THE NEED TO IMPROVE CONSISTENCY IN THE APPLICATION AND INTERPRETATION OF SECTION 337 OF THE TARIFF ACT OF 1930 AND SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*

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I. INTRODUCTION

The language of section 337 of the Tariff Act of 1930, as amended, (section 337)[1] denounces "unfair methods of competition or unfair acts" in the import trade. This language is on its face virtually identical to the language of section 5 of the Federal Trade Commission Act[2] (section 5) which proscribes "unfair methods of competition . . . and unfair . . . acts or practices in or affecting commerce." The relative identity of the statutory language could reasonably lead one to believe that the results of adjudications of charges of violation of the two acts should be similar. However, as experience is beginning to show, this is not the case. The approaches of the two agencies charged with the enforcement of the respective statutes, the International Trade Commission (ITC) and the Federal Trade Commission (FTC), tend to be considerably different for a number of reasons. Thus, the likelihood of consistency in the application of these virtually identical statutory provisions is not great.

This article will examine two areas in which improved consistency in application and interpretation of section 337 and section 5 is desirable. The first includes the problems of overlapping jurisdiction between the ITC under section 337 and the FTC under section 5. The second is the inherent discrimination against foreign competitors resulting from section 337 and its implications for United States competition policy. In this context, this article will not deal comprehensively with the details of section 337 or section 5 and the procedures employed for adjudications under each of them, both of which have been commented upon by other authors recently.[3]

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* The views expressed are those of the author and do not necessarily reflect those of the United States Federal Trade Commission or the United States Government generally.

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[1] 19 U.S.C. § 1337(a) (Supp. V 1975).

[2] 15 U.S.C. § 45(a) (1970).

[3] *See, e.g.*, La Rue, *Section 337 of the 1930 Tarriff Act and Its Section 5 FTC Act Counterpart*, 43 ANTITRUST L.J. 608 (1974); Brown, *Unfair Methods of Competition in Impor-*

II. JURISDICTIONAL OVERLAPS BETWEEN THE FTC AND ITC

Due to the virtually identical language between section 5 and section 337, the jurisdiction of the respective agencies under the respective statutes clearly overlaps. Although it may be argued that the ITC should have exclusive jurisdiction over matters involving the import trade under section 337, nothing can be found in the legislative history or case law under either section which indicates any such limitations. Section 337, which came into existence after section 5,[4] was intended to shelter and protect United States industries,[5] rather than to replace section 5.[6] Section 5's applicability to matters involving foreign commerce is well established.[7] However, section 337 goes further than section 5 by creating what is essentially a private right of action against "unfair methods of competition," which will be discussed below.

A. *The Need to Avoid Duplication of Effort*

Due to the substantially common language used in both statutes, the jurisdiction of the ITC under section 337, other than in what are essentially private controversies, is duplicative of a small area of the larger jurisdiction of the FTC under section 5.[8] Given this situation, there is a need to avoid duplication of effort within the area of overlap. The need arises in the interest of avoiding both unnecessary expenditures of public funds and the possible unfairness of requiring accused parties to answer to two agencies simultaneously with re-

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tation: the Expanded Role of the U.S. International Trade Commission Under § 337 of the Tariff Act of 1930, as Amended by the Trade Act of 1974, 31 BUS. LAW. 1627 (1976).

[4] The FTC Act was enacted in 1914, 38 Stat. 717, while section 337's predecessor, section 316, was created in the Tariff Act of 1922, 42 Stat. 943.

[5] In re Orion Co., 71 F.2d 458, 465 (C.C.P.A. 1934).

[6] 19 U.S.C. § 1337(a) provides that the ITC's proceedings and orders are to be "in addition to any other provisions of law."

[7] *See, e.g.*, Branch v. FTC, 141 F.2d 31 (7th Cir. 1944); Eastman Kodak Co. v. FTC, 7 F.2d 994 (2d Cir. 1925); Sansui Electronics Corp., 86 F.T.C. 995 (1975).

[8] The precise extent of the overlap is not clear. In Certain Electronic Audio and Related Equipment, Investigation No. 337-TA-7 (I.T.C. filed July 10, 1973), I.T.C. Pub. No. 768 (April 1976), [hereinafter cited as Electronic Audio Equipment], the current Chairman of the ITC, citing an earlier decision, Convertible Game Tables and Components Thereof, Investigation No. 337-TA-34 (I.T.C., filed Oct. 26, 1972), Tariff Comm'n Pub. No. 705 (Dec. 1974) [hereinafter cited as Convertible Game Tables], decided that no "nexus" between the importation of a product into the United States and its involvement in the allegedly unfair practice is required for jurisdiction under section 337 to attach. Under this construction, virtually any unfair practice involving the sale of imported goods in the United States is within the scope of section 337. Such broad construction was opposed by both the FTC and the Department of Justice. *See* letters from FTC to ITC dated March 9, 1976, and from the Department of Justice to ITC dated March 19, 1976.

spect to the same alleged conduct. Section 337 provides a basis for such avoidance by permitting actions initiated under it to be suspended during the pendency of other proceedings involving the same general subject matter.[9] However, this provision is discretionary with the ITC.[10] Although section 5 does not specifically authorize the FTC to defer to other agencies, the courts have recognized that the FTC has broad discretion in choosing the cases it brings.[11]

The situation between the FTC and the ITC with regard to their jurisdictional overlaps may be compared to that between the FTC and the Antitrust Division of the Department of Justice with respect to matters arising under the Sherman and Clayton Acts. It is clear, for example, that conduct which violates the Sherman Act,[12] which is enforced by the Department of Justice, may also violate the FTC Act, and that the two agencies have concurrent jurisdiction over the various sections of the Clayton Act enforced by the FTC.[13] The FTC and the Department of Justice have for many years had a functional liaison arrangement through which duplication of effort is generally avoided.[14] While it is clear that neither agency may prevent the other from seeking to enforce the laws against the same parties with respect to the same or similar conduct,[15] it is generally accepted that action by only one agency at a time is sufficient to protect the public interest.[16]

The need for such an arrangement between the ITC and the FTC to avoid duplication of effort with respect to acts which could be found to violate either section 5 or section 337 is apparent. Similar need exists with the respect to the overlap between the ITC and the Treasury Department in anti-dumping and countervailing duty

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[9] 19 U.S.C. § 1337(b)(1) (Supp. V 1975).

[10] For example, the ITC has used this provision recently in Certain Plastic Fastener Assemblies, Investigation No. 337-TA-36 (I.T.C., Notice of Suspension of Investigation Oct. 13, 1977). However, the ITC did not suspend proceedings, for example, in Certain Color Television Receiving Sets, Investigation No. 337-TA-23 (I.T.C., filed Jan. 15, 1976) [hereinafter cited as Color TV Sets].

[11] *See, e.g.*, Moog Industries v. FTC, 355 U.S. 411 (1958).

[12] 15 U.S.C. § 1, *et. seq.* (1970).

[13] *See, e.g.*, FTC v. Brown Shoe Co., 384 U.S. 316 (1966); FTC v. Cement Institute, 333 U.S. 683, 693 (1948); 15 U.S.C. § 21 (1970).

[14] *See, e.g.*, Roll, *Dual Enforcement of the Antitrust Laws by the Department of Justice and the FTC: The Liaison Procedure*, 31 BUS. LAW. 2075 (1976). Revisions of that procedure may now be in the making. *See* 834 ANTITRUST & TRADE REG. REP. (BNA) at ¶ A-8, 9 (1977).

[15] *See* FTC v. Cement Institute, 333 U.S. 683, 693 (1948).

[16] *See* FTC OPERATING MANUAL, ¶ 3.20B and app. D (1972), which provides that FTC investigations may properly be closed *inter alia* if there are proceedings by another government agency or private litigation with regard to the same conduct.

cases. As the letter from the FTC to the ITC in connection with the matter of *Color TV Sets*[17] demonstrates, however, such arrangements have not been made. Unless the agencies are prepared to enter into appropriate liaison arrangements or exercise great forbearance, it appears that the ITC is likely to duplicate under section 337 the activities of other agencies in the same general area, with a consequentially increased burden for the taxpayers who must support both agencies.

Possible legislative solutions to the legislatively created jurisdictional overlap might include either making the jurisdiction of one agency in such areas exclusive,[18] that is, ousting the other agencies from jurisdiction, or making avoidance of duplication of effort mandatory by requiring each agency to defer to the agency which had initiated a prior proceeding involving substantially the same conduct. However, neither of these possibilities appears to be realistic at this time.

B. *Need for Consistency in Interpretation of Identical Statutory Language*

Although the ITC has indicated that it is prepared to accept certain fundamental judicial precedents in dealing with established antitrust principles, it also has indicated that it does not feel bound by the precedents of the FTC in interpreting what are or are not unfair methods of competition or unfair acts or practices.[19] Perhaps this is as it should be, since interpretation of such broad language is properly committed to agency discretion and may change as beliefs and practices change over the years. As the Supreme Court pointed out in *FTC v. Sperry & Hutchinson Co.*, the FTC "does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[20] However, assuming that the same broad discretion is avail-

[17] Color TV Sets, *supra* note 10, Letter from FTC to ITC (Aug. 16, 1976).

[18] The differences of opinion concerning jurisdiction and the application of section 337 between the ITC and other agencies have apparently caught the eye of Congress. One currently pending bill, S. 1990, introduced Aug. 3, 1977, would *inter alia*, strip the ITC of its jurisdiction over section 337 and transfer proceedings under the statute to a new cabinet Department of International Trade and Investment in the interest of providing a coordinated policy approach by the Government in this area. This approach, however, would still have the overlap between section 5 and section 337.

[19] *See* Electronic Audio Equipment, note 8 *supra*.

[20] 405 U.S. 233, 244 (1972).

able to the ITC in interpreting section 337 as is available to the FTC in cases under section 5, there is the anomaly of precedents in competition and consumer protection issues being set by an agency whose mandate is neither the protection of competition overall nor protection of the consumer, but protection of domestic enterprises.[21] In the interest of coordinated and consistent competition and consumer protection policies, this situation is undesirable.

The reasons for concern are several. First, with respect to factual determinations, the ITC, as opposed to the FTC, is obliged to determine whether there has been or is likely to be injury to a domestic industry.[22] It is required to make similar determinations in other types of matters as well, such as in anti-dumping cases.[23] Its findings of injury from time to time have apparently turned simply on questions of whether the domestic industry in question had been forced to lower prices in order to avoid losing sales to foreign competitors,[24] without regard for such issues as whether the foreign competitors were more efficient or possessed comparative advantages in labor or raw material prices, or whether the prices established by the domestic industry were inflated and noncompetitive in the first place. Thus, while competition policy under the antitrust laws is concerned with the health of the United States' economy overall and the interest of the public in paying the lowest prices possible,[25] the ITC is forced by section 337's language to place the interest of particular domestic competitors in the forefront of its decision making process.[26]

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[21] In re Orion Co., 71 F.2d 458, 465 (C.C.P.A. 1934).

[22] 19 U.S.C. § 1337(a) (Supp. V 1975). Although the section also denounces unfair acts which "restrain or monopolize trade and commerce in the United States" in the alternative to finding injury to a domestic industry, the determination of injury is considered in practice in every case. Complaints filed with the ITC, as one might expect, universally allege injury to a domestic industry.

[23] 19 U.S.C. § 160(a) (Supp. V 1975).

[24] Articles Comprised of Plastic Sheets Having An Openwork Structure, Tariff Comm'n Pub. No. 444, at 9 (1971). Note that the ITC was named the Tariff Commission, prior to the enactment of the Trade Act of 1974. 19 U.S.C. 2231 (Supp. V 1975).

[25] *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958); Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960).

[26] It appears that Congress may have intended to change the ITC's focus in this regard when it amended section 337 in the Trade Act of 1974. *See*, SENATE COMM. ON FINANCE, TRADE REFORM ACT OF 1974, S. REP. No. 1298, 93d Cong., 2d Sess. 193-200 *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7326-332. The Committee stated "that the public health and welfare and the assurance of competitive conditions in the United States economy must be the overriding considerations in the administration of this statute." Accordingly, the ITC was to be required to consider the impact of any proposed orders, and to refuse to issue orders if

In cases in which domestic industry appears to be losing out to foreign competition, there is pressure for the ITC, considering the policies which underlie section 337, to find some species of unfairness on which to base remedial measures. Placing the welfare of individual competitors above the maintenance of a competitive market, however, tends to reduce the effectiveness of competition and may encourage the continued use of noncompetitive or obsolescent technology, organization, and distribution systems. Continued operation of a noncompetitive domestic enterprise, in the long run, will harm the public both through the higher prices it is forced to pay and the delay of increased efficiency in the United States industry which competition should promote. Section 337, however, tends in practice to strike the balance in favor of domestic enterprises rather than in favor of competition in the United States market.

Second, with respect to legal determinations of what constitutes unfairness under section 337 and section 5, the potential for interpretation of virtually identical language in different ways by two different and equally independent agencies causes substantial uncertainty. Not only are the two agencies different in terms of overall purpose and underlying policies, but they also differ markedly in terms of the situations with which they deal on a regular basis. This difference has resulted in differing expertise. The FTC has judicially recognized expertise in making determinations of unfairness in both competition and consumer protection matters based on its long experience in these fields.[27] The ITC's experience is more specialized and limited in the competition and consumer protection fields. Handling of cases of unfair methods of competition (other than in patent-based cases) has been a relatively minor part of the ITC's overall activity, unlike the FTC's routine consideration of such matters. The ITC's involvement with consumer protection aspects of commercial transactions has been even less substantial, whereas such cases have constituted the majority of matters before the FTC in recent years.[28]

Without frequent routine handling of matters in the competition and consumer protection areas, it is understandable that the ITC might be inclined to view matters differently from the FTC, even if

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their overall effect on the public health and welfare or on competition would be negative, "particularly . . . in cases where there is any evidence of price gouging or monopolistic practices in the domestic industry." *Id.* at 197.

[27] *See, e.g.*, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965).

[28] *See* 1976 F.T.C. ANN. REP., 14, 24 for a comparison of the actual caseload statistics of the FTC in competition and consumer protection matters.

the policy underpinnings of the two agencies were not as dissimilar as they are. Particularly in instances in which relatively novel forms of commercial behavior are involved, agencies which are not attuned in the same way to the standards of the marketplace and the expectations of the public are likely to have difficulty in arriving at similar conclusions as to what conduct is unfair and which remedies would be most appropriate.

Third, making determinations under sections 5 and 337 involves application of both competition and consumer protection policy. Both statutes are aimed broadly at preserving fairness in the market place. However, once again we see different policy outlooks of the FTC and ITC on these matters. The FTC is ultimately concerned with protecting the public's interest in having access to the widest variety of products and services through open and nondeceptive competition in the market.[29] The ITC, consistent with its overall purpose of protecting American industry not only through section 337 but also through the other laws it enforces,[30] is understandably reluctant to recognize a competition policy which would allow American enterprises to be injured or eliminated by more efficient or better managed foreign competitors,[31] even if American consumers were likely to benefit from the competition.

Such a policy outlook on the part of the ITC does not square with the policy of free and open competition espoused by the FTC, the United States Department of Justice, and the antitrust laws in general. In effect, such a policy can act to limit fair and efficient foreign competition which frequently may be the best method of keeping American industries competitive world-wide. If American markets are preserved for American firms on a preferential basis, American companies will have less incentive to develop the superior efficiency of operation and aggressiveness of management which is essential if they are to compete effectively in international trade.

Fourth, the potential for conflicting interpretations is compounded by the fact that initial appellate review of decisions under section 337 and section 5 is not in the same judicial channel. Deci-

[29] *See, e.g.*, FTC v. Brown Shoe Co., 384 U.S. 316 (1966); FTC v. Algoma Lumber Co., 64 F.2d 618 (9th Cir. 1933), *cert. denied*, 290 U.S. 607 (1933).

[30] 19 U.S.C. § 160(a) (1970 & Supp. V 1975).

[31] Although section 337 states that the injured industry must be "efficiently and economically operated," it does not set standards for measuring relative efficiency and economy of operation or require that the domestic industry be as efficiently or economically operated as its foreign competitors. The author is not aware of any section 337 antitrust case in which inefficiency of the domestic industry has been found.

sions of the FTC are reviewable in the United States Court of Appeals,[32] whereas decisions of the International Trade Commission are reviewed in the Court of Customs and Patent Appeals (CCPA).[33] The CCPA handles matters involving unfair methods of competition even less frequently than the ITC. Although certiorari from appellate decisions in both systems may be sought in the Supreme Court,[34] in practice it has been rare for the Supreme Court to hear cases from the Court of Customs and Patent Appeals. Given this situation, the likelihood of consistency in application through the judicial review process is not great.

III. SECTION 337—A DISCRIMINATORY METHOD OF PROVIDING A PRIVATE RIGHT OF ACTION AGAINST "UNFAIR METHODS OF COMPETITION"?

Considering the policy purposes of section 337 over the years as described above, it is not surprising that the statute is discriminatory in that it can be invoked only against foreign producers and importers. In contrast, section 5 is applicable to all persons, partnerships or corporations in or affecting United States commerce, without regard to nationality. The discrimination inherent in section 337 compared to section 5 is manifested in three ways: (1) in its scope of application; (2) in terms of the remedies available against violators; and (3) in substantive interpretation.

A. *Discrimination in Scope of Application*

It is well settled that no private right of action exists under section 5 of the Federal Trade Commission Act.[35] The policy reasons for this situation are relatively simple. The language of section 5 condemning "unfair methods of competition or unfair or deceptive acts or practices" is extremely broad. A criminal statute of such breadth would arguably be "void for vagueness."[36] However, the FTC Act is made precise in practice through the rulings of its enforcing agency.

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[32] 15 U.S.C. § 45(c)-(e) (1970).

[33] 19 U.S.C. § 1337(c) (Supp. V 1975).

[34] *See* discussion in La Rue, note 3 *supra*, at 612, concerning the doubtfulness of the availability of certiorari in section 337 cases.

[35] *See, e.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973). *But see* Guernsey v. Rich Plan of the Midwest, ANTITRUST & TRADE REG. REP. (BNA) No. 751, D-1 (1976), in which a private right of action against a party allegedly in violation of an FTC order was recognized.

[36] *But see* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 251 (E.D. Pa. 1975), upholding the constitutionality of the treble damages provisions of the Antidumping Act of 1916, 15 U.S.C. §§ 71-77 (1970), against a "void for vagueness" challenge.

The operative provisions of section 5 provide for administrative proceedings in the first instance. Rulings of the FTC under it are prospective in operation. The decision to initiate proceedings under section 5 is made by the FTC as a whole, and the Commission is required to act only in the public interest, rather than to redress private wrongs or become involved in private controversies.[37] The FTC does not have criminal jurisdiction, nor does it have authority to impose civil penalties for violations of the Act without proceeding through the courts. Civil penalties may only be imposed upon persons who have either violated orders of the Commission prohibiting continuation of specific activities or trade regulation rules which also prohibit specific activities.[38] Further, since section 5 can only be invoked by the Commission in the first instance rather than by private parties, problems of inconsistent application as between different industries or parties are largely forestalled.[39]

By contrast, section 337 provides that upon receipt of verified complaints in proper form, the ITC "shall" initiate investigations into conduct which arguably violates the terms of the statute.[40] Since the statute is applicable only against foreign producers or importers, however, there is an immediate discrimination. Persons who are being victimized by identical acts on the part of domestic producers or resellers are left without a private right to commence an administrative proceeding. There also is no private judicial remedy unless the allegedly unfair acts of domestic parties come within the ambit of the antitrust laws as defined in the Clayton Act.[41] Secondly, under the ITC's procedures, the complainant's attorney in effect acts as prosecutor,[42] rather than a government attorney as in FTC proceedings.[43]

Thus, accusations of "unfair methods of competition or unfair acts" resulting in injury to private parties may be lodged under

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[37] FTC v. Klesner, 280 U.S. 19 (1929).

[38] *See* 15 U.S.C. § 45(*l*) and (m) (1970).

[39] *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973), for a discussion of the reasons why enforcement by the FTC is preferred.

[40] 19 U.S.C. § 1337(b)(1) (Supp. V 1975). The mandatory language of the statute gives the ITC little discretion to refuse to accept technically well-drawn complaints.

[41] 15 U.S.C. §§ 12, 15, 26 (1970).

[42] *See* 16 C.F.R. § 3.1, *et seq.* (1977) for the procedures applicable to FTC adjudications under section 5.

[43] *See* 19 C.F.R. § 210 (1977), which provides procedural rules for proceedings under section 337, including rights of complainants. As one might expect, attorneys representing private parties are not as likely as government attorneys to recognize possible public interests which may be found on the side of a respondent.

section 337 without having to meet the "public interest" criteria required for proceeding under section 5. Foreign producers or importers may thus be forced to defend themselves against charges which could not be leveled against domestic competitors alleged to have engaged in identical conduct. Being subjected to such proceedings and the possible penalties if violations are found tends to weaken the competitiveness of foreign producers and importers *vis-à-vis* their domestic competitors.

Further, while no one should presume that domestic competitors would act in bad faith in filing complaints under section 337, the potential for anticompetitive use of that section against manufacturers and importers of foreign products is substantial.[44] With lower burdens of proof and less restrictive rules of evidence than normally would be required in private actions under the antitrust laws,[45] American businessmen who desire to restrict or eliminate competition from abroad may seize upon virtually any type of activity which might be deemed unfair, ranging from classic cases of patent infringement or price fixing to such *de minimis* acts as misleading representations at the point of sale by employees of a seller who is in some way affiliated with an importer. Acts normally considered to be "unfair" only to consumers have been included in proceedings under section 337.[46]

B. *Discrimination in Remedies Available*

Section 337 authorizes the ITC to issue orders excluding goods involved in violations from the United States market.[47] The ITC has previously recommended the use of such an order in one antitrust case under section 337.[48] No comparable authority exists under section 5 or the other antitrust laws.[49] Thus if foreign producers or

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[44] *See* La Rue, note 3 *supra*. If it were possible to demonstrate that complaints against importers or foreign producers were filed in bad faith with an anticompetitive purpose, a private action under section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), could be brought against the complainants. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

[45] Under section 337, injury to competition overall need not be shown. Further it is clear that the rules of evidence in judicial proceedings do not apply in administrative hearings, *see, e.g.*, FTC v. Cement Institute, 333 U.S. at 705-06. The ITC's rules on evidence are typically broad, providing that, "[r]elevant, material and reliable evidence shall be admitted." 19 C.F.R. § 210.42 (1977).

[46] *See*, Convertible Game Tables, note 8 *supra*.

[47] 19 U.S.C. § 1337(e) (Supp. V 1975).

[48] Tractor Parts, Tariff Comm'n Pub. No. 443 (Dec. 1971) (this decision reversed the earlier one). Tractor Parts, Tariff Comm'n Pub. No. 401, (June 1971) (this original decision recommended an embargo on Berco parts).

[49] *See* 15 U.S.C. § 45 (1970) and 15 U.S.C. § 12 (1970) and the "antitrust laws" defined

importers are found to have engaged in "unfair" conduct, they face remedial orders which are potentially more crippling than the damages which injured parties might recover in a civil damage suit or the provisions of a "cease and desist" order issued by the FTC.

While such exclusion orders may be appropriate to defend lawful monopolies in patent-based cases, their anticompetitive effect is obvious. If one accepts the concept that competition is the best means of allocating resources and encouraging efficiency, it makes no sense to use remedial measures which will totally prevent competition in the future.[50] Rather, orders should be framed with a view towards encouraging fair competition in the public interest. Exclusion orders should therefore be used only in cases involving patents, and should be applied sparingly even in those cases, if other appropriate means are sufficient to protect the legitimate interests of the patent holder.

Due at least in part to the severity of the remedies available if ITC proceedings are allowed to run their course, avoiding anticompetitive settlements between complainants and the parties accused of unfair conduct under section 337 is another cause for concern. The temptation for foreign manufacturers or importers to enter into unduly restrictive settlements to avoid exclusion orders and reduce the burdens of litigation is considerable. It could result in settlements which would diminish the competitive vigor of importers in United States commerce generally. In recent years imports have provided the basis for much of the competition in several major American industries. It would be unfortunate if the American public were to be deprived of this source of competition and incentive for greater efficiency in American business.

For example, if the alleged unfairness consists of sales by an importer at unreasonably low prices, a settlement whereby the importer in effect agrees with the complainant to raise his prices may be satisfactory between the parties in eliminating the alleged "unfair" practice. Such a settlement, however, raises obvious diffi-

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therein. A comparable order in the domestic context, for example, might consist of prohibiting the sale of products in a manner similar to that used by the Consumer Products Safety Commission for products found to be physically dangerous. 15 U.S.C. §§ 2057-2058 (Supp. V 1975). Imported products which are judged to be physically dangerous under the same standards as domestic products may also be excluded from the United States. 15 U.S.C. § 2066 (Supp. V 1975).

[50] Even the ITC staff has apparently accepted the view that exclusion orders are inappropriate in antitrust proceedings under section 337. *See* Certain Angolan Robusta Coffee, Investigation No. 337-TA-16 (I.T.C., filed Nov. 26, 1974), Brief of Commission Investigative Staff Concerning Disposition of Investigation at 3 n.1.

culties under the Sherman Act[51] and FTC Act.[52] Thus it is conceivable that a settlement of a section 337 proceeding, once all its ramifications are known, might itself become the subject of antitrust action under other statutes.[53]

C. *Discrimination in Substantive Interpretation*

This situation would arise to the extent that section 337 may be interpreted by the ITC as reaching types of "unfair" conduct which are not condemned by the FTC under section 5. So far this discrimination remains a threat rather than a reality. In *Electronic Audio Equipment,*[54] the current Chairman of the ITC, while acting as Presiding Officer, announced his view that section 337 could reach unfair conduct not covered by other similar statutes.[55] In that proceeding, however, there was no occasion to test this proposition since no violation was found.

Should the ITC in future cases go beyond the expansive area already carved out by the FTC under section 5, the import may be substantial. At present one may only speculate how far such interpretations of unfairness might go. The existence of this uncertainty, however, is at least another factor which might induce persons accused of violation of section 337 to settle the proceedings.

IV. POSSIBLE WAYS TO ELIMINATE SECTION 337'S INHERENT DISCRIMINATION

There are a number of ways in which the present discriminatory situation could be remedied. One would be to do away with section 337 altogether, leaving actions against unfair methods of competition to the FTC under section 5 and actions against infringements of patents to the courts. This alternative would probably be unacceptable to those interests which secured passage of section 337 originally and continue to utilize it today. In this era of increasing resort to litigation, it is difficult to conceive that a right of action once granted would be taken away. Further, if one accepts the goal

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[51] 15 U.S.C. §§ 1 *et seq.* (1970).

[52] 15 U.S.C. §§ 41 *et seq.* (1970).

[53] Although the ITC must consider motions for termination by reason of settlements, 19 C.F.R. § 210.51-55 (1977), its record of recognizing anticompetitive activities which tend to favor domestic parties is not encouraging. *See* Furazolidone, Tariff Comm'n Pub. No. 299 (1969).

[54] *See* note 8 *supra.*

[55] *Id.* Convertible Game Tables Investigation, *supra* note 8 at 36, Recommended Decision of Commissioner Minchew.

that unfair methods of competition and unfair practices generally should be eliminated from the market place, actions initiated by injured parties provide a much greater likelihood of enforcement than would be the case if one were forced to rely on the limited resources of the law enforcement agencies.

Another possibility would be to require that the ITC not initiate investigations under section 337 except in matters where the public interest, as opposed to the private interests of complainants, is clearly involved.[56] This would equalize the legal tests for initiation of proceedings under section 5 and section 337. It should also forestall the filing of *de minimis* cases under section 337.[57] It would not, however, resolve the problems of inconsistent interpretation of identical statutory language described earlier in this article.

Another possible method of remedying the discrimination, considering the unlikelihood of being able to cut back on rights of action already in existence, would be to create private rights of action under section 5 of the FTC Act similar to those existing under section 337,[58] that is, required initiation of investigations upon receipt of sworn complaints under section 5 of the FTC Act in order to permit private actions against alleged perpetrators of unfair methods of competition. To do so, however, would require substantial expansion of the FTC in order simply to hear such complaints and rule upon them, even if private attorneys were permitted to act as prosecutors. To require that complaints be prosecuted only by agency staff members would be very costly in terms of FTC manpower and would doubtless be less than satisfactory to complainants. The impact on business of creating such private rights of action, while it would be difficult to estimate, would also be substantial. If the remedies were expanded to include damages[59] as well as

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[56] FTC v. Klesner, 280 U.S. 19 (1929).

[57] *See* Crocheted Bootie Sets from Korea, filed May 30, 1975, amended complaint filed July 14, 1975. This case was not accepted for docketing by the ITC. It involved, *inter alia*, allegations that the accused importer failed to pay minimum wages to employees who packed the imported bootie sets for distribution and resale.

[58] *See* § 7(a) of the 1977 Amendment to the Federal Trade Commission Act, H.R. 3816, 95th Cong., 1st Sess. (1977). The Amendment proposed that private persons be granted rights of action in the courts to recover damages for violations of trade regulation rules or final cease and desist orders issued by the FTC. Such rights, however, would not have included authorization to initiate proceedings before the FTC with respect to violations of the FTC Act itself. This section was dropped prior to House and Senate approval of the bill. TRADE REG. REP. (CCH) Report No. 304, pt. I, at 8 (Oct. 24, 1977).

[59] Payment of restitution to victims of unfair conduct is not among the remedies which the FTC may order. *See*, Heater v. FTC, 503 F.2d 321 (9th Cir. 1974). However, actions by the FTC in the courts to obtain such restitution are authorized. 15 U.S.C. § 57b (Supp. V 1975).

cease and desist orders, it could be devastating.

Another alternative would be to provide for private actions on the basis of sworn complaints of unfair methods of competition to be heard by the courts. To do so, however, would inevitably erode consistency in the application of the broad statutory language because of the large number of courts which would hear cases, particularly if state courts as well as the federal courts were involved. Further, the desirability of adding to the existing case loads of the courts in such a way is questionable.

V. CONCLUSION

The overlapping jurisdiction between the FTC and ITC under sections 5 and 337, respectively, is unfortunate. The overlap was nevertheless deliberately created by the Congress and can only be changed by legislative action. The potential for unnecessary duplication of effort between the two agencies could be substantially reduced if the agencies would enter into appropriate liaison arrangements. However, the possibility of inconsistent determinations of law and applications of policy will remain inherent as a result of the independence of both agencies if the statutes are not changed.

A further anomaly is that section 337 as it currently exists creates a substantial discrimination against foreign manufacturers or importers of foreign goods by permitting what amount to private actions against such parties. No such right exists under section 5 with respect to identical conduct by domestic parties, and Congress has persistently refused to create one.[60]

The need for such discrimination under United States law is not clear, and its continued existence invites trade retaliation by foreign governments who may perceive their interests as being unfairly treated by the United States. To the extent that there is a need to offer a means of redress to persons victimized by unfair methods of competition or unfair practices, it should be available regardless of whether the perpetrators of such acts or practices are foreign or domestic. If the injury inflicted is substantially the same, the justification for limiting private rights of action to suits brought against foreign interests or importers, as opposed to domestic persons who may engage in similar harmful or predatory practices, is spurious.

Given the desirability of curtailing unfair methods of competition in general and the unlikelihood of curtailing private rights of action such as those created under section 337 as it currently exists, it

[60] *See* note 58 *supra*.

appears that the best method for eliminating both the overlap between the FTC and ITC in this area and the discriminatory nature of section 337 would be creation of more universal private rights to pursue unfair methods of competition without regard to their origins, displacing the ITC in non-patent cases of unfairness and supplementing the FTC's public interest proceedings. Remedies, as in the case of section 5, should be along the lines of cease and desist orders. The place to pursue such remedies should not, however, be in the courts, which might have difficulty in applying consistent interpretations of the broad mandate necessary to halt unfair methods of competition. Instead, such actions should be brought before a specialized administrative tribunal[61] whose decisions could be subject to judicial review in the same manner as are those of the FTC under present legislation. The question of whether damages should be available for private parties injured by unfair commercial conduct not amounting to a violation of the antitrust laws as defined in the Clayton Act[62] is one which will require particularly close study. Damage awards would probably require judicial action.[63]

Such a new system would require a major legislative effort which is not likely to take place soon. Nevertheless, the author hopes that Congress will be able in the long run to discern the wisdom of treating similar unfair methods of competition, acts, and practices evenhandedly, without regard to the nationality of the parties alleged to have engaged in them.

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[61] A single tribunal, somewhat like the FTC or the National Labor Relations Board, could hear cases in the first instance using administrative law judges to conduct hearings in locales where the cases could be most conveniently heard, rather than requiring all complainants, respondents and witnesses to come to a single location. *See, e.g.*, 16 C.F.R. § 3.41 (1977).

[62] 15 U.S.C. § 12 (1970).

[63] It does not appear that there is any bar to having an administrative agency determination impose appropriate penalties in the first instance, so long as the standards of due process are met. Atlas Roofing Co. Inc. v. Occupational Safety and Health Comm'n, 518 F.2d 990 (5th Cir. 1975), *aff'd*, 97 S. Ct. 1261 (1977). However, such administrative awards of damages are not within the scope of the Constitution under present interpretations. As shown by recent legislative action, *supra* note 58, the concept of private rights of action to recover damages for violation of section 5 is not yet acceptable to the Congress, although bringing consumer redress actions in the courts by the FTC itself is authorized under section 19 of the FTC Act. 15 U.S.C. § 57b (Supp. V 1975).