been relied on in prior Commission decisions finding that an industry exists in the United States."). The language of clause (B) ("significant employment of labor or capital") mirrors that used in *Stoves*, where the Commission considered whether there was "a significant employment of land, labor, and capital for the creation of value" (specifically, "value added domestically") such that a non-domestic-manufacturer could satisfy the domestic-industry test. *Stoves*, at *5. Using that approach, the Commission found that the complainant had established a domestic industry even though the stoves in question "arriv[ed] by ship from Norway." *Id.* Some of the evidence considered by the Commission in *Stoves*—even in the absence of domestic manufacturing—showed that the complainant "design[ed] advertising, and print brochures, including a service manual" and "instruct[ed] its dealers on

the safe installation" of its stoves, in addition to repairing and testing the stoves. *Id.* The congressional citation of *Stoves* undermines rather than supports the Commission's reading of clause (B).

2

Regarding the Commission's holding that labor or capital used for warehousing, quality control, and distribution expenditures do not count in the absence of domestic manufacturing, the Commission points to certain statements within Congress and also to the Commission's own pre-1988 practices and Congress's perceived silence about those practices in the legislative history behind the 1988 amendments. *See* Commission Response Br. at 49 ("Because Congress did not address these [warehousing/distribution] activities in the 1988 Amendments or legislative history, that practice has largely remained unchanged."); *id.* at 52–53 ("Because Congress did not address quality control activities or packaging in the 1988 Amendments or legislative history, the Commission's practice has remained largely unchanged."). In the face of the clear statutory text (discussed *supra* part II.A), we do not agree with the Commission's assessment.

The Commission points to congressional committees' reports to the effect that mere ownership of patent or similar rights should not be enough to invoke section 337. *See* H. Rep. No. 100-40, at 156–57 ("This [domestic industry] requirement was maintained in order to preclude holders of U.S. intellectual property rights who have no contact with the United States other than owning such intellectual property rights from utilizing section 337."); S. Rep. No. 100-71 at 130 ("The mere ownership of a patent . . . would not be sufficient to satisfy this test."). But those statements do not address the circumstance presented here. With respect to whether there is a domestic "industry," Lashify's expenditures on labor or capital used for

warehousing, quality control, and distribution are not at all the same as patent ownership standing alone.

The Commission identifies nothing in the legislative history that approves a pre-1988 Commission position, let alone a clear and consistent position, comparable to what it now argues. Moreover, as discussed above, Representative Kastenmeier made favorable reference to the Commission's 1980 ruling in *Stoves*, which, using language aligned with what later became clause (B) and expressly noting that domestic manufacturing was not required by the phrase "domestic industry," found section 337 relief available based on expenditures for sales and marketing even when the complainant did not manufacture the articles in question domestically. *Stoves*, at *5–6. To the extent that the Commission in the present matter in effect insisted on domestic manufacture, its position runs counter not only to the statutory language, as discussed above, but also to the legislative history we have discussed and, more generally, to the legislative history laid out in *InterDigital* showing the congressional rejection of a domestic-manufacturing requirement. 707 F.3d at 1300–03. The Commission identifies nothing in the legislative history that warrants declaring significant employment of labor or capital as insufficient (counter to the language of clause (B)) to the extent it is used in warehousing, quality control, or distribution.

C

Nor, finally, does this court's 1983 decision in *Schaper* support the Commission's position. 717 F.2d 1368. That decision pre-dated and thus was not an interpretation of the 1988 language now at issue. It "offers little guidance as to how to assess domestic industry under the current version of section 337." *Zircon Corp. v. International Trade Commission*, 101 F.4th 817, 826 (Fed. Cir. 2024). Moreover, a House Report, far from endorsing *Schaper*, characterized the underlying Commission decision in the matter

as one of the "best" exhibits of the Commission's "inconsistent and unduly narrow manner" of interpreting the domestic industry requirement. H.R. Rep. No. 99-581, at 112 (1986). Further, *Schaper*, in affirming the Commission, did not focus on labor or capital and on advertising and promotion generally, reasoning that "advertising and promotion cannot be considered *part of the production* process." 717 F.2d at 1373 (emphasis added). That reasoning seems to reflect a domestic-manufacturing requirement—which, as already indicated, Congress unmistakably rejected in 1988.

D

For the foregoing reasons, we conclude that the Commission's interpretation of section 337(a)(3)(B) is incorrect. That error requires vacatur of the Board's decision and a remand for redetermination of satisfaction of the economic prong of the domestic-industry requirement without reliance on the incorrect interpretation. The Commission's determination on that issue rested on its incorrect understanding of clause (B). It deemed Lashify's analysis to be "overinclusive and not supported" because it "include[d] expenses related to warehousing, distribution, and quality control" as well as "sales and marketing expenses." *Commission Opinion*, at *31–32. We decide today that it is not "overinclusive" to include those expenses to the extent they relate to employment of labor or capital. On remand, the Commission must count Lashify's employment of labor and capital even when they are used in sales, marketing, warehousing, quality control, or distribution, and the Commission must make a factual finding of whether those qualifying expenses are significant or substantial based on "a holistic review of all relevant considerations," *Wuhan Healthgen*, 127 F.4th at 1339. It must do so specifically with respect to the two design patents, because, as next discussed, we are affirming the Commission's holding that Lashify failed to satisfy the technical prong regarding the '984 patent. *See Zircon*, 101 F.4th at 824 ("[I]n cases in which the complainant's products or groups of products

each practice different patents, the complainant would need to establish separate domestic industries for each of those different groups of products."). With the removal of the utility patent, Lashify should be given the opportunity to present additional argument and evidence, as needed, regarding the allocation of labor and capital expenditures to the D'416 and D'664 patents. Oral Arg. at 48:10–49:32, https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23-1245_01132025.mp3.

III

For the technical prong of the domestic-industry requirement, Lashify challenges the Commission's construction of the term "heat fused," which appears in all asserted claims of the '984 patent. Specifically, Lashify argues that the Commission incorrectly construed "heat fused" (and "heat fused connection") to require that the fibers form a single entity that could not easily be separated. Lashify Opening Br. at 53–60. We review the Commission's claim construction without deference and its underlying factual findings for clear error. *See Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 332 (2015).

Challenging the single-entity component of the construction, Lashify argues that, according to the specification, heat fusion can occur at temperatures lower than the melting point of the artificial fibers, so melting of the artificial fibers should not be required. Lashify points specifically to an embodiment set forth in the specification in which "artificial hairs made of PBT [polybutylene terephthalate] could be heated to approximately 55–110°C. at one end during a heat seal process (during which the heated ends begin to fuse to one another)," '984 patent, col. 7, lines 36–39, and to the finding that the melting temperature of PBT is 225°C, *see FID*, at *36; *Commission Opinion*, at *16. These points, however, do not undermine the ALJ's construction adopted by the Commission, which does not

require melting, but only joinder to form a single entity. *Claim Construction*, at *11, *14.

The extrinsic and intrinsic evidence supports the Commission's adoption of the ALJ's claim construction. The ALJ relied on a dictionary definition of "fuse" to mean "to form a single entity." *Id.* at *14 (citing J.A. 8046). The principle that "[a] claim construction that gives meaning to all the terms of the claim is preferred over one that does not do so," *Merck & Co., Inc. v. Teva Pharmaceuticals USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir. 2005), supports a construction that gives limiting effect to "heat fused" in the phrase "heat fused connection." '984 patent, col. 9, lines 8, 10–11, 14, 17. The "single entity" requirement does that, and it does so in a way that reflects a relevant dictionary definition.

The specification contrasts a "fused" connection with a connection using an adhesive. *Id.*, col. 4, lines 46–48 ("The intersecting portions of the crisscrossing artificial hairs could also be connected using an adhesive (i.e., rather than being fused together via a hot melt process)."). Lashify has recognized that "[i]f you just glue with no heat, that's not heat fusion." J.A. 8598, lines 10–11; *see also* J.A. 8642, lines 18–21; J.A. 8643, lines 6–8. But it seeks to distinguish heat-assisted gluing from unheated gluing, so that the former is covered while the latter is not. That distinction is unpersuasive. The claims and specification are better understood not to embrace, in the "heat fused" language, using glue between the hairs for a connection, where the hairs themselves are not touching. Notably, claims 23 and 28—which the parties have treated as bearing the same meaning as claim 1 in this respect—speak specifically of the hairs themselves being "heat fused." *See* '984 patent, col. 10, lines 40–57; *id.*, col. 11, lines 4–6.

We therefore reject Lashify's challenge to the Commission's claim construction. It follows that we must also affirm the Commission's determination that Lashify did not

satisfy the technical prong of the domestic-industry requirement as to the '984 patent.

IV

For the foregoing reasons, we vacate the Commission's determination as to the economic prong of the domestic-industry requirement for all three asserted patents and affirm as to the technical prong of that requirement for the '984 patent. We remand for the Commission to determine whether there is "significant employment of labor or capital" with respect to the two design patents, D'416 and D'664.

The parties shall bear their own costs.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

THE CODE OF LAWS OF THE UNITED STATES OF AMERICA

TITLE 1—GENERAL PROVISIONS

This title was enacted by act July 30, 1947, ch. 388, §1, 61 Stat. 633

Chap.		Sec.
1.	**Rules of construction**	**1**
2.	**Acts and resolutions; formalities of enactment; repeals; sealing of instruments**	**101**
3.	**Code of Laws of United States and Supplements; District of Columbia Code and Supplements**	**201**

Statutory Notes and Related Subsidiaries

POSITIVE LAW; CITATION

This title has been made positive law by section 1 of act July 30, 1947, ch. 388, 61 Stat. 633, which provided in part that: ''Title 1 of the United States Code entitled 'General Provisions', is codified and enacted into positive law and may be cited as '1 U. S. C., §——.' ''

REPEALS

Act July 30, 1947, ch. 388, §2, 61 Stat. 640, provided that the sections or parts thereof of the Statutes at Large or the Revised Statutes covering provisions codified in this Act are repealed insofar as the provisions appeared in former Title 1, and provided that any rights or liabilities now existing under the repealed sections or parts thereof shall not be affected by the repeal.

WRITS OF ERROR

Act June 25, 1948, ch. 646, §23, 62 Stat. 990, provided that: ''All Acts of Congress referring to writs of error shall be construed as amended to the extent necessary to substitute appeal for writ of error.''

TABLE SHOWING DISPOSITION OF ALL SECTIONS OF FORMER TITLE 1

Title 1 Former Sections	*Revised Statutes Statutes at Large*	*Title 1 New Sections*
1	R.S., §1	1
2	R.S., §2	2
3	R.S., §3	3
4	R.S., §4	4
5	R.S., §5	5
6	June 11, 1940, ch. 325, §1, 54 Stat. 305	6
21	R.S., §7	101
22	R.S., §8	102
23	R.S., §9	103
24	R.S., §10	104
25	R.S., §11	105
26	Nov. 1, 1893, 28 Stat. App. 5 Mar. 2, 1895, ch. 177, §1, 28 Stat. 769.	106
27	Mar. 6, 1920, ch. 94, §1, 41 Stat. 520	107
28	R.S., §12	108
29	R.S., §13 Mar. 22, 1944, ch. 123, 58 Stat. 118.	109

TABLE SHOWING DISPOSITION OF ALL SECTIONS OF FORMER TITLE 1—Continued

Title 1 Former Sections	*Revised Statutes Statutes at Large*	*Title 1 New Sections*
29a	R.S., §5599	110
29b	Mar. 3, 1933, ch. 202, §3, 47 Stat. 1431	111
30	Jan. 12, 1895, ch. 23, §73, 28 Stat. 615 June 20, 1936, ch. 630, §9, 49 Stat. 1551. June 16, 1938, ch. 477, §1, 52 Stat. 760.	112
30a	R.S., §908	113
31	R.S., §6	114
51a	Mar. 2, 1929, ch. 586, §1, 45 Stat. 1540	201
52	May 29, 1928, ch. 910, §2, 45 Stat. 1007 Mar. 2, 1929, ch. 586, §2, 45 Stat. 1541.	202
53	May 29, 1928, ch. 910, §3, 45 Stat. 1007	203
54	May 29, 1928, ch. 910, §4, 45 Stat. 1007 Mar. 2, 1929, ch. 586, §3, 45 Stat. 1541.	204
54a	Mar. 2, 1929, ch. 586, §4, 45 Stat. 1542 Mar. 4, 1933, ch. 282, §1, 47 Stat. 1603. June 13, 1934, ch. 483, §§1, 2, 48 Stat. 948.	205
54b	Mar. 2, 1929, ch. 586, §5, 45 Stat. 1542 Mar. 4, 1933, ch. 282, §1, 47 Stat. 1603. June 13, 1934, ch. 483, §§1, 2, 48 Stat. 948.	206
54c	Mar. 2, 1929, ch. 586, §6, 45 Stat. 1542	207
54d	Mar. 2, 1929, ch. 586, §7, 45 Stat. 1542	208
55	May 29, 1928, ch. 910, §5, 45 Stat. 1007	209
56	May 29, 1928, ch. 910, §6, 45 Stat. 1007	210
57	May 29, 1928, ch. 910, §7, 45 Stat. 1008	211
58	May 29, 1928, ch. 910, §8, 45 Stat. 1008	212
59	May 29, 1928, ch. 910, §10, 45 Stat. 1008	213
60	Mar. 3, 1933, ch. 202, §2, 47 Stat. 1431	Rep.

CHAPTER 1—RULES OF CONSTRUCTION

Sec.
1. Words denoting number, gender, etc.[1]
2. ''County'' as including ''parish'', etc.[1]
3. ''Vessel'' as including all means of water transportation.
4. ''Vehicle'' as including all means of land transportation.
5. ''Company'' or ''association'' as including successors and assigns.
6. Limitation of term ''products of American fisheries.''
7. Definition of ''marriage'' and ''spouse''.[2]
8. ''Person'', ''human being'', ''child'', and ''individual'' as including born-alive infant.

Editorial Notes

AMENDMENTS

2002—Pub. L. 107–207, §2(b), Aug. 5, 2002, 116 Stat. 926, added item 8.

[1] So in original. Does not conform to section catchline.

[2] Section catchline amended by Pub. L. 117–228 without corresponding amendment of chapter analysis.

TITLE 19—CUSTOMS DUTIES

Chap.		Sec.
1.	Collection Districts, Ports, and Officers	1
1A.	Foreign Trade Zones	81a
2.	The Tariff Commission [Repealed or Omitted]	91
3.	The Tariff and Related Provisions	121
4.	Tariff Act of 1930	1202
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6.	Trade Fair Program	1751
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21.	North American Free Trade	3301
22.	Uruguay Round Trade Agreements	3501
23.	Extension of Certain Trade Benefits to Sub-Saharan Africa	3701
24.	Bipartisan Trade Promotion Authority	3801
25.	Clean Diamond Trade	3901
26.	Dominican Republic-Central America Free Trade	4001
27.	Bipartisan Congressional Trade Priorities and Accountability	4201
28.	Trade Facilitation and Trade Enforcement	4301
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CHAPTER 1—COLLECTION DISTRICTS, PORTS, AND OFFICERS

Sec.	
1.	Organization of customs service.
2.	Rearrangement and limitation of districts; changing locations.
3.	Superintendence of collection of import duties.
4 to 5a.	Omitted or Repealed.
6.	Designation of customs officers for foreign service; status; rejection of designated customs officer; applicability of civil service laws.
6a to 6d.	Repealed.
6e.	Overtime compensation based on standard or daylight saving time.
7 to 51.	Repealed.
52.	Payment of compensation and expenses.
53 to 58.	Repealed.
58a.	Fees for services of customs officers.
58b.	User fee for customs services at certain small airports and other facilities.
58b–1.	Expenses from fees collected.
58c.	Fees for certain customs services.
59.	Repealed.
60.	Penalty for extortion.
61 to 63.	Repealed.
64.	Laws imposing fines applicable to persons acting under customs laws.
66.	Rules and forms prescribed by Secretary.
67.	Repealed.
68.	Enforcement of customs and immigration laws in Guam and the Virgin Islands and along Canadian and Mexican borders; cooperation by Secretary of the Treasury and Attorney General; erection of buildings.
69.	Erection of protective gates and fences across and around roads crossing borders.
70.	Obstruction of revenue officers by masters of vessels.

§ 1. Organization of customs service

Except as hereinafter provided the reorganization of the customs service made by the President and communicated to Congress under date of March 3, 1913, shall, until otherwise provided by Congress, constitute the permanent organization of the customs service.

(Aug. 24, 1912, ch. 355, 37 Stat. 434.)

Editorial Notes

CODIFICATION

Section was superseded in part by section 2071 et seq. of this title.

PRIOR PROVISIONS

This was a provision of the sundry civil appropriation act for the fiscal year 1913. Prior to its incorporation into the Code, it read as follows: ''The President is authorized to reorganize the customs service and cause estimates to be submitted therefor on account of the fiscal year nineteen hundred and fourteen bringing the total cost of said service for said fiscal year within a sum not exceeding $10,150,000 instead of $10,500,000, the amount authorized to be expended therefor on account of the current fiscal year nineteen hundred and twelve; in making such reorganization and reduction in expenses he is authorized to abolish or consolidate collection districts, ports, and subports of entry and delivery, to discontinue needless offices and employments, to reduce excessive rates of compensation below amounts fixed by law or Executive order, and to do all such other and further things that in his judgment may be

act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(h) Definitions

For the purpose of this section—

(1) The term ''domestic article'' means an article wholly or in part the growth or product of the United States; and the term ''foreign article'' means an article wholly or in part the growth or product of a foreign country.

(2) The term ''United States'' includes the several States and Territories and the District of Columbia.

(3) The term ''foreign country'' means any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions).

(4) The term ''cost of production'', when applied with respect to either a domestic article or a foreign article, includes, for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in its production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.

(i) Rules and regulations of President

The President is authorized to make all needful rules and regulations for carrying out his functions under the provisions of this section.

(j) Repealed. Pub. L. 96–39, title II, § 202(a)(2)(D), July 26, 1979, 93 Stat. 202

(k) Investigations prior to June 17, 1930

All uncompleted investigations instituted prior to June 17, 1930, under the provisions of sections 154 to 159[1] of this title, including investigations in which the President has not proclaimed changes in classification or increases or decreases in rates of duty, shall be dismissed without prejudice; but the information and evidence secured by the commission in any such investigation may be given due consideration in any investigation instituted under the provisions of this section.

(June 17, 1930, ch. 497, title III, § 336, 46 Stat. 701; Aug. 2, 1956, ch. 887, § 2(d), 70 Stat. 946; Pub. L. 85–686, § 9(c)(1), Aug. 20, 1958, 72 Stat. 679; Pub. L. 96–39, title II, § 202(a)(2), July 26, 1979, 93 Stat. 202.)

[1] See References in Text note below.

Editorial Notes

REFERENCES IN TEXT

Sections 154 to 159 of this title, referred to in subsec. (k), were repealed by section 651(a)(1) of act June 17, 1930.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in act Sept. 21, 1922, ch. 356, title III, § 315, 42 Stat. 941. That section was superseded by section 336 of act June 17, 1930, comprising this section, and repealed by section 651(a)(1) of the 1930 act.

AMENDMENTS

1979—Subsec. (b). Pub. L. 96–39, § 202(a)(2)(A), struck out subsec. (b) which related to the setting of ad valorem rates based upon the American selling price of domestic articles as would be necessary to equalize differences in the costs of production.

Subsec. (c). Pub. L. 96–39, § 202(a)(2)(B), substituted ''changes in classification specified in any report'' for ''changes in classification and in basis of value specified in any report''.

Subsec. (d). Pub. L. 96–39, § 202(a)(2)(C), substituted ''changes in classification specified in the report'' for ''changes in classification or in basis of value specified in the report''.

Subsec. (f). Pub. L. 96–39, § 202(a)(2)(C), substituted ''change in classification which has taken effect'' for ''change in classification or in basis of value which has taken effect''.

Subsec. (j). Pub. L. 96–39, § 202(a)(2)(D), struck out subsec. (j) which authorized the Secretary of the Treasury to make necessary rules and regulations for the entry and declaration of foreign articles with respect to which a change in the basis of value had been made.

Subsec. (k). Pub. L. 96–39, § 202(a)(2)(C), substituted ''changes in classification or increases or decreases'' for ''changes in classification or in basis of value or increases or decreases''.

1958—Subsec. (a). Pub. L. 85–686 struck out provisions which authorized the commission to adopt such reasonable procedure and rules and regulations as it deemed necessary to execute its functions under this section. See section 1335 of this title.

1956—Subsec. (b). Act Aug. 2, 1956, struck out ''(as defined in section 1402(g))'' after ''selling price''.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96–39 effective July 1, 1980, see section 204(a) of Pub. L. 96–39, set out as a note under section 1401a of this title.

EFFECTIVE DATE OF 1956 AMENDMENT

Amendment by act Aug. 2, 1956, effective only as to articles entered, or withdrawn from warehouse, for consumption on or after thirtieth day following publication of the final list provided for in section 6(a) of said act, set out in note under section 1402 of this title, see section 8 of act Aug. 2, 1956, set out as an Effective Date note under section 1401a of this title.

§ 1337. Unfair practices in import trade

(a) Unlawful activities; covered industries; definitions

(1) Subject to paragraph (2), the following are unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section:

(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 by the owner, importer, or consignee, 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.

(B) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that—

(i) infringe a valid and enforceable United States patent or a valid and enforceable United States copyright registered under title 17; or

(ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.

(C) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that infringe a valid and enforceable United States trademark registered under the Trademark Act of 1946 [15 U.S.C. 1051 et seq.].

(D) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of a semiconductor chip product in a manner that constitutes infringement of a mask work registered under chapter 9 of title 17.

(E) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consigner, of an article that constitutes infringement of the exclusive rights in a design protected under chapter 13 of title 17.

(2) Subparagraphs (B), (C), (D), and (E) of paragraph (1) apply only if an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned—

(A) significant investment in plant and equipment;

(B) significant employment of labor or capital; or

(C) substantial investment in its exploitation, including engineering, research and development, or licensing.

(4) For the purposes of this section, the phrase ''owner, importer, or consignee'' includes any agent of the owner, importer, or consignee.

(b) Investigation of violations by Commission

(1) The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative. Upon commencing any such investigation, the Commission shall publish notice thereof in the Federal Register. The Commission shall conclude any such investigation and make its determination under this section at the earliest practicable time after the date of publication of notice of such investigation. To promote expeditious adjudication, the Commission shall, within 45 days after an investigation is initiated, establish a target date for its final determination.

(2) During the course of each investigation under this section, the Commission shall consult with, and seek advice and information from, the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as it considers appropriate.

(3) Whenever, in the course of an investigation under this section, the Commission has reason to believe, based on information before it, that a matter, in whole or in part, may come within the purview of part II of subtitle IV of this chapter, it shall promptly notify the Secretary of Commerce so that such action may be taken as is otherwise authorized by such part II. If the Commission has reason to believe that the matter before it (A) is based solely on alleged acts and effects which are within the purview of section 1671 or 1673 of this title, or (B) relates to an alleged copyright infringement with respect to which action is prohibited by section 1008 of title 17, the Commission shall terminate, or not institute, any investigation into the matter. If the Commission has reason to believe the matter before it is based in part on alleged acts and effects which are within the purview of section 1671 or 1673 of this title, and in part on alleged acts and effects which may, independently from or in conjunction with those within the purview of such section, establish a basis for relief under this section, then it may institute or continue an investigation into the matter. If the Commission notifies the Secretary or the administering authority (as defined in section 1677(1) of this title) with respect to a matter under this paragraph, the Commission may suspend its investigation during the time the matter is before the Secretary or administering authority for final decision. Any final decision by the administering authority under section 1671 or 1673 of this title with respect to the matter within such section 1671 or 1673 of this title of which the Commission has notified the Secretary or administering authority shall be conclusive upon the Commission with respect to the issue of less-than-fair-value sales or subsidization and the matters necessary for such decision.

(c) Determinations; review

The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section, except that the Commission may, by issuing a consent order or on the basis of an agreement between the private parties to the investigation, including an agreement to present the matter for arbitration, terminate any such investigation, in whole or in part, without making such a determination. Each determination under subsection (d) or (e) shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of sub-

chapter II of chapter 5 of title 5. All legal and equitable defenses may be presented in all cases. A respondent may raise any counterclaim in a manner prescribed by the Commission. Immediately after a counterclaim is received by the Commission, the respondent raising such counterclaim shall file a notice of removal with a United States district court in which venue for any of the counterclaims raised by the party would exist under section 1391 of title 28. Any counterclaim raised pursuant to this section shall relate back to the date of the original complaint in the proceeding before the Commission. Action on such counterclaim shall not delay or affect the proceeding under this section, including the legal and equitable defenses that may be raised under this subsection. Any person adversely affected by a final determination of the Commission under subsection (d), (e), (f), or (g) may appeal such determination, within 60 days after the determination becomes final, to the United States Court of Appeals for the Federal Circuit for review in accordance with chapter 7 of title 5. Notwithstanding the foregoing provisions of this subsection, Commission determinations under subsections (d), (e), (f), and (g) with respect to its findings on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the amount and nature of bond, or the appropriate remedy shall be reviewable in accordance with section 706 of title 5. Determinations by the Commission under subsections (e), (f), and (j) with respect to forfeiture of bonds and under subsection (h) with respect to the imposition of sanctions for abuse of discovery or abuse of process shall also be reviewable in accordance with section 706 of title 5.

(d) Exclusion of articles from entry

(1) If the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

(2) The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that—

(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

(e) Exclusion of articles from entry during investigation except under bond; procedures applicable; preliminary relief

(1) If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry, except that such articles shall be entitled to entry under bond prescribed by the Secretary in an amount determined by the Commission to be sufficient to protect the complainant from any injury. If the Commission later determines that the respondent has violated the provisions of this section, the bond may be forfeited to the complainant.

(2) A complainant may petition the Commission for the issuance of an order under this subsection. The Commission shall make a determination with regard to such petition by no later than the 90th day after the date on which the Commission's notice of investigation is published in the Federal Register. The Commission may extend the 90-day period for an additional 60 days in a case it designates as a more complicated case. The Commission shall publish in the Federal Register its reasons why it designated the case as being more complicated. The Commission may require the complainant to post a bond as a prerequisite to the issuance of an order under this subsection. If the Commission later determines that the respondent has not violated the provisions of this section, the bond may be forfeited to the respondent.

(3) The Commission may grant preliminary relief under this subsection or subsection (f) to the same extent as preliminary injunctions and temporary restraining orders may be granted under the Federal Rules of Civil Procedure.

(4) The Commission shall prescribe the terms and conditions under which bonds may be forfeited under paragraphs (1) and (2).

(f) Cease and desist orders; civil penalty for violation of orders

(1) In addition to, or in lieu of, taking action under subsection (d) or (e), the Commission may issue and cause to be served on any person violating this section, or believed to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved, unless after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States

consumers, it finds that such order should not be issued. The Commission may at any time, upon such notice and in such manner as it deems proper, modify or revoke any such order, and, in the case of a revocation, may take action under subsection (d) or (e), as the case may be. If a temporary cease and desist order is issued in addition to, or in lieu of, an exclusion order under subsection (e), the Commission may require the complainant to post a bond, in an amount determined by the Commission to be sufficient to protect the respondent from any injury, as a prerequisite to the issuance of an order under this subsection. If the Commission later determines that the respondent has not violated the provisions of this section, the bond may be forfeited to the respondent. The Commission shall prescribe the terms and conditions under which the bonds may be forfeited under this paragraph.

(2) Any person who violates an order issued by the Commission under paragraph (1) after it has become final shall forfeit and pay to the United States a civil penalty for each day on which an importation of articles, or their sale, occurs in violation of the order of not more than the greater of $100,000 or twice the domestic value of the articles entered or sold on such day in violation of the order. Such penalty shall accrue to the United States and may be recovered for the United States in a civil action brought by the Commission in the Federal District Court for the District of Columbia or for the district in which the violation occurs. In such actions, the United States district courts may issue mandatory injunctions incorporating the relief sought by the Commission as they deem appropriate in the enforcement of such final orders of the Commission.

(g) Exclusion from entry or cease and desist order; conditions and procedures applicable

(1) If—

(A) a complaint is filed against a person under this section;

(B) the complaint and a notice of investigation are served on the person;

(C) the person fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice;

(D) the person fails to show good cause why the person should not be found in default; and

(E) the complainant seeks relief limited solely to that person;

the Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both, limited to that person unless, after considering the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such exclusion or order should not be issued.

(2) In addition to the authority of the Commission to issue a general exclusion from entry of articles when a respondent appears to contest an investigation concerning a violation of the provisions of this section, a general exclusion from entry of articles, regardless of the source or importer of the articles, may be issued if—

(A) no person appears to contest an investigation concerning a violation of the provisions of this section,

(B) such a violation is established by substantial, reliable, and probative evidence, and

(C) the requirements of subsection (d)(2) are met.

(h) Sanctions for abuse of discovery and abuse of process

The Commission may by rule prescribe sanctions for abuse of discovery and abuse of process to the extent authorized by Rule 11 and Rule 37 of the Federal Rules of Civil Procedure.

(i) Forfeiture

(1) In addition to taking action under subsection (d), the Commission may issue an order providing that any article imported in violation of the provisions of this section be seized and forfeited to the United States if—

(A) the owner, importer, or consignee of the article previously attempted to import the article into the United States;

(B) the article was previously denied entry into the United States by reason of an order issued under subsection (d); and

(C) upon such previous denial of entry, the Secretary of the Treasury provided the owner, importer, or consignee of the article written notice of—

(i) such order, and

(ii) the seizure and forfeiture that would result from any further attempt to import the article into the United States.

(2) The Commission shall notify the Secretary of the Treasury of any order issued under this subsection and, upon receipt of such notice, the Secretary of the Treasury shall enforce such order in accordance with the provisions of this section.

(3) Upon the attempted entry of articles subject to an order issued under this subsection, the Secretary of the Treasury shall immediately notify all ports of entry of the attempted importation and shall identify the persons notified under paragraph (1)(C).

(4) The Secretary of the Treasury shall provide—

(A) the written notice described in paragraph (1)(C) to the owner, importer, or consignee of any article that is denied entry into the United States by reason of an order issued under subsection (d); and

(B) a copy of such written notice to the Commission.

(j) Referral to President

(1) If the Commission determines that there is a violation of this section, or that, for purposes of subsection (e), there is reason to believe that there is such a violation, it shall—

(A) publish such determination in the Federal Register, and

(B) transmit to the President a copy of such determination and the action taken under subsection (d), (e), (f), (g), or (i), with respect thereto, together with the record upon which such determination is based.

(2) If, before the close of the 60-day period beginning on the day after the day on which he re-

ceives a copy of such determination, the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken under subsection (d), (e), (f), (g), or (i) with respect thereto shall have no force or effect.

(3) Subject to the provisions of paragraph (2), such determination shall, except for purposes of subsection (c), be effective upon publication thereof in the Federal Register, and the action taken under subsection (d), (e), (f), (g), or (i), with respect thereto shall be effective as provided in such subsections, except that articles directed to be excluded from entry under subsection (d) or subject to a cease and desist order under subsection (f) shall, until such determination becomes final, be entitled to entry under bond prescribed by the Secretary in an amount determined by the Commission to be sufficient to protect the complainant from any injury. If the determination becomes final, the bond may be forfeited to the complainant. The Commission shall prescribe the terms and conditions under which bonds may be forfeited under this paragraph.

(4) If the President does not disapprove such determination within such 60-day period, or if he notifies the Commission before the close of such period that he approves such determination, then, for purposes of paragraph (3) and subsection (c) such determination shall become final on the day after the close of such period or the day on which the President notifies the Commission of his approval, as the case may be.

(k) Period of effectiveness; termination of violation or modification or rescission of exclusion or order

(1) Except as provided in subsections (f) and (j), any exclusion from entry or order under this section shall continue in effect until the Commission finds, and in the case of exclusion from entry notifies the Secretary of the Treasury, that the conditions which led to such exclusion from entry or order no longer exist.

(2) If any person who has previously been found by the Commission to be in violation of this section petitions the Commission for a determination that the petitioner is no longer in violation of this section or for a modification or rescission of an exclusion from entry or order under subsection (d), (e), (f), (g), or (i)—

(A) the burden of proof in any proceeding before the Commission regarding such petition shall be on the petitioner; and

(B) relief may be granted by the Commission with respect to such petition—

(i) on the basis of new evidence or evidence that could not have been presented at the prior proceeding, or

(ii) on grounds which would permit relief from a judgment or order under the Federal Rules of Civil Procedure.

***(l)* Importation by or for United States**

Any exclusion from entry or order under subsection (d), (e), (f), (g), or (i), in cases based on a proceeding involving a patent, copyright, mask work, or design under subsection (a)(1), shall not apply to any articles imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government. Whenever any article would have been excluded from entry or would not have been entered pursuant to the provisions of such subsections but for the operation of this subsection, an owner of the patent, copyright, mask work, or design adversely affected shall be entitled to reasonable and entire compensation in an action before the United States Court of Federal Claims pursuant to the procedures of section 1498 of title 28.

(m) "United States" defined

For purposes of this section and sections 1338 and 1340[1] of this title, the term ''United States'' means the customs territory of the United States as defined in general note 2 of the Harmonized Tariff Schedule of the United States.

(n) Disclosure of confidential information

(1) Information submitted to the Commission or exchanged among the parties in connection with proceedings under this section which is properly designated as confidential pursuant to Commission rules may not be disclosed (except under a protective order issued under regulations of the Commission which authorizes limited disclosure of such information) to any person (other than a person described in paragraph (2)) without the consent of the person submitting it.

(2) Notwithstanding the prohibition contained in paragraph (1), information referred to in that paragraph may be disclosed to—

(A) an officer or employee of the Commission who is directly concerned with—

(i) carrying out the investigation or related proceeding in connection with which the information is submitted,

(ii) the administration of a bond posted pursuant to subsection (e), (f), or (j),

(iii) the administration or enforcement of an exclusion order issued pursuant to subsection (d), (e), or (g), a cease and desist order issued pursuant to subsection (f), or a consent order issued pursuant to subsection (c),

(iv) proceedings for the modification or rescission of a temporary or permanent order issued under subsection (d), (e), (f), (g), or (i), or a consent order issued under this section, or

(v) maintaining the administrative record of the investigation or related proceeding,

(B) an officer or employee of the United States Government who is directly involved in the review under subsection (j), or

(C) an officer or employee of the United States Customs Service who is directly involved in administering an exclusion from entry under subsection (d), (e), or (g) resulting from the investigation or related proceeding in connection with which the information is submitted.

(June 17, 1930, ch. 497, title III, § 337, 46 Stat. 703; Proc. No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Pub. L. 85–686, § 9(c)(1), Aug. 20, 1958, 72 Stat. 679; Pub. L. 93–618, title III, § 341(a), Jan. 3, 1975, 88 Stat. 2053; Pub. L. 96–39, title I,

[1] See References in Text note below.

§ 106(b)(1), title XI, § 1105, July 26, 1979, 93 Stat. 193, 310; Pub. L. 96–417, title VI, § 604, Oct. 10, 1980, 94 Stat. 1744; Pub. L. 97–164, title I, §§ 160(a)(5), 163(a)(4), Apr. 2, 1982, 96 Stat. 48, 49; Pub. L. 98–620, title IV, § 413, Nov. 8, 1984, 98 Stat. 3362; Pub. L. 100–418, title I, §§ 1214(h)(3), 1342(a), (b), Aug. 23, 1988, 102 Stat. 1157, 1212, 1215; Pub. L. 100–647, title IX, § 9001(a)(7), (12), Nov. 10, 1988, 102 Stat. 3807; Pub. L. 102–563, § 3(d), Oct. 28, 1992, 106 Stat. 4248; Pub. L. 103–465, title II, § 261(d)(1)(B)(ii), title III, § 321(a), Dec. 8, 1994, 108 Stat. 4909, 4943; Pub. L. 104–295, § 20(b)(11), (12), (c)(2), Oct. 11, 1996, 110 Stat. 3527, 3528; Pub. L. 106–113, div. B, § 1000(a)(9) [title V, § 5005(b)], Nov. 29, 1999, 113 Stat. 1536, 1501A–594; Pub. L. 108–429, title II, § 2004(d)(5), Dec. 3, 2004, 118 Stat. 2592.)

Editorial Notes

REFERENCES IN TEXT

The Trademark Act of 1946, referred to in subsec. (a)(1)(C), is act July 5, 1946, ch. 540, 60 Stat. 427, also popularly known as the Lanham Act, which is classified generally to chapter 22 (§ 1051 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 1051 of Title 15 and Tables.

The Federal Rules of Civil Procedure, referred to in subsecs. (e)(3), (h), and (k)(2)(B)(ii), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Section 1340 of this title, referred to in subsec. (m), was omitted from the Code.

The Harmonized Tariff Schedule of the United States, referred to in subsec. (m), is not set out in the Code. See Publication of Harmonized Tariff Schedule note set out under section 1202 of this title.

CODIFICATION

The reference to the Philippine Islands, formerly contained in subsec. (k), was omitted because of independence of the Philippines proclaimed by the President of the United States in Proc. No. 2695, issued pursuant to section 1394 of Title 22, Foreign Relations and Intercourse, and set out as a note thereunder.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in act Sept. 21, 1922, ch. 356, title III, § 316, 42 Stat. 943. That section was superseded by section 337 of act June 17, 1930, comprising this section, and repealed by section 651(a)(1) of the 1930 act.

AMENDMENTS

2004—Subsec. (a)(1)(E). Pub. L. 108–429, § 2004(d)(5)(A), realigned margins.

Subsec. (a)(2). Pub. L. 108–429, § 2004(d)(5)(B), substituted ''(D), and (E)'' for ''and (D)''.

1999—Subsec. (a)(1)(A). Pub. L. 106–113, § 1000(a)(9) [title V, § 5005(b)(1)(A)(i)], substituted ''(D), and (E)'' for ''and (D)''.

Subsec. (a)(1)(E). Pub. L. 106–113, § 1000(a)(9) [title V, § 5005(b)(1)(A)(ii)], added subpar. (E).

Subsec. (a)(2), (3). Pub. L. 106–113, § 1000(a)(9) [title V, § 5005(b)(1)(B)], substituted ''mask work, or design'' for ''or mask work''.

Subsec. (*l*). Pub. L. 106–113, § 1000(a)(9) [title V, § 5005(b)(2)], substituted ''mask work, or design'' for ''or mask work'' in two places.

1996—Subsec. (b)(3). Pub. L. 104–295, § 20(c)(2), amended Pub. L. 103–465, § 321(a)(1)(C)(i). See 1994 Amendment note below.

Pub. L. 104–295, § 20(b)(12), struck out ''such section and'' before ''such part II'' in first sentence.

Pub. L. 104–295, § 20(b)(11), amended Pub. L. 103–465, § 261(d)(1)(B)(ii)(I). See 1994 Amendment note below.

1994—Subsec. (b). Pub. L. 103–465, § 321(a)(1)(A), struck out ''; time limits'' after ''Commission'' in heading.

Subsec. (b)(1). Pub. L. 103–465, § 321(a)(1)(B), substituted third and fourth sentences for ''The Commission shall conclude any such investigation, and make its determination under this section, at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication of notice of such investigation. The Commission shall publish in the Federal Register its reasons for designating any investigation as a more complicated investigation. For purposes of the one-year and 18-month periods prescribed by this subsection, there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.''

Subsec. (b)(3). Pub. L. 103–465, § 321(a)(1)(C)(ii), struck out after fourth sentence ''For purposes of computing the 1-year or 18-month periods prescribed by this subsection, there shall be excluded such period of suspension.''

Pub. L. 103–465, § 321(a)(1)(C)(i), as amended by Pub. L. 104–295, § 20(c)(2), in first sentence, made technical amendment to reference in original act which appears in text as reference to ''such part II''.

Pub. L. 103–465, § 261(d)(1)(B)(ii)(II)–(V), in second sentence, struck out ''1303,'' after ''purview of section'' and comma after ''1671'' and made technical amendment to references to sections 1671 and 1673 of this title to correct references to corresponding sections of original act, in third sentence, substituted ''1671'' for ''1303, 1671,'', and in last sentence, struck out ''of the Secretary under section 1303 of this title or'' after ''Any final decision'' and substituted ''1671 or'' for ''1303, 1671, or''.

Pub. L. 103–465, § 261(d)(1)(B)(ii)(I), as amended by Pub. L. 104–295, § 20(b)(11), in first sentence, struck out reference to section 1303 of this title after ''within the purview'' and made technical amendment to reference to part II of subtitle IV of this chapter by substituting in the original ''of subtitle B of title VII of this Act'' for ''of section 303 or of subtitle B of title VII of the Tariff Act of 1930''.

Subsec. (c). Pub. L. 103–465, § 321(a)(2), in first sentence, substituted ''an agreement between the private parties to the investigation, including an agreement to present the matter for arbitration'' for ''a settlement agreement'', inserted after third sentence ''A respondent may raise any counterclaim in a manner prescribed by the Commission. Immediately after a counterclaim is received by the Commission, the respondent raising such counterclaim shall file a notice of removal with a United States district court in which venue for any of the counterclaims raised by the party would exist under section 1391 of title 28. Any counterclaim raised pursuant to this section shall relate back to the date of the original complaint in the proceeding before the Commission. Action on such counterclaim shall not delay or affect the proceeding under this section, including the legal and equitable defenses that may be raised under this subsection.'', and inserted at end ''Determinations by the Commission under subsections (e), (f), and (j) with respect to forfeiture of bonds and under subsection (h) with respect to the imposition of sanctions for abuse of discovery or abuse of process shall also be reviewable in accordance with section 706 of title 5.''

Subsec. (d). Pub. L. 103–465, § 321(a)(5)(A), designated existing provisions as par. (1), substituted ''there is a violation'' for ''there is violation'' in first sentence, and added par. (2).

Subsec. (e)(1). Pub. L. 103–465, § 321(a)(3)(A), in last sentence, substituted ''prescribed by the Secretary in an amount determined by the Commission to be sufficient to protect the complainant from any injury. If the Commission later determines that the respondent has violated the provisions of this section, the bond may be forfeited to the complainant.'' for ''determined by the Commission and prescribed by the Secretary.''

Subsec. (e)(2). Pub. L. 103–465, § 321(a)(3)(B), inserted at end ''If the Commission later determines that the re-

spondent has not violated the provisions of this section, the bond may be forfeited to the respondent.''

Subsec. (e)(4). Pub. L. 103–465, §321(a)(3)(C), added par. (4).

Subsec. (f)(1). Pub. L. 103–465, §321(a)(4), inserted at end ''If a temporary cease and desist order is issued in addition to, or in lieu of, an exclusion order under subsection (e), the Commission may require the complainant to post a bond, in an amount determined by the Commission to be sufficient to protect the respondent from any injury, as a prerequisite to the issuance of an order under this subsection. If the Commission later determines that the respondent has not violated the provisions of this section, the bond may be forfeited to the respondent. The Commission shall prescribe the terms and conditions under which the bonds may be forfeited under this paragraph.''

Subsec. (g)(2)(C). Pub. L. 103–465, §321(a)(5)(B), added subpar. (C).

Subsec. (j)(3). Pub. L. 103–465, §321(a)(6), substituted ''shall, until such determination becomes final, be entitled to entry under bond prescribed by the Secretary in an amount determined by the Commission to be sufficient to protect the complainant from any injury. If the determination becomes final, the bond may be forfeited to the complainant. The Commission shall prescribe the terms and conditions under which bonds may be forfeited under this paragraph.'' for ''shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary until such determination becomes final.''

Subsec. (*l*). Pub. L. 103–465, §321(a)(8), substituted ''Court of Federal Claims'' for ''Claims Court''.

Subsec. (n)(2)(A). Pub. L. 103–465, §321(a)(7)(A), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: ''an officer or employee of the Commission who is directly concerned with carrying out the investigation in connection with which the information is submitted,''.

Subsec. (n)(2)(C). Pub. L. 103–465, §321(a)(7)(B), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: ''an officer or employee of the United States Customs Service who is directly involved in administering an exclusion from entry under this section resulting from the investigation in connection with which the information is submitted.''

1992—Subsec. (b)(3). Pub. L. 102–563 amended second sentence generally. Prior to amendment, second sentence read as follows: ''If the Commission has reason to believe the matter before it is based solely on alleged acts and effects which are within the purview of section 1303, 1671, or 1673 of this title, it shall terminate, or not institute, any investigation into the matter.''

1988—Subsec. (a). Pub. L. 100–418, §1342(a)(1), amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: ''Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.''

Subsec. (b)(2). Pub. L. 100–418, §1342(b)(1)(A), substituted ''Department of Health and Human Services'' for ''Department of Health, Education, and Welfare''.

Subsec. (b)(3). Pub. L. 100–418, §1342(b)(1)(B), substituted ''Secretary of Commerce'' for ''Secretary of the Treasury''.

Subsec. (c). Pub. L. 100–418, §1342(a)(2), inserted before period at end of first sentence '', except that the Commission may, by issuing a consent order or on the basis of a settlement agreement, terminate any such investigation, in whole or in part, without making such a determination''.

Pub. L. 100–418, §1342(b)(2), inserted reference to subsec. (g) in two places.

Subsec. (e). Pub. L. 100–418, §1342(a)(3), designated existing provisions as par. (1) and added pars. (2) and (3).

Subsec. (f)(1). Pub. L. 100–418, §1342(a)(4)(A), substituted ''In addition to, or in lieu of,'' for ''In lieu of''.

Subsec. (f)(2). Pub. L. 100–418, §1342(a)(4)(B), substituted ''$100,000 or twice'' for ''$10,000 or''.

Subsecs. (g) to (i). Pub. L. 100–418, §1342(a)(5), added subsecs. (g) to (i). Former subsecs. (g) to (i) redesignated (j) to (*l*), respectively.

Subsec. (j). Pub. L. 100–418, §1342(a)(5)(A), redesignated former subsec. (g) as (j). Former subsec. (j) redesignated (m).

Subsec. (j)(1)(B), (2), (3). Pub. L. 100–418, §1342(b)(3), inserted reference to subsecs. (g) and (i).

Subsec. (k). Pub. L. 100–418, §1342(b)(4), which directed the substitution ''(j)'' for ''(g)'' was executed by making that substitution in par. (1) and not in par. (2), as added by Pub. L. 100–418, §1342(a)(6), to reflect the probable intent of Congress.

Pub. L. 100–418, §1342(a)(6), as amended by Pub. L. 100–647, §9001(a)(7), designated existing provisions as par. (1) and added par. (2).

Pub. L. 100–418, §1342(a)(5)(A), redesignated former subsec. (h) as (k).

Subsec. (*l*). Pub. L. 100–418, §1342(b)(5), inserted reference to subsecs. (g) and (i).

Pub. L. 100–418, §1342(a)(7), substituted ''a proceeding involving a patent, copyright, or mask work under subsection (a)(1)'' for ''claims of United States letters patent'' and ''an owner of the patent, copyright, or mask work'' for ''a patent owner''.

Pub. L. 100–418, §1342(a)(5)(A), redesignated former subsec. (i) as (*l*).

Subsec. (m). Pub. L. 100–418, §1342(a)(5)(A), redesignated former subsec. (j) as (m).

Pub. L. 100–418, §1214(h)(3), substituted ''general note 2 of the Harmonized Tariff Schedule of the United States'' for ''general headnote 2 of the Tariff Schedules of the United States''.

Subsec. (n). Pub. L. 100–418, §1342(a)(8), added subsec. (n).

Subsec. (n)(2)(B). Pub. L. 100–647, §9001(a)(12), substituted ''subsection (j)'' for ''subsection (h)''.

1984—Subsec. (c). Pub. L. 98–620 inserted '', within 60 days after the determination becomes final,'' after ''appeal such determination''.

1982—Subsec. (c). Pub. L. 97–164, §163(a)(4), substituted ''Court of Appeals for the Federal Circuit'' for ''Court of Customs and Patent Appeals''.

Subsec. (i). Pub. L. 97–164, §160(a)(5), substituted ''United States Claims Court'' for ''Court of Claims''.

1980—Subsec. (c). Pub. L. 96–417 provided that the appeal of determinations to the United States Court of Customs and Patent Appeals be reviewed in accordance with chapter 7 of title 5 and substituted provision that review of findings concerning the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the amount and nature of bond, or the appropriate remedy, be in accordance with section 706 of title 5 for provision giving such court jurisdiction to review determinations in same manner and subject to same limitations and conditions as in case of appeals from decisions of the United States Customs Court.

1979—Subsec. (b)(3). Pub. L. 96–39, §1105(a), substituted ''a matter, in whole or in part,'' for ''the matter'' and inserted provisions relating to matters based solely or in part on alleged acts and effects within the purview of section 1303, 1671, or 1673 of this title.

Pub. L. 96–39, §106(b)(1), substituted ''part II of subtitle IV of this chapter'' for ''the Antidumping Act, 1921''.

Subsec. (c). Pub. L. 96–39, §1105(c), substituted ''Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f)'' for ''Any person adversely affected by a final determination of the Commission under subsection (d) or (e)''.

Subsec. (f). Pub. L. 96–39, §1105(b), designated existing provisions as par. (1) and added par. (2).

1975—Subsec. (a) Pub. L. 93–618 substituted ''Commission'' for ''President'' and ''as provided in this section'' for ''as hereinafter provided''.

Subsec. (b). Pub. L. 93–618 designated existing provisions as first sentence of par. (1), substituted ''The Commission shall investigate any alleged violation of this section'' for ''To assist the President in making any decisions under this section the commission is authorized to investigate any alleged violation hereof'' in first sentence of par. (1) as so designated, and added remainder of par. (1) and pars. (2) and (3).

Subsec. (c). Pub. L. 93–618 substituted provisions covering determinations by the Commission and appeals to the United States Court of Customs and Patent Appeals for provisions covering all aspects of hearings and review as part of investigations of unfair practices in import trade.

Subsec. (d). Pub. L. 93–618 substituted provisions covering the exclusion of articles from entry, formerly covered in subsec. (e), for provisions directing that final findings of the Commission be transmitted with the record to the President, covered by subsec. (g).

Subsec. (e). Pub. L. 93–618 substituted provisions covering the entry of articles under bond during investigation, formerly covered in subsec. (f), for provisions covering the exclusion of articles from entry, covered by subsec. (d).

Subsec. (f). Pub. L. 93–618 added subsec. (f). Provisions of former subsec. (f) covering entry of articles under bond are covered by subsec. (e).

Subsec. (g). Pub. L. 93–618 substituted provisions covering referral to the President, formerly covered by subsec. (d), for provisions covering the continuance of exclusion, covered by subsec. (h).

Subsec. (h). Pub. L. 93–618 substituted provisions covering the period of effectiveness, formerly covered by subsec. (g), for provisions defining ''United States'', covered by subsec. (j).

Subsec. (i). Pub. L. 93–618 added subsec. (i).

Subsec. (j). Pub. L. 93–618 added subsec. (j) defining ''United States'', formerly covered by subsec. (h).

1958—Subsec. (c). Pub. L. 85–686 struck out ''under and in accordance with such rules as it may promulgate'' after ''commission shall make such investigation''. See section 1335 of this title.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by section 261(d)(1)(B)(ii) of Pub. L. 103–465 effective on effective date of title II of Pub. L. 103–465, Jan. 1, 1995, see section 261(d)(2) of Pub. L. 103–465, set out as a note under section 1315 of this title.

Pub. L. 103–465, title III, §322, Dec. 8, 1994, 108 Stat. 4947, provided that: ''The amendments made by this subtitle [subtitle C (§§321, 322) of title III of Pub. L. 103–465, enacting sections 1368 and 1659 of Title 28, Judiciary and Judicial Procedure, and amending this section and section 1446 of Title 28] apply—

''(1) with respect to complaints filed under section 337 of the Tariff Act of 1930 [19 U.S.C. 1337] on or after the date on which the WTO Agreement enters into force with respect to the United States [Jan. 1, 1995], or

''(2) in cases under such section 337 in which no complaint is filed, with respect to investigations initiated under such section on or after such date.''

EFFECTIVE DATE OF 1988 AMENDMENTS

Amendment by Pub. L. 100–647 applicable as if such amendment took effect on Aug. 23, 1988, see section 9001(b) of Pub. L. 100–647, set out as an Effective and Termination Dates of 1988 Amendments note under section 58c of this title.

Amendment by section 1214(h)(3) of Pub. L. 100–418 effective Jan. 1, 1989, and applicable with respect to articles entered on or after such date, see section 1217(b)(1) of Pub. L. 100–418, set out as an Effective Date note under section 3001 of this title.

Pub. L. 100–418, title I, §1342(d), Aug. 23, 1988, 102 Stat. 1216, provided that:

''(1)(A) Subject to subparagraph (B), the amendments made by this section [amending this section and repealing section 1337a of this title] shall take effect on the date of the enactment of this Act [Aug. 23, 1988].

''(B) The United States International Trade Commission is not required to apply the provision in section 337(e)(2) of the Tariff Act of 1930 [19 U.S.C. 1337(e)(2)] (as amended by subsection (a)(3) of this section) relating to the posting of bonds until the earlier of—

''(i) the 90th day after such date of enactment; or

''(ii) the day on which the Commission issues interim regulations setting forth the procedures relating to such posting.

''(2) Notwithstanding any provision of section 337 of the Tariff Act of 1930, the United States International Trade Commission may extend, by not more than 90 days, the period within which the Commission is required to make a determination in an investigation conducted under such section 337 if—

''(A) the Commission would, but for this paragraph, be required to make such determination before the 180th day after the date of enactment of this Act; and

''(B) the Commission finds that the investigation is complicated.''

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–417 applicable with respect to civil actions commenced on or after Nov. 1, 1980, see section 701(b)(2) of Pub. L. 96–417, set out as a note under section 251 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by section 106(b)(1) of Pub. L. 96–39 effective Jan. 1, 1980, see section 107 of Pub. L. 96–39, set out as an Effective Date note under section 1671 of this title.

Amendment by section 1105 of Pub. L. 96–39 effective July 26, 1979, see section 1114 of Pub. L. 96–39, set out as an Effective Date note under section 2581 of this title.

EFFECTIVE DATE OF 1975 AMENDMENT

Pub. L. 93–618, title III, §341(c), Jan. 3, 1975, 88 Stat. 2056, provided that: ''The amendments made by this section [amending this section and section 1337 of this title] shall take effect on the 90th day after the date of the enactment of this Act [Jan. 3, 1975], except that, for purposes of issuing regulations under section 337 of the Tariff Act of 1930 [this section], such amendments shall take effect on the date of the enactment of this Act [Jan. 3, 1975]. For purposes of applying section 337(b) of the Tariff Act of 1930 [subsec. (b) of this section] (as amended by subsection (a) [as amended by section 341(a) of Pub. L. 93–618]) with respect to investigations being conducted by the International Trade Commission under section 337 of the Tariff Act [this section] on the day prior to the 90th day after the date of the enactment of this Act [Jan. 3, 1975], such investigations shall be considered as having been commenced on such 90th day.''

TRANSFER OF FUNCTIONS

For transfer of functions, personnel, assets, and liabilities of the United States Customs Service of the Department of the Treasury, including functions of the Secretary of the Treasury relating thereto, to the Secretary of Homeland Security, and for treatment of related references, see sections 203(1), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of Novem-

ber 25, 2002, as modified, set out as a note under section 542 of Title 6. For establishment of U.S. Customs and Border Protection in the Department of Homeland Security, treated as if included in Pub. L. 107–296 as of Nov. 25, 2002, see section 211 of Title 6, as amended generally by Pub. L. 114–125, and section 802(b) of Pub. L. 114–125, set out as a note under section 211 of Title 6.

CONGRESSIONAL FINDINGS AND PURPOSES RESPECTING PART 3 OF PUB. L. 100–418

Pub. L. 100–418, title I, §1341, Aug. 23, 1988, 102 Stat. 1211, provided that:

''(a) FINDINGS.—The Congress finds that—

''(1) United States persons that rely on protection of intellectual property rights are among the most advanced and competitive in the world; and

''(2) the existing protection under section 337 of the Tariff Act of 1930 [this section] against unfair trade practices is cumbersome and costly and has not provided United States owners of intellectual property rights with adequate protection against foreign companies violating such rights.

''(b) PURPOSE.—The purpose of this part [part 3 (§§1341, 1342) of subtitle C of title I of Pub. L. 100–418, amending this section, repealing section 1337a of this title, and enacting provisions set out as a note above] is to amend section 337 of the Tariff Act of 1930 to make it a more effective remedy for the protection of United States intellectual property rights.''

Executive Documents

ASSIGNMENT OF CERTAIN FUNCTIONS

Memorandum of President of the United States, July 21, 2005, 70 F.R. 43251, provided:

Memorandum for the United States Trade Representative

By the authority vested in me by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, I hereby assign to you the functions of the President under section 337(j)(1)(B), section 337(j)(2), and section 337(j)(4) of the Tariff Act of 1930, as amended (19 U.S.C. 1337(j)(1), (j)(2), and (j)(4)).

You are authorized and directed to publish this memorandum in the Federal Register.

GEORGE W. BUSH.

§ 1337a. Repealed. Pub. L. 100–418, title I, § 1342(c), Aug. 23, 1988, 102 Stat. 1215

Section, act July 2, 1940, ch. 515, 54 Stat. 724, related to importation of products produced under process covered by claims of unexpired patent.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF REPEAL

Repeal effective Aug. 23, 1988, see section 1342(d) of Pub. L. 100–418, set out as an Effective Date of 1988 Amendment note under section 1337 of this title.

§ 1338. Discrimination by foreign countries

(a) Additional duties

The President when he finds that the public interest will be served shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of, or imported in a vessel of, any foreign country whenever he shall find as a fact that such country—

(1) Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country; or

(2) Discriminates in fact against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.

(b) Exclusion from importation

If at any time the President shall find it to be a fact that any foreign country has not only discriminated against the commerce of the United States, as aforesaid, but has, after the issuance of a proclamation as authorized in subdivision (a) of this section, maintained or increased its said discriminations against the commerce of the United States, the President is authorized, if he deems it consistent with the interests of the United States, to issue a further proclamation directing that such products of said country or such articles imported in its vessels as he shall deem consistent with the public interests shall be excluded from importation into the United States.

(c) Application of proclamation

Any proclamation issued by the President under the authority of this section shall, if he deems it consistent with the interests of the United States, extend to the whole of any foreign country or may be confined to any subdivision or subdivisions thereof; and the President shall, whenever he deems the public interests require, suspend, revoke, supplement, or amend any such proclamation.

(d) Duties to offset commercial disadvantages

Whenever the President shall find as a fact that any foreign country places any burden or disadvantage upon the commerce of the United States by any of the unequal impositions or discriminations aforesaid, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty as he shall determine will offset such burden or disadvantage, not to exceed 50 per centum ad valorem or its equivalent, on any products of, or on articles imported in a vessel of, such foreign country; and thirty days after the date of such proclamation there shall be levied, collected, and paid upon the articles enumerated in such proclamation when imported into the United States from such foreign country such new or additional rate or rates of duty; or, in case of articles declared subject to exclusion from importation into the United States under the provisions of subdivision (b) of this section, such articles shall be excluded from importation.

(e) Duties to offset benefits to third country

Whenever the President shall find as a fact that any foreign country imposes any unequal imposition or discrimination as aforesaid upon the commerce of the United States, or that any benefits accrue or are likely to accrue to any in-

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TITLE 17—COPYRIGHTS
TO
TITLE 19—CUSTOMS DUTIES

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equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.

(i) Rules and regulations of President

The President is authorized to make all needful rules and regulations for carrying out his functions under the provisions of this section.

(j) Repealed. Pub. L. 96-39, title II, § 202(a)(2)(D), July 26, 1979, 93 Stat. 202

(k) Investigations prior to June 17, 1930

All uncompleted investigations instituted prior to June 17, 1930, under the provisions of sections 154 to 159 of this title, including investigations in which the President has not proclaimed changes in classification or increases or decreases in rates of duty, shall be dismissed without prejudice; but the information and evidence secured by the commission in any such investigation may be given due consideration in any investigation instituted under the provisions of this section.

(June 17, 1930, ch. 497, title III, § 336, 46 Stat. 701; Aug. 2, 1956, ch. 887, § 2(d), 70 Stat. 946; Aug. 20, 1958, Pub. L. 85-686, § 9(c)(1), 72 Stat. 679; July 26, 1979, Pub. L. 96-39, title II, § 202(a)(2), 93 Stat. 202.)

REFERENCES IN TEXT

Sections 154 to 159, referred to in subsec. (k), were repealed by section 651(a)(1) of act June 17, 1930.

PRIOR PROVISIONS

Provisions similar to those of this section were contained in act Sept. 21, 1922, ch. 356, title III, § 315, 42 Stat. 941. That section was superseded by section 336 of the Tariff Act of 1930, comprising this section, and was repealed by section 651(a)(1) of the 1930 act.

AMENDMENTS

1979—Subsec. (b). Pub. L. 96-39, § 202(a)(2)(A), struck out subsec. (b) which related to the setting of ad valorem rates based upon the American selling price of domestic articles as would be necessary to equalize differences in the costs of production.

Subsec. (c). Pub. L. 96-39, § 202(a)(2)(B), substituted "changes in classification specified in any report" for "changes in classification and in basis of value specified in any report".

Subsec. (d). Pub. L. 96-39, § 202(a)(2)(C), substituted "changes in classification specified in the report" for "changes in classification or in basis of value specified in the report".

Subsec. (f). Pub. L. 96-39, § 202(a)(2)(C), substituted "change in classification which has taken effect" for "change in classification or in basis of value which has taken effect".

Subsec. (j). Pub. L. 96-39, § 202(a)(2)(D), struck out subsec. (j) which had authorized the Secretary of the Treasury to make necessary rules and regulations for the entry and declaration of foreign articles with respect to which a change in the basis of value had been made.

Subsec. (k). Pub. L. 96-39, § 202(a)(2)(C), substituted "changes in classification or increases or decreases" for "changes in classification or in basis of value or increases or decreases".

1958—Subsec. (a). Pub. L. 85-686 eliminated provisions which authorized the commission to adopt such reasonable procedure and rules and regulations as it deemed necessary to execute its functions under this section. See section 1335 of this title.

1956—Subsec. (b). Act Aug. 2, 1956, eliminated "(as defined in section 1402(g))" following the words "selling price".

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-39 effective July 1, 1980, see section 204(a) of Pub. L. 96-39, set out as an Effective Date of 1979 Amendment note under section 1401a of this title.

EFFECTIVE DATE OF 1956 AMENDMENT

Amendment by act Aug. 2, 1956, effective only as to articles entered, or withdrawn from warehouse, for consumption on or after the thirtieth day following publication of the final list provided for in section 6(a) of said act, set out in note under section 1402 of this title, see section 8 of act Aug. 2, 1956, set out as an Effective Date note under section 1401a of this title.

CROSS REFERENCES

Section not to apply to any article with respect to which a foreign trade agreement has been concluded pursuant to section 1351 et seq. of this title, see section 1352 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1352, 1484 of this title.

§ 1337. Unfair practices in import trade

(a) Unfair methods of competition declared unlawful

Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

(b) Investigation of violations by Commission; time limits

(1) The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative. Upon commencing any such investigation, the Commission shall publish notice thereof in the Federal Register. The Commission shall conclude any such investigation, and make its determination under this section, at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication of notice of such investigation. The Commission shall publish in the Federal Register its reasons for designating any investigation as a more complicated investigation. For purposes of the one-year and 18-month periods prescribed by this subsection, there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

(2) During the course of each investigation under this section, the Commission shall consult with, and seek advice and information from, the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as it considers appropriate.

(3) Whenever, in the course of an investigation under this section, the Commission has reason to believe, based on information before it, that a matter, in whole or in part, may come within the purview of section 1303 of this title or of part II of subtitle IV of this chapter, it shall promptly notify the Secretary of the Treasury so that such action may be taken as is otherwise authorized by such section and such part II. If the Commission has reason to believe the matter before it is based solely on alleged acts and effects which are within the purview of section 1303, 1671, or 1673 of this title, it shall terminate, or not institute, any investigation into the matter. If the Commission has reason to believe the matter before it is based in part on alleged acts and effects which are within the purview of section 1303, 1671, or 1673 of this title, and in part on alleged acts and effects which may, independently from or in conjunction with those within the purview of such section, establish a basis for relief under this section, then it may institute or continue an investigation into the matter. If the Commission notifies the Secretary or the administering authority (as defined in section 1677(1) of this title) with respect to a matter under this paragraph, the Commission may suspend its investigation during the time the matter is before the Secretary or administering authority for final decision. For purposes of computing the 1-year or 18-month periods prescribed by this subsection, there shall be excluded such period of suspension. Any final decision of the Secretary under section 1303 of this title or by the administering authority under section 1671 or 1673 of this title with respect to the matter within such section 1303, 1671, or 1673 of this title of which the Commission has notified the Secretary or administering authority shall be conclusive upon the Commission with respect to the issue of less-than-fair-value sales or subsidization and the matters necessary for such decision.

(c) Determinations; review

The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section. Each determination under subsection (d) or (e) of this section shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) of this section may appeal such determination to the United States Court of Appeals for the Federal Circuit for review in accordance with chapter 7 of title 5. Notwithstanding the foregoing provisions of this subsection, Commission determinations under subsections (d), (e), and (f) of this section with respect to its findings on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the amount and nature of bond, or the appropriate remedy shall be reviewable in accordance with section 706 of title 5.

(d) Exclusion of articles from entry

If the Commission determines, as a result of an investigation under this section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers refuse such entry.

(e) Exclusion of articles from entry during investigation except under bond

If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry, except that such articles shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary.

(f) Cease and desist orders; civil penalty for violation of orders

(1) In lieu of taking action under subsection (d) or (e) of this section, the Commission may issue and cause to be served on any person violating this section, or believed to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved, unless after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued. The Commission may at any time,

upon such notice and in such manner as it deems proper, modify or revoke any such order, and, in the case of a revocation, may take action under subsection (d) or (e) of this section, as the case may be.

(2) Any person who violates an order issued by the Commission under paragraph (1) after it has become final shall forfeit and pay to the United States a civil penalty for each day on which an importation of articles, or their sale, occurs in violation of the order of not more than the greater of $10,000 or the domestic value of the articles entered or sold on such day in violation of the order. Such penalty shall accrue to the United States and may be recovered for the United States in a civil action brought by the Commission in the Federal District Court for the District of Columbia or for the district in which the violation occurs. In such actions, the United States district courts may issue mandatory injunctions incorporating the relief sought by the Commission as they deem appropriate in the enforcement of such final orders of the Commission.

(g) Referral to President

(1) If the Commission determines that there is a violation of this section, or that, for purposes of subsection (e) of this section, there is reason to believe that there is such a violation, it shall—

(A) publish such determination in the Federal Register, and

(B) transmit to the President a copy of such determination and the action taken under subsection (d), (e), or (f) of this section, with respect thereto, together with the record upon which such determination is based.

(2) If, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such determination, the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken under subsection (d), (e), or (f) of this section with respect thereto shall have no force or effect.

(3) Subject to the provisions of paragraph (2), such determination shall, except for purposes of subsection (c) of this section, be effective upon publication thereof in the Federal Register, and the action taken under subsection (d), (e), or (f) of this section, with respect thereto shall be effective as provided in such subsections, except that articles directed to be excluded from entry under subsection (d) of this section or subject to a cease and desist order under subsection (f) of this section shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary until such determination becomes final.

(4) If the President does not disapprove such determination within such 60-day period, or if he notifies the Commission before the close of such period that he approves such determination, then, for purposes of paragraph (3) and subsection (c) of this section such determination shall become final on the day after the close of such period or the day on which the President notifies the Commission of his approval, as the case may be.

(h) Period of effectiveness

Except as provided in subsections (f) and (g) of this section, any exclusion from entry or order under this section shall continue in effect until the Commission finds, and in the case of exclusion from entry notifies the Secretary of the Treasury, that the conditions which led to such exclusion from entry or order no longer exist.

(i) Importation by or for United States

Any exclusion from entry or order under subsection (d), (e), or (f) of this section, in cases based on claims of United States letters patent, shall not apply to any articles imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government. Whenever any article would have been excluded from entry or would not have been entered pursuant to the provisions of such subsections but for the operation of this subsection, a patent owner adversely affected shall be entitled to reasonable and entire compensation in an action before the United States Claims Court pursuant to the procedures of section 1498 of title 28.

(j) Definition of United States

For purposes of this section and sections 1338 and 1340 of this title, the term "United States" means the customs territory of the United States as defined in general headnote 2 of the Tariff Schedules of the United States.

(June 17, 1930, ch. 497, title III, § 337, 46 Stat. 703; Proc. No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Aug. 20, 1958, Pub. L. 85-686, § 9(c)(1), 72 Stat. 679; Jan. 3, 1975, Pub. L. 93-618, title III, § 341(a), 88 Stat. 2053; July 26, 1979, Pub. L. 96-39, title I, § 106(b)(1), title XI, § 1105, 93 Stat. 193, 310; Oct. 17, 1979, Pub. L. 96-88, title V, § 509(b), 93 Stat. 695; Oct. 10, 1980, Pub. L. 96-417, title VI, § 604, 94 Stat. 1744; Apr. 2, 1982, Pub. L. 97-164, title I, §§ 160(a)(5), 163(a)(4), 96 Stat. 48, 49.)

REFERENCES IN TEXT

Section 1340 of this title, referred to in subsec. (j), was omitted from the Code.

General headnote 2 of the Tariff Schedules of the United States, referred to in subsec. (j), is set out under section 1202 of this title.

CODIFICATION

In subsec. (b)(3), "such part" was substituted for "such Act", meaning the Antidumping Act, 1921, to reflect the probable intent of Congress. See 1979 Amendment note below regarding subsec. (b)(3).

The reference to the Philippine Islands, formerly contained in subsec. (h), was omitted because of independence of the Philippines proclaimed by the President of the United States in Proc. No. 2695, issued pursuant to section 1394 of Title 22, Foreign Relations and Intercourse and set out as a note thereunder.

PRIOR PROVISIONS

Provisions similar to those of this section were contained in act Sept. 21, 1922, ch. 356, title III, § 316, 42 Stat. 943. That section was superseded by section 337 of the Tariff Act of 1930, comprising this section, and was repealed by section 651(a)(1) of the 1930 act.

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OF THE

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§ 578. Motor boat defined. [Repealed.]

This section (Act May 29, 1928, c. 852, § 708, 45 Stat. 881) was impliedly repealed by Act June 17, 1930, c. 497, Title IV, § 651 (a) (1), 46 Stat. 762. See section 1001, par. 370.

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Section 1001. Articles dutiable, and rates; schedules. Except as otherwise specially provided for in this chapter, there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam) the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of this title, namely:

SCHEDULE 1.—CHEMICALS, OILS, AND PAINTS

PARAGRAPH 1. Acids and acid anhydrides: Acetic acid containing by weight not more than 65 per centum of acetic acid, 1⅜ cents per pound; containing by weight more than 65 per centum, 2 cents per pound; acetic anhydride, 3½ cents per pound; boric acid, 1 cent per pound; chloroacetic acid, 5 cents per pound; citric acid, 17 cents per pound; formic acid, 3 cents per pound; lactic acid, containing by weight of lactic acid less than 30 per centum, 2 cents per pound; 30 per centum or more and less than 55 per centum, 4 cents per pound; and 55 per centum or more, 9 cents per pound: *Provided*, That any lactic-acid anhydride present shall be determined as lactic acid and included as such: *And provided further*, That the duty on lactic acid shall not be less than 25 per centum ad valorem; tannic acid, tannin, and extracts of nutgalls, containing by weight of tannic acid less than 50 per centum, 5 cents per pound; 50 per centum or more and not medicinal, 11 cents per pound; 50 per centum or more and medicinal, 18 cents per pound; tartaric acid, 8 cents per pound; arsenic acid, 3 cents per pound; gallic acid, 6 cents per pound; oleic acid or red oil, 20 per centum ad valorem; oxalic acid, 6 cents per pound; phosphoric acid, 2 cents per pound; pyrogallic acid, 12 cents per pound; carbon dioxide, weighing with immediate containers and carton, one pound or less per carton, 1 cent per pound on contents, immediate containers, and carton; and all other acids and acid anhydrides not specially provided for, 25 per centum ad valorem.

PAR. 2. Acetaldehyde, aldol or acetaldol, aldehyde ammonia, butyraldehyde, crotonaldehyde, paracetaldehyde; ethylene chlorohydrin, propylene chlorohydrin, butylene chlorohydrin; ethylene dichloride, propylene, dichloride, butylene dichloride; ethylene oxide, propylene, oxide, butylene oxide; ethylene glycol, propylene glycol, butylene glycol, and all other glycols or dihydric alcohols; monoethanolamine, diethanolamine, triethanolamine, ethylene diamine, and all other hydroxy alkyl amines and alkylene diamines; allyl alcohol, crotonyl alcohol, vinyl alcohol, and all other olefin or unsaturated alcohols; homologues and polymers of all the foregoing; ethers, esters, salts, and nitrogenous compounds of any of the foregoing, whether polymerized or unpolymerized; and mixtures in chief value of any one or more of the foregoing; all the foregoing not specially provided for, 6 cents per pound and 30 per centum ad valorem.

PAR. 3. Acetone and ethyl methyl ketone, and their homologues, and acetone oil, 20 per centum ad valorem.

PAR. 4. Alcohol: Amyl, butyl, hexyl, and propyl, all the foregoing whether primary, secondary, or tertiary; fusel oil; and mixtures in chief value of any one or more of the foregoing, 6 cents per pound; methyl or wood (or methanol), 18 cents per gallon; and ethyl for nonbeverage purposes only, 15 cents per gallon.

PAR. 5. All chemical elements, all chemical salts, and compounds, all medicinal preparations, and all combinations and mixtures of any of the foregoing, all the foregoing obtained naturally or artificially and not specially provided for, 25 per centum ad valorem.

PAR. 6. Aluminum hydroxide or refined bauxite, one-half of 1 cent per pound; potassium aluminum sulphate or potash alum and ammonium aluminum sulphate or ammonia alum, three-fourths of 1 cent per pound; aluminum sulphate, alum cake or aluminous cake, containing not more than 15 per centum of alumina and more iron than the equivalent of one-tenth of 1 per centum of ferric oxide, one-fifth of 1 cent per pound; containing more than 15 per centum of alumina or not more iron than the equivalent of one-tenth of 1 per centum of ferric oxide, three-eighths of 1 cent per pound; all other aluminum salts and compounds not specially provided for, 25 per centum ad valorem.

PAR. 7. Ammonium carbonate and bicarbonate, 2 cents per pound; ammonium chloride, 1¼ cents per pound; ammonium nitrate, 1 cent per pound; ammonium perchlorate and ammonium phosphate, 1½ cents per pound; liquid anhydrous ammonia, 2½ cents per pound.

PAR. 8. Antimony: Oxide, 2 cents per pound; tartar emitic or potassium-antimony tartrate, 6 cents per pound; sulphides and other antimony salts and compounds, not specially provided for, 1 cent per pound and 25 per centum ad valorem.

PAR. 9. Argols, tartar, and wine lees, containing 90 per centum or more of potassium bitartrate, 5 cents per pound; cream of tartar, 5 cents per pound; Rochelle salts or potassium-sodium tartrate, 5 cents per pound.

PAR. 10. Balsams: Copaiba, fir or Canada, Peru, tolu, styrax, and all other balsams, all the foregoing which are natural and uncompounded, 10 per centum ad valorem: *Provided*, That no article containing alcohol shall be classified for duty under this paragraph.

PAR. 11. Amber and amberoid unmanufactured, not specially provided for, 50 cents per pound; synthetic gums and resins not specially provided for, 4 cents per pound and 30 per centum ad valorem; arabic or senegal, one-half of 1 cent per pound.

PAR. 12. Barium carbonate, precipitated, 1½ cents per pound; barium chloride, 2 cents per pound; barium dioxide, 6 cents per pound; barium hydroxide, 1¼ cents per pound; barium nitrate, 2 cents per pound; and barium oxide, 2½ cents per pound.

PAR. 13. Blackings, powders, liquids, and creams for cleaning or polishing, not specially provided for, 25 per centum ad valorem: *Provided*, That no preparations containing alcohol shall be classified for duty under this paragraph.

PAR. 14. Bleaching powder or chlorinated lime, three-tenths of 1 cent per pound.

PAR. 15. Caffeine, $1.25 per pound; caffeine citrate, 75 cents per pound; compounds of caffeine, 25 per centum ad valorem; theobromine, 75 cents per pound.

make such rules and regulations as he may deem necessary for the entry and declaration of foreign articles of the class or kind of articles with respect to which a change in basis of value has been made under the provisions of subdivision (b) of this section, and for the form of invoice required at time of entry.

(k) Investigations prior to June 17, 1930. All uncompleted investigations instituted prior to June 17, 1930, under the provisions of sections 154 to 159 of this title, including investigations in which the President has not proclaimed changes in classification or in basis of value or increases or decreases in rates of duty, shall be dismissed without prejudice; but the information and evidence secured by the commission in any such investigation may be given due consideration in any investigation instituted under the provisions of this section. (June 17, 1930, c. 497, Title III, § 336, 46 Stat. 701.)

§ 1337. Unfair practices in import trade—(a) Unfair methods of competition declared unlawful. Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) Investigations of violations by commission. To assist the President in making any decisions under this section the commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative.

(c) Hearings and review. The commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing, with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation. The testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles. Such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the commission and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Customs Court, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs and Patent Appeals by the importer or consignee of such articles. If it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only. The judgment of said court shall be final.

(d) Transmission of findings to President. The final findings of the commission shall be transmitted with the record to the President.

(e) Exclusion of articles from entry. Whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall direct that the articles concerned in such unfair methods or acts, imported by any person violating the provisions of this chapter, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, refuse such entry. The decision of the President shall be conclusive.

(f) Entry under bond. Whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed; except that such articles shall be entitled to entry under bond prescribed by the Secretary of the Treasury.

(g) Continuance of exclusion. Any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to such refusal of entry no longer exist.

(h) Definition. When used in this section and in sections 1338 and 1340, the term "United States" includes the several States and Territories, the District of Columbia, and all possessions of the United States except the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam. (June 17, 1930, c. 497, Title III, § 337, 46 Stat. 703.)

§ 1338. Discrimination by foreign countries—(a) Additional duties. The President when he finds that the public interest will be served thereby shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of, or imported in a vessel of, any foreign country whenever he shall find as a fact that such country—

(1) Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country; or

(2) Discriminates in fact against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.

(b) Exclusion from importation. If at any time the President shall find it to be a fact that any foreign country has not only discriminated against the commerce of the United States, as aforesaid, but has, after the issuance of a proclamation as authorized in subdivision (a) of this section, maintained or increased its said discriminations against the commerce of the United States, the President is hereby authorized, if he deems it consistent with the interests of the United States, to issue a further proclamation directing that such products of said country or such articles imported in its vessels as he shall deem consistent with the public interests shall be excluded from importation into the United States.

(c) Application of proclamation. Any proclamation issued by the President under the authority of this section shall, if he deems it consistent with the interests of the United States, extend to the whole of any foreign country or may be confined to any subdivision or subdivisions thereof; and the President shall, whenever he deems the public interests require, suspend, revoke, supplement, or amend any such proclamation.

Tariff Act of 1922

Pub. L. No. 67-318,
42 Stat. 858 (§ 316(a))

(excerpt: pp. 943-944)

Approval to divest United States title
R S, sec 2451, p 449, amended

"SEC. 2451. That every such adjudication shall be approved by the Secretary of the Interior and shall operate only to divest the United States of the title to the land embraced thereby, without prejudice to the rights of conflicting claimants.

Issue of new patents on surrender of outstanding
R S, sec 2456, p 449, amended

"SEC. 2456. That where patents have been already issued on entries which are approved by the Secretary of the Interior, the Commissioner of the General Land Office, upon the canceling of the outstanding patent, is authorized to issue a new patent, on such approval, to to the person who made the entry, his heirs or assigns."

Approved September 20, 1922.

September 20, 1922.
[H R 10554]
[Public, No. 317]

CHAP. 351.—An Act Authorizing the Secretary of the Interior to issue patent to Lassen County, of California, for certain lands, and for other purposes.

Public lands Granted to Lassen County, Calif, for county uses

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he hereby is, authorized and directed to issue patent to Lassen County, California, for the following tract of public land, to wit: The northeast quarter of the southeast quarter of section four, township thirty-seven north, range eleven east, Mount Diablo base and meridian, Susanville land district, in the State of California,

Payment.

upon payment therefor to the Secretary of the Interior for the Government of the United States the full sum of $1.25 per acre, which patent shall be issued upon the express condition that Lassen County shall

Provisos
Reversion for non-user, etc

use said tract of land for county uses and purposes only: *Provided*, That whenever said lands cease to be used by said county for county uses and purposes only, or are attempted to be sold or conveyed, then, in that event, title to said lands and the whole thereof shall revert to

Mining rights reserved

the United States: *Provided further*, That such patent shall contain a reservation to the United States of all gas, oil, coal, and other mineral deposits that may be found in such land, and the right to the use of the land for extracting the same.

Approved, September 20, 1922.

September 21, 1922
[H R 7456]
[Public, No 318]

CHAP. 356.—An Act To provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes.

Tariff Act of 1922.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I.

TITLE I.

DUTIABLE LIST.

DUTIABLE LIST.

Duties on imports from abroad
Vol 38, p 114

SECTION 1. That on and after the day following the passage of this Act, except as otherwise specially provided for in this Act, there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its

Philippine and Virgin Islands, Guam, and Tutuila excepted

possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila) the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of this title, namely:

SCHEDULE 1
Chemicals, oils, and paints

SCHEDULE 1.—CHEMICALS, OILS, AND PAINTS.

Acids, and acid anhydrides

PARAGRAPH 1. Acids and acid anhydrides: Acetic acid containing by weight not more than 65 per centum of acetic acid, three-fourths of 1 cent per pound; containing by weight more than 65 per centum,

ences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

No proclamation to issue until investigation by Tariff Commission.

Hearings, etc.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

Authority to modify, etc., new rates

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same.

Transfers restricted

Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty.

Specified ad valorem rates not to be exceeded.

Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

Coal-tar products considered similar or competitive

Ante, p. 861

(d) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

Regulations for executing

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

Regulations for entry, etc., under American selling price valuation

Ante, p. 942

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry.

Unfair competition or acts in importations, declared unlawful.

Acts designated.

SEC. 316. (a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

Tariff Commission to investigate alleged violations.

(b) That to assist the President in making any decisions under this section the United States Tariff Commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative.

Power conferred to conduct hearings, etc.

(c) That the commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation; that the testimony in every

SPECIAL PROVISIONS.

Transcript of findings, etc., to be the official record.

Copy to importer.

Effect of findings

Appeals to Court of Customs Appeals only on questions of law.

Additional evidence.

Modification, etc , by Commission.

Judgment of court final, subject to review by Supreme Court.

Transmittal to the President

President to impose additional duty to offset unfair act

Ad valorem rate.

Post, p. 949

May exclude entry in extreme cases

Decision conclusive.

Imports believed in violation hereof denied entry pending investigation

Proviso

Entry under bond permitted.

Continuation of duty, etc

Additional duties to be proclaimed on imports from specified countries.

such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles; that such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the commission, and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such articles, that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper; that the commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of the commission shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such articles as defined in section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon articles imported in violation of this Act, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such articles as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the decision of the President shall be conclusive.

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

(g) That any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

SEC. 317. (a) That the President when he finds that the public interest will be served thereby shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of any foreign country whenever he shall find as a fact that such country—

Calendar No. 167

100TH CONGRESS
1st Session

SENATE

REPORT
100-71

OMNIBUS TRADE ACT OF 1987

REPORT

OF THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

ON

S. 490

together with

ADDITIONAL VIEWS

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OMNIBUS TRADE ACT OF 1987

JUNE 21, 1987.—Ordered to be printed

Filed, under authority of the order of the Senate of June 11, 1987

Mr. BENTSEN, from the Committee on Finance, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 490]

The Committee on Finance, to which was referred the bill (S. 490) to authorize negotiations of reciprocal trade agreements, to strengthen United States trade laws, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill (as amended) do pass.

I. PURPOSES

The purposes of S. 490 are:

(1) To authorize the President, for a period of six years, to enter into trade agreements with foreign countries for the purposes of establishing more open, fair and equitable market excess for U.S. exporters, reducing or eliminating barriers to trade and other trade-distorting practices, obtaining an appropriate overall balance between benefits and concessions with the agricultural manufacturing, mining and services sectors, and improved management of the new global economy;

(2) To strengthen U.S. trade laws by mandating responses to unfair distortions of international trade and by improving the enforcement of the antidumping and countervailing duty laws of the United States;

(3) To enhance the competitiveness of U.S. firms and workers by amending current import relief laws to promote positive ad-

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EFFECTIVE DATES

(Section 337)

Section 337 sets forth the effective dates for the various amendments made by this bill to the antidumping and countervailing duty laws. Those provisions which specifically apply only to investigations after the date of enactment of this Act do not apply to reviews of outstanding orders under section 736(c) or 751 of the Tariff Act of 1930.

Title IV. Intellectual Property Rights

Title IV contains provisions which are designed to strengthen U.S. intellectual property right protection both domestically and internationally. The Committee places great importance on this issue because it believes that the technology and innovativeness of U.S. companies is unparalleled in the world. However, without adequate protection of these intellectual property rights, U.S. companies are at a significant disadvantage in competing in the world marketplace. This title amends section 337 of the Tariff Act of 1930, and provides for monitoring of technology transfers and promotion of foreign systems for protecting intellectual property rights.

SUBTITLE A. INTELLECTUAL PROPERTY REMEDIES

REMEDIES UNDER THE TARIFF ACT OF 1930

(Section 401)

Injury to "Efficiently and Economically Operated" U.S. Industry

Section 337 of the Tariff Act of 1930 provides for relief against unfair methods of competition and unfair acts in the importation of articles into the United States or in their sale, if the effect or tendency of such actions is to destroy or substantially injure an efficiently and economically operated industry in the United States.

The U.S. International Trade Commission has the responsibility under section 337 to conduct an investigation of alleged violations of this provision either upon a complaint being filed by an interested party or upon its own motion. If the Commission finds that a violation of this statute has occurred and determines that such relief is justified after considering the effect of the relief "upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States and United States consumers," it may provide relief in the form of an exclusion order or a cease and desist order.

Section 401 amends section 337 in several important respects. First of all, it eliminates the need to demonstrate injury to, or the prevention of the establishment of, an industry in the United States for certain intellectual property rights cases. Those cases involve registered mask works and intellectual property which is protected by a valid and enforceable United States patent (including products and processes), copyright, or registered trademark. Exam-

ples of cases not affected by this change include trade secrets, common law trademarks, false advertising, and antitrust violations. Second, section 401 eliminates in all cases the requirement to establish that an industry in the United States is "efficiently and economically operated." Third, in those cases in which the requirement of demonstrating injury to, or prevention of the establishment of, an industry is retained, the standard of "prevention of establishment" is broadened to encompass impairment as well as prevention of establishment. Finally, although the injury standard would be eliminated, complainants in intellectual property rights cases would still have to demonstrate that an industry in the United States relating to the articles or intellectual property right concerned "exists or is in the process of being established."

In cases involving a patent, copyright, trademark, common-law trademark, trade secret, or mask work, an industry in the United States is considered to exist if there is, with respect to the articles or intellectual property right concerned, in the United States—

1. significant investment in plant and equipment;
2. significant employment of labor or capital; or
3. substantial investment in its exploitation, including engineering, research and development, or licensing.

The fundamental purpose of the amendments made by section 401 is to strengthen the effectiveness of section 337 in addressing the growing problems being faced by U.S. companies from the importation of articles which infringe U.S. intellectual property rights.

Infringing imports were not the primary concern of Congress when the predecessor of section 337 was initially enacted in 1922. As indicated by the scope of its language, section 337 was designed to cover a broad range of unfair acts not then covered by other unfair import laws. However, over the years, patent, copyright, and trademark infringement were recognized as unfair practices within the meaning of section 337, and today section 337 is predominantly used to enforce U.S. intellectual property rights. According to a 1986 Government Accounting Office (GAO) study, 95 percent of the section 337 cases initiated since 1974 involve statutory intellectual property rights. The Committee believes that the injury and efficient and economic operation requirements of section 337, designed for the broad context originally intended in the statute, make no sense in the intellectual property arena.

The owner of intellectual property has been granted a temporary statutory right to exclude others from making, using or selling the protected property. The purpose of such temporary protection, which is provided for in Article I, Section 8, Clause 8 of the United States Constitution, is "to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries." In return for temporary protection, the owner agrees to make public the intellectual property in question. This trade-off creates a public interest in the enforcement of protected intellectual property rights. Any sale in the United States of a product covered by an intellectual property right is a sale that rightfully belongs only to the holder or licensee of that property. The importation of any infringing merchandise derogates from the statutory right, dimin-

ishes the value of the intellectual property, and thus indirectly harms the public interest. Under such circumstances, the Committee believes that requiring proof of injury, beyond that shown by proof of the infringement of a valid intellectual property right, should not be necessary.

The Committee notes that in adopting section 401, it is effectively eliminating the requirements that the domestic industry be "economically and efficiently operated" and that the infringement have the tendency or effect of destroying or substantially injuring the domestic industry from section 337 insofar as they apply to intellectual property cases. The Committee does not intend that the ITC, in considering the public health and welfare, or the President, in reviewing the ITC's determination on policy grounds, will reintroduce these requirements.

Although the injury test has been eliminated for certain intellectual property rights cases, a complainant must still establish that a U.S. industry relating to the articles or intellectual property right concerned "exists or is in the process of being established." This requirement was maintained in order to preclude holders of U.S. intellectual property rights who have no contact with the United States other than owning such intellectual property rights from utilizing section 337. The ITC is to adjudicate trade disputes between U.S. industries and those who seek to import goods from abroad. Retention of the requirement that the statute be utilized on behalf of an industry in the United States retains that essential nexus.

The domestic industry requirement should not be interpreted in an unduly narrow manner, however. The definition specifies that an industry exists in the United States with respect to a particular article involving an intellectual property right if there is, in the United States—

1. significant investment in plant and equipment;
2. significant employment of labor or capital; or
3. substantial investment in the exploitation of the intellectual property right including engineering, research and development or licensing.

The first two factors in this definition have been relied on in prior Commission decisions finding that an industry exists in the United States. The third factor, however, goes beyond the ITC's recent decisions in this area. This definition does not require actual production of the article in the United States if it can be demonstrated that substantial investment and activities of the type enumerated are taking place in the United States. Marketing and sales in the United States alone would not, however, be sufficient to meet this test. The definition could, however, encompass universities and other intellectual property owners who engage in extensive licensing of their rights to manufacturers.

The phrase "or in the process of being established" with regard to the industry requirement recognizes that there may be situations where, under the above definition, an industry does not currently "exist" but a party should nevertheless be entitled to bring a section 337 action. For example, if a new product is developed in the United States and is protected by a U.S. intellectual property right, the owner of the intellectual property right would not have

to wait to bring an action under section 337 until he can satisfy the definition of industry, if he can demonstrate that he is taking the necessary tangible steps to establish such an industry in the United States.

The mere ownership of a patent or other form of intellectual property rights would not be sufficient to satisfy this test. The owner of the property right must be actively engaged in steps leading to the exploitation of the intellectual property, including application engineering, design work, or other such activities. The Commission should determine whether the steps being taken indicate a significant likelihood that the industry requirement will be satisfied in the future. Because this statute is not intended to protect holders of U.S. intellectual property rights who have only limited contact with the United States, the Committee does not want to see this language used as a loophole to the industry requirement. The Committee does intend this language, however, to protect from infringement those holders of U.S. intellectual property rights who are engaged in activities genuinely designed to exploit their intellectual property within a reasonable period of time.

Finally, it is noted that the changes in this section are not intended to change existing law or practice regarding parallel imports or gray market goods. The substantive rights of intellectual property right owners and independent importers with respect to this issue are unaffected by these amendments, since the underlying statutes governing patents, copyrights, trademarks or mask works have not been changed. The law to be applied in section 337 cases raising this issue is the law as interpreted by United States courts.

Termination of Investigation by Consent Order or Settlement Agreement

Section 401(a)(2) amends section 337(b)(1) to authorize the Commission to terminate investigations, in whole or in part, by issuing consent orders or on the basis of settlement agreements. The Commission has for a number of years terminated section 337 investigations in these ways without making a determination regarding whether the statute has been violated, under authority derived from the Administrative Procedure Act, specifically 5 U.S.C. 554(c)(1). The amendment provides express authority for such terminations. It is intended to put to rest any doubts regarding the Commission's authority to terminate investigations by issuance of consent orders or on the basis of settlement agreements without making a determination regarding violation of the statute.

Exclusion of Articles During Investigation

Under section 337, the Commission is empowered to issue both temporary and final exclusion orders prohibiting the entry of merchandise. There are no time limits for the issuance of temporary exclusion orders, however.

Section 401(a)(3) amends section 337(e) to require the Commission to rule on petitions for a temporary exclusion order within 90 days (150 days in more complicated cases) of publication of the Commission's notice of investigation in the *Federal Register*; to authorize

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HOUSE OF REPRESENTATIVES

REPT. 100-40
Part 1

TRADE AND INTERNATIONAL ECONOMIC POLICY REFORM ACT OF 1987

REPORT

OF THE

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

TO ACCOMPANY

H.R. 3

APRIL 6, 1987.—Ordered to be printed

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TRADE AND INTERNATIONAL ECONOMIC POLICY REFORM ACT OF 1987

APRIL 6, 1987.—Ordered to be printed

Mr. ROSTENKOWSKI, from the Committee on Ways and Means, submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 3 which on January 6, 1987, was referred jointly to the Committees on Ways and Means, Agriculture, Banking, Finance and Urban Affairs, Education and Labor, Energy and Commerce, and Foreign Affairs]

[Including cost estimate of the Congressional Budget Office]

The Committee on Ways and Means to whom was referred the bill (H.R. 3) to enhance the competitiveness of American industry, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments to section 1, title I, title II, and title VIII appear in italic type in the reported bill.

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Background and Purpose

THE PURPOSE OF H.R. 3

Titles I, II, and VIII of H.R. 3, as amended by the Committee on Ways and Means, represent the most comprehensive restructuring of basic U.S. trade policy since the Trade Act of 1974. The Committee recommendations would affect virtually every aspect of our basic trade laws, from trade negotiating authority to import relief and unfair trade practices to the structure of Executive branch trade functions. In particular, the bill would strengthen U.S. action against a variety of foreign trade barriers and distortions in order to promote greater access to foreign markets.

One important purpose of the Committee bill is to establish a national trade policy. The bill would require, for the first time, that the President take all appropriate actions to achieve a greater balance in U.S. foreign trade and that his trade representative submit to the Congress an annual trade policy agenda. The bill strengthens the consultation process with the Congress to ensure greater coordination of trade policy between the two branches, and it centralizes trade policymaking within the Executive branch under the Office of the United States Trade Representative.

Another important purpose is to promote United States competitiveness through three basic mechanisms: First, a broad grant of Presidential trade negotiating authority, together with a statement of negotiating objectives, in order to initiate a new round of multilateral trade negotiations which will enhance trade rules and expand market access for U.S. products; second, a series of amendments to mandate action against foreign market barriers and to institutionalize the concept of reciprocity in our bilateral relations

Section 171. Congressional Findings and Purposes

Present law

No provision.

Explanation of provision

Section 171 sets forth a number of Congressional findings and purposes with regard to U.S. intellectual property rights, including the need—

(1) to amend section 337 of the Tariff Act of 1930 to make it a more effective remedy for the protection of U.S. intellectual property rights; and

(2) to provide for the development of an overall strategy to ensure adequate and effective international protection for U.S. persons that rely on protection of intellectual property rights.

Reasons for change

This provision was included to highlight the importance that the Committee attaches to improving both domestic and international protection of U.S. intellectual property rights.

Section 172. Protection Under the Tariff Act of 1930

Injury to "Efficiently and Economically Operated" U.S. Industry

Present law

Section 337 of the Tariff Act of 1930 provides for relief against unfair methods of competition and unfair acts in the importation of articles into the United States or in their sale, if the effect or tendency of such actions is to destroy or substantially injure an efficiently and economically operated industry in the United States.

The U.S. International Trade Commission has the responsibility under section 337 to conduct an investigation of any alleged violation of this provision either upon a complaint being filed by an interested party or upon its own motion. If the Commission finds that a violation of this statute has occurred and determines that such relief is justified after considering the effect "upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States and United States consumers", it may provide relief in the form of an exclusion order or a cease and desist order.

Explanation of provision

Section 172 amends section 337 of the Tariff Act of 1930 in several important respects. First of all, it eliminates the need to demonstrate injury to, or the prevention of the establishment of, an industry in the United States for certain intellectual property rights cases. Those cases involve registered mask works and intellectual property which is protected by a valid and enforceable United States patent (including products and processes), copyright, or registered trademark. Examples of cases not affected by this change include trade secrets, commonlaw trademarks, false advertising, and antitrust violations. Secondly, section 172 eliminates in all cases the requirement to establish that an industry in the United

States is "efficiently and economically operated." Finally, although the injury standard would be eliminated, complainants in intellectual property rights cases would have to demonstrate that an industry in the United States relating to the articles or intellectual property right concerned "exists or is in the process of being established."

The changes described above relating to statutory intellectual property rights cases would apply to:

1. The importation into the United States, or the sale by the owner, importer, consignee, or agent of either, of articles that—
    a. infringe a valid and enforceable United States patent or a valid United States copyright registered under title 17, United States Code; or
    b. are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent;
2. The importation into the United States, or the sale by the owner, importer, consignee, or agent of either, of articles that infringe a valid and enforceable United States trademark registered under the Trademark Act of 1946; and
3. The importation, or the sale by the owner, importer, consignee, or agent of either, of a semiconductor chip product in a manner that constitutes infringement of a mask work registered under chapter 9 of title 17, United States Code.

In such intellectual property rights cases, an industry in the United States is considered to exist if there is, with respect to the articles protected by the patent, copyright, trademark, or mask work concerned, in the United States,—

1. significant investment in plant and equipment;
2. significant employment of labor or capital; or
3. substantial investment in its exploitation, including engineering, research and development, or licensing.

Reasons for change

The fundamental purpose for the amendments made by section 172 is to strengthen the effectiveness of section 337 in addressing the growing problems being faced by U.S. companies from the importation of articles which infringe U.S. intellectual property rights.

Infringing imports were not the primary concern of Congress when section 337 was initially enacted in 1922. As indicated by the scope of its language, section 337 was designed to cover a broad range of unfair acts not then covered by other unfair import laws. However, over the years, patent, copyright, and trademark infringement were recognized as unfair practices within the meaning of the section 337, and today, section 337 is predominantly used to enforce U.S. intellectual property rights. According to a 1986 Government Accounting Office (GAO) study, 95 percent of the section 337 cases initiated since 1974 involve statutory intellectual property rights. The Committee believes that the injury and efficient and economic operation requirements of section 337, designed for the broad context originally intended in the statute, make no sense in the intellectual property arena.

Unlike dumping or countervailing duties, or even other unfair trade practices such as false advertising or other business torts, the owner of intellectual property has been granted a temporary statutory right to exclude others from making, using, or selling the protected property. The purpose of such temporary protection, which is provided for in Article I, Section 8, Clause 8 of the United States Constitution, is "to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries." In return for temporary protection, the owner agrees to make public the intellectual property in question. It is this trade-off which creates a public interest in the enforcement of protected intellectual property rights. Any sale in the United States of an infringing product is a sale that rightfully belongs only to the holder or licensee of that property. The importation of any infringing merchandise derogates from the statutory right, diminishes the value of the intellectual property, and thus indirectly harms the public interest. Under such circumstances, the Committee believes that requiring proof of injury, beyond that shown by proof of the infringement of a valid intellectual property right, should not be necessary.

The Committee recognizes that in very few cases have complainants actually been denied relief because of failure to meet the economic tests relating to injury and economically and efficiently operated industry. However, the Committee is concerned that, because of these economic tests, some holders of U.S. intellectual property rights who seek relief from counterfeit or infringing imports are denied access to section 337 relief. Since 1974, according to GAO's survey, 11 complainants have been unable to meet all of the economic criteria and 6 of them were denied relief solely for this reason. The GAO survey further indicated, however, that firms have terminated their proceedings or accepted settlement agreements which they judged not in their best interests because they could not meet all of the statute's economic tests. It has been claimed that many firms may even have been discouraged from initiating proceedings because of these tests. Further, the cost of section 337 litigation is extremely high (ranging from $100,000 to $1 million with a few costing as much as $2.5 million according to GAO) and the legal costs of satisfying the economic criteria are reportedly equal to more than half of the total litigation expenses, thus further discouraging the use of section 337 to address the problem of counterfeit imports.

The Committee notes that in adopting section 172, it is effectively eliminating the requirement that the domestic industry be "economically and efficiently operated" and the requirement that the infringement have the tendency or effect of destroying or substantially injuring the domestic industry from section 337 as it applies to intellectual property cases. The Committee does not intend that the USITC or the USTR will reintroduce these requirements in making their public interest determinations.

Although the injury test has been eliminated for certain intellectual property rights cases, a complainant must establish that a U.S. industry relating to the articles or intellectual property right concerned "exists or is in the process of being established." This re-

quirement was maintained in order to preclude holders of U.S. intellectual property rights who have no contact with the United States other than owning such intellectual property rights from utilizing section 337. The purpose of the Commission is to adjudicate trade disputes between U.S. industries and those who seek to import goods from abroad. Retention of the requirement that the statute be utilized on behalf of an industry in the United States retains that essential nexus.

The Committee is concerned, however, that in some recent decisions the Commission has interpreted the domestic industry requirement in an inconsistent and unduly narrow manner. In order to clarify the industry standard, a definition is included which specifies that an industry exists in the United States with respect to a particular article involving an intellectual property right if there is, in the United States,—

1. significant investment in plant and equipment;
2. significant employment of labor or capital; or
3. substantial investment in the exploitation of the intellectual property right including engineering, research and development or licensing.

The first two factors in this definition have been relied on in some Commission decisions finding that an industry does exist in the United States. The third factor, however, goes beyond ITC's recent decisions in this area. This definition does not require actual production of the article in the United States if it can be demonstrated that significant investment and activities of the type enumerated are taking plaoe in the United States. Marketing and sales in the United States alone would not, however, be sufficient to meet this test. The definition could, however, encompass universities and other intellectual property owners who engage in extensive licensing of their rights to manufacturers.

The phrase "or in the process of being established" with regard to the industry requirement recognizes that there may be situations where, under the above definition, an industry does not "exist" but a party should be entitled to bring a 337 action. For example, if a new product is developed in the United States and is protected by a U.S. intellectual property right, the owner of the intellectual property right would not have to wait to bring an action under section 337 until he can satisfy the definition of industry, if he can demonstrate that he is taking the necessary steps to establish such an industry in the United States.

The mere ownership of a patent or other form of protection would not be sufficient to satisfy this test. The owner of the property right must be actively engaged in steps leading to the exploitation of the intellectual property, including application engineering, design work, or other such activities. The Commission should determine whether the steps being taken indicate a significant likelihood that the industry requirement will be satisfied in the future. Because this statute is not intended to protect holders of U.S. intellectual property rights who have only limited contact with the United States, the Committee does not want to see this language used as a loophole to the industry requirement. The Committee does intend this language, however, to protect from infringement those holders of U.S. intellectual property rights who are engaged

in activities genuinely designed to exploit their intellectual property within a reasonable period of time.

Finally, it is noted that the changes in this section are not intended to change existing law or practice regarding parallel imports or gray market goods. The substantive rights of intellectual property right owners with respect to this issue are unaffected by these amendments, since the underlying statutes governing patents, copyrights, trademarks or mask works have not been changed. The law to be applied in section 337 cases raising this issue is the law as interpreted by United States courts.

Termination of Investigation by Consent Order or Settlement Agreement

Present law

No provision.

Explanation of provision

Section 172(a)(2) amends section 337(b)(1) of the Act to authorize the Commission to terminate investigations, in whole or in part, by issuing consent orders or on the basis of settlement agreements.

Reasons for change

The Commission has for a number of years terminated section 337 investigations in these ways without making a determination regarding whether the statute has been violated, under authority derived from the Administrative Procedure Act, specifically 5 U.S.C. subsection 554(c)(1). The amendment to section 337(b)(1) provides express authority in the Act for such terminations. It is intended to put to rest any lingering doubts regarding the Commission's authority to terminate investigations by issuance of consent orders or on the basis of settlement agreements without making a determination regarding violation of the statute.

Exclusion of Articles During Investigation

Present law

Under section 337, the Commission is empowered to issue both temporary and final exclusion orders prohibiting the entry of merchandise. There are no time limits for the issuance of temporary exclusion orders, however.

Explanation of provision

Section 172(a)(3) amends subsection (e) of the Act (1) to require the Commission to rule on petitions for a temporary exclusion order within 90 days (150 days in more complicated cases) of publication of the Commission's notice of investigation in the *Federal Register*; (2) to authorize the Commission to require the petitioner to post a bond as a prerequisite to the issuance of a temporary exclusion order, and (3) to authorize the Commission to grant preliminary relief in cases involving alleged patent, copyright, registered trademark, or mask work infringement to the same extent as preliminary injunctions and temporary restraining orders may be issued by the federal district courts. If the Commission later deter-

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one priority for our Nation. I hope that the first item on the legislative agenda of the 100th Congress will be to accomplish just that.

Mr. ST GERMAIN. Mr. Speaker, I rise today to express my deep concern over a section of the miscellaneous tariff bill, H.R. 5686, that the House will consider today that would, for the first time, allow watch and watch components to receive duty-free treatment under the Generalized System of Preferences [GSP] Program.

Mr. Speaker, one of the major employers in the State of Rhode Island, is Speidel, the company that invented the twist-o-flex watchband. Speidel has been an integral part of the Rhode Island economy for many years, along with the other jewelry manufacturers in my State. Unfortunately, Speidel today is the only survivor of a domestic industry that has been destroyed by imports. There are no other American manufacturers of watchbands still operating in the United States. Speidel's business has dropped by more than 40 percent over the last 5 years and its employment has fallen by more than half. Imports now control more than half of the American market in watchbands.

With the serious problems that now face this industry, I must question the need for a provision that will provide an additional incentive for imported watches and watchbands to enter this country. Our Nation already has one of the most open economies in the world. Imported watches are finding no problems in competing in our markets. So why do we need to provide duty-free treatment for such imports?

The proponents of this bill believe that this legislation will help save the jobs of the employees of a specific company. This company has already moved all of its watch assembly offshore. Most of its components are also manufactured abroad. But the proponents argue that by allowing watches and watch components into this country duty-free, this company might become a little more competitive and the jobs of their remaining American employees might be saved. The implied threat, of course, is that if this provision is not passed into law, those jobs will go overseas.

I clearly empathize with the problems that domestic manufacturers are having with meeting the challenge of low-cost imports from abroad. My State has lost thousands of jobs to imports. But providing duty-free treatment for watches and watchbands will only further damage what remains of this fragile industry. It is the wrong solution to this difficult problem.

I hope that this poorly conceived section of the bill can be eliminated from the legislation before it becomes law.

Miss SCHNEIDER. Mr. Speaker, I rise today in support of H.R. 5686, the Miscellaneous Tariffs Act. This bill includes a number of important tariff revisions that the Congress should consider and approve before we adjourn for the year. I do, however, have serious concerns about the section of the bill that would alter the treatment of watches under the generalized system of preferences.

Twelve years ago, Congress established the GSP as a means of encouraging economic growth and trade in the developing world. It was intended, however, that the benefits for lesser developed nations should not be at the expense of American workers and American industry. That is why watches and their component parts have not been considered eligible for duty-free GSP status. A number of other import-sensitive items such as textiles, shoes, leather goods, steel, glass products, and electronic items were extended from the GSP as well.

Under the bill before us today, the U.S. Trade Representative could provide duty-free status for watches and watch components, if such injury would not cause material injury to watch manufacturing and assembly operations here in the United States. Now it seems to me that "material injury" is a pretty tough standard for an American manufacturer to meet in order to avoid a flood of imported competitive products. It doesn't make sense to make trade policy that will essentially force American companies to go under before they can get relief.

We don't need a study by the U.S. Trade Representative to tell us that the watch and watch component industry is import sensitive. Look at the facts. Speidel, the only major American manufacturer of watchbands, is located in my district. Over the past 5 years, Speidel's business has fallen by over 40 percent and employment has dropped from over 1,000 workers to only 500. At the same time, every other major watchband manufacturer has stopped production in the United States. The competition from watchband manufacturers in low labor-cost countries like Hong Kong is simply too fierce. Given the ease with which imported watches and watchbands are entering the United States, they obviously do not need a tariff reduction to become competitive.

In addition, the provision offers no guarantees that if the tariff break is put in place, prices will be lowered to the consumer or jobs will be saved. In fact, the break will provide a substantial incentive to eliminate the very jobs the provision's proponents are endeavoring to save.

Mr. Speaker, I intend to support H.R. 5686 when it comes time to vote. Unfortunately, the rule does not permit a chance to consider this one section separately. I do understand that there is strong opposition to this provision in the other body. My hope is that the other body will strike this badly conceived provision before it returns this legislation to the House.

Mr. KASTENMEIER. Mr. Speaker, I rise in support of this miscellaneous tariff bill. In particular I wish to address the portion of the bill which relates to intellectual property and trade. This section has been developed cooperatively between the Ways and Means Committee and the Committee on the Judiciary. Indeed one section of the bill (relating to amendments to section 337 of the Tariff Act) is identical with my bill H.R. 4747, (a measure reported unanimously by the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary). Therefore, I am pleased to join my colleagues from Ways and Means Committee in supporting this bill.

INTELLECTUAL PROPERTY AND TRADE

It is now commonly accepted that the United States should take steps to address our serious trade problems. Increasingly the private sector, Government officials and politicians have fixated on worldwide protection of American intellectual property as one of the keystones to addressing the trade problem. Without question, the American creative genius has been nurtured by strong legal tradition of protecting the property rights of intellectual property owners. As we think about adjusting our lives and laws to meet the trade problem, I hope that we can proceed in a balanced, dispassionate and objective way. As important as this task is we should not take precipitous action as a palliative for short term problems.

Before outlining what are, in my view, the elements of a coherent and comprehensive approach to intellectual property and trade, let me set the context.

Our key intellectual property laws—copyright and patent—are derived from the constitutional mandate to "Promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries." (U.S. Constitution Art. 1, section 8, clause 8). The Constitution envisions a bargain. Creators and inventors receive a benefit—a form of a limited monopoly right. In exchange, the public arguably benefits twice—first when it obtains access to the creation or invention, and second when the term of protection expires and the creation or invention is added to the public domain. This bargain furthers the public interest and does not represent in any way recognition of the natural right of creators and inventors to proprietary protection. Thus, our intellectual property laws—including also laws relating to trademark and semiconductor chip mask works—represent carefully fashioned compromises which limit the nature and exent of the rights of intellectual property owners. These limits include concepts such as "fair use" and "first sale" in copyright and the right to engage in "reverse engineering" with respect to mask works.

From a political perspective it is safe to say that our intellectual property laws are neither unlimited nor primarily designed to provide a special benefit. "Rather, the limited grant is a means by which an important public purpose may be achieved." *Sony* v. *Universal City Studies,* 464 U.S. 417, 429 (1984).

This perspective is important to keep in mind when addressing trade legislation affecting intellectual property. In my view, it would be a serious mistake to use legislation relating to international trade as a vehicle for changing the positive law relating to intellectual property.[1] I am also hopeful that we will not ignore the public interest in a rush to protect what are currently perceived by some to be embattled industries.

It is appropriate that this bill should include amendments to the Tariff Act to improve the work done by the International Trade Commission.[2] Before outlining the features of those

[1] For example, we should avoid taking sides in the grey market or parallel import issue in trademark law or on first sale in copyright law, or on reverse engineering in mask work law.

[2] Additional measures to further classify the rights of intellectual property owners have already been considered. Congress—through legislation processed by the Committee on Ways and Means—has given the United States Trade Representative and the Department of State powerful weapons to

amendments, let me first outline the nature of the current remedy, and discuss the possible reforms.

Proposals to make an intellectual property code part of the GATT have recently been adopted at Punta Del Este. I look forward to working to assist this process.

BACKGROUND AND CURRENT LAW

The purpose of section 337 is to provide a remedy for unfair methods of competition in import trade that substantially injure, tend to substantially injure, or destroy an efficiently and economically operated domestic industry. This statute, which was first enacted in 1922, took its current form in 1974.

The Commission has instituted 240 investigations under section 337 since 1974. Of these, 19 are pending. The following table breaks down the results of the 221 completed investigations:

Voluntarily terminated	127
No respondent appeared	40
Remedy put in place	(33)
Violation found	28
Remedy put in place	(23)
No violation found	26
Total completed	221

The vast majority of section 337 cases have been based on allegations of infringement by imports of U.S. intellectual property rights, i.e., patents, trademarks or copyrights.

A violation of section 337 usually leads to exclusion from entry into the United States of the articles connected with the unfair trade practice. Such an exclusion order can cover not only articles of persons over whom personal jurisdiction existed and who participated in the proceedings to determine violations, but also articles of importers and foreign manufacturers who never participated in the proceedings and over whom no personal jurisdiction existed in the United States. Such an order can apply to the articles of persons who did not start to produce the articles until well after the order was issued. As such, it is an extraordinary remedy which allows broad relief to a holder of intellectual property rights or other individual harmed by an unfair trade practice.

After receiving a complaint under section 337, the Commission has 30 days to decide whether to institute an investigation. After a case is instituted, it is delegated to an Administrative Law Judge (ALJ), who holds a preliminary conference usually within 45 days. In cases involving requests for temporary relief, the ALJ has 4 months in which to issue a preliminary determination. The Commission may review this initial determination and, if necessary, fashion a temporary remedy, which may be disapproved by the President for policy reasons.

With regard to permanent relief, the ALJ has nine months to determine whether or not there has been a violation of section 337 (14 months in "more complicated" investigations). Again, the Commission may undertake a review to affirm, reverse, or modify the ALJ's determination and, if necessary, to fashion a remedy. The Commission has 1 year after the institution of the investigation to complete the case (or within 18 months if it finds the investigation to "be more complicated"). The President has 60 days during which disapproval of the Commission's determination can be intered.

SECTION 337 REFORM

My subcommittee—the Subcommittee on Courts, Civil Liberties and the Administration of Justice—conducted 2 days of hearings on the various legislative proposals to amend section 337 (e.g. title II of H.R. 3776 and title II of H.R. 4539). Two primary issues emerged during the hearings. First, a vast majority of the witnesses [3] and other commentators [4] advocated elimination of the "injury" and "efficiently and economically operated industry" requirements. Second, some witnesses urged elimination of the domestic injury requirement. Both of these issues are addressed in the omnibus trade bill.

Proponents of change argued that proof of injury in intellectual property cases should not be required. They asserted that acts of infringement of an intellectual property right should be sufficient. They pointed out that under the trademark and copyright laws a Customs order can be obtained for those types of infringing goods without proof of injury. Moreover, they argued that because these intellectual property rights involve the right to exclude others from using or practicing the protected property that injury should be irrelevant. Finally, although injury determinations have rarely prevented relief before the ITC advocates for change nonetheless claimed that litigating the injury question is unduly burdensome and expensive.

Opponents of removing "injury" tests have argued that such a move would violate the *General Agreement on Tariff and Trade* (GATT). This view was contradicted by the United States Trade Representative, a leading academic expert (Professor Robert Hudec of the University of Minnesota Law School) and most other witnesses. Opponents also argued that the "injury" requirement serves to keep the rights of complainants and respondents in equlibrium. They observed that in exchange for less procedural protections in an ITC proceeding the respondents are able to avoid liability unless there is the additional showing of injury. This position was rejected by proponents on policy grounds. They argued that the "injury" test only makes sense when nonintellectual property rights are being asserted and that inclusion of the requirement by Congress in 1930 did not anticipate the use of section 337 to enforce intellectual property rights.

The miscellaneous tariff bill eliminates both the "injury" and "efficiently and economically operated industry" requirements. The language used is largely derived from the language adopted by the Ways and Means Committee and the Committee on the Judiciary.

The administration (H.R. 4585) and Congressman MOORHEAD (H.R. 3376) advocated elimination of the "domestic industry" requirement. This approach was opposed by organized labor, Allied-Signal, Corning Glass Works, the chairperson of the ITC and the Intellectual Property Owners Organization.[5] Some witnesses before my subcommittee and before the Trade Subcommittee urged a slight modification of the definition of "industry" insofar as it applied to intellectual property cases. In essence these witnesses argued that the ITC has created an inconsistent set of rules to determine whether an industry exists.[6] The proposed amendment in the omnibus trade bill clarifies the results of previous ITC decisions [7] and corrects some recent incorrect applications of the Commission in more recent cases.[8] The amendment makes clear that a "domestic industry" can exist through the development of a "licensing" industry. The amendment also makes certain the availability of section 337 relief to universities who have made substantial investment in engineering, or research and development in connection with the exploitation of an intellectual property right.[9] The language used in the amendment is a combination of that found in H.R. 4539 and that found in the bill reported by the Trade Subcommittee. Deleted from both versions is language relating to "sales and marketing." As many of the witnesses indicated, the "domestic industry" requirement will serve as a gatekeeper to prevent the excessive use of the ITC under section 337. The inclusion of "sales and marketing" activities in the United States was seen by most commentators as being too broad.

PROCEDURAL REFORMS

During the course of the hearings on this bill a number of procedural suggestions also were made to improve the efficiency of ITC operations. These changes appear to have the support of virtually all commentators. A complete description of these changes can be found in the Ways and Means Committee

use in bilateral negotiations in the context of the General System of Preferences (GSP) and the Carribean Basin Initiative (CBI). By permitting GSP and CBI benefits to be affected by the adequacy of our trading partners' intellectual property laws we have already wielded a big stick to induce greater intellectual property protection abroad.

[3] United States Trade Representative, Allied Signal, Genetech, and Corning.

[4] E.G., NAM, CBEMA, U.S. Chamber of Commerce, E.I.A., IPO, A.I.P.L.A., and organized labor.

[5] In this regard, it was postulated that such a change would transform the ITC into an intellectual property court. They also claimed that it would make the ITC forum available to two non-domestic companies with no United States investment to argue about access to the United States market.

[6] Certain Softballs and Polyurethane Cores therefore, No. 337-TA-190 (1985) (ITC does not use rigid formula in determining industry test); Miniature Battery Operated Toy Vehicles, No. 337-TA-122 (1982), affd. sub. nom. Schaper Mfg. Co. v. ITC. 717 F.2d 1368 (Fed. Cir. 1983) (where complainant's product also made outside the U.S.; no domestic industry); see also, Certain Products with Gremlins Depictions, No. 337-TA-201 (1986) (no domestic industry even though extensive licensing industry within the United States); compare, Certain Ultra-Microtone Freezing Attachments, No. 337-TA-10 (1976) (finding of domestic industry when only domestic act is the importation of goods from abroad) with Certain Writing Instruments and Nibs Therefore, Investigation No. 337-TA-129 (1984). (two patents, two possible industries, only one meets statutory definition) and Certain Limited-Charges Cell Culture Microcarriers, No. 337-TA-129 (1984) (no industry finding) and Certain Modular Structural Systems. No. 337-TA-164 (1984) (no industry finding).

[7] Certain Cast-Iron Stoves, No. 337-TA-69 (1981) at 8-10 ("significantly employs . . . American land, labor and capital") Coin-Operated Audio Visual Games and Components Thereof, No. 337-TA-112 (1983).

[8] Certain Products with Gremlins Depictions, supra.

[9] Compare, Certain Limited-Charge Cell Culture Mirocarriers, supra.

report on H.R. 4800, House Report 99-581, part 1, pages 109-117.

In conclusion, I urge my colleagues to support those provisions of this bill that relate to intellectual property and trade.

Mr. FRENZEL. Mr. Speaker, I have no requests for time, and I yield back the balance of my time.

Mr. ROSTENKOWSKI. Mr. Speaker, I yield back the balance of my time.

The SPEAKER pro tempore (Mr. RANGEL). The question is on the motion offered by the gentleman from Illinois [Mr. ROSTENKOWSKI] that the House suspend the rules and pass the bill, H.R. 5686, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore. Debate has been concluded on all motions to suspend the rules.

Pursuant to clause 5, rule I, the Chair will now put the question on each motion on which further proceedings were postponed on today, in the order in which that motion was entertained.

Votes will be taken in the following order: S. 2245, by the yeas and nays; S. 2216, by the yeas and nays; and the conference report on H.R. 3113, by the yeas and nays.

EXPORT ADMINISTRATION ACT OF 1979 AUTHORIZATION

The SPEAKER pro tempore. The pending business is the question of suspending the rules and passing the Senate bill, S. 2245, as amended.

The Clerk read the title of the Senate bill.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Florida [Mr. MICA] that the House suspend the rules and pass the Senate bill, S. 2245, as amended, on which the yeas and nays are ordered.

The vote was taken by electronic device, and there were—yeas 366, nays 0, not voting 66, as follows:

[Roll No. 461]

YEAS—366

Abercrombie	Badham	Bliley
Ackerman	Barnes	Boggs
Akaka	Bartlett	Boland
Alexander	Barton	Boner (TN)
Anderson	Bateman	Bonior (MI)
Andrews	Bates	Borski
Annunzio	Bedell	Bosco
Anthony	Bellenson	Boucher
Applegate	Bennett	Boulter
Archer	Bentley	Broomfield
Armey	Bereuter	Brown (CA)
Aspin	Berman	Brown (CO)
Atkins	Bevill	Bruce
AuCoin	Billrakis	Bryant
Burton (IN)	Henry	Nowak
Bustamante	Hertel	Oakar
Byron	Hiler	Oberstar
Callahan	Hillis	Obey
Carney	Holt	Olin
Carper	Hopkins	Ortiz
Carr	Horton	Oxley
Chandler	Hoyer	Packard
Chapman	Hubbard	Panetta
Chappell	Huckaby	Parris
Chappie	Hughes	Pashayan
Cheney	Hunter	Pease
Clay	Hutto	Penny
Coats	Hyde	Pepper
Cobey	Ireland	Perkins
Coble	Jacobs	Petri
Coelho	Jeffords	Pickle
Coleman (MO)	Jenkins	Porter
Coleman (TX)	Johnson	Price
Combest	Jones (NC)	Pursell
Conte	Jones (TN)	Rahall
Cooper	Kanjorski	Rangel
Coughlin	Kaptur	Ray
Courter	Kasich	Regula
Coyne	Kastenmeier	Reid
Craig	Kildee	Richardson
Crockett	Kolbe	Ridge
Daniel	Kolter	Rinaldo
Dannemeyer	Kostmayer	Ritter
Darden	Kramer	Roberts
Daschle	LaFalce	Robinson
Daub	Lagomarsino	Rodino
de la Garza	Lantos	Roe
DeLay	Latta	Roemer
Dellums	Leach (IA)	Rogers
Derrick	Leath (TX)	Rose
DeWine	Lehman (FL)	Rostenkowski
Dicks	Leland	Roth
Dixon	Lent	Roukema
Dorgan (ND)	Levin (MI)	Rowland (CT)
Dornan (CA)	Levine (CA)	Rowland (GA)
Dowdy	Lewis (CA)	Roybal
Dreier	Lewis (FL)	Sabo
Duncan	Lightfoot	Savage
Durbin	Lipinski	Saxton
Dwyer	Livingston	Schaefer
Dymally	Lloyd	Scheuer
Dyson	Loeffler	Schneider
Early	Lott	Schuette
Eckart (OH)	Lowery (CA)	Schumer
Eckert (NY)	Lowry (WA)	Seiberling
Edwards (CA)	Lujan	Sensenbrenner
Edwards (OK)	Lungren	Sharp
Emerson	Mack	Shaw
English	Madigan	Shelby
Erdreich	Markey	Shumway
Evans (IL)	Martin (IL)	Shuster
Fascell	Martin (NY)	Sikorski
Fawell	Martinez	Siljander
Feighan	Matsui	Sisisky
Fiedler	Mavroules	Skeen
Fields	Mazzoli	Skelton
Fish	McCain	Slattery
Flippo	McCandless	Slaughter
Florio	McCloskey	Smith (FL)
Foley	McCollum	Smith (IA)
Ford (MI)	McCurdy	Smith (NE)
Ford (TN)	McDade	Smith (NJ)
Frank	McEwen	Smith, Denny (OR)
Frenzel	McGrath	
Frost	McHugh	Smith, Robert (NH)
Fuqua	McMillan	
Gallo	Meyers	Smith, Robert (OR)
Garcia	Mica	
Gaydos	Michel	Snowe
Gejdenson	Miller (CA)	Snyder
Gekas	Miller (OH)	Solarz
Gibbons	Miller (WA)	Solomon
Gilman	Mineta	Spence
Gingrich	Mitchell	Spratt
Glickman	Moakley	St Germain
Gonzalez	Molinari	Staggers
Goodling	Mollohan	Stangeland
Gordon	Monson	Stark
Gradison	Montgomery	Stenholm
Gray (PA)	Moody	Stokes
Green	Moorhead	Strang
Gregg	Morrison (WA)	Stratton
Gunderson	Mrazek	Stump
Hall (OH)	Murphy	Sweeney
Hall, Ralph	Murtha	Swift
Hamilton	Myers	Swindall
Hammerschmidt	Natcher	Synar
Hawkins	Neal	Tallon
Hayes	Nelson	Tauke
Hendon	Nielson	Tauzin
Taylor	Vucanovich	Wilson
Thomas (CA)	Walgren	Wirth
Thomas (GA)	Walker	Wise
Torres	Watkins	Wolf
Torricelli	Waxman	Wolpe
Towns	Weaver	Wright
Traficant	Weber	Wyden
Traxler	Wheat	Wylie
Udall	Whitehurst	Yates
Valentine	Whitley	Yatron
Vento	Whittaker	Young (AK)
Visclosky	Whitten	Young (FL)
Volkmer	Williams	Young (MO)

NOT VOTING—66

Barnard	Foglietta	Manton
Biaggi	Fowler	Marlenee
Boehlert	Franklin	McKernan
Bonker	Gephardt	McKinney
Boxer	Gray (IL)	Mikulski
Breaux	Grotberg	Moore
Brooks	Guarini	Morrison (CT)
Burton (CA)	Hansen	Nichols
Campbell	Hartnett	Owens
Clinger	Hatcher	Quillen
Collins	Hefner	Rudd
Conyers	Howard	Russo
Crane	Jones (OK)	Schroeder
Davis	Kemp	Schulze
Dickinson	Kennelly	Stallings
Dingell	Kindness	Studds
DioGuardi	Kleczka	Sundquist
Donnelly	Lehman (CA)	Vander Jagt
Downey	Long	Waldon
Edgar	Luken	Weiss
Evans (IA)	Lundine	Wortley
Fazio	MacKay	Zschau

□ 1530

So (two-thirds having voted in favor thereof) the rules were suspended and the Senate bill, as amended, was passed.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore. Pursuant to the provisions of clause 5, rule I, the Chairman announces that he will reduce to a minimum of 5 minutes the period of time within which a vote by electronic device may be taken on the additional motions to suspend the rules on which the Chair has postponed further proceedings.

CONSTITUTION DAY

The SPEAKER pro tempore. The pending business is the question of suspending the rules and passing the Senate bill (S. 2216) to designate September 17, 1987, the bicentennial of the signing of the Constitution of the United States, as "Constitution Day," and to make such day a legal public holiday.

The Clerk read the title of the Senate bill.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from New York [Mr. GARCIA] that the House suspend the rules and pass the Senate bill, S. 2216, on which the yeas and nays are ordered.

I

99TH CONGRESS
2D SESSION

H. R. 4539

To amend the patent and trademark laws of the United States, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 9, 1986

Mr. KASTENMEIER introduced the following bill; which was referred jointly to the Committees on the Judiciary and Ways and Means

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A BILL

To amend the patent and trademark laws of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Intellectual Property and Trade Act".

TITLE I—PATENT AND TRADEMARK AMENDMENTS

SEC. 101. USE OF PATENTED PROCESSES.

(a) INFRINGEMENT FOR IMPORTATION OR SALE.—Section 271 of title 35, United States Code, is amended by adding at the end the following new subsection:

"(e) Whoever without authority imports into the United States or sells within the United States a product which is directly made by a process patented in the United States shall be liable as an infringer, if the importation or sale of the product occurs during the term of such process patent.".

(b) DAMAGES FOR INFRINGEMENT.—Section 287 of title 35, United States Code, is amended by adding at the end the following: "No damages may be recovered for an infringement under section 271(e) of this title unless the infringer knew that the product was made by a process patented in the United States. Damages may be recovered only for infringement occurring after such knowledge.".

(c) EFFECTIVE DATE.—The amendments made by subsections (a) and (b) shall apply only to United States patents granted on or after the date of the enactment of this Act.

SEC. 102. PATENT AND TRADEMARK LAWS AMENDMENTS.

(a) LATE FEE PAYMENT ALLOWED.—Section 8(c) of the Trademark Act of 1946 (commonly known as the Lanham Act) (15 U.S.C. 1058(c)) is amended by adding at

the end the following: "Fees for filing the affidavits, together with fees for late payment, may be accepted by the Commissioner after the filing of the affidavits.".

(b) RENEWAL OF REGISTRATION.—Section 9(a) of the Trademark Act of 1946 (15 U.S.C. 1059(a)) is amended—

(1) in the first sentence by striking "payment of the prescribed fee and";

(2) by inserting after the first sentence the following: "The fee required for renewal, the time of payment, and any fee for late payment shall be prescribed by the Commissioner."; and

(3) in the second sentence by striking "the additional fee herein prescribed" and inserting "a surcharge".

(c) PERIOD FOR RESPONSE.—Section 12(b) of the Trademark Act of 1946 (15 U.S.C. 1062(b)) is amended—

(1) in the second sentence by striking "six months" and inserting "3 months, or longer as may be prescribed by the Commissioner,";

(2) in the third sentence by striking "six months" and inserting "3 months, or longer as may be prescribed by the Commissioner,"; and

(3) by adding after the third sentence the following: "The Commissioner shall prescribe fees for extending any time for response.".

(d) EXTENSION OF PERIOD FOR OPPOSING MARK.—Section 13 of the Trademark Act of 1946 (15 U.S.C. 1063) is amended—

(1) in the second sentence by striking "thirty days" and inserting "60 days"; and

(2) by inserting after the second sentence the following: "The Commissioner shall prescribe conditions, including the payment of fees, for the further extensions.".

(e) CHAIRMAN OF BOARD ADDED TO TRADEMARK TRIAL AND APPEAL BOARD.—Section 17 of the Trademark Act of 1946 (15 U.S.C. 1067) is amended in the second paragraph by striking "and members" and inserting "and a chairman and members".

(f) VERIFICATION REQUIREMENT FOR CANCELLATION PETITION DELETED.—Section 24 of the Trademark Act of 1946 (15 U.S.C. 1092) is amended by striking "verified" in the second sentence.

(g) CHAIRMAN AND VICE-CHAIRMAN ADDED TO BOARD OF PATENT APPEALS AND INTERFERENCES.—Section 7(a) of title 35, United States Code, is amended in the second sentence by inserting "a chairman and a vice-chairman appointed by the Commissioner," after "Assistant Commissioners,".

(h) ATTESTATION REQUIREMENT FOR ISSUANCE OF PATENT DELETED.—Section 153 of title 35, United States Code, is amended by striking "and attested by an officer of the Patent and Trademark Office designated by the Commissioner".

(i) PLANT PATENTS.—Section 163 of title 35, United States Code, is amended by inserting "or any part thereof" after "reproduced".

(j) EFFECTIVE DATE.—Subsection (i) shall apply only to acts of infringement committed on or after the date of the enactment of this Act. Subsections (a) through (h) shall take effect 6 months after the date of the enactment of this Act.

SEC. 103. ENFORCEMENT BY THE UNITED STATES ALLOWED IN CERTAIN PATENT APPLICATION CASES.

Section 135(c) of title 35, United States Code, is amended by adding at the end the following: "The United States may bring an action for equitable or declaratory relief to enforce the provisions of this section.".

TITLE II—ENFORCEMENT OF PATENTS, COPYRIGHTS, TRADEMARKS, AND MASK WORKS IN INTERNATIONAL TRADE

SEC. 201. REFERENCE TO TARIFF ACT OF 1930.

Except as otherwise expressly provided, whenever in this title an amendment is expressed in terms of an amend-

ment to a section or other provision, the reference shall be considered to be made to a section or other provision of the Tariff Act of 1930.

SEC. 202. UNFAIR PRACTICES IN IMPORT TRADE.

(a) UNFAIR METHODS OF COMPETITION.—Subsection (a) of section 337 (19 U.S.C. 1337) is amended—

(1) by inserting "(1)" before the first sentence;

(2) by striking "or tendency";

(3) by striking ", efficiently and economically operated,";

(4) by inserting "or to be a threat thereof," after "in the United States,";

(5) by inserting "or substantially impair" after "prevent"; and

(6) by adding at the end the following:

"For purposes of this section, an 'industry in the United States' includes a substantial investment in facilities or activities related to the exploitation of patents, copyrights, trademarks, or mask works described in paragraph (2), including research, development, licensing, sales, and marketing.

"(2) For purposes of this section, there is a rebuttable presumption that the following acts have the effect to destroy or substantially injure an industry, or to be a threat thereof,

or to prevent or substantially impair the establishment of an industry:

"(A) Unauthorized importation of an article which infringes a valid and enforceable patent issued under title 35, United States Code, or the unauthorized sale f such an imported article.

"(B) Unauthorized importation of an article which—

"(i) was made, produced, processed, or mined under, or by means of, a process covered by a claim of a valid and enforceable patent issued under title 35, United States Code, and

"(ii) if made, produced, processed, or mined in the United States, would infringe a valid and enforceable patent issued under title 35, United States Code,

or the unauthorized sale of such an imported article.

"(C) Unauthorized importation of an article which infringes a copyright registered under title 17, United States Code, or the unauthorized sale of such an imported article.

"(D) Importation of an article which infringes a valid and enforceable trademark registered under the Trademark Act of 1946, or the sale of such an import-

ed article, if the manufacture or production of such imported article was unauthorized.

"(E) The importation of a semiconductor chip product in a manner that constitutes infringement of a mask work registered under chapter 9 of title 17, United States Code.".

(b) DETERMINATIONS; REVIEW.—Subsection (c) of section 337 is amended—

(1) in the first sentence by inserting before the period the following: ", except that the Commission may, by issuing a consent order or on the basis of a settlement agreement, terminate any such investigation, in whole or in part, without making such a determination"; and

(2) in the fifth sentence by inserting after "its findings" the following: "on whether the adversely affected industry is efficiently and economically operated and its findings".

(c) EXCLUSION OF ARTICLES FROM ENTRY.—Subsection (d) of section 337 is amended in the first sentence by inserting after "considering" the following: "whether the adversely affected industry is efficiently and economically operated, and after considering".

FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 23-1245

Short Case Caption: Lashify, Inc. v. ITC

Instructions: When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

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Date: 05/21/2025

Signature: /s/ Lynde F. Herzbach

Name: Lynde F. Herzbach