

# Trade & Customs



Continuing on with our theme of Trade and Customs, *Lawyer Monthly* finds out more by speaking to Lyle Vander Schaaf, a partner at Brinks Gilson & Lione.

## Please introduce yourself.

My practice focuses on investigations at the U.S. International Trade Commission (ITC). I used to work for the ITC and so my practice still focuses on investigations conducted by that agency. I also have an active practice before the U.S. Department of Commerce (DOC), U.S. Customs and Border Protection (CBP) and Office of the U.S. Trade Representative (USTR). At my previous law firms, I worked closely with Brinks on international trade, Customs and ITC matters prior to Brinks having an office in Washington, DC. When Brinks opened their Washington, D.C. office, I moved over.

## What are the most common types of cases you deal with related to Trade and Customs?

The matters that consume most of my time are Section 337 investigations before the U.S. International Trade Commission – because they are so time consuming. The matters are brought under 19 U.S.C. 1337, which is Section 337 of the Tariff Act of 1930. I actually have a number of matters before CBP, but matters before CBP are not nearly as time consuming as ITC proceedings and CBP matters can usually be addressed and resolved without resort to formal, time-consuming proceedings like at the ITC. Also, most of my ITC matters eventually become CBP matters because CBP enforces ITC exclusion orders issued in Section 337 investigations.

I also dedicate much of my time to ITC and Department of Commerce (“DOC”) antidumping and countervailing duty investigations and the 5-year sunset reviews at the ITC of antidumping and countervailing duty orders. The ITC determines whether an industry is materially injured by imports that are allegedly sold at less than fair value or are unfairly subsidized by a foreign government and the DOC determines whether the imports are actually being sold at less than fair value or unfairly subsidized by a foreign government and determines any level of antidumping duty or countervailing duty. Each agency also conducts 5-year sunset reviews on the same issues. DOC also conducts annual administrative reviews of the duty level for these anti-dumping and countervailing duty orders, and I spend a good deal of time on these investigations.

Both the ITC and DOC have detailed procedural guarantees and conduct both preliminary and final investigations in which interested parties can participate. And, although it might be rare for the DOC to ever find no dumping or subsidization in its investigations, as the case may be, the ITC often finds no injury in its investigations. Therefore, participation in ITC proceedings is strongly encouraged. In safeguards investigations, the ITC and USTR both have formal due process mechanisms for interested parties to participate.

## How strict is regulation surrounding Trade and Customs in your country?

U.S. trade regulations are very strict compared to other countries. The U.S. trade agencies are very capable, well-funded and very good at policing trade and customs flows into and out of the country. The U.S. legal system is enabled with numerous formal and informal procedures related to the regulation of trade. The U.S. system is much more transparent than most other countries, and importers and exporters are afforded numerous due process mechanisms to address trade grievances if they feel they have been unfairly treated by the trade regulating agencies.

## What are the regulatory issues affecting corporate transactions at the moment?

The antidumping and countervailing duty laws and regulations continue to be very impactful on U.S. corporations and foreign exporters. Often times, an importer is not aware that a particular product is covered by an antidumping duty order or countervailing duty order. This often causes problems and results in payments of significant duties to CBP and, often involves penalties issued by CBP. Corporations also are disadvantaged by the fact that it is often unclear which products are covered by an antidumping or countervailing duty order issued by the DOC. One recent example was the significant alarm

created when the DOC announced, to the surprise of numerous importers, that its antidumping duty order on “tapered roller bearings” applied to downstream “wheel hub units and assemblies” used in vehicles in which a tapered roller bearing was a mere part or component. Companies in the automotive sector were taken by surprise and many were required to make retroactive payments of antidumping duties once the DOC announced its ruling on the scope of that antidumping duty order.

ITC Section 337 exclusion orders also are very impactful on U.S. companies and foreign exporters. Owners of intellectual property in the United States may sue alleged infringers in district court as well as the ITC, assuming they satisfy the ITC’s domestic industry requirements. These requirements may be met by, among other things, R&D in the United States or licensing activity in the United States. When the ITC finds that an import infringes a U.S. patent, trademark or copyright, it may order the exclusion of that infringing product. CBP enforces these exclusion orders. Section 337 investigations create much more alarm among named respondents than antidumping duty and countervailing duty orders or safeguard orders because the remedy in a Section 337 investigation is an outright ban on the imports – enforced at the border by CBP – whereas the remedy in antidumping, countervailing duty and safeguards investigations is merely the assessment of an additional duty (or, in some cases with safeguards, a quota or tariff-rate quota). District Courts in the United States do not have the same power as the ITC to issue exclusion orders enforced by CBP. In fact, even injunctive relief from a District Court is not easy to obtain. Moreover, the ITC proceedings are much faster than District Court law suits. So, ITC Section 337 proceedings are much more of a concern for a company than a similar IP infringement suit in district court.

Recently, there has been much alarm in the United States created by many patent owners who do not produce a product or practice their patent but who sue for patent infringement in the ITC. These non-practicing entities (NPEs) rely on their licensing activity alone in the United States to satisfy the ITC’s relatively low threshold requirements for a domestic industry and then seek to exclude the products of major companies who are not willing to take a license to use the patented technology in their imported products. Recent examples have included NPEs seeking to exclude navigation devices, cell phones and computers from the U.S. market. Of course, an exclusion order granted to an NPE against another company will not benefit the NPE in the market place. Exclusion of the target product does not increase the sales of the NPE in the market place because the NPE doesn’t produce or sell anything. So, it is the threat of the exclusion order and the damage it would do the sales and revenue of the target company that the NPE exploits in order to exact a favourable settlement with the target company. Many companies that have been the subject of these NPE suits at the ITC have complained that the Section 337 mechanism was not meant to be used by such non-practicing entities and there is a growing movement for the law to be clarified to prevent NPEs from using the ITC in this manner.

As the U.S. economy continues to transition to be more and more of a technology-based economy, the proliferation of ITC Section 337 investigations is expected to continue.

## How important are inter-country trade agreements to the economic health of the world?

My personal view is that inter-country trade agreements are important to the economic health of the world. Such agreements reduce tariffs and eliminate trade barriers and trade-distorting subsidies. This should cause the welfare among signatory countries to increase and

improve. However, it stands to reason that multilateral trade agreements involving all member countries of the WTO are much more important to the economic health of the world.

Often at times, the beneficial impact of inter-country trade agreements will be limited to only the signatory countries of the trade agreements. The welfare and development of the signatory countries will improve and expand. A third country might also benefit indirectly due to the economic expansion and development caused by the agreement in one of the signatory countries. For example, the welfare of one country might improve due to that country’s involvement in a trade agreement. This increased welfare or development might, therefore, cause another non-signatory country’s exports to increase to one of the signatory countries. However, when all countries of the WTO are involved in agreements to reduce tariffs or eliminate trade barriers or trade-distorting subsidies, the entire world trading system benefits. **LM**

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