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## Overview of Amendments in the 1988 Omnibus Trade Bill: Sections 301, "Super 301" and 337

Some of the most controversial and important changes in the 1988 Omnibus Trade Bill (Trade Bill) involve amendments to sections 301 and 337 of the Trade Act of 1974.<sup>1</sup> A summary of some of these amendments follows.<sup>2</sup>

### I. SECTION 301 — ENFORCEMENT OF U.S. RIGHTS UNDER TRADE AGREEMENTS AND RESPONSE TO CERTAIN FOREIGN TRADE PRACTICES

#### A. Section 2411

In section 2411(c)(1),<sup>3</sup> Congress gave presidential trade authority to the United States Trade Representative (USTR), subject to presidential direction, to enforce trade agreements and retaliate<sup>4</sup> against "unjustifiable," "unreasonable" and "discrimi-

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1. 19 U.S.C. §§ 2411-16, 1337(a)-(j), 1337a (1982 & Supp. IV 1986) (Sections 301 and 337 were the names of sections in the Tariff Act of 1930 that correspond to the above cited sections and have been carried over to present day use despite changes in the actual section numbers).

2. This piece is not intended to be an exhaustive review of all amendments contained in sections 301, "Super 301" and 337, rather it is merely a review of some of the changes to those sections.

3. 19 U.S.C.A. § 2411 (West Supp. 1988) (As of the date of this writing, the official U.S.C. report had not yet issued).

4. *Id.* § 2411(c)(1) (Under this section, enforcement and retaliation include authority in the USTR, subject to the direction of the President to:

(A) suspend, withdraw, or prevent application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country . . .

(B) impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate; or

(C) enter into binding agreements with such foreign country that commit such foreign country to—

(i) eliminate, or phase out, the act, policy, or practice that is the subject of the action to be taken . . .

(ii) eliminate any burden or restriction on United States commerce resulting from such act, policy, or practice, or

(iii) provide the United States with compensatory trade benefits . . . .)

natory" acts.<sup>5</sup> These actions by the USTR are mandatory or discretionary depending on the circumstances of each case.<sup>6</sup>

Section 2411(a) of the Trade Bill requires *mandatory* action by the USTR in the following situations: (1) when U.S. rights are being denied under a trade agreement; (2) when foreign acts, policies, or practices violate or deny U.S. benefits under any trade agreement; or (3) when foreign acts, policies, or practices are "unjustifiable," burdensome or restrictive on U.S. commerce.<sup>7</sup> "Unjustifiable" acts, policies, and practices are those "in violation of, or inconsistent with, the international legal rights of the United States," including, but not limited to, "any act, policy, or practice . . . which denies national or most-favored-nation treatment or the right of establishment or protection of intellectual property rights."<sup>8</sup>

Although section 2411(a) appears to require mandatory action by the USTR, the USTR still has discretion not to act under this section. For example, the USTR need not take such action if (1) the contracting parties to the General Agreement on Tariffs and Trade (GATT) determines that U.S. rights under a trade agreement are not being denied; (2) the USTR finds that a foreign country is taking satisfactory measures to rectify the adverse situation; (3) such action would have disproportionate adverse economic consequences to the U.S.; or (4) such action would jeopardize U.S. national security.<sup>9</sup>

5. *Id.* § 2411(a), (b), (d).

6. *Id.* § 2411 (a), (b).

7. *Id.* § 2411(a). This section provides:

(a) Mandatory action

(1) If the [USTR] determines under section 2414(a)(1) of this title—

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country—

(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States commerce; the Trade Representative *shall* take action authorized in subsection

(c) of this section, subject to the specific direction, if any, of the President . . . to enforce such rights or to obtain the elimination of such act, policy, or practice.

(emphasis added).

8. *Id.* § 2411(d)(4)(A), (B).

9. *Id.* § 2411(a)(2), (3).

(2) The Trade Representative is not required to take action under paragraph

(1) in any case in which:

(A) the Contracting Parties to the [GATT] have determined, a panel of experts has reported to the Contracting Parties, or a ruling issued under

Section 2411(b) provides for *discretionary* action by the USTR, subject to presidential direction, when foreign acts, policies, or practices are “unreasonable” or “discriminatory” and burden or restrict U.S. commerce.<sup>10</sup> An “unreasonable” act, policy or practice is one which, while not necessarily violating legal rights of the U.S., is otherwise deemed to be unfair and inequi-

the formal dispute settlement proceeding provided under any other trade agreement finds, that—

- (i) the rights of the United States under a trade agreement are not being denied, or
- (ii) the act, policy, or practice—
  - (I) is not a violation, or inconsistent with, the rights of the United States, or
  - (II) does not deny, nullify, or impair benefits to the United States under any trade agreement; or
- (B) the Trade Representative finds that—
  - (i) the foreign country is taking satisfactory measures to grant the rights of the United States under a trade agreement,
  - (ii) the foreign country has—
    - (I) agreed to eliminate or phase out the act, policy, or practice, or
    - (II) agreed to an imminent solution to the burden or restriction on United States commerce that is satisfactory to the Trade Representative,
  - (iii) it is impossible for the foreign country to achieve the results described in clause (i) or (ii), as appropriate, but the foreign country agrees to provide to the United States compensatory trade benefits that are satisfactory to the Trade Representative,
  - (iv) in extraordinary cases, where the taking of action under this subsection would have an adverse impact on the United States economy substantially out of proportion to the benefits of such action, taking into account the impact of not taking such action on the credibility of the provisions of this subchapter, or
  - (v) the taking of action under this subsection would cause serious harm to the national security of the United States.
- (3) Any action taken under paragraph (1) to eliminate an act, policy, or practice shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce.

10. *Id.* § 2411(b). This subsection provides:

(b) Discretionary action

If the Trade Representative determines under section 2414(a)(1) of this title that—

- (1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and
- (2) action by the United States is appropriate, the Trade Representative shall take all appropriate and feasible action authorized under subsection (c) of this section, subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain elimination of that act, policy, or practice.

table.<sup>11</sup> A "discriminatory" act, policy, or practice is one which "denies national or most-favored-nation treatment to United States goods, services, or investment."<sup>12</sup>

### 1. Section 2411 conclusions

"New" section 2411 is much more complex and explicit in its language than the "old" section 2411. Among major changes to this section is the shifting of the authority of initiating section 301 actions from the President to the USTR subject to the direction of the President. However, presidential involvement

11. *Id.* § 2411(d)(3). This subsection provides:

(3)(A) An act, policy, or practice is unreasonable if [it], while not necessarily a violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable.

(B) Acts, policies, and practices that are unreasonable include, but are not limited to, any act, policy, or practice, or any combination [thereof], which—

(i) denies fair and equitable—

(I) opportunities for the establishment of an enterprise,

(II) provision of adequate and effective protection of intellectual property rights, or

(III) market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by private firms . . . that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods to purchasing by such firms,

(ii) constitutes export targeting, or

(iii) constitutes a persistent pattern of conduct that—

(I) denies workers the right of association,

(II) denies workers the right to organize and bargain collectively,

(III) permits any form of forced or compulsory labor,

(IV) fails to provide a minimum age for the employment of children, or

(V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers.

(C)(i) Acts, policies, and practices of a foreign country described in subparagraph (B)(iii) shall not be treated as being unreasonable if the Trade Representative determines that—

(I) the foreign country has taken, or is taking, actions that demonstrate a significant and tangible overall advancement in providing throughout the foreign country . . . the rights and other standards described in the subclauses of subparagraph (B)(iii), or

(II) such acts, policies, and practices are not inconsistent with the level of economic development of the foreign country.

(E) The term "export targeting" means any government plan or scheme consisting of a combination of coordinated actions (whether carried out severally or jointly) that are bestowed on a specific enterprise, industry, or group thereof, the effect of which is to assist the enterprise, industry, or group to become more competitive in the export of a class or kind of merchandise.

12. *Id.* § 2411(d)(5).

will likely be limited to the most important actions relating to foreign policy.<sup>13</sup>

Likewise, making enforcement and response actions *mandatory* in the case of “unjustifiable” foreign trade practices while only *discretionary* in the case of “unreasonable” or “discriminatory” foreign trade practices is a major change. Prior law did not make this distinction.

Overall, it is important to note that these, and other changes, are primarily designed to create a more effective method of enforcing the reciprocity of market access with foreign trading partners by giving the U.S. new and stronger powers of enforcement.

### B. Section 2412 — Initiation of Investigations

Section 2412<sup>14</sup> of the Trade Bill is the section under which the USTR initiates section 301 investigations. This provision is similar to prior law, except for the addition of some specific guidelines and deadlines with respect to the mandatory initiation of investigations on identified countries under section 2242(a)(2).<sup>15</sup>

Like section 2411, section 2412 also provides that the USTR need not initiate an investigation if to do so would be contrary to U.S. economic interests.<sup>16</sup> If the USTR decides not to investigate, however, the determination must be justified in a detailed written report to Congress.<sup>17</sup> Section 2412 further adds that the USTR must consult periodically with the Register of Copyrights, the Commissioner of Patents and Trademarks, and others during an investigation initiated under section 2412(b)(2)(A).<sup>18</sup>

Finally, section 2412(d) provides an express grant of discretion to the USTR to determine whether an action under section 2411 would be effective against foreign acts, policies or practices.<sup>19</sup>

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13. 134 CONG. REC. E1488 (daily ed. May 10, 1988) (statement of Hon. Jack F. Kemp).

14. 19 U.S.C.A. § 2412 (West Supp. 1988).

15. *Id.* § 2412(b)(2)(A).

16. *Id.* § 2412(b)(2)(B).

17. *Id.* § 2412(b)(2)(C).

18. *Id.* § 2412(b)(2)(D).

19. *Id.* § 2412(d).

*C. Section 2413 — Consultation Upon Initiation of Investigation*

Section 2413<sup>20</sup> requires the USTR to request consultations with foreign countries upon the initiation of a section 2412 investigation. This section of the Trade Bill is also similar to its predecessor statute. However, if a section 2412 investigation involves a trade agreement, section 2413(a)(2)(B) adds an alternative deadline of 150 days from the beginning of consultations, within which a mutually acceptable resolution must be reached between the U.S. and the foreign country. If the earlier of this 150 day deadline or the close of the consultation period specified in the trade agreement passes, the USTR must request proceedings pursuant to formal dispute settlement procedures in the agreement.<sup>21</sup> This provision, like other provisions in section 301, serves to further restrict the time in which the USTR must act.

Both prior law and section 2413(b) of the Trade Bill provide a 90 day delay of the required request for consultations with a foreign company upon initiation of an investigation. However, the Trade Bill adds the express requirement that the USTR must first consult with the petitioner, if any, before such a delay.<sup>22</sup>

*D. Section 2414 — Determinations by the Trade Representative*

Section 2414<sup>23</sup> of the Trade Bill made some significant changes to former law. Section 2414(a)(1) expressly defines the USTR's duties to make determinations of whether U.S. rights are being denied under a trade agreement, whether foreign countries are engaging in violations of section 2411, and whether action under section 2411 is appropriate.<sup>24</sup>

Under section 2414(a)(2) and (3), there are some changes to a very complex schedule of time deadlines within which the USTR must make determinations and publish them in the Federal Register. Which deadline applies depends on whether a trade agreement exists, what type of trade agreement it is, whether the case is designated complex or complicated, and

20. *Id.* § 2413.

21. *Id.* § 2413(a).

22. *Id.* § 2413(b).

23. *Id.* § 2414.

24. *Id.* § 2414(a)(1).

whether the foreign country involved is making progress "in the right direction."<sup>25</sup> The general purpose of these changes is to restrict the time in which the USTR must make determinations.

Section 2414(a)(4), requiring a report to Congress if disputes cannot be solved within section 2414(a)(2) and (3) deadlines, is substantially the same as prior law. Likewise, section 2414(b), which provides for consultations for the presentment of views by interested persons prior to initiation of investigations, is substantially similar to prior law, except for an express requirement that thirty days notice be given before the opportunity for presentment of views occurs.<sup>26</sup> Finally, section 2414(c) provides for publication in the Federal Register of the Commissioner's determinations and underlying facts under section 2414(a).<sup>27</sup>

#### *E. Section 2415 — Implementation of Actions*

Section 2415<sup>28</sup> of the Trade Bill has no counterpart in prior statutes. This section sets a deadline of thirty days after the required determination date within which the USTR must implement actions which are deemed necessary under section 2414(a)(1)(B).<sup>29</sup> However, this deadline on implementation of actions may be extended up to 180 days in certain cases.<sup>30</sup>

#### *F. Section 2416 — Monitoring of Foreign Compliance*

Section 2416<sup>31</sup> of the Trade Bill also does not have a prior statutory counterpart. This section provides for USTR monitoring of section 2411 agreements between the USTR and foreign countries, as well as determination by the USTR of what further response or retaliatory actions are necessary upon a finding of inadequacy of foreign implementation. However, before any such determinations are made, the USTR must consult with the petitioner, if any, and with domestic industry representatives.

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25. *Id.* § 2414(a)(2),(3).

26. *Id.* § 2414(a)(4), (b).

27. *Id.* § 2414(c).

28. *Id.* § 2415.

29. *Id.* § 2415(a)(1). On this point, § 2415(a)(1) says "implement the action the Trade Representative determines under § 2413(a)(1)(B)." This appears to be a "glitch" in the code. It should read "§ 2414(a)(1)(B)".

30. *Id.* § 2415(a)(2)(A).

31. *Id.* § 2416.



Also, before any such determinations, the USTR must allow interested persons to express their views.<sup>32</sup>

*G. Section 2417 — Modification and Termination of Actions*

Section 2417<sup>33</sup> is a new provision. Under this section, the USTR, subject to presidential direction, may modify or terminate any section 2411 action for any of the following reasons: (1) any of the requirements allowing the USTR to refrain from action under section 2411(a)(2) are met; (2) the burden on U.S. rights, or the acts, policies or practices calling for the action in the first place have changed; or (3) action is no longer appropriate. Prior to such modification or termination, the USTR must consult with the petitioner and representatives of the affected domestic industry, and provide an opportunity for interested persons to present their views.<sup>34</sup>

Actions under section 2411 which are not requested to be continued by a petitioner or industry representatives after at least sixty days notification, and which are in effect for four years, will be terminated. If a request for continuation of action under section 2411 is made, the USTR will review the action's effectiveness in light of other possible actions and the effects on the U.S. economy and consumers.<sup>35</sup>

*H. Section 2418 — Request for Information*

19 U.S.C.A. section 2418<sup>36</sup> of the Trade Bill corresponds to section 2415 of the same title in prior law; both govern the issuance of information to those requesting it. Section 2418 is substantially similar to its predecessor. However, the Trade Bill adds section 2418(c) providing for the handling and confidentiality of certain business information if the person providing the information certifies, to the satisfaction of the USTR, that the information is business confidential, would endanger trade secrets or profitability, and is not generally available. The provider of this information must submit a nonconfidential summary of these requirements.<sup>37</sup>

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32. *Id.* § 2416(c).

33. *Id.* § 2417.

34. *Id.* § 2417(a)(2).

35. *Id.* § 2417(c)(3).

36. *Id.* § 2418.

37. *Id.* § 2418(c)(1).

### I. Section 2419 — Administration

Section 2419<sup>38</sup> of the Trade Bill is substantially similar to section 2416 of prior law. Both provide for promulgation of regulations, petitioner notification, and reports to Congress. However, the Trade Bill of 1988 adds section 2419(3)(D), which requires the inclusion of the commercial effects of section 2411 actions in the above-mentioned reports to Congress.<sup>39</sup>

### J. Section 301 Conclusions

The overall attempt of section 301 is to put a “tool” in the hands of the USTR which can be used to eradicate unfair trade practices and establish free and fair trade. The giving of presidential authority to the USTR, the provisions for mandatory action, and the more express and stringent guidelines of the Trade Bill should provide such a tool. However, it must be carefully implemented if it is to achieve the foreign policy and trade objectives of the United States. Fortunately, there are some “softening” provisions in section 301 which should allow it to be applied judiciously to the current state of affairs.

## II. “SUPER 301” — IDENTIFICATION OF TRADE LIBERALIZATION PRIORITIES

“Super 301” is a unique tool in the Trade Bill that does not have a counterpart in prior law. Its principal aim is to strengthen U.S. access to international markets. “Super 301” was created as a result of strong lobbying by special interest groups impatient with the sector-by-sector approach of the “old” section 301. “Super 301” is a broad, systematic approach to opening up foreign markets by challenging the governments of foreign countries to eliminate the entire web of market access impediments.

Under 19 U.S.C.A. section 2420 (part of “Super 301”), the USTR is required, before June 1, 1989, and again before May 1, 1990, to identify and report to appropriate congressional committees, and to publish in the Federal Register, certain priority practices and countries.<sup>40</sup> Factors to be considered by the USTR

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38. *Id.* § 2419.

39. *Id.* § 2419(3)(D).

40. *Id.* § 2420(a)(1):

(1) By [June 1, 1989 and again by May 1, 1990] the Trade Representative shall identify United States trade liberalization priorities, including—

when identifying priority practices include (1) the competitive position and export potential of United States goods and services, (2) whether the sale of a small amount of a product or service has implications beyond its actual value, and (3) the medium and long-term implications of government procurement commitments to U.S. exporters.<sup>41</sup> Likewise, factors to be considered by the USTR when identifying priority countries include the number and pervasiveness of unfair practices, and the reasonable level of U.S. exports of goods and services under full compliance with existing agreements to which the foreign country is a party, based on international competitive position and export potential of such products and services.<sup>42</sup>

Section 2420(b) authorizes the USTR to initiate investigations with respect to priority practices and countries pursuant to section 2412(b)(1).<sup>43</sup> In consultations incident to such an investigation the USTR must seek to negotiate an agreement with the identified priority country. The purpose of this agreement is, first, to reduce incrementally the identified priority practices during a three year period beginning with the investigation, and second, to completely eliminate or compensate for such practices before the end of the same three years. Such an agreement reached before a regular section 301 action is required will suspend any "Super 301" investigations as long as the foreign country is in compliance with the agreement.<sup>44</sup>

Finally, under 19 U.S.C.A. section 2420, the USTR is required to submit annual reports which include (1) changes in the previous year with respect to trade deficits with identified priority countries, and (2) evidence of such changes, in the form of increased U.S. exports to priority countries having entered into and complying with Super 301 agreements, or the elimination of identified priority practices if the priority country has not entered into (or is not complying with) such an agreement. After 1993, the USTR is authorized to exclude those identified priority countries from such annual reports if evidence in the two

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(A) priority practices, including major barriers and trade distorting practices, the elimination of which are likely to have the most significant potential to increase U.S. exports . . .

(B) priority countries that . . . satisfy the criteria in paragraph (2) . . . .

See also, *id.* § 2242.

41. *Id.* § 2420(a)(3).

42. *Id.* § 2420(a)(2).

43. *Id.* § 2420(b).

44. *Id.* § 2420(c).

previous reports demonstrates that all priority practices with respect to such foreign countries have been eliminated. Also, to the extent evidence of reduction of surpluses or compliance with agreements cannot be provided, the USTR must include those section 2411 actions which may be taken with respect to priority countries.<sup>45</sup>

Thus, the USTR has considerable additional authority and responsibility under "Super 301" to identify and deal with those countries engaged in "unfair trade practices." Such a powerful tool should prove helpful in eliminating trade surpluses experienced both in priority and other countries since all countries could reasonably be expected to attempt to "position themselves" in such a way as to not be targeted for special treatment under "Super 301".

### III. SECTIONS 337 AND 337A — UNFAIR PRACTICES IN IMPORT TRADE

The changes to section 337 procedures increase the level of unfair import and trade protection available to domestic entities by streamlining the process barring infringing imports and easing the burden on the petitioner in a section 337 action. Under section 337, the International Trade Commission (ITC) conducts investigations concerning complaints of unfair import trade practices and generally issues relief to domestic entities in the form of exclusion, cease and desist, and consent orders.<sup>46</sup>

#### A. *Prior Law*

Under prior law,<sup>47</sup> Congress provided relief to domestic entities from unfair practices in import trade. Former section 1337(a) declared unlawful the following: unfair methods of competition, unfair acts of importation of articles into the U.S., or unfair sale of such articles, the effect or tendency of which is to destroy, substantially injure, or prevent the establishment of an economically and efficiently run domestic industry, or the effect or tendency of which is to restrain or monopolize U.S. trade and commerce.<sup>48</sup>

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45. *Id.* § 2420(d).

46. 19 U.S.C.A. § 1337 (d)-(f) (West 1980 & West Supp. 1988)..

47. 19 U.S.C. § 1337 (a)-(j) (1982 & Supp. IV 1986).

48. 19 U.S.C. § 1337(a) (1982); L. GREEN, *THE 1988 OMNIBUS TRADE BILL AND INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY*, 1 (1989).

Section 1337(a) provided that "the importation for use, sale, or exchange of a product made, produced, processed or mined under or by means of a process covered by . . . any . . . valid United States letters patent, shall have the same status for the purposes of section 1337" as a product covered by a valid patent.<sup>49</sup> This section has been repealed by the Trade Bill.

### B. Omnibus Trade Act of 1988

The intended effect of the Omnibus Trade Act of 1988 on section 1337 was to streamline and ease the burdens on section 1337 petitioners.

#### 1. Section 1337(a)

The amendments to section 1337(a) concern the unlawful importation into the U.S., sale for importation, or sale within the United States after importation of articles that infringe a valid *registered* intellectual property right, including products from a valid process patent. As amended, section 1337(a) does not require a showing of an injury continues to require a showing that a U.S. industry relating to the articles protected by patent, copyright, trademark or mask work concerned, exists or is in the process of being established, and does not require a showing that the U.S. industry is economic and efficient. Under the Trade Bill, existence of a U.S. industry can be shown by the following: significant investment in plant and equipment, significant employment of labor or capital, or substantial investment in its exploitation, including engineering, research and development, or licensing.<sup>50</sup>

Another significant addition to section 1337(a)(1)(B)-(D) is the express language providing for the unlawful sale of articles infringing a validly *registered* intellectual property right within the United States and after importation. Prior trade law did not provide such protection to domestic intellectual property rights, but the Trade Bill now effectively discourages sale by domestic companies of imported infringing articles.<sup>51</sup> However, as for the unlawful importation of articles *not the subject of a registered* intellectual property right, such as misuse or misappropriation

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49. 19 U.S.C. § 1337a (1982).

50. 19 U.S.C.A. § 1337(a)(1)(B)-(D), (2)-(3) (West Supp. 1988); L. GREEN, *supra* note 48, at 1-2.

51. *Id.* § 1337(a)(1)(B)-(D).

of a trade secret, section 1337(a) remains the same as before and the streamline treatment is not allowed.<sup>52</sup>

## 2. Other amendments

*a. Termination.* Under section 1337(c) of the Trade Bill, “the Commission may, by issuing a consent order or on the basis of a settlement agreement, terminate [an] investigation, in whole or in part, without” determining if a violation of the section occurred.<sup>53</sup>

There was no prior counterpart to this section in the “old section 337,” but termination and consent orders are and were common before the passage of the Trade Bill. Previously, termination of section 337 investigations took place pursuant to 19 C.F.R. section 210.51.

*b. Preliminary and temporary relief.* “The Commission may grant preliminary relief under this subsection or subsection (f) of this section to the same extent as preliminary injunctions and temporary restraining orders may be granted under the Federal Rules of Civil Procedure.”<sup>54</sup> Such relief must issue, if at all, within 90 days, extendable for an additional 60 days in complicated cases, from the date of publication in the Federal Register of the notice of investigation.<sup>55</sup> Also, before issuance of such preliminary relief, “[t]he Commission may require the complainant to post a bond as a prerequisite to the issue of an order . . .”<sup>56</sup>

Former section 1337(e) provided for exclusion of articles during the course of an investigation if the Commission determined that there was reason to believe a violation had occurred.<sup>57</sup> The new Trade Bill section cited above expands this prior remedy. Motions for temporary relief were made previously pursuant to 19 C.F.R. section 210.24(e)(1) or (2).

*c. “Default” orders.* Under section 1337(g)(1) of the Trade Bill, express provision is made for “default” orders in the form of a limited exclusion order or a cease and desist order or both,

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52. *Id.* § 1337(a)(1)(A); L. GREEN, *supra* note 48, at 2.

53. *Id.* § 1337(c); L. GREEN, *supra* note 48, at 2.

54. *Id.* § 1337(e)(3) (referring to Fed. R. Civ. P. 65).

55. *Id.* § 1337(e)(2).

56. *Id.* § 1337(e)(2); L. GREEN, *supra* note 48, at 3.

57. 19 U.S.C. § 1337(e) (1982).

if a particular respondent fails to appear or respond having been served.<sup>58</sup>

Similarly, under section 1337(g)(2), a petitioner may obtain a "default" order "in the form of a *general* exclusion order if no one contests the investigation and the violation is established by substantial and credible evidence."<sup>59</sup>

Prior statutes had no such provisions. However, under 19 C.F.R. section 210.25, default was defined and relief for default was granted if the record established a *prima facie* case of a section 337 violation by a defaulting respondent, an appropriate remedy existed, and the public interest did not preclude such relief. Also, under this same regulation, in determining whether a *prima facie* case has been made, certain inferences adverse to the respondent in default could be drawn according to 19 C.F.R. section 210.36 if the complainant made a good faith but unsuccessful effort to obtain evidence.

*d. Forfeiture.* The Commission can order forfeiture of articles if (1) import into the United States was previously attempted, (2) the articles were previously denied entry by reason of a Commission order, and (3) upon the previous denial of entry, the owner, importer, or consignee of the articles received notice from the Secretary of the Treasury of the order and the seizure that would result on subsequent attempts to import.<sup>60</sup>

58. 19 U.S.C.A. § 1337(g)(1) (West Supp. 1988); L. Green, *supra* note 48, at 3. Section 1337(g)(1) provides:

(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 . . . [contrary to public health, welfare, or other competitive interests].

59. *Id.* § 1337(g)(2); L. GREEN, *supra* note 48, at 3. Section 1337(g)(2) provides in relevant part:

(2)[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, and
- (B) such a violation is established by substantial, reliable, and probative evidence.

60. *Id.* § 1337(i)(1); L. GREEN, *supra* note 48, at 3.

This section of the Trade Bill had no previous counterpart in statutory or regulatory law.

*e. Civil penalties for violation of orders.* Under section 1337(f)(2) of the Trade Bill, violations of Commission orders are subject to a fine of \$100,000 per day or twice the value of the articles concerned, whichever is greater.<sup>61</sup> Under previous law, such violations were subject to a fine of \$10,000 per day or the value of the articles concerned, whichever was greater.<sup>62</sup> Obviously, this new penalty is much greater and will have a larger deterrent effect on potential violators of Commission orders.

*f. Combined relief.* Pursuant to section 1337(f) of the Trade Bill, the Commission may issue both an exclusion order and a cease and desist order in the same case.<sup>63</sup> Although former section 1337(f) stated that cease and desist orders were "in lieu of taking action under subsection (d) or (e)" both orders could be issued in the same case with respect to different goods.<sup>64</sup>

*g. Modification or rescision of exclusion order.* An "exclusion from entry or order . . . continue[s] in effect until the Commission finds . . . that the conditions which led to such exclusion from entry or order no longer exist."<sup>65</sup> Furthermore, a person found to have violated section 1337 may petition the Commission for a determination that the petitioner is no longer in violation of section 1337, or for a modification or rescision of an exclusion from entry or order under subsection (d), (e), (f), (g), or (i) of section 1337. For such a petition, the burden of proof is on the petitioner. The Commission may grant relief in response to such a petition "on the basis of new evidence or evidence that could not have been presented at the prior proceeding, or on grounds which would permit relief from a judgment or order under the Federal Rules of Civil Procedure."<sup>66</sup>

Prior statutory law did not have any counterpart to this section. However, 19 C.F.R. section 211.57 provided for the modification or dissolution of final Commission orders upon changed

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61. *Id.* § 1337(f)(2).

62. 19 U.S.C. § 1337(f)(2) (1982).

63. 19 U.S.C.A. § 1337(d),(f),(e) (West 1980 & West Supp. 1988); L. GREEN, *supra* note 48, at 4.

64. 19 U.S.C. § 1337(f) (1982); *Certain Dynamic Random Access Memories, Components Thereof and Products Containing the Same*, Inv. No. 337-TA-242, USITC Pub. No. 2034 (1987) (The views of Commissioner Rohr, Chairman Liebeler, and Vice Chairman Brunsdale) (citations omitted).

65. 19 U.S.C.A. § 1337(k)(1) (West Supp. 1988).

66. *Id.* § 1337(k)(2).



conditions of fact or law *sua sponte*, or upon motion by any person.

### 3. Section 337 — Conclusions

These "streamlining" amendments serve to considerably ease the burden on the petitioner in a section 337 action. These provisions will also serve to enhance the petitioner's bargaining power against respondents. This increased bargaining power is further enhanced by the availability of preliminary relief, stricter civil penalties and forfeiture provisions in the new Trade Bill. Such amendments, taken together, are powerful tools in the hands of the United States to encourage free trade. Finally, another benefit of the "new" section 1337 is that it will encourage the registration of intellectual property rights, where possible, because of the easier burden on holders of such rights under section 1337(a).

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