

The Relationship of Countervailing Duty and Antidumping Law to Section 337 Jurisdiction of the U.S. International Trade Commission

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**THE RELATIONSHIP OF COUNTERVAILING DUTY
AND ANTIDUMPING LAW
TO SECTION 337 JURISDICTION OF THE U.S.
INTERNATIONAL TRADE COMMISSION**

By HARVEY KAYE* AND PAUL PLAIA, JR.**

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THE RELATIONSHIP OF COUNTERVAILING DUTY AND ANTIDUMPING LAW TO SECTION 337 JURISDICTION OF THE U. S. INTERNATIONAL TRADE COMMISSION.

HARVEY KAYE* AND PAUL PLAIA, JR.**

I. INTRODUCTION

In recent years, particularly since the passage of the Trade Act of 1974,¹ there has been an increase in antitrust-type causes being brought before the United States International Trade Commission (formerly the United States Tariff Commission). These actions are taken under section 337 of the Tariff Act of 1930, as amended,² when imported articles are involved.

Section 337 relates to unfair trade practices in the importation of articles or in their sale.³ The statute can be separated into the following elements which are necessary to a violation:⁴

1. Unfair methods of competition or unfair acts;
2. in the importation or sale of articles;
3. by the owner, importer, consignee, or agent of either;

1. Public Law 93-618, 88 Stat. 1978, signed into law by the President on January 3, 1975.

2. 19 U.S.C. § 1337. For the full text of section 337 see the Appendix.

3. For further information concerning an analysis of the amendments to section 337 made by the Trade Act of 1974, see Kaye & Plaia, *Revitalization of Unfair Trade Causes In The Importation of Goods: An Analysis of the Amendments to Section 337*, 57 J. PAT. OFF. SOC'Y 208, 269 (1975) [hereinafter cited as Kaye & Plaia, 1975]. For further information on developments concerning Section 337 proceedings since the passage of the Trade Act of 1974, see Kaye & Plaia, *Tariff Act Section 337 Revisited: A Review of Developments Since The Amendments of 1975*, 59 J. PAT. OFF. SOC'Y 3 (1977). For a discussion of judicial review under the amendments, see Kaye, *Unfair Competition Appeals Under the New Trade Act*, 69 F.R.D. 142 (1975), and for a more general review of section 337, see Kaye, *Unfair Trade in the Form of Patent Infringement by the Importation of Products into the United States*, CURRENT DEVELOPMENTS IN PATENT LAW 395, Practising Law Institute, 1976. For background on section 337 prior to the 1975 amendments, see Kaye & Plaia, *The Tariff Commission and Patents: Anatomy of a 337 Action*, 55 J. PAT. OFF. SOC'Y 346-62, 413-35 (1973).

4. These are found in 19 U.S.C. § 1337(a), which defines the violation.

4. the effect or tendency of which is to destroy or substantially injure an efficiently and economically operated U.S. industry; or
5. the effect or tendency of which is to prevent the establishment of such an industry; or
6. the effect or tendency of which is to restrain or monopolize trade and commerce in the U.S.; and
7. when found by the Commission to exist, shall be dealt with in addition to any other provisions of law as provided in this section.

When a violation is found by the Commission, it may issue the following remedies:

1. A permanent exclusion order which prohibits entry into the U.S. of the subject articles.⁵
2. A temporary exclusion order which may be issued during the pendency of an investigation when the Commission has reason to believe that there is a violation of the statute.⁶
3. A cease and desist order may be issued in lieu of a temporary or permanent exclusion order.⁷

From an antitrust standpoint, it is important to note that the Commission considers violations of the Federal antitrust laws to be unfair methods of competition and unfair acts under the statute.

This article traces the history of antitrust-type complaints before the Commission. Current jurisdictional problems are analyzed in light of the alternatives presented and the effectiveness of these alternatives. In so doing, the relationship between section 337, the Antidumping Act and countervailing duty laws is examined.

II. THE JURISDICTION PROBLEM

The Commission's exercise of jurisdiction in areas related to countervailing duties and antidumping matters is a recent

5. Pursuant to 19 U.S.C. § 1337(d).

6. Pursuant to 19 U.S.C. § 1337(e).

7. Pursuant to 19 U.S.C. § 1337(f).

development in the history of its jurisdiction under section 337.⁸ The Commission has discussed the problem regarding alleged countervailing duty and antidumping act violations in the current *Color TV case*.⁹

The complaint as originally filed alleged that:

Respondents have been engaged in unfair and anticompetitive acts and practices and by said acts and practices have caused substantial injury to the Color Television industry, restraining the trade and commerce of that industry in the U.S. By said unfair acts and practices, respondents are participating and furthering an attempt by Japanese importers to destroy the domestic U.S. portable television set manufacturing industry.¹⁰

It also alleged that respondents:

. . . have attempted to obstruct and obstructed the free market prices of color sets in the U.S. by the development and implementation of predatory pricing schemes whereby Named Respondents import and sell color sets in the U.S. at prices below-cost or at unreasonably low prices which do not cover overhead costs.¹¹

and further that:

Respondents have received and continue to receive certain incentives and other economic benefits from the Japanese government which facilitate Named Respondents below-cost pricing in the U.S. and which aid and further the attempt to destroy the U.S. portable color set manufacturing industry. Importantly, such incentives and other economic benefits do not fall in the technical definitions of "bounties and grants" as set forth in Section 303 of the Tariff Act of 1930 as amended.¹²

8. See section III, History of Non-Patent Section 337 Jurisdiction, *infra*, notes 21-94 and accompanying text.

9. Certain Color Television Receiving Sets, U.S. Int'l Trade Comm'n [hereinafter, USITC], Inv. No. 337-TA-23 [hereinafter, *Color TV Sets*], Memorandum Opinion issued December 20, 1976 [hereinafter, Memorandum Opinion].

10. *Color TV Sets*, *supra* note 9, Complaint filed January 15, 1976 at 19.

11. *Id.* at 20.

12. *Id.* at 25. But note that subsequent to the filing of the complaint the Customs Court in *Zenith Radio Corp. v. United States*, note 103, *infra*, reversed a Treasury determination upon which complainant apparently based this statement.

The complaint refers to a Treasury Notice¹³ of a final determination that no bounty or grant was being paid or bestowed within the meaning of section 303 upon the manufacture, production or exportation of certain consumer electronic products from Japan. The complaint nevertheless alleges that as an incentive to export, the Japanese commodity tax on television receivers manufactured in Japan is forgiven by the Japanese government if the set is exported. The complaint argues that this amounts to economic benefits through Japanese law. The notice states that the final negative countervailing duty determination was made by Treasury because the governmental benefits "involve an aggregate amount considered to be *de minimis* per dollar of value of the exported products." Based upon this finding, Treasury determined that no bounty was being paid or bestowed directly or indirectly within the meaning of section 303.

The Commission, in instituting a section 337 investigation, defined the scope as including an inquiry into the allegations that:

- (1) the existence of predatory pricing schemes resulting in below-cost and unreasonably low-cost pricing of such television sets in the U.S.; and
- (2) economic benefits and incentives from the Government of Japan contributing to the below-cost and unreasonably low-cost pricing in the U.S.¹⁴

Subsequently, the complaint was amended to allege that:

. . . Respondents have engaged in unfair and anticompetitive acts and practices individually, as well as in furtherance of an unlawful contract, combination or conspiracy in restraint of the United States trade or commerce in the color television industry and have engaged in a combination or conspiracy to monopolize or attempt to monopolize such trade or commerce or parts thereof, thereby causing substantial injury to said industry. By said unfair acts and practices, and by said unlawful contracts, combinations of conspiracies, Respondents are participating in and furthering an attempt

13. 41 Fed. Reg. 1298, January 7, 1976.

14. Color TV Sets, *supra* note 9, Notice of Investigation, 41 Fed. Reg. 14014, April 1, 1976.

by Japanese importers to destroy the domestic U.S. portable television set manufacturing industry. . . .¹⁵

This appears to be the first time that an allegation of a contract, combination or conspiracy in restraint of trade, or combination or conspiracy to monopolize or attempt to monopolize trade had been made in the case. The amended complaint also alleged that the economic benefits from the Japanese government facilitated the below-cost pricing in the United States.

In furtherance of the conspiracy, Respondents are alleged to:

- (1) have attempted to obstruct and have obstructed the free-market prices of color television receivers in the United States through predatory pricing schemes resulting in below-cost and unreasonably low-cost pricing of such television receivers in the United States, and
- (2) have received and continue to receive economic benefits and incentives from the Government of Japan contributing to the below-cost and unreasonably low-cost pricing of such television receivers in the U.S.¹⁶

Respondents allege, and the Commission does not seem to disagree, that an adjudication of these allegations may involve consideration as to whether the purchase price or exporter's sales price of articles is less than the foreign market value, and whether receipt of economic benefits and incentives from the Government of Japan in furtherance of an unlawful attempt or conspiracy to restrain or monopolize trade and commerce in the United States involves a determination of whether such benefits or incentives are unlawful *per se*. A problem arises when an allegation of predatory pricing is made before the Commission under section 337. An examination of an alleged predatory pricing situation necessitates a detailed examination of the reasonableness of the prices being charged. With the Commission following the established body of antitrust law (when considering antitrust-type allegations), its determination may require a decision as to whether prices being charged in the United States are lower than those

15. Color TV Sets, *supra* note 9, consolidated amended complaint filed May 25, 1976, at 19.

16. Color TV Sets, *supra* note 9, Memorandum Opinion at 4.

being charged in other countries. As pointed out below,¹⁷ the same issue may arise in the application of United States anti-dumping laws. Under the Antidumping Act, 1921, when a price variance has been found by the Secretary of the Treasury, there is a violation if the Commission finds that the existence of the price differential is causing injury to the domestic industry.

The problem can be seen when one examines the language of section 337 together with the legislative history. Section 337 (b) (3) 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.

And the legislative history explains:

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.¹⁸

Thus, it is necessary to examine whether Congress intended that the Commission simply notify the Secretary of the Treasury or whether it intended that the Commission notify Treasury and cease its own investigation of the matter.

The Commission has appeared to indicate it will only consider the question of grants, subsidies or bounties bestowed on articles of manufacture for export when the use of such incentives forms a part of a larger scheme or undertaking which may be an unfair act or unfair method of competition within the purview of the statute.¹⁹ In this manner, the Commission will be considering grants, subsidies and bounties as one of the facts which may be relevant to the broader scheme alleged in the complaint. By considering improper incentives in this limited application, the Commission will not be undertaking a determination of violation of section 303 and will not be in conflict with the proposition

17. See section V, History of United States Antidumping Law, *infra* notes 143-201 and accompanying text.

18. SENATE COMMITTEE ON FINANCE, REPORT ON H.R. 10710, S. REP. No. 93-1298, 93d Cong., 2d Sess. 195 (1974) [hereinafter, FINANCE COMMITTEE REPORT].

19. Color TV Sets, *supra* note 9, Commission Memorandum Opinion at 5-6.

that jurisdiction over countervailing duty determinations is vested in the Secretary of the Treasury.²⁰

While the countervailing duty laws seem to lend themselves to relatively clear lines of distinction with respect to section 337, this is not true of the antidumping laws. It is in the antidumping area that the greater jurisdictional problem exists. In order properly to analyze the problem, the history of the pertinent statutes should be examined. Therefore, a description of present practice and a review of the history of (1) non-patent section 337 allegations, (2) countervailing duty law, (3) antidumping law and (4) the law of predatory pricing are presented in following sections.

III. HISTORY OF NON-PATENT SECTION 337 JURISDICTION

In the first few years after the initial passage of section 337,²¹ five nonpatent unfair competition complaints were filed with the Commission: *Lumber and Timber*,²² *Petroleum and Refined Products*,²³ *Steel Brass Plated Upholstery Nails*,²⁴ *Toothbrushes*²⁵ and *Ammonium Sulphate*.²⁶ The Commission informally dismissed all of these complaints without an investigation, in most cases finding that there were adequate remedies under other provisions of law, that violations had stopped, and that the complaints did not allege a violation of section 337.

It was not until 1939 that another unfair competition complaint was filed at the Commission in *Mexican Totoaba or Sea Bass*.²⁷ This complaint alleged

... that the alleged unlawful acts of the Mexican Cooperativos are preventing the handling of this product by American

20. While the Commission in its Memorandum Opinion in Color TV Sets has said that "section 337 is an authority of concurrent jurisdiction with all other statutes applicable to unfair practices in import trade," since in most cases bounties or grants are actions of a foreign government it would appear that such activities would not be the type of unfair methods of competition or unfair acts contemplated by section 337.

21. Section 337 was enacted as part of the Tariff Act of 1930 and had a predecessor, section 316 of the Tariff Act of 1922. For more information concerning predecessor section 316, see Kaye & Plaia, 1975, *supra* note 3, Ch. II. History of Section 337.

22. Filed on May 29, 1931, by the National Lumber Manufacturing Association.

23. Filed on November 25, 1931, by the Public Service Commission, Topeka, Kan.

24. Filed on February 16, 1932, by Beardsley and Wolcott Manufacturing Co.

25. Filed on April 4, 1932, by Meuller, Phipps & Nicoll, Ltd.

26. Filed on January 20, 1933, by Interlake Iron Corporation.

27. Filed February 18, 1939, by Sonara Fish Company of Tucson, Ariz.

Commerce either within Mexico or within the United States and that the alleged unlawful acts of the Mexican Cooperativos restrain and monopolize trade and commerce in the United States; and that the acts of the Mexican Cooperativos in barring American Commerce in the catching, hauling or buying of fish within Mexico is in violation of sections 337 and 338 of the 1930 Tariff Act and that the exclusive hauling, handling and selling of the Mexican Totoaba or Sea Bass within the United States by the Mexican Cooperativos is unfair, discriminatory and unlawful.²⁸

In dismissing this complaint, the Commission said:

The Mexican Government has a plenary power to grant to its nationals the exclusive right to fish in Mexican waters or to deal in fishery products; also, the fact that the Mexican Government has permitted the establishment of cooperatives which may monopolize the trade does not constitute a violation of section 337. It may be noted in passing that the general rule of governments throughout the world is to restrict to their own nationals fishing rights in territorial waters, and that exceptions to this rule are invariably predicated upon special circumstances. This general rule is applicable in some of the territorial waters of the United States. Further, the United States permits combinations of its citizens for the purpose of engaging in export trade (Webb Pomerene Act).

The exclusive sales contract between the Mexican Cooperativos and Mr. Hugh Reeves does not of itself constitute an unfair method of competition. Exclusive sales contracts are usual in many lines of business, and while they may operate with hardship upon persons who had previously engaged in the business, they are not "unfair" within the meaning of the law.²⁹

In 1952, a complaint was filed alleging that Italian and Spanish almonds were being sold in the United States at "less than fair value and/or cost of production."³⁰ The complaint

28. Sea Bass, complaint filed February 15, 1939, at 2.

29. Letter of Raymond B. Stevens, Chairman, dated March 31, 1939.

30. Almonds, complaint filed April 3, 1952, by the California Almond Growers Exchange, at 2.

further alleged that sales of almonds were involved in improper exchange transactions in the United States. The complainant asserted that these activities constituted unfair methods of competition under section 337.³¹ Simultaneous with the filing of the section 337 complaint, an antidumping complaint was filed with the Secretary of the Treasury under the Antidumping Act of 1921.³² The section 337 complaint was informally dismissed by the Commission.³³ The complaint was dismissed on the basis that there were adequate remedies under other provisions of law, more specifically, the Antidumping Act of 1921. In dismissing the complaint the Commission stated:

The material submitted shows that the basis of the charge of unfair methods of competition and unfair acts in the importation of almonds is the alleged existence or threat of dumping within the meaning of the Antidumping Act of 1921. The same information submitted in support of the request for investigation under section 337 has been presented to the Treasury Department in support of complaints filed with that Department by the California Almond Growers Exchange seeking action under the Antidumping Act. These complaints are now pending before that Department.

The Commission has never considered dumping within the meaning of the Antidumping Act of 1921, as constituting a basis for action either under section 337 of the Tariff Act of 1930 or its antecedent provision, section 316 of the Tariff Act of 1922. Complaints of dumping submitted to the Commission have always been referred to the Treasury Department for appropriate consideration under the Antidumping Act. Accordingly, the Commission does not regard the material submitted in behalf of the California Almond Growers Exchange as a complaint which it should consider under section 337 of the Tariff Act of 1930, and the request for investigated is, therefore, denied.³⁴

31. Letter to President Truman from John Breckinridge, dated April 3, 1952.

32. Bureau of Customs File No. 6433, complaint filed on April 3, 1952.

33. See letter of Donn N. Bent, Secretary of the Commission, to Pope, Ballard & Loos, dated April 10, 1952.

34. *Id.*

It is interesting to note that the Commission action apparently fails to deal with the allegations concerning improper exchange transactions and sales below cost, either of which arguably transcends the metes and bounds of statutory dumping under the Antidumping Act of 1921. A few weeks later the complainant filed a Petition for Reconsideration.³⁵ In its Memorandum in Support of Petition, the complainant cited language from Senate Reports on the Tariff Act of 1922³⁶ and the Tariff Act of 1930³⁷ and stated:

The conclusions derived from the statutory history of this section lead to an opposite result from that of the Tariff Commission. Congress intended Section 337 to cover all kinds of unfair acts; it intended that this Section should present a more adequate remedy than the antidumping statutes, and it was an unmistakable effort to protect domestic producers from unfair competitive practices and acts of foreign producers.³⁸

In acting on the petition, the Commission did not elaborate on the basis for its position other than to make the conclusory statement that the Commission did not consider dumping within the meaning of section 337.³⁹

Later in 1952, a complaint was filed concerning rabbit skins. The complaint alleged discriminatory application of ocean freight rates by steamship companies to rabbit skins, thereby bestowing on U.S. consignees an unlawful competitive advantage in the U.S. market.⁴⁰ The Commission again refused to take jurisdiction in the matter stating as its basis:

The alleged unfair acts amount to a charge of false billing or false classification in violation of section 16 of the Shipping Act of 1916, as amended (U.S.C.A., title 46, sec. 815). Section 22 of the Shipping Act of 1916, as amended, (U.S.C.A. title 46, sec. 821) vests in the Federal Maritime

35. Re-Application for Immediate Investigation, dated April 23, 1952.

36. S. REP. No. 595, 67th Cong., 2d Sess. 3 (1922).

37. S. REP. No. 37, 71st Cong., 1st Sess. (1930).

38. Memorandum In Support of Petition for Reconsideration, Almonds, *supra* note 30, at 1-2.

39. Letter of Donn N. Bent, Secretary of the Commission, dated May 22, 1952.

40. Rabbit Fur, complaint filed May 12, 1952, by The Hatters' Fur Cutters Association of the U.S.A., complaint at 2.

Board jurisdiction to investigate alleged violations of section 16 upon sworn complaint. The Commission, therefore, does not regard the complaint of The Hatters' Fur Cutters Association of the U.S.A. as one which it should consider for the purposes of section 337 of the Tariff Act of 1930, and has not accepted the complaint as one which was properly filed with the Tariff Commission.⁴¹

In 1959, a complaint was filed at the Commission alleging patent infringement in the importation of *Zigzag Sewing Machines*.⁴² At the request of the Justice Department,⁴³ the Commission held in abeyance its decision on the merits of the Commission investigation until final action had been taken in the courts. The district court rendered a judgment in favor of the complainant, Singer.⁴⁴ However, on appeal to the Supreme Court, the judgment of the district court was reversed. In pointing to the Commission action, the Court stated:

Moreover this overriding common design to exclude the Japanese machines in the United States is clearly illustrated by Singer's action before the United States Tariff Commission. Less than eight months after the patent was issued it started this effort to bar infringers in one sweep. As an American corporation, it was the sole company of the three that was able to bring such an action. When it appeared that the references to Pfaff in the assignment agreement threatened the success of the Tariff Commission proceeding, Gegauf consented to the deletion of Pfaff from the agreement. This maneuver was for the purpose, as the trial court found, of giving Singer "a better chance of prevailing before the Tariff Commission' in its efforts to exclude" infringing machines. 205 F. Supp. at 427. While the tariff application was leveled against nine European as well as the Japanese competitors, the allegations were clearly beamed at the in-

41. Letter of Donn N. Bent, Secretary of the Commission, dated May 23, 1952.

42. Certain Household Zigzag Sewing Machines, filed by Singer Manufacturing Co. on January 15, 1959.

43. *Zigzag Sewing Machines*, *supra* note 42, letters of Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, dated May 15, 1959, and September 21, 1959.

44. *United States v. Singer Mfg. Co.*, 205 F. Supp. 394 (S.D.N.Y. 1962).

fringing Japanese machines to which Singer attributed the destruction of all American domestic household sewing machine companies save itself. As the parties to the agreements and assignment well knew, and as the trial court itself stated, "[b]y far the largest number of infringers of the Gegauf patent and invention were the Japanese." 205 F. Supp. at 418.⁴⁵

In 1963, as a result of the Supreme Court's decision, Singer requested and was allowed to withdraw its Commission complaint.

In 1964, a complaint was filed alleging a combination and conspiracy to restrain and monopolize trade and commerce in jeweled-lever watches, watch movements and watch parts, by certain foreign watch manufacturers and the U.S. importers of their merchandise. The complainants alleged that the foreign manufacturers and their U.S. importers had: been and were conspiring to restrain unreasonably and monopolize United States trade and commerce in watches, watch movements and watch parts; combined and conspired to eliminate the manufacture of watches and watch parts in the United States; unlawfully controlled distribution of watches and watch parts in the United States; agreed to fix prices on watches and watch movements imported into the United States; discriminated in prices charged for watches and watch parts; and conducted a continuing surveillance and invoked sanctions and penalties as a means of enforcing the restrictions imposed.⁴⁶

The Commission conducted an investigation into the matter but found no unfair methods of competition or unfair acts. During the pendency of the Commission's investigation, an order was issued by the U.S. District Court for the Southern District of New York enjoining a number of the parties named in the Commission complaint from further actions in pursuit of what the court found to be a combination and conspiracy, and further requiring the renunciation of the undertakings which gave rise to the unlawful combination and conspiracy.⁴⁷ The basis for the

45. *United States v. Singer Mfg. Co.*, 374 U.S. 174, 195-96 (1963).

46. *Watches, Watch Movements, and Watch Parts*, Tariff Comm'n Pub. 177, June 1966.

47. *United States v. Watchmakers of Switzerland Information Center*, C.A. No. 96-170 (S.D.N.Y. 1962). For decision denying defendants motion to dismiss for lack of jurisdiction, see 133 F. Supp. 40.

Commission's finding of no unfair methods of competition or unfair acts was expressed as follows:

In view of the rather special circumstances outlined in the preceding paragraph, [the Order of the district court] and the fact that the remedy provided by section 337 does not operate in retrospect, it was manifest that, once section 337 proceedings had been initiated, the task of the Commission was to conduct an investigation which would fully develop the facts, and, on the basis of the record thereby established, to determine whether the alleged combination and conspiracy was viable and in violation of the provisions of section 337. Had the order of the U.S. District Court not intervened in the period before the institution of the Commission's investigation and after the acts and practices on the basis of which the court found violation of the Sherman and Wilson acts, the issues before the Commission might have been different. Section 337, however, does not provide for refusal from entry in perpetuity, but only until the President finds that the conditions which led to such refusal from entry no longer exist. Therefore, and because the intervening order of the court was followed by corrective measures taken in compliance therewith, the Commission has confined its conclusions generally to the circumstances extant after the court's final order.⁴⁸

After *Watches* and *Zigzag Sewing Machines*, the Commission received a complaint concerning ceramic wall tile.⁴⁹ The complaint alleged that Japanese manufacturers and the U.S. importers of their merchandise:

1. combined and conspired to fix prices of ceramic mosaic tile and glazed wall tile imported into the United States;
2. misrepresented the country of origin;
3. initiated and misappropriated trademarks and trade names;
4. violated the antidumping laws of the United States;

48. *Watches*, *supra* note 46, at 7-8.

49. Ceramic Wall Tile, complaint filed March 29, 1966.

5. received rebates and subsidies from the Japanese government;
6. divided and allocated markets and customers in the United States;
7. attempted to monopolize the ceramic floor tile and wall tile markets; and
8. violated the Treaty of Friendship, Commerce and Navigation between the United States and Japan.

After inquiry with respect to the allegations of the complaint, the Commission refused to initiate an investigation, stating:

The complaint alleges that certain acts or practices "violate Sections 1 and 2 of the Sherman Act, Section 5 of the Federal Trade Commission Act, the Antidumping Act of 1921, Section 73 of the Wilson Tariff Act, Section 337 of the Tariff Act, as amended, and other statutes of the United States" (Complaint, p. 123). On page 124 of the complaint it is stated, "The unlawful conduct of defendants shown herein is readily within the reach of basic antitrust prohibitions." The invocation of section 337 is sought on the grounds that relief afforded under the Sherman Act or the Federal Trade Commission Act is inadequate.

The Commission is of the view that inadequacy of relief afforded under the antitrust and other statutes claimed to be violated cannot be presumed. The Commission is further of the view that an investigation under section 337 is not warranted in the premises unless the acts or practices complained of have been dealt with under the antitrust laws or section 5 of the Federal Trade Commission Act and the relief afforded under these statutes has been found wanting.⁵⁰

The modern era of Commission activism in unfair trade violations other than patent infringement began in 1968, when a complaint was filed at the Commission regarding crawler tractor parts.⁵¹ The complaint alleged a conspiracy and combination to

50. Ceramic Wall Tile, *supra* note 49, letter of Donn N. Bent, Secretary of the Commission, dated May 10, 1966.

51. Tractor Parts, complaint filed November 1, 1968, opinion at Tariff Comm'n Pub. 443, December 1971.

boycott and cut off the complainant and others from importing and selling certain crawler tractor parts in the United States. The complainant named the foreign manufacturer and nine importer-distributors as the parties to the alleged conspiracy. The Commission considered and denied respondents' motion for dismissal for lack of jurisdiction and also refused their application for a stay of the proceedings, stating:

Any incidental relief afforded to the complaining witness by reason of the issuance of an exclusion order under section 337 would be "in addition to any other provision of law." Such relief would be both complementary and supplementary in nature. There is no basis in law for not enforcing the provisions of section 337 because they do not afford every form of remedy an aggrieved party may wish to obtain. The availability of the subject tractor parts to non-conspirator importers, should there be a finding of conspiracy in this case, would, as explained above, obviate any argument of possible prejudice to the public.⁵²

The respondents immediately petitioned the District Court for the District of Columbia asking the court to enjoin the Commission from continuing its investigation.⁵³ The court denied the motion for a temporary restraining order stating that it lacked subject-matter jurisdiction.⁵⁴ Although the Commission found a combination and conspiracy between the foreign manufacturer and its U.S. distributors, no exclusion order was recommended to the President since the Commission further found that "the specific unfair method or act . . . no longer exists." Commissioner Sutton explained as follows:

My recommending against the issuance of an exclusion order is wholly consistent with the provisions of section 337. Section 337 (g) provides that —

Any refusal of entry under this section shall continue in effect until the President shall find and instruct the Sec-

52. Tractor Parts, *supra* note 51, Tariff Comm'n Pub. 443 at A 51-52.

53. Berton and Cotti v. U.S. Tariff Commission, C.A. No. 1923-69, July 16, 1969.

54. This occurred under the prior statute, which provided for the Commission to make recommendations to the President. For more information on this point, see Kaye & Plaia, 1975 *supra* note 3.

retary of the Treasury that the conditions which led to such refusal of entry no longer exist.

Clearly, if the violation of the statute no longer exists at the time the Commission reports on the full investigation, there is no justification for the Commission to recommend, or for the President to issue an order of exclusion. Reasoning to the same effect was given by the Commission in its report on Investigation No. 337-19.⁵⁵

Further, in confirming that there is no necessity to show injury to a domestic industry in antitrust-type section 337 cases, the Commission stated:

The allegation that the complainant must claim and prove injury to a domestic industry is untenable. Section 337 directs the imposition of an exclusion order in a case where an unfair method or act has the effect or tendency "to restrain or monopolize trade and commerce in the United States" irrespective of whether a domestic industry is experiencing injury. Indeed, section 337 could apply whether or not there is a U.S. industry producing the article involved in an unfair method or act. It is a statute designed to protect the "public interest" in maintaining fair practices in trade.⁵⁶

In 1972, a complaint was filed concerning certain convertible game tables.⁵⁷ After a full investigation, it is noteworthy that a majority of the Commissioners found:

In addition to our determination of unfair methods of competition and unfair acts concerning the patent issues involved, it is our view that [respondent], an importer of the subject convertible game tables, has, through its wholly owned subsidiary, . . . engaged in the deceptive trade practice of advertising a fictitious regular price for the imported tables.⁵⁸

Since infringement of a U.S. patent was also found, an exclusion order was recommended through the date of expiration of the

55. Tractor Parts, *supra* note 51 at A-45.

56. *Id.*

57. Convertible Game Tables and Components Thereof, complaint filed October 26, 1972, Inv. No. 337-TA-34, opinion at Tariff Comm'n Pub. 705, December 1975.

58. Convertible Game Tables, *supra* note 57, Tariff Comm'n Pub. 705 at 19.

patent. Regarding the deceptive pricing practices, one Commissioner noted:

Commissioner Leonard points out that an exclusion order based upon the advertising of a fictitious regular price would be a less comprehensive remedy than one issued on the basis of the patent since it would run only against Armac Enterprises, Inc., and/or Rozel Industries, Inc. He also points out that it would probably be a remedy of much shorter duration. In his view, should there be a resumption of import trade in convertible game tables by the above-named concerns at the time the patent expires (May 2, 1986) or is terminated, the matter of the advertising of a fictitious regular price might be examined anew by the Commission and an appropriate recommendation could then be formulated.⁵⁹

Under the present statute, the Commission may issue cease and desist orders in such instances.

In 1973 a complaint was filed containing allegations of a group boycott and refusal to deal.⁶⁰ While a Preliminary Inquiry was instituted by the Commission, before the Commission could complete further action on the complaint, the case was settled on agreement of the parties. Shortly after the filing of the *Dual In-Line Reed Relays* case, a patent-based complaint was filed involving certain electronic resistors.⁶¹ The complaint raised allegations of antidumping violations and countervailing duty violations. In discussing these matters during a hearing, the Chairman of the Commission suggested to complainant that these matters be taken up with the Treasury Department,⁶² and the Commission dismissed the investigation without issuing a written decision.

In 1973 a complaint was filed with the Commission involving electronic audio equipment.⁶³ The complaint alleged that the foreign manufacturer and its U.S. distributor had unlawfully refused to deal with complainant and had illegally maintained

59. *Id.* at 22 n.1.

60. *Dual In-Line Reed Relays*, Inv. No. 337-L-61, complaint filed March 27, 1973.

61. *Preset Variable Resistance Controls*, Inv. No. 337-L-63, complaint filed April 16, 1973.

62. *Id.*, transcript, vol. 1, p. 220.

63. *Certain Electronic Audio and Related Equipment*, complaint filed July 10, 1973, Inv. No. 337-TA-7, opinion at USITC Pub. 768, April 1976.

a fair trade pricing program in a non-fair trade jurisdiction. Upon completion of its investigation, the Commission found that there was no violation of section 337. The recommended determination, as adopted by the Commission, described Commission jurisdiction in antitrust-type cases:

Section 337 addresses itself to "unfair methods of competition and unfair acts" which occur "in the importation of articles into the United States, or in their sale . . ." (Emphasis added). Moreover, the statute requires that such sale be made by an "owner, importer, consignee, or agent of either." Therefore, (1) if an article is imported into the United States and (2) if such article is sold in the United States by an owner, importer, consignee, or agent of either, and (3) such sale in the United States constitutes an unfair method of competition and unfair act, the Commission may exercise jurisdiction, and, unless there are overriding public policy considerations, issue an exclusion or cease and desist order. This construction obviates the necessity of extending the words beyond their plain meaning to arrive at the intention of the legislature. In short, the positive words of the statute, coupled with their particular construction, reflect a manifestation of intent, and such words and construction further reflect a policy which Congress intended to see implemented.⁶⁴

Respondents argued that there must be a nexus between the importation and the alleged unfair acts. The recommended determination, as adopted, rejected this contention stating:

[A] nexus is not required between the time the merchandise is exported and the time the merchandise is imported into the United States. If the unfair act is committed in the sale of imported articles in the United States by an importer, for example, the Commission may take jurisdiction.⁶⁵

The opinion clarified the relationship of section 337 to other unfair competition laws as follows:

[S]ection 337, not unlike section 5 of the Federal Trade Commission Act, is intended to cover certain unfair methods of competition which are deemed to be violations of other

64. *Id.* at 28.

65. *Id.* at 29.

antitrust regulations; but at the same time I recognize the jurisdictional limitations in section 337, regarding imported merchandise.

Therefore, I agree with complainant's threshold submission applicable to this proceeding, that if there is found a violation of section 1 of the Sherman Act or, in fact, of section 5 of the Federal Trade Commission Act, there may also be a violation of section 337.⁶⁶

Finally, the broadness of section 337 jurisdiction was spelled out:

[T]his opinion is the first antitrust-related recommendation by a Presiding Officer or Administrative Law Judge of the U.S. International Trade Commission since the passage of the Trade Act of 1974. In order for a just determination to be made, the facts in this particular proceeding necessitated an examination of how section 337 relates to other domestic antitrust laws. However, it is believed that section 337 is a unique statute, applicable to the importation of merchandise, and therefore may reach conduct which might not apply to other antitrust laws.⁶⁷

The Commission's exercise of jurisdiction in both *Electronic Audio Equipment* and *Convertible Game Tables* was the subject of advice from the Federal Trade Commission. The Federal Trade Commission took the position that in these cases the unfair pricing complaints involved purely domestic trade and had no nexus to importation which would fall within the scope of section 337 jurisdiction.⁶⁸ The Justice Department took a similar position in *Convertible Game Tables* stating:

In this case, there is no proven or even alleged involvement of a foreign manufacturer or other foreign person in the

66. *Id.* at 31. In 1974, one commentator expressed a contrary view, stating "it is to be hoped the Commission will send the complainants to the Department of Justice or the Federal Trade Commission. For a variety of reasons, which we shall now consider, Section 337 is ill-suited for antitrust purposes." LaRue, *Section 337 of the 1930 Tariff Act and Its Section 5 FTC Act Counterpart*, 43 ABA ANTITRUST L.J. 608, 615 (1974).

67. *Electronic Audio Equipment*, *supra* note 63, USITC Pub. 768 at 47.

68. *Electronic Audio Equipment*, *supra* note 63, letter of Charles A. Tobin, Secretary, Federal Trade Commission, dated March 9, 1976.

pricing and advertising practices of [respondent]. The conduct appears to be well removed from the importation of the goods in question. The alleged unfair practices are absolutely within the jurisdiction of the Federal Trade Commission or local consumer protection officials. The only possible jurisdictional bases seem to be that the goods are imported or that the importer of the goods in question is affiliated with the retailer. The recommended cease and desist order thus appears to be an improper assertion by the Commission of Section 337 jurisdiction. Mere retail sales of imported products do not appear to be within the jurisdictional penumbra of Section 337 without a showing of sufficient international nexus.⁶⁹

Notwithstanding the position of these agencies, the Commission exercised jurisdiction.

A complaint regarding coffee was filed in 1974.⁷⁰ The complaint alleged that the respondents, coffee companies and producers, in concert and conspiracy with each other, agreed and sought to impose an artificially high price on Angolan coffee. The complaint also alleged:

This agreement has as its purpose the financial gain of all the respondents and perhaps others presently unknown to the complainants. As part of the agreement, the respondents have also sought to impose an embargo and boycott against the complainants and perhaps others for (a) refusing to cooperate and become parties to the agreement and (b) refusing to pay the unreasonably inflated prices demanded by the conspiring respondents. The effect and tendency of this unfair method of competition and these unfair acts is, in the short run, substantially to injure the coffee importing industry in the United States and the complainants in particular and, in the long run, substantially to injure the coffee industry in the United States and the consuming public.⁷¹

The case was terminated by the Commission after the parties before the Commission concluded a settlement agreement.

69. Convertible Game Tables, *supra* note 57, letter of Thomas E. Kauper, Assistant Attorney General, Antitrust Division, dated March 4, 1976, at 4.

70. Certain Angolan Robusta Coffee, complaint filed November 26, 1974, Inv. No. 337-TA-16.

71. *Id.*, complaint, at 23-24.

In 1974, another complaint was filed concerning certain high fidelity equipment.⁷² While the case was pending before the Commission, consent orders to cease and desist were entered into with the FTC and settlement agreements entered into by all parties. On this basis, the Commission terminated its investigation.

A complaint involving eye testing instruments was filed in 1974 alleging misleading and deceptive advertising practices.⁷³ The case was settled by the parties prior to Commission action on the merits.

In the *Reclosable Plastic Bags* case,⁷⁴ the Commission considered alleged antitrust violations which were raised by respondent as a defense. The violations alleged were characterized by the Commission:

The antitrust charges by respondent Ades are raised as a defense to a finding of violation under section 337, and fall basically into four different categories. The first is the charge of division of markets, the second is the charge of accumulation of patents, the third is the charge of a grant-back provision, and the fourth is the charge of exclusive dealership.⁷⁵

After consideration of the antitrust allegations, the Commission determined that there was no basis for the defenses.

A complaint filed in 1976 alleged an unlawful contract, combination or conspiracy in restraint of trade or commerce in color television receivers in the United States and a combination or conspiracy or attempt to monopolize such trade and commerce.⁷⁶ The complaint alleged that respondents attempted to obstruct the free market prices of color television receivers in the United States through predatory pricing schemes and receipt of economic benefits and incentives from the Government of Japan which contributed to below-cost and unreasonably low cost pricing of such television sets in the United States.

72. Certain High Fidelity Audio and Related Equipment, complaint filed November 12, 1974, Inv. No. 337-TA-14.

73. Certain Eye Testing Instruments Incorporating Refractive Principles, complaint filed February 20, 1974, Inv. No. 337-TA-6.

74. *Reclosable Plastic Bags*, Inv. No. 337-TA-22, USITC Pub. 801, January 1977.

75. *Id.*, at 10.

76. Color TV Sets, *supra* note 9, complaint filed January 15, 1976.

Respondents unsuccessfully argued that the Commission did not have jurisdiction because the causes recited in the complaint were antidumping and countervailing duty violations and should be investigated by the Department of Treasury.⁷⁷ Before the Commission reviewed the ruling and issued a written decision and opinion, review was sought in federal district court.⁷⁸ In addition to finding that it lacked subject matter jurisdiction, the Court said:

In this case, nothing in the papers or argument before this court shows that the Commission proceeding which plaintiff wishes enjoined or declared unlawful (Commission Investigation No. 337-TA-23, "Certain Color Television Receivers") is in excess of the Commission's jurisdiction under 19 U.S.C. 1337 (a), or that the Commission otherwise acted in a manner that is clearly at odds with the specific language of the Commission's statutory authority. *World Wide Volkswagen Corp. v. United States International Trade Commission*, 414 F. Supp. 713, 717 (D.D.C. 1976).⁷⁹

Subsequent to the court's decision,⁸⁰ the Commission found that it had jurisdiction even though certain allegations of the complaint may encompass antidumping law or countervailing duty violations.

Later, a section 201⁸¹ complaint was filed and the Commission suspended the section 337 investigation until the section 201 report was sent to the President, at which time the section 337 investigation was resumed.⁸²

77. *Id.*, Presiding Officer's Opinion in Support of Ruling Denying Amended Motions to Terminate and Dismiss, issued July 19, 1976.

78. *Melco Sales v. U.S.I.T.C.*, Civil Action No. 76-1932 (D.D.C. 1976).

79. *Id.*, Order filed November 15, 1976. Further, in response to a challenge to Commission authority, the court found ample protection within the statute concerning the executive prerogatives in foreign affairs.

80. *Color TV Sets*, *supra* note 9, Memorandum Opinion.

81. Section 201(b) of the Trade Act of 1974, Television Receivers, Color and Monochrome, Assembled or Not Assembled, Finished or Not Finished, and Sub-assemblies Thereof, Inv. No. TA-201-19, complaint received September 22, 1976, investigation instituted October 21, 1976. Report issued at USITC Pub. 808, March 1977.

82. Notice of Suspension in the section 337 Color TV Sets investigation was published December 23, 1976, at 41 Fed. Reg. 55947 and was stated to "remain in force and effect only during the pendency of investigation No. TA-201-19."

Predatory pricing was an issue in the *Swimming Pools* case⁸³ filed in 1976. The Presiding Officer's recommended determination indicates that there was an inquiry into home market and third country sales of pools and testimony that sales in certain foreign countries were at prices no higher than in the United States.

The Presiding Officer found:

The complaint filed in this investigation alleged, on information and belief, that [foreign manufacturer] and the named respondents are importing and selling [swimming pools] at prices "below fair market value" and the "manufacturer's cost of production" and that the sale by [foreign manufacturer] of such pools "below fair market value" is founded upon a "predatory price policy."⁸⁴

The Commission's Notice of Investigation stated that the scope of the investigation included a consideration of

whether the effect or tendency of an alleged policy of predatory pricing in the domestic sale of such merchandise is to destroy or substantially injure an industry, efficiently and economically operated, in the United States or to restrain or monopolize trade and commerce in the United States.⁸⁵

The Presiding Officer said:

This Commission first referred to the parallelism between the language of Section 337 and that of Section 5 of the FTC Act in 1922:

Section 316 extends to import trade practically the same prohibition against unfair methods of competition which the Federal Trade Commission Act provides against unfair methods of competition in interstate commerce. *Sixth Annual Report of the U.S. Tariff Commission* (Washington, D.C. 1922), at 3.⁸⁶

The Recommended Determination continued:

In the area of predatory pricing, the F.T.C. has found selling below cost or at otherwise unreasonably low prices

83. Above-Ground Swimming Pools, USITC Inv. No. 337-TA-25.

84. *Id.*, Recommended Determination [hereinafter, R.D.] of February 10, 1977, at 61.

85. *Id.*, Notice of Investigation, 41 Fed. Reg. 17975, April 29, 1976.

86. *Id.*, R.D. at 63.

with the intent, purpose and effect of restraining and lessening competition to be in violation of Section 5. See, *In the Matter of Quaker Oats Company*, 66 FTC 1131 (1963).⁸⁷

In his Recommended Determination, the Presiding Officer discussed the 1916 Antidumping Act, noting that "the investigative Staff argued that the Presiding Officer could find that [the foreign manufacturer] has sold [the subject articles] at prices low enough to be considered as made in violation of the 1916 Act, and therefore, of Section 337."⁸⁸ The Presiding Officer held, however, that this was outside the scope of the investigation as instituted by the Commission.

Citing *Zenith v. Matsushita*⁸⁹ as support, the Presiding Officer stated:

that the Robinson-Patman Act did not reach geographical price discrimination where the alleged violation involved import transactions in the United States, on the one hand, and transactions which occurred wholly within foreign countries, on the other.⁹⁰

The Presiding Officer reasoned that this statement was made in partial reliance

on the enactment of antidumping legislation in 1916 and 1921 prohibiting price discrimination between national markets subsequent to the 1914 Clayton Act and on consideration that prior to 1936, neither Congress nor the executive department and agencies charged with the enforcement of the antitrust statutes thought that the Clayton Act reached price discrimination between national markets.⁹¹

And as a conclusion of law the Presiding Officer found, "A policy of predatory pricing is an unfair method of competition and unfair act as defined in Section 337."⁹²

87. *Id.* at 64.

88. *Id.* at 66.

89. *Zenith Radio v. Matsushita Elec. Ind.*, 402 F. Supp. 244, 251 (E.D. Pa. 1975).

90. *Swimming Pools*, *supra* note 83, R.D. at 69.

91. *Id.*

92. *Id.* at 74.

Later in 1976, a complaint was filed concerning chicory.⁹³ The complaint alleged various antitrust violations.

In determining that there was no reason to believe there was a violation, the Commission set forth its position on the relationship of section 337 to the antitrust laws:

These alleged violations of section 337 pertain to activity which could constitute forbidden activity under sections 1 and 2 of the Sherman Act. Although there are no judicial precedents involving nonpatent cases arising under section 337, judicial determinations under other antitrust and unfair competition statutes are persuasive in determining what constitutes an unfair method or act under section 337. The Commission has in previous investigations, both under the prior section 337 and under section 337 as it exists today, used the antitrust laws and the practice thereunder as a standard for "unfair methods of competition and unfair acts." The presiding officer recommends this in the instant investigation and we adopt such recommendation. [Footnotes omitted].⁹⁴

IV. HISTORY OF UNITED STATES COUNTERVAILING DUTY LAW

Countervailing duties have been explained as follows:

When export bounties . . . either direct or indirect, are paid upon goods, such bounties neutralize more or less the duties that may be charged upon their importation into other countries and the protection thereby accorded. To re-establish the original amount of protection, the importing country may provide that for articles upon which export bounties are paid a protective surtax shall be charged.⁹⁵

A. *Present Countervailing Duty Proceedings In the United States*

The current countervailing duty law as amended by the Trade Act of 1974, provides:

Whenever any country, . . . other political subdivision of government, . . . [or] person . . . shall pay or bestow,

93. Chicory Root — Crude and Prepared, complaint filed June 11, 1976, Inv. No. 337-TA-27.

94. *Id.*, Commission Memorandum Opinion, October 1, 1976, at 9.

95. U.S. TARIFF COMMISSION, DICTIONARY OF TARIFF INFORMATION at 205 (1924).

directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, . . . then upon the importation of such article or merchandise into the United States, . . . there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.⁹⁶

In the case of articles which are duty free, countervailing duties may be imposed only if there is a finding of a bounty or grant and in addition, a determination of injury.⁹⁷ The injury finding is made by the International Trade Commission.

In order to initiate an investigation a petition is filed with the Secretary of the Treasury. It appears to be mandatory that the Secretary take action on the petition. The statute reads:

upon the filing of a petition by any person setting forth his belief that a bounty or grant is being paid or bestowed, and the reasons therefor, . . . the Secretary shall initiate a formal investigation to determine whether or not any bounty or grant is being paid or bestowed and shall publish in the Federal Register notice of the initiation of such investigation.⁹⁸

The Secretary must make a preliminary determination within six months from the date on which the petition is filed and within twelve months from such date shall make a final determination.⁹⁹

96. 19 U.S.C. § 1303(a) (1).

97. One reason that duty-free articles can have countervailing duties imposed only if there is a finding of injury as well as a finding of a bounty, is that this addition of inclusion of duty free articles to the law was made by the Trade Act of 1974 and thus subsequent to the General Agreement on Trade and Tariffs (GATT), which was signed in 1947. GATT provides that countervailing duties may only be imposed when bounties or grants are being bestowed and such bounties or grants are the cause of injury. Because of a grandfather clause (the United States countervailing duty law predated the 1947 GATT), the United States was not required by the treaty to impose the injury requirement. However, the United States countervailing duty law at that time only affected dutiable articles. Since, by the Trade Act of 1974, non-dutiable items are now to be included within the provisions of countervailing duty law, in order to conform to GATT it was necessary for an injury requirement to be imposed.

98. 19 U.S.C. § 1303(a) (3).

99. 19 U.S.C. § 1303(a) (4).

In order to provide for proper negotiating authority and avoid disruption of multilateral trade negotiations, the statute provides that during the four-year period beginning January 3, 1975, under certain circumstances, the Secretary may determine that the additional duty under this section will not be imposed.¹⁰⁰

Under Treasury regulations, a petition for institution of a countervailing duty investigation should contain:

1. A full statement of the reasons for the belief that any bounty or grant is being paid or bestowed with respect to merchandise imported into the United States.
2. A detailed description or sample of the merchandise.
3. All pertinent facts obtainable as to any bounty or grant being paid or bestowed with respect to the merchandise.¹⁰¹

Upon the filing of a proper petition "the Commissioner [of customs] shall cause such investigation to be made as appears to be warranted by the circumstances of the case."¹⁰²

If the information appears to be in error, the party filing it is so informed. Otherwise, the Commissioner, with the approval of the Secretary of the Treasury, publishes a notice in the *Federal Register* that the communication has been received together with an invitation to interested persons to submit written comments.

After consideration of the comments and other relevant data, a determination is made. If it is found that bounties or grants are being paid or bestowed, the Commissioner of Customs, with the approval of the Secretary of the Treasury, "shall issue a countervailing duty order describing the merchandise, designating the country or area in which it is produced . . . and declaring the ascertained or estimated amount of the bounty or grant."¹⁰³

B. *Countervailing Duty Legislation*

Legislation originated in the United States with the Tariff Act of 1890,¹⁰⁴ which provided for the imposition of an additional

100. 19 U.S.C. § 1303(d)(2).

101. 19 C.F.R. § 159.47(b)(1).

102. 19 C.F.R. § 159.47(c).

103. 19 C.F.R. § 159.47(c). The mandatory nature of the imposition of countervailing duties by the Secretary can be seen from the recent decision (April 12, 1977) in *Zenith Radio Corp. v. United States*, ____ F. Supp. ____ (Cust. Ct. 1977) C.D. 4691.

104. 26 Stat. 583.

duty on sugar exported from a country which paid a higher bounty on exportation of sugar than on raw sugars of a lower saccharine content.

The Tariff Act of 1894 expanded the imposition of an additional duty to all imports of sugar from countries which granted bounties.¹⁰⁵ The primary reason for passage of the statute was to counteract the dumping of German sugar being made possible by government bounties.

The law was further broadened by section 5 of the Tariff Act of 1897¹⁰⁶ to cover all imports dutiable under that act which received a bounty or grant upon exportation, and this provision was maintained in the Tariff Acts of 1909¹⁰⁷ and 1913.¹⁰⁸

Section 5 of the Tariff Act of 1897 provided:

whenever any country . . . shall pay or bestow . . . any bounty or grant upon the exportation of any article or merchandise from such country . . . and such article or merchandise is dutiable . . . there shall be levied and paid, in all such cases in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant. . . .¹⁰⁹

Under this statute it was the act of exportation alone and not production for which the bounty was to be paid. In an early case under the statute, sugar producers in the Netherlands were receiving a bounty pursuant to the law of that country. But as the law operated, only those firms which exported their sugar kept the bounty. The others eventually had to return it to the Netherlands government. This was considered a bounty under the 1897 act.¹¹⁰

The *Hills Bros.* decision was followed in *Downs v. United States*,¹¹¹ which involved Russian sugar. The Court stated that the 1897 act "was not only intended to aid in the collection of revenue, but also to encourage the industries of the United States . . ."¹¹² In adopting a large portion of the judgment re-

105. 28 Stat. 521.

106. 30 Stat. 205.

107. 36 Stat. 11.

108. 38 Stat. 114.

109. 30 Stat. 205.

110. *United States v. Hills Bros. Co.*, 107 F. 107 (2d Cir. 1901).

111. 113 F. 144 (4th Cir. 1902).

112. *Id.* at 145-46.

dered by the board of general appraisers,¹¹³ the court found that “[t]he word ‘grant’ is more comprehensive in meaning than the term ‘bounty’.”¹¹⁴

The first regular countervailing duty law was the 1913 Act.¹¹⁵ It provided for the Secretary of the Treasury to impose additional (countervailing) duties when grants or bounties were being paid.

The law was enlarged even further by section 303 of the Tariff Act of 1922,¹¹⁶ which provided for the inclusion of any bounty or grant upon manufacture or production in addition to the act of exportation.

Under section 303 of the Tariff Act of 1930 the Secretary of the Treasury, once he determined a bounty was being granted, had no discretion but was impelled to impose an additional duty equal to the amount of the bounty. There was no requirement that the Secretary act within any particular period of time.

When section 303 of Tariff Act of 1930 was amended by the Trade Act of 1974, it was stated:

The [Senate Finance] Committee has been concerned over the past years that the Treasury Department has used the absence of time limits to stretch out or even shelve countervailing duty investigations for reasons which have nothing to do with the clear and mandatory nature of the countervailing duty law.¹¹⁷

The House Ways & Means Committee also expressed concern with Treasury performance since “The Committee was advised in 1970 that the Treasury Department would amend its regulations to conform to these procedures, and is concerned that the Treasury has not done so.”¹¹⁸

There is no injury requirement under section 303 notwithstanding the requirements of GATT. The United States is expected from this requirement because its countervailing duty law had no injury requirement when GATT was first signed in 1947.

113. Which subsequently became the Customs Court.

114. 113 F. at 147.

115. Section III, paragraph I, of the Tariff Act of October 31, 1913, 38 Stat. 184.

116. 42 Stat. 858.

117. FINANCE COMMITTEE REPORT, *supra* note 18, at 183.

118. HOUSE COMM. ON WAYS AND MEANS, REPORT ON TRADE REFORM ACT OF 1974, 93d Cong., 1st Sess., H.R. REP. NO. 93-571 to accompany H.R. 10710 at 74 (1970) [hereinafter, WAYS AND MEANS REPORT].

In *Hammond Lead Products, Inc. v. United States*¹¹⁹ the court commented on GATT as follows:

The dealing with countervailing duties in the [GATT] (1947) seems to reflect a belief on the part of Treasury in 1947 that it could veto an assessment of countervailing duties if it chose, and Congress has not since enacted anything to contradict that assumption.¹²⁰

[T]he modern tendency to fashion a remedy for any injury is a strong one, and it could be the regular courts would take jurisdiction in cases outside section 516(b), where the domestic industry showed clear illegality and substantial injury.¹²¹

In *Energetic Worsted Corp. v. United States*¹²² the court referred to GATT and pointed out that an additional duty may be imposed if not more than the estimated bounty or subsidy. The court further noted that it had previously been held that the imposition of an additional duty does not violate the most-favored-nation clause, citing *Balfour, Guthrie and Co. v. United States*.¹²³

C. Bounties and Grants

The question of the existence of "bounties" or "grants" has been dealt with in a number of cases.

The Supreme Court discussed the German government's providing of a special advantage in the form of a tax concession and considered this advantage to be a bounty or grant.¹²⁴ In *Downs v. United States*, the Court of Appeals for the Fourth Circuit stated:

[I]t is immaterial in what manner the "bounty or grant" was paid or bestowed. The law regards substances, not shadows; things, not names.¹²⁵

119. 440 F.2d 1024 (CCPA 1971).

120. *Id.* at 1031.

121. *Id.* at 1032.

122. 224 F. Supp. 606 (Cust. Ct. 1963).

123. 136 F.2d 1019 (CCPA 1943).

124. *United States v. Passavant*, 169 U.S. 16 (1898).

125. 113 F. at 148.

The *Downs* decision was affirmed by the Supreme Court.¹²⁶ It appears that the bestowal of a bounty or grant permitted the dumping of the product. As explained by the Supreme Court:

In the case of Russian sugar the effect of the import duties is much enhanced by the fact that, the supply of free sugar from the home market being limited, the selling price is very remunerative, and each producer has therefore an interest in placing as much sugar as he can on the home market; and as the total amount of free sugar is distributed among all the manufactories in proportion to their entire production, it may become to their interest to export their surplus even at a loss, if such loss can be compensated by the profits on sugar sold in the home market.¹²⁷

After reviewing the Russian sugar arrangement, the Supreme Court stated that the bounty was at first one upon production but that:

When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation.¹²⁸

The Court in *Nicholas v. United States*¹²⁹ examined the Tariff Act of 1913¹³⁰ while dealing with certain payments by a foreign government to distillers of spirits who exported. The Court examined the justification given for reimbursements to the producers for certain costs. However, the Court stated:

If the word "bounty" has a limited sense the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of any

126. *Downs v. United States*, 187 U.S. 496 (1903).

127. *Id.* at 513.

128. *Id.* at 515.

129. 249 U.S. 34 (1919).

130. Paragraph E of Sec. 4 of the Tariff Act of 1913, 38 Stat. 114, 193-94.

article or merchandise" a countervailing duty is required by Paragraph E.¹³¹

In that same year the United States Tariff Commission reported:

For many years the tariff laws of the United States have regularly provided for the imposition of countervailing duties equal to the net amount of any grants or bounties allowed by any foreign government in aid of the exportation of merchandise to this country. The countervailing section of the act of 1894 was enacted to restrict the dumping of sugar, the production of which had been stimulated by Government bounties. Formerly, therefore, the provision for such countervailing duties was occasionally referred to as anti-dumping legislation. Reflection will show, however, that these countervailing duties possess that character in the United States only in cases where they operate against the importation or sale of articles in this country at less than their foreign market value. Indeed, what is now known as dumping has, in the main, grown from modern industrial conditions of production and distribution, without reference to direct government subsidies. It is a familiar development of the private promotion of the foreign trade of many industrially advanced countries.¹³²

In the same report the Commission again addressed government participation:

Broadly speaking, grants and bounties may or may not result in dumping. They should be regarded as aids in that direction rather than the practice itself.¹³³

131. 249 U.S. at 39. Countervailing duties were imposed (Treasury Decision [T.D.] 34466, May 25, 1914), and the latter decision was modified several times (T.D. 34992, December 11, 1914; T.D. 47753, June 20, 1935; T.D. 52555, September 7, 1950; T.D. 55812, 28 Fed. Reg. 635, January 24, 1963). Finally, after further investigation it was determined that bounties or grants were no longer being paid or bestowed upon the exportation of spirits from Great Britain and that countervailing duties would no longer be collected (after 63 years of collecting them); T.D. 77-65, 43 Fed. Reg. 9168, February 15, 1977.

132. U.S. TARIFF COMM'N, INFORMATION CONCERNING DUMPING AND UNFAIR COMPETITION IN THE UNITED STATES AND CANADA'S ANTI-DUMPING LAW at 10 (1919) [hereinafter, 1919 TARIFF COMM'N ANTIDUMPING REP.].

133. *Id.*

In a separate report the Commission noted a number of unfair methods including countervailing duty violations.

It is pointed out that, in the field of unfair methods, this country has various legislative enactments, including those offsetting the effects of foreign grants and bounties through countervailing duties, restricting the practice known as "full-line forcing," and penalizing undervaluation in making entry of imported goods.¹³⁴

The Secretary of the Treasury has wide latitude in many areas involved in countervailing duty matters. For example, the accuracy of the amount of countervailing duty is beyond the province of court review.¹³⁵

However, "once it has been determined that a bounty exists, the Secretary has no discretion but to levy the appropriate countervailing duty. See *United States v. Hammond Lead Products*."¹³⁶

In *Hammond Lead Products v. United States*¹³⁷ the Court in following the *Nicholas* case pointed out that the sole inquiry "is whether *the results* of the governmental acts 'stimulate exportation * * * by affording aid from the public treasury whereby such goods may when exported be sold in competition with ours for less'."¹³⁸

On appeal the CCPA in *United States v. Hammond Lead* considered the jurisdictional issue stating it to be a novel question "and a momentous one, fraught with consequences as to the control of the executive branch over the foreign relations and foreign policy of the United States"¹³⁹ and "that Section 303 is penal in character."¹⁴⁰

Treasury has declared that the bestowal of benefits granted to an exporter from a foreign country to the United States constitutes a bounty or grant but that unless they are more than

134. UNITED STATES TARIFF COMMISSION THIRD ANNUAL REPORT 11 (1919).

135. *Energetic Worsted v. United States*, 224 F. Supp. 606, 615 (Cust. Ct. 1963).

136. *American Express v. United States*, 472 F.2d 1050, 1056 (CCPA 1973).

137. *Hammond Lead Products v. United States*, 306 F. Supp. 460 (Cust. Ct. 1969).

138. *Id.* at 470.

139. *United States v. Hammond Lead Products*, *supra* note 119, at 1027.

140. *Id.* at 1028. The court made reference to indirect bounties and pointed out, "The problem is with the undefined 'indirect bounty.' If it is direct, there is no problem, but foreign governments with plans to subsidize their exports are rarely that cooperative with the U.S. Treasury and courts." *Id.* at 1030.

de minimis in relation to the quantity of exports involved, a negative determination would be made.¹⁴¹

Finally, one commentator has noted that the relation of the antidumping to the countervailing duty statutes has apparently been overlooked:

The antidumping and countervailing duty statutes clearly have an interlocking conceptual basis and, indeed, the practice of subsidizing exports has often been described as "bounty dumping" in trade writings. Moreover, foreign anti-dumping and countervailing duty measures are typically combined into one law, and are frequently indistinguishable.

In the United States, however, the Antidumping Act has traditionally been thought of strictly as a means of dealing with the unfair trade practices of private interests, whereas the countervailing duty law, despite its express inclusion of privately-sourced bounties, has in practice only been applied as a remedy against official bounties. . . .

. . . Since the application of countervailing duties is not dependent upon a showing of injury, as is the application of dumping duties, there would seem to be certain advantages for an American businessman filing a complaint under section 303 in such circumstances. Oddly enough, there is no evidence that such an approach has ever been tried by domestic producers.¹⁴²

V. HISTORY OF UNITED STATES ANTIDUMPING LAW

Dumping has been defined as:

[D]umping is generally regarded as occurring whenever there is a sale of imported merchandise at less than its prevailing market or wholesale price in the country of production.¹⁴³

141. Certain Consumer Electronic Products from Japan, 40 Fed. Reg. 5378, February 5, 1975.

142. Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 LAW & POL'Y IN INT'L BUS. 17, 33 (1969).

143. UNITED STATES TARIFF COMMISSION THIRD ANNUAL REPORT 11 (1919).

More recently, a Congressional Committee staff critique gave the following definition:

“Dumping,” in a foreign trade sense, occurs when a foreign producer sells his merchandise in this country at a price less than that which he charges purchasers in his home market, or a third country market, and a U.S. industry suffers injury because of that price discrimination.¹⁴⁴

A. *Present Antidumping Act, 1921, Proceedings in the United States*

According to the current Antidumping Act:

Whenever the Secretary of the Treasury . . . determines that a class or kind of foreign merchandise is being, or, likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States International Trade Commission . . . and the Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.¹⁴⁵

The statute provides that when there have been findings of sales at less than fair value and of injury or the likelihood thereof to a domestic industry, “there shall be levied, collected, and paid, in addition to any other duties imposed [upon the subject arti-

144. S. COMM. ON FINANCE, THE ANTIDUMPING ACT OF 1921 AND THE INTERNATIONAL ANTIDUMPING CODE, CONSISTENT OR NOT? A critique by the Staff, 90th Cong., 2d Sess. 1 (July 5, 1968) [hereinafter, FINANCE COMM. STAFF CRITIQUE]. According to Viner, there are three types of dumping; (a) sporadic, (b) intermittent and (c) persistent. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 3 (1923). Ehrenhaft has stated that “[e]conomists are generally agreed that it is only the intermittent, predatory dumping of goods that is to be restrained.” Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44, 48 (1958). Kindleberger and Barcelo have raised the problem of discerning the difference between predatory, intermittent and persistent dumping on the grounds that they cannot be distinguished until after some period of time has elapsed, but it has been argued by Viner that they can be distinguished by examining the average and marginal costs and only those goods sold for export below the cost of production should be made the subject of antidumping duties. KINDLEBERGER, INTERNATIONAL ECONOMICS (1953); Barcelo, *Antidumping Laws as Barriers to Trade — The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 509 (1972); VINER, MEMORANDUM ON DUMPING (1926).

145. 19 U.S.C. § 160(a).

cles] by law, a special dumping duty in an amount equal to such difference."¹⁴⁶ The margin is the amount by which the foreign market value exceeds the purchase price or the exporter sales price.

The Secretary shall, within thirty days of the receipt of the information alleging that a particular class or kind of merchandise is being or is likely to be sold in the United States or elsewhere at less than its fair value and that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, determine whether to initiate an investigation into the question of whether such merchandise in fact is being or is likely to be sold in the United States or elsewhere at less than its fair value.¹⁴⁷

If the Secretary's determination is affirmative, notice is published in the *Federal Register*. If the Secretary's determination is negative, the inquiry is closed.¹⁴⁸

The Secretary makes an investigation into the dumping allegations. Before making the LTFV¹⁴⁹ determination, the Secretary, if requested, shall conduct a hearing at which interested persons have the right to appear.¹⁵⁰ Such hearings are specifically exempted from the Administrative Procedure Act (APA).¹⁵¹ The Secretary then determines whether the subject merchandise is being sold at LTFV. The determination is published in the *Federal Register*, indicating whether it is affirmative or negative "together with a complete statement of findings and conclusions, and the reasons or basis therefor."¹⁵²

If an affirmative determination is made, the matter is referred to the International Trade Commission, which has three months within which to make a determination of whether there is injury or likelihood of injury.¹⁵³

146. 19 U.S.C. § 161(a). The difference referred to here is also called the dumping margin.

147. 19 U.S.C. § 160(c) (1).

148. 19 U.S.C. § 160(c) (1).

149. This term is used to mean "less than fair value" under the statute.

150. 19 U.S.C. § 160(d) (1).

151. 19 U.S.C. § 160(d) (3).

152. 19 U.S.C. § 160(d) (2).

153. 19 U.S.C. § 160(a).

The Trade Act of 1974 provides for a summary procedure if the Secretary determines that there is substantial doubt as to whether an industry in the United States is being or likely to be injured.¹⁵⁴ Under this procedure, the reasons for doubt and a preliminary indication concerning possible sales at LTFV are forwarded to the Commission. Within 30 days after receipt of this information from the Secretary, the Commission determines whether there is reasonable indication that an industry in the United States is being or is likely to be injured and advises the Secretary of its determination.

The Secretary is provided with six months to make his determination, and if he is not able to do so within that time, he is permitted to publish notice thereof together with the reasons therefor. In this case he is allowed an additional three months.¹⁵⁵

[T]he Secretary . . . shall, within six months after the publication under subsection (c) (1) . . . determine whether there is reason to believe or suspect, from the invoice or other papers or from information presented to him or to any other person to whom authority under this section has been delegated, that the purchase price is less, or that the exporters sales price is less or likely to be less than the foreign market value.

If the determination is affirmative, notice is published in the *Federal Register*.¹⁵⁶

154. 19 U.S.C. § 160(c) (2).

155. 19 U.S.C. § 160(b) (2).

156. 19 U.S.C. § 160(c) (1). The other sections of the statute provide:

(1) Section 161 — special dumping duty.

(2) Section 162 — purchase price, relating to the price at which the merchandise has been purchased or agreed to be purchased prior to the time of exportation.

(3) Section 163 — regarding the price at which merchandise is sold or agreed to be sold in the United States, the so-called exporter sale price.

(4) Section 164 — the foreign market value or price of merchandise or similar merchandise sold or offered for sale in principal markets of the exporting country.

(5) Section 165 — the constructed value, which are rules of constructing the price under certain circumstances.

(6) Section 166 — definition of an exporter.

(7) Section 167 — oath and bond of the person for whose account merchandise is imported before delivery thereof.

The administration of the antidumping law is complex and has many technical rules associated with it, including specific methods for calculating whether or not there are sales at LTFV.

There are regulations¹⁵⁷ governing antidumping procedures. Any person having information that merchandise is being or likely to be imported into the United States under such circumstances which bring it within the purview of the Act, may communicate the information to the Commissioner of Customs.

A petition should include, as general information, the name of the petitioner, the percentage of the total United States production, sales and employment represented by the person filing, and an indication of whether the applicant has filed for other forms of import relief.¹⁵⁸ There should be a detailed description of the imported merchandise, including its technical characteristics, its tariff classification, name of the country from which the merchandise is being or likely to be imported, the name of the foreign manufacturer, and the ports of probable importation into the United States.¹⁵⁹ The petition should also contain price information, such as the home market price in the country of exportation or, if this is not available, the price from the country of exportation to a third country.¹⁶⁰ Information concerning injury to the domestic industry should also be included.¹⁶¹

(8) Section 168 — appraisal and report to the collector of customs.

(9) Section 169 — appeals and protests from determinations of customs officers.

(10) Section 170 — drawbacks, special duties treated as regular duties.

(11) Section 170a — definitions.

(12) Section 171 — indicating that sections 160 to 171 of Title 19 may be cited as the "Antidumping Act, 1921."

(13) Section 172 — additional definitions.

157. See 19 C.F.R. Part 153 for Treasury regulations on antidumping, and 19 C.F.R. Part 208 for Commission regulations on antidumping.

158. 19 C.F.R. 153.27(a)(1).

159. 19 C.F.R. 153.27(a)(2).

160. 19 C.F.R. 153.27(a)(3).

161. 19 C.F.R. 153.27(a)(4), according to which the following information should be included: domestic production, sales and prices over the most recent three year period, and the profitability of the firms represented by the petitioner for the most recent three year period, the capacity utilization of the firm, the volume and value of import of the merchandise over the most recent three year period, the market share of the alleged LTFV imports over the most recent three year period, the effect of the alleged LTFV sales on domestic prices, unemployment of the firm and the entire industry over the most recent three year period, capital investment by the firms represented by the applicant over a five year period, the names and addresses of all

B. Antidumping Legislation

There are two United States antidumping laws:

(1) Section 801 of the Tariff Act of 1916, also known as the Antidumping Act of 1916, has been almost totally ignored.¹⁶² The application of this statute requires *in personam* jurisdiction over a dumping violator by a federal district court. Intent must be proven and the difficulty of proving intent coupled with the difficulty of obtaining *in personam* jurisdiction over foreign firms are the reasons usually ascribed to the paucity in use of this statute.

(2) Section 202 of the Tariff Act of 1921, also known as the Antidumping Act, 1921,¹⁶³ has been widely used. It is an *in rem* proceeding and is presently administered by two governmental agencies.¹⁶⁴ While a showing of injury or likelihood thereof is required, an intent to injure is not.

United States producers of competitive merchandise, and any other factors relevant to possible injury or likelihood of injury to a domestic industry or prevention of establishment of a domestic industry such as domestic demand and supply conditions, number of domestic competitors and new entrants in the market, domestic prior activity, export performance and increase foreign capacity.

162. Codified as 15 U.S.C. § 72. Approximately a decade prior to the passage of the 1916 Antidumping Act, a classic case of dumping occurred by a U.S. firm in Europe. The classic example envisions a monopolist at home which can use its excessive profits to subsidize very low prices in another country to destroy competition there. A U.S. government study, apparently printed in 1909, made findings that the Standard Oil Company in 1904 and 1905 encountered more active competition in Europe than had existed for some time before, and

it was the desire to destroy [this competition] or force them into agreements favorable to the Standard, that led the Standard to adopt its policy of extreme price cutting. . . . [The American people] can not be expected, however to approve a condition under which, while the Standard is selling an enormous volume of oil there at little or no profit, it is yet able to secure immense profits on its total business through the extortionate prices in the home market.

REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE PETROLEUM INDUSTRY, 1909, Part III, Foreign Trade Reprint Edition, 1976, Arno Press Inc., at 91-92.

163. Codified as 19 U.S.C. § 161. This is the statute usually meant when the term "Antidumping Act" is used.

164. The Secretary of the Treasury determines whether there have been sales at less than fair value and the U.S. International Trade Commission determines whether there has been injury to a domestic industry.

As long as Congress by a legislative act provides an intelligible principle to which a government official is directed to conform, such a statute is not a forbidden delegation of legislative power. *Hampton v. United States*, 276 U.S. 394.

The CCPA found the Antidumping Act, 1921, constitutional in *Kleberg v. United States*, 71 F.2d 332 (CCPA 1933). The court also stated that "if the Secre-

1. 1916 Antidumping Act

The Tariff Act of 1916 included the first U.S. antidumping law which provides for both penal and civil sanctions in the federal district courts, and even provides for treble damages.

It shall be unlawful for any person importing . . . any articles from any foreign country into the United States . . . to import, [or] sell . . . such articles within the United States at a price substantially less than the actual market value

tary of the Treasury has proceeded in the method prescribed by the Congress, we may not judicially inquire into the correctness of his conclusions." *Id.* at 335.

The federal district courts have no jurisdiction over an action to enjoin the Collector of Customs from assessing a special dumping duty. *Cottman v. Dailey*, 94 F.2d 85 (4th Cir. 1938). The reason for this is stated to be that Congress has provided for appeals for importers dissatisfied with appraisals (19 U.S.C. § 381 (1501), appeal to Customs Court) and subsequent review by the CCPA (28 U.S.C. § 310 (2601)). The court cited with approval *Riccimini v. United States*, 69 F.2d 480, 484 (9th Cir. 1934):

This system of corrective justice being complete in itself, it must be concluded that Congress did not intend to allow any other method to redress supposed wrongs occurring in the operation of the laws in relation to the collection of [customs] revenues.

An action filed in federal district court to stay a pending dumping proceeding was dismissed for lack of jurisdiction because tariff litigation has been exclusively conferred on the Customs Court. *Horton v. Humphrey*, 146 F. Supp. 819 (D.D.C.), *aff'd per curiam*, 352 U.S. 921 (1956).

However, cases may arise where a district court may properly enjoin acts by the Secretary of the Treasury when he is threatening action beyond the scope of his authority which may result in irreparable injury to a complainant. *Cottman v. Dailey*, 94 F.2d 85, 89; *cf. Waite v. Macy*, 246 U.S. 606 (1918); *Miller v. Standard Nut Margarine*, 284 U.S. 498 (1932).

According to the Customs Court, Appellate Term, the rule making provisions of the Administrative Procedure Act (APA) apply to dumping proceedings (before Treasury) but the CCPA did not consider this point on appeal. *United States v. Elof Hansson*, 178 F. Supp. 922 (Cust. Ct.), *rev'd on other grounds*, 296 F.2d 779 (CCPA), *cert. denied*, 368 U.S. 899 (1961).

In *Imbert Imports v. United States*, 314 F. Supp. 784 (Cust. Ct. 1970), *aff'd*, 331 F. Supp. 1400 (App. Term Cust. Ct. 1971), the Customs Court said the APA does not apply to dumping proceedings at the Commission. On review, the Appellate Term referred to its previous holding in *Elof Hansson* that the APA did apply to dumping proceedings and then affirmed without need to resort to specifically addressing the issue.

While Treasury was considering whether there were sales at LTFV of television sets, an importer sought to enjoin further proceedings by filing an action in federal district court. The court found "the matter is exclusively within the jurisdiction of the Customs Court" and that the district court did not have jurisdic-

or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported . . . [if such] acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.¹⁶⁵

This statute has apparently never had its sanctions imposed, either by private parties under the treble damage provision or the government under the penal provisions. Many commentators have referred to the difficulty of enforcing the 1916 Act because of the necessity of proving intent, and this is believed by these commentators to be the reason for passage of the 1921 Act.¹⁶⁶ There has been very little activity under this 1916 Act.¹⁶⁷

2. 1921 Antidumping Act

In the Tariff Act of 1921 another antidumping statute was enacted;¹⁶⁸ it provides for enforcement by the Department of the Treasury, both as to sales at less than fair value (LTFV) and injury to a domestic industry. All antidumping proceedings in the United States have proceeded under this statute. The Antidumping Act requires action against dumped goods which

tion. *J. C. Penney v. United States*, 319 F. Supp. 1023 (S.D.N.Y. 1970), *aff'd*, 439 F.2d 63 (2d Cir. 1971).

The CCPA has stated the courts have limited power of review over the Commission's dumping determinations. *City Lumber Co. v. United States*, 457 F.2d 991 (CCPA 1972).

In a dumping proceeding involving television sets, and there had been findings of sales at LTFV and injury, but no dumping duties had been levied, the CCPA affirmed the Customs Court holding of lack of jurisdiction. *Matsushita Elec. Ind. Co. v. United States*, 67 Cust. Ct. 328 (1971), *aff'd*, 485 F.2d 1402 (CCPA 1973).

165. 15 U.S.C. § 72. The last portion of this statute regarding injury reads similarly to the injury portion of 19 U.S.C. § 1337(a) and the pricing portion reads similarly to that of the antidumping statute.

166. Ehrenhaft, *supra* note 144; Barcelo, *supra* note 144; Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 LAW & POL'Y IN INT'L BUS. 85 (1973).

167. One case was decided on procedural issues, *Wagner & Adler v. Mali*, 74 F.2d 666 (2d Cir. 1935). Another case is *New Jersey Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, Civil No. 1706-70 (D.N.J. filed December 21, 1970).

168. Codified as 19 U.S.C. § 160.

cause injury to a United States industry. There is no requirement of predatory intent and there are no "excuse" provisions or exceptions as are provided in the Robinson-Patman Act.

In reviewing the legislative history the Customs Court in *City Lumber v. United States*¹⁶⁹ states:

[T]he court cannot agree with appellants' limited or restricted interpretation of the Antidumping Act. The act was drawn in broad terms and its purpose was clearly to protect a domestic industry from "dumping."

[I]t is well to remember that the 1921 Antidumping Act, as passed by the House of Representatives, would have assessed special dumping duties against any kind of dumping in competition with a domestic industry without requiring a determination of injury. The injury requirement was incorporated into the bill by the Senate Finance Committee, but, as pointed out in that Committee's report, the purpose was to facilitate administration of the law, and not to restrict its operation. See Senate Report 16, 67th Cong., 1st Sess. p. 10. The House conferees agreed to the amendment, and the act was thus passed with the injury determination requirement.

3. GATT

In 1947 GATT was signed. It permitted the signatories to protect domestic industries from dumping violations. Article VI states:

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. . . .

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.¹⁷⁰

169. *City Lumber Co. v. United States*, 311 F. Supp. 340, 347-48 (Cust. Ct. 1970).

170. GATT, art. VI, ¶¶ 1, 2 (October 30, 1947), 61 Stat. pt. 5, at A 11, 55 U.N.T.S. 194 (1950).

Since the U.S. Antidumping Act preexisted GATT, the United States takes the position that by a grandfather clause, U.S. law need not conform to GATT article VI.

4. 1954 Customs Simplification Act

In 1954 under the provisions of the Customs Simplification Act, the injury determination phase was transferred to the U.S. International Trade Commission¹⁷¹ and has remained there since.

5. International Dumping Code

In 1967, the International Dumping Code¹⁷² was developed and most of the GATT Contracting Parties signed, including the United States. However, the United States did not provide legislation to implement this Code and Congress made it clear that the laws of the United States take precedence over the Code. This situation remains today even in view of the Trade Act of 1974,¹⁷³ which amended the United States Antidumping Act.

The Code requires "material" injury, but the United States Antidumping Act only requires a determination of injury or likelihood of injury.

171. Known at that time as the Tariff Commission.

172. Negotiated during the Kennedy Round at Geneva. T.I.A.S. 6431, 19 U.S.T. 4348, *see* 82 Stat. 1347.

For more information concerning the U.S. Antidumping Act, GATT Article VI and the Code, see *Study No. 2 — GATT Provisions on Unfair Trade Practices*, EXECUTIVE BRANCH GATT STUDIES, Senate Finance Committee Print, March 1974 at 25-27.

The Code contains provisions concerning:

(1) *Domestic industry*, which is defined as domestic producers of "like products," the latter being those which are identical with, or have characteristics closely resembling those of the dumped product.

(2) *An industry*, which can be a competitive market area which is less than the entire country under certain circumstances, but then must have injury to almost all of production in the market area.

(3) *Injury*, which is to be material injury to a domestic industry.

(4) *Causation*, which is to be that the dumped merchandise is demonstrably the principal cause or threat of material injury and dumping to be weighed together with other factors adversely affecting the industry.

(5) *Simultaneously* there is to be the injury and the sales at LTFV consideration and at least considered at time of determining whether or not to initiate an investigation.

(6) *Price assurances* by the importer should allow termination. (FINANCE COMM. STAFF CRITIQUE, *supra* note 144, at 4-8).

173. 88 Stat. 1978.

The Code requires that dumped imports demonstrably be the principal cause of material injury while the Antidumping Act states only that injury by reason of dumped imports constitutes a violation.

The Code requires that evidence of injury and dumping be considered simultaneously in considering whether or not to initiate an investigation, and Treasury regulations require allegations of injury as well as dumping.

When the Code was signed, the Senate requested comments from the Commission. The Commission sent its report to the Senate Finance Committee early in 1968.¹⁷⁴

In the Commission report, the majority¹⁷⁵ stated:

It is well settled that the Constitution does not vest in the President plenary power to alter domestic law. The Code, no matter what are the obligations undertaken by the United States thereunder internationally, cannot, standing alone without legislative implementation, alter the provisions of the Antidumping Act or of other United States statutes. As matters presently stand, we believe that the jurisdiction and authority of the Commission to act with respect to dumping of imported articles is derived wholly from the Antidumping Act, and 19 U.S.C. 1337.¹⁷⁶

Since the Code would only permit the assessment of special dumping duties as a deterrent to price discriminations in international trade, the question arises as to whether other remedies and penalties provided for in the unfair trade statutes of the United States must be changed if there is to be a conformity with the Code.¹⁷⁷

174. TARIFF COMMISSION REPORT ON THE INTERNATIONAL DUMPING CODE (1968) [hereinafter, TARIFF COMM'N REP. ON CODE]. Report dated March 13, 1968. This report was requested by asking the Commission to comment on Senate Concurrent Resolution 38, which was introduced to express the sense of Congress that, to the extent the Code was inconsistent with the Antidumping Act, the Code should be submitted to the Senate for its advice and consent and should not become effective in this country until Congress enacts legislation for its implementation. Congress' action was to enact the Renegotiation Amendments Act of 1968, as to which see *supra* note 180 and accompanying text.

175. There was a Tariff Commission 3-2 Commissioner split on the report. The majority included Vice Chairman Sutton, and Commissioners Culliton and Clubb.

176. TARIFF COMM'N REP. ON CODE, *supra* note 174, at 32-33.

177. *Id.* at 28.

Dumping, which is a particular unfair trade practice also known as price discrimination, is condemned in the United States, both in interstate and international trade. The Antidumping Act, 1921, as amended, is only one of several acts of the United States Congress which deal with price discrimination in international trade.¹⁷⁸

In discussing U.S. laws on price discrimination, the Commission said:

Price discrimination in its various forms in international trade would appear to be subject to one or more of the provisions of at least six Federal statutes.¹⁷⁹

And one of the six Federal statutes mentioned was section 337.

In certain areas the Code is not fully consistent with and may conflict with the U.S. Antidumping Act, 1921. Under the Renegotiation Amendments Act of 1968,¹⁸⁰ Congress instructed Treasury and the Commission to "resolve any conflict between the International Antidumping Code and the Antidumping Act, 1921, in favor of the Act as applied by the agency administering the Act." Thus the 1968 legislation permits application of the Code only to the extent it does not conflict with domestic law or limit the discretion of the Commission in making injury determinations.

Concerning the agreement to implement article VI of the GATT:

As a signatory to this agreement, the United States subscribed to the International Antidumping Code on the condition that the code would be applied only to the extent that it did not conflict with domestic law or limit the discretion of the . . . Commission . . . in making injury determinations.¹⁸¹

6. 1968 Amendments

The Antidumping Act, 1921, was amended in 1968 to counteract the effect of *Cottmann v. United States*,¹⁸² which held that

178. *Id.* at 2.

179. *Id.* at 3.

180. Pub. L. 90-634, 82 Stat. 1347.

181. OPERATION OF THE TRADE AGREEMENTS PROGRAM, 27th Rep. USITC Pub. 791 (1975), at 62 n.1.

182. 20 C.C.P.A. (Cust.) 344, *cert. denied*, 289 U.S. 750 (1932).

restricted sales in the home market did not qualify as (in the language of the statute at that time) "freely offered for sale to all purchasers." In view of the fact that foreigners had become sufficiently sophisticated to avoid dumping problems by restricting sales in their home markets, Treasury requested changes in the act.¹⁸³

7. *The Trade Act of 1974*

The Senate Finance Committee Report on the Trade Act of 1974 expressed a desire for more vigorous enforcement of unfair foreign trade practice statutes including "injurious price discrimination" covered by the Antidumping Act, 1921. The amendments were stated to be made to continue and improve effective and vigorous enforcement of "this anti-price discrimination statute."

Section 205 of the Antidumping Act, 1921,¹⁸⁴ was amended by adding a section providing that (1) when sales in the home country were made at less than the cost of production and (2) continued over an extended period of time and (3) in substantial quantities and (4) not at prices permitting recovery of all costs within a reasonable period of time, such sales are to be disregarded. This amendment was added due to concern that "in the absence of such a provision, sales uniformly made at less than cost of production could escape the purview of the Act, and thereby cause injury to United States industry with impunity."¹⁸⁵

The Committee did not define terms such as "technical dumping, industry, injury, causation linkages" because it believed such matters "are adequately treated under existing practices and are best left to individual case determinations without additional statutory guidelines."¹⁸⁶ The Antidumping Act, 1921, is not a protectionist statute but is intended "to free U.S. imports from unfair price discrimination practices." The Committee refers to injury "indicators as suppression or depression of prices, loss of customers, and penetration of the U.S. market."¹⁸⁷

183. *Antidumping, Hearings Before the Senate Comm. on Finance on H.R. 6006*, 85th Cong., 2d Sess. 22-44 (March 26 and 27, 1968). These amendments also require the Department of the Treasury and the Commission to publish notices of their investigations.

184. 19 U.S.C. § 164.

185. FINANCE COMMITTEE REPORT, *supra* note 18, at 173.

186. *Id.* at 179.

187. *Id.*

C. *Dumping*

As early at 1919 the Commission distinguished dumping in the statutory sense (Antidumping Act, 1921) from other price-related unfair competition:

Dumping may be comprehensively described as the sale of imported merchandise at less than its prevailing market or wholesale price in the country of production. The definition derives particular importance from a not infrequent tendency to confuse with dumping ordinary low-price sales, price cutting and severe competition of a legitimate sort, as well as certain other trade practices which are generally considered unfairly competitive.¹⁸⁸

. . .

Broadly speaking, grants and bounties may or may not result in dumping. They should be regarded as aids in that direction rather than the practice itself.¹⁸⁹

This report distinguishes dumping investigations from other unfair competition proceedings (section 337) when it states that "the deceptive use of trade-marks, deceptive imitation of goods, false labeling, exploitation of patents, deceptive advertising and commercial threats and bribery" are different from dumping and "distinguishable phases of unfair competition require divergent legislative treatment from that which is indicated if the consequences of dumping are to be avoided."¹⁹⁰

Ordinary price cutting and underselling are so universal, both in domestic and foreign fields, that it is taken for granted that restrictions are contemplated only when their practice is accompanied by unfair circumstances or by unfortunate public consequences.¹⁹¹

The place of intent in statutory dumping proceedings is stated to be as follows:

It should also be observed that economic conditions are more significant in the development of dumping practices

188. 1919 TARIFF COMM'N ANTIDUMPING REP., *supra* note 132, at 9.

189. *Id.* at 10.

190. *Id.* at 11.

191. *Id.* at 18.

than is any particular intent. . . . In dumping, the intent to injure, destroy or prevent the establishment of an industry, or to restrain or monopolize trade or commerce in the United States, is not necessarily present.¹⁹²

The Tariff Commission reviewed the 1916 Antidumping Act and criticized it for uncertainty in requiring sales in the United States at a price "substantially less" than the actual market value or wholesale price abroad, and in applying its penalties "only to persons who 'commonly and systematically import' foreign articles"¹⁹³ thus making it inapplicable to sporadic dumping; it further criticized the requirement that there must be the intent to injure, destroy, or prevent the establishment of an industry in this country, or to monopolize trade or commerce in the imported articles.

An "industry" under the Antidumping Act, 1921, may be comprised of producers in one geographical region and need not include all domestic producers.¹⁹⁴ While a dumping proceeding was pending concerning cast-iron soil pipe imported from the United Kingdom, an action was filed in federal district court by certain importers requesting a stay of proceedings. That action was dismissed for lack of jurisdiction because tariff litigation has been exclusively conferred on the Customs Court.¹⁹⁵

The court in *Orlowitz* said that the meaning of "industry" was not clear and therefore examined legislative intent. It noted that in 1954 the Finance Committee, in reporting on the Customs Simplification Act, said

The Committee believes, for example, that it should be clear that injury in a particular geographical area may be sufficient for a finding of injury under the Anti-Dumping Act.

For a short period of time, the Commission had used an anti-trust reading of the Antidumping Act, 1921, by stating that sales at LTFV are condemned only when there is an anticompetitive

192. *Id.* at 20.

193. In reading the statute it will be seen that more than common and systematic importing is required — such importing must be at prices substantially less than actual market value in the country of production.

194. *Ellis K. Orlowitz Co. v. United States*, 200 F. Supp. 302 (Cust. Ct. 1961).

195. *Horton v. Humphrey*, 146 F. Supp. 819 (D.D.C.), *motion to affirm granted*, 352 U.S. 921 (1956).

effect and only then can such sales be equated with the concept of "unfair competition."¹⁹⁶

The *City Lumber* case was appealed to the CCPA,¹⁹⁷ and in its affirmance, the court states its view that

intent is a perfectly legitimate matter for the Commission to take into consideration. The statute refers not only to injury but also to likelihood of injury, which clearly envisages future events and the probability of their occurrence according to someone's intent.¹⁹⁸

One commentator has noted:

There is a real economic distinction between the use of dumping as a predatory pricing practice to injure U.S. companies, and as a reaction by the foreign producer to meet the prevailing U.S. price or to go slightly under the U.S. price to gain a foothold. The predatory dumping action more closely resembles the practice feared at the time of the enactment of both antidumping laws; that is, a foreign producer's decision to charge a high, cartel price in the home market, and dump any excess capacity in other markets on an incremental or subsidized pricing basis. The Commission has focused on the impact of the practice on the U.S. industry; it has generally not considered the distinction, made by many commentators, between predatory and more benign forms of dumping.¹⁹⁹

In questioning the need for antidumping legislation, that commentator also notes:

Further, before discarding the antidumping mechanism, serious consideration should be given to the need for an agency possessing special expertise, like the International

196. Titanium Dioxide from France, Inv. No. AA 1921-31, 1963 — no injury; Titanium Dioxide from West Germany, Inv. No. AA 1921-46, 1966 — no injury; White Portland Cement from Japan, Inv. No. AA 1921-38, 1964 — no injury; Chromic Acid from Australia, Inv. No. AA 1921-32, 1964 — injury; Vital Wheat Gluten from Canada, Inv. No. AA 1921-37, 1964 — no injury.

197. *City Lumber Co. v. United States*, 457 F.2d 991 (CCPA, 1972).

198. *Id.* at 997.

199. Applebaum, *The Antidumping Laws — Impact on The Competitive Process*, 43 ABA ANTITRUST L.J. 590, 600-01 (1974).

Trade Commission, to deal with unfair trade practice by importers.²⁰⁰

Another noted commentator has questioned whether there is any need at all for an antidumping law:

Any careful consideration of antidumping laws inevitably raises doubts about the need for such legislation at all, especially in a developed country like the United States, with its bulging armory of antitrust laws. It seems fair to say that dumping has not proved to be the threat anticipated at the turn of the century or during the interwar years. The Robinson-Patman and Sherman Acts in particular give ample protection against predatory practices, even in incipient stages, and there seems little reason from a free trade perspective to demand greater protection or different standards where international as opposed to domestic price discrimination is at issue. Both of these antitrust laws may be enforced against local importers or nonresident foreigners.²⁰¹

VI. PREDATORY PRICING

Predatory pricing is usually defined as low pricing which does not result from legitimate purposes and with the intent of injuring or destroying a competitor.²⁰²

Ruinous competition by lowering prices has been recognized as an illegal medium of eliminating weaker competitors.²⁰³

. . . .

Such price-cutting to capture the market, by eliminating the appellee therefrom, is prohibited by the provisions of the Clayton Act. It was foreign to any legitimate commercial competition.²⁰⁴

200. *Id.* at 605.

201. Barcelo, *supra* note 144.

202. Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234, 237 (2d Cir. 1929), rendered under Section 2 of the Clayton Act.

203. *Id.* at 236.

204. *Id.* at 237.

The Robinson-Patman Act provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to sell, or contract to sell, goods . . . at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.²⁰⁵

The Robinson-Patman Act usually brings to mind price discrimination; but, as can be seen from the above-quoted portion of section 3 thereof, unreasonably low prices are also covered by this statute. One portion of this statute prohibits, as does the original Clayton Act, charging predatorily low prices in one geographic area while maintaining higher prices in another.

Determinations of whether or not there is predatory pricing frequently involve two areas to be examined in each instance:

(1) Are the prices charged (a) below cost, or (b) less than is being charged in another geographic area or another country, and

(2) Is the unreasonably low price being charged with the intent of injuring or destroying a competitor.

As to issue (1) (a), whether or not sales are being made below cost, an economic analysis need be made for such a determination. The results may vary depending upon the particular system of accounting used. Furthermore, there is a variety of meanings which may be given to the term "costs" in "sales below costs." For example, a below-cost price may mean to one economist "a price that fails to cover short-run average *total* cost (as reflected in accounting data), a definition that of course produces a much higher figure than either short-run *marginal* cost or average variable cost."²⁰⁶

Predatory, below-cost, selling could mean that a firm is not maximizing short-run profits. The profit-maximizing output "is that where any increase in output would add more to costs than to revenues and any decrease in output would reduce revenues more than costs. . . . However, not all deliberate sacrificing of short-run profits is illegitimate." According to this theory, a firm with market control should be presumed to have engaged in a

205. 15 U.S.C. § 13a, Section 3 of the Robinson-Patman Act. But see note 89, *supra*, and accompanying text.

206. Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. ECON. REV. 105, 106 (Summer 1971) [hereinafter, Koller].

predatory practice when it prices below its marginal cost or below its average variable cost.²⁰⁷

The determination of whether there are different prices in different areas is usually much simpler. However, complications can arise when the need occurs to take transportation into consideration. The determination becomes even more complex when the two geographic areas are located in two different countries with different duty rates. These considerations are similar to LTFV determinations which the Department of the Treasury makes in antidumping proceedings when comparing the price on the U.S. market with that in the home country or in another foreign market.

A further difficult issue is whether the particular pricing under consideration has been engaged in for the purpose of injuring or destroying a competitor. This will almost never be provable by direct evidence and will usually require the use of inferences. For example, if there appears to be no logical legitimate reason for the particularly low price, an illegal purpose may be inferred, and the burden of explaining away this inference rests with the party charged with predatory pricing.

In considering predatory pricing, it should be noted that "[a]ntitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." *Anheuser-Busch v. Federal Trade Commission*,²⁰⁸ citing with approval *Atlas Building Products Co. v. Diamond Block and Gravel Co.*,²⁰⁹ and *Whitaker Cable Corporation v. Federal Trade Commission*.²¹⁰ This is an important point for inevitably "[c]ompetition . . . is a battle for something that only one can get; one competitor must necessarily lose,"²¹¹ and this is because "competition is, in its very essence, a contest for trade,"²¹² and therefore the Robinson-

207. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of The Sherman Act*, 88 HARV. L. REV. 697, 703-04, 712-13 (1975) [hereinafter, Areeda & Turner].

208. 289 F.2d 835 (7th Cir. 1961).

209. 269 F.2d 950, 954 (10th Cir. 1959).

210. 239 F.2d 253 (7th Cir. 1956).

211. *Sinclair Refining Co. v. Federal Trade Comm'n*, 276 F. 686, 688 (7th Cir. 1921), *aff'd*, 261 U.S. 463 (1922).

212. *United States v. Standard Oil Co. of New Jersey*, 47 F.2d 288, 297 (E.D. Mo. 1931).

Patman Act (section 2(a)) “. . . is not concerned with mere shifts of business between competitors.”²¹³

Under the price discrimination portion of the Act (section 2(a)), the discrimination need not have had an actual adverse effect on competition since it is enough that it “may” have the proscribed effect, meaning a probability thereof.²¹⁴

[A] well-grounded finding of substantial actual present injury might with other facts be a basis for a finding of a reasonable probability or possibility of future adverse effect. . . .²¹⁵

Predatory pricing theory assumes that present lost profits will be more than compensated for after the competitor is eliminated and the monopolist has more freedom to set pricing without the interference of the competitive process or that the present lost profits in one market are compensated for in another market where the alleged violator has greater market control.

However, in recent years this theory has come under increasing attack.²¹⁶ The Robinson-Patman Act has been indicated to be intended to catch price discrimination and predatory pricing at an early stage:

The statute is designed to reach such discriminations “in their incipiency,” before the harm to competition is effected. It is enough that they “may” have the proscribed effect. . . .²¹⁷

Section 3 of the Robinson-Patman Act is a criminal statute and is not an “antitrust law” within the meaning of the Clayton Act and cannot be the basis of a civil action for private damages or injunctive relief.²¹⁸ However, since violations of this section may have the effect or tendency of restraining or monopolizing

213. *Anheuser-Busch v. FTC*, 289 F.2d 835.

214. *Corn Products Refining Co. v. Federal Trade Comm'n*, 324 U.S. 726 (1945).

215. *Anheuser-Busch v. FTC*, *supra* note 210, at 841.

216. *Koller*, *supra* note 206, *Areeda & Turner*, *supra* note 207.

217. *Corn Products v. FTC*, *supra* note 214, at 738.

218. *Nashville Milk Co. v. Carnation Milk Co.*, 355 U.S. 373 (1958).

trade, they nevertheless may serve as the basis for a section 337 violation.

If the price fixed by the defendants for the purchase of machines sold by them is uniform, it may be lower than the price charged by plaintiff for its machines, without subjecting defendants to the charge of lessening competition, creating a monopoly, or injuring or eliminating competition. But a practice of underselling plaintiff in certain territory where plaintiff has an established business and maintaining a higher level of prices in other localities where competition with plaintiff or other companies is not so keen is a practice condemned by the antitrust laws, and is a practice which may permit a remedy to plaintiff if such practices are established upon the trial of this cause, and a resulting damage to plaintiff is proved.²¹⁹

In *A.J. Goodman and Son v. United Lacquer Mfg. Corp.*²²⁰ the Court held that a civil action complaint properly alleged a violation of section 3, as a basis for which plaintiff was claiming triple damages. A contract to sell at an unreasonably low price was sufficient under section 3, as distinguished from other sections which require actual sales.

In an early case it was held that while section 3 was penal in nature, since it "attacks the problem of monopoly and obstruction of competition in interstate commerce, [it] is, therefore, an 'antitrust law' for violation of which civil remedies are given by Title 15 U.S.C.A. §§ 15 and 26."²²¹ The court found that since the plaintiff gas station owners were not engaged in interstate commerce in their retail sales, they therefore were "not within the purview of the Robinson-Patman Act."²²² The gas station owners were found to have themselves been guilty of an antitrust violation (price maintenance) and if they had been engaged in interstate commerce they would be in violation of the Sherman Act. The court said no relief should be granted to assist the carrying out of an illegal agreement.

219. *National Nut Co. v. Kelling Nut Co.*, 61 F. Supp. 76, 81 (N.D. Ill. 1945).

220. 81 F. Supp. 890 (D. Mass. 1949).

221. *Spencer v. Sun Oil Co.*, 94 F. Supp. 408, 410 (D. Conn. 1950).

222. *Id.* at 411.

In finding the term “unreasonably low” prices free of un-constitutional vagueness, the court pointed out that “[c]ost accountancy has reached the exactness of a science.”²²³

The unreasonably low price which the statute considers an evil would rarely, if ever, be an *initial* price, except in the rare instance where it would relate to a product not previously marketed. In most instances, it would involve a sudden and unexpected change of price in a staple article of commerce by one engaged in a competitive field.²²⁴

The court then lists new economic factors which might justify a precipitate price decrease such as changes in the costs of production and demand.

In *Hershel California Fruit Products Co. v. Hunt Foods*,²²⁵ where the primary relief requested was an injunction, the injunction was denied because plaintiffs did not show irreparable harm. There was evidence of good faith lowering of prices. The court discussed the difficulties in attempting to restore competition by use of injunctive relief.

In a private suit for treble damages, *Moore v. Mead's Fine Bread Co.*,²²⁶ under section 3 it appeared defendant had cut its intrastate local prices while maintaining its price in its interstate sales. The court found the evidence to amply support a finding that the local price cutting was intended to eliminate a competitor.

The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. . . . The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. . . .

This type of price cutting was held to be “foreign to any legitimate commercial competition” even prior to the Robinson-Patman Act. See *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234, 237 . . .

It is, we think, clear that Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business, outlawing the price cutting employed by respondent.²²⁷

223. *F&A Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180 (S.D. Cal. 1951).

224. *Id.* at 189-90.

225. 111 F. Supp. 732 (N.D. Cal. 1953).

226. 348 U.S. 115 (1954).

227. *Id.* at 119-20.

In an extremely competitive market where the number of firms in a locality was reduced to two and overall sales were still decreasing, one firm reduced prices to increase volume and decrease unit cost and one firm initiated a treble damage action where the only question was "whether uniform price reductions violated the unreasonably low price provisions of section 3 of the Robinson-Patman Act."²²⁸ The court stated:

[O]ne who consistently sells at unreasonably low prices is vulnerable to the inference that he is doing so for the proscribed purpose of destroying competition or eliminating a competitor.

We cannot say, however, that a pricing policy based upon sound economics is inadmissible simply because it may result in the destruction of a competitor, for it is not within the scope or purpose of the antitrust laws to protect a business against loss in a competitive market. . . . If, as the trial court held, the price reductions on domestic coal were made to increase volume and decrease unit cost in order to retain its proportionate share of a diminishing market, the appellees were certainly within the law. *In the final analysis, the question resolves itself into one of intent and purpose, not a choice of accounting methods.* (emphasis supplied)²²⁹

In *Nashville Mills Co. v. Carnation Co.*²³⁰ the Supreme Court, for the first time, considered whether section 3 was one of the antitrust laws, the violation of which could lead to private causes of action, or whether it was strictly penal in nature. In a 5-4 decision the majority stated:

It is not an idle conjecture that the possibility of abuse inherent in a private cause of action based upon this vague provision was among the factors which led Congress to leave the enforcement of the provisions of § 3 solely in the hands of the public authorities. . . .

[W]e should not read the Robinson-Patman Act as subjecting violations of the "unreasonably low prices" provision of § 3 to the private remedies given by the Clayton Act.²³¹

228. *Ben Hur Coal Co. v. Wells*, 242 F.2d 481, 483 (10th Cir. 1957).

229. *Id.* at 486.

230. 355 U.S. 373 (1958).

231. *Id.* at 378-79.

And the Court held "that a private cause of action does not lie for practices forbidden only by § 3 of the Robinson-Patman Act."²³² The dissent, however, points out:

As the [majority of the] Court notes, it appears that the Department of Justice has never enforced the criminal provisions of § 3 of the Robinson-Patman Act. Because of the Court's holding that § 3 is not available in civil actions to private parties, the statute has in effect been repealed. It is apparent that the opponents of the Robinson-Patman Act have eventually managed to achieve in this Court what they could not do in Congress.²³³

In 1959 the Tenth Circuit Court of Appeals in *Atlas Building Products v. Diamond Block & Gravel*²³⁴ said:

Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, it is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor. For surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor.

And, as to the inferences of predatory prices in view of the acts complained of, the Court said:

It is significant, we think, that the appellant was the largest manufacturer and supplier of cinder concrete blocks in this territory. It enjoyed a virtual monopoly in El Paso County, and possessed the dominant market power in nearby counties in New Mexico, including Dona Ana County. In this setting, it is fairly inferable that the appellant utilized its higher El Paso prices to stifle competition with its lower prices in the Las Cruces area. In other words, that the appellant utilized its dominant market power for predatory ends.²³⁵

232. *Id.* at 382.

233. *Id.* at 387-88.

234. 269 F.2d 950, 954 (10th Cir. 1959).

235. *Id.* at 956.

As to proof, the jury at the district court level had properly been instructed that even though the pricing policy of the party charged with illegal pricing was actionable at law, "the burden was on the [charging party] to establish by a preponderance of the evidence that the losses, if any, were proximately caused by such price discriminations"²³⁶ and not for other reasons. The jury had been clearly instructed "that there must be a causal connection between the losses sustained, if any, and the unlawful acts."²³⁷

Many times one competitor charges another with illegal pricing policies by arguing that the competitor sells at a price lower than plaintiff's cost. That this is not a sufficient basis for a holding of illegality is clear from *Gold Fuel Service v. Esso Standard Oil*:²³⁸

The appellant here has conceded that it has no evidence of such intention except an inference it would draw from the fact that [defendant's] ultimate bid was less than what it would cost appellant and other middlemen to purchase and deliver the commodity in question. This is not, in our view, a permissible inference. If allowed, it would make every bid lower than a competitor's cost a sufficient basis for a finding of attempted monopoly.

Section 3 "was aimed at a specific weapon of the monopolist — predatory pricing" and is not unconstitutionally vague.²³⁹ Failure to demonstrate causation will prevent recovery.²⁴⁰

In *Utah Pie v. Continental Baking*²⁴¹ the Court said a party could lower its price in view of below-cost pricing by a competitor and still have the trier of fact consider "the potential impact of [the competitor's] price reduction absent any responsive price cut by [such party]."²⁴²

It is interesting that the Court (as the International Trade Commission in certain cases) disagrees with the apparent view of the court of appeals "that there is no reasonably possible

236. *Id.* at 957.

237. *Id.* at 958.

238. 306 F.2d 61, 64 (3d Cir. 1962).

239. *United States v. National Dairy Products*, 372 U.S. 29, 34 (1963).

240. *Shore Gas & Oil v. Humble Oil & Refining*, 224 F. Supp. 922 (D.N.J. 1963).

241. 386 U.S. 685 (1967).

242. *Id.* at 699.

injury to competition as long as the volume of sales in a particular market is expanding and at least some of the competitors in the market continue to operate at a profit."²⁴³ And as to the future, the statutory test is one that necessarily looks forward on the basis of proven conduct in the past.²⁴⁴

In one of the most significant decisions involving predatory pricing, *International Air Industries v. American Excelsior*,²⁴⁵ predatory pricing was defined:

By "predatory" we mean that AMXCO must have at least sacrificed present revenues for the purpose of driving Vebco out of the market with the hope of recouping the losses through subsequent higher prices.²⁴⁶

In reviewing previous decisions the court said:

Judicial use of the term "predatory intent" is troublesome. Several cases hold that from a finding of certain actions, the trier of fact may infer predatory intent, and from this inference the proscribed inimical effects upon competition in turn may be inferred. However, application of these principles is particularly difficult, for predatory intent has never been clearly defined. Its appearance has been characterized by phrases such as "putting a crimp" into one's competitors, punitively or destructively attacking other firms, and acting vindictively with punitive effect. But any price decrease by a legitimately competitive firm will necessarily have a nonremunerative effect upon other firms in the market, if only by decreasing their profit margins. It is therefore important to clearly indicate the types of business behavior which violate the Act.²⁴⁷

The court then cited with approval and discussed the position of certain commentators.²⁴⁸ However, a different view has also been presented.²⁴⁹

243. *Id.* at 702.

244. *Id.* at 703.

245. 517 F.2d 714 (5th Cir. 1975).

246. *Id.* at 723.

247. *Id.* at 722-23.

248. Areeda & Turner, *supra* note 207.

249. Scherer, *Predatory Pricing and The Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976). This article is commented upon: Areeda & Turner, *Scherer On*

The U.S. Department of Justice has expressed doubt about the effectiveness of the Robinson-Patman Act in accomplishing its intended results:

Recent empirical studies, however, have shown that genuine predation, *i.e.*, pricing below shortrun marginal costs, is rare. Moreover, such predation which can actually threaten competition and consumer well-being does not require the Robinson-Patman Act for prevention since it can be reached independently under the Sherman Act.²⁵⁰

VII. ANALYSIS OF THE RELATIONSHIP OF COUNTERVAILING DUTIES AND ANTIDUMPING LAW TO COMMISSION'S SECTION 337 JURISDICTION

The ultimate problem is for the Commission — and eventually the courts — to decide the extent of Commission jurisdiction in the area.

A. GENERAL

An examination of the statute disclose three portions which are pertinent to the jurisdiction problem:

(1) "when found by the Commission to exist shall be dealt with, in addition to any other provisions of law."²⁵¹

(2) "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."²⁵²

(3) "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 1303 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."²⁵³

Predatory Pricing: A Reply, 89 HARV. L. REV. 891 (1976), and this is responded to: Scherer, *Some Last Words On Predatory Pricing*, 89 HARV. L. REV. 901 (1976).

250. UNITED STATES DEP'T OF JUSTICE REPORT ON THE ROBINSON-PATMAN ACT, 1976, at 164-65.

251. 19 U.S.C. § 1337(a).

252. 19 U.S.C. § 1337(b)(1).

253. 19 U.S.C. § 1337(b)(3).

Whether or not one finds these three portions of the statute clear and not in conflict, it must be recalled that portion 1 was already part of the statute prior to the amendments effected by the Trade Act of 1974, but that portions 2 and 3 were added. Portion 1 had previously, and for a long period, been interpreted by the Commission as not requiring it to conduct an investigation when the allegations could be dealt with by the courts or another agency.²⁵⁴

The CCPA has recently²⁵⁵ stated:

Long-established administrative practice may bear on the construction of the tariff laws . . . However, this court has recognized such practice to be comparable to other extrinsic aids to ascertaining legislative intent which come into play when the construction of a statutory provision is in doubt.²⁵⁶

When Congress reenacted portion 1 it incorporated the Commission's construction. The CCPA in *Commonwealth Oil* cites with approval *C.J. Tower & Sons v. United States*²⁵⁷ and states that there:

[T]he court also recognized the reenactment of an ambiguous statute without substantive change to have incorporated the administrative construction where that construction had been followed consistently for a long time.²⁵⁸

The addition of portions 2 and 3 would seem to allow for a construction consistent with past Commission practice. It therefore seems that the pertinent portions of the statute are not clear and, as the CCPA has said, "the statutory provisions at issue are ambiguous as to the intended scope . . . [and] [r]esort to extrinsic aids in ascertaining the legislative intent is therefore warranted in this case."²⁵⁹

254. See *supra* notes 21–50 and accompanying text.

255. *Commonwealth Oil Refining v. United States*, 480 F.2d 1352 (CCPA 1973).

256. *Id.* at 1361.

257. 44 CCPA (Cust.) 41, 44, C.A.D. 634 (1957).

258. *Commonwealth Oil Refining v. United States*, *supra*, 480 F.2d at 1361. The Court also pointed out that "an administrative practice prejudicial to the importer shown to be clearly erroneous would be reversible despite its age." *Id.* at 1361.

259. *Id.* "Although this language [of section 337(b)(3)] logically indicated a Congressional intent for the Commission to refrain from investigating matters within the purview of the antidumping and countervailing duty laws, it is not without some

An examination of legislative intent shows that “[i]t 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.”²⁶⁰

B. *The Commission Alternatives*

1. *The Commission could refuse to exercise jurisdiction.*

The Commission could refuse to exercise jurisdiction on the basis that the recent amendments make it clear that Congress did not wish to have agency duplicative proceedings, as voiced, for example, in the Finance Committee Report which states the expectation that the Commission’s practice of not investigating matters clearly within the purview of either section 303 or the Antidumping Act would be continued.²⁶¹

This action would be in accord with Commission action in the Almond investigation, which was dismissed by the Commission because

[t]he Commission has never considered dumping within the meaning of the Antidumping Act of 1921 as constituting a basis for action either under section 337 of the Tariff Act of 1930 or its antecedent provision section 316 of the Tariff Act of 1922.²⁶²

It would also be in accord with a later case, *Ceramic Wall Tile*, in which the complainant alleged violations of the antidumping and antitrust laws. In dismissal the complaint the Commission stated that a section 337 investigation was not warranted “unless the acts or practices complained of have been dealt with under the antitrust laws or section 5 of the Federal Trade Commission Act and the relief afforded under these statutes has been found wanting.”²⁶³

ambiguity. Therefore, resort may appropriately be had to the legislative history of the amendment for clarification.” *Color TV Sets*, *supra* note 9, letter of September 24, 1976 from William E. Simon, Secretary of the Treasury.

260. FINANCE COMMITTEE REPORT, *supra* note 18, at 195.

261. *Id.*

262. Almonds, *supra* note 30.

263. *Ceramic Wall Tile*, *supra* note 49. In *Color TV Sets*, *supra* note 9, the Federal Trade Commission suggested the ITC dismiss the complaint:

We understand that the issue of continued exercise of jurisdiction over the complaint is now before the ITC in the form of respondents’ motion to dismiss.

However, the difficulty with this position is that it emasculates the statute, as has happened in the past. The reason for the long period of inactivity under section 337 during the years

Insofar as the amended complaint relates to predatory pricing practices, whether or not undertaken in concert or as a part of a conspiracy, we believe the alleged unlawful activities fall within the purview of separate statutory procedures for dealing with dumping activities or improper export incentives. We urge the ITC to adhere to these procedures and notify the Department of the Treasury as prescribed by Section 337(b)(3) of the amended Tariff Act. Moreover, in the absence of specific allegations of conspiratorial activity going beyond predatory pricing, we urge the ITC to consider the wisdom of continued exercise of jurisdiction over this matter, particularly where continued proceedings would unnecessarily compel Respondents to appear before two different agencies with respect to the same issues. . . . In any event, the allegations in the subject proceedings are directed against unfair acts which result in predatory prices. One remedy which could deal with this problem would be the imposition of an additional import duty to offset the unfair pricing practice — and such a remedy is available to the Secretary of the Treasury under the Antidumping Countervailing Duty laws.

. . . .

. . . . Therefore we respectfully urge that . . . the complaint be dismissed insofar as complainants fail to allege any additional specific conspiratorial acts within the jurisdiction of the ITC.

Id., letter of August 27, 1976, from Charles A. Tobin, Secretary, FTC.

The Department of Justice has taken the position in Color TV Sets that the allegations dealing with receipt of economic benefits should be dismissed as a matter of law and that the allegations of predatory pricing should be dismissed as a matter of policy. As to receipt of economic benefits, the Justice Department believes enforcement by Treasury Department to be the exclusive remedy.

Second, for the Commission to proceed here would lead to difficulties of inconsistent dual enforcement. Complainants unsuccessful with Section 303 cases at Treasury would have another opportunity to seek redress denied by the primary enforcement agency, harassing adversaries and undermining a final resolution of issues.

Id. As to dumping, the Justice Department stated:

There may be situations where a complainant can show conduct unrelated to predation or below-cost pricing. Such a pleading could raise issues of unfair competition beyond the dumping issue which would make the complaint viable even under Section 337(b)(3), but the amended complaint does not appear to be one such. The Commission should be able to recognize the difference, early in a proceeding, between true unfair competition allegations and ones which appear to be nothing more than "lesser included offenses" which, in themselves, do not even rise to the level of consummated dumping. . . .

. . . .

The investigation now being conducted by Treasury should be the exclusive avenue for examination of below-cost or unreasonably low-cost pricing complaints regarding Japanese television receivers outside of private litigation. . . .

. . . .

A second concern is the possibility that domestic firms faced with vigorous foreign competition could, if the Commission permitted it, file simultaneous dump-

1940-1968 is in large part explained by the Commission's willingness to dismiss complaints whenever a concurrent case was pending in another agency, in the courts, or if action appeared to be available in another forum and it had not yet been demonstrated to the Commission that this other action was inadequate. (For example, *Ceramic Wall Tile*.) It would appear from the Trade Act of 1974 amending section 337 that Congress did not intend that the Commission gradually sink back to its quiescent state of virtual non-action,²⁶⁴ but rather that when unfair acts in connection with imported goods are involved the Commission "shall" ensure that appropriate action is quickly taken.

Furthermore, if the Commission were to take this position now, it would be difficult to change to a different position in the future. While the Commission has been free to change its positions in the past, in view of the type of court review of commission actions now provided, the Commission must plan on contending with *stare decisis* and the holdings of the courts when reviewing agency decisions which tend to use previous agency decisions over long periods of time as precedent.²⁶⁵

Therefore, it would appear that the first alternative (refusing jurisdiction) would not be workable.

2. *The Commission could refuse to take jurisdiction until after Treasury has acted.*

While this alternative would appear at first blush to be a reasonably workable solution, it is difficult to reconcile taking such action with congressional intent as expressed with passage of the Trade Act of 1974, which clearly indicates that expeditious action is to be taken by the Commission:

ing, countervailing duty, private actions, and 337 cases on the basis of unsupported allegations of pricing, bounties or grants, or conspiracies and thus subject importers to substantial expense and harassment which may unfairly damage their competitive position. We believe it should be the policy of the Commission either to defer to primary agencies or forums for resolution of issues where they believe this possibility may exist, or, at the very least, make extensive use of procedural devices such as dismissal, summary judgment and early offers to proof, quickly to establish substantiality of a complainant's broad allegations.

Letter of Sept. 24, 1976, from Jonathon C. Rose, Deputy Assistant Attorney General.

264. "The Commission *shall* investigate *any* alleged violation of this section on complaint under oath or upon its initiative." 19 U.S.C. § 1337(b)(1) (emphasis supplied).

265. *Commonwealth Oil Refining v. United States*, *supra* note 255.

[I]t is the intent of the Committee that investigation be commenced by the Commission as soon as possible after receipt of a properly filed petition.²⁶⁶

Further difficulties would arise at the time Treasury had completed its investigation and forwarded its findings to the Commission for its injury determination, since the Commission would then have two separate although related investigations.²⁶⁷

It does not appear that the Commission would wish to exercise jurisdiction over a purely countervailing duty matter. For example, in *Color TV Sets*, the Commission stated:

[W]e are not convinced that an adjudication under section 337 of the receipt of economic benefits and incentives from the Government of Japan in furtherance of an unlawful attempt or conspiracy to restrain or monopolize trade and commerce in the United States necessarily involves a determination of whether the benefits or incentives are unlawful *per se* — a matter which may be within the purview of section 303.²⁶⁸

Later in that same opinion the Commission says:

Accordingly, the Commission is not persuaded at this time that the adjudication under section 337 of the alleged use of economic benefits and incentives received from the Government of Japan in furtherance of a scheme to restrain or monopolize commerce in the United States necessarily involves an adjudication of whether the benefits and incentives are unlawful *per se*, a matter which may be within the purview of section 303.²⁶⁹

Despite the portions of the Commission's *Color TV Set* opinion to the effect that its adjudication in that case would not

266. FINANCE COMMITTEE REPORT, *supra* note 18, at 194.

267. And only one under the APA. This problem is presently facing the Commission in *Swimming Pools*. In the section 337 investigation, the Presiding Officer issued his R.D. on February 10, 1977 and the Commission is now considering the matter (including predatory pricing). On April 1, 1977 (42 Fed. Reg. 17558) Treasury announced its determination of sales at LTFV and referred the matter to the Commission for its injury determination. Should the Commission be able to issue its decision and opinion in the section 337 investigation shortly and prior to initiating action on the dumping injury investigation, it will have avoided the problem in this case.

268. *Color TV Sets*, *supra* note 9, at 5-6.

269. *Id.* at 7.

involve a *per se* determination of whether certain foreign government benefits were unlawful under U.S. law (stating that this was "a matter which may be within the purview of section 303"), the question remains open as to whether the Commission would consider such a *per se* determination under its section 337 jurisdiction.

The Commission has said:

Respondents in this investigation contend that an adjudication by the Commission of the complainants' allegations requires an adjudication of issues of dumping and bounties and grants, matters within the purview of the Antidumping Act, 1921, and section 303 of the Tariff Act of 1930, both of which are administered in part by the Department of the Treasury. They further contend that Congress did not give the Commission jurisdiction under section 337 to adjudicate matters which may be within the purview of these acts. The Commission cannot agree with either of these contentions.²⁷⁰

The Commission does not appear to concede that the issue in that case either dealt with dumping and bounties and grants

270. *Id.* at 4. In *Color TV Sets*, *supra* note 9, the Treasury Department stated its view that the Commission may take the receipt of economic benefits by Respondents and predatory pricing allegations into consideration, but only by accepting the findings of Treasury.

This is not to say that, in view of the Treasury Department, the Commission, in pursuing an investigation under section 337, is foreclosed from taking into account any dumping or subsidy practices that may have existed as it examines a broad variety of trade activities in an effort to determine whether there has been a violation of section 337. Rather, it is our view that insofar as dumping or bounty or grant allegations are made in the context of an investigation under section 337, the Commission cannot investigate such allegations independently or look behind any conclusions reached by the Treasury Department, but must refer such allegations to Treasury if the Department has not previously investigated them and must accept the conclusions of the Department on such allegations whenever they have been investigated.

....

Accordingly, I hope that the Commission, taking these views and those expressed by others into account, will limit its present investigation to substantive matters over which it, and not the Treasury Department, has jurisdiction. To the extent that matters in the antidumping and countervailing duty area are relevant to the Commission in its investigation, I trust that the Commission will either accept the conclusions of the Treasury Department where investigations have been conducted, or refer to us unresolved questions.

Id., letter of September 24, 1976, from William E. Simons, Secretary of the Treasury.

or that the Commission could not adjudicate such matters. The reasoning of this opinion suggests that the Commission believed that more than dumping or bounties and grants was involved.

And as to the quoted second contention of Respondents:

As to respondents' second contention, that Congress did not give the Commission jurisdiction under section 337 to adjudicate matters that may be within the purview of the Antidumping Act or section 303, the Commission is of a different view.²⁷¹

The Commission explains:

[S]ection 337 is an authority of concurrent jurisdiction with all other statutes applicable to unfair practices in import trade.²⁷²

It would appear that when the Commission has occasion to determine whether government bounties or grants are such unfair practices it could well find they are not. However, this would not be the case in typical dumping matters.

The Commission noted legislative history referring to the Commission's practice of not investigating matters clearly under the countervailing duty or Antidumping Act stating:

This expression of Congressional intent suggests that the Commission should, in a manner consistent with law, avoid imposing the burden of simultaneous and possibly duplicative investigations of matters that are "clearly" within the purview of section 303 or the Antidumping Act.²⁷³

The Commission explains its view of this language as meaning, "This legislative history, however, is not a substantive limitation on the Commission's jurisdiction under section 337, as amended."²⁷⁴ The Commission then defines its "practice," as mentioned by the Senate Finance Committee, as referring to "correspondence and other inquiries alleging the suspected existence of dumping or export subsidization" being "routinely routed to Treasury, as they are today."²⁷⁵ Unfortunately, no specific examples of the

271. *Id.* at 8.

272. *Id.*

273. *Id.* at 11.

274. *Id.*

275. *Id.*

practice referred to were set forth either by the Senate Finance Committee or the Commission. The earlier section herein on section 337 history in conjunction with the Senate Finance Committee statement would indicate that the Commission should not investigate such matters. This does not mean it should necessarily refuse jurisdiction, but only that to "avoid imposing the burden of simultaneous and possibly duplicative investigations of matters that are 'clearly' within the purview of Section 303 or the Antidumping Act" the Commission should suspend action on at least those portions of its investigation pending completion of Treasury's investigations.

This statement by the Commission appears to admit the possibility of the Commission's refusing jurisdiction until Treasury has completed its handling of the matter. The theory would be, as stated in the Commission's *Color T.V. Set* Memorandum Opinion, that if action by Treasury has eliminated the unfair act, then there would be no need for the Commission to exercise section 337 jurisdiction.

Does the imposition of dumping duties eliminate the unfair act or does it merely lessen the effect of the unfair act on competition? Since, in a dumping matter, it is the injury and not the intent which is determinative, the Treasury's remedy may well be unsuitable to protect competition, yet adequate under the Antidumping Act. Since predatory pricing is a violation of the unfair competition or antitrust laws (violation of section 3 of the Robinson-Patman Act or section 1 of the Sherman Act) which includes as an element the intent to injure competition, will Treasury's remedy prevent the continued violation of section 337? This can be distilled into the threshold question of whether it is the price to the customer in the United States or the price charged by the alleged violator which need be examined. The price charged by the alleged violator presumably remains the same; however, since Treasury will have to impose dumping duties, the price to customers will no longer be at predatory levels. We believe that in the situation presented, where the section 337 complaint alleges no more than that which Treasury examines in an antidumping investigation, the imposition of dumping duties may well eliminate any violation under section 337.

This solution would appear to be satisfactory only when limited solely to matters clearly within the purview of the Antidumping Act. If matters not clearly within the Antidumping Act are alleged, it does not appear to be a satisfactory solution for

the Commission to refuse to take jurisdiction pending completion by Treasury of its investigation.

Treasury's completion of investigation is meant to be that point when Treasury has finally disposed of the dumping problem. This means that Treasury has made its dumping finding, has referred the matter to the Commission, that the Commission has found injury caused by the dumping, and that Treasury has actually assessed dumping duties.

For dumping purposes a finding of dumping plus injury is sufficient, and intent does not play a part in the violation. To establish a predatory pricing violation, on the other hand, intent is of the essence of the violation. It may occur that the Commission would find in its dumping investigation that there is no injury, while based on a section 337 complaint on the same matter, it may find an intent to injure competition. In these circumstances, it would appear that dumping duties could not be assessed, but the Commission could find a section 337 violation. In this event, it would not serve the public interest for the Commission to withhold taking any action in a section 337 proceeding while Treasury is conducting its antidumping investigation.

The problem becomes even more difficult when the Commission is considering the likelihood of injury to the domestic industry under the Antidumping Act. This is true since a determination of "likelihood" requires an examination of "intent" to a certain extent. However, the "intent" examined under the Antidumping Act is an intent to continue the price variance, whereas the intent necessary under section 337 (established antitrust law) is an intent to injure competition. Indeed, there may be instances where an article is being sold in the domestic market and the foreign market for the same price, which is below the cost of production. In these circumstances, there would be no actual price differential,²⁷⁶ and the wrongfulness of the situation would rest on the unlawful intent to injure competition. Likewise, there may be instances where there are substantial price differentials and there is injury to the domestic industry (or likelihood of injury to the domestic industry) notwithstanding the fact that there is no intent to injure competition.

Therefore, withholding the Commission's exercise of jurisdiction pending the dumping finding would appear to be possible

276. According to section 204(d) of the Trade Act of 1974 amending 19 U.S.C. § 164, this situation might be handled in an antidumping proceeding at Treasury.

and sometimes desirable in purely dumping matters. However, if predatory pricing (intent to injure a competitor) is an issue in a section 337 proceeding, the Commission should consider proceeding immediately with its investigation into that matter. The Commission appears to recognize this as a workable solution when it states:

The Commission may, pursuant to section 337(b) (1), suspend its section 337 investigation pending the outcome of any proceedings under those statutes. At the completion of any such proceedings, the Commission may consider the evidence obtained and, where appropriate, take official notice of the findings, in continuing with its section 337 investigation as the facts warrant. If the only matters alleged in the section 337 investigation fall "clearly within the purview" of the Antidumping Act or section 303, then action taken under either of those statutes may dispose of the alleged unfair trade practices and the resultant injury.²⁷⁷

3. *The Commission can take jurisdiction immediately.*

There are two options to this solution, inasmuch as the Commission can take jurisdiction without limitation or may take jurisdiction with certain limitations on its investigation.

At the conclusion of the consideration of the preceding alternative, a situation was hypothesized which would appear to require the Commission to take jurisdiction under section 337 and restrict its inquiry to matters which are not clearly within the purview of the Antidumping Act. For the reasons already set forth in the preceding section, this would appear to involve solely the findings of the investigation by Treasury as to whether or not there is dumping and, if so, the margins thereof. While Treasury is conducting its investigation, the Commission may proceed to investigate predatory pricing, particularly the element of intent.

If this is done, it will mean simultaneous proceedings by Treasury and the Commission, although directed to different

277. *Color TV Sets*, *supra* note 9, at 12. The Commission, however, must exercise great caution in considering evidence from other proceedings or in taking official notice of them, with a view to ensuring compliance with the APA. Also, in antitrust type cases there may be no "resultant injury" in a section 337 context, to have been disposed of.

aspects of the problem. Assuming that Treasury finds dumping, it would then refer the matter to the Commission for a determination as to whether or not there is injury caused by the dumping. At this stage, the Commission would find itself handling a section 337 investigation and a dumping investigation at the same time concerning similar fact situations. In the past, when faced with a similar situation (a section 337 investigation and an industry investigation under section 201), the Commission suspended its section 337 proceeding until it completed the industry investigation and had sent its report to the President. At that time it resumed its section 337 proceeding. This occurred in *Color TV Sets*.²⁷⁸ The statutory time limit of one year was tolled

278. In *Color TV Sets*, *supra* note 9, the Department of State suggested the Commission take jurisdiction but limit its investigation pending the results of the Treasury Department as to matter within the purview of the antidumping and countervailing duty laws.

It is our view that practices which fall within the purview of the antidumping or countervailing duty laws can also be elements of broader practices with respect to which the Commission is empowered to grant relief under section 337 of the Tariff Act of 1930. At the same time we strongly believe, based on both policy and legal grounds, that the Commission must refer these specific elements to the Department of the Treasury for purposes of investigation. The Commission can then determine whether relief is appropriate under section 337, based on new investigations or rulings by Treasury and any investigation by the Commission of other alleged practices.

. . . .

A decision to proceed with the investigation in this case would represent an especially embarrassing example of abuse of governmental processes. In two diplomatic notes to the Department of State, the Government of Japan has pointed out that the investigation, because it embraces issues which have already been the subject of separate antidumping and countervailing duty investigations and of current antitrust litigation, places an unjustifiable and serious burden on the respondent companies.

. . . .

The Commission should therefore, decide whether the complaints before it sufficiently state a claim which goes beyond the purview of the antidumping and countervailing duty laws. If they do not it should refer the complaints to the Treasury and terminate its investigation of them. If they do, it should still refer charges which fall under these laws to the Treasury and should investigate the remaining allegations. Based on its findings and those of Treasury, it can grant or deny relief under section 337, as appropriate.

Id., letter of September 24, 1976, from the Department of State. This view is re-enforced by that of the Special Representative For Trade Negotiations:

The Office of the Special Representative for Trade Negotiations strongly urges that the Commission's investigation be confined to allegations of practices that are clearly beyond the scope of the Antidumping Act, 1921, and the counter-

during the time the section 337 investigation was under the self-imposed suspension.

As the Commission points out, section 337 (b) (3) seems to be worded to parallel section 201 (b) (6), which states:

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 provision 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.²⁷⁹

vailing duty law (Section 303 of the Tariff Act of 1930, as amended). We urge that the Commission take this position both on grounds of law and policy.

Insofar as the complaint rests on allegations of dumping within the purview of the Antidumping Act, we believe that the Commission should rely upon the findings which have been made by the Department of the Treasury in this matter. Similarly, insofar as subsidization is alleged within the scope of the countervailing duty law, we would submit that the Commission should rely for this aspect of the investigation on the findings of the Treasury Department. If further unresolved questions are deemed to exist under these statutes, they should be referred to the Treasury Department for further consideration. It would be for the Commission to determine whether the investigation of conspiracy, monopoly, or other unfair trade practices should continue independently prior to a further determination being made by the Secretary of the Treasury, if any is required.

I do not presume to advise the Commission as to whether the separation of the dumping and subsidization allegations from the section 337 complaint would require the Commission to abandon this investigation, as maintained by the Presiding Officer in this investigation. This office is confining its comments to recommending in the strongest terms that the Commission limit its present investigation to matters not falling within the scope of the Antidumping Act and the countervailing duty law. If the Commission determines, however, that matters falling within those two statutes constitute necessary elements in a broader investigation of unfair practices, I urge that it rely upon the determination of the Secretary of the Treasury to establish those particular unfair trade practices, rather than conduct a separate independent investigation on these matters.

Id., letter of September 24, 1976.

279. Pub. L. No. 93-618, § 201(b) (6), 88 Stat. 2013.

This latter section has been explained to mean:

[T]he Tariff Commission will be required whenever in the course of its investigation it has reason to believe that the increased imports are attributable in part to circumstances which come within the purview of the Antidumping Act, countervailing duty statutes (Section 303 of the Tariff Act of 1930), or the unfair import practices statutes (Section 337 of the Tariff Act of 1930) or other remedial provisions of law, promptly to notify the appropriate agency so that such action may be taken as is otherwise authorized by such provisions of law. Action under one of those provisions when possible is to be preferred over action under this chapter.

This provision is designed to assure that the United States will not needlessly invoke the escape-clause (article XIX of the GATT) and will not become involved in granting compensatory concessions or inviting retaliation in situations where the appropriate remedy may be action under one or more United States laws against unfair competition for which action no compensation or retaliation is in order.²⁸⁰

Later in its report the Way and Means Committee again explains that in the course of a section 201 investigation the Commission is promptly to notify the appropriate agency if 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 . . . so that such action may be taken as is otherwise authorized by such provisions of law."²⁸¹

One difficulty facing the Commission in attempting to comply with this legislative intent is that the statute appears to prevent it from so doing. Section 201 (d) (2) provides:

The report of the Commission of its determination under subsection (b) shall be made at the earliest practicable time, but not later than 6 months after the date on which the petition is filed . . .²⁸²

280. WAYS AND MEANS REPORT, *supra* note 118, at 47. The SENATE FINANCE COMMITTEE REPORT, *supra* note 18, contains virtually the same language at 122-23.

281. *Id.* at 112.

282. Pub. L. No. 93-618, § 201(d)(2), 88 Stat. 2013.

The Commission's conclusion is:

Just as the Commission does not construe section 201 (b) (6) as a limitation on the jurisdiction of the Commission under section 201, it does not view section 337 (b) (3) as a limitation on the broad jurisdiction of the Commission under section 337.²⁸³

In examining the possibilities and technicalities involved with this alternative, it appears that the Commission has already set sail on the course we have outlined above. In *Welded Steel Tubes*²⁸⁴ it was questioned whether the complaint had sufficient allegations for a section 337 investigation to be properly initiated, and whether the matter possibly should be handled by Treasury as a dumping matter. The Commission took the unique step of conducting a public hearing prior to making its determination as to whether or not an investigation should be instituted. At the hearing, the complainant and respondents agreed that a dumping matter was not presented. Rather, the arguments related to whether an antitrust conspiracy had been alleged. The respondents and the Department of Justice²⁸⁵ took the position that a conspiracy had not been properly alleged and that an investigation should not be instituted. However, the Commission proceeded to institute an investigation.²⁸⁶

It appears that the Commission should require specific detailed factual pleadings when predatory pricing allegations are

283. Color TV Sets, *supra* note 9, at 11.

284. *Welded Steel Tubes*, USITC Inv. No. 337-TA-29. Complaint filed November 15, 1976.

285. *Id.* Transcript of hearing of January 26, 1977.

286. *Id.* Notice of Investigation, 42 Fed. Reg. 10348. The Commission after instituting a section 337 investigation on February 22, 1977, notified Treasury on March 2, 1977, that the section 337 complaint filed in Stainless Steel Tubing, may involve matters coming within the purview of the Antidumping Act, 1921. Previously, in 1972, Treasury, in an antidumping investigation concerning the same products, had determined that in view of formal assurances "from the manufacturers that they would make no future sales at less than fair value" and that this constituted "evidence warranting the discontinuance of the investigation" (37 Fed. Reg. 15742, August 4, 1972), the investigation was discontinued (37 Fed. Reg. 24838, November 22, 1972). Based on the information received from the Commission, the investigation was reopened by Treasury (42 Fed. Reg. 16883, March 30, 1977). That same day respondents at the Commission filed a motion to terminate and dismiss and in the alternative to suspend the pending section 337 investigation. (Motion filed March 30, 1977, Motions 29-37 and 29-40. As this article goes to press the matter is being briefed before the Presiding Officer.)

made. This is necessary so that the Commission may determine whether it can, in a particular case, distinguish predatory pricing allegations from dumping allegations. If it can so distinguish, then the bounds of its inquiry will be clearly defined in relation to a concurrent investigation being conducted by Treasury. If a clear distinction cannot be established, the Commission should consider suspending its investigation pending the outcome of proceedings at Treasury.

APPENDIX

SEC. 337. UNFAIR PRACTICES IN IMPORT TRADE.

(a) UNFAIR METHODS OF COMPETITION DECLARED UNLAWFUL. — 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, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

(b) INVESTIGATIONS OF VIOLATIONS BY COMMISSION; TIME LIMITS. — (1) 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 that 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.

(2) During the course of each investigation under this section, the Commission shall consult with and seek advice and information from, the Department of Health, Education, and Welfare, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as it considers appropriate.

(3) 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.

(c) DETERMINATIONS; REVIEW. — The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section. Each determination under subsection (d) or (e) shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5, United States Code. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d) or (e) may appeal such determination to the United States Court of Customs and Patent Appeals. Such court shall have jurisdiction to review such determination in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Customs Court.

(d) EXCLUSION OF ARTICLES FROM ENTRY. — If the Commission determines, as a result of an investigation under this section, that there is viola-

tion of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering 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 United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

(e) EXCLUSION OF ARTICLES FROM ENTRY DURING INVESTIGATION EXCEPT UNDER BOND. — If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering 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 United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry, except that such articles shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary.

(f) CEASE AND DESIST ORDERS. — In lieu of taking action under subsection (d) or (e), the Commission may issue and cause to be served on any person violating this section, or believed to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved, unless after considering the effect of such order 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 United States consumers, it finds that such order should not be issued. The Commission may at any time, upon such notice and in such manner as it deems proper, modify or revoke any such order, and, in the case of a revocation, may take action under subsection (d) or (e), as the case may be.

(g) REFERRAL TO THE PRESIDENT. — (1) If the Commission determines that there is a violation of this section, or that, for purposes of subsection (e), there is reason to believe that there is such a violation, it shall—

(A) publish such determination in the Federal Register, and

(B) transmit to the President a copy of such determination and the action taken under subsection (d), (e), or (f), with respect thereto, together with the record upon which such determination is based.

(2) If, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such determination, the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken under subsection (d), (e), or (f) with respect thereto shall have no force or effect.

(3) Subject to the provisions of paragraph (2), such determination shall, except for purposes of subsection (c), be effective upon publication thereof in the Federal Register, and the action taken under subsection (d), (e), or (f) with respect thereto shall be effective as provided in such subsections, except that articles directed to be excluded from entry under subsection (d) or subject to a cease and desist order under subsection (f) shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary until such determination becomes final.

(4) If the President does not disapprove such determination within such 60-day period, or if he notifies the Commission before the close of such period that he approves such determination, then, for purposes of paragraph (3) and subsection (c) such determination shall become final on the day after the close of such period or the day on which the President notifies the Commission of his approval, as the case may be.

(h) PERIOD OF EFFECTIVENESS. — Except as provided in subsections (f) and (g), any exclusion from entry or order under this section shall continue in effect until the Commission finds, and in the case of exclusion from entry notifies the Secretary of the Treasury, that the condition which led to such exclusion from entry or order no longer exist.

(i) IMPORTATIONS BY OR FOR THE UNITED STATES. — Any exclusion from entry or order under subsection (d), (e), or (f), in cases based on claims of United States letters patent, shall not apply to any articles imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government. Whenever any article would have been excluded from entry or would not have been entered pursuant to the provisions of such subsections but for the operation of this subsection, a patent owner adversely affected shall be entitled to reasonable and entire compensation in an action before the Court of Claims pursuant to the procedures of section 1498 of title 28, United States Code.

(j) DEFINITION OF UNITED STATES. — For purposes of this section and sections 338 and 340, the term 'United States' means the customs territory of the United States as defined in general headnote 2 of the Tariff Schedules of the United States. (Public Law 93-618, 93rd Congress, H.R. 10710, January 3, 1975.)