The Heritage Foundation

BACKGROUNDER

No. 3114 | JUNE 2, 2016

Section 337 of the Tariff Act: Fighting Distortionary Import Trade and Strengthening American Intellectual Property Rights

Alden F. Abbott

Abstract

Free trade policies promote a strong economy and protect the rights of individuals to pursue their own interests. The full benefits of international trade will not be realized, however, if sales and purchase decisions are distorted by anticompetitive behavior or other illegitimate commercial conduct that undermines market forces. The provision of U.S. trade law that is targeted most specifically at anticompetitive and other harmful business conduct affecting American imports is Section 337 of the Tariff Act of 1930. Section 337 condemns as illegal imports that violate U.S. intellectual property rights related to a U.S. industry or involve "unfair methods of competition and unfair acts" that harm a U.S. industry. Congressional consideration of reforms that address policy constraints on its application, potential limitations on its reach, and the breadth of the conduct it covers could help Section 337 to become an even more valuable tool with which to protect U.S. intellectual property rights and combat truly unfair competition in a manner that is consistent with general free trade principles.

International trade restrictions already have generated substantial commentary and may loom large during the 2016 U.S. presidential campaign.[1] Accordingly, sound analysis of U.S. international trade regulation is particularly timely and important.

Public policies that rely on free-market forces and avoid government interventions that distort terms of international trade benefit producers, consumers, and national economies alike. "According to data in the annual [Heritage Foundation] *Index of Economic Freedom*, countries with low trade barriers are more prosperous than those that restrict trade."[2] Specifically:

Key Points

- Intellectual property rights are fundamental to economic growth, encouraging innovation and facilitating the commercialization of new products.
- To ensure the benefits of IP protection, federal law imposes steep penalties to deter IP infringers.
- The provision of U.S. trade law that is targeted most specifically at anticompetitive and other harmful business conduct affecting American imports is Section 337 of the Tariff Act of 1930.
- Section 337 is broadly designed to protect American markets from unfair competition generated by foreign producer practices that distort market forces.
- Section 337 declares unlawful "unfair methods of competition and unfair acts" in the importation of "articles" into the U.S. as well as post-importation sales by the owner, importer, or consignee that infringe federal statutory IP rights.
- Section 337 allows industries to protect their interests and compete on an undistorted playing field with imported products, and a few carefully tailored amendments could make the statute even more effective.

This paper, in its entirety, can be found at **http://report.heritage.org/bg3114**

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

> [F]ree and open trade has fueled vibrant competition, innovation, and economies of scale, allowing individuals and businesses to take advantage of lower prices and increased choice. As a result, billions of people around the world have escaped the constraints of subsistence farming and extreme poverty that characterized the lives of most of humanity throughout history.[3]

The full benefits of international trade will not be realized, however, if sales and purchase decisions are distorted by anticompetitive behavior or other illegitimate commercial conduct (such as theft, fraud, or deceit) that undermines market forces. Transactions affected by such types of illicit business behavior do not reflect the efficient working of a free market. Thus, it is appropriate for governments to enact laws that seek to correct for such international trade distortions, and the United States has adopted a number of statutes with this end in mind.[4]

The provision of U.S. trade law that is targeted most specifically at anticompetitive and other harmful business conduct affecting American imports is Section 337 of the Tariff Act of 1930.[5] Section 337 condemns as illegal imports that:

- Violate U.S. intellectual property (IP) rights related to a U.S. industry or
- Involve "unfair methods of competition and unfair acts" that cause harm to a U.S. industry.

The U.S. International Trade Commission (USITC), an independent federal agency, is required to investigate allegations of Section 337 violations and direct the exclusion of the articles concerned when a violation is found, unless it deems that specified public policy conditions counsel against exclusion. The USITC may also issue "cease and desist" orders in lieu of exclusion orders. The President may disapprove ("for policy reasons") a Section 337 exclusion or cease-and-desist order within 60 days after he receives the proposed order from the USITC, but this has seldom been done.

In recent decades, almost all Section 337 cases have involved violations of U.S. IP rights, especially patents.[6] Overall, Section 337 does a good job of protecting the rights of American IP holders. In so doing, it discourages imports that "free ride" on U.S. technology and thereby artificially distort the terms of competition in the affected American product markets. But the statute could be improved. Congressional consideration of possible targeted statutory reforms to address "policy" constraints on Section 337's application, potential limitations on its reach, and the breadth of the conduct it covers could make it an even more valuable tool with which to protect U.S. IP holders and combat truly unfair competition in a manner that is consistent with general free trade principles.

IP Rights: Strengthening the American Economy and Protecting the Rights of Innovators

Before assessing Section 337's role in protecting federally protected IP rights, an understanding

1. See generally Ballotpedia, "2016 Presidential Candidates on International Trade," https://ballotpedia.org/2016_presidential_candidates_on_international_trade (accessed March 18, 2016).
2. Bryan Riley and Anthony B. Kim, "Freedom to Trade: A Guide for Policymakers," Heritage Foundation *Backgrounder* No. 3064, October 20, 2015, p. 3, http://thf-reports.s3.amazonaws.com/2015/BG3064.pdf.
3. Ibid., pp. 1–2.
4. For a discussion of U.S. antidumping law, the American statutory schemes directed at the "unfairly low" pricing of U.S. imports, see Alden F. Abbott, "U.S. Antidumping Law Needs a Dose of Free-Market Competition," Heritage Foundation *Backgrounder* No. 3030, July 17, 2015, http://www.heritage.org/research/reports/2015/07/us-antidumping-law-needs-a-dose-of-free-market-competition.
5. 19 U.S.C. § 1337.
6. During the 1970s, the USITC's application of Section 337 in non-IP-related cases generated substantial controversy and may have convinced the agency to narrow its focus to IP. As discussed herein, other federal trade laws such as antidumping law (dealing with "unfairly low" pricing); countervailing duty law (dealing with foreign government subsidies to exporters that distort trade); and the "Escape Clause" (Section 201 of the Trade Act of 1974, which allows the President to impose limitations on imports that the USITC finds are injuring or threatening to injure a U.S. industry) have been employed to remedy non-IP-related harm to U.S. producers. See U.S. International Trade Commission, "Antidumping and Countervailing Duty Laws Under the Tariff Act of 1930," https://www.usitc.gov/press_room/usad.htm (accessed March 4, 2016), and Daniel B. Pickard, "The Future of Section 201: Safeguard Actions in International Trade Law in Light of WTO Review," *The Metropolitan Corporate Counsel*, June 2006, p. 10, http://www.metrocorpcounsel.com/pdf/2006/June/10m.pdf (accessed March 28, 2016).

of the increasing importance of those rights to the American economy is essential.

IP rights—in particular, patents, copyrights, and trademarks—are fundamental to economic growth. They encourage innovation by allowing inventors, authors, and other creative individuals to reap the rewards of their labor and by facilitating the commercialization of new technologies and products. Recognizing their importance, the Founding Fathers explicitly provided for the protection of IP rights under Article I, Section 8, Clause 8 of the Constitution (the IP Clause), which states:

> The Congress shall have Power To...promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries....[7]

Over the past 225 years, Congress has acted vigorously to protect the rights of IP holders. Under its authority found in the IP Clause and the Commerce Clause of the Constitution, Congress has enacted robust IP laws,[8] revising and extending them as necessary to deal with new technologies and novel forms of IP.[9] These efforts have paid huge dividends for America's economy, which has become increasingly IP-reliant, reflecting the technological advances that now pervade all segments of American industry.[10] A few statistics drawn from a 2012 U.S. Department of Commerce report and other recent scholarly research illustrate IP's importance to the American economy:

- IP-intensive industries added $5.06 trillion in value to U.S. gross domestic product (GDP) in 2010;[11]
- In 2010, 60.7 percent of U.S. merchandise exports stemmed from IP-intensive industries;[12]
- In 2012, IP was estimated to have directly created 19 million jobs and supported 55 million jobs;[13]
- IP-spurred innovation has bolstered U.S. growth and employment by over 40 percent;[14]
- The average worker in an IP-intensive industry earned about 30 percent more than his or her counterpart in a non-IP industry;[15] and
- America's IP is worth $5.8 trillion, more than the nominal GDP of any other country in the world.[16]

To ensure the benefits of IP protection, federal law imposes steep penalties to deter IP infringers.[17] The general nature of federal IP sanctions is well

7. U.S. Const., art. I, § 8, cl. 8. Since 1790, this clause has been invoked by Congress to support enactment of patent and copyright laws.
8. For a good account of Congress's long-standing support for IP rights and the high regard in which the Framers of the Constitution held those rights, see Randolph J. May and Seth L. Cooper, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (Durham, NC: Carolina Academic Press, 2015).
9. Congress has provided protection for new forms of IP, including trademarks, design patents, and semiconductor chip design mask works, under the Commerce Clause of the Constitution (U.S. Const., art. I, § 8, cl. 3), which provides that "Congress shall have Power...To regulate Commerce...among the several States...."
10. U.S. Department of Commerce, *Intellectual Property and the U.S. Economy: Industries in Focus*, March 2012, p. vi, http://www.uspto.gov/sites/default/files/news/publications/IP_Report_March_2012.pdf (accessed March 28, 2016).
11. Ibid., p. vii.
12. Ibid., p. viii.
13. Nam D. Pham, Joseph Pelzman, Justin Badlam, and Anil Sarda, *The Economic Benefits of Intellectual Property Rights in the Trans-Pacific Partnership*, NDP Analytics, February 2014, http://static1.squarespace.com/static/52850a5ce4b068394a270176/t/52fd37f6e4b0931510f510da/1392326646083/TPP+February+2014.pdf (accessed April 4. 2016).
14. U.S. Chamber of Commerce, Global Intellectual Property Center, *Why Is IP Important?* 2012, http://www.theglobalipcenter.com/resources/why-is-ip-important/ (accessed March 28, 2016).
15. Ibid.
16. Ibid.
17. See Brian T. Yeh, "Intellectual Property Rights Violations: Federal Civil Remedies and Criminal Penalties Related to Copyrights, Trademarks, and Patents," Congressional Research Service *Report for Congress* No. RL34109, December 13, 2012, https://www.fas.org/sgp/crs/misc/RL34109.pdf (accessed March 28, 2016).

illustrated by patent law.[18] Successful plaintiffs in patent litigation may be awarded lost profits, legal costs, and even treble damages.[19] Additionally, they may secure either preliminary or post-trial injunctions, federal court orders mandating that the defendant cease the challenged activity.[20] Because they directly block infringing activity, injunctions are a particularly powerful remedy for patentees. Federal court injunctive relief has become rare, however, as a result of an important 2006 Supreme Court decision.

In *eBay Inc. v. MercExchange, L.L.C.*,[21] the Supreme Court of the United States ruled unanimously that patent infringement does not automatically result in the issuance of an injunction. For a party to be granted injunctive relief, it must demonstrate that:

- The injury will be irreparable,
- No existing legal remedy exists to sufficiently compensate the plaintiff,
- It has suffered more hardship than the respondent, and
- The injunction would not trump the public interest.

These stringent requirements substantially lessen the ability of petitioners—who at the same time must absorb enormous litigation cost burdens when they seek to defend their property rights in court—to obtain injunctive relief.[22]

While *eBay* sharply limited injunctive relief for patent holders involved in domestic cases, patentees can still obtain generous damages from domestic infringers in lieu of an injunction. U.S. patent holders are, however, virtually defenseless when protecting themselves against foreign parties. U.S. federal courts are empowered to adjudicate IP cases between parties holding assets within the United States, but they are often powerless to enforce IP rights when the infringer is located outside of U.S. jurisdiction.[23] Unless the foreign violator holds assets within the United States, the courts cannot deter foreign producers from breaking U.S. patent law. Thus, firms engaged in multinational disputes must litigate in multiple jurisdictions, which can lead to inconsistent outcomes and further swell court costs.[24] This is a serious problem for U.S. inventors.

Furthermore, the United States is particularly ripe for patent infringement. It is the world's largest importer, and its people expect a high quality standard for consumer goods.[25] Thus, foreign producers seeking shares of the U.S. market are tempted to cheat and plagiarize profitable, patented American ideas.[26] Because foreign producers often cannot be held to account for infringement in U.S. courts (unless they have assets in the United States that can be used to pay a judgment), their infringements reduce the profits of victimized American IP holders, thereby discouraging future innovation and slowing economic growth.

18. The following discussion of IP remedies focuses primarily on patent rights, which are by far the most frequently invoked in Section 337 cases, but the principles applicable to patent protection under Section 337 also apply to other forms of federally protected IP.
19. William Harris, "How Patent Infringement Works," HowStuffWorks.com, January 12, 2011, http://science.howstuffworks.com/innovation/new-inventions/patent-infringement3.htm (accessed March 28, 2016).
20. Ibid.
21. *eBay Inc. et al. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), http://www.supremecourt.gov/opinions/05pdf/05-130.pdf (accessed April 4, 2016).
22. "The median amount billed by firms whose practice was 75% or more IP was $2,800,000, identical to the figure reported for 2012." American Intellectual Property Law Association, *2015 Report of the Economic Survey*, prepared by Association Research, Inc., June 2015, p. 57, http://files.ctctcdn.com/e79ee274201/b6ced6c3-d1ee-4ee7-9873-352dbe08d8fd.pdf (accessed March 28, 2016). This price is unaffordable for many patent holders. For more information on the cost of patent litigation, see generally Jim Kerstetter, "How Much Is that Patent Lawsuit Going to Cost You?" CNET, April 5, 2012, http://www.cnet.com/news/how-much-is-that-patent-lawsuit-going-to-cost-you/ (accessed March 28, 2016).
23. Daniel R. Pearson, "Patent Rights and Imported Goods," Cato Institute *Policy Analysis* No. 780, September 15, 2015, p. 3, http://www.cato.org/publications/policy-analysis/patent-rights-imported-goods (accessed March 28, 2016).
24. Alan W. Kowalchyk, "Resolving Intellectual Property Disputes Outside of Court: Using ADR to Take Control of Your Case," *Dispute Resolution Journal*, Vol. 61, No. 2 (May–July 2006), p. 35.
25. Observatory of Economic Complexity, "United States," Massachusetts Institute of Technology Media Lab Macro Connections Group, http://atlas.media.mit.edu/en/profile/country/usa/ (accessed February 18, 2016).
26. Pearson, "Patent Rights and Imported Goods," p. 2.

Section 337 of the Tariff Act of 1930 offers a remedy for this problem, serving as a substitute for injunctive relief.

Section 337: Providing Relief Not Available to the Courts

Responding to a renewed demand for protectionism after World War I, Congress enacted Section 337 as part of the Tariff Act of 1930.[27] Section 337 has evolved substantially over the years.[28]

- As originally written, the statute proved to be rather limited and ineffectual due to textual weaknesses (it did not provide a clear administrative mechanism for obtaining import relief) and institutional weaknesses (especially resource constraints and lack of expertise) that plagued the U.S. Tariff Commission, the agency that enforced the law.

- The law was substantially rewritten and strengthened by the Trade Act of 1974. That Act transformed the Tariff Commission into the U.S. International Trade Commission (USITC), a revamped five-member independent agency that was given more resources for investigations and analysis as well as strengthened adjudicatory powers.

- Further statutory amendments in 1988 made Section 337 an even more effective tool for combating unfairness in import trade and, in particular, violation of U.S. IP rights.

- A few additional statutory changes in 1994 were designed to ensure that Section 337 comported with the U.S.'s obligations as a World Trade Organization member nation to afford "national treatment" to imported articles (national treatment requires giving the same protections to imported goods as to nationally produced goods).[29]

The current version of the statute is broadly designed to protect American markets from unfair competition generated by foreign producers' practices (primarily IP infringements) that distort market forces. Unlike the court system, Section 337 litigation offers no ability to recoup monetary damages. It offers, however, two other strong remedies to protect the interest of IP holders.

First, a USITC ruling in favor of the plaintiff generally leads to an exclusion order that disallows the foreign respondent from exporting the challenged good into the country.[30] These orders serve as *de facto* injunctions. For example, an exclusion order against a copycat patent-infringing medicine produced by a foreign pharmaceutical company would enable U.S. Customs to prevent the medicine from being imported into the United States. Moreover, when exclusion orders directed merely to particular respondents are insufficient to provide effective relief from infringement, the USITC may issue

27. Tom Schaumberg, *A Lawyer's Guide to Section 337 Investigations Before the U.S. International Trade Commission* (Chicago: American Bar Association, Section of Intellectual Property Law, 2012), p. 5. For an overview of the descent into protectionism, see U.S. Department of State, "Smoot–Hawley Tariff," http://future.state.gov/when/timeline/1921_timeline/smoot_tariff.html (accessed March 28, 2016).
28. For a general discussion of the evolution of Section 337, see Joshua D. Furman, "Reports of Section 337's Death Have Been Greatly Exaggerated: The ITC's Importance in an Evolving Patent Enforcement Environment," *Berkeley Technology Law Journal*, Vol. 30, Annual Review (2015), pp. 489–529, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2595765 (accessed March 28, 2016); Lindsey E. Martinez, "ITC Section 337 Practice: Beyond Patent Infringement," Snell & Wilmer, 2011, http://www.swlaw.com/assets/pdf/news/2011/05/20/ITCSection337Practice_Martinez_WEB.pdf (accessed March 28, 2016); Richard G. Allison, "Section 337 Proceedings Before the International Trade Commission: Antiquated Compromise or Model Forum for Patent Dispute Resolution?" *New York University Journal of Law & Business*, Vol. 5, No. 2 (Summer 2009), pp. 873–904, http://www.nyujlb.org/wp-content/uploads/JLBv5n2_11.pdf (accessed March 28, 2016); and Shara L. Aranoff, "The U.S. International Trade Commission, Section 337, and Patents—Looking Back and Looking Forward," speech before the Berkley Center for Law and Technology, University of California, May 18, 2010, https://www.law.berkeley.edu/files/Aranoff-ITC-Comments.pdf (accessed March 28, 2016).
29. For a discussion of the national treatment obligation and the 1994 amendments, See Pearson, "Patent Rights and Imported Goods," pp. 6–8. The four statutory amendments aimed at ensuring national treatment that were adopted in 1994 (1) tightened the standards for issuing "general" exclusion orders applicable to all imports from any source (as opposed to the normal remedy of "limited" exclusion orders applicable to the specific products of named respondents); (2) eliminated mandatory time limits for completing investigations; (3) required a federal district court to stay its patent infringement proceedings at the request of a party involved in a Section 337 investigation; and (4) allowed Section 337 respondents to raise counterclaims that are immediately removable to federal district court.
30. 19 U.S. Code § 1337.

a "general" exclusion order against all infringing imports from any source, including sources not named in the investigation, which may be useful when the source of infringing imports is not readily identifiable.

Overall, these statutory provisions effectively allow U.S. producers to block the source of continuing harm due to infringing imports, not just to be compensated for continuing harm suffered. Relatedly, by making it much harder to obtain a court injunction, the Supreme Court's decision in *e-Bay* led many more U.S. patent-holder victims of foreign patent infringement to seek Section 337 relief at the USITC rather than in federal court.

Second, a successful plaintiff in a Section 337 case may also be rewarded with issuance of a cease-and-desist order against the respondent.[31] If a respondent continues to import the infringing imports in violation of the order, it faces civil penalties of up to twice the amount of the value of the illicit imports. While this penalty is not as significant as an exclusion order, it nevertheless offers additional deterrence.

In addition, the ease, cost-efficiency, and speed of the USITC's quasi-judicial Section 337 process make it a particularly attractive forum for protecting patent rights. Contrary to federal district court procedure, all known violators of a patent right may be investigated under one umbrella Section 337 case. In addition, the USITC serves complaints to alleged violators directly by mail.[32]

Section 337 complaints are now investigated and adjudicated in a more formalized court-like setting by USITC administrative law judges, many of whom possess patent expertise (a rarity among federal court judges). These complaints need not be translated, unlike in other proceedings.[33] After 10 days, if there has been no response to a complaint, the Federal Trade Commission (FTC) may issue a default judgment swiftly banning the challenged product from being imported.[34] When a trial does occur, the USITC rules "at the earliest practicable time" (normally within a year, with 18 months allowed for "more complicated" inquiries,[35] although a few exceptional cases have taken more time).

These timetables are much faster and involve lower discovery costs than are involved in federal district court litigation. Hence, Section 337 litigation is effective and much less costly than traditional patent suits for American IP holders who are confronted by foreign infringers.

In recent years, Section 337 increasingly has been invoked by U.S. patent holders as a way to secure relief from infringing imports. In 2009, the USITC instituted 31 cases.[36] By 2011, the number of cases had grown to 69.[37] Absent some unexpected development, it may be expected that the number of Section 337 filings will to continue to grow as patents continue to be issued in large numbers, technologies are diffused broadly, and globalization leads to the siting of high-tech production facilities in more foreign locales.

Key Elements of Section 337[38]

Section 337 covers two types of violations.

First, it declares unlawful "unfair methods of competition and unfair acts" in the importation of "articles" into the United States (as well as sales after importation by the owner, importer, or consignee) that do not involve federally protected IP rights if such importation (1) threatens to destroy, substantially injure, or prevent the establishment of a U.S. industry or (2) threatens to restrain or monopolize U.S. trade or commerce. This first "leg" of the statute has given rise to very few Section 337 investigations in recent decades and does not merit much additional attention here.[39]

31. Ibid.
32. Ibid.
33. Martinez, "ITC Section 337 Practice: Beyond Patent Infringement."
34. Ibid.
35. Ibid.
36. Schaumberg, *A Lawyer's Guide to Section 337 Investigations Before the U.S. International Trade Commission*, p. 6.
37. Ibid.
38. The following summary draws upon the language of Section 337, codified at 19 U.S. Code § 1337.
39. This may reflect the substantial criticism directed at the USITC during the 1970s alleging that the agency's efforts to pursue non-IP-related Section 337 cases interfered with U.S. international economic policy. See "Section 337 Violations Not Involving IP Infringement," *infra*.

Second, Section 337 declares unlawful the importation of "articles" into the United States (as well as post-importation sales by the owner, importer, or consignee) that infringe the full panoply of federal statutory IP rights, including U.S. patents, copyrights, federally registered trademarks, federally registered designs, and federally registered semiconductor chip mask works. These IP-infringing imports violate Section 337, however, only if there exists a U.S. industry (or one is being established) related to the articles protected by U.S. IP rights. Such an industry exists if there is shown to be (1) "significant investment in plant or equipment," (2) "significant employment of labor or capital," or (3) "substantial investment in" IP-related "exploitation, including engineering, research and development, or licensing."

The third element reflects the increasing importance of IP licensing in the modern economy. Major American companies like Interdigital, Qualcomm, and Microsoft obtain enormous revenues from licensing their IP,[40] which in turn is an incentive for them to invest in future innovations and thereby spur the economy. Once the U.S. industry requirement is met, the infringement of federal statutory rights automatically establishes a Section 337 violation.

The USITC is required to investigate any alleged violation of Section 337 presented to it, or it may undertake such an investigation on its own initiative. Based on its investigation, the commission "shall determine" whether or not there is a violation of Section 337, except that it may terminate the investigation if all parties agree to the entry of a consent order or to the submission of the matter to binding arbitration. If the USITC determines there is a violation, "it shall direct that the articles concerned…be excluded from entry into the United States," and that order shall be enforced by the U.S. Treasury Department.[41]

There is, however, one important "public policy" exception to this directive: The USITC shall not issue an exclusion order if it finds that the articles in question should not be barred from entry "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." In addition, the President has 60 days after he is notified of a Section 337 decision to disapprove it "for policy reasons" and thereby automatically block its implementation, an authority that has been invoked only six times.[42]

Finally, any person "adversely affected" by a final USITC decision—including, most importantly, a decision to issue an exclusion order or a decision not to do so on "public policy" grounds[43]—may appeal that decision to the U.S. Court of Appeals for the Federal Circuit. In reviewing such appeals, the Federal Circuit applies the Administrative Procedure Act,[44] which provides that federal agency decisions are to be struck down if they are "arbitrary or capricious" or "unsupported by substantial evidence."

Current Section 337 Controversies

The application of Section 337 has generated substantial litigation and commentary in recent years.[45] Four Section 337 issues in particular merit highlighting, given their importance to the ability of the statute to provide relief to victims of IP infringement:

40. Matt Larson, "Monetizing Patents: Trends in Royalties and Licensing," Bloomberg Intelligence, July 20, 2015, http://www.bloomberg.com/professional/blog/monetizing-patents-trends-in-royalties-and-licensing/ (accessed March 28, 2016).
41. Furthermore, the USITC may grant preliminary relief, including exclusion of articles during an investigation (subject to entry under bond), if the USITC "determines that there is reason to believe that there is a violation of" Section 337. Also, as noted, the USITC may issue "cease and desist" orders requiring persons to stop engaging in unfair methods or acts. Parties that violate such orders are subject to fines that may be collected in suits brought by the United States in federal district courts, which may also issue injunctions incorporating relief sought by the USITC in the enforcement of its orders.
42. Furman, "Reports of Section 337's Death Have Been Greatly Exaggerated," p. 495.
43. USITC decisions that imports are infringing U.S. IP rights and either merit being excluded from entry or merit being allowed to enter despite their infringing nature (taking into account "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") are fully reviewable by the Federal Circuit.
44. 5 U.S. Code §§ 701–706.
45. For a good overview recent Section 337 controversies, see Furman, "Reports of Section 337's Death Have Been Greatly Exaggerated," pp. 502–526.

- The statute's role vis-à-vis "patent assertion entities";
- Its application to non-tangible imports, such as data collections;
- Its application to items that do not directly infringe at the time of importation; and
- The scope of the President's ability to overturn Section 337 exclusion orders on public policy grounds.

In addition, consideration of a statutory amendment precluding Section 337's application to non-IP-related unfair importation could help to ensure that the statute is applied consistently in a procompetitive, pro–free trade manner.

Section 337 and Patent Assertion Entities. Patent assertion entities (PAEs) are companies whose primary business model involves acquiring (or aggregating) patents developed by other parties and asserting the patents against companies that allegedly are employing the patented technology. PAEs make money either by obtaining licensing royalties up front or by suing parties for patent infringement and (typically) settling the suits for a specified sum of money.

PAEs are also sometimes called "patent trolls" because "rather than producing anything," they allegedly impose an inefficient tax on productive companies. Although some PAEs undoubtedly harm the economy by filing abusive lawsuits, many contribute to economic growth and efficiency:

> Although patent trolls undoubtedly have been responsible for individual wasteful lawsuits, the extent to which they actually have spawned a serious patent litigation problem is very much in question....
>
> [P]atent aggregators facilitate an efficient division of labor between inventors and those who wish to use those inventions for the betterment of their fellow man, allowing inventors to spend their time doing what they do best: inventing. Patent aggregators can expand access to patent pools that allow third parties to deal with one vendor instead of many, provide much-needed capital to inventors, and lead to a variety of licensing and sublicensing agreements that create and reflect a valuable and vibrant marketplace for patent holders and provide the kinds of incentives that spur innovation. They can also aggregate patents for litigation purposes, purchasing patents and licensing them in bundles....
>
> All of this is to say that there can be good patent assertion entities that seek licensing agreements and file claims to enforce legitimate patents and bad patent assertion entities that purchase broad and vague patents and make absurd demands to extort license payments or settlements.[46]

Some commentators have advocated precluding or limiting the Section 337 relief made available to PAEs. They have suggested such "reforms" as new USITC rules that would restrict the scope of relief granted PAEs,[47] application of the *eBay* standard to greatly limit the granting of exclusion orders,[48] statutory amendments to eliminate or greatly narrow the application of Section 337 to PAEs,[49] and (most drastic of all) repeal of Section 337.[50]

Such proposals lack merit. They ignore the fact that *eBay* is designed for situations in which patent infringers can be reached and assessed damages in the absence of injunctions, a situation that typically does not apply to exporters, who operate outside the jurisdiction of the United States. The proposals

46. Alden F. Abbott and John G. Malcolm, "A Measured Approach to Patent Reform Legislation," Heritage Foundation *Backgrounder* No. 3035, July 14, 2015, http://www.heritage.org/research/reports/2015/07/a-measured-approach-to-patent-reform-legislation.
47. Colleen V. Chien and Mark A. Lemley, "Patent Holdup, the ITC, and the Public Interest," *Cornell Law Review,* Vol. 98, No. 1 (November 2012), pp. 1–46, http://cornelllawreview.org/files/2013/02/Chien-Lemley.pdf (accessed March 28, 2016).
48. Robert W. Hahn and Hal J. Singer, "Assessing Patent Bias in Infringement Cases: A Review of International Trade Commission Decisions," *Harvard Journal of Law and Technology*, Vol. 21, No. 2 (Spring 2008), pp. 488–489.
49. Charlotte R. Lane, "The International Trolling Commission," *The Wall Street Journal*, October 8, 2013, p. A15, http://www.wsj.com/articles/SB10001424127887323308504579083701201429502 (accessed March 28, 2016).
50. Thomas F. Cotter, "The International Trade Commission: Reform or Abolition? A Comment on Collen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*," *Cornell Law Review Online*, Vol. 98 (2013), pp. 43–54, http://cornelllawreview.org/files/2013/05/Cotterfinal.pdf (accessed March 28, 2016).

also implicitly assume that denying PAEs Section 337 relief is an unalloyed good, ignoring the fact that many PAEs contribute substantially to economic growth and innovation. Denying economically beneficial PAEs vital protection from foreign infringers who cannot easily be reached may be expected to diminish the welfare-enhancing activities of those valuable patent intermediaries.

Two recent Federal Circuit Court of Appeals decisions have circumscribed Section 337's future application to PAEs seeking relief somewhat more modestly.

- In 2011, in *John Mezzalingua Associates v. International Trade Commission*,[51] the Federal Circuit held that Section 337's application to a domestic industry that exists due to "substantial investments in...licensing" requires that the licensing in question not be solely for the sake of litigation, but rather must be part of a broader licensing effort.

- In 2013, in *InterDigital Communications v. International Trade Commission*,[52] the Federal Circuit held that the licensing activity needed to satisfy the domestic industry requirement must have a tie to the specific asserted infringed patent.

Overall, these Federal Circuit holdings appear to be reasonable. They allow economically productive, wealth-producing licensing operations to obtain Section 337 relief while denying protection to PAEs that likely are not being deterred from engaging in truly innovative activity. In short, even though they slightly limit the scope of Section 337's protective reach in the case of PAEs, these judicial decisions likely will not materially weaken property rights protections or undermine the American economy.

Section 337 and Non-Tangible Imports. Section 337 applies to imported "articles" that infringe an IP right. In November 2015, in *ClearCorrect Operating v. International Trade Commission*,[53] the Federal Circuit held that electronic transmissions of digital data from abroad do not involve the importation of "articles" for purposes of Section 337, thereby stripping the USITC of jurisdiction over IP infringement facilitated through such transmissions.

If allowed to stand, this ill-reasoned decision will incentivize IP infringement schemes involving data imports, thereby harming U.S. IP holders. As the Motion Picture Association of America has noted, "[t]his ruling, if it stands, would appear to reduce the authority of the [US]ITC to address the scourge of overseas web sites that engage in blatant piracy of movies, television programs, music, books, and other copyrighted works."[54] The continued rapid growth of Internet-enabled data transfers suggests that the cost of infringing data transmissions to U.S. industry may become quite substantial.

Align Technology, Inc., held various U.S. patents covering the production of orthodontic tooth-straightening appliances, known as aligners. ClearCorrect LLC (ClearCorrect US) used patented Align Technology without authorization to create digital models of patients' teeth and transmitted those models electronically to its Pakistani affiliate, ClearCorrect Pakistan. The Pakistani affiliate manipulated those models and then transmitted final digital models back to the United States, where ClearCorrect US utilized them to make orthodontic aligners.

The USITC found that ClearCorrect Pakistan engaged in infringing activity in Pakistan and that data transmission of its digital models to the United States violated Section 337. ClearCorrect appealed the USITC's determination to the Federal Circuit, and a three-judge panel ruled two-to-one that the term "articles," which is not defined in the Tariff

51. *John Mezzalingua Associates, Inc. v. ITC*, 660 F.3d 1322 (Fed. Cir. 2011).

52. *InterDigital Commc'ns, LLC v. ITC*, 707 F.3d 1295, 1297–98 (Fed. Cir. 2013), rev'g In re Certain 3G Mobile Handsets and Components Thereof, Inv. No. 337-TA-613, USITC Pub. 4145 (April 2010), cert. denied, No. 12-1352 (U.S. October 15, 2013).

53. *ClearCorrect Operating, LLC v. ITC*, No. 2014-1527 (Fed Cir. Nov. 10, 2015) (slip op.), http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/14-1527.Opinion.11-6-2015.1.PDF (accessed April 4, 2016). For a more detailed discussion of this case and its implications, see Alden Abbott, "The Federal Circuit Fails to Connect Clearly with Modern Technology by Protecting Infringing Data Imports," Truth on the Market, November 10, 2015, http://truthonthemarket.com/2015/11/10/the-federal-circuit-fails-to-connect-clearly-with-modern-technology-by-protecting-infringing-data-imports/ (accessed March 28, 2016).

54. Russell Brandom, "The ITC Does Not Have Authority over the Internet, According to Federal Circuit," The Verge, November 10, 2015, http://www.theverge.com/2015/11/10/9704582/itc-clearcorrect-ruling-federal-circuit-open-internet (accessed March 28, 2016).

Act, refers to "material things," not to electronically transmitted digital data. In her dissent, Judge Pauline Newman argued unsuccessfully that the term "articles" was written broadly to be adaptable to new technologies, including data transmissions, noting that the U.S. Supreme Court itself has defined "articles of commerce" to include pure information.

A simple statutory amendment clarifying that the term "articles" as used in Section 337 covers all intangible items (including, of course, information) as well as tangible items that may cross national boundaries would deal with the problem of infringing data transmissions and prevent the use of electronic means to evade Section 337's protective reach.

Section 337 and Induced Infringement. In August 2015, in *Suprema, Inc. v. ITC*,[55] the Federal Circuit upheld the USITC's determination that under Section 337, goods that do not directly infringe a U.S. patent at the time they are imported nevertheless may be excluded from entry if they are used after importation to infringe directly at the inducement of the goods' seller.

Cross-Match Technologies owned four patents that involved certain fingerprint scanning devices. A Korean company, Suprema, Inc., made fingerprint scanners that an American company, Mentalix, Inc., bought and imported into the United States. Mentalix subsequently combined the scanners with Mentalix software and used and sold the scanners in the United States.

The USITC determined that Mentalix directly infringed a Cross-Match patent claim by integrating its software with the Suprema scanners. The USITC also found that Suprema was liable for inducing patent infringement by Mentalix in that it "willfully blinded" itself to and "actively encouraged" Mentalix's infringing U.S. activities. In addition, Suprema "aided and abetted" Mentalix's infringement by assisting Mentalix in getting Mentalix software to work with the scanners. Consequently, the USITC imposed a Section 337 exclusion order covering the importation of scanners used in the infringement.

Initially, a three judge Federal Circuit panel found no Section 337 violation, reasoning that there are no "articles that infringe" at the time of importation when direct infringement does not occur until after importation. A majority of the full Federal Circuit, however, reversed. It determined (1) that Congress had not definitively answered the question whether the term "articles that infringe" could apply to the inducement of post-importation direct infringement and (2) that deference to the USITC's interpretation of the statutory language was appropriate, particularly given legislative history "evidenc[ing] Congressional intent to vest the ITC with broad enforcement authority to remedy unfair trade acts."

The full Federal Circuit's *Suprema* majority decision has desirable economic implications because it forestalls schemes that would undermine IP rights by importing items that could be assembled into infringing products shortly after importation. Nevertheless, there is a strong argument, based on statutory interpretation, against the majority decision (supported by four dissenting Federal Circuit judges),[56] and the Supreme Court has yet to rule on this question.

A narrow statutory amendment to Section 337 making it clear that the term "articles that infringe" applies to cases of post-importation induced infringement would eliminate any remaining legal uncertainty in this area and promote sound public policy.

Scope of the President's Disapproval Authority. As noted, Section 337 authorizes the President to disapprove Section 337 exclusion or cease-and-desist orders "for policy reasons." Unlike USITC public policy determinations, such presidential decisions are not reviewable by the courts, and they grant the President unlimited discretion[57] to deny relief to U.S. IP holders that the USITC has found are the victims of IP infringement or unfair methods of competition and unfair acts in import trade. Such a broad grant of discretion is inappropriate.

55. *Suprema, Inc. v. ITC*, No. 2012-1170 (Fed. Cir. Aug. 10, 2015) (en banc), slip op., http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/12-1170.Opinion.8-6-2015.1.PDF (accessed April 4, 2016).

56. In particular, Supreme Court case law that limits the scope of liability for inducement of patent infringement is in tension with the reasoning of the full Federal Circuit's majority opinion. See Alden Abbott, "The Federal Circuit Misapplies Chevron Deference (and Risks a Future 'Supreme Scolding') in Suprema Inc. v. ITC," Truth on the Market, August 14, 2015, http://truthonthemarket.com/2015/08/14/the-federal-circuit-misapplies-chevron-deference-and-risks-a-future-supreme-scolding-in-suprema-inc-v-itc/ (accessed March 28, 2016).

57. Section 337 does not define the term "policy reasons."

It appears justifiable to give the President some discretion to ensure the continuation of infringing imports to cope with national public health or safety emergencies (for example, temporary shortages of patented drugs needed to combat a looming epidemic or patented components needed for a critical weapons system in the face of a national security crisis). In such situations, time is of the essence, and grave national harm may result from the exclusion of key imports.

Nevertheless, apart from such limited emergency situations, it is highly problematic for the President unilaterally to overturn detailed, judicially reviewable, administrative fact-based findings invoked to implement a congressional policy that vindicates American IP rights. Notably, in other federal economic regulatory areas, the President cannot unilaterally overturn final judicially reviewable agency actions. Thus, for example, the President has no role to play in countermanding FTC orders that parties cease and desist from engaging in anticompetitive, deceptive, or unfair actions[58] that are analogous to the sorts of bad practices in import trade ("unfair methods of competition and unfair acts" as well as infringements of U.S. IP rights) that Section 337 condemns.

There is good reason to preclude the President from unilaterally overturning agency actions of this sort. Allowing the President to intrude in an unpredictable fashion into an economically based law enforcement investigation carried out to implement congressional economic policy would inject undesirable uncertainty into business affairs and detract from neutral application of the law. Such uncertainty would be particularly harmful to U.S. IP holders who face substantial threats to their valuable property rights from foreign infringers.

Concern about the President's inappropriate invocation of "policy reasons" unrelated to health or safety to overturn USITC determinations is not merely academic.[59] In August 2013, the U.S. Trade Representative (USTR), on behalf of the President,[60] disapproved a USITC decision to impose a limited exclusion order barring Apple from importing certain older model iPhones and iPads.[61] The limited exclusion order had been based on a USITC finding that Apple had infringed a certain U.S. patent owned by Samsung. Samsung had committed to license that patent and certain other key "standard essential" patents (patents needed to implement a technical standard applicable to smartphones) on "fair, reasonable, and non-discriminatory" rates, but the USITC found that such a commitment did not preclude it from granting exclusion order relief, which it did, only to be overturned by the USTR.

In overturning the USITC's determination, the USTR did not acknowledge either the strong economic policy arguments in favor of injunction-like remedies[62] or the possibility that interjecting himself into what was in effect a commercial dispute

58. For a description of the FTC's enforcement authority, including the conduct of FTC investigations, final FTC decisions, and judicial review, see Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, revised July 2008, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (accessed March 28, 2016).

59. According to one commentator, "[g]iven the recent level of public debate on all aspects of patent law, including the increased use of section 337 to address unfair trade practices predicated on patent infringement, it is reasonable to expect that the President will exercise his authority more frequently in the future to disapprove ITC exclusion and cease and desist orders." Client Alert, "President Disapproves ITC Exclusion Order in -794 Investigation on Public Interest Grounds," King & Spalding, August 19, 2013, http://www.kslaw.com/imageserver/KSPublic/library/publication/ca081913.pdf (accessed March 28, 2016).

60. The President has delegated to the U.S. Trade Representative, an official within the Executive Office of the President, the authority to disapprove USITC Section 337 determinations.

61. Letter from Ambassador Michael B. G. Froman, U.S. Trade Representative, to Irving A. Williamson, Chairman, USITC, "RE: Disapproval of USITC's Determination in the Matter of Certain Electronic Devices, Portable Music and Data Processing Devices, and Tablet Computers, Investigation No. 337-TA-794," August 3, 2013, https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF (accessed March 28, 2016).

62. A leading law and economics scholar, Professor Joshua Wright, has argued against applying antitrust law to bar suits for injunctions brought by standard essential patent holders, cautioning that "the threat of injunction can be a very important part of the bargaining process and is likely part of the benefit of the bargain conceived of by a contributing member of [a standard setting body]…at the time it decided to participate in the standard…. Undermining this bargaining outcome using antitrust rules runs a significant risk of doing more harm than good." Joanna Tsai and Joshua D. Wright, "Standard Setting, Intellectual Property Rights, and the Role of Antitrust in Regulating Incomplete Contracts," *Antitrust Law Journal*, Vol. 80, No. 1 (2015), p. 182, http://www.crai.com/sites/default/files/publications/Standard-setting-intellectual-property-rights-and-the-role-of-antitrust-in-regulating-incomplete-contracts.pdf (accessed March 28, 2016).

over patent licensing terms could do more harm than good.[63] More generally, the significant possibility of error by the USTR in issuing "economic policy" rejections of detailed USITC Section 337 determinations, entirely free from the need to provide a substantial justification for doing so (given the lack of judicial review), is quite troublesome.

In order to forestall future questionable "public policy" disapprovals by the President, Congress might wish to consider amending Section 337 to provide that the President may overturn the issuance of USITC exclusion orders or cease-and-desist orders only on grounds of the public health or safety, including the national defense.

Section 337 Violations Not Involving IP Infringement. As already discussed, Section 337 is well tailored to provide a relatively economical and focused forum for the vindication of IP rights, and its benefits in this context are apparent. It is not, however, well suited to be applied outside of the IP context to "[u]nfair methods of competition" and "unfair acts."[64]

In the mid-1970s, immediately following the passage of the Trade Act of 1974, there was a flurry of non-IP-related investigations that proved to be highly contentious. These investigations provoked controversies about the scope and merits of Section 337's application, especially given the availability of other well-understood statutory remedies for anticompetitive and "unfair" acts,[65] including the antidumping statute (dealing with unfair pricing); the countervailing duty statute (dealing with unfair foreign government subsidies); the Federal Trade Commission Act (dealing with unfair methods of competition and unfair or deceptive acts); and the Sherman and Clayton Antitrust Acts (dealing with the full panoply of anticompetitive acts).[66] Other federal agencies specifically raised concerns about Section 337's potential interference with other federal enforcement programs and with international trade relations.[67]

Reflecting on the problems engendered by Section 337's application to non-IP matters, three trade law experts concluded that:

> Section 337...does not fill any substantial need for protection and redress of grievances unmet by other statutes, and it has substantial liability. It is at best ambiguous and, therefore, unpredictable on the important issues of jurisdiction over both subject matter and over parties; it is duplicative of relief available through other agencies and less effective in enforcing that relief; and its procedural limitations serve neither the public interest nor the demand for fairness in adjudication. No one's interest would suffer from the repeal of section 337.[68]

Although Section 337 has not been applied to non-IP-related import practices in recent decades,[69] its statutory language covering such matters remains. If the USITC should decide to turn once again to

63. "The decision of the Trade Representative did not point to any such complications in the case [involving the USITC's Apple exclusion order] justifying a departure from the usual remedy of an injunction. Indeed the ITC order was not lightly entered into, for it was agreed by all commissioners that Apple had indeed infringed the Samsung patents in ways that would have resulted in extensive damage awards if the case had been tried in a federal court." Richard A. Epstein, "The Dangerous Adventurism of the United States Trade Representative: Lifting the Ban Against Apple Products Unnecessarily Opens a Can of Worms in Patent Law," George Mason University School of Law, Center for the Protection of Intellectual Property, August 2013, p. 1, http://cpip.gmu.edu/wp-content/uploads/2013/08/Epstein-Dangerous-Adventurism-of-USTR.pdf (accessed March 28, 2016).
64. 19 U.S.C. § 1337(a)(1)(A).
65. For a detailed description of these controversies, see Noel Hemmendinger, William H. Barringer, and T. Leonard Kossl, "Section 337: A Case for Repeal or Change," *Georgia Journal of International and Comparative Law*, Vol. 8, No. 1 (1978), pp. 81–114, http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2064&context=gjicl (accessed March 28, 2016).
66. For a discussion of the application of the other trade and competition statutes to the behavior covered by non-IP-related Section 337 investigations, see ibid. In particular, "[t]he arguments favoring FTC and Department of Justice jurisdiction over ITC [Section 337] jurisdiction [in non-IP matters] are...strong. The scope of the combined subject matter of these two agencies is at least equal to that of the ITC." Ibid., p. 106 (footnote citation omitted).
67. Ibid.
68. Ibid., p. 113.
69. In part, this may have reflected a desire to avoid the controversies prompted by its critical interaction with other federal agencies during the 1970s (which included direct criticisms of USITC positions). See ibid.

investigations unrelated to IP, Section 337 conceivably could be applied in a manner that interfered with other federal statutes, as happened in the 1970s. Moreover, and perhaps even more seriously, Section 337 conceivably could be applied in a manner that is inimical to American economic welfare.

Specifically, the FTC and U.S. Department of Justice today apply antitrust and consumer protection law in a manner that is designed to promote a vibrant competitive process, economic efficiency, and the interests of American consumers.[70] But what if Section 337, which refers specifically to practices that "injure an industry in the United States,"[71] were construed as reaching aggressive efficiency-enhancing actions by foreign companies that reduce costs and raise the quality of imports, thereby costing American firms sales but benefiting American consumers and the competitive process?[72] Such an application of Section 337 would be consistent with "public choice" theory, which demonstrates how well-organized producers (for example, inefficient American industries) may "capture" a regulatory body and use it to reduce competition (for example, from efficient importers).[73]

It is likewise possible that the USITC might characterize as "unfair methods of competition" foreign government reforms that reduced inefficiently high labor costs, environmental costs, or other regulatory burdens if those reforms were instigated or supported by foreign firms that exported to the United States.[74] Such a result would be most unfortunate, because a general lowering of inefficient cost burdens affecting internationally traded goods tends to raise economic well-being.[75]

In light of all of these considerations, Congress might also wish to consider rescinding the USITC's Section 337 authority with respect to non-IP-related import practices.

Conclusion

Section 337 of the Tariff Act of 1930 provides valuable relief to American IP holders whose property rights are undermined by infringing imports. In many cases, Section 337 may be the only truly effective means by which industries that depend on U.S. IP can protect their interests and compete on an undistorted playing field with imported products. Nevertheless, a few carefully tailored amendments to the statute could render it even more effective. Specifically, Congress should seriously consider language that would:

70. See generally Joshua D. Wright and Douglas H. Ginsburg, "The Goals of Antitrust: Welfare Trumps Choice," *Fordham Law Review*, Vol. 81, No. 5 (April 2013), pp. 2405–2423.

71. 19 U.S.C. § 1337(a)(1)(A)(i).

72. Although the USITC would have to characterize such actions as "unfair methods of competition" or "unfair acts" in order to condemn them, it is possible that a USITC majority might determine that efficient foreign business decisions were "unfair." Notably, some old (albeit now discredited) Supreme Court cases characterized efficient conduct that harmed less efficient producers as involving antitrust violations. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."). Foreign investments in new plant and equipment that raised the quality and reduced the average costs of imports, for example, allowing them to be sold at lower prices, might be deemed "unfair" if the USITC viewed the competing American firms as not being in a position (for whatever reason) to match the foreign producers' innovative strategy. (Note that Section 337 does *not* require that the U.S. industry suffering harm be efficient, suggesting that efficient conduct by foreign firms that harms *inefficient* American producers could well be actionable.) In short, it is conceivable that vigorous welfare-enhancing competition could be tagged with an "unfairness" label, leading to the ill-advised application of Section 337.

73. Classic works on public choice and regulation include, for example, Robert D. Tollison, "Rent Seeking: A Survey," *Kyklos*, Vol. 35, No. 4 (November 1982), pp. 575–602; Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law and Economics*, Vol. 19, No. 2 (August 1976), pp. 211–240; Richard A. Posner, "Theories of Economic Regulation," *Bell Journal of Economic and Management Science*, Vol. 5, No. 2 (Autumn 1974), pp. 335–358; and George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economic and Management Science*, Vol. 2, No. 1 (Spring 1971), pp. 3–21.

74. In other words, the notion would be that a relative lowering of regulatory exactions borne by imports compared to the exactions borne by U.S.-produced products would not be "fair." Possibly applying Section 337 to reach regulatory policies such as "sustainable environmental practices" has already been suggested by one international trade practitioner. See Martinez, "ITC Section 337 Practice: Beyond Patent Infringement."

75. Reducing inappropriate costs placed on foreign producers should not be confused with counteracting (through appropriate countervailing duties) artificial foreign government subsidies conferred on such producers by their governments. Government subsidies distort the terms of international trade, while regulatory cost reductions merely render particular transactions less inefficient and may encourage a general lessening of regulatory burdens by other trading nations. Phrased differently, one nation's reduction in bloated regulatory burdens relative to other countries may be a "self-created" form of comparative advantage that encourages virtuous emulation by other trading countries.

- Clarify that Section 337 covers all imports, both intangible (such as electronic data compilations) and tangible;
- Specify that it applies to import schemes aimed at infringing IP rights, even if there is no direct infringement at the precise time of importation;
- Limit the President's unreviewable discretion to overturn Section 337 exclusion orders, except on grounds of public health or safety; and
- Eliminate Section 337's application to non-IP-related import practices.

Adoption of reforms along these lines could make Section 337 an even more effective tool with which to protect U.S. IP rights in international trade and ensure that Section 337 is applied in a procompetitive, pro-consumer fashion. Such reforms would enhance the role of Section 337 as a law that supports American innovation and economic growth in a manner that is consistent with free trade principles.

*—**Alden F. Abbott** is Deputy Director of and John, Barbara, and Victoria Rumpel Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.*