SECTION 337: A VIEW FROM TWO WITHIN THE DEPARTMENT OF JUSTICE*

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I. INTRODUCTION

Until quite recently, it has rarely been claimed that section 337 of the Tariff Act of 1930 (section 337),¹ was or should be an antitrust statute. In a recent article on section 337 jurisdiction,² it is reported that in nine cases prior to 1972, the Tariff Commission, through a process of informal dismissal of complaints, refused to investigate matters of a suspected antitrust nature. In one case of relatively recent vintage, Ceramic Wall Tile,³ the Tariff Commission was presented with a complaint charging Japanese manufacturers and U.S. importers with price fixing, predation, customer and market allocations, and attempted monopolization, among other unfair acts. The complainants stated in their pleadings that although antitrust and other laws covered the complained-of acts, relief was sought under section 337 because relief under the antitrust laws was "inadequate." The Tariff Commission dismissed the case, stating in part:

The Commission is of the view that inadequacy of relief afforded under the antitrust and other statutes claimed to be violated cannot be presumed. The Commission is further of the view that an investigation under section 337 is not warranted in the premises unless the acts or practices complained of have been dealt with under the antitrust laws or section 5 of the Federal Trade Commission Act and the relief afforded under these statutes has been found wanting.⁴

* The views expressed in this article are personal to the authors and are not necessarily those of the Department of Justice.
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³ Ceramic Wall Tile, (Tariff Comm'n, filed Mar. 29, 1966). See also Kaye & Plaia, note 2 supra, at 15-16.
This deference is notwithstanding the fact that the final clause of section 337 sounds like an antitrust statute. It reads:

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 prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States are declared unlawful . . . 5 (emphasis added).

Then, Congress amended section 337 in the Trade Act of 1974 (the Trade Act). 6 The first important suggestion that section 337 might be an antitrust statute is contained in the report as to these amendments of the Senate Finance Committee. It states that “[t]he Committee believes that the public health and welfare and the assurance of competitive conditions in the United States economy must be overriding considerations in the administration of this statute.” Recently, the able current Chairman of the International Trade Commission (ITC), Daniel Minchew, has been developing and articulating his understanding of the Finance Committee’s admonition. 8

This new development, and the new energy with which the ITC and its section 337 legal staff are developing a program to enforce this statute, makes it appropriate to take a fresh look at its problems and possibilities as an antitrust law in areas of investigation, such as international predatory pricing, foreign cartels affecting domestic commerce, and anticompetitive distribution practices dictated from abroad.

II. Section 337 As Protection for Property Rights

While the statute has antitrust potential, for the first 50 years its primary purpose was to protect the property rights of American producers, largely ignoring competition considerations. For an im-

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porter to infringe the property rights, broadly defined, of a United States producer, is to engage in "unfair methods of competition" within the statutory language regardless of the effect these imports have on competition in domestic markets. The first clause of the section is dominant. This was established in Frischer & Co. v. Bakelite Corp. There, the Court of Customs and Patent Appeals held, in 1930, that a finding of infringement by the Tariff Commission of a United States patent was an unfair act under the predecessor to section 337. This holding was asserted even though the ITC is not authorized by law to make final factual determinations of patent infringement. Most section 337 enforcement actions for the next forty years were limited to the protection of American patent holders against importers of similar and competing foreign goods, whether or not a district court in fact ultimately upheld the patent infringement determination of the Tariff Commission.

In one recent study it has been determined that 70 percent of all American patents judicially challenged for validity between 1967 and 1971 were legally invalid. Moreover, enforcement of an invalid patent (patent misuse), or the obtaining of a patent by fraud, may be violations of existing antitrust laws. In many section 337 actions brought over the years there was neither close investigation of patent misuse defenses nor ultimate vindication in a trial court of the Tariff Commission's findings of infringement.

For example, in the Tariff Commission's 1971 Ampicillin investigation, complainant drug companies sought exclusion of imports of ampicillin on the grounds that their U.S. patents were being infringed. The Tariff Commission was informed that the Department of Justice was conducting a current, active investigation of possible antitrust activity by these complainants to the detriment of these importers, including possible patent misuse. This investigation subsequently culminated in a patent-based antitrust action. Nevertheless, the Tariff Commission refused to terminate its inves-

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10 D. Dunner, J. Gambrell & I. Kayton, Patent Law Perspectives, 1971 Developments, app. 2, at 38 (1971). This study examined 292 court of appeals validity holdings and found only 89 patents upheld or valid.
tigation, only doing so reluctantly, after Judge Sirica suspended enforcement of Commission subpoenae to the importers.\textsuperscript{15}

In the \textit{Furazolidone}\textsuperscript{16} section 337 investigation, the issue of a market division between the complainant and its licensee was raised by the Department of Justice. Two members of the Tariff Commission found the market division a "reasonable" restraint of trade and voted to recommend an exclusion order.\textsuperscript{17} Other enforcement actions over the years in which property rights, besides patent rights, were vindicated regardless of competitive considerations involved issues such as mislabeling\textsuperscript{18} and deceptive marketing ("passing off").\textsuperscript{19} As the Court of Customs and Patent Appeals found in 1934 as to section 337's predecessor, this statute was "intended to shelter, protect and conserve the industries of the United States."\textsuperscript{20}

Merely to declare that section 337 should be an antitrust statute, or even to employ it as an antitrust statute in a few investigations, does not insure that its primary purpose will not remain the protection of property rights regardless of competitive effects. This concern is illustrated in a recent section 337 patent case, \textit{Reclosable Plastic Bags}.\textsuperscript{21} There the ITC held a patent valid and infringed in the presence of evidence that the patent owner was engaged in worldwide licensing activities aimed at restricting trade in the article to the point that significant patent misuse was committed. The legal position of the ITC in this case reflected a narrow view of patent misuse rather than what one might expect from an antitrust enforcement agency.

III. SECTION 337 AS PROTECTION FOR EXISTING MARKET POSITIONS

One antitrust objective which fits the new aggressive antitrust posture of the ITC is protecting hard-pressed domestic producers against predatory conduct by foreign exporters. It should be noted, in passing, that the ITC lacks jurisdiction to protect, conversely hard-pressed foreign exporters against predatory conduct by domes-

\textsuperscript{15} Ampicillin, \textit{supra} note 13.
\textsuperscript{17} \textit{Id.} at 17.
\textsuperscript{18} Manila Rope, docket no. 5 (April 1927). Section 316, section 337's predecessor, created the first jurisdiction over unfair trade practices in import trade. Tariff Act of 1922, ch. 353, \S\ 316, 42 Stat. 943.
\textsuperscript{19} Cigar Lighters, Investigation No. 337-TA-6 (1933).
\textsuperscript{20} In \textit{re} Orion Co., 71 F.2d 458, 465 (C.C.P.A. 1934).
tic producers in United States markets. This presumably is left to other antitrust laws.

Predatory conduct exists where it can be shown that a domestic producer is the target of a sustained sales campaign by his foreign competition at prices so low that they realize losses over an extended period, and that these ruinous prices are adopted not to gain a foothold in the market, not to meet existing competition (which are legitimate purposes) but rather, for the primary purpose of putting him out of business. Once this is done, the competition can thereafter be expected to raise prices dramatically and reap monopoly profits at the consumer's expense. True predation is probably found infrequently in today's national economic markets because it is costly, may lead to criminal sanctions if discovered, and raises serious risks that the predator will put himself under before burying his competition. Nevertheless, understandably, hard-pressed producers are frequently convinced that their toughest competitors are predators.

Existing antitrust laws, as acknowledged by the ITC in the Ceramic Wall Tile opinion quoted above, provide adequate remedies if true predation can be proved. Perhaps the greatest problem with winning even true predation cases is that judges and juries are reluctant to find that low prices today may injure the ultimate consumer tomorrow. Costly birds in the bush are insufficient distraction from cheap birds in the hand. Even if antitrust enforcement officials are too skeptical about the infrequency of true predation to know it when they see it and “properly” enforce the law, the Sherman Act provides a private treble damage remedy for injured enterprises. District court juries and judges can do what federal officials ignore. Recent jurisdictional decisions such as Zenith Radio Corp. v. Matsushita Electrical Ind. Co., Ltd. make it unlikely that any alleged foreign predator with significant sales in the domestic market will escape the reach of the Sherman Act in private litigation.

But even if section 337 is a potentially valuable supplement to existing antitrust laws, it is not clear that the ITC doesn’t already

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22 See L. Sullivan, Antitrust § 43 (1977) for a basic discussion of predatory practices.
have sufficient statutory authority to reach predation under the Antidumping Act of 1921.\textsuperscript{19} Under the 1921 Act, price discrimination between home and American markets which causes or threatens injury to an American industry is actionable by the Treasury. The ITC determines whether domestic complainants have sustained dumping injury, after the Treasury has determined that \textit{de facto} price discrimination (sales in the United States at less than home market prices) exists.\textsuperscript{27} The remedy under the 1921 Act is a special duty which has the effect of equalizing prices in the two markets. Amendments to the 1921 Act in the Trade Act provide that where sales in foreign and American markets are at prices which are below cost but identical, the 1921 Act may be applied to raise foreign prices to a cost plus eight percent profit level.\textsuperscript{28} Since international predatory pricing will involve either price discrimination or below cost sales in United States markets, the 1921 Act would appear to be applicable.

In the recent \textit{Color TV Sets}\textsuperscript{29} section 337 case, involving allegations of predatory behavior, the conflict between Treasury's investigation of dumping under the 1921 Act and the ITC investigation of predatory behavior under section 337 was explicit. In a letter to the ITC, the Secretary of the Treasury stated in regard to section 337: "[I]t must be concluded that the Commission cannot properly conduct investigations of allegations which clearly fall within the scope of the Antidumping Act . . . .\textsuperscript{30}

The risk, from a pro-competitive standpoint, of enforcement against predation, is that it is often possible to mistake aggressive but fair competition for predation. Foreign competitors, who are often seeking to improve American consumer choice and lower market prices without mislabeling or infringing valid patents, are doing nothing more "unfair" than engaging in vigorous competition. A domestic producer who finds himself unable to compete effectively against a foreign exporter with newer technology, lower wage costs,

\textsuperscript{29} Certain Color Television Receiving Sets, Investigation No. 337-TA-23 (I.T.C., filed Jan. 15, 1976) [hereinafter cited as Color TV Sets].
\textsuperscript{30} Id. Letter from William E. Simon (Sept. 23, 1976). Similar letters were sent by the Department of Justice, Federal Trade Commission, Department of State, and President's Special Representative for Trade Negotiations. See Minchew & Webster, 8 GA. J. INT'L & COMP. L. 37 n.46-50 (1978).
more productive labor and greater marketing assistance from his
home government than our government provides U.S. business, is
often going to view that competitor as unfair. But, put simply, this
kind of unfairness—if indeed it is unfairness at all—has very little
to do with the antitrust laws. The purpose of the antitrust laws, in
fact, is to promote this kind of unfairness, to free markets from those
kinds of restraints which exclude the person producing the better
product at a lower price. What may be unfair for the domestic
producer fighting for his economic life is just what is most fair for
the American consumer, the ultimate beneficiary. If section 337 is
to be enforced as an antitrust statute, enforcement must express the
interests of the ultimate consumer, even when that conflicts with
the valid interests of domestic industry and labor in self-
preservation. If section 337 is to be an antitrust statute it must be
enforced differently from the other purely protectionist legislation
which the ITC administers such as escape clause, tariff revision, and
relative cost of production statutes.  

IV. THE RELATION OF SECTION 337 TO TRADITIONAL ANTITRUST
LEGISLATION

Since protection of the property rights of domestic manufacturers
has no necessary relationship to antitrust enforcement, and since
much of the problem of predation by foreign exporters aimed at
domestic manufacturers can be addressed under the Antidumping
Act, 32 it is not immediately clear for what antitrust enforcement role
section 337 is appropriate. While Congress made it clear that the
ITC was to have antitrust jurisdiction under the statute as amended
in the Trade Act, the precise focus of that jurisdiction was not
articulated. 33

The Sherman, Clayton, Wilson Tariff, and Federal Trade Com-
mission Acts, the core of traditional antitrust legislation, are broad
and flexible enforcement tools. This is especially true of the Sher-

“protectionist legislation” generally refers to statutory schemes which provide, like the escape
clause, for domestic industries or labor to qualify for tariff increases or similar relief from
injurious but fair foreign competition based on some comparative advantage held by the
foreign competition, such as lower labor rates or raw material costs.


33 FINANCE COMM. REP., supra note 7, discusses the ITC’s jurisdiction over “alleged unfair
methods of competition or unfair acts” in import trade without any greater specificity as to
possible violations of the statute beyond enforcement of rights.
man Act, as construed in the *American Tobacco* \(^{34}\) case before World War I, and the *Alcoa*, \(^{35}\) *I.C.I.*, \(^{36}\) and *Watchmakers* \(^{37}\) cases more recently. As the "effects" doctrine has developed, conferring subject matter jurisdiction under the Sherman Act over foreign acts by domestic and foreign persons which have direct, substantial and foreseeable anticompetitive effects in United States commerce, \(^{38}\) many if not most significant foreign export practices which have an anticompetitive effect in the United States can be reached under the Sherman Act. \(^{39}\) The Sherman Act is not only enforced by the Department of Justice, but by private "attorneys general," promoting competition through the prosecution of private antitrust claims. \(^{40}\)

One possible justification for adding section 337 to the roster of antitrust statutes in force is the perception that there is a practical problem in obtaining not subject matter, but *in personam* jurisdiction over some culpable foreign exporters. Section 337 jurisdiction is not over the person but over the imported goods which are the instruments of illegality. It is *in rem* jurisdiction. Where jurisdiction over the person cannot be effected, it makes good sense to repose jurisdiction in the offending product which can be seized. In fact, *in rem* jurisdiction is already provided for in section 6 of the Sherman Act and section 76 of the Wilson Tariff Act. \(^{41}\) These statutes provide long-standing authority in the Attorney General to seize property which is the subject of antitrust violations both to establish jurisdiction and, if necessary, to provide the means for effecting relief from the violation. In fact, section 76 of the Wilson Tariff Act was invoked several times between 1928 and 1931 for just this purpose. \(^{42}\)

\(^{34}\) *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

\(^{35}\) *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

\(^{36}\) *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951) (main opinion); 105 F.Supp. 215 (S.D.N.Y. 1952) (opinion on relief to be granted).

\(^{37}\) *United States v. Watchmakers of Switzerland Information Center, Inc.*, [1963] *TRADE CASES* (CCH) ¶ 70,600 (main opinion); [1965] *TRADE CASES* (CCH) ¶ 71,352 (final judgment modified).

\(^{38}\) For the legal history and philosophy behind the concept of subject matter jurisdiction under the antitrust laws, see W. Fugate, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 29-86 (2d ed. 1973).

\(^{39}\) *Id.*


Why then has more use not been made of in rem jurisdiction under the antitrust laws in recent years? The principal reason is that under modern state long arm statutes and section 22 of the Clayton Act, there is no longer significant difficulty in establishing that foreign exporters have sufficient contacts with the United States to be deemed personally liable for violations of law within U.S. subject matter jurisdiction. For example, in the recent Angola Coffee case plaintiff coffee brokers charged other brokers, domestic and foreign, with conspiring to fix the price of certain Angolan coffee and to enforce certain restrictions on resales of this coffee. A defendant Dutch coffee dealer was held to have transacted sufficient business in the Southern District of New York to meet the test of the New York long arm statute by virtue of the defendant sending several telex communications to New York in furtherance of the alleged conspiracy.

A further illustration is the recent successful Sherman Act enforcement against the legendary international diamond cartel against which prosecution had previously failed because of its limited contacts with the United States. In 1974, the hub of the cartel was charged in criminal and civil suits with illegally fixing the territories resale prices of its United States distributors' industrial diamonds. In this case the criminal charge was disposed of by a plea of nolo contendere and the payment of a fine after the Department of Justice began to take steps to confirm the effective service of the criminal summons. The civil case was settled by a consent decree which includes a provision for a substantial sum to be deposited by the defendant in escrow in a domestic bank which can be drawn upon by the Department of Justice to finance any enforcement order under the decree.

While it is not clear precisely what lacunae section 337 will fill as an antitrust statute, the ideas of the ITC and its staff are eagerly awaited. But there are pitfalls here which should, if possible, be avoided. One such pitfall is the possibility for abuse inherent in the concurrent jurisdiction of several competing antitrust agencies. If

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14 Id.
section 337 complaints are filed not because the ITC is the agency best suited to hear a complaint and provide expeditious relief, but because such a suit serves to wear down the respondent in a coordinated litigation attack in several antitrust fora, all based on the same facts and allegations, the ITC can lend itself to the undermining of competition. This possibility is at least raised in the recent Color TV Sets and Stainless Steel Pipe cases. In these cases section 337 complaints were but one in an interrelated series of actions by domestic firms charging foreign competitors with violations of the trade laws. Other statutes invoked were antidumping, countervailing duty, private antitrust damage actions, and the escape clause, as well as coordinated requests to the Congress and the Executive for statutory protection. Coordinated litigation programs may even raise issues of possible antitrust violations by complainants under the Trucking Unlimited doctrine. There it was held that the Sherman Act is violated by a conspiracy unreasonably to restrain trade through the intentional use of judicial and administrative adjudication procedures for that purpose. If a prior concurrent forum has been entered for antitrust relief, the ITC might consider deferring to that forum.

The current attitude of the ITC appears to be that the language of section 337, in stating "[t]he Commission shall investigate any alleged violation of this section," precludes any prosecutorial discretion to avoid abuse of legal process. This is questionable since this language is similar to the prior statute which was in effect when the ITC did refuse to hear Ceramic Tile and other earlier antitrust cases. Moreover, the Congress itself approved a policy for the ITC of regular deferral of complaints where prior investigations or proceedings are underway. Prosecutorial discretion is inherent in the power to prosecute.

Section 603 of the Trade Act allows the ITC to conduct preliminary investigations on its own initiative. This provision can probably be used to conduct preliminary investigations terminable at an early stage if found unmerited. Unlike section 337 investigations, such section 603 investigations can be terminated without any nec-

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49 Trucking Unlimited v. California Motor Transport Co., 432 F.2d 755 (9th Cir. 1970).
50 The "shall investigate" issue is discussed in Kaye & Plaia, supra note 2, at 62-63.
necessary finding of injury or no injury.\textsuperscript{54} Either under section 337 or under section 603, the ITC might examine the nature of each complaint, the likelihood of success, the motivations of the complainant, and the impact on trade policy of a matter before it undertakes a full formal investigation. The ITC might also consider at this preliminary stage early offers of proof and other economical litigation management devices to lessen undue burdens for the ITC staff and for meritorious respondents.

It is also important that the ITC consider establishing reasonable jurisdictional guidelines and limits for section 337. Some recent cases have suggested that the ITC will assert section 337 jurisdiction over actions in domestic commerce merely because goods in that commerce were, at an earlier stage, imported. In the \textit{Convertible Game Tables} patent case,\textsuperscript{55} the ITC began to consider remedies for false advertising claims involving imported goods after they had entered the U.S. and were within the flow of U.S. domestic commerce. The issue was apparently abandoned because the ITC felt the patent-based exclusion order it issued in that case would make redundant any further consumer protection cease-and-desist order. The ITC did, however, assert its jurisdiction over conduct in United States interstate commerce leaving the door open for possible future enforcement overlap with the courts and with the Federal Trade Commission, Justice Department and various state consumer protection agencies as to issues in United States domestic commerce.

\textbf{V. SOME SUGGESTIONS FOR PRO-COMPETITIVE ENFORCEMENT OF SECTION 337}

If section 337 is to be enforced as an antitrust law it must be enforced so as to promote rather than inhibit competition. Antitrust is concerned "primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise."\textsuperscript{56} This should be the central concern of the ITC as antitrust enforcer.

As a practical matter, given the language of the first part of section 337 as well as its enforcement history, most of the ITC's enforcement is likely to remain the investigation of suspected patent

\textsuperscript{54} Id.


\textsuperscript{56} Atlas Building Products Co. v. Diamond Block and Gravel Co., 269 F.2d 950 (10th Cir. 1959), \textit{cert. denied}, 363 U.S. 843 (1960).
and trademark infringements and fraudulent sales by foreign exporters seeking to pass off their products in violation of the property rights of domestic manufacturers. To enhance competition, the ITC in such investigations should pay careful attention to the validity of the allegedly threatened domestic property rights (especially patents). Relief should not be granted where there is reason to doubt the validity of such rights. The ITC should also be open to investigating fully possible defenses of respondents based on complainants' alleged fraudulent procurement of such property rights. Evidence of such fraud should lead to dismissal of the complaint and should be referred to another antitrust enforcement agency for possible affirmative enforcement action. This sound advice has been given, as well, by the Senate Finance Committee Report on the Trade Act:

The Commission has also established the precedent of considering U.S. Patents as being valid unless and until a court of competent jurisdiction has held otherwise. However, the public policy recently enunciated by the Supreme Court in the field of patent law (cf., Lear, Inc. v. Adkins, 395 U.S. 653 (1969)) and the ultimate issue of the fairness of competition raised by section 337, necessitate that the Commission review the validity and enforceability of patents, for the purposes of section 337, in accordance with contemporary legal standards when such issues are raised and are adequately supported.57

Herewith are several additional suggestions for procompetitive enforcement of section 337. First and foremost, the ITC should be concerned that its attitude and standards be congruent with a commitment to antitrust enforcement and the parameters of antitrust doctrine. The ITC's announced incorporation by reference of the corpus of existing antitrust laws as precedent in the Electronic Audio Equipment case58 is a constructive start. But this announcement must be implemented to be meaningful. In this context, the ITC should be particularly alert to the law as it applies to the complexities of international antitrust. Important issues such as the applicability of act of state and foreign government compulsion defenses, and considerations of comity, must be recognized.59

59 The recognition of the doctrine of comity by the ITC is particularly important. A recent statement on this issue as it effects the international antitrust enforcement policy of the Department of Justice is discussed in Address of Attorney General Griffin Bell before the ABA House of Delegates, August 8, 1977.
Second, the ITC should exercise its power to exclude imports with great restraint. Until 1974, exclusion of the offending products was the only remedy. However, the Trade Act gave the ITC the power to issue cease-and-desist orders against offending unfair practices as well. Curiously, the Congress apparently did not grant the ITC any contempt power to apply in situations where there is a current cease-and-desist order and a possible violation of that order. The only ultimate sanction is the exclusion of the import. This exclusion remedy is draconian in nature and has an inevitable "chilling effect" on the competitiveness of importers.

Publicity about a filed section 337 matter may cause buyers of imports to change their purchases away from imports because of a perceived risk of discontinued supplies, regardless of the eventual outcome of the proceeding. The mere threat of a section 337 case may have the same effect, particularly in the common situation where an importer must spend time and resources to develop an effective distribution chain in this country. Potential importers may simply not want to involve themselves in handling an imported product they understand to be vulnerable to a complicated and expensive action which could lead ultimately to that product's exclusion and their loss of investment.

The exclusion of imports restricts market supply and totally eliminates a competitor from the market for a violation which may be minor. The chilling effect is even more severe when a temporary exclusion is ordered at the early stages of a section 337 proceeding. Such an order may be issued if the ITC "determines there is reason to believe that there is a violation" of section 337. Temporary exclusion orders victimize both the innocent importer and the American consumer.

To protect the public interest the ITC should only use the exclusion remedy as a last resort in the face of clear evidence that a cease-and-desist order would be ineffective or has been previously violated. Cease-and-desist orders should be the usual and preferred remedy for section 337 violations. In those cases where potentially criminal conduct is suspected, whether by the complainant or the respondent, the ITC should refer the matter to the Department of

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81 The Department of Justice, in contrast, has the useful alternative of only seeking civil relief enjoining continuation of anticompetitive practices. Injunctive relief with money damages for violation is not inherently anticompetitive nor inherently punitive as is exclusion.
Justice for felony Sherman Act enforcement. Section 337 is not a criminal statute. It should only be used to stop on-going anticompetitive and property rights violations, not to punish them.

The effect of exclusion orders on the broader framework of United States international trade policy is also a matter for ITC review and possible discretionary prosecutorial abstention in purported international predation cases. The United States is the only party which provides private rights of action for certain unfair trading practices covered by the General Agreement on Tariffs and Trade (GATT). The GATT is an international diplomatic process by which many nations are seeking, in an orderly manner, agreed upon definitions of legitimate and unfair trading practices. Unilateral definitions by the ITC isolated from this diplomatic process should be avoided. For example, the past several administrations have uniformly taken the position, as stated in the GATT Treaty, that rebates on exports of value added taxes normally collected by a government on domestic sales do not constitute an occasion for the importing nation to impose a countervailing duty. Nor is it an unfair trade practice. A section 337 complaint that certain foreign indirect taxation practices are unfair trade practices could put the ITC in the position of examining and deciding the “unfairness” of trade policy issues appropriately left to the Executive.

The investigatory time limits imposed on the ITC in the Trade Act also raise problems which may suggest deference in a few especially difficult cases to other antitrust agencies not similarly constrained. While the judiciary and the Congress are legitimately concerned with the complexity and glacial pace of antitrust litigation, such prosecutions almost necessarily involve sophisticated economic and legal issues, carefully presented after thorough discovery. International antitrust matters often involve even greater complexities of international conflicts of laws, as well as mechanical problems such as document and testimony translations and discovery abroad. The limited time period granted litigants in section 337 cases may simply, as a matter of law as well as a matter of practice, prove inadequate to insure that all relevant issues are discovered, presented, and argued in a manner consistent with fundamental

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44 Id. art. VII(4) prohibits countervailing duties “by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation or by reason of the refund of such duties or taxes.”
fairness and professionalism. It is becoming common practice for discovery to be cut off in section 337 cases six or seven months from the entry of the complaint. The ITC then runs a substantial risk of deciding major cases on the basis of an incomplete, hastily-assembled record. Incomplete and hastily-assembled decisions serve no responsible interests.

The ITC must also be alert to the possibility that specific terms of settlement, especially consent settlement, of some section 337 cases will have anticompetitive effects not in the public interest. The important new development in ITC section 337 practice which raises this concern is the recent consent settlement of the Color TV Sets cases. The use of consent decrees is, of course, an integral part of antitrust enforcement. Most Department of Justice and Federal Trade Commission cases are so settled. The challenge facing the ITC is avoiding a settlement which fixes prices or allocates markets between importers and exporters at the expense of U.S. consumers. For example, negotiations to settle a predatory pricing section 337 matter could result in an attempt by the complainant domestic industry to coerce respondent importers to agree to raise their prices to an "acceptable" level. This is price fixing. Under United States v. Socony-Vacuum Oil Co., an otherwise illegal agreement will not be immunized by government knowledge, acquiescence, or even approval. The unusual tripartite nature of section 337 litigation, which involves litigation between competitors with the presence of the ITC staff as an additional and often secondary party, may tempt some litigants to engage in an illegal settlement. Consent decree negotiations at the Department of Justice and the Federal Trade Commission do not, in the ordinary case, involve negotiations with and among competitors. These negotiations are done on a one-to-one basis. In proceedings before the ITC, however, multi-party or direct negotiations between competitors raise significantly greater risks of anticompetitive conduct.

The ITC should take care to avoid the following hypothetical situation. X, a Delaware corporation, has obsolete production facilities and a patent of questionable validity. Its strongest competitor is company Y, a German corporation with a modern plant and an aggressive export policy. X files a section 337 complaint with the ITC, and files a Sherman Act treble damage action in a Federal District Court. The German firm can only afford to spend $100,000

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310 U.S. 150 (1940).
to defend both legal actions. This fund is quickly exhausted in responding both to discovery in the antitrust litigation and in the ITC staff inquiries. Y lacks the money properly to defend these legal attacks, let alone to prosecute its strong counterclaim that X has an invalid patent which it has misused. X approaches Y and offers to settle the antitrust litigation and withdraw the section 337 complaints if Y agrees to raise the export price of its product in the U.S. market to that of the products of less efficient X. Reluctantly, Y agrees. The ITC, at the request of X and Y, terminates the section 337 investigation. If such a settlement made on such facts were today to come to the attention of the Justice Department, there is a substantial possibility that the Department would convene a criminal grand jury to investigate it.

Other possible opportunities for anticompetitive resolutions of section 337 cases involving property rights should be avoided by the ITC. Consent settlements could involve patent pools, cross licensing, non-interference agreements, or licensing having market division effects. These kinds of agreements are a ripe field for antitrust scrutiny. A preferable solution to the problem of settlements which are themselves antitrust violations, is a settlement which terminates the anticompetitive practice but substitutes no new trade restraint in its place.

VI. Responsibilities of the Department of Justice in Section 337 Cases

The Department of Justice has several roles to play in the administration of section 337. First, it is the executive branch agency entrusted by the Congress with the duty of investigating and prosecuting criminal and civil violations of the antitrust laws in international trade. Because several recent section 337 cases have involved issues of antitrust law and policy the Department of Justice has a natural and substantial interest. The second basis for Department of Justice involvement is statutory. One clause of the Trade Act amendments to section 337 requires the ITC "[d]uring the course of each investigation" to "consult with and seek advice and information" from the Department of Justice.\(^7\) The same consultation requirement is placed on the ITC with regard to the Federal Trade Commission, the Department of Health, Education and Welfare, and "such other departments as [the ITC] considers appropri-

The current policy of the ITC (as stated in its regulations) to fulfill this statutory obligation is to transmit to the agencies a copy of all newly filed section 337 complaints, recommended decisions of the Presiding Officer, and final ITC orders terminating section 337 cases. In addition, the ITC specifically requests Department of Justice comments on any recommended decisions forwarded to the Commission by the Presiding Officer.

Third, the Department of Justice serves in an advisory capacity to the President in his deliberations over whether section 337 remedies should be vetoed for policy reasons. ITC section 337 recommendations are forwarded to the President’s Special Representative for Trade Negotiation (STR) for action recommendation. The STR consults with three levels of executive agency advisory groups. Representatives from the Antitrust Division of the Department of Justice sit on these groups along with representatives of other agencies concerned with trade, consumer, and foreign policy issues. In these review groups policy recommendations to the President are formulated. The interest of the Department of Justice in this review is the same as that given in the earlier stage of the section 337 proceeding: that the use of section 337 not undermine the antitrust laws or promote protection instead of competition.

To avoid unnecessary conflicts, the ITC should expand consultations with the Department of Justice and the Federal Trade Commission at preliminary and investigatory stages of section 337 complaints. Expanded consultations will draw advice from agencies with experience in both the legal and practical areas of international antitrust enforcement. It is important, however, that the advice given be made on the basis of relevant information. For that reason, the ITC staff should make investigatory files accessible to the other antitrust agencies subject to appropriate safeguards of confidentiality by such consulting agencies. In its report on the Trade Act, the Senate Finance Committee advised the ITC to seek the early advice of relevant agencies, by saying, "[s]uch agencies will often have information and insight which is relevant to the Commission's determination of whether there is reason to believe, or there is, a violation of section 337." Only by having access to all relevant

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48 Id. § 1337(b)(2).
50 These review groups, established in the regulations issued by the Special Trade Representative are the Trade Policy Staff Committee, the Trade Policy Review Group, and the cabinet-level Trade Policy Committee. 15 C.F.R. pts. 2002, 2003 (1977).
information can other agencies aid the ITC in efficient and procompetitive resolution of worthy section 337 complaints.

VII. CONCLUSION

Section 337 started as a protectionist adjunct to the antidumping law. In 1922, when debating the original statute Senator Smoot declared:

If any doubt whatever exists to the effectiveness of the tariff rates and the provisions of the elastic tariff as means to protect the coal tar dye industries, the addition of this effective unfair competition statute should remove it. We have in this measure an antidumping law with teeth in it—one which will reach all forms of unfair competition. 72

This protectionist purpose largely remained over the years, even when section 337 became primarily a patent rights enforcement statute. However, the present chairman and members of the ITC staff say that this purpose will change. Armed with congressional mandate, section 337 will now, for the first time, be enforced as an antitrust law.

The Department of Justice is undoubtedly prepared to cooperate with the ITC to try to help make section 337 a law which protects legitimate property rights consistent with the promotion of competition in domestic markets and the avoidance of discrimination against imports. If, however, section 337 is used to frustrate significant competition and protect oligopolistic American producers at the expense of the American consumer, it is likely that the Department of Justice will intervene and speak out before the ITC, take independent enforcement action where appropriate, and advise the President to reject ITC section 337 remedy recommendations.