In the matter of:

CERTAIN WELDED STAINLESS STEEL PIPE AND TUBE

Investigation No. 337-TA-29

February 1978

USITC Publication 863

United States International Trade Commission / Washington, D.C. 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION

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George M. Moore
Catherine Bedell
Italo H. Ablondi
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FOR RELEASE
February 22, 1978

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USITC 78-021

USITC ISSUES CEASE AND DESIST ORDER

The United States International Trade Commission issued today its first cease and desist order against a predatory pricing practice. The order, issued under the authority of section 337 of the Tariff Act of 1930, as amended by the Trade Act of 1974, prevents 11 Japanese firms from engaging in unfair competitive practices in the manufacturing and importing of certain welded stainless steel pipe and tube. Specifically, the order prohibits pricing the product below the average variable cost of production without commercial justification.

The Commission determined the violation by a 4 to 2 vote. Chairman Daniel Minchew and Commissioners George M. Moore, Italo H. Ablondi, and Bill Alberger formed the majority. Vice Chairman Joseph O. Parker and Commissioner Catherine Bedell dissented as to the determination and did not participate in the issuance of the order.

Copies of the order and the record in the case have been forwarded to the President, who has 60 days to consider the USITC action. The President may disapprove the order; he may also allow the 60-day period to expire without doing anything, which has the effect of allowing the order to stand, or he can approve the order.

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Thirty-five firms involved in the manufacture and importing of the products were named in the original complaint, which was brought by eight domestic manufacturers. Of the 35 firms, only 11 were found to be engaged in unfair competitive practices. Named in the cease and desist order are Ataka & Co., Ltd., Brasimet Industries Corp., Hanwa Co., Ltd., Kanematsu-Gosho, Ltd., Marubeni Corp., Nissho-Iwai Co., Ltd., Okura Trading Co., Ltd., Sumitomo Shoji America, Inc., Sumitomo Shoji Kaisha, Ltd., Toa Seiki Co., Ltd., and Toyo Menka Kaisha, Ltd.

If the order is violated, the Commission may modify the order, go to court for enforcement of the order, or order the products excluded from the country. The cease and desist order expires by its terms December 31, 1982.

Copies of the Commission's cease and desist order and report containing the views of the Commissioners in the matter of Certain Welded Stainless Steel Pipe and Tube (USITC Publication 863), with respect to the Investigation No. 337-TA-29, may be obtained by calling (202) 523-5178 or from the Office of the Secretary, 701 E Street NW., Washington, D.C. 20436.

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of:	:	
CERTAIN WELDED STAINLESS STEEL PIPE AND TUBE	:	Investigation No. 337-TA-29

COMMISSION DETERMINATION AND ACTION

The United States International Trade Commission ("Commission") having instituted an investigation pursuant to its Notice of Investigation issued on February 16, 1977;

And, having heard this matter in accordance with the provisions of 19 U.S.C. 1337 (section 337) and 5 U.S.C. 551-559;

HAS DETERMINED* that there is in this investigation a violation of section 337 by reason of the importation or sale or both (as the case may be) by persons named in this order of certain welded stainless steel pipe and tube at prices lower than the average variable cost of production of said product without commercial justification; that an order directing these persons to cease and desist from this practice should be issued in lieu of a direction under section 337(d) that the articles concerned be excluded from entry into the United States; that such order has none of the effects listed under section 337(f) such that the order should not be issued; and that during the period of Presidential consideration of this order under section 337(g), the articles concerned shall be entitled to entry free of bond.

* Vice Chairman Joseph O. Parker and Commissioner Catherine Bedell dissenting as to the determination of violation of section 337 and are not participating in the issuance of the subject order.

Therefore, the Commission hereby issues the following order as its action in this matter:

ORDER TO CEASE AND DESIST

I. Definitions

The terms in quotations below shall be defined as shown for purposes of interpreting this Order:

"Respondents" refer to all respondents listed below, their successors and assigns:

Ataka & Co., Ltd.
Brasimet Industries Corp.
Hanwa Co., Ltd.
Kanematsu-Gosho, Ltd.
Marubeni Corp.
Nissho-Iwai Co., Ltd.
Okura Trading Co., Ltd.
Sumitomo Shoji America, Inc.
Sumitomo Shoji Kaisha, Ltd.
Toa Seiki Co., Ltd.
Toyo Menka Kaisha, Ltd.

"Commission" refers to the United States International Trade Commission.

"Stainless steel" refers to any alloy steel which contains less than one percent of carbon and a minimum of ten percent of chromium.

"Welded stainless steel pipe and tube" refers to all welded tubular products made from stainless steel having a circular cross-sectional configuration with an actual outside diameter from .0375 to 6.525 inches inclusive.

"Marginal cost" is the increment to total cost that results from producing an additional increment of output.

"Average variable cost of production" is the sum of all costs that vary with changes in output divided by output, and includes, but is not limited to the cost of all raw materials and energy plus direct labor.

"Commercial justification" shall be a reason for pricing other than as prescribed in this order, which reason indicates, by virtue of commercial context, that such pricing was not intended to injure competition in the United States in welded stainless steel pipe and tube.

"United States" refers to the fifty states, the District of Columbia and Puerto Rico.

"Manufacturer" refers to any company which produces welded stainless steel pipe or tube.

"Exporter" refers to any company which sells welded stainless steel pipe or tube for export to customers located in the United States.

"Importer" refers to any company which imports welded stainless steel pipe or tube into the United States.

II. Conduct Prohibited

No respondent manufacturer shall sell for export to the United States, without commercial justification, any welded stainless steel pipe and tube manufactured in Japan at a price that is below the reasonably anticipated marginal cost. In determining whether costs are "reasonably anticipated," the Commission will assume that prices above average variable cost, as calculated by methods that are reasonably consistent for each respondent manufacturer from year to year, are above reasonably anticipated marginal cost.

No respondent exporter or importer shall sell or offer for sale in the United States, without commercial justification, welded stainless steel pipe and tube manufactured in Japan at a price that is below the reasonably anticipated marginal cost of the manufacturer plus incidental costs

of said respondent exporter or importer. In determining whether a respondent exporter and importer has complied with this Order, the Commission will impute knowledge of suppliers' costs to respondent exporters and importer, which may be rebutted by the suppliers' affidavit under oath that (1) it will not supply its costs to the respondent exporters or importer and (2) its price in the transaction in question is not less than the original manufacturer's reasonably anticipated marginal cost.

This order is applicable to any and all importations made after the date this order is published in the Federal Register, regardless of terms of sale, date of contract, etc.

III. Reporting

Respondent manufacturers, exporters, and importers shall file with the Commission information sufficient in form and detail that the Commission can determine whether there is compliance with this Order. The first such report shall be due 120 days after the date this order becomes final. Subsequent reports shall be filed annually by each respondent beginning for each of them with a second report on a date not later than two months after the end of each respondents' fiscal year. A form for all reports required by this paragraph will be timely provided by the Commission. Respondent manufacturers and exporters who are no longer engaged in the manufacture or sale of welded stainless steel pipe and tube for export to customers in the United States may file a certificate under oath to that effect in lieu of the reports required by this paragraph.

Failure to report shall constitute a violation of this order.

IV. Compliance and Inspection

For each year as to which (or as to any part of which) a report is required, each respondent manufacturer shall maintain business and accounting records on a basis consistent from year to year such that prices and all costs of producing welded stainless steel pipe and tube in Japan may be determined by examining these records. Such records shall also be adequate for determining each respondent manufacturer's total production for export from Japan to the United States of welded stainless steel pipe and tube manufactured by said respondent in Japan. All respondents shall maintain such records adequate to show each respondent's profits and losses by fiscal year for their operations relating to welded stainless steel pipe and tube manufactured in Japan for export to the United States. Such records shall be retained by each respondent for a period of at least three years after each required report is due.

V.

Each respondent, upon written request by the Commission mailed to its principal office, shall furnish or otherwise make available to the Commission all books, ledgers, accounts, correspondence, memoranda, financial reports, and other records and documents in the possession or under the control of each respondent for the purposes of verifying any matter contained in the reports required under paragraph IV of this Order. The Commission may exercise, in the enforcement of this order, any of the information-gathering powers available to it under section 333 of the Tariff Act of 1930, 19 U.S.C. 1333.

VI.

Information obtained by the means provided in paragraphs III and V above shall only be made available to the Commission or its representatives, shall be entitled to confidential treatment, and shall not be divulged by any representative of the Commission to any person other than a duly authorized representative of the Commission, except as required in the course of legal proceedings to which the Commission is a party for the purpose of securing compliance with this Order or as otherwise required by law, upon ten days notice to the respondent involved.

VII.

Any violation of this Order shall allow action by the Commission in accordance with the provisions of section 337(f) (19 U.S.C. 1337(f)), including the revocation of this Order and the exclusion of the articles concerned from entry into the United States. Violation of this Order may also be the subject of action pursuant to section 333 of the Tariff Act of 1930 (19 U.S.C. 1333). In determining whether any respondent is in violation of this Order, the Commission may infer facts adverse to any respondent failing to provide adequate or timely information.

VIII. Bonding

The Secretary of the Treasury shall not require bond during the period of Presidential consideration of this action pursuant to section 337(g) of the Tariff Act of 1930, as amended (19 U.S.C. 1337(g)).

IX. Term

This order shall expire, unless earlier modified or revoked by the Commission, on December 31, 1982.

X. Publication

The Secretary will publish a copy of this "Commission Determination and Action" in the Federal Register; serve a copy upon all parties, and transmit a copy thereof, together with the record of this proceeding, to the President. The Secretary will also inform the Secretary of the Treasury of the Commission's determination on bonding.

XI. Dismissals

No person not specifically named in this order is subject to this order, and as to any such person, previously a party to this investigation, this investigation is hereby terminated.

By order of the Secretary:

KENNETH R. MASON
Secretary

Issued: February 22, 1978

OPINION OF COMMISSIONERS MINCHEW, MOORE AND ALBERGER

INTRODUCTION

This investigation under Section 337 of the Tariff Act of 1930, as amended, was commenced by the Commission on February 22, 1977. 1/ The notice of investigation provided that, pursuant to subsection 337(b), an investigation be instituted on the question whether there is a violation of section 337(a) "by reason of the alleged sale in the United States of such welded stainless steel pipe and tube at unreasonably low prices, often below the cost of production, with an intent to restrain or monopolize trade and commerce in these articles in the United States," with the effect or tendency of either injuring an efficiently and economically operated domestic industry or restraining or monopolizing trade and commerce in the United States. The complaint upon which the investigation notice was based was filed by eight domestic manufacturers of welded stainless steel pipe and tube (hereinafter referred to as "complainants") and named as respondents thirty-five persons abroad and in the United States. By virtue of subsequent interlocutory actions, the Commission dismissed fourteen of these respondents.

On November 14, 1977, the Presiding Officer issued his recommended determination and certified the record of proceedings before him to the full Commission. Exceptions to the recommended determination were timely filed by all parties and an amicus curiae, Prudential Stainless Pipe Corp.

1/ See 42 F.R. 10348 (Feb. 22, 1977); section 337, (19 U.S.C. 1337) is hereafter referred to as "section 337."

By notice published December 12, 1977, 1/ the Commission announced a schedule for briefing and oral argument; requested comments on remedy, bonding and the public interest factors; and set a hearing on these matters. Briefs and comments were subsequently received, and the oral argument and hearing held in the Commission's hearing room on January 31, 1978.

The record of this case shows the complexity of the issues before us. Sixty-one separate motions were made, and the Presiding Officer issued numerous orders in response to motions concerning discovery, summary determinations, dismissal of parties, and the admission of evidence. Many of these orders are contested by the parties and have been raised in their submissions to us. This procedural history, coupled with the many complex, substantive questions before us, makes this one of the most difficult and confusing cases we have ever considered.

This opinion addresses all the exceptions properly before us. It commences with an explanation of our jurisdiction. We then distinguish section 337 from the Antidumping Act of 1921. Third, we discuss the unfair method or act we have found to exist. Fourth, we discuss the evidence showing a restraint of trade. Finally, we give our views on the adoption of a cease and desist order, the reasons why that order is not contrary to the public interest, and our determination on bonding, all of which are determinations required by law where a violation of the statute has been found.

Our determination is, in brief, that there is a violation of section 337 by reason of importations and sales of certain welded stainless

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1/ See 42 F.R. 62432 (December 12, 1977)

steel pipe and tube in the United States by eleven of the twenty-one parties respondent[1/] at prices below the reasonably anticipated marginal cost of production of that article in Japan, without commercial justification, and with a resulting tendency to restrain trade and commerce in the sale of such articles in the United States. The Commission has therefore issued a "Commission Determination and Action," which we find is not contrary to any aspect of the public interest we are required to consider. Our reasons for these determinations are expressed in this opinion and so much of the presiding officer's recommended determination as we specifically adopt.

JURISDICTION

Two separate and distinct jurisdictional issues have been raised in this case and must be decided by the Commission.

First is the question whether the Commission enjoys--or even needs--personal jurisdiction over those named respondents who are not present in the United States. 2/ This issue has been addressed by the presiding officer and the parties as one of due process; namely, whether there are minimum contacts sufficient to confer jurisdiction over these parties. Before reaching that question, we must consider whether our power to remedy

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1/ Those respondents are: Ataka & Co., Ltd.; Brasimet Industries Corp.; Hanwa Co., Ltd.; Kanematsu-Gosho, Ltd.; Marubeni Corp.; Sumitomo Shoji America, Inc.; Nissho-Iwai Co., Ltd.; Okura Trading Co., Ltd.; Sumitomo Shoji Kaisha, Ltd.; Toa Seiki Co., Ltd.; Toyo Menka Kaisha, Ltd.

2/ Motions to dismiss for lack of personal jurisdiction were made by the following respondents: San-Eki Tube Corp.; Stainless Pipe Kogyo Co.; Toa Seiki Co., Ltd.; Yamato Industries Co. Ltd.; and Brasimet Industries (see M 29-30 through 29-33). All are manufacturers of products abroad who sold to foreign trading companies. This opinion attempts to deal only with their jurisdictional arguments. These and other respondents filed a "Statement" on August 4, 1977, that they would not participate in or cooperate with this investigation, which was based in part on jurisdictional arguments. All respondents asserted jurisdictional arguments in their brief to us filed January 13, 1978.

unfair trade practices under section 337 even requires personal jurisdiction in the constitutional sense.

Section 337 is a unique statutory provision, in that it combines various aspects of customs procedure with traditional antitrust and trade regulation law. Section 337 complements other antitrust and trade laws by allowing the exercise of control over offending articles in accordance with traditional customs concepts. Most customs procedures are in rem, while most laws dealing with antitrust or unfair trade practices involve adjudicative proceedings requiring personal jurisdiction.

Prior to 1974 the sole power of the Commission in section 337 cases was to recommend to the President an exclusion order. At that time our jurisdictional base was perceived by many as solely in rem. Since the ultimate sanction for violation of the statute was the exclusion of articles, section 337 seemed to fit comfortably into the scheme of customs and tariff law.

The argument is that the expansion of our powers in 1974 to include cease and desist powers under section 337(f), 1/ required the Commission to obtain personal jurisdiction 2/ over persons subject to such orders. Nothing could be further from the truth.

1/ Section 341 of the Trade Act of 1974, P.L. 93-618.

2/ Official Report of Proceedings Before the U.S.I.T.C. in Investigation 337-TA-29 (Jan. 31, 1978) at p. 144, Mr. Barringer, counsel for respondents, said:

> "My reading is that to enforce or invoke an exclusionary order, you need in rem jurisdiction; to invoke a cease and desist order, you need personal jurisdiction. . . . I don't think you can order a party to cease and desist from doing something unless you have jurisdiction over that party."

In determining whether the addition of cease and desist powers altered our jurisdictional base, it is useful to look at both the legislative history and the wording of section 337(f). The Senate Finance Committee Report on the 1974 Trade Act states:

> It is clear to your committee that the existing statute, which provides no remedy other than exclusion of articles from entry, is so extreme or inappropriate in some cases that it is often likely to result in the Commission not finding a violation of this section, thus reducing the effectiveness of section 337 for the purposes intended.
>
> The power to issue cease and desist orders would add needed flexibility.[1/]

The language of the statute itself supports their conclusion that 337(f) merely gives the Commission more flexibility. It goes no further than allowing the Commission to modify a cease and desist order or to revoke it and replace it with an order of exclusion. The cease and desist order itself merely compels parties to refrain from unfair trade practices or risk exclusion of their products. This Commission has no independent power beyond that of exclusion. Any contempt order or other penalty would have to come from a court. While we could seek enforcement of our cease and desist order in court,[2/] in most cases that would not be as effective an enforcement tool. In the event that we sought a court order to require compliance with section 337(f), it would be incumbent on the court to raise the requirement of due process before

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1. U.S. Senate, Report of the Committee on Finance to accompany H.R. 10710, Trade Act of 1974, S. Rept. No. 93-1298 (93rd Cong., 2nd Sess.) 1974 at p. 198 (hereafter cited as "S. Rep.").

2. 19 U.S.C. 1333(c). Where the unfair method or act that is the basis of our ruling occurs or would occur after importation is completed, then court enforcement of our orders may be necessary because exclusion would not be an effective recourse. Therefore, in many section 337 cases, it will be useful to determine whether an enforcing court would have jurisdiction.

providing the full panoply of punitive measures at its disposal. Since few cases contemplate resort to judicial enforcement, it is better to view 337(f) as ancillary and subordinate to the exclusion power. In most cases, exclusion is our only practical means of enforcement.

The exercise of our exclusion power without personal jurisdiction is not contrary to the due process clause. Section 337 is an exercise of the Congressional power to regulate Commerce with foreign nations. 1/ In Buttfield v. Stranahan, the Supreme Court gave the following interpretation of this power:

> The power to regulate commerce with foreign nations is expressly conferred upon Congress, and, being an enumerated power, is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. . . . Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; . . .
>
> As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution. 2/

1/ United States Constitution, Article 1, section 8, clause 3.

2/ Buttfield v. Stranahan, 192 U.S. 470, 492-93 (1904). See also The Board of Trustees of the University of Illinois v. United States, 289 U.S. 48 (1933).

Hence the due process clause only places one significant limitation on the exercise by Congress of its plenary power over foreign commerce--that it not be carried out in an arbitrary manner. 1/

On the other hand, it is apparent from the safeguards built into section 337 that some form of protection must be afforded to the individuals involved. Section 337(c) requires a determination on the record after notice and opportunity for a hearing in conformity with subchapter II of the Administrative Procedure Act (APA). 2/ Section 554 of the APA gives content to the requirement of notice and hearing. Respondents in this action were fully provided with notice and opportunity for a hearing sufficient to meet any requirements of the APA. But the requirements of personal service inside the forum jurisdiction or, in the alternative, minimum contacts with the forum jurisdiction, do not stem from the APA. Rather, they are imposed by the due process clause of the Constitution only in certain proceedings. Since this is not such a proceeding, respondents' constitutional and procedural rights were fully safeguarded by notice and hearings in conformity with the APA.

If for some reason not apparent to us the naming of foreign respondents requires us to meet due process "minimum contacts," such requirements have been met in this particular case. This conclusion does not rest on the presiding officer's ruling that personal jurisdiction could

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1/ In N.L.R.B. v. Mackay Radio and Telegraph Co., 304 U.S. 333 at 351 (1938) the Court said:

> The 5th Amendment (due process clause) guarantees no particular form of procedure; it protects substantial rights.

2/ 5 U.S.C. § 554. In order to be entitled to a hearing a party must usually show he will be "adversely affected" by an agency action. See Fugazy Travel Bureau, Inc. v. C.A.B., 350 F 2d 733 (1965).

be based on respondents' failure to answer jurisdictional interrogatories. Rather, it is based upon an examination of the full record, which indicates sufficient proof to sustain a finding of "minimum contacts." These minimum contacts arise from the acts of the particular respondents who contest jurisdiction, in that such acts are alleged to have caused an effect in the United States. To appreciate fully this notion, one must look briefly at the judicial history of jurisdiction.

The growth and expansion of jurisdictional theories has led to a well accepted "effects" doctrine. This doctrine, in its earliest form, addressed the territorial limits on the application of U.S. law. 1/ In numerous cases the doctrine was interpreted to mean that a state could prescribe rules of law attaching legal consequences to conduct occurring outside its territory and causing an effect within its territory. 2/ It was applied in antitrust cases to confer jurisdiction over foreign-based conspiracies or attempts to monopolize U.S. commerce. In the context of international trade, however, there has been considerable support for the view that any internal effect must occur as a direct and foreseeable result of the conduct abroad. 3/

1/ In Strasshein v. Daily, 221 U.S. 280 (1910) the Court (per Holmes, J.) expanded the concept of territorial jurisdiction to include ". . .acts done outside a jurisdiction but intended to produce and producing detrimental effects within it." See also, Ford v. United States 273 U.S. 593, 620-21 (1927). More recent expressions of the doctrine included United States v. Aluminum Company of America 148 F 2d 416, 443 (2 Cir. 1945) (hereafter, the Alcoa case); United States v. Watchmakers of Switzerland Information Centers, Inc., 1963 Trade Cases para. 70,600 (S.D.N.Y. 1962).

2/ The Alcoa case at 443 (1945); United States v. Watchmakers of Switzerland Information Centers, Inc., 1963 Trade Cases 70,600 (1962); Restatement 2d of Foreign Relations Law of the United States, § 18 (1962).

3/ See the Alcoa case and the Watchmakers case cited in fn. 1, supra.

These authorities support the assertion of state jurisdiction to cover acts committed aborad. Until recently, however, the principle underlying the effects doctrine had not been extended to the more fundamental issue of due process and power over a particular individual. In Leasco Data Processing Equipment Corporation v. Maxwell,[1] the Second Circuit finally drew the logical connection between the effects doctrine and the minimum contacts test of McGee v. International Life.[2] It held that one of the bases for exercise of jurisdiction over a foreign corporation is ". . .where a defendant has sufficiently caused consequences within a state /so that/ he may fairly be subjected to its judicial jurisdiction, even though he cannot be served with process in the state."[3] The Court added, however, that ". . .the conduct must meet the important requirement that the effect occurs as a direct and foreseeable result of the conduct outside the territory."[4]

1/ 468 F 2d 1326 (2 Cir., 1972).

2/ 355 U.S. 220 (1957).

3/ Id. at 1341. See also, Restatement of Conflict of Laws 2d, § 50 (1969).

4/ Id. at 1341. See, e.g., Scriptomatic, Inc. v. Agfa Gevaert, Inc., 1973-1 Trade Cases 74,595 (S.D.N.Y. 1973); Duple Motor Bodies Ltd. v. Hollingworth 417 F.2d 235 (9 Cir. 1969); Gray v. American Radiator and Standard Sanitary Corp. 176 N.E. 3d 761 (I11. 1961); Liberty Mutual Insurance Co. v. American Pecco Corporation 334 F. Supp. 522 (E.D.N.Y. 1971).

It is clear that the alleged acts committed abroad by the foreign respondents in this case had an effect in the United States, in that the articles connected with the unfair acts were injected into United States commerce by importation. The only remaining question for the purpose of determining personal jurisdiction is whether the effect of the alleged wrongdoing was foreseeable as a consequence of their conduct. If there is a basis in the record for concluding that respondents had reason to know of such potential results, there are sufficient contacts with this forum to meet any due process objections.

In finding of fact #9, the presiding officer concluded that the foreign manufacturers who sold to foreign trading companies did so with the knowledge of subsequent export to the United States. On the basis of testimony presented and exhibits submitted to him, he concluded there were grounds for imputing knowledge of importation to the manufacturers even though they never dealt directly with importers. The record supports such a conclusion, particularly since no contrary evidence was submitted.[1/]

1/ As shown infra, p. 47, we adopt recommended finding 9. Testimony before the Presiding Officer by complainant's expert witnesses indicated that manufacturers sold directly to exporting companies. This certainly gives us the basis for imputing knowledge of Japanese production that is exported, and about the high percentage which the United States imports. See Report to the President on Prices and Costs in the United States Steel Industry, by the Council on Wage and Price Stability, October, 1977.

Thus it is fair and reasonable for the United States to exercise jurisdiction over those respondents who committed acts abroad with the reasonable expectation such acts would affect U.S. commerce. Accordingly, all motions to dismiss for lack of personal jurisdiction were properly denied.

A second jurisdictional issue in this case arises from the contention by the respondent manufacturers who sold prior to importation that they are not "owners" of the product within the meaning of section 337(a). They maintain that no judicial or administrative construction of the statute has extended our jurisdiction to parties such as themselves.

Our subject matter jurisdiction is limited to those unfair acts which occur:

> . . .in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either. . ." 1/

The use of the word "or" in section 337(a) indicates that we are not limited to proscribing only those acts which occur during the actual physical process of importation. We may also consider acts occurring in the sale by an owner, importer, consignee, or agent of either. This second part of section 337(a) would seem to broaden our jurisdiction considerably, unless limited in some way by the concept of importation.

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

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1/ 19 U.S.C. 1337(a), (emphasis added).

to see such a relationship. Unjustified sales by foreign manufacturers below average variable costs become unfair methods or acts in the importation of these articles because the respondents intended the products to become articles of commerce in the United States. Three separate observations can be made to support this position.

First, our statute has a protective function, in that it protects the domestic market from those products sold in the United States, which are the fruits of unfair competition.

Second, it is clear that any Commission action will have as great an impact on the manufacturer as it does on the exporter. Hence, to say we are not regulating sales by regulating import practices is to take a position which simply does not conform to reality.

Third, and most importantly, the meaning of the term "owner" must include foreign owners.[1/] What possible basis would there be for invoking exclusion powers to remedy unfair acts in the subsequent sale by domestic owners? Our whole remedial scheme is designed to attack unfair acts before the goods reach our shores, and in that sense respondents' arguments are questionable at best.

1/ At the hearing before the Commission, counsel for respondents maintained that the phrase ". . .or in their sale by the owner. . ." referred to subsequent sale in the United States. He put forth the notion that it refers to any person who owns the product at the time of importation or thereafter, up until the first domestic sale. But if the term were being used to cover selling practices by domestic sellers exclusively, there would be less of a nexus with importation than if it covered foreign sellers. Official Report of Proceedings before the U.S.I.T.C. in Investigation 337-TA-29 (Jan. 31, 1978) at p. 146.

We are aware that the phrase "owner, importer, consignee or agent" has had long standing usage in the field of customs administration. 1/ The law seems to indicate that such legislation was designed to cover two classes of importations--"purchased" and "consigned" goods. 2/ But these laws simply sought to have someone produce an affidavit stating the value of the goods imported into the United States in order to ascertain the accuracy of the price shown on the invoice. In trade regulation matters, however, Congress is seeking to control a far broader range of activity than that which is relevant to entry of goods. 3/ While section 337 does attempt to apply traditional customs concepts to the trade regulation field, it is not consistent with the intent of our statute to rely wholly on historical usage of the phrase "owner, importer, consignee, or agent."

Therefore, we hold that section 337(a) encompasses the alleged unfair acts of all the named respondents.

THE ANTIDUMPING ACT AND SECTION 337

Respondents argued that this investigation ought to be dismissed or suspended because a current investigation under the Antidumping Act of 1921 4/ and this investigation are duplicative. They dwelled at length

1/ The first apparent use was in the Tariff Statute of March 1, 1823, 3 Stat. 730. See also Customs Administrative Act of June 10, 1890, 26 Stat. 132. Not until the Tariff Act of 1922, was the full phrase as it appears in section 337 used. The addition of the words "of either" into section 316 of the old Tariff Act was interesting, because that was the first use of such language in the context of unfair trade practices. This could easily mean that Congress wanted to give a new meaning to a phrase which had been construed only in terms of customs administration. On this question, however, there is a paucity of case law.

2/ See U.S. v. Johnson Co. TD 38215 (U.S.C.C.A. 1919).

3/ See, infra. p. 39.

4/ 19 U.S.C. 160.

on the similarities between the two proceedings, and there are some. However, we believe it is particularly appropriate to distinguish clearly the many important differences between the two statutes, and the significantly varied results which can, quite logically, be obtained. 1/ Because of these differences, the argument is without merit.

The Department of Justice has also contended that this Commission should defer to the Treasury Department whenever we determine that our investigation under Section 337 of the Tariff Act of 1930 involves only below cost sales. 2/ While it is somewhat understandable for the Department of Justice to be asserting their own pre-eminence in matters of Antitrust law, it is disturbing to find them attempting to limit our jurisdiction under this statute. This continuing opposition to Commission actions clearly within the purview of section 337 is hardly the kind of "advice and information" envisioned by section 337(b)(2). The Justice Department arguments are not worthy of serious consideration because section 337 has been "in addition to any other provisions of law" since it was passed in 1922.

There are many obvious differences between the dumping investigation currently under way at the Department of the Treasury with respect to welded stainless steel pipe and tube from Japan 4/ and this case under section 337. For example, the Treasury investigation covers many more products than our investigation. Treasury looks at a specific six-month period and

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1/ We note motions by Respondents to dismiss or suspend because of the pendency of an investigation opened by the Treasury Department after the date this investigation was instituted, which were denied. We sustain that action of the presiding officer for the reasons stated below.

2/ Letter from Department of Justice, filed January 13, 1978 at 4. In fact, our notice related to "unreasonably low prices."

3/ Section 316 of the Tariff Act of 1922, P.L. 67-318.

4/ Notice of Reopening of Discontinued Investigation, 42 F.R. 16883 (March 30, 1977).

examines a percentage of sales to compare with their determined fair value. The Commission, in this particular case, examined sales for a 36-month period. The respondents in our case are not the same as those in the Treasury proceeding either.

Even more significant is the very nature of the investigation itself. Treasury investigations under the Antidumping law are not adversary proceedings. There is no opportunity for cross-examination on the question of less than fair value sales. Respondents seemed to be arguing before the Commission that the tentative findings of the Treasury Department in its investigation of welded stainless stainless steel pipe and tube from Japan 1/ were somehow conclusive evidence that respondents could not be pricing below average variable cost. Some of the margins found by Treasury were as high as 42%, so the factual assertion is at best questionable.

A careful examination of the two statutes will note two important differences. First, in section 337, an element of intent is a significant factor, while it plays no role whatsoever in the Antidumping Act. Second, and most important, is the question of harm caused by the unfair acts. Under the Antidumping Act, the only question is "whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States." 2/ Under section 337, much broader questions are raised. The unfair acts or unfair methods of competition must have--". . .the effect or tendency. . .to destroy or substantially injure an industry, efficiently

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1/ Issued January 9, 1978, 43 F.R. 2031 (January 13, 1978).
2/ 19 U.S.C. 160.

and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, . . ." 1/ The portions of the statutes quoted above have only one common phrase where the meanings of the two are clearly identical, and that refers to preventing the establishment of such an industry. The standards are the same in that respect, but, since establishment of an industry is not an issue in this case, it need not be further analyzed.

The critical addition under 337 is the possibility that an effect or tendency of substantial injury is not required if there is an "effect or tendency. . .to restrain or monopolize trade and commerce in the United States." Thus, when injury to the domestic injury does not exist, but a restraint or monopolization of trade and commerce in the United States does exist, Section 337 applies where the Antidumping Act does not. As we will show, this case demonstrates this difference between the two laws, because the result we reach now is impossible under the Antidumping Act. Our result depends solely on having found a tendency to restrain trade.2/

1/ 19 U.S.C. 1337 (a).

2/ One additional comment must be made on an argument offered by the Justice Department, which is that the Treasury Department is the most appropriate forum for complaints regarding below costs sales. Justice says our time period for investigation--one year--is too short. Apparently, arithmetic is not the strong suit of the writers of that letter, as we find it relatively easy to prove that the nine months Treasury has for below cost sales investigations is indeed less than the twelve months we have.

UNFAIR METHODS OF COMPETITION OR UNFAIR ACTS

It is generally accepted that Section 337 embraces a broad variety of unfair trade practices.[1/] Moreover, Congress intended to allow the Commission wide discretion in applying the statute.[2/] It behooves the Commission, however, to formulate rational and generally acceptable reasons for treating certain practices as unfair.

Respondents argue that the Commission has never based a finding of unfair method or act solely on the price-cost comparison.[3/] It is important, therefore, to decide whether a practice of unreasonably low pricing constitutes an unfair method or act within the meaning of Section 337.

1/ In re Certain Color Television Receiving Sets, U.S.I.T.C. Memorandum Opinion, Inv. 337-TA-23 (December 20, 1976) pp. 11-12. The Commission stated:

> Clearly, the legislative history reveals that Section 337 was intended to be. . .a statute directed at reaching a broad variety of unfair acts. Unless some convincing authority can be found for the proposition that Congress has since limited the scope of Commission jurisdiction, it is our opinion that Section 337 embraces dumping and all other unfair methods of competition and unfair acts in the importation of articles or in their sale.

See also, In Re Von Clemm, 229 F.2d 441 (C.C.P.A. 1955). Sen. Rept. 67-696, 67th Cong., 2nd Sess. 3 (1922).

2/ In Re Von Clemm, supra.

3/ The Justice Department argued that the Commission find that --

> ". . .unilateral below cost selling by a non-dominant firm is not an 'unfair method of competition' encompassed by Section 337 and that the complaint should be dismissed as a matter of law and policy."

Letter from Department of Justice, filed January 13, 1978, at p. 5.

The basic contention in this case is that some respondents have sold below even their marginal cost of production. Since any allegations of joint action, combination, contract or conspiracy were stricken by the Presiding Officer, the basic charge is that each respondent engaged in a separate, unilateral pricing policy designed to exclude competitors from the United States market. It is then important to examine the arguments for proscribing such unilateral pricing schemes.

The presiding officer relied heavily on section 3 of the Robinson-Patman Act 1/ as the basis for prohibiting predatory business practices. That law makes it unlawful "to sell or contract to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." Section 3 is a little-used criminal statute. While it does not attempt to define what constitutes "unreasonably low prices," the Supreme Court provided some illumination in United States v. National Dairy Corp., 372 U.S. 29, 33-34, (1963):

> The history of § 3 of the Robinson-Patman Act indicates that selling below cost, unless mitigated by some acceptable business exigency, was intended to be prohibited by the words "unreasonably low prices." In proscribing sales at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" we believe that Congress condemned sales made below cost for such purpose. . .
>
> Whether "below cost" refers to "direct" or "fully distributed" cost or some other level of cost computation cannot be decided in the abstract.

Hence, when prices fall too far below production costs, and the only business exigency is an intent to drive out competitors, there is a clear violation of section 3.

1/ 15 U.S.C. § 13(a)

Certainly section 337 is broad enough to cover these predatory pricing schemes, since it is designed to apply the protection of domestic trade regulation to the unique circumstances of international trade. We therefore hold that a violation of section 337 may occur when foreign competitors engage in unreasonably low pricing with an intent, either individually or collectively, to destroy competition in the United States market.

It is unnecessary for this Commission to adopt an inflexible test of what constitutes "unreasonably low prices". In each industry there are peculiar methods of accounting, cost computation, and cost distribution, such that any absolute test would be meaningless. Each case must be examined individually to determine whether, under the circumstances, prices are unreasonably low.

Evidence presented in this case indicates that stainless steel pipe and tube producers incur substantial costs which bear a direct relationship to their volume of output. The most important of these are raw materials and labor.1/ These costs ("variable costs") increase significantly as output grows. Hence, increased output will not significantly reduce the percentage of such costs attributable to each unit of production. These are referred to by economists as marginal costs. They represent the additional cost of producing each additional unit of output. For various reasons, exact marginal costs are difficult to isolate and are usually applied to cases such as this on the basis of some average, hence the term "average variable costs" (AVC). 2/ If a company sells below AVC

1/ See Recommended Determination, p. 24. The Presiding Officer found that 65 to 70 percent of all costs in this industry were for raw materials alone. Another 15 percent represents labor. Transcript p. 359.

2/ See Areeda and Turner, Predatory Pricing and Related Practices under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697 (1975) [hereinafter cited as Areeda and Turner]. See, infra. note 3, p. 21. Average variable cost is defined as "the sum of all costs that vary with changes in output divided by output." Recommended Determination finding 35.

it is unable to recover the amount expended to maintain or increase production. In short, it is more profitable to close down than to continue selling below AVC.

Producers of welded stainless steel pipe and tube also incur fixed costs, or those which remain relatively constant despite changes in output. These fixed costs include overhead, taxes, plant costs, and some sales costs. For the most part, fixed costs are long range costs which can be computed in advance. Thus, it is ordinarily quite possible to determine the percentage of fixed costs borne by each product--but, that percentage declines as output increases.

When fixed costs are added to AVC, the sum is Average Total Cost (ATC). Hence, when we refer to "pricing below ATC", we are referring to prices which may recoup variable costs, but do not recoup fixed costs.[1/] "Pricing below AVC" would indicate that even variable costs are not being recovered. It is only when prices dip below AVC that each sale means greater losses. By contrast, pricing below ATC does not mean mounting business losses; it merely means long term investment costs are not being recovered.

Presumably sales below either ATC or AVC could be unreasonably low for the purposes of section 337. In either case, the effect might very well be to drive others out of business, or at least to force them out of production temporarily. It only becomes significant to understand the difference between these two practices when we recognize that complainants in this case presented no independent evidence of predatory intent. Instead, they relied on inferences of such intent gleaned from numerous cases, and strengthened by the fact that respondents made no showing of a contrary intent.

1/ Obviously, "pricing below average total cost" can be below average variable cost. However, as used in this opinion, the phrase means pricing between AVC and ATC.

Given the fact that any sales below ATC might be unreasonable, the presiding officer adopted a rule that predatory intent could only be inferred where prices fell lower than AVC. He cited Utah Pie Co. v. Continental Baking, 1/ as well as other authorities, 2/ to support the use of such an inference. More importantly, he cited the rule of thumb laid down in the article by Professors Areeda and Turner. The rule, in short, states that sales below average variable cost raise a conclusive presumption of predatory pricing. 3/ The uncontested testimony of the only expert economist on this record is that pricing below AVC is inevitably predatory. 4/

The presiding officer, however, did not adopt a per se rule. He held instead that in this case the presumption of intent must be rebuttable, due to the number of variables in the international steel market which justify a rule "flexible enough to allow a defendant to demonstrate its price was commercially justified." 5/

We prefer the approach taken by the presiding officer. There are compelling reasons why a sustained practice of sales below AVC raises a

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1/ 386 U.S. 685 (1967). Although the issue in this case was discriminatory pricing under the Clayton Act, the court allowed an inference of predatory intent from persistent sales below cost.

2/ See F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536, 552 (1960); Ben Hur Coal Co. v. Wells, 242 F.2d 481, 486 (10 Cir. 1957); Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356, 369 (9 Cir. 1955).

3/ Areeda and Turner, supra, note 8. This rule has been accepted in a number of recent Federal court cases. International Air Industries v. American Excelsior Co., 517 F. 2d 714 (5 Cir. 1975) cert. denied, 424 U.S. 934 (1976); Pacific Engineering and Production Co. v. Kerr-McGee, 551 F.2d 790 (10 Cir. 1977) (petition for cert. filed). In both cases the courts applied the reasoning of Areeda and Turner, but failed to find unfair pricing on the facts presented. See also, Hanson v. Shell Oil Co., 541 F.2d 1352 (9 Cir. 1976).

4/ Transcript p. 359, 360, 361.

5/ Recommended determination at p. 42. In Hanson v. Shell Oil Co., a monopolization case, the Ninth Circuit held:

> While proof of pricing below marginal or average variable cost is prerequisite to a prima facie showing of an attempt to monopolize, such a showing, if made, would not show a per se violation. There may be nonpredatory and acceptable business reasons for a firm engaging in such pricing. Plaintiff's showing of below-cost pricing merely clears the first hurdle and raises the question of justification.

541 F.2d 1352, 1359 (n. 6).

strong presumption of predatory intent, but there are also sound policy arguments for making that presumption rebuttable. The economic structure of the steel industry is extremely complex. It is conceivable that acceptable business reasons may exist for apparently unreasonably low pricing. A company on the verge of going out of business may want to minimize its losses by selling out its inventory. A new entrant into the market may want to gain an acceptable market share. Sales below AVC may be in response to the predatory practices of competitors, and may represent an attempt to remain in business. In short, there are too many economic variables in the steel industry to adopt a per se rule.

On the other hand, it is reasonable to draw a line between AVC and ATC, and to consider AVC the threshhold at which a presumption of predatory intent arises. This is so because of the significantly greater number of plausible justifications for pricing between ATC and AVC than for pricing below AVC. Considerable evidence indicates that a serious situation of excess capacity prevails in the domestic market. 1/ Hence, there may be a rational business decision that the market cannot sustain normal prices at current output, and that it would be better to put off recovering fixed costs in favor of maintaining long standing customers, keeping faithful employees, and assuring the vitality of the industry. In a product such as steel, where crucial defense and security reasons argue for a strong industry, 2/ the latter consideration may be forced upon respondents by government policy.

1/ Recommended Determination, Findings 64 and 65.

2/ See letters in this record from NASA (filed January 3, 1978). and the Department of Defense (filed January 13, 1978).

For all these reasons, we hold that sales below a respondent's average variable costs of production raise a rebuttable presumption of predatory intent, while sales above AVC but below average total costs must be supported by evidence of subjective intent before this Commission can find them to be unfair within the meaning of section 337.

We do not consider this rule to depend upon a showing of monopoly power. Rather, it is sufficient to conclude from surrounding economic circumstances that respondents could engage in such a course of unreasonable sales persistently.[1/] In the absence of some proof that respondents possess monopoly power, it is permissible to apply the above rule when there is a sustained practice of sales below AVC sufficient to indicate a party's ability to incur mounting losses in the course of a predatory scheme.

1/ The below-AVC sales appear in this case to have continued for about 1-1/2 years, Staff Exhibit 8. See also Recommended Determination finding 46.

The case against the respondents

Applying the rules enunciated above to the present case has been an arduous task. The direct evidence that was adduced as to the unfair method or act was as follows.[1/]

The information on cost is reflected in staff Exhibit 7, which shows, in addition to average unit selling prices for United States producers, the United States producers' costs for materials, labor, overhead, and other expenses. The staff then made a rough estimation of average variable cost by combining the domestic producers' costs for stainless steel strip, other raw materials, and direct labor. This information was fed into a computer to produce an imputed cost of the respondent producers by quarterly period, type of product, and wall thickness. This is the imputed cost of the respondent manufacturers. This imputing of American average variable cost to foreign manufacturers and exporters is consistent with the evidence in the record, which is the testimony of American manufacturing executives that it is unlikely costs other than direct labor in Japan are different in any significant degree from variable costs in the United States.[2/]

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1. This information is basically reflected in staff's Exhibits 1A through 1D; the computer printouts resulting from a collation of Exhibits 1A through 1D -- particularly staff Exhibit 8 --; and the affidavits of various Commission investigators regarding the methods by which this information was collected and collated. The essential objective of this evidence was to try to construct, by indirect means, prices and costs by quarter that could be attributed to the foreign manufacturers and exporters.

2. Recommended Determination finding 40. Prudential's last-minute attempt to offer evidence to rebut imputed cost on the very eve of trial was properly rebuffed. Recommended Determination, p. 49 (last paragraph), which we adopt. See also the transcript of oral argument (Jan. 31, 1978) p. 86 (In. 11) - p. 87.

As to the prices, the basic evidence again consists of information compiled by the Commission investigative staff from questionnaires to domestic distributors of welded stainless steel pipe and tube, and domestic importers of those products.[1/] These questionnaires asked for quantity of imports by year, names of customers and suppliers, and one lowest net price per calendar quarter by type and wall thickness gauge from the beginning of 1974 through the end of 1976, as well as net selling price. Of course, this information was designed to complete the pricing and cost information that the staff expected by virtue of its negotiations with the respondents to be supplied by the foreign manufacturers and exporters. It is therefore incomplete. The prices paid are only one price per quarter per type of product rather than all prices; the prices cannot in some cases be reliably attributed to a given foreign manufacturer or exporter, since many importers received sales from two or more foreign sources, and since the importers were only required to report the names of suppliers, not their prices. Thus we were precluded from attributing sales below AVC to those suppliers with absolute certainty. Notwithstanding these difficulties, Exhibit 8 represents an attempt to attribute the lowest sale price in each quarter

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1. In one case, Kanematsu-Gosho, Ltd., we have direct evidence of prices charged. However, since Kanematsu-Gosho, Ltd. did not appear at the hearing and did not make available books and records, the truthfulness of these answers could not be tested. Moreover, Kanematsu-Gosho, Ltd. showed in its questionnaire net selling prices of welded stainless steel pipe and tube in a given time period, but failed to show net purchase prices of the same product from Japanese manufacturers in that time period or any other. Instead, they answered "not applicable", a term, which under the general instructions of the questionnaire, was to be used for sections of the questionnaire that did not apply to the questionnaire respondent. Furthermore, the prices stated by Kanematsu-Gosho, Ltd. in the selling price section of their questionnaire are all below the corresponding, imputed average variable cost of production in staff Exhibit 8.

2. This is reflected in the text below. See also the argument of Staff Investigative Attorney; oral argument of Jan. 31, 1978 at 91.

by each importer to the imputed costs of production of this article. It thus represents the best that could be made of the information available.

We recognize that this evidence, standing alone, is less than complete. However, the present state of the record is a direct result of respondents' failure to participate in the investigation. As the record of this proceeding shows, respondents negotiated on all matters relating to discovery while they delayed actual production. The impact of this delay was destructive, because time limits under Section 337(b) are so short that once discovery plans go awry, they cannot be reconstructed later on. Respondents, the record shows, just delayed their actual responses until the staff and complainants were committed to a course that relied upon respondents, and then refused to participate. It was a purposeful, destructive course of conduct under the circumstances. We can only conclude from their failure to participate that facts might have been produced that would have been adverse to them on the issue of unfair methods or acts.[1/] We now recite the sorry record that leads us to this conclusion.

After this proceeding was instituted, the presiding officer issued prehearing order No. 1 "Submission of Discovery Timetables," which required parties to state in detail a timetable for discovery, the methods to be used, the persons or class of persons to whom discovery by each method would be directed, and so on.[2/] Prehearing Order No. 1 also provided that

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1. This inference is rebutted where the indirect evidence we have just described is inconsistent with it as to any particular respondent.

2. This action by the presiding officer was entirely consistent with the need for expeditious and closely supervised discovery under Section 337.

discovery was to be completed not later than June 15, 1977.

Discovery plans were indeed filed by the Commission investigative staff and by the complainants in this investigation on March 25, 1977. The filing of the plans reflects an effort by counsel, including even counsel for respondents, to prevent duplicative and therefore unduly burdensome discovery, which is also consistent with the need for expeditious discovery under Section 337. Specifically, the Commission investigative staff stated in their discovery plan, "in fulfilling /our/ 'public interest' role, the staff does not intend to usurp or duplicate the roles of complaint or defense counsels who have their respective burdens of proving the existence or non-existence of violations or offenses." The staff then reported that, as agreed at the first prehearing conference, it had circulated drafts of questionnaires which it planned to send Japanese producers and exporters of the articles under investigation; that it had subsequently met with all counsel to discuss the questionnaires "in an attempt to avoid duplication of discovery efforts and to generally agree upon terms and relevance of the information requested." Further meetings were also reportedly scheduled among all counsel. The staff also announced its intention to serve purely jurisdictional interrogatories on the parties respondent and to coordinate discovery efforts with complainants.

Complainants' discovery timetable, while less complete than the staff's, also indicates a spirit of cooperation and avoidance of

duplication. Thereafter, on March 29, 1977, the presiding officer conducted a preliminary conference (reflected in prehearing order No. 8 issued April 8, 1977). There, the presiding officer ruled that "the stringent time limits existing in these investigations require that discovery continue regardless of the pendency of any motion before the presiding officer or the Commission."

In fact, there were pending at this time and at various other times in the course of this investigation, peremptory motions of various kinds reflected in the presiding officer's recommended determination, pages 5 through 10. The presiding officer eventually denied all of these motions as well as applications for interlocutory review.

As demonstrated by the pleadings in this case, the staff and the complainants issued essentially non-duplicating discovery to the producer and exporter respondents in Japan. The staff's interrogatories and their later questionnaires go essentially to price and (the interrogatories only) to costs. The complainant's requests for production, on the other hand, are for information demonstrating customers, distribution channels, total production by size and type, prices and costs, profits and losses, product mix, and so on.[1/]

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1. The complainants' discovery is more thorough than the staff's, which reflects the staff's position that the complainants had the burden of proving their case, a position which is not inconsistent with the APA 5 USC 556(d). The greater scope of complainant's discovery was also consistent with the agreement to avoid duplication. The staff also had the objective of getting a sample of prices and cost in one "wave" of discovery, then a more detailed exploration of sales below average variable cost in a second "wave". They also limited the products canvassed. Transcript of oral argument (Jan. 31, 1978) at 91. The respondents' refusal to cooperate in the face of these reasonable procedures makes their actions all the more worthy of the inferences we draw from them.

By the original discovery deadline date, June 15, 1977, the respondents in Japan had provided virtually no cooperation at all. Specifically, some of the Japanese manufacturers and exporters had failed and refused to respond even to jurisdictional interrogatories. More importantly, staff interrogatories served on April 5, 1977, were not answered by any of the Japanese manufacturers and exporters upon whom they had been served.[1/] An oral order granting the motion to compel answers was issued at a discovery conference held the next day, June 16, 1977.

Thereafter the staff met several times with counsel for both respondents and complainants concerning the price interrogatories. The staff stated later in a motion for sanctions that its discovery had, at the very least, the tacit approval of the respondents and complainants who had actively participated in its drafting.[2/]

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1. See staff "Motion to Compel Answers to Interrogatories" (Motion Docket No. 29-48), Exhibit B. The certificate of service attached to Exhibit B lists those persons who had failed at that point to respond to the staff interrogatories.

2. Staff motion for sanctions (motion docket no. 29-51, July 5, 1977) p. 2. The complainants also requested sanctions against respondents for their failure to respond to discovery requests on July 9, 1977. One Japanese exporter was not the subject of the staff motion for sanctions, Kanematsu-Gosho, Ltd., which responded to part of a staff questionnaire (see Staff Exhibit 1D). It appears from the record before us that this respondent never responded to the staff's interrogatories or to any of the complainants' discovery. Moreover, while this company was not a subject of the presiding officer's order for sanctions discussed below, he plainly attached sanctions to them by allowing indirect proof of their costs to be used with respect to them in finding sales below average variable cost (see finding No. 42 of the recommended determination). Moreover, while this respondent did not participate in the respondents' statement withdrawing from this proceeding, which is also discussed below in the text, they plainly had no intention of continuing separately in the proceeding, as they did not appear at the hearing and have otherwise associated themselves with those who did sign the statement of withdrawal. We see no reason to treat Kanematsu-Gosho, Ltd. differently from others who failed entirely to respond to reasonable discovery efforts merely because they responded to one small corner of a carefully arranged pattern of discovery.

On July 22, with less than two months left to run before the beginning of the hearing on the issue of violation, the presiding officer was finally forced to issue his order for sanctions against twenty-three respondents who are named in footnote 4 on page 2 of prehearing order No. 15. Complainants' motion for sanctions had included a request for adverse inferences and a recommended determination against the respondents. Complainants had requested as an alternative (and the staff joined in this) sanctions relating to the admissibility of evidence. The presiding officer chose the second alternative to avoid a recommended determination on the pleadings. A trial was eventually had, without even the active appearance of the respondents, on such evidence as the staff and the complainants could muster.

Respondents have subsequently argued to the Commission that the record before the presiding officer fails to show that they have committed an unfair method or act much less a violation of Section 337. In fact, what happened was that respondents refused all discovery on the issues relating to costs and prices and manipulated the time schedules so as to prevent the orderly conduct of the Commission's hearing and investigation on the merits. Of course, evidence relating to price and cost were available only from the manufacturer and the pricer (the exporter) of the product.

Commission Rule 210.36 provides certain actions which may be taken by a presiding officer (and therefore ultimately by the Commission) in the event a party fails to comply with an order to make discovery. The action taken, according to the rule, must be "sufficient to compensate

for the lack of withheld testimony, documents, or other evidence." In this case, the presiding officer took action, at the request of the Commission investigative staff, that (1) permitted the introduction and use of secondary evidence and (2) barred certain respondents from making proof of facts that would have been discovered had they responded to discovery. We see no need to overrule the presiding officer, for his action was helpful, but he didn't go far enough. His sanction fails to take into account the impact of respondents' conduct on this investigation.

The Administrative Procedure Act requires our decision to be on the record, and a record of fact is desirable, but the preeminent fact in this case is the respondents' refusal to cooperate in discovery. Under such circumstances, the Administrative Procedure Act does not prevent us from finding a prima facie case of violation.

> Nor is an agency forbidden to draw such inferences or presumptions as the courts customarily employ, such as the failure to explain by a party in exclusive possession of the facts, or the presumption of continuance of a state of facts once shown to exist. (Attorney General's Manual on the Administrative Procedure Act, 1947, page 76.)

Of course, it is a basic principle of our system of evidence that one party's failure to offer vital information to a tribunal indicates, as the most natural inference, that the party fears to do so, and that this fear is evidence that the information, if brought, would expose facts unfavorable to the party.[1/] Of course, the inference ought not be drawn where there is some colorable reason for refusal to cooperate.

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1. Wigmore on Evidence, Section 285.

However, in this case, there is no such reason. The refusal to cooperate appears to have been based upon the theory that the Commission lacked "jurisdiction" over these respondents, or should not exercise it. In our opinion, the reasons pertaining to jurisdiction are no basis whatever for failing to cooperate with the administrative process. That process is based upon fact, and our power to discover fact is essential to our functions under Section 337.

In many cases, the evidence is consistent with our inference of sales below AVC, and the respondents cannot be heard to object to any logical inferences drawn from the record.[1/] In many instances where the presiding

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1. We agree with the presiding officer's conclusion of law #5 that the secondary evidence used is "relevant, reliable, and probative of the costs of production of the non-complying responding parties" and that the secondary evidence was properly filed and admitted.

The use of secondary evidence is in accordance with the Administrative Procedure Act, the Commission's rules and the case law developed in this area. The Administrative Procedure Act and the Commission's rules are flexible as to the admissibility of evidence in an administrative proceeding such as this. The Administrative Procedure Act (5 USC §556(d)) states that any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. The Commission's rules (§210.42(b)) direct that relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded.

Unlike the courts, administrative agencies are not bound by the strict rules of evidence applicable to trials. Due to the fact that an agency should appraise the totality of the situation presented by the evidence, this freedom in the admissibility of evidence which might be excluded elsewhere, aids the agency in making a better informed final determination.

officer found sales below AVC,[1] the relationship between the importer and the foreign exporter or manufacturer is direct. In the other instances, the number of reported lowest net selling prices below average variable cost is a large enough percentage of total reported selling prices that we feel justified in allowing our inference to stand as to the suppliers of importers providing this information.

Accordingly, our record of this proceeding establishes that the following respondents were shown to have made or participated in sustained sales below the average variable costs of production:

Ataka & Co., Ltd.
Brasimet Industries Corp.
Hanwa Co., Ltd.
Kanematsu-Gosho, Ltd.
Marubeni Corp.
Sumitomo Shoji America, Inc.
Nissho-Iwai Co., Ltd.
Okura Trading Co., Ltd.
Sumitomo Shoji Kaisha, Ltd.
Toa Seiki Co., Ltd.
Toyo Menka Kaisha, Ltd.[2]

We therefore hold that the above named respondents have engaged in unfair methods of competition or unfair acts by virtue of their sustained sales below AVC with predatory intent and without business justification. Respondents' failure to offer any evidence of a plausible defense to such practices can only lead to the conclusion that the rebuttable presumption of predatory intent must be applied instead. The only remaining question is

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1. Recommended Determination, Finding 42.

2. Id.

whether their acts had the requisite effect or tendency under Section 337. This is discussed in the next section.[1/]

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1. We find further that the following respondents sold below average total costs but above average variable costs: Mitsui & Co., Ltd., Nichimen Co., Ltd., Okaya & Co., Ltd., San Eki Tube Corp., Stainless Pipe Kogyo Co., Ltd., Sumitomo Metal Industries, Ltd., Yamato Industries Co., Ltd. With respect to these named respondents there is no independent evidence of predatory intent, and no inferences or presumptions of such intent will be drawn. Accordingly, they have not committed any violation of Section 337. These respondents included those to whom no inferences of sustained sales below AVC could be drawn. On this matter, we do not accept the staff's contention that a mere three transactions at below average variable cost indicates an unfair method or act, even though with direct evidence any selling below average variable cost by a person who has the power to sustain those costs over a long period of time is potentially a violation of the law. This is because the evidence as to these few sales is, we believe, inconsistent with our inferences.

Finally, we hold that the following respondents do not sell or import welded stainless steel pipe and tube within the meaning of Section 337, and are therefore not in violation: Daitai Kogyo Co., Ltd., Itoh Metal Abrasive Co., Ltd., and Watanabe Trade and Engineering Co.

THE EFFECT OR TENDENCY OF THE UNFAIR METHOD OR ACT

Having found an unfair method or act by reason of pricing below AVC on a sustained basis, we are required by Section 337 to consider whether this unfair method has one of three "effects or tendencies."[1/] Of these, we find and determine that the unfair method or act we have found in this case has a tendency to restrain trade and commerce in the United States.

In applying the statutory criteria to this case, complainants make two arguments, both of which we find without merit. The first is that we may derive an inference that the pricing practices we have found necessarily cause injury (the so-called double inference test). The staff makes a similar argument, that the practice involved inherently restrains trade as well as causes injury to competitors. Section 337 will not support the double inference. It contains a separate requirement of injury, either to competition or to competitors. The party with the burden of proof must show by substantial, probative and reliable evidence that either injury or a restraint of trade is taking place, or that there is a tendency toward them. A restraint of trade is demonstrated affirmatively by any number of factors including the commercial context.

Secondly, complainants argued there was actual injury to an efficiently and economically operated domestic industry. We agree with the presiding

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1. These include --
". . .the effect or tendency. . .to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States. . . ." Section 337(a).

officer that market shares are not such as to indicate that the industry as a whole is being substantially injured and we adopt his findings of fact on this question.[1/]

However, complainants did point to one aspect of this case which shows a tendency to restrain trade. In their brief to the Commission, they suggested that imports from Japan of welded stainless steel pipe and tube have a large and increasing share of total imports into the United States.[2/]

Section 337 is not merely a statute to protect competitors but also a statute to preserve competition. In this case the evidence in the record on imports establishes that the tendency of the unfair practices of the respondents has been to exclude from the United States market welded stainless steel pipe and tube manufactured in countries other than Japan. Such evidence is contained in complainants' exhibit 14. This exhibit compares imports of welded stainless steel pipe and tube from Japan with total imports. In 1973, imports from Japan constituted 89 percent of total imports. In 1974, the Japanese share was reduced to 70 percent. In 1975, it increased to 82 percent, and in 1976 Japanese imports represented 87 percent of total imports.[3/] The unfair pricing that we have found began seriously in mid-1975 and has continued with greater frequency in 1976 than in 1975. In our opinion it is the unfair practice which is enabling Japanese firms to regain the market share they lost in 1974

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1. Recommended Determination, Finding of Fact No. 70.
2. Brief of complainants, filed December 23, 1977, at page 18.
3. Transcript, p. 324-327. The Japanese share of imports of welded stainless steel pipe and tube may vary slightly from these figures, since only 90% of imports under TSUSA 610.3720 are welded stainless steel pipe and tube, and the stated percentages encompass all imports under this item. See also Recommended Determination, finding 67.

to imports from other countries. We conclude from this exhibit that firms which are engaging in unfair pricing are the ones who receive the advantage of an increased total share for Japanese firms of imports to the United States. In summary, the information in complainants' exhibit 14 demonstrates that the tendency of the unfair method or act has been to exclude imports from other countries.

For the purposes of this proceeding under Section 337, it is unimportant that imports as a whole constitute a relatively small percentage of the domestic market, because the record shows that they are a significant competitive factor without which competition in the United States would be restrained. The Department of Justice also takes the position that "imports have had a restraining effect on price" in the domestic market. We agree.

Lawful competition between firms handling imported products is essential to maintain a healthy competitive environment in the U.S. market. Thus, competition between products from Japan and from other countries must exist. When competitors are excluded from the U.S. market, as they are in this case, by a means contrary to law, they are being excluded not by our competitive process but by a means which would not be permitted to any competitor, foreign or domestic.

Imports are an essential part of U.S. trade and commerce. Imports are protected from restraints in trade and commerce under the Sherman, Wilson Tariff, and Clayton[1/] Acts as well as the Federal Trade Commission

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1. The protection of competition in importation has been the subject of enforcement action under section 7 of the Clayton Act. See, e.g., United States v. Schenley Industries, Inc., 1966 Trade Cas. Par. 71,897 (S.D.N.Y.) in which the government challenged the acquisition of an importer by another importer and distributor. A consent decree requiring divestiture and limiting future acquisitions of any companies which have "the right to produce and sell or the right to import and sell" scotch whiskey terminated the case, 1971 Trade Cas. 73,490 at 90,0007 (S.D.N.Y.)

Act.[1/]

The gist of the law in the area of unfair competition is the effort to prevent those kinds of methods, acts and practices which subvert fair competition. Any exclusion of competitors through unfair methods of competition or acts would tend to restrain U.S. trade and commerce.

The language "tendency . . . to . . . restrain trade and commerce in the United States . . ." requires the prohibition of unfair methods and acts which, unless arrested in their incipiency, could result in full blown restraints of trade. This language first appeared in section 316 of the Tariff Act of 1922 and was incorporated without change into section 337 of the Tariff Act of 1930.

Although the legislative histories of section 316 and 337 do not specifically address the concept of tendency, the obvious parallel between these sections and section 5 of the Federal Trade Commission Act justifies comparison with the interpretation of that statute.[2/] Both the legislative history[3/] and pre-1922 judicial gloss on section 5[4/] indicate

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1/ This Commission first referred to the parallel between the language of section 337 and that of section 5 of the FTC Act in 1922:

> Section 316 extends to import trade practically the same prohibition against unfair methods of competition which the Federal Trade Commission Act provides against unfair methods of competition in interstate commerce. Sixth Annual Report of the U.S. Tariff Commission (Washington, D.C., 1922), at 3.

The breadth of the meaning of the phrase "unfair methods of competition" in section 5 of the FTC Act has been left to that agency to define from its regulatory experience. See FTC v. Motion Picture Advertising Service Co., Inc., 344 U.S. 392 (1953). The phrase as used in section 337 could well encompass the experience of the FTC with section 5. See, generally, In re Von Clemm 229 F.2d 441 (1955).

2/ See, supra, note 1.
3/ See, remarks of Senator Cummins (chairman of the committee which reported the bill), at 51 Cong. Rec. 11455 (July 1, 1914).
4/ See, e.g., Federal Trade Commission v. Gratz, 253 U.S. 421, at 427, 435 (1919).

that the FTC Act was intended to stop trade restraints and other undesirable methods of competition in their incipiency. It is reasonable to assume that the framers of Section 316 were cognizant of the legislative and judicial history of Section 5 of the FTC Act and the "tendency" language was provided in Section 316 to make explicit the incipiency doctrine implicit in Section 5. Support for this view appears in the report of the Senate Finance Committee on the bill that became the Tariff Act of 1922:[1/]

> /t/he provision relating to unfair methods of competition in the importation of goods /section 316/ is broad enough to prevent every type and form of unfair practice and is therefore a more adequate protection to American industry than any antidumping statute the country has ever had. (emphasis added).

Simply stated, what we have found here is that the sale by certain respondents of stainless steel pipe and tube in the U.S. market at prices below AVC is an unfair act which has the tendency to restrain trade and commerce in the United States by substantially reducing the domestic market share of other foreign competitors.[2/]

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1. U.S. Senate, Committee on Finance, Report to Accompany H.R. 7456, S. Rept. No. 595, 67th Cong., 2d Sess., at 3.

2. We find, therefore, that the tendency of those unfair acts committed by the respondents listed in finding of fact #42 is to restrain trade or commerce in the United States. Accordingly, we reject conclusion of Law #10.

FINDINGS AND CONCLUSIONS CONCERNING REMEDY, THE PUBLIC INTEREST AND BONDING

Section 337 requires that, in the event we determine there is a violation of the law, we either enter an exclusion order or, in lieu of that, enter an order for the persons involved to cease and desist from engaging in their unfair methods or acts. Both of these remedies are subject to the caveat that, if their effect upon various public interest factors is such that the order should not be issued, then the Commission will not do so. Finally, if an order is issued, then we are required by Section 337(g)(3) to determine a bond under which the articles concerned are entitled to entry during the period when our action is subject to presidential disapproval. By a notice issued on December 7, 1977, the Commission stated its intention to receive comments on these matters and decide them. The December 7 notice was also served upon the parties and mailed to various persons who in our view might have an interest in these matters. The notice was also sent to various federal agencies, including the Federal Trade Commission, Department of Agriculture, National Aeronautics and Space Administration, Department of Justice, Department of Defense, and Department of Health, Education, and Welfare. The Commission received comments on all of these issues from the Commission investigative staff and complainants, and from the amicus Prudential Stainless Pipe Corporation. However, it appears that respondents made no representations or submissions on this issue.

We also received a request from the Department of Justice that the time for it to comment be extended, and, in fact, that time was extended, as well as was the time for entering appearances by persons who wished to make oral presentations on these issues to the Commission.

a. Remedy

Of those agencies queried for comment on this case, the Department of Health, Education, and Welfare stated in a letter filed December 2, 1977, that it had no advice or information to offer in the investigation. Although the Bureau of Competition of the Federal Trade Commission expressed interest in commenting, it never did. The Department of Agriculture also filed a letter stating that it had no comment.

The agencies which responded were the National Aeronautics and Space Administration (NASA); the Office of the Secretary of Defense for Research and Energy (Defense); and the Antitrust Division of the Department of Justice (Justice).

NASA stated that "there is an increasing general use of Japanese-supplied materials and equipment by the aerospace industry of the United States," but they expressed their view that low cost was not the sole selection criterion for suppliers. The Department of Defense supplied detailed information on lead times for acquisition of welded alloy pipe and tube (which had generally decreased over the past eighteen months) and information on annual demand, prices, and so on, of the Department in 1977. While the decrease in lead times for acquisition of alloy steel pipe and tube procured by aircraft production activities was a matter of seven weeks in one six-month period (July, 1976 to September, 1977), we see no

indication of harm to the strategic interests of the United States in any remedy as a result of the NASA or Defense Department submissions. We also received a submission from Justice which we discuss below.

Comments were received from the Amalgamated Clothing and Textile Union; C. A. Roberts Company, a specialty tubing and pipe distributor; the House of Stainless, Inc., evidently also a distributor of stainless steel pipe and tube; and the American Textile Manufacturers Institute, Inc. Of these, the American Textile Manufacturers Institute, Inc. did not wish to participate, and the others supported generally, but without specific comments, an affirmative result in this proceeding. Since these comments were not directed specifically at the issues set forth in the December 7 notice, they have not been particularly helpful in resolving these questions.

We have decided that a cease and desist order is the only appropriate remedy under the Trade Act. This remedy was added to the statute in 1974 for the reason that the exclusion remedy "is so extreme or inappropriate in some cases that it is often likely to result in the Commission not finding a violation of this section, thus reducing the effectiveness of section 337 for the purpose intended."[1/]

Our December 7 notice, referred to above, requested the parties to provide draft final orders, and the complainants and the staff did so. Complainants' position is that an exclusion order ought to be issued now to be replaced by a cease and desist order when and if the respondents provide information sufficient to determine the essential facts of trade in this product. We believe it is contrary to the objectives of the 1974

1/ S. Rep. at 198.

Trade Act to issue an exclusion order in precisely the type of proceeding for which the cease and desist order was added as a remedy in 1974. We are able to issue a remedy in this case because a cease and desist order allows these respondents a reasonable opportunity to conform their business to the standards in the order. We, therefore, reject the suggestion by complainants of an immediate exclusion order.

Complainants have also suggested an order which would prohibit all sales at prices below fully allocated cost, i.e., total cost. Since our decision in this case finds that the only unfair method or act engaged in by the eleven respondents who are the subject of our action was pricing below reasonably anticipated marginal cost, we cannot accept a cease and desist order which goes to any higher pricing. We have, therefore, decided to use as our basic model the draft order submitted by the Commission investigative staff, which called for prohibitions against pricing below average variable cost and against "predatory pricing," as well as elaborate reporting provisions.

We have added to the "definitions" section of the order, definitions for the terms "marginal cost" and "commercial justification," since, as described earlier in our opinion, these are essential elements of the conduct which is being prohibited by this action. A respondent who is subject to the order may, however, demonstrate compliance by showing that his prices were above average variable cost. We are now subjecting manufacturers to this requirement. Exporters and importers are required not to handle products which do not meet the requirement. We recognize

that it may not, in some cases, be commercially practicable for exporters and importers to determine whether the products they have handled meet the requirement except by consultation with foreign manufacturers. We expect them to do so, and if such consultations do not develop information sufficient to demonstrate to the exporters and importers that the prices they are selling at are lawful, then they must at least obtain the certificate of their suppliers that the information will not be released to the exporter or importer and that the prices charged are consistent with the terms of our order.

Forms for reporting will timely be provided to the respondents subject to this order. We will not require the first reporting on compliance with this order until 120 days after the order becomes final. This will allow time for the respondents to adjust to the form of reporting required by the Commission. We intend to permit reporting on cost as calculated by whatever reasonable method each respondent chooses to employ, so long as it is used consistently by that respondent over a period of years. The order will expire by its terms in 1982 if not earlier dissolved, one year less than the staff would require. We believe that this will be a sufficient period of time, given past cycles of this market, for us to determine that there has been compliance.

This action, then, is to order the eleven named respondents to cease and desist so far as it is within their power the unfair methods and acts which we have found, and to require them to demonstrate in as simple and non-burdensome ways as we can devise at this time their compliance over the next four years.

b. The public interest.

It seems to us, after considering the factors relating to the public interest listed in Section 337(f),[1] that this order is not only consistent with the public interest, but aids it. The arguments made to us that a cease and desist order is not in the public interest are unpersuasive. The amicus Prudential Stainless Pipe Corporation argued that selling below average variable cost enhances competition and is therefore beneficial. We have already demonstrated that selling below AVC is harmful to competition. They and the respondents also argued, in effect, that this proceeding overlaps a concurrent proceeding under the Antidumping Act which will, if relief is granted, overshadow any relief granted here. As we have shown, Section 337 and the Antidumping Act are not coextensive.[2] Finally, nothing in this record shows this action is inconsistent with the foreign relations interests of the United States.[3]

With respect to the requirement concerning "competitive conditions in the United States economy," we have a great deal of information about

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1. Section 337(f) provides,

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

2. Supra, p. 13.

3. These matters are within the province of the President under the statute, Section 337(g); Melco Sales, Inc. v. United States International Trade Commission, et al, Civil Action No. 76-1932 (order filed November 15, 1976).

the sources of imports and feel confident that the effect of this decision will be to keep as many competitors in this market as are consistent with efficiency and general welfare, including foreign competitors from all countries. This order merely assures that competitors are not excluded from the marketplace by plainly unfair means.

The Department of Justice also takes the position that "imports have had a restraining effect on price" and that, therefore, the effects on consumers of "excluding" Japanese imports would be to raise consumer prices. The one argument defeats the other. If imports have a restraining influence on prices, then we ought to argue in favor of all imports, because they enhance the competitive environment. In fact, no Japanese firm will be "excluded" from the American market by the action we are taking, but will only be required to raise somewhat the price of the imported article so that all may participate in this market. Indeed, we are not requiring the price to cover even fully allocated cost, but only to be at a level which reasonably guarantees that predation is not the reason for the price. We do not even require the price to be raised at all, if there is a commercial justification for below-AVC prices. We, therefore, determine that the cease and desist order that we have described above is in the public interest and has no adverse effect upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers. The order, in fact, serves these interests.

c. Bonding

The Commission investigative staff has suggested that we impose no bond for the reason that it "would not serve the purpose of making the price of the imported and domestic articles equivalent unless it were specially determined for each entry." 1/

The complainants urged upon us a bond "equivalent to 50% of the price" of the articles in question, but provided no justification. In light of our objectives of not interfering with trade and commerce in this article, and because of difficulties such as those described by the Commission investigative staff, we have determined that there should be no bond upon entries of these articles made during the period of Presidential consideration. 2/

RULINGS ON FINDINGS, CONCLUSIONS, AND EXCEPTIONS PRESENTED

Consistent with the Administrative Procedure Act, we now show our ruling on each finding, conclusion, or exception presented. The presiding officer made seventy-two recommended findings of fact (some of which are confidential) and eleven conclusions of law. Exceptions to some of these were filed by all parties and Prudential on November 25, 1977. We hereby adopt all numbered findings of fact from the presiding officer's recommended determination except findings 53, 54, 62, and 63, thereby

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1. "Commission Investigative Staff's Comments on Bonding and the Public Interest Factors," filed December 23, 1977 at p. 4.

2. Nothing in our decision today precludes us from determining a bond in cases of this nature in the future where the bond is necessary to assure compliance with the law during the period of Presidential consideration, and the record is sufficient to allow the Commission to determine an amount appropriate to act as a deterrent to unfair methods of acts during that period.

ruling for the reasons stated in the foregoing opinion on exceptions inconsistent with this action. We have adopted none of the exceptions, also for the reasons stated in the foregoing opinion.

We hereby substitute for the conclusions of law reached in the recommended determination the foregoing opinion and our action, to the extent not consistent with them, and otherwise reject all exceptions and arguments not consistent with this opinion.

CONCURRING OPINION OF ITALO H. ABLONDI

I concur in the determination in this proceeding, that a cease and desist order to prevent sales at below reasonably anticipated marginal cost (or average variable cost) without commercial justification issue. However, I would have entered this order as a matter of sanction against the respondents Ataka & Co., Ltd., Brasimet Industries Corp., Hanwa Co., Ltd., Kanematsu-Gosho, Ltd., Marubeni Corp., Nissho-Iwai Co., Ltd., Okura Trading Co., Ltd., Sumitomo Shoji America, Inc., Sumitomo Shoji Kaisha, Ltd., Toa Seiki Co., Ltd., Toyo Menka Kaisha, Ltd., who are the subjects of the majority opinion.

I find that the Commission has personal jurisdiction over each of the respondents above named for the reason stated in that portion of the opinion of Commissioners Minchew, Moore, and Alberger which goes to personal, and in rem, jurisdiction.

The majority's statement setting forth the abysmal record of noncooperation by the respondents evidences a program of such dilatory and destructive consequences that no reasonable record could accumulate in this investigation. Given the 7-month time limitation provided for in Commission rules (19 C.F.R. 201.41 (e)), it is unconscionable that respondents should have evinced an intent of full participation in this investigation before

their decision to withdraw. Almost 6 months of this 7 month rule had expired before respondents' decision was made known. 1/

At oral argument before the Commission, the respondents' lack of candor and cooperation with the Commission was further revealed. I inquired to what extent respondent manufacturers had any interest in exporting or trading companies. The response was unsatisfactory inasmuch as it did not reveal the relationship of these respondents to trading companies exporting to the United States, and therefore, made it impossible to grant their motions based upon lack of personal jurisdiction. Furthermore, the affidavits submitted on this issue likewise were lacking of complete and factual data. (See, transcript of oral argument January 31, 1978 at pp. 124 through 128).

For the reasons stated in the majority's opinion, it is patent that the inference may be drawn as to the matter of an unfair method or act. But, even as to the question of an effect of restraining or monopolizing or tendency to restrain or monopolize trade and commerce in the United States, the respondents' recalcitrance was equally destructive. Both the staff's and complainants' discovery plainly went to questions that would have produced information on the market share of each respondent, the persons to whom their

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1/ In Import Motors Limited, Inc. v. USITC, 530 F.2d 940 (CCPA 1976), the Court said in respect of the Commission's exclusion of a party from its hearing on violation:

> The International Trade Commission appears to be one of the few administrative agencies, if not the only administrative agency, which must conclude its investigation and make its determination within a specified time. That statutory limit could encourage intervention and dilatory, duplicative tactics by those who may be interested in increasing the burden on the Commission and thereby preventing its reaching a timely determination.

product had ultimately been sold, and other information probative on the issues of injury or restraint of trade. For example, staff interrogatory No. 18, which is quoted in the staff motion of June 16, 1977, to compel answers to interrogatories, requested respondent manufacturers and exporters to describe the type of documents they maintain that indicate the ultimate destination of their welded stainless steel pipe and tube. Those interrogatories asked them to describe their contacts with the United States and the substance of any agreements relating to "a continuous course of dealing" with any person in the United States. Interrogatory No. 11 asked for the terms of sale of shipments of welded stainless steel pipe and tube to any person involved in the importation of that product to the United States. Complainants' request for production, filed on April 29, 1977, requires the providing of information to show total production, prices in the United States, and other information that would have enabled complainants or the staff to demonstrate whether there was injury to the domestic industry by reason of sales lost to the respondents.

Moreover, the withdrawal of certain respondents from this case and their subsequent nonparticipation leaves us with no criteria with which to test the information that is before us, and, I believe, strongly suggests the respondents' violative selling practices. Respondent manufacturers' arguments regarding personal jurisdiction are baseless without facts of their interests in trading companies.

Notwithstanding their noncooperation, the Commission has permitted the respondents to participate at every phase of this investigation. Even the sanction imposed by the presiding officer did not prevent their participation in the hearing on violation; it only prevented their presentation of certain forms of evidence.

I would therefore overrule the sanctions imposed by the presiding Officer and instead substitute for them a ruling under rule 210.36(b)(2), "that for the purposes of the investigation the matter or matters concerning the order (compelling discovery) be taken as established adversely to the party."

While this is a severe sanction it is clearly consistent with the history of our system of evidence, due process and the Administrative Procedure Act (APA). It has long been the law of this country that importation is a privilege granted by law (Buttfield v. Stranahan, 192 U.S. 470 (1904); The Board of Trustees of the University of Illinois v. United States, 289 U.S. 48 (1933); United States v. 12 200 Ft. Reels of Super 8MM Film, 413 U.S. 123 (1973). This privilege should not be abused.

It is plain that withholding documentary evidence has always been held to be receivable against the person withholding

> . . . as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause. (Wigmore, Evidence, section 278 at 120).)

The inference is apparently even stronger where the withholding of information takes place out of court, as in discovery. (Id. at 188.)

Rule 210.36(b)(2) is drawn rather broadly from rule 37 of the Federal Rules of Civil Procedure, which provides for "sanctions" for failures to make discovery, including--

> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order . . .

The original provisions of rule 37, authorizing orders establishing facts, excluding evidence, striking pleadings, authorizing judgments of dismissals or default for refusal to make discovery, were drawn from the Supreme Court's decision in Hammond Packing Company v. Arkansas, 212 U.S. 322 (1909). (See 4A Moore's Federal Practice 37-7 (Para. 37.01 (2)). It may appear at first blush that a court's authority to issue a default for failure to obey its discovery orders derives from its contempt powers, and therefore an agency which does not have contempt powers, such as this one, may not issue such a decision. However, Hammond Packing appears to hold otherwise. In that case the State of Arkansas commenced an action in the State court against the Hammond Company for forfeiture of its permit to do business in Arkansas and for money penalties under a State antitrust statute. Under the antitrust statute, the Attorney General of Arkansas moved for the appointment of a commissioner to take testimony and for the production and examination of books and papers outside the State. The commissioner was appointed, but his orders for discovery were refused by the Hammond Company. The State court thereafter granted a motion to strike out all pleadings of the Hammond Company and a penalty amounting to $10,000 was entered.

In affirming this decision, the Supreme Court specifically held that the decision of Arkansas based upon a failure to produce was not a violation of due process as beyond the power of the State. It also held that striking the answer and the entry of default was based upon the right to create a presumption flowing from the failure to produce, and not the contempt power. This is what the court stated:

> . . . This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hovey v. Elliott, and the power exerted in this, is as follows: In the former due process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other. In its ultimate conception therefore the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law.

I therefore conclude that the failure to comply with discovery in this investigation justifies a presumption of violation, and that is a basis for my decision. 1/

1/ See also Societe Internationale v. Rogers, 357 U.S. 197 (1958) and National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976). I note that the Attorney General's Manual on the APA states the agencies subject to the APA may claim the usual evidentiary inferences notwithstanding the APA requirement for a decision "on the record". While my reasoning extends to noncooperating respondents, I have taken cognizance of the presiding officer's finding that certain respondents were not pricing at below average variable cost (AVC). Since I here also adopt the "below-AVC" test of the majority, for the reasons they have given, I limit those findings only to those respondents in finding No. 42 of the Recommended Determination, since I do not wish an action to issue that is inconsistent with the record.

The definition the Commission has used for average variable cost and marginal cost are supported by decisions of several Federal courts. The definitions appear, inter alia, in Pacific Engineering & Production Co. v. Kerr-McGee Corp., 1977 Trade Cases, Para. 61290 at footnote 3 (10 Cir. 1977) and Hanson v. Shell Oil Co., 541 F.2d 1352 (9 Cir. 1976).

I join in the majority's finding that a cease and desist order is the proper action in this investigation. The issuance thereof is in the public interest. Pricing below average variable cost is so extraordinary, particularly when conducted over a sustained period of time, that there is an adverse effect upon the public interest in not prohibiting this practice. Moreover, the cease and desist order entered today does not necessarily prohibit this practice, since any of the respondents may reveal that there is commercial justification for their having priced at below average variable cost. Thus, I am convinced that it is in the public interest to enter the order agreed upon by the majority.

Dissenting Opinion of Vice Chairman
Joseph O. Parker and Commissioner Catherine Bedell

On February 22, 1977, the Commission published in the Federal Register 1/ notice of institution of investigation No. 337-TA-29. In this investigation, complainants, eight domestic producers of welded stainless steel pipe and tube, allege that respondents, Japanese manufacturers and exporters and domestic distributor-importers of welded stainless steel pipe and tube, violated section 337 of the Tariff Act of 1930, as amended.

Specifically, as set forth in the notice of investigation, complainants allege a violation of section 337--

> by reason of the alleged sale in the United States of such welded stainless steel pipe and tube at unreasonably low prices, often below the cost of production, with an intent to restrain or monopolize trade and commerce in these articles in the United States, the effect or tendency of which is to destroy or substantially injure an industry efficiently and economically operated in the United States, or to restrain or monopolize trade and commerce in these products in the United States.

Under these allegations, as set forth in the notice of investigation, it is incumbent upon complainants to establish that--

1. Respondents sold at unreasonably low prices;
2. That such sales at unreasonably low prices were made with an intent to restrain or monopolize trade and commerce in these articles in the United States; and
3. That the effect or tendency of such sales at unreasonably low prices is to destroy or substantially injure an industry efficiently and economically operated in the United States, or to restrain or monopolize trade and commerce in these products in the United States.

In order to make an affirmative determination, it is necessary that each of the criteria described in the notice of investigation be met.

1/ 42 F.R. 10348.

We have determined that at least one of these criteria has not been met and, therefore, have made a negative determination.

A hearing before Judge Myron R. Renick, the presiding officer in this investigation, was held on September 12-13, 1977. No respondents appeared at this hearing although they had appeared generally through counsel at various earlier stages of the proceeding. At the conclusion of the hearing, the presiding officer gave all parties the opportunity to file briefs and proposed findings of fact and conclusions of law.

On November 14, 1977, the presiding officer served upon complainants, respondents, and the Commission investigative staff and transmitted to the Commission his recommended determination. He determined and recommended that section 337 is not violated by reason of the fact that the unfair methods of competition and unfair acts alleged have not had the effect or tendency to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to restrain or monopolize trade and commerce in these products in the United States. Exceptions to the recommended determination were filed by complainants, respondents, and the Commission investigative staff.

Although several prehearing and discovery conferences were held in this investigation, the presiding officer found respondents' compliance with discovery requests so "unsatisfactory" that in Prehearing Order No. 15, he issued sanctions against respondent Japanese manufacturers and exporters under rule 210.36(b)(4). 1/ These sanctions prohibited these respondents from

1/ Commissioner Bedell supports the issuance of sanctions by the presiding officer under the circumstances in this case, and is of the opinion that the presiding officer's understanding of the conduct of the investigation and positions of the parties gave him the necessary insight to order the most appropriate sanctions.

objecting to the introduction and use of secondary evidence and made objectionable the offer of anything in evidence that would have been produced in response to discovery by the respondents. Following the issuance of this prehearing order by the presiding officer, all of the respondents ceased active participation in the case until the oral argument before the Commission and did not present any evidence as to their costs or their selling price. The effect of the sanctions, therefore, was to restrict the respondents, but in no way did they relieve complainants from the standards of proof which they must fulfill in order to establish a violation of the statute.

Section 337 proceedings are subject to the provisions of the Administrative Procedure Act, and under that act the proponent of an order has the burden of proof and the burden of coming forward with substantial, probative, and reliable evidence. In this investigation, which involves separate and distinct respondents, it is essential that proof of the violations alleged be made as to each respondent since conspiracy was removed as an issue. In the absence of a conspiracy or other showing that respondents were acting in concert or responsible for the acts of another, the proof as to the actions of one respondent cannot be imputed to another respondent.

We agree with the presiding officer that the requisite effect or tendency

of the alleged unfair methods and unfair acts have not been proven in this investigation. The record does not support the allegations that respondents have restrained or monopolized trade and commerce in the United States or that their actions have substantially injured a domestic industry. It is complainant's burden to prove that individual respondents were responsible for the sales allegedly lost by domestic producers. The record does not contain any evidence of lost sales to any respondent. The most the evidence shows is that sales were lost to "the Japanese." (See, e.g., staff Exhibit 1A). Many foreign manufacturers and exporters of welded stainless steel pipe and tube are Japanese, but not all of them are respondents. Obviously, linking lost sales to specific respondents is a necessity in this case in order to avoid holding any respondent liable for acts committed by another. The presiding officer found that complainants "failed to link any [lost] sales to a specific respondent who has been found to have violated the act" (Recommended Determination at 44-45). We concur.

An argument has been made that the market share of Japanese imports is climbing in comparison to the U.S. market and in relation to other sources of imports and that this somehow is evidence of a tendency to restrain trade. While figures presented by complainants demonstrate that the market share for Japanese imports of welded stainless steel pipe and tube rose in 1975 and 1976, there is no evidence to show that this increase in market share was obtained by respondents in this investigation, nor is there any evidence of the reasons for this increase.

While the presiding officer determined and recommended that there is no violation of section 337, he determined that certain of the named respondents had engaged in unfair methods of competition and unfair acts by the importation and sale of welded stainless steel pipe and tube at prices below the average variable cost of production. However, in our opinion, the evidence in this investigation does not contain adequate proof that the importation and sale of welded stainless steel pipe and tube were made by any respondents at prices which were below their respective average variable costs of production over a sustained period.

The only evidence in the record of this investigation as to the cost of production of Japanese-produced welded stainless steel pipe and tube offered by complainants or the Commission investigative staff was staff exhibit 7. This exhibit was derived from information supplied by U.S. producers, some of whom are complainants in this investigation, in response to a Commission investigative staff questionnaire as to U.S. producers' "cost to manufacture." This information purporting to be U.S. producers' domestic costs to manufacture pipe and tube was averaged and imputed to each respondent manufacturer as its cost of production of stainless steel pipe and tube. This information contained in exhibit 7 was derived from sections P and Q of staff exhibit 1A which simply requested the U.S. producer to supply the stainless steel cost, other raw material, direct labor, and overhead, the sum of these described in the questionnaire as "total cost to manufacture." The only instructions as to how a company is to derive these costs is that "standard costs may be used" and that the

company is to "use the same allocation factor employed in the profit and loss section . . . ." The information in the questionnaires was not submitted under oath. There is no evidence concerning the bookkeeping and accounting practices followed by the different domestic producers or how their accounting practices may have differed between different producers. There is no evidence that the answers received were audited by complainants or the Commission investigative staff or subjected to the standards of any recognized accounting practice or test.

Complainants and the Commission investigative staff have also failed to prove with reliable, probative, and substantial evidence the prices at which respondents sold stainless steel pipe and tube. Pricing information in the record of this investigation, relates only to the lowest price paid or charged by an importer for various categories of welded stainless steel pipe and tube, by quarters, for a period of several years. In general, these prices are of no probative value since they are evidence only of the lowest price charged by an importer in that quarter for a particular category of welded stainless steel pipe and tube supplied by some unknown Japanese exporter or manufacturer. Clearly, such evidence is insufficient to support a charge that any manufacturer sold at prices below the average variable cost of production on a sustained basis.

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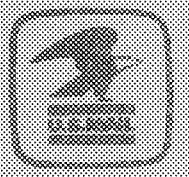

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