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Is Section 337 Consistent with the GATT and the TRIPs Agreement?

Joel W. Rogers

Joseph P. Whitlock

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IS SECTION 337 CONSISTENT WITH THE GATT AND THE TRIPs AGREEMENT?

JOEL W. ROGERS AND JOSEPH P. WHITLOCK*

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* Joel Rogers is Counsel at Miller and Chevalier, Chartered, in Washington, D.C. and specializes in Customs, Trade Litigation and Export Control. Joseph Whitlock was a summer associate, and will be an associate attorney at Miller and Chevalier, Chartered, as of August 2002. The authors are grateful for the helpful comments and encouragement of Joel Davidow of Miller and Chevalier, Chartered, and Richard Chovanec, Attorney-Advisor at the U.S. Customs Service.
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INTRODUCTION

Section 337 of the U.S. Tariff Act of 1930\(^1\) has been a source of contention between the United States and its trading partners for the last twenty years. As recently as Spring 2000, the European Community ("EC") was actively pursuing a challenge to the U.S.'s Section 337 trade remedy through the World Trade Organization ("WTO") dispute settlement system.\(^2\) The Section 337 issue has also

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gained increasing importance in light of the rapid increase in Section 337 cases brought since September 2000. The EC's request for consultations claimed that Section 337 violated not only the general WTO principle of national treatment with respect to imported goods, but also various other obligations provided for by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("the TRIPs Agreement"). Shortly after the EC request for consultations began, the EC filed a request for consultations with the United States under WTO rules regarding section 337.


4. See United States—Section 337 of the Tariff Act of 1930 Request for Consultations by the European Communities, WT/DS186/1 (Jan 18, 2000) [hereinafter EC Request for Consultations on Section 337] (stating the EC's request for consultations within the U.S. regarding Section 337 of the U.S. Tariff Act), at http://docsonline.wto.org/gen_search.asp (last visited Oct. 29, 2001); see also EU Takes First Step in Second Challenge of U.S. Section 337 Law, INSIDt U.S. TRADE, Jan. 21, 2000 (generally discussing that EU officials cited the number of cases brought against EC companies as one reason for the EC's invocation of the WTO Dispute Settlement Mechanism). Over thirty pending Section 337 cases against EC companies existed at the time the EC filed a request for consultations with the U.S. Id.


6. See EC Request for Consultations on Section 337, supra note 4, at 1 (stating the specific violations alleged by the EC). The EC set forth its legal claims for purposes of consultations as follows:

The European Communities and their member States consider that Section 337 is not in conformity with the United States of America's obligations under the GATT 1994, notably its Article III, and under the TRIPs Agreement, notably its Articles 2 (in conjunction with Article 2 Paris Convention), 3, 9 (in conjunction with Article 5 Berne Convention), 27, 41, 42, 49, 50 and 51 TRIPs Agreement. Id. Please note that Article III under GATT 1947 and GATT 1994 are the same exact obligation. GATT 1994
consultations, the Canadian and Japanese governments each filed requests to join the EC-U.S. consultations. However, the WTO-mandated consultations between the United States and its trading partners did not lead to a mutually acceptable solution, and panel procedures have not been sought. USTR continues to monitor the dispute over Section 337.

This paper will examine possible outcomes in the current dispute over Section 337. As background, it will first outline the salient features of Section 337, as well as the twenty-year history of the dispute, focusing on the 1988 GATT panel decision holding Section 337 to be in violation of GATT obligations. It will then analyze the legality of Section 337 under the WTO. This analysis will take into account the 1994 statutory changes designed to address the 1988 GATT panel decision as well as other aspects of Section 337.

simply incorporated many of the provisions of GATT 1947 as is, including the Article III provision.

Id.

7. See United States–Section 337 of the Tariff Act of 1930 Request for Consultations by Canada, WT/DS186/2 (Feb 1, 2000) [hereinafter Canadian Request for Consultations on Section 337] (stating Canada’s request for consultations); United States–Section 337 of the Tariff Act of 1930 Request for Consultations by Japan, WT/DS186/3 (Feb 1, 2000) [hereinafter Japanese Request for Consultations on Section 337] (stating Japan’s request for consultations). See also Daniel Pruzin, Tariffs: Canada, Japan Join EU in Claiming U.S. Tariff Law Violates Global Trade Rules, BNA INT'L TRADE DAILY, Feb. 3, 2000, at D3 (noting that the Canadian and Japanese requests to join consultations did not cite their underlying legal bases in the same detail as the EC request, but referred to the high number of Canadian and Japanese respondents in Section 337 cases initiated by the United States).

8. See Snapshot of WTO Cases Involving the United States (United States Trade Representative Oct. 11, 2001) (stating that the USTR is monitoring progress of Section 337 of Tariff Act of 1930 consultations), at http://www.ustr.gov/enforcement/snapshot.pdf (last visited Jan. 24, 2002). The Section 337 case is one of eight cases that have not been withdrawn, and yet are neither in the consultations nor panel proceedings stage.

9. See generally Section 337 Investigations at the U.S. International Trade Commission: Answers to Frequently Asked Questions, USITC Pub. 3027 (1997) [hereinafter USITC Report Section 337 FAQs] (providing background and clarifications about the Commission’s procedures with regard to Section 337); JACKSON, ET AL., supra note 5, at 874-84 (discussing Section 337 procedures); BHALA, supra note 5, at 1224-41 (discussing Section 337 generally); Peter D. Ehrenhaft, Remedies Against Unfair Int’l Trade Practices, SF24 ALI-ABA 203, 227-231 (providing an overview of some Section 337 procedures).
Finally, it will examine Section 337 from the perspective of the GATT 1947, the TRIPs Agreement, and evolving WTO practice.

A. THE DISPUTE OVER SECTION 337 IS PART OF A LARGER CHALLENGE TO U.S. TRADE REMEDIES

The complaint of the EC, Japan, and Canada against Section 337 is simply one chapter (albeit arguably a particularly important one) in a larger debate over U.S. trade remedies, such as Section 301 and U.S. dumping and countervailing duty laws. The controversy stems from the perception that U.S. trade remedies function as non-tariff barriers and are a form of "legal protectionism."\(^{10}\) The WTO Trade Policy Review of U.S. trade policies devoted ten pages to analyzing the legality of U.S. trade remedies.\(^{11}\) Further, U.S. trading partners, which have been generally critical of U.S. trade remedies,\(^{12}\) have already challenged U.S. trade remedy laws through the WTO dispute settlement process.

In January 1999, the EC brought a WTO complaint against the United States regarding Section 301, which (depending on whether the foreign governmental action is in contravention of a treaty obligation with the United States) either permits or requires the U.S. Trade Representative to investigate and retaliate against foreign governmental action deemed to be unjustified and harmful to U.S. interests.\(^{13}\) On December 19, 1999, the WTO adopted a panel report which found that Section 301 *prima facie* violated Article 23 of the

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10. See I.M. DESTLER, AMERICAN TRADE POLITICS 170-173 (The Twentieth Century Fund ed., 3d ed. 1995) (discussing the proposition that Section 337 is a non-tariff barrier and a form of legal protectionism).


12. See, e.g., INDUS. STRUCTURE COUNCIL, MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, 2000 REPORT ON THE WTO CONSISTENCY OF TRADE POLICIES BY MAJOR TRADING PARTNERS 203 (2000) [hereinafter MITI REPORT] (arguing that, depending on the manner in which the 1994 amendments to Section 337 are implemented, Section 337 could still "result in discriminatory treatment of imports").

13. See 19 U.S.C. § 2411(a), (b) (1994 & Supp. IV 1998) (outlining the possible actions of the USTR in response to foreign trade practices). Section (a) requires the USTR to take action against a treaty party that is in violation of its obligations, while section (b) requires the USTR to take action against a trading partner acting unreasonably with respect to U.S. interests. *Id.*
Dispute Settlement Understanding ("DSU"), which requires WTO members to "have recourse and to abide by the rules and procedures" of the DSU as a prerequisite to retaliatory action. Nevertheless, the Panel ultimately held that Section 301 did not violate the DSU because the Statement of Administrative Action, which the Panel determined to be "an important interpretative element" of the statute, promised to resort to the DSB when required, thereby repudiating unilateral U.S. action inconsistent with WTO obligations.

In 1999, the EC and Japan initiated separate complaints challenging the Antidumping Act of 1916, a trade remedy that requires a showing of predatory intent, but not material injury, and provides for fines and imprisonment instead of dumping duties. In the case initiated by Japan, the Panel held that the 1916 Act violated WTO obligations because it provides for penalties other than dumping duties (in contravention of the WTO Antidumping


15. See generally Statement of Administrative Action, reprinted in Uruguay Round Agreements, Texts of Agreements. Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, 103d Cong., 2d Sess., H.R. DOC. NO. 103-316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040 [hereinafter SAA]. The Statement of Administrative Action ("SAA") was part of the Administration's effort to receive congressional approval for the Uruguay Round Agreement. It includes detailed explanations of the likely interaction of the WTO Agreements with U.S. laws. Although courts were initially wary of doing so, some courts have recently begun to treat the SAA as a portion of the legislative history.

16. See Section 301 Panel Report, supra note 14, paras. 7.131-136 (finding the SAA was as an important tool in interpreting the powers under Section 304 in conjunction with the language of the statute). These paragraphs detail the effect of the SAA and other U.S. statements before the WTO Panel, removing the fear that the United States would fail to comply with Article 23. Id.

Agreement), and it does not require a showing of material injury, notice to the government of the exporting country, or standing requirements to ensure that complainants represented a significant portion of the domestic industry.  

Finally, the Dispute Settlement Body has issued reports in several cases wherein WTO members have challenged the administration of U.S. antidumping, countervailing duty, and safeguard provisions. Antidumping and countervailing duty laws, which

18. See United States–Antidumping Act of 1916, Report of the Panel, WT/DS162/R, paras. 10.253, 10.289, 10.261 (May 29, 2000) [hereinafter 1916 Antidumping Act Report of the Panel] (elaborating on reasons why the 1916 Act violated WTO obligations); see also Jeffrey S. Beckington, The World Trade Organization’s Dispute Settlement Resolution in United States–Antidumping Act of 1916, 34 Vand. J. of Transnat’l L. 199 (Jan. 2001) (discussing in detail the WTO treatment of the 1916 Anti-Dumping Act). In addition to the reasons cited above, the Panel refuted the U.S. defense that the 1916 Act was a dead-letter, noting that it had recently been used against Japanese, Russian, and German steel manufacturers. Id. Further, the Panel refuted the U.S. defense that the 1916 Act was really an antitrust remedy and therefore fell outside the ambit of the WTO’s jurisdictional reach. Id.; see also BHALA supra note 5, at 872-75 (discussing the WTO’s view of the Antidumping Act of 1916); Ehrenhaft supra note 9, at 233 (discussing the Antidumping Act of 1916 WTO case).


21. See United States–Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, Report of the Panel, WT/DS177/R & WT/DS178/R (Dec. 21, 2000) (finding that the U.S. violated its obligations as per Article 4.1(b) of the Agreement on Safeguards); United States–Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Report of the Panel, WT/166/AB/R (Dec. 22, 2000) (concluding that the U.S. violated certain agreed upon safety measures); United States–Transitional...
continue to be relied upon heavily by U.S. industry claiming unfairly low pricing by foreign rivals, remain highly contentious areas of U.S. trade law.\(^2\)

B. THE COMPLEXITY OF COMPETING INTERESTS IN THE DEBATE OVER SECTION 337

Against this background of disputes over U.S. trade remedies, the Section 337 case stands out as perhaps the most complex. After twenty years and two previous GATT Panel attempts to resolve the issue,\(^2\) the section 337 issue continues to prompt debate and continuing conflict.\(^2\) The debate over the proper scope of intellectual property rights protection makes a quick resolution of the Section

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Safeguard Measure on Combed Cotton Yarn from Pakistan, Report of the Panel, WT/DS192/R (May 31, 2001) (concluding that the U.S. actions on cotton yarn from Pakistan violated its obligations under the WTO safeguard provisions).


23. See infra notes 54-68 and accompanying text (discussing the 1981 Canadian complaint and the 1988 EC complaint against Section 337).

24. See generally MITI REPORT, supra note 12, at 202-204 (criticizing Section 337 despite amendments enacted in 1994).
337 debate less and less likely. Because the Section 337 debate is now about much more than the precise contours of a particular border enforcement remedy, it has become part of a philosophical disagreement over the proper balance to be struck between strong intellectual property rights protection and other values, such as protection of consumer welfare (as in the case of access to life-saving pharmaceuticals in developing countries).

Supporters of Section 337 have traditionally used protectionist rhetoric in touting Section 337's ability to protect domestic industries. However, as foreign companies with U.S. investments

25. Abdulqawi A. Yusuf, et al., TRIPs: Background, Principles and General Provisions, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE 3 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998). This disagreement involves, "tensions arising from the need, on the one hand, of those responsible for new industrial or technological breakthroughs to capitalize on them, and on the other hand, of second comers to gain access to them at little or no cost." Id.


Some foreign businesses take advantage of delays and limitations in the U.S. court system to infringe on the intellectual property rights of American competitors. Foreign businesses acquire market share by selling infringing imported products, while infringement cases against them languish in federal courts. They use profits earned from their infringing activities to alter or enhance the infringed design, then switch to the new design to protect their market share if the court finally orders them to stop their infringing activities.

Id. See also Margo A. Bagley, Using Section 337 of the Tariff Act of 1930 to Block Materially Different Gray Market Goods in the Common Control Context: Are Reports of its Death Greatly Exaggerated?, 44 EMORY L.J. 1541, 1543 (1995) (stating that Section 337 helps protect U.S. trademark owners). Many articles on Section 337 written before 1990 (many of which deal with the amendments to Section 337 wrought by the Omnibus Trade and Competitiveness Act of 1988) view Section 337 as an important tool in protecting U.S. producers from imports. See, e.g., Andrew S. Newman, The Amendments to Section 337: Increased Protection for Intellectual Property Rights, 20 LAW & POL’Y INT’L BUS. 571 (1989) (stating that Section 337 was a powerful trade remedy even before the amendments were enacted); see also William E. Perry, Administration of Import
and intellectual property rights have increasingly availed themselves of Section 337’s powerful remedies, many commentators have noted Section 337’s ability to protect a variety of U.S. and foreign interests in the American market. Thus resolving this issue may be increasingly difficult due to the fact that Section 337 benefits both domestic and foreign interests that rely on it to protect their U.S. intellectual property rights and their position in the U.S. market.

Despite the increase in cases brought by foreign interests under Section 337, opponents of Section 337 have criticized its tendency to discriminate between domestic and foreign producers. Opponents also point to the alleged ability of domestic and foreign companies with a portfolio of broadly written patents to discourage or exclude new entrants from the U.S. market with costly Section 337 cases.


29. Foreign and domestic interests have utilized the Section 337 procedure to protect their interests. See, e.g., In re Certain Personal Watercraft and Components Thereof, USITC Inv. No. 337-TA-452 (Feb. 6, 2001) (outlining the complaint brought by Yamaha Hatusudoki Kabushiki Kaisha and Sanshin Kogyo Kabushiki Kaisha against Bombardier Inc.); In re Certain Integrated Circuits, USITC Inv. No. 337-TA-450 (Jan. 26, 2001) (outlining the complaint brought by inter alia United Microelectronics Corporation of Taiwan against Silicon Integrated Systems Corporation); In re Certain Safety Eyewear, USITC Inv. No. 337-TA-433 (Mar. 31, 2000) (outlining the complaint brought by Bacou USA Safety, Inc. against Crews, Inc.); In re Certain Rare-Earth Magnets, USITC Inv. No. 337-TA-413 (July 31, 1998) (outlining the complaint brought by inter alia Sumitomo Special Metals Co. against inter alia four U.S.-based companies); In re Certain Organic Photoconductor Drums, USITC Inv. No. 337-TA-411 (Apr. 30, 1998) (outlining the complaint brought by Mitsubishi Chemical Corporation); In re Certain Lens-Fitted Film Packages, USITC Inv. No. 337-TA-406 (Feb. 13, 1998) (outlining the complaint brought by Fuji Photo Film Co.).

Finally, commentators who favor balancing intellectual property rights with other social values have also criticized Section 337 as overly protective of the interests of intellectual property rights holders, or even as "a means of extra-territorial enforcement of domestic American intellectual property."\(^{31}\)

I. IMPORTANT FEATURES OF SECTION 337

Section 337 is a powerful border enforcement mechanism to be used against imports that infringe a U.S. patent, copyright, trademark, or registered semiconductor mask work.\(^{32}\) In addition to the infringement of the aforementioned intellectual property rights, the statute also prohibits various "unfair methods of competition."\(^{33}\) Most cases brought under Section 337 are in the area of patent infringement.\(^{34}\) The 1988 Trade Act made intellectual property

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Conceptually, Section 337 can be considered either as a means of extra-territorial enforcement of domestic American intellectual property, or—more consistent with the overall framework of American trade law—as a counter to an unfair advantage acquired by a foreign producer in competition with domestic American producers for the American market. However, the remedy provided by s. 337, a ban on the imports in question rather than a duty aimed at neutralizing the supposed unfair advantage, comports more with the former interpretation that the latter.

Id. at 318-19.

32. See 19 U.S.C 1337(a)(1)(B)-(D)(2001). There are special standing requirements to bring a patent, copyright, trademark, or mask work infringement claim under Section 337. The complainant [plaintiff] must be able to show that "an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work or design concerned, exists or is in the process of being established." See 19 U.S.C. § 1337(a)(2). This term, "an industry," is further defined as follows: "(A) significant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in [the IP right's] exploitation, including engineering, research and development, or licensing." See 19 U.S.C. § 1337(a)(3)(A)-(C).

33. See 19 U.S.C. § 1337(a)(1)(A) (prohibiting "unfair methods of competition . . . the threat or effect of which is (i) to destroy or substantially injure an industry in the United States; (ii) to prevent the establishment of such an industry; or (iii) to restrain or monopolize trade and commerce in the United States").

34. See House Comm. on Ways and Means, 105th Cong., Overview and Compilation of U.S. Trade Statutes 96 (Comm. Print 1997) ("Among the few nonpatent cases have been cases involving group boycotts, price fixing, predatory
claims much easier to assert than other claims; thus, Section 337 is often used for intellectual property claims instead of other "unfair methods of competition" claims. A complainant asserting an "unfair methods of competition claim" must prove serious damage.\(^{35}\) On the other hand, a complainant asserting an intellectual property claim need only show the existence of a U.S. "industry," a term that is defined broadly.\(^{36}\)

Litigation of a patent infringement claim under Section 337 differs from litigation in federal district court in ways which make Section 337 a more attractive litigation option for U.S. intellectual property rights holders. Although Section 337 cases apply the same substantive patent law as a federal district court would, Section 337 is unique in, among other areas, the remedies it provides, the strict limitation on counterclaims, and the speed with which disputes are resolved.\(^{37}\)

Whereas federal district courts offer damages to the patent holder upon a finding of infringement, Section 337 provides limited and general exclusion orders, temporary exclusion orders, and cease and desist orders.\(^{38}\) Limited exclusion orders are applied at the border against a named manufacturer's infringing product.\(^{39}\) General

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35. See 19 U.S.C. § 1337(a)(1)(A) (meaning that the respondent's acts will likely destroy or substantially injure a domestic industry, among other effects).

36. See 19 U.S.C. § 1337(a)(2) (noting that under Section 337 an "industry" exists if there is significant investment in plant and equipment and significant employment of labor or capital related to articles protected under a U.S. intellectual property regime or substantial investment in exploiting the article); see also TREBILCOCK & HOWSE, supra note 31, at 318 (noting the broad reach of Section 337).

37. See 19 U.S.C. § 1337(c)-(i) (outlining remedies available in Section 337 proceeding).

38. See 19 U.S.C. § 1337(d)-(f) (inferring that in order to issue an exclusion order, the USITC must consider more than the interests of the complainant by examining the "effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and U.S. consumers..."). See 19 U.S.C. § 1337(d)(2). See generally Bryan A. Schwartz, Remedy and Bonding Law under Section 337: A Primer for the Patent Litigator, 81 J. PAT. & TRADEMARK OFF. SOC'Y 623 (1999) (discussing the variety of Section 337 remedies).

39. See 19 U.S.C. § 1337(d)(2) (noting that the authority of the Commission to order an exclusion from an entry of articles will be limited to persons it determines
exclusion orders are *in rem* relief applied at the border against all imports that infringe an intellectual property right, regardless of the product manufacturer.40 Temporary exclusion orders may also be issued where the complainant can prove the factors required for a preliminary injunction in District Court.41 In addition to, or instead of, exclusion orders, the United States International Trade Commission ("USITC") may issue cease and desist orders, imposing substantial monetary penalties for any violations thereof.42 Finally, the USITC may also conclude an investigation by either a consent order or by an agreement between the private parties to the investigation.43

Section 337 investigations are expedited and tend to last about one year (or eighteen months in more complex cases), while patent litigation in a federal district court can last for years.44 Moreover, the case is not complicated by a respondent's counterclaims, as Section

have violated this section).

40. See 19 U.S.C. § 1337(d) (noting the USITC may issue an exclusion order against articles "imported by any person violating... ").

41. See 19 U.S.C. § 1337(e) (stating that if the Commission finds a violation of Section 337 during an investigation, it can exclude the product from entry until further notice). Temporary exclusion orders (like preliminary injunctions and TROs in district court) are often conditioned upon the posting of bond by complainant and/or respondent. See 19 U.S.C. § 1337(e)(1). The respondent, on the other hand, must also post bond in order to continue importation during the duration of the temporary exclusion order. See id. If the complainant ultimately prevails, the bond may be forfeited to the complainant. Id. These bonding features resulted, in part, from the 1994 amendments to Section 337. See Atkins, *supra* note 28, at 121 (providing further information on bonding issues).

42. See 19 U.S.C. 1337(f)(2001) (explaining the criteria and procedures for a cease and desist order in a Section 337 investigation).

43. See 19 U.S.C. § 1337(c) (explaining that the USITC may terminate a Section 337 investigation by issuing a consent order or referring the matter to arbitration upon parties' agreement).

44. See David Foster & Joel Davidow, *GATT and Reform of Section 337*, 30 Int'l Law 97, 99 (stating USITC is likely to continue to complete investigations on an expedited basis relative to federal court actions because of relative caseloads and expertise); see also Uruguay Round Agreements Act, Pub. L. No. 103-465, § 321(a)(1)(B) (1994) (codified as amended at 19 U.S.C. § 1337 (b)(1) (1994)). Following the 1994 Amendments, there is no longer a statutory requirement that Section 337 cases be completed within a given term. Yet Section 337 cases are generally completed within approximately one year, an astonishingly short period compared to most federal district court litigation.
337 does not give the USITC the legal authority to hear counterclaims on their merits. When a respondent brings a counterclaim before the USITC, it is promptly removed to federal district court for resolution, while the complainant's claims are resolved by the USITC.

Patent litigation under Section 337 differs from federal district court litigation because the USITC has the choice of initiating an investigation by itself, or initiating an investigation in response to a complaint. Generally speaking, investigations only occur in response to specific complaints.

Section 337 investigations also differ from federal litigation in that the Administrative Procedure Act applies to Section 337 investigations. This means that an administrative law judge oversees discovery, conducts hearings, and then issues an initial determination. The initial determination automatically becomes a

45. See 19 U.S.C. § 1337(c) (noting procedures if a counterclaim is raised wherein the matter is removed to district court). The provision under which counterclaims are brought before the USITC and immediately removed to district court was intended to bring Section 337 into compliance with the WTO rules. See Foster & Davidow, supra note 44, at 103. Some commentators claim that this amendment still falls short of fulfilling the United States' obligations before the WTO. See Martenczuk, supra note 30, at 135-45 (analyzing whether Section 337 amendments are consistent with the United States' WTO obligations).

46. See 19 U.S.C. § 1337(c) (noting that the counterclaim relates back to the date of the original complaint).

47. See 19 U.S.C. § 1337 (noting USITC authority to self-initiate an investigation or to investigation upon request); see also Krupka et al., supra note 27, at 789-807 (1993) (discussing the differences between bringing a complaint before the ITC or filing in a district court).

48. See 19 C.F.R. § 210.20(a) (1992) (listing required elements of complaint); see also Krupka et al., supra note 27, at 792 (noting that the ITC requires specific recitation of facts in a complaint).

49. See Summary of Statutory Provisions Related to Import Relief, 12 USITC Publication 3125 (U.S. Int'l Trade Comm'n, Washington, D.C.) (August 1998) ("All Commission investigations under Section 337 are conducted on the record after publication of notice and with opportunity for a hearing in conformity with the adjudicative provisions of the Administrative Procedure Act (5 U.S.C. 551 et seq.)."); see also Atkins, supra note 28, at 109 (inferring that the Administrative Procedure Act is followed because an administrative law judge is assigned immediately when the investigation begins).

50. See 19 C.F.R. § 210.42 (a)-(f) (explaining the role of an administrative law judge during an investigation); see also USITC Report Section 337 FAQs, supra
final determination after forty-five days, unless the USITC chooses to review it.\(^1\) Once a final determination is made, the President may render the determination of no effect if he overrules it within sixty days on policy grounds.\(^2\) If the President does not disapprove of the determination within sixty days, the parties have sixty more days to appeal to the Federal Circuit.\(^3\)

II. HISTORY OF GATT DISPUTES INVOLVING SECTION 337

A. THE 1981 CANADIAN COMPLAINT CHALLENGING SECTION 337

Canada initiated the first GATT dispute involving Section 337 in 1981.\(^4\) The Canadian government, which was pursuing the claim on behalf of a Canadian exporter whose products were subjected to a general exclusion order, claimed that Section 337 violated the national treatment principle.\(^5\) The GATT panel agreed that Section note 9, at 2 (stating that according to the Administrative Procedures Act, an administrative law judge conducts the evidentiary hearing).

51. See 19 C.F.R. § 210.42(h)(2) (noting USITC determination shall become the determination of the USITC within forty-five days after date of such service of the initial determination unless the USITC orders a review within forty-five days of such service).

52. See 19 U.S.C. § 1337(j)(2) (explaining that the President may disapprove of the determinations of the administrative law judge for policy reasons).

53. See 19 U.S.C. § 1337(c) (noting that the appeal must be in accordance with Chapter 7 of Title 5).


55. See GATT Panel Report on Canadian Challenge to Section 337, supra note 54, at 111 (arguing that treatment by United States of the imported spring components for automatic transmissions was “clearly less-favourable” than that given to U.S. products where there is alleged patent infringement); see also Krupka et al., supra note 27, at 814-15 (noting that Canada argued that U.S. patent holders with a domestic industry were given more remedies than those without a domestic industry).
337 represented a violation of the GATT principle of national treatment, but held that the statute was permissible because it fell within the ambit of GATT Article XX(d), as a measure "necessary" to secure compliance with laws or regulations relating to the protection of patents. The measure was "necessary" because:

United States civil court action would not have provided a satisfactory and effective means of protecting [the complainant's] patent rights against importation of the infringing product. The Panel took the view that the only way in which, under existing United States law, [the complainant's] right to the exclusive use of its patent in the United States domestic market could be effectively protected against the importation of the infringing product would be to resort to the exclusion order procedure [under Section 337].

B. THE 1988 EC COMPLAINT AGAINST SECTION 337

In 1988, the EC brought the second GATT challenge to Section 337 on behalf of Akzo, a Dutch chemical firm that was subject to a limited exclusion order for infringing upon a DuPont patent. Ultimately, the GATT Panel ruled against the United States, finding that Section 337 violated the national treatment principle of Article 3, and could not be justified under any of the Article XX exceptions. The Panel held that Section 337 violated national treatment principles because imported products alleged to have infringed upon a U.S.-granted patent were given less favorable treatment under Section 337 than like situations where a U.S. product

56. See GATT Panel Report on Canadian Challenge to Section 337, supra note 54, at 126 (finding USITC exclusion order was consistent with U.S. WTO obligations pursuant to Article XX(d)).

57. Id.


59. See GATT Panel Report on EC Challenge to Section 337, supra note 58, at 396 (concluding that Section 337 violated U.S. obligations under Article 3(4)).
is at issue. The Panel cited six features of the Section 337 process, which lead to this conclusion:

(i) The availability to complainants of a choice of forum in which to challenge imported products, whereas no corresponding choice is available to challenge products of United States origin;

(ii) The potential disadvantage to producers or importers of challenged products of foreign origin resulting from the tight and fixed time-limits in proceedings under Section 337, when no comparable time-limits apply to producers of challenged products of United States origin;

(iii) The non-availability of opportunities in Section 337 proceedings to raise counterclaims, as is possible in proceedings in federal district court;

(iv) The possibility that general exclusion orders may result from proceedings brought before the USITC under Section 337, given that no comparable remedy is available against infringing products of United States origin;

(v) The automatic enforcement of exclusion orders by the United States Customs Service, when injunctive relief obtainable in federal court in respect of infringing products of United States origin requires for its enforcement individual proceedings brought by the successful plaintiff;

(vi) The possibility that producers or importers of challenged products of foreign origin may have to defend their products both before the USITC and in federal district court, whereas no corresponding exposure exists with respect to products of United States origin.60

The Panel then turned to Article XX(d) to determine whether any of these GATT Article 3-violative features could be justified as “necessary” measures.61 The Panel concluded that Section 337 was inconsistent with GATT obligations because none of these six


61. See GATT Panel Report on EC Challenge to Section 337, supra note 58, at 393-95 (discussing whether the measures which violated Article 3(4) are “necessary” as per Article XX(d)).
features were clearly justified under Article XX(d) as measures "necessary" to secure compliance with U.S. laws or regulations relating to patent protection. The Panel also articulated the far-reaching principle that a facially discriminatory statute, like Section 337, was inconsistent with GATT obligations so long as its effects were potentially capable of discriminating against a single foreign producer.

When the Panel issued its report, the United States initially refused to adopt it, but later decided to accept the panel report. The United States, however, said it would be premature to make Section 337 changes before the conclusion of the Uruguay Round negotiations.

62. See id. at 395 (noting that even though there was some evidence of inconsistencies, they were not an intentional effort to harm foreign products). "Nevertheless, the Panel did not rule out entirely that there could sometimes be objective reasons why a general in rem exclusion order might be 'necessary'... against imported products even though no equivalent measure was needed against products of United States origin." Id. The Panel noted that such in rem exclusion orders may be necessary when an infringing products origin is unknown. Id. However, the Panel stated that to bring Section 337 into compliance with the GATT regarding general exclusion orders would be to provide for "the application in like situations of equivalent measures against products of United States origin." Id.

63. See GATT Panel Report on EC Challenge to Section 337, supra note 58, at 387 (accepting the EC argument that a statute that "may lead" to less favorable treatment will violate Article III): see also Robert E. Hudec, GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test, 32 INT'L LAW. 619, 622 (1998) (noting that the panel's conclusion implies where elements of Section 337 were "merely capable of being burdensome" to any one foreign producer, no matter how such provisions may benefit other foreign producers there is an Article III violation).

64. The United States was able to block adoption of the panel report because before the Uruguay Round, GATT Panel Reports could only be adopted if all GATT Contracting Parties agreed to the adoption of the report. See JOHN JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO 122-23 (2000). In the new WTO dispute settlement system, panel reports are automatically adopted. See id. at 384-85.

65. See Foster & Davidow, supra note 44, at 100 (suggesting that the United States did not wish "[t]o create a precedent that major powers should prevent adoption of GATT panel decisions supported by virtually every other GATT party, especially given the favorable record of the United States regarding GATT panel decisions and U.S. attempts at that time to strengthen GATT dispute settlement in the Uruguay Round").

66. See id. (noting Administration statements that negotiations about amending
Further, commentators suggest that the delay in amending Section 337 arose from a practical sense that it would be counterproductive to amend Section 337 right away to conform with GATT 1947.67 In light of the ongoing Uruguay Round negotiations, the United States decided to wait and see how the TRIPs Agreement would treat border enforcement measures, and then amend Section 337 to conform to the new WTO standard.68

III. AMENDMENTS TO SECTION 337

Although the United States planned to amend Section 337 only at the close of the Uruguay Round, the United States Trade Representative ("USTR") requested comments in 1990 on several alternative plans for amending Section 337.69 The USTR outlined the following proposals: (1) create a separate division of the Court of International Trade to deal with patent issues, (2) allow transfer of 337 cases after either (a) the administrative law judge ("ALJ") ruled on the infringement or (b) the ALJ ruled on preliminary injunctive relief, and (3) create an Article 3 court with exclusive jurisdiction over patent issues.70 Ultimately, instead of the more radical USTR
proposal, a proposal by Senator Rockefeller, supported by the American Bar Association, provided the basis for the amendments. The amendments were finalized only after extensive lobbying by various interest groups. Eventually, the substance of Senator Rockefeller’s bill was included in the Uruguay Round Agreements Act (“URAA”).

The URAA provisions, which amended Section 337 (in response to the 1988 GATT Panel Report), provided for the following:

1. Under the amended Section 337, the USITC may issue general exclusion orders only where (1) a general exclusion order is necessary to prevent circumvention of a limited exclusion order, or (2) a pattern of importation of infringing articles exists that makes it difficult to pinpoint the source of the infringing articles.

2. The time limit for case completion was eliminated. Rather, the USITC is required to reach a determination “at the earliest practicable time after the date of publication” of the investigation.

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71. See S. 3172, 102d Cong. §3 (1992) (proposing major changes to Section 337, especially in the parts that focus on the exclusion of articles and the cease and desist orders); see also S. 148, 103d Cong. §3 (1993) (proposing the same changes as the previously named legislation): Rockefeller Lawyers Attack Proposed USTR Changes to Section 337, INSIDE U.S. TRADE, June 10, 1994, at 9-10 (contrasting the Administration’s proposals and Senator Rockefeller’s bill providing amendments to Section 337).

72. Letter from Peter D. Ehrenhaft, Chairman, Working Group on Section 337, to Hon. Sam Gibbons, Chairman, House Trade Subcommittee, Committee on Ways and Means, House of Representative (June 1, 1994), reprinted in Text: ABA Letter on Section 337, INSIDE U.S. TRADE, June 10, 1994, at 10-11 (showing the Working Group of the International Law Section of the American Bar Association’s support for the Rockefeller amendments to Section 337 because they disallow respondents to move for declaratory judgments, places counterclaims in district courts and solidified forum selection).

73. See Industry Pressure Mounts on USTR to Change Section 337 Proposal, INSIDE U.S. TRADE, July 8, 1994, at 7-8 (describing the multitude of interest groups lobbying the Administration about proposed amendments).


75. See 19 U.S.C. §1337 (2001) (codifying the Section 337 amendments); see generally Foster & Davidow, supra note 44, at 101-05 (analyzing Section 337 amendments made in the URAA).

76. See 19 U.S.C. §1337(d)(2)(A)-(B) (limiting the USITC’s authority to issue exclusion orders in a Section 337 investigation).
notice, and to "establish a target date" for the final determination within 45 days after initiation.  

3. The amendments eliminated the danger of simultaneously subjecting a respondent to parallel proceedings before the USITC and a federal district court. The district court must now stay its proceedings at the request of a party that is also a respondent in a Section 337 investigation until the USITC makes a final determination with respect to any claim involving the same issues pending before the USITC.  

4. Respondents are also permitted to raise counterclaims, which can immediately be removed to district court. The Statement of Administrative Action ("SAA") stated:

Counterclaims raised before the ITC and removed to the district court will relate back to the date of the original petition filed by the complaining party at the ITC. These provisions will be particularly relevant with respect to the tolling of applicable statutes of limitations and the calculation of damages in infringement actions.

5. Although these two final amendments were not made in response to the 1988 Panel report, Congress also amended Section 337 as follows: (1) arbitration agreements could now furnish the basis for a final settlement of a USITC dispute, and (2) the USITC was also given discretion not only to establish bonding amounts, but also to declare them forfeited to the opposing party in cases where the original complainant or respondent's allegations are unfounded.

These amendments appear to address all of the major concerns of

77. See 19 U.S.C. § 1337(b)(1) (codifying the amendment to eliminate a time limit).

78. See SAA, supra note 15, at 367.

79. See 19 U.S.C. 1337(c)(2001) (noting that the counterclaims must exist under Section 1391 of Title 28).

80. See SAA, supra note 15, at 368.

81. See id. at 361 ("Agreements between private parties to the investigation, including an agreement to present the matter for arbitration" were an acceptable basis for a final settlement of the dispute); id. at 362-63 (noting that the USITC had discretion to set an amount "sufficient to protect the complainant from injury, but the bond amount could be forfeited to the opposing party if the [USITC] later determines that the respondent has not violated the provisions of this section.").
the 1988 GATT panel, thus arguably bringing Section 337 into compliance with the WTO. It should be noted, however, that the amendments are much less ambitious than the USTR's original proposals.\textsuperscript{82} Perhaps this is the reason many commentators consider them to represent relatively modest changes in response to the GATT panel report's recommendations.\textsuperscript{83}

**IV. CONSISTENCY OF AMENDED SECTION 337 WITH WTO OBLIGATIONS**

**A. INTRODUCTION**

In order to understand the relationship between Section 337 and the WTO, it is necessary to be familiar with relevant provisions of GATT 1947 and the TRIPs Agreement. It is also important to understand how these provisions are affected by prior GATT/WTO Panel and Appellate Body Reports and by the terms of the Dispute Settlement Understanding.

1. **Effect of Previous Panel and Appellate Body Reports on Future WTO Disputes**

In view of the previous two adopted Panel reports dealing with Section 337, as well as the many recent Appellate Body and Panel Reports dealing with other U.S. trade remedies, the legal effect of these reports must be examined. Generally, the WTO takes the view

\textsuperscript{82} See Foster & Davidow, supra note 44, at 105 (noting USTR's more drastic proposals for amending Section 337, which removed some or all of the USITC's jurisdiction for patent infringement matters, were rejected in favor of the Rockefeller proposal); see also Krupka et al., supra note 27, at 825-35 (discussing the USTR's proposed amendments and the resulting amendments to Section 337 in the URAA).

\textsuperscript{83} See Foster & Davidow, supra note 44, at 98 ("A strong nation like the United States can manage to change its laws relatively little even when the laws run afoul of GATT nondiscrimination rules.").
that such reports are of limited legal effect. The WTO Appellate Body has said:

[A]dopted panel reports are an important part of the GATT acquis. Subsequent panels often consider them. They create legitimate expectations among WTO members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.

Early WTO Appellate Body and Panel Reports suggest that this view is correct as far as the facts of cases are concerned. In other words, Panels examine the factual circumstances carefully in each individual case, and do not jump to legal conclusions based on previous cases with analogous facts.

However, the Appellate Body has prescribed certain modes of interpretation with respect to particular provisions that it expects to be applied consistently in future cases. Some of these emerging standards will likely apply in any WTO Panel Report on Section 337.


85. See id. at 15 (describing the impact of panel reports on the resolution of future disputes).

86. Id. at 14 (illustrating the Appellate Body's position that "the generally-accepted view under GATT 1947 is that "the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but [that] subsequent panels did not feel legally bound by the details and reasoning of a previous panel report." (emphases added).

87. See Raj Bhala, The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy), 9 J. TRANSNAT'L L. & POL'Y 1, 3-4 (1999) (asserting that the Appellate Body is in the process of establishing binding principles with the effect of stare decisis). "[A]ll holdings of the WTO Appellate Body are, in fact, binding." Id. at 3. "[W]e can observe the emergence of an international common law of procedure in WTO adjudications with respect to (1) burden of proof, (2) judicial economy, (3) standing, and (4) sufficiency of complaints. And we can observe an emerging substantive common law on (1) the interpretation of Article XX . . ., (2) like product determinations, and (3) the interpretation of GATT XIII." Id. at 4.
and thus are directly relevant in analyzing this dispute. Appellate
Body Reports prescribing general modes of analysis for cases
involving Articles III and XX of GATT 1947, as well as for the
TRIPs Agreement, constitute relevant WTO practice.

2. The Dispute Settlement Understanding ("DSU") Standards for
Interpretation of WTO Agreements

DSU Article 3(2) requires that Panels apply "customary rules of
interpretation of public international law" in interpreting WTO
provisions. In case after case, the Appellate Body has interpreted
this language to imply the application of the principles embodied in
the Vienna Convention on the Law of Treaties ("Vienna
Convention") Article 31, which sets forth the default rules of

88. See Understanding on Rules and Procedures Governing the Settlement of
Disputes, Article 3.2, Final Act Embodying the Results of the Uruguay Round of

Article 3.2 states:
The dispute settlement system of the WTO is a central element in providing
security and predictability to the multilateral trading system. Members
recognize that it serves to preserve the rights and obligations of Members
under the covered agreements, and to clarify the existing provisions of those
agreements in accordance with customary rules of interpretation of public
international law. Recommendations and rulings of the DSB cannot add to or
diminish the rights and obligations provided in the covered agreements.

89. See United States—Standards for Reformulated and Conventional Gasoline,
on Reformulated Gasoline] (explaining that the general rule of interpretation stated
in Article 31 of the Vienna Convention is regarded as a rule of customary
international law, and therefore the DSU requires that panels apply it in their
interpretations), at http://www.wto.org/English/tratop_e/dispu_e/dispu_e.htm;
Appellate Body Report on Alcoholic Beverages, supra note 84, at 10-12 (stating
that Article 32 of the Vienna Convention is regarded as a rule of customary
international law); India – Patent Protection for Pharmaceutical and Agricultural
Chemical Products, Appellate Body Report, WT/DS50/AB/R, para. 45 (Dec. 19,
1997) (explaining that panels should interpret treaties according to the principles of
Article 31 of the Vienna Convention), at http://www.wto.org/English/tratop_e/dispu_e/dispu_e.htm; see also Peter C. Maki,
to Increase the Legitimacy of the Dispute Settlement System, 9 MINN. J. GLOBAL
TRADE 343, 354 (2000) (asserting that panels consistently have stated that the
Vienna Convention should be used in their interpretations of the GATT).

interpretation, and Article 32, which sets forth the supplementary rules of interpretation. In the WTO Appellate Body Report on Alcoholic Beverages, the Appellate Body commented on the relationship between the Vienna Convention and the meaning of any given WTO provision by saying:

The provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions. [Where treaty language would permit two interpretations equally, the interpretation more consistent with the treaty's object and purpose should be adopted]. . . . [I]nterpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or

U.N.T.S. 331. Article 31, entitled General Rule of Interpretation, provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection [sic] with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

91. See id. art. 32. Article 32, entitled Supplementary Means of Interpretation, provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Id.
The Appellate Body’s view of how to interpret WTO agreements is important background to a discussion of the consistency of a WTO Member’s national regulatory scheme with that Member’s WTO obligations.

3. Relationship of GATT Article III to Article XX

a. Introduction and Analysis of Article III(4) and Article XX Issues

Before examining Section 337 in light of Articles III(4) and XX, the particular operation of these articles must be discussed. Article III(4) holds in relevant part that:

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

Thus, a law violates Article III(4) if it accords treatment less favorable to imported than domestic products. However, as long as a law meets the requirements of Article XX, it remains legal under the WTO even if it violates Article III. Article XX provides in relevant part that:

[S]ubject to the requirements that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(d) [N]ecessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those

92. See Appellate Body Report on Alcoholic Beverages, supra note 84, at 12-13 (explaining how Panels are to interpret treaties) (internal citations omitted).

relating to customs enforcement, . . . the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.  

Thus, even if a measure is found to violate Article III(4) because it gives imported products less favorable treatment relative to domestic products, Article XX permits a WTO Member to adopt the measure if it meets the requirements of one of the lettered paragraphs, as well as the requirements of the introductory paragraph, known as the Chapeau.

The Appellate Body has prescribed a sequential analysis to determine whether measures meet the requirements of one of the Article XX exceptions. Specifically, the Appellate Body in the Reformulated Gasoline case said:

In order that the justifying protection of Article 20 may be extended to it, the measure at issue must not only come under one or another of the particular exceptions—paragraphs (a) to (j)—listed under Article 20; it must also satisfy the requirements imposed by the opening clauses of Article 20. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under 20(g); second, further appraisal of the same measure under the introductory clauses of Article 20.

This sequential analysis reflects the “fundamental structure and logic of Article XX,” because the measure must first meet the specific requirements of a given exception before it is examined

94. Id. art. XX(d).

95. See Appellate Body Report on Reformulated Gasoline, supra note 89, at 8 (stating the United States’ claim that an environmental regulation fell within the ambit of Article XX(g)).


97. See Appellate Body Report on Shrimp, supra note 96, para. 119 (disagreeing with the Panel’s conclusion that the steps outlined by the Appellate Body in the Reformulated Gasoline case could be applied in any order).
under the broad standards of the Chapeau.98

Analysis under Article XX(d) looks to a measure's design,99 while analysis under the Chapeau looks to a measure's application.100 Further, panels are to interpret "the existing language of the Chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose,"101 taking into account language in the relevant WTO provisions,102 as well as "other developments," such as relevant international agreements.103 The key terms of Article XX(d) that are relevant to the Section 337 dispute are (1) "necessary

98. See id. para. 120. The Appellate Body explained:
When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under the examination varies. "What is appropriately characterizable as ‘arbitrary discrimination’ or ‘unjustifiable discrimination’, or as a ‘disguised restriction on international trade’ in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of ‘arbitrary discrimination’, for example, under the Chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.

Id.

99. See id. para. 116 (explaining that a panel is to examine a measure’s basic design to determine if the measure falls within one of the Article XX exceptions).

100. See Appellate Body Report on Reformulated Gasoline, supra note 89, at 22. The Appellate Body stated:
The Chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. . . . The Chapeau is animated by the principle that while the exception of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If [the lettered] exceptions are not to be abused or misused, in other words, the measure falling within the particular exceptions must be applied reasonably, with due regard both to the duties of the party claiming the exception and the legal rights of the other parties concerned.

101. See Appellate Body Report on Shrimp, supra note 96, para. 155 (explaining how Panels are to construe the Chapeau).

102. See id. (explaining that the preamble language of the WTO Agreement is an important tool, which gives “colour, texture and shading to the rights and obligations of Members...”).

103. See id. para. 154. In the context of Section 337, relevant treaties would include those administered by the World Intellectual Property Organization (“WIPO”): the Berne Convention, the Paris Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.
to” and (2) Article XX Chapeau terms. These terms are analyzed in the following discussion.

b. Article XX(d) language: “Necessary to”

As was the case in the 1988 GATT Panel Report on Section 337, it must first be determined whether amended Section 337 is “necessary to” secure compliance with laws or regulations relating to IPR Protection. The Appellate Body in the Reformulated Gasoline case stressed the importance of differentiating among measures “essential” or “necessary,” as opposed to measures merely “relating to,” “in pursuance of,” “for the protection of,” or “involving.” Such distinctions must be drawn because “an interpreter is not free to adopt a reading that would result in reducing whole clauses... to redundancy or inutility.”

The Appellate Body argued that a measure that is “necessary” or “essential” to some state interest would require a greater “degree of connection” with the state interest than a measure that is merely “relating to” a given state interest. Similarly, because “necessary”

104. See GATT Panel Report on EC Challenge to Section 337, supra note 58, at 393-95 (ruling that Section 337 could not be classified as “necessary” under Article XX(d)).

105. See GATT 1947, supra note 93, art. XX(j).

106. See id. art. XX(a), (b) & (d).

107. Id. art. XX(c), (e) & (g).

108. Id. art. XX(h).

109. Id. art. XX(f).

110. Id. art. XX(i); see also Appellate Body Report on Reformulated Gasoline, supra note 89, at 17 (explaining that Article XX uses different terms for various categories of measures).

111. See Appellate Body Report on Reformulated Gasoline, supra note 89, at 22-23 (explaining the importance of interpreters using precise language).

112. See id. at 17.

In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories... It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and
does not imply as close and imperative a relationship as "essential,"113 measures "necessary" to a state interest permit greater flexibility in design than measures "essential" to a state interest. Thus, trade restrictive measures under Article XX range from "essential" measures to measures simply "involving" a state interest: an "essential" measure must be the least trade-restrictive alternative, while a measure "involving" a state interest may be any one of many alternatives. Measures "necessary" to the attainment of a given state interest are closer to the middle of the spectrum than "essential" measures, so a country instituting a "necessary" measure would not be limited to the single least trade-restrictive measure conceivable.

c. Article XX Chapeau Language: Discrimination

The "nature and quality" of discrimination prohibited by the Chapeau is "different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Article 1, 2, or 6."114 The Chapeau addresses discrimination in the application, as opposed to the design, of a measure.115

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113. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Philip Babcock Gove & Merriam-Webster Editorial Staff eds., 1993) (defining "essential" as, inter alia, "constituting an indispensable structure, core, or condition of a thing" and "necessary" as, inter alia, "of, relating to, or having the character of something that is logically required"). Necessary appears to have a somewhat broader definition than "essential," thus implying a lower level of requisiteness.

114. See Appellate Body Report on Shrimp, supra note 96, para. 150; see also Appellate Body Report on Reformulated Gasoline, supra note 89, at 22 (explaining that if the discrimination referred to under the Chapeau were the same as the discrimination referred to under Article III(4), for example, there would be no need for Article XX, as any provision found to be Article III(4) violative would necessarily fall afoul of the prohibition on discrimination in Article XX). Such a reading would render all of Article XX redundant. Id.

115. See Appellate Body Report on Shrimp, supra note 96, para. 16 (contrasting the examination of a measure's design versus its application).
d. Article XX Chapeau Language: A Means of Arbitrary Discrimination

Arbitrary discrimination is akin to a procedural due process concept. The Appellate Body in the Shrimp case said the rigid application of a U.S. statute resulted in arbitrary discrimination. It based this determination on the statute’s lack of transparency, lack of a “formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it,” and the lack of “formal written reasoned decisions.”\textsuperscript{116} Because the statute was applied in a “singularly informal and casual” manner, which could lead to the “negation of rights of Members,” the Appellate Body held the statute to constitute “arbitrary discrimination.”\textsuperscript{117}

e. Article XX Chapeau Language: A Means of Unjustifiable Discrimination Between Countries Where the Same Conditions Prevail

The Appellate Body Report on Shrimp also contains a discussion of “unjustifiable discrimination between countries where the same conditions prevail.”\textsuperscript{118} The Appellate Body ultimately found that the application of the U.S. import ban constituted “unjustifiable discrimination.”\textsuperscript{119} It faulted the United States for failing to consider conditions in other countries\textsuperscript{120} and for failing to negotiate with other WTO Members on the issue of endangered sea turtles.\textsuperscript{121} The general

\textsuperscript{116} See id. para. 180 (outlining the United States’ inequitable certification processes).

\textsuperscript{117} See id. para. 181 (stating that the Members had no method to guarantee that the United States was applying its law fairly and justly).

\textsuperscript{118} Id. para. 161 (examining whether United States had applied the law in question in a way that amounted to “unjustifiable discrimination”).

\textsuperscript{119} Id. para. 176 (holding that the cumulative effect of the diverse ways that the United States had applied a law constituted “unjustifiable discrimination”).

\textsuperscript{120} Id. para. 164 (stating it is not acceptable for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members).

\textsuperscript{121} See Appellate Body Report on Shrimp, supra note 96, para. 166 (commenting that “the failure of the United States to engage . . . in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral
rule appears to be that a WTO Member who wishes to advance a state interest by means of a de facto discriminatory measure must be careful not to do so unilaterally and without taking into account conditions in other WTO Member territories.

f. Article XX Chapeau Language: Disguised Restriction on Trade

Although this language has not been analyzed as a separate test in recent WTO Panel and Appellate Body Reports, it refers to the kind of discriminatory application of trade restrictions that the Chapeau prohibits. In the past, panels have avoided interpreting "disguised restriction on trade" as requiring investigation of the intent behind a discriminatory measure. Avoidance of an intent-based inquiry is understandable given the difficulty in pinpointing a particular country's "intent" with respect to a particular measure. With an intent-based inquiry, the most obvious problem stems from the diplomatic difficulties of a multilateral organization ascribing a bad faith motivation to a given measure and publicly condemning a country's government on that basis. In any event, it may not be possible to ascertain a single "intent" behind a complex piece of legislation, as most measures are the result of negotiation among interest groups, including groups with protectionist agendas and groups with free trade agendas.

agreements" with all interested nations on a non-discriminatory basis "bears heavily in any appraisal of justifiable or unjustifiable discrimination"). In 1998, the United States was party to only one multilateral treaty dealing with the protection of sea turtles, an Inter-American Convention also signed by the five Latin American countries. Id. para. 169. Thus, the United States had only negotiated minimally regarding an environmental issue that was the basis for an import ban. Id. para. 171. In the context of intellectual property, the United States has taken a much more proactive negotiating stance, seeking to increase recognition of intellectual property rights around the world by negotiating bilateral and multilateral treaties. See e.g., Marney L. Cheek, The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime, G.W. INT'L L. REV. 277, 287 n.24 (2001) (explaining that the United States' aggressive foreign policy campaign regarding intellectual property rights issues included multilateral and bilateral negotiations with other countries around the world).

122. See Appellate Body Report on Reformulated Gasoline, supra note 89, at 25 (stating that the factors that pertain to a decision regarding whether a measure constitutes "arbitrary or unjustifiable discrimination" also apply to a decision regarding whether a measure is a "disguised restriction on trade").
B. RELATIONSHIP BETWEEN SECTION 337 AND ARTICLES III(4) AND XX OF GATT 1947

1. Introduction

Although the EC’s request for consultations does not specify which provisions of amended Section 337 it considers to be in violation of the United States’ WTO obligations, it is possible to identify Section 337 provisions that are potentially inconsistent with GATT 1947 national treatment principles, such as provisions for target dates, parallel proceedings, and respondents’ counterclaims. Some, though not all, of these provisions still appear to violate Article III(4), thereby rendering the entire statute inconsistent with Article III(4). Amended Section 337 would nevertheless be permissible if it fit into the exception for measures “necessary” to ensure compliance with laws relating to the protection of intellectual property rights, and also passed the prohibitions against “arbitrary or unjustifiable discrimination” and “disguised restriction[s] on trade.”

Although this paper attempts to find a reasonable justification for Section 337 where possible, it concludes that certain aspects of Section 337 potentially run afoul of Article III(4), and the Article XX Chapeau. This paper addresses in turn each of Section 337’s potentially impermissible features in light of Articles III(4) and XX, with references to relevant WTO practice.

2. Section 337 and Article III(4) of GATT 1947

a. Target Dates and Article III(4)

Under the amended Section 337, the USITC is statutorily required to reach a determination on infringement “at the earliest practicable time” after notice of the investigation is issued. The USITC must

123. See EC Request for Consultations on Section 337, supra note 4, at 1 (requesting consultations regarding the United States’ Section 337 and its alleged inconsistencies with the GATT).
124. See GATT 1947, supra note 93, art. XX.
125. See 19 U.S.C. § 1337(b)(1)(2001) (establishing the investigation procedure
also establish a "target date" for the final determination within 45 days after initiation of the investigation. In this connection, it is worth noting that at the time of the Section 337 amendments, USITC Chairman Peter Watson, as well as a Senate Joint Committee Report, stated a belief that Section 337 investigations would still take roughly the same length of time as they had taken under the pre-amendment statutory time-limit scheme. In light of Watson's speech and the Senate Report, some commentators have concluded that the "target date" amendment was an effort to end-run the 1988 GATT Panel Report's recommendations and maintain the status quo. For this reason, critics have argued that the current "target date" scheme violates GATT 1947 in exactly the same way as the statutory time-limits regime did because it subjects Section 337 respondents to tight time-limits, which defendants in federal district court patent infringement cases do not have to face.

for the infringement of patents, trademarks and copyrights).

126. See id.

127. See Foster & Davidow, supra note 44, at 105-06 (noting an address by Chairman Peter S. Watson before the ITC Trial Lawyers Association in 1994 wherein Watson responded to Section 337 amendments regarding time limits by saying the USITC would likely continue to complete Section 337 investigations in twelve months).

128. See S. Rep. No. 103-412, at 119 (1996) ("[T]he Committee expects that . . . the ITC will normally complete its investigations in approximately the same amount of time as is currently the practice [despite elimination of the statutory deadlines].").

129. See Martenczuk, supra note 30, at 137-38. Martenczuk states:

[I]t is likely that the practical effect of the move to target dates will not be to remove the inherent discriminatory bias of the ITC's timetable under Section 337. Of course, the ITC's commitment to expeditious adjudication is laudable. However, it is suspicious that expeditious adjudication is such a prominent concern when foreign products are involved, while there is no similarly tight time frame for the adjudication of disputes concerning intellectual property in District Courts.

130. See id. at 138 ("The problem with target dates is not that administrative law judges lack the power to set appropriately timed target dates, but the problem is that there may still be a bias towards speedy completion for its own sake, and that this bias may work to the disadvantage of foreign respondents.").
i. "Target Dates" and Prior WTO Practice in United States--Sections 301-304 of the Trade Act of 1974

Language in the Section 301 Panel Report\(^{131}\) addressing the status of the Statement of Administrative Action does seem to have implications for the Section 337's "target dates" issue in terms of how it may be interpreted by a WTO panel.\(^{132}\) In the Section 301 Panel Report, the Panel held that Section 301, although *facially* inconsistent with the Dispute Settlement Understanding ("DSU"), did *not* violate the DSU because of statements in the SAA, which vowed to apply Section 301 consistently with WTO obligations.\(^{133}\) Conceivably, a panel faced with the question of the legality of the "target dates" scheme under Section 337 might similarly focus on the Senate Report that pushed for adherence to time-constraints similar to those declared illegal by the 1988 Panel.\(^{134}\) A panel relying on the Senate Report could easily reason that even if an amended Section 337 were WTO-consistent on its face, that it would violate the GATT 1947 non-discrimination principle *in practice*.

Further, one might argue that the 1988 GATT Panel Report (holding statutory time limits impermissible under Article III(4)) should be given special deference, because the new "target date" scheme is equivalent to the old statutory time-limits scheme, and

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132. See GATT Panel Report on EC Challenge to Section 337, supra note 58, at 389 (finding that time limits for Section 337 investigations put respondents in a "significantly less favorable position" than they would be in federal court where there are no fixed time limits).

133. See Section 301 Panel Report, supra note 131, paras. 7.125-126 (explaining that the SAA and U.S. statements during the dispute settlement proceeding convinced the Panel that Section 301 would not be applied in a way that is inconsistent with the United States' WTO obligations); see id. paras. 7.131-136 (noting that Section 304 should be read in conjunction with the SAA).

134. See S. Rep. No. 103-412, at 119 (1996) ("[T]he Committee expects that...the ITC will normally complete its investigations in approximately the same amount of time as is currently the practice [despite elimination of the statutory deadlines]."); GATT Panel Report on EC Challenge to Section 337, supra note 58, at 389-90 (finding that Section 337 proceedings impose less favorable treatment on imported products versus domestic products that have allegedly infringed on a patent).
because the parties to the WTO dispute (the EC and the U.S.) are the same parties as were before the Panel in 1988.

However, the argument that special deference be accorded the Section 301 Panel Report’s standard of statutory interpretation and the 1988 GATT Panel Report’s conclusion regarding time limits is fundamentally flawed. The Appellate Body has emphatically argued that adopted panel and Appellate Body reports are not binding on subsequent disputes. They are binding on the parties to a specific dispute with respect to the issues raised in that dispute. 135 Thus, even if the EC requests a Panel decision with respect to the “target date” scheme, it is highly unlikely that the 1988 Panel’s ruling on statutory time limits will pre-determine the outcome. Although the parties are the same, neither the underlying facts of the case, nor the statutory scheme are the same.

ii. “Target Dates” and Federal Rule of Civil Procedure 16

One defense of the “target date” scheme (and the fast pace of litigation at the USITC) is that this scheme comports with federal district court practice, which provides district courts with various mechanisms for expediting litigation under Rule 16 of the Federal Rules of Civil Procedure (“FRCP”). 136 According to this argument, the “target date” scheme now has an equivalent in federal district court practice, so that Article III claims of discriminatory treatment can no longer be made. 137

A response to this argument is that although all Section 337 cases are consistently conducted in a short period of time, patent cases in federal district court are not consistently conducted on an expedited

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135. See Appellate Body Report on Alcoholic Beverages, supra note 84, at 14 (explaining that recommendations and conclusions in an adopted panel report bind the parties to the dispute in that specific case, but that subsequent panels are not bound by previous conclusions or recommendations).

136. See Tom Schaumberg, A Revitalized Section 337 to Prohibit Unfairly Traded Imports, 77 J. PAT. & TRADEMARK OFF. SOC’Y 259, 263 (1995) (explaining that some federal courts “decide cases in less than one year under their local version of Rule 16”).

137. See Fed. R. Civ. P. 16(a)(1) (outlining rules to expedite litigation); see also Schaumberg, supra note 136, at 263 (noting that some federal courts under their local rules decide cases in less than one year).
FRCP Rule 16 is simply a discretionary means of expediting litigation; the "target dates" scheme is mandatory. Thus, patent litigation in a federal district court does seem to differ in practice from Section 337 patent litigation before the USITC. Such differential treatment of imported and domestic products may indicate an Article III(4) violation.

b. Provisions for Stay of Parallel Proceedings and Article III(4)

The amended Section 337 incorporated a provision allowing a respondent to stay proceedings in any federal district court case dealing with the same legal issues as in a concurrent Section 337 case. This provision was a response to the 1988 GATT Panel Report's criticism of concurrent litigation before the USITC and federal district court. Critics of Section 337 argue that although the amendment addresses concurrent litigation, it does not address the burdens of successive litigation, first before the USITC and then before a federal district court. According to this argument, Section 337 still accords Section 337 complainants the advantage of getting "two shots at a favourable ruling." Because imported products

138. See Schaumberg, supra note 136, at 266 (discussing amendments that could be used to expedite proceedings in patent cases heard before federal courts).

139. See 19 U.S.C. § 1337(b)(1) (stating that USITC "shall," within 45 days after an investigation is initiated, establish a target date for a final determination).

140. Another critique of the "target date" scheme is that the relatively fast paced litigation under the "target date" scheme works to the disadvantage of foreign respondents who are not familiar with the U.S. legal system. According to this reasoning, because investigations tend to run for one year from the notice of investigation, domestic complainants can secretly prepare their case before they bring a complaint, and thereby derive significant advantages over the respondent.

141. See SAA, supra note 15, at 369 (explaining that a district court may stay proceedings in a civil action at the request of a party who is also party to an action before the U.S. International Trade Commission under Section 337 of the Tariff Act of 1930).

142. See GATT Panel Report on EC Challenge to Section 337, supra note 58, at 391 (explaining that dual proceedings were not possible in certain circumstances, and when they were, a patent owner might choose, for any of several reasons, not to commence a court action).

143. See Martenczuk, supra note 30, at 141-43 (criticizing Section 337 for not addressing the problems of having to carry on successive litigation).

144. See id. at 142. Martenczuk states:
(unlike domestic products) could ultimately become the subject of successive infringement cases, the amendment for a stay of district court proceedings does not bring Section 337 into compliance with Article III(4) of GATT 1947. However, even though this provision appears to violate Article III(4), Section 337's legality under the WTO depends on whether it meets the requirements of Article XX.

c. Respondents' Counterclaims and Article III(4)

In order to address the 1988 GATT Panel's concerns with the inability of respondents to bring counterclaims before the USITC, Section 337 was amended to permit respondents to bring counterclaims, which would then be transferred to a federal district court. Commentators have criticized this amendment as an attempt to comply with the Panel report in form only.

Criticisms of the Section 337 amendments are somewhat persuasive with respect to the counterclaim provision, because the counterclaim provision works at cross-purposes with the provisions

This double opportunity is a clear advantage for the domestic complainant and, therefore, would have to be regarded as a denial of national treatment to imported goods. Finally, it must not be overlooked that, like simultaneous proceedings, successive proceedings are a way in which the complainant can involve the foreign respondent in lengthy and costly litigation.

Id.

145. See supra notes 67-87 and accompanying text (discussing USTR proposals that would have eliminated the “double jeopardy” in IP infringement litigation to which imports are subjected). It is worth recalling that the USTR made proposals for reform of Section 337 that would have eliminated this particular inconsistency with Article III, where the danger that imports (but not domestic products) could be subject to successive infringement suits on the same issues. For example, the proposal to create a special court at the district level to deal with all patent issues arising in the United States would subject both imported and domestic products to the same treatment in this regard.

146. See GATT 1947, supra note 93, art. XX (offering exceptions to the Article III non-discrimination requirement, provided that certain conditions are met).

147. See 19 U.S.C. § 1337(c)(2001) (stating that respondents may bring counterclaims, which are then removed to a federal district court).

148. See Martenczuk, supra note 30, at 140 (“[T]he amendment regarding counterclaims cannot be regarded as more than a veiled attempt to defy the GATT Panel’s findings.”).
addressing parallel proceedings.\textsuperscript{149} Even though federal district court proceedings will be stayed pursuant to the statute, as soon as respondents make a counterclaim, it will be transferred to a federal district court, where the opposing party may (in response to the counterclaim) be able to resurrect the full range of issues that would have been in the recently stayed federal district court case. In this way, a respondent's use of the counterclaim provision immediately subjects the respondent to litigation in two fora, thereby negating the effect of the stay provision. It is likely that many respondents would choose not to make counterclaims, because the counterclaim provision has the effect of subjecting respondents to tremendous litigation expenses.

In sum, the counterclaim may not satisfy the 1988 GATT Panel's recommendations. It is debatable whether such a limitation of counterclaims is a necessary part of a reasonably designed border enforcement measure.

3. Section 337 May Be Inconsistent with GATT Article III(4)

As discussed above, Section 337 appears to discriminate between domestic and imported products in a number of respects, most significantly in its applicability of very limited counterclaim provisions to respondents.\textsuperscript{150} This differential treatment means that Section 337 violates Article III(4), and therefore would run afoul of WTO rules unless it can qualify as a permissible exception under Article XX.\textsuperscript{151}

\textsuperscript{149} See 19 U.S.C. § 1337(c) (stating that respondents may bring counterclaims, which are then removed to a federal district court); see also SAA, supra note 15, § 1659(a) (explaining that a district court may stay proceedings in a civil action at the request of a party who is also party to an action before the U.S. International Trade Commission under Section 337 of the Tariff Act of 1930).

\textsuperscript{150} See Martenczuk, supra note 30, at 139-40 (criticizing Section 337's counterclaim provision as no more than "a veiled attempt to defy the GATT Panel's findings").

\textsuperscript{151} See GATT 1947, supra note 93, art. XX (noting permissible exceptions for certain measures which violate Article III(4)).
Section 337 and Article XX(d) of GATT 1947

i. Arguments Supporting a Finding That Section 337 Is Consistent with Article XX(d)

Under Article XX(d), it must be established that Section 337 is a measure "necessary to" ensuring compliance with laws or regulations relating to intellectual property rights protection. As discussed above, WTO practice suggests that WTO Members instituting a measure "necessary to" a state interest have a narrower range of options than in the case of a measure "involving" a state interest, but a wider range of options than in the case of a measure "essential to" a state interest. With regard to the target dates provisions, such provisions represent a less trade-restrictive alternative than the statutory time limit scheme because it gives administrative law judges discretion to adjust the time necessary to resolve the issues in complex cases, thereby balancing the need for expedited resolution of claims with the need for added discovery and careful consideration of complex technological problems.

Arguably, Section 337 meets the requirements of Article XX(d). Its discriminatory features, such as the counterclaim and target dates provisions, are "necessary to" providing patent holders with relief from infringing imports because appropriate relief cannot be secured through federal district court litigation. Border enforcement measures that provide for quicker resolution of claims than litigation in federal district court might be justifiable if expedited litigation were "necessary" with respect to infringing imports but not infringing domestic goods.

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152. See GATT 1947, supra note 93, art. XX(d) (requiring that one must show that Section 337 is "necessary to" continued compliance with rules relating to protection of intellectual property rights).

153. See supra notes 104-113 and accompanying text (discussing the language "necessary to" in Article XX(d)).

154. See GATT 1947, supra note 93, art. XX(d) (requiring Members claiming an Article XX(d) exception to show that Section 337 is "necessary to" continued compliance with rules relating to protection of intellectual property rights); 19 U.S.C. § 1337 (2001) (requiring a target date by which a determination on infringement should be made, and stating that respondents may bring counterclaims, which are then removed to a federal district court).
Such a necessity could exist where the infringing import's production costs are so much less than the non-infringing products' production costs, that the infringing product could overrun the market in a much shorter period of time than infringing domestic goods. Such a difference between infringing imports and infringing domestic goods could be dispositive in the intellectual property area. Due to the pace at which technology develops, a technology company that is prevented by a flood of infringing imports from reaping a return on its investment in research and development may be significantly harmed during a relatively short period. If such a company's finances deteriorated quickly enough, it might lack the resources to invest in further research and development, and could thus be driven from the market. The argument that special measures are required to combat infringing imports (as opposed to infringing domestic products) is strengthened by the fact that the TRIPs Agreement provides for special border enforcement mechanisms.

**ii. Arguments Supporting a Finding of Inconsistency with Article XX(d)**

However, even assuming that some infringing imports have such a tremendous cost advantage over domestic infringing products that powerful border enforcement measures are required, certainly not all infringing imports have such a cost advantage. Thus, it could be argued that Section 337, which applies to all allegedly infringing imports, is designed much more broadly than "necessary." If this argument is correct, Section 337 is too broadly written to satisfy the requirements of Article XX(d).

The argument that an expedited patent proceeding is "necessary" where low-cost infringing imports could overrun a U.S. market is

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156. See GATT 1947, supra note 93 (explaining that the measure at issue must be "necessary" to secure compliance with laws and regulations which are not inconsistent with WTO obligations).
also somewhat dubious because U.S. technology companies already manufacture many products overseas where costs are low. Thus, in many cases U.S. technology firms have the same production costs as the alleged foreign infringers. It is the investment in innovation and research, much more than the investment in U.S.-based production facilities, that Section 337 aims to protect. The reality that Section 337 is designed to protect U.S. intellectual property rights, but not U.S.-based production, casts doubt on the argument that an expedited proceeding like Section 337 is necessary to protect U.S. producers from foreign infringers with lower costs. Nevertheless, assuming for the sake of argument that Section 337’s most powerful features are “necessary” features, Section 337 still needs to meet the requirements of the Article XX Chapeau.

b. Section 337 and the Chapeau of Article XX

i. Arguments Supporting a Finding That Section 337 Is Consistent with the Article XX Chapeau

Two arguments support a finding that Section 337 is applied consistently with the Chapeau. First, the prohibitions of the Chapeau should be read narrowly in the intellectual property area, in view of the Chapeau’s context, object, and purpose. The TRIPs Agreement, one of the WTO agreements, is part of the Chapeau’s context, and it not only supports enhanced intellectual property rights protection, but also explicitly recognizes border enforcement measures. It is important to examine this context in order to

157. The notion that Section 337 is designed to protect U.S. intellectual property rights, not U.S.-based “industry” is supported by the fact that mere licensing activities will fulfill Section 337’s “domestic industry” standing requirement. See 19 U.S.C. § 1337(a)(2) (explaining that Section 337 provisions apply to products protected by U.S. patent regime).

158. See GATT 1947, supra note 93, art. XX (discussing in the introductory clause (referred to as the Chapeau) that there is a requirement that measures are not to be applied “in a manner that would constitute a means of arbitrary or unjustifiable discrimination”); see also Appellate Body Report on Shrimp, supra note 97, para. 147 (referring to the introductory clause of Article XX as the “Chapeau”).

159. See TRIPs Agreement, supra note 155, arts. 41:1, 41:5 (permitting the use of border enforcement measures to protect against attempted acts of infringement).
understand the breadth of the Chapeau's prohibitions, because neither the TRIPs Agreement nor any other WTO agreement articulates the exact contours that a border enforcement measure should take.

Second, Section 337 neither constitutes a means of "arbitrary" or "unjustifiable" discrimination between countries where the same conditions apply, nor does it constitute a disguised restraint on trade.\textsuperscript{160} Section 337 is not applied arbitrarily, the argument goes, because it meets all the requirements of due process under the Administrative Procedure Act. For example, respondents are promptly notified of suit in writing and are given the opportunity of a hearing before an administrative law judge, whose decision is in writing and on the basis of the record.\textsuperscript{161} With regard to "unjustifiable" discrimination, the argument is that the United States does not apply Section 337 in a unilateral and inflexible manner because it has actively sought to negotiate treaties, both bilateral and multilateral, with other WTO Members in the area of intellectual property rights. In particular, the TRIPs Agreement explicitly permits border enforcement mechanisms.\textsuperscript{162}

\textit{ii. Arguments Supporting a Finding That Section 337 Is Inconsistent with the Article XX Chapeau}

The first argument outlined above contains assumptions that are debatable. The argument states that the Chapeau's prohibitions must

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\textsuperscript{160} See GATT 1947, supra note 93, art. XX (stating in the Chapeau that there is a requirement that measures are not to be applied "in a manner that would constitute means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade").

\textsuperscript{161} See 19 U.S.C. § 1337(c) (2001) (requiring that determinations be made "on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of Chapter 5 of Title 5").

\textsuperscript{162} See generally TRIPs Agreement, supra note 155, art. 44 (providing Members the authority to institute border enforcement measures to counteract infringing imports).
be read narrowly because the Chapeau’s context contains strong “pro-IPR” elements.\textsuperscript{163} The weakness of this argument lies in its simplified view of international agreements that “support” enhanced intellectual property rights. The reality is more complex than the first argument suggests. In fact, many of the intellectual property agreements negotiated in recent years are a balance of competing interests as to the appropriate level of intellectual property protection in the international arena.\textsuperscript{164}

More importantly, the increasing international acceptance of intellectual property rights does not necessarily imply an acceptance of border enforcement as powerful as Section 337. None of the treaties administered by the World International Property Organization ("WIPO") explicitly support border enforcement measures as broad in scope as Section 337.\textsuperscript{165} Admittedly, the TRIPs Agreement does address the issue of border enforcement measures.\textsuperscript{166} However, acknowledging the use of border enforcement measures hardly qualifies as signaling an international consensus in this area. Thus, it cannot be stated that the “context” of GATT 1947 unequivocally supports border enforcement measures like Section 337. This “context,” which provides varying levels of support for border enforcement measures, does not provide a clear mandate to read the Chapeau’s prohibitions narrowly.

c. Section 337 May Be Inconsistent with Article XX

In sum, although it is a close question, Section 337 does not seem to qualify as a permissible exception to WTO obligations under

\textsuperscript{163} See GATT 1947, supra note 93, art. XX (containing several elements intended to ensure the continued compliance with rules relating to the protection of intellectual property rights).

\textsuperscript{164} See, e.g., TRIPs Agreement, supra note 155, art. 21 (prohibiting use of compulsory licensing of trademarks, but permitting Members to place other conditions on the licensing and assignment of trademarks). Although Article 21 of the TRIPs Agreement contains provisions that favor strong intellectual property rights protection, it also contains provisions that undercut such protection.

\textsuperscript{165} See WIPO Treaties and Contracting Parties (providing information on the twenty-one intellectual property related treaties administered by WIPO), at http://www.wipo.org/treaties/ (last visited Nov. 3, 2001).

\textsuperscript{166} See TRIPs Agreement, supra note 155, arts. 41:1, 41:5 (permitting the use of border enforcement measures to protect against attempted acts of infringement).
Article XX. In particular, the counterclaim provision does not appear to be "necessary" to combating infringing imports. Thus, Section 337 may not qualify as an Article XX(d) exception.

Even if Section 337's discriminatory features were "necessary," the way in which Section 337 is applied may contravene the prohibitions of the Article XX Chapeau. The arguments in favor of reading those prohibitions narrowly are not entirely convincing because the Chapeau's "context" does not unequivocally support powerful border enforcement measures such as Section 337. Notwithstanding the border enforcement provisions of the TRIPs Agreement, there does not appear to be an international consensus in favor of a border enforcement measure as broad in scope as Section 337.

With regard to the Article XX Chapeau prohibition on measures, which result in "arbitrary or unjustifiable discrimination," it is not clear whether Section 337 violates this prohibition. While Section 337, which offers all the procedural safeguards as the APA, does not appear to be applied in an "arbitrary" way, it may nevertheless result in "unjustifiable" discrimination. On the one hand, there is significant international debate about the appropriate scope of intellectual property rights protection. On the other hand, there does seem to be an acknowledgement that border enforcement measures may be an acceptable way to protect intellectual property rights by virtue of the fact that the United States has successfully negotiated one international agreement dealing in part with border enforcement mechanisms: the TRIPs Agreement.

C. CONSISTENCY OF SECTION 337 WITH THE TRIPS AGREEMENT

The EC has complained that Section 337 violates certain articles of the TRIPs Agreement.\textsuperscript{167} After discussing important substantive and procedural considerations in the TRIPs Agreement, this paper will focus on the main allegations made by the EC, including alleged violation of: the TRIPs principle of national treatment,\textsuperscript{168} general

\begin{footnotesize}
\begin{enumerate}
\item[167.] See EC Request for Consultations on Section 337, supra note 4 (stating EC allegations that Section 337 violates Articles 2, 3, 9, 27, 41-42, 49-51 of the TRIPs Agreement).
\item[168.] See TRIPs Agreement, supra note 155, art. 3 (discussing national treatment
\end{enumerate}
\end{footnotesize}
obligations in the enforcement of intellectual property rights,¹⁶⁹ and special requirements related to border measures.¹⁷⁰

1. Background

a. Organization of the TRIPs Agreement

i. Preamble

The TRIPs Agreement is divided into seven main parts plus the preamble.¹⁷¹ The preamble, which is largely aspirational, sets forth a series of exhortative and foundational statements.¹⁷² The preamble and explaining that Members are to accord the same treatment to other Members' nationals as to their own nationals, with regard to intellectual property).

¹⁶⁹. See id. art. 41 (discussing general obligations and explaining that these include providing enforcement measures under each Member's law to effectively act against infringement of intellectual property rights).

¹⁷⁰. See id. arts. 51-60 (discussing Special Requirements Related to Border Measures).

¹⁷¹. See id. pts. I-VII (organizing the TRIPs agreement into the following provisions: General Provisions and Basic Principles; Standards Governing the Availability, Scope and Use of Intellectual Property Rights; Enforcement of Intellectual Property Rights; Acquisition and Maintenance of Intellectual Property Rights and Related Inter-Parties Procedures; Dispute Prevention and Settlement; Transitional Arrangements; and Institutional Arrangements – Final Provisions).

¹⁷². See id., pmbl. The preamble states, inter alia:

Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade; . . .

Recognizing, to this end, the need for new rules and disciplines concerning:

(a) The applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions; . . .

(c) The provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights, taking into account differences in national legal systems; . . .

Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives; . . .

Emphasizing the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues
contains language balancing the interests of strong intellectual property rights with other societal interests, such as economic development and competition laws.173

ii. Part I: General Provisions and Basic Principles—Article 7

Objectives and Article 8 Principles

In addition to the preamble’s language from, other foundational principles are found in Part I.174 Part I contains provisions on national treatment,175 Most Favored Nation ("MFN"),176 as well as provisions entitled "Nature and Scope of Obligations" (Article 1),177 "Objectives" (Article 7),178 and "Principles" (Article 8).179

through multilateral procedures.

See id.


174. See TRIPs Agreement, supra note 155, arts. 1-8 (setting forth the general provisions and basic principles of the agreement).

175. See id. art. 3 (setting forth important foundational principles, such as one that requires Members to accord the same treatment to other Members' nationals as to their own nationals, with regard to intellectual property).

176. See id. art. 4 (explaining Most Favored Nation ("MFN") Treatment). The MFN provision incorporated into the TRIPs Agreement is derived from similar provisions in the GATT. This stands in contrast to the principle of national treatment, which derives not from the GATT, but from other intellectual property treaties. All the major international intellectual property treaties contain a principle of national treatment. See Yusuf, supra note 25, at 16-17 (1998) (discussing MFN Treatment as a cornerstone to GATT, which ensures equality among all Member States by requiring a state to extend privileges to all Members, once it has extended them to any one Member).

177. See TRIPs Agreement, supra note 155, art. 1. Article 1.1 states:

Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protections that is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

Id.

178. See id. art. 7. Article 7 states:

The protection and enforcement of intellectual property rights should
Articles 1, 7, and 8, like the preamble, contain language that juxtaposes interests that could be seen as conflicting. This juxtaposition of countervailing interests adds both elements of tension and flexibility to many of these provisions.\textsuperscript{180} For example, the preamble balances “the need to promote effective and adequate protection” by means of “enforcement” and “expeditious procedures” on the one hand, with “ensur[ing] that measures... do not themselves become barriers to legitimate trade” and creating “standards... concerning the availability, scope and use of... intellectual property rights,” on the other.\textsuperscript{181}

Article 7 not only focuses on the “promotion of technological innovation,” the interests of “producers... of technological knowledge,” and “economic welfare,” but also focuses on “the transfer and dissemination of technology,” the interests of “users of technological knowledge,” and “social welfare.”\textsuperscript{182} Finally, Article 8 permits members to adopt measures necessary to “technological contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

\textit{Id.}

179. See \textit{id.} art. 8. Article 8 states:

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices, which unreasonably restrain or adversely affect the international transfer of technology.

\textit{Id.}

180. See \textit{John Croome, Guide to the Uruguay Round Agreements: The WTO Secretariat}, 208-9 (1999) (declaring that, “[t]he effort to reconcile rights of creators with the needs of users explains many of the provisions of the TRIPs Agreement,” and noting the “twin needs [of] effective and adequate protection and yet prevent measures that enforce these rights from becoming barriers to legitimate trade”).

181. See TRIPs Agreement, \textit{supra} note 155. pmbl.

182. See \textit{id.} art. 7 (discussing the notion that the protection of intellectual property rights should promote technology for the shared advantage of producers and users).
development,” as well as measures necessary to “socio-economic” development.183

The preamble and Articles 1, 7, and 8 balance two sets of competing considerations. First, these competing considerations can be seen as representing the divergent interests of developing and developed nations.184 Second, the competing considerations articulated in these articles can be seen to represent the interests of sophisticated IPR holders whose competitive position depends on a pro-IPR regime as opposed to countervailing interests of less well-established innovators and producers. It is important to recognize that the TRIPs Agreement is informed by more than merely tensions between developed and developing countries, and to recognize that not all developed (or developing) nations necessarily share the same interests with respect to intellectual property rights.

iii. Article 3 National Treatment

The National Treatment clause in the TRIPs Agreement is relevant to this discussion of Section 337 because it is one of the specific bases of the EC’s request for consultations regarding Section 337.185 The key distinction between the respective national treatment principles under GATT 1947 and the TRIPs Agreement is that the former requires that imported products be treated at least as favorably as domestic products, while the latter requires that foreign nationals be treated at least as favorably as nationals.186 This

183. See id. art. 8 (allowing Members to adopt laws necessary to protect public health, nutrition, the public interest, and the prevention of abuse of intellectual property rights).

184. Developed nations, because of their comparative advantage in technology, tend to favor stricter intellectual property norms, while developing nations, because they lack the resources and, thus, the incentive for investing in technology, tend to favor looser intellectual property norms. See generally Evelyn Su, The Winners and the Losers of the Agreement on Trade-Related Aspects of Intellectual Property Rights and its Effects on Developing Countries, HOUSTON J. OF INT’L L. 169 (2000) (providing analysis of the TRIPs Agreement and its implications for developed and developing nations); Ruth L. Gana, Prospects for Developing Countries Under the TRIPs Agreement, 29 VAND. J. TRANSNAT’L L. 735 (1996) (analyzing the relationship between the TRIPs Agreement and developing nations).

185. See EC Request for Consultations on Section 337, supra note 4 (alleging Section 337 violates certain WTO obligations).

186. See TRIPs Agreement, supra note 155, art. I(3) (stating “members shall
distinction is not simply a semantic one and has significant consequences for the kind of measures that are permissible in each case. As long as the measure in question does not discriminate between nationals and non-nationals, it will meet the requirements of Article I of TRIPs. In contrast, under GATT Article III, the measure must not discriminate between foreign and domestic-like products, which is arguably a higher standard.

iv. Part III: Enforcement of Intellectual Property Rights

Part III of the TRIPs Agreement is directly relevant to Section 337 because it deals with enforcement of intellectual property rights and includes provisions for border mechanisms. Part III mandates minimum judicial procedures that WTO Members must provide in the intellectual property area. It is divided into five sections: General Obligations, Civil and Administrative Procedures and Remedies, Provisional Measures, Special Requirements Related to Border Measures, and Criminal Procedures.

accord the treatment provided for in this agreement to the nationals of other members."); GATT 1947, supra note 93, art. I (referring to "domestic products" and imports in its statement of national treatment principals).

187. See TRIPs Agreement, supra note 155, arts. 41-61 (dealing with enforcement of intellectual property rights and providing for border measures).

188. See id. art. 41 (explaining that judicial procedures shall be fair and equitable, not unnecessarily costly or complicated, nor unreasonable in terms of time limits or unwarranted delays).

189. See id. (outlining "general obligations" in enforcement of intellectual property rights).

190. See id. arts. 42-49 (discussing fair and equitable procedures, injunctions, evidence, damages and other remedies, right of information, indemnification, and administrative procedures).

191. See id. art. 50 (providing judicial officials with the authority to order, adopt, or revoke prompt and effective provisional measures and to require submission of evidence).

192. See id. arts. 51-60 (discussing special requirements related to border measures, such as suspension of the release of goods into free circulation, requirement of a security or equivalent assurance by the applicant, notification or duration of suspension, indemnification and right of inspection, and remedies).

193. See TRIPs Agreement, supra note 155, art. 61 (requiring members to create criminal procedures and penalties, which they will apply in cases of "willful trademark counterfeiting or copyright piracy on a commercial scale").
The first four sections are relevant to the Section 337 issue. General obligations include ensuring judicial proceedings that are neither overly costly, nor overly time-consuming (or subject to unreasonable time constraints). Other general obligations include providing procedural safeguards (along due process lines) and the opportunity for judicial review.\textsuperscript{194} The section on civil and administrative procedures and remedies establishes a minimum floor of the procedures and remedies that must be provided to intellectual property rights holders. These include legal provisions covering evidentiary concerns and remedies, such as injunctions or payment of damages.\textsuperscript{195} The section on provisional measures requires that legal provisions for remedies similar to temporary restraining orders and preliminary injunctions be available to protect intellectual property rights holders when necessary.\textsuperscript{196} With regard to the special requirements related to border measures, Members must have enforcement mechanisms to prevent importation of counterfeit goods.\textsuperscript{197} These measures are often characterized as stopgap measures to compensate for the possible failure of the exporting country to provide domestic intellectual property rights protections adequate to prevent the production of counterfeit goods in the first place.

b. Absence of Consensus and Legal Precedent Makes Discussion of TRIPs Speculative

Writing about WTO standards for intellectual property is complicated by the newness of the TRIPs Agreement and the Dispute

\textsuperscript{194} See id. art. 41 (setting forth general obligations such as, required minimum judicial procedures for members to provide, concerning intellectual property rights).

\textsuperscript{195} See id. arts. 42-49 (discussing civil and administrative remedies such as, fairness and equity, injunctions, evidence, damages, right of information, and indemnification).

\textsuperscript{196} See id. art. 50 (providing provisional measures, including granting judicial authorities with the authority to order, adopt, or revoke prompt and effective provisional measures and to require submission of evidence).

\textsuperscript{197} See id. arts. 51-60 (discussing special requirements related to border measures, such as suspension of the release of goods into free circulation, requirement of a security or equivalent assurance by the applicant, notification and duration of suspension, indemnification, and right of inspection and remedies).
Section 337, GATT and the TRIPS Agreement

Settlement Understanding. Further, as the recent Doha Ministerial shows, the lack of consensus on the precise role and level of engagement appropriate for the WTO in the intellectual property area also complicates the subject. Deciding on how active (or inactive) the WTO Dispute Settlement Body's approach should be has been a contentious issue.\textsuperscript{198}

The discord surrounding the TRIPs Agreement has engendered a lively debate among commentators, with some claiming that the TRIPs Agreement provides a mandate to force developing countries to conform their intellectual property regimes to the letter and spirit of the TRIPs Agreement.\textsuperscript{199} Others caution against the imposition of the will of a few powerful states on the newly industrialized states and developing countries.\textsuperscript{200} Still others criticize the TRIPs

\textsuperscript{198} The contention over whether the WTO should countenance non-violation nullification and impairment claims brought by developed nations against developing nations five years after the TRIPs Agreement is essentially a disagreement over the role of the WTO Dispute Settlement Body. \textit{Compare} Paul Edward Geller, \textit{Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlements?}, 29 INT'L LAW. 99, 107-14 (1995) (advocating the view that it would be useful to have the Dispute Settlement Body clarify and define legal standards which negotiating parties phrased vaguely because of failure to reach consensus), \textit{with} Tuan N. Samahon, Note, \textit{TRIPs Copyright Dispute Settlement After the Transition and Moratorium: Nonviolation and Situation Complaints Against Developing Countries}, 31 LAW & POL'Y INT'L BUS. 1051, 1060-75 (2000) (expressing the opposing view that giving the Dispute Settlement Body this power is particularly inappropriate in the case of an agreement as divisive and unsettled as the TRIPs Agreement). These commentators point to the destabilizing effect that largely unsupported legal principles mandated by a three-member panel or the Appellate Body could have.

\textsuperscript{199} \textit{See, e.g.,} Robert J. Gutowski, Comment, \textit{The Marriage of Intellectual Property and International Trade in the TRIPs Agreement: Strange Bedfellows or a Match Made in Heaven?} 47 BUFF. L. REV. 713, 728-47 (1999) (discussing the idea that developing countries must conform to the norms established by developed countries in the TRIPs Agreement); Charles S. Levy, \textit{Implementing TRIPS - A Test of Political Will}, 31 LAW & POL'Y INT'L BUS. 789, 793-95 (2000) (discussing the role of government leverage and private business in bringing countries into compliance).

\textsuperscript{200} \textit{See, e.g.,} J.H. Reichmann & David Lange, \textit{Bargaining Around the TRIPs Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions}, 9 DUKE J. COMP. & INT'L L. 11, 37-9, 42-45, 53-61 (1998) (arguing that the Dispute Resolution Panel may hesitate to enforce the provisions against developing countries due to their less sophisticated law enforcement capabilities).
Agreement as a form of imperialism, while advising developing nations on how to turn the Agreement's provisions to their advantage.201

Given this disunity and the short time since the Uruguay Round, it is understandable that the Dispute Settlement Body is only just beginning to create a body of precedent on substantive and procedural issues relevant to the TRIPs Agreement. Some cases involving the TRIPs Agreement have, however, been brought before the Dispute Settlement Body.202 Interestingly, all of these cases involved complaints that another Members' intellectual property laws fell short of the standards set by the TRIPs Agreement. The Dispute Settlement Body has not yet invoked Panel proceedings for a national measure that exceeds the level of protection required by the TRIPs Agreement.203

2. The EC Allegation That Section 337 Violates the TRIPs Agreement

The EC challenge to Section 337 is unprecedented because it complains about a legal provision that is overly protective of intellectual property rights, claiming it is essentially a protectionist measure. This situation contrasts with the overwhelming majority of


203. See Sue Ann Mota, TRIPs—Five Years of Disputes at the WTO, 17 ARIZ. J. INT'L & COMP. L. 533, 539-553 (2000) (detailing a comprehensive overview of all disputes involving the TRIPs Agreement). It should be noted that WTO disputes involving the TRIPs Agreement that have reached panel proceedings are vastly outnumbered by such disputes that are still pending or have been resolved without recourse to panel proceedings. ld.
commentary on the TRIPs Agreement, as well as with every TRIPs dispute already adjudicated before the WTO, which deal with measures that fail to adequately protect for intellectual property rights.

On a general level, the EC challenge appears to have some legal basis. Article 1(1) of the TRIPs Agreement explicitly provides that measures can be found to violate the agreement, not simply for failing to implement its minimum standards, but also by otherwise enacting measures that are more protective of intellectual property rights than the provisions require.204 Ultimately, this paper concludes that Section 337 does not, however, violate any of the TRIPs provisions. A discussion of the relationship between Section 337 and the relevant TRIPs provisions follows.

a. TRIPs Article 3 and Section 337

The EC argues that Section 337 violates TRIPs Article 3, the national treatment provision. Article 3 of TRIPs resembles the GATT Article III(4) national treatment provision, but has a somewhat different scope of application and a different set of permissible exceptions.205 Article 3 of TRIPs states:

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in [inter alia the Rome, Paris and Berne Conventions].

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures . . . where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which constitute a disguised restriction on trade.206

204. See TRIPs Agreement, supra note 155, art. 1(1) ("Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement provided that such protection does not contravene the provisions of this Agreement.").

205. See supra notes 185-86 and accompanying text (discussing the distinctions in national treatment clauses in the GATT and TRIPs).

206. See TRIPs Agreement, supra note 155, art. 3.
The term "protection" is further defined to include "matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property..." The TRIPs Agreement thus defines "protection" very broadly to encompass a wide range of intellectual property rights and obligations.

b. Analysis of Section 337 Under Article 3 of the TRIPs Agreement

The TRIPs Agreement’s national treatment provision is subject to a variety of exceptions set forth in other intellectual property treaties. As regards Section 337, then, one must first analyze whether, by virtue of Section 337, the United States accords less favorable treatment to foreigners than it does to U.S. persons. If Section 337 accords less favorable treatment to foreigners than to U.S. persons, then it violates Article 3 of the TRIPs Agreement, and thus applicability of the Article 3 exceptions must be investigated.

In order for any of these exceptions to apply, (1) the exceptions must be "necessary to secure compliance with laws or regulations not inconsistent with" the TRIPs Agreement; and (2) the exceptions must not be applied so as to effect a disguised restriction on trade.

c. Nationals and Non-Nationals Are Treated Equally Under Section 337

The national treatment provision of the TRIPs Agreement requires that a WTO Member accord other WTO Members’ nationals treatment no less favorable than that accorded to its own nationals in the area of intellectual property protection. The emphasis on equality of treatment of nationals, not goods, is a fundamental

207. Id. n.3.
208. See id. art. 3(1) (qualifying national treatment with respect to intellectual property by allowing exceptions to national treatment as provided for in intellectual property treaties).
209. See id. art. 3(2) (explaining application of exceptions to national treatment provided for in other treaties only where such exceptions necessary to comply with laws and regulations not inconsistent with this Agreement).
210. Id.
211. See TRIPs Agreement, supra note 155, art. 3(1) (referring to “nationals” in outlining the applicable national treatment principal).
difference between the national treatment principles of the TRIPs Agreement and the GATT 1947.

Since the fundamental difference between the national treatment provisions in GATT Article III and TRIPs Article 3 is that the former focuses on treatment of goods while the latter focuses on nationals, it is likely that Section 337 is valid under TRIPs. As a border enforcement mechanism, Section 337 is open to nationals from any country who hold U.S. intellectual property rights.212 The equal treatment of nationals and non-nationals under Section 337 becomes apparent if one appreciates that U.S. companies and foreign-based companies are on an equal footing in terms of Section 337’s “domestic industry” requirement.213 Thus, a U.S.-based company that cannot at least show licensing or research and development sufficient to meet the statutory “domestic industry” requirement will fail to qualify as a Section 337 complainant. Likewise, a foreign-based company that fails to show that it practices its U.S. intellectual property rights through a “domestic industry” in the United States will also fail to qualify as a Section 337 complainant.

Thus, Section 337 fulfills the requirements of TRIPs Article 3 because both foreign and domestic holders of U.S. intellectual property rights can avail themselves of Section 337, thereby protecting themselves against U.S. importers and foreign exporters who infringe their patents. Section 337’s non-discriminatory nature (according to TRIPs national treatment standards) is borne out by the extensive use of Section 337 by foreign corporations.214

d. TRIPs Article 41 and Section 337

The EC further claims that Section 337 violates Article 41 of the TRIPs Agreement.215 In particular, the EC could argue that Article

212. See 19 U.S.C. § 1337 (a)(2) (noting Section 337 procedures are available to those holding intellectual property rights under the United States intellectual property regime).

213. See 19 U.S.C. § 1337 (a)(3) (describing the requirements to qualify as a “domestic industry”).

214. See supra note 29 (listing numerous foreign complaints that have been brought under Section 337).

215. See TRIPs Agreement, supra note 155, art. 41. Article 41 states:
41(1) mandates that enforcement procedures "shall be applied in a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse." Further, the EC might argue (as the Canadians did in 1983) that Section 337 violates Article 41(2), because it is not only "unnecessarily . . . costly" but also "entails unreasonable time limits." In this connection, the EC could argue that the mere threat of having a Section 337 case would have a significant effect on commerce. In areas where intellectual property constitutes a key part of the research and development, design, and/or production process, the mere likelihood of being subject to a Section 337 case creates an impediment for importers wishing to enter the U.S. market and, therefore, could be considered a barrier to legitimate trade.

1. Members shall ensure that enforcement procedures as specified in this Part are available under their laws so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decision on the merits of a case.

Id. Language in SMALL CAPS type can be construed as supporting a border measure like Section 337. Italicized language can be construed as critical of a border measure like Section 337.

216. See id. art. 41(1) (supporting the EC argument that TRIPs mandates that enforcement procedures do not have a negative effect on trade and are applied uniformly).

217. Id. art. 41(2) (suggesting arguments that the EC could make to prove that Section 337 violates certain portions of the TRIPs Agreement).
This argument is flawed. Under such logic the TRIPs Agreement would permit no border enforcement mechanisms apart from traditional trial court patent litigation.\textsuperscript{218} However, the language of the TRIPs Agreement generally and Article 41 specifically do not support such a claim. First, border enforcement mechanisms are explicitly provided for in the TRIPs Agreement.\textsuperscript{219} Second, border enforcement mechanisms are implicitly provided for in Article 41. Article 41(5) states that there is no obligation "to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general."\textsuperscript{220} By implication, this statement renders border enforcement mechanisms permissible, based on the principle of treaty interpretation that prohibits reading a clause in such a way as to render it redundant or

\begin{verbatim}
218. See Martenczuk, supra note 30, at 136 (arguing that TRIPs has decreased the need for Section 337 as an additional enforcement mechanism). Martenczuk continues saying:

TRIPs does not contain a justification for Section 337 as a separate and additional mechanism for the enforcement of IPRs. On the contrary, it should be noted that Article 41:1 of TRIPs explicitly states that procedures for the enforcement of IPRs must not lead to the creation of barriers to legitimate trade . . . . If anything, therefore, TRIPs has weakened the case for Section 337, not strengthened it.

Id.

219. See TRIPs Agreement, supra note 155, arts. 51-60 (outlining special requirements Members must meet when using border enforcement mechanisms).

220. See id., art. 41(5). Article 41(5) implies that there is no prohibition on putting in place a judicial system for the enforcement of intellectual property rights distinct from that for law enforcement generally. Article 41(5) also provides that "[n]othing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general." Id. This statement implies that Member States can decide freely what proportion of resources they will expend on intellectual property rights enforcement and enforcement of law generally. Thus, a country like the United States that wishes to devote many resources to intellectual property enforcement is free to do so. Id. Article 41(5) clearly addresses the concerns of developing countries that lack resources to expend on intellectual property enforcement. Id. However, application of Article 41(5) is not limited to developing countries. Id. Instead, when read in light of Article 1(1), it sets forth a general principle that Members can at their discretion choose whether to institute separate intellectual property enforcement procedures and how many resources to expend on those procedures. See DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 197 (Sweet & Maxwell Ltd. 1998) (discussing the negotiating history of Article 41(5)).
\end{verbatim}
meaningless. By stating that members do not have to institute border enforcement mechanisms, the drafters implied that members could institute them at their discretion. Instead, the drafters chose (1) by means of Articles 41 and 51 through 60, to permit border enforcement measures, and (2) by means of Article 1(1), to permit members to institute measures providing stronger protection than the minimum requirements of the TRIPs Agreement.\footnote{See TRIPs Agreement, supra note 155, art. 1(1) (stating that the fundamental principle is that member countries have a basic right to institute intellectual property protections stronger than those mandated by the TRIPs Agreement). Only where such a measure violates a specific provision of the Agreement, will it be found in violation of the TRIPs Agreement. \textit{Id}.}

Article 41(1) can also be interpreted as providing support for border enforcement measures to the extent that it mandates "enforcement procedures . . . to permit effective action against any act of infringement, . . . including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."\footnote{See \textit{id}. art 41(1) (discussing TRIPs' role in border enforcement functions).} Note in this connection that, for the very reasons articulated in Article 41(1), intellectual property rights holders prefer Section 337 litigation over federal district court patent litigation as a means of preventing and deterring the entry of infringing goods. Section 337 is more expeditious than federal district court litigation, and the available remedies, such as exclusion orders, are considered a more effective deterrent than the remedies offered by patent litigation in federal district court. The above-cited language from Article 41(1) provides an effective response to those who claim that Section 337 is a prohibited "barrier to legitimate trade" because it deters imports generally. Article 41(1) suggests that as long as the effect of an enforcement procedure (including a border enforcement mechanism) is limited to preventing and deterring the entry of infringing imports, the procedure is permissible.\footnote{See \textit{id}. (implying that border enforcement mechanisms should be carefully tailored to meet their stated goals). It is logical, then, that border enforcement mechanisms may reach their special objectives through the use of features distinct from district court procedures. Such features may include provisions for expedited procedures (e.g., Section 337's target date procedures), or for remedies tailored to address differing patterns of infringement (e.g., Section 337's various exclusion orders and cease and desist orders). If, however, the measure's unique features bear no logical nexus to the border enforcement measure's objectives, then these}
The fact that Section 337 meets all of the procedural requirements for enforcement procedures laid out in Articles 41(3) through 41(4) also supports a finding of consistency with Article 41. Section 337 provides for decisions on the merits that are "in writing and reasoned." Decisions are based on "evidence in respect of which parties were offered the opportunity to be heard" and where parties "have an opportunity for review by a judicial authority."225

Finally, it is worth noting that Section 337 provides safeguards against the situation in which intellectual property protections themselves become barriers to legitimate trade. Such safeguards include the obligation of the USITC to consult with different agencies and to consider the public interest in fashioning relief.226 Another safeguard is the requirement that complainants post bond in temporary exclusion order cases.227 Finally, it is significant in this regard that respondents can defend by alleging anticompetitive behavior such as patent misuse by the complainants.228

e. TRIPs Articles 51 Through 60 and Section 337

Articles 51 through 60 are relevant to an examination of Section 337 under the TRIPs Agreement because they set forth specific requirements for border enforcement mechanisms. Further, the EC’s features might constitute a barrier to legitimate trade. An example of such an unreasonable feature might be the application of substantive patent law principles completely foreign to those applied in federal district court. Section 337 does not appear to contain any provisions completely unrelated to its purpose of providing fast, effective relief against infringing imports. Id.

224. TRIPs Agreement, supra note 155, art. 41(3).

225. See id., art. 41(3)-(4) (discussing parties’ right to judicial review under the TRIPs Agreement).

226. See 19 U.S.C. § 1337(b)(2) (directing USITC to consult with several different agencies including the Federal Trade Commission and the Department of Justice).

227. See 19 U.S.C. § 1337(e) (excluding products from entry during investigation unless bond is posted).

228. See, e.g., In re Certain Semiconductor Light Emitting Devices, Order No. 5, Inv. No. 337-TA-444, 5-6 (introducing types of antitrust allegations commonly raised by respondents in Section 337 proceedings, and limiting extensive antitrust discovery at early stage of proceedings).
complaint against Section 337 alleges a violation of Article 51. This article will focus on Articles 51 and 52.229

i. Article 51

Although Article 51 only obligates WTO members to adopt border enforcement mechanisms with respect to counterfeit trademark or pirated copyright goods, it permits members to adopt border enforcement mechanisms with respect to other kinds of infringements (e.g., patent infringement).230 Thus, Section 337 is a permissible border enforcement mechanism, provided it meets the

229. Like the TRIPs Agreement, Articles 51-52 and Articles 53-60 appear to permit Members to employ border enforcement mechanisms like Section 337. In fact, many of the provisions called for in Articles 53-60 closely track Section 337’s statutory provisions. Article 53 provides that applicants may be required to provide a “security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse.” See TRIPs Agreement, supra note 155, art. 53. In this and other particulars, this provision resembles the bonding provisions of Section 337. See 19 U.S.C. § 1337(e). Article 54, which provides that importer and applicant be notified of suspension of release of goods, accords with provisions regulating the actions of the U.S. Customs Service. See TRIPs Agreement, supra note 155, art. 54. Article 57 permits authorities to access relevant and confidential information, “[w]ithout prejudice to the protection of confidential information,” and appears to be consistent with USITC practice regarding protective orders. Id. art. 57. Article 58 deals with cases in which the USITC or the U.S. Customs Service decide to act in their official capacity to investigate and prevent the importation of infringing articles. Id. art. 58. Section 337 has been applied consistently with this article. 19 U.S.C. 1337(b)(1). To the extent that it is relevant to Section 337, article 59 requires that judicial review be afforded. See TRIPs Agreement, supra note 155, art. 59. This provision is satisfied by Section 337 by virtue of 19 U.S.C. 1337(c).

230. See TRIPs Agreement, supra note 155, art. 51. Article 51 states:

Members shall, in conformity with the provisions set out below, adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, or lodge an application in writing with competent authorities, administrative, or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met. Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

Id. (emphasis added).
requirements of Articles 51 through 60. As discussed below, it meets all of these requirements.\textsuperscript{231}

\textit{ii. Article 52}

Article 52 requires that an intellectual property rights holder (1) have evidence adequate to show a \textit{prima facie} infringement of intellectual property right(s), and (2) afford authorities a description of goods sufficiently precise "to make them readily recognizable by the customs authorities."\textsuperscript{232} This provision (like all the provisions in Section IV) applies not only to Section 337, but also to border enforcement mechanisms permitting an intellectual property rights holder to appeal directly to the U.S. Customs Service for redress for infringement of copyrighted and trademarked goods.\textsuperscript{233} Based on the detailed procedural requirements for prosecuting a Section 337 case, it appears that Section 337 meets the requirements of Article 52.

\textsuperscript{231} It should be noted that Section 337 does not violate Article 51 because of the fact that it does not provide for copyright infringement issues. Every one of a Member State’s border enforcement mechanism need not meet all of the requirements of Article 51. Instead, a Member is required to have some border enforcement mechanism in place that satisfies article 51. The United States has several border enforcement mechanisms, and together they more than satisfy article 51. In addition to Section 337, for example, there are other U.S. border enforcement mechanisms, which allow an intellectual property rights holder to petition the U.S. Customs Service to exclude the infringing goods at the border. See \textit{19 C.F.R. 13} (2001) (outlining requirements for recording rights to intellectual property and consequences if such property rights are infringed upon); see also LESLIE A. GLICK, \textit{GUIDE TO THE UNITED STATES CUSTOMS AND TRADE LAWS AFTER THE CUSTOMS MODERNIZATION ACT} 108-110 (describing Customs border enforcement measures to address violations of intellectual property rights).

\textsuperscript{232} \textit{See TRIPs Agreement, supra} note 155, art. 52. Article 52 states:

\begin{quote}
Any right holder initiating the procedures under Article 51 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is \textit{prima facie} an infringement of the right holder’s intellectual property right and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities. The competent authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.
\end{quote}

\textit{Id.}

\textsuperscript{233} \textit{See GERVASIS, supra} note 220, at 221-22 (noting that WTO Members are not limited in applying the measure to pirate and counterfeit goods).
A related issue is whether the U.S. Customs Service’s enforcement of Section 337 exclusion orders could result in a violation of the TRIPs Agreement. If the USITC’s exclusion order (as a proxy for the complainant’s description of the goods) was not sufficiently precise for the U.S. Customs Service to differentiate among infringing and non-infringing merchandise, a violation of Article 52 could arise.\[234]\n
3. Section 337 Does Not Violate Any Provision of the TRIPs Agreement

There are no strong grounds for claiming that Section 337 violates the TRIPs Agreement. As discussed above, Section 337 does not clearly violate the specific provisions of Sections III or IV of the TRIPs Agreement. On the contrary, the TRIPs Agreement and other commentators expressly acknowledge the need to incorporate intellectual property protections into border enforcement mechanisms.\[235]\n
Further, it is not reasonable to argue, as some commentators have, that Section 337 should be held to violate the TRIPs Agreement on the basis of aspirational language, such as the language in Article 41(1) admonishing against enforcement procedures becoming barriers to legitimate trade.\[236]\n
To the extent that this general language does not provide clear standards for finding a violation of the TRIPs Agreement, it is improper to rely on it as the sole basis for a claim that Section 337 violates the TRIPs Agreement.

The overall structure and language of the TRIPs Agreement, especially the preamble and Articles 1, 7, and 8, provide another reason not to find Section 337 in violation of the TRIPs Agreement. These Articles illustrate the extent to which the TRIPs Agreement represents a toughly negotiated compromise between such competing interests as those of developing country versus developed country

\[234\] See id. at 220-21 ("A reason to limit the application of the measure to visibly infringing goods, is that certain customs authorities may not be equipped to properly identify goods which may infringe, e.g., a patent claim or layout-design of an integrated circuit.").


\[236\] See, e.g., Matenczuk, supra note 30, at 136 (arguing that the precatory language warning against potentially trade distorting effects of IPR enforcement constitutes a basis for finding Section 337 to violate the TRIPs Agreement).
interests, producer versus consumer interests, and Member State discretion to choose laws appropriate to their circumstances versus the WTO multilateral system's interest in consistency and coherence of intellectual property rules. Under an agreement in which concessions to competing interests are made in so many different provisions, only clear prohibitions and requirements provide the authority to declare a country in violation.

Thus, the general language of the preamble and Articles 1, 7 and 8 can be seen as standing for the proposition that only clear violations of detailed, substantive provisions constitute a violation of the TRIPs Agreement. That same language is not a useful authority, however, for finding a TRIPs violation, because it can be cited equally for the proposition that the TRIPs Agreement approves and disapproves of a border enforcement remedy like Section 337.

CONCLUSION

The foregoing analysis discusses the level of consistency between Section 337 and the GATT 1947 on the one hand, and the TRIPs Agreement on the other. With respect to GATT 1947, it appears that even if Section 337 is consistent with the Article 3 national treatment provision, it may not meet the stringent standards of Article 20, as developed through WTO Dispute Settlement Body practice. With respect to the TRIPs Agreement, it appears that Section 337 is consistent with the Agreement's requirements. The difference between Section 337's relationship with GATT 1947 and the TRIPs Agreement is attributable to the fact that the TRIPs Agreement contains a national treatment principle with a focus different from GATT 1947, and an overall structure comprising specific minimum standards on the one hand, and general language that articulates the interests of various competing interests, on the other.

Based on this initial analysis, it would appear that Section 337 could be deemed inconsistent with GATT 1947. Other considerations, however, suggest that Section 337 will ultimately not be found inconsistent with U.S. WTO obligations.

One reason that Section 337 may not be found inconsistent with WTO obligations lies in the fact that the EC, Japan, and Canada do
not appear to be pushing a challenge to the law. It may be that these trading partners wish to avoid a showdown with the United States over Section 337. Foreign interests benefit more directly from the challenges to U.S. antidumping and countervailing duty law than they would from a challenge to Section 337. In contrast to U.S. antidumping and countervailing duty laws, which affect important political constituencies abroad—particularly foreign steel makers—Section 337 arguably only affects foreign producers that lack large patent portfolios that can be used defensively to deter litigation. Presumably, these producers are less politically powerful in their home jurisdictions than steel makers and other producers generally subjected to U.S. antidumping and countervailing duty laws.

Further, in view of the number of economically and politically influential foreign firms that take advantage of Section 337—such as Sumitomo Special Metals, Fuji Photo Film, Mitsubishi Chemical Corporation or Michelin Tire—it is also likely that these foreign interests would oppose a concerted effort to challenge Section 337.

Japan and the EC, in particular, may also have diplomatic reasons to avoid pushing for a decision that Section 337 violates either the GATT 1947 or the TRIPs Agreement. First, as compared with developing countries, Japan and the EC’s interests are aligned with strong IPR protection. These countries may not wish to lend support to the efforts of those nations wishing to weaken the protections of the TRIPs Agreement.

Second, in areas marred by as much disunity and contention as trade related aspects of intellectual property rights, there may be some wisdom in according deference to national governments’ views of the appropriate level of protection. Thus, in the intellectual property area, it is important to maintain a measure of decentralized authority, not just because of “the importance at the national level of decision-making expertise, [and] democratic accountability or institutional efficiency,” but also because of social welfare and economic goals that differ greatly from country to country. In areas
that remain controversial it is important for panels not to overextend their reach.\textsuperscript{238}

\textsuperscript{238} "Panels should be cautious about adopting 'activist' postures in the GATT/WTO context. For one thing, the international system and its dispute settlement procedures, in stark contrast to most national systems, depend heavily on voluntary compliance by participating members. Inappropriate panel 'activism' could well alienate members, thus threatening the stability of the GATT/WTO dispute settlement procedure itself," \textit{Id.} at 212. Thus, a panel presiding over a case as apparently close as the Section 337 case would be (at least in the TRIPs context) would be wise to adopt a deferential attitude. \textit{But cf.} Judith H. Bello, \textit{Some Practical Observations About WTO Settlement of Intellectual Property Disputes}, 37 VA. J. INT’L L. 357, 362-4 (1997) (arguing for an “offensive standard [of review]” in TRIPs cases). Bello explains that the TRIPs Agreement does not articulate a standard of review, whereas the Antidumping Agreement does articulate a Chevron deference standard. \textit{Id.} at 362. According to accepted rules of treaty interpretation, "it would be highly inappropriate for panelists in TRIPS cases . . . to import the deferential standard established only for antidumping cases." \textit{Id.}