

LAW OFFICES OF NITHYA NAGARAJAN, LLC

INTERNATIONAL TRADE LAW AND CONSULTING

SECTION 337 ACTIONS

What is Section 337?

Under Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, the International Trade Commission (ITC) is authorized to issue an order to exclude articles from entry into the United States that have been found to violate U.S.-based intellectual property rights, or where the respondent has committed other unfair acts relating to imported products. The exclusion order is enforced by the U.S. Customs and Border Protection (CBP).

Most Section 337 investigations allege violations of intellectual property-based rights involving claims of patent, copyright or trademark infringement. In such cases, the complainant must establish that a valid and enforceable U.S. patent, copyright or trademark is being infringed by the importation into the U.S., the sale for importation, or the sale within the U.S. after importation of an accused article, and that a domestic industry exists or is in the process of being established.

Section 337 also provides remedies for other unfair acts, such as theft of trade secrets and Lanham Act violations. Recent investigations have also involved allegations of price-fixing, computer hacking, and customs circumvention. In these cases, the complainant is required to show that the respondent's unfair practices threaten to destroy or substantially injure a domestic industry.

Implications for Antidumping and Countervailing Duty Orders

A recent specific 337 claim that is referred to as a Lanham Act claim is unusual in that it is based on alleged violations of existing anti-dumping and countervailing duty orders issued by the Commerce Department. The complainant claims that the exporting company falsely designated the country of origin of the imported product. Enforcement of antidumping and countervailing duty and any circumvention allegations had previously been the exclusive domain of the Department of Commerce (DOC) and CBP, as reinforced in the recent 2016 changes to U.S. Customs law under the Trade Enforcement Act. An important aspect here, as noted above, is that the remedy under Section 337 is an exclusion order, whereas a circumvention proceeding before CBP and the DOC would result in a ruling that the importer owes the unpaid duties (and perhaps fines and penalties) on the imported goods. If the ITC determines such claims are within the scope of Section 337, this could be a powerful weapon for U.S. industries to enforce anti-dumping and countervailing duty orders outside of the traditional remedies.

The importance for U.S. trade remedies being brought under the purview of a 337 investigation could be enormous. Instead of applying to just one specific subset of steel products, as would be the case in an anti-dumping or countervailing duty case, the remedy here could bar from entry into the U.S. and entire class of goods from a particular country. Additionally, the ITC has the potential to expand the scope of its authority and could rule it has jurisdiction over virtually any unfair act in the importation of goods irrespective of statutory and other requirements for plaintiffs to pursue such claims in U.S. courts.

Examples of Where Is the ITC is Expanding Its Section 337 Reach?

Most ITC investigations are based on allegations of patent infringement. However, Section 337 applies broadly to all “unfair acts” in the importation of goods that cause or threaten to cause injury to a domestic industry. Non-patent cases have recently been on the rise at the ITC. A sample of these types of non-patent claims include:

- ***False Advertising Claims:*** A recent ITC decision barred from entry into the United States bed sheets where the respondent falsely advertised the product’s thread count. This is a prime example of the use of Section 337 as a means to exclude products from importation based upon “unfair acts” which are not related to the violation of intellectual property.
- ***Theft of Trade Secrets Claims.*** The Federal Circuit recently affirmed that a claim alleging the theft of trade secrets is a viable Section 337 claim, even where the theft occurred overseas. In May 2016 Congress also enacted a federal trade secret statute, the Defend Trade Secrets Act, Pub. Law No. 114-153. These two developments are likely to lead to an increased use of Section 337 claims based upon allegations of the theft of trade secrets.
- ***Customs Circumvention.*** The recent claim by U.S. Steel that Chinese companies were seeking to avoid antidumping and countervailing duties imposed by the DOC by falsely designating the country of origin. The ITC held that such claims are viable under Section 337 and could lead to several new 337 actions which were previously not possible.
- ***Antitrust.*** Antitrust claims brought by competitors, rather than customers, may be given approval by the ITC and may provide an attractive alternative to antidumping claims where prices are fixed in non-market economy countries.

What Are the Remedies Under Section 337?

In a successful Section 337 case, the remedy to be imposed is an exclusion order, barring entry of the unfairly traded import from entry into the United States. This is a much more effective and stringent remedy than an award of damages, or even the imposition of duties in an antidumping or countervailing duty proceeding. In contrast, an exclusion order is the exclusive remedy in the ITC and is the functional equivalent of an injunction. Given the extremely powerful nature of the exclusion order remedy, it is often possible to obtain quick settlements with accused importers.

Additionally, Section 337 cases are very fast-paced. A fully litigated Section 337 proceeding can result in an exclusion order in as little as 15 months after the investigation is instituted by the ITC. The ITC provides a forum for a wide variety of disputes that involve unfair acts in the importation of goods. The unfair acts over which the ITC has jurisdiction exceed the jurisdiction of U.S. courts on these claims.

The Law Offices of Nithya Nagarajan, LLC can assist companies with defenses in 337 proceedings and enable them to have continued access to the U.S. market.