

Smoot-Hawley and the Art of War

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What is of supreme importance in conflict, Sun Tzu said, is to attack an opponent's strategy.¹

One potential blueprint for rebuilding American economic independence and security in a post-COVID-19 world already exists in the form of Section 337 of the Tariff Act of 1930.²

That act coupled with the independent federal agency charged with enforcing its provisions — the U.S. International Trade Commission (ITC) — are uniquely capable of protecting U.S. intellectual property rights, incentivizing a renaissance of American-made products and services, as well as forcing non-U.S. competition to choose between paying reparations (e.g., by way of paying licensing fees to intellectual property owners), moving foreign operations inside the U.S. to avoid ITC jurisdiction or being excluded altogether from the U.S. consumer market.

Encouraging the immediate and strategic use of Section 337 should be the centerpiece for any plan to rebuild American economic independence and security in a post-COVID-19 world.

What! Dusting off and using an early 20th Century primitive tool of American protectionism to advance U.S. national interests in 2020? Well, why not?

The ITC is an independent federal agency with broad investigative responsibilities on matters of trade. Founded in 1916 as the U.S. Tariff Commission, the ITC has evolved over the last century into a powerful agency that can reshape industries.

Section 337's predecessor — Section 316 of the Tariff Act of 1922 — was specifically enacted to make it "possible for the President to prevent unfair practices, even when engaged in by individuals residing outside the jurisdiction of the United States."³

But Section 316 proved cumbersome to use, and in 1930 — at the beginning of the Great Depression — Congress enacted the Smoot-Hawley Tariff Act, which re-designated the old Section 316 as Section 337.⁴

This streamlined proceedings to some extent, but still the law was used infrequently for decades — likely because of the U.S.'s preeminent position as a net exporter of goods during World War II and the post-war years.

As the trade balance began to turn in the 1970s, Section 337 activity picked up and has been growing steadily ever since.

For several years, the economic aspect of the ITC's domestic industry requirement was more difficult to establish because it required proof of economic injury. However, in 1988, Congress amended Section 337 to allow the patent owner to satisfy the domestic industry requirement via engineering, research and development, and licensing activities.

Congress expanded the scope of the domestic industry to make Section 337 a more effective remedy for the protection of U.S. patent rights, since the prior definition excluded many activities in the U.S. from establishing a domestic industry and was cumbersome and costly to prove.

Indeed, despite the fear-inducing Smoot-Hawley label, Section 337 is more than still alive and has the power to completely ban the importation of products into the U.S. that infringe U.S. intellectual property rights (patents, copyrights, trademarks, trade secrets, etc.).

In fact, when the ITC issues a final determination under Section 337, that decision is immediately enforceable by U.S. Customs and Border Protection (CBP) at all ports of entry into the United States.

While money damages are not available at the ITC, the practical effect is unmistakable — massive quantities of infringing products that might have entered the U.S. and been sold here are kept out, thereby dealing a potentially decisive economic blow to the would-be importers.⁵

A Section 337 action begins when the ITC institutes an investigation in response to an infringement complaint.⁶ Patent infringement cases represent about 90-95% of the cases brought under this statute.

To initiate an ITC action, the complaining party must prove that

- (1) it owns the asserted patent,
- (2) the accused product was imported into the U.S. and
- (3) an industry in the U.S. relating to the articles protected by the patent exists or is in the process of being established.⁷

The investigation proceeds quickly — an evidentiary hearing at about 9 months, an initial determination from an administrative law judge (ALJ) at about 12 months, and a final determination at about 16 months.⁸

Upon institution, the investigation is assigned to an ALJ, who presides over the proceeding.

Discovery in the ITC proceeds quickly. For example, responses to discovery requests are due within 10 days (as opposed to 30 days in district court).

The ALJ oversees discovery, rules on discovery-related motions, and rules on summary determination motions (akin to summary judgment motions in district court).

In district court litigation, there are only two sides — the patent owner (and potentially exclusive licensees or other parties aligned with the patent owner), and the accused infringer(s). In the ITC, however, there is a third side — the Office of Unfair Import Investigations (OUII).

The OUII represents the public interest and participates as an independent party. Thus, the OUII is free to participate in discovery and motion practice, question witnesses at the evidentiary hearing, and take positions on the issues in dispute.⁹

The ALJ presides over the evidentiary hearing (there is no jury), which is much like a bench trial in a district court, and held at the ITC's Washington, D.C., headquarters. Within several weeks after conducting an evidentiary hearing, the ALJ issues an initial determination (ID) as to whether there is a violation of Section 337.

The ALJ's ID is subject to review by the ITC commissioners upon petition by a party. If a petition for review is denied, the ALJ's ID is adopted and becomes the ITC's final determination. If a petition for review is granted, the parties will typically be given an opportunity to provide further briefs on the specific issues that are under review.

The portions of the ALJ's ID that are not under review are deemed adopted and become part of the ITC's final determination. At its discretion, the commissioners can

adopt, modify or reverse the ALJ's ID. In rare instances, the commissioners may put aside a finding of violation if such a determination would be contrary to the public interest.

If the complainant is successful, the ITC typically issues a "limited exclusion order" that bans infringing imports from the named respondent companies.¹⁰ The ITC can also sometimes issue a "general exclusion order" that bans infringing imports from all sources (even sources not named in the complaint).¹¹

These remedies are uniquely powerful and can inflict severe damage on overseas companies that depend on importing products into the U.S. for a significant portion of their business.¹² If the ITC finds a violation and issue either a remedial order, it is forwarded to the President of the United States for review.

The president (through his/her trade representative) has 60 days in which to approve or disapprove the ITC's findings.¹³ The ITC's final determination can be appealed to the U.S. Court of Appeals for the Federal Circuit.¹⁴

Encouraging the immediate and strategic use of Section 337 should be the centerpiece for any plan to rebuild American economic independence and security in a post-COVID-19 world. To be sure, in our collective search for potential off-ramps from our current COVID-19 chaos, a real and viable opportunity hides in plain sight.

The answer can't be found by trying to decipher meaningless political platitudes or filing what appear to be doomed private lawsuits seeking monetary compensation.¹⁵ Rather, the answer lies in using Section 337 as it was intended because doing so will undoubtedly attack (and should defeat) the strategy of America's global competitors.

Notes

¹ Sun Tzu, *The Art of War* (Samuel B. Griffith trans., Oxford Univ. Press 1971) (1963) at 71 ("[W]hat is of supreme importance in war is to attack the enemy's strategy").

² 19 U.S.C.A. § 1337.

³ See *Tianrui Group Co. v. ITC*, 661 F.3d 1322, 1331 (Fed. Cir. 2011).

⁴ *Id.*

⁵ Beyond Section 337, the ITC also handles other statutes, including the antidumping and countervailing duty statutes. See 19 U.S.C.A. § 1671.

⁶ The information required in Section 337 complaints is specified in 19 C.F.R. § 210.12.

⁷ See 19 U.S.C.A. § 1337(a).

⁸ See 19 C.F.R. § 210.51.

⁹ See 19 C.F.R. § 210.3.

¹⁰ See 19 U.S.C.A. § 1337(d)(1).

¹¹ See 19 U.S.C.A. § 1337(d)(2).

¹² See generally Tom M. Schaumberg et al., *Advantages of a Section 337 Investigation at the U.S. International Trade Commission*, IP LITIGATOR, May/June 2006.

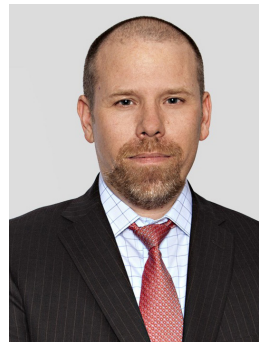
¹³ See 19 U.S.C.A. § 1337(j).

¹⁴ For a more thorough understanding of Section 337, please refer to Title 19 of the Code of Federal Regulations, and the ITC's website which has more information regarding the mechanics of Section 337 actions before the ITC.

¹⁵ See generally Mary Ellen O'Connell, *Lawsuits against China, WHO are not the way forward, Notre Dame expert says*, UNIV. OF NOTRE DAME, May 27, 2020, <https://bit.ly/2E84Adh>.

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