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An Introduction to Section 337 Intellectual Property Litigation at the U.S. International Trade Commission

In recent decades, parties asserting patent infringement and other intellectual property (IP) claims have increasingly looked to the U.S. International Trade Commission (ITC) as a fast-paced forum with authority to stop the importation of infringing products. This In Focus provides an overview of these “Section 337” (or “unfair import”) investigations; the special legal issues and remedies involved; the litigation process; and changes proposed by some in Congress.

Background on the ITC and Section 337

Congress created the ITC as the U.S. Tariff Commission in 1916 and gave the agency its current name in 1974. The ITC is an independent, nonpartisan agency led by six commissioners who are appointed by the President and confirmed by the Senate to nine-year terms. The President appoints one commissioner each to serve as chair and vice chair for a two-year term. No more than three commissioners may be of the same political party, and the chair cannot be of the same party as either the prior chair or the vice chair. In addition to unfair import investigations, the ITC conducts other trade-related investigations, including import injury investigations involving antidumping and countervailing duties. The ITC also administers the U.S. tariff schedule and provides information and analysis to the President and Congress.

The ITC’s authority to investigate unfair imports is governed by Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337). Section 337 expressly encompasses infringement of patents, copyrights, trademarks, and certain other “statutory” IP. It also extends generally to “unfair methods of competition and unfair acts,” which include trade-secret misappropriation and non-IP claims. Patent infringement claims comprise the vast majority of Section 337 cases, although recent years have seen an uptick in trade secret claims.

The ITC’s Section 337 caseload increased significantly in this century, with 127 ongoing investigations in 2021 and 128 in 2011, compared with 38 in 2001. These proceedings have also drawn congressional interest. One bill introduced in the 117th Congress—H.R. 5184, the Advancing America’s Interests Act (AAIA)—would amend Section 337 in various respects, as described below.

Legal Issues in Section 337 Cases

Just like plaintiffs in U.S. district court cases, complainants asserting IP claims under Section 337 must prove infringement or misappropriation of their IP rights. As a trade statute, however, Section 337 requires the ITC to consider special additional issues. The ITC also has different remedies at its disposal than may be available in district court.

Importation

For the ITC to find a violation of Section 337, the infringing articles must be imported into the United States, sold for importation into the United States, or sold within the United States after importation. Although respondents do not always contest importation, it can be challenging for complainants to determine whether and how the infringing articles are imported, especially if the articles are merely components of other products.

Domestic Industry

A crucial and often litigated condition for the ITC to find a violation of Section 337 is the so-called domestic industry (DI) requirement. For claims involving patents or other statutory IP, Section 337 essentially requires the complainant to prove there are both (1) articles that practice the IP (the “technical prong”) and (2) a U.S. industry relating to those articles consisting of significant investments in (a) plant and equipment; (b) labor or capital; or (c) exploitation activities such as engineering, research and development, or licensing (the “economic prong”).

By contrast, for claims involving other “unfair acts,” including trade-secret misappropriation, complainants meet the DI requirement by proving that the “threat or effect” of the respondents’ actions is “(i) to destroy or substantially injure an industry in the United States; (ii) to prevent the establishment of such an industry; or (iii) to restrain or monopolize trade and commerce in the United States.” Thus, unlike patent cases, complainants in trade secret cases must prove real or threatened injury to their DI, although the DI need not practice the asserted trade secrets.

It is often challenging to apply these tests to the facts of specific cases. One controversy is the extent to which non-practicing entities, which hold patents but do not practice the patented technologies, should be able to satisfy the DI requirement through patent licensing programs. The AAIA, which aims “to ensure that the resources of the [ITC] are focused on protecting genuine domestic industries,” would amend Section 337 to limit the ability of complainants to rely on either their own patent licensing programs or the activities of licensees to satisfy the DI requirement.

Remedies

Unlike U.S. district courts, the ITC cannot order money damages for IP infringement. Nonetheless, the ITC may issue powerful injunctive remedies. If the ITC finds a violation of Section 337, it typically enters a limited exclusion order, preventing specific persons from importing infringing articles into the United States. It may also enter general exclusion orders, not limited to specific persons, “to prevent circumvention” or address “a pattern of violation.”

U.S. Customs and Border Protection enforces exclusion orders at U.S. ports of entry.

In addition, the ITC may enter cease-and-desist orders (CDOs) enforceable by civil fines. CDOs are typically entered against respondents who have significant inventory or operations in the United States and might therefore be able to circumvent an exclusion order. In 2022, for instance, the ITC entered both a limited exclusion order and a CDO regarding wind turbine parts found to infringe General Electric's patent rights (Investigation No. 337-TA-1218).

Public Interest

Even if the ITC finds a violation of Section 337, it may tailor or refrain from issuing a remedy based on public-interest factors of “public health and welfare, competitive conditions ... , the production of like or directly competitive articles in the United States, and United States consumers.” In the wind turbine investigation noted above, for instance, the ITC made an exception to its remedies to allow for service and repair of already existing turbines.

The AAIA attempts to give more weight to the public-interest analysis. The bill would prevent the ITC from entering an exclusion order without finding that doing so is in the public interest. It would also allow the ITC to terminate an investigation early if it finds that excluding the accused articles would not be in the public interest.

Litigation Process for Section 337 Cases

In addition to the substantive issues above, Section 337 litigation has unique procedural characteristics, including the judges and parties involved, the fast pace, and the opportunities to appeal adverse decisions.

Judges and Parties

Each Section 337 investigation is assigned to one of the ITC's administrative law judges (ALJs). The parties to a Section 337 investigation include not only complainants and respondents, but also the ITC's Office of Unfair Import Investigations, which represents the public interest and may take an active role in the litigation.

Litigation Process and Appeals

Section 337 requires the ITC to resolve investigations “at the earliest practicable time,” and the ALJ must set a date for the ITC's final determination. This “target date” cannot be more than 16 months after institution of the investigation without the commissioners' consent. In FY2021, the average duration of investigations reaching a final determination on the merits was just longer than 18 months.

Civil procedure in Section 337 investigations is governed by the ITC Rules of Practice and Procedure and the ALJ's personal “ground rules.” As in district court cases, the parties conduct fact and expert discovery via depositions and other disclosures, albeit on an accelerated time frame.

Unless the investigation is terminated earlier—e.g., due to settlement—it proceeds to a trial-like evidentiary hearing governed by the Administrative Procedure Act. The ALJ presides over the hearing and makes findings via an initial determination. The commissioners may review the initial

determination at a party's request or of their own volition and may affirm, modify, reverse, or remand all or part of it. Otherwise, the initial determination becomes final.

A party may appeal a final determination to the U.S. Court of Appeals for the Federal Circuit. Section 337 also allows the President to disapprove a final determination within 60 days for any “policy reasons,” an authority delegated to the U.S. Trade Representative (USTR). The only such presidential disapproval in recent decades came in 2013, when the USTR set aside a CDO and exclusion order against Apple and some of its iPhone and iPad products found to infringe one of Samsung's patents. The USTR determined that public-interest factors regarding competitive conditions and U.S. consumers weighed against the ITC's injunctions, as the patent appeared to be a “standard-essential patent” on an invention necessary to comply with a technical standard for mobile devices.

The ITC has experimented with ways to resolve investigations even faster. An ongoing pilot program allows ALJs to enter interim initial determinations following a hearing on one or more significant issues that may facilitate settlement or dispose of the case. In addition, an “early disposition” program allows ALJs to hold a hearing and issue an initial determination on a single dispositive issue (e.g., importation or DI) within the investigation's first 100 days. ALJs usually deny requests for early disposition proceedings, often citing the complexity of the issues involved. To increase the use of these proceedings, the AAIA would direct the commissioners to *require* ALJs to conduct early disposition proceedings in appropriate cases.

Parallel Litigation

Complainants in a Section 337 investigation may assert their claims in U.S. district court as well as the ITC—for instance, to seek money damages in addition to ITC remedies. Respondents, however, have the right under 28 U.S.C. § 1659 to stay (i.e., pause) a parallel district court action to the extent that it involves the same issues as the ITC case until the ITC reaches its final determination.

Similarly, respondents in a Section 337 investigation may challenge the validity of an asserted patent both in the ITC case and by filing a petition for proceedings with the U.S. Patent Trial and Appeal Board (PTAB). Following new guidance issued in June 2022, PTAB cannot decline to hear these challenges on the basis of a pending Section 337 investigation as it had often done previously.

Considerations for Congress

As one of the main vehicles for high-stakes IP litigation involving imported products, Section 337 investigations have drawn congressional interest. Should Congress seek to change the existing Section 337 legal requirements and litigation process, it could consider amendments to the statute such as those envisioned by the AAIA. Congress could also consider whether trade-secret misappropriation claims should continue to be subjected to a different DI test than patent and other statutory IP claims.

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