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THE RULE OF LAW IN INTERNATIONAL TRADE: LITIGATING UNFAIR IMPORT TRADE PRACTICE CASES BEFORE THE UNITED STATES INTERNATIONAL TRADE COMMISSION

THE HONORABLE DONALD K. DUVALL*

One of the most dynamic statutes administered by the United States International Trade Commission (ITC), located in Washington, D.C., is section 337 of the Tariff Act of 1930, as amended.[1] The principal purpose and effect of this statute is to protect economically and efficiently operated domestic industries in the United States from unfair competition or other unfair acts by foreign imports which tend to substantially injure these domestic industries. Although complainants (usually domestic manufacturers) often prevail in these proceedings, favorable decisions are not politically motivated, but are due solely to the probative weight of the evidence of record as determined by a presiding officer (federal administrative law judge), whose decisional independence is assured by the Administrative Procedure Act[2], as amended. In short, the statute is not "protectionist" in the ideological sense. On the contrary, the statute seeks to encourage "free" trade by providing adequate defenses against international traders who engage in unfair acts or unfair methods of competition in violation of the established law and rules of trade in the United States.

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* Chief Administrative Law Judge, United States International Trade Commission; Secretary, Inter-American Bar Foundation; former Chairman, International Law Section, American Bar Associaton. The views expressed in this paper are those of the author alone and do not necessarily reflect those of the United States International Trade Commission. The Commission, created by Congress in 1916 as the United States Tariff Commission, is an independent administrative agency with authority to investigate, adjudicate, research, advise and provide technical assistance concerning all aspects of international trade as it relates to the United States as a service to the President, the Congress, other Government agencies, and the public. The six Commissioners of the ITC are appointed by the President for terms of nine years, with no more than three Commissioners permitted to be affiliated with the same political party. The Commission Chairman is designated by the President for a term of two years, and his successor cannot be from the same political party.

1. 19 U.S.C. § 1337.

2. 5 U.S.C. § 554, *et. seq.*

The subject statute, commonly referred to as section 337, is to be distinguished from other, more publicized statutes also administered by the ITC, such as the Anti-Dumping Statute[3], the Countervailing Duty (foreign subsidy) Statute[4], and the Import Injury Relief Statute.[5] Compared to the involvement of states and citizens in other regions of the world, especially Europe and the Far East, none of these statutes have greatly affected or involved Latin American states or citizens. However, during 1980-82, certain products from Brazil,[6] Venezuela,[7] Uruguay[8] and Mexico[9] have been the subject of countervailing duty proceedings before the ITC. Because of space limitations, this paper will be limited to a discussion of section 337 and the procedures followed by the ITC in adjudicating cases under the statute's unfair import trade practice provisions.

To establish a violation of section 337, the complainant must prove the following elements by a preponderance of the evidence: (1) unfair methods of competition or unfair acts, (e.g., patent infringement or antitrust law violation) in (2) the importation of articles into the United States, or in their sale, (3) that will effectively destroy or substantially injure or prevent the establishment of (4) an industry (5) efficiently and economically operated in the United States, (6) or will restrain or monopolize trade and commerce in the United States.

Unfair trade practices under section 337 have been construed to include patent, trademark and copyright infringement, misappropriation of trade secrets, antitrust violations (such as predatory pricing, price-fixing, territorial restrictions, conspiracy to monopolize) and unfair competition (such as palming off, deceptive advertising, and product disparagement). According to the Trade Act of 1974 amendments, respondents in section 337 cases may now assert all legal and equitable defenses to patent infringement allegations. As a result, the presumption of validity which United States patents enjoy under the patent law[10] can be rebutted by clear and

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3. 19 U.S.C. § 160, *et. seq.*

4. 19 U.S.C. § 1303 (1930).

5. 19 U.S.C. § 2251 (1974).

6. Specifically, pig-iron, ferro-alloys, hot-rolled stainless steel bar, carbon steel plate, cold-formed stainless steel bar, stainless steel and carbon steel wire rod, leather handbags and frozen concentrated orange juice.

7. Most notably carbon steel wire rod.

8. Manufactured leather goods like handbags, luggage and brief cases.

9. Specifically, ceramic tile setters and fungicides.

10. 35 U.S.C. § 282.

convincing evidence that the patent is invalid or unenforceable by reason of anticipation, obviousness under prior art, patent misuse, or fraud or inequitable conduct. Of course, a Commission's determination that a patent is invalid is only for the purposes of section 337 and will not estop concurrent or subsequent litigation in the courts by *res judicata.*

Perhaps the most distinguishing characteristic of section 337 is its requirement of expedition. The statute absolutely mandates that the Commission make its determination in this type of case "at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication (in the Federal Register) of notice of such investigation."[11] The Commission has scrupulously observed these strict time limits and there is no question that the resulting remarkable expedition has been a significant factor in revitalizing a 40-year old statute which had previously seen relatively little litigation.

A section 337 proceeding is commenced by a party, usually a domestic manufacturer, filing a complaint with the ITC. If it meets the filing requirements, the complaint will lead to the institution of a formal investigation within 30 days. As soon as the investigation is instituted, it is transmitted to the Chief Administrative Law Judge for assignment to a judge within the ITC's Office of Administrative Law Judges. The judge will conduct and preside over a formal trial-type hearing on the record in accordance with the Administrative Procedure Act.[12] Possessing complete decisional independence under the law, administrative law judges at the ITC, as in other federal agencies and departments employing such presiding officers, are competent to conduct a trial in a manner comparable to the trial of a civil case by a federal district court judge sitting without a jury. A claim for temporary relief is accompanied by a hearing to determine whether there is reason to believe there has been a violation of section 337. A claim for permanent relief requires a hearing to decide whether there has been a violation. Both are conducted in accordance with the ITC's Rules of Practice and Procedure which closely follow the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

Early in the proceeding, the presiding judge issues a comprehensive protective order designed to facilitate prompt pre-trial dis-

11. *Supra*, note 1.
12. 5 U.S.C. § 551 (1946).

covery by the parties while protecting properly designated confidential business information and trade secrets. Within a few weeks, the judge holds a preliminary conference with the parties, including the Commission investigative attorney, who is a full party to the proceedings. At this initial conference, any preliminary motions are decided and the issues are clearly identified and simplified to the greatest extent possible. Pre-trial discovery plans and methods, including interrogatories, admissions, depositions, subpoenas for testimony and production of documents are thoroughly discussed. Then, a procedural schedule for the pre-hearing conference, hearing and post-hearing briefs is set.

In the usual twelve-month proceeding, all discovery must be completed within five or six months from the date that the notice of investigation is published in order to allow adequate time to prepare for the hearing, and for the presiding judge to write his initial determination. The hearing typically requires two weeks for completion. The initial determination of the presiding judge, which includes findings of fact and conclusions of law, must be filed with the ITC within nine months from the original date of publication. This leaves the ITC three months to conduct its hearing, render its final determination, and consider arguments on the remedy or relief to be granted[13] if a violation is found. The ITC must also consider the public interest factors specified in the statute. These include the effect of exclusion of the accused articles on the public health and welfare, competitive conditions in the United States economy, the production of directly competitive articles in the United States and the interest of United States consumers.

In determining a remedy, the ITC must consult with other interested or involved government departments, including the Department of Health and Human Services, the Department of Justice and the Federal Trade Commission. During the sixty-day period following the Commission's final determination, the President may veto the decision for policy reasons. If the President does not disapprove such determination, any person adversely affected by the ITC's determination may, within sixty days, appeal to the United States Court of Appeals for the Federal Circuit.[14] The ITC

13. Typical remedies include the exclusion of the accused imported article from the United States or a cease and desist order.

14. The U.S. Court of Appeals for the Federal Circuit was established on October 1, 1982, by a merger of the former U.S. Court of Claims and the U.S. Court of Customs and Patent Appeals.

sets the bond under which articles subject to an exclusion order may enter the United States during this sixty-day period.

Evaluating the effectiveness of section 337, at least since the Trade Act of 1974 amendments, depends on the experience and perspective of the viewer. On the one hand, the statute clearly affords a proven avenue of expeditious and judicious relief to U.S. industries and firms suffering from the effects of unfair import practices in the introduction of competing articles into the U.S. market. On the other hand, the administration and application of the statute suggest certain problem areas that should be addressed if the statute is to fulfill the purpose intended by Congress in an ever-changing economic environment. For example, to avoid the risks inherent in a "worst case" scenario, the statute should be amended to make clear that the prescribed time limits, although intended as the normal course under which a section 337 proceeding is to be carried out, may be deviated from at the discretion of the Commission for good cause.

Another incipient problem relates to the nature and extent of the ITC's jurisdiction over foreign parties whose principal place of business is located outside the United States. Even where foreign parties in a section 337 proceeding have not subjected themselves to the personal jurisdiction of the forum, the ITC has assumed full authority to impose appropriate relief (exclusion or cease and desist orders) on the basis of its subject matter and *in rem* jurisdiction (jurisdiction over the accused imported articles themselves, apart from any presence in or minimum contacts with the United States by the foreign party who manufactured or exported the accused articles). Such jurisdictional questions can become critically important during the pre-trial discovery stage. Unless the parties agree on voluntary discovery, coping with international conventions or foreign laws and restrictions governing service of process and obtaining evidence abroad, such as the Hague Conventions on Service and Taking Evidence Abroad,[15] can play havoc with discovery procedures and timetables under section 337. Should opposition to discovery by any party be intentional and without good cause according to United States law and practice, the party, foreign or domestic, may be subjected to severe sanctions, including negative inferences tantamount to full proof. These negative inferences can readily result in a final determination adverse to the re-

15. 20 U.S.T. 361, T.I.A.S. No. 6638 (1965); 23 U.S.T. 2555, T.I.A.S. No. 7444 (1970).

calcitrant party. Such a harsh solution is certainly less preferable than a full trial on the merits.

Finally, recent cases suggest that, in the face of tougher competition from abroad, the ITC's definition of "domestic industry" as used in section 337 will be construed narrowly. This new interpretation will preclude relief to domestic companies in labor-intensive industries, (for example, toy vehicle manufacturers), which find it more economical to manufacture the basic product abroad, even though substantial value in land, capital or labor is added to the product within the United States, where it will be marketed. It remains to be seen whether this strict construction will benefit the United States economy by protecting only "all American" companies from unfair imports (much as the domestic content legislation proposed in Congress seeks to do for the automobile industry). Alternatively, it could drive more entrepreneurs engaged in multinational, integrated, labor-intensive industries out of the United States altogether.