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Torquemada and the Tariff Act: The Inquisitor Rides Again

Imagine a system of civil litigation in which a party serves a massive discovery request, consisting of interrogatories and requests for production of documents. Imagine further that the serving party has the sole authority to prescribe the time within which response must be made and the format (such as to require multiple copies and translation into English of all requested documents originally prepared in a foreign language). Imagine still further that the serving party is the sole judge of the adequacy of the response and of the merits of all objections as to relevancy or burdensomeness of the request; that the serving party also is the imposer of sanctions for failure to comply, and the ultimate decision-maker in the underlying matter for which the information is sought.

Such a system would be intolerable in the state or federal courts of the United States. It would raise serious questions of due process in a system of administrative law that separates the investigative from the judicial function within a single agency. But this is the inquisitorial system that was ordained by Congress for the administration of the antidumping and countervailing duty provisions of Title VII of the Tariff Act of 1930 (Tariff Act).[1] Torquemada, no doubt, would be right at home with it. But this is hardly a recommendation for the system.[2] It should be changed.

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1. Pub. L. No. 96-39, 93 Stat. 150, 19 U.S.C. § 1671 *et. seq.* (1982) [hereinafter cited as Tariff Act].

2. Tomas de Torquemada was the first Inquisitor-General of the Spanish Inquisition, a man "whose name has become a byword for cruelty and severity." W. BENET, THE READER'S ENCYCLOPEDIA, 500 (1968).

I. Title VII of the Tariff Act

Title VII, pertaining to countervailing and antidumping duties, was added to the Tariff Act of 1930 by Title I of the Trade Act of 1979.[3] A countervailing duty is imposed to offset—or to "countervail"—subsidies paid on products exported to the United States.[4] An antidumping duty is imposed to offset any margin of "dumping" of imported merchandise. This is the amount by which the price of the merchandise to the United States is less than "fair" value.[5] The determination of whether imported merchandise is benefitting from subsidies or is being sold at less than fair value is made by the International Trade Administration of the Department of Commerce (Commerce).[6]

Normally, countervailing duty and antidumping proceedings are initiated when an interested party—usually a U.S. producer, trade association, or labor union—files a petition on behalf of an industry alleging the elements necessary for the imposition of the duty. The petition must contain information reasonably available to the petitioner supporting the allegations. Commerce, within twenty days of its filing, must determine whether the petition meets these requirements, and, if so, commence an investigation to determine whether a subsidy is being provided or whether sales below fair value are taking place. If the ultimate determination of Commerce is affirmative, and if the United States International Trade Commission determines that an industry in the United States is being materially injured thereby, then the countervailing or antidumping duty will be imposed.[7] It is the inquisitorial investigative procedure established by Title VII, and administered by Commerce, with which this article takes issue.

A. The Statutory Scheme

Title VII investigations are characterized by massive amounts of data that must be obtained and presented within an extremely short period of time.

3. *See* Tariff Act, *supra* note 1.
4. Tariff Act § 701, 19 U.S.C. § 1671 (Supp. III 1985).
5. Tariff Act § 731, 19 U.S.C. § 1673 (Supp. III 1985).
6. Tariff Act §§ 701 and 731, *supra*. The same provisions require the United States International Trade Commission to determine whether an industry in the United States is materially injured or is threatened with material injury or if the establishment of an industry in the United States is materially retarded by reason of imports of merchandise that is subsidized or sold at less than fair value. Such a determination is necessary before countervailing or antidumping duties may be imposed, except countervailing duties may be levied on imports from certain countries without an injury determination. *See* Tariff Act § 701(c), 19 U.S.C. § 1671(c) (Supp. III 1985).
7. The regulations of the Department of Commerce with regard to countervailing and antidumping duty investigations are set out at 19 C.F.R. Part 355 and Part 353 (1985) respectively.

The procedures are complex. After commencement of an investigation, Title VII calls for a preliminary and a final determination by Commerce in both countervailing and antidumping proceedings. In a "normal" countervailing duty investigation, Commerce must reach a preliminary determination within 85 days of the filing of a petition, and a final determination within 75 days of the preliminary determination. In a "normal" antidumping investigation, the preliminary determination must be reached within 160 days of the filing of the petition and the final determination also must be made within 75 days of the preliminary determination. Thus, in a "normal" countervailing duty investigation, Commerce must reach its final determination in less than 6 months from the filing of the petition (85 days to the preliminary and 75 days to the final determination, or 160 days total); in a "normal" antidumping investigation, Commerce has less than 8 months to reach a final determination (160 days to the preliminary determination and 75 days to the final determination, or 235 days total).[8]

These severe time limits, coupled with the magnitude of the task Commerce and the investigated foreign parties must accomplish within them, have contributed to the situation described at the outset of this article and seriously call into question the very fairness and justice of the system itself.

B. Department of Commerce Procedures

Before reaching a preliminary determination in a Title VII proceeding, Commerce analyzes the petition and its allegations and prepares a detailed questionnaire. In a countervailing duty investigation, the questionnaire normally is presented to the appropriate foreign embassy in Washington, D.C.; in an antidumping investigation, presentation usually is made to the foreign companies concerned through the U.S. embassy in the particular country concerned.

A "standard" Commerce questionnaire in a countervailing duty investigation calls for data from many different agencies of the foreign government and from most, if not all, producing and exporting companies in the foreign country for the past year, plus any completed quarters since the close of the year. Two years of tax data usually are required. All information submitted must be in English or be accompanied by a translation. This

8. These time limits are set out in Tariff Act, §§ 703 and 705, 19 U.S.C. §§ 1671b and 1671d (countervailing) (Supp. III 1985) and §§ 733 and 735, 19 U.S.C. § 1673b (antidumping) (1982). They apply to a "normal" case. Commerce may extend for 65 days the deadline for its preliminary countervailing duty determination, and for 50 days the deadline for its preliminary antidumping investigation, if it determines the cases are extraordinarily complicated. Commerce may also extend its antidumping final determination by 60 days in certain circumstances.

includes all relevant laws, decrees and regulations. All of this must be submitted in 10 copies within 30 days.[9]

A "standard" antidumping questionnaire requires data for a six-month period covering all sales to the United States and in the home market. Commerce requires the data to be on computer tape in mandatory formats, and will accept only IBM-compatible computer tapes. Exporters who have acquired Sperry-Univac, Hewlett-Packard, Control Data or other U.S. brands are—by Commerce requirements—out of luck.[10]

C. Judicial Review

Final determinations by Commerce in countervailing and antidumping investigations are subject to review in the Court of International Trade which employs the normal standard of review of administrative proceedings: whether the determination is supported by substantial evidence on the record and is otherwise in accordance with law.[11] Decisions of the Court of International Trade are reviewable by the Court of Appeals for the Federal Circuit and, upon writ of *certiorari*, by the Supreme Court.[12]

II. The Problem

The system described at the outset of this article flows from the statutory and regulatory process ordained for countervailing and antidumping investigations: establishment within a single agency of the dual responsibility of

9. *See, e.g.*, Countervailing Duty Questionnaire, Oil Country Tubular Goods from the Republic of Korea, Inv. No. C-580-402, July 13, 1984. This consists of 44 single-spaced typewritten pages. The cover letter of the same date, to the Commercial Attache, Embassy of Korea, states: ". . . we are requesting that the government of Korea, the Korean producers which export the subject merchandise to the United States, and trading companies which export or import the subject merchandise to the United States, provide complete answers to all questions . . . we further request that (10) copies of each response be forwarded to this office by August 13, 1984." (It is worth noting that the date of presentation of the questionnaire, July 13, was Friday the 13th, unlucky for the respondents because the first two days of the 30 were a weekend, making transmittal to Korea more difficult than it otherwise might have been during regular business days.) The cover letter also provides, "All information submitted in response to this questionnaire should be in English." (Documents available in public file, Inv. No. C-580-402, U.S. Department of Commerce, International Trade Administration.)

10. *See, e.g.*, Antidumping Request for Information, Nylon Impression Fabric, Japan, July 25, 1985, Appendix III, A-588-502 (DOC Public File): "The tape should be 9-track and can have a density of either 800, 1600 or 6250 BPI. Since the Department cannot translate ASCII data, the coding requirements are quite specific and must be followed. The characters must be coded either EBCDIC or BCD alphanumeric." In computer-ese, the author is informed, this means IBM-compatible. In one case of which the author is aware, a foreign exporter, having acquired a U.S.-made Univac computer, was required to bear the considerable expense of completely re-entering its information onto a machine whose data DOC could "translate."

11. 19 U.S.C. § 1516a (1982).

12. 19 U.S.C. § 1516a(a) (1982); 28 U.S.C. § 1295 (Supp. III 1985); 28 U.S.C. § 1254 (1982).

investigation and determination without the intervention of any independent entity. This is the essence of the inquisitorial system: "conversion of the judge from an impartial referee into an active inquisitor who is free to seek evidence and to control the nature and objectives of the inquiry."[13] The problem is exacerbated by the fact that the agency concerned is one that also plays an important role in trade policy formulation.[14]

Utilization of government personnel to investigate and to establish a petitioner's case is of obvious benefit to petitioners, since they are relieved of a large measure of the cost that would otherwise be incurred. More significantly, petitioners, having caused an investigation to begin, have the luxury of sitting back, letting someone else carry the burden, and criticizing the results, whatever they are. Petitioners may, directly or indirectly, attempt to apply pressure on the working level at Commerce by complaining to higher policy officials of the efforts made or of the results achieved: the less than fair value margins are not high enough; the true nature of the subsidy has not been ascertained; the verification is not adequate. If such tactics are not fruitful, petitioners have available a judicial challenge to the determination of Commerce on the ground that it is not supported by substantial evidence on the record or is otherwise not in accordance with law.

On the other hand, the system also is laden with potential frustration for petitioners who, believing that they are being injured by unfairly traded imports, have gone to the trouble and expense of making a presumptive case sufficient to start an investigation. They then must sit back and watch others prosecute their case. From the petitioner's point of view, they may suggest, they may argue, they may cajole and plead, but they never can control the prosecution of the proceeding they have launched. Understandably, petitioners and their counsel may believe that they could do a better job than Commerce of ferretting out the precise nature and extent of the alleged unfair practices involved. Frustration in this situation certainly is understandable.

Whether petitioners are frustrated or not, the system places Commerce in an unenviable position—it is supposed to be at once the official, impartial judge and the thorough, relentless investigator for petitioners. It must go out and attempt to make the case for petitioners once the latter have overcome the minimal thresholds necessary to begin the process. No matter what Commerce does, no matter what it accomplishes in the brief period of time allotted, the agency always is subject to the allegation that it did not do enough. If one had set out to give a government agency a mission that is

13. J. MERRYMAN, THE CIVIL LAW TRADITION 135 (1969).
14. *See* notes 46 to 48, *infra*, and accompanying text.

subject, by its very nature, to relentless second guessing, it would be difficult to do better than this.

The impact on foreign respondents is predictable. Commerce seeks to leave no stone unturned, understandably desiring to do as thorough an investigation as possible—to say nothing of its responding to criticism and pressure generated by petitioners. But the burden of turning over the stones is placed upon respondents. The burden can range from the seriously harrassing to the impossible. Frequently, for example, respondents are asked to prove the negative.[15] Much of the information respondents are required to produce results not from the need of Commerce to obtain evidence on which it will reach its judicially reviewable determination; rather, the required production results from a perfectly understandable bureaucratic desire on the part of Commerce to cover every possible base in order to protect itself from criticism by petitioners. Respondents who balk at the demands of Commerce, or who cannot comply, risk being branded as uncooperative or unresponsive, and risk paying the price of having Commerce use the "best information available," *i.e.*, petitioners' allegations, against them.[16]

Respondents have no effective appeal from the requirements imposed unilaterally by Commerce. There is, at the administrative stage, no independent arbiter of the reasonableness, the burdensomeness, the relevance of the requirements imposed by Commerce. The agency alone determines the nature and extent of the requirements that will be imposed on respondents, whether respondents have complied adequately, whether respondents' answers have been verified, what sanctions will be imposed for perceived failure of respondents to meet the demands of Commerce.[17] And, after conducting the investigation, Commerce then reaches a quasi-judicial final determination. Respondents, to be sure, have access to the Court of International Trade for review of an adverse final determination under the substantial evidence test. But the utility of this right is doubtful when Commerce has the power to exclude from the record to be reviewed by the court information supplied by respondents on the ground that the informa-

15. *See, e.g.*, Government Verification Outline, Countervailing Duty Investigations, Certain Textile Mill Products and Apparel from Sri Lanka, C-542-401, (DOC Public File): (1). "Demonstrate that the GCEC does not build factories within the zone for lease to investors." (2). "Demonstrate that IPZ companies are not eligible for any benefits under this program." (3). "Demonstrate that there has been no individual assistance to exporters of the subject merchandise to the United States from EDB under this program." (4). "Demonstrate that the Government of Sri Lanka does not have a textile self-sufficiency program."

16. Tariff Act § 776, 19 U.S.C. § 1677e (Supp. III 1985). H.R. REP. No. 96–317, 96th Cong., 1st Sess. 77 (1979).

17. Of course, petitioners may believe that Commerce is not going far enough in attempting to obtain information from respondents. In such cases, they share the essential powerlessness of respondents in dealing with the dictates of Commerce.

tion is not in conformity with the administrative requirements imposed by Commerce.[18]

III. A Proposed Solution

Title VII of the Tariff Act is not the only provision of the trade laws dealing with so-called "unfair competition." Section 337 of the Act prohibits "unfair methods of competition and unfair acts." The procedures employed in Section 337 investigations are not inquisitorial; rather, they are the adversarial procedures characteristic of traditional common law litigation. They suggest a model for Title VII proceedings as well.[19]

A. The Section 337 Model

A Section 337 investigation begins with the filing of a complaint with the United States International Trade Commission (ITC) which, within 30 days, must determine if the complaint is properly filed; if so, the ITC must initiate the investigation and serve all alleged violators as soon as possible. Responses are due in 20 days.[20] Upon initiation, the matter is referred to an Administrative Law Judge (ALJ) who presides through the discovery and hearing phase of the investigation. Following a hearing, the ALJ reaches an Initial Determination which will become the Final Determination of the ITC unless the ITC orders review. The ITC may grant requests for review in whole or in part, and may order review on its own motion.

ITC remedy orders against offending imports are subject to disapproval by the President within 60 days.[21] During the period allotted for presidential

18. *See, e.g.*, Preliminary Determination of Sales at Less Than Fair Value; Certain Stainless Steel Sheet and Strip Products From the Federal Republic of Germany, 47 Fed. Reg. 56529.

19. Tariff Act § 337, 19 U.S.C. § 1337 (1982) (Section 337). The undesirable costs to government of Title VII proceedings—both the costs of administration and the costs of increased intergovernmental confrontations—are further reasons for utilization of a private litigation approach. *See* Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for U.S. Trade Policy*, 11 Law & Pol'y Int'l Bus. 1361 (1979). Ehrenhaft, the administrator of the countervailing duty and antidumping regimes before the effective date of Title VII, raises serious questions concerning the wisdom of opting for the present elaborate process administered by the executive branch as opposed to the policy-oriented process that applied previously. Viewing antidumping proceedings in particular as essentially private in nature, Ehrenhaft suggests transfer to the courts might be more appropriate and less costly to government than the Title VII process. For a persuasive argument that, as to dumping at least, there should be no regime, inquisitorial or otherwise, *see* Caine, *A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930*, 13 Law & Pol'y Int'l Bus. 681 (1981).

20. The regulations of the ITC dealing with § 337 investigations are set forth in 19 U.S.C. Part § 210 (1985).

21. If the ITC determines that § 337 has been violated, it may issue an order to exclude imports of the offending merchandise, or it may order a party to cease the unfair activities.

review, imports may enter under bond. Appeals from ITC Final Determinations are heard by the Court of Appeals for the Federal Circuit, with Supreme Court review possible by way of writ of *certiorari*.[22]

The record in a Section 337 proceeding is made by the parties pursuant to rules of evidence under a procedure strongly resembling civil litigation. There is a significant difference however, in that ITC regulations provide for the assignment to each proceeding of an investigative attorney who is a party, and who is entitled to participate fully in all phases of the case—including initiation of discovery and participation in the hearing. This staff participation insures public sector presence in these potentially sensitive proceedings and suggests a continued important role for government staff in Title VII investigations under the litigation model suggested here.[23]

B. A Basic Procedure for Title VII Investigations

1. *Complaint and Response*

A Title VII proceeding would begin with the filing of a complaint which, like present Title VII and Section 337 complaints, is more than a notice pleading.[24] All aspects of alleged violations should be set out with specificity along with the names and addresses of all alleged violators. Upon a decision to initiate the administering agency should assume responsibility for service upon alleged violators, who would be required to respond to the detailed complaint.[25]

2. *Discovery*

The major difference between present Title VII proceedings and those that would occur under the proposed method of adjudication would be in the fact development phase of the case. Presently this is accomplished by government inquisitorial investigation. Under a Section 337 type system it would be accomplished by the parties using all of the apparatus available through civil discovery proceedings, including interrogatories, requests for

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Section 337 remedies would not be appropriated substitutes for antidumping or countervailing duties.

22. 19 U.S.C. § 1337(c) (1982); 28 U.S.C. § 1254 (1982).

23. The role of the ITC investigative attorney to represent the public interest in a proceeding between private parties has a counterpart in some civil law jurisdictions where public prosecutors, in addition to prosecuting criminal cases, also represent the public interest in non-criminal proceedings between private parties. Merryman, *supra* note 13, at 111.

24. 19 C.F.R. § 210.20 (1985).

25. 19 C.F.R. §§ 201.16, 210.8 (1985). For reasons set out below, the ITC is suggested as the most appropriate administering government agency. *See infra* notes 42 to 48, and accompanying text.

production of documents and depositions.[26] Complainants, vested with the full panoply of discovery techniques, would acquire a vastly increased measure of control over the development of their own cases. So would, by the same token, respondents, who would be equally free to develop relevant information, particularly that relating to the question of material injury.[27] Through use of discovery techniques—such as document production requests—complainants could obtain (under appropriate protective order) raw pricing information from respondents, from which they could develop and argue their own case.[28]

Under the present inquisitorial system, this information is obtained by Commerce through questionnaire responses which are "verified" by on-site inspection. Complainants, who are not present, must accept what Commerce obtains and deems verified. Issues of credibility, for example, are determined by Commerce based upon its evaluation of the results of its own investigation. A complainant who would have evaluated evidence differently is left to argue with a fact-finder who was "there" and clearly has a superior claim as to knowledge of what occurred. In the proposed adjudicatory process, by contrast, a complainant would present its case to an independent weigher of the evidence, the ALJ. This system would at once place the burden of proof on complainant and give to complainant a better opportunity to develop its own case.

What of respondents under such a system? There are some clear disadvantages: complainant's counsel would have access to extremely sensitive data of respondents, to the books and records themselves. Presently com-

26. 19 C.F.R. Part 210, Subpart D (1985). The ITC General Counsel has taken the position that § 337 proceedings are administrative proceedings, not judicial, and therefore are not subject to the provisions of The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444. ITC General Counsel Memorandum GC-81-144, Oct. 9, 1981.

27. This would be a significant contrast from—and improvement over—present ITC procedures which place respondents at a marked disadvantage. The ITC investigation is carried on by the agency's staff largely on the basis of confidential responses to questionnaires. None of the information thus furnished to the ITC need be verified and, in practice, none is verified. Moreover, respondents have extremely limited access to business confidential information submitted by petitioners in support of an affirmative injury determination. While the ITC may disclose to a party, under protective order, any confidential information submitted by any other party, Tariff Act § 777(c)(1), 19 U.S.C. 1677f(c)(1), (Supp. III 1985), it rarely does so. If it declines to disclose, the judiciary, on appeal, may order production only of information submitted in support of a petition concerning domestic price or cost of production. Tariff Act § 777(c)(2), 19 U.S.C. 1677f(c)(2) (1982). Such information pertaining to the respondents is the core of a fair value investigation before Commerce, but it generally is meaningless at the ITC where the indicia of injury—production, profits, employment etc.—are of much greater relevance.

28. Such a proceeding might bear a strong resemblance to litigation under the Robinson-Patman Act. 15 U.S.C. §§ 13, 13a–b, 21a (1982).

plainant's counsel have only limited access.[29] Respondent's employees would be subject to oral deposition under oath and to cross-examination should they testify at a hearing. By contrast, at present only Commerce officials may interview respondents in an informal manner; complainant's counsel has no access to these witnesses. Under the proposed system, respondents would be subject to direct discovery from complainant's counsel, rather than having that contact controlled and filtered by Commerce.

Yet it is suggested that under an adjudicatory system respondents would benefit from significant protections that they presently do not have: the power of the ALJ to control discovery and to prevent abuse. The key is the independence of the ALJ. A party that believes a discovery request is not proper would have the option of refusing to comply. In the suggested Section 337 style proceeding, as in ordinary civil litigation, the party seeking disclosure could move the ALJ for an order to compel production.[30] If the order is granted, then of course, a party refusing to comply would be subject to sanctions, and these could be as disadvantageous as "best evidence" now employed by Commerce.[31] But the point is that the requesting party is not the arbiter of the matter. That task resides where it should reside—with an impartial judge.[32]

3. *Initial and Final Determinations*

Presently in Title VII proceedings, preliminary and final determinations are made both by Commerce as to the existence of a subsidy or sales at less than fair value, and by the ITC as to material injury. These procedures would adapt easily, with minor changes, to the initial determination and final determination procedures of Section 337. Under Title VII, both the preliminary and final determinations are made by the same entity, Commerce or the ITC.[33] Under Section 337, the initial determination is made by the ALJ, while the final determination is made by the ITC.[34] Title VII cases

29. The access generally is to confidential information submitted in response to antidumping duty and countervailing duty questionnaires. 19 C.F.R. §§ 353.30, 355.20 (1985). Information is exempt from disclosure if it relates to any matter which is required to be kept confidential pursuant to privilege, statute or Executive Order. 19 C.F.R. § 353.31, 355.21 (1985).

30. 19 C.F.R. § 210.36(a) (1982); FED. R. CIV. P. 37(a).

31. *See, e.g.*, Certain Vinyl-Covered Foam Blocks, Inv. No. 337-TA-178, USITC Pub. 1604 (Nov. 1984); Certain Plastic Food Storage Containers, Inv. No. 337-TA-152, USITC Pub. 1563 (Aug. 1984).

32. Since neither party presumably would be anxious to appear frivolous before the ALJ, motions to compel likely would not be overreaching, while refusals to comply likely would not amount to "stonewalling."

33. Commerce makes both determinations as to the unfair practice and the ITC both determinations as to injury.

34. The Initial Determination of the ALJ will become the Final Determination of the ITC unless the ITC orders review, which may be requested by any party. Perhaps in response to the

could benefit from this procedure. In utilizing Section 337 as a model for Title VII cases, the Title VII two-stage process would remain, but the initial (or preliminary) determination would be that of the ALJ, following the adversarial proceeding. This decision would deal both with material injury and with the question of sales at less than fair value or subsidies. It would be subject to review and subsequent modification or adoption as a final determination.

4. *Appeals and Presidential Disapproval*

Adoption of Title VII investigations to the Section 337 model would not necessitate a change in their avenues of judicial appeal, which, as noted, are taken initially to the United States Court of International Trade and then to the Court of Appeals for the Federal Circuit.[35] One major difference between Section 337 and Title VII final determinations at present, however, is that Section 337 allows for explicit Presidential disapproval, while Title VII provides no authority for the President to intervene for policy reasons. He may, within sixty days, disapprove of an ITC exclusion order or cease and desist order in Section 337 cases.[36] If this occurs, the order is without force or effect.[37]

Prior to 1974, the President's Section 337 veto power was structured differently. ITC orders did not take effect unless the President affirmatively approved of them. A 1974 change in the law reversing this procedure and providing that the ITC's orders automatically become final unless the President affirmatively takes steps to disapprove them,[38] has had the effect of increasing greatly the number of exclusion orders issued.[39] The President

increased number of Section 337 cases, the ITC rarely initiates review on its own motion, and increasingly has denied petitions for review thereby making the Initial Determination of the ALJ the Final Determination of the ITC itself. *See, e.g.*, Certain Heavy-Duty Staple Gun Tackers, Inv. No. 337-TA-137, USITC Pub. 1506 (Mar. 1984); Certain Caulking Guns, Inv. No. 337-TA-139, USITC Pub. 1507 (Mar. 1984).

35. *See supra* notes 11 and 12, and accompanying text.

36. § 337(g), 19 U.S.C. § 1337(g) (1982).

37. § 337(g)(2), 19 U.S.C. § 1337(g)(2) (1982). During the President's sixty-day consideration, merchandise may be permitted to enter under bond. § 337(g)(3), 19 U.S.C. § 1337(g)(3) (1982). If the President does not take affirmative action, the ITC order automatically becomes final. § 337(g)(4), 19 U.S.C. § 1337(g)(4) (1982).

38. The ITC, prior to 1974, investigated in order to assist the President, who was charged with determining if Section 337 was violated. The Trade Reform Act of 1974 gave the responsibility to the ITC subject to Presidential veto, which was retained because "the granting of relief against imports could have a very direct and substantial impact on United States foreign relations, economic and political." TRADE REFORM ACT OF 1974, S. REP. No. 1298 93rd Cong., 1st Sess. 199 (1974).

39. From 1944 to 1969, no exclusion orders were issued. In 1969, in *Furazolidone*, the President issued the first order since the early years of the law. Inv. No. 337-21 T.C. Pub. 299 (Nov. 1969). Two other exclusion orders were issued by the President in the early 1970's: Lightweight Luggage, Inv. No. 337-28, T.C. Pub. 463 (Feb. 1972) and Pantyhose, Inv. No.

does not frequently interfere for policy reasons in Section 337 cases.[40]

It seems anomalous that in Section 337 proceedings (involving for the most part such purely legal matters as infringement of copyrights, patents or trademarks) the President is given a policy veto, while in Title VII proceedings (frequently involving matters of great foreign policy significance and impact) the President has no such authority.[41] The experience of Presidential exercise of this authority under Section 337 suggests that its inclusion in Title VII proceedings would not be misplaced and, more importantly, would not be misused.[42] In any event, however, the case for adoption of Title VII

337-25, T.C. Pub. 471 (Mar. 1972). By contrast, as of September 3, 1985, 39 exclusion orders were in effect. USITC, CALENDAR OF HEARINGS AND DEADLINE DATES FOR PENDING INVESTIGATIONS 27 (Sept. 3, 1985).

40. One recent instance involved so-called "grey market" goods against which the Commission had issued an exclusion order. In Certain Alkaline Batteries, Inv. No. 337-TA-165, USITC Pub. 1616 (Nov. 1984), the Commission determined that batteries produced abroad by a subsidiary of the U.S. trademark owner, and legitimately bearing that trademark in foreign commerce, infringed the U.S. trademark when imported by third parties. The President found the Commission's determination "at odds with the longstanding regulatory interpretation" adopted by the Treasury in administering the customs laws applicable to trademarked goods. "The Administration has advanced the Treasury Department's interpretation in a number of pending court cases," the President said. "Recent decisions of the U.S. District Court for the District of Columbia and the Court of International Trade explicitly uphold the Treasury Department's interpretation. Allowing the Commission's determination in this case to stand could be viewed as an alteration of that interpretation. I, therefore, have decided to disapprove the Commission's determination." OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, DETERMINATION OF THE PRESIDENT REGARDING CERTAIN ALKALINE BATTERIES, 50 Fed. Reg. 1655 (1985). In addition, the President disapproved the Commission's determination in Certain Headboxes and Paper Making Machine Forming Sections for the Continuous Production of Paper and Components Thereof, Inv. No. 337-TA-82, USITC Pub. 1138 (Apr. 1981). *See* 46 Fed. Reg. 32361 (1981). The President found the Exclusion Order issued by the Commission too broad. Subsequently the Commission, on its own motion, initiated a second investigation, again found a violation, and issued a narrower order, which was not disapproved by the President. Certain Headboxes etc., Inv. No. 337-TA-82A, USITC Pub. 1197 (Nov. 1981). Presidential disapproval and modification by the Commission of its order also occurred in Certain Molded-in Sandwich Panel Inserts and Methods for Their Installation, Inv. No. 337-TA-99, USITC Pub. 1297 (Oct. 1982).

41. A clear example of the foreign policy significance and impact of Title VII cases are those involving steel. For two decades trade in steel has created international problems, leading to "voluntary" export restraints in the 1960's, the Trigger Price Mechanism of the 1970's, and scores of antidumping and countervailing duty cases in the 1980's. *See*, Horlick & Savage, *Steel Trade Wars, 1968–84, How Washington Became the Center of U.S. Steel Trade*, WORLD L., July–Aug. 1984, at 5.

42. The President is given the final word under the "escape clause" provisions of the Trade Act of 1974 19 U.S.C. §§ 2251–2253 (Supp. III 1985), in which the USITC, if it determines that an industry is being seriously injured—or is threatened with serious injury—because of increased imports, recommends to the President a level of import restrictions designed to remedy the injury. Similarly, the President is given the last word in market disruption cases under § 406 of the Trade Act of 1974 involving trade with non-market economies when the ITC, if it finds market disruption, also recommends a level of protection to the President. 19 U.S.C. § 2436 (1982). This authority is significantly different from the President's authority under § 337. Relief will not be granted under the "escape clause" or § 406 *unless* the President affirmatively

to the Section 337 model does not hinge upon the inclusion of a Presidential veto for policy reasons.

C. A Single Agency—Commerce or ITC

Section 337 investigations are conducted entirely by a single agency, the ITC. This includes the issue of substantive violation—an unfair trade practice—as well as the question of injury. Title VII proceedings, apparently more for reasons of historic accident than anything else, are bifurcated. Commerce decides the issue of substantive violation while the ITC deals with matters of injury.[43]

There is no particular reason to continue the bifurcation. A single proceeding encompassing both aspects of a case before a single agency would be more efficient and would comport more closely with the obligations of the United States under the international Antidumping Code and Subsidies Code.[44] It makes sense to assign responsibility for the complete investigation to the quasi-judicial ITC rather than to a policy-making and policy-implementing executive branch agency such as the Department of Com-

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acts to provide a remedy. In § 337 proceedings, by contrast, a remedy will become effective automatically *unless* the President acts to veto an ITC order.

43. Enforcement of the antidumping and countervailing duty laws originally was the responsibility of the Department of the Treasury. Presumably this resulted from the fact that Treasury was the department that included the Customs Service, the agency charged with the collection of duties, including antidumping and countervailing duties. Treasury's responsibilities were transferred to the Department of Commerce by Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69173 (codified as a note at 19 U.S.C. § 2171 (Supp. III 1985)). *See* Palmeter & Kossl, *Restructuring Executive Branch Trade Responsibilities: A Half-Step Forward*, 12 Law & Pol'y Int'l Bus. 611 (1980). Under the Antidumping Act of 1921, Ch. 14, tit. II, 42 Stat. 11 (1921) (previously codified at 19 U.S.C. § 160 *et seq.*) Treasury was responsible also for the injury determination until 1954, when this was transferred to the ITC (then the Tariff Commission). Ch. 1213, tit. III, 68 Stat. 1138 (1954). Injury determinations were not required under the countervailing duty laws before 1975, when injury was made a prerequisite for imposition of a countervailing duty on otherwise duty-free merchandise. P.L. 93–618, 88 Stat. 190 (1975) 19 U.S.C. § 1330(b) (1982). This responsibility went directly to the ITC, as did the injury determination responsibility for dutiable merchandise when that was instituted by the Trade Agreements Act of 1979, P.L. 96–30, 93 Stat. 144 (1979), 19 U.S.C. § 701 (1982). This pattern of agency responsibility began with Treasury because of its duty-collection function. The injury determination eventually was lodged with the ITC because of its economic expertise. Treasury's functions then were shifted to Commerce.

44. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, April 12, 1979 (relating to subsidies and countervailing measures), and Agreement on Implementation of Article VI of the General Agreement on Tariff and Trade (relating to antidumping measures), *reprinted in* Agreements Reached in the Tokyo Round of the Multilateral Trade Negotiations, H.R. Doc. No. 153, 96th Cong., 1st Sess. Pt. 1, 259–306 and 309–337 (1979). These agreements evince an explicit preference for simultaneous investigation of injury and of substantive violations, *i.e.*, subsidies or less than fair value sales. Subsidies Code, Art. 2 para. 4; Antidumping Code, Art. 5 para. 2.

merce. Title VII cases, like their Section 337 counterparts, are in every realistic sense, legal proceedings.[45] They proceed according to statute and implementing regulation, and they develop a judicially reviewable record. Responsibility for reaching a judicially reviewable determination on that record is best left to an agency such as the ITC.[46]

The Department of Commerce cannot escape the fact that it is widely perceived as a political entity. How could the perception be otherwise? After all the Secretary of Commerce is a political appointee whose responsibility it is to develop and to implement commercial policies. Quite properly the Secretary hears and promotes within government the position of U.S. industry.[47] His subordinates responsible for the enforcement of Title VII cannot always be expected to be totally unaffected by such considerations, although certainly they try.[48] Regardless of their success, the perception of improper political influence remains—especially in the eyes of the foreigners who are the subject of Title VII investigations. By assuming that the role of the U.S. Secretary of Commerce and his subordinates is the same as their

45. The fact that the President may disapprove an ITC order in a § 337 proceeding does not change its legal character, which is that of an adjudicatory proceeding under the Administrative Procedures Act 5 U.S.C. Ch. 5 Subch. II. 19 U.S.C. § 1337(c) (1982).

46. The Commission "is an independent and quasi-judicial agency that conducts studies, reports, and investigations, and makes recommendations to the President and the Congress on a wide range of international trade issues." Staff of Subcomm. on Trade, Comm. on Ways and Means, 98th Cong., 2d Sess., OVERVIEW OF CURRENT PROVISIONS OF U.S. TRADE LAW 137 (Comm. Print, 1984).

47. The mandate of the Department of Commerce includes the promotion of the foreign and domestic commerce of the United States. *Id.* at 133.

48. For example, the subject of political considerations was raised in an interview with the then outgoing Deputy Assistant Secretary of Commerce for Import Administration, Alan Holmer:

> *Q*: My final question concerns allegations by some critics of the department that Commerce, like Treasury before it, does not vigorously enforce the dumping and countervailing duty statutes. Moreover, the critics maintain that Commerce sometimes makes decisions which are political in nature, such as finding in the negative with regard to countries that the United States does not want to antagonize or in the affirmative in instances where we wish to make a point with regard to a particular industry or country. What is your response to this?
>
> *A*: First, decisions are made here absolutely without regard to foreign policy or domestic political considerations. We are frequently called by other departments or agencies to receive status reports on cases, but we are never called with a request that we decide a case a particular way for one reason or another.

2 INT'L TRADE REP. (BNA) at 1019 (Aug. 7, 1985).

The matter came up more pointedly in Lightweight Polyester Filament Fabric From Japan; Final Determination of Sales at Less Than Fair Value, 49 Fed. Reg. 472 (1984) in which respondents maintained that "reversals in policy guidelines and burdensome, last-minute requests for information" raised the question of whether the proceeding had been "tainted by legislative interference." Commerce responded: "It is not unusual for there to be a degree of Congressional interest in our determinations, this case being no exception. Notwithstanding whatever legislative interest there may have been in this case, all of our decisions throughout the course of the investigation were based upon the Act and our regulations as applied to the facts of this case." *Id.* at 479.

counterparts in the foreigner's government, the foreign subject of the investigation may fear adverse political influence or may hope for favorable political influence.[49] Either way, the problem is best avoided by assignment of the function to the quasi-judicial, independent ITC.

D. Special Problems: Countervailing Duty Proceedings

Application of the Section 337 model to countervailing duty cases might present some problems that do not occur in application of the model to antidumping investigations. The problems would arise from the fact that countervailing duty investigations involve programs of sovereign foreign governments in their governmental capacity[50] while antidumping investigations involve the pricing practices of individual firms. Thus, while the private U.S. petitioner in an antidumping investigation would make its case, and conduct its discovery, against a foreign commercial firm, in a countervailing duty proceeding in the proposed Section 337 format, by contrast, a private U.S. petitioner would, in effect, be hauling a foreign government into court.[51] The private petitioner would be conducting discovery of the foreign government, including, possibly taking sworn depositions from government officials. In short, in a Section 337 style countervailing duty proceeding, a foreign government in effect would be a party to private litgation before a quasi-judicial U.S. tribunal, and, eventually, should the cases be appealed, before the courts of the United States.[52]

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49. The author once had the experience of explaining U.S. countervailing duty procedures to an official of a foreign government in the course of a countervailing duty investigation of that government's programs. The official was exceedingly skeptical of the author's assurances that the matter would be decided on the facts and the law and not on political considerations. But the Secretary of Commerce is a political official, the foreign official observed. Of course he would make a political decision, as would his counterpart in any other country. It is true that the Secretary of Commerce is a political official, the author conceded, but the decision in these cases was delegated by the Secretary to others in the Department. The foreign official remained skeptical, and reviewed the chain of command: Secretary, Under Secretary, Assistant Secretary, Deputy Assistant Secretary and so on. "At what point in the chain," the foreign official asked, "does the law-enforcing subordinate tell the policy-making superior to go to hell?" The author suggested a point where this might occur, but the official did not seem convinced.

50. The problems, therefore, are different from those addressed by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (1982), which deals with the commercial activity exemption to the general rule that foreign states are immune from the jurisdiction of U.S. courts.

51. A "private" petitioner is the only kind of petitioner there is. Only an "interested party" may file a countervailing duty petition. Tariff Act § 702(b), 19 U.S.C. § 1677(9)(c)(D)(E) (1982). However, government possesses the seldom, if ever, used authority to initiate countervailing duty investigations without a petition. 19 U.S.C. § 702(a).

52. The Tariff Act § 771(9)(B) also provides that foreign governments are included within the term "interested party." 19 U.S.C. § 1677(9)(B) (1982). As such, they may invoke the jurisdiction of U.S. courts to appeal the results of investigations in which they participated. 19

There are at least two answers to the problem: the first is that essentially the same thing already occurs under the administration of Title VII by the Department of Commerce—questions, very detailed questions, are put to foreign governments in the ordinary course of countervailing duty investigations;[53] strict time limits for responses are imposed on those governments;[54] Department of Commerce officials travel to the foreign country, meet with and question foreign government officials in order to verify the truth of the government response, and examine the records of that government.[55] Little in fact would occur under the supposed Section 337 model that does not already occur under the present administration of Title VII.

The present Title VII procedures, of course, could be viewed as a major invasion of the sovereignty of foreign governments, but it is an invasion that foreign governments themselves permit.[56] Submission to the strictures of U.S. countervailing duty law procedures may be seen as a voluntary, albeit necessary, condition of doing business in the U.S. market. Through the Subsidies Code, governments already have established certain ground rules for the application of domestic countervailing measures to each other's programs.[57] Presumably they could do the same to further the development of an accusatorial rather than an inquisitorial system.

A second answer to the problem of private party intrusion of foreign governmental sovereignty might be the role of the ITC staff attorney as a party to the proceeding. Use of the staff attorney as an intermediary in the serving of discovery requests might help cast the procedure into more of a

U.S.C. § 1516a(a)(1) (1982). The Tariff Act thus makes explicit what the Supreme Court found implicit as to whether a foreign sovereign is a "person" entitled to sue for treble damages under the antitrust laws. *Pfizer Inc. v. India*, 434 U.S. 308, *reh. den.* 435 U.S. 910 (1978).

53. *See, e.g.*, *supra* note 9, where questionnaire consisted of 44 single-spaced typewritten pages.

54. *See supra* note 8 and accompanying text.

55. Verification of all information relied upon in making a final determination is required. 19 U.S.C. § 1677e(a)(1) (Supp. III 1985). Moreover, confidential information submitted by a foreign government to the U.S. government in the course of an investigation is not immune from disclosure: "The Court of International Trade may order that . . . any information provided to the United States by any foreign government or foreign person, may be disclosed to a party, its counsel, or any other person under such terms and conditions as the court may order." 28 U.S.C. § 2641(b) (1982).

56. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, April 12, 1979, Art. 2, para. 8, (relating to subsidies and countervailing measures), *supra* note 43, provides: "The investigating authorities may carry out investigations in the territory of other signatories as required, provided they have notified in good time the signatory in question and unless the latter objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if (i) the firm so agrees and (ii) the signatory in question does not object."

57. Subsidies Code, 31 U.S.T. 513, T.I.A.S. No. 9619.

government-to-government than a private party-to-government matter. Perhaps this could be done through a requirement that discovery requests to a foreign government be made through the staff attorney. Care would have to be taken to avoid the staff attorney's becoming a mere conduit for private petitioners on the one hand, or an obstacle to petitioners' opportunity for fair prosecution of their own cases on the other. Perhaps this could be done by establishing guidelines as to the authority of the staff attorney to reject discovery requests either as too burdensome, too intrusive, not relevant etc. A rapid review of any refusal by the ALJ or the Commission as a whole might be necessary to protect a petitioner's interest.[58]

VI. Conclusion

Perhaps a fundamental error occurred in the 1970s with the abandonment of the original idea of the Antidumping Act of 1921—the idea that a Cabinet officer would make a policy decision as to the fairness of the conduct of foreigners in international trade, a decision made without "benefit" of forty-four page questionnaires and extensive judicial review.[59] Determinations in large measure were more trade policy than trade law. But regardless of the wisdom of the change in course, the countervailing and antidumping duty toothpaste is out of the tube and is not likely to be replaced. Litigation, not policy, is now the format. This being the case, it only makes sense to seek the fairest litigation system available commensurate with the peculiar needs of international trade regulation. The inquisitorial system has been described by a Japanese scholar as "no less hideous to the modern mind than the similar method employed during the Tokugawa regime."[60] It does not behoove a nation whose notions of procedural fairness are rooted in the Bill of Rights, and in the opinions of a Holmes or a Brandeis, to utilize a system in which Tomas de Torquemada and Ieyasu Tokugawa would be more than comfortable. If we insist on turning trade policy into trade law, we should make sure that the procedural protections of our law are not abandoned in the process.

58. A foreign government, of course, like any party, could refuse to comply with a discovery request and oppose a motion to compel.

59. *See*, Ehrenhaft, *supra* note 19, at 1365.

60. K. Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868–1961, reprinted in* TANAKA, THE JAPANESE LEGAL SYSTEM 163, 168 (1984). Ieyasu Tokugawa was shogun, or supreme warlord, of Japan in the 17th Century. *See* E. REISCHAUER, THE JAPANESE 64–67 (1977).