SECTION 337: A CASE FOR REPEAL OR CHANGE

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   (Introduction)
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   (Text)

I. INTRODUCTION

One's view of section 3371 of the Tariff Act of 1930 depends upon his perspective. From the perspective of the United States International Trade Commission (ITC), it affords a valuable avenue of relief to American industries and firms suffering from unfair practices in the importation of goods into the United States. From the perspective of practitioners representing foreign trade interests, it is an administrative horror and a major non-tariff trade barrier. This Article expresses the latter perspective.

Students of government administration are familiar with the fact that interests tend to accrete around an institution, however obsolete or unnecessary it may be, and that mere existence becomes a reason for continued existence. One would think there is sufficient evidence that a remedy is unnecessary if it has been provided by law for 50 years and utilized hardly at all. No doubt, that was the view of the draftsmen of the trade bill sent to the Congress by the Administration in 1973.2 That bill would have transferred to the Federal Trade Commission (FTC) the ITC's jurisdiction under section 337 in non-patent cases, leaving the ITC jurisdiction only in patent cases. In addition, it would have removed the President from the operation of the Act, in order not to require a decision of the Chief Executive in a private controversy, and, thus, would have permitted judicial review. Outright repeal of section 337 was not proposed, presumably because vested interests already surrounded the patent

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remedy, although there was a good case for leaving patent remedies to the courts.

It had been common knowledge that section 337, as it had developed between its original enactment in 1922 and 1973, was unsatisfactory. The law was severely criticized because, while it was used chiefly in patent cases, those defenses, which existed in the courts, were of no avail before the Tariff Commission (which today is known as the ITC). Doubts increased when the Supreme Court questioned whether the statutory appeal to the Court of Customs and Patent Appeals was inconsistent with the existence of a constitutional court because of the President's final authority over decisions.

The ITC opposed the transfer of non-patent jurisdiction to the FTC, and the House left this part of the law unchanged. When the trade bill reached the Senate, little attention was focused on amendments to section 337 in view of other important provisions with larger policy implications. The section was then rewritten by the staff of the Senate Finance Committee in order to deal with the perceived defects in the preexisting law, in an attempt to protect the rights of all parties. As amended, the law allowed respondents all defenses that they would have in a court of law, required proceedings to be conducted under the Administrative Procedure Act (APA), and provided that in addition to matters of fact and law the ITC should consider the public interest, including the views of other agencies. The President no longer had to make the final determination, although he could set the order aside. Judicial review in the Court of Customs and Patent Appeals was available if the President upheld the ITC's decision. Procedural changes included the provision of time limits, the power to suspend investigations in the event of parallel proceedings (without clarification of the

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1 For a history of problems arising under section 337, see H.R. 6767 Hearings note 2 supra, at 1353 (statement of Noel Hemmendinger).
7 Id. § 1337(b)(2),(3).
8 Id. § 1337(c).
9 Id. § 1337(g).
10 Id. § 1337(c).
11 Id. § 1337(b)(1).
circumstances under which such suspension was appropriate), and referral to the Treasury Department if the matter appeared to come within the purview of dumping or countervailing duty investigations. The ITC was granted the power to issue cease and desist orders, so that exclusion of the product was no longer the sole remedy afforded. The effect of these well-meant amendments, however, is comparable to hanging so many sophisticated gadgets on an airplane that cannot fly.

As it stands, section 337 is a hybrid with no clear concepts or procedures to vindicate private rights or protect the public interest. Although complaints are initiated by private parties, the ITC’s staff is also a party, and the ITC is instructed to consider the public interest independent of private rights. The existence of a violation is determined, it would appear, under existing legal principles found in other statutes. The relief ordered, however, can be set aside in the first instance by the President and then by the Court of Customs and Patent Appeals, if upheld by the President. This vehicle would seem to be of little use in vindicating any rights at all.

The principal consequence of the changes in section 337 is one that its draftsmen doubtless did not foresee. By bringing in the APA and requiring the ITC to make rules consistent with the APA, all the paraphernalia of discovery and motion practice as they have developed in the federal courts have been introduced. There seems to be a natural law requiring a lawyer to take any action to assist his cause, no matter how marginal or remote that action may be to a favorable resolution. Therefore, there are few practical limits on the amount of pretrial activity that can be employed. The trouble is compounded by the ITC’s practice of including the investigative staff as a party. Practitioners estimate that to present a case adequately on either private side in a section 337 case costs at least five times more than presenting a case under other trade statutes, such as section 201 or the Antidumping Act of 1921. In addition, the requirements of the APA, the complexities of antitrust litigation, and the inclusion of a third party make it virtually impossible to hear a section 337 case adequately within the time limits provided.

In patent cases the evils of section 337 are mitigated by the presence of a definite, underlying, litigable issue. Because of the time

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14 Id.
15 Id. § 1337(b)(3).
16 Id. § 1337(f).
limits imposed by the statute, the patent holder has some advantages that he does not have in a federal court. He can apply pressure faster. The main consequence, however, is a strong pressure on both sides to settle the issue. The party with the larger purse has no more advantage than he does in other patent cases. In non-patent section 337 cases, however, there is hopeless confusion between the vindication of private rights and the protection of the public interest. Such confusion is not unknown in the fields of antitrust and unfair competition, but, at least, the Antitrust Division of the Department of Justice and the FTC are acting in the public interest, and consequences for private claims are secondary. The interrelationship of these interests under section 337, however, is unclear. In the following Article, these matters are examined systematically and possible remedies are considered.

II. THE EVOLVING DEFINITION OF UNFAIR METHODS OF COMPETITION UNDER SECTION 337

The ITC has recently breathed new life into section 337. Prior to the enactment of the Trade Act of 1974 investigations under the statute were largely limited to patent and "passing off" cases. The broad language providing for ITC investigations into "unfair methods of competition and unfair acts in the importation of articles into the United States" had only twice been used to undertake investigations involving antitrust. Since the passage of the Trade Act of 1974, however, the ITC has undertaken investigations into alleged antitrust violations in Above Ground Swimming Pools, Chicory

The initiation of these investigations has led to a vigorous debate over the limits of ITC jurisdiction over unfair methods of competition in the import trade.

The ITC has provided only vague definitions of the scope of its jurisdiction over unfair methods of competition. It has said that "judicial determinations under other antitrust and unfair competition statutes" and "precedents arising under section 5 of the Federal Trade Commission Act" are important in determining what constitutes a violation of section 337. In fact, the original provision was intended by its drafters to reach "all forms of unfair competition" and, by implication, to be brandished as a weapon against "unfair price cutting, full line forcing, commercial bribery, or any other type of unfair competition." Arguably the entire range of unfair trade practices comprehended by the Federal Trade Commission, Sherman, Robinson-Patman, and Clayton Acts are in-

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21 In re Certain Angolan Robusta Coffee, Investigation No. 337-TA-16 (I.T.C., filed Nov. 26, 1974) [hereinafter cited as Angolan Coffee].
21 Certain Color Television Receiving Sets, Investigation No. 337-TA-23 (I.T.C., filed Jan. 15, 1976) [hereinafter cited as Color TV Sets]. Allegations include "... predatory pricing schemes resulting in below cost and unreasonably low cost pricing... and economic benefits and incentives from the Government of Japan..."

24 In the opinion handed down in Tractor Parts, supra note 21, an investigation into charges alleging conspiracy to boycott certain U.S. importers in the sale of tractor parts to the U.S., Commissioner Leonard stated:

Although there are no judicial precedents involving non-patent cases arising under section 337, judicial determination under other antitrust and unfair competition statutes are persuasive in determining what constitutes an unfair method or act under section 337. Id. at 8.

Identical language was used in the Commission Memorandum Opinion at 9 in Chicory Root, supra note 23.


21 Statement by Senator Smoot prior to passage of section 316 of the Tariff Act of 1922, 62 Cong. Rec. 5879 (1922). The report on the bill stated that it was "broad enough to prevent every type and form of unfair practice" in the importation of goods into the United States. S. REP. No. 595, 67th Cong., 2d Sess. 3 (1922). Section 316 contained the identical language and was the predecessor of section 337. Tariff Act of 1922, ch. 353, § 316, 36 Stat. 943.

21 1922 TARIFF COMM'N ANN. REP. 4.
cluded when they occur "in the importation of articles . . . or in their sale by the owner, importer, consignee or agent of either." 35

While the broad language of section 337 has been in effect for more than fifty years, the initiation by the ITC of investigations into unfair methods of competition not involving the issue of patent infringement creates a new perspective on this provision. One must now consider the interrelationship of ITC investigations with those of other agencies and with the body of antitrust and unfair trade practice jurisprudence of those agencies. For instance, in Color TV Sets the Department of Justice seriously questioned whether the facts alleged indicated that an antitrust investigation was appropriate and strongly indicated that the Department would not act in such a situation. Assistant Attorney General Baker found a "puzzling inconsistency" between the complainant's charge that domestic firms had been injured by imports being sold in the United States at unreasonably low prices on the one hand, and the charge that a conspiracy was evidenced by an export agreement setting minimum prices on goods exported to the United States on the other. 36 Baker further stated that the export association upon which the conspiracy charge was based would be fully exempt from the operation of the Sherman Act under the provisions of the Webb-Pomerene Act 37 if entered into by United States firms, and that the Justice Department policy was to extend similar exemptions to foreign export associations. 38 Similarly, the initiation by the ITC of investigations which could be adjudicated by other agencies raises the specter of concurrent and competing investigations involving identical or similar facts in several agencies of the United States Government.

The evolution of ITC authority under section 337 has given rise to numerous questions which remain unresolved. First, assuming that its subject matter jurisdiction is broad and sweeping, what legal or policy limitations exist to prevent the ITC from emerging as a competing antitrust enforcement agency? Second, is the ITC, which has traditionally been a fact finding agency, competent to perform quasi-judicial functions, and can such functions in the anti-

38 Letter from Donald I. Baker, Assistant Attorney General, to Senator Edward M. Kennedy (Feb. 6, 1977) at 3 [hereinafter cited as Baker Letter].
40 Baker Letter, supra note 36, at 5.
trust area be adequately performed within the constraints of the statute? Third, are the remedies and enforcement mechanisms provided the ITC appropriate and preferable to those which other agencies have? Fourth, what effect will broader ITC action in the antitrust area have on our international economic relations?

III. THE CONFLICT OVER JURISDICTION

The assumption by the ITC of jurisdiction in cases which would have been adjudicated by or before other agencies prior to the enactment of the Trade Act of 1974 and the new activist posture of the ITC have made the subject matter jurisdiction the principal issue in the debate over section 337. To date, the issue of whether and to what extent the ITC can and should assume jurisdiction concurrently with other agencies has focused on its investigations of matters within the authority of the Department of Treasury under the antidumping and countervailing duty laws. The ITC's liberal and expansive interpretation of its authority in these cases where the arguments for restraint are most compelling, however, might indicate that one can expect similar encroachment on the jurisdiction of the FTC and the Department of Justice.

The initiation by the ITC of the controversial investigation into the importation of television sets from Japan in March 1976 precipitated the debate over the ITC jurisdiction. The complaint charged practices involving substantially the same facts and questions of law as those previously litigated before the Department of Treasury under both the antidumping and countervailing duty statutes, the latter of which was then pending before the Court of Customs and Patent Appeals. Although the complainants subsequently added a transparent conspiracy charge, presumably to bring the matter within the ITC's jurisdiction over antitrust violations involving

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40 Commissioner Minchew has, in essence, stated that he believes ITC jurisdiction with respect to unfair acts is coterminous with that of virtually all other antitrust statutes and that the provision of the cease and desist power in the Trade Act of 1974 is substantiation of this fact. The only apparent limit he recognizes is that imposed by the necessary involvement of imports. See Recommended Determination of Presiding Officer Minchew, in Electronic Audio Equipment, note 28 supra, at 55,549. In light of the broad interpretation by the ITC the possibility of conflicting jurisdiction with the FTC or Justice is not remote. See text infra at notes 74-83.
43 Color TV Sets, supra note 25. See text infra at notes 90-91.
imports into the United States, the investigation represented a significant and unprecedented exercise of the ITC's subject matter jurisdiction under section 337. A second investigation into allegations which could arguably fall within the exclusive jurisdiction of the Department of Treasury, that of Stainless Steel Pipe, was initiated in February 1977, raising similar jurisdictional issues.

Pursuant to section 337(b)(2), the ITC in Color TV Sets received the advice and information of the Department of State, the Special Trade Representative, the Federal Trade Commission, and the Justice and Treasury Departments. All agreed that the ITC either did not, as a matter of law, possess statutory jurisdiction over matters actionable under the countervailing duty or antidumping laws, or that it should, as a matter of policy, refrain from exercising jurisdiction. Although Congress, under section 337(b)(1), provided a

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44 See text infra at note 92.
(2) During the course of each investigation under this section, the Commission shall consult with, and seek advice and information from, the Department of Health, Education and Welfare, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as it considers appropriate.
46 Letter from Charles W. Robinson, Acting Secretary of State, to Will E. Leonard, Chairman of the ITC (Sept. 6, 1976) [hereinafter cited as Robinson Letter].
47 Letter from Frederick B. Dent, Special Representative for Trade Negotiations, to Will E. Leonard, Chairman of the ITC (Sept. 23, 1976) [hereinafter cited as the Dent Letter].
49 Letter from Jonathon C. Rose, Deputy Assistant Attorney General, to Will E. Leonard, Chairman of the ITC (Sept. 23, 1976) [hereinafter cited as Rose Letter]; see also Baker Letter, note 36 supra.
50 Letter from William E. Simon, Secretary of the Treasury, to Will E. Leonard, Chairman of the ITC (Sept. 23, 1976) [hereinafter cited as Simon Letter]; Letter from David R. MacDonald, Assistant Secretary of the Treasury for Enforcement, to Will E. Leonard, Chairman of the ITC (Apr. 14, 1975) [hereinafter cited as MacDonald Letter]; Letter from Peter O. Suchman, Deputy of the Treasury for Tariff Affairs, to Will E. Leonard, Chairman of the ITC (June 18, 1976) [hereinafter cited as Suchman Letter].
51 The advice of the Treasury Department is representative: "[I]nsofar as any Commission investigation is based solely on dumping or bounty or grant allegations, no remedy exists under section 337 and such investigation should be terminated." Simon Letter, supra note 50.

The State Department and others agreed with the ITC that it may take jurisdiction if allegations not solely within the antidumping and countervailing duty laws are charged: it contended, however, that "based on both policy and legal grounds," the ITC must refer to the Treasury for a determination of the issues falling within the antidumping and countervailing duty statutes. Robinson Letter, supra note 46, at 2. See text infra at notes 105-08.
For purposes of the one-year and 18-month periods prescribed by this subsection, there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.
mechanism whereby the ITC might suspend an ongoing investigation in the event of "concurrent proceedings involving similar issues concerning the same subject matter before a court or agency of the U.S.," the ITC declined to exercise this power in Color TV Sets.

The traditional role of the ITC in antidumping and countervailing duty matters, as defined in section 201 of the Antidumping Act of 1921 and section 303 of the Tariff Act of 1930 has been limited to determining whether articles imported into the United States have injured or are likely to injure or prevent the establishment of a United States industry. The ITC's role in antidumping and countervailing duty matters under those statutes is dependent upon a prior affirmative finding by the Treasury that foreign goods have been sold at less than fair value in the United States market or are receiving subsidies and incentives from foreign governments upon export to the United States. By assuming jurisdiction in cases alleging practices that would, if proven, constitute violations of the antidumping and countervailing duty statutes, the ITC duplicates the role of the Treasury Department which has historically made the determination of whether an unfair import practice has been committed. While the Trade Act of 1974 marginally expands the

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54 Color TV Sets, Memorandum Opinion (Dec. 20, 1976) [hereinafter cited as Memorandum Opinion].
   (a) Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States International Trade Commission (hereinafter called the "Commission"), and the Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.
58 Id. Although it seldom occurs, the Treasury may refer the injury question to the ITC prior to its own investigation, 19 U.S.C. § 160(c)(2) (Supp. V 1975).
role of the ITC under the antidumping statute, the amendments to that statute do not contemplate parallel determinations by the Treasury Department and the ITC as to whether unfair pricing practices exist.

Should the ITC continue to assert jurisdiction over matters falling within the antidumping and countervailing duty laws, it is feared that section 337 will be employed by United States firms, which lose dumping or countervailing duty cases, to take "a 'second shot' at keeping out foreign competition or heaping legal costs on foreign sellers." Such actions would be clearly inconsistent with the intent of Congress as stated in the Senate Finance Committee Report to "eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade." The attraction of a second chance to United States businesses and manufacturers attempting to protect domestic sales markets from vigorous foreign competition is understandable, particularly since a substantial portion of the costs of section 337 investigations are borne, not by the firm, but by American taxpayers. Finally, unilateral action on the part of the ITC over alleged dumping practices and foreign export

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59 See, e.g., 19 U.S.C. § 160(c)(2) (Supp. V 1975) which allows the ITC to make preliminary inquiries into an injury suffered by a United States industry if the Secretary of the Treasury concludes that there is substantial doubt that an industry is or is likely to be injured.

60 Baker Letter, supra note 36, at 3. The possibility that section 337 might be used as a means of harassing foreign competitors was considered by the departments and agencies advising the ITC to be a significant danger. The letter of the Justice Department to Chairman Leonard is illustrative:

A second concern is the possibility that domestic firms faced with vigorous foreign competition could, if the Commission permitted it, file simultaneous dumping, countervailing duty, private actions, and 337 cases on the bases of unsupported allegations of pricing, bounties or grants, or conspiracies and thus subject importers to substantial expense and harassment which may unfairly damage their competitive position. Rose Letter, supra note 49, at 11.

Special Trade Representative, Frederick B. Dent, characterized the duplication of Treasury proceedings by the ITC under section 337 in the Color TV Sets case as being "an unjustifiable and serious burden" on respondents to the action. Dent Letter, supra note 47, at 2.

61 FINANCE COMM. REP., supra note 19, at 171.

62 A propensity to institute a multiplicity of actions involving similar factual circumstances and legal questions was evident in Color TV Sets, where a respondents' motion to terminate the proceedings was denied despite prior Treasury Department determinations on the issues of dumping and subsidization, an appeal of the Treasury's negative finding of Japanese export subsidies, and a pending action in federal district court alleging similar claims of conspiratorial activity and predatory pricing. See, Motion of Respondents to Terminate the Proceedings and Dismiss the Complaint, (I.T.C., filed June 14, 1976), and Ruling Denying Such Motion, (July 19, 1976); Simon Letter, supra note 50, at 1. Proceedings were finally suspended after a section 201 escape clause action had been brought before the ITC. Notice of Suspension of Investigation, Memorandum Opinion, supra note 54. A settlement by the parties to the section 337 proceeding was finally reached, see note 63 infra.
subsidization may impair United States export markets by provoking international retaliation, compromise the U.S. position at the multilateral trade negotiations, and jeopardize the successful completion of ongoing negotiations between the United States and its foreign competitors to establish an international code covering the payment of subsidies and the application of countervailing duty laws.

In November 1976, the issue of concurrent jurisdiction was raised when respondents filed a civil action in the U.S. District Court for the District of Columbia to enjoin the ITC from proceeding further in its investigation in Color TV Sets. The Court apparently granted the motion of the ITC to dismiss the complaint on the ground that the Court of Customs and Patent Appeals provides the appropriate forum for review after a final determination has been rendered by the ITC. In World-Wide Volkswagen v. USITC, an earlier decision by the same court, Judge Gesell, citing Coca-Cola Co. v. FTC and Pepsico, Inc. v. FTC, suggested that had the ITC exercised authority “in excess of its jurisdiction” or “plainly beyond its jurisdiction as a matter of law,” a court injunction might have

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63 The ITC was advised by the State Department in Color TV Sets that concurrent adjudications of dumping and countervailing duty issues in the Treasury and the ITC would: “damage our relations with Japan, directly contradict our stated foreign policy objectives of gaining the removal of artificial barriers to trade, and compromise our position at the multilateral trade negotiations in Geneva.” Robinson Letter, supra note 46, at 2.
64 See text infra at notes 95-98; the advice of the Special Trade Representative’s Office to the ITC included these thoughts:

The uncertainty of duplicative proceedings not only threatens specific trade, but could cast serious doubt upon the ability of United States negotiators to fashion international regulations governing practices such as subsidies and the application of countervailing duties. A subsidies code is one of the key international objectives of the United States in the multilateral trade negotiations. The regulation of subsidies is a key objective of the Congress contained in the Trade Act of 1974. This objective was determined serious enough to allow the waiver of countervailing duties in connection with the trade negotiations. The appearance of providing entirely separate remedies, administered without reference to the existing countervailing duty law, could pose a serious threat to obtaining the United States trade policy objectives established by the Congress and the President. Dent Letter, supra note 47, at 3-4.
66 Id. Judge Waddy orally ruled on November 19, 1976, that: the district court did not have jurisdiction, but failed to specify reasons; that the proper forum was the Customs Court; that, even if the district court had jurisdiction, the issue was not ripe for review; and that the adequacy of the plaintiff’s standing was not clear.
68 475 F.2d 299, 303 (5th Cir. 1973).
69 472 F.2d 179, 187 (2d Cir. 1972).
been appropriate. Presumably, then, the issue of ITC jurisdiction over matters falling within the antidumping and countervailing duty laws is an open question that will ultimately be resolved by appeal of an ITC final determination to the Court of Customs and Patent Appeals or the Supreme Court.

The ITC bases its authority over practices constituting violations of the antidumping and countervailing duty laws in part upon the broad power granted by Congress to investigate "[u]nfair 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 courts have interpreted the jurisdictional language of section 337 to be both "broad" and "inclusive" in scope. The addition of cease and desist powers under the Trade Act of 1974, which expanded the range of violations for which the ITC could provide effective relief under section 337, might be considered a signal for the ITC to utilize more fully its sweeping mandate against unfair import practices.

The ITC has not interpreted section 337 jurisdiction to be limited by parallel actions in courts or other agencies. The concluding

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72 In re Von Clemm, 229 F.2d 441, 444 (C.C.P.A. 1955).
73 Prior to enactment of the Trade Act of 1974, the Commission's remedies were limited to exclusion of articles from entry into the United States. Statutory authority to issue cease and desist orders is found at 19 U.S.C. § 1337(f) (Supp. V 1975). Chairman Minchew stated in a recent law review article that the Trade Act of 1974 amendments expand the authority of the Commission under section 337:

Prior to the enactment of the Trade Act of 1974, the Tariff Commission was concerned primarily with violation of U.S. patent rights in unfair trade practice actions. Now, the Commission has the authority to go well beyond patents. This provision has greatly increased the authority of the Commission. It would appear, to this Commissioner at least, that the unfair trade practice section now enables the Commission to extend its investigations into false pricing, false advertising, mislabeling, and false representation of source, in all instances where an international product is involved. Minchew, The Expanding Role of the United States International Trade Commission, 27 MERCER L. REV. 429, 437 (1976) (emphasis added).

Although Chairman Minchew does not indicate which new provisions of section 337 lead him to draw this conclusion, it cannot come from the jurisdictional section of the statute. As noted by former Chairman Will E. Leonard, "[t]he wording of section 337 with respect to subject matter jurisdiction," unfair methods of competition and unfair acts, "has not changed." Leonard & Foster, supra note 39, at 751. The Senate Finance Committee makes clear that "[n]o change has been made in the substance of the jurisdiction conferred under section 337(a) with respect to unfair methods of competition or unfair acts in the import trade." FINANCE COMM. REP., supra note 19, at 194. Presumably, then, the Commission's expanded authority has to stem from the other provisions added to section 337 by the Trade Act.

74 Kaye & Plaia, Jr., Tariff Act Section 337 Revisited: A Review of Developments Since
clause of the jurisdictional paragraph of section 337, providing that unfair methods and acts shall be dealt with by the ITC "in addition to any other provisions of law," has been literally construed. The ITC has not considered decisions by federal courts on issues of patent violations to be controlling or binding upon an investigation into similar matters under section 337. Similarly, the ITC has continued investigations into alleged antitrust violations, despite concurrent litigation involving similar facts and questions of law in federal courts or agencies.

Although no case has decided the issue of whether jurisdiction under section 337 is limited by the existence of concurrent litigation involving similar facts or issues of law brought in federal courts or other agencies under other antitrust or unfair trade practice statutes, the Supreme Court had occasion in the 1948 case of FTC v. Cement Institute to decide a parallel question of whether an action charging unfair methods of competition under section 5 of the Federal Trade Commission Act should be dismissed because concurrent proceedings based largely on the same misconduct had been brought under section 1 of the Sherman Act. Justice Black, writing for the Court, stated:

The Amendment of 1975, 59 J. PAT. OFF. Soc'y 3, 37 (1977). This article states that:

The International Trade Commission has a history since Furazolidone [1969] of not suspending an investigation when there is concurrent litigation. The question of the Commission's use of its discretion in the area seems to be developing in line with its position prior to the passage of the new amendments. In many recent cases (Chicory . . . Monolythic Catalytic Converters . . . and Solder Removal Wicks), concurrent litigation has been pending in the federal courts involving similar facts and questions of law and the Commission has not deferred to the courts.


The statements of Commissioners Leonard and Minchew in the investigation of Electronic Pianos, I.T.C. Pub. No. 721, (Mar. 1975) at 27, is indicative.

The decision of the court in the case at hand should therefore be viewed, not in terms of having some kind of imagined binding effect on the Commission nor in terms of an opinion which must in some way be given credence in the Commission's finding, but rather in terms of what it actually is—an opinion relating to a given set of facts with which the Commission, given sufficient justification, may agree or disagree, whether in whole or in part.


FTC v. Cement Institute, 333 U.S. 683 (1948) [hereinafter cited as Cement Institute].

Id.
The fact that the same conduct may constitute a violation of both acts in no wise requires us to dismiss this Commission proceeding. Just as the Sherman Act itself permits the attorney general to bring simultaneous civil and criminal suits against a defendant based on the same misconduct, so the Sherman Act and the Trade Commission Act provide the Government with cumulative remedies against activities detrimental to competition. 81

The "in addition to" language of section 337 arguably empowers the ITC to act despite the existence of remedies against similar misconduct provided by other statutes administered by the courts or other federal agencies. Based upon the Supreme Court opinion in Cement Institute, a proceeding initiated by one agency of the Government does not of itself bar concurrent litigation based upon similar facts or questions of law before another agency. 82 It is questionable, however, whether the Court's decision in Cement Institute is applicable to ITC jurisdiction. Significantly, the Court reasoned that: "Both the legislative history of the Trade Commission Act and its specific language indicate a congressional purpose not to confine each of these proceedings within narrow, mutually exclusive limits, but rather to permit simultaneous use of both types of proceedings." 83 Although no provision of section 337 prohibits the ITC from exercising jurisdiction over violations falling within the ambit of the antidumping and countervailing duty laws, the legislative history of the Act, other provisions of the statute, and the provisions of the countervailing duty law, place implicit limitations on simultaneous proceedings.

Prior to the enactment of the Trade Act of 1974, the ITC had, apparently, "entertained" matters which might fall within the antidumping law on only four occasions and had never initiated an investigation into conduct that would violate the antidumping or countervailing duty statutes. 84 The report of the Senate Finance Committee on the Trade Act of 1974 stated that the ITC was "expected" to continue its practice of not investigating matters

81 Id. at 694.
82 Id.
83 Id. at 694-95.
84 The ITC investigative staff was able to unearth only four instances in the entire history of the Tariff Act in which the ITC has "entertained" dumping matters: Briarwood Pipes, (Tariff Comm'n 1926); Russian Asbestos, Investigation No. 1, (Tariff Comm'n 1933); Ceramic Floor & Wall Tile, Investigation No. 337-L-33 (Tariff Comm'n, filed Mar. 29, 1966); Present Variable Resistance Controls, Investigation No. 337-L-63 (Tariff Comm'n 1966). Response of Commission Investigative Staff to Amended Motion on Certain Respondents to Terminate Proceedings and Dismiss Complaint, Color TV Sets, supra note 25, at 7-8.
clearly within the purview of either section 303 [the countervailing duty statute] or the Antidumping Act.\textsuperscript{55} Moreover, Congress added a new subsection 337(b)(3) in the Trade Act of 1974 amendments which provides:

Whenever in the course of an investigation under this section, the Commission has reason to believe, based on information before it, that the matter may come within the purview of section 303 or of the Antidumping Act, 1921, it shall promptly notify the Secretary of the Treasury so that such action may be taken as is otherwise authorized by such section and such Act.\textsuperscript{56}

The directive of the Senate Finance Committee to refrain from investigating matters clearly within the purview of section 303 or the antidumping law together with the statutory duty to "promptly notify" the Secretary of the Treasury of such matters coming to the attention of the Commission, undoubtedly was intended to limit the ITC's jurisdiction. The ITC contends that subsection 337(b)(3) constitutes a mere procedural obligation rather than a substantive limitation on its subject matter jurisdiction,\textsuperscript{57} and that in actions charging "broader allegations" than those "clearly" falling within the antidumping or countervailing duty laws, the ITC may assert jurisdiction.\textsuperscript{58}

It is apparent, however, that what the ITC refers to as "broader allegations" is not significantly different from "matters clearly within the purview" of the antidumping or countervailing duty statute. If the ITC is free to continue to assert jurisdiction over antidumping and countervailing duty matters in the context of "broader allegations" as defined by the ITC, no genuine limitation on ITC jurisdiction in this area in fact exists. "Broader allegations" were found to exist in Color TV Sets by the inclusion of conspiracy and monopolization charges in the amended complaint.\textsuperscript{59} The antitrust

\textsuperscript{55} Finance Comm. Rep., supra note 19, at 195. The Commission has convoluted the meaning of this statement by redefining what is meant by the Commission's "practice" and then claiming to continue in that practice. "The 'Commission's practice' referred to by the Senate Finance Committee is that correspondence and other inquiries alleging the suspected existences of dumping or export subsidization have been routinely routed to Treasury, as they are today." Memorandum Opinion, supra note 54, at 11. The practice referred to in the Finance Comm. Rep. of "not investigating matters clearly within the purview of section 303 or the Antidumping Act" is, of course, not the same.


\textsuperscript{57} Memorandum Opinion, supra note 54, at 10.

\textsuperscript{58} Id. at 11.

\textsuperscript{59} Id. The original complaint charged: "The existence of predatory pricing schemes resulting in below cost and unreasonably low pricing of such television sets in the United States, and economic benefits and incentives from the Government of Japan contributing to the
issues raised by the amended complaint were considered by Jonathan C. Rose, Deputy Assistant Attorney General, to "go no further than alleging joint activity to do those things complained of in the original complaint." In his letter of advice to the ITC, Rose presenting the view of the Justice Department, continued:

Nothing is alleged which is intrinsically different than the original charge of predatory pricing. In these circumstances, the Commission does not face an entirely new, antitrust-related issue, but the same antidumping complaint with a surface gloss of antitrust, hastily added and submitted without any supporting evidence similar to the price and cost computations made in the original complaint.

Again, in Stainless Steel Pipe, Rose asserted:

Complainants apparently have no basis on which to assert that the Japanese exporters have acted conspiratorily. Thus, this case is even weaker than the Japanese TV set matter. In this case, there is absolutely no basis for finding that the allegations are broader than or different from those within the purview of the Antidumping Act.

In fact, the ITC continued the investigation based only upon the issue of unreasonably low prices (even after the administrative judge had stricken the conspiracy issue from the investigation), and on February 22, 1978, issued a cease and desist order against 11 Japanese firms in this case.

Balancing the directive in the Senate Finance Committee Report and the statutory notice provisions of section 337(b)(3) with the stated policy of Congress to "eliminate unnecessary and costly investigations," it is reasonable to conclude that Congress intended to place some limitations upon the subject matter jurisdiction of the ITC, at least over antidumping and countervailing duty matters. To suggest that the notice provisions of section 337 were designed to permit the Treasury Department to initiate proceedings duplicative


Letters of advice and information to the ITC indicate that these allegations fall squarely within the antidumping and countervailing duty statutes. Rose Letter, supra note 49, at 5, 8; Tobin Letter, supra note 48, at 3; McDonald Letter, supra note 50, at 1; Suchman Letter, supra note 50, at 2.

Rose Letter, supra note 49, at 8.

Id.


See Prehearing Order No. 16, Stainless Steel Pipe, supra note 26, (denying respondents motion to terminate the investigation after the presiding officer had eliminated the conspiracy issue) and I.T.C. Pub. No. 863 (Feb. 1978).
of key elements in an ITC investigation would appear to be inconsistent with this congressional policy. Moreover, because the antidumping and countervailing duty statutes embody a considered and well-developed body of law within the experience and expertise of the Treasury Department and provide relief specifically tailored to remedy practices violative of those statutes, it does not require a strained interpretation of congressional intent to conclude that the antidumping and countervailing duty statutes administered by the Treasury were intended to provide the primary, if not exclusive, remedy against foreign dumping practices and export subsidization. On this point, Frederick Dent, the President's Special Trade Representative for Trade Negotiations stated, "[t]he Congress in passing the Trade Act of 1974 recognized that the Antidumping Act and the countervailing duty law had worked over a number of years into sophisticated instruments aimed at preventing the use of specific unfair acts in connection with imports into the United States." Having devoted considerable effort in the Trade Act of 1974 to provide statutory changes to improve the administration of these provisions, it would seem unlikely that Congress would vest the ITC with unlimited and undefined subject matter jurisdiction over antidumping and countervailing duty matters.

The role assumed by the ITC in countervailing duty matters under section 337 is also plainly inconsistent with the specific provisions of the countervailing duty provisions of the Trade Act of 1974. Assuming that wherever possible statutes are to be read consistently with one another, the provisions of the countervailing duty law implicitly limit the scope of ITC jurisdiction over foreign export subsidization. Subsection 303(d)(2) authorizes the Secretary of Treasury to suspend countervailing duties for the purpose of exp-
diting ongoing negotiations to establish international rules and procedures governing export subsidization and the application of countervailing duty laws. The Senate Finance Committee Report emphasized the importance of this discretionary power:

The Committee believes that, in the final analysis, the interests of the United States will be best served by international agreement permanently eliminating the use of governmental subsidies which distort trade patterns. The forthcoming negotiations may offer the occasion for such an agreement, and the Committee recognizes that, in order to enable international resolution of the difficult problems involved in connection with subsidies, the Secretary of the Treasury must have flexibility to suspend the imposition of countervailing duties where such imposition would jeopardize negotiations authorized under section 102 of this Act.

Unilateral action on the part of the ITC in countervailing duty matters would impair the effectiveness of suspending countervailing

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100 19 U.S.C. § 1303(d) (Supp. V 1975) provides:

(1) It is the sense of the Congress that the President, to the extent practicable and consistent with United States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties.

(2) If, after seeking information and advice from such agencies as he may deem appropriate, the Secretary of the Treasury determines, at any time during the four-year period beginning on January 3, 1975, that—

(A) adequate steps have been taken to reduce substantially or eliminate during such period the adverse effect of a bounty or grant which he has determined is being paid or bestowed with respect to any article or merchandise;

(B) there is a reasonable prospect that, under section 2112 of this title, successful trade agreements will be entered into with foreign countries or instrumentalities providing for the reduction or elimination of barriers to or other distortions of international trade; and

(C) the imposition of the additional duty under this section with respect to such article or merchandise would be likely to seriously jeopardize the satisfactory completion of such negotiations;

the imposition of the additional duty under this section with respect to such article or merchandise shall not be required during the remainder of such four-year period. This paragraph shall not apply with respect to any case involving non-rubber footwear pending on January 3, 1975, until and unless agreements which temporize imports of non-rubber footwear become effective.

(3) The determination of the Secretary under paragraph (2) may be revoked by him, in his discretion, at any time, and any determination made under such paragraph shall be revoked whenever the basis supporting such determination no longer exists. The additional duty provided under this section shall apply with respect to any affected articles or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of any revocation under this subsection in the Federal Register.

duties as a means of expediting international negotiations. As stated by the Special Trade Representative, Frederick Dent, "[t]he appearance of providing entirely separate remedies, administered without reference to the existing countervailing duty law, could pose a threat to obtaining the United States trade policy objectives established by the Congress and the President."\(^\text{102}\) Because the Secretary of the Treasury exercises no statutory control over the application of remedies under section 337, his discretion to suspend sanctions against foreign export subsidization would be subject to the whim of the ITC.\(^\text{103}\) It follows that Congress could not have intended to vest the Secretary of the Treasury with the autonomous and carefully proscribed discretion provided in the countervailing duty statute and at the same time confer unlimited jurisdiction upon the ITC in the countervailing duty area.

To the extent that section 337 investigations, particularly the *Color TV Sets* and *Stainless Steel Pipe* investigations, merely duplicate antidumping or countevailing duty proceedings before the Treasury Department, they are unnecessary and undesirable. Although it is arguable from the language in subsection 337(b)(1) that the ITC must initiate an investigation upon every properly filed complaint,\(^\text{104}\) that subsection also provides a statutory mechanism

\(^{102}\) Dent Letter, *supra* note 47, at 4. The imposition of an exclusion order by the ITC, for example, could be far more devastating to the trade negotiations than the existence of a countervailing duty. The uncertainty of duplicative proceedings and the absence of a clear definition of standards to be applied or of the remedy to be employed impair the ability of United States' negotiators to reach agreement as to the rules and procedures for controlling export subsidies.

\(^{103}\) The discretion of Congress in overriding the decision of the Treasury Secretary to repeal sanctions against foreign export subsidization would also be impaired. This override power is provided in § 303(e)(2) of the countervailing duty law. No congressional override for ITC determinations exists under section 337. Thus, if the ITC finds an unfair import practice is committed as a result of export subsidies paid by foreign governments, neither the Treasury Secretary nor Congress has any statutory control over the remedy and sanctions applied by the Commission.

19 U.S.C. § 1303(e)(2) (Supp. V 1975), reads:

(2) If, at any time after the document referred to in paragraph (1) is delivered to the House of Representatives and the Senate, either the House or the Senate adopts, by an affirmative vote of a majority of those present and voting in that House, a resolution of disapproval under the procedures set forth in section 2192, then such determination under subsection (d)(2) with respect to such article or merchandise shall have no force or effect beginning with the day after the date of the adoption of such resolution of disapproval, and the additional duty provided under this section with respect to such article or merchandise shall apply with respect to articles or merchandise entered, or withdrawn from warehouse, for consumption on or after such day.

\(^{104}\) 19 U.S.C. § 1337(b)(1) (Supp. V 1975). The ITC maintains that subsection 337(b)(1) legally binds it to initiate a full investigation upon any properly filed complaint. Memoran-
whereby ITC proceedings may be suspended if duplicative of proceedings in federal courts or agencies:

For purposes of the one-year and 18-month periods prescribed by this subsection, there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.\(^{105}\)

The purpose of this provision is set forth in the Senate Finance Committee Report:

The provision for the tolling of the running of the time limits provided by this amended section is intended to apply to situations where section 337 proceedings are suspended due to concurrent proceedings involving similar issues concerning the same subject matter before a court or agency of the U.S.\(^{106}\)

If read in conjunction with the Senate Finance Committee's expressed desire to "eliminate unnecessary and costly investigations,"\(^{107}\) it provides a strong basis for the ITC to suspend duplicative proceedings.

Taking into account the possibility that section 337 will be abused as a vehicle for harassing foreign competitors, the international ramifications of unilateral action by the ITC in the antidumping


\(^{107}\) Id. at 171.
and countervailing duty areas, and the questionable authority of the ITC over practices falling within the antidumping and countervailing duty statutes, it would be preferable for the ITC to employ its suspension powers until determinations on the antidumping and countervailing duty issues are rendered by the Treasury Department. Even though the ITC might properly assert jurisdiction on the basis of a complaint charging "broader allegations" than those falling squarely within the purview of the antidumping and countervailing duty statutes, to the extent that the latter constitute elements of the alleged unfair practices, the ITC ought to defer to the Treasury.\(^8\) Based upon the investigation and findings of the Treasury Department, the ITC can then determine whether the "broader allegations" merit relief under section 337.

Similarly, where investigations initiated by the Department of Justice or the Federal Trade Commission are in process and involve similar issues of fact and law, the ITC should consider suspension. Continuation of simultaneous parallel actions in two forums operates as a hardship on the parties defending, risks the possibility of contradictory resolutions, and unnecessarily expends public resources. By granting the ITC authority to suspend investigations under section 337 and expressing a preference for avoiding duplicative proceedings, the Congress has at least indicated that the ITC should be responsive to problems created by the concurrent exercise of its jurisdiction with other agencies.\(^9\)

IV. PROBLEMS WITH PARTIES AND REMEDIES UNDER SECTION 337

Section 337 as originally conceived provided *in rem* relief to

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\(^8\) The Robinson Letter, *supra* note 46, at 2, argued that the ITC must defer countervailing duty and dumping issues to the Treasury:

> It is our view that practices which fall within the purview of the antidumping or countervailing duty laws can also be elements of broader practices with respect to which the Commission is empowered to grant relief under section 337 of the Tariff Act of 1930. At the same time we strongly believe, based on both policy and legal grounds, that the Commission must refer these specific elements to the Department of the Treasury for purposes of investigation. The Commission can then determine whether relief is appropriate under section 337, based on new investigations or rulings by Treasury and any investigation by the Commission of other alleged practices.

\(^9\) The legal case that the ITC must defer to the Justice Department and the Federal Trade Commission on matters also within their jurisdiction is decidedly less persuasive than the case for deferral to the Treasury in antidumping and countervailing duty matters. Section 337(a) explicitly provides the ITC with jurisdiction over unfair import practices, the effect or tendency of which is "to restrain or monopolize trade and commerce in the United States." The general policy arguments, however, such as avoiding duplicative proceedings, conflicting resolutions, or contradictory remedies still apply.
United States industries against unfair trade practices in international trade which were either difficult or impossible to remedy under other unfair competition statutes. The *in rem* approach to unfair trade practices both set the ITC apart from other agencies enforcing unfair trade practice and antitrust statutes and circumscribed the types of behavior over which the ITC could effect appropriate relief. Section 337 was not intended to be principally a mechanism whereby United States patent holders could protect themselves against foreign infringers, but the remedy of exclusion did not lend itself to other forms of unfair competition arguably actionable under subsection 337(a).

While the addition of the cease and desist power to the remedies available under section 337 has undoubtedly increased the scope of unfair practices against which the ITC can reasonably respond, it is not without its own practical, policy, and legal limitations.

The legal limitations on the cease and desist power arise principally from the language of subsection 337(a) which limits the ITC's subject matter jurisdiction to unfair acts "in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either." As long as the statute was used to exclude articles, either themselves infringing United States patents or which were manufactured under processes protected by United States process patents, importation of the goods themselves arguably constituted the unfair act and the conduct abroad, manufacture of an article infringing a process patented in the United States, was a legitimate area of inquiry to establish relevant facts about the merchandise. Cease and desist power, however, is grounded not upon goods but upon the person. Consequently, the legitimate areas of inquiry are limited to acts by persons involved in the importation of goods into the United States or in their subsequent sale by the "owner, importer, consignee, or agent." This does not apparently include the manufacturer or exporter unless it is involved in "importation," defined by case law as the act of bring-

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112 Id.
113 See In re Von Clemm, 229 F.2d 441 (C.C.P.A. 1955).
114 It is interesting to note that in *Stainless Steel Pipe* the Presiding Officer eliminated a United States distributor on this basis but failed to see its relevance with respect to motions by manufacturers and exporters. Compare Stainless Steel Pipe, supra note 26, Prehearing Order Nos. 6 and 17 with the Order Dismissing Certain Respondents Adopting the Presiding Officer's Opinion.
ing articles into the United States. Under this reading of the statute, no cease and desist order could be issued directly against foreign exporters and manufacturers; a cease and desist order designed to prevent unfair acts by manufacturers and exporters abroad, such as the alleged predatory pricing in Stainless Steel Pipe, would have to be issued against importers, enjoining them from purchasing the merchandise at unreasonably low prices.

The ITC has declined to reach this anomalous result by avoiding a clear statement as to the basis of its actions against foreign parties. It is apparent from both Color TV Sets and Stainless Steel Pipe that the ITC perceives its jurisdiction as reaching foreign manufacturers and exporters. In the latter case the Presiding Officer stated:

It is the purpose of section 337 to protect the United States market from the effects of unfair methods of competition perpetrated by foreign companies. If such unfair acts occur abroad and the foreign articles are then exported to the United States so that the domestic industry is injured, then it is within the authority of this Commission to examine such acts in order to consider whether relief should be granted.

As discussed earlier in this section, this reasoning has been accepted by the courts where the remedy to be applied is based upon in rem

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115 “Importation” has been defined by numerous cases as the act of bringing articles into the United States. See United States v. Boshell, 14 C.C.P.A. 273 (1927), Cunard Steamship Co. v. Mellon, 282 U.S. 100 (1923) and United States v. John V. Carr and Son, 226 F. Supp. 175 (Cust. Ct. 1967). The importer has been defined as the first purchaser who resides in the United States and who arranges for the goods to be brought into the United States. See Handley Motors, Inc. v. United States, 338 F.2d 361 (Ct. Cl. 1964) and Import Wholesalers Corp. v. United States, 368 F.2d 577 (Ct. Cl. 1966). The ITC has not apparently construed these words in conformity with these opinions.

116 The ITC has not issued a cease and desist order to date. The consent order in Color TV Sets, however, did prohibit parties from selling for export to the United States “at any price in a predatory manner.” This order applied to both manufacturers and exporters. Consent Order, Color TV Sets, supra note 25.

117 Prehearing Order No. 17, Stainless Steel Pipe, supra note 26. It is interesting to contrast this language with that of the Order, In re Monolithic Catalytic Converters, Investigation No. 337-TA-18 (I.T.C., issued Dec. 3, 1975) [hereinafter cited as Monolithic Catalytic Converters], in which the ITC adopted the following reasoning of counsel for United States’ distributors:

The statute conferring jurisdiction—refers to “importation” of articles. Mid-America is not importing; rather, Volkswagen of America, Inc. (hereinafter “VWoA”) is the importer. The statute also refers to “or in their sale by the owner, importer, consignee or agent of either.” It is believed by Mid-America that a mere sale alone is not contemplated by the statute, but the sale must be one which is connected with the importation. Under this interpretation, Mid-America is not covered by the statutory jurisdictional basis for the investigation and should be removed as a party.
jurisdiction over foreign goods imported from abroad, but would seem to be inapplicable to cease and desist orders premised upon personal jurisdiction over importers, owners, consignees, or agents. Furthermore, the ITC has dismissed or excluded persons purchasing from importers as parties to an investigation on the ground that they did not fall within the statutory language;\(^{118}\) this same logic can be applied as a basis for precluding persons equally remote from the act of importation, namely manufacturers and exporters. While the ITC has to date not interpreted the statute this way, continued use of the cease and desist power rests on its ability to include parties in an investigation properly, and this should require a clear statement by the ITC of the legal authority upon which jurisdiction is premised.

In addition, the ITC's broad interpretation of the language of subsection 337(a) would imply that it is no more restrictive than the language of the Federal Trade Commission Act. Since the Congress provided a clear distinction between subsection 337(a) and section 5 of the Federal Trade Commission Act—the former applies to unfair acts "in the importation of articles into the United States"\(^ {119}\) and the latter applies to unfair acts "in commerce"\(^ {120}\)—the argument that ITC jurisdiction is broader than the plain language of the provision is open to question.

The weaknesses of section 337 as a remedial statute for unfair acts occurring abroad are amplified by the interrelationship of the exclusions and cease and desist orders. The enforcement mechanism provided for cease and desist orders under subsection 337(f) is limited to alternative actions taken under subsections (d) and (e), that is, exclusion.\(^ {121}\) Exclusion, however, is a particularly inappropriate remedy because it is itself anticompetitive; by excluding goods from competition, upward pressure is exerted on prices and consumer choice is limited.\(^ {122}\) Moreover, the reach of an exclusion order is

\(^{118}\) Order, Monolithic Catalytic Converters, supra note 117.


\(^{122}\) In commenting on Color TV Sets, the FTC concluded that exclusion is appropriate as a remedy only in a limited context and not in antitrust cases:

"We believe that the ITC would agree that an exclusion order is an extreme remedy since it has the effect of completely eliminating an element of competition in a domestic market and ignores the obvious fact that unfair pricing practices occurring in international trade, even those which may have severe consequences, can be restrained through incremental price remedies, without reducing the number of competitors or denying consumers the benefits of fair competition. Although
limited to articles "imported by any person violating this section." Even if the ITC finds that the language of subsection 337(a), "importation," does not limit the parties subject to investigation and remedial order under its cease and desist power, the fact that its ultimate enforcement mechanism, exclusion, is statutorily limited to articles imported by persons violating the statute raises serious doubts as to the ITC's authority to enforce a cease and desist order through exclusion against non-importing foreign parties.

The practical limitations on the ITC's remedial powers are similar to those accompanying any extraterritorial application of United States law. Assuming the ITC has authority under the statute to investigate alleged violations and the parties named as violators, personal jurisdiction must still be established. To date this issue does not appear to have been directly addressed by the ITC, but the issue has been raised by parties refusing to submit to discovery on the ground that the ITC lacked personal jurisdiction. The ITC has not, however, forced resolution of the jurisdictional issue by resorting to court enforcement; rather it has been content to apply evidentiary sanctions and make its determination on an incomplete record. Given the complexity of this issue and the adverse effect non-cooperation by foreign parties has on the outcome of an investigation, can the ITC be considered a proper forum for its resolution?

Practical and policy reasons suggest that the ITC's authority over practices falling within other antitrust or unfair trade practice statutes should be limited, particularly when one considers the relative merits of remedial action by the Commission and other agencies. The Department of Justice has characterized the choices of remedy available in the ITC as being either "draconian" or "untested:"
“draconian” because the exclusion power is extreme and counter-productive in dealing with unfair competition; “untested” because the cease and desist power, and the ITC’s ability to monitor and enforce its orders under it, has not been challenged. Relative to other agencies—the FTC and Departments of Justice and Treasury—the forms of relief available to the ITC over antitrust and non-patent unfair trade violations appear to be neither more effective or appropriate, nor more capable of reaching conduct that would not fall within the jurisdiction of at least one of the other agencies.

With respect to the Treasury Department’s jurisdiction over foreign export subsidies and dumping, the remedy provided effectively eliminates the advantage which foreign competitors gain through subsidies or dumping by imposing an additional duty equal to the margin of dumping or subsidization. The Treasury investigation is internationally recognized and therefore, does not raise problems of extraterritorial jurisdiction or compulsory discovery. Further, the Treasury has long established expertise in undertaking such investigations and has the capability of effectively enforcing its decisions; its Customs Service is both an experienced monitoring and enforcement agency, and the remedy is not dependent upon any sanction such as exclusion for enforcement. In contrast, the resolution of an ITC investigation in the imposition of a cease and desist order requires the establishment of personal jurisdiction, is not internationally recognized, does not have the support of an experienced and effective enforcement agency capable of day-to-day monitoring, and ultimately is dependent on an anti-competitive remedy, exclusion.

The arguments favoring FTC and Department of Justice jurisdiction over ITC jurisdiction are less compelling but still strong. The scope of the combined subject matter jurisdiction of these two agencies is at least equal to that of the ITC. The FTC can grant relief in the form of cease and desist orders and the Department of Justice can seek equally effective relief through injunctions or fines. Both agencies can enforce the relief granted through the courts and do not require such a drastic remedy as exclusion. Finally, both agencies are established antitrust enforcement agencies with staffs and procedures capable of monitoring and seeking enforcement of their remedies. The ITC can at best claim only equal status on these points, and this in itself puts into question the wisdom of duplicating the efforts of these other agencies.

Finally, the entry of the ITC into the antitrust field raises not only the specter of parties being subjected to costly and duplicative proceedings, but also the possibility that the relief provided by the ITC will conflict with that provided by other agencies. Although there have been no instances of directly contradictory relief to date,\textsuperscript{129} it is possible to conceive of them. For example, the Treasury Department could impose a countervailing duty against a foreign government subsidy while the ITC simultaneously issues an order compelling foreign manufacturers to cease and desist from setting prices at a level reflecting the amount of the subsidy. In such a case, the party subjected to the order and duty would, in effect, have to account for the subsidy twice in its prices. Similar instances of contradictory remedies could equally appear with respect to other statutes and agencies, creating an outcome which neither serves the public interest nor preserves essential elements of fairness in our legal process.

V. Procedural Limitations on the Investigation

While much of the criticism of investigations under section 337 has focused on jurisdictional issues, equal attention should be given to the procedures by which investigations are initiated and conducted and their fairness. Any time an administrative agency is given or assumes the authority to conduct full scale adjudicative hearings into matters as complex as unfair competition, within rigid time limits and without well defined pre-existing standards and procedural rules, a danger exists that neither the public interest nor fairness to the parties will be observed.

While the creation of adjudicative powers in administrative agencies is undoubtedly founded in part upon the need to dispose of certain legal issues more quickly than would be possible in court litigation, the imposition by the Congress of stringent time limits in a section 337 investigation has given rise to numerous problems in the conduct of an investigation. Largely in response to Congress' perception that ITC investigations under section 337 should be completed in a timely manner,\textsuperscript{130} the Congress provided that investiga-

\textsuperscript{129} There is in fact precedent for terminating an investigation based upon the settlement of proceedings in another agency. See Presiding Officer's Recommendation to Terminate and to Determine No Violation, Angolan Coffee, note 24 supra. To date, however, section 337 has been resorted to either concurrently with other proceedings, after unsatisfactory results from other proceedings, or as an alternative to other proceedings. Presumably the President could override contradictory forms of relief such as may arise from simultaneous investigation by the ITC and Treasury in Stainless Steel Pipe, supra note 26.

\textsuperscript{130} See Finance Comm. Rep., note 19 supra, at 194.
tions should be completed within twelve months of publication of the notice of investigation unless the investigation was a more complicated one, in which case eighteen months would be allowed. In the event an investigation is designated as being more complicated, the ITC must publish its reasons for the designation; the ITC appears to have interpreted this requirement as indicating a strong congressional intent that investigations be concluded within the twelve month rather than the eighteen month period. An additional time constraint, expressed by the Senate Finance Committee, is that "an investigation be commenced by the Commission as soon as possible after receipt of a properly filed petition." Both of these time limits raise the question of whether a determination on the merits based on a complete record is possible under section 337.

Within the twelve (or eighteen) months allotted for an ITC investigation, the full procedures of an adjudicative proceeding are followed. This includes an answer by the respondents, motions on a full range of issues, discovery, prehearing conferences, hearings, the recommended determination by the presiding officer, and ITC consideration of that determination. In addition, when a temporary exclusion order is requested, a preliminary hearing is held to determine whether there is reason to believe that a violation of section 337 exists. The full hearing must be completed within seven months of the publication of the notice of investigation and the preliminary hearing within three months of the publication.

The language of section 337 provides that "[t]he Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative." This language, as amplified by

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This conclusion is drawn because in both Color TV Sets and Stainless Steel Pipe, the criteria of the Senate Finance Committee and ITC Rules—namely, that the investigation be of an involved nature, that information be difficult to obtain, or that a large number of parties are involved—were satisfied at initiation and the ITC did not designate the investigation as more complicated. In Color TV Sets it was later designated. See Recommended Ruling that Motion to Designate This Investigation As "More Complicated" Be Granted. Color TV Sets, supra note 25.


19 U.S.C. § 1337(e) (Supp. V 1975) authorizes the ITC to exclude articles from entry during an investigation except under bond if they have "reason to believe" that section 337 has been violated. 19 C.F.R. § 210.41(a)(2) (1977) provides for a hearing pursuant to section (e) above.


the legislative history, would seem to require that, after receiving a properly filed complaint and allowing a brief period to identify sources, determine the availability of information and look into preliminary matters, the ITC initiate an investigation. The ITC has in fact initiated investigations in a timely manner since the enactment of the Trade Act of 1974.

Various questions arise from the statutory language and ITC practice thereunder:

(1) Must the ITC initiate an investigation pursuant to any properly filed complaint?

(2) What discretion does the ITC have to reject a complaint because of insufficient or unsubstantiated allegations?

(3) Does the statute permit preliminary hearings or investigations prior to initiation of a full investigation?

The answers to these questions are crucial to an evaluation of whether the statutory time limits can be met without prejudice to the rights of interested parties and whether section 337 enables domestic interests to protect themselves from unfair foreign competition or provides a potent harassing device for protectionists. These issues in turn focus on whether (1) the parameters of the investigation are sufficiently defined prior to initiation to permit the respondents to defend within the limited time allowed and (2) the allegations of a violation of section 337 are credible enough to merit the mobilization of the resources of the United States Government and the respondents in an investigation.

In the investigations of both Color TV Sets and Stainless Steel Pipe respondents submitted motions to dismiss on the grounds that the allegations of the complaint were insufficient. Commenting on the latter case, the Department of Justice urged the ITC not to act

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139 The Finance Committee's report states:

Under amended section 337(b)(1), it is the intent of the Committee that an investigation be commenced by the Commission as soon as possible after receipt of a properly filed petition, but it is not the intent of the Committee to compel the Commission to institute an investigation before it has had an adequate opportunity to identify sources of relevant information, assure itself of the availability thereof, and, if deemed necessary, prepare subpoenas therefore, and to give attention to other preliminary matters.

FINANCE COMM. REP., supra note 19, at 194.

140 There is some question as to what constitutes a properly filed complaint. Since the statute provides no standards (e.g., reason to believe or suspect that a violation of section 337 has occurred) for the initiation of an investigation one must assume at a minimum that "properly" means in compliance with the Administrative Procedure Act. The subject of what constitutes a sufficient complaint has been raised by the Justice Department, among others. See text infra at notes 141-49.
on the complaint and rely on the discovery process to subsequently "establish the existence or non-existence of facts to support such a broad notice pleading as the instant complaint . . . where no substantive evidence of the violation, other than low price levels, is offered or even promised at the outset of the matter." The ITC pursued both investigations despite opposition on this point from the Department of Justice and the FTC.

Investigations under section 337 are governed by the APA which requires that parties to an adjudicatory administrative hearing be timely informed of "the matters of fact and law asserted." While the pleading requirements of the APA allow broad notice pleading, they do require sufficient particularity to allow the responding parties to prepare a defense. Further, the rules of the ITC require that a complaint state specific allegations supported by a statement of fact. Former Chairman of the Commission, Will E. Leonard, stated, with respect to the ITC rules, that: "The Commission is going to be demanding a lot from parties. For example, the rules set out rather extensive requirements for the format of complaints under section 337, requiring rather specific allegations and supporting factual material as opposed to notice-type pleading." The notice-type pleading contemplated by the APA would present a major obstacle to completing a full hearing within the time limits of the statute. A bare notice pleading would, in addition to the normal requirements of adjudication, leave the central issues and allegations for definition after the investigation is initiated. While the ITC rules if adhered to within the meaning apparently given to them by Chairman Leonard might mitigate this problem, it has not been the practice of the ITC to be demanding in reviewing a complaint. In Stainless Steel Pipe the issue whether a contract, combination or conspiracy was subject to the investigation was not resolved until after the close of discovery and little more than one

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111 Letter from Jonathon C. Rose, Deputy Assistant Attorney General, to Daniel Minchew, Chairman, ITC (Jan. 25, 1977), at 4.
114 See Davis, 1 ADMINISTRATIVE LAW TREATISE 524 (1958) and Administrative Procedure Act, Legislative History, Senate Doc. No. 248, 79th Cong., 2d Sess. 23 (1946).
117 See, e.g., text supra at note 141.
month prior to the scheduled hearings.\textsuperscript{148} Furthermore, none of the allegations in the complaint related a specific violation of section 337 to a particular respondent.\textsuperscript{149} Given the severe time constraints of an investigation, the procedure of initiating investigations on little more than a notice pleading would seem to present serious risks that a determination would be made upon an inadequate record.

In addition to the lack of specificity in the allegations, when a complaint is not specific uncertainties can also arise as to the parties to be included. In Stainless Steel Pipe, the complaint initially included few manufacturers who were subsequently found to produce the product under investigation.\textsuperscript{150} Additional manufacturers were included after they appeared at the pre-initiation hearing.\textsuperscript{151} Subsequent to initiation, complainants and the ITC investigative staff moved to include additional manufacturers. These motions were rejected by the presiding officer on the grounds that inclusion of additional parties after initiation requires a greater showing of a section 337 violation than is required initially to include parties, and because of the difficulty of including additional parties while complying with the time requirements of the investigation.\textsuperscript{152} In fact, the basis of the motion to include additional parties was that the Treasury Department had included the parties in their parallel investigation under the Antidumping Act of 1921.\textsuperscript{153} The grounds provided by the ITC staff and complainants were, in fact, significantly more persuasive than those contained in the original complaint. Nevertheless, because of lack of specificity in the complaint,

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\textsuperscript{148} The close of discovery in Stainless Steel Pipe was orally set for June 27, 1977. The issue of whether a conspiracy was subject to investigation was not ruled upon until July 20, 1977, at which time it was denied, Prehearing Order No. 14, Stainless Steel Pipe, \textit{supra} note 26 (issued July 20, 1977).

\textsuperscript{149} The request for a more definite statement with respect to violations by individual respondents was denied, although the complaint itself contained no specifics, Prehearing Order No. 6, Stainless Pipe and Tube, \textit{supra} note 26.

\textsuperscript{150} Nine of the original parties named in the complaint were subsequently dismissed because they did not manufacture for export to the United States or export to the United States. Order Dismissing Certain Respondents, Stainless Steel Pipe, \textit{supra} note 26.

\textsuperscript{151} Six manufacturers, not in the original complaint, were included as respondents in the "Notice of Investigation" after appearing at the preinitiation hearing. See Brief in Opposition to Institution of an Investigation, Stainless Steel Pipe, \textit{supra} note 26. If they had not appeared at that time, none of the principal Japanese manufacturers would have been parties at the initiation.


\textsuperscript{153} Complainants' Motion Requesting That Certain Additional Japanese Manufacturers Be Named As Respondents in This Investigation, Stainless Steel Pipe, \textit{supra} note 26. 
the ITC included numerous respondents in the investigation with no substantial facts alleged to tie them to a violation of section 337 and, because of time limitations was forced to exclude others who, in the opinion of the staff and complainants, were appropriate parties and for which at least some factual basis existed for inclusion.\textsuperscript{124}

Both \textit{Color TV Sets} and \textit{Stainless Steel Pipe} illustrate the difficulties confronting the ITC in terms of determining parties, issues of fact, and legal issues to be included in an investigation. While it can and has been argued that the language of section 337 is obligatory and thereby requires the initiation of an investigation pursuant to a properly filed complaint,\textsuperscript{155} the ITC can require that certain minimum standards be met. In the first instance, the ITC has exercised this authority in promulgating regulations which set certain minimum requirements for a complaint.\textsuperscript{156} In implementing these regulations, the ITC could seek to avoid difficulties in meeting the statutory time limits and unfairness to the respondents by returning complaints for additional information should they not specify the parties and behavior complained of and support such allegations with adequate statements of fact. This practice is not uncommon in the Treasury Department where, as in the ITC, no provision is made for preliminary investigations and strict time limits are applied under the Antidumping Act of 1921.\textsuperscript{157} In light of the complexity of recent investigations under section 337, a practice of demanding more of complainants prior to initiating an investigation should be implemented.

It is often difficult for domestic parties who perceive injury by unfair foreign competition to develop sufficient information about the practices of foreign companies to meet a higher standard of specificity in their complaints. This is particularly true where the United States industry is small or where the origin of the unfair act or acts is outside the United States. In such a case, rather than initiating an investigation on insufficient grounds, the ITC might resort to its power under section 603 of the Trade Act of 1974 which authorizes it to "conduct preliminary investigations, determine the

\textsuperscript{124} The factual basis amounted to no more than establishing that the companies which the complainants wished to include manufactured the product under investigation.
\textsuperscript{155} See Kaye and Plaia, note 74 \textit{supra}, at 29.
\textsuperscript{157} 19 U.S.C. § 160(c)(1) (1970 & Supp. V 1975) allows the Secretary thirty days after receipt of an antidumping petition to determine whether to initiate an investigation. As a matter of practice the Treasury has on occasion requested parties to improve certain aspects of their petitions and has returned them as being insufficient.
scope and manner of its proceedings, and consolidate proceedings before it." 158 Although the ITC has never initiated a preliminary investigation under section 603 on the basis of a complaint filed under section 337, it did on its own initiative investigate unfair practices in the importation of black-and-white televisions and television parts under section 603 in conjunction with the section 337 investigation of color televisions and later consolidated it in the section 337 investigation. 159 More important than this precedent under section 603, however, is the fact that the use of section 603 would, while not mandated by section 337 or 603, appear to be permitted by the statute. Unlike an investigation under section 201, the ITC is not required under section 337 to "promptly" make an investigation. 160 While the legislative history indicates that it is contemplated that the ITC will not delay in the initiation of an investigation, 161 it does not prescribe or discuss the time limits between the filing of a complaint and the initiation of an investigation. Further, section 603 is not limited in its applicability to the Commission's authority to act under other sections of the statute and, therefore, would seem to be a provision of general authority to be used where other sections of the statute might be inapplicable or inadequate.

VI. Conclusion

Section 337 has provided a remedy against unfair import practices for more than 50 years. For most of that period it has been unused or used only against alleged patent infringements. The changes effected by the Trade Act of 1974 and the new activism by the ITC itself have brought section 337 to the fore as a potent new weapon for aggrieved domestic industries. Section 337, however, does not fill any substantial need for protection and redress of grievances unmet by other statutes, and it has substantial liability. It is at best ambiguous and, therefore, unpredictable on the important issues of jurisdiction over both subject matter and over parties; it is duplicative of relief available through other agencies and less effective in enforcing that relief; and its procedural limitations serve neither the public interest nor the demand for fairness in adjudication. No one's interest would suffer from the repeal of section 337.

159 Investigation No. 603-TA-1.
161 FINANCE COMM. REP., supra note 19, at 194.
If it is not repealed one can only hope that a combination of responsible administration by the ITC and eventual changes in the statute itself will prevent it from becoming a significant impediment to our international trade.

Subsequent to the completion of this article, the ITC issued a cease and desist order against eleven of the Japanese respondents in the Stainless Steel Pipe investigation. The cease and desist order prohibits the respondent manufacturers from selling for export into the United States any of the articles subject to the investigation below the reasonably anticipated marginal cost of production, if such sales are without commercial justification. The ITC indicated that prices above average variable cost would be considered above reasonably anticipated marginal cost. A similar proscription was applied to exporters and importers who were respondents in the case. The ITC will apparently impute knowledge of suppliers’ costs to the exporters and importers. Extensive reporting is required of all of the respondents subject to the order. The order was issued February 22, 1978, and will take effect, unless the President overrides it, within sixty days. A violation of the order would allow the ITC to exclude the articles subject to the order from entry into the United States under section 337(f).

The ITC took strong exception to the argument that section 337 proceedings should be discontinued when the activity under investigation is also the subject of a concurrent investigation under the Antidumping Act. The commissioners stressed that section 337 is a remedy in addition to remedies provided by other provisions of law and that, in any event, broader questions of fact were raised under section 337. The ITC also adopted a broad interpretation of both its subject matter and personal jurisdiction under section 337. They concluded that the phrase “in the importation of articles into the United States, or in their sale by the owner, importer, consignee or agent of either” included owners abroad of articles manufactured for exportation. In addition, they found that they had personal jurisdiction over all the parties to the investigation and, in the majority opinion subscribed to by three of the commissioners, stated that the cease and desist power under section 337(f) is “ancillary and subordinate” to their exclusionary power under section 337(d). Since they maintained that the exclusionary power is based upon in rem jurisdiction only, these commissions concluded that the ancillary and subordinate power to issue cease and desist orders could be based on in rem jurisdiction. The ITC thereby seems to have created a precedent whereby cease and desist order can be based on in rem jurisdiction.

The ITC, in overruling the Presiding Officer’s finding that there was no violation of section 337 because there was no injury, found that there was a tendency to restrain trade and commerce in the United States. The ITC apparently based this tendency on the effect of Japanese imports on other imports and not on the United States industry. The relevant section of the opinion states:

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

This is the broadest of all possible interpretations of the Act.

In conclusion, the ITC would seem to have taken a broad interpretation of section 337 in deciding the Stainless Steel Pipe case. The restraint which the ambiguities of this statute require was not evidenced by the opinion. Indeed, should the President not override the ITC’s decision in this case, it can be said that the statute is a potent new weapon for use by United States industry, in addition to and concurrent with other statutes, to prevent import competition.