

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN HYDRAULIC EXCAVATORS
AND COMPONENTS THEREOF**

Investigation No. 337-TA-582

**NOTICE OF COMMISSION DECISION TO REVIEW
THE ADMINISTRATIVE LAW JUDGE'S FINAL INITIAL DETERMINATION;
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 the presiding administrative law judge's ("ALJ") final initial determination, Order No. 67, in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Jonathan Engler, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3112. Copies of non-confidential 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 at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. 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: On August 29, 2006, the Commission instituted this investigation, based on a complaint filed by Caterpillar Inc. ("Caterpillar") of Peoria, Illinois. The complaint alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain hydraulic excavators and components thereof by reason of infringement of U.S. Trademark Registration No. 2,140,606, U.S. Trademark Registration No. 2,421,077, U.S. Trademark Registration No. 2,140,605, and U.S. Trademark Registration No. 2,448,848. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337. The complaint named twenty one (21) firms as respondents. The complainant requested that the Commission issue a general exclusion order and cease and desist orders. Two respondents, Barkley Industries LLC ("Barkley") and Frontera Equipment Sales ("Frontera"), have been

found in default. Nineteen respondents have been terminated as a result of settlement agreements.

On September 9, 2008, the ALJ issued an initial determination, Order No. 67, granting Caterpillar's motion for summary determination concerning violations of section 337. He also issued his recommended determinations on remedy and bonding. No petitions for review of the initial determination were filed. On October 8, 2008, the Commission extended the date for determining whether to review the initial determination until October 30, 2008.

The Commission has determined to review Order No. 67. The Commission requests briefing by the parties, based on the record, on the following questions:

1. Has Caterpillar rebutted the presumption established by the U.S. Court of Appeals for the Federal Circuit in *Bourdeau Bros., Inc. v. International Trade Commission*, 444 F.3d 1317 (Fed. Cir. 2006), that its official U.S. dealers had apparent authority to sell gray market hydraulic excavators in the United States? If not, could Caterpillar rebut the presumption if given the opportunity to supplement its motion for summary determination of no violation? For background concerning the Commission's analytical approach in gray market cases, please refer to the Commission Opinion in *Certain Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487 (Aug. 25, 2008).
2. Did any of Caterpillar's overseas affiliates, subsidiaries, and/or official dealers sell gray market hydraulic excavators to or in the United States? If so, has Caterpillar rebutted, or if given the opportunity could Caterpillar rebut, the presumption that these dealers had actual or apparent authority to sell these excavators in the United States? Also, how many gray market sales were made to or in the United States by Caterpillar's overseas affiliates, subsidiaries, and official dealers?
3. Does the record indicate the total quantity of gray market sales made in the United States from 2000 to 2006? If not, could Caterpillar provide this information if given the opportunity to supplement its motion for summary determination of no violation?

In connection with the final disposition of this investigation, the Commission may issue an order that results in the exclusion of the subject articles from entry into the United States. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect

that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submission on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determinations on remedy and bonding which were made by the ALJ in Order No. 67. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to state the HTSUS numbers under which the accused products are imported. Written submissions and proposed remedial orders must be filed no later than close of business on Tuesday, November 18, 2008. Reply submissions must be filed no later than the close of business on Tuesday, November 25, 2008. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof with the Office of the Secretary on or before the aforementioned deadlines. Any person desiring to submit a document 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* 19 C.F.R. § 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All non-confidential 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 section 210.16 and 210.42-46 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.16; 210.42-46).

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: October 30, 2008