

## Kaye and Plaia on Section 337 - Pricing Jurisdiction

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## A COMMENT: KAYE AND PLAIA ON SECTION 337— PRICING JURISDICTION

*Edward R. Easton and Jeffrey M. Lang\**

In the Spring 1977 issue of the *International Trade Law Journal*,<sup>1</sup> Messrs. Kaye and Plaia presented an analysis of the jurisdiction of the United States International Trade Commission (ITC) over matters concerning the pricing of articles imported into the United States under the provisions of section 337 of the Tariff Act of 1930, as amended.<sup>2</sup> In their analysis, Kaye and Plaia

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\* Attorney-Advisers, Office of the General Counsel, U.S. International Trade Commission. The views expressed in this Comment are entirely personal, and do not put forth the official policy of any agency of the United States. This Comment is not written on behalf of nor approved in advance by the U.S. International Trade Commission or any member or officer of the Commission.

1. 2 INT'L TRADE L.J. 1 (1977).

2. 19 U.S.C. § 1337 (1970). The jurisdictional provisions of the statute are set out in subsection (a):

Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, . . .

The boundaries of this jurisdiction have yet to be firmly established by the ITC. The Commission has interpreted the language "or in their sale" as not requiring a nexus between importation of merchandise and the commission of an unfair act even after the merchandise has been withdrawn from customs for consumption. See Commission Opinion, In the Matter of Convertible Game Tables and Components Thereof, Investigation Docket No. 337-TA-2 (December 1974), at 19; Commission Opinion, In the Matter of Certain Electronic Audio and Related Equipment, Investigation Docket No. 337-TA-7 (April 1976), at 29.

In its annual report for 1923, the agency suggested that "the statute would be made somewhat more explicit if the words 'exporter' and 'sell for export' were inserted in subsection (a). . . ." Seventh Annual Report of the Tariff Commission (Washington, D.C. 1923), at 41. Resolving the ambiguity in the use of the term *Sale* in favor of the meaning of a sale for export to the United States is consistent with the concept of *tendency* or incipency in subsection (a). Compare, Federal Trade Commission v. Gratz, 253 U.S. 421, 427 (1920). Although, the Commission has not explicitly relied on this kind of interpretation in making a statutory determination an order by an administrative law judge held that the agency should proceed with an investigation before an actual importation has taken place if high cost durable goods are involved, see, In the Matter of certain Machinery Centers with Automatic Tool Changers, Investigation Docket No. 337-TA-34 (order of August 10, 1977).

suggested that on its face section 337 overlaps the antidumping acts of 1916<sup>3</sup> and 1921,<sup>4</sup> the countervailing duty statute,<sup>5</sup> the

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3. The first United States law directed at dumping was the Revenue Act of 1916, Pub. L. No. 271, 39 Stat. 756 (1916). Under "Title VIII, Unfair Competition," Sections 800 and 801 of the Revenue Act of 1916 provide for suit in a district court and treble damages and criminal sanctions if the defendant is found guilty of the misdemeanor of importing or selling imported articles at a price substantially less than the "actual market value" or "wholesale price" of such articles in the principal markets of the country of their production or of other foreign countries to which they are common exported, if "such act or acts be done with the intent of destroying or injuring an industry in the United States, . . . or of restraining or monopolizing any part of trade and commerce in such articles in the United States."

Both the language of the 1916 Act and the remedies it provided reflect the provisions of Section 2 of the 1914 Clayton Act. In a letter to the New York Times (July 14, 1916), Assistant Attorney General Samuel J. Graham described the 1916 Act as follows:

Any antidumping provision is not a matter of taxation, or strictly speaking, tariff. It is a power exercised under the Commerce Clause of the Constitution and not under the Taxing Clause. Its purpose should be to prevent unfair competition. Just as we have said to our own people by the Clayton Act that they should not indulge in unfair competition, so we propose to say the same to foreigners.

In *Zenith Radio Corp. v. Matsushita Elec. Ind. Co., Ltd.*, 402 F. Supp. 251 (E.D. Pa. 1975), the court held that certain provisions of the statute are not unconstitutionally vague. Among the provisions challenged in the *Zenith Radio Corp.* case were the terms "actual market value or wholesale price." The court found that the entire phrase was a part of the customs law of the United States at the time the 1916 law was enacted. 402 F. Supp. at 257. "Actual market value" was defined in the Tariff Act of 1913, Pub. L. No. 16, § III, ¶ R, 38 Stat. 114, as follows:

that such actual market value shall be held to be the price at which such merchandise is freely offered for sale to all purchasers in (the principal markets of the country from whence exported), in the usual wholesale quantities, and the price which the seller, shipper, or owner would have received, and was willing to receive, for such merchandise when sold in the ordinary course of trade in the usual wholesale quantities, including the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, whether holding liquids or solids, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States. . . .

The court did not discuss the term "wholesale price" other than to remark that the term ". . . is surely familiar to the astute businessmen who are officers of defendant corporations." 402 F. Supp. at 257.

4. The Antidumping Act, 1921, *as amended*, 19 U.S.C. § 160 (1970), *et seq.*, provides, roughly, that when a foreign company sells merchandise in the United States for less than in its home market and such U.S. sales are injurious to a U.S. industry, the Treasury Department shall assess antidumping duties to countervail the margin of dumping, or margin of underselling from the home market price. Certain adjustments are made for differences in the "circumstances of sale." *See*

Sherman,<sup>6</sup> the Clayton<sup>7</sup> and the Robinson-Patman Acts,<sup>8</sup> and attempted to distinguish section 337 by an historical analysis of

UNITED STATES ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, Vol. 1, *Antidumping Duties*, Papers submitted to the Commission on International Trade and Investment Policy (Washington, D.C., July 1971), 395.

Socialist countries have been involved disproportionately in antidumping cases in terms of the amount of their trade with the United States. DeJong, *The Significance of Dumping in International Trade*, 2 J.W.T.L. 162, 182 (1968). The Antidumping Act has been applied to products of State-controlled economies. See Anthony, *The American Response to Dumping from Capitalist and Socialist Economies*, 54 CORNELL L. REV. 159 (1969). Price comparisons, in such cases, are made on the basis of products sold in a non-State controlled economy or on the basis of the constructed value of similar merchandise in the non-State controlled economy, 19 U.S.C. § 164(c) (1975).

5. Trade Act of 1974, Pub. L. No. 93-618, § 303, 88 Stat. 1978 (1975). The United States countervailing duty statute is broader in scope than the Antidumping Act, 1921. Although it has only been invoked against government subsidies, its jurisdiction encompasses private business organizations. However, the General Agreement on Tariffs and Trade [GATT], Article VI, ¶ 5, October 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, provides that no contracting party (i.e., member-signatory) shall subject imports to both antidumping and countervailing duties to remedy the same situation. The GATT is an executive agreement.

6. 26 Stat. 209 (1890).

7. Section 2 of the Clayton Act of 1914, Pub. L. No. 212, 38 Stat. 730, as amended by the Robinson-Patman Act, provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States. . . .

15 U.S.C. § 13(a) (1970).

Price discrimination in the primary line of competition — competitors of the seller — usually involves two geographic markets. Concern with the primary line of competition was the purpose of the enactment of Section 2 of the Clayton Act. The Judiciary Committee described Section 2 in the following terms:

Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread and unfair trade practice whereby certain great corporations . . . have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods — at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country.

H.R. REP. NO. 627, 63d Cong., 2d Sess. 7 (1914). In geographic price discrimination cases, a discriminator relies, presumably, upon a very strong position in one market to subsidize his predatory pricing in a second market to weaken or eliminate local competitors. See S. REP. NO. 698, 63d Cong., 2d Sess. 3 (1914).

8. Pub. L. No. 550, 52 Stat. 446 (1938). The Robinson-Patman Act was enacted largely in reaction to the ascent of chain stores. The size of the chains gave them

the enforcement of the latter statute. They also suggested that the ITC establish standards for gauging unfair price competition in the experience of the courts and the Federal Trade Commission with sections 2 and 3 of the Robinson-Patman Act.

This comment will focus on three areas of disagreement with the treatment of these subjects in the Kaye and Plaia article. First, recent events seriously weaken any argument that the enforcement history of section 337 is a test of the scope of the ITC's section 337 jurisdiction. The Trade Act of 1974<sup>9</sup> not only made substantive amendments to section 337, but changed the nature of the ITC's legislative mandate. Second, it would be difficult to do worse than to use past Robinson-Patman practice as a standard for regulation under section 337. We suggest that the ITC develop standards through market analyses of the impact of alleged unfair pricing. This was not done in the cases concerning enforcement of the Robinson-Patman Act cited in the Kaye and Plaia article.<sup>10</sup> Finally, the Kaye and Plaia article suggests that in the foreseeable future, the ITC and the executive departments will focus their energies on overlapping agency and court jurisdictions under the various statutes affecting pricing competition. In our view, the primary issue will be instead, the negotiation of international agreements concerning fair pricing competition. Government export subsidization is at the root of most pricing problems in international trade. The ITC can participate in negotiating such agreements and can exercise its section 337 jurisdiction accordingly.

#### I. CONCURRENT JURISDICTION AND PRICE DISCRIMINATION

It appears that Kaye and Plaia want to resolve the alleged jurisdictional overlappings of the ITC's jurisdiction under section

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bargaining power to exact price concessions from suppliers which the suppliers would not grant to other purchasers. See H.R. REP. NO. 2287, 74th Cong., 2d Sess. (1936); and S. REP. NO. 1502, 74th Cong., 2d Sess. (1936). Although the Robinson-Patman amendment of Section 2 was concerned with the secondary line of competition, or the effect of price discrimination on competition between a favored buyer and the competitors of the favored buyer, the Clayton Act provisions concerning the primary line of competition were kept in the amended law.

9. Pub. L. No. 93-618, 88 Stat. 1978, (January 3, 1975).

10. Generally, the courts have not analyzed the conditions in the marketplace in which the alleged price discriminations occurred. They have been more concerned with injury to individual firms than the "impairment of competitive forces in the market." Note, *Meeting Competition under the Robinson-Patman Act*, 90 HARV. L. REV. 1476, 1482 (1977).

337 and the Treasury Department's authority under both the Antidumping Act, 1921, and the countervailing duty statute. By its own terms, section 337 provides:

Whenever, in the course of an investigation under this section, the Commission has reason to believe, based on information before it, that the matter may come within the purview of section [303] . . . or of the Antidumping Act, 1921, it shall promptly notify the Secretary of the Treasury so that such action may be taken as is otherwise authorized by such section and such Act.<sup>11</sup>

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11. 19 U.S.C. § 1337(b)(3) (1975). Apparently this language was taken from that in subsection 201(b)(6) of the Trade Act of 1974, which provides:

In the course of any proceeding under this subsection, the Commission shall investigate any factors which in its judgment may be contributing to increased imports of the article under investigation; and, whenever in the course of its investigation the Commission has reason to believe that the increased imports are attributable in part to circumstances which come within the purview of the Antidumping Act, 1921, section 303 or 337 of the Tariff Act of 1930, or other remedial provisions of law, the Commission shall promptly notify the appropriate agency so that such action may be taken as is otherwise authorized by such provisions of law.

It has never been suggested that the provisions of subsection 201(b)(6) operate in a manner which would limit either the ITC's authority to conduct investigations under or to reach determinations appropriate to section 201. See Commission Memorandum Opinion, In the Matter of Certain Color Television Receiving Sets, Investigation Docket No. 337-TA-23 (December 1976), at 10-11. The Commission recently took this position when it enacted a section of its Rules of Practice and Procedure implementing both section 337 and section 201(b)(6). It referred to both statutes as "notification" provisions, and said,

Two commenters suggest that if the Commission has reason to believe that the subject matter of a Commission investigation falls within a statute that is under another agency's jurisdiction, the Commission should stop (or not start, as the case may be) its investigation.

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The Commission has decided not to accept [this] suggestion. Neither of the statutory 'notification' provisions requires cessation of Commission activity in any investigation [citing the order of December 20, 1976, denying motions to dismiss in Certain Color Television Receivers, Inventory No. 337-TA-23, and the decision in *Melco Sales, Inc. v. ITC, et al.*, Civil Action No. 76-1932 (D.D.C., November 9, 1976)]. These provisions, sections 201(b)(6) and 337(b)(3), require only notification. In a proper case the Commission is free to suspend a section 337 investigation (see sec. 337(b)(1)), but suspension should not be, and is not, required, nor should it be mentioned in this rule.

42 Fed. Reg. 16775 (1977). The rule, which is too long to quote here, appears at 19 C.F.R. 201.4(d) (1977). It essentially provides a procedure for determining whether it is appropriate in any given case to notify another agency of matters or circumstances that "may come within the purview of another remedial provision of law not the basis of such investigation. . . ."

In developing alternative postures which the ITC might adopt in order to give effect to the provisions of section 337(b)(3), Kaye and Plaia examine the types of unfair methods of competition and unfair acts which have been investigated by the ITC under both section 337 and its predecessor statute.<sup>12</sup> After an elaborate analysis of these investigations they conclude that the ITC has had a long-established administrative practice of interpreting section 337 as not requiring it to conduct investigations petitioned on the basis of unfairness in pricing. This conclusion, when coupled with the language of section 337(b)(3) and the authority of the ITC under designated circumstances to suspend its investigations under section 337,<sup>13</sup> led Kaye and Plaia to the further conclusion that the statute itself was ambiguous, in turn allowing

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12. Section 316 of the Tariff Act of 1922, Pub. L. No. 318, 42 Stat. 858, in effect from 1922 to 1930, provided that the Commission was to investigate alleged violations of the Section, and was to make findings and recommendations which were appealable to the Court of Customs and Patent Appeals and from there by way of certiorari to the Supreme Court. Upon completion of this procedure, the record was to be transmitted to the President, who, if he was satisfied that the Act had been violated, could levy an additional duty of 10 to 50 percent ad valorem, or could impose an embargo (exclusion order) on the goods being imported in violation of the Act. Few changes were made in Section 316 when it became Section 337 of the Tariff Act of 1930. The House eliminated the Presidential authority to impose penalty duties, H.R. REP. NO. 7, 71st Cong., 1st Sess. 166 (1929), and the Senate eliminated the provision for review by the Supreme Court, S. REP. NO. 37, 71st Cong., 1st Sess. 67 (1929).

13. Subsection 337(b)(1), in part, provides:

The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative. Upon commencing any such investigation, the Commission shall publish notice thereof in the Federal Register. The Commission shall conclude any such investigation, and make its determination under this section, at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication of notice of such investigation. The Commission shall publish in the Federal Register its reasons for designating any investigation as a more complicated investigation. For purposes of the one-year and 18-month periods prescribed by this subsection, there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

The suspension provision does not relieve the Commission from the requirement in subsection 337(c) that the agency shall determine whether there is a violation of section 337 in each investigation conducted under its authority. The agency can take official notice of the effect of any judicial or administrative action taken by the court or other agency when rendering its own determination. See *infra* note 26 and subject text, and *supra* note 11.

a construction of legislative intent.<sup>14</sup> However, the legislative history of section 337(b)(3) provides unambiguously that:

Section 337(b)(3), as amended by this bill, would provide that the Commission, when it has reason to believe based on information available to it that the subject matter of an investigation it is conducting may come within the purview of section 303 of the Tariff Act of 1930 or of the Antidumping Act, 1921, shall notify the Secretary of the Treasury so that such action may be taken as is otherwise authorized by section 303 of the Antidumping Act. It is expected that the Commission's practice of not investigating matters clearly within the purview of either section 303 or the Antidumping Act will continue.<sup>15</sup>

Kaye and Plaia conclude from this analysis that the ITC is authorized to refuse to exercise jurisdiction over matters alleging unfair pricing. They reason that the provisions of subsection 337(b)(3) can be read to "carve-out" pricing matters from the jurisdictional provisions of subsection 337(a).

We disagree. We believe a reading of section 337 in context with the other provisions of the Trade Act of 1974 — which revised much of the organic statutes of the Commission — shows that the Commission, rather than being deprived of jurisdiction over pricing matters, was ordered to establish any and all standards for commercial conduct in the import trade of the United States, including pricing policy.

Prior to the Trade Act of 1974, the Commission merely assisted the President in determining when violations of the statute existed. The statutory authority to assist the President extended to fact-finding and was merely advisory.<sup>16</sup> A violation had to be established to the satisfaction of the President and the Commission carried that burden. Due to enforcement problems in

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14. There is no compelling reason to accept the proposition that subsections 337(b)(1)-(3) are ambiguous. See *infra* note 27. Administrative practice and legislative history are only resorted to when the language of the statute is unclear.

15. S. REP. NO. 93-1298, 93d Cong., 2d Sess. 195 (1974).

16. Eventually, the advisory nature of the Commission's findings cast doubt on the constitutional requirements that there be a "case or controversy" for a contest to be justiciable. In *Glidden Company v. Zdanok*, 370 U.S. 530 (1962), the Supreme Court reviewed the provisions of 28 U.S.C. § 211, enacted in 1958, which declared the United States Court of Customs and Patent Appeals (CCPA) to be an Article III or constitutional court. In considering the jurisdiction of the CCPA, the



attempts to remedy unfair competition from abroad, including the problems involved in obtaining personal jurisdiction over foreign companies, the statute provided for an *in rem* jurisdiction over imported articles. The remedy for violation of the statute appeared to be limited to an order subjecting offensive merchandise to exclusion from entry into domestic commerce,<sup>17</sup> except where an

Supreme Court considered the provision in section 337 authorizing appeals from Commission findings of violations and recommendations that the President issue exclusion orders:

The jurisdictional [statute] in issue, § 337 of the Tariff Act of 1930 . . . appear[s] to subject the decisions called for . . . to an extrajudicial revisory authority incompatible with the limitations upon judicial power this Court has drawn from Article III. . . . It does not follow, however, from the invalidity, actual or potential, of [this] . . . jurisdiction, that the . . . Court of Customs and Patent Appeals must relinquish entitlement to recognition as an Article III court.

370 U.S. at 582. From the decision in *Glidden* until the 1974 amendments it was doubtful that the CCPA would entertain appeals from Commission findings under section 337.

17. Commission recommendations that the President exclude articles never set forth a nexus between the import and the importer. Whether exclusion orders were intended to operate exclusively *in rem* was not clear from the terms of the statute. The legislative history of the statutory predecessor of section 337 indicates that the Senate may have intended a limited type of exclusion order which affected only those importers found to practice unfair methods of competition or unfair acts:

That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President . . . he shall direct that such articles [concerned in such unfair methods or acts] *imported by any person violating the provisions of this Act*, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers . . . refuse such entry; and that the decision of the President shall be conclusive. [Emphasis added]

Tariff Act of 1922, Pub. L. No. 318, § 316(e), 42 Stat. 944.

The underlined portion of subsection (e) was added as an amendment on the floor by the Senate during the debate on section 316 of the Tariff Act of 1922. During the course of that debate, Senator Lenroot stated:

[S]o, under the amendment now proposed, if one importer has indulged in unfair competition, and a finding to that effect is sustained and reported to the President, because one importer has been guilty of wrongdoing the President may fix rates from 10 to 50 per cent ad valorem upon all merchandise, either of that character or any different character.

MR. REED. Let me ask the Senator whether, in the case he has just put, it would not be much wiser if we provided penalties to be visited upon the particular importer who violated the proper practices, and reach it in that way, instead of reaching it by excluding everybody?

MR. LENROOT. I think that is the way to reach it. The Senator from Utah has just called my attention to one of the amendments which is intended

appropriate bond was given in connection with a temporary exclusion order.<sup>18</sup>

The direction which the regulation of imports took under the statute was unexpected. The Commission recommended an exclusion order based upon the theory that infringement of a valid U.S. patent was a violation of the act.<sup>19</sup> The Court of Customs and

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to be proposed, which will limit it to merchandise imported in violation of this act. Do I understand from the Senator from Utah, then, that it will not be a general rate imposed upon all merchandise but will be a rate imposed upon merchandise imported by a given individual who is guilty of violation of the act.

MR. SMOOT. That is all there is to it, Mr. President. The criticism the Senator has just offered to the original paragraph is absolutely correct. Under that, if there had been one violation the President could have imposed the extra duty upon all importations, by any and every person, of that kind of merchandise, and that is why the committee is going to offer this amendment.

MR. LENROOT. I am very frank to say that that greatly improves the section.

Cong. Rec., August 11, 1922, at 11241-44.

Later during the course of the debate an amendment was offered to subsection (e) to overcome the objection voiced by Senator Lenroot, which amendment consisted of the insertion of the language underscored above. The amendment was agreed to and the language was inserted in the law.

In the conference report which was issued when the Tariff Act of 1922 was reported out by the conferees, the following statement was made:

Investigations of cases arising under this section are to be made by the United States Tariff Commission and its findings are subject to review, on questions of law, by the United States Court of Customs Appeals. The final findings of the Commission are then transmitted to the President and he is authorized, in case such unfair methods or acts are established to his satisfaction, to impose additional duties upon merchandise imported in violation of the act, and in extreme cases he is authorized *to prohibit the offending person from importing any merchandise into the United States.* [Emphasis added]

18. The amount of the bond was set by the Customs Service at the domestic value of the merchandise. 19 C.F.R. 12.39(b) (1977). [This provision is still set out in Title 19 of the Code of Federal Regulations although it is no longer appropriate.]

With the amendment of section 337 by the Trade Act of 1974, however, the authority to establish the bond amount was transferred to the ITC. 19 U.S.C. § 1337(e), (g)(3) (1975). The bond is to be set in an amount which will offset the competitive advantage resulting from unfair acts in the importation or sale of the offensive articles. S. REP. NO. 93-1298, 93d Cong., 2d Sess. 198 (1974).

Where a permanent exclusion order is issued, the bond obligors, under the supervision of customs officers, either export all of the offending merchandise to a foreign country, destroy the merchandise, or present an appropriate license permitting its entry, 19 C.F.R. 12.39(c) (1977).

19. In the Matter of Coilable Metal Rules and Holders, Investigation Docket No. 337-8 (October 1935).

Patent Appeals upheld the Commission's findings to the effect that patent infringement was an unfair method of competition and an unfair act.<sup>20</sup> Subsequently the limited role of the Commission and the inflexibility of the exclusion order resulted in the great bulk of Commission investigations being concerned with allegations of patent infringement.

In excluding infringing and unlicensed articles, an exclusion order operates to promote compliance with the patent laws and to allow the importation of licensed merchandise.<sup>21</sup> However, exclusion of merchandise for an "antitrust type" of offense presented a remedy more harmful than the violation. A proceeding aimed at promoting competition would result at best in an order cutting off competition from certain imports.

The 1974 amendments to section 337 included a more flexible remedy, cease and desist orders, as well as exclusion orders. This amendment can only be appreciated when it is realized that all Commission section 337 orders become, by virtue of the Trade Act of 1974, final agency orders subject to a limited form of Presidential "disapproval." Previously, the Presidential authority had been plenary. Prior to the 1974 amendments, the President, not the Commission, determined what conduct was a violation of the statute. As amended by the 1974 Trade Act, subsection 337(c) specifically authorizes the Commission to determine what is unlawful conduct. The President can only veto an affirmative order on "policy" grounds.

We submit that Congress decided that the proper division of authority between the President and the ITC is that the Commission establish the fair competition standards for importation of merchandise into the United States and that the President may prevent the implementation of such standards only when they conflict with national or foreign policy objectives, and then only on a case-by-case basis.<sup>22</sup> The Commission clearly has the

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20. *Frischer & Co. v. Bakelite Corporation*, 39 F.2d 247 (1930), 17 C.C.P.A. 494, *cert. denied*, 282 U.S. 852 (1930).

21. See e.g., Commission Memorandum Opinion, In the Matter of Reclosable Plastic Bags, Investigation Docket No. 337-TA-22 (January 1977), at 15.

22. See November 6, 1976, hearing transcript, *Melco Sales, Inc. v. United States International Trade Commission, et al.*, C.A. No. 76-1932:

Counsel for plaintiff:

Your honor, the question is whether the Court has jurisdiction to review the actions of one of the Federal agencies which in this case not only exceed [sic] its jurisdiction, but the State Department has represented in no uncertain

authority and the responsibility to develop an interpretation of statutory authority removing ambiguities from the pre-Trade Act of 1974 history of instituting very few investigations resulting in limited enforcement, *i.e.*, selective findings and recommendations transmitted to the President.<sup>23</sup> In further support of this interpretation of Congressional intent, we note the significant "independence" of the ITC legislated in the Trade Act of 1974.<sup>24</sup>

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terms that, 'continuation of the [ITC's] investigation will disrupt our vital foreign relations. . . .'

*The Court:*

Does this court have jurisdiction to sit to enforce the pronouncements of Secretary Kissinger?

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*The Court:*

Fundamentally, aren't you challenging the right of the Commission to do what the statute commands it to do, to make an investigation? Fundamentally, isn't that what you're doing?

23. Gifford, *Communication of Legal Standards, Policy Development, and Effective Conduct Regulation*, 56 CORNELL L. REV. 409, 424-25 (1971). A similar situation seems to exist with respect to economic regulation of foreign air carriers and routes between points in the United States and points without. The U.S. Civil Aeronautics Board is empowered by section 402 of the Federal Aviation Act of 1958 to issue permits to foreign air carriers, 49 U.S.C. § 1372(b) (1970), and in doing so it takes into account, *inter alia*, "the public interest" and international agreements, 49 U.S.C. § 1372(b) (1970) and 49 U.S.C. § 1502 (1970). Nevertheless, the issuance or denial of such permits are "subject to the approval of the President," 49 U.S.C. § 1461 (1970). Even though the scope of Presidential authority in foreign aviation is greater than under section 337, there has never been any doubt that the economic policy of foreign air transportation is made by the Board, subject to Presidential approval. We will have occasion later to comment on the Board's experience under this arrangement, which is now substantial. *See infra* note 62, subject text.

24. Professor Dixon has gauged the independence of agencies from the Executive branch by cataloging limitations on their freedom from influence. Limitations on independence include: Executive control of budget submissions; centralization of litigation in the attorney general; centralized clearance of all agency proposals for new legislation and comments on proposed congressional legislation; the combination of presidential control over the chairmanship of most commissioners with the chairman's control over the administration and staffing of the commission; executive branch monitoring of agency requests for information; public intervention by executive in adjudicative agency proceedings; personnel policies of the Civil Service Commission; absence of limitations set forth in the agencies' organic statutes on the president's power to remove members of the agency; and, presidential delegation to independent commissions without explicit statutory authority. Dixon, *The Independent Commissions and Political Responsibility*, 27 ADMIN. L. REV. 1 (1975) [hereinafter cited as Dixon.]

The Executive branch has no control over ITC budget submissions, 19 U.S.C. § 2232 (1975), or ITC litigation, Pub. L. No. 93-618, § 714, amending 19 U.S.C. § 1333 (1970). Requests for information in formal adjudicative proceedings

Finally, the statute, as amended, is replete with language which bars the exercise of ITC discretion to avoid exercising its jurisdiction to determine what constitutes unfair methods of competition and unfair acts in the import trade:

Subsection (b)(1) states that the Commission *shall* investigate *any* alleged violation of section 337 on complaint or upon its initiative;<sup>25</sup>

Subsection (c) states that the Commission *shall* determine, with respect to *each* investigation conducted under section 337, whether or not there is a violation of section 337;<sup>26</sup>

Subsection (a), which makes unlawful injurious unfair methods of competition and unfair acts in the importation of articles into the United States, states that the provisions of section 337 are *in addition to any other provision of law*.

Against this background, it would seem that the provisions of subsection (b)(3) — requiring the notification of the Secretary of

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are exempt from Executive branch monitoring, Pub. L. No. 93-153, § 409, and OMB Circular No. A-40, February 10, 1976, section 9(c). Finally, Presidential control over the chairmanship of the ITC is circumscribed, Pub. L. No. 95-106, § 2(a), 91 Stat. 867 (1977).

25. Prior to amendment by the 1974 Trade Act, 19 U.S.C. § 1337(b) provided that "[t]o assist the President in making any decisions under this section the Commission is authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative." The term "authorized" does not suggest that the Commission *shall* investigate.

26. A recent decision of the United States Court of Customs and Patent Appeals, however, may stand for the proposition that the Commission does not have to take evidence on disputed facts where a complainant, in effect, elects to nonsuit an investigation which had been initiated on the basis of its petition.

In Investigation Docket No. 337-TA-20, the complainant, Standard Oil Company (SOHIO), filed a motion for an order granting SOHIO leave to dismiss without prejudice, terminating the patent-based investigation. The motion was challenged by respondents Rohm and Haas and the foreign producer on the ground that they were entitled to an on-the-record adjudication of their affirmative defenses to the allegations of patent infringement. The Commission dismissed the investigation on the basis that complainant had conceded in its motion that any alleged unfair method of competition or unfair act had not resulted in injury and, therefore, the statute had not been violated.

In a consolidated appeal to the C.C.P.A., Rohm and Haas Company and the foreign producer argued that they had been entitled to a determination, based upon a hearing on-the-record, of whether or not there was a violation of section 337. In a *per curiam* decision the Court held that the Commission dismissal was "with prejudice to SOHIO." See *Rohm and Haas Co. v. Int'l Trade Comm'n and Standard Oil Co. (SOHIO)*, 554 F.2d 462 (C.C.P.A. 1977).

the Treasury whenever matters come before the ITC that are also within the purview of the Antidumping Act, 1921, or the countervailing duty statute — are completely procedural in nature.<sup>27</sup>

Of course, the ITC is quite new to the area of regulation, as distinguished from its traditional role as an advisor and fact-finder. It will take time and experience to develop tools which best carry out this new function. It may prove inefficient and inconclusive to make such policy on a case-by-case basis, even if adjudication is a necessary tool in enforcing the law.<sup>28</sup> Devices which could facilitate a break with the pre-Trade Act of 1974 enforcement policies are the adoption of an advisory rulings system and the promulgation of industry-wide trade regulation rules — both efforts representing an agency commitment to prescribe standards conforming to enforcement policy.<sup>29</sup> These rulemaking devices would help to inform the public of the ITC's thinking concerning the statute without the agency having to adjudicate individual cases to do so. This is perhaps needed even more at the ITC than elsewhere, where all complaints meeting the formal requirements of the ITC's rules are instituted as investigations.<sup>30</sup>

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27. We believe that subsection (b)(3) is supposed to operate in concert with subsection (b)(1); i.e., if during the course of a section 337 proceeding the ITC has reason to believe that matter before it comes within the purview of the Antidumping Act, 1921, or the countervailing duty statute, the ITC may — in its discretion — suspend the section 337 proceeding in accordance with the provisions of subsection (b)(1), pending the outcome of any investigation the Department of the Treasury may conduct.

In promulgating 19 C.F.R. 201.4 (Notification of Other Federal Agency of Matter Within Its Jurisdiction), the Commission rejected suggestions — received in the form of written comments on the rule as proposed — to the effect that in lieu of “notification” the Commission either stop or not initiate, as appropriate, an investigation into a matter which also fell within a statute under another agency's jurisdiction. See *supra* note 11.

28. STAFF OF SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, 95th Cong., 1st Sess., *Delay in the Regulatory Process*, IV STUDY ON FEDERAL REGULATION 36-53 (COMM. PRINT 1977).

29. Dixon, *supra* note 24, at 431, n.84 and accompanying text.

30. Blumrosen, *Toward Effective Administration of New Regulatory Statutes*, 29 ADMIN. L. REV. (1977) 87, 113-114; STAFF OF HOUSE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, 94th Cong., 2d Sess., REPORT ON FEDERAL REGULATION AND REGULATORY REFORM (Comm. Print 1976), at 66-72. The Commission's policy, evidently based on the language of section 337(b)(1) that the Commission “shall investigate,” does not, however, bar peremptory motions. Motions to dismiss for lack of jurisdiction are regularly entertained after institution as well as before, even though all the facts relating to such issues may

## II. ROBINSON-PATMAN IN RETREAT

Kaye and Plaia contend that the ITC has the "option" of interpreting and implementing subsection 337(b)(3) as being procedural in nature to avoid simultaneous and duplicative investigations by both the ITC and the courts or other agencies. The provisions in subsection 337(b)(3) would not therefore be applicable if the contested pricing matter were being litigated only before the ITC. In such cases Kaye and Plaia appear to suggest that the Robinson-Patman Act is applicable to investigations conducted under the authority of section 337 as a "model" for developing a body of law under the statute.<sup>31</sup> This is puzzling. We would submit that there is a trend away from the enforcement of the Robinson-Patman Act and that it is a healthy one.<sup>32</sup> To resurrect discredited pronouncements under the Robinson-Patman Act as a standard for adjudications of pricing fairness under section 337 appears both unnecessary and undesirable.<sup>33</sup> More-

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have been available before institution. See opinion of the presiding officer in *Welded Stainless Steel Pipe and Tube*, Investigation Docket No. 337-TA-29, March 23, 1977 (Prehearing Order No. 6).

31. Their discussion of predatory pricing is somewhat directionless. The Supreme Court decision in *Utah Pie v. Continental Baking*, 386 U.S. 685 (1967), is cited uncritically. The result in *Utah Pie* was that defendants, in attempting to enter a geographic market demonstrated an intent to weaken plaintiff, the dominant seller. This has been described by Professor Posner as an "example of judicial ineptitude." R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 194 (1976). Prohibiting market entry by means of a price reduction may inhibit entry and prevent the introduction of competition. See Note, *Competitive Injury Under the Robinson-Patman Act*, 74 HARV. L. REV., 1597, 1603, n.44 and text (1961).

The case of *F & A Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180 (S.D. Cal. 1951) is cited for the proposition that "cost accountancy has reached the exactness of a science." The statement is absurd. The attribution of costs to particular products is always arbitrary to some degree. See ADVISORY COMMITTEE ON COST JUSTIFICATION, REPORT TO THE FEDERAL TRADE COMMISSION (February 1956), at 22. Finally, the U.S. Justice Department's 1976 Report on the Robinson-Patman Act is cited for the proposition that the act is unnecessary for prevention of pricing predation. If Messrs. Kaye and Plaia agree with the department, what was their reason for reciting the case law under section 2(a)?

32. The FTC has begun to investigate predatory conduct under § 5 of the Federal Trade Commission Act, which is "a more flexible, potent and expeditiously enforceable statute in every way than Robinson-Patman." Ward, *Panel Discussion*, 45 ANTITRUST L.J. 59, 64 (1976). See also R. POSNER, *THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES* 31-34 (1976).

33. In discussing the injury standards of section 337 being applied to individual competitors, one commentator observed that:

We have traveled this route before under the banner of Robinson-Patman. Who among us cannot vividly recall the FTC and Supreme Court "soft

over, recent section 337 cases involve allegations of unlawful pricing for which Robinson-Patman is a particularly inappropriate solution. These cases most frequently allege predatory pricing, or prices that are in some sense too low, thus, the alleged overlap of these cases and antidumping proceeding. However, section 3 of the Robinson-Patman Act which relates to unreasonably low prices was in effect repealed some time ago by the Supreme Court.<sup>34</sup>

Even section 2 of Robinson-Patman may have been repealed in a similar fashion. In *Certain Above-Ground Swimming Pools*<sup>35</sup> the ITC adopted a portion of a recommended determination by the presiding officer who heard that case, to the effect that section 2 does not reach discrimination in price as between import transactions in the United States and other transactions that occurred wholly in other countries. Moreover, the body of case law developed under section 2(a) of the Robinson-Patman Act is not necessary for developing standards concerning price competition in two or more geographic markets. The prohibitions in section 2 of the Sherman Act also reach anticompetitive price discrimination. As Professor Gellhorn has suggested, the prohibitions in

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competition" decisions of the 1950's and 1960's which brought that statute in open conflict with the Sherman Act? How the antitrust symposia and literature of that period resounded with denunciations and calls for repeal! Now that that trip is behind us, and Robinson-Patman enforcement has become selective and its injury test broader, who would wish to repeat it under a different banner?

LaRue, *Section 337 of the 1930 Tariff Act and Its Section 5 FTC Act Counterpart*, 43 ANTITRUST L.J. 608, 615 (1975).

34. Section 3 of the Robinson-Patman Act, a criminal provision containing penalties for its violation, did not amend the Clayton Act. In holding that a private cause of action did not lie for practices forbidden only by § 3, the Supreme Court noted that, "[t]he Department of Justice has never, so far as we have been able to determine, brought proceedings under this provision, of § 3." *Nashville Milk Co. v. Carnation Milk Co.*, 355 U.S. 373, 378 (1957). Writing for the dissenting justices in a five to four opinion, Justice Douglas observed that "the statute [§ 3] has in effect been repealed." *Id.* at 388 (Douglas, J., dissenting).

35. ITC Publication 815 (April 1977) at 5. See Commission Opinion, In the Matter of Certain Above-Ground Swimming Pools, Investigation Docket No. 337-TA-25. See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co. Ltd.*, 402 F. Supp. 244 (1975), which was cited by the presiding officer. This ruling was reached in reliance on the enactment of antidumping legislation in 1916 and 1921 subsequent to enactment of the 1914 Clayton Act and also because neither Congress nor the executive department and agencies charged with antitrust enforcement were of the opinion that the 1914 act reached price discrimination between national markets. *Id.* at 249.



section 2(a) of the Robinson-Patman Act are redundant. They repeat the prohibitions of the Sherman Act in any antitrust policy which does not discourage price competition.<sup>36</sup> The case law under the Robinson-Patman Act fosters an atmosphere of resale price maintenance for wholesalers.<sup>37</sup> The result of its enforcement has been similar to that of the Fair Trade Laws — the elimination of price competition.

In view of their having recited the similarities between section 337 and section 5 of the Federal Trade Commission Act, it is surprising that Kaye and Plaia did not advance the possible use of section 5 as a model in the area of investigations of alleged price discrimination, including predatory pricing. As one commentator noted some time ago, the employment of section 5 for the investigation and prosecution of price discrimination cases would facilitate "a full-range inquiry and proof of imminent economic effect, rather than continued administration and judicial juggling with the verbal incongruities of the Patman Act."<sup>38</sup>

Enforcement of the Robinson-Patman Act has assumed that costs are the primary determinant of price<sup>39</sup> and has tended to attribute the cost-plus pricing typical of "regulated" industries to firms competing in markets not serviced by regulated industries.<sup>40</sup> Often factors such as the quality of competing goods, consumer preferences and buying power, and the numbers and sizes of competing firms, have not been taken into account.<sup>41</sup> These

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36. E. GELLHORN, *ANTITRUST LAW AND ECONOMICS* 370 (1976). There is no doubt that enforcement of the Robinson-Patman Act has had anticompetitive results. In a parade of horrors, Professor Liebler cited instances where FTC actions against quantity discounts reinforced price-fixing arrangements. Liebler, *LET'S REPEAL IT [the Robinson-Patman Act]*, 45 *ANTITRUST L.J.* 18, 30-31 (1976).

Another commentator has observed that the facts alleged in certain "treble-damage suits charging violations of the Robinson-Patman Act . . . appear sufficient to constitute a monopoly or monopolization attempt cognizable under § 2 of the Sherman Act." Austern, *Difficult and Diffuse Decades: An Historical Plaint About the Robinson-Patman Act*, 41 *N.Y.U. L. REV.* 897, 910 (1966).

37. The phrase "resale price maintenance program for wholesalers" is attributed to William F. Baxter in hearings on Regulatory Reform before the Domestic Council (1975). See Liebler, 45 *ANTITRUST L.J.* at 43, n.69.

The relationships between below-cost sales prohibitions, and resale price maintenance are explored in Fulda, *Resale Price Maintenance*, 21 *U. CHI. L. REV.* 175, 198-201 (1954).

38. 41 *N.Y.U. L. REV.* at 910. See also POSNER, *supra* note 32, at 35.

39. The act assumes this. Liebler, 45 *ANTITRUST L.J.* at 41.

40. See Burck, *The Myths and Realities of Corporate Pricing*, *FORTUNE*, April, 1972, 85, 87.

41. See Note, *supra* note 31, at 1600.

market factors are typical of those regularly taken into account by the ITC in several of its statutory jurisdictions, under which it is authorized to ascertain the impact of import competition on U.S. industries in domestic markets.<sup>42</sup> There would appear to be no reason why section 337 cannot be applied in this realistic and flexible way to administer pricing policy in the import trade.

### III. EXPORT SUBSIDIES AND FAIRNESS IN COMPETITION

The real issue in the area of international price competition is what is a trade distorting subsidy? Government export subsidies distort competition in much the same way as the price discriminator who subsidizes low prices in one market with high prices in another. The subsidized exporter and the predator capture sales and gain market power at the expense of their competitors. They could not have competed effectively in the market "but for" the subsidy.<sup>43</sup>

Domestic statutes designed to countervail export subsidies date from the 1890's. At that time U.S. tariff levels were intentionally protectionist and tariff provisions were designed to prevent imports from causing domestic market disruptions. Export subsidies were considered as a way of avoiding the protection provided by the tariff.<sup>44</sup> Countervailing duty laws were therefore enacted for the express purpose of restoring the integrity of the tariff where foreign subsidies would otherwise compensate for the customs duty.

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42. See 19 U.S.C. § 1332 (1970) (general investigations of import trade); 19 U.S.C. § 160 and § 1303 (1970) (determination of the existence of certain types of injury to domestic industry under the Antidumping Act, 1921, and the countervailing duty statute, respectively); and sections 201 and 406 of the Trade Act of 1974 (recommendations to the President regarding import relief).

43. Compare, Schwartz and Harper, *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831, 836-39 (1972); and Note, *Meeting Competition Under the Robinson-Patman Act*, 90 HARV. L. REV. 1476, 1477 (1977).

44. P. BIDWELL, *THE INVISIBLE TARIFF* 87 (1939). Prior to the current "Tokyo Round" of negotiations in Geneva, several multilateral negotiations for the exchange of tariff concessions were held under the auspices of the General Agreement on Tariffs and Trade: Geneva (1947); Annecy (1949); Torquay (1950-1951); Geneva (1955-1956); Geneva (1961-1962); Geneva (1963-1967).

As tariffs have been negotiated<sup>45</sup> downward under the auspices of the GATT and, "bound" at the negotiated rates,<sup>46</sup> the existence of a tariff is no longer considered as necessarily adequate to protect domestic industries from significant market disruption. Indeed, tariffs are becoming neither a source of revenue nor an effective protectionist device.

Prior to the Trade Act of 1974, the countervailing duty statute reached only dutiable imports and the provision dealing with dutiable imports does not contain any injury requirement.<sup>47</sup> Section 331 of the Trade Act extended the law to reach duty-free merchandise but also required that the ITC conduct the same injury investigation with respect to duty-free articles under the countervailing duty statute as it does with respect to articles sold at "less than fair value" under the Antidumping Act, 1921.<sup>48</sup> Unlike the provisions of the Antidumping Act, 1921, however, the countervailing duty statute does not contain any legislative formula for determining what type of subsidy constitutes a proscribed "bounty or grant." The administration of the statute has led to a bewildering series of pronouncements on "bounties or grants," especially with respect to the rebate of consumption or sales taxes upon the export of a product.

The Department of the Treasury basically regards the following types of taxes to constitute "bounties or grants" when rebated upon exportation: (1) direct taxes; (2) overrebated indirect taxes; and (3) indirect taxes where the tax collected has no relationship to the product exported — as with taxes paid for

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45. Prior to the current "Tokyo Round" of negotiations in Geneva, several multilateral negotiations for the exchange of tariff concessions were held under the auspices of the General Agreement on Tariffs and Trade: Geneva (1947); Annecy (1949); Torquay (1950-1951); Geneva (1955-1956); Geneva (1961-1962); Geneva (1963-1967).

46. Ernest H. Preeg has defined a binding as "A commitment that the rate of duty on a product will not be increased or that no duty will be imposed on a duty-free product." *TRADERS AND DIPLOMATS* 307 (1970).

47. GATT Article VI(6) prohibits the levying of countervailing duties in the absence of a determination of injury to a domestic industry. The United States, however, is exempted from this provision by the Protocol of Provisional Application of the GATT, a "grandfather" clause applicable to existing legislation.

48. The statutory provision for the ITC investigation of the impact of duty-free imported products was derived verbatim from the Antidumping Act, 1921. The House Ways and Means Committee Report on the Trade Act stated that the injury determination under the countervailing duty statute was ". . . intended to have the same meaning . . . as that under the antidumping act." *HOUSE COMMITTEE ON WAYS AND MEANS, TRADE REFORM ACT OF 1973, H.R. REP. NO. 571, 93d Cong., 1st Sess., 74* (1973).

overhead expenses — even though it may have been shifted forward on like products sold domestically.<sup>49</sup> Domestic assistance programs, too, have been the subject of countervailing duty orders.<sup>50</sup>

The recent decision of the Customs Court in *Zenith Radio Corporation v. United States*<sup>51</sup> and challenge to the European value added tax export remissions<sup>52</sup> threatened disruptions to international trade. The Customs Court decision and the challenge to the value added tax suggested that each article exported from a country employing a system of “indirect” or consumption taxes<sup>53</sup> might have been vulnerable to the imposition of countervailing duties. Such wholesale impositions of duties would have precipitated foreign retaliation. The *Zenith* decision was overturned by the C.C.P.A., affirmed by the Supreme Court, which appears to doom the challenge to the value added taxes as well.<sup>54</sup>

The current state of the law consists of a “general interpretation of the statute on a case-by-case basis.”<sup>55</sup> There is some sort of

49. UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, Vol. 1, *Countervailing Duties*, Papers submitted to the Commission on International Trade and Investment Policy (Washington, D.C., July 1971), 409-10.

50. *X-Radial Belted Tires from Canada*, T.D. 73-10, CUST. BULL. 24 (1973). Canadian government assistance to the Michelin Tire Corp. to establish a plant in Nova Scotia was held to constitute the payment of a bounty or grant on the ground that 73 percent of the output of the plant was exported to the United States.

51. *Zenith Radio Corp. v. United States*, 430 F. Supp. 242 (Cust. Ct. 1977), *rev'd* 562 F.2d 1209 (C.C.P.A. 1977).

52. *U.S. Steel v. United States*, No. 76-2-00456 (Cust. Ct., filed February 10, 1977).

53. The complement to the assumption that indirect (excise) taxes are consumption taxes and that their rebate constitutes a subsidy is the assumption that direct (income) taxes are not shifted to the consumer. The assumption may have no merit. See K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 214-16 (1970), and M. KRZYSANIAK AND R. MUSGRAVE, *THE SHIFTING OF THE CORPORATE INCOME TAX* (1963). It certainly lacks congressional support. STAFF OF SENATE COMM. ON FINANCE, 92d Cong., 1st Sess., *FOREIGN TRADE: A SURVEY OF CURRENT ISSUES TO BE STUDIED BY THE SUBCOMM. ON INT'L TRADE OF THE SENATE COMM. ON FINANCE* (Comm. Print 1971), at 14; H.R. REP. NO. 571, 93d Cong., 1st Sess., 7 (1973); S. REP. NO. 1298, 93d Cong., 2d Sess. 19 (1974). The failure of the Treasury Department to countervail the remission of the value added tax on E.C. exports of steel led to the enactment of section 301(a)(3) of the Trade Act, authorizing presidential retaliation under designated circumstances. See 119 CONG. REC. 40769 (1973), (remarks of Rep. Ullman).

54. *Zenith v. United States*, 46 U.S.L.W. 4752 (June 21, 1978).

55. Marks and Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 L. & POL. INT'L BUS. 327, 348 (1975).

consensus that not all subsidies ought to be countervailed against but there is no agreed upon standard as to what practices constitute "unfair" subsidies. Until very recently, the countervailing duty statute has received little attention when contrasted with that afforded the Antidumping Act, 1921. The failure to negotiate a countervailing duty code along with the International Anti-dumping Code<sup>56</sup> during the multilateral trade negotiations ending in 1967 is attributed to the smaller number of proceedings under the statute.<sup>57</sup>

Since 1968, however, the controversy over border tax adjustments has kept the international subsidy issue in the limelight. In 1968 the GATT Ministers endorsed negotiation of a code on export

56. The International AntiDumping Code was negotiated in order to interpret the provisions of Article VI of the GATT and to harmonize different national antidumping procedures. See Rehm, *Developments in the Law and Institutions of International Economic Relations: The Kennedy Round of Trade Negotiations*, 62 AM. J. INT'L L. 403 (1968). The authority for negotiating the Code was section 201(a)(2) of the Trade Expansion Act of 1962 which authorized the President to proclaim a reduction of "... any existing duty or other import restrictions;" however, a statement in the Senate report accompanying the act stated that "... laws not intended to be affected include the Antidumping Act. . . ." S. REP. No. 2059, 87th Cong., 2d Sess. 19 (1962). There was no similar restriction in the House Report, H.R. REP. No. 1818, 87th Cong., 2d Sess. 45 (1962).

Article 14 of the Code provided that the signatory parties would bring their laws, regulations, and administrative procedures into conformity with its terms. United States accession to the Code was accomplished by executive agreement — implementation of its terms was left to the Treasury Department and the then Tariff Commission (predecessor of the ITC) through their administrative decisions. See Barcello, *Antidumping Laws as Barriers to Trade — The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 533-34 (1972).

In a report to the Senate, the Tariff Commission took the position that standards of the Code were inconsistent with the determinations made under the authority of the Antidumping Act, 1921, and that the administrative agencies could implement the provisions of the code only if the 1921 act was amended. See *U.S. Tariff Commission, Report On Antidumping Code*, reprinted in 114 CONG. REC. 4061 (1968). In the Renegotiation Amendments Act of 1968, the Congress provided that the Treasury Department and the Tariff Commission retain the discretion to interpret the 1921 Act. 19 U.S.C. § 160 (1970). There is no question of the constitutional supremacy of the Renegotiation Amendments Act over the executive agreement. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 145 (1965). Any conflict between the provisions of the 1921 Act and the Code are to be resolved in favor of the Act. The language of the Renegotiation Amendments Act, however, left it to the discretion of the agencies to interpret the 1921 Act.

57. K. Dam, *supra* note 53, at 178.

subsidy practices and countervailing duties.<sup>58</sup> The effort had faltered until the current round of GATT negotiations.<sup>59</sup> Section 331(a) of the Trade Act of 1974 provides that, "[i]t is the sense of the Congress that the President . . . seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties."<sup>60</sup> The section also authorizes the Secretary of the Treasury to refrain from ordering the imposition of countervailing duties in designated circumstances where the imposition of the duties would also "be likely to seriously jeopardize satisfactory completion of [such] negotiations." The most far-reaching indication of congressional support for a code is the indication on the part of the House Committee on Ways and Means that, "[t]he Committee assumes that it may be necessary to further amend section 303 [the countervailing duty statute] depending upon the outcome of these negotiations, assuming that they terminate in an agreement acceptable to the United States."<sup>61</sup> The provisions for making necessary legislative amendments to implement a subsidy code will prevent a recurrence of the International Antidumping Code fiasco.<sup>62</sup>

Existing GATT provisions do not differentiate between subsidies which adversely affect "international trade, and therefore might be prohibited, and those subsidies which should be offset only when their use causes injury."<sup>63</sup> Any agreement negotiated as a part of the multilateral negotiations will most likely implement the injury requirement in Article VI of the GATT, especially as the European Community negotiating position on subsidies has been to put a "priority on bringing the U.S. into line on the question of injury."<sup>64</sup> An amendment of the countervailing duty law to provide for an injury test will most likely follow the examples of the provision of the statute for duty-

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58. H. MALMGREN, *INTERNATIONAL ECONOMIC PEACEKEEPING IN PHASE II* 104 (rev. ed. 1973).

59. See STAFF OF HOUSE SUBCOMM. ON TRADE OF THE COMM. ON WAYS AND MEANS, 94th Cong., 1st Sess., *BACKGROUND AND STATUS OF THE MULTILATERAL TRADE NEGOTIATIONS*, Supp. I, at 10-21 (Comm. Print 1975).

60. 19 U.S.C. § 1303(d) (1970).

61. H.R. REP. NO. 571, *supra* note 48, at 76. See *infra* note 62.

62. Section 151 of the Trade Act of 1974 specifies expedited congressional procedures for enactment of trade agreements into domestic law. See *supra* note 56.

63. Wolff, *The U.S. Mandate for Trade Negotiations*, 16 VA. J. INT'L L. 505, 549 (1976).

64. Marks and Malmgren, *supra* note 55.

free imports and the bifurcated proceedings in the Antidumping Act, 1921, placing the responsibility for such injury determinations in the ITC.

The potential also exists for the ITC to make a contribution to the negotiation of any codes on subsidies. By virtue of its new status as regulator the ITC obviously has an interest in the negotiation of a subsidies code in the current round of multilateral trade negotiations under the GATT. In that way, past section 337 policies can be taken into account in the negotiations and future section 337 policy conditioned in the sense that it can be made to take account of the acts resulting from the negotiations. The ITC is an appropriate technical consultant to the United States delegation.

Such arrangements are not unheard of. The Civil Aeronautics Board which as we have mentioned earlier is responsible for the implementation of economic policies respecting foreign air transportation and has been invited to provide technical assistance to U.S. delegations.<sup>65</sup> Indeed, to a limited extent, the Commission has done so in the past.<sup>66</sup>

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65. *See supra* note 23.

Under the Civil Aeronautics Act [which has since been replaced by similar provisions of the Federal Aviation Act of 1958], the CAB is the agency of Government vested with the responsibility to develop an air transportation system properly adapted to the present and future need of the foreign commerce of the United States. This requires the Board to assert fully its responsibility as the principal aviation adviser to the executive branch of the Government on international air agreements.

*See* SEN. REP. NO. 1875, 84th Cong., 2d Sess. 25 (1956), for a list of recommendations. This report describes a system that involved "a serious tug-of-war between the State Department and the CAB as to just which agency is the dominate [sic] one in these negotiations." *Id.* at 28. It is common knowledge that today the CAB actively participates in the delegations which negotiate bilateral air agreements as the model of the so-called Bermuda Agreement, T.I.A.S. No. 1507 (1946). These agreements, as GATT, are executive agreements. Moreover, since the Bermuda Agreement model includes "[quoting the State Department] the basic American philosophy of regulated competition in the public interest," issues of unfair practices arising from cartelization, division of markets, and so on, are or may be subjects upon which the Board may have to take a position in these negotiations. *Id.* at 3. These principles are, indeed, now a part of the Federal Aviation Act, 49 U.S.C. § 1381 (1970).

66. *See Hearings on the International Antidumping Code Before the Senate Comm. on Finance*, 90th Cong., 2d Sess., 13 (1968) (testimony of Rep. William M. Roth).

## IV. CONCLUSIONS

Section 337 offers a broad instrument for effecting a policy of free competition in the import trade of the United States, but the history of the antecedents of the present law, which were essentially decisions to bring the statute into disuse, are not, in our opinion, a useful vehicle for realizing this potential. This is the case with the Robinson-Patman Act as well. Several constructive, although somewhat complex, options lie along the lines of interpretive rules and greater Commission participation in the negotiation of international agreement affecting competition in imports.