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Characteristics of section 337 investigations and Chinese measures - case study of anhui foreign trade enterprises

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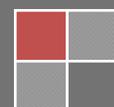
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ABSTRACT

USA Customs have a power coming from the 337 clause to stop importing the foreign products which violated the intellectual property rights in America. But this clause was accused of protecting international trade in the name of protecting intellectual property rights. With the development of economy, the strategy of intellectual property was vigorously implemented in Anhui from 2009 to 2013. Consequently, the quantity and quality of patents had been increased greatly and their growths were in the forefront of the country. Under this background, high-tech products and electromechanical products in Anhui to USA will face a great hidden trouble from 337 investigations. So it is necessary to give layout of patents in advance and be prepared for coping with 337 investigations on the basis of market share of products from Anhui enterprises in the US and according to whether these products will be involved.

KEYWORDS

337 investigations; Intellectual property; Enterprises in Anhui province; Strategy.



INTRODUCTION

Intellectual property rights barrier is a trade protection method increasingly used by developed countries. The US section 337 investigations are such an important means to set Intellectual property rights barrier and protect intellectual property rights and domestic trade.^[1] 337 investigations are based on section 337 of the Tariff Act of 1930, aims at dealing with unfairness brought by importation of goods. Unfairness means that goods are imported to America through unfair competition or in unfair ways, or titleholders, importers or agents sell the goods in unfair ways in American market, causing substantial damage or threat to relevant American industries, impeding the establishment of relevant American industries, suppressing and manipulating American commerce and trade, or violating legal and effective American intellectual property rights, often referring to the patent.^[2]

CHARACTERISTICS OF SECTION 337 INVESTIGATIONS

With the change of international trade environment, section 337 has been amended several times. The current version reflects the feature of administrative remedy to protect domestic industry. It is largely different from court litigation, demonstrating a tendency of protecting domestic industry, setting trade barrier and preventing foreign products from entering to American market or expanding their shares in American market.

Easiness to file an application and simplicity to put on record

According to ITC Rules of Operation and Procedure, the plaintiff can apply for an investigation as long as the plaintiff thinks the defendant has infringed its legal and effective intellectual property rights registered in America and that America has relevant industry or is establishing relevant industry. While filing an application, only two sorts of evidence are needed. First, the defendant infringes the plaintiff's legal and effective intellectual property rights, especially the patent. Second, there exists in America the industry or similar industry that the products sold by the defendant belong to, or, if not, relevant industry is being established in America. Therefore, the plaintiff bears little responsibility for evidence while filing an application.

Short time to reply to the suit

From the idea and investigation procedure of section 337, it is known that the defendant ought to response to the suit within 20 days since the issue of the announcement. On occasions where the plaintiff requires temporary relief measures in its application, the defendant need to response to the suit within 10 days since the application is presented. Otherwise, the defendant is regarded as giving up response, and the American ITC can directly take sanctions.

It can be seen that the delivery procedures of section 337 investigations are much simpler than the delivery procedures of court litigations and that the plaintiff bears less responsibility and takes less risks. In terms of person responsible for delivery, the plaintiffs in the section 337 investigations are completely unrelated to the delivery; the plaintiffs in American court litigations are responsible for the delivery; for Chinese court litigations, the court takes the responsibility for delivery. In regard to delivery procedures, section 337 investigations don't stick to fixed rules, while the Chinese court and American court both operate according to strict rules. As to time of delivery, in spite of the long distance of oversea delivery, section 337 investigations set a time limit of 10 days; the American courts give a period of 3 months; the Chinese courts have different time limits for different means of delivery. As for the consequence of non-delivery, in the section 337 investigations, the defendant bears the unfavorable consequence, being regarded as giving up replying, whether the writ is delivered or if not replying to the charge within 30 days since the delivery; the plaintiff bears the unfavorable consequence in American court litigation; in China, only 3 months after the announcement is delivered the plaintiff may bear the unfavorable consequence. Concerning the rate of successful delivery, in section 337 investigations, it happens so often that the defendants don't receive the writ; in American court litigations, the defendants can essentially receive the writ; in Chinese court litigations, although it can't be guaranteed that the writs actually go to the defendants, the majority of the defendants can receive them.

When a Chinese domestic enterprise is involved in section 337 investigations as an accused party by an American plaintiff, it has to go through a series of process within 20 days since the issue of announcement, such as information collection, translation, hiring relevant experts and submitting written materials of replying to the suit, or, has to reply to the suit in 10 days since it receives the application for temporary measures by the plaintiff. In both cases, time is pressed for the defendant to make preparations. Especially in the case where the defendant has to response to a lawsuit within 20 days since the date of announcement, if the defendant hasn't pay attention to the information or hasn't received the writ so that it is totally unaware that itself has become a defendant and need to response to a lawsuit, it is very much likely to lose the chance of response. "For example, in the section 337 investigations of Viagra in 2003, two of the 15 defendants couldn't participate in the investigations and defended for themselves on account of not receiving the petition and filing notice."^[3] In addition, "the object-orientation of section 337 investigations makes it possible for the plaintiff to request investigations without knowing the manufacture and titleholder of infringing products".^[4] That is to say, the plaintiff doesn't indicate the enterprises to be surveyed but only indicates the country of origin of the surveyed product, such as the "made in China" products. Consequently, the general exclusion order can extend to foreign manufactures besides the defendant. This in fact deprives the

foreign enterprises of the opportunity of response to the lawsuit. In this aspect, the defendant is at a disadvantage since the very beginning.

Flexible ruling and high rate of losing and severe consequences for the defendant

The section 337 investigations are conducted and ruled by the United States International Trade Commission (ITC) whose precursor is United States Tariff Commission and is now a independent, non-partisan and quasi-judicial federal agency. Since a large number of non-American enterprises are involved in section 337 investigations, the ITC has a tendency to protect domestic industry when domestic companies have disputes with foreign companies. Objectively, there are doubts about the ITC's role as a neutral judge. Practice also confirms that although the ITC makes flexible judgment on the basis of American Patent Law, it sometimes surpasses the provisions of the law. For instance, in the case of "Convertible Game TABLE and Component Thereof", some TABLES can be used alone and this independent use is legal, yet the ITC issued an injunction all the same, enlarging the application of infringement set by the Patent Law."^[5]

Concerning the rulings of section 337 investigations, the plaintiff is more likely to get the upper hand. First of all, interlocutory injunction which is not often in civil cases is frequently used in section 337 investigations. Besides, section 337 investigations progress quickly, the hearing is held just 6 to 8 months after the survey which is instantly followed by the ruling. Generally speaking, the whole process of section 337 investigations last as short as 12 months and as long as 15 months. It is almost impossible for the defendant to postpone the survey. The defendant is in a passive situation without preparations while the plaintiff is fully prepared. At last, from the rulings released by the ITC, it is observed that in 60% of the cases, the defendants were found guilty or the two parties reached settlements. This ratio is much higher than court proceedings.

If the defendant is found guilty in section 337 investigations, it will bear severe consequences of losing the lawsuit. The ITC will then issue an exclusion order or restraining order (takes effect 60 days since its release). The exclusion order includes limited exclusion order and general exclusion order. The limited exclusion only has effect on the infringers who are listed in the statement of charges. The general exclusion order bans importation, is applicable to "all the infringing goods and affects some infringers who are not in the indictment though these infringers have no relations with the accused party and has never defended for themselves in the investigations."^[6] The restraining order only has an impact on the infringing goods that have already been in America. The accused party is ordered to stop all the activities that are related to intellectual property violations. The most direct consequence is that the infringing goods that are already in America are not allowed to sell, only to be destroyed or returned. In practice, the ITC's exclusion order or restraining order is not subject to product model, batch number or brand. The release of exclusion order or restraining order indicates that the products are going to face sanctions or complete withdrawal from the American market. The complainant doesn't need to pay legal cost for section 337 investigations and 337 investigators doesn't accept counterclaim. Therefore, even if the complainant loses the suit, it need not bear any adverse consequences.

Strong enforcement measures

The rulings of the ITC will be implemented strictly. The exclusion order is performed by the US customs and border protection agency independent of the ITC. The restraining order is executed by the ITC. The defendant don't obey to the orders will be fined two times the value of the involved products or ten dollars a day.

OVERVIEW OF ANHUI ENTERPRISES ENCOUNTERING SECTION 337 INVESTIGATIONS

In August 2002, Anhui Wonder Trade Co., Ltd. became the first Anhui enterprise that had ever been the respondent of section 337 investigations concerning Ammoniummolybdat. By March 2014 when this paper is written, two Anhui enterprises have encountered section 337 investigations, the number of enterprises and products involved were relatively small. What's more, the final verdicts were comparatively satisfactory, one was successful, and the other was ended by reconciliation.

TABLE 1 : Overview of Anhui enterprise encountering section 337 investigations

Filing Time	File ID	Product Involved	Anhui Enterprise Involved	Verdict
2002.8.20	337-TA-477	Ammoniummolybdat	Anhui Wonder Trade co., Ltd.	Win the Lawsuit
2012.9.21	337-TA-855	Sintered rare earth magnet products and products containing this kind of products	Earth-Panda Advance Magnetic Material Co., Ltd.	Reconciliation

Number of enterprises involved in section 337 investigations

The United States launched the first 337 survey on April 4, 1972. By the time of August in 2014 when this article is composed, the United States has carried out 926 section 337 investigations in the world, among which 154 cases were against Chinese enterprises, accounting for 17% on the global scale. In the 148 cases, Anhui took up 2, accounting for 1.2% on the Chinese scale. Since China's entry into the WTO at the end of 2001, from 2002 until now, the United States has launched

504 section 337 investigations worldwide, among which 132 were against Chinese enterprises, accounting for 27% on the global scale. In the 138 cases, Anhui took up 2, accounting for 1.5% on the Chinese scale. In terms of number, the number of Anhui enterprises involved in the investigations was small and accounted for a small proportion nationwide. Thus Anhui is not a severely afflicted area by the investigations.

From the statistics of each year, the number of investigations on Chinese enterprises varied. Before 2002, the number of investigation on Chinese was small, only accounting for 3.4% of the total. Nevertheless, since China joined the WTO, that is, since 2002 until now, among the 489 investigations the United States has carried out around the world, 132 cases were against Chinese enterprises, accounting for 27% of the total. In the 12 years since China's accession to the WTO to 2014, the number of investigations in 7 years against China was over 30% of the total number on the global scale, and that of the other 5 years was also over 23%. As can be seen from the statistics, since the TRIPS agreement took effect for China in 2002, China has become the country that most frequently encountered section 337 investigations. Details about section 337 investigations from 2002 to 2012 are shown in TABLE 2.

TABLE 2 : Number of section 337 investigations against Chinese enterprises and enterprises in the world and proportion of China in the world

Number Time	Investigations Against Chinese Enterprises	Investigations Against Enterprises in the World	Proportion of China in the World (%)
Before 2002	16	466	3.4
2002	5	17	30
2003	8	18	44
2004	10	26	38
2005	10	29	34
2006	8	33	24
2007	10	35	29
2008	11	41	27
2009	8	31	26
2010	19	56	34
2011	16	69	23
2012	13	40	33
2013	17	42	29
1/2014- 8/2014	8	23	35
Total	154	926	16.6

The statistics about Anhui province shows that Anhui are involved in two 337 investigations, one was in 2002, the other was in 2012, which were two special years for Anhui.

Products involved

The statistics the writer has collected manifests a variety of involved products, such as computer accessories, DVD, Electronic games, storage devices, agricultural machinery, mineral products, mercury-free alkaline batteries, printer ink, communication equipment, etc. In 2001, for example, mechanical and electrical products involved even reached 95%, including "the ground fault circuit breaker, dynamic random storage semiconductor, toner cartridges, ink cartridges, automatic media display, automotive products, chip, bed with adjustable height, handbag, etc."^[7] The cause of action was mainly about patent infringement. In 2010, for example, 18 cases were about Chinese enterprises infringing patents, accounting for 95% of the total 19 cases against China. From 2011 to July 2012, in the 24 investigations launched by the ITC against China, 90% were related to high-tech enterprises and their patents.^[8]

In the two cases where investigations were against Anhui enterprises, the products involved were not mechanical and electrical products which Chinese enterprises often receive surveys for. The two kinds of products involved were Ammoniummolybdat and sintered rare earth magnet products and products containing this kind of products (new material technology). The two companies were both investigated because of being suspected of infringing patents.

Outcome of cases

Most of the 337 cases ended with the defendants losing the suits, some with reconciliation and a few with the defendants winning the suits. As for the two cases that were against Anhui, one ended with the defendant winning the suit, the other with reconciliation, which was relatively favorable compared with the verdicts of all the 337 investigations.

Reasons for small number of investigations against Anhui

From the data represented above, it can be seen that the number of investigations against Anhui is small, which can be explained by comparison with the top five provinces and municipalities Guangdong, Jiangsu, Zhejiang, Shanghai and Beijing^[9] in the investigations. The reasons are as follow.

Relatively low economic aggregate

From 2009 to 2013, for example, the average GNP in the five years was 1473.6 billion Yuan, while that of Beijing, Shanghai, Guangdong, Jiangsu, and Zhejiang was respectively 1579, 1863.8, 5129.1, 4735.7 and 3084.7 billion Yuan. Comparatively speaking, Anhui's GDP was much lower than these five provinces and municipalities.

Small total export value and small export value to the United States

From 2009 to 2013, the average total export value was 18.7 billion US dollars per year, while that of Beijing, Shanghai, Guangdong, Jiangsu, and Zhejiang was respectively 57.2, 188.7, 510.9, 288 and 200.6 billion US dollars. The same was with the export value. In the same period, the average export value of Anhui to the United States was 2.7 billion US dollars per year, while that of Beijing, Shanghai, Guangdong, Jiangsu, and Zhejiang was respectively 23, 44.5, 85.1, 58.9 and 33.6 billion US dollars. The export value of these five provinces and municipalities were 9 to 23 times that of Anhui. Accordingly, section 337 investigations involving Anhui were much less than these five places.

Small proportion of technical products

Mechanical and electrical products and new high-tech products, which compose the major part of high-tech products in foreign trade, take up a small part in Anhui's foreign trade. From 2009 to 2013, the proportion of mechanical products was 41.6%, while that of Beijing, Shanghai, Guangdong, Jiangsu, and Zhejiang was respectively 61.8%, 71.2%, 68.8%, 67.4% and 42.3%. And the proportion of high-tech products was 15.4%, while that of Beijing, Shanghai, Guangdong, Jiangsu, and Zhejiang was respectively 33%, 44.6%, 38.7%, 42.7% and 7%.

THE STRATEGIES OF ANHUI ENTERPRISES AGAINST SECTION 337 INVESTIGATION

The strategies adopted by Anhui's enterprises to respond to Section 337 Investigation are closely related to its overall foreign trade situation. Drawing lessons from other provinces and cities in China, the strategies of Anhui's enterprises are divided into lawsuit period and non-lawsuit period, among which different measures are taken.

Strategies of Anhui's enterprises in lawsuit period

U.S. International Trade Commission initiate the Section 337 investigation towards the enterprises involved in lawsuit based on the products involved in lawsuit. The enterprises involved in lawsuit can figure out the responding strategies according to the defense cost and the market share in America of the products involved in lawsuit.

First, if the involved products of Anhui's enterprises are greatly dependent on American markets, it's advisable to respond actively. If the products are mainly exported to U.S. and account for a high share in its world market, they are highly dependent on American market. As a consequence, the enterprises involved in the lawsuit should take active measures to act for defense. The responding measure should start from an active attitude, which means the enterprises involved in the lawsuit should take active responding strategies. The specific acts include engaging a lawyer and search information. The case can be defended by the lawyer with professional experience and knowledge, who is hired by the enterprise involved in the lawsuit. With the help and instruction of the lawyer, the involved enterprise should search the information associated with the products involved in the lawsuit in a detailed and comprehensive manner. Meanwhile, studying American patent rights, the enterprise could search more proof to disprove American patent rights concerned. Additionally the involved enterprise can make joint efforts with other enterprises to discuss responding measures and dare to defend the suit, with the help of trade association and relevant government departments.

In Anhui's two cases, the involved enterprises both took active responding measures. In 2012, Anhui Da Di Xiong New Material Co., Ltd. was under Section 337 investigation. Its value of export was reduced by 30% for the impact of investigation. This company is one of those enterprises which depend deeply on American market. The active measure taken by it include: set up suit-responding team which is made up of different departments; visit China Chamber of Commerce for Import and Export of Machinery and Electronic Product to get industry recommendation; hire lawyer from American Aston Lawyer Firm to defend the suit. After 12 month's efforts, Anhui Da Di Xiong New Material Co., Ltd. finally reached a settlement agreement with Hitachi Metal. The settlement helped Anhui Da Di Xiong New Material Co., Ltd. to retrieve financial loss and achieved business cooperation with Hitachi Metal, which ended up in win-win situation.

Second, if the products are less dependent on American market, it's suggested to defend the suit passively. If the involved products account for comparatively small market share in U.S., the involved enterprise is less dependent on American market. The enterprise involved in the lawsuit could take passive measures to defend the suit. Passive litigation is characterized by ignorance of Section 337 Investigation initiated by ITC, extension of another overseas market and switch to other production. The active litigation needs great financial cost, so the loss of American market will have no great influence on the future of the enterprise involved if it's not competitive and accounts for only small share of American market. The involved enterprise can take passive litigation and the cost will just be the losses of American market share. There are no cases about Anhui's Enterprises which take passive measures.

Strategies of Anhui's enterprises in non-lawsuit period: focus on prevention

In recent years Anhui's foreign trade export rises tremendously. To make sure the products exported are not under Section 337 investigation, enterprises, trade association and the local government should come up with responding measures all together.

First, from the perspective of the enterprises, they should be familiar with the process of Section 337 Investigation, including file, investigation and the procedure of different stages of proceeding of the case. The enterprises also need to learn

the possible consequence they must bear if they face the Section 337 Investigation. On the basis of knowing the exact procedure of Section 337 Investigation, the responding measures should be worked out according to actual situation of the enterprises, such as accelerate industry upgrade, strengthen independent innovation, increase the awareness of intellectual property rights, and possess independent intellectual property rights. For the intellectual property rights involved in their products and service, the enterprises concerned should obtain the ownership and authorization of corresponding intellectual property rights. It's also necessary for those enterprises to fully understand in advance the intellectual property rights of the countries such as America which the products are exported to. In the last 10 years, Chinese enterprises confronted the Section 337 Investigation were mainly due to the patents in intellectual property rights. Details are shown in the following chart:

TABLE 4 : Patent-related cases to the overall Section 337 investigation cases

Year (China)	2	2	2	2	2	2	2	2	2	2	2	2
Item	0	0	0	0	0	0	0	0	0	1	1	1
Cases related to patent	2	3	4	5	6	7	8	9	0	1	2	3
Total involved cases	4	5	9	10	6	10	11	8	18	14	12	17
percentage	5	8	11	10	8	10	11	8	19	16	13	17
	80	63	82	100	75	100	100	100	95	88	92	100

Second, from the perspective of trade association, it is the bond between government and enterprises. It's a civil organization but not a governmental organization. Trade association is somewhere in between government and enterprise, goods producing industry and operator. "It is a social intermediary organization which offers service, consultation, supervision, justice, self-discipline and coordination."^[10] As the representative of the whole industry with its comprehensive strength, the trade association can conduct business training, hold product conference and exhibition, coordinate, improve efficiency and reduce the operational cost of single enterprise. All the functions are based on the common regulations agreed by all the members of the association. On a daily basis industry associations should provide a wide range of professional services for the member unit, maintain the interests of the member enterprise, provide all kinds of market information for members and government coordinate with trade disputes and provide legal consulting services. Industry association should make the enterprise fully know the procedure and the consequences of Section 337 Investigation through publicity and training. Through the integrated function of the industry association, it is to establish an early warning system for the industry, standardize market behavior and allocate marketing resources effectively. Industry associations can also set up intellectual property proposal mechanism for the enterprise to safeguard its economic rights and interests so as to finally achieve the enhancement of the enterprise to resist of all kinds of market risks.

Third, the government plays a great role on good trade environment in foreign trade activities from the perspective of the government. Domestic government at all levels shall take positive action for consultations with the U.S. government. It's advisable to establish a communication channel which will make the enterprise under Section 337 Investigation communicate directly and quickly with relevant government sectors. Government sectors can also rely on information, coordination and personnel as well as much other strength. In particular, they can draw lessons from foreign experience and perfect intellectual property insurance to provide support for the enterprise, especially the enterprise involved in lawsuit in order to achieve the maximum interests for the enterprise.

In addition, the government and industry associations can learn from the previous cases and accumulate experience in defending the suit. They should set up communication channels between the enterprises involved in lawsuit and ITC. At the same time, government or the trade association should strengthen the education of the intellectual property rights involving foreign elements for the enterprises, speed up the cultivation of the domestic professional talents and provide conditions for enterprises to maintain their own rights and interests involved in the lawsuit so as to implement the national intellectual property strategy.

Although there are not many direct barrier cases of Anhui's enterprises involved in Section 337 Investigation, with the implementation of the strategy of intellectual property rights in Anhui, with the rise of wanjiang city belt, the technical content will be greatly enhanced in Anhui's products for export. As the United States is the largest export region for Anhui, the technological friction will not be avoided between the United States and Anhui, which increases the possibility of Anhui's enterprises involved in Section 337 Investigation. Therefore, it's better to prepare in advance. On the one hand, it's necessary to reasonably lay out intellectual property distribution, and determine the role of the government, industry associations and enterprises in the prevention. On the other hand, confronted with the actual Section 337 Investigation, the enterprises should determine the reasonable way to cope with it according to its own situation. Only in this way, can it maintain the economic benefits for foreign trade enterprises in Anhui.

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