Analysis of Enforcement Mechanism of Section 337 of the US Tariff Act through Perspectives in Law and Economics

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The analyses made in this article aim at providing distinct explanations and making some predictions on the enforcement mechanism of Section 337 of the Tariff Act of 1930 of the United States from three specific perspectives in the domain of law and economics. Firstly, from the perspective of cost-benefit analysis, it is apparent that the utilization of this enforcement mechanism is the more rational choice for patent holders and exclusive licensees to prohibit and prevent patent infringement in import trade compared with patent litigation in federal district courts. Secondly, from the perspective of negative externalities, it could be ascertained that negative externalities would possibly be incurred by the issuance and enforcement of the general exclusion order issued by the US International Trade Commission (ITC). Whether evaluated by Pareto-efficient or by Kaldor-Hicks-efficient standards, economic inefficiency would potentially be incurred by the issuance and enforcement of general exclusion order especially from the global perspective. Some other institutional measures should be designed and implemented to assure that the possible negative externalities and economic inefficiency caused by general exclusion order should be regulated and restrained to the greatest extent. Finally, from the perspective of path dependence, it can be concluded that the legal institution of Section 337 has been locked-in after the history of 90 years’ development. Consequently, even if there would be another dispute against Section 337 adjudicated by the Dispute Settlement Body of the WTO in the future, Section 337 would not be totally abolished or substantially derogated.

Keywords: Section 337, patent infringement, trade remedy, law and economics

In recent years, with the goal to fight against the spread and deterioration of infringement of intellectual property rights (IPRs) in the field of international trade, many countries and separate customs territories have been attaching more importance to administrative protection besides simultaneously reinforcing legislative and judicial protection, especially the United States. As globalization becomes increasingly prevalent in almost every aspect of the economy, the amount of imported tangible products rushing into the United States continues to increase by the year. Although many exporters in other countries respect IPRs, the amount of imported goods that infringe US patents, simultaneously continues to rise. Consequently, patent holders in the US are increasingly leaning towards the Section 337 investigations conducted by the International Trade Commission (ITC) to prohibit the infringement of intellectual property rights specifically in the field of import trade. The ITC shoulders the crucial responsibility of adjudicating cases including those involving alleged infringement of patent rights by products imported into the United States. In particular, over the last ten years, the ITC gradually has become an important forum for patent litigation by means of Section 337 investigations. Although not all of the unfair practices in the import trade are concerned with intellectual property rights, ‘the overwhelming majority of Section 337 cases have been brought for intellectual property infringement, especially patent infringement.’1 Empirical statistics have shown that over 90 per cent of the cases recently brought under Section 337 involve alleged infringement of US patents.2 If the ITC reaches the conclusion after an investigation that a challenged product infringes a patent of the United States’, it may exclude the product in the US through US Customs and Border Patrol [19 USC §1337(d). (g)].

The enforcement mechanism of Section 337 deserves to be thoroughly explored in theory and in practice, especially from the perspective of law and economics. In this study, the analysis focuses on three perspectives: (i) cost-benefit analysis, (ii) negative externalities and (iii) path dependence.

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Cost-Benefit Analysis

Cost-benefit analysis is one of the most frequently-adopted methods in the field of law and economics. The essence is the tenet that one solution that has been finally selected by a rational decision-maker through cost-benefit analysis should be the most economically desirable and the most utility-maximizing among all the possible solutions.

As a rational decision-maker, when a patent is infringed by imported products, the patent owner or the exclusive licensee usually choose to make cost-benefit analysis (although not always through formal economic tools or models) of all the possible avenues to ultimately select one avenue which is the most economically desirable and can bring maximization of utility to prohibit the infringing activities or to obtain damages. From the perspective of economic theories, rational execution with the knowledge of restrictions, choices available, and opportunity costs of all the choices available may be possible. With regard to the enforcement mechanism of Section 337, intellectual property holders can use this tool against infringement, which has many advantages in terms of economic benefits and remedial effects over litigating in federal district courts of the United States. The utilization of the enforcement mechanism of Section 337 can be proved to be rational by means of cost-benefit analysis.

However, considering the above two available avenues, there is indeed such thing as an absolutely better one. In fact, some advantages of one avenue are just the disadvantages of the other and vice versa. As a result, there exists the tradeoff between them and opportunity costs emerge when either of the avenues is chosen; just as there exists a tradeoff between efficiency and equity in fundamental economic theories.

Therefore, the cost-benefit analysis of the enforcement mechanism of Section 337 takes the form of comparing the advantages and disadvantages of the enforcement mechanism vis-à-vis the advantages and disadvantages of patent litigation in federal district courts.

Advantages of the Enforcement Mechanism of Section 337

In practice, complainants in patent-infringement cases before the ITC have several distinguished institutional advantages over civil litigations in federal district courts and these advantages primarily can explain why the ITC has become a significantly favoured venue for patent holders. After all, the number of Section 337 investigations actually doubled between 1996 and 2005 and gradually continues increasing till date. This statistical fact undoubtedly denotes that patentees in the United States have noticed and have been significantly attracted by the strategic and economic benefits of Section 337 investigations. Its main advantages are: First, a faster or much faster resolution of the dispute can be expected. Section 337 (b)(1) requires that the Commission complete its Section 337 investigations ‘at the earliest practicable time’ after publication of the notice of investigation in the Federal Register. Although legislators eliminated the former regulation through Uruguay Round Agreement Act (URAA) of fixed time-limit of 12-18 months, the investigations before the ITC generally last twelve to fifteen months with trials usually occurring six to nine months after institution of the investigation. In contrast, infringement suits in the six fastest district courts require twenty months. With the current fast pace of technology, patent holders usually do not prefer to wait several years for the resolution of a patent dispute with foreign infringers in a federal district court perhaps mainly because the actually valid lives of some patents are even shorter than the time of waiting for the resolution.

Second, this remedy can offer the complainants the significant benefit of much broader jurisdictional reach than a federal district court. It is mainly because the statute confers in rem jurisdiction at the ITC. Jurisdiction in Section 337 investigations is not substantially based on in personam jurisdiction over the manufacturer, but on jurisdictional power directly over the imported goods. This jurisdictional advantage is significantly important and attractive to complainants essentially because foreign manufacturers that produce infringing goods are usually not subject to in personam jurisdiction in federal district courts. This jurisdictional advantage is especially crucial for issuing general exclusion orders because the unique kind of remedial measures is only effective against the infringing goods instead of the importers, owners or consignees and can even be enforced against parties who did not participate in the related investigations as respondents.

Third, in a special sort of Section 337 cases involving process patents, certain valid defences available in patent litigation in federal district court are not available at the ITC. On 25 March 2004, the
investigations may include hearsay evidence as well.

Sixth, with regard to evidence, the ITC allows and adopts all kinds of evidence that seem useful and relevant. For instance, evidence under Section 337 investigations may include hearsay evidence as well.13

By contrast, the federal district courts strictly adhere to the Federal Rules of Evidence and limit discovery under the Federal Rules of Civil Procedure.

Seventh, ALJs in the ITC have some technical experience, or become familiar with technology over a period of time due to the experience in handling so many patent cases. In federal courts, there is little chance that a judge has a technical background. Moreover, judges may not be conversant with the intricacies of patent law, unless they are associated with a district that handles a high volume of patent cases.14 In practice, the ITC ALJs exclusively deal with Section 337 investigations where statistically over 90 per cent investigations address complaints of patent infringement; a reason why ALJs become highly experienced and experts in this field. On the contrary, federal district court judges have a large, diverse docket of civil and criminal cases; consequently they do not concentrate on cases of patent infringement and thus are not as familiar with patent infringement issues as ALJs at the ITC.

Eighth, the final determination of a Section 337 patent infringement case is not res judicata with regard to a future civil litigation at a federal district court on the same patent claims and cause of action.15 Therefore, a patent holder who does not obtain a desirable remedy in a Section 337 patent infringement case before the ITC is not precluded from seeking remedies and pecuniary damages based on its subsequent patent infringement claims before a federal district court. Consequently, there is no such a major opportunity cost for adopting the enforcement mechanism of Section 337.

Disadvantages of the Enforcement Mechanism of Section 337

The aforementioned advantages of the enforcement mechanism of Section 337 are essentially attractive to patent holders and exclusive patent licensees, especially whose patents are infringed by products imported into the United States. However, it is not the perfect solution and indeed has some disadvantages compared to civil litigations at federal district courts.

First, the most apparent one, the ALJs and the ITC are not statutorily empowered to issue pecuniary damages to complainants who prevail; while the district court can award monetary damages to compensate the loss of the patent holders due to infringement.

Second, complainants in Section 337 investigations must show that a US industry that is dedicated to
exploitation of the asserted patent rights either exists or is in the process of being established in order to prove their sufficient legal standing and to ultimately obtain relief under Section 337. There is no such comparable requirement of ‘domestic industry’ for patent litigations in federal courts.

Third, the initial determination of the ALJ is subject to public policy review. It is theoretically another disadvantage of Section 337 investigations in that the relief initially issued may finally be denied either by the ITC or the President due to public policy concerns. Although, having no statutory power to challenge factual determinations made by ALJ or the ITC, the President can still disapprove the ITC determination on policy grounds, the effect of which is to render the final determination ineffective. However, according to the historical statistics of Section 337 investigations, very few such vetoes were made.

Thus, with regard to fighting against patent infringement in import trade, it is obvious that the advantages of utilization of enforcement mechanism of Section 337 are preponderant over the advantages of patent litigation in federal district courts even without utilizing some econometric models and analysis. As a rational decision maker, it is not difficult to generally figure out the costs (including opportunity costs and sunk costs besides real costs for litigations) and benefits of utilization of enforcement mechanism of Section 337 in contrast to patent litigation in federal district courts.

In conclusion, from the perspective of law and economics, the cost-benefit criterion usually denotes that the economically optimal legal rules or institutions are the ones that can yield the maximum positive difference between the expected benefits and the expected costs. Specifically, in this context, cost-benefit analysis is made through detailed comparison between the two available avenues to fight patent infringement in import trade of the United States by patent holders who may unintentionally ‘on the basis of weighing up costs and benefits find justification for doing so in the Kaldo-Hicks criterion’.\textsuperscript{16} The result of the analysis is apparent in that the utilization of the enforcement mechanism of Section 337 is the more rational choice for patent holders and exclusive licensees to prohibit and prevent patent infringement in import trade. The specific cost-benefit analysis can accordingly be deemed as a kind of effective explanation for related facts from the perspective of law and economics.

**Negative Externalities**

The second perspective is through negative externalities. Externality is one of the important concepts, especially with respect to efficiency loss and the well-being of third parties instead of the well-being of the parties of a certain economic activity. In essence, it can be regarded as a sort of market failure and one of the sources of economic inefficiency.

The analysis in this part only focuses on the possible negative externality effect of the issuance and enforcement of the general exclusion order. There have been lots of endeavours in the United States to justify and uphold the existence and utilization of a general exclusion order. Among them, one of the most typical justifications for the reasonable legal basis for general exclusion order may be summarized as below:\textsuperscript{5}

First, the unique \textit{in rem} nature of Section 337 exclusion orders is the key to understand that the ITC can issue general exclusion orders to prohibit the importation of goods by companies that were never parties to a Section 337 investigation without violating the principle of due process.

Second, the power for issuing such kind of \textit{in rem} exclusion orders is expressly conferred upon the Congress, which was elucidated and held by the United States Supreme Court in the case of \textit{Buttfield v Stranahan}.\textsuperscript{17}

Third, there is no such thing as a ‘vested right’ to import goods into the United States. Importation is in fact a privilege granted by Congress.

Fourth, the Congress has complete power over foreign commerce and accordingly can exclude some specific kinds of goods from the United States, or empower the ITC to do so from considerations of public policy without violating the due process clause of the Constitution.

Fifth, in practice, the subject matter jurisdiction of the ITC which was delegated by Congress pursuant to the foreign commerce clause provides the Commission power to issue exclusion orders.

It seems that the legal reasoning justifying the issuance of a general exclusion order by the ITC is sufficiently logical and reasonable. But it may be only perfectly logical and reasonable within the ambit of the United States. Although the current issuance and enforcement of general exclusion orders seem to be fully consistent with WTO law, is the existence of the general exclusion order completely reasonable, in other words, is it economically efficient to issue and
enforce general exclusion orders in Section 337 investigation cases? While the amendments restricted the issuance of general exclusion orders in terms of the two clearly-defined requirements and the Commission held that it exercised caution in issuing such orders in view of its considerable impact on international trade, potentially extending beyond the parties and articles involved in the investigation\textsuperscript{18}, the issuance and enforcement of general exclusion orders can also possibly cause economic inefficiency in the future mainly because some products which do not infringe a specific patent could potentially be excluded from the US domestic market.

In terms of economic terminology, the issuance and enforcement of the general exclusion order can be deemed as a kind of intangible product provided by the US Government represented by the ITC. Also, a certain Section 337 investigation can also be regarded as an economic transaction between the ITC and the parties. When the remedy comes out to be a limited exclusion order, there would be no incidental benefits or damages to others not directly involved in the transaction. By contrast, when the remedy comes out to be a general exclusion order, there would possibly emerge costs to others who are not respondents of the investigation. Thus, negative externality appears. Although it is reasonable and just to exclude all the infringing products in order to prevent circumvention of a limited exclusion order, it still possibly would exclude non-infringing products when general exclusion orders are issued and enforced only because it is difficult to identify the source of infringing products. Indeed, negative externality would definitely appear when non-infringing products are wrongly excluded by general exclusion orders. Accordingly, economic inefficiency would be unavoidably incurred due to this sort of negative externality.

Furthermore, the possible negative externality effect arising from the issuance and enforcement of the general exclusion order can also be analysed from the angle of Pareto optimality. Especially in theory, economists usually consider whether an allocation of scarce resources is efficient in terms of Pareto optimality criterion which is the most broadly accepted criterion concerning economic efficiency. In short, ‘the fundamental rule of Pareto Optimality states that the economic situation is optimal when no change can improve the position of one individual (as judged by himself) without harming or worsening the position of another individual (as judged by that other individual)’\textsuperscript{19}.

As stated above, all the related goods are excluded from entry into the market of the United States after the issuance and enforcement of a general exclusion order. If some non-infringing goods are wrongly verified as infringing goods and consequently excluded, the patent owner or exclusive licensees and the competitors in the same market of the United States would be better off in terms of less severe competition. By contrast, the producers of the non-infringing goods would be worse off because of wrongly being recognized as infringers. Other parties who are worse off are the US government due to less income from tariff, consumers of the related goods in the domestic market of the United States because less severe competition in the market usually results in higher price and evidently the foreign manufacturers who are wrongly recognized as infringers due to the loss of opportunities for marketing in the vast market of the United States. In this situation, it is obvious that some parties are better off and other parties are worse off. Therefore, the issuance and enforcement of general exclusion orders which wrongly verified some non-infringing products as infringing products would lead to a change of well-being of related parties and this change is not a Pareto improvement. Then, would it totally meet the requirement of Kaldor-Hicks-efficient outcome? i.e., ‘if an exchange generates more gains for the winner than the loss to the loser, should the legal system encourage or coerce the transaction in order to achieve a Kaldor-Hicks-efficient outcome.’\textsuperscript{20} It is very clear that the standard to meet the core requirements of Kaldor-Hicks-efficient outcome are lower than those of Pareto-efficient outcome. But as to the aforementioned gains for patent holders or exclusive licensees and the competitors in the same market of the US and the loss to the US government, consumers of the related goods in the domestic market of the United States and the foreign manufacturers; it is really hard to make sure whether the total gains are more than the total loss. There exists a possibility that the total loss is more than total gains and accordingly the outcomes of issuance and enforcement of some general exclusion orders are not even Kaldor-Hicks-efficient outcomes, let alone Pareto-efficient outcomes.

Thus, negative externalities would possibly be incurred by the issuance and enforcement of general
exclusion order. Besides, whether evaluated by means of Pareto-efficient or Kaldor-Hicks-efficient standards, economic inefficiency would potentially be caused especially in the global context than just within the United States. As a result, although it seems to be impossible to repeal the remedy of the general exclusion order in the enforcement mechanism of Section 337 in the near future, some other institutional measures should be designed and implemented to ensure that the possible negative externalities and economic inefficiency caused by general exclusion order is regulated and restrained to the greatest extent.

Path Dependence

The last perspective is keeping in view the path dependence. The source of the legal institution of Section 337 can be traced back to Section 316 of the Tariff Act of 1922, which authorized the Tariff Commission (the forerunner of the current ITC) to investigate complaints of unfair competition and accordingly make recommendations to the President. Thus, the legal institution of Section 337 has a relative long developmental history of 90 years. Will it be completely abolished in the future caused by the further disputes in the WTO? Will it be amended to a great extent in the future? Will it keep all the crucial features and currently available remedies in the future? These questions are undoubtedly vital to many parties, such as US patent holders, foreign manufacturers and so on. It is, therefore, worthwhile to explore these development-related issues.

As to these kinds of history-related economic issues, one of the most suitable analytical tools is the theory of path dependence in law and economics. The concept of path dependence and the corresponding analytical tool are effectively interpretive in explaining institution-related phenomena by means of facilitating understanding on the significant inertia or stickiness in institutional developments. Certainly, there exist different versions of what is path dependence. For example, the term has been used to describe the important role which historical events and historically formed institutions play in determining the future range of possibilities for a nation. These institutions lock-in certain evolutionary paths for the nation. Also path dependence has been referred to as the lock-in effects stemming from the initial conditions on subsequent development and change in the institutional environment. Even from the limited definitions, it is not difficult to discern some key elements, such as institutional development, lock-in, constraint and so on. Furthermore, many economic, political or technological phenomena have been theoretically explored and successfully explained by virtue of the theory of path dependence. As a legal institution with a developmental history of 90 years, Section 337 also deserves to be researched this way.

In 1916, US President Woodrow Wilson requested the Congress to establish an independent agency to enforce customs laws, study the tariff structure and administer unfair trade practice laws. The Congress responded by establishing the United States Tariff Commission which was initially designed to investigate the administrative, fiscal, and economic effects of the customs laws, as well as to study tariff relationships between the United States and foreign countries. The Tariff Commission’s main responsibility was to provide the President with recommendations related to unfair competition in imports. If the President confirmed that the Act had been violated, he could order to levy additional duties against the unfairly traded articles or exclude them from entry into the United States. In the history of institutional development of Section 337, there were several significant amendments by some acts which need emphasis since they were responses to corresponding challenges and thus important in the developmental path of the legal institution of Section 337.

(i) In the 1974 amendments, Section 337 was not invoked for a relatively long period since its initial existence. With the passage of the Trade Act of 1974, Congress effectively revived the statute and transformed Section 337 into a genuinely powerful remedy against related kinds of infringing activities. For instance, the Congress imposed time limitations upon Section 337 investigations to significantly expedite their completion. Also, another new type of remedy called cease and desist order was available under Section 337 after these amendments.

(ii) The 1988 amendments were motivated by the increasing US trade deficits which made it substantially easier for the US patent owners to prove violations of their patents and obtain remedies under Section 337. The amendment of this time included many facets aimed at making Section 337 ‘a more effective remedy’. For example, the Omnibus Trade
and Competitiveness Act of 1988 (ref. 27) substantially altered the burden of proof in intellectual property cases before the ITC and subsequently it was not necessary for complainants to prove that the domestic industry is efficiently and economically operated. This amendment significantly reduced the difficulty of presenting proof by patent owners in establishing a cause of action under Section 337 and conspicuously facilitated the ability of a US patent holder to establish a violation under Section 337. Besides, the 1988 amendments also authorized the ITC to order seizure and forfeiture of an article subject to an exclusion order.

(iii) The 1994 Amendments were essentially a response to a GATT panel report. The Congress enacted the Uruguay Round Agreements Act (URAA), which fundamentally intended to preserve the expeditious and efficient characteristics of Section 337 investigations and simultaneously ensured that the statute complied with GATT to the greatest extent. For instance, previous time limits which had been strictly listed in the legal text were replaced with requirements that investigations conclude at ‘the earliest practical time after the date of publication of notice’ [19 USC § 1337(b)(1) (2000)]. Also, respondents were empowered legally to request stays of parallel district court proceedings until the Commission completed investigations [28 USC § 1659(a) (2000)]. Furthermore, as stated above, limitations upon the Commission’s use of general exclusion orders were clearly codified [19 USC § 1337(d)(2), (g)(2)]. Even though the 1994 amendments nominally eliminated the elements which had been alleged to be against related provisions of GATT, there was no clarity on whether these amendments brought Section 337 entirely in line with GATT.\(^28\)

In addition to the several important amendments to Section 337, three cases in GATT/WTO are also very noteworthy in the history of institutional development of Section 337. In particular, the second case was directly responsible for the latest amendment to Section 337.

The 1981 Canadian Complaint Challenging Section 337

In 1981, Canada initiated the first GATT dispute involving Section 337 (ref. 29). The Canadian government put forward the claim on behalf of a Canadian exporter whose products were subjected to a general exclusion order arguing that Section 337 violated the national treatment principle of GATT. In due course, the GATT panel confirmed that the enforcement of Section 337 constituted a violation of the GATT principle of national treatment. Nevertheless, the panel finally held that the statute was legitimately permissible because it fell within the ambit of GATT Article XX(d), as a domestic measure ‘necessary’ to secure compliance with laws or regulations relating to the protection of patents. After getting the confirmation of legality in GATT, the enforcement of Section 337 was greatly entrenched until the second challenge within the framework of GATT.

The 1988 EEC Complaint against Section 337

The United States initially refused to adopt the report after the GATT Panel issued it.\(^30\) Even if it later decided to accept the panel report because of some self-interested considerations\(^31\), US still held that it would be premature to amend Section 337 before the conclusion of the Uruguay Round negotiations. Because TRIPS Agreement was being negotiated in this round, the US naturally intended to justify and legitimize the legal institution of border protection mechanism for IPRs. Thus, it decided to wait and see how it could exert influence on the formation of the TRIPS Agreement with regard to border enforcement measures, and then accordingly amend Section 337 to comply with the new WTO standard. This is perhaps the main reason why the United States amended Section 337 almost 5 years after the issuance of the panel report of this dispute.

The EC Challenge against Section 337

Almost 5 years after the establishment of WTO, the European Community (EC) challenged Section 337 in the dispute settlement system of WTO. The EC’s request for consultations argued that the amended Section 337 still violated not only the general WTO principle of national treatment with regard to imported goods, but also some obligations contained in certain provisions of the TRIPS Agreement. However, till date the consultations between US and its trading partners have not resulted in a mutually acceptable solution and accordingly no panel was established, let alone another panel report deciding the current legality of Section 337 within the new legal framework of the WTO.

From the description and explanation of the brief history of institutional development of the
enforcement mechanism of Section 337, it is apparent that there does exist a developmental path toward the direction of sustainably confirming and entrenching the existence and enforcement of the border protection for US patents embodied by the enforcement mechanism of Section 337. As a result, this enforcement mechanism is still effectively and continuously functioning and mainly protecting US patents from being infringed by foreign products imported into the territory of the United States regardless of whether this legal institution is really efficient or not.

It should be stressed that ‘the evolution of institutions and their performance implications are affected strongly by their path-dependent nature. Path dependency means that history does matter: the direction and scope of institutional change cannot be divorced from its early course or past history.’ Thus, it can be concluded that the legal institution of Section 337 has been locked-in after the history of 90 years development. The amendments made by Omnibus Trade and Competitiveness Act of 1988 greatly lessened the legal requirements for instituting a Section 337 investigation and obtaining desirable remedies by patent holders, thus making this legal institution greatly attractive to patent holders in the United States. Afterwards, although the amendments made by the Uruguay Round Agreements Act ensured that the amended Section 337 is nominally more in line with the GATT, the effectiveness of the enforcement mechanism of Section 337 has not been substantially derogated.

Thus, even if there were another dispute against Section 337 handled by the dispute settlement mechanism of the WTO in the future, Section 337 would not be totally abolished or substantially derogated because there seemingly exists no sufficient proof to demonstrate that the current Section 337 severely violates the national treatment principle of GATT and some related provisions of TRIPS. Besides, the sunk costs of abolishing the current legal institution would be prohibitively high, which is also an important reason why the path dependence of the legal institution of Section 337 came into existence and gradually consolidates. To put it in another way, there exist lock-in effects in the developmental path of the legal institution of Section 337. Besides the function of explaining a set of empirical observations in the scientific sense, another main function of theory is to predict it as scientifically as possible. Thus, analysed by the application of theory of path dependence, it is seemingly somewhat indisputable that the legal institution of Section 337 will sustainably exist and even possibly be fortified in the future despite new disputes against Section 337 initiated by trading partners within the legal framework of WTO.

**Conclusion**

Firstly, from the perspective of cost-benefit analysis, it is apparent that the utilization of this enforcement mechanism is the more rational choice for patent holders and exclusive licensees to prohibit and prevent patent infringement in import trade compared with patent litigation in federal district courts.

Secondly, from the perspective of negative externalities, it could be ascertained that negative externalities would possibly be incurred by the issuance and enforcement of the general exclusion order issued by the US ITC. No matter whether evaluated by Pareto-efficient or by Kaldor-Hicks-efficient standards, economic inefficiency would potentially be incurred by the issuance and enforcement of the general exclusion order especially from the global perspective. Some other institutional measures should be designed and implemented to ensure that the possible negative externalities and economic inefficiency caused by the general exclusion order should be regulated and restrained to the greatest extent.

Finally, from the perspective of path dependence, it can be concluded that the legal institution of Section 337 has been locked-in after a history of 90 years of development. Consequently, even if there would be another dispute against Section 337 adjudicated by the Dispute Settlement Body of the WTO in the future, Section 337 also would not be totally abolished or substantially derogated.

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**References**

3 19 CFR §§ 210.1-20 (2007), Limiting discovery time systematically and significantly favours complainants, who can have ample time to prepare their case and develop evidence before filing a complaint. In comparison, a respondent surprised by unexpectedly involvement in a complaint will have little time to develop and prepare a defence.


5 Shaffer v Heitner, 433 US 186, 200-01 (1977) (in rem actions can 'proceed regardless of the owner’s location').

6 19 USC § 1337(d); Bristol-Myers Co v Erbamont Inc, 723 F Supp 1038, 1041 n 10 (D Del 1989).


8 Kinik Co v Int’l Trade Comm’n, 362 F.3d 1359, 1361-63 (Fed Cir 2004).

9 19 USC § 1337 (d), providing an exclusion order as remedy for infringement unless certain exceptions are satisfied; 19 USC § 1337(f) providing for cease and desist orders in addition or in lieu of exclusion orders.


11 United States v Morton Salt Co, 338 US 632, 641-42 (1950), it was held that ‘the judicial subpoena power... is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution’.

12 19 CFR 210.37 (b), ‘Relevant, material, and reliable evidence shall be admitted’.


15 Texas Instruments v Cypress Semiconductor Corp, 90 F.3d 1558 (Fed Cir 1996); Tandon Corp v USITC, 831 F.2d 1017 (Fed Cir 1987).


17 Buttrfield v Stranahan, 192 US 470, 492 (1904), ‘[t]he power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution.’

18 USITC Publication 3366, Investigation No 337-TA-424 (6 November 2000), Commission Opinion, p. 3.


24 The United States Tariff Commission was founded by the Congress in 1916 as part of the Revenue Act of 1916, ch 463, 39 Stat 756 (1916). The Commission continuously operated under that name until 1975 when it was changed to its present form as part of the Trade Act of 1974, Pub L No 93-618, § 172 (a), tit III, § 341, 88 Stat 2053 (codified as amended at 19 USC § 1330 (1982 & Supp I 1983)).


26 134 Cong Rec H1985 (daily edn 20 April 1988).


30 The United States was legally able to completely block adoption of the panel report because GATT Panel Reports could only be adopted if all GATT Contracting Parties agreed to the adoption of the report before the establishment of WTO.
