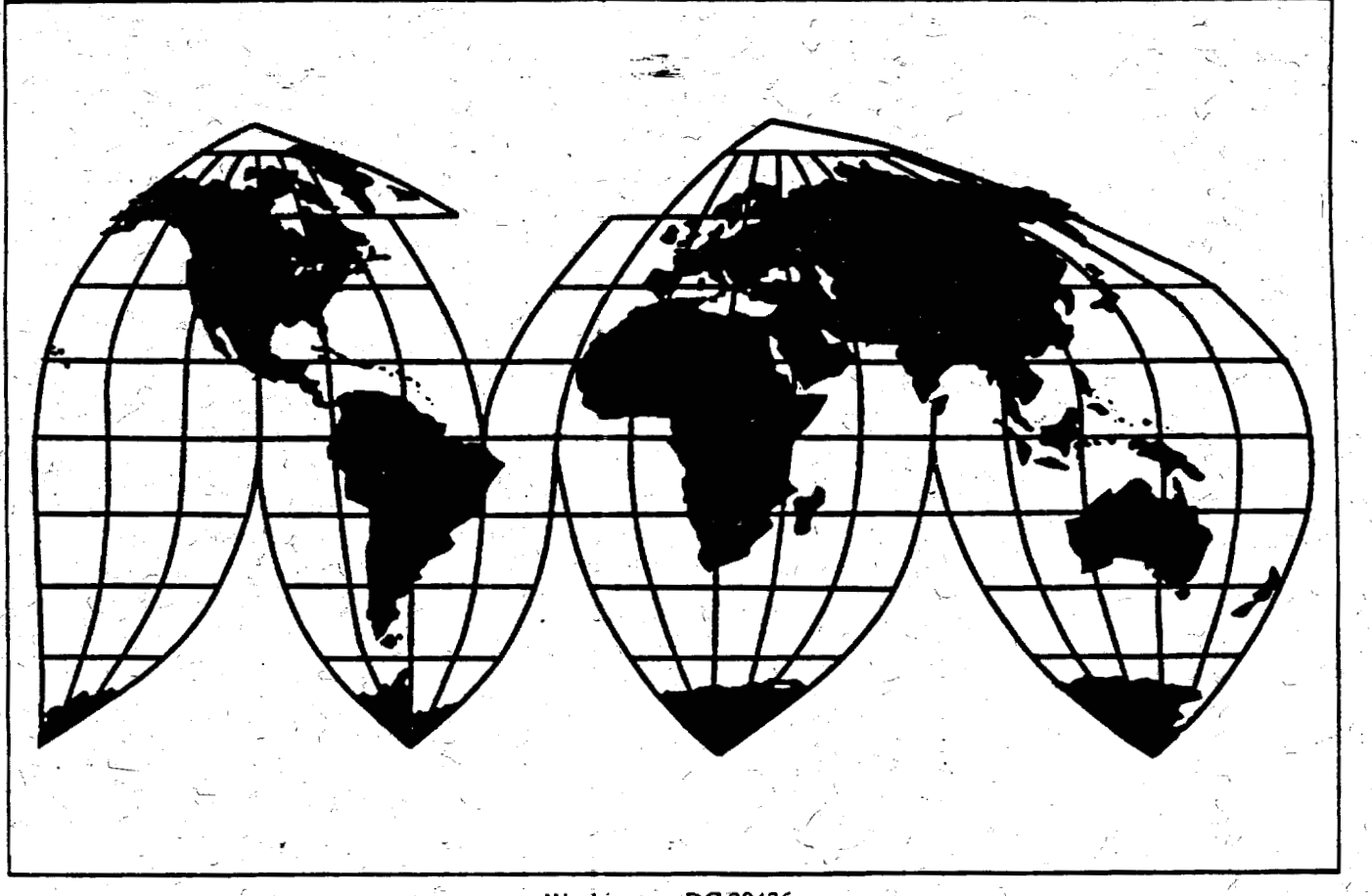
In the Matter of

Certain Variable Speed Wind Turbines and Components Thereof

Investigation No. 337-TA-376
REMAND

Publication 3072 **November 1997**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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In the Matter of

Certain Variable Speed Wind Turbines and Components Thereof

Publication 3072

November 1997

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

In the Matter of CERTAIN VARIABLE SPEED WIND TURBINES AND COMPONENTS THEREOF	Inv. No. 337-TA-376

NOTICE OF COMMISSION DETERMINATIONS CONCERNING FEDERAL CIRCUIT REMAND QUESTION AND RESPONDENTS' MOTION TO SHOW CAUSE AND PETITION FOR RESCISSION OF LIMITED EXCLUSION ORDER

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that, in response to an order issued by the U.S. Court of Appeals for the Federal Circuit ("the Federal Circuit") on April 24, 1997 (the "remand order"), the U.S. International Trade Commission determined that the requirement of section 337(a)(3), 19 U.S.C. § 1337(a)(3), regarding the presence of a domestic industry is satisfied by the domestic activities of Zond and the domestic activities of the companies licensed by Zond to practice the invention of claim 131 of U.S. Letters Patent 5,083,039. Thus, the Commission determined that, by virtue of its ownership of the '039 patent and its licensing of significant domestic activities practicing that patent, Zond is part of the domestic industry. The Commission also determined that further proceedings are not necessary to resolve any factual issues presented by the question posed by the Court on remand, and to deny respondents' motion to show cause and their petition to rescind the limited exclusion order. The Commission will issue an opinion shortly concerning these issues.

FOR FURTHER INFORMATION CONTACT: Jay H. Reiziss, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-205-3116.

SUPPLEMENTARY INFORMATION: This patent-based section 337 investigation was conducted by the Commission in 1995 and 1996 based on a complaint filed by Kenetech Windpower, Inc., of Livermore, California ("Kenetech") to determine whether there was a violation of section 337 in the importation, sale for importation, and/or the sale within the United States after importation, of certain variable speed wind turbines and components thereof by reason of infringement of claim 131 of U.S. Letters Patent 5,083,039 ("the '039 patent") and claim 51 of U.S. Letters Patent 5,225,712 ("the '712 patent"), both owned by Kenetech. Enercon GmbH of Aurich, Germany ("Enercon") and The New World Power Corporation of Lime Rock, Connecticut were named as respondents (collectively "respondents"). The Commission found a violation of section 337 had occurred and issued a limited exclusion order. Because Kenetech had filed for bankruptcy under Chapter 11 of the

U.S. Bankruptcy Act by the time the exclusion order issued, and had by then ceased manufacturing wind turbines, the Commission required Kenetech to submit quarterly reports detailing its domestic activities exploiting the '039 patent.

After the President declined to disapprove the Commission's determination, Enercon appealed to the Federal Circuit. Subsequently, in its March 31, 1997, quarterly report, Kenetech informed the Commission that it had sold the '039 patent to Zond Energy Systems, Incorporated ("Zond"). That quarterly report states that Kenetech continues to exploit the '039 patent, apparently under license from Zond.

Before any briefs were submitted in the appeal, but after the time for filing a motion to intervene had expired, Zond moved to intervene, asserting that it had standing to intervene based on its ownership of the patent in issue. Enercon opposed Zond's intervention, arguing that Zond must first show that it qualifies as a domestic industry under section 337 in order to enter an appearance in the appeal, and that Zond had failed to show it had the requisite standing to participate in the appeal. On April 24, 1997, the Federal Circuit issued an order remanding the case to the Commission for the Commission to determine in the first instance: (1) "whether Zond should be substituted for Kenetech;" and (2) "whether Zond qualifies as a domestic industry."

The Commission reopened this investigation, reinstated the protective order issued in this investigation, and requested comments from the parties' counsel on the questions posed by the Federal Circuit remand. On June 12, 1997, Zond filed a motion to intervene in this investigation. On July 8, 1997, the Commission issued an order permitting Zond to intervene in the remand proceeding as a co-complainant. Zond's motion effectively presented the Commission with the same issue posed by the Federal Circuit's first remand question. The Commission has concluded that its decision on the motion to intervene is equally applicable to the first remand issue. Thus, in response to the first of the Federal Circuit's remand questions, the Commission has determined that, rather than substituting Zond for Kenetech, Zond should be permitted to intervene as a co-complainant. *See* Order Granting Motion to Intervene of Patent Owner Zond Energy Systems, Inc. (July 8, 1997).

On June 16, 1997, respondents and the Commission investigative attorney ("IA") filed comments on the remand issues, and on June 23, 1997, all parties filed reply comments.

On June 27, 1997, respondents filed a motion for an order to show cause why the law firm of Howrey & Simon should not be deemed continuing counsel to Kenetech. Howrey & Simon and the IA subsequently responded to that motion. On July 9, 1997, Howrey & Simon filed a notice of withdrawal as counsel to Kenetech.

On July 2, 1997, respondents filed a petition under Commission rule 210.76(a)(2) seeking rescission of the exclusion order issued by the Commission on August 30, 1996. Both Zond and the IA filed responses in opposition to that petition.

Copies of the Commission's order, the public version of the opinion in support of that

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, SW, Washington, D.C. 20436, telephone 202-205-2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

By order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: August 11, 1997

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

In the Matter of CERTAIN VARIABLE SPEED WIND TURBINES AND COMPONENTS THEREOF	Inv. No. 337-TA-376

DETERMINATION CONCERNING FEDERAL CIRCUIT REMAND QUESTION AND ORDER DENYING RESPONDENTS' SHOW CAUSE MOTION AND PETITION FOR RESCISSION OF THE LIMITED EXCLUSION ORDER

This patent-based section 337 investigation was conducted by the Commission in 1995 and 1996 based on a complaint filed by Kenetech Windpower, Inc., of Livermore, California ("Kenetech") to determine whether there was a violation of section 337 in the importation, sale for importation, and/or the sale within the United States after importation, of certain variable speed wind turbines and components thereof by reason of infringement of claim 131 of U.S. Letters Patent 5,083,039 ("the '039 patent") and claim 51 of U.S. Letters Patent 5,225,712 ("the '712 patent"), both owned by Kenetech. Enercon GmbH of Aurich, Germany ("Enercon") and The New World Power Corporation of Lime Rock, Connecticut were named as respondents (collectively "respondents"). The Commission found a violation of section 337 had occurred and issued a limited exclusion order. Because Kenetech had filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Act by the time the exclusion order issued, and had by then ceased manufacturing wind turbines, the Commission required Kenetech to submit quarterly reports detailing its domestic activities exploiting the '039 patent.

After the President declined to disapprove the Commission's determination, Enercon appealed to the U.S. Court of Appeals for the Federal Circuit. Subsequently, in its March 31, 1997, quarterly report, Kenetech informed the Commission that it had sold the '039 patent to Zond Energy Systems, Incorporated ("Zond"). That quarterly report states that Kenetech continues to exploit the '039 patent, apparently under license from Zond.

Before any briefs were submitted in the appeal, but after the time for filing a motion to intervene had expired, Zond moved to intervene, asserting that it had standing to intervene based on its ownership of the patent in issue. Enercon opposed Zond's intervention, arguing that Zond must first show that it qualifies as a domestic industry under section 337 in order to enter an appearance in the appeal, and that Zond had failed to show it had the requisite standing to participate in the appeal. On April 24, 1997, the Federal Circuit issued an order remanding the case to the Commission for the Commission to determine in the first instance: (1) "whether Zond should be substituted for Kenetech;" and (2) "whether Zond qualifies as a domestic industry."

The Commission reopened this investigation, reinstated the protective order issued in

this investigation, and requested comments from the parties' counsel on the questions posed by the Federal Circuit remand. On June 12, 1997, Zond filed a motion to intervene in this investigation. On July 8, 1997, the Commission issued an order permitting Zond to intervene in the remand proceeding as a co-complainant. Zond's motion effectively presented the Commission with the same issue posed by the Federal Circuit's first remand question. The Commission has concluded that its decision on the motion to intervene is equally applicable to the first remand issue. Thus, in response to the first of the Federal Circuit's remand questions, the Commission has determined that, rather than substituting Zond for Kenetech, Zond should be permitted to intervene as a co-complainant. *See* Order Granting Motion to Intervene of Patent Owner Zond Energy Systems, Inc. (July 8, 1997).

On June 16, 1997, respondents and the Commission investigative attorney ("IA") filed comments on the remand issues, and on June 23, 1997, all parties filed reply comments.

On June 27, 1997, respondents filed a motion for an order to show cause why the law firm of Howrey & Simon should not be deemed continuing counsel to Kenetech. Howrey & Simon and the IA subsequently responded to that motion. On July 9, 1997, Howrey & Simon filed a notice of withdrawal as counsel to Kenetech.

On July 2, 1997, respondents filed a petition under Commission rule 210.76(a)(2) seeking rescission of the exclusion order issued by the Commission on August 30, 1996. Both Zond and the IA filed responses in opposition to that petition.

The Commission, having considered the parties' comments and responses to comments, and the record in this investigation, determines that the requirement of section 337(a)(3), 19 U.S.C. § 1337(a)(3), regarding the presence of a domestic industry is satisfied by the domestic activities of Zond and the domestic activities of companies licensed by Zond to practice the invention of claim 131 of the '039 patent. Thus, the Commission has determined that, by virtue of its ownership of the '039 patent and its licensing of significant domestic activities practicing that patent, Zond is part of the domestic industry. The Commission also determines that further proceedings are not necessary to resolve any factual issues presented by the questions posed by the Court on remand. Finally, the Commission determines to deny respondents' motion to show cause and their petition to rescind the exclusion order.

Accordingly, it is hereby ORDERED:

1. Respondents' Motion for an Order to Show Cause Why the Law Firm of Howrey & Simon Should Not Be Deemed Continuing Counsel to Kenetech Windpower, Inc. is denied; and

2. Respondents' Petition Pursuant to 19 C.F.R. 210.76(a)(2) For Rescission of Exclusion Order Herein Entered under 19 U.S.C. §1337(d) is denied.

By order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: August 11, 1997

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of

Investigation No. 337-TA-376

CERTAIN VARIABLE SPEED
WIND TURBINES AND
COMPONENTS THEREOF

INTRODUCTION

Upon remand from an appeal with the U.S. Court of Appeals for the Federal Circuit filed by respondent Enercon GmbH of Aurich, Germany ("Enercon"), the Commission determined that (1) Zond Energy Systems, Incorporated ("Zond") should be permitted to intervene in this investigation as a co-complainant; (2) Zond is part of a domestic industry that continues to exist in the investigation; (3) referral to the presiding administrative law judge (ALJ) for further fact finding is not warranted; (4) respondents' motion for an order to show cause why the law firm of Howrey & Simon should not be deemed continuing counsel to Kenetech is denied; and (4) respondents' petition for rescission of the exclusion order is denied.

PROCEDURAL BACKGROUND

The Commission conducted this patent-based investigation under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in 1995 and 1996 based on a complaint filed by Kenetech to determine whether there was a violation of section 337 in the importation, sale for importation, and/or the sale within the United States after importation of certain variable speed

wind turbines and components thereof, by reason of infringement of claim 131 of U.S. Letters Patent 5,083,039 ("the '039 patent") and claim 51 of U.S. Letters Patent 5,225,712 ("the '712 patent"), both patents then owned by complainant. Enercon and The New World Power Corporation of Lime Rock, Connecticut ("New World") (collectively "respondents") were named as respondents. The Commission found a violation of section 337 (with regard to the '039 patent only) and, in August of 1996, issued a limited exclusion order excluding the subject wind turbines and components thereof from entry for consumption into the United States. In order to inform itself regarding the continued presence of a domestic industry, the Commission required complainant Kenetech, which had filed for protection under Chapter 11 of the U.S. Bankruptcy Act, to file quarterly reports detailing its domestic industry activities. Subsequently, Kenetech sold the '039 patent to Zond. Zond granted Kenetech and Trace Technologies, Inc. ("Trace") licenses under the '039 patent.

Respondent Enercon appealed the Commission's determination to the U.S. Court of Appeals for the Federal Circuit. Zond moved to intervene in the appeal. Enercon opposed, arguing that Zond had not shown that it qualifies as a domestic industry and that it thus lacked standing to appear. The Commission did not oppose Zond's motion. On April 24, 1997, the Federal Circuit remanded the case to the Commission to determine in the first instance (1) "whether Zond should be substituted for Kenetech;" and (2) "whether Zond qualifies as a domestic industry." Pursuant to the Federal Circuit's order, on June 2, 1997, the Commission issued an order reopening the investigation, reinstating the administrative protective order, and requesting comments from the parties' counsel on the questions posed by the Federal Circuit

remand.[1]

I. Whether Zond Should Be Substituted for Kenetech

As indicated above, in its remand of this case to the Commission, the Federal Circuit directed the Commission to determine "whether Zond should be substituted for Kenetech." On June 12, 1997, Zond filed with the Commission a motion to intervene in this remand investigation. On July 8, 1997, the Commission issued an order permitting Zond to intervene in the remand proceeding as a co-complainant. Zond's motion effectively presented the Commission with the same issue posed by the Federal Circuit's first remand question. We have concluded that our decision on the motion to intervene is equally applicable to the first of the Federal Circuit's remand questions. Thus, in response to the first of the Federal Circuit's remand questions, we have determined that, rather than substituting Zond for Kenetech, Zond should be permitted to intervene as a co-complainant. *See* Order Granting Motion to Intervene of Patent Owner Zond Energy Systems, Inc. (July 8, 1997).

II. The Existence of a Domestic Industry

A. Introduction

The second question posed by the Federal Circuit in its remand is "whether [patent owner] Zond [Energy Systems Incorporated] qualifies as a domestic industry." This question is somewhat problematic since, strictly construed, it would unduly narrow the focus of the domestic industry inquiry to a consideration of the activities of only the patent owner, Zond. Accordingly, we have interpreted the Court's order as instead inquiring whether a domestic

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[1] *Notice of Reopening of Investigation*, Inv. No. 337-TA-376 (June 2, 1997).

industry exists by virtue of the activities of Zond *and* its licensees in practicing the claimed invention in the United States. This interpretation, which is reflected in our June 2, 1997, order requesting comments from the parties' counsel ("June 2 Order"), is consistent with Commission precedent.

B. Complainant's Position

Zond states that its activities and those of its licensees, including activities related to the operation, maintenance, and engineering consultation concerning domestically installed KVS-33 wind turbines, are sufficient to satisfy the domestic industry requirement of section 337, particularly in view of the level of activities previously found to support the Commission's determination that there is a domestic industry in this investigation.[2] According to Zond, the same domestic activities that were present when the Commission issued its opinion on violation of section 337 in September 1996, are still in place; they are simply being conducted by Kenetech and Trace acting under license from Zond, instead of by Kenetech alone.[3] In support of its position, Zond cites extensively to specific examples of these activities as attested to in Kenetech's quarterly reports and in certain declarations of Kenetech, Trace, and Zond officials attached to its submission.

C. Respondents' Position

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[2] Zond Energy Systems Inc.'s Comments on the Remand Issues Pursuant to the Commission's Order of June 2, 1997 ("Zond's Remand Comments"). Respondents have stipulated that the KVS-33 wind turbine practices (*i.e.*, embodies the invention of) claim 131 of U.S. Letters Patent 5,083,039 ("the '039 patent"), the patent in issue in this remand.

[3] Zond Remand Comments at 10.

Respondents assert that Zond, as the new owner of the '039 patent, must demonstrate that "it has domestic industry status," and that if it does not, the Commission must rescind the limited exclusion order issued in this investigation.[4] Respondents argue that mere ownership of the patent in issue is not sufficient to satisfy the domestic industry requirement, and appear to take the position that the Commission should define the domestic industry in terms of the activities of the patent owner alone. Respondents primarily discuss the fact that the Commission lacks information on the record regarding patent owner Zond's activities.[5] For example, respondents asserted that Zond has not submitted to the Commission any description of *its* present business and has not affirmatively stated that there is any current activity by it or either of its licensees with respect to the '039 patent.[6]

Respondents attempt to distinguish this investigation from *Certain Battery-Powered Ride-On Toy Vehicles and Components Thereof,* Inv. No. 337-TA-314 (*"Toy Vehicles"*),[7] upon which the Commission previously relied in rendering its domestic industry finding. According to respondents, the holding in *Toy Vehicles* was based on the fact that the complainant in that case was manufacturing new toy vehicles and selling them in competition with respondent's

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[4] Comments of Respondents Relative to Remand Questions in Response to Order Dated June 2, 1997 ("Respondents' Remand Comments") at 1-3. Respondents also make several arguments on subjects clearly beyond the scope of the remand (*e.g.*, claim interpretation, the definition of the article at issue) which we do not address herein.

[5] *Id.* at 8-9.

[6] Reply of Respondents to Submissions on Remand Pursuant to Commission Order of June 2, 1997 of Zond Energy Systems, Inc. and OUII [Office of Unfair Import Investigations] at 3-4.

[7] USITC Pub. 2420 (unreviewed portion of Initial Determination, December 1990, at 20-21).

infringing ones.[8] In this investigation, respondents contend, it is "completely illogical to exclude from the U.S. Enercon wind turbines which would compete only for business of persons and entities wishing to buy *new machines*, simply because [Kenetech] is maintaining and operating some of its old machines."[9]

D. The IA's Position

The Commission investigative attorney ("IA"), on behalf of the Commission's Office of Unfair Import Investigations, which is the office primarily responsible for monitoring Kenetech's quarterly reports, takes the position that there continues to be a domestic industry practicing the patent in issue. Specifically, the IA argues that the continued operation of the KVS-33 wind turbines, as reflected in Kenetech's quarterly reports, satisfies the domestic industry requirement of section 337.[10] The IA also notes that licensee Trace is utilizing certain manufacturing and laboratory assets located in former Kenetech facilities in California for, among other purposes, maintaining and operating existing KVS-33 wind turbines. Inasmuch as these activities were part of the domestic industry found by the Commission at the time of its August 30, 1996, final determination, when the facilities were still owned by Kenetech, the IA urges that Zond's licensees (*i.e.*, Kenetech and Trace) are engaged in activities which the Commission has already found sufficient to constitute a domestic industry.[11]

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[8] Respondents' Remand Comments at 5-6.

[9] *Id.* at 5 (emphasis in original).

[10] Brief of the Office of Unfair Import Investigations in Response to the Commission's Order of June 2, 1997 ("IA's Remand Comments") at 8.

[11] IA Remand Comments at 6-8; Brief of the Office of Unfair Import Investigations in Reply to the Comments of June 16, 1997 ("IA's Reply Comments") at 4.

E. Analysis

1. The Statutory Standard

The domestic industry provision in section 337 requires that "an industry in the United States, relating to the articles protected by the patent, . . . exist[] or [be] in the process of being established."[12] Section 337 defines such a domestic industry as follows:

> (a) (3) . . . an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, or mask work concerned - -
>
> (A) significant investment in plant and equipment;
>
> (B) significant employment of labor or capital; or
>
> (C) substantial investment in its exploitation, including engineering, research and development, or licensing.[13]

We have consistently held that the domestic industry inquiry under section 337 is not limited to the activities of the patent owner, but also involves the activities of any licensees.[14]

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[12] 19 U.S.C. § 1337(a)(2).

[13] 19 U.S.C. § 1337(a)(3). Section 337 thus establishes both an economic prong and a technical prong for the domestic industry inquiry. *See, e.g., Certain Variable Speed Wind Turbines and Components Thereof* at 22, 24.

[14] *See, e.g., Certain Static Random Access Memories*, Inv. No. 337-TA-341, Order No. 5. ("The question of whether complainant or its parent company owns the patent right may be in issue, but it is not relevant to the domestic industry. The owner of a patent is not the only possible complainant. A licensed domestic producer of an article that is protected by a U.S. patent may be the complainant.") Indeed, it has been the long-standing Commission practice to examine the activities of licensees in making domestic industry determinations. *Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same*, Inv. No. 337-TA-242 at 62, (Sept.1987); *Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same*, Inv. No. 337-TA-366 (Sept. 1995). In fact, in *Certain Diltiazem Hydrochloride and Diltiazem Preparations*, Inv. No. 337-TA-349, *aff'd* on appeal to the U.S. Court of Appeals for the Federal Circuit on other grounds as *Tanabe Seiyaku Co., Ltd. v. U.S. International Trade Commission*, 109 F.3d 726 (Fed. Cir. 1997), the *sole* domestic economic activities that constituted the domestic industry were those of the patent holder's licensee.

For this reason, we have interpreted the Court's domestic industry remand question as raising the issue of whether the U.S. activities of patent owner Zond and the activities of those authorized by it to practice the patent continue to satisfy the domestic industry requirement of section 337.[15]

2. The Law of the Case

In the order seeking comments on the remand questions, we stated:

> The Commission will consider it to be the law of the case that the level of activities found to be adequate to support the determination that there is a domestic industry in this investigation remains adequate to support a determination that there continues to be a domestic industry.[16]

With regard to the level of activities previously found adequate to support the existence of a domestic industry, the presiding ALJ determined in his final initial determination ("ID") that the domestic industry should be defined in terms of complete wind turbines, such that Kenetech's relevant investments regarding any and all "downtower" and "uptower" components were properly included in the domestic industry.[17] The ALJ found that the technical prong of the domestic industry requirement was satisfied in view of the parties' stipulation that the KVS-33 wind turbines (indisputably in operation in the United States) practice (*i.e.*, embody the

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Certain Diltiazem Hydrochloride and Diltiazem Preparations, Inv. No. 337-TA-349, Initial Determination (unreviewed portion) at 133-141. In this regard, we agree with the IA that the legislative history of the 1988 amendments to section 337 merely clarifies that section 337 relief is not available to a complainant that is unable to demonstrate the existence of a domestic industry through *either* its own activities *or* those of its licensees. *See* H.R. Rep. No. 100-40, 100th Cong., 1st Sess, p. 157 (1987) (emphasis added). *See* IA Remand Comments at 6-7.

[15] June 2 Order at 2.

[16] June 2 Order at 2.

[17] ID at 71. The entire KVS-33 wind turbine includes both so-called "uptower" components at the top of a tall tower (*e.g.*, fan blades) and so-called "downtower" components at the bottom of the tower (*e.g.*, power converters and other electrical/electronic components). *See* ID, FF V 1-6.

invention of) claim 131 of the '039 patent.[18] The ALJ also found that the economic prong of the domestic industry requirement was satisfied by Kenetech's: (a) significant investment in plant and equipment, which included investments in a manufacturing facility and related equipment, and in equipment used to monitor and regulate the operation and maintenance of, or perform repairs on, installed wind turbines; and/or (b) significant employment of labor and capital, which included the employment of people working in domestic operation and maintenance of installed wind turbines, the employment of people working in the fabrication of the wind turbines, and Kenetech's investment in materials.[19]

On August 30, 1996, we affirmed the ALJ's determination, but noted that around the time the ID issued, on May 29, 1996, Kenetech filed a petition for reorganization under Chapter 11 of the U.S. Bankruptcy Act.[20] We specifically discussed the lessened economic activity engaged in by Kenetech with respect to the KVS-33 wind turbines in rendering our finding on the existence of a domestic industry.[21] In particular, we noted that, although Kenetech apparently had ceased manufacturing the KVS-33 wind turbine, it was continuing to provide maintenance services with respect to installed KVS-33 wind turbines.[22] We determined that this level of activity was sufficient to satisfy the statutory domestic industry requirement.[23]

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[18] *Id.* at 72; *see also, Certain Variable Speed Wind Turbines and Components Thereof* at 22.

[19] *Id.* at 73-74.

[20] *Certain Variable Speed Wind Turbines and Components Thereof* at 22-26.

[21] *Id.*

[22] *Id.* at 23-24.

[23] As discussed above, in holding that the reduced activities of Kenetech were sufficient to satisfy the domestic industry requirement, the Commission cited *Toy Vehicles*, wherein we

3. The Current Status of the Domestic Industry

Licensee Kenetech continues to operate as a debtor-in-possession during the bankruptcy proceedings and continues to monitor and regulate the operation and maintenance of, or perform repairs on, a substantial number of installed KVS-33 wind turbines in the United States.[24] During the past three months, Kenetech has assembled and shipped hundreds of electrical/electronic and mechanical components, under license from Zond, to windplants for the maintenance of KVS-33 wind turbines.[25] In addition, Kenetech's March 27, 1997, report states

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concluded that the complainant was entitled to relief because of its past extensive research and development, and its current inventory of patented products sold as replacement parts (*i.e.*, a power pedal unit for a toy vehicle), notwithstanding that the complainant was no longer practicing the patent because of declining sales. *Id.* at 25. In particular, we stated in our *Wind Turbines* opinion:

> The same reasoning [as in *Toy Vehicles*] would appear to apply with respect to complainant's past activities in this investigation, *i.e.*, a domestic industry can be found based on complainant's *past* activities in exploiting the '039 patent. . . . Because [in the present investigation] it has been only a matter of months since complainant ceased its manufacturing activities with respect to the KVS-33, and because of complainant's substantial investment in plant and equipment, significant employment of labor and capital, and substantial investment in engineering, research and development related to the patented technology, as well as evidence that it continues to exploit the patent (albeit in a more limited fashion), we reaffirm our determination that there is a domestic industry in this investigation.

Id.

[24] Declaration of Steven A. Kern ("Kern Decl.") ¶ 2, filed with Zond's Remand Comments. With regard to the technical prong, the Commission previously has noted that claim 131 of the '039 patent was still being exploited by reason of the continued operation and maintenance of the KVS-33 wind turbines. *Certain Variable Speed Wind Turbines and Components Thereof* at 24. Since respondents have stipulated that the KVS-33 practices claim 131 of the '039 patent, satisfaction of the technical prong of the domestic industry requirement is not in dispute.

[25] *See* Declaration of Steven A. Kern on Behalf of Complainant Kenetech Windpower, Inc. Pursuant to Paragraph 4 of Limited Exclusion Order, dated July 9, 1997 ("July 1997 Report") at ¶ 5, Exhibit A; *see also*, Zond Remand Comments at 11-12; Kern Decl. ¶ ¶ 2, 5-8.

that three KVS-33 wind turbines were built in the three-month period from January through March, 1997.[26] Kenetech continues to maintain inventory for the assembly and completion of KVS-33 wind turbines at its facility in Livermore, California.[27] It has stated that it expects to assemble, complete, and sell additional KVS-33 wind turbines from its existing inventory, subject to the approval of the bankruptcy court.[28] Kenetech performed these activities under license from the patent owner Zond.[29] We find that these Kenetech activities alone demonstrate the continued existence of a domestic industry.

In addition, licensee Trace entered into agreements with Kenetech in February 1997 to provide maintenance services and spare parts to Kenetech [

].[30] In connection with this contract, Trace has purchased certain assets from Kenetech, including manufacturing and laboratory assets located in former Kenetech facilities in Livermore, California, [

].[31] Trace's

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[26] *See* Declaration of Steven A. Kern on Behalf of Complainant Kenetech Windpower, Inc. Pursuant to Paragraph 4 of Limited Exclusion Order, dated March 27, 1997 ("March 1997 Report").

[27] July 1997 Report at ¶¶ 6, 10.

[28] Kern Decl. ¶ 10.

[29] *See* Kern Decl. ¶ 3; Declaration of Dr. Amir Mikhail ("Mikhail Decl.") ¶ 2, filed with Zond's Remand Comments.

[30] *Id.* at ¶ 3.

[31] [

].

domestic activities also include [

].[32] [

]33

Based on the foregoing, the same level of domestic activity that the Commission previously found sufficient to satisfy the statutory domestic industry standard continues to exist. Specifically, the above-described activities of Kenetech [ ], under license from Zond, in connection with the assembly of KVS-33 wind turbines, as well as the maintenance of installed KVS-33 wind turbines, demonstrate the continued existence of the domestic industry in this case.[34] The domestic industry in a section 337 proceeding is comprised of the patentee and any licensees exploiting the patent.[35] Accordingly, we find that a domestic industry, now comprised of Zond, Kenetech, and Trace, continues to exist in this investigation.[36] The post-investigation

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[32] Erdman Decl. ¶¶ 5-6.

[33] Erdman Decl. at ¶ 4.

[34] *See Certain Airtight Cast Iron Stoves,* Inv. No. 337-TA-69, USITC Pub. 1126 (Jan. 1981); *Certain Airless Paint Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, USITC Pub. 1199 (Nov. 1981); *Certain Cube Puzzles*, Inv. No. 337-TA-112, USITC Pub. 1334 at 4 (Jan. 1983)(finding that the complainant's domestic investments regarding the inspection, testing, repair, and packaging of cube puzzles, and the design and production of cube puzzle molds, were sufficient to satisfy the domestic industry requirement.)

[35] To the extent that respondents contend that the Commission cannot use the economic activities of a licensee to reach a determination that a domestic industry exists in a section 337 investigation, they have overlooked the long-standing Commission practice that the domestic industry in a patent-based investigation is not restricted to the operations of the patent owner.

[36] We do not agree with respondents' argument that further proceedings before the ALJ are needed to gather sufficient information regarding the activities of patent owner Zond. Respondents' Remand Comments at 9-10. The information needed to answer the Court's remand questions is before the Commission in the form of Kenetech's quarterly reports and the declarations of Kenetech, Trace, and Zond officials submitted to the Commission. Indeed, as

developments, including Zond's purchase of the '039 patent, have not affected the viability of the exclusion order issued in this investigation.[37]

III. Respondents' Show Cause Motion

On June 27, 1997, respondents filed a motion for an order to show cause why the law firm of Howrey & Simon should not be deemed continuing counsel to Kenetech.[38]

A. Respondents' Position

Respondents argue that, in light of Howrey & Simon's failure to move to withdraw as Kenetech's counsel, the Commission is empowered to order that Howrey & Simon be deemed as continuing to represent Kenetech. In support of their position, they cite to, *inter alia*, *Certain*

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indicated above, Kenetech's quarterly reports alone provide a sufficient factual basis for the Commission to address the domestic industry question without referring the investigation to the ALJ. We are not persuaded by respondents' attempt to cast doubt upon the sufficiency of Kenetech's quarterly reports and the Kern declaration. Specifically, respondents argue that because there have been reports of electrical failures for certain KVS-33 turbine inverters, further proceedings are required to determine whether Kenetech retrofitted the inverters in a way that would cause them no longer to practice the '039 patent. Reply of Respondents to Submissions on Remand Pursuant to Commission Order of June 2, 1997 of Zond Energy Systems, Inc. and The Commission's Office of Unfair Import Investigations at 5-8. However, the Commission already has determined that the domestic industry should be defined in terms of KVS-33 wind turbines, including Kenetech's relevant investments in both downtower and uptower components. ID at 71. As noted, the parties have also stipulated that the model KVS-33 wind turbines practice claim 131 of the '039 patent. *Id.* at 72; *see also*, *Certain Variable Speed Wind Turbines* at 22.

[37] We do not find persuasive respondents' attempt to distinguish this investigation from *Toy Vehicles*. First, the Commission's reliance on *Toy Vehicles* is the law of the case and respondents' attempt to revisit the issue is untimely. Moreover, unlike the situation with respect to Enercon's wind turbines, the imported new vehicles at issue in *Toy Vehicles* were *not covered* by the patent in issue. *See Toy Vehicles* (unreviewed portion of Initial Determination, at 20-21, August 1991). Finally, as Zond noted, the Commission's domestic industry determination in *Toy Vehicles* was based only on the activities related to the old vehicles, which *were* covered by the patent, but which were no longer being manufactured. *Id.*

[38] Motion Docket No. 376-45C.

Memory Devices with Increased Capacitance and Products Containing Same.[39] Respondents stated that they were "of the strong conviction that the status of Howrey & Simon in this Investigation must be resolved *definitively* in order to maintain the integrity of the Investigation as well as the disposition of the present remand."[40]

B. Howrey & Simon's Position

On July 2, 1997, Howrey & Simon filed an opposition to respondents' motion, arguing that the show cause motion was moot in that: (1) on June 18, 1996, James Eisen, Vice President and General Counsel for Kenetech, notified the Commission that Kenetech was "not authorized to continue to retain Howrey & Simon in connection with this investigation....", and (2) the investigation has been concluded, notwithstanding the current limited remand in which Kenetech is participating *pro se* and for which it does not require formal legal representation.[41] On July 9, 1997, "in order to obviate expressed concerns on the part of respondents," Howrey & Simon submitted a formal notice of withdrawal as counsel to Kenetech.[42]

C. The IA's Position

On July 9, 1997, the IA submitted a response opposing the show cause motion. He

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[39] Inv. No. 337-TA-371 (*"Memory Devices"*) (Order No. 67, February 13, 1996 (denying a motion to withdraw that was filed only a short time before the scheduled commencement of the evidentiary hearing). Respondents cite also to Civil Local Rule 11-5(a) of the Northern District of California, the American Bar Association's Disciplinary Rule DR2-108(C), and the American Bar Association's Model Rule 1.16(c).

[40] Docket No. 376-45C at 4 (emphasis in original).

[41] Howrey & Simon's Response To Respondents' Motion For An Order To Show Cause Why The Firm Should Not Be Deemed Continuing Counsel To Kenetech, dated July 2, 1997.

[42] Howrey & Simon indicated that it did not file a formal withdrawal earlier because the investigation had already concluded and withdrawal appeared unnecessary.

argued that there does not appear to be any reason for the Commission to order that Howrey & Simon be deemed continuing counsel to Kenetech.[43] He noted that the investigation into whether a violation of section 337 occurred has been concluded, and opined that the rights of the parties are not jeopardized by Kenetech's lack of counsel.[44]

D. Analysis

We deny respondents' show cause motion for the reasons that: (1) Kenetech itself, more than one year ago, indicated that it is no longer authorized to retain the services of Howrey & Simon;[45] (2) Howrey & Simon has filed a notice of withdrawal as counsel to Kenetech; and (3) it does not appear that Kenetech or any other party will be prejudiced by Howrey & Simon's withdrawal as counsel to Kenetech.[46]

IV. Respondents' Petition for Rescission of the Limited Exclusion Order

On July 2, 1997, respondents filed a petition for rescission of the exclusion order issued in this investigation.

A. Respondents' Position

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[43] Brief of the Office of Unfair Import Investigations in Response to Respondents' Motion for an Order to Show Cause at 2.

[44] *Id.* at 2-4.

[45] *See* Eisen Letter, June 18, 1996 (attached to Howrey & Simon response of July 2, 1997).

[46] Thus, the circumstances in this case are unlike those in *Memory Devices* (cited to by respondents) in that the trial in this investigation has concluded. Therefore, unlike in *Memory Devices* where counsel attempted to withdraw on the eve of trial, Howrey & Simon's withdrawal in this investigation does not raise any due process considerations. To the extent that there are certain continuing issues before the Commission (*i.e.*, Kenetech is required to submit quarterly reports and the Commission is considering the remand question and rescission petition addressed herein), Kenetech can continue (as it has for the past year) to participate *pro se*, without prejudicing the rights of any party.

Respondents argue that: (1) the institution of this investigation was premised upon a specific misrepresentation by Kenetech in its complaint that "on information and belief Enercon has engaged in the sale of Enercon Model E-40 wind turbines for importation;" (2) the Commission's holding that a sale for importation occurred "follows from its uncritical adoption of the [ALJ's] Initial Determination;" (3) the ID's holding that there was a sale for importation is the result of a misreading of Uniform Commercial Code §2.106(1) by the ALJ, who "erroneously equated a 'sale' to '*a contract for* [a future] *sale*' in direct (albeit clearly inadvertent) derogation of established law"; and (4) now that the appeal has been remanded, "19 C.F.R. §210.76 (a)(2) affords a welcome opportunity for the Commission to make a serious and careful examination of whether it ever had jurisdiction in this Investigation to enter an exclusion order."[47] In short, respondents argue that the Commission initially and subsequently lacked *in rem* jurisdiction over respondents' accused devices and therefore lacks subject matter jurisdiction to determine patent infringement under section 337. [48] Based on the foregoing, and citing rule 210.76(a)(2), respondents seek rescission of the exclusion order on the grounds permitted by Federal Rule of Civil Procedure ("FRCP") 60(b), and in particular: subsection (1) regarding mistake; subsection (3) regarding fraud or misrepresentation; subsection (4) regarding a void judgment; and subsection (6), the catch-all provision.[49]

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[47] Petition of Respondents Pursuant to 19 C.F.R. 210.76(a)(2) for Rescission of Exclusion Order Herein Entered Under 19 U.S.C. § 1337(d) ("Respondents' Rescission Petition") at 4-14. Respondents believe that "such an examination should lead to a prompt rescission of the exclusion order and obviation of the need for appellate review." *Id.* at 5.

[48] *Id.* at 2.

[49] With respect to FRCP 60(b)(1), respondents urge that the ALJ made a mistake in determining that there was a sale for importation because he supposedly misjudged the facts and misapplied the U.C.C. *Id.* at 4-8. Respondents urge that the exclusion order should be rescinded under

B. Complainant's Position

Zond opposes the petition, arguing that it "merely urges reexamination of arguments that even Respondents must (and do) admit have been repeatedly raised before -- and rejected -- by the presiding Administrative Law Judge and the Commission."[50] According to Zond, respondents' petition "is no more than a poorly disguised request for reconsideration of the final rejection of the arguments in Respondents' petition: the Commission's decision to let stand, unreviewed, the determination that there has been a sale for importation and that the Commission has jurisdiction."[51] Zond contends that respondents already raised in their petition for review of the ALJ's final ID all of the same alleged legal and factual errors they now reassert in their petition for rescission. Zond further contends that, since respondents' petition is based on old factual and legal arguments, it fails to satisfy rule 210.76(a)(1), which requires that petitions for modification of outstanding orders be based on changed conditions of fact or law or the public interest.[52]

FRCP 60(b)(3) in light of Kenetech's purported misrepresentation of Enercon's intent to import. *Id.* at 13. Respondents assert that the Commission's determinations are void under FRCP 60(b)(4) because, in respondents' view, the Commission never had jurisdiction in light of the alleged legal error concerning the existence of a sale for importation. *Id.* at 14. Respondents also cite to the "catch-all" provision of FRCP 60(b)(6), but do not specify how that rule applies to their petition.

[50] Zond Energy Systems, Inc.'s Comments on Respondents' Petition for Rescission ("Zond's Rescission Response") at 1.

[51] *Id.*

[52] *Id.* at 2. With respect to respondents' arguments under FRCP 60(b)(1) (regarding judicial mistake), Zond notes that the Commission has already considered whether a mistake was made with respect to the ALJ's interpretation of the U.C.C., citing the fact that Commission rule 210.43(d)(3) requires that the Commission consider whether the ID contains, among other things, a clear error of material fact or an error of law. *Id.* at 3-5. With respect to FRCP 60(b)(3)(regarding fraud), Zond argues that respondents' accusations do not meet the burdens

C. The IA's Position

The IA argues that respondents' petition amounts to an attempt to reargue an issue that has already been decided by both the ALJ and the Commission, *viz.*, the issue of the existence of a sale for importation.[53] The IA maintains that the law on FRCP 60(b) "clearly states that the rule is not to be used to allow reconsideration of questions already litigated and decided."[54] He notes that courts will deny a motion filed under FRCP 60(b) if the motion merely revisits an issue that has already been disposed of, citing *Van Skiver v. United States*, 952 F.2d 1241 (10th Cir. 1991), *rehearing denied, cert. denied* 506 U.S. 828 (1992); *Lewis v. American Foreign Service Association*, 846 F. Supp. 77 (D.D.C. 1993); *Tann v. Service Distributors, Inc.* 56 F.R.D. 593 (E.D. Pa. 1972); and *United States ex rel. TVA v. McCoy*, 198 F. Supp. 716 (W.D.N.C. 1961).[55] Based on the foregoing, the IA submits that "entertaining the petition would be contrary

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imposed under subsection (3) that the alleged fraud be proven by clear and convincing evidence, and that the "fraud must have prevented the moving party from fully and fairly presenting [its] case," citing *Gonzalez v. Gannett Satellite Information Network, Inc.*, 903 F. Supp. 329, 332 (N.D.N.Y. 1995), *aff'd*, 101 F.3d 109 (Fed. Cir. 1996); *Atkinson v. Westburne Supply, Inc.*, 43 F.3d 367, 372-73 (8th Cir. 1994); and *Diaz v. Methodist Hospital*, 46 F.3d 492, 497 (5th Cir. 1995). *Id.* at 5-6. Zond also argues that a determination is not void under FRCP 60(b)(4) "merely because a party disagrees with the court's decision that it has jurisdiction." *Id.* at 6-7. Finally, Zond notes that relief under FRCP 60(b)(6) is available "only where exceptional circumstances prevent the moving party from seeking relief through other channels," citing *Atkinson v. Westburne Supply, Inc.*, 43 F.3d 367, 373 (8th Cir. 1994), and "exceptional circumstances are not present [merely because] a party is subject to potentially unfavorable consequences as a result of an adverse judgment properly arrived at." *Id.* at 7.

[53] Brief of the Office of Unfair Import Investigations in Response to Respondents' Petition for Rescission of Exclusion Order ("IA's Rescission Response") at 4-5.

[54] *Id.* at 3.

[55] *Id.* at 3-4.

to the well-established principle that FRCP 60 (b) is not to be used to relitigate settled issues."[56]

D. Analysis

Section 337(k)(2) and Commission rule 210.76(a)(2) implementing that statutory provision permit the Commission to grant relief from a previously issued order or determination on certain limited grounds. Specifically, the Commission may grant such relief: (1) on the basis of new evidence or evidence that could not have been presented at the prior proceeding; or (2) on grounds that would permit relief from a judgment or order under the Federal Rules of Civil Procedure.[57] Respondents do not rely upon the portion of rule 210.76(a)(2) that turns on new or previously unavailable evidence. Rather, as indicated above, respondents premise their petition upon FRCP 60(b).

We agree with Zond and the IA that respondents' petition merely reargues the "sale for importation" jurisdictional issue which has already been decided by both the ALJ and the Commission.[58] Indeed, respondents themselves acknowledge that they unsuccessfully raised this same issue on several occasions before the ALJ, and that they unsuccessfully sought

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[56] *Id.* at 5.

[57] 19 U.S.C. § 1337(k)(2), 19 C.F.R. § 210.76(a)(2).

[58] The only arguably new circumstance that respondents raise involves the allegation that the Commission's initiation of the investigation was based on a misrepresentation in Kenetech's complaint. However, respondents directly contested the statement in the complaint that they now challenge; they simply did not allege fraud. *See* Response of Respondent The New World Power Corporation ("New World") to the Complaint (Affirmative Defenses ¶15 at 26 and ¶4 to the Notice of Investigation at 31). Moreover, respondents have not even provided a *prima facie* showing of fraud on Kenetech's part. In addition, as Zond notes, the Commission's determination that there was a sale for importation was not based on the allegations contained in the complaint, but was based on the evidence against respondents compiled from their own statements and actions. *See* ID, findings of fact ("FF")1-61.

Commission review of this issue in the ALJ's final ID.[59] In fact, the ALJ considered and rejected respondents' jurisdictional arguments and determined that the Commission had jurisdiction to decide the matter.[60] The Commission declined to review that determination.[61]

Nor do respondents' mistake, fraud, and voidness allegations warrant re-opening the sale for importation issue. It is well-established that F.R.C.P. 60 (b) is not to be used to relitigate settled issues.[62] Accordingly, we decline respondents' invitation to revisit these jurisdictional

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[59] Respondents' Rescission Petition at 3-4. *See also* Response of Respondent The New World Power Corporation to the Complaint (Affirmative Defenses ¶15 at 26 and ¶4 to the Notice of Investigation at 31); Prehearing Statement of Respondents, The New World Power Corporation and Enercon GmbH (January 24, 1996) at 6-15; Respondents' Posthearing Brief (March 4, 1996) at 2-6; and Respondents' Petition Pursuant To 19 C.F.R. § 210.43 For Review Of Initial Determination (June 13, 1996) at 12-15.

[60] *See* Order No. 11, dated October 19, 1995; Order No. 13, dated November 20, 1995; Order No. 18, dated January 26, 1996; ID at FF 1-61.

[61] *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, Commission Order (August 30, 1996).

[62] *See, e.g., Glavor v. Shearson Lehman Hutton, Inc.*, 879 F. Supp. 1028, 1033 (N.D. Cal. 1994) (rejecting Rule 60(b) motion in which party merely reargued its previous motion and expressed its dissatisfaction with the court's prior decision), *aff'd*, 1996 U.S. Dist. Lexis 11581 (9th Cir. 1996); *Van Skiver v. United States*, 952 F.2d 1241 (10th Cir. 1991), *rehearing denied, cert. denied* 506 U.S. 828 (1992); *Lewis v. American Foreign Service Association*, 846 F. Supp. 77 (D.D.C. 1993); *Tann v. Service Distributors, Inc.* 56 F.R.D. 593 (E.D. Pa. 1972); *United States ex rel. TVA v. McCoy*, 198 F. Supp. 716 (W.D.N.C. 1961). In addition, when faced with FRCP 60(b)(1) motions, courts generally refuse to grant requests involving alleged judicial mistakes of a substantive nature. *See, e.g., Smith v. Evans*, 853 F.2d 155, 158 (3d Cir. 1988) (legal error without more cannot justify granting Rule 60(b) motion); *Hoult v. Hoult*, 57 F.3d 1 (1st Cir. 1995) (assertion of legal error is not a ground for relief under Rule 60(b)); *U.S. v. Williams*, 674 F.2d 310, 313 (4th Cir. 1982) (Rule 60(b)(1) motion not authorized when it is nothing more than a request that the court change its mind). We also agree with Zond that the Commission's jurisdictional determination is not void. Rather, as the Federal Circuit has stated:

> [T]he jurisdictional requirements of section 337 mesh with the factual requirements necessary to prevail on the merits. In such a situation, the Supreme Court has held that the tribunal should assume jurisdiction and treat (and dismiss on, if necessary) the merits of the case.

issues simply because the investigation has been remanded for the limited purpose of determining whether a domestic industry continues to exist.

Amgen Inc., v. USITC, 902 F.2d 1532, 1536, 14 USPQ2d 1734, 1737-1738 (Fed. Cir. 1990), citing, *inter alia, Bell v. Hood*, 327 U.S. 678, 682 (1946).