THE WHITE HOUSE

WASHINGTON

January 4, 1985

MEMORANDUM FOR DIANNA G. HOLLAND

FROM: JOHN G. ROBERTS

SUBJECT: Proposed (Revised) Letter to ITC Regarding Alkaline Batteries

This matter may be closed out. I advised Darman's office on January 3 that we had no legal objection to the revised letter, after obtaining Mr. Hauser's concurrence in that course of action.

Attachment

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) ___/___/___

Name of Correspondent: Richard Daumar

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Proposed (Revised) letter to ITC re: Alkaline Batteries

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CMHOL	ORIGINATOR	84/10/03			/ /
	Referral Note:				
CMAT 18	D	84/10/03		S	84/10/03
	Referral Note:				6:00
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ACTION

DISPOSITION

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 1/3/84 **ACTION/CONCURRENCE/COMMENT DUE BY:** 6:00 p.m. TODAY

SUBJECT: PROPOSED (REVISED) LETTER TO ITC RE ALKALINE BATTERIES

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	MURPHY	☐	☐
MEESE	☐	☐	OGLESBY	☐	☐
BAKER	☐	☐	ROGERS	☐	☐
DEAVER	☐	☐	SPEAKES	☐	☐
STOCKMAN	☑	☐	SVAHN	☐	☐
DARMAN	☐P	☑SS	VERSTANDIG	☐	☐
FIELDING	☑	☐	WHITTLESEY	☐	☐
FULLER	☑	☐	_____	☐	☐
HERRINGTON	☐	☐	_____	☐	☐
HICKEY	☐	☐	_____	☐	☐
McFARLANE	☑	☐	_____	☐	☐
McMANUS	☐	☐	_____	☐	☐

REMARKS:

The attached letter was prepared by Treasury and USTR.
If my office has not heard from you by 6:00 p.m. tonight, we will assume you have no problem with this revised letter and determination.

Thank you.

RESPONSE:

1985 JAN -3 PM 4:34

Richard G. Darman
Assistant to the President
Ext. 2702

DRAFT LETTER TO CHAIRWOMAN STERN

Dear Madame Chairwoman:

Pursuant to Section 337(g)(2) of the Tariff Act of 1930, as amended, I have decided to disapprove the Commission's determination in Investigation No. 337-TA-165, Certain Alkaline Batteries. Enclosed is a copy of my determination.

Sincerely,

RONALD REAGAN

DRAFT

Disapproval of the Determination of the United States International Trade Commission in Investigation No. 337-TA-165, Certain Alkaline Batteries

The United States International Trade Commission, following a finding of a violation of Section 337 of the Tariff Act of 1930, as amended, has ordered excluded from entry into the United States imports of certain alkaline batteries that were found to infringe a U.S. registered trademark and to misappropriate the trade dress of the batteries on which the trademark is used.

The President is authorized by Section 337(g)(2) to disapprove a Commission determination for policy reasons. I have notified the Commission today of my decision to disapprove its determination in this case.

The Commission's interpretation of section 42 of the Lanham Act (15 U.S.C. 1124), one of several grounds for the Commission's determination, is at odds with the longstanding regulatory interpretation by the Department of the Treasury, which is responsible for administering the provisions of that section. The Administration has advanced the Treasury Department's interpretation in a number of pending court cases. Recent decisions of the U.S. District Court for the District of Columbia and the court of International Trade explicitly uphold the Treasury Department's interpretation. Allowing the Commission's determination in this case to stand could be viewed as an alteration of that interpretation. I, therefore, have decided to disapprove the Commission's determination.

The Departments of Treasury and Commerce, on behalf of the Cabinet Council on Commerce and Trade, have solicited data from the public concerning the issue of parallel market importation and are reviewing responses with a view toward formulating a cohesive policy in this area. Failure to disapprove the Commission's determination could be viewed as a change in the current policy prior to the completion of this process.

DRAFT

Disapproval of the Determination of the United States International Trade Commission in Investigation No. 337-TA-165, Certain Alkaline Batteries

The United States International Trade Commission, following a finding of a violation of Section 337 of the Tariff Act of 1930, as amended, has ordered excluded from entry into the United States imports of certain alkaline batteries that were found to infringe a U.S. registered trademark and to misappropriate the trade dress of the batteries on which the trademark is used.

The President is authorized by Section 337(g)(2) to disapprove a Commission determination for policy reasons. I have notified the Commission today of my decision to disapprove its determination in this case.

The Commission's interpretation of section 42 of the Lanham Act (15 U.S.C. 1124), one of several grounds for the Commission's determination, is at odds with the traditional interpretation by the Department of the Treasury, which is responsible for administering the provisions of that section. The Administration has advanced the Treasury Department's interpretation in a number of pending court cases. Allowing the Commission's determination in this case to stand could be viewed as an alteration of that interpretation. I, therefore, have decided to disapprove the Commission's determination.

The Administration, through the Cabinet Council on Commerce and Trade Working Group on Intellectual Property, is studying the range of issues connected with so-called "grey market" imports. My decision to disapprove the determination in this case does not in any way prejudge the results of that review. Should the Administration decide to alter the traditional Treasury Department interpretation of section 42 of the Lanham Act, or should that interpretation be overturned in court, the Treasury Department will exclude the products that were the subject matter of this case without the need for further legal action.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

MEMORANDUM FOR: RICHARD G. DARMAN

FROM: ALTON G. KEEL

SUBJECT: USITC Determination Re Certain Alkaline Batteries

In general, USTR's memorandum fairly represents the reasons for our view that the President should disapprove the ITC determination. I would offer the following clarifications:

- We disagree with Ambassador Smith's arguments that Presidential acquiescence in the ITC order would:

  -- "preserve the rights of all concerned, including [the President's]," and

  -- "reserve to [the President] the greatest latitude in the current review of the 'grey market' issue."

  If the ITC's order is allowed to stand, and is appealed to the Court of Appeals for the Federal Circuit (a near certainty), the Court will be able to invalidate the existing Customs regulations that allow entry of gray market goods. We do not see why the President should run the risk of judicial reversal of current policy.

- By expanding the concepts of "territoriality" and "confusion" beyond their traditional interpretation in trademark law, the Commission has, in effect, created new trademark rights. The Commission's order outlaws gray market imports by excluding items bearing genuine foreign trademarks unless the U.S. holder of the identical trademark consents -- even if the U.S. trademark holder is the parent of the foreign manufacturer. This puts the Government in the position of enforcing price discrimination by multinational corporations. We believe that multinational firms already have sufficient means (such as contracts) to control the distribution of their products.

- There is a precedent for disapproval of a Section 337 case on the grounds of conflict with Executive Branch responsibilities. In 1978, President Carter disapproved an ITC determination because it was based on a judgment that dumping had occurred. (The antidumping laws are administered by the Executive Branch.) The Congress subsequently amended Section 337 to exclude dumping and subsidy cases from ITC review.

- If the President disapproves the ITC order, Duracell has other remedies. For instance, they can ask the ITC for a narrower exclusion order on the grounds of improper labeling. (This remedy was recommended by the two dissenting ITC commissioners.) Duracell could also challenge the Customs regulations in court.

A rewrite of the disapproval letter is offered at Tab A. It tones down the presentation of the "turf" issue.

A summary of the case is attached for your information at Tab B.

Attachments

Dear Madame Chairwoman:

This is to inform you that I have disapproved the Commission's determination in Investigation No. 337-TA-165, Certain Alkaline Batteries, for the following policy reasons:

1. The Commission's ruling has the effect of invalidating Customs regulations (19 CFR 133.21). As a matter of policy, the Commission's determinations should not contradict duly issued Executive regulations.

2. Recent decisions of the U.S. District Court for the District of Columbia and the Court of International Trade have upheld the aforementioned Customs regulations. Allowing the Commission's decision to stand would conflict with the posture of the Government in pending appeals.

3. The Administration, through the Cabinet Council on Commerce and Trade, is reviewing current law and policy on intellectual property rights in general and "gray market" goods in particular. Congress is also reviewing these issues. Failure to disapprove the Commission's determination would effectively change the present U.S. policy prior to the completion of this process.

Sincerely,

The Honorable Paula Stern
Chairwoman
United States International
Trade Commission
701 E Street, N.W.
Washington, D.C. 20436

Summary of Duracell Case

Issue

Should the President disapprove the International Trade Commission's order to exclude certain foreign-made Duracell batteries from entry into the United States?

ITC Determination

By a 3-2 vote on a petition filed under Section 337 of the Tariff Act of 1930, the ITC has:

- determined that imports of Belgian Duracell batteries into the U.S., without the consent of the Belgian firm's American parent (Duracell, Inc.), are *per se* unfair, and threaten to substantially injure the domestic industry. (Since 1982, roughly 10 million Belgian Duracell batteries have been imported into the U.S. by third parties.)

- ordered the exclusion of all foreign made Duracell batteries from entry into the U.S., unless Duracell, Inc. gives its consent.

Dissent

The dissenting commissioners found that the third party imports are not *per se* unfair, but that unfair trade practices (such as violations of the Fair Labeling and Packaging Act) have occurred. Consistent with its more limited finding, the minority remedy would exclude only those batteries that are improperly labelled.

Presidential Authority

The President has 60 days to disapprove an ITC order "for policy reasons." If he takes no action, the ITC's order automatically becomes effective. The 60-day review period for this case expires January 5, 1985.

Significance of This Case

This case has been described in the press as a test of "gray market" policy. "Gray market" goods bear genuine foreign trademarks, but their importation into the U.S. is not authorized by the holder of the identical U.S. trademark.

Current law prohibits unauthorized imports of goods bearing U.S. trademarks. By regulation, Customs does not enforce this law when identical foreign and U.S. trademarks are owned by the same entity. (The Customs regulations are being challenged in several court cases. So far, they have been upheld.)

The ITC determination that gray market imports are per se unfair (and thus subject to exclusion) contradicts the Customs regulations.

A CCCT Working Group is currently reviewing Administration policy on gray market imports. Substantial differences of opinion exist within the Administration.

Options

1. Allow the ITC order to go into effect, but inform the Commission that Presidential acquiescence in this case does not prejudge Administration policy on gray market imports.

2. Disapprove the ITC order on the grounds that it contradicts existing Customs regulations.

Arguments for Letting the ITC's Order Stand

- Since the Administration's gray markey "policy" is undecided, there is no "policy" reason sufficient to warrant the positive step of disapproval. Presidential acquiescence does not imply approval. (The President can formally approve an ITC order; no agency is recommending this option. Disapproval has occurred in only 3 of 65 cases.)

- In the absence of a policy reason, disapproval would deny due process to Duracell. (Current law requires the ITC to review all petitions except those based solely on allegations of subsidy or dumping, and provides that relief shall be in addition to any other provision of law.)

- If the order takes effect and is appealed (which is likely), a single appeals court will consider both this case and the challenge to Customs regulations. Concurrent judicial clarification of all legal issues would facilitate policymaking.

Arguments for Disapproving the ITC's Order

- Acquiescence in the ITC order would increase the risk of judicial reversal of current policy, as embodied in the Customs regulations. The Administration has defended these regulations in court. Preservation of Executive regulatory flexibility is a sufficient "policy" reason to warrant disapproval. The President should not take himself to court over an issue that he can decide directly.

- Disapproval would discourage future attempts to circumvent Customs regulations and established judicial remedies by filing Section 337 cases. It would be desirable as a matter of "policy" to close this loophole in current law. (Note: If the President disapproves this order, Duracell can still seek ITC relief from the narrower trademark infringements that appear to exist in this case.)

- Notwithstanding any disclaimers to the contrary, failure to disapprove this case would be perceived as a step by the Administration in the direction of curtailing gray market imports. Increased fear of successful Section 337 cases could be a damper on such imports.

THE UNITED STATES TRADE REPRESENTATIVE

WASHINGTON
20506

December 31, 1984

MEMORANDUM TO THE PRESIDENT

FROM: MICHAEL B. SMITH
ACTING

SUBJECT: U.S. International Trade Commission Determination Regarding Certain Alkaline Batteries

By January 5, you must decide what action, if any, you will take regarding the U.S. International Trade Commission's determination in its investigation, under section 337 of the Tariff Act of 1930, regarding certain alkaline batteries. I recommend that you take no action regarding the determination but that you direct the Trade Representative to advise the Commission, for the record, that your decision does not constitute an endorsement of the Commission's legal findings and does not indicate what action you might take in future cases involving the same issues. I believe that following my recommendation will preserve the rights of all concerned, including yours; will reserve to you the greatest latitude in the current review of the "grey market" issue; and will allow judicial review of the all of the Commission's legal findings by the Court of Appeals for the Federal Circuit. (A draft letter is attached at Tab A.) My recommendation is supported by the Departments of Agriculture, Commerce, Justice and Labor.

The Department of the Treasury, supported by the Department of State, the Council of Economic Advisers, and the Office of Management and Budget, disagrees with my recommendation. These agencies believe that if you do not disapprove the Commission's determination, you, in effect, will have transferred this issue to the courts when you have the authority to decide the question yourself. This, they believe, would be an act directly against the interests of an Executive Branch department which currently is defending in federal court its interpretation of the statute involved. They further argue that this would be a severe intrusion into the authority of the President and the statutory authority of an Executive Branch department by the Commission which would be substituting its judgment for that of the Administration. Further, if you fail to disapprove, they argue, you will be giving up your discretionary authority regarding the Customs Service treatment of "grey market" goods. (A draft letter to the Commission giving your reasons for disapproval is attached at Tab B.)

The two positions are discussed following a brief statement of the facts, a description of the "grey market" issue, and a review of the President's authority under section 337.

BACKGROUND

The complainant, Duracell, Inc., a Delaware Corporation, owns the U.S. registered trademark, DURACELL. Duracell, Inc. manufactures batteries, for sale in the United States, in plants located in Waterbury, Conn., La Grange, Ga., Lancaster, S.C., and Cleveland, Tenn. N.V. Duracell S.A., a Belgian corporation, is authorized to use the Belgian registered trademark, DURACELL, owned by its parent, Duracell International, Inc. Duracell S.A. manufactures batteries in Belgium for sale in the European Communities.

The respondents in the case purchase batteries, for sale in the United States, after the batteries have left the control of Duracell S.A. and entered the European distribution system. The strong position of the U.S. dollar makes this practice profitable. The importers sell the batteries to U.S. wholesalers at prices below those of Duracell, Inc. The Commission record indicates that at least 10 million batteries bearing the Belgian registered trademark, DURACELL, have been imported by the three respondents. The record also indicates that there are others importing the batteries who were not named as respondents.

The Commission determined that there were unfair practices within the meaning of section 337 in the importation into, and sale in, the United States of batteries bearing the Belgian registered trademark, DURACELL, based upon six independent grounds:

> "(1) infringement of a registered trademark under the common law of trademarks;
>
> (2) violation of section 42 of the Lanham Act, 15 U.S.C. 1124;
>
> (3) infringement of a registered trademark under section 32(a) of the Lanham Act, 15 U.S.C. 1114;
>
> (4) misappropriation of trade dress;
>
> (5) false designation of origin under the Lanham Act, 15 U.S.C. 1125; and
>
> (6) violations of the Fair Packaging and Labeling Act, 15 U.S.C. 1452 and 1453." (USITC Publication 1616, November 1984, p.6.)

The Commission found that the unfair practices tended to injure substantially an efficient and economically operated domestic

industry and, therefore, that there was a violation of section 337. The Commission (Chairwoman Stern and Commissioner Rohr dissenting) ordered the U.S. Customs Service to deny entry to imported batteries of particular sizes bearing the mark, DURACELL, or using the distinctive copper and black trade dress, unless importation was authorized by Duracell, Inc.

BACKGROUND REGARDING CUSTOMS TREATMENT OF "GREY MARKET" GOODS

Briefly, "grey market" goods are imported goods produced abroad bearing a foreign trademark identical or substantially similar to a U.S. registered trademark when there is common ownership or control between the U.S. trademark owner owner and the foreign user of the mark, or when the foreign user of the mark has the authorization of the U.S. trademark owner. The U.S. Customs Service traditionally has not applied the provisions of 15 U.S.C. 1124 (which prohibits entry of goods which bear marks copying or simulating U.S. registered trademarks) or 19 U.S.C. 1526 (which makes unlawful importation of goods without the written authorization of the owner of the U.S. trademark) to "grey market" goods. In two recent cases, the U.S. District Court for the District of Columbia and the Court of International Trade have upheld the Customs regulations. Both cases have been appealed, the latter to the Court of Appeals for the Federal Circuit, which is the reviewing Court for the Commission.

The Treasury and Commerce Departments on behalf of the Working Group on Intellectual Property of the Cabinet Council on Commerce and Trade have solicited data from the public concerning the issue of "grey market" goods. To date they have received in excess of 1,000 responses. These are being reviewed currently.

In the section of its opinion regarding 15 U.S.C. 1124, the Commission majority held that importation of goods bearing the foreign trademark identical to the U.S. registered trademark should be denied entry even though the U.S. trademark owner is related to the user of the foreign mark. It is this finding that has raised questions regarding what action you should take in this case.

Senators Baker, D'Amato, DeConcini, Kasten, and Thurmond and Representatives Roybal, Spratt, and Stark have written urging you to take no action in this case. Senators Chafee, Hawkins, Roth, and Symms and Representatives Broomfield, Frenzel and Gibbons have written urging that you disapprove the determination in this case.

THE PRESIDENT'S AUTHORITY UNDER SECTION 337

Under subsection 337(g)(2), you may disapprove a Commission determination for policy reasons, leaving the determination, and any order issued under its authority, without force or effect.

You also may approve a determination, making it, and any associated order, final and ripe for appeal. The determination and associated order become final automatically, and ripe for appeal, after the sixty day review period if you take no action.

The Report of the Senate Finance Committee on the Trade Reform Act of 1974 (Report No. 93-1298, p. 199), in discussing the reasons for including authority for the President to disapprove Commission determinations, states:

> "It is recognized by the Committee that the granting of relief against imports could have a very direct and substantial impact on United States foreign relations, economic and political. Further, the President would often be able to best see the impact which the relief ordered by the Commission may have 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.
>
> Therefore, it was deemed appropriate by the Committee to permit the President to intervene before such determination and relief become final, when he determines that policy reasons require it. The President's power to intervene would not be for the purpose of reversing a Commission finding of a violation of section 337; such finding is determined solely by the Commission, subject to judicial review."

RECOMMENDATION TO TAKE NO ACTION

The scope of the issue before you is a narrow one. With regard to this case, I believe there are no policy reasons, as outlined in the legislative history to section 337, sufficient to justify disapproval of the Commission's determination in this case, thereby denying the U.S. manufacturer relief from the unfair practices found by the Commission to exist. A decision to take no action regarding a section 337 determination does not, in any way, constitute approval of that determination since the President does not have authority to reverse a determination on the merits of a case. A letter to the Commission will prevent any of the misunderstandings which concern the Treasury Department, the State Department, the Council of Economic Advisers, and the Office of Management and Budget.

Reviewing the particular facts of this case in the manner followed in other cases, the alkaline batteries that are the subject of the exclusion order are not necessary for human health and safety. The domestic manufacturer can supply the demand for its product. No allegations of anticompetitive behavior on the part of the complainant were made during the Commission's

investigation. Competing brands of comparable quality and price are readily available. Competitive conditions in the United States, therefore, will not be affected by the exclusion of foreign produced batteries bearing the Belgian trademark, DURACELL. The U.S. Customs Service has indicated that shipments of other batteries will not be delayed as a result of the exclusion order. Exclusion of infringing batteries will not affect the production of like or directly competitive products in the United States. In fact, production of domestically produced batteries bearing the U.S. registered trademark, DURACELL, is likely to increase. Nothing in the Commission record suggests that consumers will be affected adversely by the order since the foreign produced batteries are sold for the same price as the domestically produced ones.

The order is not inconsistent with U.S. obligations under the General Agreement on Tariffs and Trade. No foreign government has raised questions about this case. The Paris Convention for the Protection of Industrial Property, to which most of our trading partners adhere, expressly recognizes the principle of territoriality of trademarks and, therefore, permits exclusion of "grey market" goods. There are, therefore, no foreign or domestic policy considerations presented by the facts of this case, as ordinarily analyzed, that would justify a recommendation that you disapprove the determination.

Regarding the larger questions that have been raised, if you disapprove the determination, it cannot be appealed. On the other hand, if you take no action, the Commission determination will become final and ripe for appeal. While there is no guarantee that it will be appealed, appeal seems very likely given the interest in the issue. That would enable the Court of Appeals for the Federal Circuit to review each of the issues before the Commission at the same time as it reviews the Treasury Department's regulations which are the subject of the case appealed from the Court of International Trade.

The interpretation of the Treasury regulations themselves is not completely clear, as illustrated by the Justice Department's amicus brief, submitted to the U.S. Court of Appeals for the Second Circuit in Bell & Howell : Mamiya Co. v. Masel Supply Co., in which the Justice Department took the opposite position to that which it now argues on behalf of the Treasury Department's regulations. The CAFC will review the question of the Treasury regulations regardless of your decision here because of the appeal of the Court of International Trade case. The Court of Appeals for the District of Columbia also will rule on the appeal before it regardless of your decision. If either of the Courts upholds the Treasury Department's regulations, the respondents in this case can ask the Commission to modify its order in light of the changed circumstances.

Neither of those Courts, however, will address the question of how common law trademark infringement, or registered trademark infringement under 15 U.S.C. 1114, or misappropriation of trade dress, or passing off, or violations of the Fair packaging and Labeling Act should be treated when the owner of a U.S. trademark and the user of a foreign trademark are related. An appeal of the Commission's determination would allow the CAFC to review all of the questions regarding the appropriate treatment of "grey market" goods under U.S. trademark law and related laws. The Court would tell us for the first time what the law is in each of these areas. If you disapprove the Commission's determination, it cannot be appealed. We would lose the opportunity to have all of the issues related to trademarks, when "grey market" goods are involved, reviewed by one court at one time.

The CAFC's opinion would enhance the CCCT Working Group's review of the "grey market" question rather than negating it, since it would enable us to consider the question in light overall trademark policy, not just in terms of Customs Service treatment of trademarked goods. Consideration of the question in light of trademark policy is particularly important at a time when Congress has passed major legislation strengthening trademark protection at home and tying trade benefits to adequate and effective intellectual property protection abroad. This view is supported by the Chairman of the CCCT Working Group.

The Commission's jurisdiction under section 337 also is a legal question suitable for review by the CAFC. Section 337 requires the Commission to investigate any allegations presented in a legally sufficient petition. The law states that relief under section 337 is in addition to any other provision of law. The statute excepts only allegations of subsidization and dumping and that exception has been in the law since 1975. On several occasions, the Commission has has found violations of section 337 based upon trademark infringement and copyright infringement, over which the Customs Service also has jurisdiction, without objection from the Administration or from the Congress.

A statement that the Commission should not assert jurisdiction in an area where Congress has not indicated it should not could be viewed by the Congress as overreaching by the Administration. Disapproval also would not act as a legal precedent on which the Commission could rely in future cases. It also would not answer the question of jurisdiction when petitions allege only registered trademark infringement and common law trademark infringement and there is a relationship between the owner of the U.S. trademark and the foreign user of the mark. A CAFC decision defining the Commission's jurisdiction would serve as precedent for the Commission and would provide direction on treatment of "grey market" goods under section 337.

A decision to take no action in this case in no way will compromise

the position taken by the Justice Department, as the Treasury Department's legal representative, in pending legal actions. A letter to the Commission stating that your decision to take no action in this case does not represent an endorsement of the Commission's legal findings should prevent any misunderstanding of your position. The Justice Department advises that its ability to defend the Treasury Department in pending litigation would not be seriously prejudiced if a letter of clarification is sent to the Commission for the record.

The Commission is an independent Executive branch agency. It defends itself in the CAFC, it is not represented by the Justice Department. The Commission's arguments do not represent those of the Administration. Commission determinations do not act as precedents in U.S. courts. Lawyers opposing the Treasury Department's regulations certainly will cite Commission findings they view as favorable to their clients' interests. They also are likely to cite the amicus brief submitted to the Court of Appeals for the Second Circuit by the Justice Department in which it takes a position opposite that taken in the current litigation. Justice Department lawyers, I am certain, will be prepared to respond in either case.

Finally, a decision to take no action in this case will not result in a flood of future section 337 cases based upon the same allegations. For the Commission to find a violation under section 337, it must conclude that there is an unfair practice (here it found six) and that the unfair practice is causing or threatening substantial injury to an efficient and economically operated U.S. industry. The latter requirement would prevent many U.S. trademark owners that are exclusive distributors for foreign manufacturers from obtaining a remedy from the Commission. In addition, every affirmative determination under section 337 must be referred to the President for policy review. As in the past, each will be reviewed carefully in light of foreign and domestic policy. Any that affect consumers adversely, that have anticompetitive effects in the U.S. market, or that raise other policy issues not present here, can be disapproved. A decision to take no action here will not narrow the President's authority under section 337 in any way.

For these reasons, I recommend that you take no action to disapprove the Commission's determination in this case and that you direct me to send the attached letter to the Commission to be entered in the record.

RECOMMENDATION TO DISAPPROVE

The Treasury Department has supplied this explanation of its position. I have removed the citations to cases since the citations are provided in the Trade Policy Staff Committee paper which is included with this memorandum.

"The Treasury Department, the State Department, OMB and CEA believe that you should disapprove the decision for the following six reasons:

First, the Commission should not substitute its judgment for that of the Treasury Department with respect to the regulatory interpretation of 19 U.S.C. 1526 and 15 U.S.C. 1124;

Second, the Commission's interpretation of the law is contrary to the position taken by the Administration through the Department of the Treasury, with Department of Justice representation, in various court cases which are currently in various stages of litigation. Recent decisions of the U.S. District Court for the District of Columbia and the Court of International Trade explicitly support the Administration's position and uphold the regulations;

Third, a decision not to disapprove would be a direct narrowing of the authority of the President to decide these and related cases. There is no sound reason for the President to, in effect, send himself to court to argue his case when he has the authority to decide the issue himself;

Fourth, the Treasury and Commerce Departments on behalf of the Working Group on Intellectual Property (WGIP) of the Cabinet Council on Commerce and Trade (CCCT) have solicited data from the public concerning the issue of parallel market importation and are currently reviewing in excess of 1,000 responses with a view toward formulating a cohesive, well-developed policy in this area. Failure by the President to disapprove the Commission's decision would effectively change the present U.S. policy prior to the completion of this process;

Fifth, any approval of this decision by the President, whether tacit or explicit, would send conflicting signals to U.S. trade partners regarding the policy of the U.S. Government concerning the issue of parallel market importation. Exclusion of grey market goods would be inconsistent with the policies of our trading partners on this issue making trade conflicts likely with possible retaliation against U.S. exports;

Sixth, by excluding parallel imports, the precedential effect of the ITC decision would necessarily reduce competition for sales in the United States, hurting consumers, feeding inflation, and would in effect aid multi-national corporations in efforts to segment markets for their goods and price discriminate among those markets to increase profits. For example, foreign owned multi-national corporations could refuse to sell their goods to discounters or others who seek to sell the goods at prices below suggested retail price.

While the Treasury Department believes that the Commission possesses broad authority to investigate a wide-range of unfair trading practices, this authority should not be considered unlimited. Specifically, the Commission should not exercise jurisdiction in those instances where the resolution of the allegations raised more properly resides with another federal agency. The Treasury Department has been charged with interpreting, implementing and enforcing 19 U.S.C. 1526 and 15 U.S.C. 1124. Pursuant to this authority, Treasury and Customs have promulgated a comprehensive regulatory scheme for the protection of certain American trademark owners. The Commission, in exercising jurisdiction over Duracell's section 1526 and 1124 claims, permitted Duracell to circumvent the comprehensive scheme established by Treasury for the resolution of these disputes. In doing so, the Commission unjustifiably intruded into an area which Congress has entrusted to another agency.

A second reason for disapproval by the President is that there are three pending lawsuits directly challenging Treasury's interpretation of 15 U.S.C. 1124 and 19 U.S.C. 1526. Treasury has vigorously defended its regulatory scheme. The case of Vivitar Corporation v. United States is currently on appeal before the Court of Appeals for the Federal Circuit, the same court which would hear any appeal of the Commission's decision in this case. If the President were to allow the Commission's decision to take effect, the Government could be placed in the anomalous and untenable position of arguing conflicting views on the parallel market issue in the same forum.

The case of Coalition to Preserve the Integrity of American Trademarks, et al. v. United States et al., decided on December 5, 1984, by District Judge Norma Johnson, ratifies Treasury's longstanding interpretation of both 15 U.S.C. 1124 and 19 U.S.C. 1526. The final case challenging Treasury's position is Olympus Corporation v. United States et al. Briefs have been filed by parties to this proceeding and oral argument has been scheduled for January 4, 1985. It is important to note that the only two courts to have directly addressed the parallel market goods issue, to date, found Treasury's position to be legally correct and wholly consistent with the intent of Congress. Since the Commission has taken a conflicting view of 15 U.S.C. 1124, any approval by the President of the Commission's decision would make it far more difficult to sustain the position taken by the Government in these cases. Indeed, the Department of Justice has advised Treasury that the Government's continued defense of these actions could prove difficult should the President approve the Commission's determination.

The third reason for disapproval by the President is that allowing the International Trade Commission decision to go into effect would constitute a narrowing of the authority of the President. There is no sound reason for the President to cause the Treasury

Department to argue its case in Federal Court when the President has the authority to decide the matter himself. By such an act the President would be acknowledging the authority of the International Trade Commission to overrule the considered opinions of his Executive Branch departments. It has been argued that a decision to take no action "will preserve the rights of all concerned" in this matter. This would not be the case in that the position of the Treasury Department would be contradicted by such a decision. The President's decision in this matter is a policy decision. However, the practical effect of a decision to take no action would be to allow the legal findings of the International Trade Commission to stand and have the force and effect of law. This is the case regardless of whatever language is inserted into a side letter from the President. The President would be putting himself and the Treasury Department in the anomalous position of having to argue against the legal findings that the President has allowed to stand. Indeed the decision of the ITC has already been cited as legal authority against the Government by an opposing party in the grey market litigation.

A fourth reason supporting disapproval by the President is that on May 21, 1984, the Department of the Treasury and the Department of Commerce published a notice in the Federal Register requesting the public to comment on the complex issues raised by parallel market imports. The reasons underlying this request are the desire by the Administration to make an informed decision in this matter. Any final policy decision in this area requires consideration of the economic, trade and foreign policy ramifications of any change in existing policy.

A fifth reason supporting disapproval is that the proper implementation of sound trade policy requires, at the very least, that the United States speak in a consistent manner on important trade issues. The issue of parallel market importation has attracted considerable public attention in the last several years. Thus far, the Department of the Treasury has taken the position before the International Trade Commission and various judicial tribunals, that United States policy permits parallel market importation in those instances where the foreign and U.S. trademark owners are "related" companies. If the President were to approve the Commission's determination in this investigation, particularly in light of the Government's continuing defense in court of Treasury's position, it will appear that U.S. trade policy in this area is in a state of confusion.

Finally, the precedential consequences of failing to reject the exclusion order will almost assuredly result in higher prices for U.S. consumers. Lower prices result not only from the parallel imports themselves, but also their competitive effects. The mere availability of such products to retailers acts as a restraint on potential price increases and ensures market access by discount chains. Estimates of the cost savings to the American consumer

run as high as 40 to 50 percent on a given product line. In the past several years protectionist measures have been taken with regard to commodities such as steel and textiles. In those cases clear, articulable benefits existed and/or clear rules of trade were violated. These factors are not present in this case and therefore no justification exists for the economic cost of protecting multi-national corporations from themselves."

For these reasons, the Department of Treasury, supported by the Department of State, the Council of Economic Advisers, and the Office of Management an Budget, recommends that you disapprove the Commission's determination, sending the Commission a copy of the attached letter and rationale.

OPTIONS	ACTION REQUIRED
Option 1 (my recommendation)	
Take no action.	None, the determination will become final automatically on January 6, 1985. I will send a letter of clarification to the Commission for the record.
Option 2 (Treasury's recommendation)	
Disapprove the determination.	Inform the Commission of your disapproval by sending the attached letter. The determination and order will be without force or effect when the Commission receives notice.
Option 3 (Not recommended by any agency)	
Approve the determination.	Inform the Commission of your approval. The determination and order will become final when the Commission receives notice.

DECISION

OPTION 1: Take no action. _____

OPTION 2: Disapprove. _____

OPTION 3: Approve. _____

Attachments

For Option 1

January 5, 1985

The Honorable Paula Stern
Chairwoman
United States International Trade Commission
701 E Street, N.W.
Washington, D.C. 20436

Dear Madame Chairwoman:

The President has asked me to advise you that he has decided to take no action regarding the Commission's determination in Investigation No. 337-TA-165, Certain Alkaline Batteries. The determination and the exclusion order, therefore, become final on January 6, 1985.

The President also has directed me to advise the Commission, on the record, that his decision to take no action in this case does not represent an endorsement of the Commission's legal findings. The President has decided only that there are no policy reasons within the narrow facts of this case that call for disapproval.

The President's decision to take no action in this case also should not be understood to be an indication of his decision in future cases involving the issues present here. As you know, the Administration is studying the range of issues connected with so-called "grey market" imports. The President's decision in this case does not in any way prejudge the results of that review.

In particular, the President has directed me to advise the Commission of his concern with the Commission's interpretation of section 42 of the Lanham Act, one of several grounds for the Commission's determination. The Commission's interpretation is at odds with the interpretation of that section by the Department of the Treasury, which the Administradion has advanced in a number of court cases that are currently pending. The President's decision not to disapprove the determination in this case should not be viewed as altering that interpretation.

Very truly yours,

William E. Brock

WEB:z

Dear Madame Chairwoman:

This is to inform you that I have disapproved the Commission's determination in Investigation No. 337-TA-165, Certain Alkaline Batteries.

This determination is based on the following policy reasons:

1) The Commission should not exercise jurisdiction in those instances where the resolution of the allegations raised specifically resides with another federal agency. The Treasury Department has been charged by the Congress with interpretating, implementing and enforcing 19 U.S.C. 1526 and 15 U.S.C. 1124. Pursuant to this authority, the Treasury Department and the Customs Service have promulgated a comprehensive regulatory scheme for the protection of trademark owners. The Commission, to the extent that it has exercised jurisdiction over Duracell's section 1526 and 1124 claims, permitted Duracell to circumvent the comprehensive scheme established by Treasury for the resolution of these disputes. In doing so, the Commission unjustifiably intruded into an area which Congress has entrusted to a Cabinet-level department. As was stated by the two dissenting Commissioners in this case, "the impossibility of reconciling the proper administration of section 526 [19 U.S.C. 1526] and section 42 [15 U.S.C. 1124] with the Commission's administration of section 337 persuades us that violations of these statutes are not the proper subject matter for an action under section 337."

2) Recent decisions of the U.S. District Court for the District of Columbia and the Court of International Trade explicitly support the Administration's position and uphold the regulations. Allowing the Commission's decision to stand would conflict with the posture of the Government in this litigation.

3) The Treasury and Commerce Departments on behalf of the Cabinet Council on Commerce and Trade (CCCT) have solicited data from the public concerning the issue of parallel market importation and are currently reviewing responses with a view toward formulating a cohesive policy in this area. Failure to disapprove the Commission's decision would effectively change the present U.S. policy prior to the completion of this process.

4) The precedential consequences of allowing the Commission's decision to stand would necessarily reduce competition for sales and would almost assuredly result in higher prices for U.S. consumers.

Yours very truly,

Ronald R. Reagan

The Honorable Paula Stern
Chairwoman
United States International
Trade Commission
701 E Street, N.W.
Washington, D.C. 20436

re: Duracell Batteries

USTR DRAFT LETTER TO CHAIRWOMAN STERN

Dear Madame Chairwoman:

Pursuant to Section 337(g)(2) of the Tariff Act of 1930, as amended, I have decided to disapprove the Commission's determination in Investigation No. 337-TA-165, Certain Alkaline Batteries. Enclosed is a copy of my determination.

Sincerely,

RONALD REAGAN

THE WHITE HOUSE

WASHINGTON

March 18, 1985

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Duracell v. U.S.

You requested information on the status of Duracell's challenge to the President's disapproval of the International Trade Commission decision in the gray market case. The attached materials have been forwarded by Justice. Briefly, Duracell filed an appeal before the Court of Appeals for the Federal Circuit on January 28. Justice has filed a motion to dismiss for lack of jurisdiction, Duracell's reply is due later this week.

Attachment

Memorandum

DMC:VAMelnbrencis:peh 724-7309

Subject	Date
Duracell, Inc. v. United States International Trade Commission, Appeal No. 84-00390	March 15, 1985

To

Roger B. Clegg
Associate Deputy
Attorney General

From

SEF

Stuart E. Schiffer
Deputy Assistant Attorney
General
Civil Division

1. Pursuant to 19 U.S.C. § 1526, it is unlawful to import into the United States any merchandise of foreign manufacture if the merchandise bears a trademark owned by a corporation created or organized within the United States, unless written consent of the owner of the trademark is produced at the time of entry. Pursuant to 15 U.S.C. § 1124, no article of imported merchandise which copies or simulates a registered trademark can be admitted to entry at any customhouse of the United States.

Since at least 1936, the Treasury Department (through the Customs Service) has interpreted these two statutes as not requiring the exclusion from entry of merchandise manufactured abroad and bearing the genuine trademark if the foreign trademark and the United States trademark are owned by the same person, partnership, association, or corporation. For many years, the Treasury Department has also interpreted the statutes as not requiring exclusion from entry of foreign merchandise if its foreign producer has been authorized by the American owner to produce and sell goods abroad bearing the recorded trademark. The long standing administrative interpretation of these two statutes has been incorporated in current Customs regulations contained in 19 C.F.R. § 133.21(c).

The validity of 19 C.F.R. § 133.21(c) was sustained by the Court of International Trade as a reasonable interpretation of 19 U.S.C. § 1526 in Vivitar Corporation v. United States, Court No. 84-1-00067, Appeal No. 84-1638 pending.1/

1/ The Vivatar case has been briefed and argued in the court of appeals and is under submission.

On December 5, 1984, the District Court for the District of Columbia held in Coalition to Preserve the Integrity of American Trademarks v. United States, Civil Action No. 84-0390, Appeal No. 84-00390 pending, that 19 C.F.R. § 133.21(c) constituted a reasonable interpretation of 19 U.S.C. § 1526. It further held that 15 U.S.C. § 1124 was inapplicable to genuine goods bearing the genuine trademark.

3. Duracell, Inc. instituted a proceeding before the United States Court of International Trade Commission, pursuant to 19 U.S.C. § 1337, contending that the importation of genuine Duracell batteries bearing the Duracell trademark constituted an unfair trade practice because, among other things, it violated 19 U.S.C. § 1526 and 15 U.S.C. § 1124. On November 5, 1985, the Commission agreed with the Treasury Department's interpretation of 19 U.S.C. § 1526, but found that there was a violation of 19 U.S.C. § 1337, among other things, because the importation was unauthorized pursuant to 15 U.S.C. § 1124. It determined that a general exclusion order was the appropriate remedy.

On January 5, 1985, the President notified the Commission that he disapproved its determination in Investigation No. 337-TA-165.

On January 28, 1985, Duracell filed an appeal in the Court of Appeals for the Federal Circuit. We moved to dismiss the appeal upon the grounds that the court lacks jurisdiction to review the appeal. (Our motion papers are attached.) Duracell's reply is due in one week.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

DURACELL INC.,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	Appeal No.
	)	
UNITED STATES INTERNATIONAL TRADE COMMISSION,	)	
	)	
Respondent-Appellee.	)	

ORDER

Upon reading and filing the motion of the United States International Trade Commission for dismissal of the appeal filed by Duracell Inc., captioned "Petition for Review of a Final Determination of the United States International Trade Commission" for lack of jurisdiction and the memorandum in support of the motion, and upon all other papers and proceedings herein, it is hereby

ORDERED that the motion be, and it hereby is, granted; and it is further

ORDERED that the appeal filed by Duracell Inc., be, and it hereby is, dismissed.

_____

CIRCUIT JUDGE

Dated: _____, 1985
Washington, D.C.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

DURACELL INC.,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	Appeal No.
	)	
UNITED STATES INTERNATIONAL TRADE COMMISSION,	)	
	)	
Respondent-Appellee.	)	

MOTION OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION FOR ORDER DISMISSING APPEAL

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, the United States International Trade Commission hereby moves this Court an order dismissing the appeal filed by Duracell Inc., captioned "Petition for Review of a Final Determination of the United States International Trade Commission" for lack of jurisdiction as set forth in greater detail in the annexed memorandum.

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General

DAVID M. COHEN
Director

VELTA A. MELNBRENCIS
Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
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Tele: (202) 724-7903

Attorneys for United States
International Trade Commission

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

DURACELL INC.,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	Appeal No.
	)	
UNITED STATES INTERNATIONAL TRADE COMMISSION,	)	
	)	
Respondent-Appellee.	)	

MEMORANDUM IN SUPPORT OF
MOTION FOR ORDER DISMISSING APPEAL

On or about January 28, 1985, Duracell Inc. filed a "Petition for Review of a Final Determination of the United States International Trade Commission", in which it recited the following:

> Duracell Inc. hereby petitions the Court for review of the determination of the United States International Trade Commission in Certain Alkaline Batteries, Inv. No. 337-TA-165 made final by disapproval of the President on January 4, 1985.

As we demonstrate below, the appeal instituted by Duracell Inc. should be dismissed because (1) there is currently no final determination of the United States International Trade Commission ("Commission") in effect in Certain Alkaline Batteries, Inv. No. 337-TA-165, which can be appealed to this Court pursuant to 19 U.S.C. § 1337 and 28 U.S.C. § 1295(a)(6); and (2) Duracell Inc. is seeking to review the President's disapproval (pursuant to 19 U.S.C. § 1337(g)(2)) of the determination of the Commission in Certain Alkaline Batteries, Inv. No. 337-TA-165, despite the fact that this Court does not possess jurisdiction to review the

President's disapproval (made pursuant to 19 U.S.C. § 1337(g)(2)) of a determination of the Commission.

I. BACKGROUND

On May 5, 1984, the United States International Trade Commission ("Commission") determined that there was a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, in the importation and sale of certain alkaline batteries and that a general exclusion order pursuant to section 337(d), 19 U.S.C. § 1337(d), was the appropriate remedy for the violation found to exist. A notice of this determination was published in the Federal Register (49 Fed. Reg. 45275-6) on November 15, 1984. (See Exhibit 1).

On January 4, 1985, the President notified the Commission that he disapproved its determination in Investigation No. 337-TA-165, Certain Alkaline Batteries. The Office of the United States Trade Representative published a notice of this notification along with a statement of the President's determination, which was included with the notice to the Commission, in the Federal Register (50 Fed. Reg. 1655) on January 11, 1985. (See Exhibit 2).

II. APPLICABLE STATUTES

Section 1337 of title 19, United States Code ("section 337"), provides in pertinent part:

> (a) Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated in the

United States, . . . are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

(b)(1) The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative. . .

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

(d) If the Commission determines, as a result of an investigation under this section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the Untied States, unless after considering the effect of such exclusion upon the public health and welfare, competitive condition in the United States economy, the production of like or directly competitive articles in the United States and

United States consumers, it finds that such articles should not be excluded from entry. . . .

(e) If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States. . . .

(f)(1) In lieu of taking action under subsection (d) or (e) of this section, the Commission may issue and cause to be served on any person violating this section, or believed to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved. . . .

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

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

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

(2) If, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such determination, the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken under subsection (d), (e), or (f) of this section

with respect thereto shall have no force or effect.

(3) Subject to the provisions of paragraph (2), such determination shall, except for purposes of subsection (c) of this section, be effective upon publication thereof in the Federal Register, and the action taken under subsection (d), (e), or (f) of this section with respect thereto shall be effective as provided in such subsections. . . .

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

Section 1295 of title 28, United States Code ("section 1295"), provides in pertinent part:

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--

* * * *

(6) to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337);

III. ARGUMENT

A. The Appeal Filed By Duracell Inc. Must Be Dismissed Because There Has Been No Final Determination of the Commission

As is evident from the statutory language of section 1295(a)(6), this Court possesses jurisdiction only to review the

final determinations of the Commission relating to unfair practices in import trade, made under section 337. The latter section, in turn, makes it clear that a determination which has been disapproved by the President, pursuant to section 337(g)(4), does not constitute a final determination of the Commission which can be reviewed by this Court.

Thus, subsection (c) of section 337 specifically provides that:

> Any person adversely affected by a final determination of the Commission under subsection (d), (e) or (f) of this section may appeal such determination to the United States Court of Appeals for the Federal Circuit.

Subsection (g)(4) of section 337, in turn, specifies that only a determination of the Commission made under subsection (d), (e), or (f) of section 337, which has not been disapproved by the President, constitutes a final determination which can be appealed to this Court pursuant to section 337(c):

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

In this case, the Commission made a determination pursuant to subsection (d) of section 337. That determination, however, never became a final determination for purposes of an appeal to this Court, pursuant to subsection (c) of section 337, because, prior to the expiration of the statutorily provided 60-day period

(see 19 U.S.C. § 1337(g)(2)), the President disapproved the Commission's determination. Import Motors Limited, Inc. v. United States International Trade Commission, 530 F.2d 940, 945 (CCPA 1976).

Since there has been no final determination of the Commission pursuant to section 337 in Certain Alkaline Batteries, this Court does not possess jurisdiction to entertain Duracell Inc.'s Petition for Review and this appeal must be dismissed.[1/]

B. This Appeal Must Be Dismissed Because This Court Does Not Possess Jurisdiction to Review The President's Disapproval of a Determination Made by the Commission Pursuant to Section 337.

Duracell Inc. may contend that it is seeking to review the President's disapproval of the Commission's determination. It is

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1/* Furthermore, since the President disapproved the determination pursuant to subsection (g)(2) of section 317, it became without force and effect on January 4, 1984, the day on which the President notified the Commission of his disapproval. Young Engineers, Inc. v. United States International Trade Commission, 721 F.2d 1305, 1311-13 (Fed. Cir. 1983). This Court, as a court established pursuant to Article III of the Constitution, has no power to issue advisory opinions. Glidden Company v. Zdanok, 370 U.S. 530 (1962). As a consequence, this Court does not have power to review a determination which by statute has become without force and effect. See also Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 114 (1948), in which the Supreme Court held (1) that the orders of the Civil Aeronautics Board as to certificates for overseas or foreign air transportation were not mature and susceptible of judicial review at any time before they were finalized by Presidential approval; and (2) that after such approval was given, the final orders embodied Presidential discretion as to political matters and therefore were beyond the competence of the courts to adjudicate.

clear from the statutory scheme that this Court does not possess jurisdiction to review an appeal from the President's disapproval of a determination made by the Commission pursuant to section 337.

Section 1295 grants to this Court only jurisdiction to review final determinations of the Commission made under section 337. The President's disapproval does not constitute a determination of the Commission. Moreover, section 337(c) specifically limits appeals to this Court to final determinations of the Commission made under subsection (d), (e), or (f) of section 337. The President's disapproval is made pursuant to subsection (g)(2) of section 337, not pursuant to subsections (d), (e), or (f).

Since this Court does not possess jurisdiction to review the President's disapproval of a determination made by the Commission pursuant to section 337, this appeal must be dismissed.

CONCLUSION

Inasmuch as this Court does not possess jurisdiction over the subject matter of this appeal, the appeal should be dismissed.

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General

DAVID M. COHEN
Director

VELTA A. MELNBRENCIS
Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
550 11th Street, N.W.
Washington, D.C. 20530
Tele: (202) 724-7903

Attorneys for United States
International Trade Commission

EXHIBIT 1

Commission in accordance with § 201.8 of the rules (19 CFR 201.8). All written submissions except for confidential business data will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary to the Commission.

Any business information for which confidential treatment is desired must be submitted separately. The envelope and all pages of such submissions must be clearly labeled "Confidential Business Information." Confidential submissions and requests for confidential treatment must conform with the requirements of § 201.6 of the Commission's rules (19 CFR 201.6, as amended by 49 FR 32569, Aug. 15, 1984).

Authority: This investigation is being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.12 of the Commission's rules (19 CFR 207.12).

Issued: November 9, 1984.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 84-30059 Filed 11-14-84; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 701-TA-224 (Preliminary)]

Live Swine and Fresh, Chilled and Frozen Pork From Canada

AGENCY: United States International Trade Commission.

ACTION: Institution of a preliminary countervailing duty investigation and scheduling of a conference to be held in connection with the investigation.

SUMMARY: The Commission hereby gives notice of the institution of preliminary countervailing duty investigation No. 701-TA-224 (Preliminary) under section 703(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Canada of live swine and of fresh, chilled and frozen meat (except meat offal) of swine, provided for in items 100.85 and 106.40, respectively, of the Tariff Schedules of the United States, which are alleged to be subsidized by the Government of Canada. As provided in section 703(a), the Commission must complete preliminary countervailing duty investigations in 45 days, or in this case by December 17, 1984.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, Part 207, Subparts A and B (19 CFR Part 207), and Part 201, Subparts A through E (19 CFR Part 201).

EFFECTIVE DATE: November 2, 1984.

FOR FURTHER INFORMATION CONTACT: Lawrence Rausch (202-523-0286), Office of Investigations, U.S. International Trade Commission, 701 E Street, NW., Washington, DC 20436.

SUPPLEMENTARY INFORMATION:

Background.—This investigation is being instituted in response to a petition filed on November 2, 1984 by counsel on behalf of members of The National Pork Producers Council, Des Moines, Iowa.

Participation in the investigation.—Persons wishing to participate in the investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules (19 CFR 201.11), not later than seven (7) days after publication of this notice in the Federal Register. Any entry of appearance filed after this date will be referred to the Chairwoman, who will determine whether to accept the late entry for good cause shown by the person desiring to file the entry.

Service list.—Pursuant to § 201.11(d) of the Commission's rules (19 CFR 201.11(d)), the Secretary will prepare a service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance. In accordance with § 201.16(c) of the rules (19 CFR § 201.16(c)), each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by the service list), and a certificate of service must accompany the document. The Secretary will not accept a document for filing without a certificate of service.

Conference.—The Commission's Director of Operations has scheduled a conference in connection with this investigation for 9:30 a.m. on November 26, 1984 at the U.S. International Trade Commission Building, 701 E Street NW., Washington, DC. Parties wishing to participate in the conference should contact Lawrence Rausch (202-523-0286) not later than November 21, 1984 to arrange for their appearance. Parties in support of the imposition of countervailing duties in this investigation and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference.

Written submissions.—Any person may submit to the Commission on or before November 28, 1984 a written statement of information pertinent to the subject of the investigation, as provided in § 207.15 of the Commission's rules (19 CFR 207.15). A signed original and fourteen (14) copies of each submission must be filed with the Secretary to the Commission in accordance with § 201.8 of the rules (19 CFR 201.8). All written submissions except for confidential business data will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary to the Commission.

Any business information for which confidential treatment is desired must be submitted separately. The envelope and all pages of such submissions must be clearly labeled "Confidential Business Information." Confidential submissions and requests for confidential treatment must conform with the requirements of § 201.6 of the Commission's rules (19 CFR 201.6, as amended by 49 FR 32569, Aug. 15, 1984).

Authority: This investigation is being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.12 of the Commission's rules (19 CFR 207.12).

Issued: November 9, 1984.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 84-30060 Filed 11-14-84; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-165]

Certain Alkaline Batteries; Issuance of Exclusion Order

AGENCY: U.S. International Trade Commission.

ACTION: Notice is hereby given that the Commission has issued a general exclusion order in the above-captioned investigation.

Authority: 419 U.S.C. 1337.

SUPPLEMENTARY INFORMATION: The Commission determined that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation and sale of certain alkaline batteries. The Commission found that all respondents had engaged in unfair acts by reason of registered trademark infringement, misappropriation of trade dress, and false designation of origin in the unauthorized importation and sale of certain alkaline batteries with the DURACELL trademark and trade dress, and that all respondents, except for respondent Continent-Wide Enterprises,

Ltd., had committed unfair acts by reason of violation of the Fair Packaging and Labeling Act (15 U.S.C. 1452 and 1453.

The Commission determined that a general exclusion order pursuant to section 337(d) is the appropriate remedy for the violations of section 337 found to exist; that the public interest considerations enumerated in section 337(d) do not preclude such relief; and that the amount of the bond during the Presidential review period under section 337(g) shall be 75 percent of the entered value of the imported articles.

Copies of the Commission's Action and Order, the Opinions issued in connection therewith, and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, Docket Section, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0471.

FOR FURTHER INFORMATION CONTACT: William E. Perry, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0499.

Issued: November 5, 1984.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 84-30061 Filed 11-14-84; 8:45 am]

BILLING CODE 7020-02-M

[Investigation Nos. 731-TA-161 and 162 (Final)]

Titanium Sponge From Japan and the United Kingdom

Determinations

On the basis of the record [1] developed in investigation No. 731-TA-161 (Final), the Commission determines,[2] pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)), that an industry in the United States is threatened with material injury by reason of imports from Japan of titanium sponge,[3] which the Department of Commerce has found are being, or are likely to be, sold in the United States at less than fair value (LTFV). Pursuant to section 736 of the Tariff Act of 1930 (19 U.S.C. 1673e(b) (1980)), the Commission further determines that the threat of material injury would not have led to a finding of material injury but for the suspension of liquidation under section 1673b(d)(1).

On the basis of the record [1] developed in investigation No. 731-TA-162 (Final), the Commission determines, pursuant to section 735(b) of the Tariff Act of 1930, that an industry in the United States is not materially injured or threatened with material injury, nor is the establishment of an industry in the United States materially retarded, by reason of imports from the United Kingdom of titanium sponge [3] which the Department of Commerce has found are being, or are likely to be, sold in the United States at LTFV.

Background

The Commission instituted these final antidumping investigations, effective May 11, 1984, following preliminary determinations by the Department of Commerce that imports of titanium sponge from Japan and the United Kingdom are being, or are likely to be, sold in the United States at LTFV (49 FR 20042). Notice of the institution of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the Federal Register of May 31, 1984 (49 FR 22724). Following a 60-day extension of its final determinations by the Department of Commerce, the Commission revised its hearing date (Federal Register of July 18, 1984, 49 FR 29167). The hearing was held in Washington, DC, on September 26, 1984, and all persons who requested the opportunity were permitted to appear in person or to be represented by counsel. Commerce published its affirmative final LTFV determinations in the Federal Register on October 1, 1984 (49 FR 38384). The Commission's determinations in these investigations were made in an open "Government in the Sunshine" meeting, held on October 29, 1984.

The Commission transmitted its report on these investigations to the Secretary of Commerce on November 7, 1984. A public version of the Commission's report, Titanium Sponge from Japan and the United Kingdom, (investigations Nos. 731-TA-161 and 162 (Final), USITC Publication 1600, November 1984) contains the views of the Commission and information gathered during the investigations.

Issued: November 7, 1984.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[Investigation No. 337-TA-193]

Certain Rowing Machines and Components Thereof; Prehearing Conference

Notice is hereby given that the prehearing conference in this matter commence at 9:00 a.m. on December 1984, in Hearing Room 6311 at the Interstate Commerce Commission Building at 12th & Constitution Aven NW., Washington, D.C., and the hear will commence immediately thereaft

The Secretary shall publish this no in the **Federal Register.**

Issued: November 2, 1984.

Janet D. Saxon,

Administrative Law Judge.

[FR Doc. 84-3063 Filed 11-14-84; 8:45 am]

BILLING CODE 7020-02-M

Termination of Countervailing Duty Investigation Concerning Vitamin K From Spain

AGENCY: United States International Trade Commission.

ACTION: Termination of countervailing duty investigation under section 104(b)(1) of the Trade Agreements Ac 1979, with regard to Vitamin K from Spain.

EFFECTIVE DATE: November 8, 1984.

FOR FURTHER INFORMATION CONTACT: Ms. Vera Libeau, Office of Investigations, telephone number (202 523-0368.

SUPPLEMENTARY INFORMATION: The Trade Agreements Act of 1979, subsection 104(b)(1), requires the Commission in the case of a countervailing duty order issued unde section 303 of the Tariff Act of 1930, upon the request of a government or group of exporters of merchandise covered by the order, to conduct an investigation to determine whether a industry in the United States would b materially injured, or threatened wit material injury, or whether the establishment of such an industry wo be materially retarded, if the order w to be revoked. On June 17, 1982, the Commission received a request from Government of Spain for the review the outstanding countervailing duty order on Vitamin K from Spain. Noti of the countervailing duty order was published on November 16, 1976 in t Federal Register (41 FR 50419).

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[1] The "record" is defined in § 207.2(i) of the Commission's *Rules of Practice and Procedure* (19 CFR 207.2(i)).

[2] Chairwoman Stern and Vice Chairman Liebeler dissenting.

[3] Titanium sponge is provided for in items 629.14 and 633.00 of the Tariff Schedules of the United States.

EXHIBIT 2

• Test the manner and frequency with which the procedures are applied.

B. Eligibility

Compliance Requirement:

• The State must prescribe eligibility standards in accordance with federally published guidelines, and participants must meet family-size income standards for free and reduced-price meals. (7 CFR 245.1, 245.11, 245.13)

• The SFA must approve proper applications submitted in accordance with these standards. (7 CFR 245.6(b))

Suggested Audit Procedures (State):

• Examine the *Federal Register* or correspond with FNS to ascertain the Federal guidelines.

• Review the State's family size and income standards.

• Review the State's eligibility determination and verification system and evaluate for adequacy.

• Review selected applications and determine whether they were properly approved.

Suggested Audit Procedures (School Food Authority):

• Review the SFA procedures for complying with the published eligibility guidelines and evaluate for adequacy.

• Review selected case files and determine whether there was adherence to the prescribed procedures. Verify the conclusions regarding eligibility.

• Determine the numbers of free and reduced price meals claimed for reimbursement in selected schools and determine whether it exceeds the number of approved applications.

C. Matching, Level of Effort, and/or Earmarking Requirements

Compliance Requirement (Applies to Lunch Program Only):

The State is required to contribute, from State-appropriated sources, an amount equal to at least 30 percent of all General Assistance funds (commonly referred to as Section IV funds of the National School Lunch Act, as amended) made available by FNS to the State in the last year. In certain States, whose per capita income has been designated lower by FNS, the 30 percent match may be proportionately lower. The listing of the match for all States is available from FNS on form SL-1 (untitled). (7 CFR 210.6(a))

Suggested Audit Procedures (State):

• Correspond with FNS to ascertain the amount of funds made available in the preceding school year.

• Correspond with FNS and determine if the State has been designated a low per capita income State.

• Ascertain the amount expended from State sources for the current year.

D. Reporting Requirements

Compliance Requirement: The State must submit a report of child nutrition operations (FNS-10) quarterly specifying the number of meals claimed, supported by meal counts from School Food Authorities (SFA), and the estimated number of meals served for which claims had not yet been received from SFA's. (7 CFR 210.13, .14(g); 220.13(b))

Suggested Audit Procedures (State):

• Obtain copies of submitted reports and review for completeness and timeliness of submission.

• Trace data in selected reports to supporting documentation.

Compliance Requirement: The following financial reports must be submitted periodically.

—Financial Status Report (SF 269)
—Request for Advance or Reimbursement (SF 270) or
—Request for Payment on Letter of Credit and Status of Funds Report (SF 183)

Suggested Audit Procedures: See Federal Financial Reports (VI) in the GENERAL REQUIREMENTS section of this document.

E. Special Tests and Provisions

There are no special tests and provisions for the auditor to perform.

[FR Doc. 85-889 Filed 1-10-85; 8:45 am]

BILLING CODE 3110-01-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Determination of the President Regarding Certain Alkaline Batteries

On Friday, January 4, 1985, the President notified the United States International Trade Commission that he disapproved its determination in Investigation No. 337-TA-165, *Certain Alkaline Batteries*. A statement of the President's determination, which was included with the notice to the Commission, is printed below.

William E. Brock,

United States Trade Representative.

Disapproval of the Determination of the United States International Trade Commission in Investigation No. 337-TA-165, Certain Alkaline Batteries

The United States International Trade Commission, following a finding of a violation of Section 337 of the Tariff Act of 1930, as amended, has ordered excluded from entry into the United States imports of certain alkaline batteries that were found to infringe a U.S. registered trademark and to misappropriate the trade dress of the batteries on which the trademark is used.

The President is authorized by Section 337(g)(2) to disapprove a Commission determination for policy reasons. I have notified the Commission today of my decision to disapprove its determination in this case.

The Commission's interpretation of section 42 of the Lanham Act (15 U.S.C. 1124), one of several grounds for the Commission's determination, is at odds with the longstanding regulatory interpretation by the Department of the Treasury, which is responsible for administering the provisions of that section. The Administration has advanced the Treasury Department's interpretation in a number of pending court cases. Recent decisions of the U.S. District Court for the District of Columbia and the court of International Trade explicitly uphold the Treasury Department's interpretation. Allowing the Commission's determination in this case to stand could be viewed as an alteration of that interpretation. I, therefore, have decided to disapprove the Commission's determination.

The Departments of Treasury and Commerce, on behalf of the Cabinet Council on Commerce and Trade, have solicited data from the public concerning the issue of parallel market importation and are reviewing responses with a view toward formulating a cohesive policy in this area. Failure to disapprove the Commission's determination could be viewed as a change in the current policy prior to the completion of this process.

[FR Doc. 85-921 Filed 1-10-85; 8:45 am]

BILLING CODE 3190-01-M

PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL

Economic Forecasting Advisory Committee; Meeting

AGENCY: Economic Forecasting Advisory Committee of the Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power Planning Council).

ACTION: Notice of meeting to be held pursuant to the Federal Advisory Committee Act, 5 U.S.C. Appendix I, 1-4. Activities will include:

• Approval of minutes.

• Discussion of Proposed Draft Economic, Demographic and Fuel Price Assumptions and response to comments.

• Discussion of Issue Paper on Assumptions for Financial Variable.

CERTIFICATE OF SERVICE

I, Velta A. Melnbrencis, hereby declare that on this 11th day of February, 1985, I caused to be placed in the United States mail (first class, postage prepaid) copies of the annexed papers addressed as follows:

James N. Bierman, Esq.
Foley & Lardner
1775 Pennsylvania Ave., N.W.
Washington, D.C 20006

Gregg A. Dwyer, Esq.
Vice President and General Counsel
Duracell Inc.
Berkshire Industrial Park
Bethel, Connecticut 06801

Charles E. Koob, Esq.
Simpson Thacher & Bartlett
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Baskin & Steingut
Suite 1100
1100 Fifteenth Street, N.W.
Washington, D.C. 20005

Velta A. Melnbrencis

VELTA A. MELNBRENCIS

THE WHITE HOUSE

WASHINGTON

(5)

January 7, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Correspondence from Duracell Counsel Concerning ITC Decision

James N. Bierman of Foley & Lardner wrote you on January 3 on behalf of his client, Duracell, reiterating the arguments against Presidential disapproval of the ITC decision and requesting an opportunity to meet with Messrs. Baker, Fuller, Meese, Oglesby, Stockman, Svahn and yourself to discuss the matter. I knew that you would have opposed any such meeting; in light of the President's decision the matter is now OBE and I see no need for any response. You should, however, be aware that Mr. Bierman's letter contains an implicit threat (second paragraph) to litigate the question of the scope of Presidential review in a Section 337 case, to which I can only reply, in an Eastwoodian fashion, "Go ahead. Make my day...."