Vanderbilt Journal of Transnational Law

Volume 11
Issue 3 *Summer 1978*

Article 2

1974

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I. INTRODUCTION

The Trade Act of 1974[1] amended section 337 of the Tariff Act of 1930,[2] and thereby substantially modified the procedures for the conduct of United States International Trade Commission[3] investigations concerning unfair practices in import trade.[4] The Trade

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1. Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified in large part at 19 U.S.C. §§ 2101-2487 (1976)). The Trade Act of 1974 will hereinafter be cited as the "Trade Act" or the "Act."

2. Tariff Act of 1930, ch. 497, § 337, 46 Stat. 703 (codified at 19 U.S.C. § 1337 (1976)).

3. Formerly the United States Tariff Commission, which was created by the Revenue Act of 1916, ch. 463, §§ 700-09, 39 Stat. 795 (no longer in force). The International Trade Commission will hereinafter be cited as the "ITC" or the "Commission."

4. Section 337 as amended by the Trade Act of 1974 has not been substan-

Act changed the role of the ITC from that of a relatively passive adviser on potential courses of action to the President[5] to that of final judge, subject to Presidential override and judicial review,[6] of whether a violation of the Act has occurred. Additionally, the Trade Act provides that in the event that the violation is found, the ITC may now issue cease and desist orders.[7] Prior to passage of the Act, exclusion of the articles of trade from entry into the United States was the only remedy for violation.

The authority to issue cease and desist orders provided the Commission with the flexibility to remedy a broad variety of unfair acts and methods of competition in import trade more equitably. Cease and desist orders also paved the way for an additional change in the administration of section 337: the "public interest" is now of paramount importance in the administration of section 337. Congress determined that in view of the language and enforcement of the statute prior to the amendments, there are no justifiable rea-

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tively changed since the provision was first enacted as section 316 of the Tariff Act of 1922, ch. 356, 42 Stat. 943. *See* note 12 *infra.* Section 337(a), as amended, declares 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 monopolize trade and commerce in the United States* . . . .

19 U.S.C. § 1337(a) (1976) (emphasis added).

The above underscored portions of section 337(a) appear to provide the Commission with the same broad enforcement authority in matters relating to import trade as that contained in the Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7 (1976)); the Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12-27 (1976)); and the Federal Trade Commission Act, ch. 331, § 5, 38 Stat. 717 (1914) (codified at 15 U.S.C. §§ 41-58 (1976)).

5. Prior to the passage of the Trade Act, the ITC simply assisted the President in reaching a determination as to whether section 337 had been violated and whether imported goods should be excluded from entering the United States. The President was not bound by the Commission's findings even as to conclusions of fact. The Trade Act, however, gave the Commission sole responsibility for determining whether a violation of section 337 exists or whether there is reason to believe that a violation exists. 19 U.S.C. § 1337(c)-(e) (1976).

6. The Court of Customs and Patent Appeals (CCPA) is the reviewing court for parties adversely affected by Commission determinations. Prior to the passage of the Trade Act, only importers or consignees of articles could appeal Commission actions. The Trade Act, however, provides that any person (including complainants) "adversely affected by a final determination of the Commission" may appeal to the CCPA. *Id.* § 1337(c).

7. *Id.*

sons why the interests of the public should not only be relevant but controlling with respect to actions taken by the Commission and the President.

This article will seek to explain the origins of this hybrid tariff/antitrust statute and why the statute was interpreted and enforced in a fashion totally at odds with public interest concepts and recent judicial pronouncements. Further, although the Trade Act established a mandate protecting the public interest, many questions remain concerning the adequacy of the responses of the Commission and the President to the public interest, the ability of the Commission to fulfill its mandate in spite of resource limitations, and the statutory time restraints provided by the new Act.

The amendments added by the Trade Act and the explanations offered in the Act's legislative history require that in all phases of a section 337 proceeding, the "public interest must be paramount in the administration of this statute."[8] When the Commission finds that a violation has taken place or that there is reason to believe a violation has taken place, remedial relief may only be directed by the Commission after the benefits that might accrue from protecting the domestic industry and/or United States competition are weighed against the impact such protection would have on the public interest. The statute specifically requires the Commission to define the relevant public interest by considering the impact that the proposed import remedy would have on: (1) public health and welfare, (2) competitive conditions in the United States economy, (3) production of like or directly competitive articles in the United States, and (4) United States consumers.[9] These four "public interest criteria" are not the only considerations required of the Commission. The Presiding Officer must make an examination of all "legal and equitable defenses"[10] in building the adjudicative record upon which the Commission makes its determination.

The task of weighing and evaluating public interest considerations does not end with the Commission. If it makes a determina-

8. SENATE COMM. ON FINANCE, REPORT ON THE TRADE REFORM ACT OF 1974, S. REP. No. 1298, 93d Cong., 2d Sess. 193 (1974) [hereinafter cited as FINANCE COMM. REP.].

9. 19 U.S.C. § 1337(d)-(f) (1976). The same public interest criteria govern whether an exclusion order, an exclusion order except under bond, or a cease and desist order is contemplated. *Id.*

10. FINANCE COMM. REP., *supra* note 8, at 197. For example, there may be antitrust defenses which would preclude the complainant from receiving import protection. A Commission determination on such defenses is intended to assure that the public interest is being adequately protected.

tion that a violation exists and that an exclusion or cease and desist order is in the public interest, the Commission must certify the record to the President. Section 337(g) provides that the President may disapprove, or, in effect, veto the Commission's remedial relief for "policy reasons." The legislative history explains that adequate "policy reasons" require the Commission's actions to have a "very direct and substantial impact" on this country's "foreign relations, economic and political."[11] Congress undoubtedly intended that the exercise of the President's veto power should be based upon the impact that ITC actions may have on United States foreign relations, as well as the same public policy criteria considered by the Commission.

II. THE ADMINISTRATION OF SECTION 337 PRIOR TO THE TRADE ACT OF 1974

A. *Legislative History*

Section 316 of the Tariff Act of 1922,[12] the predecessor of section 337, was incorporated into a major piece of tariff legislation that became known as the Fordney-McCumber Act of 1922. The operative prohibition against unfair methods of competition and unfair acts in import trade found in section 316 has remained unchanged since 1922. Section 316 required the Commission, then the United States Tariff Commission, to make findings and recommendations that were appealable to the Court of Customs and Patent Appeals (CCPA), and, on certiorari, to the Supreme Court. Following the time period provided for appeal, the Commission's advisory findings were sent to the President. The President could accept or reject the Commission's recommendations or he could make his own findings based upon the evidence collected by the Commission. The President's determinations were not subject to judicial review. As a remedy for violation, the President had authority either to levy an additional duty of 10 to 50 percent *ad valorem* or

11. *Id.* at 199.

12. Section 316 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 . . . .

Tariff Act of 1922, ch. 356, § 316, 42 Stat. 943 (current version at 19 U.S.C. § 1337(a) (1976).

to issue an exclusion order prohibiting the articles from entering the United States.

Apparently realizing the draconian possibilities inherent in the Executive's authority to exclude, Congress specifically provided that such a remedy could only be imposed in "extreme cases."[13] But even this limitation was insufficient in the view of several legislators,[14] because no judicial or congressional mechanisms were included to act as a check upon the President in the exercise of his broad discretion.

A full understanding of the historical setting of section 337 requires a discussion of how section 316 fit into the large body of antitrust and trade regulation laws that already existed in 1922. Several parallels exist between the passage of antitrust and trade regulation laws which focus upon unfair acts occurring in domestic and foreign commerce. The enactment of the Federal Trade Commission Act (FTC)[15] and the Clayton Act[16] were intended to supplement the Sherman Antitrust Act of 1890.[17] The Wilson Tariff Act of 1894[18] was intended to bring about "the repression of trusts

13. *Id.* § 316(e).

14. Senator Walsh: "Just exactly what is an extreme case, or a moderate case, or a mild case, we are left merely to speculate." 62 CONG. REC. 11241 (1922); *see id.* (remarks of Senator McCumber); *id.* at 6500 (remarks of Senator Walsh). Lengthly debates were held in the Senate as to the constitutionality of giving the President authority to substantially increase rates. Such authority had traditionally been within the province of the Congress. *See, e.g., id.* at 11206 (remarks of Senator Underwood).

For an excellent review of the legislative history of sections 316 and 337, see Musrey, *Tariff Act's Section 337: Vehicle for the Protection and Extension of Monopolies,* 5 LAW & POL'Y INT'L BUS. 56 (1973).

15. Ch. 311, 38 Stat. 727 (1914) (codified at 15 U.S.C. §§ 41-58 (1976)). The FTC Act prohibited unfair methods of competition in U.S. commerce, and directed the Commission to issue cease and desist orders to prevent such unfair acts. *See* text accompanying note 199 *infra.*

16. Ch. 323, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12-27 (1976)). The Clayton Act declared unlawful certain price discrimination, exclusive dealing, tying, and total requirements arrangements that substantially lessened U.S. competition or tended to create a monopoly in any line of domestic commerce. The Act further condemned certain acquisitions and mergers having a similar effect. Remedies for violation of the Clayton Act include cease and desist orders, injunctions, divestiture, and treble civil damages.

17. Ch. 674, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7 (1976)). The Sherman Act condemned unlawful contracts, combinations, and conspiracies in restraint of trade. Remedies for violations of the Sherman Act include criminal sanctions and injunctions.

18. Ch. 349, 28 Stat. 509 (1894) (current version at 15 U.S.C. § 8 (1976)). The Wilson Tariff Act made unlawful contracts, combinations, and conspiracies in

. . . in respect of the importation of goods from foreign countries . . . ."[19] The Wilson Tariff Act of 1894 was as comprehensive as the Sherman Act and served "only to make the law more specific in its application, as it relates to foreign commerce."[20] It would seem, therefore, that section 316 was intended to supplement the Wilson Tariff Act in much the same way that Congress intended the FTC Act and Clayton Acts to attack unfair trade practices not covered by the Sherman Act.

In addition to the analogous distinction between domestic and foreign commerce trade practices and the historical transition, Congress probably extracted the "unfair methods of competition" clause found in section 316 from the identical language incorporated into the earlier Federal Trade Commission Act. Indeed, the parallel between the two statutes has been recognized by the ITC on two occasions. In an early Annual Report, the Commission noted: "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 trade."[21] More recently, the Commission intimated that Congress must have intended that the types of unfair trade practices condemned under section 316 should be similar to those prohibited under section 5 of the FTC Act: "It is reasonable to assume that the framers of section 316 were cognizant of the legislative and judicial history of Section 5 of the FTC Act."[22]

Moreover, although the 1922 legislators continued to be preoccupied with the threat of predatory pricing by foreign manufactur-

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import trade. Remedies for violations of the Wilson Tariff Act include criminal sanctions and seizure of property.

19. 26 CONG. REC. 7117 (1894) (remarks of Senator Morgan).

20. Fosburgh v. California & Hawaiian Sugar Refining Co., 291 F. 29, 32 (9th Cir. 1923); *see* United States v. General Dyestuff Corp., 57 F. Supp. 642 (S.D.N.Y. 1944). A Wilson Tariff Act violation will often be coupled with a violation of the Sherman Act. *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

21. 6 TARIFF COMM'N ANN. REP. 4 (1922). U.S. Tariff Commissioners Costigan and Culbertson also noted the kinship between section 316 and the FTC Act while testifying before the Senate Select Committee on Investigation of the Tariff Commission. *See Hearings on S. Res. 162 Before the Senate Select Comm.*, 69th Cong., 1st Sess. 254, 645-46 (1926). Final determinations by the International Trade Commission and Tariff Commission are contained in their respective *Publications.* Other documents, such as letters or notices, are contained in Commission files, which are designated "ITC Inv. No." or "Trade Inv. No."

22. Certain Welded Stainless Steel Pipe & Tube, INTERNATIONAL TRADE COMM'N PUB. 863, at 39 (Feb. 1978) (ITC Inv. No. 337-TA-29).

ers,[23] a striking similarity exists in the language used by the lawmakers in according the Commission and FTC[24] considerable latitude in their interpretations of "unfair methods of competition." With respect to section 316, the original House version of the Tariff Act of 1922 did not define the Commission's authority. The Senate added the language in Amendment No. 1666 of the Conference Report. The Report of the Senate Committee on Finance explained that "[t]he provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice . . . ."[25] Further insight was provided by Senator Smoot, who was a major force behind the passage of section 316. He explained:

> Dumping and other unfair methods of competition in importation have been recognized as a menace, particularly under postwar conditions, to American industries . . . . We have in this measure an anti-dumping law with teeth in it—one which will reach all forms of unfair competition in importation. This section (316) not only prohibits dumping . . . but also bribery, espionage, misrepresentation of goods, . . . and other similar practices frequently more injurious to trade than price cutting.[26]

Similarly, the fact that Congress also intended the FTC Act to have a broad application was perhaps highlighted by Senator Brandegee's remarks when he stated that the breadth of the "unfair methods of competition" language was intended to be "as varied as the ethical conceptions of the consciences of men."[27]

Many of the antitrust laws that had been passed before 1922 could prohibit unfair trade practices committed in foreign com-

23. Congress was particularly concerned about foreign cartels that were thought to be threatening the existence of U.S. industries by certain monopolistically designed pricing practices. *See, e.g.*, text accompanying note 26 *infra* (remarks of Senator Smoot).

24. *See, e.g.*, 51 CONG. REC. 11498 (1914) (remarks of Senator Thomas).

25. S. REP. No. 595, 67th Cong., 2d Sess. 3 (1922). The quoted passage from the Report has been repeatedly used by the Commission in its determinations. *See, e.g.*, Certain Welded Stainless Steel Pipe & Tube, *supra* note 22, at 39; Certain Color Television Receiving Sets, Memorandum Opinion at 9 (Dec. 20, 1976) ITC Inv. No. 337-TA-23 (instituted Mar. 29, 1976).

26. 62 CONG. REC. 5879 (1922). Senator Smoot's comments have been quoted by commentators on the statute. *E.g.*, Fisher, *Protection Against Unfair Foreign Competition: Section 337 of the Tariff Act of 1930*, 13 VA. J. INT'L L. 158 (1972). In addition, these comments have been quoted by the Commission in its determinations. *E.g.*, Certain Color Television Receiving Sets, *supra* note 25, Memorandum Opinion at 9 (Dec. 20, 1976).

27. 51 CONG. REC. 12792 (1914).

merce.[28] In order to understand the need for section 316, then, it is first instructive to examine the scope of the jurisdictional authority under section 316. The section's caption, "Unfair Practices in Import Trade," made it clear that unfair practices committed during the time of importation would be sanctioned by the Commission. Yet the President's jurisdiction went further. Although faced with dissent from at least one noted international trade authority,[29] the Commission believed that the statute made "it possible for the President to prevent unfair practices, even when engaged in by individuals residing outside the jurisdiction of the United States."[30] This extraterritorial reach over undefined foreign trade practices further suggests that section 316 was intended as both a supplement to and progeny of antitrust law. But the apparent conceptual and literal thread between most of the statute's violation language (*i.e.*, "unfair methods of competition" having an "effect or tendency . . . to restrain or monopolize trade and commerce in the United States . . . .") and the similar language that is to be found in other antitrust statutes such as the FTC, Clayton, and Sherman Acts, was worn thin if not severed by the dramatic differences in their remedies, which in turn substantially affected who or what was intended to be protected from unfair trade practices.

These early antitrust laws applied to foreign manufacturers or exporters only if in personam jurisdiction could be obtained over them.[31] This requirement obviously was a severe limitation upon antitrust law enforcement.[32] The Wilson Tariff Act, as amended in 1913,[33] provided for seizure and criminal penalties for violations by foreign-based respondents. Even though this act permitted in rem enforcement, however, it was directed to monopolistic price fixing of imported merchandise.[34] The forfeiture of the goods was appro-

28. *E.g.*, United States v. American Tobacco Co., 221 U.S. 106 (1911); FTC v. Federal Rope Co., 2 F.T.C. 327 (1920) (FTC Act).

29. J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE (1923). Professor Viner believed that section 316 was only intended to prohibit unfair trade practices committed by importers and, therefore, "failed to reach unfair acts in connection with *exportation* of the goods to the United States." *Id.* at 253.

30. 6 TARIFF COMM'N ANN. REP. 4 (1922).

31. *See* United States v. Scophony Co., 333 U.S. 795, 817 (1948); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (1973); 11 AMERICAN BAR ASSOCIATION ANTITRUST SECTION REPORT 86-87 (1957).

32. *See generally*, W. FUGATE, *supra* note 31.

33. Tariff Act of 1894, ch. 349, 28 Stat. 509, *as amended by* Tariff Act Amendments of 1913, ch. 40, 37 Stat. 667 (current version at 15 U.S.C. § 8 (1976)).

34. *See* Adams-Mitchell Co. v. Cambridge Distrib. Co., 189 F.2d 912, 920 (2d Cir. 1950).

priate in view of the severity of the offense, since the public policy of attacking monopolizers and price fixers by whatever means had been long established.

The section 316 prohibition also reached unfair acts having the effect of monopolizing United States trade. Further, like the Wilson Act, section 316 effectively prevented imported merchandise from being domestically traded by assuring that such goods never entered the stream of commerce. In order for the Commission and the President to investigate and attack unfair practices less onerous than monopolization, the President in such cases was not required to obtain in personam jurisdiction over the offenders. The President was only required to have in rem jurisdiction over the imported goods themselves. Once the goods were imported, and a violation found, the President could exclude the goods from the United States or could substantially increase the tariff-rate on such merchandise thereby effectively terminating the import trade. The 1922 Congress did not intend section 316 to supplement the then-existing antitrust laws, however, even if in certain cases it might have had that effect, because the statute was neither drafted nor intended to share the pro-competitive goals embodied in the FTC, Clayton, Sherman, and Wilson Tariff Act.[35] Section 316 grew out of a major piece of tariff legislation, as evidenced by the title of the 1922 Act. Accordingly, the statutory remedies were unique to international trade matters and were intended to increase significantly the tariff protection that might have already been imposed on the offending imported merchandise.

More generally, the public purposes for the enactment of tariff laws like section 316 and antitrust laws like the Federal Trade Commission Act and the Sherman Act were diametrically opposed. There was a pronounced public need in 1922 to protect American producers and American workers from the threat of import competition. Thus, if even one American producer was threatened by an unfair import practice, he could be protected by an import barrier and his domestic competitors would probably be protected as well, even though they may not have been injured or had not complained of such competitive injury. Therefore, section 337 encouraged the Commission to investigate and the President to decide private competitive controversies having no public significance.

Section 316 was designed to protect individual producers rather than to effectuate the policies underlying the antitrust laws. In

35. *E.g., id.; see* text accompanying note 39 *infra.*

addition to the antitrust language noted earlier, section 316 includes distinctive tariff law nomenclature,[36] rendering unlawful unfair practices in import trade that have an effect or tendency to "destroy or substantially injure" an "efficiently and economically operated" industry. Indeed, such a standard focusing upon the effect of certain acts on an industry or on individual competitors rather than upon competition has always been alien to established antitrust principles.[37]

In sharp contrast, Congress intended the FTC to promote competitive prices, competitive output levels, ease of entry, and to deconcentrate the industry structure. In order to assure that these purposes were effectuated, Congress mandated that the FTC could only commit its staff or funds for investigations promoting the "public interest."[38] If the same limitation applied to the Tariff Commission, smaller, less efficient producers, who were the most likely to seek relief from import competition, could not avail themselves of section 316's umbrella import protection.

The remedies that were available under section 316 illustrate the most obvious difference between its purposes and those of the antitrust laws. Exclusion of goods from a market and the potential for restraint or termination of trade as a result of inordinately high tariff rates were in basic conflict with antitrust principles which focused upon correcting the unlawful act so that import trade could continue. In short, Congress' need to protect domestic competitors and United States workers was sufficient to outweigh the potential effect of stifling competition rather than preserving it.[39] Nothing in the legislative history of section 316 suggests that the legislators believed that import protection should have the effect

36. A determination as to whether injury to an "industry" rather than to competition has been inflicted is required in several other import-related statutes enforced by the International Trade Commission. *See, e.g.*, 19 U.S.C. § 1303(b)(1) (1976) (the countervailing duty law); *id.* § 160(c)(2) (the Antidumping Act).

37. The nature of the Commission's other responsibilities must also be kept in mind. As we shall see in the following sections, the Commission was created for the purpose of providing information to the President and Congress that might result in protection for U.S. producers and workers. Therefore, the Commission was not to concern itself with providing advice on the status of U.S. competition or of U.S. consumers.

38. 51 CONG. REC. 14936 (1914) (remarks of Congressman Stevens); *id.* at 11109 (remarks of Senator Newlands).

39. Perhaps one of the reasons import trade was considered differently than domestic trade is the notion that Congress had subjected "the imports of foreign commodities to public control . . . ." United States v. General Dyestuff Corp., 57 F. Supp. 642, 649 (S.D.N.Y. 1944).

of fostering competition. In fact, quite the opposite view was held by some lawmakers. Senator King of Utah stated on the Senate floor: "The issue is whether certain manufacturing and other interests in the United States shall be permitted to prey upon the people and continue prices at levels inordinately high, or increase them to prevent a decline to such levels as would be fair and just to the American consumer . . . ."[40] Later during the debates, Senator King with the support of Senator Underwood[41] explained what were believed to be the true purposes of section 316's passage: "Its true object is to give to domestic producers a complete monopoly of the domestic market and to maintain domestic prices at levels so high as to be oppressive to the American people."[42]

Attempts were made to minimize potential inequities flowing from attacks on the imported merchandise. There were concerns that "these tariff duties, like the rain, fall on the just and the unjust alike."[43] Certain legislators justifiably believed that it would have been inequitable to impose additional duties or exclude articles from entering the United States by parties who had not been found by the Commission and the President to have engaged in any unfair method of competition. Attempting to respond to this inequity, the legislators agreed upon an amendment to section 316 imposing duties "upon merchandise imported in violation of this act" and with respect to exclusion upon "merchandise imported by any person violating the provision of this act."[44] These additions were ostensibly intended to attack "merchandise imported by a given individual who is guilty of violations of this act."[45]

The amendments, however, did not clearly address the potential inequities to foreign manufacturers, exporters, or importers. As we

40. 62 CONG. REC. 5890 (1922).

41. *Id.* at 6507.

42. *Id.* at 5890. Certain other legislators believed, however, that by providing the President with the final authority to remedy section 316 violations, the public interest would be protected. *See id.* at 6501 (remarks of Senator Walsh); *id.* at 11241 (remarks of Senator McCumber). But at that time, the public interest in passing tariff legislation was perceived to be protection of U.S. manufacturers from the threat of import competition. Moreover, no mechanisms had been legislatively or otherwise devised which might have enabled the President to evaluate the effects of the remedies on various national interests, such as U.S. competition or consumers.

43. *Id.* at 11242 (remarks of Senator Lenroot); 11241 (remarks of Senators Walsh and Reed).

44. Tariff Act of 1922, ch. 356, § 316(e), 42 Stat. 943 (current version at 19 U.S.C. § 1337 (1976)).

45. 62 CONG. REC. 11242 (1922) (remarks of Senator Lenroot).

shall see in the following sections, the Commission and the President did not interpret section 316 to require an identification of the individual wrongdoers. Subjecting international traders who had not been associated with the perpetration of unfair trade practices and whose goods would be subject to the unreasonably high duty penalties or even exclusion was an obvious harm to the public interest.

The operative language of section 316 was not changed when the statute was amended by the passage of section 337 of the Tariff Act of 1930, known as the Smoot-Hawley Tariff Act of 1930.[46] Upon the advice of the Commission, however, the House of Representatives concluded that the imposition of increased duties was "entirely inadequate to prevent the further violations" of the Act.[47] Consequently, exclusion was left as the sole remedy for violations.

The Tariff Act of 1930 was passed as a response to the political, social, and economic environment that prevailed in 1930, and represented one of the most protectionist pieces of legislation in United States history. The 1930 Congress continued to be disturbed over foreign manufacturers', exporters', and importers' unfair pricing practices and other unfair acts referred to by Senator Smoot during the passage of section 316.[48] The deletion of the duty remedy, which at least could have had the effect of raising the price of the imported merchandise to "fair" levels, and the substitution of exclusion, which also attacked fair-traded goods, led the Commission and the President into a new era of potential protectionism.

B. *Commission and Presidential Administration of Sections 316 and 337*

In 1915, public and governmental demands accelerated for Congress to establish a "non-partisan"[49] governmental agency regulating various international trade matters, principally tariffs. The underlying purpose for the creation of a new agency was, however, the need to establish a forum that would gather information and analyze information that might lead to increases in tariff rates, thereby protecting United States industries and workers from com-

46. Ch. 497, § 337, 46 Stat. 703 (1930) (codified at 19 U.S.C. § 1337 (1976)).

47. H.R. REP. No. 7, 71st Cong., 1st Sess. 166 (1929). The Senate deleted review by the Supreme Court because the President was not bound by the findings of the Commission and the CCPA and, therefore, no case or controversy existed.

48. *See* text accompanying note 26 *supra*.

49. 62 CONG. REC. 6239 (1922) (remarks of Senator Fletcher).

petition. As a result, in 1916 Congress established the United States Tariff Commission.[50]

The establishment of the Commission was severely criticized by the few free trade Democrats in Congress. One partisan Congressman noted that the Commission was founded in large part due to the strenuous efforts of the National Tariff Commission Association, a privately funded lobbying group "headed and officered and controlled by lifelong Republican protectionists."[51] The prevalent view, however, was the bipartisan belief that Congress, the Executive, and domestic manufacturers should have at their disposal a federal forum willing to collect data and report on and listen to domestic manufacturers' and congressional import-related grievances.

Following World War I, the Commission's efforts were primarily devoted to furnishing Congress and the Executive information with respect to duty rates. The Commission's regulatory activities under section 316 were then minimal, since very few complaints were filed alleging unfair practices in import trade and the Commission made no independent effort to investigate such practices. The United States Tariff Commission received only twenty-three complaints of alleged violations from 1922 to 1930, while section 316 was in effect. Of that number, only six investigations were conducted, four of which resulted in recommendations to the President that the statute had been violated. The Commission recommended to the President that exclusion of the goods be ordered in each case, believing that increased tariff duties could not offset the effects of the violations. In each of the four cases, the President issued a temporary exclusion order and later, following the final Commission report, an exclusion order.

In the first of the four cases, the President ordered an exclusion

50. Revenue Act of 1916, ch. 463, §§ 700-09, 39 Stat. 795.

51. 53 CONG. REC. 1949 (1916) (remarks of Representative Kitchin). The statement's concern over the establishment of a "non-partisan" Tariff Commission were predominately made by post-World War Democrats, such as Congressman Kitchin, who stated:

> My fear is that even if every member [of the proposed Tariff Commission] is a rank free trader, in a few years he will be a rank high protectionist. From the time he is appointed until his term ends he will be a rank high protectionist. From the time he is appointed until his term ends he will be environed only by protection. He will be asked to do nothing except in the interest of protection . . . . The clever and cunning authors of the Tariff Commission conception anticipate such operation and results.

Id.

of certain revolvers entering from Spain.[52] The Commission found that the imported revolvers were unfairly simulating Smith & Wesson's domestically manufactured revolvers, even though the Spanish articles had imprinted the name of the manufacturer, monogram, trademark, and country of origin of the foreign manufacturers. The President issued an exclusion order in response to the Commission's advice and without discussion of actual injury to the American industry by the imports. Compounding this statutory omission, however, and in clear contravention of the legislative history of section 316, the President went on to direct that any imported revolvers that copied Smith & Wesson's be excluded.[53] One commentator stated that this blanket exclusion order "gave Smith & Wesson the equivalent of a patent monopoly, vis-a-vis imports on its unpatented revolver."[54] Such a result was clearly not in the public interest as contemplated by congressional public-interest advocates.

Soon after the *Revolvers* decision, the Commission advised the President to order exclusion of certain manila rope[55] found to be mislabeled regarding quality. The exclusion order was believed necessary so that "all infringing importation by whomsoever manufactured or imported"[56] would be prohibited from competing with the domestic complainants. Only conclusory statements with respect to injury to the industry were made, and again the recommendation was directed against all importers of the subject merchandise, rather than against only those in violation of the statute. In 1927, the President adopted the Commission's recommendations in full and issued a blanket exclusion order.[57]

With *Revolvers* and *Manila Rope* as a foundation, the Commission concluded in the case of *Synthetic Phenolic Resin*[58] that the subject resins manufactured abroad were made in accordance with

52. T.D. 41,655, 49 TREAS. DEC. 1049 (1926); Certain Revolvers, Exclusion Order (June 23, 1926), Tariff Inv. No. 316-1 (July 14, 1925).

53. Certain Revolvers, *supra* note 52, Exclusion Order (June 23, 1926).

54. Musrey, *supra* note 14, at 63.

55. Manila Rope, Exclusion Order (June 13, 1927), Tariff Inv. No. 316-5 (Apr. 1926).

56. *Id.*, Opinion at 5. Musrey, *supra* note 14, at 66, notes that the Federal Trade Commission initiated an investigation against certain domestic manila rope manufacturers for selling a product not entirely composed of manila fiber. A cease and desist order was issued against the offending importers, a result clearly more consistent with this country's antitrust laws. *See* FTC v. Federal Rope Co., 2 F.T.C. 327 (1920).

57. T.D. 42,257, 51 TREAS. DEC. 959 (1927).

58. Synthetic Phenolic Resin — Form C, Tariff Inv. No. 316-4 (May 25, 1927).

the complainant's United States patent and that importation of the goods into the United States and domestic sale thereof without license from the owner of the patent was an "unfair method of competition and unfair act" for purposes of section 316. In *Resin,* the Commission determined both the validity of the domestic complainant's patents and whether the imported articles were infringing those patents. The Commission correctly recognized that "[m]anifestly there can be no infringement of an invalid patent."[59] The patent was held valid and the imported articles were found to infringe the patent. An exclusion order was thereupon recommended and ordered by the President.

On appeal to the Court of Customs and Patent Appeals the Commission's affirmative recommendation to the President and the exclusion order were sustained.[60] The Court concluded, however, that since the Commission was merely an administrative, fact-finding body, it had no authority to pass upon the validity of the complainant's patent. The court nevertheless sustained the Commission's authority to find that if the complainant's patent had been infringed, such infringement could be considered an unfair method of competition and an unfair act within the meaning of section 316.

The *Resin* decision under section 316 established the precedent for future section 337 determinations. Since patent-based proceedings later dominated the Commission's calendar, the opinion had a substantial impact on the nature and breadth of future recommendations to the President. Guided by the ruling of the Court of Customs and Patent Appeals, the Commission felt compelled to presume the validity of each complainant's patent.[61] The distinct possibility that the Commission might be perpetuating unlawful monopolies by providing protection to United States patent holders whose patents were invalid was nevertheless obvious to the Commission and to the Court of Customs and Patent Appeals.

It is unclear why the court in *Resin* did not conclude that the Commission should make a finding as to the validity of the peti-

59. *Id.,* Opinion at 7.

60. Frisher & Co. v. Bakelite Corp., 39 F.2d 247 (C.C.P.A. 1930), *cert. denied,* 282 U.S. 852 (1930).

61. *In re* Orion Co., 71 F.2d 458 (C.C.P.A. 1934); *In re* Northern Pigment Co., 71 F.2d 447 (C.C.P.A. 1934). For background information with respect to patent-based section 337 proceedings, see Kastriner, *Protection Against Imports Which Undermine the Value of a United States Patent,* 7 PAT., T.M. & COPYRIGHT J. RES. & EDUC. 488 (1963); Stark, *Protection for Process Patents Against Imported Goods,* 34 N.Y.U. L. REV. 1254 (1958); Note, *Tariff Commission Upheld on Exclusion Order Based on Contested Patent,* 56 COLUM. L. REV. 1119 (1956).

tioner's patents. The Commission's findings clearly were mere advisory opinions to the President.[62] Furthermore, although the court held that the validity of the complainant's patent could not be reviewed by the Commission, it permitted the Commission to rule on the question of patent infringement.[63] It is difficult to understand the justification for the distinction. It is also difficult to understand why corrective legislation was not sought by the President or the Commission. Because protection of an invalid patent would give a patent holder an unlawful monopoly and therefore would have anticompetitive consequences, the court's ruling was contrary to United States antitrust laws. As a consequence, in view of the long history of Commission enforcement of patent rights under section 337, there is the strong possibility[64] that certain complainants' patents were invalid, thereby perpetuating unlawful monopolies by means of section 337 protection.[65]

Strong dissents in later opinions of the Court of Customs and Patent Appeals pinpointed the significant adverse consequences inherent in the *Resin* decision regarding the interpretation provided by the Commission. In an appeal to the court from a Commission patent-based section 337 case, Judge Cole, in a dissenting opinion, articulated his concern over the Commission's findings:

> There has been [by the Commission] no inquiry into the validity of the patent, nor into the prior art to limit the claims. There has been no finding of *actual* injury to the patent owner; the mere fact that there have been substantial sales has been found sufficient to establish a *tendency* to injure sufficient to support an exclusion order.
>
> Carrying the majority opinion to its logical conclusion, the only

62. In his dissenting opinion in *Frischer & Co. v. Bakelite Corp.* 39 F.2d at 261, Judge Garrett stated: "By its own force such [Commission] judgment can exercise no control over the actions of the executive under the Section." *Id.* at 263.

63. *In re* Orion Co., 71 F.2d 458.

64. *See* Musrey, *supra* note 14, at 66, where the author contends that the Commission twice recommended exclusion where the complainants' patents were invalid, citing Phosphates & Apatite, Tariff Inv. No. 337-3 (1934); *rev'd, In re* Amtorg Trading Co., 75 F.2d 826 (C.C.P.A. 1935), *cert. denied,* 296 U.S. 576 (1935), and Oxides of Iron, Tariff Inv. No. 337-4 (1933), *aff'd, In re* Northern Pigment Co., 71 F.2d 447 (C.C.P.A. 1934).

65. From 1936 to 1968, however, no exclusion orders were issued under section 337. An explanation for this inactivity lies in the relative obscurity of the Commission and a lack of public awareness as to the Commission's statutory responsibilities under section 337.

function of the Tariff Commission is to determine whether the complaining American manufacturer has a patent.[66]

Not until the 1960s did several members of the Tariff Commission shed their patent "blinders" and acknowledge an awareness of Judge Cole's admonitions. Although the Commission continued to believe that it was hamstrung by the decision of the Court of Customs and Patent Appeals with respect to questioning the validity of a complainant's patent, several of the commissioners began to examine the complainant's activities in the use and misuse of their patents.[67] Thus, in a patent proceeding involving imports of furazolidone, Commissioners Sutton and Neusom recognized that section 337 "is operating in the public interest . . . the doctrine of patent misuse is identified with the law of unfair competition, and, as such, is clearly within [the Commission's] competency."[68] And in a later case, the conceptual breakthrough appeared again with the pronouncement that section 337 is primarily a public interest statute and, as such, requires Commission examination of such issues as fraud on the patent office and patent misuse.[69] As encouraging as these statements might have seemed, they did not represent the views of a voting majority of the Commissioners. In no other area of the Commission's statutory responsibilities was the composition of the Commission more critical.

The majority of Commissioners believed that "antitrust matters (such as patent misuses) [are] unconnected with import trade" and are therefore beyond the scope of the Commission's statutory responsibilities.[70] Similarly, the majority concluded that the doctrine of "unclean hands," which in patent law terms constitutes patent misuse, was totally irrelevant to section 337 proceedings.[71]

66. *In re* Von Clemm, 229 F.2d 441, 446 (C.C.P.A. 1955).

67. "Patent misuse," a term that will appear later in this article, has special legal meaning. If a patent is used in a way that is in violation of the antitrust laws, the patent is said to be "misused" and is unenforceable while the misuse continues and remains unenforceable by the patent holder unless or until he "purges" himself of the antitrust violation. While any use of a patent to carry out an antitrust violation is a misuse, it is not the case that any misuse of a patent automatically constitutes an antitrust violation.

68. Furazolidone, TARIFF COMM'N PUB. 299, at 13 (Nov. 1969) (Tariff Inv. No. 337-21).

69. Ampicillin, Report to the President on Preliminary Inquiry into Complaint, TARIFF COMM'N PUB. 245, at 19-21 (Nov. 1970) (views of Commissioners Sutton & Leonard).

70. Furazolidone, *supra* note 68, at 38 (views of Commissioners Moore & Clubb).

71. *Id.*

These Commissioners shared a strong belief that the protection of United States patent-bearing complainants was the only public interest that was relevant to the Commission's inquiry, by virtue of the absence of any explicit statutory language or legislative history to justify the introduction of other public interest considerations. This lack of express statutory guidance or legislative history should have been expected, however, in view of the fact that in drafting either section 316 or section 337, Congress never contemplated that the statute would be enforced so as to protect United States patents.

Nonetheless, the majority's reactionary position invited anticompetitive conduct by complainants holding misused patents and may have encouraged such complainants to seek relief from the Commission rather than seeking injunctive relief in the district courts in cases involving imports. The views of the majority persisted in spite of strenuous arguments advanced by the Antitrust Division of the Department of Justice and the Federal Trade Commission in several section 337 patent-based proceedings.[72] These federal agencies argued that the complainants' United States patents should not be protected because sufficient evidence existed that the complainants may have violated United States antitrust laws in the use of their patents. In retrospect, it is unbelievable that the framework of United States antitrust laws and the recent developments in patent law were not believed to be germane to the enforcement of section 337 patent cases.

The tide at last turned in March 1975 when the Commission ruled on the validity of a complainant's patent in a case involving imported golf gloves.[73] At that time the Trade Act of 1974 was

72. The Federal Trade Commission submitted its views in *Meprobamate* on November 18, 1970. *See, e.g.*, Meprobamate, Report to the President on Preliminary Inquiry into Complaint, TARIFF COMM'N PUB. 389, at 1 (Apr. 1971). In *Furazolidone*, the Department of Justice intervened, arguing that the complainants had conspired with its licensee to divide markets, such conspiracy constituting both a violation of the Sherman Act and a misuse of the complainant's patent. *See* Furazolidone, *supra* note 68, Letters from Edwin M. Zimmerman (Ass't Attorney General, Antitrust Div., Dep't of Justice) to Donn N. Bent (Secretary, U.S. Tariff Comm'n), (April 15, 1969), TARIFF COMM'N PUB. at 77-79, 80-81. *Furazolidone* further points out that the Commission staff made no attempt to explore a possible patent misuse, arguably because the Commissioners did not direct them to do so. Commissioners Sutton and Newson noted: "Prior to Justice Department involvement in the investigation, the Commission was not aware of the existence of patent misuse." *Id.* at 14; *see* Ampicillin, *supra* note 69, at 8-12 (discussing Letter from Ass't Attorney General McLearen to Kenneth R. Mason, Secretary, U.S. Tariff Comm'n (June 1, 1970)).

73. Golf Gloves, INTERNATIONAL TRADE COMM'N PUB. 720 (Mar. 1975) (ITC Inv.

passed, but not yet applicable to section 337 proceedings.[74] The Commission unanimously found that the complainant's patent was invalid and made a negative recommendation to the President. In a confusing statement, however, three of the six Commissioners persisted in supporting the view that the Commission "should consider a patent valid in the absence of a finding of invalidity by a court of competent jurisdiction."[75] Those Commissioners ruled upon the validity of the complainant's patent because uncontroverted evidence existed that it was invalid. In an effort to avoid any sign of precedent-setting, however, they further stated that they did "not intend [their] findings to be construed as an indication that [they] believe it is necessary for the Commission to establish the validity of a patent (or claim therein) in each section 337 investigation by the Commission."[76] Although the remaining three Commissioners in a trenchant opinion[77] found that an overwhelming public policy, as well as case law, required validity and misuse examinations in every section 337 case, it was clear that a legislative directive with respect to patent validity and patent misuse issues remained necessary.[78]

III. The Trade Act of 1974: Legislative History

The renaming of the United States Tariff Commission to the United States International Trade Commission[79] was the most obvious indication that the Commission was undergoing major changes as a result of the Trade Act of 1974. The significant amendments to section 337 were strong evidence that the changes were substantive as well as nominal. The fundamental changes made clear that section 337 must be enforced so as to reflect the

No. 337-37). In *Golf Gloves,* Commissioners Leonard and Ablondi stated: "In our opinion, the Commission should reverse its policy of conclusively presuming a patent or (claim thereon) in issue before it as valid unless held otherwise by a Federal court . . . ." *Id.* at 10.

74. *See* Trade Act of 1974, Pub. L. No. 93-618, § 341(a), 88 Stat. 1978 (1974) (codified at 19 U.S.C. § 1337(a)-(j) (1976)).

75. Golf Gloves, *supra* note 73, at 6.

76. *Id.*

77. *Id.* at 7-22 (separate statement of Commissioners Leonard and Ablondi; separate statement of Commissioner Minchew).

78. The reasons provided in the findings of Commissioners Leonard, Ablondi and Minchew could have been given many years earlier. The decision in *Golf Gloves* may have been precipitated by the passage of the Trade Act and by a change in the composition of the Commission itself.

79. 19 U.S.C. § 2231(a) (1976). *See also* Finance Comm. Rep., *supra* note 7, at 115.

public interest and must not be used as a vehicle for protecting private rights at the possible expense of the public health and welfare, domestic competition and United States consumers, even in those cases in which the complainant has lawfully acquired and lawfully administered his United States patent. The Trade Act furthered the public interest by providing the Commission with the authority to issue cease and desist orders and, implicitly, consent decrees as well. These additional alternatives to exclusion provided the Commission with the flexibility needed to remedy those unfair acts and methods of competition in import trade having no relation to patents or trademarks.

A. *Patent Proceedings*

In passing the 1974 Trade Act, Congress recognized that patent proceedings have always consumed the Commission's section 337 case work. Upon examination of the history of Commission interpretation, Presidential enforcement, Court of Customs and Patent Appeals review, and recent judicial developments in the patent law, Congress determined that a new legislative directive was essential.

A shift in the Commission's entrenched presumption that a complainant's patent is valid unless a court has deemed otherwise was one of the most obvious section 337 changes that Congress believed necessary. As noted earlier, a patent grant affords the patent holder a limited monopoly to make, use, or sell the patented product.[80] If the patentee has an invalid patent, his continued use thereof may subject him to antitrust charges.[81] Three other primary reasons explain why the Commission should rule on the validity of the complainant's patent prior to reviewing the question of infringement. First, under domestic law, injunctive relief would not be granted by a court in a patent infringement case unless the validity of the patent had been either expressly or presumptively

80. *See* text accompanying notes 54 & 67 *supra.*

81. For example, if a patentee committed fraud on the patent office by not reporting all known facts bearing upon the patent application, the patent is invalid and unenforceable. See Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806 (1945). The enforcement of a fraudulently procured patent may constitute an antitrust violation, depending upon the exclusionary effect on the relevant market involved. *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965). If the patentee tries to enforce what is known to be a fraudulently procured patent, such patentee may be criminally prosecuted. See Mas v. United States, 151 F.2d 32 (D.C. Cir. 1944), *cert. denied,* 362 U.S. 776 (1945).

established. For example, Judge Learned Hand pointed out: "We have often said that an injunction *pendente lite* in a patent suit should not go except when the patent is beyond question valid and infringed."[82] Second, in 1969 the Supreme Court in *Lear Inc. v. Adkins*[83] imposed limitations on United States patent law by reason of overriding considerations of "federal policy favoring free competition in ideas which do not merit patent protection."[84] Third, and quite apart from purely legal reasons, it has been estimated that more than 80 percent of patent infringement cases on appeal have resulted in a determination that the patent sued upon was invalid.[85] In response to these overwhelming legal and equitable demands founded upon the principle of fostering the public interest, section 337(c), as amended by the Trade Act, addresses the issue by simply mandating that "all legal and equitable defenses may be presented in all cases."

The Senate Finance Committee Report[86] explained in detail the Commission's future responsibilities in patent-based proceedings. Attacking the Commission's practice of conclusively presuming the validity of all complainants' patents, the Report set forth the following:

> [T]he public policy recently enunciated by the Supreme Court in the field of patent law (cf. Lear, Inc. v. Atkins, 395 U.S. 653 (1969)) and the ultimate issue of the fairness of competition raised by section 337, necessitates that the Commission review the validity and enforceability of patents, for the purposes of section 337, in accordance with contemporary legal standards when such issues are raised and are adequately supported.[87]

Thus, for purposes of section 337 only, the Commission may, "and should when presented,"[88] review the validity of the complainant's patent. Since the review is only for section 337 enforcement purposes, a finding of validity does not have res judicata or collateral estoppel effect in federal courts.

As explained in legislative history, section 337(c) goes further in defining the Commission's prospective administration of patent

82. Simson Bros. v. Blancard & Co., 22 F.2d 498, 499 (2d Cir. 1927).

83. 395 U.S. 653 (1969). *See also* Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964).

84. Lear, Inc. v. Adkins, 395 U.S. at 656.

85. Milgrim, *Sears to Lear to Painton: Of Whales and Other Matters,* 46 N.Y.U. L. REV. 17, 31 (1971).

86. FINANCE COMM. REP., *supra* note 8, at 196.

87. *Id.*

88. *Id.*

cases. Congress recognized that an occasion might arise where a majority of commissioners might not see the relevance of misuse of a patent or other misconduct on the part of a patent-bearing complainant. In an attempt to dispel any confusion in this regard, the Finance Committee Report construed the "all legal and equitable defenses" language in section 337(c) to mean that "[t]he Commission would also consider the evolution of patent law doctrines, including defenses based upon antitrust and equitable principles, and the public policy of promoting 'free competition,' in the determination of violations of the statute."[89]

The examination of adequately supported antitrust and other related defenses does not deny an individual the statutory[90] and constitutional rights[91] to apply for and obtain a patent, contrary to the apparent belief held by some Commissioners. Rather, the section 337(c) requirement that the Commission evaluate patent-related antitrust defenses simply incorporated what should have been a long-established warning to patent-bearing complainants before the Commission. In order to enjoy their patent monopoly and enforce it against others, complainants must avoid fraud,[92] conspiracy,[93] or misuse,[94] since such misconduct would constitute a prohibited use or extension of the patent monopoly and be contrary to the "public policy of promoting free competition."

B. *Non-Patent Antitrust Proceedings*

As stated by the Federal Trade Commission in a section 337 proceeding, "[E]xclusion as a remedy in section 337 antitrust cases is inconsistent with the antitrust principles to which this country has long been committed."[95] In order to push the Commission out of the era of protectionism and provide it some leverage to condemn unfair import practices, Congress provided it with the authority to issue cease and desist orders against persons violating

89. *Id.*

90. 35 U.S.C. § 101 (1976).

91. U.S. CONST. art. I, § 8.

92. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. at 176-77.

93. American Cyanamid Co. v. FTC, 363 F.2d 757, 770 (1966).

94. Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 670 (1944).

95. Certain Color Television Receiving Sets, *supra* note 25, Letter from Federal Trade Comm'n to International Trade Comm'n (Apr. 12, 1977). In support of their contention, the FTC cited the landmark cases, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), and Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

or believed to be violating section 337.[96] The Finance Committee Report on the Trade Act justifies this grant of authority by stating the following:

> It is clear . . . that the existing statute, which provides no remedy other than 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.[97]

Congress thus focused upon the "ineffectiveness" of exclusion as the sole remedy for certain section 337 violations, rather than upon the obvious anticompetitive consequences that result from exclusion of goods from a marketplace. Nonetheless, the grant of authority to issue the cease and desist orders may also have been a response to Commissioner Sutton's view in a 1971 non-patent section 337 case involving tractor parts,[98] where he highlighted the anticompetitive consequences of exclusion as a remedy in an antitrust proceeding:

> Inasmuch as a violation of Section 337 does not continue to exist in this case, the public interest will not be served by the exclusion of Berco tractor parts from entry into the United States. A different situation might exist if Section 337 provided, as a remedy, the issuance against the conspirators of an order to cease and desist from their illegal acts. Such an order would allow business to continue, while also enjoining the continuation or resumption of the unfair methods or acts; Section 337, however, provides only for an *in rem* action against the imported goods (*i.e.*, exclusion from entry), and such action, if taken, would have the effect of terminating trade in the tractor parts in question.[99]

Cease and desist orders were obviously intended to be used in lieu of exclusion in non-patent investigations. If respondents subject to a cease and desist order violated its terms, however, "[s]uch an order could be modified or revoked at any time, and when revoked, could be replaced by an exclusion order."[100]

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96. 19 U.S.C. § 1337(f) (1976). Cease and desist authority was not included in the bill which eventually became the Trade Act, as reported by the House Ways and Means Committee. Rather, the authority was included in the bill by the Senate Finance Committee and eventually approved by the full Senate, the Conference Committee, and both houses of Congress.

97. FINANCE COMM. REP., *supra* note 8, at 198.

98. Tractor Parts, TARIFF COMM'N PUB. 401, at 16 (June 1971).

99. *Id.*

100. FINANCE COMM. REP., *supra* note 7, at 198. Section 337(f) states:

The Commission may at any time, upon such notice and in such manner

IV. COMMISSION ADMINISTRATION OF SECTION 337 AFTER THE TRADE ACT OF 1974

A. *Procedural Background*

Although the Trade Act amendments to section 337 became effective on April 3, 1975,[101] the Commission's Rules of Practice and Procedure[102] which were revised to reflect the new statutory changes were not implemented until May 26, 1976. For the purpose of this article, only the basic procedures adopted by the Commission relating to the conduct of section 337 proceedings will be discussed. Although the Commission may initiate complaints on its own,[103] investigations thus far have been instituted exclusively upon outside complaints by domestic producers. Responding to the congressional mandate to avoid delay,[104] the Commission's rules provide that an investigation will be instituted within 30 days after the filing of a complaint.[105] To institute an investigation, the Commission publishes notice in the *Federal Register,*[106] serves the parties named in the complaint,[107] and serves relevant government agencies that might have an interest in the proceeding.[108] The Commission must complete its investigation within one year from the date of publication of notice.[109] If there are grounds for concluding that the case is "more complicated," the Commission may grant itself an additional six months in which to make its final determination.[110]

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as it deems proper, modify or revoke any such [cease and desist] order, and, in the case of a revocation, may take action under subsection (d) [exclusion] or (e) [exclusion except under bond], as the case may be.
19 U.S.C. § 1337(f) (1976).

101. Trade Act of 1974, Pub. L. No. 93-618, § 341(a), 88 Stat. 1978 (1974) (codified at 19 U.S.C. § 1337(a)-(j) (1976)).

102. The rules become effective 30 days after their publication in the Federal Register. 41 Fed. Reg. 17710 (1976). The Rules of Practice are codified in 19 C.F.R. § 210 (1977).

103. 19 U.S.C. § 1337(b)(1) (1976).

104. FINANCE COMM. REP., *supra* note 8, at 194.

105. 19 C.F.R. § 210.12 (1977). It is important to recognize that section 337(b)(1) provides that the Commission "shall investigate any alleged violation" of the statute. 19 U.S.C. § 1337(b)(1) (1976). The mandatory "shall" has sparked oftentimes heated debates as to whether the Commission must institute every complaint filed.

106. 19 C.F.R. § 210.12 (1977).

107. *Id.* § 210.13.

108. *Id.*

109. 19 U.S.C. § 1337(b)(1) (1976).

110. *Id.* Rule 210.15 sets forth the following criteria under which the ITC decides whether or not to designate a case "more complicated": (1) complexity

Once the respondents file their answers to the complaint[111] the case proceeds as would any other adjudicative proceeding governed by the Administrative Procedure Act.[112] Pre-hearing discovery conferences may be held before the Presiding Officer of the Commission in preparation for full adjudicative hearings.[113] Once the Presiding Officer completes the hearings, he files a "Recommended Determination" to the Commission,[114] which incorporates his findings of fact and conclusions of law concerning all material issues contained in the record[115] and which automatically goes before the Commission for review.[116] The Presiding Officer's responsibilities are completed at that point unless the Commission thereafter remands the case to him.[117] The Commission must then decide four issues: (1) whether the statute has been violated; (2) if so, what bond, if any, is required; (3) the appropriate remedy to be imposed; and (4) the public interest criteria to be considered.[118] Although the question is not settled, an appeal of a Commission decision apparently is not judicially ripe until after the President has had the statutory 60 days to accept or reject the Commission's remedial relief.[119]

B. *Patent-Based Proceedings*

1. General Public Interest Considerations

The Trade Act amendments make public interest considerations

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of subject matter, (2) difficulty in obtaining information, or (3) large number of parties involved. 19 C.F.R. § 210.15 (1977).

111. 19 C.F.R. § 210.21 (1977).

112. 19 U.S.C. § 1337(c) (1976) provides that Commission proceedings under section 337 must be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1976).

113. 19 C.F.R. § 210.40 (1977).

114. *Id.* § 210.53(a).

115. *Id.* § 210.53(b).

116. *Id.* § 210.55(a).

117. *See id.* § 210.57.

118. 19 U.S.C. § 1337(e), (f) (1977).

119. This was the only section 337 ruling of the CCPA on this issue since the passage of the Trade Act. Import Motors, Ltd. v. International Trade Comm'n, 530 F.2d 937, *vacated,* 530 F.2d 940 (C.C.P.A. 1975). The Chief Judge of the CCPA, in his review of the question whether the court could take the appeal, criticized the Commission for its delay in ruling on the administrative appeal from the Presiding Officer. The court stated: "Since November 19, 1975 appellants have sought, without success, to obtain a written decision of the Commission respecting the order appealed from . . . . To date the Commission has filed with this court neither a copy of its decision respecting the order appealed from nor any response whatever to appellants' motions." *Id.* at 539.

relevant to section 337 patent cases in several ways. First, Congress specifically addressed the threat to the public interest by granting to the Commission the authority to examine the validity of complainants' patents. The Commission is required to make a determination of the validity of the complainant's patent whenever the issue is raised. Second, the Commission's authority to review and determine the validity of certain affirmative defenses raised by respondents also fosters public interest considerations. The Commission must explore and develop a full record upon allegations of fraud on the patent office, patent misuse, or other antitrust-type defenses. Third, the Commission must conduct a public interest balancing test to determine whether an exclusion order can be issued.[120] The test is required only when the following determinations have been made: (1) the complainant's patent has been found to be valid and infringed by the unlicensed imported goods; (2) the United States patent holder is lawfully administering his patent; and (3) substantial injury has been inflicted upon domestic industry[121] by reason of the infringing unlicensed imported goods. This balancing test is totally unrelated to the determination that a violation has occurred[122] and is therefore intended to be segre-

120. Exclusion is the primary relief contemplated to remedy an affirmative patent-based section 337 violation. As stated in Frischer & Co. v. Bakelite Corp., "The difficulties which confront a patentee seeking to enforce rights [against infringing imported goods] through the courts are practically insurmountable." 39 F.2d 247, 260 (C.C.P.A. 1930), *cert. denied, sub nom,* Frischer & Co. v. Tariff Comm'n, 282 U.S. 852 (1930). There are several reasons for the obstacles referred to by the court. Once infringing imported goods enter the stream of commerce, to protect his rights the U.S. patentee is required to file an action for infringement against each individual dealer who sells the infringing merchandise. This results in a costly multiplicity of suits with a likelihood that not all infringing dealers will be found. "Moreover," stated the court in *Frischer,* "a decree obtained against one dealer would have no binding effect upon others, and by the simple expedient of changing the consignees the effect of a decree when secured would be nullified." *Id.*

121. The industry in section 337 patent cases has traditionally been defined by the Commission to consist of the U.S. facilities manufacturing in accordance with the claims of the U.S. patent. See, e.g., Panty Hose, TARIFF COMM'N PUB. 471, at 7 (Mar. 1972) (Tariff Inv. No. 337-25). Under this definition, the size of the U.S. industry is irrelevant since often only one producer manufactures in accordance with the patent in question. *In re* Von Clemm, 229 F.2d 441, 444 (C.C.P.A. 1955). The industry may also consist of assignees, *Furazolidone, supra* note 68; sublicensees, *Ampicillin, supra note 59; or distributors, Self-Closing Containers,* TARIFF COMM'N PUB. 55 (Apr. 1962) (Tariff Inv. No. 337-18). The industry definition will probably not be affected by the Trade Act's amendments.

122. The balancing test refers to the public interest phase of the Commission's proceeding in which it has already made its determination as to whether a viola-

gated from such issues as patent misuse or fraud. The balancing test reveals that the intent of Congress was to require the Commission to weigh the need for protection of valid United States patents held by complainants against the need for protection of broader public interests.[123] The Senate Finance Committee Report described the factors to be considered in this balance:

> Should the Commission find that issuing an exclusion order would have a greater adverse impact on the public health and welfare; on competitive conditions in the United States economy; or production of like or directly competitive articles in the United States; or on the United States consumer, than would be gained by protecting the patent holder (within the context of the United States patent laws) then the Committee feels that such exclusion order should not be issued.[124]

2. Public Interest Requirements in Commission Violation Determinations

Section 337 patent case decisions since the passage of the Trade Act have raised serious questions as to whether the Commission is properly addressing the intention of Congress to protect the public interest in the determination of whether a violation of the statute has occurred. In *Reclosable Plastic Bags,*[125] a United States patent holder alleged that the importation and domestic sale of unlicensed articles by certain foreign manufacturers, importers, and domestic distributors had resulted in infringement of his patents and trademarks and were unfair acts and methods of competition under section 337(a). The complainant was the exclusive United States licensee under a United States patent on reclosable plastic bags which was owned by a Japanese company and licensed all over the world. The complainant licensee requested that the Commission recommend issuance of an exclusion order against the respondents. The primary respondent, an importer, seller, and dis-

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tion has occurred, whether bonding is necessary, and whether exclusion (in patent cases) should be ordered.

123. The test is similar to that conducted by courts in determining whether an injunction should be issued against an alleged patent infringer. *E.g.*, Foster v. American Mach. & Foundry Co., 492 F.2d 1317 (2d Cir. 1974); Vitamin Technologists, Inc. v. Wisconsin Alumni Research Found'n, 146 F.2d 941, 943 (9th Cir. 1944); City of Milwaukee v. Activated Sludge, Inc., 49 F.2d 577, 597 (7th Cir. 1934).

124. FINANCE COMM. REP., *supra* note 8, at 197.

125. INTERNATIONAL TRADE COMM'N PUB. 801 (Jan. 1977) (ITC Inv. No. 337-TA-22).

tributor of unlicensed plastic bags, denied that the complainant's patent had been infringed and alleged that the complainant itself had engaged in acts and participated in agreements which constituted patent misuse.

The alleged misuses included royalty-free patent grant-backs, cross-licensing beyond the limits justifiable by reasonable business needs, territorial restrictions, patent pooling and tie-in mechanisms, cross-licensing and pooling of expertise, and exchanging of market and price information, done with the purpose and effect of restraining commerce in the relevant markets. However, almost all of the allegations relating to exchanges of proprietary information, pooling of expertise, and territorial restrictions were not developed on the record either from primary or secondary sources. The merits of those defenses, therefore, could not be conclusively determined. Sufficient evidence, however, did exist to conclude that numerous exchanges of patents and technological and proprietary information had taken place between the complainants and foreign licensees and perhaps sub-licensees. Evidence was also introduced which raised suspicion that an implied agreement existed among the Japanese patent owner's licensees which, if proven, would clearly have been a misuse of the patent and a violation of United States antitrust laws.[126]

Moreover, the record revealed that the complainant had indeed misused the patent in its domestic practices. The complainant's president testified during the hearing that notices of infringement and threats of legal action were mailed to potential and actual sellers and buyers of plastic bags, including the respondents. The Commission's record indicated that the letters alleging infringement referred to a number of patents that had already expired. In addition, the complainant's representatives reluctantly conceded during the hearing that no inspection of the allegedly infringing imported articles had been made. Although the Commission did not fully explore the facts regarding this practice, such conduct, if supported by adequate evidence, has been held to be an unlawful patent misuse.[127]

The Presiding Officer in *Reclosable Plastic Bags* recommended to the Commission that the unlicensed imports had infringed the complainant's patent. The Commission thereupon endeavored to

126. *E.g.*, United States v. General Elec. Co., 82 F. Supp. 763 (D.N.J. 1949); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

127. *E.g.*, United States v. Besser Mfg. Co., 96 F. Supp. 304, 312 (E.D. Mich. 1951), *aff'd*, 343 U.S. 444 (1952); Emack v. Kane, 34 F. 46 (C.C.N.D. Ill. 1888).

determine whether the respondents had violated the statute. Since very little evidence had been developed relating to the most critical antitrust allegations raised by respondents, the Commission was unable to determine the merits of respondents' defenses. If the Commission had concentrated upon the entire record rather than merely upon the Presiding Officer's findings of fact and conclusions of law, it might have recognized that important antitrust questions remained as to whether the complainant was lawfully administering the United States patent under which it was licensed. If the inadequately explored misuse issues had been detected, the Commission could have exercised its option of designating the case "more complicated,"[128] thus allowing the Commission an additional six months to collect additional evidence.

The Commission found that section 337 had been violated without adequately addressing the more critical issue of whether the unfair methods of competition had the effect of destroying or substantially injuring an industry in the United States. Since infringement of the complainant's patent is not a *per se* violation, an "effects tests" must be applied. In *Reclosable Plastic Bags,* the Commission followed precedent[129] by defining the industry in question to consist only of the domestic producers manufacturing in accordance with the terms of the patent. Even with this extremely narrow definition, imports—which had been entering since 1970—never accounted for more than 1.5 percent of domestic production.[130] Nonetheless, this *de minimis* harm inflicted upon the industry was sufficient for a majority of Commissioners to find that there was a "tendency toward substantial injury . . . ."[131] This tendency toward injury was apparently predicated upon the fact that the imported plastic bags undersold the domestic producers

128. 19 C.F.R. § 210.15 (1977).

129. *See* note 121 *supra.*

130. Reclosable Plastic Bags, *supra* note 125, at 20 (dissenting views of Commissioner Ablondi).

131. *Id.* at 14. As part of its injury analysis, the ITC uses import ratios to determine the extent of import penetration. However, this methodology, although easily determined, is overly simplistic and misleading. For example, the import ratio for a particular industry may be 20%, but that figure may represent only one foreign firm's imports. That firm may, therefore, be a viable competitor with the U.S. industry. On the other hand, the 20% import penetration may be the result of multiple, displaced firms with unique product differences. In the latter case, the small, dislocated foreign competitors would not be perceived as major threats to their U.S. competitors. The ITC should determine whether or not there are dominant foreign competitors in the U.S. market, for the degree of injury inflicted domestically would be substantially affected.

and that the cost of producing the bags was cheaper in the Far East than in the United States.[132] *Reclosable Plastic Bags* and, more recently, the affirmative determination in *Certain Luggage Products,* are ominous signs that the Commission will find a tendency to substantially injure in all future patent cases in which the complainant's patent has been infringed.[133]

After deciding that exclusion was the appropriate remedy, the Commission in *Reclosable Plastic Bags* evaluated whether exclusion of the goods might have an adverse impact on the public interest criteria.[134] The Commission had no difficulty in finding that the exclusion of such a small quantity of plastic bags would have no discernible impact on the relevant public interests. Nevertheless, the competitive pressures applied by the importation of bags clearly would have had the effect of stimulating domestic competition and would have benefited the consumer by making domestic producers more efficient.

As a result of the evidentiary gaps in the Commission's record, an administrative chain reaction in the *Reclosable Plastic Bags* case followed. The Commission's record was certified to the President's Office of the Special Representative for Trade Negotiations (STR), the working body responsible for presidential review of section 337 determinations. Unable to review the legal conclusions reached by the Commission,[135] and unable to conclude that exclusion of plastic bags would have any significant adverse impact on

132. This is one of the anomalies of section 337 patent proceedings. The unfair method of competition found to exist bears no relationship to competitive conditions.

133. In *Certain Luggage Products,* no imports of the infringing products entered in 1978 and one-half of the imported luggage products which entered in 1977 were found not to be infringing the complainant's patent. The complainant could not prove that it had lost any sales to the infringing imports. It is significant that the majority of Commissioners concluded that the past imports had the "tendency of injuring complainant's otherwise exclusive production" rather than concluding—in accordance with the statute—that there was a tendency to "destroy or substantially injure." Accordingly, the Commission is clearly derogating from the injury test required under section 337. Certain Luggage Products, INT'L TRADE COMM'N PUB. 932, at 11 (Nov. 1978) (ITC Inv. No. 337-TA-39). As of this writing, the President has not made a decision whether the exclusion order recommended in *Certain Luggage Products* should be approved.

134. *See* text accompanying notes 9 and 10 *supra.*

135. With respect to Presidential review, the Senate Finance Committee explains that: "The President's power to intervene would not be for the purpose of reversing a Commission finding of violation of Section 337; such finding is determined solely by the Commission, subject to judicial review." FINANCE COMM. REP., *supra* note 7, at 199.

this country's foreign relations or other public interest factors, STR recommended to the President that no action be taken, thus effectively endorsing the Commission's exclusion order. The decision was reached in the face of an opinion of the Department of Justice that presidential "denial or postponement of exclusion" was appropriate "because facts adduced in the ITC investigation have raised a significant likelihood that the patent rights on which the action is based are being misused in violation of United States antitrust laws, and that exclusion of foreign goods may be an integral part of the scheme."[136]

(a) *The Statutory Time Restraints.*—The disposition of *Reclosable Plastic Bags* raises several fundamental questions relevant to the Commission's responsibility to protect the public interest in patent-based proceedings. One of the most critical difficulties facing the Commission is the stringent statutory time restrictions on completing an investigation. Many cases before the Commission in the future will probably attain the same degree of complexity experienced in *Reclosable Plastic Bags.* Until very recently, the Commission had only one Presiding Officer[137] who was given a seven-month statutory period in which to conduct pre-hearing conferences, to arrange discovery timetables, to conduct the adjudicative hearings, and to prepare a recommended determination. Bearing in mind that the Presiding Officer must also respond to all motions that are filed in adjudicative proceedings, and that he must also preside over an increasing number of section 337 cases, the proper adjudication of cases becomes increasingly a matter of serious question.

A designation by the Commission that a case is "more complicated" would minimize the pressure on the Presiding Officer and would give him an additional five months in which to render a recommendation. The Commission, however, is rarely persuaded to designate a patent case "more complicated."[138] Unfortunately,

136. Reclosable Plastic Bags, *supra* note 125. Letter from Hugh P. Morrison, Jr., Deputy Ass't Attorney General, Antitrust Div., Dep't of Justice to Alan W. Wolff, Acting Special Representative for Trade Negotiation (Feb. 18, 1977).

137. Donald K. Duvall is the Chief Administrative Judge and Janet D. Saxon, who assumed her responsibilities at the ITC on July 3, 1978, is an Administrative Law Judge. As noted throughout this article, they are referred to at the ITC as Presiding Officers.

138. For the ITC's criteria for determining whether a case shall be designated "more complicated," see note 103 *supra.* Of the approximately 50 cases decided or near completion since January 1975, only three have been extended. *Certain Color Television Receiving Sets, supra* note 25, involving complex predatory pricing issues, is the only non-patent investigation thus far designated more compli-

the prevalent feeling at the Commission is that Congress intended only "pure" section 337 antitrust proceedings (as compared to patent/antitrust cases) to warrant the protracted time period. This interpretation has no foundation in the Trade Act's legislative history and reveals a deep-seated lack of understanding of the importance and complexity of patent/antitrust issues. The Commission cannot fairly dispose of many complex patent cases that raise colorable antitrust issues within a seven-month period.

(b) *Participation by Respondents.*—Although section 337 cases are not technically adversary proceedings, the absence of foreign respondents participating before the Commission is a problem with which it must frequently deal. Many foreign manufacturers, exporters, or importers do not wish to participate in Commission proceedings and thereby subject their records to the scrutiny of a United States government agency. In addition, respondents are often small corporations which are not represented by trade associations and are thus unable to afford costly litigation expenses. As a result, the Commission's frequent reliance upon its own investigative staff rather than litigant's counsel to gather evidence places an increased burden upon the ITC. In *Reclosable Plastic Bags,* although the primary respondent participated in the hearing before the Presiding Officer, it withdrew from the case before the Commission began its review of the recommended determination. Therefore, at the critical stage of the proceeding when the Commission heard arguments concerning whether a violation of the statute had occurred and whether the public interest criteria had

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cated. In *Doxycycline,* a patent case, the Commission stated that the case was more complicated due to the need to evaluate more thoroughly allegations of fraud on the Patent Office, inequitable conduct, patent misuse and the joinder of another respondent. Notice Concerning Length of Commission Investigation (May 25, 1978) ITC Inv. No. 337-TA-3. In *Certain Apparatus for the Continual Production of Copper Rod,* the Commission designated the case more complicated due to the complexity of the issues and the great volume of technical evidentiary materials. Notice Designating This Investigation as More Complicated (Nov. 17, 1978), ITC Inv. No. 337-TA-52. To avoid granting a party more time, the IR will often grant a one month extension of time to enable the party to prepare for the Presiding Officer's hearing. In several patent cases, the Commission has denied motions to permit an additional three months for a determination. *See, e.g.,* Certain Above-Ground Swimming Pools, Notice Denying The Case Be Treated More Complicated (Mar. 21, 1977) ITC Inv. No. 337-TA-24. The *Swimming Pool* case raised both complex patent-related antitrust defenses as well as predatory pricing allegations. It is evident, therefore, that in order for a case to be designated more complicated the ITC must be satisfied that all three of the criteria have been met. This is the case even though, according to its Rules of Practice, only one of the criterion need be established. *See* 19 C.F.R. § 210.15 (1977).

been affected, the only parties present were the complainant and the Commission's staff.

(c) *Staff Participation and the Record.*—In accordance with section 210.14(b)[139] of the Commission's Rules of Practice, the investigative staff is a "party" to each section 337 investigation. Whereas the complainants and respondents have pecuniary interests to protect, the ITC's staff is responsible for protecting the public at large. Since the staff has full authority to subpoena records or witnesses, it is judicially able to use the discovery tools for the purpose of assisting the Presiding Officer and the Commission in the difficult task of deciding whether reason exists to believe a violation of the statute has occurred. Thus, whenever the staff suspects, for example, that a complainant has extended the patent monopoly beyond the scope permitted by law, the staff must submit evidence to that effect so that the complainant is unable to prevail and the public interest is served. Additionally, if the respondents withdraw or are not adequately represented by counsel, the staff is delegated the responsibility of filling in the evidentiary gaps so that the Presiding Officer and the Commission have a complete record upon which they can make a proper determination.[140]

Only through experience will the Commission staff come to fully appreciate the critical role it must frequently play in patent-based proceedings. The staff seems to remain entrenched, however, in the pre-Trade Act mentality that the public interest paramount in the enforcement of the statute is the benefit that society receives from technological inventions. When it amended section 337, Congress recognized that although the patent system is effective and worthwhile, a patent grant affords the patent holder a limited monopoly which, if misused, should not be perpetuated. The tenor of the staff's responses to the patent/antitrust issues and therefore to public interest matters, exhibits a bias to preserve the patent system.

In *Chain Door Locks,*[141] the staff did not fully explore the impacts that exclusion might have upon the public interest criteria. The Commission summarily noted: "Our investigative staff takes the position that the patent monopoly, being a statutory policy, overrides the policy considerations set forth in Section 337(d)."[142]

139. 19 C.F.R. § 210.14(b) (1977).

140. *Id.*

141. INTERNATIONAL TRADE COMM'N PUB. 770 (Apr. 1976) (ITC Inv. No. 337-TA-5).

142. *Id.* at 43.

In a case involving allegedly infringing imported above-ground swimming pools[143] in which significant antitrust issues were raised by the respondents, the staff stated with respect to the impact that relief might have on the public interest: "when an exclusion order is based on a determination of patent infringement . . . the general public benefits because the viability of the patent system is thereby upheld."[144] It is revealing that the identical language used by the staff in the swimming pool case has been utilized in other staff submissions,[145] thus indicating superficially a lack of any independent analysis of different fact situations that might have a different impact upon the public interest.

The essential point, however, is that the staff is frequently unable to discern on the basis of the record alone whether compelling evidence exists to show that complainants should not be entitled to patent protection either because of patent misuse or because of any countervailing public interest considerations. When a record is defective or incomplete, the staff and ultimately the Commissioners feel compelled to conclude that the patent in question is lawful and should be protected. Thus, the staff's continued patent orientation is intertwined with its failure to develop a record on the patent/antitrust and public interest issues.[146]

(d) *Characterization of the Public Interest and the Public Interest Criteria.*—Another area of potential concern involves the Commission's apparent confusion concerning how the public interest and section 337(d)'s public interest criteria should be characterized and when they should be analyzed. As set forth above, Congress clearly intended that the public interest theme is to be relevant in each stage of a section 337 proceeding, from the Presiding Officer's adjudication of the proceeding to the exercise of the President's veto power.

The Presiding Officer apparently continues to improperly characterize substantial antitrust issues that relate to a complainant's

143. Certain Above-Ground Swimming Pools, INTERNATIONAL TRADE COMM'N PUB. 815 (Apr. 1977) (ITC Inv. No. 337-TA-25).

144. *Id.* at 3.

145. *E.g.*, Certain Solder Removal Wicks, Staff Submission (June 1, 1977), ITC Inv. No. 337-TA-26.

146. In the past, the staff's recommendations to the Commission have carried great weight in the agency's disposition of the case. However, this trend may be changing. In the *Swimming Pool* case, the Commission for the first time overruled the recommendations of the Presiding Officer and the staff that respondents had infringed the complainant's patents. This may mean that the Commission will be less inclined in the future to simply "rubber stamp" the Presiding Officer's patent findings. *See* Certain Above-Ground Swimming Pools, *supra* note 143.

use of his patent. In *Bismuth Molybdate Catalysts,*[147] the Presiding Officer stated in dictum in his recommendation to the Commission that the respondents' defense that complainant is participating "in a worldwide scheme to prevent commercialization of superior technology, *is without merit inasmuch as this Commission's jurisdiction in Section 337 proceedings is limited to whether or not there are unfair acts in the importation of articles into the U.S.* . . . ."[148]

The Presiding Officer's theory was not addressed in the Commission's opinion, but would mean that when a complainant participated in a patent pool and in international agreements not to export or import in violaton of the antitrust laws, it would nonetheless be able to enforce its patent before the Commission. Such a result negates the Commission's public interest mission. The Presiding Officer, however, will ordinarily adjudicate all relevant patent misuse allegations and, if substantiated, the Commission will deny relief.

In *Above-Ground Swimming Pools,*[149] the respondent alleged as a defense that the complainant had conspired with its American competitors to exclude smaller competitors, including the respondents, from the United States marketplace. The Presiding Officer apparently believed that several of the defenses were technically beyond the issue of complainant's use of his patent and were therefore unrelated to the question of whether a violation of the statute had occurred. In his view, however, the defenses were relevant to the question of the impact which remedial relief might have on the public interest criteria. Based upon this interpretation of the defenses, the Presiding Officer intended to defer consideration of the issues to the Commission for review during the public interest (non-adjudicative) phase of the proceeding.[150] This procedure was considered serious enough to precipitate the following Federal Trade Commission comments:

> The Commission [FTC] is concerned that the respondents' antitrust defenses will not be adjudicated by the Presiding Officer under the theory that such defenses relate only to the public policy criteria set forth in Section 337(d),(e), and (f) of that statute. In this regard, we note that many patent-related antitrust violations also would support a finding of patent misuse—a defense which would appear

147. Certain Bismuth Molybdate Catalysts, ITC Inv. No. 337-TA-20.

148. *Id.,* Determination of the Presiding Officer, at 5-6 (May 26, 1976) (emphasis added).

149. Certain Above-Ground Swimming Pools, *supra* note 143.

150. *See* 19 C.F.R. § 210.14 (1977).

> to bear directly on the Presiding Officer's task to adjudicating whether there is a violation of Section 337. More important, the Commission believes that the respondents' allegations are sufficiently serious and complex so that they would be the subject of adjudicative proceedings before the Presiding Officer, even if the allegations are relevant only to the public policy issues that must be resolved by the full ITC.[151]

Once the Presiding Officer certifies his recommended determination and the record to the Commission, the proceeding is no longer adjudicative.[152] Approximately two weeks following the receipt of the Presiding Officer's recommendations and record, the Commission conducts a "legislative" or "rule making" type hearing, wherein the parties and interested persons are provided an opportunity to orally argue issues such as whether a violation has occurred, the issue of bonding, the type of remedial relief which is warranted, and the public interest criteria. Because of the statutory time restraints, the hearing generally lasts only one day.[153]

Due to the brief nature of the public interest phase of its proceedings and the absence of the adjudicative safeguards, the Commission is unable to take evidence or in any other way explore substantive patent or antitrust issues. In the *Swimming Pool* case, a Commission-level determination of whether a conspiracy in fact had existed between complainant and its American competitors was impossible. Therefore, in future cases the Presiding Officer

151. Certain Above-Ground Swimming Pools, *supra* note 143. Letter from Charles A. Tobin (Secretary, FTC) to Kenneth R. Mason (Secretary, ITC) (Nov. 30, 1977). (In response to the FTC's concern, the Presiding Officer allegedly accepted evidence with respect to the antitrust issues, but no such indication could be found in the record. Several inferences could be drawn. The first is that no evidence was available to support the allegations, although efforts were made by both the respondents and the Commission's staff. There is no indication that the staff attempted to address the antitrust defenses cited above. The second inference is that the Presiding Officer permitted such evidence to be submitted, but a directive was made too late in the proceeding. A third inference is that the Presiding Officer made no attempt to have the parties explore the issue more fully. There is no doubt that the Presiding Officer played a passive role vis-ä-vis the conspiracy issues.

152. This may be in violation of the statute. Section 337(c) provides that "each determination under subsections (d) or (e) shall be made" in accordance with the A.P.A. However, as noted above, the public policy considerations, which are an integral part of subsections (d) and (e), are not disposed of under the A.P.A.'s umbrella protection. The reason for this procedure is the severe time restraints on the Commission's investigations.

153. For an example of the Commission's notice of hearing, see Certain Steel Toy Vehicles, Notice of (Jan. 27, 1978), ITC Inv. No. 337-TA-31.

must characterize all patent and antitrust issues having any bearing on the use of the complainant's patent as integral parts of the question of whether there is a violation if the public interest is to be fully considered.

(e) *Termination of Patent Proceedings.*—The final observation relevant to the Commission's duty to assure that public interest factors are properly considered relates to its practice of terminating patent cases. Generally, such cases are terminated on the basis of licensing agreements executed between the parties.[154] Section 337 requires the Commission to make a determination as to whether the statute has been violated.[155] When the complainant and respondent enter into licensing agreements covering the allegedly infringing imported goods, the Commission has two options: first, to dismiss on the ground that the parties have settled the controversy and therefore no finding with respect to violation is necessary; or, second, to dismiss on the grounds that there is no violation by reason of the licensing agreements. The Commission, reading section 337(c) literally, has routinely taken the second alternative.

In such circumstances, the Commission has recognized a responsibility to review the parties' licensing agreement to determine whether it "appear[s] to conflict with the U.S. antitrust laws or patent law," or "appear[s] to have any other effects which might be detrimental to the public interest."[156] Thus, if the licensing agreement contained, for example, an exclusive grant-back provision that contravened the antitrust laws, the Commission might not accept the licensing agreement as a basis for dismissal because the settlement would have an adverse effect on the public interest. It is less clear that the Commission would reject such an agreement if it required the respondents to pay an extraordinarily high penalty or royalty payment that would substantially increase the price of the imported goods to American consumers.[157] To this date, the

154. Dry Wall Screws, Notice (Nov. 1, 1976), ITC Inv. No. 337-TA-21; Certain Electronic Printing Calculators, Notice (Jan. 13, 1976), ITC Inv. No. 337-TA-11.

155. Section 337(c) provides: "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." 19 U.S.C. §] 1337(c) (1976).

156. Dot Matrix Impact Printers, Determination and Action at 3 (Dec. 8, 1977), ITC Inv. No. 337-TA-32.

157. A decision to this effect would meet both the letter and spirit of section 337's public interest mandate and would be representative of the uniqueness of the provision. It is recognized that under U.S. patent law, the reasonableness of a negotiated royalty may not be judicially examined. *See, e.g.,* American Photocopy Equipment Co. v. Rovico, Inc., 257 F. Supp. 192 (N.D. Ill. 1966), *aff'd,* 384

Commission has dismissed every patent case in which the parties have executed licensing agreements. In view of the Commission's cursory review of the settlement's impact upon the public interest, the rejection of such agreements on public interest grounds appears to be founded more on theory than practice.

In this regard, it is important to note that the Commission has dismissed patent cases upon execution of a particular licensing agreement even when serious indications exist that the complainant's patent is invalid or has been misused. The key case in this area is *Monolithic Catalytic Converters,*[158] in which an investigation was instituted to determine whether the importation of certain foreign-made automobiles containing unlicensed catalytic converters should be excluded due to infringement of the complainant's patent. The respondents answered the complaint denying infringement and alleging that the complainant was committing a variety of antitrust violations in its use of the patent.

During the adjudication of the case, the complainant and respondents executed licensing agreements and moved that the Commission dismiss on the ground that neither the unfair method of competition nor the unfair act remained. A supplier of the allegedly infringing imported goods to one of the respondents intervened, however, and opposed the motion asserting that the complainant's primary patent was invalid and that it was in the public interest for the Commission to decide that issue.[159] Moreover, the Commission investigative staff apparently suspected that the complainants had misused their patent.[160] Following precedent and without exploring the reasonableness of the invalidity and misuse allegations, the Commission adopted the Presiding Officer's recommendation to dismiss because the licensing agreement had effectively obviated any unfair methods of competition and unfair acts.[161]

F.2d 813 (7th Cir. 1967), *cert. denied,* 390 U.S. 945 (1968), *rehearing denied,* 390 U.S. 1037 (1968). However, as noted in the text above, although the ITC's determination of violation should reflect contemporary patent law doctrines, section 337's public interest requirements are unique and may require a departure from patent law principles and case law.

158. Notice of Institution (July 23, 1975), ITC Inv. No. 337-TA-18.

159. *See id.,* Johnson & Matthey & Co., Opposition to Engelhard and VW Motion to Dismiss Proceedings (June 4, 1976).

160. In a footnote to its response to dismissal, the staff conditioned its views by stating: "There have been . . . patent misuse defenses raised in earlier pleadings and briefs upon which the staff expressly reserves the right to comment in the event that this motion is denied." *Id.,* Response of Investigative Staff to the Joint Motion to Terminate the Investigation (June 1, 1976).

161. *Id.,* Notice (Sept. 16, 1976).

As noted earlier, the Commission's practice has been to make a determination of no violation on the basis of a licensing agreement settlement. The Trade Act's legislative history, however, makes clear that "for the purpose of determining whether section 337 is being violated," it must "take into consideration" and "make findings" on the validity and enforceability of patents.[162] For the Commission to make a determination on the question of statutory violation when there is reason to suspect that the complainants have an invalid patent or have misused their patent contravenes both the letter and spirit of section 337.

Fundamental reasons have been raised to justify Congress' intent in authorizing the Commission to review and decide the validity of certain colorable defenses even when a settlement agreement is before the Commission. The argument that the Commission is not in the business of determining whether patents are valid or invalid is fallacious.[163] Congress made clear that the Commission is indeed intended to protect lawfully acquired and lawfully administered patents that are infringed by unlicensed imported goods. Dismissal on the basis of a settlement is a representation that for purposes of section 337, a complainant is using the patent in accord with the public interest and is therefore entitled to reap the financial benefits of his patent by having forced an infringer to execute a licensing agreement. When a district court has held a complainant's patent invalid prior to execution of a licensing agreement, the Commission has rejected its pro forma policy of accepting the agreement. Rather, the Commission has dismissed such cases on the basis of the court's ruling.[164] However, the Commission should not always wait for a court to make such a ruling. The Administrative Procedure Act provides that settlements should be encouraged only when the public interest permits.[165] The effect of avoiding an examination and determination of suspect patents is to endorse potentially anticompetitive conduct, a result which is clearly not in the public interest.

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162. FINANCE COMM. REP., *supra* note 8, at 196.

163. Essentially this was the argument of the Commission's staff in *Monolithic Catalytic Converters*. *See* Monolithic Catalytic Converters, *supra* note 158, Investigative Staff Reply to Johnson & Matthey & Co., Opposition to Motion to Dismiss Proceedings (June 10, 1976).

164. *See* Electric Pianos, INTERNATIONAL TRADE COMM'N PUB. 721 (March 1975); Doxycycline, *supra* note 138, Notice (Aug. 13, 1975) (suspending the investigation after a District Court held complainant's patent invalid).

165. Administrative Procedure Act § 5, 5 U.S.C. § 554(c)(1) (1976). *See also* H.R. REP. No. 1980, 79th Cong., 2d Sess. 27 (1946); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.07 (1958).

In the case of *Bismuth Molybdate Catalysts,*[166] the Commission left the disposition of the case to the parties with little recognition of the public interest impact of such action. In *Bismuth Molybdate,* four Commissioners voted to terminate primarily because the complainant did not wish to continue the proceeding,[167] and Commissioner Parker noted in a separate statement that the case should be dismissed "in the absence of a compelling public interest."[168] The Commission did not specifically recognize the colorable antitrust defenses raised by the respondents although the record revealed that the investigative staff believed that *prima facie* evidence existed that the complainant had misused its patent.[169] Thus, in *Bismuth Molybdate,* as in *Monolithic Catalytic,* the Commission was used simply as a forum for disposing of private commercial patent controversies, a situation which clearly did not reflect public interest concerns.

3. Commission Implementation of the Public Interest Criteria After a Violation is Found

Once the Commission determines that a violation of section 337 exists and an exclusion order is necessary to remedy the violation, a balancing test is conducted to determine whether the public interest criteria outweigh the interest in protecting the complainant's United States patent. The Commission has yet to determine that the impact on any of the four public policy factors sufficiently outweighs the necessity of protecting the complainant's United States patent. The four exclusion orders that have been issued since the Trade Act's passage,[170] however, provide some guidance as to the relevant factors considered by the Commission during this phase of its proceedings.

The *Chain Door Locks* decision was the first post-Trade Act order issued by the Commission. The Commission in that case made clear that not every patent found to be infringed by unlicensed imports will be given protection. A majority of the commission stated: "We do not believe . . . that in every patent case the Congress intended the policy of patent monopoly to override the

166. Certain Bismuth Molybdate Catalysts, *supra* note 147, Notice (Oct. 9, 1975).

167. *Id.,* Opinion (Oct. 15, 1976).

168. *Id.,* Opinion, at 9 (Oct. 15, 1976).

169. *See id.,* Reply of Commission Investigative Staff, at 2 (Apr. 16, 1976).

170. Certain Luggage Products, *supra* note 134; Certain Exercising Devices, INTERNATIONAL TRADE COMM'N PUB. 813 (Apr. 1977) (ITC Inv. No. 337-TA-24); Reclosable Plastic Bags, *supra* note 117; Chain Door Locks, *supra* note 141.

[public policy] factors."[171]

Some guidelines appear to govern when the Commission will conclude that the public interest outweighs the need to protect a party's patent. Thus, an exclusion order may not issue if the domestic industry seeking protection is not capable of "meeting the domestic demand for [the] product"[172] or of supplying "dependable products of reasonable quality at fair prices."[173] However, even under those circumstances it is unclear whether a majority of Commissioners would deny a complainant relief. It does not appear that Congress only intended that patent protection be denied when imported goods which infringe a complainant's patent are drugs, such as essential antibiotics which, if excluded, might have a detrimental effect on United States health and welfare.[174]

Little analysis has been undertaken thus far by the Commission in its balancing test determinations required in patent cases.[175] No attempt has been made at the Commission level to require the staff or respondents to submit even a brief cost-benefit analysis in order to understand more fully what impact an exclusion order might have on consumers. Similarly, no attempt has been made to examine the structure of United States industry or the profits realized by domestic companies producing in competition with the infringing imports.

The reasons for the Commission's minimal efforts to evaluate the public interest factors appear to be three-fold. The first reason is that the Commission defines the industry as those facilities manufacturing in accordance with the complainant's United States patent, as discussed earlier.[176] Thus, when considering the issue of violation, competition in the marketplace is irrelevant. This irrelevancy is carried over to the public policy phase of the proceeding, in which the effect of exclusion on "like or directly competitive articles in the United States" and on "competitive conditions in the United States economy" are critical considera-

171. Chain Door Locks, *supra* note 141, at 43.

172. Certain Exercising Devices, *supra* note 170, at 7.

173. Reclosable Plastic Bags, *supra* note 125, at 16.

174. The origin of this belief might be found in Commissioner Leonard's strong dissenting opinion in a 1970 patent case involving Ampicillin. *See* Ampicillin, *supra* note 69, at 20-22.

175. For example, in the most recent determination to exclude, *Certain Luggage Products,* the majority of Commissioners summarily concluded that "the appropriate remedy for the violation of the statute we have found to exist is an exclusion order, and there is no public policy reason for denying such relief." Certain Luggage Products, *supra* note 133, at 13.

176. *See* note 121 *supra.*

tions that, in accordance with sections 337(d) and (e), must be made regardless of the patent nature of the proceeding. As a consequence, the patent-oriented definition of "an industry" may be rendering the competition-oriented balancing test meaningless.

Second, recent decisions indicate that the Commissioners rely completely upon what the staff, other parties, and government agencies have submitted as relevant to the public interest impact rather than making independent inquiries on the issue. At least with respect to patent-based proceedings, the Commission often relies heavily upon the advice of other government bodies. This reliance is particularly misguided since the rival antitrust agencies have their institutional reasons for wanting to see the ITC confine itself to patent-based investigations. Although Congress provided in section 337(b)(2) that other government agencies and departments must be consulted by the Commission during the course of each investigation and the legislative history explains that other government bodies may have "significant information, as well as sound advice"[177] with respect to the public interest criteria, Congress clearly did not intend that the Department of Justice, the Federal Trade Commission, and other federal bodies act as the Commission's surrogate for public interest considerations. The third reason is that the Commission procedures do not afford parties or interested persons sufficient time to build a record concerning the complex economic analysis often necessary to discern the effect exclusion might have on the public interest.[178]

C. *Antitrust Proceedings*

Although since the passage of the Trade Act the Commission has investigated several section 337 complaints sounding in antitrust,[179] *Welded Stainless Steel Pipe & Tube*[180] is the only antitrust

177. FINANCE COMM. REP., *supra* note 8, at 195.

178. The lack of such time is primarily due to the statutory time restrictions. *See* text at note 138 *supra*. However, it is evident that the parties, interested persons, and other government agencies have not played an active role in commenting on the possible public interest impacts. As a result, the Commission has undoubtedly not felt that it has limited comment during this phase of its proceeding. With a greater awareness of the potentials inherent in the public interest phase, it should be expected that the issues will reach a greater prominence in the administration of future cases.

179. Chicory Root: Crude & Prepared, ITC Inv. No. 337-TA-27 (1977) (combination or conspiracy or attempt to restrain or monopolize U.S. trade, refusal to deal, predatory pricing); Certain Color Television Receiving Sets, *supra* note 25 (predatory pricing, subsidies bestowed by foreign government); Certain Electronic Audio & Related Equipment, INTERNATIONAL TRADE COMM'N PUB. 768 (Apr.

determination that has been rendered by the Commission. It is therefore difficult to make an assessment of the impact that Commission actions in antitrust cases might have on the public interest. The Commission can be expected to continue to employ traditional antitrust principles in determining unfair methods of competition and unfair acts.[181] For that reason and because of the Commission's increased authority to issue cease and desist orders which allows violators to continue importing at unregulated levels if they cease the unfair methods of competition, the potential for adverse effects upon the public interest will be largely confined to the several discernible problem areas discussed below.[182]

Several of the public interest concerns in section 337 antitrust proceedings are similar to those addressed earlier with respect to patent cases. Thus, serious questions exist as to whether the Commission is adequately equipped to investigate within the 12 or 18-month period and adjudicate the complex and subtle antitrust issues which invariably require both a substantial allocation of resources and staff commitment.[183] The investigation of *Color Television Sets,*[184] which was ultimately terminated on the basis of a consent decree,[185] involved complex issues relating to predatory

1976) (ITC Inv. No. 337-TA-7) (resale price maintenance, conspiracy and combination between foreign manufacturer and its U.S. distributors); Certain High Fidelity Audio Equipment, ITC Inv. No. 337-TA-14 (1976) (same allegations as in *Electronic Audio);* Certain Angolan Robusta Coffee, ITC Inv. No. 337-TA-6 (1975) (price fixing, refusals to deal, boycotts).

180. Certain Welded Stainless Steel Pipe & Tube, *supra* note 22.

181. *See, e.g.,* Certain Electronic Audio & Related Equipment, *supra* note 179, Presiding Officer's Recommendation & Commission Opinion.

182. This argument assumes that the Commission will only remedy antitrust violations with a cease and desist order. Very few antitrust cases could be remedied by exclusion of the imported goods without causing a substantially adverse effect on one or more of the public policy criteria.

183. On January 10, 1979, due primarily to President Carter's hiring freeze applicable to government agencies and departments, the number of litigating and advisory attorneys dropped to 24. This total would approximately be the same number of attorneys employed in, for example, the Federal Trade Commission's Cleveland, Ohio, regional office.

184. Certain Color Television Receiving Sets, *supra* note 25.

185. *Id.,* Notice of Consent Orders and Termination of Investigation (July 29, 1977). Although considerable "patting on the back" among attorneys in the private sector took place as a result of negotiating a consent decree, it is believed that the only reason the parties and the Commission accepted the consent order is because of the Orderly Marketing Agreement (OMA) executed between the United States and Japan, wherein Japan agreed to limit its television exports to the United States. Agreement of May 20, 1977, United States-Japan (on file at Special Trade Representative's Office, Washington, D.C.). From a purely com-

pricing and subsidizing by a foreign government. *Color Television Sets* was a typical antitrust proceeding which attained even greater complexity because essential documents and witnesses were located abroad. The Commission could not have been able to simultaneously adjudicate two such mammoth proceedings.

Additionally, the Commission and its staff need more experience to develop the expertise necessary to try complicated antitrust cases. The Commission has had an institutional and historical mission to protect United States industries and labor. In antitrust proceedings, the Commission will have to pay particular attention to the harm to competition rather than harm to competitors and therefore avoid employing a test which balances private interests against the public interest. Such a test fails to give the proper paramount role to the public interest that Congress intended.

Public interest considerations in antitrust cases take on a different shape than those relevant to patent proceedings. The Trade Act gave the Commission considerable prestige, creating another forum for antitrust issues. Following a strong protest by the Federal Trade Commission,[186] the ITC quickly enlarged its section 337 jurisdictional base. In *Electronic Audio & Related Equipment,*[187] the Commission concluded that unfair methods of competition involving imported merchandise could be investigated even when such unfair practices occurred within the United States. Although the *Pipe & Tube* decision[188] appears to have weakened the jurisdic-

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petitive and consumer-oriented perspective, an OMA may in certain cases have a greater adverse impact than any cease and desist order. The primary reason for this is that an OMA may affect all foreign manufacturer's exports, whereas a cease and desist order attacks only those parties who have been found by the Commission to have committed an unfair method of competition.

186. Certain Electronic Audio & Related Equipment, *supra* note 179, Letter from Charles A. Tobin (Secretary, FTC) to Kenneth R. Mason (Secretary, ITC) (Mar. 9, 1976). A similar letter was also filed by the Justice Department where it stated: "For the Commission to properly assert jurisdiction in a Section 337 matter, we believe the alleged unfair acts must have a sufficient international nexus to trigger the special jurisdictional requirements of Section 337." *See id.,* Letter from Thomas E. Kauper (Ass't Attorney General, Antitrust Div.) to Kenneth R. Mason (Secretary, ITC) (Mar. 19, 1976).

187. *Id.,* INTERNATIONAL TRADE COMM'N PUB. 768 at 2. It was generally believed prior to *Electronic Audio* that the Commission could only investigate unfair methods of competition committed prior to the time the articles passed through U.S. customs. *But see* Convertible Game Tables & Components Thereof, TARIFF COMM'N PUB. 705 (Dec. 1974) (Tariff Inv. No. 337-TA-34).

188. Certain Welded Stainless Steel Pipe & Tube, *supra* note 22, at 11. In *Pipe & Tube* Commissioners Minchew, Moore and Alberger adopted the Justice Department's jurisdictional views by concluding that "It is obvious from our

tional findings in *Electronic Audio,*[189] the Commission can presently investigate matters within the purely domestic authority of the FTC or the Department of Justice. In *Electronic Audio,* the FTC pointed out the potentially harmful effect of the Commission's jurisdictional reach, stating:

> The [FTC] believes that considerations of public policy require a clear definition of the scope of FTC section 337(a) jurisdiction. It is important that antitrust and trade regulation authorities not produce conflicting interpretation of the law and not act at cross purposes . . . enforcement requires large commitments of staff and budgetary resources, duplication of effort must, therefore, be avoided whenever possible.[190]

Although the ITC and FTC participated in exploratory liaison discussions, the agencies failed to follow the FTC's recommendations to "work together to seek a consistent interpretation of the law [they] administer."[191] It is likely that both agencies, as well as the Justice Department, will attempt to avoid inconsistencies, and duplication of effort, even though individual ITC Commission-

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traditional role, not to mention our remedial provisions, that Congress intended Section 337 to attack only unfair trade practices which related to imported products. It then becomes *crucial to discern some nexus between unfair methods or acts and importation* before this Commission has power to act . . . . Our whole remedial scheme is designed to attack unfair acts before the goods reach our shores . . . ." *Id.* at 11-12 (emphasis added).

189. In fact, it appears that the jurisdictional determination in *Pipe & Tube* is in direct conflict with the ITC's determination in *Certain Electronic Audio and Related Equipment, supra* note 179. In the latter opinion, the Commission adopted the Presiding Officer's exercise of jurisdiction in the case by concluding that the "allegation that the importer, JVC, Inc., committed unfair methods of competition and unfair acts in the domestic sale of imported audio electronic equipment provided the legal basis for the Commission to determine whether such unfair acts occurred." *Id.* at 2. In the Presiding Officer's Recommended Determination, it was concluded "that a *nexus is not required* between the time the merchandise is exported and the time the merchandise is imported into the United States" for the Commission to assume jurisdiction. *Id.* at 29. It is noted, therefore, that Commissioners Minchew and Moore reversed their positions in *Pipe & Tube* with respect to whether jurisdiction requires a nexus between the time of exportation and importation.

190. *Id.*, Letter from Charles A. Tobin (Secretary, FTC) to Kenneth R. Mason (Secretary, ITC) (Mar. 9, 1976), at 6.

191. *Id.*, Letter from Charles A. Tobin (Secretary, FTC) to Kenneth R. Mason (Secretary, ITC) (Mar. 9, 1976), at 9. The Supreme Court, in addressing the existence of concurrent jurisdiction to investigate certain antitrust violations between the FTC and the Justice Department, endorsed and encouraged "efficient cooperation" through dual enforcement. United States Alkali Export Ass'n v. United States, 325 U.S. 196, 209 (1945).

ers have expressed a desire to expand interpretation beyond traditional antitrust doctrines under section 337.[192] In view of the Commission's minimal experience in handling even the most fundamental antitrust issues, troublesome public policy ramifications may exist if the Commission carves out new doctrines that are perceived to be unique to foreign commerce. Some of these problems may be ameliorated, however, because of the Commission's unique status as a quasi-independent agency[193]—the President, for example, is authorized by statute to veto the Commission's actions, and does not appear reluctant to do so.

It is unclear whether the Commission should exercise jurisdiction over predatory pricing (*i.e.*, below cost sales made at any unreasonably low level) when such pricing is also within the jurisdiction of the Treasury Department under the Antidumping Act of 1921.[194] The Commission had ruled in *Color Televisions* that it had jurisdiction over predatory pricing allegations, but the issue again erupted in *Pipe & Tube*. The Treasury Department was investigating alleged below cost sales of stainless steel pipe and tube under the Antidumping Act. Several of the same respondents were also appearing before the Commission.[195] A few weeks before the Treasury Department's pricing determinations were to be announced, the Commission found that the respondents were violating section 337. A cease and desist order was issued and forwarded to the President for a 60-day policy review. The jurisdictional questions regarding predatory pricing continue to be unresolved, although the President has taken action which might severely limit the Commission's jurisdiction over such issues. Strong public pol-

192. The following remarks were made by former Chairman Daniel Minchew: "I do not believe we will be bound by precedents set by other regulatory agencies, but that we will establish boundaries which will reflect the unique character of international trade, and thereby provide a new voice in the world of international competition law." Remarks by ITC Chairman Daniel Minchew before the World Trade Institute Seminar on International Antitrust and Related Trade Problems, World Trade Center, New York, N.Y. (Oct. 17, 1977).

No attempt to define a "unique characteristic of international trade" which might justify a departure from traditional antitrust theory has been articulated. It is not unreasonable to believe, however, that certain interpretative differences might exist, particularly in the area of mergers and joint ventures where non-tariff trade barriers might minimize any potentially anticompetitive effects.

193. An "independent agency," such as the Federal Trade Commission, is one whose functions and determinations are largely free from executive and legislative intrusion or control. *See, e.g.*, B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 4.01 (1977).

194. 19 U.S.C. §§ 160-71 (1978).

195. 42 Fed. Reg. 16883 (1977).

icy considerations exist in opposition to duplication of governmental efforts. The controversy will have to be resolved by judicial review, legislative clarification, or by the Commission itself.

A cease and desist order may have an impact upon any one or more of the four statutory public policy criteria. In *Pipe & Tube,* a majority of Commissioners[196] concluded that a cease and desist order seeking to prevent a limited number of respondents from selling below their average variable cost of production, is "not only consistent with the public interest, but aids it."[197] The Commissioners explained that the effect of the order would "be to keep as many competitors in this market as are consistent with efficiency and general welfare, including foreign competitors from all countries."[198] The Commissioners inferred that the order would have positive effects on domestic competition but the thrust of the opinion was that the relief would promote import competition. This is illustrated by its finding that all sales below certain respondents' average variable cost of production had a "tendency" to restrain import rather than domestic trade.

The Commission's legal findings were unprecedented, although decisions construing other antitrust laws have held similarly. For example, section 5 of the FTC Act grants the FTC jurisdiction over unfair methods of competition "in or affecting commerce."[199] Section 4 of that act defines "commerce" to include commerce with foreign nations.[200] In addition, section 4 of the Webb-Pomerene Act provides that section 5 of the FTC Act will extend to acts "done without the territorial jurisdiction of the United States."[201] The FTC, then, can condemn unfair acts which restrain foreign commerce, including import trade.[202] Yet, read literally, the language of section 337(a) focuses exclusively on the consequences to domestic commerce in the United States as a result of unfair competition in import trade. Although "commerce" within the meaning of section 337 arguably may be given a broad interpretation, it is apparent that the Commission must concentrate on the effects of foreign unfair trade practices which have direct consequences within the United States. During the public interest analysis phase of any proceeding, the Commission should evaluate the effects of the rem-

196. Commissioners Minchew, Moore and Alberges. Commissioner Ablondi concurred with the majority and Commissioners Parker and Bedell dissented.

197. Certain Welded Stainless Steel Pipe & Tube, *supra* note 22, at 45.

198. *Id.* at 46.

199. 15 U.S.C. § 45 (1976).

200. *Id.* § 44.

201. *Id.* § 64.202. *See* note 21 & text accompanying notes 21-22 *supra.*

edial relief on certain *domestic* conditions such as competition and consumers. In patent-based proceedings, for example, the Commission weighs the need to protect the patent holder's interest only against the *negative* impacts such patent-protection might have on the public interest criteria. A more complex and subtle "balancing test" may be necessary for the Commission in antitrust proceedings, but neither the statute nor its legislative history provides any clear guidelines. It appears that all public interest impacts, whether positive or negative, must be examined.

The Commission's efforts to define the effects of a cease and desist order will be subject to various limitations which relate to the nature of the unfair methods of competition being examined. For example, certain unfair trade practices, whether domestic or international, are in and of themselves unlawful.[203] Particularly in light of the statutory time restrictions, it would be fruitless and unreasonable to require the Commission to define the impact of these *per se* violations on competition or consumers. Moreover, section 337 condemns unfair trade practices that have a "tendency" to restrain or monopolize trade. The statute's "tendency" clause, like the FTC Act's "incipiency" doctrine, should not require the Commission to find actual or present harm to competition.[204] In a section 5 "insipiency" case in which predatory pricing was proven, the FTC held that is was not necessary for competitors to have "suffered loss" in order that a violation be found.[205] Therefore, it would be unreasonable to require the Commission in certain antitrust cases to identify the actual impact of its order on competition or consumers.

Similarly, under section 337, when no actual "suffered loss" is required to find a violation, a Commission ruling should not be fatal if it only conceptually explains in antitrust terms why remedial relief would have certain negative and positive effects on the public interest criteria. To require more destroys the enforceability of the statute and requires the Commission to do more than that required of other antitrust enforcement bodies. In addition, section 337, like the original section 5 of the FTC Act, focuses on decreased competition as a result of certain unfair acts. Section 337's prohibition language fails to give equal attention to the welfare of consumers. This gap in section 5 was corrected with the passage of the

203. *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

204. Alterman Foods, Inc. v. FTC, 497 F.2d 993, 1000 (5th Cir. 1974); Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948).

205. E.B. Muller & Co. v. FTC, 142 F.2d 511, 517 (6th Cir. 1944).

Wheeler-Lea Amendment[206] to the FTC Act, but still exists in section 337; however, most claims alleging unfair methods of competition will afford relief to consumers even though section 337 does not specifically direct such protection.

It is difficult to define further requirements for the Commission, since each case raises unique questions. Whenever possible, however, it is imperative that the Commission should comment on the status of competition in the United States. For example, what is the structure of the domestic industry competing with the imports? Is there a highly concentrated market in which the imports play a critical competitive role? What is the pricing behavior in the domestic industry? Are there signs of oligopolistic pricing in which monopoly profits are being realized? These questions should be germane to every public interest evaluation. Not only were they ignored by the Commission in *Pipe & Tube,* but they were not commented upon, pursuant to section 337(b)(2), by the Justice Department and Federal Trade Commission.

The effects of the *Pipe & Tube* cease and desist order on United States consumers were also summarily treated. The majority of Commissioners simply concluded that the respondents found to be in violation will "only be required to raise somewhat the price of the imported article . . . ."[207] No attempt was made to explain this minimal price increase or to quantify the extent to which the prices should increase. The Commission also failed to evaluate any other effects such increases might be expected to have on United States consumers.

There is an additional aspect to enforcement of cease and desist orders in antitrust investigations which relates to the public interest criteria. As noted earlier, if an outstanding cease and desist order is violated, the Commission may exclude the imported goods. However, in an antitrust case that involves a high volume of imported merchandise or involves imports essential to the public health and welfare, the public interest criteria may forbid issuance of an exclusion order. Thus, the Commission may be left with no remedy. Section 337 fails to provide the Commission the authority to seek judicial enforcement of its decrees.

One of the primary explanations for the deficient analysis of the public interest factors lies in the Commission's procedures. Many of the relevant issues require the submission of substantial evi-

206. *See* 83 CONG. REC. 391 (1938) (remarks of Congressman Lea); *id.* at 3254 (remarks of Senator Wheeler).

207. Certain Welded Stainless Steel Pipe & Tube, *supra* note 22, at 46.

dence. The gathering of such evidence should be the responsibility of the Presiding Officer so that he can certify to the Commission a full and complete record upon which policy decisions can be made. The Commission's brief post-Recommended Determination hearing simply does not afford sufficient time to carry out any fact-finding duties. It should be expected that the Commission will be more thorough with its review of the public interest as a result of *Pipe & Tube*. Unless present administrative procedures are modified, however, there will continue to be gaps in the record.

V. PRESIDENTIAL DISAPPROVAL OF COMMISSION ACTIONS

Once the Commission decides to issue an exclusion or cease and desist order, it publishes its findings in the *Federal Register* and transmits a copy to the President. Section 337(g)(2) provides that the President has 60 days to disapprove the Commission's remedy determination "for policy reasons,"[208] and, if disapproved, the Commission's actions have no force or effect. The President has no authority to alter or delay the Commission's remedial actions, however, and cannot reverse the "finding of a violation of Section 337" because "such a finding is determined solely by the Commission, subject to judicial review."[209] Thus, the President is not authorized to review the merits of the case. The legislative history provides that the effect of the import remedy on "foreign relations, economic and political" is a legitimate policy reason upon which the President may disapprove a Commission order. The legislative history further explains that the President may also consider the identical public interest criteria that are earlier considered by the Commission before ordering import relief.

A. *Patent Proceedings*

In patent-based proceedings, the President's review of the public interest criteria is potentially broader than the Commission's. The Commission conducts a balancing test, which considers whether

208. In practice, several groups participate in reviewing the Commission's order for an eventual recommendation to the President. The order of review is as follows: (1) Section 337 Subcommittee (inter-agency group comprised of working staff), (2) Trade Policy Staff Committee (inter-agency civil servant staff), (3) Trade Policy Committee Review Group (inter-agency Assistant or Under Secretaries), (4) Trade Policy Staff Committee (cabinet level). However, if the Trade Policy Staff Committee is uanimous as to the course of action, the recommendations will often go directly to the Ambassador for Trade Negotiations for transmittal to the President. *See* 15 C.F.R. §§ 2001-03 (1978).

209. FINANCE COMM. REP., *supra* note 8, at 199.

the impact on the public interests is so detrimental that it outweighs the need to protect the patent holder. The legislative history fails to indicate that the President's policy review should be similar to that of the Commission. Rather, the President is required to evaluate the general impact of an exclusion order on the public interest.[210] Thus, the Commission might find that the volume of unlicensed goods infringing the complainant's patent is minimal as compared to those articles with which they compete. Yet such infringing goods may be substantial enough to justify a conclusion that the complaining industry, which in patent cases is defined as only those producers manufacturing under the patent, is being substantially injured. Because there may be few imports, the Commission may conclude that exclusion of the articles would not adversely affect domestic competition or consumers. However, the President has the discretion to conclude that exclusion would have no discernible positive effect in the United States. In fact, the President might find that United States trading partners view the exclusion order as a symbol of protectionism and reject exclusion on foreign economic or political grounds.

Even in light of the flood of patent cases that have recently been instituted by the Commission,[211] only rarely will a case be overruled by the President. All three of the exclusion orders issued by the Commission since the Trade Act have withstood a Presidential veto.[212] Nonetheless, complainants trying to obtain an exclusion order should identify various factors which include the structure of the industry competing with the unlicensed imports, the employment impact of exclusion, the price-differential between the goods produced domestically and the imports, the ability of United States producers to meet consumer demands and the importance

210. *Id.*

211. *E.g.*, Certain Rotary Scraping Tools, ITC Inv. No. 337-TA-62 (Jan. 5, 1979) (alleged patent violation plus misleading packaging and/or deceptive advertising); Certain Compact Cyclotrons with a Pre-Septrum, ITC Inv. No. 337-TA-61 (Dec. 22, 1978); Certain Automatic Crankpin Grinders, ITC Inv. No. 337-TA-60 (Dec. 12, 1978); Pump Top Insulated Containers, ITC Inv. No. 337-TA-59 (Nov. 6, 1978); Certain Cattle Whips, ITC Inv. No. 337-TA-57 (Aug. 3, 1978); Certain Thermometer Sheath Packages, ITC Inv. No. 337-TA-56 (July 6, 1978); Certain Multicellular Plastic Film, ITC Inv. No. 337-TA-54 (June 26, 1978); Certain Swivel Hooks & Mounting Brackets, ITC Inv. No. 337-TA-53 (June 7, 1978) (alleged patent violation plus trademark violations and false designations of origin); Certain Apparatus for the Continuous Production of Copper Rod, *supra* note 138.

212. *See* note 170 & text accompanying notes 170-74 *supra*. It appears that only if the President overrules the Commission order will he furnish reasons for his action.

of the continued flow of the unlicensed imported articles to the exporting country.

B. *Antitrust Proceedings*

Following the 60-day review period, President Carter disapproved the Commission's *Pipe & Tube* cease and desist order on the basis of both the public interest criteria and for "policy reasons."[213] The President furnished several reasons to support his action.

1. Impact on the Public Interest Criteria

President Carter assessed the impact of the order on three of the four public interest criteria: (1) domestic competition, (2) production of like or directly competitive articles in the United States, and (3) domestic consumers. The Commission found no injury to the domestic industry and discarded the notion that the effect of the order would "likely be limited to a shifting among foreign suppliers of their share of the present level of imports into the domestic market."[214] Consequently, the President reasoned that implementation of the order would "not significantly promote competition in the domestic industry" and would result in "little or no benefit to the domestic industry or its employees."[215] In effect, the President concluded that an unfair method of competition in import trade—which the Commission found as a matter of law—would not have anticompetitive consequences on United States commerce. This was in direct conflict with the Commission's legal analysis and determination, in which it accurately stated the following antitrust principle: "When competitors are excluded from the U.S. market, as they are in this case, by a means contrary to law, they are being excluded not by our competitive process but by a means which would not be permitted to any competitor, foreign or domestic."[216] The President, then, rejected the established notion that suppression of competition in United States foreign commerce would be likely to have significant effects on domestic commerce.[217]

213. Office of the special Representative for Trade Negotiations, Press Release No. 269 (April 25, 1978).

214. *Id.* at 2.

215. *Id.*

216. Certain Welded Stainless Steel Pipe & Tube, *supra* note 22, at 37.

217. *See, e.g.,* United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd,* 332 U.S. 319 (1947).

The President's decision appears to have been influenced by the lack of any Commission analysis of the United States pipe and tube industry. If the Commission had cited evidence of a highly concentrated industry or attempted to define the effects of the order, the President might have been forced to conclude that there would be a far greater need to assure that import competition remained healthy. Clearly, the President required of the Commission some qualitative analysis respecting the positive effects of the order on competition within the United States. The President abused his discretionary authority, for he imposed a heavy burden by requiring that the cease and desist order must result in a *"significant" promotion* of competition.[218] This standard cannot be found in either the statute or the legislative history. If adopted in future affirmative antitrust determinations where the Commission finds only a "tendency" to restrain or monopolize United States trade, no cease and desist order could issue. Defining the beneficial impact of a cease and desist order on the public interest criteria would be extremely difficult not only in section 337 cases but also in the enforcement of other antitrust laws. As stated by one noted antitrust authority, to require an actual effect of an order on prices, for example, would "elude the best efforts of economic science."[219]

Furthermore, the prohibition of some antitrust violations, such as predatory pricing, would actually result in an immediate increase in prices to consumers, since a cease and desist order would force the predator to raise his prices to competitive levels. The theory behind attacking predation is to keep the competitive machinery from being destroyed. Otherwise, the predator, having attained his monopoly position, will raise his prices and receive further excess profits well above the prices charged and profits received under normal competitive conditions.[220]

For these reasons, although Congress provided the President with wide discretion to veto Commission actions, Congress could not have intended that a beneficial impact test be employed by the Executive. As suggested by the Commission's General Counsel,[221]

218. With respect to the impact of the order on U.S. consumers, the President summarily stated without substantiation that there would probably be a lack of any "significant" benefit to U.S. consumers as a result of implementation of the order. Press Release No. 269, *supra* note 213, at 2.

219. R. POSNER, ANTITRUST LAW 24-25 (1976).

220. *See* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 HARV. L. REV. 697 (1975).

221. Letter from Michael H. Stein, (General Counsel, ITC) to Michael Hathaway (Chairman, Section 337 Subcomm., Trade Policy Staff Comm.) (Apr. 7, 1978).

the President and his advisors may be confusing the Executive's responsibility to review section 337 Commission actions with review of section 201 "escape clause"[222] Commission recommendations. Under section 201, the President is required to assess the *beneficial* impact of a Commission recommendation for import relief on various public interests, including American competition and consumers.[223] Unlike the FTC Act,[224] section 337 does not limit the ITC to investigations upon a showing that the proceeding will be in the "interest of the public."[225] On the contrary, section 337(b) requires the Commission to investigate "any alleged violation" on complaint or upon its own initiative. The need for a distinction between initiation of investigations of an international nature and of a purely domestic nature is puzzling and may be strenuously argued as unsound. Yet the recent amendments to section 337 manifest an intention to make the Commission available to all industries which may be harmed by unfair methods of competition in import trade. Thus, the vast majority of Commission cases may be expected to continue to be relatively small compared to the often industry-wide proceedings initiated by the FTC. Therefore, the policy of requiring a significant beneficial impact on competition and consumers is unsound.

2. Impact on United States Foreign Relations

If the President concludes that the grant of import relief would have a "very direct and substantial impact on United States foreign relations, economic and political,"[226] then he may veto the Commission's order. Utilizing a balancing test in *Pipe & Tube,* the President determined that the detrimental effect on this country's foreign policy that would result from approval of the Commission's order outweighed the beneficial impact that the order would have on the public interest criteria. The President concluded that implementation of the order would not only be viewed by foreign governments as "undesirable harassment of their producers" and as an "unjustified burden on international trade" but would also invite "retaliation against United States exports" and "complicate our current efforts to negotiate revisions of the international trading rules."[227] How could the weak cease and desist order, which if

222. 19 U.S.C. § 2251 (1976).
223. FINANCE COMM. REP., *supra* note 8, at 124.
224. 15 U.S.C. § 45(b) (1976).
225. *Id.*
226. FINANCE COMM. REP., *supra* note 8, at 199.
227. Press Release No. 269, *supra* note 213, at 2.

enforced would have actually affected far less than the 15 million dollar import total of pipe and tube for 1977, have the potential to cause such havoc to this country's foreign relations? In view of the 8 billion dollar trade surplus that Japan has with the United States, the question becomes even more puzzling.[228]

Although other reasons were given, the sole basis for the President's foreign policy conclusions was that the Commission failed to dismiss its proceeding when it notified "the Secretary of the Treasury of the potential applicability of the Antidumping Act to the same subject matter."[229] Although duplication of effort by government agencies and departments is extremely undesirable and, if permitted to continue, could conceivably have some discernible consequences on this country's foreign relations, to conclude that this would have been the effect in the *Pipe & Tube* case is fallacious. The Justice Department's institutional arguments to contain the ITC's jurisdiction at whatever cost[230] and the State Department's sensistivity to domestic administrative proceedings remotely affecting United States foreign relations clearly played a significant role in the President's decision.

Aside from the unrealistic appraisal of the potential "direct and substantial" impact of the order on foreign relations, the Senate Finance Committee made it abundantly clear in its report accompanying the Trade Act that the President is not permitted to re-

228. This point was raised in a letter dated April 13, 1978, to the President from Senators Long, Talmadge, Moynihan, Ribicoff, Bentsen, and Nelson, all members of the Senate Committee on Finance. The letter cautiously warned the President that the Trade Act's legislative history defined the President's role in reviewing a Commission determination. Several members of Washington's international trade community believe that the President did not see the letter until after the decision to veto was made.

229. Press Release No. 269, *supra* note 213.

230. Recently, the Department of Justice announced that it will stimulate its attack against the ITC. In a speech riddled with incorrect interpretations of the law relevant to international trade matters, John Shenefield, Assistant Attorney General, Antitrust Department, set forth a new policy of "competitive advocacy" to be undertaken by the Justice Department. *See* Speech by John Shenefield before the ALI-ABA Course entitled "Competition Advocacy and International Trade: A New Role for Antitrust Policy" (May 26, 1978).

The Justice Department's advice to the ITC under Section 337(b)(2) has been less than constructive. In one controversial nonpatent investigation, the Department advised the ITC that Congress intended it only to exercise *in rem* jurisdiction in Section 337 investigations and that deferral should be exercised by the ITC if personal jurisdiction could be obtained and a cease and desist order issued. *See* Certain Color Television Receiving Sets, *supra* note 25, Letter from Jonathan C. Rose (Deputy Assistant Attorney General) to Chairman Will E. Leonard (Sept. 23, 1976).

verse a finding of a violation of section 337. As noted both by the Commission's General Counsel[231] and the six Senators who were alerted to the President's review of the case,[232] the Commission's proper exercise of jurisdiction over the proceeding continues to be an issue specifically reserved to the courts.

The President's veto of the *Pipe & Tube* order has resulted in considerable uncertainty as to the status of section 337 as an enforcement tool for attacking non-patent-based unfair practices in import trade. It is uncertain whether *any* Commission cease and desist order prohibiting predatory practices or export subsidies will survive a presidential review. Contrary to many expressions within the international trade community, as an antitrust enforcement tool, section 337 is far from dead. In future cases the Commission can be expected to explore the various impacts of its order on the public interests, which will make it more difficult for the President to disapprove Commission actions. If the respondents are found to be acting in concert or committing another classic antitrust violation, the President will have no foundation for condemning the Commission for not deferring to the Treasury Department. The Commission's Presiding Officer will be less reluctant to utilize the Commission's sanctions where, as in the *Pipe & Tube* case, the respondents refuse to participate in the proceeding.[233] Finally, the Commission's determination that import rather than domestic trade will be restrained should be considered an aberration. When, in the more typical case, domestic trade is being restrained, the negative foreign policy impacts will have to be clearly direct and substantial for the President to exercise his veto authority.

In sum, presidential review of antitrust determinations by a quasi-independent administrative agency is an unprecedented congressional experiment. The existence of such review is deemed critical, for the balancing of national public policies—the need to carry out foreign policy objectives versus the need to prohibit internationally-related antitrust violations—should be maintained. The President's misguided veto of the *Pipe & Tube* order may justify a congressional re-evaluation of the Executive's authority which may substantially limit the President's veto power on for-

231. Certain Welded Stainless Steel Pipe & Tube, ITC Inv. No. 337-TA-29, at 37.

232. *See* note 228 *supra.*

233. Rule 210.36 provides that the Presiding Officer may take various steps to sanction parties who fail to cooperate or fail to appear in the adjudication of the investigation. 19 C.F.R. § 210.36 (1977).

eign policy grounds and leave the Commission the sole decision-maker under section 337.

VI. Conclusion

Prior to the passage of the Trade Act, the Commission acted merely as an adviser to the President. In turn, the President had only two options: either to exclude the imported goods, or to deny relief altogether. The Commission's jurisdiction was thus limited primarily to attacks on patent violations. Over the past several decades the Commission has gained considerable expertise in the patent law area. A review of its pre-Trade Act determinations reveals that no fundamental interpretive changes were made since the statute's predecessor, section 316, was passed in 1922. As a consequence, the Commission's patent and few non-patent determinations were permeated by the belief that only private interests, such as those of the patent holder, domestic manufacturer, and United States labor, were to be protected. The Commission failed to adapt the increasing judicial and social demands on administrative agencies to reflect national interests such as domestic competition and United States consumers.

The Trade Act amendments to section 337 provided the Commission a new active role in the international trade arena. The potential to expand the breadth of its jurisdiction and administrative responsibilities is significant. The new areas of law, primarily in the field of antitrust, will eventually become familiar and comfortable to the Commission, particularly if the Department of Justice and Federal Trade Commission are willing to furnish sound and meaningful antitrust advice. On the other hand, the Trade Act's introduction of a public interest theme, particularly as it relates to patent proceedings, will present greater difficulties for the Commission and require it not only to depart from certain preconceived notions but require new and imaginative thinking.

The post-Trade Act "honeymoon period" is over for the Commission. The International Trade Commission continues, however, to adjust its interpretations of section 337. The most drámatic and far-reaching adjustments must be made in the interpretation of patent-based proceedings. Not only must the Commission and its staff continue its traditional responsibility for developing evidence and making determinations concerning infringement of the complainant's patent, but it must also be prepared to rule on allegations of fraud, conspiracy, and other possible violations that may fall within the broad patent/antitrust category. The public interest mandate, as found in the need to evaluate the four public interest criteria, also makes clear that not every infringed and valid patent

will be necessarily entitled to protection from foreign infringing merchandise. This unique feature of section 337 highlights the paramount position which the public interest plays in the administration of the statute.

The Commission may need to make additional adjustments in its patent determinations. It must avoid treating patent cases as primarily adversary proceedings in which the parties can enter and exit the Commission at will. Moreover, the Commission and its staff must acquire an appreciation for the complexity and seriousness of patent/antitrust issues since they have thus far failed to aggressively explore the possibilities of patent misuse. If the Commission is unable to address these complex problems even within a protracted eighteen-month time frame, it should request corrective legislative action or attempt to work more closely with the Patent Division of the Department of Justice. This is particularly vital since 94 percent of the Commission's section 337 calendar presently involves patent-based complaints.

The Commission's practice of not permitting its Presiding Officers to adjudicate the public interest criteria is an unfortunate indication of its perception of the importance of these factors. In patent cases, the Presiding Officer only addresses factual issues relevant to the production of the patented product. Yet the public interest mandate requires the Commission to evaluate the impact of remedial relief on United States competition and consumers. Obviously substantial evidence might be required in certain cases to determine what competes with the infringing imported goods in the United States market and how United States consumers are affected. This issue may not be adequately addressed when it is considered—in a one day hearing—with other significant questions such as the existence of a violation, the type and level of relief, and bonding.

With the authority to issue cease and desist orders, new avenues have been opened to the Commission to attack traditional unfair methods of competition and perhaps unfair practices that are unique to international trade. Although it has Congress as an ally, the Commission must firmly establish its antitrust expertise or other, more powerful, Federal departments and agencies will continue to attempt to contain the Commission's antitrust reach. Because the various rival government bodies participate in the Executive Committee's review of the Commission's actions, the Commission will experience great difficulty in surviving as still another antitrust enforcement agency. The Executive's need to keep the Commission inconspicuous while the sensitive multilateral trade negotiations are taking place in Geneva constitutes an additional,

but temporary, obstacle to confronting the Commission's efforts to follow an aggressive antitrust policy. Thus, the Commission must tread softly in its attempt to become a *bona fide* antitrust enforcer. It may be in the Commission's interest to request legislative change with respect to the institution of complaints under section 337. Since the statutory language requires the Commission to investigate every complaint, the Commission should be given flexibility concerning its resource commitments.

The questionable state of the dollar in world market exchanges, the difficulty of distinguishing private from governmental commercial practices, and the increasing trend to stimulate export trade and reduce imports by numerous industrial nations in an attempt to offset oil and manufacturing deficits comprise only a few of the reasons why international trade issues have attained critical importance. New and complex problems will arise now that the Commission has sole responsibility for interpreting section 337's unfair trade practice language. In order to meaningfully address these issues, the Commission should conduct a detailed study identifying whatever unique features international trade matters might raise that would justify or necessitate a departure from established trade regulation principles. The Commission should further consult with the Department of Justice and Federal Trade Commission to determine how those enforcement bodies identify unfair trade practices.

Since the enactment of the Trade Act, only one cease and desist order has been proposed. *Pipe & Tube* was in many ways a unique case. The decisions reached both by the Commission and the President should have little precedential value. Substantively, the Commission will continue to rely upon traditional antitrust doctrines. It is not presently equipped in terms of manpower or expertise to handle major complex antitrust complaints. Assuming the President will not veto future cease and desist orders, there is no reason the Commission cannot recover from the *Pipe & Tube* decision and receive more antitrust-based complaints from the private sector, or initiate such complaints on its own. With the advent of such activity, its resources will undoubtedly be increased. In order to attain an antitrust enforcement status, the Commission must employ a more sophisticated review of the impact its orders may have on the public interest.

The President has not been reluctant to nullify antitrust actions of the Commission. The decision in *Pipe & Tube* nevertheless has raised fundamental questions regarding the discretion Congress intended the President to exercise in his review of Commission remedies. Certainly Congress had no intention of bolstering the

Commission's authority so that it could condemn non-patent unfair practices in import trade only to have such action negated by the President.

In view of the insignificance of the *Pipe & Tube* case in terms of volume of import trade and actual impact had the order been approved, and notwithstanding the reasons given by the President, the cease and desist order was vetoed upon the basis of its potential impact on this country's political, rather than economic, interests. It is difficult to attack a decision reached on political grounds involving subtle foreign policy issues. Yet it is hard to explain how the President's rationale could have met the statutory requirement that the Commission's action may be nullified only if it would have had a "very direct and substantial impact on United States foreign relations." In the event the President continues to utilize a "substantial beneficial impact" test to emasculate the foreign relations impact requirement, sound reasons exist to justify the need for corrective legislative action.