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Separating fiction from fact over the International Trade Commission

By: Alice A. Kipel and Charles F. Schill – February 14, 2013

These days, Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) is the target of much hyperbolic and hysterical attack, based not on facts, but on myth stemming from the diverse agendas of the criticizing parties. One of the most recent attacks emanates from the Cato Institute. It is easily rebutted when one examines the actual facts. We summarize below the assertions, and then state the facts.

Fiction: The U.S. International Trade Commission/Section 337 is redundant.

Fact: A Section 337 complainant can have one-stop shopping within one case, to provide it relief against all infringing imports, with no need for personal jurisdiction over the defendants/respondents; and the relief in the form of an exclusion order will be enforced by U.S. Customs and Border Protection.

The same relief is not available in any other U.S. forum. In other U.S. fora, an entity confronted by unfair acts from imported articles must sue multiple defendants in multiple jurisdictions, only where personal jurisdiction exists, enforcing the various judgments separately, on its own. Moreover, in such other fora, an entity may not be able to enforce monetary damages against foreign parties, leaving the complaining party without a remedy for the unfair act committed.

Finally, a complainant can get speedy resolution at the International Trade Commission (ITC), which often is not possible in federal district court. This is particularly so when stays pending appeal are routinely granted with respect to remedial relief granted by other U.S. fora, whereas such stays are almost never granted with respect to relief issued by the ITC.

Indeed, the importance and uniqueness of the ITC/Section 337 are clear—if Section 337 were redundant, companies would have no need to bring both a district court action and an ITC action. The fact that so many entities bring both highlights that Section 337 fulfills a different role from that of a federal district court (in fiscal year 2012, almost 85 percent of the complaints filed at the ITC also involved parallel district court proceedings).

Fiction: Section 337 is protectionist.

Fact: First, Section 337 predates the Tariff Act of 1930, which admittedly was a

protectionist piece of legislation; Section 337's predecessor first appeared in 1922. Second, and more importantly, Section 337 proceedings are conducted under the Administrative Procedure Act (APA), with full due process, in a transparent manner, with anything but protectionist results. Forty-two percent of the Section 337 complaints filed in fiscal year 2012 were filed by foreign headquartered complainants. And respondents are successful in roughly two-thirds of ITC cases. Of the 30 to 40 percent of cases that go to trial/hearing, 45 percent result in complete wins for respondents; in about half of ITC cases, respondents obtain favorable results through settlement. These results speak for themselves and demonstrate the importance of the ITC to render determinations based exclusively on the facts.

Fiction: Section 337 violates international law.

Fact: All challenges to Section 337 under the General Agreement on Tariffs and Trade (and its successor, the World Trade Organization) have been addressed by the United States. The law was amended in the Uruguay Round Agreements Act of 1994 in response to a 1989 adverse GATT decision. There is no basis for finding any inconsistency with current WTO obligations of the United States, including those under the WTO's Trade Related Aspects of Intellectual Property Rights agreement (TRIPs). Indeed, since the Uruguay Round amendments, there have been no claims pursued before the WTO arguing that Section 337 is inconsistent with international obligations.

Fiction: Section 337 disrupts the patent system.

Fact: Section 337 strengthens the patent system by giving U.S. patent owners a forum where disputes can be litigated quickly against imports from abroad—a feature that is critical in rapidly changing technology areas where competition is worldwide, such as smartphones, smart televisions and other cutting-edge electronic devices. In addition, patent infringement is only one kind of unfair act dealt with by Section 337—the statute provides relief against all types of unfair acts and unfair competition related to imports.

Fiction: Injunctive relief is automatic at the ITC.

Fact: An ITC complainant has to prove many more elements than in a federal district court before it can obtain injunctive relief. It must prove infringement; defend against invalidity claims; prove that its products practice the claims of the patent (a/k/a the domestic industry technical prong); show that it has substantial U.S. investments related to the patent (a/k/a the domestic industry economic prong); demonstrate that the accused products are imported into the United States, sold for importation into the United States or sold in the United States after importation; and show that relief is not contrary to the public interest. This is hardly automatic.

Fiction: There is a schism in the law applied by federal district courts versus the

ITC, and the ITC applies different standards for liability than do the district courts.

Fact: The ITC applies the same patent law as do federal district courts. Decisions from either type of venue are subject to review by the U.S. Court of Appeals for the Federal Circuit, and the Federal Circuit's decisions are binding on the ITC and on the district courts. The ITC will give preclusive effect to district court decisions on the same facts/issues; while the district courts cannot give preclusive effect to most ITC decisions, they almost always find such decisions persuasive. Moreover, in nonpatent cases (such as trademark infringement cases), ITC decisions have been given res judicata effect by federal district courts. The standards for liability at the ITC, while the same on the merits when the same issues are being considered, are indeed higher than in the district courts due to the additional proofs necessary to establish a violation of Section 337.

Fiction: Section 337 is unnecessary and excessive and serves no useful purpose.

Fact: Section 337 is foremost an international trade statute, and thus it can be used only for a limited set of cases in which importation is involved. Its utility is in promoting free and fair trade in a setting familiar with the intricacies of international trade. The ITC, not local federal district courts, provides the unique insight to analyze this powerful remedy in the context of international trade, balanced against domestic legal theories under the Administrative Procedure Act, to make certain it is exercised not in a protectionist, but in a fair and even-handed, manner. This law provides now, as it always has, a forum for cases in which international (not domestic) trade in articles from companies that may not be subject to federal district court jurisdiction, or which are important to be resolved expeditiously, can be resolved in an international trade context.