TRADE LAW—NOTICE AND OPPORTUNITY TO BE HEARD IN A "GOOD CAUSE" DETERMINATION PROCEEDING UNDER SECTION 201(E) OF THE TRADE ACT OF 1974 ARE NOT REQUIRED BY THE PROVISIONS OF THE ACT ITSELF OR BY CONSTITUTIONAL DUE PROCESS. *(Sneaker Circus, Inc. v. Carter,* E.D.N.Y. 1978).

Title II of the Trade Act of 1974 (the Trade Act) permits domestic industries to seek relief from injurious import competition by petitioning the United States International Trade Commission (ITC).[1] After investigating the industry's claims, the ITC forwards its report and recommendation to the President who then decides what relief, if any, will be provided.[2] Section 201(e)[3] of the Trade Act authorizes only one investigation into a particular subject matter area within a twelve month period. Once it has made

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[1] Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978-2077 (codified at 19 U.S.C. §§ 2102-2487 (1976)) (hereinafter referred to as the Trade Act).

Title II of the Trade Act is set out in sections 201 through 284 and codified at 19 U.S.C. §§ 2251-2394 (1976).

The United States International Trade Commission is "an independent agency created by the Congress, to which Congress has delegated some of its constitutional authority to regulate foreign commerce." Minchew & Webster, *Regulating Unfair Practices In International Trade: The Role of the United States International Trade Commission,* 8 GA. J. INT'L & COMP. L. 27, 28 (1978). The agency was originally denominated the United States Tariff Commission, Act of Sept. 8, 1916, ch. 463, § 700, 39 Stat. 795, but has since been "renamed as the United States International Trade Commission." 19 U.S.C. § 2231 (1976).

[2] Sections 201 through 203 of the Trade Act set out the important relief procedures. 19 U.S.C. §§ 2251-2253 (1976).

The remedies available to the President are contained in section 203 which states in part:

> (a) If the President determines to provide import relief . . . he shall . . .
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> (1) proclaim an increase in, or imposition of, any duty on the article causing or threatening to cause serious injury to such industry;
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> (2) proclaim a tariff-rate quota on such article;
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> (3) proclaim a modification of, or imposition of, any quantitative restriction on the import into the United States of such article;
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> (4) negotiate orderly marketing agreements with foreign countries limiting the export from foreign countries and the import into the United States of such articles; or
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> (5) take any combination of such actions.

19 U.S.C. § 2253 (1976).

[3] Section 201(e) of the Trade Act states:

> Except for good cause determined by the Commission to exist, no investigation for the purposes of this section shall be made with respect to the same subject matter as a previous investigation under this section, unless 1 year has elapsed since the Commission made its report to the President of the results of such previous investigation.

19 U.S.C. § 2251(e) (1976).

its initial investigation, the ITC may not reinvestigate that same area for one year unless it finds that "good cause" exists.[4] Certain procedures used in making this section 201(e) "good cause" determination were recently challenged in the United States District Court for the Eastern District of New York. Plaintiffs claimed that since the ITC had failed to give notice or to provide an opportunity to be heard at the "good cause" determination proceeding, the resulting import relief measures ordered by the President should be invalidated. *Held*: Notice and opportunity to be heard in a "good cause" determination proceeding under section 201(e) of the Trade Act of 1974 are not required either by the provisions of the statute itself or by the requirements of constitutional due process since the "good cause" determination proceeding is only a threshold factual determination which does not affect plaintiffs' rights or property interests. *Sneaker Circus, Inc. v. Carter*, 457 F. Supp. 771 (E.D.N.Y. 1978).[5]

In September, 1975, after a petition by members of the domestic footwear industry,[6] the ITC conducted an initial investigation into the effect of non-rubber footwear imports on American industry. On February 8, 1976, the ITC reported to the President and recommended that tariff increases be ordered.[7] President Ford found,

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[4] *Id.*

[5] The district court's decision on the merits was not arrived at directly. On June 10, 1977, the district court had originally dismissed the complaint, holding that it lacked subject matter jurisdiction over the controversy. The court cited 28 U.S.C. § 1582 as giving the United States Customs Court exclusive jurisdiction over all civil actions filed pursuant to the Tariff Act of 1930 as amended.

On appeal, the United States Court of Appeals for the Second Circuit reversed, stating:

> In the present case, the trade agreements regulate exports from a foreign nation. Violation of these export limits subjects the foreign exporter to heavy civil and criminal sanctions in the country of export. There is accordingly every likelihood that the agreements will be effectively enforced abroad, with the result that no occasion for protest under section 514 will ever present itself, and no Custom Court jurisdiction under 28 U.S.C. § 1582 will arise. The point is not that the dispute is not presently ripe for adjudication in the Customs Court, but rather that the case will never ripen sufficiently to meet the statutory requirements for jurisdiction. When this situation occurs, jurisdiction over a customs matter which presumptively inheres in the Customs Court reverts to the District Court under 28 U.S.C. §§ 1331 and 1337.

Sneaker Circus, Inc. v. Carter, 566 F.2d 396, 399-400 (2d Cir. 1977). The court of appeals then remanded the case back to the district court to consider the questions of standing and ripeness.

[6] After being petitioned by the American Footwear Industries Association and two domestic footwear trade unions, the ITC began this investigation into the effects of foreign competition on September 17, 1975. Plaintiffs' Memorandum of Law on the Merits at 10, Sneaker Circus, Inc. v. Carter, 566 F.2d 396 (2d Cir. 1977).

[7] *Id.*

however, that the domestic footwear industry was in a state of economic recovery, and therefore import relief was not warranted at that time.[8] Notwithstanding the President's findings, the Senate Finance Committee passed a resolution[9] on September 22, 1976 calling upon the ITC to reinvestigate the effects of import competition on the domestic footwear industry. Since it had been less than one year since the ITC's prior report to the President on February 8, 1976, it was necessary for the ITC to find that "good cause" existed before it commenced a reinvestigation.

On October 5, 1976, without giving notice or providing an opportunity to be heard to the public or to interested parties, the ITC determined that sufficient "good cause" did exist to warrant reinvestigation of the effect of foreign imports on the domestic footwear industry.[10] After conducting a reinvestigation,[11] which did include notice and public hearings, the ITC found that the domestic industry was threatened. The ITC sent its recommendations for import relief to President Carter, who rejected the specific recommendations of the ITC report[12] and ordered the Special Representative for Trade Negotiations, Robert S. Strauss,

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[8] On April 16, 1976, President Ford announced that since the domestic footwear industry was showing signs of recovery, neither the tariff-rate quota system nor the tariff rate suggested by the ITC would be imposed. *Id.*

[9] The resolution passed by the Senate Finance Committee is as follows:

> Resolved by the Committee on Finance of the United States Senate, That (a) pursuant to section 201(b)(1) of the Trade Act of 1974, the United States International Trade Commission shall promptly make an investigation to determine whether footwear is being imported into the United States in such increased quantities as to be a substantial cause, or threat thereof, of serious injury to the domestic industry producing an article like or directly competitive with the imported footwear. For purposes of this resolution, the term "footwear" means articles classified under items 700.05 through 700.85, inclusive (except items 700.51, 700.52, 700.53 and 700.60), of the Tariff Schedules of the United States (19 U.S.C. § 1202).
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> (b) It is the sense of the Committee that changing circumstances, including increasing imports and rapidly deteriorating economic conditions in the domestic footwear industry, constitute good cause, within the meaning of section 201(e) of such Act, to commence an investigation.

[10] In the Federal Register of October 12, 1976, the public was informed that a Senate Finance Committee resolution had been received by the ITC, which, in acting on the resolution, had determined on October 5, 1976 that good cause did exist for a reinvestigation into the footwear industry. The announcement then gave the date of the public hearing to be held in connection with the reinvestigation. 41 FED. REG. 44,756 (1976).

[11] The ITC conducted the reinvestigation and held hearings on the matter from December 7 through December 9, 1976. Plaintiffs' Memorandum of Law on the Merits at 12.

[12] The ITC report to the President found that injury to the domestic industry "existed and recommended the imposition of a tariff-rate quota system imposing increased duties on amounts imported above quota levels." *Id.*

to negotiate and enter into Orderly Marketing Agreements (OMAs) with the Republic of China and the Republic of Korea.[13] These OMAs, which deal with the number of pairs of non-rubber athletic footwear that Taiwan and South Korea will export to the United States, were proclaimed by the President on June 22, 1977.[14]

In June, 1977, plaintiffs, Sneaker Circus, Inc., Blazer Sports International, Inc., and Bob Wolf Associates, Inc.,[15] brought an action in the United States District Court for the Eastern District of New York, seeking to enjoin the signing the OMAs, claiming, *inter alia*,[16] that the OMAs were invalid since the ITC had failed to provide notice and an opportunity to be heard at the "good cause" determination proceeding under section 201(e) of the Trade Act.

The Trade Act of 1974 is the latest in a series of acts[17] which have attempted to promote the economic growth of the United States by reducing barriers to foreign trade. During the late nine-

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[13] Agreement on Import of Non-Rubber Footwear, United States-Republic of China, June 14, 1977, T.I.A.S. No. 8884; Agreement on Import of Non-Rubber Footwear, United States-Republic of Korea, June 21, 1977, T.I.A.S. No. 8885.

Both of these orderly marketing agreements are authorized by section 203 of the Trade Act, set out in note 2 *supra*. The OMAs deal with voluntary restraints on exports to the United States of certain non-rubber footwear products (leather, plastic, etc.), and will remain in effect from June 28, 1977 through June 30, 1981.

[14] Pres. Proc. No. 4510 [1977] U.S. CODE CONG. & AD. NEWS 4574, 42 FED. REG. 32,436 (1977). In this proclamation, President Carter notes that although the ITC recommended tariff-rate quotas on imports, he has decided that orderly marketing agreements should be implemented as the appropriate remedy.

[15] Plaintiffs are, respectively, a retailer, a wholesaler and an importer of the type of non-rubber footwear regulated by the OMAs. Plaintiffs claim that as a result of the OMAs they are unable to purchase adequate supplies of the foreign footwear products.

[16] Besides challenging the procedures used by the ITC in making the "good cause" determination, plaintiffs also challenged the actual finding of "good cause," claiming that the ITC did not have sufficient evidence to make the determination. Plaintiffs' Memorandum of Law on the Merits at 44.

Plaintiffs also claimed that President Carter failed to comply with sections 202 and 203 of the Trade Act which require the President to give notice of his determination of the remedy to be implemented within certain specific time periods. *Id.* at 79.

Finally, plaintiffs claimed that the OMAs violated the Treaties of Commerce which the United States had entered into with the Republic of China and the Republic of Korea, 8 U.S.T. 2217, T.I.A.S. No. 3974; 63 Stat. 1300, T.I.A.S. No. 1871; the General Agreement on Tariff and Trade (GATT), *done* October 30, 1947, 61 Stat. 43 (1947), T.I.A.S. No. 1700, 56-61 U.N.T.S. (January 1, 1948); and section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). *Id.* at 85-108.

The district court found no merit in any of plaintiffs' claims.

[17] The Trade Act of 1974 is the thirteenth extension of the Trade Agreements Act of 1934. *See generally* Metzger, *The Trade Expansion Act of 1962*, 51 GEO. L.J. 425, 426 (1963); Note, 8 N.Y.U.J. INT'L L. & POL. 63 (1975).

teenth century the United States followed a policy of economic isolation while seeking to develop its own industries without political or economic interference from abroad.[18] The early twentieth century, however, found a strong and expanding domestic economy. With this increased domestic productivity came the need for new markets, and a trend toward participation in the world market emerged.[19] The end of economic isolation was finally signaled by the passage of the Trade Agreements Act of 1934[20] which sought to promote reciprocal tariff reductions and authorized the President to negotiate trade agreements with foreign nations.[21] The Trade Agreements Act of 1934 has been extended and amended by subsequent acts.[22]

The most recent legislation, the Trade Act of 1974, was introduced in the Congress in 1973.[23] While the bill was being considered by the Senate[24] the domestic economy was shaken by the combined effects of inflation and the OPEC oil embargo.[25] As a result, the Act finally passed by Congress is a complex piece of legislation which clearly reflects a concern for the American economy. Thus, while the Act continues the policy of previous legislation in promoting reductions of international trade barriers, it also contains strengthened measures designed to protect domestic industry from the harmful effects of foreign competition.[26] Title II of the Trade Act is specifically concerned with

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[18] Metzger, *supra* note 17, at 426. *See also* S. RATNER, THE TARIFF IN AMERICAN HISTORY (1972).

[19] Metzger, *supra* note 17, at 427.

[20] 48 Stat. 943 (1934).

[21] Metzger, *supra* note 17, at 428.

[22] *Id.*

[23] H.R. 6767, 93d Cong., 1st Sess. (1973). The bill was introduced in the House of Representatives as H.R. 6767 by Ways and Means Committee Chairman Wilbur Mills, among others. *See* Campbell, *The Foreign Trade Aspects of the Trade Act of 1974*, 33 WASH. & LEE L. REV. 325, 332 (1976).

[24] In its report of November 26, 1974, the Senate Finance Committee notes that "the Trade Reform Act of 1974 . . . coincides with a serious crisis in the domestic and world economies." S. REP. NO. 1298, 93d Cong., 2d Sess. *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7187.

[25] Campbell, *supra* note 23, at 332.

[26] The Trade Act's statement of purpose reads in part:

> The purposes of this chapter are, through trade agreements affording mutual benefits—
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> (1) to foster the economic growth of and full employment in the United States and to strengthen economic relations between the United States and foreign countries through open and nondiscriminatory world trade: . . . .
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> * * *
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> (4) to provide adequate procedures to safeguard American industry and labor

these domestic relief provisions.[27]

Title II provides two distinctive forms of relief to domestic industry: adjustment assistance and import relief. Adjustment assistance offers aid to particular firms, communities, and groups of workers who have suffered from the adverse effects of foreign competition.[28] Import relief, on the other hand, provides relief to the industry as a whole.[29] While the relief offered by adjustment assistance is primarily financial,[30] import relief remedies are directed toward limiting the quantities of competing foreign goods or imposing tariffs to minimize the price benefits of the foreign products.[31]

The import relief provisions set out in section 201 of the Trade Act define three main procedural steps. First, there is a petition to the ITC requesting relief. According to section 201(a)(1), the petition may be filed by "an entity, including a trade association, firm, certified or recognized union, or group of workers, which is representative of an industry."[32] However, section 201(b)(1) makes it clear that an investigation may also be requested by the President or his Special Trade Representative, the Committee on Ways and Means of the House, the Committee on Finance of the Senate, or by the ITC itself.[33]

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against unfair or injurious import competiton . . . .
19 U.S.C. § 2102 (1976).

Perhaps the most significant change brought about by the trade Act of 1974 in regard to protection of domestic industry is the deletion of the requirement that the injury be directly related to a trade concession resulting from an agreement with a foreign nation. The Senate Finance Committee Report of November 26, 1974 points out that "under present law [referring to the trade Expansion Act of 1962], increased imports must be *in major part* the result of trade agreement concessions before import relief measures are undertaken; under the Committee's bill [referring to the Trade Act of 1974], no link to concessions would be required." S. REP. NO. 1298, 93d Cong., 2d Sess. *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7205.

[27] Title II of the Trade Act is contained in sections 201 through 284 which are codified at 19 U.S.C. §§ 2251-2394 (1976).

[28] The Adjustment Assistance provisions of the Trade Act of 1974 are codified at 19 U.S.C. §§ 2271-2394 (1976).

Some of the remedies provided under Adjustment Assistance are loan guarantee programs, employment allowances, relocation services and training assistance.

[29] Section 201(b)(1) speaks in terms of ". . . a substantial cause of serious injury, or the threat thereof, to the *domestic industry* producing an article like or directly competitive with the imported article." 19 U.S.C. § 2251(b)(1) (1976) [emphasis added].

[30] *See* note 28 *supra*.

[31] *See* note 2 *supra*.

[32] 19 U.S.C. § 2251(a)(1) (1976).

[33] 19 U.S.C. § 2251(b)(1) (1976).

The second step involves the initial investigation by the ITC. According to section 201(b)(1), the purpose of the investigation is "to determine whether an article is being imported . . . in such increased quantities as to be a substantial cause of serious injury . . ." to the American industry which produces the same type article or product.[34] Whenever an investigation is held pursuant to section 201(b)(1), the section 201(c) requirements[35] for notice and public hearings are activated. Once an initial investigation has been made, section 201(e) prohibits another investigation into that same subject matter for one year unless the ITC finds that "good cause" exists to warrant reinvestigation.[36]

The third step involves the ITC report of findings. Section 201(d)(1) requires that the ITC report to the President and include its recommendations as to the most appropriate remedies to be provided the domestic industry.[37] It is then left for the President to determine what relief, if any, will be ordered.[38] Under the import relief provisions, the President may impose a duty on the foreign goods, proclaim a tariff-rate quota, impose any quantitative restriction, or negotiate an orderly marketing agreement with the nation which is producing the competing goods.[39]

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[34] *Id.* Section 201(b)(4) defines "substantial cause" as follows:

> For purposes of this section, the term "substantial cause" means a cause which is important and not less than any other cause.

19 U.S.C. § 2251(b)(4) (1976).

[35] Section 201(c) of the Trade Act provides:

> In the course of any proceeding under subsection (b) of this section, the Commission shall, after reasonable notice, hold public hearings and shall afford interested parties an opportunity to be present, to present evidence, and to be heard at such hearings.

19 U.S.C. § 2251(c) (1976).

[36] *See* note 3 *supra*.

[37] Section 201(d)(1) of Trade Act states:

> The Commission shall report to the President its findings under subsection (b) of this section, and the basis therefor and shall include in each report any dissenting or separate views. If the Commission finds with respect to any article, as a result of its investigation, the serious injury or threat thereof described in subsection (b) of this section, it shall—
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> (A) find the amount of the increase in, or imposition of, any duty or import restriction on such article which is necessary to prevent or remedy such injury, or
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> (B) if it determines that adjustment assistance under parts 2, 3, and 4 of this subchapter can effectively remedy such injury, recommend the provision of such assistance, and shall include such findings or recommendation in its report to the President. The Commission shall furnish to the President a transcript of the hearings and any briefs which were submitted in connection with each investigation.

19 U.S.C. § 2251(d)(1) (1976).

[38] *See* note 2 *supra*.

[39] *Id.*

In *Sneaker Circus*, plaintiffs challenged, *inter alia*, the ITC determination of "good cause" under section 201(e) of the Trade Act.[40] Plaintiffs claimed that the failure of the ITC to provide notice and an opportunity to be heard in connection with the "good cause" determination proceeding violated not only the statutory language of the Trade Act itself,[41] but also the constitutional guarantees contained in the Due Process Clause of the Fifth Amendment.[42]

The opinion of the district court concluded that neither the specific language of the Trade Act nor the fifth amendment Due Process Clause require that notice or a hearing be provided in a section 201(e) "good cause" determination proceeding.[43] According to the court, the literal provisions of the Trade Act clearly indicate that "Congress specifically limited the notice and hearing requirements to proceedings brought under subsection (b)."[44] Furthermore, this congressional design was found to be in accordance with due process requirements. Since a decision under subsection (b) goes to the "merits of the question of whether import relief should be provided,"[45] such a decision will necessarily affect "the rights and property interests of the interested parties,"[46] and procedural due process must be afforded.[47] Congress apparently recognized this constitutional implication of a section 201(b) decision, and therefore specifically required that notice and a hearing be provided. The court found, however, that a section 201(e) proceeding did not affect the rights or property interests of the parties,[48] since "the only effect of the good cause determination is to allow a reinvestigation"[49] into the same subject matter as a previ-

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[40] *See* note 16 *supra*.

[41] Plaintiffs' Memorandum of Law on the Merits at 51.

[42] *Id.* at 49.

> [T]he due process clauses . . . have a procedural aspect in that they guarantee that each person shall be accorded a certain 'process' if they are deprived of life, liberty or property. Where the power of the government is to be used against an individual there is a right to a fair procedure to determine the basis for, and legality of, such action.

J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, at 477 (1978). *See Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed2d 556 (1972).

[43] 457 F. Supp. at 786.

[44] *Id.* at 785.

[45] *Id.*

[46] *Id.*

[47] *See* note 42 *supra*.

[48] 457 F. Supp. at 785.

[49] *Id.*

ous investigation conducted less than one year before. If "good cause" is found to warrant a reinvestigation, then notice and an opportunity to be heard will be afforded in connection with the reinvestigation since such a proceeding would lead to a decision on the merits. In holding that notice and a hearing are not required in a section 201(b) proceeding, the district court found plaintiffs' interpretation of the provisions of the Trade Act to be "troubled at best"[50] and without merit.

Plaintiffs commenced their statutory argument by noting that a Senate Finance Committee request for an initial investigation was only authorized by section 201(b)(1).[51] Plaintiffs then directed the court's attention to section 201(c) which specifically mandates notice and an opportunity to be heard "in the course of any proceeding under subsection (b) . . ."[52] Since it was the Senate Finance Committee which requested the reinvestigation, and since a request by the Senate Finance Committee is only authorized by section 201(b)(1), then the notice and hearing requirements of section 201(c) should apply to any proceeding initiated by a Senate Finance Committee request. Thus the mere fact that the request is made by the Senate Finance Committee activates the notice and hearing requirements of section 201(c).

Plaintiffs' analysis of the statute fails on two counts. First, it does not recognize the difference between an initial investigation under section 201(b)(1) and a reinvestigation pursuant to section 201(e). The language of section 201(b)(1) is mandatory and leaves nothing to the discretion of the ITC. It states that "upon . . . request . . . the Commission shall promptly make an investigation . . ."[53] Upon receiving a request, the ITC may not refuse to investigate. The notice and hearing provisions of section 201(c) are then required to be implemented in each of these initial investigations made by the ITC.

The language of section 201(e), however, is discretionary. It states that there is to be no reinvestigation within one year of an initial investigation "except for good cause determined by the Commission to exist . . ."[54] The language of section 201(e) clearly leaves it to the discretion of the ITC to determine if "good cause"

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[50] *Id.*

[51] *See* note 33 *supra.*

[52] *See* note 35 *supra.*

[53] *See* note 33 *supra.*

[54] *See* note 3 *supra.*

does exist to justify a reinvestigation; the reinvestigation, however, is not mandatory.

Regardless of who makes the request for a reinvestigation, then, the ITC is not authorized to commence a reinvestigation unless it finds that "good cause" exists to do so.[55] If "good cause" is found, then there is no dispute that the reinvestigation is to be treated as an initial investigation as far as procedures are concerned. There would be notice and opportunity to be heard provided for reinvestigations as well as initial investigations. But plaintiffs' argument would result in notice and hearing being provided at two different points in the same proceeding: once at the point where it is determined that a reinvestigation should be made, and then again at the reinvestigation itself.

The very structure of the language of section 201 precludes such a procedure. When the ITC receives a request for an initial investigation it is not required to provide notice and a hearing on the question of whether it should commence an investigation; section 201(b)(1) commands the ITC to investigate.[56] Likewise, the Trade Act should not be read as requiring notice and a hearing in connection with a preliminary proceeding, the sole purpose of which is to determine if there exists sufficient "good cause" to reinvestigate. Furthermore, since there will be notice and a hearing in regard to both an initial investigation and a reinvestigation, there is no total deprivation of an opportunity for interested parties to be heard.

Plaintiff's argument contains a second flaw. In claiming that the section 201(c) notice and hearing requirements[57] were activated because the request for a reinvestigation was from the Senate Finance Committee, plaintiffs presuppose that the Committee would be powerless to request such a reinvestigation without the specific authorization contained in section 201(b). However, there is nothing in the statute which leads to such a conclusion. Section 201(e) authorizes a reinvestigation upon "good cause determined by the Commission to exist."[58] There is no limitation as to who may request a reinvestigation, nor is there any reason to believe that the ITC could not commence a reinvestigation in the absence

[55] One member of the ITC, Commissioner Ablondi, stated that a Senate Finance Committee resolution in itself would be sufficient to constitute "good cause" to justify a reinvestigation under section 201(e). *See* 457 F. Supp. 771, 784 n.12 (E.D.N.Y. 1978).

[56] *See* note 33 *supra*.

[57] *See* note 35 *supra*.

[58] *See* note 3 *supra*.

of a request from anyone. It would be sufficient that the ITC acted on its own so long as there was a finding of "good cause" by the ITC. The district court, then, was correct in holding that the statutory language of the Trade Act does not require that notice or an opportunity to be heard be provided in a "good cause" determination proceeding under section 201(e) of the Trade Act.[59]

Plaintiffs also claimed that, even if not mandated by the specific language of the Trade Act, notice and an opportunity to be heard were nevertheless required by the Due Process Clause of the Fifth Amendment.[60] Plaintiffs cited *Hanly v. Kleindienst*[61] as authority for the proposition "that notice and hearing *are necessary* before a preliminary or threshold determination of significance is made.[62]

In *Hanly*, the court was dealing with an agency determination under the National Environmental Protection Act.[63] If the agency found that a proposed construction project would have a significant impact on the environment, then an environmental impact statement would be required. The procedure employed in the drafting of such a statement included a public hearing. However, if the agency found that the impact of the project was insignificant, then no environmental impact statement with its concomitant public hearing would be required. In a very real sense, then, the finding of a need for an environmental impact statement would determine whether an opportunity to be heard would be provided before property interests were affected by the construction project. The *Hanly* court recognized this and held that the agency determination should be accompanied by an opportunity for interested parties to be heard.[64]

The "good cause" determination proceeding in *Sneaker Circus*, however, cannot be construed as being determinative on the question of a hearing, since it was only a threshold factual determina-

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[59] 457 F. Supp. 771, 785 (E.D.N.Y. 1978).

[60] *See* note 42 *supra*.

[61] 471 F.2d 823 (2d Cir. 1972), *cert. denied* 412 U.S. 908 (1973).

Plaintiffs appear to rely on the following language of the *Hanly* court:

> . . . before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision. We do not suggest that a full-fledged formal hearing must be provided before each such determination is made although it should be apparent that in many cases such a hearing would be advisable . . . .

471 F.2d 823, 836 (2d Cir. 1972).

[62] Plaintiffs' Memorandum of Law on the Merits at 49.

[63] National Environmental Protection Act, 42 U.S.C. § 4332 (1976).

[64] *See* Note 51 *supra*.

tion which, if answered in the affirmative, would result in a reinvestigation including notice and an opportunity to be heard.[65] On the other hand, if "good cause" is found lacking, then there is no reinvestigation, and thus no property rights or legal interests placed in jeopardy.

The critical factor to be considered in agency determinations is the effect the agency's findings will have on legal rights or property interests. The procedural requirements of due process are activated when legal rights or interests are put in jeopardy.[66] "Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures[67] which have traditionally been associated with the judicial process."[68] In *Sneaker Circus*, the court found that no legal interests were placed in jeopardy at the "good cause" determination proceeding, and "it is thus not a violation of the Due Process Clause not to require notice and a hearing on the threshold question of good cause."[69]

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[65] The District Court recognized that:

> A proceeding under § 201(b) goes to the merits of the question of whether import relief should be provided to assist a domestic industry because it is being seriously injured by imports. A decision under § 201(b) will affect the rights and property interests of the interested parties and they are therefore provided with notice and an opportunity to be heard so as not to run afoul of the Due Process Clause of the Constitution. The situation is quite different with respect to a good cause determination under § 201(e), since no rights or property interests of the parties are affected by that determination. *See Hannah v. Larche*, 363 U.S. 420, 440-44, 80 S.Ct. 1502, 4 L.Ed2d 1307 (1960). Should the ITC determine that good cause does exist, then the public is provided with notice and interested partes are given the opportunity to be heard before the Commission makes its determination on the merits. The only effect of the good cause determination is to allow a reinvestigation within one year rather than after the expiration of one year from the previous report to the President on the same subject matter.

457 F. Supp. 771, 785 (E.D.N.Y. 1978).

[66] *See* Note 40 *supra*.

[67] The District Court points out that when hearings were held in connection with the reinvestigation in *Sneaker Circus*, plaintiffs "apparently" did not participate in them. 457 F. Supp. 771, 786 n.14 (E.D.N.Y. 1978).

[68] Former Chief Justice Warren discussed Due Process as follows:

> "Due Process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.

Hannah v. Larch, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514 (1960).

[69] 457 F. Supp. 771, 785 (E.D.N.Y. 1978).

The district court was sound in its analysis of both the provisions of the Trade Act and the due process procedural requirements. A careful reading of the Trade Act finds no requirement for either notice or a hearing in connection with the "good cause" determination proceeding under section 201(e). Moreover, since the "good cause" proceeding does not threaten any party's legal rights, the due process procedural requirements are not applicable. It does seem, however, that the ITC would be wise to initiate a policy providing notice and an opportunity to be heard in these proceedings. Such a policy might serve to prevent future allegations of deference to political pressure such as those made in *Sneaker Circus*.[70]

When the Senate Finance Committee voted on the resolution requesting the ITC to reinvestigate, only four Senators were present.[71] This can hardly be cited as evidence of a clear consensus that there should be a reinvestigation. Furthermore, although the Committee resolution was not received until September 28, 1976, the ITC was able to reach a determination that "good cause" existed just five working days later.[72] This casts some doubt on the degree of independent research and analysis involved in the ITC proceeding. Finally, no transcript of the "good cause" determination proceeding was made by the ITC.[73]

The facts of the ITC "good cause" proceeding in *Sneaker Circus* might be interpreted to indicate that the ITC "permitted itself to be dictated to by outside influences allowing its judgment to be supplanted by that of third parties; . . ."[74] Clearly such an inference tends to cloud the image of the ITC. It would seem to be in the best interests of everyone concerned to give any and all interested parties an opportunity to present evidence and to be heard even at a threshold factual determination proceeding under section 201(e). If such a policy were followed, the ITC could avoid factual situations which potentially impair its reputation as an impartial agency.[75]

Alan Stephen Peevy

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[70] Plaintiffs' Post-Trial Memorandum at 1.

[71] Plaintiffs' Memorandum of Law on the Merits at 17.

[72] *Id.*

[73] *Id.* at 18.

[74] Plaintiffs' Post-Trial Memorandum at 1.

[75] In at least one subsequent proceeding under section 201(e) the ITC has provided notice and an opportunity to be heard. *See Bolts, Nuts and Large Screws of Iron or Steel*, 43 Fed. Reg. 28057.