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**A REPLY TO EASTON AND LANG COMMENT ON
SECTION 337 PRICING JURISDICTION
OF THE U.S. INTERNATIONAL
TRADE COMMISSION**

Harvey Kaye and Paul Plaia***

These authors¹ find it difficult to reply to the comments of Messrs. Easton and Lang² because:

(1) they attribute to the present authors position which these authors have not taken; and

(2) whenever these authors attempt to provide historical information for use in analysis of section 337,³ they assume this is tantamount to agreement or acceptance of it.

A reading of these authors' earlier article on section 337 jurisdiction demonstrates that the article presents historical and factual information along with judicial pronouncements in various areas of unfair acts, unfair methods of competition and restraints or monopolization of trade and commerce. This is offered so that the discussions currently being conducted by those in the international trade field can be based on more information than was previously available and, hopefully, arrive at reasonable decisions and conclusions.

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1. "These authors" throughout this reply will refer to Harvey Kaye and Paul Plaia, Jr. Messrs. Kaye and Plaia have authored many articles in this area, most recently *Revitalization of Unfair Trade Causes In The Importation of Goods*, 57 J. PAT. OFF. SOC'Y 208 (1975); *Tariff Act Section 337 Revisited: A Review of Developments Since The Amendments of 1975*, 59 J. PAT. OFF. SOC'Y 3 (1977); and the article to which Messrs. Easton and Lang wrote their comment, *The Relationship of Countervailing Duty and Antidumping Law to Section 337 Jurisdiction of the U.S. International Trade Commission*, 2 INT. TRADE L. J. 1 (1977).

2. Edward R. Easton and Jeffrey M. Lang are Attorney-Advisers in the Office of the General Counsel, U.S. International Trade Commission. This reply refers to their comment entitled *A Comment: Kaye and Plaia on Section 337 — Pricing Jurisdiction*, published in this issue of the *International Trade Law Journal*, at p. XX *supra*.

3. 19 U.S.C. § 1337 (1975).

I. CONCURRENT JURISDICTION

Easton and Lang attribute to the present authors a position advocating a refusal of jurisdiction in matters of unfair pricing. While concluding this, they fail to identify and define what they mean by "unfair pricing." To characterize the Kaye and Plaia position in these terms greatly misinterprets and understates the position presented. If unfair pricing by the Easton and Lang definition includes violations under the Antidumping Act, 1921,⁴ a careful reading of these authors' position shows that what is advocated is not a refusal of jurisdiction, but rather a suggestion that the Commission, under certain circumstances, suspend its proceedings pending the outcome of the Treasury dumping investigation under section 337(b)(1). The suggested suspension would only be undertaken when predatory intent is not a part of the allegations before the Commission. As pointed out, should the Treasury take action in a purely dumping situation, *i.e.*, price discrimination without intent to injure competition, there would be no basis for jurisdiction under section 337. This is made clear through these authors' explanation of what are considered unfair acts and unfair methods of competition under the statute.

Easton and Lang find that the statute "was ordered to establish any and all types of standards for commercial conduct in the import trade of the United States, including pricing policy." There is no basis for this position since the substantive unfair competition (subject matter) jurisdiction under the statute was not changed by the 1974 amendments to section 337. The thrust of their statement appears to be that the ITC should take part in determining U.S. international trade policy and use section 337 to accomplish this end. The purpose of section 337 is to interpret fairness; an important point which Easton and Lang do not address is that commercial fairness requires that *foreigners be held to the same standards as domestic firms*. Indeed, this is what section 337 is intended to accomplish. The Senate, in its report on the Trade Act of 1974⁵ made it clear that the substantive jurisdiction under section 337 was not changed by the 1974

4. 19 U.S.C. §§ 160 (1970), *et seq.*

5. S. REP. NO. 93-1298, 93d Cong., 2d Sess. 194 (1974). The legislative history of the section 337 Amendments states with reference to the Commission's jurisdiction: "No change has been made in the substance of the jurisdiction conferred under section 337(a) with respect to unfair methods of competition or unfair acts in the import trade."

amendments. While Easton and Lang discuss the mandatory nature of the Commission's statutory responsibility, this does not upset nor contradict the position of these authors concerning Commission action on unfair pricing complaints.

II. THE ROBINSON-PATMAN ACT

Easton and Lang appear to have pronounced the Robinson-Patman Act as repealed without the requisite legislative act. These authors have suggested that the need to examine predatory pricing arises out of the Commission's recognition that unfair competition and antitrust law violations, including section 3 of the Robinson-Patman Act, section 1 or 2 of the Sherman Act, and section 5 of the FTC Act are within the coverage of conduct prohibited under section 337. The Robinson-Patman Act is not used as a model, but must be reckoned with since it defines one type of unfair act. It is necessary to examine intent when considering pricing violations whether that intent be viewed from the standpoint of the Robinson-Patman Act or the Sherman Act. These authors discuss predatory pricing and review the current and past applications of the law in the area; nowhere do these authors adopt or align themselves with any of the specific methods or findings within that body of law.

What these authors have suggested is that there is a body of law which should be examined as a prelude for Commission action on the alternatives available.⁶ Very simply, what these authors conclude is that predatory or unfair pricing is distinguished from violations under the Antidumping Act, 1921, by the existence or non-existence of intent to injure competition. For the purpose of these authors' analysis, it was not necessary to go further than to point out that the ITC has determined that violations of the unfair competition and antitrust laws of the

6. See Kaye and Plaia, *The Relationship of Countervailing Duty and Antidumping Law to Section 337 Jurisdiction of the U.S. International Trade Commission*, 2 INT. TRADE L.J. at 9, where the suggestion was made that "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. . . ." It is the body of law encompassed by these areas which should be examined by the Commission prior to its following one of the alternatives open to it. The alternatives themselves were discussed in this article from pages 64-77.

United States are a basis for violations under section 337 of the Tariff Act of 1930, as amended.⁷

Whether or not past Robinson-Patman decisions provide a good or bad standard was not within the scope of these authors' article. Various sections of the FTC Act and the Robinson-Patman Act have been previously used as guides for defining unfair acts and unfair methods of competition.⁸ To the extent that these statutes and the decisions analyzing them have been used as guides they must be considered under section 337. The reason for this is clear when one considers the Easton and Lang point that the ITC develop thorough market analyses of the impact of unfair pricing. This should not be done unless it has been done in the past so that there is some judicial precedent for it.

These authors discuss the Robinson-Patman Act because there have been cases dealing with unfair pricing under the Act and it would be irresponsible for the Commission to ignore precedents in the area of fairness in trade and pricing.

In discussing the *Above-Ground Swimming Pool* case,⁹ Easton and Lang state that the ITC, in adopting a portion of the recommended determination, found that section 2 does not reach discriminations in price between import transactions in the United States and other transactions that occurred wholly in other countries. It is important to note that this statement was based upon a court determination under the Robinson-Patman Act, the same type of court decision which they suggest the ITC should ignore. It should also be noted that these authors suggest that prior Robinson-Patman decisions should be approached with caution as indicated by the citation of the Department of Justice study concerning the Robinson-Patman Act.

III. EXPORT SUBSIDIES

The third point of the Easton and Lang comment unequivocally finds the real issue in price competition to be the definition

7. 19 U.S.C. § 1337 (1970).

8. For cases in which various sections of the FTC and Robinson-Patman Acts have been used as guides for defining these terms, see *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931); *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948); *In Re Orion Co.*, 71 F.2d 458 (1934). For a discussion, see also Kaye and Plaia, *Tariff Act Section 337 Revisited*, 59 J. PAT. OFF. SOC'Y 3 (1977).

9. Commission Opinion, *In the Matter of Certain Above-Ground Swimming Pools*, Investigation Docket No. 337-TA-25.

of trade distorting subsidies. This position, however, does nothing to resolve section 337 jurisdictional problems. They fail to address the conclusion of these authors (and of the Commission) that a countervailing duty-type situation may be a relevant *fact* when investigating a larger scheme of predatory pricing. Their statement concerning countervailing duties does not expand, define or contradict either the position of these authors concerning the place of countervailing duty in Commission jurisdiction, or their review of the state of countervailing duty law as a factual matter. The "real issue" examined by these authors is the jurisdictional bounds and limits of section 337 in the unfair pricing area. Comments concerning actions which this country or the Congress may take concerning the elimination of grants and subsidies, while interesting, do little to resolve the current jurisdictional problem.

Easton and Lang suggest that the ITC become involved in the current multilateral trade negotiations. However, this is not a proper arena for the ITC since it is independent and non-political. The Commission's statutory duties are to make objective studies for the President and for Congress when requested and under section 337 to engage in regulatory activity. As a regulatory agency the Commission should not be involved in a diplomatic and political matter such as the multilateral trade negotiations.

IV. CONCLUSION

Insofar as the future is concerned these authors believe that during the multilateral trade negotiations, the potentially harassing effect of multiple actions on factually related matters under different statutes will be discussed, including a section 337 investigation on predatory pricing currently with a dumping investigation. The readiest solution to this problem, and one which does not emasculate any of the current statutes and still preserves the philosophy that foreign business entities are to be held accountable for their unfair acts in trade and commerce just as domestic firms are, is to transfer the consideration of less than fair value determinations in dumping proceedings to the U.S. International Trade Commission.