

*Salvaging the ITC:  
How Court of International Trade Review Can Re-Legitimize Section 337 Actions*

Sarah R. Wasserman Rajec

A new phenomenon has brought two new actors into the pantheon of agencies and courts making patent-related decisions: the United States Customs and Border Protection (“Customs”) and the United States Court of International Trade. These developments hint at broader potential benefits of expanding Court of International Trade review of patent decisions made in the context of U.S. trade laws. The rise of the U.S. International Trade Commission (“ITC”) as “*The Other Patent Agency*,” has been well-documented and scrutinized.<sup>1</sup> Patent holders can bring lawsuits against infringing imports that result in exclusion orders—a remedy similar to a permanent injunction, but with the added enforcement power of Customs. Although the enforcement of exclusion orders has generally been considered a mechanical application of the ruling, the Court of International Trade recently reversed a Customs decision refusing entry of certain goods based on its infringement analysis in *Corning Gilbert Inc., v. United States*.

A first impression of the case might suggest that review by the Court of International Trade is undesirable: patent cases at the Court of International Trade are highly unusual; the court therefore lacks expertise; and procedurally, review adds (arguably unnecessary) steps for those seeking relief from infringing imports. However, a second look reveals potential benefits to the use—and expansion—of Court of International Trade review for patent infringement determinations from the ITC. To those familiar with the structure and etymological requirements of Customs classification review, it is apparent that the Court of International Trade already performs tasks similar to the infringement determinations Customs is increasingly tasked with making. In particular, Customs classification requires the same two steps necessary in a patent infringement determination. The first involves the construction of language in the context of a particular trade and the second is application of that language to the description of physical objects. I further suggest that the jurisdiction of the Court of International Trade could be expanded to include appeals from ITC determinations of patent infringement. The Court of International Trade is the logical place for first review of all ITC determinations, because all are meant to implement trade laws. An anticipated benefit is the potential to better align ITC patent jurisprudence with trade, lending legitimacy to an agency that has been criticized for its ability—and inability—to advance trade objectives.

---

<sup>1</sup> See Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FL. L. REV. 529 (2009); see also Colleen Chien, *Protecting Domestic Industries at the ITC*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 169 (2011).