

SYMPOSIUM

SECTION 337 OF THE TRADE ACT OF 1974

REGULATING UNFAIR PRACTICES IN INTERNATIONAL TRADE: THE ROLE OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION*

*Daniel Minchew***

*R. Dan Webster****

I. INTRODUCTION

The regulation of international trade is one of the most complex and difficult forms of economic regulation entrusted to government. Not only must the regulator consider the problems of economic regulation inherent in domestic programs, but he must also consider diversity of national laws, elements of public international law, and questions of policy dictated by foreign relations. The United States must realize that economic regulation is still in its infancy in most nations of the world—even in countries that are highly industrialized.

International trade can be regulated through tariff and nontariff methods, by escape clause actions,¹ voluntary and involuntary restraints, and other mechanisms. The regulation of “unfair methods of competition and unfair acts” should be the least controversial of all types of regulation. Such regulation of unfair trade practices, contrary to restraints on trade, actually should enhance worldwide efficiency and move every nation toward the positive benefits of comparative gain. However, the application of various United States trade laws, because of overlapping jurisdiction and different

* The views expressed in this article are those of the authors alone and do not necessarily reflect the view of the entire Commission at the United States International Trade Commission.

** Chairman, United States International Trade Commission, Washington, D.C.; A.B., University of Georgia, 1960; M.A., St. John's College, Oxford University, Oxford, England, 1963.

*** Legal Adviser to the Chairman, United States International Trade Commission, Washington, D.C.; B.S., Oklahoma State University, 1967; J.D., University of Oklahoma, 1973; Ph.D. cand. Fitz-William College, Cambridge University, Cambridge, England; Member of the Bar of the District of Columbia and Oklahoma.

¹ See General Agreement on Tariffs and Trade, *done* Oct. 30, 1947, art. XIX, 61 Stat. pt. 5, A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

interpretations of these laws, has insured a lively jurisdictional debate among the government enforcement agencies. Other than the United States International Trade Commission (the Commission), the key federal agencies involved in international trade regulation are the Department of Justice,² the Department of the Treasury,³ and the Federal Trade Commission.⁴

Further complicating the question of jurisdiction over the regulation of international trade is the distinct authority of the Congress under article I, section 8, of the Constitution to regulate foreign commerce, and the general constitutional powers of the President to conduct foreign relations. Where foreign commerce ends and foreign relations begin is often not easy to discern.

The Commission is an independent agency created by the Congress, to which Congress has delegated some of its constitutional authority to regulate foreign commerce. Headed by six commissioners, no more than three of which can be from the same political party,⁵ the Commission enjoys unique independence from the Executive, a status fostered by the Congress' belief that the Commission should be bipartisan.⁶ To enhance this independence the Congress enacted new legislation to allow the Commission to represent itself in the courts,⁷ and to enable the Commission to go directly to the Congress for funding and oversight, rather than through the office of the Bureau of the Budget (now the Office of Management and Budget).⁸

² See generally Sherman Act, 15 U.S.C. §§ 1-7 (1970), and Clayton Act, 15 U.S.C. §§ 8-11 (1970).

³ Antidumping Act of 1921, 19 U.S.C. §§ 160-170 (1970 and Supp. V 1975) and countervailing duty legislation, 19 U.S.C. § 1303 (Supp. V 1975).

⁴ Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1970).

⁵ Act of Sept. 8, 1916, ch. 463, § 700, 39 Stat. 795.

⁶ SENATE COMM. ON FINANCE, TRADE REFORM ACT OF 1974, S. REP. NO. 1298, 93d Cong., 2d Sess. 115 reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7259. (hereinafter cited as FINANCE COMM. REPORT).

⁷ 19 U.S.C. § 1333(c) (Supp. V 1975).

⁸ 19 U.S.C. § 2232 (Supp. V 1975). The Finance Committee Report states:

The Committee strongly believes that the only way to preserve the strict independence of the Commission from unwarranted interference or influence by the Executive Branch is to place its budget directly under the control of Congress. Consequently, section 175 of the bill would more specifically identify the Commission as an agency independent from the Executive departments, would provide that the budget of the Commission shall not be subject to revision by the President under the Budget and Accounting Act, 1921, but rather shall be included by the President in the Budget without revision. Further, any necessary apportionment or reapportionment of appropriations required by section 3679 of the Revised Statutes (31 U.S.C. 665) would not be subject to the control of the Director of the Bureau of

By keeping in mind the rather unique, independent character of the Commission and by examining the pertinent law, legislative history, and Commission practice, one may gain a better feeling for the authority of the Commission to regulate "unfair methods of competition and unfair acts" in international trade.

II. COMMISSION'S STATUTORY AUTHORITY

The Commission's statutory authority to regulate "unfair methods of competition and unfair acts" in international trade is found in section 337 of the Tariff Act of 1930,⁹ as amended by the Trade Act of 1974¹⁰ (the Trade Act). Section 337(a) of the Tariff Act of 1930, as amended, provides:

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.¹¹

Prior to the amendments to section 337, the Commission had traditionally applied the section almost exclusively to patent infringement cases,¹² the Commission's *in rem* jurisdictional authority seeming to be particularly appropriate in those cases. However, with the Trade Act's passage in 1974, the amendments to this section clearly provided an increased emphasis on the regulation of non-patent violations.

One important amendment changed Commission "recommendations" to "determinations," thus altering the roles of the Com-

the Budget, but rather by the Commission officer having administrative control of such appropriation.

FINANCE COMM. REP. *supra* note 6, at 118.

⁹ 19 U.S.C. § 1337 (1970) (amended 1975).

¹⁰ Pub. L. No. 93-618, 88 Stat. 1978 (codified in large part at 19 U.S.C. §§ 2101-2487 (Supp. V 1975)). Section 341 of the Trade Act amended section 337 of the Tariff Act of 1930. 19 U.S.C. § 1337 (Supp. V 1975).

¹¹ 19 U.S.C. § 1337(a) (Supp. V 1975).

¹² Notable exceptions include Tractor Parts, Tariff Comm'n Pub. No. 443 (Dec. 1971) [hereinafter cited as Tractor Parts] and Watches, Watch Movements and Watch Parts, Tariff Comm'n Pub. No. 177 (June 1966) [hereinafter cited as Watches].

mission and the President in determining violations of the statute. Prior to this amendment, the Commission could only give the President its advice on whether the section had been violated. The President was empowered to make the final determination based on the Commission's recommendation and other considerations. Under the current law, the Commission is now the body making the final determination subject to judicial review.¹³

While the President no longer has the authority to make final determinations under this section, he does have the authority to disapprove Commission decisions for "policy reasons."¹⁴ By giving the President an opportunity to disapprove Commission determinations for "policy reasons," the Congress was attempting to provide a mechanism whereby the President could coordinate foreign policy considerations with more economically oriented international trade issues. The Senate Finance Committee Report states:

It is recognized by the Committee that the granting of relief against imports could have a very direct and substantial impact on United States foreign relations, economic and political. Further, the President would often be able to best see the impact which the relief ordered by the Commission may have 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.¹⁵

Thus, while the new legislation has given increased authority to the Commission, it has tempered this authority with a presidential veto for policy reasons.

Another significant amendment formalized the hearing process at the Commission. While the provisions of section 337 prior to its amendment by the Trade Act would, if interpreted literally, make the statute appear to be an "antitrust" statute, the hearing procedures were clearly inadequate for antitrust purposes. The Commission was not subject to provisions for prehearing discovery, and the Commission's decisions were often based on confidential information which was not "on the record." So inadequate were the Commission's procedures that one antitrust expert described the

¹³ 19 U.S.C. § 1337(c) (Supp. V 1975).

¹⁴ 19 U.S.C. § 1337(g)(2) (Supp. V 1975).

¹⁵ FINANCE COMM. REP. *supra* note 6, at 199. It should be noted that the Commission, under sections 337(d), (e), and (f), the remedy sections, also considers prior to its remedy determinations the effect of such remedies on the public health and welfare, competitive conditions in the United States economy, and United States consumers.

thought of antitrust proceedings under such procedures as "mind-boggling."¹⁶

In changing section 337 to a provision which would adequately deal with "antitrust" or non-patent "unfair acts," the Congress recognized the inadequacies of the hearing procedures and attempted to correct the deficiencies. Section 337(c) provides, in part, that "[e]ach determination . . . 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 [5 U.S.C. §§ 551-559 (1970 & Supp. V 1975)]."¹⁷ Thus, by placing section 337 hearings under the provisions of the Administrative Procedure Act, a major procedural gap was closed, thereby bringing the Commission closer to being a true regulatory agency.

In addition, the Commission promulgated new rules which further enhanced the opportunities for reasonable "antitrust" or "unfair act" proceedings.¹⁸ The early fact-finding hearings under section 337 were conducted before a Commissioner who served as presiding officer. Now the Commission has added two Administrative Law Judges, before whom hearings are generally held, and who certify the record with their recommended determination to the Commission for its final decision. While it would be incorrect to say that the Commission has perfected its procedures, it has largely fulfilled the requirements of "due process" which must be dealt with before an agency can properly conduct complex "antitrust" or "unfair act" cases.

Remedy provisions were also revised by the Trade Act amendments of section 337. Prior to the amendments of the Trade Act, the remedies which were available were so harsh that, in many cases, they were simply unworkable. The remedies were themselves often anticompetitive, requiring exclusion of the offending articles. This "anticompetitive" remedy did not facilitate the proper application of section 337 as an "antitrust" statute.

Section 337(f), as amended, was intended by Congress to alleviate this problem.¹⁹ This section provides:

¹⁶ La Rue, *Section 337 of the 1930 Tariff Act and Its Section 5 FTC Act Counterpart*, 43 ANTITRUST L.J. 608, 618 (1974).

¹⁷ 19 U.S.C. § 1337(c) (Supp. V 1975).

¹⁸ The rules became effective on May 27, 1976, 30 days after their publication in the Federal Register at 41 Fed. Reg. 17710 (1976).

¹⁹ The Finance Committee Report states:

Section 337(f) of the Act, as amended by this bill, would be a new provision authorizing the Commission to issue cease and desist orders, in lieu of excluding

CEASE AND DESIST ORDERS.—In lieu of taking action under subsection (d) [exclusion of articles from entry] or (e) [exclusion of articles from entry during investigation], 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 revocation, may take action under subsection (d) or (e), as the case may be.²⁰

Taken alone, this section may be insufficient, as the sanction against violating a cease and desist order is the same harsh remedy which caused the need for the creation of the cease and desist authority. Nevertheless, with the basic statutory authority now in existence, the Commission is in a position to perfect its cease and desist authority through regulations, and the Act has now been amended in such a fashion as to make it possible to attack "antitrust" or "unfair act" problems without employing "anticompetitive" remedies.

The Commission has also sought to fill a void in the remedy options it has available by the use of consent orders. While there are no statutory provisions for consent orders, in *Color TV Sets*,²¹ by far the most important antitrust case considered under section 337 to date, the Commission issued consent orders which were negotiated by the parties, including the Commission's investigative staff, and thereby terminated the investigation. The Commission had clearly

articles, against any persons violating, or believed to be violating, section 337 It is clear to your Committee that the existing statute, which provides no remedy other than the exclusion of articles from entry, is so extreme or inappropriate in some cases that it is often likely to result in the Commission not finding a violation of this section, thus reducing the effectiveness of section 337 for the purposes intended.

The power to issue cease and desist orders would add needed flexibility. . . .

FINANCE COMM. REP. *supra* note 6, at 198. See also, *Hearing Before the Senate Comm. on Finance on H.R. 10710, The Trade Reform Act of 1973*, 93d Cong., 2d Sess. 1999, 2011 (1973) (statement of Harvey Kaye and Paul Plaia, Jr.).

²⁰ 19 U.S.C. § 1337(f) (Supp. V 1975).

²¹ Certain Color Television Receiving Sets, Investigation No. 337-TA-23 I.T.C., filed Jan. 15, 1976) [hereinafter cited as *Color TV Sets*].

not moved as quickly as it should have in promulgating rules for settlement by consent, but through reasonable negotiation by all parties, was able to enter the order. The Commission has now drafted proposed rules for the settlement of consent orders, which will be published for comment shortly.

Another significant amendment to the Act is its increased emphasis on competition. Section 337(b)(2), as amended, provides:

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.²²

Further, the remedy subsection of the section provides for the Commission to consider the effect of exclusion or cease and desist on 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"²³

The Senate Finance Committee Report gives even stronger emphasis to the consideration of competition when it states, "[t]he Committee believes that the public health and welfare and the assurance of competitive conditions in the United States must be the overriding considerations in the administration of this statute."²⁴ (emphasis added).

The above mentioned amendments to section 337 are crucial to an understanding of the Commission's interpretation of its new-found authority and aggressiveness. Add to these factors the Commission's independence from the executive branch and its close ties to the Congress,²⁵ and one can easily see the transformation of the agency from one which was somewhat passive to one which will have an ever-increasing role in dealing with competition issues in international trade.

III. SUBJECT MATTER JURISDICTION

Section 337, as amended by the Trade Act, reflects the authority of the Congress under article I, section 8 of the Constitution to

²² 19 U.S.C. § 1337(b)(2) (Supp. V 1975).

²³ 19 U.S.C. § 1337(d), (e), (f) (Supp. V 1975).

²⁴ FINANCE COMM. REP., *supra* note 6, at 197.

²⁵ The Commission's oversight committees in the Congress are the Senate Committee on Finance and the House Ways and Means Committee, the two congressional committees which have primary responsibility for international trade.

regulate trade or commerce with foreign nations. "Subject matter jurisdiction," means that the court, or in this case the agency, has the authority to hear the issues before it. Section 337 specifies when the Commission may exercise "subject matter jurisdiction." It may do so if:

- (1) an article is imported into the United States, and
- (2) if such imported article is sold in the United States by an owner, importer, consignee, or agent of either, and
- (3) if such sale of the imported article constitutes an unfair method of competition or unfair act.²⁶

In addition, if overriding public policy considerations do not exist, the Commission may issue an exclusion or cease and desist order.²⁷

That the Commission has the jurisdiction to hear cases involving the importation and sale of articles which infringe patents has never been seriously questioned; however, disputes have arisen as to whether the Commission can, or should, exercise jurisdiction over non-patent "unfair methods of competition or unfair acts," and those cases involving pricing problems or economic incentives possibly covered by the Antidumping Act²⁸ or countervailing duty laws,²⁹ respectively.

The Commission had, prior to the passage of the Trade Act and its amendments of section 337, taken jurisdiction over cases involving alleged non-patent violations,³⁰ and, in its amendments to section 337 the Congress had not seen fit to alter this approach. To the contrary, all indications are that the Congress approved of the Commission's practice. The Senate Finance Committee Report states, "[n]o 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."³¹

²⁶ 19 U.S.C. § 1337(a) (Supp. V 1975).

²⁷ *Id.*

²⁸ 19 U.S.C. §§ 160-170 (1970 and Supp. V 1975).

²⁹ 19 U.S.C. § 1303 (Supp. V 1975).

³⁰ The Commission had previously considered non-patent violations to fall within the scope of section 337. In *Watches*, *supra* note 12, at 13, the Commission was unable to find facts sufficient for an affirmative finding, it did state:

If, however, in the importation or sale of articles such an organization imposes unreasonable restraints upon trade and commerce in the United States, or monopolizes such trade and commerce, or engages in unfair methods of competition tending to restrain or monopolize trade and commerce in the United States, section 337 may be applicable.

And, in *Tractor Parts*, *supra* note 12, at A 44-46, the Commission again defined its jurisdiction in terms of non-patent violations.

³¹ FINANCE COMM. REP., *supra* note 6, at 194.

As to what constitutes "unfair methods of competition or unfair acts" the courts have generally interpreted the term broadly. The Court of Customs and Patent Appeals, in the case of *In re Northern Pigment Co.*,³² held:

We are of the opinion that when Congress used the phrase, in section 337(a) . . . "unfair methods of competition and unfair acts in the importation of articles into the United States," it did not intend that before such methods or acts could be stopped, the act had to fall within the technical definition of unfair methods of competition as it had been defined in some of the decisions, but we think that if unfair methods of competition or unfair acts in the importation of articles into the United States are being practiced or performed by anyone, they are to be regarded as unlawful, and the section was intended to prevent them.³³

Almost identical language was used by the same court in the case of *In re Von Clemm*,³⁴ when the court stated:

The statute here under consideration provides broadly for action by the Tariff Commission [now the International Trade Commission] in cases involving "unfair methods of competition and unfair acts in the importation of articles," but does not define those terms nor set up a definite standard . . . [T]he quoted language is broad and inclusive and should not be held to be limited to acts coming within the technical definition of unfair methods of competition as applied in some decisions.³⁵

And, the Supreme Court, in *Schechter Poultry Corp. v. United States*,³⁶ stated in reference to the Federal Trade Commission Act³⁷ that, "[w]hat are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest."³⁸

³² *In re Northern Pigment Co.*, 71 F.2d 447 (C.C.P.A. 1934).

³³ *Id.* at 455.

³⁴ 229 F.2d 441 (C.C.P.A. 1955).

³⁵ *Id.* at 443-444.

³⁶ 295 U.S. 495 (1935).

³⁷ 15 U.S.C. § 41, *et seq.* (1970).

³⁸ *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532-33 (1935). Other instances where the courts have dealt with defining language like, or comparable, to section 337 language include: *In re Orion Co.*, 71 F.2d 458 (C.C.P.A. 1934); *In re Amtorg Trading Corporation*, 75 F.2d 826 (3d Cir. 1935); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FTC v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392 (1953); *FTC v. Raladam Co.*, 283 U.S. 643 (1931); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Frisher & Co., Inc. v. Bakelite Corp.*, 39 F.2d 247 (C.C.P.A. 1930); *FTC v. Texaco, Inc.*, 393 U.S. 233 (1968).

Commission practice has been to define "unfair methods of competition and unfair acts" in terms of traditional antitrust or unfair competition statutes. In *Chicory Roots*,³⁹ the Commission Memorandum Opinion stated:

Although there are [as yet] no judicial precedents involving non-patent 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 and under section 337 as it exists today, used the antitrust laws and the practice thereunder as the standard for unfair methods of competition and unfair acts.⁴⁰

However, section 337 is a unique statute, and it is entirely possible that some actions which do not violate other antitrust or unfair competition statutes may still violate this section. In *Electronic Audio Equipment*,⁴¹ the Commission recognized this uniqueness and the Presiding Officer, in his opinion which was certified to this Commission stated:

In conclusion, I have scrutinized other antitrust provisions, particularly section 1 of the Sherman Act and section 5 of the FTC Act and found that neither the letter nor the spirit of such laws has been violated

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 may therefore reach conduct which might not apply to other antitrust laws.⁴²

Another point of controversy between United States agencies as to the definition of "unfair methods of competition and unfair acts" is predatory pricing and economic incentives.⁴³ The Antidumping

³⁹ *Chicory Root—Crude and Prepared*, Investigation No. 337-TA-27 (I.T.C., filed June 11, 1976).

⁴⁰ *Id.*

⁴¹ *Certain Electronic Audio and Related Equipment*, Investigation No. 337-TA-7 (I.T.C., filed July 10, 1973), I.T.C. Pub. No. 768 (Apr. 1976) [hereinafter cited as *Electronic Audio Equipment*].

⁴² *Id.* at 46-47. The Court of Customs and Patent Appeals would seem to agree with this interpretation. In the case of the *In re Von Clemm*, 229 F.2d at 444, the court stated, "[t]he importation of articles may involve questions which differ materially from any arising in purely domestic competition, and it is evident from the language used that Congress intended to allow wide discretion in determining what practices are to be regarded as unfair."

⁴³ For an excellent analysis of this issue, see Kaye & Plaia, *The Relationship of Countervail-*

Act of 1921, as amended,⁴⁴ and countervailing duty law, as amended,⁴⁵ are administered by the Department of Treasury and the Commission jointly, but under other provisions of law than section 337. However, under both laws, a complainant must initiate his complaint with the Department of the Treasury. The point in controversy is whether certain actions which may properly be filed under the Antidumping Act of 1921, as amended, and the countervailing duty laws, as amended, may also be filed under section 337 as "unfair methods of competition and unfair acts."

The issue reached its peak of controversy under *Color TV Sets* when the Commission received a complaint alleging predatory pricing and unfair economic incentives. The complaint was subsequently amended to allege conspiracy to monopolize. Nevertheless, the Commission received advice from the Department of State,⁴⁶ Department of the Treasury,⁴⁷ the Department of Justice,⁴⁸ the Special Representative for Trade Negotiations,⁴⁹ and the Federal Trade Commission,⁵⁰ urging the Commission not to entertain the complaint.

The Commission did decide to entertain the complaint, despite this advice, and eventually settled the complaint by issuing consent orders.⁵¹ However, during the course of its investigation, Melco Sales, Inc., sought to enjoin the investigation, alleging that the basis for the complaint in the *Color TV Sets* case was actually within the purview of the antidumping and countervailing duty laws.⁵² In dismissing the complaint Judge Waddy stated:

In this case, nothing in the papers or argument before this court shows that the Commission proceeding which plaintiff wishes enjoined or declared unlawful . . . is in excess of the Commission's

ing Duty and Antidumping Law to Section 337 Jurisdiction of the U.S. International Trade Commission, 2 INT'L TRADE L.J. 1, 62-77 (1977).

⁴⁴ 19 U.S.C. §§ 160-170 (1970 and Supp. V 1975).

⁴⁵ 19 U.S.C. § 1303 (Supp. V 1975).

⁴⁶ Letter from Charles W. Robinson, Deputy Secretary of State, to Chairman Will E. Leonard (Sept. 23, 1976).

⁴⁷ Letter from William E. Simon, Secretary of the Treasury, to Chairman Will E. Leonard (Sept. 23, 1976).

⁴⁸ Letter from Jonathon C. Rose, Deputy Assistant Attorney General, to Chairman Will E. Leonard (Sept. 23, 1976) [hereinafter cited as Justice Department Letter].

⁴⁹ Letter from Frederick B. Dent, The Special Representative for Trade Negotiations, to Chairman Will E. Leonard (Sept. 23, 1976).

⁵⁰ Letter from Charles A. Tobin, Secretary, Federal Trade Commission, to Chairman Will E. Leonard (Aug. 27, 1976).

⁵¹ *Color TV Sets*, *supra* note 21.

⁵² *Melco Sales v. USITC*, Civ. Action No. 76-1932 (D.D.C. 1976).

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.⁵³

Melco Sales v. USITC, does not stand for the proposition that the Commission may exercise jurisdiction over the same cases as the Treasury Department. As stated before, the complaint in *Color TV Sets* had been amended to include conspiracy prior to Melco's attempt to enjoin the Commission. Therefore, in stating that the Commission did apparently have jurisdiction, the court was not dealing just with activities which are under the purview of the antidumping and countervailing duty statutes.

The basic rationale of the other regulatory agencies' objection to the Commission's exercise of jurisdiction can be supported by section 337(b)(3), which states:

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 [countervailing duty] 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.⁵⁴

And, the Senate Finance Committee Report states, "[i]t is expected that the Commission's practice of not investigating matters clearly within the purview of either section 303 [countervailing duty] or of the Antidumping Act will continue."⁵⁵

However, the Commission has yet to receive complaints under section 337 which are "clearly within the purview of section 303 or of the Antidumping Act." There have been complaints filed which contained some elements of these provisions of law,⁵⁶ but other alleged elements of "unfair methods of competition and unfair acts" also existed. And, it must be kept in mind that section 337(b) provides, in part, "[t]he Commission *shall* investigate any alleged violation of this section on complaint under oath or upon its initiative."⁵⁷ (emphasis added). And, section 337(a) requires that when unfair acts are found by the Commission to exist they "shall be

⁵³ *Id.* Order filed Nov. 15, 1976.

⁵⁴ 19 U.S.C. § 1337(b)(3) (Supp. V 1975).

⁵⁵ FINANCE COMM. REP., *supra* note 6, at 195.

⁵⁶ In addition to *Color TV Sets*, see *Above Ground Swimming Pools*, Investigation No. 337-TA-25 (I.T.C., filed Feb. 25, 1976).

⁵⁷ 19 U.S.C. § 1337(b)(1) (Supp. V 1975).

dealt with, in addition to any other provisions of law”⁵⁸ It would appear that the ambiguity which now exists in the law will insure controversy in the application of section 337, as it relates to countervailing duty and antidumping laws, until some clarification of the law by the Congress or the courts occurs.

Interestingly, despite the broad interpretation the courts have applied to define “unfair methods of competition and unfair acts,” or similar language, some of the criticism directed at the Commission’s more aggressive posture in attacking non-patent violations of section 337 has been predicated on the charge that the Congress did not really intend the Commission to deal with such cases. However, even a cursory look at the Senate Finance Committee Report and the House Ways and Means Report indicates the contrary. The Senate Finance Committee Report “General Statement” contained the following language:

U.S. trade policy has not been noted for its coherence or consistency. Throughout most of the postwar era, U.S. trade policy has been the orphan of U.S. foreign policy. Too often the Executive has granted trade concessions to accomplish political objectives. Rather than conducting U.S. international economic relations on sound economic and commercial principles, the Executive has used trade and monetary policy in a foreign aid context. An example has been the Executive’s unwillingness to enforce U.S. trade statutes in response to foreign unfair trade practices.⁵⁹

And the House Ways and Means Report “General Purpose” number 8 states, “[the general purposes are] to improve the procedures and means of dealing with problems of unfair trade practices in the United States and abroad.”⁶⁰ The new powers of the Commission were the most significant in the Trade Act for dealing with unfair trade practices. It would seem to be inconceivable that the amendments which were thought to be so important by the Congress were intended only to improve the procedures for handling patent violations.

Unfair methods of competition and unfair acts are not, by themselves, sufficient to vest jurisdiction in the Commission. It is also necessary that there be an importation and sale of the imported article.⁶¹ At this point, it is difficult to say, in looking at Commission

⁵⁸ 19 U.S.C. § 1337(a) (Supp. V 1975).

⁵⁹ FINANCE COMM. REP., *supra* note 6, at 11.

⁶⁰ HOUSE COMM. ON WAYS AND MEANS, TRADE REFORM ACT OF 1973, H.R. REP. NO. 571, 93d Cong., 1st Sess. 2 (1973) [hereinafter cited as WAYS AND MEANS COMM. REP.].

⁶¹ 19 U.S.C. § 1337(a) (Supp. V 1975).

jurisprudence, whether a nexus is required between the time the merchandise is exported and the time it is imported into the United States, or whether a nexus is required between the sale and the manufacture.

In *Monolithic Catalytic Converters*⁶² the Commission released a party from the investigation who had argued that a nexus was required between the sale and the importation and that none existed in his case. In *Electronic Audio Equipment* the recommended determination of the Presiding Officer, which was adopted by the Commission, states:

I conclude that 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.⁶³

In adopting the Presiding Officer's opinion the Commission specified that the broad view of jurisdiction was being adopted for that case alone. And, the facts in *Electronic Audio Equipment* were sufficient to establish a nexus, even though they were not relied on.⁶⁴ In *Convertible Game Tables*, although the unfair acts complained of occurred in this country, the Commission adopted a position which would allow jurisdiction notwithstanding a lack of nexus between the importer and the foreign manufacturer.⁶⁵

IV. *In Personam* AND *In Rem* JURISDICTION

The Commission enjoys a unique combination of *in personam* and *in rem* jurisdiction over the parties and the imported articles in cases of alleged violations of the statute. This authority enables the Commission to act in certain instances and in certain ways that neither the Department of Justice, the Federal Trade Commission, nor the Department of the Treasury may act.⁶⁶

⁶² Investigation No. 337-TA-18 (I.T.C., filed Oct. 21, 1975).

⁶³ *Electronic Audio Equipment*, *supra* note 41.

⁶⁴ *Id.*

⁶⁵ *Convertible Game Tables and Components Thereof*, Investigation No. 337-TA-34 (Tariff Comm'n, filed Oct. 26, 1972), Tariff Comm'n Pub. No. 705 (Dec. 1974).

⁶⁶ 19 U.S.C. § 1337(d) (Supp. V 1975) provides:

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

In personam jurisdiction, or jurisdiction over the parties as it is sometimes called, has been extended extraterritorially to a great extent in antitrust and anticompetition statutes recently. This reflects a change from the first important United States antitrust case. In *American Banana Co. v. United Fruit Co.*,⁶⁷ Mr. Justice Holmes, writing for the Supreme Court, stated "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done"⁶⁸ Just five years later in *United States v. Hamburg-Amerikanische P.F.A. Gesellschaft*,⁶⁹ a different rule was used. The court stated:

Citizens of foreign countries are not free to restrain or monopolize the foreign commerce of this country by entering into combinations abroad . . . [s]uch combinations are to be tested by the same standard as similar combinations entered into here by citizens of this country. The vital question in all cases is the same: Is the combination to so operate in this country as to directly and materially affect our foreign commerce?⁷⁰

Such an approach seemed inevitable as increased trade and economic interdependence between economies of the world placed greater pressures on domestic economies.

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, upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

19 U.S.C. § 1337(e) (Supp. V 1975) provides:

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, 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.

⁶⁷ 213 U.S. 347 (1909).

⁶⁸ *Id.* at 353. A careful examination of the facts establish, however, that significant "effects" were not present in this case.

⁶⁹ 200 F. 806 (S.D.N.Y. 1911); 216 F. 971 (S.D.N.Y. 1914), *rev'd for mootness*, 239 U.S. 466 (1916).

⁷⁰ 200 F. at 807.

By 1945, there seemed to be little question of extraterritorial *in personam* jurisdiction. Or, at least this was the view of Judge Learned Hand in *United States v. Aluminum Co. of America*.⁷¹ Judge Hand, writing for the court stated, "[i]t is settled law . . . that any state impose liabilities, even upon persons not within its allegiance for conduct outside its borders that has consequences within its borders which the state reprehends. . . ."⁷² Not only has *Alcoa* been expanded,⁷³ but key decisions have now been issued which allow jurisdiction even though the conduct complained of is sanctioned by foreign governments.⁷⁴

In addition to extension of *in personam* jurisdiction so that more persons can be brought within the scope of United States trade regulations, there is the problem of concurrent jurisdiction. Not only can the United States International Trade Commission reach certain conduct outside the United States, but so can the Department of Justice and the Federal Trade Commission. The danger of this concurrent jurisdiction is that a defendant can be brought before several forums at the same time and for basically the same alleged violations.⁷⁵

The problem of concurrent jurisdiction was addressed in a letter from the Department of Justice which provided a novel solution to the problem.⁷⁶ It stated:

It has consistently been the position of the Department of Justice that section 337 was intended by Congress to be a special statute providing an *in rem* jurisdictional base, i.e., jurisdiction over the import brought unfairly into United States markets, in those situations where traditional concepts of *in personam* jurisdiction were ineffective to reach wrongdoers outside our territory

⁷¹ 148 F.2d 416 (2d Cir. 1945).

⁷² *Id.* at 443.

⁷³ See *Timken Roller Bearing v. United States*, 341 U.S. 593 (1951); *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949).

⁷⁴ See *United States v. Watchmakers of Switzerland Information Center, Inc.* [1963] TRADE CASES (CCH) ¶ 70,600; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *United States v. Holophane Co.*, 119 F. Supp. 114 (S.D. Ohio 1954) *aff'd per curiam*, 352 U.S. 903 (1956). However, compulsion by a foreign government would seem to be a defense to violation. See *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Interamerican Refining Corp. v. Texaco Maracaibo Co.*, 307 F. Supp. 1291 (D. Del. 1970); *United States v. Gulf Oil Corp.*, [1960] TRADE CASES (CCH) ¶ 69,851; But see Jones, *Extraterritoriality in United States Antitrust: An International "Hot Potato"*, 11 INT'L LAW. 415 (1977) for a discussion of *United States v. Bechtel Corp.*, Civ. No. C 76-99 (N.D. Cal. 1976).

⁷⁵ The problem of concurrent jurisdiction with the Department of the Treasury has already been discussed at text accompanying notes 51-53 *supra*.

⁷⁶ Justice Department Letter, *supra* note 48.

. . . . We believe section 337 is appropriately used in situations where enforcement agencies or private complainants cannot establish the minimal contacts in the United States of alleged wrongdoers necessary to assert *in personam* jurisdiction over them In cases where personal jurisdiction can be effected against those restraining U.S. import trade through unfair anticompetitive practices, we believe it appropriate for the Commission to consider deferring, especially where other law enforcement agencies have commenced investigations or litigation, or complainants to the Commission have or may commence private litigation challenging such conduct under antitrust or unfair competition laws.⁷⁷

The Department of Justice position, it would seem, is that the Commission should only take cases under section 337 where another government agency, presumably it or the Federal Trade Commission, was unable to gain jurisdiction. Under such a policy, the Commission would need to defer to the other agencies and, as a matter of policy, refuse to hear complaints where *in personam* jurisdiction was possible.

The approach of the Justice Department, however, presents at least two obvious problems. First, the Commission is required to investigate alleged violations of section 337 when complaints are properly filed before it.⁷⁸ No discretion was given by the Congress in the legislation, or in the legislative history, to allow the Commission to make a policy decision of this sort. Secondly, the Commission was given authority to issue "cease and desist" orders under the amendments in the Trade Act, which is *in personam* in nature.⁷⁹ It would seem inconceivable that the Congress would pass legislation pertaining to *in personam* jurisdiction, if the Congress intended that the Commission should always defer to other agencies which had equivalent jurisdiction. One of the major directions of the Trade Act of 1974, which contained the amendments extending the powers of the Commission in the unfair trade practice area, was to properly enforce laws relating to international trade. The congressional committees sponsoring the legislation were the Senate Finance Committee and the House Ways and Means Committee, the Commission's oversight committees. Again, it is unlikely that these committees which are so deeply involved with international trade would sponsor

⁷⁷ *Id.*

⁷⁸ 19 U.S.C. § 1337(b)(1) (Supp. V 1975) provides in part that "[t]he Commission *shall* investigate any alleged violation of the section on complaint under oath . . ." (emphasis added).

⁷⁹ 19 U.S.C. § 1337(f) (Supp. V 1975). See note 19 *supra*.

legislation to enhance the Commission's authority and then expect the Commission not to exercise this authority.

V. FUTURE DIRECTION OF THE COMMISSION

The Commission does not have the discretionary authority to refuse complaints brought before it. And, there is no doubt that concurrent jurisdiction exists with other government agencies. One of the real challenges to the Commission, and the other agencies involved, is to find a method of handling the problems created by a multiplicity of suits involving the same subject matter and possibly even the same parties. Meetings have already taken place between the Commission and representatives of the Department of Justice. The full Commissions of the United States International Trade Commission and the Federal Trade Commission have met. It is hoped that these meetings will result in a formalized means of handling the issue of multiple suits.

Even though the Commission has no discretion over whether or not to investigate properly filed complaints, it can exercise discretion in the type of cases it initiates on its own motion. It is obvious that a multiplicity of investigations on the same subject matter is inefficient and costly to American taxpayers. It is reasonable, therefore, to assume that the Commission will not invest great amounts of time and money on cases in which investigations are being conducted by other regulatory agencies.

There are certain cases, however, in which the Commission has unique capabilities. The Commission has several offices which are capable of conducting economic analysis on various international trade issues. A better method of providing other government regulatory agencies with early warning of problem areas would enhance international trade regulation. Proper cooperation between regulatory agencies would tend to improve this operation.

In addition, because of its primary commitment to dealing with international trade issues, the Commission should be thinking more about its own specialized service. The Commission should be thinking about consumer protection. For example, should a different standard be applied to "point of sale" contracts when the goods are imported and relief from the manufacturer is not readily available to the consumer? Should violations of public international law constitute "unfair methods of competition and unfair acts" upon importation and sale of the articles into the United States?

These are simply some of the issues confronting the Commission.

The Congress, with its amendments to section 337, has attempted to close a gap in the regulation of international trade. It is now up to the Commission to insure that this congressional mandate is performed in a reasonable, but aggressive, manner.

