Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Unfair Trade Practice? Prove It Under Section 337

Law360, New York (October 21, 2015, 11:27 AM ET) --

Beau Jackson

Michael Buckler

The Obama administration recently announced the agreement of 12 countries on terms of the Trans-Pacific Partnership, a trade deal implicating about 40 percent of the world's gross domestic product. Some labor unions and public interest groups fear the agreement will lead to job losses for American workers. Yet, they have the opportunity to litigate the deal's potentially negative impacts — specific instances of harm to U.S. markets caused by imported goods.

Ninety percent of seafood consumed in the United States is imported. Could a U.S. seafood company prohibit the importation of a Thai competitor's illegally harvested fish? The vast majority of apparel sold in the United States is imported. Could a clothing company exclude from the U.S. market garments that a competitor in Vietnam made with illegal child labor? The answer to these questions is yes: Section 337 of the Tariff Act of 1930 — a trade statute administered by the U.S. International Trade Commission — could be an effective weapon against these and other unlawful trade practices.

Although Section 337 is best known as an intellectual property enforcement mechanism, the statute exists to protect U.S. industries and the American public from a range of unfair acts. The language of Section 337(a)(1)(A) — "[u]nfair methods of competition and unfair acts" incident to the importation of products — is profoundly broad, and "unfairness" is not defined in the statute or its legislative history.[1] The ITC has already construed unfairness to include misappropriation of trade secrets, false designation of origin, false labeling, false advertising, violation of the Digital Millennium Copyright Act and antitrust violations.[2] Section 337 rewards successful complainants with a powerful remedy: an exclusion order blocking the importation of goods associated with the unfairness. The ITC may also issue cease and desist orders that prohibit respondents from marketing, distributing or selling products in the United States.

Section 337's reach is international and its adjudication is fast, making the ITC a compelling venue for a company or interest group opposed to an unlawful practice overseas that affects the United States through trade.[3] Upon institution of an investigation, a complainant can immediately serve the respondents — domestic and foreign — with discovery requests seeking information about their business practices. Respondents failing to appear can be held in default. In this way, Section 337 can leverage the appeal of the U.S. marketplace to promote fairer and freer markets worldwide.

Prevailing on Non-IP Claims Under Section 337

To establish a prima facie case under Section 337(a)(1)(A), a complainant must demonstrate: (1) unfair methods of competition or unfair acts; (2) relating to imported merchandise; and (3) injury to a U.S. industry from such imports.

Unfair Methods or Acts

"What is unfair under Section 337(a)(1)(A)?" is a threshold question for any entity seeking to use the statute to challenge imports that do not infringe statutory IP. Notably, the Senate report accompanying the original passage of the statute explained that "[t]he provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice and is, therefore, a more adequate protection to American industry than any antidumping statute the country has ever had."[4]

The predecessor court to the U.S. Court of Appeals for the Federal Circuit recognized that Section 337's prohibitions are:

broad and inclusive and should not be held to be limited to acts coming within the technical definition of unfair methods of competition as applied in some decisions. The importation of articles may involve questions which differ materially from any arising in purely domestic competition, and it is evident from the language used that Congress intended to allow wide discretion in determining what practices are to be regarded as unfair.[5]

The ITC has intervened where alleged unfairness in the importation of articles threatens "the assurance of competitive conditions in the United States economy,"[6] even for the purpose of halting such unfairness in its incipiency.[7] In light of its broad scope as written and interpreted, Section 337(a)(1)(A) is practically unbounded.

Bottom line: If unfair methods or acts overseas threaten the free and fair operation of the U.S. marketplace, Section 337 may apply. For example, it would be unfair for a Malaysian manufacturer exporting to the United States to pay its workers a wage so low that it violates Malaysian law.

Nexus Between Unfairness and Importation

As the ITC has explained:

It is obvious from our traditional role, not to mention our remedial provisions, that Congress intended Section 337 to attack only unfair trade practices which relate to imported products. It then becomes

crucial to discern some nexus between unfair methods or acts and importation before this commission has power to act.

A Chinese company manufacturing widgets for the U.S. market would engage in unfairness by defrauding its suppliers into providing it goods and services for free, and such fraud might allow the manufacturer to import the widgets into the United States at an artificially low price. Yet, if the manufacturer pocketed the ill-gotten gains and imported the widgets into the United States at a fair price, the unfairness, while unfortunate for the foreign suppliers, would be too removed from the United States to justify Section 337's involvement. Likewise, if a U.S. retailer of the Chinese manufacturer's widgets committed fraud only in the post-importation sale of widgets, Americans might suffer, but the ITC would stand idle, deferring to the jurisdiction of U.S. federal and state courts.

Bottom line: A complainant must connect the alleged unfairness to the importation of articles. For example, show that underpaid workers produced the imported goods, allowing the goods to be sold in the United States at an artificially low price.

Injury to a U.S. Industry

A complainant under Section 337(a)(1)(A) must have a domestic industry that is the target of the unfair methods or acts. "The commission does not adhere to any rigid formula in determining the scope of the domestic industry as it is not precisely defined in the statute, but will examine each case in light of the realities of the marketplace."[8] Generally speaking, a company with U.S. employees that expends resources in the United States — whether on manufacturing, customer service, research and development, etc. — should be able to establish a domestic industry under Section 337(a)(1)(A).

A complainant must then show substantial injury from the unfairness — either real or threatened. The ITC's injury determinations tend to focus on five factors: (1) the respondent's volume of imports and penetration into the market; (2) the complainant's lost sales; (3) underselling by the respondent; (4) the complainant's declining production, profitability and sales; and (5) harm to goodwill and reputation.[9] The ITC considers three additional criteria in assessing *threat* of substantial injury: (1) foreign cost advantages and production capacity; (2) the ability of the imported product to undersell the complainant's product; or (3) substantial foreign manufacturing capacity combined with the respondent's intention to penetrate the U.S. market.[10] While showing injury (or threat thereof) can entail complex economic analyses, in practice, the ITC has not imposed a high threshold for satisfying this element of Section 337(a)(1)(A).

Bottom line: Connect the unfairness to real or threatened injury. For example, show that the goods imported at an artificially low price have or will likely erode the market share of a company operating in the U.S. market, regardless of whether that company manufactures here.

Hypothetical Cases Under Section 337

Conflict Minerals

Many U.S. consumers would be surprised to learn that their smartphone or gaming system may contain raw materials mined by militias in war-torn countries. In August 2012, the U.S. Securities and Exchange Commission issued a rule implementing Section 1502 of the Dodd-Frank Act, requiring all publicly traded companies to disclose their use of certain minerals associated with conflict and used in consumer goods.[11] Failure to comply could give rise to a Section 337 action, to the extent companies save

money by not complying and, thus, are able to import and sell products to U.S. consumers at prices below those of their competitors who expend resources complying with the law.

Another "unfair act" that could potentially trigger this type of case is the acquisition and use of conflict minerals in derogation of a foreign sovereign's law. In February 2012, the government of the Democratic Republic of the Congo codified a requirement that all mining and mineral trading companies operating in the country perform supply chain due diligence to ensure their purchases are not supporting warring parties in that country. In theory, Section 337 could reach companies trading in certain minerals mined in Congo without performing the required Congolese compliance, where those activities result in an importation into the United States.

Child Labor

The illegality of child labor is widely recognized. The United Nations Convention on the Rights of the Child recites basic human rights for all children, including the right to protection from economic exploitation.[12] Additionally, the Minimum Age Convention requires countries to ensure that children below a certain minimum age (which varies depending on the activity) are not employed.[13] Section 337 may be well-situated for claims based on the importation of articles produced with child labor in contravention of these treaties.

A violation of the national labor laws of the country-of-origin of imported goods could also trigger a Section 337 case. Indeed, "nations that violate [their own] fair labor laws and accepted standards ... [can] accrue an unfairly gained competitive advantage through unfair reduction of the cost of labor, a major input in the cost of production, thereby distorting trade."[14] This practice has been labeled "social dumping," defined as the "export of products that owe their competitiveness to low labor standards."[15] A Section 337 investigation could improve standards for child workers in poor countries by threatening import-driven segments of the U.S. marketplace that traffic in goods made by such children.

Environmental Degradation

The Lacey Act is a powerful weapon for demonstrating unfairness related to importation. Incredibly broad, the Lacey Act makes it unlawful — and thus unfair when undertaken for business advantage — "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce ... any fish or wildlife[,] ... any plant," or "any prohibited wildlife species" that has been "taken, possessed, transported, or sold in violation of any law or regulation of any state or in violation of any foreign law."[16] "Taken" encompasses "captured, killed, or collected and, with respect to a plant, also means harvested, cut, logged, or removed."[17] Collectively, these terms encompass an enormous number of product lines of the Harmonized Tariff Schedule of the United States.

A Section 337 investigation could be premised on the unfair act of importing an article in violation of the Lacey Act. Such a case would likely involve an allegation that the complainant's competitors have flouted U.S. or foreign environmental law for the purpose of bringing a commodity to market at an artificially low price. For example, companies could be accused of importing seafood caught in prohibited waters or in violation of conservation treaties,[18] or of importing lumber harvested in protected forests.

Food and Drug Safety

Only 2 percent of U.S. seafood imports are inspected by the U.S. Food and Drug Administration before entering the U.S. market.[19] One public interest group found that 33 percent of samples were mislabeled and thus sold to unsuspecting consumers under false, and potentially dangerous, pretenses.[20] Sushi vendors and grocery stores were businesses found most likely to sell mislabeled food. A U.S. seafood company could use Section 337 to challenge the importation of competing, mislabeled fish.

U.S. drug products are increasingly imported from emerging economies, such as India and China, yet the FDA cannot conduct sufficient oversight of foreign plants to ensure compliance with U.S. law.[21] To offer competitive pricing and gain market share at the expense of compliant companies, some overseas plants have abdicated good manufacturing practices and, consequently, caused adulteration of the U.S. drug supply. Drug companies who follow the law could use Section 337 to combat the importation of competing drugs made in substandard facilities, thereby protecting U.S. consumers from unsafe medicines.

Conclusion

Section 337 is a powerful trade remedy administered by a nimble, expert agency. Whether a company or interest group can employ the statute to redress non-IP claims depends on the legal and factual contours of each alleged infraction. If a complainant can establish a prima face case — unfair acts or methods of competition, nexus between unfairness and importation and injury to a domestic industry — the ITC is an excellent forum in which to challenge harmful trade practices and, hopefully, make the world a more equitable place.

—By Beau Jackson, Adduci Mastriani & Schaumberg LLP; Michael Buckler, Village X Inc.

Beau Jackson is an associate in Adduci Mastriani & Schaumberg's Washington, D.C., office.

Michael Buckler is the CEO and general counsel of Village X Inc., a nonprofit that crowd funds donations to community-led projects with quantifiable impacts in developing countries and provides live picture updates of project impacts.

[1] *See In re* Von Clemm, 229 F.2d 441, 443–44 (C.C.P.A. 1955) ("Congress intended to allow [the Commission] wide discretion in determining what practices are to be regarded as unfair.").

[2] *See, e.g.*,Certain Electronic Audio & Related Equip., Inv. No. 337-TA-7, USITC Pub. 768, Comm'n Determination, at 2-4 (April 2, 1976) (involving predatory pricing); Certain Alkaline Batteries, Inv. No. 337-TA-165, USITC Pub. 1616, Views of Vice Chairman Liebeler, Comm'r Eckes & Comm'r Lodwick, at 1 (Nov. 1984) (involving false labeling and false designation of origin); Certain Floppy Disk Drives & Components Thereof, Inv. No. 337-TA-203, USITC Pub. 1756, Comm'n Memorandum Op., at 2 (Sept. 1985) (involving breach of contract); Certain Cast Steel Ry. Wheels, Processes for Mfg. or Relating to Same & Certain Prods. Containing Same, Inv. No. 337-TA-655, Comm'n Op. (Mar. 19, 2010) (involving misappropriation of trade secrets).

[3] *See* Michael Buckler and Beau Jackson, *Section 337 as a Force for "Good"? Exploring the Breadth of*

Unfair Methods of Competition and Unfair Acts Under § 337 of the Tariff Act of 1930, 23 Fed. Cir. B.J. 513 (2014); Jonathan J. Engler, *Section 337 of the Tariff Act of 1930: A Private Right-of-Action to Enforce Ocean Wildlife Conservation Laws*, 40 Envtl. L. Rep. 10513 (2010); Tom M. Schaumberg, *A Revitalized Section 337 to Prohibit Unfairly Traded Imports*, 77 J. Pat. & Trademark Off. Soc'y 259 (1995).

[4] S. Rep. No. 67-595, pt. 1, at 3 (1922).

[5] *In re* Von Clemm, 229 F.2d 441, 443-44 (C.C.P.A. 1955).

[6] *See* Certain Cast-Iron Stoves, Inv. No. 337-TA-69, USITC Pub. 1126, Op. of the Comm'n, at 9-10 (citing *Trade Reform Act of 1974: Report on the Committee on Finance*, S. Rep. No. 93-1298, at 197 (1974)).

[7] *See* Certain Welded Stainless Steel Pipe & Tube, Inv. No. 337-TA-29, USITC Pub. 863, Op. of Comm'rs Minchew, Moore & Alberger, at 38-9 (Feb. 1978).

[8] *See TianRui Grp. Co. Ltd.*,661 F.3d at 1336 (citing Certain Floppy Disk Drives and Components Thereof, Inv. No. 337-TA-203, USITC Pub. No. 1756, Initial Determination, at 44-45 (May 9, 1985)).

[9] Certain Cast Steel Ry. Wheels, Processes for Mfg. or Relating to Same & Certain Prods. Containing Same, Inv. No. 337-TA-655, USITC Pub. 4265, Initial Determination, at 81 (Oct. 16, 2009) (citing Certain Elec. Power Tools, Battery Cartridges & Battery Chargers, Inv. No. 337-TA-284, USITC Pub. 2389, Initial Determination, at 246 (June 1991)).

[10] Certain Methods for Extruding Plastic Tubing, Inv. No. 337-TA-110, USITC Pub. 1287, Comm'n Action & Order, at 20 (Sept. 2, 1982).

[11] *See* Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2218 (2010) (including the minerals Columbite-tantalite, Cassiterite, Wolframite and Gold (aka "the 3T's and gold" or 3TG)).

[12] Convention on the Rights of the Child art. I, Sept. 2, 1990, 1577 U.N.T.S. 44.

[13] Convention (No. 138) Concerning Minimum Age for Admission to Employment art. III, June 30, 1973, 1015 U.N.T.S. 297.

[14] Edens, *An Expanded Perspective: Child Labor Claims Under Section 337*, 337 Reporter Vol. XXIII at 19.

[15] *Id.*

[16] 16 U.S.C. § 3372(a)(2) (2012); § 3371(a).

[17] *Id.* at § 3371.

[18] Engler, *Section 337 of the Tariff Act of 1930: A Private Right-of-Action to Enforce Ocean Wildlife Conservation Laws*, 40 Envtl. L. Rep. 10513.

[19] U.S. Gov't Accountability Office, SEAFOOD FRAUD: FDA PROGRAM CHANGES AND BETTER

COLLABORATION AMONG KEY FEDERAL AGENCIES COULD IMPROVE DETECTION AND PREVENTION 1 (2009).

[20] Kimberly Warner et. al, *Oceana Study Reveals Seafood Fraud Nationwide*, OCEANA 1 (Feb. 2013),http://oceana.org/sites/default/files/reports/National_Seafood_Fraud_Testing_Results_FINAL.pdf.

[21] Pew Health Group, After Heparin: Protecting Consumers From the Risks of Substandard and Counterfeit Drugs 7 (2011),http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Health/Pew_Heparin_Final_HR.pdf.at 48.
