

The New Development of the Application of 337 Investigation Rules in the United States and the Countermeasures of Anhui Province

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Abstract: *With the rapid development of economic globalization and trade liberalization, the world market is increasingly inseparable from China, and China's trade restrictions are hard to avoid. The 337 survey is just such restrictions. Reviewing the cases of 337 investigation in the United States in 2020, we can find out the current situation and future development trend of 337 investigation, and find out the new development of the application of investigation rules. Combined with the current development situation of Anhui Province, this paper studies the risks of 337 investigation encountered by enterprises in Anhui Province, and puts forward the Countermeasures of correctly treating 337 investigation, actively mastering the new development of 337 Investigation Rules and actively responding to lawsuits.*

Keywords: *337 investigation, Patent protection, Rule development*

1. Introduction

Looking back on the whole year of 2020, the global economic development has been greatly impacted. Under this great impact, we can see that the closely connected global village is basically constructed, especially in the face of global health emergencies. However, it is also sad to see that the United States still insists on using the unilateral trade protection system including Section 337 to over protect the domestic market of the United States, so as to ensure its market position. In fact, since China's accession to the WTO, due to China's increasingly active foreign economic and trade activities, 337 surveys of Chinese enterprises show a trend of rapid growth. China has become the main country involved in the 337 investigations. Looking back to 2020, the ITC of the United States has filed 49 new 337 investigations, including 22 cases involving China, accounting for about 45%. Combing the past year's 337 investigations of China related cases in the United States, we can learn the new development of the application of the 337 Investigation Rules, and better respond to the 337 investigation.

2. Investigation of 337 Cases in the United States in 2020

2.1 Cause of Action

In 2020, 337 cases were filed for investigation and 49 cases were filed for prosecution, including patent infringement, trademark infringement, copyright infringement and others. Among them, patent infringement is the main cause of action, and the number of 337 investigation cases with patent infringement as the cause of action is 46. From a historical point of view, from 2006 to 2019, patent infringement cases occupied a dominant position in the 337 investigation, mainly because the infringement of patent rights often showed a certain degree of concealment, and it was difficult to quickly judge whether the infringement occurred.

2.2 Types of Industries Involved

In 2020, 337 new cases filed in the United States involved many industries, including furniture industry, chemical raw materials and products industry, automobile industry, electronic and electrical industry, food industry, photovoltaic industry, metal and plastic products, tobacco, agricultural products, petroleum and other industries, and up to 12 industries or products were affected. In terms of the number of cases, 24 cases were in the electronic and electrical industry, 4 cases in the pharmaceutical

industry and 4 cases in the furniture industry, accounting for 49.00%, 8.16% and 8.16% respectively, of which the electronic and electrical industry accounted for half of the country. Obviously, the electronic and electrical industry can be said to be the hardest hit area investigated by 337 because of its rapid development, large market scale and relatively high profit.

2.3 Closing Time

According to statistics, the shortest period of 337 investigation cases from 2006 to 2019 is 2.6 months, the longest is 30.1 months, and the average period is about 12 months to 20 months. In 2020, the shortest time for new 337 cases to appear in the investigation changed such a routine. In the case of active matrix OLED display device and its components (337-ta-1225), it took only 24 days from October 22, 2020 to November 19, 2020 for some final decisions. At the same time, it is worth noting that in 2020, all the nine new cases have been closed within four months, and most of them are closed by withdrawal or mediation. Only the blower and its components case (337-ta-1217) is closed by issuing consent order.

3. New Development of the Application of 337 Investigation Rules in the United States

3.1 Hundred Day Program

“Hundred day procedure” refers to the rapid discovery of evidence, fact finding and adjudication, which aims to solve the key problems that play a decisive role in the case within one hundred days. This new development of 337 Investigation Rules and procedures is less studied in China, and most of them take the “hundred day procedure: a new weapon for state-owned enterprises to safeguard their rights overseas” published by the lawyer ran Ruixue of Covington bailing law firm in the United States as an important reference. Lawyer ran Ruixue believes that the hundred day procedure has the advantages of creating a precedent for quick success and attaching importance to new practical rules. At the same time, he hopes that Chinese enterprises should fully grasp the investigation procedure and reasonably apply the hundred day procedure as a magic weapon for quick success when dealing with the 337 investigation. The case of taurine case (337-ta-1146) is the most successful application of hundred day procedure in China. Due to the proper coping strategies of our company, the applicant of this case proposed the withdrawal motion of 337 case to ITC on April 1, 2019. On April 10, the ITC administrative judge approved the applicant's withdrawal. On April 25, ITC issued a final ruling announcement, announcing that it would not review the preliminary ruling of the administrative judge and terminate the investigation of the case.

3.2 Markman Hearing

In the litigation process of patent infringement cases in the United States, the determination of the meaning of patent claims is the core link in the litigation process. And the Markman hearing (or claim construction hearing) is exactly the hearing procedure for the judge to interpret the patent claims in patent infringement cases in the United States. The emergence of Markman procedure is based on the final judgment of the mark man v. west view instruments case issued by the U.S. Supreme Court at the end of the 20th century. In 1991, Mr. mark man held that his patent No. re33054 “dry cleaning storage and tracking control device” was infringed by west view instruments. Based on this, he filed a patent infringement lawsuit with the court of eastern Pennsylvania. At the first trial of the case, the jury held that all Mr. Markman's patent rights had been infringed, but the court did not recognize the jury's ruling and held that Mr. Markman had not been infringed. Markman appealed. The court of appeal recognized the decision of the State District Court and held that the interpretation of the patent claims should be a legal issue and should be decided by the court. Due to the intersection of the scope of the facts of the jury verdict and the facts of the court trial, the Federal Supreme Court made it clear in the final ruling of this case that the interpretation right of the patent and its definition in the patent claims belongs to the court.

The main content of Markman hearing includes two aspects: one is to make clear that legal issues in patent litigation should be decided by the court; the other is to make clear the boundary of patent rights by interpreting patent claims. The appearance and use of Markman hearing make the scope of jury and court trial clear, jury trial factual issues, court trial legal issues. In fact, Markman hearing has been applied in Tongling technology's winning case, so Markman hearing will play an important role in 337 investigation in the future.

4. Anhui Province Faces the Risk of 337 Investigation in the Future

4.1 The Possibility of Encountering 337 Investigations in Anhui Province

4.1.1 Mechanical and Electrical Industry is the Pillar Industry of Anhui Province

By collecting and sorting the total export volume and major industries of Anhui Province in 2018 and 2019, the data are as follows:

Table 1 Export Volume and Main Industries of Anhui Province in 2018 and 2019

particular year	Export volume	Major industries	Export volume and proportion of major industries
2018	US \$36.21 billion	electromechanical	US \$20.97 billion / 57.91%
2019	US \$40.4 billion	electromechanical	23.17 billion US dollars / 57.35%

(The data is collected from the statistical bulletin of national economic and social development of Anhui Province.)

From the data, it can be seen that the pillar industry of Anhui province's export is the mechanical and electrical industry, and the export volume created accounts for more than half of the total export volume of Anhui Province. At the same time, it is worth noting that in 2018, judging from the foreign trade market of Anhui Province, there are 219 trading partners in Anhui Province, and the top five trading partners are the United States, Japan, Chile, South Korea and Australia. Obviously, the trade between Anhui Province and the United States is close, and this situation is difficult to change in a short time.

4.1.2 The Establishment of Anhui Free Trade Zone

On August 30, 2020, the State Council issued the overall plan of China (Anhui) pilot Free Trade Zone, which promoted the status and role of Anhui Province in the process of regional economic integration in the Yangtze River Delta. In this scheme, Anhui free trade zone is composed of Hefei area, Wuhu area and Bengbu area. In addition, the establishment of the free trade zone in Anhui Province will inevitably lead to the rapid development of foreign trade in Anhui Province, accompanied by international commercial disputes.

4.2 Anhui Province Encounter 337 Survey Risk Increase

Looking back on history, the number of cases involving 337 investigations in Anhui Province is relatively small. In 2002, Anhui Wanda Trade Co., Ltd. became the first defendant to accept 337 investigation in Anhui Province, and the case (337-ta-477) won the final victory. Now, for Anhui Province, with the establishment of Anhui free trade zone and the deepening of the integration process of regional economic development in the Yangtze River Delta, the risk of Anhui Province encountering 337 investigation will increase in the future.

Table 2 Number of Patent Applications in Anhui Province in Recent Three Years and Its Ranking in China

particular year	Number of patent applications in China	Number of patents applied in Anhui Province	National Ranking
2017	3536333	175872	6
2018	4146772	207428	6
2019	4195104	166871	7

(The data is collected from the intellectual property annual report of 2019)

Obviously, the number of patent applications in Anhui province remains at a high level in the country, and the patent level has also improved. But it is inevitable that with the development of foreign trade in Anhui Province, patent disputes are inevitable, and the risk of 337 investigation will increase.

5. Anhui Province's Countermeasures to 337 Survey

5.1 A Correct View of 337 Investigation Procedure

Export enterprises in Anhui Province should fully understand, correctly understand and be familiar with the overseas patent system and rules, especially the patent system and specifications of the destination and transshipment of export products. Enterprises in Anhui Province should treat the 337 investigation procedure correctly. We should not simply regard the 337 investigation procedure as a challenge from the outside, but as a kind of supervision. In the face of 337 investigation procedure, enterprises in Anhui Province should treat it correctly from the following two aspects: first, to clarify the importance of patent rights. Enterprises should pay attention to whether the patents they use or are going to use have been registered. The second is to reserve patents in time. First of all, we should actively apply for patents and build a patent protection mechanism for products.

5.2 Grasp the Changes of 337 Investigation Procedures in Time

Enterprises in Anhui Province should pay close attention to and grasp the new development of 337 investigation procedure in time. Enterprises should entrust professionals or set up special departments to study 337 articles and understand all aspects of the legal system of 337 investigation. Historically, clause 337 has undergone four major revisions and several supplements to specific clauses. In 1974, the U.S. Customs Commission was renamed ITC and the length of investigation was increased; in 1979, ITC had the right to impose a fine by way of civil action in court for violation of the exclusion order or stop order, and the maximum amount of fine was specified; in 1988, the scope of “domestic industry” was expanded, the absence of the respondent was clarified, and ITC could issue an attachment. In 1994, ITC was required to determine the time limit for making a final decision within 45 days of the initiation of the investigation. In recent years, the emergence of the hundred day procedure and the gradual application of the Markman hearing in the 337 investigation are two new developments worthy of attention.

5.3 Enterprises Should Actively Respond to Lawsuits

Among the nine new cases to be settled in 2020, five are the withdrawal of the plaintiff, three are the settlement of both parties and one is the issuance of consent order. It can be seen that the majority of the cases closed in 2020 will benefit the defendant. So, once Anhui enterprises encounter 337 investigation in the future, they should take a more positive attitude to respond to the lawsuit, rather than the serious consequences of passive evasion leading to absent trial. They should, according to their own actual situation, choose to jointly respond to the lawsuit, seek the positive help of the government, associations and organizations, and actively respond, so as to strive for their maximum interests.

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