

Unfair Practices in Import Trade

A respondent's point of view of Section 337 of U.S. Trade Act; being prepared to act is important in defending interests

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INTRODUCTION

The foreign trade laws for the United States provide a general statute to counter unfair practices in the import trade of the United States. This statute, which is administered by the U.S. International Trade Commission, is section 337 of the United States Trade Act. The statute 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 substantially injure a United States industry or to restrain or monopolize trade or commerce in the United States. The violation of this law usually leads to a commission order excluding articles connected with the unfair trade practice from entry into the United States.

This article is written from the perspective of the foreign businessman who may be faced with potential or actual proceedings under section 337 as they involve patents. The article examines stages in a patent based proceeding under section 337 and points out possible courses of action and what needs to be done by respondents in order to effectively respond to a section 337 action.

SECTION 337 GENERALLY

As indicated previously, section 337 declares unlawful unfair methods of competition and unfair acts in the import trade which have the effect or tendency to substantially injure a U.S. industry or to restrain or monopolize trade and commerce in the United States. Actions under section 337 have largely involved attempts by U.S. patent owners to protect their U.S. patents from infringement by imported products. The U.S. International Trade Commission considers the infringement of a U.S. patent by an imported product to be an unfair trade practice within the meaning of section 337.

Actions under section 337 have certain advantages over litigation in the U.S. courts to protect a patent. Section 337 provides for a remedy that may be taken

by the commission to exclude an article from being imported regardless of the number of importers. This means that the patent owner need not sue each individual who may be importing or selling an imported product in violation of section 337 in order to have relief from the unfair practice, as would be the case if the action proceeded in a U.S. court. Actions under section 337 proceed more swiftly than do actions in the courts; the commission must conclude a section 337 investigation within one year of its institution (or in complicated cases eighteen months), while a court proceeding normally takes considerably longer to conclude. A section 337 action is also probably less expensive than a court action. As an administrative proceeding, there is somewhat more informality, and due to its swiftness, costs and attorney's fees are reduced. Further, the commission takes an active role in examining the facts, thus relieving to some extent the burden from a complaining U.S. company referred to as a complainant. Finally, and significantly, the adverse results of the loss of a section 337 action by a complainant are probably less than those resulting from the loss of a patent action in a court because the commission, when it determines issues of infringement and validity of a patent, does so only for the purpose of the particular investigation before it. Thus, the commission decision has less precedential value than does a court decision on the same matter, and hence is less controlling of future disputes on the same matter.

Roles of the Commission and the President of the United States

The U.S. International Trade Commission administers section 337. It conducts a formal investigation under section 337 of a complaint and within one year determines if there is a violation of section 337. If the commission finds there is a violation of section 337, it orders appropriate relief as permitted by the statute.

Under section 337, the role of the President is restricted to a possible disapproval of a commission order if he finds for policy reasons that this is appropriate. The President has 60 days in which to make such disapproval.

Remedy Orders

A remedy afforded to the commission is the issuance of an exclusion order. This order is transmitted through the Secretary of the Treasury to all the customs entry ports, and forbids entry of the affected articles into the customs territory of the United States. In patent cases, the order provides for the exclusion of all articles which infringe the patent for the

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duration of the patent, and excepts from such order only imports which have been properly licensed by the U.S. patent owner.

An additional remedy of the Trade Act is a cease and desist order. This order is a direction to an individual to cease engaging in some unfair trade practices; with respect to patents, it would be to cease infringing U.S. patents.

The exclusion and cease and desist orders, besides being permanent orders issued at the conclusion of a section 337 proceeding, may also be issued as a temporary order during the course of the commission's investigation. Temporary orders are issued when the commission has reason to believe, but not facts sufficient to satisfy it, that a violation of section 337 may exist. These temporary orders are in effect only during the pendency of the section 337 proceedings. Since the passage of the Trade Act, no temporary orders have been issued by the commission.

PUBLIC INTEREST

The Trade Act adds to section 337 a requirement that before the commission provides a remedy for an unfair trade practice, it must consider the effect of such order upon the public health and welfare in the United States, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and United States consumers. If it finds the continued importation to be more important to the public than halting importation, then the order will not be issued. To date, no remedy order has failed to issue because of the commission's consideration of these public interests. However, the addition of these public policy considerations to section 337 is potentially very significant, adding a dimension which permits respondents broad range to argue against relief on other than legal grounds.

APPLICABILITY OF STRICT ADMINISTRATIVE PROCEDURES

Foreign responding companies, referred to as respondents are permitted extensive opportunity to discover facts and evidence held by U.S. complainants, have the opportunity to cross examine witnesses in formal proceedings, and generally have the opportunity to present all relevant arguments and defenses. However, in spite of the formal limitations upon the commission, there is still an effort made to make the proceedings less formal than a court proceeding.

Judicial Review

Finally, in this brief overview of section 337, after the commission has acted or failed to take action, and if the President does not disapprove the commission action, judicial review is available of the proceedings before the commission. This review is available to both the respondents who are faced with an order of exclusion or a cease and desist order as well as complainants who may not have succeeded before the commission.

There is no question that judicial review is available with respect to a determination of whether the statute has been violated, i.e., whether an unfair trade practice is proven, with the requisite injurious effect.

PRE-COMPLAINT ACTIVITY

A formal patent proceeding under section 337 is generally initiated by the filing of a complaint by a person with an interest in a U.S. patent. The complaint will allege the unfair act or unfair method of competition and the injury which results from that, and must include economic information regarding injury. In patent cases, the complaint is also required to contain numerous facts regarding the patent and the operations of the domestic industry.

Before a complaint is filed formally with the commission, there is usually contact made by complainant with the commission's investigative staff in order to ascertain the proper form in which the complaint should be in order for an investigation to be instituted. While no public records are maintained regarding proceedings prior to the filing of a formal complaint, a potential respondent who is aware of the pendency of the filing of such a complaint does have an opportunity to contact the investigative staff. This is important to bear in mind because this access by respondents to investigative staff who help complainant properly shape his complaint permit respondents from the very outset of the proceeding to counter-influence the ultimate issues which are to be presented to the commission. It is never too early in a proceeding to shape the issues.

While activity under section 337 is generally begun by a complainant from a domestic industry, there may exist the possibility for a potential respondent to initiate a protective action under section 337. The commission by statute has authority to issue declaratory orders to remove uncertainty as to whether a particular action is a violation of section 337. While the commission has no rule of practice implementing this authority, it may well be that the commission could be persuaded to issue such a declaratory order if particular circumstances warranted it. For example, the commission might be persuaded that threats of potential section 337 actions are so inimical to trade that it would be appropriate to put to rest such threats by issuing a declaratory order as to whether a particular class of imports infringe a U.S. patent. There is apparently no precedent for such actions, but potentially, with an activist commission, this avenue may exist.

THE COMPLAINT IS FILED

Upon the filing of a formal complaint with the commission, the complaint is referred to the commission's investigative staff for its consideration. The investigative staff, which will investigate the matter for the commission, conducting discovery and presenting evidence at the hearing in the matter as a party to the investigation, examines the complaint to determine if it meets the rules regarding the form which complaints are to take and the information which complaints are required to have. Basically, the investigative staff must determine whether the complaint was properly filed so that the commission may proceed with an investigation.

When a complaint is filed, it becomes a public document. The commission rules specifically provide that the petitions of this nature are available for inspection by the public at commission headquarters in Washington. It is often important at this time for respondents to secure a copy of the complaint to see what allegations are made and what facts are stated. Respondents can at this time make their views on the complaint known and this could again have an effect on shaping the course which an investigation will take. Contact may be made informally with the investigative staff to discuss the complaint. Problems with allegations and facts stated may be made known. This is an important time to seek clarification of the issues, to have the complainant provide as much information and facts as possible, and to discourage the institution of vague or poorly worded complaints, or complaints which do not meet commission rules.

In addition to an examination by the investigative staff, the complaint is also examined by the commission and its advisory staff, both of which are independent of the investigative staff. Neither the commission nor the advisory staff to the commission is available for contact by one potential party to the investigation without the other being present. However, a respondent may make known its views to the advisory staff and the commission by way of pre-investigation expressions called motions. These motions may go to such matters as to the sufficiency of the complaint, and may request clarification of the complaint, the disclosure of additional facts, and similar matters.

The commission's consideration of the complaint is usually conducted in a meeting open to the public. The commission will have before it recommendations from the investigative staff and its advisory staff as to how to proceed with the complaint. These meetings are important in that by attending them a respondent may get an idea of what questions and what aspects of the investigation are troublesome to the commission. This, of course, is significant as it may affect the strategy of a respondent in approaching the commission during any investigation that may be undertaken.

The commission upon consideration will either institute the investigation, dismiss the complaint with an indication that it may be refiled in a proper form, or may order what is known as a show cause hearing. A show cause hearing before the commission involves arguments by all potential parties, including potential respondents, as to whether the complaint is properly filed, i.e., represents a proper basis for a formal commission investigation.

INVESTIGATION INSTITUTED

Upon institution of a section 337 investigation, a presiding officer is assigned to conduct the proceedings. A presiding officer operates in much the same way that a judge does in a court, basically presiding over the gathering and presentation of the evidence and the establishment of a formal record of the proceedings. The presiding officer is also required under commission rules to make a recommended decision to the commission as to whether there has been a violation of section 337.

Once a case is referred to a presiding officer, the time for a response to the complaint arrives. The complaint is served by the commission on all named respondents, and notice of the complaint is published in the U.S. Government periodical called the *Federal Register* for all to see and respond to if they have an interest. The response is usually the first occasion for respondents to formally present their defenses to the alleged violations and to rebut any evidence which may have been made a part of the complaint.

Defenses which may be raised to a complaint under section 337 include all the defenses which would be available in a court in the United States, as well as defenses particular to section 337 as a result of its wording as to what constitutes a violation. For this, a foreign respondent would rely on the counsel of its U.S. attorneys. For example, defenses in a patent-based case would include non-infringement of the relevant patent(s) and the invalidity thereof. Defenses based on the particular structure of 337 might include challenges to the jurisdiction of the commission on the basis that there have been no importations or sales of the alleged infringing product, or that there is no domestic industry, or that the industry is not suffering the requisite injury.

In order to be in a position to respond properly to the complaint within the rather short time permitted for such a response (20 days), it is often best to have started work on the response prior to the actual receipt of the complaint. The response will depend largely upon facts which are within the control of the respondent, as there is no time for discovery. These facts will generally relate to patent issues at the time a response is called for. Thus, upon receipt of a complaint, or sooner if the possibility of a section 337 action is known, it is generally in order to conduct a patent search regarding the validity of the U.S. patent, and for a respondent to examine his product to see if it in fact does arguably infringe the U.S. patent. Some respondents may also want to secure information about the alleged U.S. industry and its position in the United States. These activities can be undertaken rather quickly and will provide the necessary background upon which to make a response to the complaint before the commission.

DISCOVERY

After the response is filed, with the proceeding still before the presiding officer, the discovery phase arrives. This is a period where parties to the investigation — complainant, respondents, and commission investigative staff — search for information relevant to the proceedings.

A respondent can expect at this time, generally through his attorneys, to receive requests for information from complainant pursuant to procedural rules established by the commission which compel the provision of properly requested information. These may include a request for an admission of facts alleged in the complaint, a request to orally examine employees of respondent or others associated with the respondent, or a request to answer written questions. In general, discovery will be as broad as is available in the U.S. courts. The information that is most likely to be

sought at this time from a respondent includes information regarding production, production techniques, sales, methods of distribution of the subject product, and the development of the subject product.

Before supplying this information, a respondent can request the issuance of what is known as a protective order, if such has not already been issued by mutual agreement of the parties. A protective order basically limits the right of access to sensitive information provided by a party to only other parties who need to know for the fair conduct of the investigation. This access is often limited to attorneys and a few representatives for complainants, and, of course, the commission and its investigative staff.

A respondent during this period can also request information from the complainant. In patent cases, where injury to a domestic industry must be shown, a respondent should at this time probe for information relevant to the financial condition of a complainant, its production and sales of the relevant domestic product, the development of the patented product by the patentee, and similar information which would bear upon the patent issues and whether a complainant is injured and whether the injury is caused by imports connected with the unfair trade practice. In general, a respondent would engage in the same sort of discovery as in a normal patent case in court, also seeking relevant information regarding the requisite injury.

THE HEARING

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After the discovery phase is concluded, the investigation proceeds to a hearing before the presiding officer. The hearing is a formal proceeding where evidence is presented based on the discovery phase and what was known prior to that time. Extraneous evidence is excluded and the facts upon which a complainant and respondent are to rely are brought forth. The complainant has the burden of proving that each of the facts necessary to find a violation of section 337 exists. Cross-examination of witnesses is permitted, whereby opposing attorneys may question another party's witnesses with regard to a statement they make or documents they introduce.

Of course, a respondent must be prepared at the time of the hearing to proceed with its case. Particularly, witnesses must be secured who will give testimony relevant to respondent's position. A respondent can often take an active role in deciding what evidence would be helpful to its position, and need not wait for its U.S. attorney to come to it with questions. After all, the foreign respondent knows best what information they have with respect to the matters that are before the commission and what people within their organization or outside of it can best present their case. Additionally, a respondent's active role can include the educating of its U.S. attorney to the specifics of the particular situation of a foreign business. This should, of course, start from the beginning of the relationship, but probably needs to be intensified in the weeks immediately preceding the hearing.

In addition to preparing its case, a respondent must also be ready to provide rapid rebuttal to information presented during the hearing by a complainant. Quite often information will be presented at the hearing

which was not anticipated and which will call for immediate analysis and rebuttal. Thus, it will often be necessary or helpful for a respondent to have liaison at the hearing to provide necessary backup to its U.S. attorney.

POST HEARING AND BRIEF AND RECOMMENDED DETERMINATION

After conclusion of the hearing, the matter remains before the presiding officer in order for him to make a recommended determination to the commission as to whether there has been a violation of section 337. The presiding officer at this time will call for briefs as to the legal and economic issues which have been presented and will also call upon the parties to provide recommended findings of fact and conclusions of law upon which he may base his recommended determination to the commission.

This stage of the proceedings presents an opportunity for respondent to marshal its arguments in a coherent way and to present the findings of fact and conclusions of law which they feel are appropriate for their case. While this work is largely done by its U.S. attorney, foreign respondents must be prepared to support their attorney with needed analysis.

Upon receipt of the arguments and proposed findings and conclusions, the presiding officer proceeds to make his recommended determination to the commission. This recommended determination contains findings of fact and conclusions of law for the commission's consideration generally only with respect to what remedy should be issued or findings with respect to the public interest factors mentioned earlier. The recommendation is not binding upon the commission.

COMMISSION CONSIDERATION

Following receipt of the presiding officer's recommended determination, the commission considers essentially three main points in reaching its decision in the matter. The first consideration involves whether there has been a violation of section 337. The commission generally permits oral argument with respect to this matter by all parties and permits the parties to take exception to the recommended determination of the presiding officer. No new facts may be presented in the argument.

The commission also considers at this time the question of the appropriate remedy if a violation should be found to exist. Again, oral argument is permitted by the parties, and factual presentations may be made by all parties, directly to the commission, as prior to this time information regarding the appropriate remedy has not generally been presented.

In addition to the questions of violation and remedy, the commission also considers at this time the various public interests mentioned previously. These interests include the public health and welfare in the United States, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States and U.S. consumers. The commission generally calls for factual presentations at this time along with arguments as to what should be their findings as to the public interests. As can be seen, the

public interest considerations revolve around the impact of a remedy on U.S. interests. Thus, foreign respondents will often find it expedient to call upon U.S. firms to help them in the preparation of their analysis with respect to this matter.

In regard to the commission's consideration of the public interest factors, the respondent may well want to involve other U.S. governmental agencies in the proceedings at this time. By statute, the U.S. Department of Justice, the United States' Federal Trade Commission, and the U.S. Department of Health, Education and Welfare may provide information to the commission with respect to these public interest factors. Respondents may find that they have an ally in one of these agencies, or in another agency in the government. For example, the Federal Trade Commission is properly concerned about excessive concentration of a U.S. industry to the detriment of competitive conditions in that industry. In patent cases under section 337, there may well be occasions in which the Federal Trade Commission would find it appropriate to comment that the issuance of an exclusion order would have a serious adverse affect on competitive conditions, or would be detrimental to U.S. consumers. A respondent should, of course, lay the groundwork for the involvement of a federal agency prior to this particular point in the proceeding, since as in all bureaucracies an agency position sometimes requires considerable time to be developed.

POST COMMISSION ORDER — IMMEDIATE

If we assume that the commission finds there is violation of section 337 and, after considering the public interests, orders a remedy, a respondent may at this time move for reconsideration of the matter by the commission. Such reconsideration would generally only occur if the commission considered that there was a grievous error of fact or law committed, or that there has been a substantial change of circumstances since the gathering of the evidence, which may have occurred some five months previous to this time.

If a reconsideration is turned down, or a respondent decides not to seek reconsideration, the next phase in the proceeding concerns the deliberations of the President. Under section 337, the President within 60 days may disapprove a commission remedy order if he feels policy reasons require this. The policy reasons the President may consider include the same factors which the commission took into consideration in its public policy exercise. Further, the President may consider the impact that the granting of relief might have upon U.S. foreign relations, both economic and political. The actual staff work leading up to the President's position on disapproval is performed by the Office of the Special Representative for Trade Negotiations, which generally asks for comments by interested persons upon the commission's determination and remedy order. It should be emphasized that the focus of the President and his advisors is not generally upon the patent issues at this time, but rather upon various public interest considerations.

If the President does not disapprove the commission action, judicial review of the commission's determination is available but not of the President's decision. As

mentioned earlier, review may be had with respect to whether or not an unfair trade practice exists which has the requisite injurious effect.

POST COMMISSION ORDER — AFTER PASSAGE OF TIME

Section 337 provides that any exclusion from entry or cease and desist order which has been issued by the commission shall continue in effect until the commission finds that the conditions which led to such exclusion from entry no longer exist. Thus, a respondent, even if it should lose before the commission, should keep under review the matter to see if changed circumstances warrant a reopening of the matter by the commission. For example, newly discovered information which might tend to invalidate the patent upon which the outstanding commission order is based may warrant the commission reopening the investigation and dissolving the order. Similarly, changes affecting the public interest which the commission has considered previously may result in the commission appropriately reconsidering its order in light of the new status of the public interest. For example, if at the time of the exclusion order the patented products were being made available by the domestic industry at reasonable prices and in reasonable quantity, but several years later the price had skyrocketed without a cost justification, or the product was in short supply, a reconsideration might be appropriate.

It should also be borne in mind that any order to exclude goods from entry will be administered by the U.S. Customs Service. Thus, if a respondent's product changes so that it is no longer infringing the U.S. patent which forms the basis of the exclusion order, it may not be necessary to go back to the commission to avoid the effect of the remedy if one can persuade the Customs Service that the imported article no longer conflicts with the patent.

OFFENSIVE STEPS ON THE PART OF A FOREIGN COUNTRY

Respondents are not necessarily restricted to a reactive position. There are methods available by which a party who is uncertain about the propriety of a given activity or who anticipates commission action concerning the activity can take the initiative.

Advisory Opinions

Potential respondents may seek advice from the commission with respect to a course of conduct that the requesting party proposes to pursue. The commission has the authority to issue advisory opinions under Section 554 of the Administrative Procedure Act. Such agency opinions would be available where the request presents sufficient facts about the activity to allow an informed determination. The procedure does not contemplate a protracted administrative investigation. Advisory opinions would probably not be available where the activity in question is already being followed or is the subject of a current proceeding, order or investigation of a governmental agency.

Where advice is appropriate, the importer would receive guidance in conducting his affairs in conformity with the legal requirements. He can remove any uncertainty he has concerning a given product's status in the affected industry prior to introducing his product into the United States.

Moreover, interested federal agencies would not normally proceed against the requesting party with respect to any action taken in good faith reliance upon commission advice.

Declaratory Orders

While the advisory mechanism might clarify the status of proposed activity, a party would require a different framework to get a commission determination for current conduct.

There is statutory authority for the issuance of declaratory orders in the commission's sound discretion.

Declaratory orders operate to inform interested parties of what the government, acting through its agencies, requires of an individual so that he can conduct current business lawfully.

It is a preventative procedure in that it imposes no civil or criminal penalties, even in cases where the

events which could give rise to liability have already transpired. It is specifically designed to determine an affected party's rights and obligations with respect to ongoing facts or conduct.

Declaratory orders have as much binding legal effect as coercive orders, such as an exclusion or a cease and desist order. Judicial review before the commission would probably be available in the declaratory situation, as it is in the coercive context.

A businessman who suspects he may be charged with violating the law can ask the commission to take a position with respect to the activity and perhaps obviate the disruption of normal business functions that would be concomitant with an investigation.

As noted earlier, the commission has not promulgated rules executing its statutory authority to issue declaratory orders or advisory opinions. However, the historical accessibility of the ITC forum to private interests in conjunction with the public interest considerations added by the 1974 amendments might well operate to persuade the commission to issue such comments. These procedures are available in one form or another at most federal agencies, including the Federal Trade Commission, the domestic counterpart to the International Trade Commission.