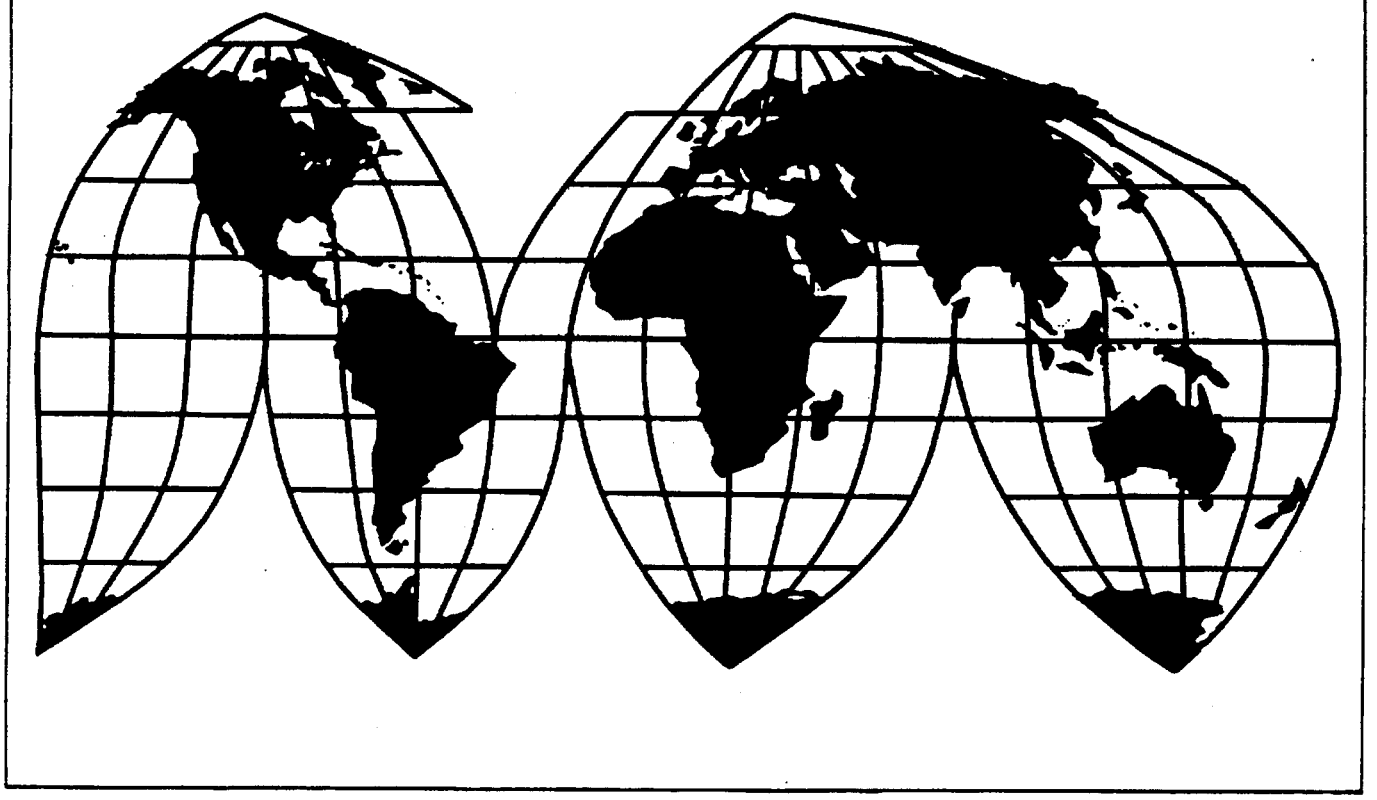
Certain Plastic Molding Machines With Control Systems Having Programmable Operator Interfaces Incorporating General Purpose Computers, and Components Thereof II

Investigation No. 337-TA-462

Publication 3609 **July 2003**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of	)	
CERTAIN PLASTIC MOLDING MACHINES WITH CONTROL SYSTEMS HAVING PROGRAMMABLE OPERATOR INTERFACES INCORPORATING GENERAL PURPOSE COMPUTERS, AND COMPONENTS THEREOF II	)	**Inv. No. 337-TA-462**

NOTICE OF COMMISSION DECISION TO REVERSE AN ALJ DETERMINATION ON STATUTORY AUTHORITY AND TO VACATE ALJ ORDER NO. 29; TERMINATION OF THE INVESTIGATION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to reverse an ALJ determination that subsection 337 (g)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337(g)(2), contains the authority to issue a general exclusion order in an investigation in which all respondents appeared and have been terminated on the basis of settlement agreements. The Commission has also determined to vacate ALJ Order No. 29, denying a motion for summary determination of violation. Finally, the Commission has determined to terminate this investigation without reaching the issue of violation. The Commission will issue its Opinion shortly.

FOR FURTHER INFORMATION CONTACT: Jean Jackson, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3104. Copies of the ALJ's order and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS-ON-LINE) at *http://dockets.usitc.gov/eol/public*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted the above-referenced investigation on August 23, 2001, based on a complaint filed by Milacron, Inc. (Milacron) of Cincinnati, OH, against eleven respondents. 66 *Fed. Reg.* 44374 (2001). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337) in the importation into the United States, sale for importation, and sale within the United States after importation of certain plastic molding machines with control systems having programmable operator interfaces incorporating general purpose computers, and components thereof, by reason of infringement of claims 1-4 and 9-13 of U.S. Patent No. 5,062,052. All named respondents have been terminated from the investigation on the basis of settlement agreements.

On April 18, 2002, Milacron filed a motion to amend the procedural schedule so that it would have an opportunity to file a motion for summary determination of violation of section 337 and to request a general exclusion order. On April 24, 2002, the ALJ issued Order No. 27, granting Milacron's request to amend the procedural schedule in the investigation to allow Milacron the opportunity to file a motion for summary determination of violation and to seek a general exclusion order under Commission Rule 210.16 (c)(2). On May 17, 2002, complainant filed its motion for summary determination and request for a recommendation supporting a general exclusion order.

On June 11, 2002, the ALJ issued Order No. 29 denying Milacron's motion for summary determination of violation. On June 18, 2002, the ALJ issued a one-paragraph ID (Order No. 30) terminating the investigation. On June 24 and June 25, 2002, respectively, Milacron and the IA petitioned for review of the ID and appealed Order No. 29.

The Commission determined to review and reverse the ALJ's ID terminating the investigation. 67 *Fed. Reg.* 47569 (July 19, 2002). The Commission also determined to review the ALJ's determination in Order No. 29 that the Commission has the statutory authority under section 337 (g)(2) to issue a general exclusion order in an investigation in which all respondents have settled with complainant, and requested briefing on the issues under review. *Id.* Complainant and the IA filed briefs in response to the Commission's notice of review.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.24, 210.43(d), 210.44, and 210.45 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.24, 210.43(d), 210.44, and 210.45).

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: January 21, 2003

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of	)	
CERTAIN PLASTIC MOLDING MACHINES WITH CONTROL SYSTEMS HAVING PROGRAMMABLE OPERATOR INTERFACES INCORPORATING GENERAL PURPOSE COMPUTERS, AND COMPONENTS THEREOF II	)	**Inv. No. 337-TA-462**

ORDER

The Commission instituted this investigation on August 23, 2001, based on a complaint filed by Milacron, Inc. (Milacron) of Cincinnati, OH, against eleven respondents. All named respondents have been terminated from the investigation on the basis of settlement agreements.

On April 18, 2002, Milacron filed a motion to amend the procedural schedule so that it would have an opportunity to file a motion for summary determination of violation of section 337 and to request a general exclusion order. On April 24, 2002, the ALJ issued Order No. 27, granting Milacron's request to amend the procedural schedule in the investigation to allow Milacron the opportunity to file a motion for summary determination of violation and to seek a general exclusion order under Commission Rule 210.16 (c)(2). On May 17, 2002, complainant filed its motion for summary determination and request for a recommendation supporting a general exclusion order.

On June 11, 2002, the ALJ issued Order No. 29 denying Milacron's motion for summary determination of violation. On June 18, 2002, the ALJ issued a one-paragraph ID (Order No. 30) terminating the investigation. On June 24 and June 25, 2002, respectively, Milacron and the IA petitioned for review of the ID and appealed Order No. 29.

The Commission determined to review and reverse the ALJ's ID terminating the investigation. 67 *Fed. Reg.* 47569 (July 19, 2002). The Commission also determined to review the ALJ's determination in Order No. 29 that the Commission has the statutory authority to issue a general exclusion order in an investigation in which all respondents have settled with complainant, and requested briefing on the issues under review. *Id.* Complainant and the IA filed briefs in response to the Commission's notice of review.

The Commission has determined to reverse the ALJ's determination that the Commission has the authority to issue a general exclusion order in this investigation under section 337 (g)(2) and to vacate Order No. 29. The Commission has further determined to terminate this

investigation, in which all respondents previously have been terminated based on settle agreements, without reaching the issue of violation.

Accordingly, the Commission hereby **ORDERS THAT**:

1. The ALJ's determination that the Commission has the authority to issue a general exclusion order in this investigation under section 337 (g)(2) is reversed.

2. The ALJ Order No. 29 is vacated.

3. The investigation is terminated without reaching a determination on violation.

4. The Secretary shall serve this Order and the forthcoming Commission Opinion in support thereof on all parties of record.

By Order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: January 21, 2003

CERTAIN PLASTIC MOLDING MACHINES WITH CONTROL SYSTEMS HAVING PROGRAMMABLE OPERATOR INTERFACES INCORPORATING GENERAL PURPOSE COMPUTERS, AND COMPONENTS THEREOF II

337-TA-462

CERTIFICATE OF SERVICE

I Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DECISION TO REVERSE AN ALJ DETERMINATION ON STATUTORY AUTHORITY AND TO VACATE ALJ ORDER NO. 29; TERMINATION OF THE INVESTIGATION,** was served upon the following parties via first class mail and air mail where necessary on January 21, 2003

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PUBLIC

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of	)	
CERTAIN PLASTIC MOLDING MACHINES WITH CONTROL SYSTEMS HAVING PROGRAMMABLE OPERATOR INTERFACES INCORPORATING GENERAL PURPOSE COMPUTERS, AND COMPONENTS THEREOF II	)	Inv. No. 337-TA-462

COMMISSION OPINION

INTRODUCTION

After all the respondents were terminated from this investigation on the basis of settlement agreements, complainant moved for a finding of violation under subsection 337(g)(2)(B), 19 U.S.C. § 1337(g)(2)(B), and a recommendation from the presiding administrative law judge (ALJ) for a general exclusion order. The ALJ determined in Order No. 29 that the Commission has authority pursuant to subsection 337(g)(2) to find a violation based on substantial, reliable, and probative evidence and to issue a general exclusion order in this investigation, but he denied the motion for summary determination of violation for policy reasons, and issued an ID (Order No. 30) terminating the investigation. We determined to review and reverse the ID terminating the investigation and to review the ALJ's determination that the Commission has the statutory authority under subsection 337(g)(2) to issue a general exclusion order in this investigation. On review we determine to reverse the ALJ's determination that the Commission has the authority under subsection 337(g)(2) to issue a general exclusion order in this investigation, and we vacate ALJ Order No. 29. We also determine to adhere to our longstanding policy of not reaching the issue of violation in terminating investigations based on settlement agreements.

PUBLIC

PROCEDURAL BACKGROUND

The Commission instituted the above-referenced investigation on August 23, 2001, based on a complaint filed by Milacron, Inc. (Milacron) of Cincinnati, OH, against eleven respondents: Dr. BOY GmbH of Neustadt/Fernthal,[1] Germany; Boy Machines Inc., of Exton, PA (collectively, "BOY"); Cannon S.p.A., of Trezzano s/Naviglio (Milano), Italy; Automata S.p.A. of Pertusella (Va), Italy; Sandretto Industrie, S.p.A., of Collegno (To), Italy; Sandretto USA, Inc. of Freedom, PA (collectively, "Sandretto"); Sidel SA of Le Havre Cedex, France; Sidel Inc., of Norcross, Georgia (collectively, "Sidel"); and Zoppas Industries S.p.A., of San Vendemiano (TV), Italy; SIPA S.p.A., Vittorio Veneto (TV), Italy; and SIPA North America, Inc., of Atlanta, Georgia (collectively, "SIPA"). 66 *Fed. Reg.* 44374 (2001). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 in the importation into the United States, sale for importation, and sale within the United States after importation of certain plastic molding machines with control systems having programmable operator interfaces incorporating general purpose computers, and components thereof, by reason of infringement of claims 1-4 and 9-13 of U.S. Patent No. 5,062,052 (the '052 patent).[2]

On October 17, 2001, the ALJ issued Order No. 8 granting the joint motion of Milacron and Sandretto to terminate the investigation as to Sandretto on the basis of a confidential settlement and non-exclusive licensing agreement. On February 27, 2002, in Order No. 20, the ALJ granted the joint motion of Milacron and BOY to terminate the investigation as to BOY based on a settlement and non-exclusive

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[1] Now Dr. BOY GmbH & Co. KG.

[2] Milacron previously filed two other complaints concerning the '052 patent with the Commission. One of these complaints, ITC Docket No. 2125, was withdrawn on June 28, 2000, before an investigation was instituted. The other complaint resulted in Inv. No. 337-TA-438, *Certain Plastic Molding Machines with Control Systems Having Programmable Operator Interfaces Incorporating General Purpose Computers, and Components Thereof (I)*, which was terminated on the basis of a settlement agreement between Milacron and the only two respondents named in the investigation. 66 *Fed. Reg.* 4861 (Jan. 18, 2001). Milacron did not make a motion for summary determination of violation as to the settled respondents in that investigation.

license agreement. On March 25, 2002, in Order No. 25, the ALJ granted the joint motion of Milacron and SIPA to terminate the investigation as to SIPA based on a settlement and non-exclusive license agreement. Those IDs were not reviewed by the Commission.

On April 9, 2002, Milacron and Sidel (the last group of respondents remaining in the investigation), filed a joint motion to terminate the investigation as to Sidel based on a settlement and non-exclusive license agreement. On April 18, 2002, while the joint motion to terminate was pending before the ALJ, Milacron filed a motion to amend the procedural schedule so that it would have an opportunity to file a motion for summary determination of violation of section 337 and to request a general exclusion order under Commission Rule 210.16(c)(2). On April 23, 2002, the ALJ issued an ID (Order No. 26) granting the joint motion to terminate the investigation as to Sidel, and on April 24, 2002, he issued Order No. 27 granting Milacron's request to amend the procedural schedule. The Commission determined not to review the ID granting the joint motion to terminate the investigation as to Sidel on May 23, 2002. In the notice of its decision not to review the ID terminating Sidel, the Commission stated that "[u]nder ALJ Order No. 27, the investigation will continue so that complainant may have the opportunity to move for summary determination of violation and to request a general exclusion order pursuant to Commission rule 210.16(c)(2)." 67 *Fed. Reg.* 37438. (May 29, 2002). Meanwhile, on May 17, 2002, Milacron filed a motion for summary determination and request for a recommendation for issuance of a general exclusion order. The IA filed a response in support of Milacron's motion and request.

On June 11, 2002, the ALJ issued Order No. 29 denying Milacron's motion for summary determination and request for a recommendation for a general exclusion order. The ALJ determined that the Commission had the authority to find a violation and to issue a general exclusion order pursuant to subsection 337(g)(2) in an investigation in which all respondents had settled, although he noted that "the

few investigations in which a general exclusion order has issued without contest involved defaulting named respondents." ID at 11-12.[3] Nonetheless, the ALJ denied Milacron's motion for a summary determination of violation for policy reasons. On June 18, 2002, the ALJ issued an ID (Order No. 30) terminating the investigation. Milacron and the IA petitioned for review of that ID and appealed Order No. 29.

The Commission determined to review and reverse the ALJ's ID terminating the investigation and determined to review the ALJ's determination in Order No. 29 that the Commission has the statutory authority to issue a general exclusion order under section 337(g) in an investigation in which all respondents have settled with complainant. 67 *Fed. Reg.* 47569 (July 19, 2002). The Commission further determined to hold in abeyance the petitions for review of the denial of summary determination filed by Milacron and the IA pending its decision on the issue that it determined to review. *Id.* In its notice of review, the Commission requested briefing from the parties on the issue of whether the Commission has the authority to issue a general exclusion order under either subsection 337(g)(2) or subsection 337(d), 19 U.S.C. § 1337(d), in an investigation in which all respondents have been terminated on the basis of settlement agreements. 67 *Fed. Reg.* 47569 (July 15, 2002). Complainant and the IA filed briefs in response to the Commission's notice.

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[3] The ALJ identified the following investigations in which a general exclusion order issued without contest: *Certain Compact Multipurpose Tools*, Inv. No. 337-TA-416, USITC Pub. No. 3239 (September 1999); *Certain Devices for Connecting Computers Via Telephone Lines,* Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994); *Certain Window Shades and Components Thereof,* Inv. No.337-TSA-83, USITC Pub. No. 1152 (May 1981); *Certain Electric Slow Cookers,* Inv. No. 337-TA-42, USITC Pub. No. 994 (August 1979); *Certain Novelty Glasses,* Inv. No. 337-TA-55, USITC Pub. No. 991 (July 1979).

DISCUSSION

I. Whether Subsection 337(g)(2) Authorizes Issuance of a General Exclusion Order in an Investigation Where All Respondents Have Settled

The ALJ determined, based chiefly on the plain language of the statute, that the Commission had the authority under subsection 337(g)(2) to issue a general exclusion order in an investigation in which all respondents have settled.[4] Subsection 337(g)(2) reads as follows:

> In addition to the authority of the Commission to issue a general exclusion from entry of articles when a respondent appears to contest an investigation concerning a violation of the provisions of this section, a general exclusion from entry of articles, regardless of the source or importer of the articles, may be issued if –
>
> > (A) no person appears to contest an investigation concerning a violation of the provisions of this section,
> >
> > (B) such a violation is established by substantial, reliable, and probative evidence, and
> >
> > (C) the requirements of subsection (d)(2) of this section are met.[5]

19 U.S.C. § 1337(g)(2). By its express terms, a general exclusion order under this subsection requires that "no person appears to contest an investigation concerning a violation."

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[4] The ALJ also based his determination on Commission rule 210.16(c)(2). ALJ Order No. 29 does not indicate whether the ALJ consulted the legislative history of section 337(g).

[5] The requirements for issuing a general exclusion order are set forth in 19 U.S.C. § 1337(d)(2), which provides:

> The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that –
>
> > (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or
> >
> > (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

Both Milacron and the IA argue that the language "no person appears to contest an investigation concerning a violation" applies where no respondent remains in the investigation up to and until a finding is made on the merits of the complaint, and therefore covers the situation here, where all respondents have settled with complainant.

In contending that a person "appears to contest an investigation" only if the person contests the allegations of violation through to a determination on the merits, the IA construes subsection 337(g)(2) in opposition to subsection 337(g)(1),[6] and argues that Congress would have used the word "default" in subsection 337(g)(2), as it did in subsection 337(g)(1), if subsection 337(g)(2) was indeed limited to default cases. We disagree with the IA's analysis. Subsection 337(g)(1) concerns limited exclusion orders and requires that a recipient of a limited exclusion order be a "person who fails to show good cause why the person should not be found in default," 19 U.S.C. § 1337(g)(1)(D), *i.e.*, the recipient of a limited exclusion order under subsection 337(g)(1) must be found in formal default. In contrast, subsection 337(g)(2) concerns general exclusion orders which are directed to goods from all sources, including future and unknown current importers. Accordingly, requiring a formal finding of default is not possible in the context of a general exclusion order. Unknown importers cannot be issued a show

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[6] Subsection 337(g)(1) reads:

If–

(A) a complaint is filed against a person under this section;

(B) the complaint and a notice of investigation are served on the person;

(C) the person fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice;

(D) the person fails to show good cause why the person should not be found in default; and

(E) the complainant seeks relief limited solely to that person;

the Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both, limited to that person unless, after considering the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such exclusion or order should not be issued.

cause order and cannot be made subject to subsection 337(g)(1)(D). Thus, use of the term "default" in subsection 337(g)(1), but not in subsection 337(g)(2), is no basis for construing the term "no person appears to contest the allegations" to include respondents that appeared in the investigation, participated, and then later settled with complainant.

Milacron and the IA acknowledge that the respondents in this investigation vigorously defended themselves until they opted to settle rather than proceed to a determination on the merits.[7] Many of the named respondents conducted extensive discovery, including taking multiple depositions, propounding hundreds of requests for admission, interrogatories and document requests, and filing motions to compel. In addition, these respondents offered claim constructions for the patent at issue and retained experts for the purpose of testifying at trial. Aside from one group of respondents who settled instead of responding to the complaint,[8] the respondents here actively participated in discovery and motion practice up to the time of their respective settlements. Accordingly, we do not find that the respondents here "failed to appear" in the investigation.

Furthermore, Milacron's and the IA's approach to statutory analysis is at odds with the legislative history of section 337. The Omnibus Trade and Competitiveness Act (OTCA) added subsections 337(g)(1) and (g)(2) to section 337 in 1988. The House Report accompanying the OTCA stated regarding new subsection 337(g):

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[7] IA's "Petition for Review of Order No. 29" at 12; "Petition of Complainant Milacron Inc. for Review of Order No. 29" at 17.

[8] The first respondents to settle with Milacron, the Sandretto respondents, did not file a response to the complaint and notice of investigation. Rather Sandretto filed a joint motion with Milacron on October 1, 2001, to terminate the investigation based on a settlement agreement.

Default Judgments

Present Law

No Provision.

Explanation of provision

Section 172(a)(5)(c) adds a new subsection to the Act which requires the Commission, in cases involving defaulting respondents, to presume the facts alleged in the complaint to be true and, upon request, to issue relief against the defaulting respondents, unless the enumerated public interest factors (the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers) preclude relief. However, a general exclusion order prohibiting the entry of unfairly traded articles regardless of their source may not be issued unless a violation of the Act has been established by substantial, reliable, and probative evidence.

Reasons for change

This amendment is motivated by the fact that discovery is usually difficult or impossible to obtain from respondents who have chosen not to participate in a section 337 investigation. For this reason, the bill authorizes the Commission to presume the facts alleged in the complaint to be true insofar as they involve a defaulting respondent, and to then issue relief limited to that respondent. This amendment will therefore not affect participating respondents. Relief in the form of a general exclusion order must be supported by a Commission finding of violations of the Act based on substantial, reliable, and probative evidence. Complainants would declare at the time the last remaining respondent is found to be in default whether they are pursuing a general exclusion order.

H. Rept. 100-40, p. 160-161 (emphasis added). The legislative history specifically states that the provision was intended to apply in cases involving default, and was motivated by the fact that discovery is usually difficult or impossible to obtain from respondents who have chosen not to participate in a section 337 investigation. Thus Congress enunciated a clear basis, *i.e.*, the difficulty in obtaining discovery, for distinguishing between respondents who ignore the Commission's investigation and respondents, such as those in this investigation, who participate until they reached a settlement agreement with complainant. Moreover, the statement in the legislative history that "[c]omplainants would declare

at the time the last remaining respondent is found to be in default whether they are pursuing a general exclusion order," as well as other references to defaulters, strongly supports an interpretation that subsection 337(g)(2) — as well as subsection 337(g)(1) — is restricted to investigations involving respondents that never appeared in the Commission investigation.

In arguing that a general exclusion order should be available where no participating respondents *remain* in the investigation, Milacron focuses on the statement in the above-quoted House report that "[t]his amendment will therefore not affect participating respondents," and argues that this language indicates that Congress intended the subsection to apply to non-participating or inactive respondents, including those that have settled. In so arguing, Milacron fails to address the explicit references to default in the House Report. Given the totality of the legislative history, we believe it is more reasonable to interpret the term "participating respondents" to include the respondents here because they participated in the investigation up until settlement.

Milacron and the IA also rely on Commission rule 210.16(c)(2) to support their interpretation of the Commission's authority under subsection 337(g)(2). They argue that the rule applies to both respondents that default and respondents that have settled or entered into consent orders because of its reference to the "last remaining respondent." We disagree with Milacron's and the IA's interpretation of rule 210.16(c)(2), particularly when it is read in context with rule 210.16(c)(1). Commission rule 210.16 (c) provides:[9]

> (c) *Relief against a respondent in default.* (1) After a respondent has been found in default by the Commission, the complainant may file with the Commission a declaration that it is seeking immediate entry of relief against the respondent in default. The facts alleged in the complaint will be presumed to be true with respect to the defaulting

[9] Although the Commission's notice requested briefing on Commission rules 210.16(c)(1) and 210.12(c)(2), and their commentaries, neither Milacron nor the IA addressed Commission rule 210.16(c)(1) or the commentaries in their submissions.

> respondent. The Commission may issue an exclusion order, a cease and desist order, or both, affecting the defaulting respondent only after considering the effect of such order(s) upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States and U.S. consumers, and concluding that the order(s) should still be issued in light of the aforementioned public interest factors.
>
> (2) In any motion requesting the entry of default or the termination of the investigation with respect to the last remaining respondent in the investigation, the complainant shall declare whether it is seeking a general exclusion order. The Commission may issue a general exclusion order pursuant to section 337(g)(2) of the Tariff Act of 1930, regardless of the source or importer of the articles concerned, provided that a violation of section 337 is established by substantial, reliable, and probative evidence, and only after considering the aforementioned public interest factors and the requirements of Sec. 210.50 (c) [pertaining to the requirements for seeking a general exclusion order].

19 C.F.R. § 210.16(c).

The predecessor of rule 210.16(c) was interim rule 210.25(c), which was put in place soon after the OTCA was passed. It stated in relevant part as follows:

> (c) *Relief against a respondent in default.* The complainant shall declare at the time the last remaining respondent is found to be in default whether the complainant is seeking a general or limited exclusion order, or a cease and desist order, or both. . . . In cases in which the record developed by the administrative law judge contains substantial, reliable, and probative evidence of a violation of section 337 of the Tariff Act, the Commission may issue a general exclusion order (in addition to or in lieu of cease and desist orders) regardless of the source or importer of the articles concerned, unless the public interest considerations enumerated above preclude such relief. In considering whether a prima facie case of violation of section 337 has been presented, the administrative law judge and the Commission may draw appropriate adverse inferences as provided in § 210.36 against a respondent or respondents in default with respect to those issues for which complainant has made a good faith but unsuccessful effort to obtain evidence.

Commission interim rule 210.25, 19 C.F.R. § 210.25(c)(emphasis added). The underlined language tracks the language from H. Rept. 100-40, p. 161, quoted above. When the Commission promulgated this interim rule, it expressly stated that the rule pertained to the Commission's default practice. 53 *Fed. Reg.* 33051 (August 26, 1988).

When Commission rule 210.16(c) was proposed in essentially its present form, the Commission's commentary on the provision stated:

> Paragraph (c)(1) of proposed final rule 210.16 permits a complainant to file a declaration seeking immediate entry of relief against the respondent in default. The rule does not specify, however, a point in time at which the Commission is required to issue a remedial order against a defaulting respondent *i.e.*, whether the Commission will issue such relief immediately after the respondent is found to be in default or only after the Commission has adjudicated the violation issues. The Commission believes it necessary and appropriate to retain the flexibility to issue limited remedial orders immediately or at the end of the investigation.
>
> There may be cases in which time is of the essence and the complaint should not be forced to wait until the end of the investigation to obtain relief against defaulting respondents. There also will be cases in which the rapid issuance of limited relief is not critical and it would be more appropriate to wait until the end of the investigation. In most cases, the Commission is likely to defer decisions on issuing default relief pending the adjudication of any defenses by participating respondents that may have a bearing on the public interest factors. [footnote omitted] . . . .
>
> Paragraph (c)(2) of the proposed final rule 210.16 governs the issuance of general exclusion orders in default cases.

57 *Fed. Reg.* 52837 (November 2, 1992).[10]

In view of the Commission's commentary when it proposed the final rule, it is apparent that rule 210.16(c)(2) was a counterpart to rule 210.16(c)(1) which concerned the issuance of a limited exclusion order to a defaulting named respondent. Thus, we believe that rule 210.16(c)(2) is reasonably interpreted in light of the commentary concerning rule 210.16(c) not to apply to situations where there are no defaulters and the last respondent is terminated on the basis of settlement agreement, but rather to situations where complainant waits until the end of the investigation (*i.e.*, "termination of the

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[10] The omitted footnote states that there are sound reasons to defer relief until the end of the investigation. For instance, in the absence of such a rule, the Commission would risk later having to vacate its remedial order in a contested patent case if the patent were found invalid or unenforceable. Also the seriatim issuance of limited exclusion orders was deemed likely to be an administrative burden on the President, who must review each order, and the U.S. Customs Service, which must enforce each order. Moreover, if a general exclusion order were ultimately issued in the investigation, it would render superfluous any limited exclusion orders issued to defaulting respondents.

investigation with respect to the last remaining respondent") before declaring whether it is seeking a general exclusion order in an investigation where some respondents have been held in default.

In further support of this interpretation is the Commission's statement that the proposed final rule 210.16(c) contained no specified time for issuing relief, and its solicitation of comments from interested persons on "whether the final rules should specify the point at which the *default* remedy should be issued." 57 *Fed. Reg.* 52837 (November 2, 1992) (emphasis added). In its commentary on the final rules, the Commission discussed the ITC Trial Lawyers Association's (ITCTLA) position that the final rule should not specify a time at which a default remedy may be issued and that a decision on the point of issuance should be made on the basis of the facts. 59 *Fed. Reg.* 39026 (Aug. 1, 1994). In response to the ITCTLA's comments, the Commission noted that it had not altered paragraph (c)(1) of proposed rule 210.16(c)(1) before adopting it as the final rule. *Id.* In fact, it has become the general practice for complainants to delay requesting relief against defaulters until the end of the investigation. *See, e.g,. Certain Lens-Fitted Film Packages*, Inv. No. 337-TA-406 (several respondents were found in default early in the investigation, but relief against them in the form of a general exclusion order was not sought until the end of the investigation). In any case, the Commission's rules cannot confer statutory authority where none exists. *Killip v. Office of Pers. Mgmt.*, 991 F.2d 1564, 1569 (Fed. Cir. 1993) ("Though an agency may promulgate rules or regulations pursuant to authority granted by Congress, no such rule or regulation can confer on the agency any greater authority than that conferred under the governing statute.")

Although Milacron and the IA have interpreted isolated words and phrases taken from subsection 337(g) and its legislative history, and Commission rule 210.16(c)(2) to support their view that subsection 337(g)(2) can be applied in cases where all respondents have settled, it is clear that neither Congress nor the Commission considered subsection 337(g)(2) to apply to cases involving only settled respondents.

We note that there are no references of any kind to settlement or settled respondents in either subsection 337(g) and its legislative history, or in Commission rule 210.16 and its commentaries. Accordingly, we do not interpret subsection 337(g)(2) to apply to cases involving only settled respondents merely because some language, when viewed out of context, can be cited to support such an interpretation. Milacron's and the IA's policy arguments in support of their contention that subsection 337(g)(2) has a broader reach should be addressed to Congress which can amend the statute, if it sees fit, after it fully considers the issue of whether issuance of a general exclusion order is appropriate in investigations where all respondents have settled.

We have considered arguments as to the supposedly dire consequences of not issuing a general exclusion order in circumstances such as those presented in this investigation. The IA presents a hypothetical situation where a complainant names ten respondents, nine of whom never made an appearance and a tenth that only filed an answer to the complaint before defaulting. The IA presupposes that a Commission determination that a general exclusion order should not be issued in the present investigation, in which all respondents have settled, inexorably leads to a determination that a general exclusion order would not issue under the IA's hypothetical. We disagree, however, that the ability to obtain a general exclusion order would necessarily be defeated under the IA's proposed set of facts. The issue of whether subsection 337(g)(2) would apply to investigations that include a mix of respondents that do not appear and respondents that settle or enter into consent orders is not before the Commission. All the respondents in this investigation appeared and were terminated on the basis of settlement agreements. The Commission does not decide here whether subsection 337(g)(2) applies when some respondents fail to appear in an investigation. Rather, it decides only that subsection 337(g)(2) does not apply where all respondents participated in the investigation before entering settlement agreements with complainant. Depending on the particular circumstances of the case, the rationale that a general

exclusion under subsection 337(g)(2) is appropriate where complainant has difficulty in getting discovery may or may not apply in an investigation in which some named respondents fail to appear.

Further, under the IA's scenario, a general exclusion order may issue under subsection 337(d). *Certain Devices for Connecting Computers*, Inv. No. 337-TA-360, 1994 WL 932382 at 5 (Dec. 1994) (*Connecting Devices*) is instructive on this point. In *Connecting Devices*, sixteen respondents settled with complainant and two respondents failed to appear. Complainant filed a motion for summary determination of violation before the two remaining respondents were terminated from the investigation, and the respondents failed to oppose the motion. The ALJ then issued an ID granting the motion for summary determination of violation. The Commission did not review the ID and entered a general exclusion order in the investigation under subsection 337(d). Thus, under the IA's hypothetical scenario, a complainant could file a motion for summary determination of violation while the party who only answered the complaint was still in the investigation, obtain a summary determination of violation, if appropriate, and request a general exclusion order under subsection 337(d).

The IA also raises concerns that subsection 337(g)(2) would be rendered useless if it only applied in the "rare" case of an investigation that included only defaulters. As noted above, we do not determine here that application of subsection 337(g)(2) is limited to investigations involving only defaulting respondents. Such a situation however did occur, however, in *Certain Strip Lights*, Inv. No. 337-TA-287 (1989), and a general exclusion order was issued in that investigation. In any case, the fact that a provision may be invoked infrequently does not render the provision useless. Congress clearly intended subsection 337(g) to be invoked in situations where respondents do not participate in the Commission's section 337 investigations. When respondents do participate in section 337 investigations, general exclusion orders can be issued, where appropriate, under subsection 337(d).

Accordingly, we determine to reverse the ALJ's determination that the Commission has the authority under subsection 337(g)(2) to issue a general exclusion order in this investigation, and we vacate ALJ Order No. 29.

B. Whether the Commission Has Authority Pursuant to the Administrative Procedure Act and Subsection 337(c) to Make a Determination on the Issue of Violation in this Investigation

The Commission also has the authority to issue general exclusion orders under subsection 337(d), which provides:

> (1) If the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. . . .
>
> (2) The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that – –
>
> (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or
>
> (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d).

As both Milacron and the IA concede, whether proceeding under subsection 337(g)(2) or subsection 337(d), a determination of violation is a prerequisite to the issuance of a general exclusion order. *See Sealed Air Corp. v. United States Int'l Trade Comm'n*, 645 F.2d 976, 987 (Fed. Cir. 1981) (The Commission "must follow established procedures in making a determination that a violation of the Act has occurred, and may exclude a product only after completion of such procedures"). Subsection 337(c) specifically requires that "[e]ach determination under subsection (d) . . . of this section shall be

made on the record after notice and opportunity for a hearing in conformity with [the Administrative Procedure Act (APA)]. All legal and equitable defenses may be presented in all cases." 19 U.S.C. § 1337 (c).

Subsection 337(c) also provides, however, that "[t]he Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section, *except that the Commission may, by issuing a consent order or on the basis of an agreement between the private parties to the investigation . . . terminate any such investigation, in whole or in part, without making such a determination.*" 19 U.S.C. 1337(c) (emphasis added). The italicized language, which grants the Commission express discretionary authority to terminate an investigation on the basis of a settlement agreement without making a determination as to violation was added by the 1988 Amendments. The legislative history of the 1988 Amendments reads as follows:

> *Termination of Investigation by Consent Order or Settlement Agreement*
>
> *Present law*
>
> No provision.
>
> *Explanation of provision*
>
> Section 172(a)(2) amends section 337(b)(1) [sic] of the Act to authorize the Commission to terminate investigations, in whole or in part, by issuing consent orders or on the basis of settlement agreements.
>
> *Reasons for change*
>
> The Commission has for a number of years terminated section 337 investigations in these ways without making a determination regarding whether the statute has been violated, under authority derived from the Administrative Procedure Act, specifically 5 U.S.C. subsection 554(c)(1). The amendment to section 337(b)(1) provides express authority in the Act for such terminations. It is intended to put to rest any lingering doubts regarding the Commission's authority to terminate investigations by issuance of consent orders or on the basis of settlement agreements without making a determination regarding violation of the statute.

H.R. Rep. No. 100-40 at 158. On its face and consistent with the legislative history, subsection 337(c) provides the Commission with express discretionary authority to terminate investigations on the basis of settlement agreements without making a determination on the violation issue. The legislative history indicates that the additional authority provided by the 1988 Amendments was intended to provide an express statutory basis for what Congress understood to be the Commission's long-standing practice of terminating investigations based on a settlement agreement *without* making a determination on the issue of violation.

Although section 337 arguably grants the Commission the authority to make a finding on the issue of violation when it terminates an investigation based on a settlement agreement or consent order, it is less clear that the Commission has the authority to make a determination of violation for purposes of subsection 337(d) after all named respondents have settled and been terminated from the investigation because subsection 337(c) *requires* that each determination under subsection 337(d) be "on the record after notice and opportunity for a hearing" in conformance with the APA. 19 U.S.C. § 1337(c). Neither the IA nor Milacron squarely address this issue. In *Certain Chemiluminescent Compositions and Components Thereof*, Inv. No. 337-TA-285, Order No. 24 (Mar. 22, 1989), however, the ALJ denied a motion for summary determination of violation by non-parties, stating:

> Were a determination of violation made as to articles of non-parties there would be no notice to the non-party, and no opportunity for that non-party either to present evidence at a hearing as to reasons why the article does not infringe, or to present any other of its possible defenses, despite the fact that section 337 provides that "all legal and equitable defenses may be presented in all cases."

Chemiluminescent Compositions, Order No. 24. It is axiomatic that a terminated respondent is no longer a party to the investigation. Thus, under the ALJ's reasoning in *Chemiluminescent Compositions*, a determination of violation against any of the named respondents in the instant case (all of whom have been terminated) would be contrary to both section 337 and the APA.

Milacron and the IA note that in its commentary accompanying the Commission's August 29, 1988, interim rules implementing the 1988 Amendments, the Commission stated:

> Section 210.51 of the Commission's rules, which governs termination of investigations, has been revised by adding, to paragraphs (b) and (c) of that section, a citation to the new statutory provision that authorizes the Commission to order terminations on the basis of a settlement agreement or a consent order without making a determination as to whether section 337 has been violated. Since the statute indicates that such terminations 'may' be ordered without making a determination as to whether a violation has occurred and it is possible that there may be instances in which such a determination would be appropriate, paragraphs (b) and (c) have been further revised to indicate that the Commission can, but is not required to, make a violation determination when it terminates an investigation in whole or in part on the basis of a settlement agreement or consent order." 53 *Fed. Reg.* 33043, 33052.

Milacron and the IA argue that this commentary supports their view that the Commission has the authority to find a violation in this investigation. A more reasonable interpretation of this commentary, however, is that the Commission simply may have put off for another day its decision on whether it had the authority to find a violation when it terminates a respondent from an investigation based on either a settlement agreement or a consent order. Moreover, because the commentary refers to finding a violation when the Commission terminates the investigation on the basis of a settlement agreement or consent order, it gives no support whatsoever to the proposition that the Commission may make a finding of violation after respondents have been terminated from the investigation.

We find it unnecessary, however, to decide whether the Commission has the authority to make a finding on the issue of violation pursuant to the APA and subsection 337(c) in this investigation because we determine to adhere in this case to our long-standing policy of not reaching the issue of violation when terminating investigations on the basis of settlement agreements.

C. Longstanding Commission Policy Militates Against Reaching the Issue of Violation In This Investigation.

Prior to the 1988 Amendments, the Commission concluded that it had the authority to terminate investigations based on settlement agreements pursuant to subsection 554(c)(1) of the APA.[11] Although the Commission's early practice in terminating an investigation based on settlement agreements was to make a determination of "no present violation," the Commission ultimately concluded that such terminations were inconsistent with *any* determination on the issue of violation. The Commission set forth its reasoning in detail in 1979:

> It has been Commission practice in investigations under section 337 of the Tariff Act of 1930, when settlement agreements or other agreements are entered into among the parties, to make a determination of no present violation in light of the language of section 337(c) and Commission rule 210.53. This practice has been adopted by the Commission because section 337(c) provides that the Commission is to determine in each investigation whether there is or is not a violation of section 337.
>
> We are of the opinion now, however, that a distinction should be drawn between settlements entered into by the parties and other kinds of termination prior to a hearing, so that in the case of settlements, only an order of termination is required, and no finding as to the issue of violation is necessary.
>
> The Administrative Procedure Act, which is incorporated in section 337(c) of the Tariff Act of 1930, as amended, provides in subsection 5 that agencies must "give all interested parties an opportunity" to settle cases. The provision relating to a determination on the issue of violation contained in section 337(c) is not intended to and in our opinion does not negate the provisions of the Administrative Procedure Act allowing for settlement of agency cases.
>
> A finding respecting violation is, in our view, inconsistent with a settlement of a case, since settlement is a means plainly designed to avoid the necessity (and expense to the government and parties) of a determination on matters no longer in issue before the agency. Therefore a determination on the issue of violation is not necessary in this case where the parties have entered into a settlement agreement.

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[11] Section 554(c)(1) of the APA provides that "[t]he agency shall give all interested parties opportunity for . . . the submission and consideration of . . . offers of settlement . . . when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c)(1).

Alternating Pressure Pads, Inv. No. 337-TA-48, Notice of Termination at 5-6 (1979) (emphasis added) (footnotes omitted). As discussed above, the Commission's practice was subsequently acknowledged by Congress when it amended section 337 in 1988 to specifically provide that the Commission need not reach the issue of violation when terminating cases on the basis of settlement agreements or consent orders.

We find that this case presents no special circumstances that would warrant a change to longstanding Commission practice. Milacron and the IA concede that the settled respondents fully cooperated in the Commission's investigation up until the time of settlement. Contrary to Milacron's view, we believe that this investigation is fundamentally different from a default case in which a complainant may obtain a general exclusion order provided that a violation is established pursuant to subsection 337(g)(2)(B). A respondent's decision not to appear in an investigation is completely beyond the control of a complainant, whereas termination of the investigation based on settlement requires the cooperation and the agreement of complainant. Milacron chose to bring its motion for summary determination of violation after it had voluntarily settled with each respondent, and each respondent had been terminated from the investigation. Thus, either by design or inadvertence, Milacron placed itself in the position that it now finds itself.

We find unpersuasive Milacron's argument that a Commission policy prohibiting a general exclusion order in a case where all respondents settled would encourage collusion between a complainant and a "sacrificial" respondent to keep the investigation alive. While the Commission does not base its policy decisions on assumptions that parties and their counsel will abuse Commission process or behave unethically, we nonetheless believe that the opportunity for abuse of Commission process would be greater should the Commission find a violation of section 337 and issue a general exclusion in an investigation in which all respondents have settled. Under such circumstances, issuing a general

exclusion order may encourage complainants to file complaints against respondents that are not likely to mount a strong defense, to offer favorable settlement terms to those respondents, and to seek, based on an uncontested finding of violation, a general exclusion order that is effective against the world. Such a scenario would invite complainants to, in effect, contract for a general exclusion order. Settled respondents that are fully licensed by complainant may find it in their interests to support a general exclusion order that would exclude the imports of their competitors.

We also disagree with Milacron's contention that a rule precluding a complainant from obtaining a general exclusion order in an investigation in which all respondents settled would conflict with the Commission's policy of encouraging settlement. The contrary rule would be more likely to undercut the Commission's policy of encouraging settlement by disrupting the reasonable expectations of respondents that they would not be found in violation of section 337 once they had settled with complainant. Neither Milacron nor the IA has shown that any of the respondents contemplated that Milacron would pursue a determination of violation against them after they had settled and been terminated from the investigation pursuant to their respective joint motions to terminate. In fact, given the Commission's long and consistent practice of not finding a violation as to settled respondents, we believe it is likely that the respondents settled with the well-founded expectation that no finding of violation of section 337 would be made. We note the IA's and Milacron's arguments concerning the Commission's safeguards to prevent an incorrect finding of violation. In our view, however, such safeguards would provide cold comfort to a respondent who settled with the expectation that it would not be found in violation of section 337.

Furthermore, in order to ensure the integrity of Commission general exclusion orders, we believe that complainants, should they be contemplating a motion for summary determination of violation, should be encouraged to file such motions before respondents are terminated from the investigation. As

the Commission noted in *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-424, Comm. Opinion at 3 (Nov. 6, 2000):

> because [of a general exclusion order's] considerable impact on international trade, potentially extending beyond the parties and articles involved in the investigation, more than just the interest of the parties is involved. Therefore, the Commission exercises caution in issuing general exclusion orders. . .

A general exclusion order is an extraordinary trade remedy in that it completely excludes from entry all articles that infringe the intellectual property right involved, without regard to the source of the articles. Consequently, we closely adhere to expressed Congressional intent in implementing this remedy.

Notwithstanding our determination here, Milacron is not foreclosed from obtaining the general exclusion order that it seeks. Milacron is free to bring another complaint against other respondents and to obtain a finding of violation based either on subsection 337(d) before the respondents are terminated from the investigation, or under subsection 337(g), if applicable. Milacron argues that requiring it to file an additional complaint undercuts the conservation of resources policy underlying the general exclusion order remedy. Milacron, however, chose not to file its motion for summary determination of violation until it had settled with every respondent.

CERTAIN PLASTIC MOLDING MACHINES WITH CONTROL SYSTEMS HAVING PROGRAMMABLE OPERATOR INTERFACES INCORPORATING GENERAL PURPOSE COMPUTERS, AND COMPONENTS THEREOF II

337-TA-462

CERTIFICATE OF SERVICE

I Marilyn R. Abbott, hereby certify that the attached **COMMISSION OPINION**, was served upon the following parties via first class mail and air mail where necessary on April 2, 2003

Marilyn R. Abbott

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of	)	
CERTAIN PLASTIC MOLDING MACHINES WITH CONTROL SYSTEMS HAVING PROGRAMMABLE OPERATOR INTERFACES INCORPORATING GENERAL PURPOSE COMPUTERS, AND COMPONENTS THEREOF II	)	Inv. No. 337-TA-462
	)	000016

NOTICE OF COMMISSION DECISION TO REVIEW AND REVERSE AN INITIAL DETERMINATION TERMINATING THE INVESTIGATION; DECISION TO REVIEW ALJ ORDER NO. 29; SCHEDULE FOR WRITTEN SUBMISSIONS

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review and reverse the presiding administrative law judge's ("ALJ's") initial determination ("ID")(Order No. 30) terminating the above-captioned investigation. The Commission has also determined to review ALJ Order No. 29 on its own motion, and to hold in abeyance the petitions for review of Order No. 29 that were filed in this investigation.

FOR FURTHER INFORMATION CONTACT: Jean Jackson, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3104. Copies of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS-ON-LINE) at *http://dockets.usitc.gov/eol/public*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted the above-referenced investigation on August 23, 2001, based on a complaint filed by Milacron, Inc. (Milacron) of Cincinnati, OH, against eleven respondents. 66 *Fed. Reg.* 44374 (2001). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337) in the importation into the United States, sale for importation, and sale within the United States after importation of certain plastic molding machines with control systems having programmable operator interfaces incorporating general purpose computers, and components thereof, by reason of infringement of claims 1-4 and 9-13 of U.S. Patent No. 5,062,052. All named respondents have been terminated from the investigation on the basis of settlement agreements.

On April 18, 2002, Milacron filed a motion to amend the procedural schedule so that it would have an opportunity to file a motion for summary determination of violation of section 337 and to request a general exclusion order. On April 19, 2002, the Commission investigative attorney (IA) filed a response in support of Milacron's motion to amend the procedural schedule. On April 24, 2002, the ALJ issued Order No. 27, granting Milacron's request to amend the procedural schedule in the investigation to allow Milacron the opportunity to file a motion for summary determination of violation and to seek a general exclusion order under Commission Rule 210.16 (c)(2). On May 17, 2002, complainant filed its motion for summary determination and request for a recommendation supporting a general exclusion order. The IA supported the motion and request.

On June 11, 2002, the ALJ issued Order No. 29 which held that Milacron could not seek summary determination of violation and was not entitled to a recommended determination supporting a general exclusion order because of practical and Constitutional concerns in making an unopposed determination of violation of section 337. On June 18, 2002, the ALJ issued a one-paragraph ID (Order No. 30) terminating the investigation. On June 24 and June 25, 2002, respectively, Milacron and the IA petitioned for review of the ID and appealed Order No. 29.

Having examined the ALJ Order Nos. 29 and 30, and the petitions for review, the Commission has determined to review and reverse ALJ Order No. 30, which terminated the investigation. The Commission has also determined to review, on its own motion, the determination contained in ALJ Order No. 29 that the Commission has the statutory authority to issue a general exclusion order in an investigation in which all respondents have settled with complainant. Finally, the Commission has decided to hold in abeyance the petitions for review that were filed by Milacron and the IA pending its decision on the issue that it has determined to review.

WRITTEN SUBMISSIONS: In order to complete its review, the Commission requests briefing from the parties on the issue under review. Briefs should address the statutory language of section 337(g)(2), 19 U.S.C. § 1337 (g)(2), and the legislative history of the provision. Briefs should also include a discussion of Commission rules 210.16 (c)(1) and (2), 19 C.F.R. §§ 210.16(c)(1) and (2), as well as a discussion of the Commission's commentaries issued in connection with the promulgation of these rules. The commentaries are found in 53 *Fed. Reg.* 330432 *et seq.*, (August 29, 1988); 57 *Fed. Reg.* 52830 *et seq.* (November 5, 1992); 59 *Fed. Reg.* 39020 *et seq.* (August 1, 1994). In addition, the briefs should address whether the Commission has the authority to issue a general exclusion order under section 337(d)(2), 19 U.S.C. § 1337(d)(2), in an investigation in which all named respondents have settled with complainant. In this regard, the parties should address in particular the basis upon which a finding of violation of section 337 could be made in accordance with the Administrative Procedures Act in an investigation in which all respondents have settled and what showing the complainant needs to make in order to establish a finding of violation. Finally, the parties should address any policy implications that might be raised by a finding of violation of section 337 based on record evidence that relates solely to respondents that have settled with complainant and as to which the investigation has been terminated. Main briefs are due on August 1, 2002. Reply briefs, if any, are due on August 10, 2002.

Written submissions (the original document and 14 true copies thereof) must be filed with the Office of the Secretary on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests

should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.24, 210.43(d), 210.44, and 210.45 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.24, 210.43(d), 210.44, and 210.45).

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: July 15, 2002

CERTAIN PLASTIC MOLDING MACHINES WITH CONTROL SYSTEMS HAVING PROGRAMMABLE OPERATOR INTERFACES INCORPORATING GENERAL PURPOSE COMPUTERS, AND COMPONENTS THEREOF II

337-TA-462

CERTIFICATE OF SERVICE

I Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DECISION TO REVIEW AND REVERSE AN INITIAL DETERMINATION TERMINATING THE INVESTIGATION; DECISION TO REVIEW ALJ ORDER NO. 29; SCHEDULE FOR WRITTEN SUBMISSIONS,** was served upon the following parties via first class mail and air mail where necessary on July 15, 2002.

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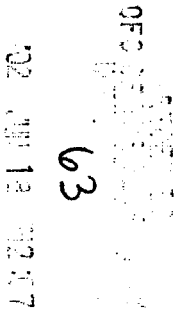
UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of	
CERTAIN PLASTIC MOLDING MACHINES WITH CONTROL SYSTEMS HAVING PROGRAMMABLE OPERATOR INTERFACES INCORPORATING GENERAL PURPOSE COMPUTERS AND COMPONENTS THEREOF II	**Inv. No. 337-TA-462**



ORDER NO. 30: INITIAL DETERMINATION TERMINATING INVESTIGATION

(June 18, 2002)

In Order No. 27 (April 24, 2002), the undersigned continued this investigation giving COMPLAINANT the opportunity to move for summary determination of violation and to request a general exclusion order pursuant to Commission Rule 210.16(c)(1), 19 C.F.R. § 210.16(c)(2). See Commission Notice (May 23, 2002). In light of Order 29 (June 11, 2002), denying COMPLAINANT'S motion for a summary determination, the undersigned hereby terminates the instant investigation.

SO ORDERED.

Delbert R. Terrill, Jr.
Administrative Law Judge

CERTAIN PLASTIC MOLDING MACHINES WITH CONTROL SYSTEMS HAVING PROGRAMMABLE OPERATOR INTERFACES INCORPORATING GENERAL PURPOSE COMPUTERS AND COMPONENTS THEREOF II **INV. NO. 337-TA-462**

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached ORDER was served upon, Rett V. Snotherly, Esq., Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on June 18, 2002.

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CERTAIN PLASTIC MOLDING MACHINES WITH CONTROL SYSTEMS HAVING PROGRAMMABLE OPERATOR INTERFACES INCORPORATING GENERAL PURPOSE COMPUTERS AND COMPONENTS THEREOF II

INV. NO. 337-TA-462

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of	
CERTAIN PLASTIC MOLDING MACHINES WITH CONTROL SYSTEMS HAVING PROGRAMMABLE OPERATOR INTERFACES INCORPORATING GENERAL PURPOSE COMPUTERS AND COMPONENTS THEREOF II	Inv. No. 337-TA-462

ORDER NO. 29: ORDER DENYING MOTION FOR SUMMARY DETERMINATION

(June 11, 2002)

On May 17, 2002, COMPLAINANT, Milacron, Inc. ("Milacron"), moved [462-30] for a summary determination that there has been a violation of Section 337 and further requested a general exclusion order. On June 3, 2002, COMMISSION INVESTIGATIVE STAFF filed a response in support of Milacron's motion.

As Staff relates, this investigation was instituted on August 23, 2001, as a result of publication of a Notice of Investigation in the Federal Register. See 66 Fed.Reg. 44374-75 (August 23, 2001). All of the named Respondents in this investigation have

settled and the Commission has determined not to review the undersigned's four initial determinations granting the motions to terminate based upon settlement. See Order No. 8 (Oct. 17, 2001) [Commission Notice (Nov. 7, 2001)]; Order No. 20 (Feb. 27, 2002) [Commission Notice (March 18, 2002)]; Order No. 25 (March 25, 2002) [Commission Notice (April 15, 2002)]; Order No. 26 (April 23, 2002) [Commission Notice (May 23, 2002)]. In Order No. 27, the undersigned granted Milacron's motion requesting an opportunity to seek a general exclusion order under Commission Rule 210.16(c)(2).

A motion for a summary determination in a Section 337 investigation is governed by Commission Rule 210.18, which provides:

> Any party may move with any necessary supporting affidavits for a summary determination in his favor upon all or any part of the issues to be determined in the investigation.
>
> * * *
>
> The determination sought by the moving party shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.

The party moving for summary determination bears the initial burden of demonstrating the absence of any genuine issue of material fact and demonstrating its entitlement to judgement as a matter of law. Vivid Tech. v. American Science and Engineering, 200 F.3d 795, 806-07, 53 USPQ2d 1289, 1297 (Fed. Cir. 1999); Continental Can Co. USA, Inc. v. Monsanto Co., 948 F.2d 1264, 1265, 20 USPQ2d 1746, 1747 (Fed. Cir. 1991). "When ruling on a motion

for summary judgment, all of the nonmovant's evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant's favor." Xerox Corp. v. 3Com Corp., 267 F.3d 1361, 1364 (Fed.Cir. 2001). The court must view all evidence submitted in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Bayer A.G. v. Elan Pharmaceutical Research Corp., 212 F.3d 1241, 1247, 54 USPQ2d 1710, 1714 (Fed. Cir. 2000). Any doubt as to the existence of a genuine issue of material fact must be resolved in favor of the nonmoving party. Lockwood v. American Airlines, Inc., 107 F.3d 1565, 1569 41 USPQ2d 1961, 1964 (Fed. Cir. 1997). The trier of fact should "assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial." EMI Group North America, Inc. v. Intel Corp., 157 F.3d 887, 891 (Fed. Cir. 1998). "In other words, '[s]ummary judgment is authorized when it is quite clear what the truth is,' [citations omitted], and the law requires judgment in favor of the movant based upon facts not in genuine dispute." Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc., 984 F.2d 1182, 1185 (Fed. Cir. 1993). Summary determination "is not designed to substitute lawyers' advocacy for evidence, or affidavits for examination before the fact-finder, when there is a genuine issue for trial." Continental Can, 948 F.2d at 1265, 20 USPQ2d at 1747 citing Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Thus, summary determination is inappropriate where the record contains facts which, if explored

and developed, might lead the Commission to accept the position of a party opposing the motion. Merck & Co. v. United States Int'l Trade Comm'n, 774 F.2d 483, 487-88 (Fed. Cir. 1985).

Milacron first maintains that it has established by uncontested facts and/or admissions the importation of the plastics molding machines of the named Respondents and that its plastics molding machines incorporating its XTREEM control system practice the claims of its U.S. Patent No. 5,062,052 ("the '052 patent"). Milacron also contends that it has provided "voluminous evidence" showing that each of the claim 1-4 and 9-13 of the '052 patent has been infringed by the named Respondents. Moreover, citing Certain Airless Paint Spray Pumps and Components Thereof, Inv. No. 337-TA-90, 3 ITRD 2041 (Nov. 24, 1981), and 19 U.S.C. § 1337(d)(2), as the authority and standard for determining whether a general exclusion order should issue, Milacron argues that it has established the necessary factors of "widespread pattern" and "business conditions." Specifically, Milacron contends that it has set forth uncontroverted evidence of a widespread pattern of unauthorized use of the invention of the '052 patent by non-respondent entities and evidence of business conditions that will facilitate and encourage the continuation and expansion of such widespread pattern of unauthorized use by other non-respondents which have already entered and/or may attempt to enter the U.S. market with infringing plastics molding machines. Milacron adds that because it has granted numerous licenses to foreign plastics molding machine manufacturers which allow their continued importation of plastics molding machines incorporating the invention of the '052 patent, as well as the fact that plastics

molding machines incorporating proprietary or other prior art control systems would not be affected by such order, the public interest further supports the issuance of a general exclusion order in this investigation.

Staff maintains that Milacron has sufficiently established for purposes of the instant motion that: (1) Respondents have imported into the United States, sold for importation, or sold within the United States after importation the accused plastics molding machines; (2) the '052 patent is valid and enforceable; (3) the imported machines infringe the asserted claims of the '052 patent; and (4) a domestic industry exists as to the '052 patent. Staff also contends that Milacron has made a proper showing of a widespread pattern of unauthorized use of its patent and that business conditions exist such that foreign manufacturers other than the Respondents may attempt to enter the U.S. market with infringing articles. Therefore, Staff concludes that a recommendation for the issuance of a general exclusion order is appropriate.

Based on the evolution of general exclusion orders, the undersigned concludes that a general exclusion order is not appropriate under the instant circumstances. Typically, the Commission issues a general exclusion order after an Administrative Law Judge, upon finding a violation of Section 337 in an investigation in which a named respondent has entered an appearance and contested the complaint, recommends the issuance of a general exclusion order rather than limited exclusion order because certain statutory criteria have been met. See In the Matter of Certain Cigarettes and Packaging Thereof, USITC Inv. No. 337-TA-424, Commission Notice (Oct. 16, 2000). A general exclusion order is the broadest

type of relief available from the Commission. Id. Such an order dictates that United States Customs Service (Customs) exclude from entry all articles that infringe the involved intellectual property right, without regard to source. Id. Thus, a general exclusion order applies to persons who were not parties to the Commission's investigation and to persons who could not have been parties, such as persons who decide to import after the Commission's investigation is concluded. Id.

Since Section 337 was amended in 1994 in response to the Uruguay Round international trade agreement, general exclusion orders are now regarded as the exception rather than the rule, as Section 337(d)(2) currently provides:

> The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that –
>
> > (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or
> >
> > (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2) (effective January 1, 1995).

Although the passage of subsection (d)(2) established that limited exclusion orders are the preferred remedy over general exclusion orders, in terms of choosing between the two forms of remedy, the statute is generally recognized to have done nothing more than codify the criteria that were already being used by the Commission in Section 337 investigations to determine whether a general exclusion order was warranted. These are the

so-called "Spray Pumps" factors, which were first enunciated in Spray Pumps, *supra*, 3 ITRD at 2049.

According to Spray Pumps, two tests must be met for issuance of a general exclusion order: (1) a widespread pattern of unauthorized use of the patented invention, and (2) business conditions from which one might infer that foreign manufacturers other than the respondents to the investigation may enter the United States with infringing articles. See id. Spray Pumps enumerated the following factors as relevant to demonstrating whether a widespread pattern of unauthorized use exists:

> (1) a Commission determination of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers; or
> (2) the pendency of foreign infringement suits based upon foreign patents which correspond to the domestic patent at issue; or
> (3) other evidence which demonstrates a history of unauthorized foreign use of the patented invention.

See id. Spray Pumps also enumerated the following factors to evaluate in determining whether there are business conditions from which one might infer that foreign manufacturers other than the respondents to the investigation may enter the United States with infringing articles:

> (1) an established demand for the patented product in the U.S. market and conditions of a world market;
> (2) the availability of marketing and distribution networks in the United States for potential foreign manufacturers;
> (3) the cost to foreign entrepreneurs of building a facility capable of producing the patented article;
> (4) the number of foreign manufacturers whose facilities could be retooled to produce the patented article; and

(5) the cost to foreign manufacturers of retooling their factories to produce the patented article.

See id.

Although exclusion orders typically issue after contested Section 337 investigations, the Commission is also authorized to issue exclusion orders in instances where the complaint is uncontested. This is usually the case when a named respondent "defaults," which means that the respondent "fails to respond to the complaint and notice of investigation in the manner prescribed in [19 C.F.R.] Sec. 210.13 or Sec. 210.59(c), or otherwise fails to answer the complaint and notice, and fails to show cause why it should not be found in default." 19 C.F.R. § 210.16(a). In such cases, the Commission may issue a limited exclusion order against that named defaulting respondent if the criteria of Section 337(g)(1) are met:

(1) If–

(A) a complaint is filed against a person under this section;

(B) the complaint and a notice of investigation are served on the person;

(C) the person fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice;

(D) the person fails to show good cause why the person should not be found in default; and

(E) the complainant seeks relief limited solely to that person;

the Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both, limited to that person

> unless, after considering the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such exclusion or order should not be issued.

19 U.S.C. § 1337(g)(1).

On the other hand, where unnamed entities are engaging in unfair importation, the Commission may issue a general exclusion order if the criteria of Section 337(g)(2) are met:

> In addition to the authority of the Commission to issue a general exclusion from entry of articles when a respondent appears to contest an investigation concerning a violation of the provisions of this section, a general exclusion from entry of articles, regardless of the source or importer of the articles, may be issued if –
>
> > (A) no person appears to contest an investigation concerning a violation of the provisions of this section,
> >
> > (B) such a violation is established by substantial, reliable, and probative evidence, and
> >
> > (C) the requirements of subsection (d)(2) of this section are met.

19 U.S.C. § 1337(g)(2).

Thus, the Commission is authorized to proceed essentially ex parte against the goods of unnamed importers by issuing a general exclusion order. Two issues, however, are unclear from the statutory language: (i) whether the prerequisite that "no person appears to contest an investigation concerning a violation" means that there must be one or more named respondents that subsequently "default," or whether it also covers instances in which all

named respondents enter into settlement agreements or consent orders; and (ii) whether and how the prerequisite that "such a violation is established by substantial, reliable, and probative evidence" can be met when there is no contested trial on the merits of the complainant's allegations of a Section 337 violation.

With regard to the first issue, the undersigned finds that the statute does not literally require a defaulting respondent because by its own terms the statute covers the situation in which "no person" enters any appearance in the Section 337 investigation. The Commission's Rules of Practice and Procedure implement this statutory provision in Rule 210.16(c)(2) as follows:

> (2) In any motion requesting the entry of default or the termination of the investigation with respect to the last remaining respondent in the investigation, the complainant shall declare whether it is seeking a general exclusion order. The Commission may issue a general exclusion order pursuant to section 337(g)(2) of the Tariff Act of 1930, regardless of the source or importer of the articles concerned, provided that a violation of section 337 of the Tariff Act of 1930 is established by substantial, reliable, and probative evidence, and only after considering the aforementioned public interest factors and the requirements of Sec. 210.50(c).

19 C.F.R. § 210.16(c)(2) (rev. 2000) (emphasis added).

The foregoing underscored passage of Rule 210.16(c)(2), having been written in the alternative, can be read consistently with the statutory language of Section 337(g)(2) to permit a request for an uncontested general exclusion order to be made either when the last respondent has defaulted or when the investigation has been terminated as to last respondent to settle with the complainant or enter into a consent order.

Rule 210.16(c)(2) was first proposed in 1992 and issued as a final rule in 1994. See 57 Fed. Reg. 52830, 52837 (November 5, 1992) (Notice of proposed rulemaking and request for comments that introduced Rule 210.16(c)(2)); 59 Fed. Reg. 39020, 39026 (August 1, 1994) (Notice of final rule). The current rule reads differently from its predecessor under the old "interim" Commission Rules, rule 210.25(c). The old rule read in relevant part as follows, with germane portions underscored for emphasis:

> (c) *Relief against a respondent in default.* The complainant shall declare at the time the last remaining respondent is found to be in default whether the complainant is seeking a general or limited exclusion order, or a cease and desist order, or both. . . . In cases in which the record developed by the administrative law judge contains substantial, reliable, and probative evidence of a violation of section 337 of the Tariff Act, the Commission may issue a general exclusion order (in addition to or in lieu of cease and desist orders) regardless of the source or importer of the articles concerned, unless the public interest considerations enumerated above preclude such relief. In considering whether a prima facie case of violation of section 337 has been presented, the administrative law judge and the Commission may draw appropriate adverse inferences as provided in § 210.36 against a respondent or respondents in default with respect to those issues for which complainant has made a good faith but unsuccessful effort to obtain evidence.

19 C.F.R. § 210.36(c) (1991) (emphasis added).

The foregoing underscored language of the old rule only covered requests for an uncontested general exclusion order when the last named respondent had defaulted. There was no provision for a request in which all remaining respondents had settled with the complainant or had entered into consent orders.

Consistently with the practice under the old rule, the few investigations in

which a general exclusion order has issued without contest involved defaulting named respondents. See, e.g., Certain Compact Multipurpose Tools, Inv. No. 337-TA-416, USITC Pub. No. 3239 (September 1999) ("Tools"); Certain Devices for Connecting Computers Via Telephone Lines, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) ("Connectors"); Certain Window Shades and Components Thereof, Inv. No. 337-TA-83, USITC Pub. No. 1152 (May 1981) ("Window Shades"); Certain Electric Slow Cookers, Inv. No. 337-TA-42, USITC Pub. No. 994 (August 1979) ("Cookers"); Certain Novelty Glasses, Inv. No. 337-TA-55, USITC Pub. No. 991 (July 1979) ("Glasses").

The fact that all of the located cases involved defaulting respondents does not mean, however, that the Commission did not always have the inherent power to do more than its own regulations permitted itself to do. The current wordings of Section 337(g)(2) and Commission Rule 210.16(c)(2) contemplate the possibility that an uncontested general exclusion order can be issued against the goods of unnamed importers without a trial on the merits, even if all of the named respondents settle with the complainant or enter into consent orders beforehand. The only showings required to achieve this result under Section 337(g)(2) and Rule 210.16(c)(2) are: (i) that the statutory analog of the Spray Pumps factors (that is, Section 337(d)(2)) have been met; (ii) that a Section 337 violation has been "established by substantial, reliable, and probative evidence;" and (iii) that the statutory public interest factors for granting relief have been met.

In all but one of the located cases in which an uncontested general exclusion order was issued, the requisite "substantial, reliable, and probative evidence" of a violation

of Section 337 was established by means of an initial determination granting a motion for summary determination prior to the final termination of the investigation. In each of those cases, one or more respondents that remained in the case when the motion for summary determination was filed had an opportunity to respond prior to being found in default (that is, being found pursuant to current Commission Rule 210.16(b) or former interim rule 210.25(a) to have "waived its right to appear, to be served with documents, and to contest the allegations at issue in the investigation"), but did not do so.

Thus, in Cookers, supra, nine respondents were originally named in the investigation, six were terminated initially on the basis of a recommended determination of no violation of Section 337 on their part, the remaining three respondents did not contest a subsequent joint motion of the complainant and the Staff for summary determination of violation as to them, and summary determination was granted against the three remaining respondents before the investigation was finally terminated; the three remaining respondents were not found to be in default until the end of the investigation. Similarly, in Window Shades, supra, five respondents were originally named in the investigation, two were terminated early on the basis of settlement agreements or consent orders, the remaining three respondents did not contest the joint motion of the complainant and the Staff for summary determination of violation as to them, summary determination was granted against two of the three remaining respondents (Commission jurisdiction over the third having been found lacking), and all three remaining respondents were found to be in default when the investigation was finally terminated.

Again, in Connectors, supra, 18 respondents were originally named in the investigation, 16 were terminated early on the basis of settlement agreements, the remaining two respondents did not contest the complainant's motion (supported by the Staff) for summary determination that a violation of Section 337 existed as to those remaining respondents, summary determination was granted against the two remaining respondents, and only one of the two remaining respondents was found to be in default before the investigation was finally terminated. In Tools, supra, six respondents were originally named in the investigation, two were terminated early on the basis of consent orders, the remaining four respondents did not contest the complainant's motion (supported by Staff) for summary determination of violation as to them, summary determination was granted against the four remaining respondents, and the four remaining respondents were found to be in default before the investigation was finally terminated but after the time period to respond to the motion for summary determination had passed.

The only located case in which there is no record of a summary determination motion being made is the early case of Glasses, supra. In that investigation, two respondents were originally named in the investigation, both were found to be in default, and the Commission determined, on the basis of a recommended determination of the Administrative Law Judge, that there was a violation of Section 337.

Although, as discussed above, there is no requirement under Section 337 to have a respondent remain in the case in order to issue an uncontested general exclusion order, the undersigned concludes that a practical concern arises if the summary

determination procedure is used in order to establish the requisite "substantial, reliable, and probative evidence" after all respondents have been terminated from the investigation by reason of settlements or consent orders. Other than the Staff, which in the cited cases has generally supported the complainant, there would be no adverse party with at least the opportunity, if not the actual will, to oppose the motion. More importantly, given that complaints filed with the USITC do not appear en total in the Federal Register, competitors in general will receive no notice of such complaints nor the pendency of any summary determination motion. Thus, the undersigned concludes that such a process does not afford unnamed importers sufficient notice as required by due process. In addition, a motion for summary determination is typically decided by viewing the evidence in the light most favorable to the party opposing the motion, with doubts resolved in favor of the opponent. See DeMarini Sports, Inc. v. Worth, Inc., 239 F.3d 1314, 1322 (Fed. Cir. 2001); Wenger Mfg., Inc. v. Coating Machinery Systems, Inc., 239 F.3d 1225, 1231 (Fed. Cir. 2001). If there is no "opponent," this skewing of the balance can not apply.

The undersigned notes yet another problem regarding the evidence of violation to be considered. If there is a named respondent, there is at least a minimal assurance, backed up by a verified complaint, that the complainant has identified that entity in the complaint, has examined that entity's product and described it in the complaint in sufficient detail, has pointed out how that product allegedly infringes, and has determined that the product has been imported into the United States, sold for importation, or sold within the United States after importation. There is no assurance of these facts whatsoever in the case

of an unnamed importer.

Finally, the undersigned concludes that granting a general exclusion order under these circumstances would give future complainants the incentive not to name entities that could raise strong defenses to allegations of section 337 violations as respondents, or to file only against likely defaulters. See In The Matter of Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles, USITC Inv. No. 337-TA-334, Commission Opinion (Remand) (September 10, 1997).

Accordingly, Milacron's motion for a summary determination that there has been a violation of Section 337 and request for a general exclusion order is denied.

SO ORDERED.

Delbert R. Terrill, Jr.
Administrative Law Judge

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