INTRODUCTION

As the ever-increasing volume of world trade creates a greater interdependence among nations, perhaps no provision of American law figures more prominently in the future of American foreign trade than the controversial Section 337 of the Tariff Act of 1930.1 Ad-

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ministered by the International Trade Commission (ITC),\(^2\) this trade statute declares unlawful:

[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 effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States.\(^3\)

For years, this competitively-couched statute labored in relative obscurity due to its virtual insignificance on the international scene. The Trade Act of 1974,\(^4\) however, revitalized Section 337 and in doing so

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\(^2\) Originally designated the United States Tariff Commission, the ITC was created by Act of Congress and approved on September 8, 1916 (39 Stat. 795). The name was changed to the United States International Trade Commission by § 171 of the Trade Act of 1974 (88 Stat. 2009) to reflect that act’s emphasis upon non-tariff trade barriers. Other than the Tariff Act of 1930, the ITC’s present powers and duties can be found in the Antidumping Act of 1921, the Agricultural Adjustment Act and the Trade Expansion Act of 1962. For a descriptive chronicle of the ITC, see generally, J. DOBSON, TWO CENTURIES OF TARIFFS: THE BACKGROUND AND EMERGENCE OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION (1976).

\(^3\) 19 U.S.C. § 1337(a) (1982). The ITC is accorded wide discretion in determining what practices constitute unfair acts under the statute. The Court of Customs and Patent Appeals in In re Von Clemm, 229 F.2d 441 (C.C.P.A. 1955), stated: the quoted language [of the statute] is broad and inclusive and should not be held to be limited to acts coming within the technical definition of unfair methods of competition as applied in some decisions. The importation of articles may involve questions which differ materially from any arising in purely domestic competition, and it is evident from the language used that Congress intended to allow wide discretion in determining what practices are to be regarded as unfair. Id. at 443-44.

Though the language is defined broadly, the great majority of cases brought under Section 337 have involved intellectual property rights: trademarks, copyrights and especially patents. See Palmer, The U.S. International Trade Commission at Common Law, 18 J. WORLD TRADE L. 497 (1984). Other cases, however, have also found unfair methods of competition or unfair acts under the statute to include: palming off, false designation of origin, deceptive advertising and such antitrust violations as predatory pricing, price-fixing, and conspiracy to restrain trade. See Duvall, The Rule of Law in International Trade: Litigating Unfair Import Trade Practice Cases Before the United States International Trade Commission, 15 LAW. OF THE AM. 31, 32 (1983). See also Comment, Scope of Action Against Unfair Import Trade Practices Under Section 337 of the Tariff Act of 1930, 4 NW. J. INT’L L. & BUS. 234, 247-51 (1982).

established the ITC as the forum of choice for foreign unfair competition claims. Possessing the total exclusion order as its ultimate prize, domestic holders of intellectual property rights have increasingly sought the “fast track” of Section 337 to protect their rights against foreign infringements. Due to its increased use, the question of whether the administration of Section 337 operates against unfair competition or actually protects domestic industries from legitimate foreign competition has become a subject of much debate.

Central to the controversy surrounding Section 337 are the rules of procedure by which the ITC governs its investigations. Both foreign and domestic producers have criticized the administration of this section pursuant to these rules. The domestic producers claim that despite the more effective protection afforded by the ITC, its procedures are still too expensive for all but the largest companies to defend their intellectual property rights. Foreign producers, on the other hand, claim that the procedures utilized by the ITC are already less favorable to respondents (usually foreign producers) than the procedures in the United States courts and thereby result in a denial of national treatment contrary to Article III of the General Agreement on Tariffs and Trade. Recently, the Commission of the European Communities (Commission) amplified this debate over Section 337 in its decision *Re United States Litigation Between E.I. DuPont de

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6 As one commentator suggests, one’s view of this debate may depend upon his or her perspective. Proponents generally agree that Section 337 “affords a valuable avenue of relief” to domestic industries, while critics contend that the section is “a major non-tariff trade barrier.” Hemmendinger, Barringer and Kossel, *Section 337: A Case for Repeal or Change*, 8 Ga. J. Int’l & Comp. L. 81, 81 (1978).

7 The ITC procedural rules pursuant to Section 337 are codified at 19 C.F.R. § 210.1-26 (1987).


9 General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194, art. III. Both the United States and the Netherlands are signatories. The General Agreement on Tariffs and Trade is both an international agreement and an international organization. For purposes of this Note, the international agreement will be denoted as the General Agreement or Agreement and the international organization will be referred to as the GATT.
In that decision the Commission held that the application of Section 337, to the particular facts of that case, violated the national treatment provision of the General Agreement. The Commission, considering it in the EEC's interests to have GATT address the compatibility of Section 337 and Article III of the General Agreement, initiated the international consultation and dispute settlement procedures of the GATT.

The following Note analyzes the ITC's administration of Section 337 and its consistency with United States international obligations under the GATT, specifically the national treatment provision of Article III. The international dispute involving AKZO and DuPont, which represents the much-anticipated test-case concerning Section 337, will be utilized as the primary vehicle to demonstrate the denial of national treatment in the statute's administration. In light of the GATT's previous treatment of this statute and considering the economic and political implications of this case, this Note challenges the GATT panel to confront the issue and deliver a definitive legal ruling. Finally, this Note discusses the importance of such a GATT decision to the future of Section 337.

I. BACKGROUND

A. Historical Perspective of Section 337

Congress first announced federal legislation targeting unfair methods of competition in Section 316 of the Tariff Act of 1922. The 1922

11 2 COMMON Mkt. L. R. at 549.
12 Id. at 550. See infra note 73-84 and accompanying text.
13 For purposes of this Note, AKZO will be used generally to refer to AKZO and its affiliated companies. AKZO is primarily a holding company providing various financial and management services to its subsidiaries. ENKZ B.V., Aramide Maatschappij v.o.f. and AKZONA Inc. are all subsidiaries of AKZO involved in the manufacture or distribution of aramid fiber.
14 Section 337 has been the subject of a GATT Panel Conciliation in one previous case, United States - Imports of Certain Automotive Spring Assemblies, reprinted in THE CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, GENERAL AGREEMENT ON TARIFFS AND TRADE: BASIC INSTRUMENTS AND SELECTED DOCUMENTS 107 (30th Supp. 1984) [hereinafter Spring Assemblies I].
15 Tariff Act of 1922, ch. 356, § 316, 42 Stat. 943-44. Commonly known as the Fordney-McCumber Tariff, the Tariff Act of 1922 passed in response to a public mandate to return to the traditional pre-war protectionist philosophy. See J. DOBSON, supra note 2, at 31.
Act's main feature was an elastic tariff empowering the President to vary duties on imports to equalize costs of production and thereby remove any competitive disadvantage.\footnote{This elastic tariff was patterned after the Harding Administration's principle of scientific tariff protection. Upon the recommendation of the Tariff Commission, the President could adjust tariff rates up or down by as much as fifty percent (50\%) to equalize costs of production. \textit{Id.} at 33. \textit{See also} Musrey, \textit{Tariff Act's Section 337: Vehicle for the Protection and Extension of Monopolies}, \textit{5 LAW \\& POL'Y INT'L BUS.} \textit{56, 60 (1973).}} Congress, believing unfair methods of competition to be the only means to circumvent the tariff, designed Section 316 as a shield for this economic scheme by requiring the Tariff Commission to conduct investigations and make recommendations to the President toward remedying these unfair practices.\footnote{Tariff Act of 1922, § 316(b), (c), and (d). Section 316 provided in pertinent part: \begin{itemize} \item[(b)] That to assist the President in making any decisions under this section the United States Tariff Commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative. \item[(c)] That the commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation; \item[(d)] That the final findings of the commission shall be transmitted with the record to the President. \textit{Id.}} In turn, Section 316 authorized the President to protect domestic producers and their particular industries by imposing an additional duty on the imported product or, in extreme cases, excluding the imported article altogether.\footnote{Commenting on the purpose of Section 316, Senator Smoot, a member of the Senate Finance Committee, explained: "If any doubt whatever exists as to the effectiveness of the tariff rates and the provisions of the elastic tariff as a means to protect the coal-tar dye industries, the addition of this effective unfair competition statute should remove it." \textit{62 CONG. REC.} 879 (1922). Senator Smoot further explained that Section 316 was to be a law with teeth to it — one which would reach all forms of unfair competition in importation. \textit{Id.}} Hence, Section 337, through its predecessor, Section 316, was originally designed to champion a protective tariff.\footnote{For an article positing that section 337, and its predecessor section 316, is administered to protect and promote illegal domestic monopolies, see Musrey, \textit{supra} note 20, at 56.}

The Tariff Act of 1930 represented the high-water mark of protectionism in the United States.\footnote{Tariff Act of 1930, ch. 479, § 337, 46 Stat. 590, 703 (codified as amended at} Though renumbered Section 337,
Section 316 substantively changed very little, with the Tariff Commission continuing in its advisory role to the President. The most important of the changes concerned the section’s remedies. By eliminating Presidential authority to levy additional duties, Section 337 rendered the exclusion order the sole available remedy. This act also provided for the admittance of articles temporarily excluded under bond and eliminated direct Supreme Court review of Tariff Commission findings. On the books, Section 337 remained firm in its protectionist conviction until the Trade Act of 1974; its role in safeguarding the interests of United States producers, however, lessened significantly during those years as protectionist philosophy gave way to ideas of liberal trade.

The Trade Act of 1974 restructured United States trade policy in order to promote the development of liberal free trade competition through the elimination of trade barriers. Principally, the 1974 Act authorized the President to negotiate and enter into trade agreements with foreign countries “for the purpose of establishing fairness and equity in international trading relations.” This organization sought to coordinate United States policy with the General Agreement and to encourage the extension of free trade ideals into areas not yet embraced by the General Agreement. Although the 1974 Act un-


23 Id. § 337(f) (codified as amended at 19 U.S.C. § 1337(f) (1982)).

24 Id. § 337(c) (codified as amended at 19 U.S.C. § 1337(c) (1982 & Supp. III 1985)).

25 Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified throughout Title 19 of the United States Code). Although the statutory language of Section 337 remained unchanged, some amendments were made as provisions became clarified through case law. Foremost among these amendments was the extension of the protected position enjoyed by owners of product patents to owners of process patents. See In re Amtorg Trading Corp. 75 F.2d 826 (C.C.P.A. 1935); cert. denied, 296 U.S. 576 (1935).

26 For a description of the progressive role of U.S. tariffs as the protectionist philosophy eroded, see J. Dobson, supra note 2.


28 Id. at 7203.
underscores United States commitment to an open world economy, Congress recognized that such a system was only possible on a basis of reciprocity and equal competitive opportunity. The 1974 Act ensured this opportunity by recasting executive authority to respond to foreign unfair trade practices. In the area of unfair import practices this meant a redefinition and revitalization of Section 337.

The 1974 Act renamed the Tariff Commission the International Trade Commission, and Section 337, as amended, vested the ITC with full authority to investigate any alleged violations of the statute, make a final determination of violation, and then to invoke a suitable remedy. Intending a swift response to unfair trade practices, Congress mandated that the ITC conduct its investigations and make any determination of violation and remedy within twelve months. As the role of the ITC changed from advisory to quasi-adjudicatory, its proceedings became subject to the notice and hearing requirements of the Administrative Procedure Act (APA). The Act authorized the ITC to consider "all legal and equitable defenses," with any party adversely affected permitted an appeal to the United States Court of Customs and Patent Appeals, now the Court of Appeals for the Federal Circuit (CAFC). Finally, and perhaps most importantly, the

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29 Id.
30 Id. at 7208.
35 The general policy of expedition is stated in 19 C.F.R. § 210.2 (1987) and reads: It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously. In the conduct of such proceedings, the administrative law judge and counsel or other representative for each party shall make every effort at each stage of the proceedings to avoid delay.
36 Id.
39 Id., 19 C.F.R. § 210.71. The Court of Customs and Patent Appeals was abolished
1974 Act shifted the emphasis of the Section 337 proceeding from the protection of private rights to the much greater responsibility of guarding the public interest. Thus, the ITC will not issue a remedial order where its effects are determined detrimental to the public.

B. The General Agreement and Article III

The General Agreement on Tariffs and Trade is a multi-nation pact designed to facilitate the elimination of discriminatory treatment in international commerce and as a framework for the progressive reduction of tariffs and other trade barriers. Though not a treaty, the General Agreement is customarily accorded the same efficacy as a treaty under the supremacy clause of the United States Constitution.


See supra note 34. The Senate Finance Committee explained, "[t]he Committee believes that the public health and welfare and the assurance of competitive conditions in the United States economy must be the overriding considerations in the administration of this statute." FINANCE COMM. REP., supra note 27 at 7330.

To assure these conditions, each Section 337 proceeding will address essentially five legal issues: 1) jurisdiction; 2) whether an unfair act or unfair method of competition exists; 3) what is the domestic industry; 4) whether the domestic industry is efficiently and economically operated; and 5) whether the unfair acts have the effect or tendency of substantially injuring the domestic industry. As a practical matter, during a Section 337 investigation jurisdiction is rarely a problem as most proceedings are conducted in rem. The ITC has found the unfair act in a number of ways including patent infringement, trademark infringement, and theft of trade secrets. The domestic industry is usually defined according to the exploitation of the patent approach defining the industry as the patentee and its suppliers. No domestic industry has ever been denied relief due to lack of efficient operation. Finally, the injury requirement is a very low standard which may be satisfied by a simple threat of lower prices from a competitor. For a more complete discussion of each legal issue addressed in a Section 337 investigation and the manner in which each is resolved, see Perry, Administration of Import Trade Laws by the United States International Trade Commission, 3 B.U. INT'L L. J. 345, 437-447 (1985).

The ITC also has the option of initiating its own investigation in the public's interest, see 19 C.F.R. § 210.58; however, this option is seldom exercised. See Certain Apparatus for Flow Injection Analysis and Components Thereof, USITC Pub. 1665, Inv. No. 337-TA-157 (Nov. 1984).

40 See, e.g., Automatic Crankpin Grinders, USITC Pub. 1022, Inv. No. 337-TA-60 (Dec. 1979). (The Commission determined there was a violation of Section 337 but concluded public interest factors precluded imposition of remedies).

41 See supra note 9.

42 The General Agreement was never submitted to nor ratified by the U.S. Senate. It is an executive agreement entered into by the President pursuant to authority
Thus, United States commercial policy concerning internal trade regulation is subject to the nation’s international obligations. The General Agreement operates by setting forth broad prohibitions against certain activities and then allowing those activities only where they fall within an exception expressly enumerated in the Agreement. Though the Agreement does not specifically address unfair trade practices, paragraph two of Article III, commonly known as the national treatment provision, provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Thus, in the area of foreign trade, any nation extending trade advantages to domestic producers through internal regulation must also extend these advantages to foreign producers seeking access to United States markets. Where advantages afforded to domestic producers are not similarly extended to foreign producers, such differential treatment may only be justified within an express exception. Article XX(d), for example, provides an express exception for domestic laws and regulations concerning the protection of intellectual property rights. This exception, granted him by the Reciprocal Trade Agreements Act of 1934, 48 Stat. 943 (1943), as amended by 19 U.S.C. § 1351 (1958). The United States Supreme Court has held that international agreements which are negotiated and proclaimed by the President are "treaties" within the supremacy clause. United States v. Belmont, 301 U.S. 324, 330-32 (1937); United States v. Pink, 315 U.S. 203 (1942). See also Cardozo, The Authority in Internal Law of International Treaties: The Pink Case, 13 SYRACUSE L. REV. 544, 553 (1962).

43 Id.
46 See id.
47 See supra note 44 and accompanying text.
48 GATT, supra note 9, Article XX provides for general exceptions and reads in part: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction.
however, is subject to certain conditions, the most relevant being that the exception must be "necessary to secure compliance with laws or regulations which are not [otherwise] inconsistent with the provision of this Agreement."  

Where the exception is inapplicable, any resulting inferior treatment violates the Agreement.

II. CURRENT STATUS OF SECTION 337 BEFORE THE GATT

The AKZO/DuPont dispute marks only the second time a GATT Panel will examine certain aspects of Section 337. The first Panel to do so resulted from the ITC decision in In Re Spring Assemblies

on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

....

(d) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph four of Article II and Article XIII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices ....

49 Id.

50 Though the General Agreement promotes negotiation as its primary dispute resolution mechanism, the agreement does provide a skeletal provision for the adjudication of trade disputes. Article XXIII provides:

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representation as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

As developed, the panel procedure begins when complaints submitted to the Contracting Parties are referred to a "panel of experts," usually consisting of five members who represent neutral countries. The Panel conducts evidentiary hearings where both parties are allowed to present their cases. After these hearings, the Panel delivers its findings of fact and ruling on the merits in a written recommendation to the Contracting Parties. Unless one of the parties objects, approval is usually automatic. For a critical analysis of this dispute resolution mechanism see Hudec, Thames Essays, ADJUDICATION OF INTERNATIONAL TRADE DISPUTES (1978).

51 See supra note 14 for the first GATT examination of Section 337.
and Components Thereof (Spring Assemblies I). In *Spring Assemblies I* the ITC determined that a Canadian importer of automotive spring assemblies violated Section 337 on the grounds “that the spring assemblies infringed a United States patent and were the product of a process which, if practiced in the United States, would infringe a United States patent, the effect or tendency of which was to substantially injure an industry, efficiently and economically operated in the United States.” The ITC subsequently ordered that imports of the assemblies from all sources be excluded from entry and sale in the United States.

In response to the ITC’s exclusion order Canada requested the establishment of a GATT panel, pursuant to Article XXIII:2 of the General Agreement, to reconcile the differential treatment of imported goods which resulted from the application of Section 337. Canada advanced three main arguments before the Panel to demonstrate the “protectionist purpose and effect of Section 337.” First, Canada argued that the term “unfair methods of competition and unfair acts” served as a general term applied in all types of cases, including patent cases, wherever its use would protect a domestic industry. Canada conceded that GATT Article XX allowed for certain exceptions to the national treatment provision but denied the existence of any provision authorizing differential treatment based on grounds of “unfair methods of competition and unfair acts” found in Section 337.

Secondly, Canada argued that with respect to patent law, foreign producers received treatment less favorable than domestic producers through their exposure to double jeopardy. Canada explained that a domestic patentholder in a patent infringement dispute with a domestic producer could only seek remedy in a United States civil court,
while the same patentholder in a dispute over patents with a foreign producer could seek remedy either in a United States civil court, before the ITC, or both. Canada believed the potential for harassment to be obvious, since this procedure subjected the importer to separate proceedings before separate bodies. Moreover, Canada asserted, the United States was well aware that duplicative proceedings were internationally disfavored.

Canada's last major argument concerned the many disadvantages facing the respondent in a Section 337 proceeding as compared to similarly-situated respondents before a United States civil court. Canada asserted that procedurally the ITC utilized different rules of evidence and burdens of proof than did a federal court. In addition, Canada claimed that ITC representatives interposed government representation into patent disputes, that the twelve-month time limit often provided insufficient time for a complete presentation of the case, and that all legal and equitable defenses were not available as a respondent could not counterclaim before the ITC. Canada claimed these disadvantages made it more likely that a foreign infringer rather than a domestic infringer would be sued for patent infringement.

Canada believed these discriminatory consequences of Section 337 proved that the section operated as a "whole system of law for the protection of United States industry from injurious import competition," rather than as a mechanism to secure the enforcement of United States patent law, as claimed by the United States.

60 Id. This argument is more fully addressed at notes 148-164 infra and accompanying text.
61 Spring Assemblies II, supra note 14, at 112. One commentator noted that the respondent suffers substantial harassment potential for the following reasons: (1) Section 337 investigations can go forward without regard to any other provisions of law; (2) the addition of the commission investigative attorney to Section 337 discovery procedure makes complainant's action under the statute comparatively easier than those in other forms; (3) Section 337 is a relatively little-known statute, especially to foreign respondents. See Comment, Scope of Action Against Unfair Import Trade Practices Under Section 337 of the Tariff Act of 1930, 4 Nw. J. Int'l. L. & Bus. 234, 235 n. 2 (1982).
62 Spring Assemblies II, supra note 14, at 112. Canada noted that such duplicative proceedings had also existed in antidumping and countervailing duty areas but had changed in 1978 as a result of international disfavor at the multinational trade negotiations. Id.
63 Id. at 113.
64 Id.
65 Id.
66 Id. at 126.
The compatibility of Section 337 with the General Agreement presented an issue of first impression for the Panel. Before reaching a decision regarding Section 337, the Panel termed the applicability of an Article XX(d) exclusion a threshold question: if the exclusion applied, any further examination of consistency between the exclusion order and the General Agreement would not be required. The Panel deemed the exclusion order necessary to protect the patent holder’s rights under existing United States law and concluded that any remedy from a civil court would be inadequate. As Section 337 provided the only effective remedy to secure compliance with United States patent law, the Panel found the authorization of the exclusion order “necessary” within Article XX(d) and therefore not incompatible with the General Agreement.

This Panel decision, however, is of very suspect legal value. By applying the “necessary” exception to the case, the Panel avoided any review of the consistency of Section 337 to relevant provisions of the Agreement. The Panel’s action, therefore, precluded a direct examination of the issues which led to the Canadian complaint. Nevertheless, the Panel suggested the “strong possibility” that other Section 337 investigations might violate the General Agreement and, by way of observation, noted that its finding “carried no implication that the use of Section 337 was an entirely satisfactory means of dealing with patent-based cases.” Consequently, this failure to address the specific dispute at issue or to provide any definitive guidance on the subject caused many qualifications and reservations, rendering the report essentially impotent. As the pending aramids case before

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67 Id. at 124.
68 Id. at 126.
69 Id.
70 Id. at 127. The panel decision stated:

The Panel did not, therefore, exclude the strong possibility that there might be cases, for example involving high-cost products of an advanced technical nature and with a very limited number of potential users in the United States, where a procedure before a United States court might provide the patent holder with an equally satisfactory and effective remedy against infringement of his patent rights. In such cases the use of an exclusion order under Section 337 might not be necessary in terms of Article XX(d) to secure compliance with laws and regulations (i.e. United States patent law) which were not inconsistent with the General Agreement. If therefore Article XX(d) were found not to be applicable, such use would be subject to the other relevant provision of the General Agreement.

71 After the Panel report had been before the Council for several meetings with no agreeable resolution the Council Chairman proposed to the Council:
the Panel demonstrates, the Panel decision in *Spring Assemblies* resolved very little concerning Section 337.

### III. THE AKZO/DuPONT TEST CASE

The Panel decision in *Spring Assemblies* noted that the substance of patent infringement cases could vary considerably, and in some factual circumstances an Article XX(d) exception would not be necessary to secure compliance with United States law. This suggestion left foreign producers waiting for an appropriate case to test the Panel's supposition. The European Community believes it has found the appropriate test-case in *RE: United States Litigation Between E.I. DuPont De Nemours & Co. and AKZO N.V.*

AKZO and DuPont have been involved in an ongoing dispute involving the manufacture of aramid fibers since 1980. The specific
litigation which resulted in the present GATT panel investigation began in April, 1984, when DuPont filed a complaint with the ITC alleging patent infringement through unfair methods of competition and unfair acts in the importation or sale of the aramids. After an investigation in which both parties participated, the ITC concluded that the importation and sale of the fibers did constitute an unlawful act or

with aramid samples and possessed no existing commercial product plan, the court felt there was no real issue to be litigated. See ENKA v. DuPont, 519 F. Supp. 356 (D. Del. 1981).

In October, 1983, after AKZO had begun construction of a major manufacturing facility in the Netherlands, AKZO again filed suit in Delaware seeking to have DuPont's patents declared invalid. DuPont moved to dismiss AKZO's action, filed a counterclaim alleging infringement of its patents, and initiated ITC proceedings on its process patent, the proceeding which ultimately has become the subject of the GATT panel investigation. The District Court dismissed AKZO's claims with regard to DuPont's two process patents for lack of jurisdiction, declined to exercise jurisdiction on the product patents because of the parallel ITC proceeding, and dismissed DuPont's counterclaim for improper service of process. AKZONA v. DuPont, 607 F. Supp. 227 (D. Del. 1984).

Lastly, in May 1985, AKZO filed suit in the United States District Court of Virginia (DuPont manufactured Kelvar at its Spruance Plant in Richmond, Virginia) seeking an injunction and damages for the deliberate infringement of another of its process patents. DuPont counterclaimed that AKZO's patent was unenforceable in view of prior arts and therefore could not be infringed. The District court held AKZO's process patent invalid for obviousness. AKZO N.V. v. DuPont, 635 F. Supp. 1336 (E.D. Va. 1986). This decision was subsequently upheld on appeal. AKZO N.V. v. DuPont, 810 F.2d 1148 (Fed. Cir. 1987). Recently completed or pending patent litigation between AKZO and DuPont also exists in the Netherlands, Great Britain, France, Germany and Japan. Complaint for ENKA B.V., Commission Decision, supra note 10 [hereinafter AKZO Complaint].

Because this litigation involved a process patent the complaint was brought under Section 337(a). That section provides:

Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.


Foreign producers feel that Section 337(a) represents a substantive extension of U.S. patent law which, because of difficulties for foreign producers in bringing claims before the ITC, grants U.S. process patent holders a separate right unavailable to foreign producers. AKZO Complaint, supra note 75 at 11-13.

The original complaint filed by DuPont named as respondents AKZO N.V., ENKA B.V., and Aramide Maatschappij v.o.f., all of the Netherlands, and AKZONA Inc. of Enka, North Carolina. AKZO N.V. v. USITC, 808 F.2d 1471, 1475 (Fed. Cir. 1986).
method of competition in violation of Section 337.\textsuperscript{77} Finding the fibers to be manufactured abroad by a process which, if practiced in the United States, would have infringed a United States patent process covered by the claims of United States Letters Patent No. 3,767,756 assigned to DuPont, the ITC determined a limited exclusion order to be the appropriate remedy.\textsuperscript{78} Subsequently, on November 25, 1985, the ITC issued an order excluding the importation into the United States of certain aramid fibers made abroad by AKZO or its affiliated companies.\textsuperscript{79}

Two weeks after the issuance of the ITC order, AKZO lodged a complaint with the Commission alleging that the application of Section 337 to AKZO’s importation of the aramids and the resulting exclusion order constituted an illicit commercial practice by the United States Government which threatened injury to a Community industry.\textsuperscript{80} Specifically, AKZO claimed that certain ITC procedures preventing respondents from raising a counterclaim, considered by AKZO to be essential to an effective defense, violated the national treatment provision of Article III of the General Agreement.\textsuperscript{81} AKZO also claimed that this violation did not fall within the parameters of the general exception provisions of Article XX.\textsuperscript{82} The Commission held the procedure followed by the ITC pursuant to Section 337 to be less favorable to the respondents than the procedures in the United States district courts, and determined that this practice thereby denied national treatment as required by the General Agreement.\textsuperscript{83} The Commission then held the evidence of an illicit commercial practice and resultant threat of injury sufficient to warrant initiation of GATT procedures for consultation and dispute settlement.\textsuperscript{84}

\textsuperscript{78} Id. at 1969. United States Letters’ Patent No. 3,767,756 (756 patent) is a process patent. Claim 13 of the 756 patent covers the process of producing aramid fiber on a commercial basis. This was the only patent DuPont named in its complaint before the ITC.
\textsuperscript{79} Id. at 1971-72. The limited exclusion order prohibited the entry of aramid fibers in the form of fiber, yarn, pulp, staple, chopped fiber, paper, felt, or fabric. Other commercial applications of these fibers include rope, tires, bulletproof clothing, and in substitutes for steel, aluminum, asbestos, nylon, and cotton. Id.
\textsuperscript{80} Commission Decision, supra note 10, at 546.
\textsuperscript{81} Id. at 547.
\textsuperscript{82} Id. See supra note 48 for relevant exceptions.
\textsuperscript{83} Id. at 550.
\textsuperscript{84} Id. The procedure by which the Commission initiates consultation before a GATT Panel is provided for under Article 6 of Council Regulation 2641/84.
IV. Is Section 337 consistent with United States International Obligations Under the General Agreement?

The central theme of United States trading partners in their objections to Section 337 is that the statute and its exclusion order remedy are not "necessary" within the meaning of the exception; and even if, under some particular factual circumstance, they can be considered necessary, the statute's administration is nevertheless inconsistent with the national treatment provision of the Agreement. Therefore, United States trading partners claim the exception should never be applicable since any application of Section 337 violates the Agreement's broad prohibition against inferior treatment. In addressing those contentions, any analysis of Section 337's compatibility with the Agreement entails a two part approach: first, whether Section 337 provides less-than-national treatment, and second, whether the exception allows such treatment.

A. Does the administration of Section 337 provide less-than-national treatment?

United States law provides for an infringement action against domestic producers accused of infringing United States patents. With regard to imported goods accused of infringing a United States patent, a domestic patent holder has a choice: he may bring an infringement action before a federal court, or seek an exclusion order pursuant to Section 337. Foreign respondents to a Section 337 investigation argue that subjection to separate procedures imposes upon them a greater burden than does the single infringement procedure faced by a domestic respondent. Accordingly, the respondents claim that they are not simply subject to either one...
procedure or the other, but instead are often faced with both procedures simultaneously.88 Technically, without coming under an existing exception, this double jeopardy violates the national treatment provision solely because foreign respondents face a proceeding which domestic respondents do not.89

Proponents of Section 337 claim that Section 337 is necessary to secure compliance with United States patent laws and other unfair trade laws generally.90 They correctly assert that national treatment does not necessarily mean identical treatment, but rather that domestic and foreign products need only be treated equally.91 Therefore, they argue, different or parallel measures may be used so long as they have the same enforcement outcome. The proponents argue that Section 337 provides a remedy for two specific problems which United States federal courts cannot: service of process and enforcement of judgments.92 Valid service of process is necessary to proceed before a federal court; however, such service on foreign respondents is especially expensive and time consuming and at times altogether impossible because regular service by mail is easily avoided by a simple refusal to accept delivery.93 The second problem concerns the enforcement of judgments against foreign defendants. The remedies available in United States courts, injunction and damages, are only enforceable within a court's particular jurisdiction and where the respondent has sufficient assets in the United States to satisfy any judgment. Because these remedies can only be enforced extraterritorially through foreign courts they are at times wholly ineffective.94 Section 337, by contrast, provides for in rem jurisdiction over unfair imports.95 The exclusion order remedy available under Section 337

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88 This threat of facing simultaneous proceedings on essentially the same issues is not theoretical. In refusing to enjoin a simultaneous ITC proceeding, the U.S. District Court for Delaware stated, "... Congress, as the source of this court's patent jurisdiction and the ITC's jurisdiction, has made the choice to permit an overlap of issues in these two fora. It cannot, therefore, be said that the simultaneous prosecution of an ITC action is an unlawful intrusion upon this court's patent jurisdiction." In Re Convertible Rowing Exerciser Patent Litigation, 616 F. Supp. 1134, 1143 (D.C. Del. 1985).
89 See supra notes 44-46 and accompanying text.
90 See generally, Spring Assemblies II, supra note 14, at 121.
91 Id. at 123.
92 Id. at 116-17.
93 Id. at 116.
94 Id. at 117.
ensures the protection of domestic industry by stopping the unfair import at the border. Consequently, proponents argue that Section 337's jurisdiction and remedy are necessary to ensure the same level of compliance as would be available in domestic courts.

Article III of the General Agreement operates to prevent the inferior treatment of foreign goods. As previously noted, the treatment need not be identical, only not less than that afforded goods of national origin. The relevant inquiry then is whether these separate procedures operate as the functional equivalent of the single procedure for accused domestic infringers or whether the separate procedures present such procedural inequities that they result in less-than-national treatment. To answer this inquiry, the perceived major disadvantages of the separate Section 337 procedure must be examined.

1. The strict and arbitrary time constraints do not allow for a full and fair adjudication.

A Section 337 investigation operates under strict time constraints. Though trial-like in that it includes extensive discovery, motions, party conferences, and hearings, the investigation must be concluded and the ITC must reach a final determination within twelve months (within eighteen months if a case is deemed more complicated). Within this period, stringent intermediate deadlines are imposed by code for the respondent's response to service (20 days from the date of service) and to all responses to requests for interrogatories, admissions, and production of documents (within 10 days of service of request). The Administrative Law Judge (ALJ) sets all other deadlines for particular

96 Exclusion orders are enforced by the U.S. Customs Service. 19 U.S.C. § 1337(d) (1982).
97 On appeal from the ITC determination in Aramid Fiber, the Court of Appeals for the Federal Circuit (CAFC) framed the appropriate inquiry as whether AKZO was afforded the same rights afforded to domestic firms in a Section 337 proceeding before the ITC. AKZO N.V. v. USITC, 808 F.2d 1471, 1485 (Fed. Cir. 1986). This is incorrect. The appropriate inquiry concerning Article III national treatment is whether, in patent proceedings, those who deal in foreign goods are afforded the same treatment as those who deal in domestic goods. As domestic patent proceedings take place in U.S. district court and patent proceedings involving foreign goods mostly occur at the ITC, the appropriate comparison concerns U.S. district court proceedings and Section 337 ITC proceedings.
and all stages must be conducted consistent with the Administrative Procedure Act. Failure to comply with any of these deadlines subjects the failing party to stiff sanctions.

Within this framework, the procedural history of the aramids case before the ITC evidences the inferior treatment afforded AKZO due to these time constraints. The ITC ordered investigation of an alleged Section 337 violation of May 14, 1984. Upon service, AKZO had twenty days not only to respond to DuPont's complaint and notice but to answer requests for interrogatories and documents as well. This stringent regimen carried over into pretrial preparation as the ALJ set a discovery cut-off date for Oct. 26, 1984 and a December 3, 1984, evidentiary hearing date. Due to the number and complexity of the issues required to be adjudicated, AKZO motioned for an additional four months in which to prepare. The ITC finally acted on this motion seven working days prior to the start of the originally-scheduled hearing and then granted only a ten-week extension. During this discovery period an incredibly large volume of discovery was sought and elicited, including over a half-million pages of documents.

The evidentiary hearing on violation took place between February 11 and February 23, 1985 with additional rebuttal testimony heard.

102 19 U.S.C. § 1337(c) (1982 & Supp. III 1985) requires that: "Each determination under subsection (d) or (e) of this section shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5." The APA may be found at 5 U.S.C. §§ 500-576 (1982 & Supp. III 1985).
103 These sanctions include adverse inferences, the preclusion of supporting evidence, and an adverse determination against the party. 19 C.F.R. 210.36; see Certain Multicellular Plastic Film, USITC Pub. No. 987, Inv. No. 337-TA-54 (June, 1979). (A respondent who did not comply with a discovery order was sanctioned by an adverse inference which ultimately lead to an exclusion order against its products).
106 Id.
107 Id. at 22-23. The ITC acted on AKZO's motion on Nov. 19, 1984. Id.
108 Id. at 23. In addition, over one hundred depositions were taken and approximately six hundred interrogatories and requests for admissions were served. Id.
on February 28 and March 5, 1985.109 During these fourteen days the hearings regularly lasted twelve-to-fourteen hours daily including Saturdays with little break,110 a pace which made proper witness and trial preparation virtually impossible. The ALJ issued an Initial Determination on May 9, and after partial review, the ITC, on November 25, 1985, affirmed a limited exclusion order.111 Although, the entire proceeding before the ITC involving complex patent, anti-trust, and economic issues lasted almost eighteen months, all investigation, preparation, and evidentiary hearings took place in the first ten months.

The harshness of these time constraints becomes clearer when compared with the more equitable procedural treatment provided by the federal courts. Paula Stern, former Chairwoman of the ITC, testified before a House subcommittee that "only half the patent-based trials in federal district courts are completed within 29 months."112 In contrast, the ITC constraints hardly seem reasonable or to provide equal treatment. Chairwoman Stern added, "[t]his time differential for adjudication is significant and may provide tactical advantages that could translate into abridgement of rights."113 Her testimony refers to the lengthy court proceedings failing to remedy situations quickly enough, but as the AKZO case shows, the reverse may also be true. Unnecessarily short time limits can prevent respondents from obtaining a full and fair adjudication of the issues. The addition of a third party to the litigation, the ITC investigative attorney, can only further

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110 AKZO Response Brief, supra note 105, at 23.
111 Certain Aramid Fiber, 8 I.T.R.D. (BNA) 1968-72 (March, 1986). On June 3, AKZO requested ITC review of the ALJ's initial determination. AKZO Complaint, supra note 75 at 28. The standards for granting review of an initial determination include:

(A) A finding or conclusion of material fact is clearly erroneous;
(B) A legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or
(C) The determination is one affecting Commission policy.


113 Id. at 20-21.
aggravate these constraints. Clearly, this disparate treatment may amount to less-than national treatment.

2. The extensive use or overuse of the protective order violates rights of due process.

In Section 337 proceedings, a general protective order enables either party to initially designate information as confidential, thus avoiding extensive disclosure during discovery. This designation restricts disclosure of information to the opponent’s outside counsel, experts, and those who can make the requisite showing of need. This initial designation, however, is not conclusive. Upon objection by a party, procedures within the protective order itself will typically allow for voluntary resolution by the parties; failing that, either party could submit its objection to the ALJ or the ITC for final resolution. The protective order plays an important role in Section 337 investigations since the strict time constraints force the ITC to be heavily dependent on the parties’ voluntary participation in discovery. Only through complete participation by the parties will the ITC be able to carry out its specific tasks; any unnecessary disclosure of sensitive information would undoubtedly affect the parties’ willingness to participate. The ITC in Rotary Wheel Printers noted that “protection of confidential information is crucial to the Commission’s ability to carry out its statutory responsibilities.” Hence, the ITC has taken

\[\text{References:} \]


116 In Re Certain Rotary Wheel Printers, Inv. No. 337-TA-145, 5 I.T.R.D. (BNA) 1933, 1937 (November, 1983). Commission rules do not specifically address the release of confidential information. Commission practice, however, is that the party seeking access must show that it has no other reasonable way of adequately preparing and presenting its arguments without the information. Id.

117 An example of this typical provision is paragraph 10 of the protective order issued by the ALJ in the aramids case. This paragraph provides a mechanism whereby the objecting party “shall confer [with the supplier] as to the status of the subject information proffered within the context of this order” and if within 10 days this voluntary resolution failed, either party could submit the issue to the ALJ or the Commission. This mechanism could also be used to permit disclosure of classified material to other persons. AKZO N.V. v. U.S. Int’l Trade Comm’n, 808 F.2d at 1483 (Fed. Cir. 1986).


120 Rotary Wheel Printers, 5 I.T.R.D. (BNA) at 1935.
the stance that "in Section 337 investigations, it is the exception rather than the rule to release confidential information to in-house counsel." Many respondents in Section 337 actions claim that the overuse of the protective order violates principles of fundamental due process by depriving a party of its rights to confrontation, to rebuttal, and to effective assistance of counsel.

Due process principles are incorporated into administrative agency proceedings, including those of the ITC, by the APA. The Act accords parties the right "to appear in person or by or with counsel or other duly qualified representative in an agency proceeding." These rights, however, must be qualified by the nature of the administrative proceeding and that proceeding's needs to perform its prescribed task. Thus, a party's rights to participation and access to confidential information must be balanced by the ITC's need to protect confidentiality. To determine whether, to whom, and under what conditions to release confidential information, the ITC conducts a balancing test, weighing the parties need to the information against the harm that information would cause the supplier, as well as the forum's interest in maintaining confidentiality.

AKZO advanced this due process argument on appeal of the Aramids case to the CAFC. Claiming that the protective order protected 80% of the documents and testimony submitted by DuPont, AKZO asserted that its inability to review these documents resulted in AKZO being unable to assist its outside counsel in the preparation and litigation of its case. AKZO argued the protective order severely hindered its defense because, when combined with the severe time constraints, AKZO had virtually no time to acquaint its counsel with its own products, production processes, or marketing efforts. AKZO considered the order especially prejudicial because as DuPont and

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121 Id.
126 Rotary Wheel Printer, 5 I.T.R.D. (BNA) at 1937.
127 AKZO Complaint, supra note 75 at 32. DuPont rebutted this computation by explaining that AKZO categorized as "confidential" every document on which any confidential material was found. DuPont added that, on this basis, 78% of AKZO's documents were confidential. Brief by intervenor-Appellee at 45, n. 46, AKZO N.V. v. U.S. Int'l Trade Comm'n 808 F.2d at 1476 (Fed. Cir. 1986).
128 AKZO Complaint, supra note 75 at 32.
AKZO were the only manufacturers of the aramids, there existed no outside experts on the technology and marketing aspects of the fibers.129

Relying predominantly on *Rotary Wheel Printers* the CAFC found no violation of AKZO’s due process rights.130 Noting that AKZO had more than 90 representatives—including technical experts and four large law firms with unrestricted access to DuPont’s confidential information—and that AKZO never invoked its dispute resolution procedures to challenge DuPont’s confidential designation, the CAFC determined that AKZO failed to demonstrate that the protective order caused them actual harm.131

Based on AKZO’s failure to present any evidence of need for access, and DuPont’s unchallenged assertion of a need to protect its confidentiality, the CAFC’s decision seems correct.132 The CAFC, however, failed to address the important question under a national treatment analysis: whether the different standards of the ITC and the federal courts governing what constitutes confidential information provides inferior treatment.133 The CAFC did not examine this issue because

129 *AKZO Complaint Brief*, supra note 105 at 27.
131 *Id.* at 1484-85.
133 Before the Commission, AKZO argued that although the ITC rule was modeled on Federal Rule of Civil Procedure 26, the ITC interprets it very differently. *AKZO Response Brief*, supra note 105, at 27. Rule 26(c) provides:

(c) PROTECTIVE ORDERS. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may,
of a number of decisions upholding confidentiality which "strongly suggest the validity of carefully tailored protective orders allowing exceptions to be made if adequate proof is made."\textsuperscript{134} This finding, however, provides no guidance with regard to the question of national treatment. Where a difference in standards and application of protective orders exists, there also exists a very real possibility of inferior treatment.

3. \textit{Respondent may not have all related claims settled in one proceeding.}

As a rule, the ITC will only examine those claims set forth in the complaint because every element of each independently-asserted claim must be proven in order to warrant a remedy.\textsuperscript{135} Although there exists no regulatory prohibition preventing the ITC from entertaining related claims, even compulsory counterclaims, in practice the ITC refuses to do so. While such a practice is seemingly justified by the strict time constraints imposed on the ITC process, the practice of the ITC is in stark contrast to the practice of federal courts. Rule 18 of the Federal Rules of Civil Procedure provides:

\begin{quote}
A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.\textsuperscript{136}
\end{quote}

United States courts typically allow these claims primarily on the basis of judicial economy — hearing related issues with the same parties at the same time.\textsuperscript{137} Although the rules governing Section 337 state

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\textsuperscript{134} AKZO N.V. v. U.S. Int'l Trade Comm'n, 808 F.2d at 1485.
\textsuperscript{135} In her testimony before the House Subcommittee, Former Chairwoman Stern acknowledged: "the ITC does not consider counterclaims, contrary to the judicial principle of resolving all disputes between the parties at one time in one forum." \textit{Stern Statement, supra} note 112, at 20. For a summary of the elements needed to warrant a remedy, see \textit{supra} note 39.
\textsuperscript{136} FED. R. CIV. P. 18a.
\textsuperscript{137} \textit{See Great Lakes Rubber Corp. v. Herbert Cooper Co.}, 286 F.2d 631, 634 (3d Cir. 1961) ("where multiple claims involve many of the same factual issues, or the same factual and legal issues, or where they are offshoots of the same basic controversy between the parties, fairness and considerations of convenience and of economy require that the counterclaimant be permitted to maintain his cause of action.")
that all legal and equitable defenses are available, no ITC equivalent of the notion of judicial economy appears to exist.

The ITC investigation of Certain Aramid Fibers evidences the prejudice that this differential treatment may create. As noted previously, DuPont and AKZO are the only companies with the capability of manufacturing the fibers on a commercial basis. At the time of investigation DuPont held two patents covering its manufacturing processes and four patents covering its fiber products while AKZO held three process and three product patents. The Section 337 investigation began when DuPont alleged that AKZO imported products into the United States made overseas by a process which, if practiced in the United States, would have been prohibited by DuPont’s rights under one of its process patents.

At hearing, AKZO sought to counterclaim that DuPont’s technique in the manufacture of its aramid products infringed one of AKZO’s process patents. Essentially, AKZO claimed that if both its process patent and DuPont’s process patent were valid and both were infringed then DuPont could not continue its manufacture of the aramids because AKZO’s patented process would act as a blocking patent—it covered a prior process used in conjunction with the other patents to produce the fiber commercially. Consequently, if DuPont could not produce its fiber commercially, it could not prove the existence of an efficient and economically-operated domestic industry and could

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138 See 19 U.S.C. § 1337(c). See supra note 33 for the text of this section.
139 AKZO Complaint, supra note 75 Attachment A pp. 2-5. DuPont holds its process patents under U.S. Letters No. 3, 787, 756 (756 patent) and No. 30,352 (intermediate product), and its product patents under U.S. Letter numbers 3,817,941; 3,819,587; 3,869,429; 3,869,430.
AKZO holds process patents under U.S. Letters numbers 4,376,730; 4,308,374 (the 374 patent); and 4,320,081, and its product patents under U.S. Letters numbers 4,368,615; 4,455,341; 547,491 (application sn).
141 AKZO Complaint, supra note 75 at 34.
142 AKZO’s 374 process patent covered a polymerization process utilizing a N-Methylpyrolidone and calcium chloride (NMP/CaCl$_2$) solvent system. This solvent system is attractive because it is a noncarcinogenic. DuPont originally used a solvent containing hexamethylphosphoramide (“HMPA”) which was found to be an experimental carcinogen. In 1982, DuPont began using the NMP/CaCl$_2$ solvent which it had previously developed independent of AKZO but which would have been covered by AKZO’s 374 patent. AKZO argued that if allowed to counterclaim against this infringement, DuPont’s 756 patent would be blocked as AKZO’s NMP/CaCl$_2$ solvent was a process required by DuPont’s process. See AKZO N.V. v. E.I. DuPont De Nemours, 635 F. Supp. 1336-48.
not meet the requirements for the exclusion order remedy. The ITC's refusal to hear AKZO's counterclaim, resulted in AKZO's subsequent exclusion from the United States market since the ITC examined only DuPont's process patent.

The potential prejudice which could result from the failure to allow respondents to counterclaim seems obvious. In all probability, a federal district court would have heard AKZO's counterclaim and any other claims related to the aramids, including those concerning other patents. In contrast, the ITC procedures potentially allow a party to manipulate an entire case by confining the ITC's examination to one particular matter. In *Aramid Fibers*, DuPont astutely chose a single patent (of its six), confined the examination to that patent, proved infringement, and consequently received the draconian exclusion order remedy.

AKZO's inability to get the entire dispute heard in a single forum necessitated the filing of a patent infringement suit in federal court seeking to enjoin DuPont from infringing its patents. In this suit, DuPont counterclaimed against AKZO's process patent and eventually succeeded in having it declared invalid. Regardless of this decision, however, the single most important factor is AKZO's inability to have its claims decided in a single forum under the same rules and procedures to which a domestic respondent would have been entitled. Had AKZO been a domestic respondent before a federal court, the validity of DuPont's patents would have been put in issue and AKZO would not have been forced into the harassment, danger, and expense of two forums to protect itself. The quick decisions accomplished by adherence to Section 337's time constraints cannot justify the inferior treatment possible under these separate and manipulatable procedures.

4. Federal court deference to the ITC allows the ITC to assume a dominant position.

United States district courts and the ITC, under Section 337, share concurrent jurisdiction over patent disputes involving foreign com-

143 *AKZO Response Brief*, *supra* note 105, at 31.
144 See *supra* note 136 and accompanying text.
145 DuPont claims that the case was brought under Section 337a because that section specifically affords the protections of Section 337 to U.S. process patent holders against imports. DuPont adds that holders of U.S. process patents have no other remedy under U.S. law against infringing imports. *DuPont Brief for Intervenor-Appellee at 61-62, n. 74.*
147 *Id.* at 1356.
This concurrent jurisdiction and the problems inherent therein result from the 1974 amendments to the Tariff Act of 1930. By imposing the requirements of the APA on Section 337 investigations, the 1974 amendments created an adjudicatory, trial-like proceeding in the ITC designed to reach a final determination regarding the claim and implement a remedy. The availability of two fora capable of considering similar issues creates inherent difficulties. Allowing parties before the ITC to later relitigate the same dispute before federal courts undermines the legitimacy of the ITC proceeding. If on the other hand ITC decisions are afforded res judicata effect by federal courts, complainants would seek its fast-track remedy, thus rendering federal court jurisdiction pointless. As one commentator recently observed, because the procedures and remedies of the two fora differ significantly, one's choice of forum may have considerable influence on the outcome of the dispute.

The problems for national treatment created by this concurrent jurisdiction emanate from two realities: the procedural discrepancies between the fora, and the recent development of the federal courts to defer to the ITC in unfair trade cases. This development appears logical; if concurrent proceedings are brought before both the ITC and a federal court, the ITC proceeding, because of its time constraints, will be the first to render judgment. The time differential, and the fact that in patent cases both the federal courts and the ITC are reviewed by the CAFC, produces a danger that district courts

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148 Technically the two proceedings rest on different jurisdictional foundations. Congress placed original jurisdiction over patent actions, i.e., patent validity and enforceability, in the federal district courts. 28 U.S.C. § 1338(a). Jurisdiction over unfair import practices was placed in the ITC. 19 U.S.C. § 1337(a). Due to the similarity of issues, however, the jurisdictions of these fora often overlap. For a recent article discussing concurrent jurisdiction and suggesting how jurisdictional conflicts might better be resolved, see Finalyson, Rethinking the Overlapping Jurisdiction of Section 337 and the U.S. Courts, 21 J. WORLD TRADE L. 41 (1987).

149 See supra notes 32-40 and accompanying text.

150 Id.

151 See Union Manufacturing Co. v. Han Back Trading Co., 763 F.2d 42 (2d Cir. 1985).

152 See Finalyson, supra note 148 at 41.

153 Id. at 58. The legislative history of the 1974 Act suggests that "suspension of proceedings may be undertaken by the Commission, as an exercise of its own discretion, or as a result of a court order to that same effect." S. Rep. No. 1298, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7326, 7327 (1985). In practice, however, the ITC rarely suspends its investigations irrespective of other proceedings. See Finalyson, supra note 148, at 55-58.

154 See infra notes 161-64 and accompanying text.
may consider it futile to proceed in such cases. Such deference in unfair trade cases results in the ITC assuming a dominant position on issues common to both fora, and consequently the application of its unique practice and procedures to those cases.

Despite language in the legislative history of the 1974 Act expressly precluding a *res judicata* or collateral estoppel effect of ITC decisions in patent cases, as a practical matter these decisions may still obtain such force. For example, during the ITC investigation of aramid fibers AKZO brought an action for declaratory judgment in federal court seeking to have all six of DuPont’s aramid patents declared invalid, unenforceable, and noninfringed. DuPont admitted jurisdiction over the four product patents but contended that the court had no jurisdiction over the two process patents. The court, concluding that DuPont could not litigate an infringement suit based on its two process patents in a district court, found no jurisdictional basis for AKZO’s declaratory judgment suit on the same issues. The court also declined to exercise pendent jurisdiction over the case because it found Congress provided a specific forum — the ITC — for the protection of those interests regarding imports.

Apart from any possible *res judicata* effects in lower court proceedings, the differing standards of review utilized by the CAFC upon appellate review of patent cases poses a threat to national treatment of foreign litigants. Pursuant to the Federal Courts Improvement Act of 1982, the CAFC possesses appellate review of both federal courts and the ITC. District Court decisions of factual determinations are reviewed under a clearly erroneous standard. The CAFC, on the

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155 The legislative history specifically states that “decisions by the U.S. Court of Customs and Patent Appeals reviewing Commission decisions under section 337 should not serve as res judicata or collateral estoppel in matters where U.S. District Courts have original jurisdiction.” Finance Comm. Rep., *supra* note 27, at 7212.


157 *Id.* at 229.

158 *Id.* at 231.

159 *Id.*

160 *Id.* at 232.

161 See *supra* note 38.

162 FED. R. CIV. P. 52.
other hand, will uphold ITC factual determinations where substantial evidence exists on the record.\textsuperscript{163} This disparity subjects foreign producers to a double curse; not only are foreign infringers subject to the more deferential review standard given ITC decisions on appeal, but foreign complainants are forced to litigate their claims in district courts and meet the higher standard of review while their domestic counterparts may utilize the ITC.\textsuperscript{164} Clearly this disparity is a double standard operating for the benefit of domestic producers.

\textbf{B. Is Section 337 a "necessary" exception to the principles of the General Agreement within the sense of Article XX(d)?}

Article XX(d) of the General Agreement provides an exception from GATT obligations for the adoption or enforcement of measures that are necessary to secure compliance with national laws or regulations concerning the protection of patents, trademarks, copyrights, and the prevention of deceptive practices.\textsuperscript{165} Proponents of Section 337 label the section a trade remedy statute operating against unfair imports which, because of certain difficulties existing under United States law, necessarily exist to secure compliance with United States patent laws.\textsuperscript{166} In other words, Section 337 is necessary because, in circumstances involving foreign infringers, it possesses the only effective remedy — the general exclusion order.

The GATT Panel in \textit{Spring Assemblies} accepted this view of Section 337 on the specific facts of that case. Considering the potential conflict of this statute with GATT principles, the Panel noted that:

the GATT recognized, by the very existence of Article XX(d), the need to provide that certain measures taken by a contracting party to secure compliance with its national laws or regulations which otherwise would not be in conformity with the GATT obligations


\textsuperscript{164} As a practical matter most foreign patent owners can not bring a claim before the ITC because they cannot establish the existence of a domestic industry. \textit{See supra} note 39. The importance of this standard of review is illustrated by statistics which show that since the 1974 amendments, holders of United States patents have prevailed on the issue of patent validity in about 65\% of the ITC decisions, whereas United States patent holders prevail on patent validity only 40-45\% in United States district courts. \textit{In Re Convertible Rowing Exerciser}, 7 ITRD 1208, n. 11 (D. Del. 1985).

\textsuperscript{165} \textit{See supra} notes 47-49 and accompanying text.

\textsuperscript{166} \textit{See Stern Statement, supra} note 112, at 21-23.
of that contracting party would, through the application of this provision under the conditions stipulated therein, be in conformity with the GATT provided that the national laws or regulations concerned were not inconsistent with the General Agreement.167

Interpreting the term “measure” found in Article XX(d) as meaning the exclusion order,168 the Panel considered the necessity of the exclusion order to secure compliance with United States patent law. Based on the particular factual circumstances of Spring Assemblies, the Panel concluded that no effective and satisfactory alternative existed in the federal courts and thus action under Section 337 was necessary, thereby falling within the GATT exception.169 The Panel allowed, however, for the “strong possibility” that under different factual circumstances federal court might render an equally effective remedy.170 In such a case, Section 337 would be unnecessary and inconsistent with Article XX(d).

The Panel posited a set of circumstances where Section 337 might be unnecessary which involved a high-cost product of an advanced technical nature with a very limited number of potential users.171 The rationale of this example concerns a federal court’s ability to render an effective remedy in lieu of an ITC exclusion order. While the aramid products may not fit this particular loophole, the rationale may still apply to the aramids circumstance. Aramids are products of an advanced technical nature with an extraordinarily wide range of uses and, hence, potential users.172 For remedy purposes, however, the determinative fact may be that AKZO and DuPont are the only producers with the capability of producing a commercially feasible aramid product. As no other producers are likely to enter the market, the importance of the United States market virtually assures AKZO’s presence in the United States for jurisdictional or enforcement purposes, thus making them subject to the federal courts.173 As the normal hardships in dealing with foreign parties (the basis for Section 337 application) do not apply, Section 337 would be unnecessary in this case.

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167 Spring Assemblies II, at 124-25.
168 Id. at 125.
169 Id. at 126.
170 Id. at 127.
171 Id.
172 See supra note 77.
173 The United States market is currently the largest and technologically most advanced market for the aramids. See AKZO Response Brief, supra note 105, at 54.
Though this case-by-case factual application seems straightforward, the aramid fibers case contains an extra twist. Due to a quirk in United States law, process patent claims may not be brought in federal court. Relying on this anomaly, DuPont asserted that the ITC was the only forum which could entertain DuPont's patent process claim and therefore the Section 337 investigation and exclusion remedy automatically became "necessary." Under existing United States law, this procedural posture forced by DuPont is technically valid. This quirk, however, should not be allowed to conceal the important issue relating to Section 337 — its inequitable administration.

A second approach concerning the question of necessity involves the definition of the term "measure." Focusing on the necessity of the available remedy, the Panel in Spring Assemblies defined measure to mean the exclusion order issued by the ITC. An alternative would be to define measure more broadly to include the entire Section 337 investigation. Consistent with the United States reference to the use of Section 337 in patent infringement cases as the "enforcement mechanism," this redefinition would render the statute unnecessary where its procedures needlessly deny national treatment to foreign respondents.

Similar to this approach, AKZO argued before the Commission that even were the exclusion order necessary, that alone did not justify the Article XX(d) exception. The exception provides that the measures used by a party must be "necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement." Thus, if the laws underlying the measure violate a provision of the Agreement (i.e., the national treatment provision), then the exception won't apply. Perhaps because it invoked the GATT

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174 Several recent bills have unsuccessfully sought to amend the patent statute to enable United States process patent owners to obtain relief in federal court against importation of products made overseas by means of a United States patented process. See e.g., H.R. 1069, 99th Cong., 1st Sess (1985) and H.R. 3776, 99th Cong., 1st Sess. (1985).


176 See supra note 168 and accompanying text.

177 See Spring Assemblies II, at 114-15. The representative of the United States stated, "Section 337 was not there to protect United States industry; its use in patent infringement cases in fact only an enforcement mechanism to protect the rights of United States patent holders." Id.

178 See AKZO Response Brief, supra note 105, at 10.

179 See supra note 48 (emphasis added).
procedures, the Commission chose not to address this specific argument in its opinion except to add that the "Section 337 procedure is not necessary in the sense that, as the practice in practically all other countries shows, infringements of domestic patents by imports can be dealt with in the same way as infringements by domestic products."  

A third, often-repeated argument against the necessity of separate procedures for imports concerns the extra requirements required for remedy in Section 337 investigations. United States patent holders have a right to an effective remedy against infringement based solely upon ownership of their property right. If, however, the separate procedures seek only the same level of compliance, then why must a patent holder prove extra requirements, i.e., domestic industry and injury, in order to secure a remedy against a foreign infringer under Section 337? If the separate procedure is necessary, the ownership of the property right itself should be sufficient. In reality the extra requirements make Section 337 operate as a trade remedy statute and not solely to protect property rights.

Even though the stated purpose of this separate procedure may be a trade remedy, this doesn't justify subjecting a foreign infringer to two procedures. Article XX(d) allows an exception to the general provisions of the Agreement for measures necessary to secure compliance with laws or regulations not otherwise inconsistent with the Agreement. Nothing in United States law prohibits Congress from expanding the jurisdiction of the federal courts to include in specific cases the allowance of in rem remedies. As a result, no necessity or justification exists for subjecting foreign infringers to two procedures while domestic infringers are subject to only one. Since the exception provision does not apply, an examination of the consistency of Section 337 with the relevant GATT provisions is required.

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180 Commission Decision, supra note 10, at 549.
181 For the requirements to obtain remedy in a section 337 proceeding, see supra note 39.
183 For an opinion that this argument is in reality a red herring, see Intellectual Property and Trade: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 99th Cong., 2d Sess. 179, 189-90 (1986) (Testimony of Robert Hudec, Professor of Law, University of Minnesota Law School).
185 For text of Article XX(d) see supra note 48.
186 See U.S. Const. art. III, § 2, cl. 2.
187 See supra notes 41-49 and accompanying text.
V. Comments

The legal issues surrounding Section 337 are extremely complex. Not only do they involve a less-than-well-defined international obligation affecting both United States domestic law and foreign policy, they also affect the role of United States administrative agencies, legal authorities peculiar to the United States legal system. Due to this complexity, it is likely that no real black and white solutions exist to the problems concerning Section 337 administration; perhaps the best response can only be to fashion some better shade of gray. With this in mind, the first step necessary to improve Section 337, or to better bring it in line with United States international obligations, concerns the initiation of a working dialogue between the policy makers and other interested parties to explore existing alternatives.

As a practical matter, however, this dialogue will fall prey to the law of inertia if left solely to the policy makers. Only through international pressure will the United States ultimately decide that United States interests require change in the existing procedures. Hence, the Panel in Aramid Fibers occupies a very important and opportune position. By rendering a decision directly on the Section 337 issues, the Panel could offer true definitive guidance regarding the consistency of Section 337 with United States GATT obligations. By so doing, the Panel could signal its dissatisfaction with the existing structure and begin to exert the pressure needed to initiate such a dialogue.

Many of the issues to be faced by the Aramid Fibers Panel will duplicate those presented in Spring Assemblies. As in Spring Assemblies, before the Panel will examine the consistency of Section 337 with the general principles of the Agreement, it must find that the exception provision of Article XX(d) does not apply. At this stage, proponents of Section 337 will contend that because the aramids case involved a process patent, the ITC was necessary as it provided the only available forum. Understandably, the Panel may be reluctant to examine the domestic legal procedures of a contracting party, but it must not be persuaded by this contention. At issue is not the quirk in United States law excluding process patents from district courts but rather a much broader and more important issue affecting trans-

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188 See supra notes 55-69 and accompanying text.
189 See supra note 48.
190 See supra note 175.
national trade, the administration of Section 337. A definitive ruling on this issue could help dispel many of the doubts concerning the current viability and effectiveness of the GATT's dispute settlement process.

Aside from the GATT's interest in offering some definitive guidance on the use of Section 337, the United States also has an interest in resolving this controversy. During the recent debates over Section 337 reform, practitioners argued against the removal of the industry and injury requirements. Essentially, they considered the existing procedure very effective in defending United States interests and worried that such reform would precipitate numerous international challenges and cause relief to become much less predictable. Many feared that this reform would cause Section 337 to be interjected into the upcoming multilateral trade negotiations at the expense of other United States interests and goals. For reasons other than this reform, these fears are likely to be substantiated. The increasing international disfavor of Section 337 should already render it a topic of discussion and an important defensive mechanism for United States trading partners. If the United States wishes attention to focus on other intellectual property issues, such as the conclusion of an anticounterfeiting code, the United States must take action on Section 337 beforehand.

Despite the complexity of the Section 337 controversy and the fact that any dialogue must entail extensive research and debate, several options exist to better ensure national treatment of foreign litigants. Perhaps the most obvious option would be to transfer the remedial powers of Section 337 to the federal district courts. This option would entail congressional action awarding district courts in rem jurisdiction in patent infringement actions to be used when necessary to secure

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191 AKZO has requested the European Community to retaliate by imposing its own trade restrictions should resort to the GATT dispute resolution mechanism fail. See AKZO Response Brief, supra note 105, at 58-61.
194 Id.
195 Id.
196 See supra note 71. Within the European Community written submissions from numerous industry associations encouraged commission action on the Aramids case. See AKZO Response Brief, supra note 105, at 57-58.
compliance with United States patent laws. Although there exists no constitutional impediment to create this jurisdiction, this option is not without problems. One of the major reasons for the revitalization of Section 337 concerned the amount of time it took district courts to reach a judgment. If jurisdiction were returned to the courts unchanged, the ITC's time constraints would pose serious due process problems. In addition, in areas of assessment of industries and the effects of imports on their competitiveness, the ITC possesses a recognized expertise which may suffer in the federal courts. Further, placing this jurisdiction in the federal courts would entail the executive giving up its presidential override powers. This could pose a danger of the courts rendering decisions concerning particular parties which could have considerable affects on United States foreign policy.

A recent commentary concerning the overlapping jurisdiction of Section 337 and the United States courts presents a second option. The commentator suggests the creation of a mechanism to match and allocate a particular dispute to the forum whose attributes are best suited to decide the issues presented. Although this proposal focuses on the unfairness and wastefulness of the present allocation system (essentially forum shopping), it can also be relevant as an option to promote national treatment. National treatment could be better approximated by the creation of a mechanism to match the particular characteristics of a case to the forum best suited to resolve its problems and by subjecting all respondents, foreign and domestic, to the same mechanism. The determination of such a forum, however, must then constitute a final adjudication. This approach would solve the problems of double jeopardy but could still pose a danger, depending on the mechanism, of matching the majority of foreign respondents with the ITC. Those subjected to the ITC would still face the procedural inequities of that body.

A third option would be the creation of a distinct patent court. Appellate review for patent cases has already been consolidated in the CAFC, so why not create a separate trial court with exclusive patent jurisdiction? This court could be vested with in rem jurisdiction and in time would attain the expertise of the ITC in areas of domestic industry, injury, and import analysis. Such a court could also promote a uniform application of the law and contribute to greater legal

197 See Finlayson, supra note 148.
198 See supra notes 148-60 and accompanying text.
199 See supra note 161.
certainty. This approach, however, also contains its obstacles. This approach would require the removal of the presidential override and thus pose the danger of a court decision impacting United States foreign policy. It would also mean the creation of a specialty court, a move long perceived adverse to the idea that general jurisdiction courts more readily assure a democratic element in a nondemocratic body.

These options are purposefully vague and certainly not exclusive. This Note simply purports to point out the existing problems concerning the consistency of Section 337's administration with United States international obligations pursuant to the General Agreement, and to perhaps provide some avenues of thought for the redress of these problems. Although the Panel's decision in *Aramid Fibers* will play an important role in the determination of the future of Section 337, the Panel's presence already indicates the reemergence of international tension caused by the use of this section. The United States must realize that Section 337 now exists as an albatross which will hamper United States interests in more important areas of international trade. The United States government, in its response before the Commission in *Aramid Fibers* stated, "the issue in dispute was between private parties regarding the extent of rights conferred by national process patents, and any EEC investigation of 'illicit commercial practices' should be based on evidence of a pattern, and not on the basis of a single dispute." The evidence of a pattern is building, and it's time for the United States to act in its own best interest as this unfair legal procedure is certain to reappear in the next round of trade negotiations.

*Nathan G. Knight, Jr.*

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200 *Commission Decision, supra* note 10, at 548.