

# AN UPDATED PRIMER ON PROCEDURES AND RULES IN 337 INVESTIGATIONS AT THE U.S. INTERNATIONAL TRADE COMMISSION

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## I. Introduction

A Chinese general once wrote that “[i]t is only one who is thoroughly acquainted with the evils of war who can thoroughly understand the profitable way of carrying it on.”<sup>1</sup> The protection and defense of intellectual property is not unlike war, and the successful party is the one that understands all of its options. The use of the United States International Trade Commission (ITC or Commission) in Washington, D.C. is one critical option that any owner of United States intellectual property must understand because it can provide relief to those owners whose rights are being infringed by products imported into the United States. Foreign companies that export products into the United States should also become familiar with ITC proceedings in order to adequately defend their interests. This article focuses on the most frequently used administrative mechanism for enforcing U.S. intellectual property rights against imported items: ITC investigations under Section 337 of the Tariff Act of 1930, as amended (Section 337).<sup>2</sup>

The white paper is designed to provide readers with a rudimentary understanding of a Section 337 action and the rules of engagement, including a detailed discussion on the “investigative” nature of a 337 proceeding, effects of the in rem jurisdiction, the domestic industry requirement, injury, the speed of the proceeding, remedies available, relief against defaulting respondents, counterclaims, presidential review, and actions after a Commission order becomes final. For a more detailed understanding than the one provided, one should refer to Title 19 of the Code of Federal Regulations,<sup>3</sup> and Donald Duvall’s treatise on the mechanics of Section 337 actions before the ITC.<sup>4</sup>

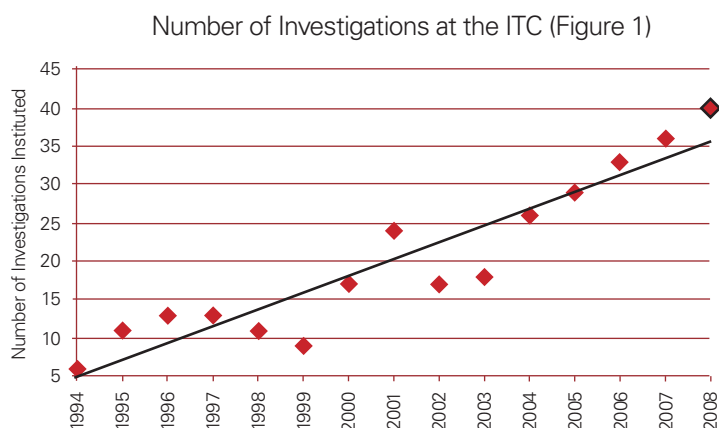
## II. Overview of Section 337

The term “Section 337” is shorthand for section 337 of the Tariff Act of 1930, which is codified at 19 U.S.C. § 1337.<sup>5</sup> Section 337 is administered by the ITC which is an independent government agency charged with administering a number of United States trade laws.<sup>6</sup> Under Section 337, the Commission has the authority to investigate and issue decisions on unfair methods of competition and unfair acts in the importation and/or sale of imported articles.<sup>7</sup> Such investigations are typically based on a complaint requesting an investigation, and it is filed by a U.S. company or a foreign company that qualifies for protection under Section 337.<sup>8</sup> The Commission may, however, conduct Section 337 investigations on its own initiative.<sup>9</sup>

There are five facets to a Section 337 investigation. The complainant who alleges a Section 337 violation, the respondents who are accused of violating Section 337, the ITC's investigative attorney (IA) who investigates on the Commission's behalf, the administrative law judge (ALJ) who hears evidence and may recommend action, and finally, the Commissioners who conclude the investigation and report to Congress and the President of the United States.<sup>10</sup> Failing to participate in the investigation, e.g., provide discovery and respond to pleadings, will likely result in a default judgment.<sup>11</sup>

#### A. The Scope of Section 337

Section 337 parallels section 5 of the Federal Trade Commission Act,<sup>12</sup> and broadly declares unlawful unfair methods of competition and unfair acts in the importation and/or sale of imported articles.<sup>13</sup> With limited exceptions, Section 337 was originally intended to be a "catch all" statute that provides relief to U.S. industries that can prove they are victims of unfair, injurious competition involving imported goods.<sup>14</sup> While acts such as dumping and unlawful subsidies are not within the scope of Section 337,<sup>15</sup> a variety of grievances related to imported articles can provide the basis for relief under Section 337.<sup>16</sup> Over the years, however, Section 337 has evolved almost exclusively into an intellectual property enforcement statute.<sup>17</sup> The cases appealed from the ITC to the Federal Circuit can sometimes result in substantive changes to patent law.<sup>18</sup>



The majority of Section 337 investigations have focused on either patent, unregistered trademark, or trade secret claims, in part because these types of rights are not subject to recordation with the U.S. Customs Service.<sup>19</sup> The majority of these investigations have involved alleged infringements of patents,<sup>20</sup> and the number is growing, from six in 1994 to forty in 2008, as shown in Figure 1.<sup>21</sup> The ITC, however, has also accepted Section 337 jurisdiction over both common law<sup>22</sup> and registered<sup>23</sup> trademark infringement, misappropriation of trade dress,<sup>24</sup> trade dress infringement,<sup>25</sup> false

designation of origin or source,<sup>26</sup> trademark dilution,<sup>27</sup> copyright infringement (including violations of the Digital Millennium Copyright Act),<sup>28</sup> mask work infringement,<sup>29</sup> and misappropriation of trade secrets.<sup>30</sup> The Commission has also held that violation of Section 304,<sup>31</sup> which requires a country of origin marking, is a violation of Section 337 when coupled with evidence of either consumer confusion or a U.S. consumer preference for domestically-produced articles.<sup>32</sup> Business torts such as passing off,<sup>33</sup> false advertising,<sup>34</sup> false representation of source,<sup>35</sup> tortious interference with contractual and customer relations,<sup>36</sup> product disparagement,<sup>37</sup> trade libel,<sup>38</sup> unfair pecuniary benefits,<sup>39</sup> unfair competition,<sup>40</sup> and fraudulent inducement to enter into a license,<sup>41</sup> have also been considered by the Commission in the context of Section 337 investigations.<sup>42</sup> The Commission also considers antitrust allegations under Section 337, but the allegations must not duplicate the elements of an antidumping action.<sup>43</sup>

If alleged, the Commission looks to general principles and precedents from case law in determining whether unfair competition or an unfair act has occurred under Section 337.<sup>44</sup> It will also consider whether the alleged infringement is protected by a § 271(e)(1) defense which allows infringing users if they "reasonably relate to the development and submission of information under a Federal Rule which regulates the manufacture, use or sale of drugs or veterinary biological products."<sup>45</sup>

## B. Effects of the eBay Decision

The Supreme Court's 2006 holding in *eBay Inc. v. MercExchange, LLC*<sup>46</sup> makes the ITC an increasingly attractive venue.<sup>47</sup> Before the *eBay* decision, the Federal Circuit had a long-standing general rule that courts would issue permanent injunctions against patent infringers unless there were extraordinary circumstances.<sup>48</sup> In *eBay*, the Supreme Court revived the four-factor test that had previously been considered automatic.<sup>49</sup> The test requires the patent holder to show the following to obtain injunctive relief: (1) he has suffered an irreparable harm; (2) legal remedies are inadequate; (3) the balance of hardships lies in his favor; and (4) the public interest weighs in favor of granting the injunction.<sup>50</sup> This weakening of the patent holder's ability to obtain permanent injunctive relief in district court provides a greater incentive for patent holders to enforce their rights in the ITC, where the remedies are general exclusion orders, limited exclusion orders, and cease and desist orders.<sup>51</sup>

## III. Basic Distinctions Between 337 and Federal Court Litigation

Several key features distinguish Section 337 proceedings from intellectual property litigation in the judicial system.<sup>52</sup> These distinctions are treated in more detail later, but as a preliminary matter it should be noted that:

- A. Section 337 investigations are in *rem* (their jurisdiction arises from the importation of products) and the Commission has nationwide personal jurisdiction;
- B. There must be an actual or prospective "domestic industry" dedicated to the exploitation of intellectual property rights sought to be protected under Section 337;
- C. The ITC attempts to complete all Section 337 investigations in a very short timeframe (around 12-18 months);
- D. The Commission can issue "general" exclusion orders that will bar importation of infringing products irrespective of their source;
- E. In certain types of cases, there must be a showing that the unfair acts or methods of competition threaten to, or have the effect of: (a) destroying or substantially injuring an industry in the United States; (b) preventing the establishment of such an industry; or (c) restraining or monopolizing trade or commerce in the United States;
- F. The remedies afforded by the Commission under Section 337 are injunctive in nature and do not include damages for the unfair acts or methods of competition;
- G. Section 337 investigations are government investigations that are not limited to or defined by the interests of the private parties;
- H. While counterclaims can be asserted in the course of a Section 337 investigation, they may be "removed" to the appropriate U.S. district court;
- I. The relief issued by the Commission is subject to disapproval by the President of the United States; and
- J. The Commission can issue exclusion orders and cease and desist orders without being subject to the *eBay* test for injunctive relief.

The Commission may also conduct a Section 337 investigation even though there is "parallel" litigation in the judiciary concerning the same parties and intellectual property rights.<sup>53</sup> This situation is generally referred to as "dual-path litigation," and can give rise to important considerations regarding litigation tactics and expenses. Section 337, however, gives respondents the right to a stay of the parallel litigation in a district court if they so request.<sup>54</sup>

## IV. Detailed Discussion

### A. The “Investigative” Nature of Section 337 Proceedings

#### 1. The Mechanics of Section 337 Investigations

Although typically based on a complaint filed by a private party, Section 337 investigations are instituted and conducted by the Commission.<sup>55</sup> An investigation resembles private litigation and the Commission’s Rules of Practice and Procedure (Rules) are based on the Federal Rules of Civil Procedure.<sup>56</sup> The involvement of an investigative agency, however, gives rise to several distinctions between private litigation and Section 337 proceedings. These distinctions are important and must be kept in mind by those more accustomed to litigation in federal courts.<sup>57</sup>

The filing of a Section 337 complaint by a complainant does not automatically result in an investigation by the Commission even though investigation is statutorily mandated once a complaint is filed, under oath, alleging a violation.<sup>58</sup> This, however, is subject to the provisions in the rules requiring the Commission to “determine whether the complaint is properly filed” by examining the complaint “for sufficiency and compliance with the applicable sections of this Chapter” and “identify[ing] sources of relevant information,” to “assure itself of the availability thereof, and, if deemed necessary, prepare subpoenas therefore, and give attention to other preliminary matters.”<sup>59</sup> Thus, the Commission conducts a pre-institution investigation to determine if the complaint complies with the Commission’s Rules and, more importantly, provides an adequate basis for institution of an investigation.<sup>60</sup> This pre-institution investigation generally takes thirty days, but can take longer where the complaint is accompanied by a motion for immediate temporary relief.<sup>61</sup> The Commission then votes on whether to institute an investigation and, if a motion for temporary relief has been filed, whether to accept the motion.<sup>62</sup>

The complaint must provide a basis for the commitment of public resources to an investigation and therefore, the Rules require that a complaint contain a substantial amount of detail and supporting exhibits.<sup>63</sup> A patent-related complaint must support the allegation that the accused imported item or foreign manufacturing process is covered by the asserted patent. Put simply, notice pleading is not sufficient.<sup>64</sup> Therefore, preparation of a Section 337 complaint is typically more expensive and requires a greater commitment of resources than the preparation of a district court complaint.

A complainant must also determine which products it seeks to exclude if the ITC issues a favorable ruling in view of the Federal Circuit’s recent decision in *Kyocera Wireless Corp. v. Int’l Trade Comm’n* (better known as the dispute between Broadcom and Qualcomm).<sup>65</sup> In this saga, Broadcom initiated an investigation at the ITC, accusing various Qualcomm chips and chipsets of infringing several patents.<sup>66</sup> However, Broadcom did not name any of Qualcomm’s customers who actually used Qualcomm chips and chipsets in their mobile devices, as respondents to the complaint.<sup>67</sup> The ITC issued a limited exclusion order covering both Qualcomm’s chips and chipsets and downstream products imported by Qualcomm’s customers incorporating Qualcomm’s chips and chipsets.<sup>68</sup> Qualcomm and its customers appealed that decision to the Federal Circuit.<sup>69</sup> The Federal Circuit concluded that limited exclusion orders under Section 337(d)(1) only apply to respondents who are named in the complaint and found to import infringing products.<sup>70</sup> Furthermore, if a complainant seeks an exclusion order covering infringing products imported by non-respondents, the complaint must prove that it is entitled to a general exclusion order.<sup>71</sup> In light of *Kyocera*, complainants should preferably name respondents that directly import the alleged infringing products as well as respondents who incorporate the alleged infringing products in the downstream products that are imported. If the complainant is not careful in crafting its complaint, the remedy awarded could be different than what was expected.

Once a Section 337 investigation is instituted, an ITC Administrative Law Judge (ALJ) is assigned to the investigation. The ITC currently has five ALJs who exclusively handle Section 337 investigations, Chief Judge Paul Luckern,<sup>72</sup> Judge Charles Bullock,<sup>73</sup> Judge Carl Charneski,<sup>74</sup> Judge Theodore Essex,<sup>75</sup> Judge Robert Rogers,<sup>76</sup> and Judge Edward Gildea.<sup>77</sup> Within forty-five days of the commencement of the investigation, the ALJ will set a “target date” for completion of the investigation.<sup>78</sup> Except for issuing an order of violations, the ALJ’s role mirrors that of a district court judge and includes presiding over discovery, motions proceedings, and the hearing on whether a violation of Section 337 has been established. The ALJ issues “Initial Determinations” on such matters as whether a violation of Section 337 has been shown, whether temporary relief should be granted, whether summary judgment should be granted on any or all of the issues raised in the investigation, and whether an investigation should be terminated on the basis of a settlement or consent order agreement.<sup>79</sup> Initial Determinations become determinations of the Commission unless the Commission reviews them.<sup>80</sup> With certain limited exceptions, an ALJ’s decision on motions may not be appealed to the Commission before the ALJ issues an initial determination on whether a violation of Section 337 has been shown.<sup>81</sup>

An especially unique aspect of Section 337 investigations is the participation of an Investigative Attorney (IA) from the Commission’s Office of Unfair Import Investigations (OUII).<sup>82</sup> The IA enjoys full party status in the investigation and participates in discovery, motions practice, briefings, and hearings before the ALJ.<sup>83</sup> The chief roles of the IA are to ensure that a complete record is developed, to provide “objective” advocacy on issues that arise in the course of the investigation, and to safeguard the “public interest” in the investigation.<sup>84</sup> Like the private litigants in Section 337 investigations, the IA cannot engage in ex parte communications with the ALJ, Commissioners, or the Office of the General Counsel once an investigation is instituted.<sup>85</sup> The presence of this “third party,” who can alternatively or simultaneously be a friend or a foe to the private litigant, is a feature of Section 337 litigation that is most startling to counsel who are not familiar with the ITC.

The decision to review determinations of the ALJ on Section 337 matters are made by a vote of the Commissioners.<sup>86</sup> There are six Commissioners at the ITC.<sup>87</sup> Information about the commission can be found at [www.usitc.gov](http://www.usitc.gov). Each Commissioner is nominated by the President and confirmed by the U.S. Senate.<sup>88</sup> No more than three Commissioners may be from any one political party.<sup>89</sup> Assistance and advice to the Commissioners is provided by the staff of the individual commissioners and by the Commission’s Office of the General Counsel.

Appeals from decisions by the Commission are heard by the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit uses *Markman v. Westview Instruments, Inc.*<sup>91</sup> to interpret the claims in an ITC appeal de novo, which means they consider the patent’s claims as if no decision had been rendered by the ITC.<sup>92</sup> The Federal Circuit can vacate the Commission’s rulings on the issue of infringement and remand the case for findings and re-determination with respect to literal infringement and infringement under the doctrine of equivalents.<sup>93</sup> Of course, the Federal Circuit has also recently affirmed the Commission’s decision in a number of cases.<sup>94</sup>

## **2. Parallel Litigation, Non-Exclusive Jurisdiction and *Res Judicata* / Collateral**

Before the amendments made by the General Agreement on Tariffs and Trade (GATT) Act that became effective in 1995, a respondent in a Section 337 action was faced with the possibility of simultaneous or parallel litigation at the ITC and in the American judicial system.<sup>95</sup> GATT gave Section 337 respondents relief from the prospect of simultaneous litigation.<sup>96</sup>

GATT amended Title 28 to provide a respondent, who is also a party to a civil district court action, with the ability to seek a mandatory stay of the district court proceedings with respect to any claim that involves the same issues that are involved in the proceedings before the Commission.<sup>97</sup> The stay of district court proceedings will last until the Commission determination becomes final.<sup>98</sup> In order to invoke the automatic stay of district court proceedings, however, the request for the stay must be made within either (a) thirty days after a party is formally named as a respondent by the Commission, or (b) thirty days after the defendant in a district court action is effectively served, whichever is later.<sup>99</sup>

The Federal Circuit interpreted the meaning of a “final” determination by the Commission according to § 1659 in the case of *In re Princo Corp.*<sup>100</sup> The issue before the court was whether the district court had to stay proceedings after an initial decision by the full Commission or wait until the proceedings truly ended.<sup>101</sup> The Federal Circuit held that “§1659 requires that the stay of district court proceedings continue until the Commission proceedings are no longer subject to judicial review.”<sup>102</sup>

After the stay of district court proceedings is lifted, the record from the Section 337 proceedings is given to the district court for the court’s use, under a suitable protective order, to the extent permitted by the Federal Rules of Evidence and the Federal Rules of Civil Procedure.<sup>103</sup> This ensures that the parties’ efforts in the Section 337 proceeding and the Commission’s determinations, will have an effect on the parties’ efforts and strategies in the district court proceeding.

However, the Commission’s findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws in particular contexts. Therefore, it seems clear that any disposition of a Commission action by a federal court should not have a res judicata or collateral estoppel effect in cases before such courts.<sup>104</sup>

Because of Section 337’s legislative history, and the federal courts’ exclusive original jurisdiction over issues of patent validity,<sup>105</sup> federal courts have been unwilling to give dispositive weight to determinations of a product’s non-infringement by the ITC.<sup>106</sup> However, if a trademark owner files parallel actions with the Commission and in federal court, it is likely that the Commission’s determination under Section 337 will be binding on the trademark owner and be accorded res judicata effect by the federal court because the legislative history of 337 does not apply and the federal courts do not have exclusive jurisdiction over trademarks.<sup>107</sup> For example, the Second Circuit has held that, “ITC adjudications of unfair trade practice and trademark infringement causes of action are entitled to res judicata effect.”<sup>108</sup>

## **B. Effects Of In Rem Jurisdiction Over Products and “Reimported” Products**

Section 337 investigations are in rem which means that the Commission’s jurisdictional basis arises from the products.<sup>109</sup> The products form the basis of the jurisdiction because the unfair act addressed by Section 337 is the “importation of articles into the United States.”<sup>110</sup> The Commission also has nationwide personal jurisdiction and therefore domestic respondents from all over the country can be joined in a single action.

The *in rem* nature of the investigations is reflected in the titles and the titles typically show a listing of products, components of products, or manufacturing processes.<sup>111</sup> Because of this, titles of investigations can appear awkward. However, along with the Notice of Investigation published in the Federal Register, the title of an investigation is intended to clearly define the subject of the investigation and provide the public with notice that certain products or processes are being considered in a Section 337 investigation.

The fact that imported products form the basis of the Commission’s jurisdiction is important because it directly relates to parties that produce the accused products, sell them in the United States, or otherwise participate in the alleged unfair acts. These parties, or respondents, can all be drawn into a single investigation conducted in Washington, D.C., and subjected to nationwide and foreign discovery due to this jurisdiction.



The *in rem* jurisdiction of the Commission also provides a basis for the issuance of exclusion orders against products, irrespective of their source. For example, in *In re Certain Digital Multimeters, and Products with Multimeter Functionality*,<sup>112</sup> the complainant secured a “general exclusion order” against infringing products without limitation to specific manufacturers whose products were actually considered in the course of the investigation.<sup>113</sup>

### 1. “Reimported” Products

In an investigation called *In re Certain Sputtered Carbon-Coated Computer Disks and Products Containing Same, Including Disk Drives* (the *Computer Disks* investigation),<sup>114</sup> the question arose as to whether “reimported” products are also subject to the ITC investigatory powers under Section 337.<sup>115</sup> Among the accused computer disks in the *Computer Disks* investigation were disks that were manufactured in the United States, exported for assembly into disk drives, and subsequently “reimported” into the United States in finished disk drives and computers.<sup>116</sup> The Commission was thus faced with the question of whether allegedly infringing products that are manufactured in the United States could be the subject of a Commission investigation under Section 337 when the U.S.-manufactured products are reimported back into the United States.<sup>117</sup> The Commission concluded that it has jurisdiction under Section 337 to determine if the reimportation of such articles violates Section 337 and requires issuance of a remedy by the Commission.<sup>118</sup> In other words, the fact that an accused, imported product was originally manufactured in the United States will not protect the product from an investigation by the Commission under Section 337.

On a practical level, the *Computer Disks* decision is a matter of concern for the many non-U.S. companies that integrate U.S.-manufactured components into products that are then shipped into the United States. In short, the U.S. origin of allegedly infringing components will not avoid the ITC’s investigatory powers under Section 337. On the other hand, the *Computer Disks* decision points out to owners of U.S. patents and other U.S. intellectual property rights that an ITC investigation under Section 337 is a potential source of relief against imported items that contain infringing U.S. components.

### C. The Domestic Industry Requirement

In order to obtain relief under Section 337, complainants must show that a U.S. industry that is dedicated to exploitation of the asserted intellectual property rights either exists or is in the process of being established.<sup>119</sup> For example, where the complaint is based on a patent, the complainant must show that the asserted patent rights qualify as “domestic industry” activities.<sup>120</sup> The meaning of the term “domestic industry” may seem obvious. It is not. Under Section 337, the term “domestic industry” has a very specific and oftentimes confusing meaning. The meaning is different from general usage and even differs from the definition used by the ITC in its application of U.S. anti-dumping laws.

Confusion over Section 337’s domestic industry requirement has led many foreign owners of U.S. intellectual property to mistakenly assume that their rights cannot be protected under Section 337. The confusion has also led to the mistaken assumption that any U.S. company that owns a patent or other intellectual property right can seek relief under Section 337.

The domestic industry requirement has both “technical” and “economic” prongs.<sup>121</sup> The technical prong requires activities based in the United States, that exploit the specific intellectual property rights that are being asserted. Mere ownership of the rights is not enough. This can be outlined in the following hypothetical:

The Cushman Company (Cushman) manufactures computer chipsets in the United States and owns a U.S. patent that relates to chipsets. However, none of the company's present or planned activities use or relate to the patented chipsets. There are also no present or prospective licensees under the patent. Put simply, Cushman's chipsets patent is not exploited or sought to be exploited by the company or any licensees.

Darby Enterprises (Darby) is a foreign company that exports chipsets to the United States which infringe the patent owned by Cushman. Cushman threatens Darby with a Section 337 complaint.

Is Darby at risk of having its products excluded from the United States under Section 337? No, because Cushman has no domestic industry that qualifies for relief under Section 337. There is no question that under the common U.S. usage of the term "domestic industry," Cushman would be classified as a domestic U.S. computer chipset manufacturing industry. But, as pointed out above, Section 337 uses the term "domestic industry" in a precisely defined manner.<sup>123</sup>

A surprisingly common misconception is that Section 337 cannot be used by foreign companies. The fact that a foreign company owns the intellectual property to be asserted is irrelevant to the domestic industry requirement. Again, the following hypothetical may lead to a better understanding of this point:

Darby Enterprises (Darby) owns a U.S. patent that relates to computer chipsets modems. Darby conducts no activities in the United States. However, Darby has a U.S. licensee that manufactures chipsets in the United States. These chipsets are covered by Darby's U.S. patent.

The Cushman Company (Cushman) assembles computer chipsets in the United States, but the Company uses imported components. Both the chipsets and components infringe Darby's U.S. patent.

Can Darby seek to exclude Cushman's imported components? Yes. It is very likely that the activities of Darby's U.S. licensee will satisfy Section 337's domestic industry requirement. The fact that a U.S. patent is owned by a foreign company does not preclude a finding that there is a domestic industry capable of obtaining relief under Section 337.

On the other hand, the economic prong "concerns the investment in domestic industry."<sup>124</sup> In order to satisfy the economic prong of the domestic industry requirement, the complainant must prove any of the following:

1. Significant investment in plant and equipment;
2. Significant employment of labor or capital; or
3. Substantial investment in its exploitation [of the IP right], including engineering, research and development, or licensing.<sup>125</sup>

Therefore, although there is a domestic industry requirement under Section 337, it is not necessary that a company must actually engage in manufacturing activities in the United States.<sup>126</sup>

Cases have shown a trend toward reducing the amount of domestic activity needed to satisfy the domestic industry requirement.<sup>127</sup> For example, in the 1997 *In re Digital Satellite Systems*, ALJ Paul Luckern found that the complainant had satisfied the economic prong of the domestic industry requirement because he had



invested a substantial amount of money in the licensing program.<sup>128</sup> In that investigation, the complainant only had five employees in the United States.<sup>129</sup> The ALJ further found that Section 337 “does not require a complainant to manufacture the patented product nor does it require that a complaint show that a product covered” by the patent was made by the complainant’s licensee.<sup>130</sup> Former ALJ, Sidney Harris, also reached a similar holding in *In re Semiconductor Chips* in 2002.<sup>131</sup>

In the 1999 case of *In re Graphic Display Controllers*, ALJ Debra Morris found that the complainant satisfied the economic prong despite having stopped manufacturing and having failed to show sales for several months before trial of the complainant’s patented product.<sup>132</sup> Additionally, the complainant no longer employed any research and development personnel and had eliminated the division that arguably practiced the patent at issue.<sup>133</sup> The court held that because the complainant had invested substantial capital in developing and manufacturing the product, was still offering the product for sale and intended to continue doing so, and had licensed the patent at issue, the complainant satisfied the economic prong of the domestic industry requirement.<sup>134</sup> Furthermore, in *In re Removable Electronic Cards*,<sup>135</sup> the Commission found that there is no requirement that any products manufactured by the alleged domestic industry actually compete with respondents’ allegedly infringing products.<sup>136</sup>

More recently, in *In re Light Emitting Diodes*, ALJ Paul Luckern found the domestic industry requirement satisfied based solely on licensing activities, despite only having a single employee (the complainant).<sup>137</sup> In particular, the order stated that “[p]roof of substantial investment could include factors such as the number of companies that are licensed, licensing revenues, licensing costs, the number of employees involved in the licensing process, legal fees, and whether licensing activities are active and on-going.”<sup>138</sup> The order seemed to open up the possibility that investment in outside law firms to litigate the asserted patent could qualify to satisfy the domestic industry requirement.<sup>139</sup>

In the *In re Light Emitting Diodes* decision, on domestic industry being supported by substantial investment due to licensing activities, Judge Luckern wrote:

There is no bright-line test to determine what constitutes a ‘substantial investment’ in licensing of the asserted patent(s) and the scope of the domestic industry in an investigation is determined on a case by case basis. Proof of substantial investment could include factors such as the number of companies that are licensed, licensing revenues, licensing costs, the number of employees involved in the licensing process, legal fees, and whether licensing activities are active and on-going. In particular, receipt of royalties is ‘an important factor in determining whether the domestic industry requirement is satisfied.’ With respect to this, the Commission has stated the following:

We emphasize that there is *no minimum monetary expenditure* that a complainant must demonstrate to qualify as a domestic industry under the ‘substantial investment’ requirement of [section 337(a)(3)(C)]. We agree with the parties that *the requirement for showing the existence of a domestic industry will depend on the industry in question and the complainant’s relative size*. Moreover, we agree with the parties that there is *no need to define or quantify the industry itself* in absolute mathematical terms.

Thus, evidence or testimony of the complainant that demonstrates the expenditure of non-monetary resources also supports a finding of substantial investment. A precise accounting is not necessary, as most people do not document their daily affairs in contemplation of possible litigation.<sup>140</sup>

However, the Commission may not find the domestic industry requirement satisfied in every situation. For example, in the 2008 investigation of *In re Stringed Musical Instruments and Components Thereof*,<sup>141</sup> the Commission found that total expenditures of \$8,500 (as found by the ALJ) for developing five prototypes and “sweat equity” failed to qualify as a substantial investment.<sup>142</sup> The Commission noted that “[w]hile [it does] not discount the concept of sweat equity, documentation thereof in this case lacked sufficient detail.”<sup>143</sup> The Commission also articulated that while “[a] precise accounting is not necessary . . . evidence or testimony would have to demonstrate a sufficiently focused and concentrated effort to lend support to a finding of a ‘substantial investment.’”<sup>144</sup> With respect to the complainant’s licensing efforts, the Commission noted that while the complainant “attended trade shows and engaged in discussions with various manufacturers,” the complainant’s pre-complaint licensing efforts did not constitute a substantial investment.<sup>145</sup> The Commission also held that “[w]hile a consummated license achieved prior to filing a complaint is not a prerequisite for us to give weight to pre-complaint efforts to license a patent, the absence of any actual licenses prior to a complaint is a factor we consider.”<sup>146</sup>

The domestic industry issue can become difficult when less than all of the activities that exploit a complainant’s rights take place in the United States. Such situations are quite common in this era of international manufacturing activities. In such instances, the Commission generally looks to the nature and significance of the activities performed in the United States.<sup>147</sup> One method of doing this, albeit not the only method, is a comparative “value-added analysis.”<sup>148</sup> A value-added analysis compares the amount of value attributable to foreign activities with the value attributable to activities conducted in the United States.<sup>149</sup> In, *In re Certain Microlithographic Machines and Components Thereof*, however, ALJ Charles Bullock held that while a comparative analysis applies to the first two tests for whether a domestic industry exists (i.e., “significant investment in plant and equipment” or “significant employment of labor or capital”), a comparative analysis should not apply to the third test (i.e., whether there is “substantial investment” in the exploitation of the intellectual property right at issue).<sup>150</sup> The third test only requires an examination of U.S. activities in absolute terms.<sup>151</sup> As indicated above, the key concern is that domestic industry activities must consist of more than what a mere importer of goods would perform.<sup>152</sup> Thus, mere marketing activities may fail to constitute a domestic industry.

More recently, the Commission applied value-added analysis in *In re Certain Male Prophylactic Devices*.<sup>153</sup> In *In re Certain Male Prophylactic Devices*, complainant Portfolio Technologies Inc. (PTI) imported unfinished condoms from China.<sup>154</sup> The unfinished condoms were lubricated, foiled, and tested in the United States.<sup>155</sup> The Commission ultimately found a value added of thirty-four percent based on the per-unit cost of the imported bulk condoms and the per-unit cost of lubricating, foiling and testing the condoms.<sup>156</sup> The Commission held “the domestic activities in which PTI invested create ‘value added’ to the bulk product imported from China,” “which under the circumstances tends to support the finding of a domestic industry.”<sup>157</sup>

Where more than one intellectual property right is considered in a single investigation, or more than one product is alleged to be the subject of domestic industry activities, the domestic industry analysis can become quite complex. For example, in the 1987 investigation of *In re DRAMs*,<sup>158</sup> the Commission found that five of the complainant’s patents were infringed by the respondents. Rather than parse out all the distinct and overlapping domestic activities undertaken to exploit the patents, the Commission found that there was a single domestic industry devoted to a single commercial product, DRAMs.<sup>159</sup> The Commission’s determination was based, in part, on determinations that: (1) several of the patents were used in the production of more than one “density” of DRAMs; and (2) the same processes and equipment were frequently used in manufacturing DRAMs of differing densities.<sup>160</sup> In essence, the Commission found one unified domestic industry even though DRAMs of differing densities were not always interchangeable.<sup>161</sup> As a note, the approach to defining

the domestic industry in the DRAMs case may not always be appropriate, and a complainant can find itself burdened with the task of allocating domestic activities to specific intellectual property rights and products. However, complainants in more recent cases that involve more than one intellectual property right generally have not had to allocate domestic activities to specific intellectual property rights.<sup>162</sup>

#### **D. Injury**

If the investigation is not based on patents, copyrights, mask works or federally registered trademarks, the complainant must prove that the alleged unfair competition or unfair acts will threaten to or actually:

1. Destroy or substantially injure an industry in the United States;
2. Prevent the establishment of such an industry; or
3. Restrain or monopolize commerce in the United States.<sup>163</sup>

Unlike the domestic industry requirement, the best starting point for an injury analysis is to determine whether the domestic industry's articles and the accused imported articles are, or are likely to be, competing in the same markets for the same customers.<sup>164</sup> In other words, there must be a nexus between the substantial injury and the unfair act.<sup>165</sup>

Instead of looking for any particular type of injury, the Commission examines each investigation on its own particular facts.<sup>166</sup> The Commission considers such factors as trends in employment, production, capacity, corresponding market shares of complainant and respondent, levels of importations, and pricing.<sup>167</sup> No one factor is dispositive and these factors are examined in the context of the specific industry and market under consideration.<sup>168</sup>

For the first inquiry, concerning whether the respondent's unfair acts will substantially injure the domestic industry, the Commission considers a broad range of factors.<sup>169</sup> Such factors include "a respondent's volume of imports and penetration into the market, the complainant's lost sales, underselling by the respondent, and the complainant's declining production, profitability and sales."<sup>170</sup>

The Federal Circuit has declined to specify a legal standard regarding what is required to establish substantial injury,<sup>171</sup> but has rejected the standard that unfair methods or acts that result in "conceivable losses of sales" establish a tendency towards substantial injury.<sup>172</sup> In short, there should be something more than merely speculative losses.<sup>173</sup>

The second and third inquiries, regarding preventing the establishment of an industry and restraining or monopolizing commerce, are self-explanatory.

#### **E. Procedures to Ensure Speed of Section 337 Investigations**

The Commission is required to conclude an investigation "at the earliest practicable time after the date of publication of notice of such investigation."<sup>174</sup> In other words, there are no pre-established time limits and yet, "[t]o promote expeditious adjudication," the Commission must establish a "target date" for completion of the investigation and a target date must be established by the ALJ within forty-five days from the initiation of an investigation.<sup>175</sup> For cases with target dates of less than fifteen months the initial determination by the ALJ must be issued at least three months before the target date.<sup>176</sup> For longer cases, it is a minimum of four months.<sup>177</sup>

This fast pace distinguishes Section 337 investigations from district court actions, which can take years to complete.<sup>178</sup> For example, the U.S. District Court for the District of Columbia currently averages forty-four months or three years and eight months from filing to trial for a civil case.<sup>179</sup> In 2008, the average length of a

completed ITC Section 337 investigation increased to 16.7 months, the shortest completion was six months and the longest was twenty-eight months.<sup>180</sup> Depending on a party's point-of-view, the speed of Section 337 investigations can be their most attractive or most onerous feature. On one hand, where technology is progressing rapidly and market share in one generation of products can be affected by sales performance of a preceding generation, a client may not want to wait several years for resolution of a patent dispute with a foreign competitor in a federal court. On the other hand, monetary damages cannot be won in the ITC, only market share.

## **F. Remedies**

The remedies afforded by the Commission under Section 337 are injunctive in nature and, the ITC cannot award monetary damages.<sup>181</sup> These remedies include:

1. General exclusion orders that forbid further importation of offending products irrespective of the source;<sup>182</sup>
2. Limited exclusion orders that affect only products manufactured by a specific foreign company or group of foreign companies specifically designated by complainant in complaint;<sup>183</sup>
3. Cease and desist orders that enjoin offending activities by U.S. entities;
4. Temporary exclusion and/or cease and desist orders that remain in effect during the pendency of an investigation;<sup>184</sup> and
5. Consent orders.<sup>185</sup>

Violations of these Commission orders can result in forfeiture of the offending goods.<sup>186</sup> Also, Section 337 specifically provides that the Commission is empowered to levy sanctions for abuse of discovery and abuse of process to the extent authorized by Rule 11 and Rule 37 of the Federal Rules of Civil Procedure.<sup>187</sup>

### **1. Permanent Relief**

General exclusion orders are the broadest relief available from the ITC and typically affect the goods of foreign manufacturers who may not even know that the ITC was interested in such products.<sup>188</sup> Section 321(a)(5) of the GATT Act codifies the criteria that the Commission must use to determine if issuance of a general exclusion order is appropriate:

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.<sup>189</sup>

Due to the rigorous criteria and careful balancing of interests that apply to requests for general exclusion orders, complainants will more often seek and obtain limited exclusion orders. Such limited orders affect only the products of the specific respondents that have been adjudged to be in violation of Section 337.<sup>191</sup>

Cease and desist orders are another remedy available from the ITC and are much like injunctive relief issued by the courts. These orders direct domestic respondents to refrain from activities determined to

be unlawful under Section 337.

Consent orders can be also issued by the Commission. Before issuing such an order however, the Commission must consider the effect that a proposed consent order will have on the public health and welfare, competitive conditions in the domestic economy, the production of like or directly competitive articles in the United States, and consumers in the United States.<sup>192</sup>

## **2. Temporary Relief**

Temporary relief is obtained by filing a separate motion either with the complaint or before the Commission's institution of an investigation and the temporary relief proceedings are conducted on an extremely fast schedule.<sup>193</sup> In the temporary relief motion, the complainant must offer convincing showings on four equitable factors. These factors are:

- a. Complainant's likelihood of success on the merits;
- b. Irreparable harm caused to complainant in absence of temporary relief;
- c. Harm, if any, to the respondent(s) if temporary relief is granted; and
- d. The effect, if any, that the issuance of temporary relief would have on the public interest.<sup>194</sup>

This four-factor balancing test is the same standard as the one applied by the Federal Circuit in determining whether to affirm a trial court's granting or denying a preliminary injunction.<sup>195</sup> The number of motions for temporary relief is relatively small.<sup>196</sup> This is largely due to the already compressed schedule of Section 337 cases.

To satisfy the irreparable harm requirement, the Commission requires that the harm must be likely to occur before the Commission is able to issue permanent relief.<sup>197</sup> The Commission or ALJ evaluates the threat of irreparable harm with respect to the patents involved, not any general threat to the complainant.<sup>198</sup> There is a presumption of irreparable harm when the complainant makes a strong showing of validity and continuing infringement.<sup>199</sup>

## **3. Bonding**

### **a. Temporary Relief**

Upon issuance of a temporary exclusion order, 19 U.S.C. § 1337(e)(1) provides that the Secretary of the Treasury establish a bond amount under which the articles will be permitted to be imported during the remaining term of the Section 337 investigation. The amount of the bond is the amount that the Commission determines to be "sufficient to protect the complainant from any injury."<sup>200</sup> The statute expressly provides that if the Commission later decides that the respondent has violated Section 337, the respondent's bond may be forfeited to the complainant.<sup>201</sup>

The Commission can alternatively require a complainant to post a bond to protect the respondent's interests during the term of a temporary exclusion order.<sup>202</sup> Unlike the provisions regarding the respondent's bond, it is not mandatory that a complainant be required to post a bond. The statute provides that, if the respondent is found to have not violated Section 337, the complainant's bond may be forfeited to the respondent. A similar mechanism is available for domestic respondents against whom a temporary cease and desist order has issued.

b. Permanent Relief

Upon issuance of a permanent exclusion order, 19 U.S.C. § 1337(j)(3) provides that the Secretary of the Treasury establish a bond amount under which the articles will be permitted to be imported during the Presidential review of the order. The amount of the bond shall be the amount that the Commission determines is sufficient to protect the complainant from any injury. If the order becomes final, i.e., the President does not disapprove it, the respondent's bond may be forfeited to the complainant.

**4. Relief Against Defaulting Respondents**

A respondent is in default if it fails to respond to the complaint in time and does not have cause for its tardy response.<sup>203</sup> Under old Commission practice, when a respondent “defaulted” and did not participate in a Section 337 investigation, the complainant was nonetheless required to present a prima facie case in order to obtain any relief. Amendments in 1988, however, provided that a complainant can get a remedial order against any respondent who fails to respond to the complaint and Notice of Investigation because the ITC “shall presume the facts alleged in the complaint to be true.”<sup>204</sup>

**G. Counterclaims**

Respondents in Section 337 investigations have the right to raise all legal and equitable defenses,<sup>205</sup> but until 1995 they were not permitted to raise counterclaims against complainants.<sup>206</sup> Defenses that may be raised during Section 337 investigations include virtually all defenses that are available in district court litigation, such as invalidity, patent misuse, fraud/inequitable conduct, laches/equitable estoppel/waiver, and license/settlement. Additionally, a respondent has defenses based on breach of duty of candor or abuse of process under ITC Rule 210.16(b)(2).<sup>207</sup> Now, under ITC Rule 210.14(e), respondents can assert counterclaims. However, once a counterclaim is asserted by a respondent, the respondent must remove it to the appropriate federal district court.<sup>208</sup>

According to the rule, immediately after a counterclaim is received by the Commission, the respondent raising such counterclaim shall “file a notice of removal with a United States district court in which venue for any of the counterclaims raised by the party would exist under 28 U.S.C. Section 1391.” However, section 321(b)(3)(A) of the GATT Act also amended Chapter 85 of Title 25, United States Code to provide that “[t]he district courts shall have original jurisdiction of any civil action based on a counterclaim raised pursuant to section 337(c) . . . to the extent that it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim in the proceeding under section 337(a) . . . .” Therefore, in order to be subject to the GATT Act's amendment of Chapter 85, a counterclaim must have some direct relation to the transaction or occurrence under consideration in the Section 337 investigation.

While the respondent's counterclaims will not typically be considered in the course of the Section 337 investigation, the respondent will have the benefit of the filing date of the Complaint as the filing date of the counterclaims for, e.g., statute of limitations and choice of forum considerations. Moreover, payment of a filing fee will not be required in such cases.

ITC Rule 210.14(e) makes it clear that district court proceedings on counterclaims will not delay or affect proceedings at the Commission, including proceedings on legal and equitable defenses that may be raised by respondents. Therefore, to the extent that there are “overlaps” in the factual bases of a party's defenses and counterclaims, the Section 337 investigation will still involve a rapid determination of the merits of the allegations that are common to the defenses and counterclaims.



However, there are a few notable anomalies to the counterclaim removal rule. For example, in *In re Certain Recordable Compact Discs and Rewritable Compact Discs*,<sup>209</sup> complainant argued that respondents' antitrust counterclaim, which had been filed in the corresponding district court action, precluded respondents' allegations of patent misuse because the patent misuse defense did not actually constitute an affirmative defense, but rather was only the antitrust counterclaim under a different label.<sup>210</sup> The ALJ did not strike the defense, finding that "[a]lthough counterclaims, when pleaded at the Commission, are removed to a federal district court for disposition, there is no indication in the statute that any related affirmative defenses are to be stricken."<sup>211</sup>

Also, a retaliatory Section 337 complaint is not necessarily considered a counterclaim requiring removal to a district court.<sup>212</sup> In *Programmable Logic Devices*, the ALJ rejected the respondent's contention that Section 337(c) prevented the wholesale consolidation of two investigations because such consolidation would circumvent the requirement that counterclaims be removed.<sup>213</sup>

## H. Presidential Review

### 1. Overview

Exclusion orders and cease and desist orders by the Commission do not take effect immediately.<sup>214</sup> Instead, because Commission actions have effects on international relations, the President has sixty days, during which he or she can disapprove, for policy reasons, any Commission order.<sup>215</sup> During this period of review, respondents can avoid the total impact of the exclusion and/or cease and desist orders by posting a bond set by the Commission.<sup>216</sup> When the sixty-day review period ends, unless the President has announced his disapproval, the bond automatically expires and the Commission's remedial order goes into effect.<sup>217</sup>

Presidential disapprovals of remedies issued by the Commission are rare.<sup>218</sup> For example, Presidential review of approximately ninety exclusion orders has resulted in five vetoes since the passage of the Trade Act of 1974, when this review procedure was created.<sup>219</sup> Three disapprovals were based on the breadth of the Commission remedy and, in each case; the Commission modified the order in view of the concerns expressed in the Presidential disapproval. None of these modified orders was disapproved.<sup>220</sup> The following cases are illustrative of the review process and its underlying concerns.

### 2. Specific Instances of Presidential Disapproval

In *Certain Molded in Sandwich Panel Inserts and Methods for Their Installation*,<sup>221</sup> the Commission modified its order by removing three specific cease and desist orders directed against domestic users of the subject product. The Presidential disapproval claimed that the cease and desist orders in the original order unfairly discriminated between foreign and domestic products that infringed a U.S. process patent.<sup>222</sup>

The Presidential disapproval in *In re DRAMs* is found at 52 Fed. Reg. 46,011. In that investigation, the Commission had issued a limited exclusion order prohibiting the importation of downstream products that contained infringing DRAMs.<sup>223</sup> The President disapproved the order because he believed that the effect of the order on U.S. firms and U.S. trade would extend far beyond the respondent and importers of the respondent's infringing products.<sup>224</sup> The Commission modified the exclusion order, in accordance with the President's recommendation, to limit the exclusion of "downstream" products to only those manufactured by a respondent.<sup>225</sup>

The remaining two disapproved orders were never revised. Both involved jurisdictional disputes. In one, the President disapproved an ITC exclusion order based on predatory pricing because a pending dumping case involved the same facts and could result in different remedies.<sup>226</sup> And the other Presidential disapproval involved the Commission's order excluding importation of genuine trademarked articles from Europe that infringed the parent corporation's trademark in the United States. Because this ruling contradicted one made by Customs on the same facts, the President disapproved it.<sup>227</sup>

## I. Actions After a Commission Order Becomes Final

In addition to appeals to the U.S. Court of Appeals for the Federal Circuit, there are a variety of post-issuance activities that can have an effect on Commission orders. These activities are discussed below.

### 1. Proceedings at The Commission

As indicated above, the three types of Commission orders that affect the importation or sale of imported goods are exclusion orders, cease and desist orders, and consent orders.<sup>228</sup> After they become effective, these types of Commission orders are subject to enforcement, modification, and revocation proceedings at the Commission.<sup>229</sup> The Commission, through its Office of Unfair Import Investigations, can institute both informal and formal enforcement proceedings by reviewing reports submitted pursuant to any final Commission action under Section 337 and conducting any further investigative activities that the Commission deems necessary to ensure compliance with its orders.<sup>230</sup>

Informal proceedings typically involve Office of Unfair Import Investigations simply corresponding with potential violators to address any issues.<sup>231</sup> The Commission may issue whatever orders it deems appropriate to enforce and assure compliance of the exclusion order, cease and desist order, or consent order.<sup>232</sup>

The Commission may also institute formal enforcement proceedings.<sup>233</sup> One option is for the Commission to commence a civil action in a U.S. District Court pursuant to 19 U.S.C. § 1337(f) seeking the imposition of a civil penalty or the issuance of a mandatory injunction incorporating the relief sought by the Commission.<sup>234</sup> Another option is for the Commission to institute formal enforcement proceedings at the Commission level.<sup>235</sup> To commence such a proceeding, the Commission serves a complaint on the alleged violator.<sup>236</sup> A notice of institution is also published in the Federal Register.<sup>237</sup> The named respondent must file a response within fifteen days of receiving the complaint.<sup>238</sup> At the conclusion of the enforcement proceedings, the Commission may fashion a number of remedies, including modifying a cease and desist order, consent order, or exclusion order, bringing civil actions in U.S. District Court, and/or revoke the cease and desist order or consent order and direct that the articles in question be excluded from entry.<sup>239</sup>

Finally, a respondent can request that the Commission engage in further investigative activities and issue an advisory opinion as to whether the respondent's proposed new course of conduct would violate Section 337 or a Commission order.<sup>240</sup> Although not specifically provided for in the Rules, an entity that has not been a respondent in a Commission proceeding can nonetheless seek an advisory opinion as to whether a proposed course of conduct would violate a Commission order.<sup>241</sup> For example, a foreign manufacturer who is contemplating exporting products to the United States might seek a prior determination that its products are not covered by a particular general exclusion order. Thus, even after a final Commission order goes into effect, the potential for further action concerning the Commission's order remains.

## 2. Proceedings at Customs

The Commission's exclusion orders are enforced by the U.S. Customs Service ("Customs").<sup>242</sup> The procedures used by Customs in enforcing exclusion are not prescribed by regulations, but instead are internal.<sup>243</sup> Customs headquarters generally operates by educating field personnel on how to identify excluded products and where to find them.<sup>244</sup> A complainant should meet with Customs officials soon after the ITC issues the exclusion order to discuss the scope of the exclusion order and assist Customs in identifying infringing products.<sup>245</sup> A binding administrative ruling regarding whether a proposed importation would be excluded by the Customs under a Commission exclusion order can be sought from Customs by prospective importers or other "interested persons."<sup>246</sup>

The case of *Eaton Corp. v. United States* dealt with the question of what happens when the administrative ruling by Customs conflicts with a Commission order or decision.<sup>247</sup> In *Eaton*, the Commission found the respondent to be in violation of Section 337.<sup>248</sup> The respondent then redesigned its product, and sought both an advisory opinion from the Commission and an administrative ruling by Customs that the redesigned product did not fall within the scope of the limited exclusion order.<sup>249</sup> Before the Commission finished deciding whether the redesigned product violated the limited exclusion order, Customs began allowing importation of the redesigned product.<sup>250</sup> The complainant filed suit in the Court of International Trade to (which is not the ITC) enjoin Customs from allowing the redesigned products into the United States.<sup>251</sup> The court granted the complainant's motion for a preliminary injunction while the Commission investigated the redesigned products, thus making the Commission the ultimate authority on the scope of exclusion orders.<sup>252</sup>

In addition, the decision to exclude a particular shipment under the terms of a Commission exclusion order is made by the Customs Director of the pertinent district and is subject to an administrative "protest" proceeding.<sup>253</sup> A protest regarding a decision to exclude must be filed by the importer, consignee, or person seeking entry or delivery of the imported articles within ninety (90) days of the decision by the Customs Director.<sup>254</sup> Denial of a protest can be appealed through a civil action in the U.S. Court of International Trade.<sup>255</sup>

## V. Conclusion

Hopefully, this article has provided the reader with a better understanding of the complexities and nuances of Section 337 investigations. Section 337 can be both a powerful tool for those seeking to enforce their intellectual property rights and a nightmarish challenge for the respondents.

In order for a complainant to fully capitalize on the potential benefits of Section 337, it must understand both the procedures and rules of enforcement. The complainant must establish a domestic industry by satisfying both the technical and economic prongs.<sup>256</sup> The remedies afforded by the Commission under Section 337 are injunctive in nature but do not include damages.<sup>257</sup> The Commission can issue either "general" exclusion orders that bar importation of infringing products irrespective of source or "limited" exclusion orders barring importation by specifically named respondents.<sup>258</sup> However, the relief issued is subject to disapproval by the President of United States,<sup>259</sup> but that disapproval is rare.<sup>260</sup> Lastly, after obtaining an exclusion order, the complainant should meet with Customs and Border Protection to define the scope of the exclusion order and help Customs in identifying infringing products.<sup>261</sup>

With this piece, the reader has now been acquainted "with the evils of war" at the ITC, and hopefully has a better understanding of "the profitable way of carrying it on," and defending against it.<sup>262</sup>

### Endnotes

- <sup>1</sup> Sun Tzu, *The Art of War 13* (James Clavell ed., Dell Publishing 1988) (1983).
- <sup>2</sup> 19 U.S.C. § 1337 (2006).
- <sup>3</sup> 19 C.F.R. §§ 200.735-361.103 (2010).
- <sup>4</sup> Donald K. Duvall et. al., *Unfair Competition and the ITC* (Philip J. McCabe & John W. Bateman eds., Thomson West 2008) (1990).
- <sup>5</sup> 19 U.S.C. § 1337.
- <sup>6</sup> See 19 U.S.C. § 1332(a)-(c) (2006). Among the other statutes that the Commission handles are the antidumping and countervailing duty statutes. See 19 U.S.C. §§ 1671, 1673. Jurisdiction under these statutes is shared by the Commission and the U.S. Department of Commerce. See 19 U.S.C. § 1334.
- <sup>7</sup> See 19 U.S.C. § 1332(a)-(d).
- <sup>8</sup> The information required in Section 337 complaints is specified in 19 C.F.R. § 210.12 (2010).
- <sup>9</sup> See *In re Certain Apparatus for Flow Injection Analysis and Components Thereof*, USITC Pub. 1655, Inv. No. 337-TA-151 (Nov. 1984).
- <sup>10</sup> 19 C.F.R. § 210.3 (2008); See 19 U.S.C. § 1337(c).
- <sup>11</sup> See *Id.* at § 1337(g)(1).
- <sup>12</sup> Compare 19 U.S.C. § 1337(a)(1)(A)-(E) (2006) (declaring unfair trade practices unlawful), with 15 U.S.C. § 45(a)(1)-(4) (2006) (also declaring unfair trade practices unlawful).
- <sup>13</sup> See generally, 19 U.S.C. § 1337. The constitutionality of the breadth of Section 337 was upheld in *In re Orion Co.*, 71 F.2d 458, 461-63, 21 USPQ 563 (C.C.P.A. 1934); see also *Frischer Co. v. Elting*, 60 F.2d 711, 713-14 (2d Cir. 1932).
- <sup>14</sup> See Busey, *supra* note 3, at 4.
- <sup>15</sup> See 19 U.S.C. § 1671 (2006) (unlawful subsidies); 19 U.S.C. § 1673 (dumping). Dumping is the act of selling a product in a foreign country for less than the market price the product is sold for in the manufacturer's country or less than the cost of manufacture. See United States Department of Commerce International Trade Administration, An Introduction to U.S. Trade Remedies, <http://ia.ita.doc.gov/intro/index.html>. U.S. federal law provides the Secretary of the Treasury with the obligation to notify the U.S. Tariff Commission whenever he determines that foreign merchandise is being or is likely to be sold in the United States or elsewhere at less than its fair value and if the Tariff Commission determines the injury to domestic sales of similar products, then such imports may be ordered stopped. See 19 U.S.C. § 1673.
- <sup>16</sup> See *supra* notes 14-16 and accompanying text; *infra* notes 18-38 and accompanying text.
- <sup>17</sup> Busey, *supra* note 3, at 4.
- <sup>18</sup> *Princo Corp v. U.S. Int'l Trade Comm'n*, 563 F.3d 1301, 1314-15 (Fed. Cir. 2009), *vacated pending en banc review*, 583 F.3d 1380 (Fed. Cir. 2009) (potentially modifying the test for determining patent misuse).
- <sup>19</sup> See 19 C.F.R. §§ 133.0 to .53 (2008).
- <sup>20</sup> The language of Section 337 expressly provides for relief from the importation and/or sale of products that "are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent." 19 U.S.C. § 1337(a)(1)(B)(ii) (2006).
- <sup>21</sup> See United States International Trade Commission, 337 Investigational History, <http://info.usitc.gov/ouii/public/337inv.nsf/All?OpenView> (follow "Inv. No." hyperlink for each investigation, then follow "Next 30 Cases" hyperlink repeatedly for more cases).
- <sup>22</sup> See, e.g., *In re Certain Automotive Measuring Devices and Products Containing Same*, USITC Inv. No. 337-TA-494, Complaint at 19 (May 2003); *In re Certain Bearings and Packaging Thereof*, USITC Pub. 3736, Inv. No. 337-TA-469, 2 (Dec. 2004); *In re Certain Aerospace Rivets and Products Containing Same*, USITC Inv. No. 337-TA-447, Complaint at 3 (Dec. 2000).
- <sup>23</sup> See e.g., *In re Certain Cigarettes and Packaging Thereof*, USITC Inv. No. 337-TA-643, Verified Complaint at 12 (Mar. 2008) (Complaint); *In re Certain Digital Multimeters, and Products with Mutimeter Functionality*, USITC Inv. No. 337-TA-588, Complaint at 1, 14 (Oct. 2006); *In re Certain Ink Markers and Packaging Thereof*, USITC Pub. 3971, Inv. 337-TA-522, 2 (Dec. 2007).
- <sup>24</sup> See e.g., *In re Certain Safety Eyeware and Components Thereof*, USITC Inv. No. 337-TA-433, Complaint at 13 (Mar. 2000); *In re Certain Bar Clamps, Bar Clamp Pads, and Related Packaging, and Other Display Materials*, USITC Inv. No. 337-TA-429, Complaint at 15-16 (Feb. 2000); *In re Multiple Implement Multi-Function Pocket Knives and Related Packaging and Promotional Material*, USITC Inv. No. 337-TA-398, Complaint at 31-32 (Mar. 1997).
- <sup>25</sup> See e.g., *In re Ink Markers*, USITC Pub. 3971, Inv. No. 336-TA-522, at 2; *Certain Automotive Measuring Devices*, USITC Inv. No. 337-TA-494, Complaint at 19; *In re Certain Agricultural Vehicles and Components Thereof*, USITC Pub. 3735, Inv. No. 337-TA-386, Complaint at 48 (Dec. 2004).
- <sup>26</sup> See e.g., *In re Certain Plastic Food Storage Containers*, USITC Pub. 1563, Inv. No. 337-TA-152, 1-2 (Aug. 1984); *In re Certain Caulking Guns*, USITC Pub. 1507, Inv. No. 337-TA-139 (Mar. 1984).

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- <sup>27</sup> See e.g., *In re Agricultural Vehicles*, USITC Pub. 3735, Inv. No. 337-TA-487; *In re Bearings*, USITC Pub. 3736, Inv. No. 337-TA-469; *Certain Cigarettes*, USITC Pub. 3366, Inv. No. 337-TA-424.
- <sup>28</sup> See e.g., *In re Certain Universal Transmitters for Garage Door Openers*, USITC Pub. 3670, Inv. No. 337-TA-497, 8-18 (Jan. 2004) (involving violations of the Digital Millennium Copyright Act); *In re Certain Toothbrushes and Packaging Thereof*, USITC Pub. 3068, Inv. No. 337-TA-391 (Oct. 1997).
- <sup>29</sup> *In re Certain Monolithic Microwave Integrated Circuit Downconverters*, USITC Inv. No. 337-TA-384, 3 (Nov. 1996).
- <sup>30</sup> See e.g., *In re Certain Cast Steel Railway Wheels*, USITC Inv. No. 337-TA-655, 1 (Aug. 2008); *In re Certain Dental Positioning Adjustment Appliances*, USITC Inv. No. 337-TA-562, 6 (Jan. 2006); *In re Certain Modified Vaccinia Ankara Viruses and Vaccines*, USITC Inv. No. 337-TA-550, Complaint at 4 (Aug. 2005).
- <sup>31</sup> 19 U.S.C. § 1304(a) (2006).
- <sup>32</sup> See, e.g., *In re Certain Soft Sculpture Dolls Popularly Known as "Cabbage Patch Kids," Related Literature and Packaging Therefor*, USITC Inv. No. 337-TA-231 (Nov. 1986); *In re Certain Nut Jewelry and Parts Thereof*, USITC Inv. No. 337-TA-229 (Nov. 1986).
- <sup>33</sup> See, e.g., *In re Bearings*, USITC Inv. No. 337-TA-469 at 2 (Mar. 2002); *In re Multiple Implement, Multi-Function Pocket Knives and Related Packaging and Promotional Materials (Multi-Function Pocket Knives)*, USITC Inv. No. 337-TA-398, 2 (Mar. 1997).
- <sup>34</sup> See, e.g., *In re Bearings*, USITC Inv. No. 337-TA-469 at 2; *In re Cigarettes*, USITC Inv. No. 337-TA-424, 15 (Aug. 1999).
- <sup>35</sup> *In re Bearings*, USITC Inv. No. 337-TA-469 at 77; *In re Cigarettes*, USITC Inv. No. 337-TA-424 at 15; *Multi-Function Pocket Knives*, USITC Inv. No. 337-TA-398 at 35.
- <sup>36</sup> See, e.g., *In re Certain Electrically Resistive Noncomponent Toner and "Black Powder" Preparations Therefor*, USITC Pub. 2069, Inv. No. 337-TA-253, 2 (Mar. 1988); *In re Certain Floppy Disk Drives and Components Thereof*, USITC Pub. 1756, Inv. No. 337-TA-203 (Sept. 1985).
- <sup>37</sup> See, e.g., *In re Certain Fluidized Bed Combustion Systems*, USITC Pub. 1752, Inv. No. 337-TA-213 (Sept. 1985).
- <sup>38</sup> *Id.*
- <sup>39</sup> *In re Bearings*, USITC Inv. No. 337-TA-469, 41.
- <sup>40</sup> *In re Coamoxiclav Products*, USITC Inv. No. 337-TA-479, 13 (Aug. 2002).
- <sup>41</sup> See, e.g., *In re Certain Fluidized Bed Combustion Systems*, USITC Pub. 1752, Inv. No. 337-TA-213, 1 (Sept. 1985).
- <sup>42</sup> The statutory language resembles section 5 of the FTC Act and borrows some statutory language from another major antitrust statute, the Sherman Act. Compare 19 U.S.C. § 1337 (2006), with 15 U.S.C. §§ 1-7, 45(a) (2006). Therefore, Section 337 investigations have involved such traditional antitrust practices as price fixing, customer allocation, group boycotts, refusal to deal, exclusive dealings and conspiracy to monopolize. See *In re Electronically Resistive Noncomponent Toner*, USITC Inv. No. 337-TA-253, Order at 10; *In re Certain Laminated Floor Panels*, USITC Inv. No. 337-TA-545, Answer to Complaint at 14 (Sept. 2005); *In re Certain Recordable Compact Discs and Rewritable Compact Discs*, USITC Inv. No. 337-TA-474, Petition to Review at 24 (Nov. 2003); *In re Certain Set-Top Boxes and Components*, USITC Inv. No. 337-TA-454, Petition to Review at 22-23 (July 2002).
- <sup>43</sup> In *In re Welded Stainless Pipe and Tube*, USITC Inv. No. 337-TA-29 (1978), President Carter disapproved an exclusion order based on an allegation of predatory pricing. Among the "policy" reasons cited for the disapproval was the overlap in antidumping and Section 337 remedies. 43 Fed. Reg. 789-90 (1978).
- <sup>44</sup> See, e.g., *Amgen v. ITC*, 565 F.3d 846 (Fed. Cir. 2009).
- <sup>45</sup> *Id.* at 849.
- <sup>46</sup> 547 U.S. 388, 391 (2006).
- <sup>47</sup> See Benjamin Petersen, *Injunctive Relief in the Post-eBay World*, 23 Berk. Tech. L.J. 193, 194 (2008).
- <sup>48</sup> *Id.* at 217.
- <sup>49</sup> *eBay v. MercExchange, LLC*, 547 U.S. 388, 391, 78 USPQ2d 1577, 1578-79 (2006).
- <sup>50</sup> *Id.*, 78 USPQ2d at 1578.
- <sup>51</sup> See Petersen, *supra* note 48, at 215.
- <sup>52</sup> See Virginia L. Carron & F. Leslie Bessenger, *The ITC vs. Federal District Courts: Comparing the ITC and the Six Fastest District Courts for Patent Litigation*, Practicing. L. Inst., Sept.-Nov. 2008 14971, 106; Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 Wm. & Mary L. Rev. 63, 70 (2008); Neil Edward L. Santos et al., *What IP Holders Ought to Know about the ITC and the District Courts*, 7 J. High Tech. L. 173 (2007).
- <sup>53</sup> 28 U.S.C. § 1659(a) (2006).
- <sup>54</sup> *Id.*
- <sup>55</sup> 19 C.F.R. § 210.10 (2010).

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<sup>56</sup> See generally 19 C.F.R. pt. 210.

<sup>57</sup> See U.S. Int'l Trade Comm'n, Section 337 *Investigations Answers to Frequently Asked Questions*, Pub. No. 4065, Mar. 2009, available at [http://www.usitc.gov/intellectual\\_property/documents/337\\_faqs.pdf](http://www.usitc.gov/intellectual_property/documents/337_faqs.pdf), for information regarding Section 337 investigation procedures.

<sup>58</sup> See 19 U.S.C. § 1337(b)(1) (2006).

<sup>59</sup> 19 C.F.R. §§ 210.9 to .10 (2010).

<sup>60</sup> See *Id.* § 210.9.

<sup>61</sup> See *id.* § 210.10; see also 19 C.F.R. § 210.22.

<sup>62</sup> An example of a refusal by the Commission to institute an investigation occurred on January 23, 1992 with respect to a complaint entitled *In re Manual Resuscitators*, Docket No. 1666. Apparently, the complainant failed to provide information that would support the complainant's allegation that there was a domestic industry dedicated to exploitation of the asserted intellectual property right. See James O'Reilly & Gracia Gerg, *Stealth Caused By Sunshine: How Sunshine Act Interpretation Results in Less Information for the Public About the Decision Making Process of the International Trade Commission*, 36 Harv. Int'l L. J. 425 (1995).

<sup>63</sup> See 19 C.F.R. § 210.12(a).

<sup>64</sup> See *id.* § 210.12(a)(9).

<sup>65</sup> 545 F.3d 1340, 89 USPQ2d 1057 (Fed. Cir. 2008).

<sup>66</sup> *In re Certain Baseband Processor Chips & Chipsets*, USITC Inv. No. 337-TA-543 (Oct. 2006).

<sup>67</sup> *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d at 1345, 89 USPQ2d at 1060.

<sup>68</sup> *Id.*, 89 USPQ2d at 1059.

<sup>69</sup> *Id.*, 89 USPQ2d at 1059-60.

<sup>70</sup> *Id.* at 1354-58, 89 USPQ2d 1067-70; see also *Epistar Corp v. Int'l Trade Comm'n*, 566 F.3d 1321 (Fed. Cir. 2009) (affirming the Federal Circuit's decision in *Kyocera Wireless*).

<sup>71</sup> *Kyocera*, 545 F.3d 1340 at 1354-58, 89 USPQ2d at 1067-70.

<sup>72</sup> Chief Judge Luckern began his career as a chemist for Eastman Kodak. He was a patent examiner in the U.S. Patent and Trademark Office from 1956 to 1960. From there, he worked under contract as a patent consultant for J.R. Geigy, A.G., in Basel, Switzerland. From 1962 to 1964, Judge Luckern served as a technical advisor to the late Honorable I. Jack Martin of the United States Court of Customs and Patent Appeals. He started as an associate with the law firm of Fish & Neave in New York City in 1964 and later became a junior partner there. From 1971 to 1981, he served as a trial attorney in intellectual property with the U.S. Department of Justice, where he received Special Commendation awards for outstanding service in 1975 and 1979. Judge Luckern was appointed an ALJ with the Social Security Administration in Pittsburgh, Pennsylvania, in 1981. He served on detail with the ITC for several months before his permanent appointment. He has served as an ALJ at the ITC since 1984. Judge Luckern holds an LL.B (J.D.) degree and an LL.M degree from Georgetown University. He received a bachelor of science degree in chemistry, cum laude, from Georgetown University and a master of science degree in organic chemistry from Cornell University. He completed further graduate work under a research grant and taught chemistry at the University of Southern California. Judge Luckern is a native of Auburn, New York. Press Release, ITC, Luckern Named Chief Administrative Law Judge at U.S. International Trade Commission (July 3, 2008), available at [http://www.usitc.gov/ext\\_relations/news\\_release/2008/er0703ff1.htm](http://www.usitc.gov/ext_relations/news_release/2008/er0703ff1.htm).

<sup>73</sup> Judge Bullock began his career as a trial attorney and then an Assistant General Counsel at the Federal Energy Regulatory Commission (FERC). He served for 24 years at FERC. For the last 12 of those years, he was an Administrative Law Judge, conducting hearings and writing initial decisions in complex, multi-party cases involving electric utility and natural gas pipeline rates. In that position, he conducted hearings and wrote initial decisions in enforcement proceedings brought under a number of environmental laws administered by the EPA. Since June 1996, Judge Bullock has been an Administrative Law Judge with the U.S. Environmental Protection Agency (EPA). Judge Bullock is a 1968 graduate of Bucknell University, where he received a Bachelor of Arts degree in Political Science. He received his Juris Doctor degree from George Washington University Law School in June 1971. He is a member of the Bar of the District of Columbia. Press Release, ITC, Bullock Name New Administrative Law Judge at U.S. International Trade Commission (Apr. 19, 2002), available at [http://www.usitc.gov/ext\\_relations/news\\_release/2002/ER0419Z1.htm](http://www.usitc.gov/ext_relations/news_release/2002/ER0419Z1.htm).

<sup>74</sup> Judge Charneski began his career as an attorney in the Office of the General Counsel at the Federal Mine Safety and Health Review Commission from 1977 to 1983. Judge Charneski later served as Counsel to Commissioner L. Clair Nelson at the Federal Mine Safety and Health Review Commission from 1983 to 1988. He was an appellate attorney with the Mine Safety and Health Administration of the U.S. Department of Labor from 1988 to 1991 and a trial attorney with that agency from 1991 to 1994. He previously served as an Administrative Law Judge at the U.S. Social Security Administration from 1994 to 1995. Judge Charneski served as an Administrative Law Judge at the U.S. Environmental Protection Agency from 1995 until his ITC appointment. Judge Charneski holds a Juris Doctor degree from St. John's University School of Law and a bachelor of arts degree from St. Francis College. He is a member of the Bars of the District of Columbia and Virginia. Press Release, ITC, Charneski Named New Administrative Law Judge at U.S. International Trade Commission (Apr. 16, 2007), available at [http://www.usitc.gov/ext\\_relations/news\\_release/2007/er0416ee1.htm](http://www.usitc.gov/ext_relations/news_release/2007/er0416ee1.htm).

<sup>75</sup> Judge Essex previously served in a variety of positions with the U.S. Air Force (USAF) from 1985 to 2005, from which he retired in 2005. He served as an Assistant Staff Judge Advocate from 1985-1986; as an Area Defense Counsel from 1986-1987; as a Deputy Staff Judge Advocate based in Belgium from 1987-1988; as a Circuit Defense Counsel for the USAF AL Legal Services Center from 1988-1990; as a Deputy Staff Judge Advocate based in the United Kingdom from 1990-1992; as a Staff Judge Advocate based in Norway from 1992-1995; as an Attorney-Adviser in the AFLEM Office of International Claims and Investment Disputes at the U.S. Department of State from



1995-1996; as Chief, Operations Law, USAF Headquarters in the United Kingdom from 1996-1999; and as Deputy Staff Judge Advocate with the Air Intelligence Agency, USAF, from 1999-2000; as Chief of Aviation Law with the Air Education and Training Command, USAF, from 2000-2002. He was Chief of the General Torts Branch of AFLSA/JACT in Arlington, VA, from 2002-2005. He served as a consultant to the Compensation and Pension Service of the Department of Veterans' Affairs in Washington, DC, from 2005 to 2006. Judge Essex served as an Administrative Law Judge at the Office of Medicare Hearings and Appeals in Cleveland, Ohio, from November 2006 until his ITC appointment. Judge Essex holds a Juris Doctor degree from The Ohio State University and a Bachelor of Arts Degree from Miami University in Oxford, Ohio. He holds an active law license in the state of Louisiana and is a registered solicitor in England and Wales. Press Release, ITC, Essex Named New Administrative Law Judge at U.S. International Trade Commission (Oct. 17, 2007), available at [http://www.usitc.gov/ext\\_relations/news\\_release/2007/er1017ee1.htm](http://www.usitc.gov/ext_relations/news_release/2007/er1017ee1.htm).

<sup>76</sup> Judge Rogers served as a City Attorney with the City of South San Francisco from 1980 to 1986. From 1986 to 1992, he was in private practice as an attorney in Auburn, CA. He then served as an Assistant City Attorney for the City of Thousand Oaks, CA, from 1992 to 1995. He served as an Administrative Law Judge at the Office of Hearings and Appeals with the Social Security Administration in Sacramento, CA, from 1994 to 2005 and at the Federal Energy Regulatory Commission in Washington, DC, from 2005 to 2007. Judge Rogers served as a Supervisory Administrative Law Judge at the Office of Medicare Hearings and Appeals in Irvine, CA, from April 2007 until his ITC appointment. Judge Rogers holds a Juris Doctor degree from Brigham Young University's Clark Law School and a bachelor degree from San Diego State University. He is a member of the State Bar of California. Press Release, ITC, Rogers Named New Administrative Law Judge at U.S. International Trade Commission (July 7, 2008), available at [http://www.usitc.gov/ext\\_relations/news\\_release/2008/er0707ff1.htm](http://www.usitc.gov/ext_relations/news_release/2008/er0707ff1.htm).

<sup>77</sup> Judge Gildea served as Assistant State's Attorney with the State's Attorney of Cook County, Illinois. He was an associate in the Chicago law firm Hardiman, Pesavento & Lynch from 1969 to 1970. Gildea was a partner at Gillis, Gildea, and Rimland, a law firm specializing in criminal defense, from 1970 to 1971. From 1971 to 1976, he served as Assistant Illinois Attorney General, Chief of Special Prosecutions, with the Illinois Attorney General in Chicago, IL. After that, he served as Assistant United States Attorney, Criminal Division, with the United States Attorney, Northern District of Illinois. From 1978 to 1985, Gildea was a partner at Schwartz & Freeman in Chicago, IL. From 1985 to 2004, he was a solo practitioner in general practice in Elmhurst, IL. Gildea served as an Administrative Law Judge at the Social Security Administration's Office of Hearings and Appeals in Peoria, IL, from July 2004 until his ITC appointment. Press Release, ITC, Gildea Named New Administrative Law Judge at U.S. International Trade Commission (Dec. 8, 2008), available at [http://www.usitc.gov/ext\\_relations/news\\_release/2008/er1208ff1.htm](http://www.usitc.gov/ext_relations/news_release/2008/er1208ff1.htm).

<sup>78</sup> 19 C.F.R. § 210.51(a) (2010).

<sup>79</sup> 19 C.F.R. §§ 210.15 to .42.

<sup>80</sup> *Id.* § 210.42(h)(1).

<sup>81</sup> *Id.* § 210.24.

<sup>82</sup> *Id.* § 210.3.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4944 (1994).

<sup>86</sup> See Robert A. Caplen, *Recent Trends Underscoring International Trade Commission Review of Initial Determinations and Federal Circuit Appeals from Final Commission Determinations under Section 337 of the Tariff Act of 1930*, 17 Fordham Intell. Prop. Media & Ent. L.J. 337, 359 (2007) (discussing the underlying substantive issues prompting the Commission to review Initial Determinations issued by presiding ALJs in recently concluded section 337 proceedings over the past decade).

<sup>87</sup> 19 U.S.C. § 1330(a) (2006).

<sup>88</sup> *Id.* § 1330(c)(1).

<sup>89</sup> *Id.* § 1330(c)(1)(a).

<sup>90</sup> 19 U.S.C. § 1337(h) (2006).

<sup>91</sup> See generally 517 U.S. 370, 38 USPQ2d 1461 (1996).

<sup>92</sup> See *Cybor Corp. v. FAS Techs. Inc.*, 138 F.3d 1448, 46 USPQ2d 1169 (Fed. Cir. 1998).

<sup>93</sup> See generally *Sinorgchem Co. v. U.S. Int'l Trade Comm'n*, 511 F.3d 1132, 85 USPQ2d 1415 (Fed. Cir. 2007).

<sup>94</sup> See generally *Yingbin-Nature Wood Indus. Co. v. U.S. Int'l Trade Comm'n*, 535 F.3d 1322, 87 USPQ2d 1590 (Fed. Cir. 2008) (affirming the Commission's determination on the validity of certain claims); *Solomon Tech. Inc. v. U.S. Int'l Trade Comm'n*, 524 F.3d 1310, 86 USPQ2d 1805 (Fed. Cir. 2008) (affirming the Commission's final determination of non-infringement); *SKF USA Inc. v. U.S. Int'l Trade Comm'n*, 423 F.3d 1307, 78 USPQ2d 1045 (Fed. Cir. 2005) (affirming the Commission's decision that there was no violation of Section 337). Cf. *Amgen v. ITC*, 565 F.3d 846 (Fed. Cir. 2009) (affirming the Commission's ruling that the 35 U.S.C. § 271(e)(1) safe harbor statute applies to process patents in actions under Section 337, but reversing the Commission to the extent it held that all importation and all uses exempt under the safe harbor statute while Food and Drug Administration approval was pending.).

<sup>95</sup> Uruguay Round Table Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4943-46 (1994).

<sup>96</sup> *Id.*

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<sup>97</sup> See 28 U.S.C. § 1659 (2006).

<sup>98</sup> *Id.* § 1659(a).

<sup>99</sup> *Id.* § 1659(a)(1)-(2).

<sup>100</sup> *In re Princo Corp.*, 478 F.3d 1345, 1353, 82 USPQ2d 1997, 2002-3 (Fed. Cir. 2007).

<sup>101</sup> *Id.*, 82 USPQ2d at 2002-3.

<sup>102</sup> *Id.* at 1355, 82 USPQ2d at 2004.

<sup>103</sup> See 28 U.S.C. § 1659(b) (2006).

<sup>104</sup> S. Rep. No. 93-298, 22 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7212.

<sup>105</sup> 28 U.S.C. § 1338(a) (2006).

<sup>106</sup> See, e.g., *Texas Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 39 USPQ2d 1492, 1569 (Fed. Cir. 1997); *In re Convertible Rowing Exerciser Patent Lit.*, 721 F. Supp. 596, 12 USPQ2d 1275 98-602 (D. Del. 1989); see also Douglas Martin, *Preclusive Effect of Factual Determinations of the International Trade Commission with Regard to Patent Matters*, 62 U. Chi. L. Rev. 885, 891-95 (Spring 1995); Thomas Rouse, *The Preclusive Effect on the ITC Patent Fact Findings on Federal District Courts: A New Twist on In re Convertible Rowing Exerciser Patent Litigation*, 27 Loy. L.A. L. Rev. 1417, 1435-40 (1994); Kaye, Lupo, Lipman, *The Jurisdictional Paradigm Between The United States International Trade Commission and the Federal District Courts*, 64 J. Pat. Off. Soc'y 118 (Mar. 1982).

<sup>107</sup> 28 U.S.C. § 1338(a) (2006). *Union Mfg. Co. Inc. v. Han Baek Trading Co. Ltd.*, 763 F.2d 42, 226 USPQ 12 (2d Cir. 1985).

<sup>108</sup> *Union Mfg. Co. Inc.*, 763 F.2d at 46, 226 USPQ at 14.

<sup>109</sup> *In re Certain Welded Stainless Steel Pipe and Tube*, USITC Inv. No. 337-TA-29 (Feb. 1978).

<sup>110</sup> See *Sealed Air Corp. v. U.S. Int'l Trade Comm'n*, 645 F.2d 976, 209 USPQ 469 (C.C.P.A. 1981). 19 U.S.C. § 1337(a) (2006).

<sup>111</sup> See, e.g., *In re Dynamic Random Access Memories, Components Thereof and Products Containing Same*, USITC Inv. No. 337-TA-242 (Mar. 1987) (hereinafter "*In re DRAMS*").

<sup>112</sup> USITC Inv. No. 337-TA-588, Comm'n Opinion (June 2008).

<sup>113</sup> *Id.* at 11-12.

<sup>114</sup> USITC Pub. 2701, Inv. No. 337-TA-350, Comm'n Opinion Denying Summary Determination (Nov. 1993).

<sup>115</sup> *Id.* at 6. See also Margo A. Bagley, *Using Section 337 of the Tariff Act of 1930 to Block Materially Different Gray Market Goods in the Common Control Context: Are Reports of Its Death Greatly Exaggerated?*, 44 EMory L.J. 1541, 1554-89 (1995) (discussing the use of Section 337 to combat "gray market goods.").

<sup>116</sup> *In re Certain Sputtered Carbon-Coated Computer Disks*, USITC Inv. No. 337-TA-350, Comm'n Opinion Denying Summary Determination at 4. Among the arguments considered and rejected by the Commission was the argument that the first act of infringement—the manufacturing of the disks—took place in the United States and, therefore, the patent holder should be limited to seeking a remedy from the U.S. courts rather than from the ITC. *Id.* at 4-5. This argument is directly based on language in the Commission's earlier EPROMs decision. *In re Certain Erasable Programmable Read-Only Memories*, USITC Pub. 2196, Inv. No. 337-TA-276 (May 1989).

<sup>117</sup> *In re Certain Sputtered Carbon-Coated Computer Disk*, USITC Inv. No. 337-TA-350, Comm'n Opinion Denying Summary Determination at 4-6.

<sup>118</sup> *Id.* at 6.

<sup>119</sup> See 19 U.S.C. § 1337(a)(2) (2006). Where the alleged unfair activity restrains or monopolizes commerce in the United States, the statute does not require a showing of domestic industry.

<sup>120</sup> See, e.g., *In re DRAMS*, USITC Pub. 2023, Inv. No. 337-TA-242, 99-102 (Nov. 1987).

<sup>121</sup> *In re Certain Excimer Laser Systems for Vision Correction and Components Thereof and Methods for Performing Such Surgery*, USITC Inv. No. 337-TA-419, Comm'n Opinion at 30 (Apr. 2000).

<sup>122</sup> *Id.* ("[T]he technical prong involves whether complainant (or licensees) practices its own patent.")

<sup>123</sup> See *In re Certain Gel-Filled Wrist Rests and Products Containing Same*, USITC Inv. No. 337-TA-456, Comm'n Opinion at 21 (Jan. 2003) (adopting the ALJ's finding that complainants' wrist rests do not practice any claim of the patent, thus failing the domestic industry requirement); *In re Certain Flooring Products*, USITC Inv. No. 337-TA-443, Comm'n Opinion at 1 (Apr. 2002) (adopting the ALJ's initial determination that complaints did not practice the asserted claims of the patents, and therefore fail to meet the domestic industry requirement).

<sup>124</sup> *In re Excimer Laser Systems*, USITC Inv. No. 337-TA-419, Comm'n Opinion at 30 ("The economic prong concerns the investment in domestic industry.").

<sup>125</sup> 19 U.S.C. § 1337(a)(3) (2006).

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- <sup>126</sup> See Siddharth Fernandes, *A Realistic Analysis of § 271(g) and the ITC: Academic Hypothesis Aside, § 271(g) Does not Violate the Paris Convention of TRIPS Because Its Affirmative Defenses Do not Apply to § 337 Actions Before the ITC*, 17 Fed. Cir. B.J. 473, 499-501 (2006) (discussing the ITC's broad jurisdictional net).
- <sup>127</sup> See, e.g., Donald K. Duvall et. al., *Unfair Competition and the ITC* 78 (Philip J. McCabe & John W. Bateman eds., Thomson West 2008) (1990).
- <sup>128</sup> *In re* Digital Satellite Systems Receivers, USITC Inv. No. 337-TA-392, Initial and Recommended Determination at 10 (Oct. 1997).
- <sup>129</sup> *Id.* at 11.
- <sup>130</sup> *Id.* at 10.
- <sup>131</sup> *In re* Semiconductor Chips, USITC Inv. No. 337-TA-432, Initial Determination at 12 (June 2002) ("[A]ctual production of the article in the United States is not required if a complainant has made a substantial investment in licensing the patent (or patents) at issue in an investigation.").
- <sup>132</sup> *In re* Certain Video Graphics Display Controllers and Products Containing Same, USITC Inv. No. 337-TA-412, Initial Determination at 11, 13 (May 1999). ALJ Debra Morris ultimately found that the complainant failed to meet the technical prong of the domestic industry requirement. *Id.* at 24.
- <sup>133</sup> *Id.* at 11.
- <sup>134</sup> *Id.* at 13.
- <sup>135</sup> *In re* Certain Removable Electronic Cards and Electronic Card Reader Devices and Products Containing Same, USITC Inv. No. 337-TA-396, Comm'n Opinion at 20 (Aug. 1998) ("Nowhere, in fact, does the legislative history indicate that the domestic industry must produce a product that directly competes with the imported product.").
- <sup>136</sup> *Id.*
- <sup>137</sup> *In re* Certain Short-Wavelength Light Emitting Diodes, Laser Diodes and Products Containing Same, USITC Inv. No. 337-TA-640, Order No. 72 at 7 (May 2009).
- <sup>138</sup> *Id.* at 5-6.
- <sup>139</sup> *Id.* at n.1.
- <sup>140</sup> *Id.* (citing *In re* Certain Light Emitting Diodes and Products Containing Same (*In re Light Emitting Diodes I*), USITC Inv. No. 337-TA-640 (June 2008); *In re* Certain Light Emitting Diodes and Products Containing Same (*Light Emitting Diodes II*), USITC Inv. No. 337-TA-512, 132 (May 2005) (Initial Determination); *In re* Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same, USITC Inv. No. 337-TA-432, Order No. 13 at 13 (June 2002); *In re* Certain Digital Satellite Sys. Receivers and Components Thereof, USITC Inv. No. 337-TA-392, 11 (Oct. 1997); *In re* Certain Digital Processors and Digital Processing Systems, Components Thereof, and Products Containing the Same, USITC Inv. No. 337-TA-559, Order No. 242 at 93-94 (June 2007); *In re* Certain NAND Flash Memory Devices and Products Containing Same, USITC Inv. No. 337-TA-553, Initial Determination at 121 (Nov. 2006); *In re* Certain Stringed Musical Instruments and Components Thereof, USITC Inv. No. 337-TA-586, Comm'n Opinion at 25-26 (Dec. 2007).
- <sup>141</sup> USITC Inv. No. 337-TA-586, Comm'n Opinion (May 2008).
- <sup>142</sup> *Id.* at 26.
- <sup>143</sup> *Id.*
- <sup>144</sup> *Id.*
- <sup>145</sup> *Id.*
- <sup>146</sup> *Id.* at 26-27.
- <sup>147</sup> *In re Microlithographic Machine*, USITC Inv. No. 337-TA-468, Initial Determination (Jan. 2003).
- <sup>148</sup> *Id.*
- <sup>149</sup> See *In re* Certain Concealed Cabinet Hinges and Mounting Plates, USITC Inv. No. 337-TA-289, Comm'n Opinion (Jan. 1990).
- <sup>150</sup> *In re Microlithographic Machines*, USITC Inv. No. 337-TA-468, Initial Determination at 362 (Jan. 2003).
- <sup>151</sup> *Id.*
- <sup>152</sup> *Id.*
- <sup>153</sup> USITC Inv. No. 337-TA-546, Comm'n Opinion (Aug. 2007).
- <sup>154</sup> *Id.* at 42.
- <sup>155</sup> *Id.* at 41.
- <sup>156</sup> *Id.* at 43.
- <sup>157</sup> *Id.*

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<sup>158</sup> USITC Inv. No. 337-TA-242, Comm. Op. on Violation, Remedy, Bonding, and Public Interest (Nov.1987).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 65-66, n.151.

<sup>161</sup> See also *In re* Certain Electric Power Tools, Battery Cartridges and Battery Chargers, USITC Inv. No. 337-TA-284, Initial Determination at 239 (June 1991) (citing DRAMs).

<sup>162</sup> See, e.g., *In re* Certain Variable Speed Wind Turbines and Components Thereof, USITC Inv. No. 337-TA-641, Order No. 30 (Apr. 2009) (where more than one intellectual property right was considered and the ALJ found the domestic industry requirement satisfied without specifically allocating domestic activities to certain intellectual property rights); *In re* Certain Digital Televisions and Certain Products Containing Same and Methods of Using Same, USITC Inv. No. 337-TA-617, Initial Determination (Nov. 2008); *In re* Mobile Telephone Handsets Wireless Communication Devices, USITC Inv. No. 337-TA-578, Order No. 33 (Feb. 2007).

<sup>163</sup> 19 U.S.C. § 1337(a)(1)(A) (2006).

<sup>164</sup> See, e.g., *In re* Certain Products with Gremlin Character Depictions, USITC Pub. No. 1815, Inv. No. 337-TA-201, 14, 22 (Mar. 1985), The Commission found that imported articles infringed the subject copyright but were different from and did not compete against domestically made articles. *Id.* The Commission went on to conclude that there was a failure to prove the requisite injury. *Id.*

<sup>165</sup> See, e.g., *In re* Certain Optical Waveguide Fibers, USITC Pub. No. 1754, Inv. No. 337-TA-189 (Sept. 1985), *aff'd sub nom., Corning Glass Works v. U.S. Int'l Trade Comm'n*, 799 F.2d 1559, 1569 (Fed. Cir. 1986); *In re* Bar Clamps, Bar Clamp Pads, and Relating Packaging Display, and Other Materials, USITC Inv. No. 337-TA-429 (May 2001) ("[T]he complainant must also prove a nexus between the respondent's unfair acts and the injury to the domestic industry."); *In re* Cigarettes and Packaging Thereof, USITC Inv. No. 337-TA-424 (Oct. 2000) (finding "a causal nexus between the false designation of source and the effect or threat of injury").

<sup>166</sup> *In re* DRAMs, USITC Pub. No. 2034, Inv. No. 337-TA-242 at 76 (citing *Corning Glass Works*, 799 F.2d at 1568).

<sup>167</sup> *In re* DRAMs, USITC Pub. No. 2034, Inv. No. 337-TA-242 (Nov. 1987).

<sup>168</sup> *Corning Glass Works*, 799 F.2d at 1568 n.9.

<sup>169</sup> *In re* Certain Bearings and Packaging Thereof, USITC Inv. No. 337-TA-469.

<sup>170</sup> *Id.*; See also *In re* DRAMs, USITC Pub. No. 2034, Inv. No. 337-TA-242; *In re* Methods for Extruding Plastic Tubing, USITC Pub. No. 1287, Inv. No. 337-TA-110 (Sept. 1982).

<sup>171</sup> *Corning Glass Works*, 799 F.2d at 1568; *In re* DRAMs, USITC Pub. No. 2034, Inv. No. 337-TA-242, at 75.

<sup>172</sup> *Corning Glass Works*, 799 F.2d at 1566, 1568.

<sup>173</sup> *Id.*

<sup>174</sup> 19 U.S.C. § 1337(b)(1) (2006).

<sup>175</sup> See *Id.*

<sup>176</sup> Shayerah Ilias, *Intellectual Property Rights Protection and Enforcement: Section 337 of the Tariff Act of 1930*, CRS Report for Congress (Cong. Research Serv., Washington, D.C.), May 16, 2008.

<sup>177</sup> *Id.*

<sup>178</sup> Virginia L. Carron & F. Leslie Bessenger III, *The ITC vs. Federal District Courts: Comparing the ITC and the Six Fastest District Courts for Patent Litigation*, 949 Practicing L. Inst. 99 (2008).

<sup>179</sup> U.S. Courts, Federal Court Management Statistics, [www.uscourts.gov/fcmstat/index.html](http://www.uscourts.gov/fcmstat/index.html). See also Carron & Bessenger III, *supra* note 179 (comparing several "fast" litigation venues, including the ITC and particular U.S. District Courts).

<sup>180</sup> Office of Unfair Import Investigations, U.S. Int'l Trade Comm'n, Performance and Accountability Report FY2008 67-73 (2008), available at [http://www.usitc.gov/ext\\_relations/about\\_itc/FinalPAR2008.pdf](http://www.usitc.gov/ext_relations/about_itc/FinalPAR2008.pdf).

<sup>181</sup> See Schwartz, *supra*, note 3.

<sup>182</sup> 19 U.S.C. §1337(d) (2006).

<sup>183</sup> See *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1356 (Fed. Cir. 2008).

<sup>184</sup> See 19 U.S.C. § 1337(d)-(f).

<sup>185</sup> See 19 C.F.R. § 210.21(c)(2)-(3) (2010).

<sup>186</sup> 19 U.S.C. § 1337(i).

<sup>187</sup> *Id.* § 1337(h).

<sup>188</sup> See Gary M. Hnath, *General Exclusion Orders under Section 337*, 25 NW. J. INT'L L. & BUS. 349 (2005).

<sup>189</sup> 19 U.S.C. § 1337(d)(2).

<sup>190</sup> Hnath, *supra* note 189, at 356.

<sup>191</sup> Hnath, *supra* note 189, at 351. The first limited exclusion order was issued in *In re Certain Headboxes and Papermaking Forming Sections for the Continuous Production of Paper and Components Thereof* (Headboxes II), USITC Inv. No. 337-TA-82A (1981). *Id.* The Commission originally issued a general exclusion order which the President disapproved because: (1) respondents were the only known entities infringing the patent; and (2) an order extending to other papermaking forming sections threatened to interfere needlessly with legitimate trade. *Id.*

<sup>192</sup> 19 C.F.R. § 210.21(c)(2)(ii) (2010).

<sup>193</sup> *Id.* § 210.42-67. See also Schwartz, *supra* note 3, at 125, 128-31.

<sup>194</sup> Schwartz, *supra* note 3, at 129. "In determining whether to grant temporary relief, the Commission will apply the standards the U.S. Court of Appeals for the Federal Circuit uses in determining whether to affirm lower court decisions granting preliminary injunctions." 19 C.F.R. § 210.52 (2010). See also *Pfizer, Inc. v. Teva Pharms. USA, Inc.*, 429 F.3d 1364, 1372 (Fed. Cir. 2005); *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001) (stipulating the standard for granting a preliminary injunction).

<sup>195</sup> 19 C.F.R. § 210.52

<sup>196</sup> Busey, *supra* note 3, at 11, 29.

<sup>197</sup> *In re Certain Electrical Connectors & Prods. Containing Same*, USITC Inv. No. 337-TA-374, Order No. 25 at 89 (Sept. 1995).

<sup>198</sup> *Id.* at 91.

<sup>199</sup> *Id.* at 89.

<sup>200</sup> 19 U.S.C. § 1337(e)(1) (2006).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* § 1337(e)(2).

<sup>203</sup> 19 C.F.R. § 210.16 (2010). See also John C. Evans, *Addressing Default Trends in Patent-Based Section 337 Proceedings in the United States International Trade Commission*, 106 Mich. L. Rev. 745 (2008) (illustrating relief to defaulting respondents).

<sup>204</sup> 19 U.S.C. § 1337(g)(1)(E).

<sup>205</sup> Donald K. Duvall et. al., *Unfair Competition and the ITC* 574-609 (Philip J. McCabe & John W. Bateman eds., Thomson West 2008) (1990). In addition, a complaint under Section 337 may be dismissed for breach of the duty of candor or abuse of process under ITC Rule 210.16(b)(2). *Id.* at 606.

<sup>206</sup> See Joel W. Rogers & Joseph P. Whitlock, *Is Section 337 Consistent with the GATT and the TRIPS Agreement?*, 17 Am. U. INT'L L. REV. 459, 478-81 (2002) (listing amendments to Section 337 under GATT, including the allowance of counterclaims); David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 Ariz. J. INT'L & Comp. L. 1, 107-8 (1995) (discussing the amendments to Section 337 under GATT, including the allowance of counterclaims).

<sup>207</sup> "Any party may file a motion for issuance of . . . an initial determination finding a party in default for abuse of process under § 210.4(c) or failure to make or cooperate in discovery." 19 C.F.R. § 210.16(b)(2). See also 19 C.F.R. § 210.4(c) (requiring that any pleading, written motion, or other paper submitted to an ALJ or the Commission must "to the best of the person's knowledge, information, and belief, [be] formed after an inquiry reasonable under the circumstances . . .").

<sup>208</sup> 19 U.S.C. § 1337(c) (2006). See also *Ansell Healthcare Prods. LLC v. Tillotson Corp.*, 567 F. Supp. 2d 196, 199-200 (D.D.C. 2008) (where the respondent in an ITC investigation filed a counterclaim at the ITC and removed the counterclaim to the District Court); *In re Certain Semiconductor Light Emitting Devices, Components Thereof, and Products Containing Same*, USITC Inv. No. 337-TA-444, Order No. 5 at 3 (Apr. 2001) (where complainant argued that respondent's antitrust defenses were really counterclaims).

<sup>209</sup> USITC Inv. No. 337-TA-474, Order 8 (Dec. 2002).

<sup>210</sup> *Id.* at 6-9. See also *Princo Corp v. U.S. Int'l Trade Comm'n*, 583 F.3d 1380 (Fed. Cir. 2009) (articulating the test for determining patent misuse to be applied by the ITC in *In re Recordable Compacts Discs*).

<sup>211</sup> *In re Recordable Discs*, USITC Inv. No. 337-TA-474, Order 8 at 6-9.

<sup>212</sup> *In re Certain Programmable Logic Devices and Products Containing Same*, USITC Inv. No. 337-TA-453, Order No. 3 at 7, n. 6 (Apr. 2001).

<sup>213</sup> *Id.*

<sup>214</sup> 19 U.S.C. § 1337(j)(2) (2006).

<sup>215</sup> *Id.* § 1337(j).

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<sup>216</sup> *Id.* § 1337(j)(3).

<sup>217</sup> *Id.* § 1337(j)(4).

<sup>218</sup> See also Busey, *supra* note 3; James T. O'Reilly & Gracia M. Berg, *Stealth Caused by Sunshine: How Sunshine Act Interpretation Results in Less Information for the Public About the Decision-Making Process of the International Trade Commission*, 36 Harv. Int'l L.J. 425, 427 (1995).

<sup>219</sup> See *In re* Certain Welded Stainless Steel Pipe and Tube, USITC Inv. 337-TA-29 (Feb. 1987); *In re* Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper, and Components Thereof, USITC Pub. 1197, Inv. No. 337-TA-82 (Nov. 1981); *In re* Certain Molded-In Sandwich Panel Inserts and Methods for Their Installation, USITC Pub. 1246, Inv. No. 337-TA-99 (May 1982); *In re* Certain Alkaline Batteries, USITC Pub. 1616, Inv. No. 1337-TA-165 (Nov. 1984), *aff'd*, Duracell Inc. v. U.S. Int'l Trade Comm'n, 778 F.2d 1578 (Fed. Cir. 1985); *In re* DRAMS, USITC Pub. 2034, Inv. No. 337-TA-242 (Nov. 1987).

<sup>220</sup> Presidential Disapproval of Determination of the U.S. International Trade Commission Investigation of No. 337-TA-082, Certain Multi-Ply Headboxes, 46 Fed. Reg. 32361-01 (proposed June 22, 1981). There the Commission issued a limited exclusion order after the President disapproved a general exclusion order on the grounds that "[t]he papermaking machinery industry is relatively transparent and the manufacturers and importers are few." 46 Fed. Reg. 32361-01. *In Headboxes II*, USITC Inv. No. 337-TA-82A (1984), the Commission revised the order but the case was reversed and remanded to the Commission for further consideration in *Aktiebolaget Karlstads Mekaniska Werkstad and KMW-Johnson, Inc. v. U.S. Int'l Trade Comm'n*, 705 F.2d 1565 (Fed. Cir. 1983).

<sup>221</sup> USITC Pub. 1297, Inv. No. 337-TA-99 (Jan. 1982) (Memorandum).

<sup>222</sup> Presidential Disapproval of the Determination of the U.S. International Trade Commission in Investigation No. 337-TA-099, Certain Molded-In Sandwich Panel Inserts and Methods for Their Installation, 47 Fed. Reg. 29,919 (proposed June 28, 1981).

<sup>223</sup> Presidential Disapproval of a Section 337 Determination, 52 Fed. Reg. 46011 (Dec. 3, 1987).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *In re* Certain Welded Stainless Steel Pipe and Tube, USITC Inv. 337-TA-29 (Feb. 1987). The Presidential disapproval in *In re* Pipe and Tube is found at 47 Fed. Reg. 17,789-90 (1978).

<sup>227</sup> See *In re* Batteries, USITC Pub. 1616, Inv. No. 1337-TA-165, *aff'd*, Duracell Inc. v. U.S. Int'l Trade Comm'n, 778 F.2d 1578 (Fed. Cir. 1985).

<sup>228</sup> See discussion *infra* section IV. F. Remedies.

<sup>229</sup> See generally 19 C.F.R. §§ 210.1, 210.70 to .79 (2010).

<sup>230</sup> *Id.* § 210.75.

<sup>231</sup> *Id.*; see also Donald K. Duvall et. al., *Unfair Competition and the ITC* § 10:2 (Philip J. McCabe & John W. Bateman eds., Thomson West 2008) (1990) ("Informal enforcement proceedings, by way of correspondence, conference or otherwise, may be conducted by the Commission through its Office of Unfair Import Investigations, to address any act or omission by any person in violation of any provision of a final Commission determination or order.").

<sup>232</sup> 19 C.F.R. § 210.75(a).

<sup>233</sup> *Id.* § 210.75(b)(1).

<sup>234</sup> 19 U.S.C. § 1337(f)(2) (2006).

<sup>235</sup> 19 C.F.R. § 210.75(b).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* § 210(b)(4).

<sup>240</sup> See 19 C.F.R. § 210.79(a).

<sup>241</sup> *Id.*

<sup>242</sup> Donald K. Duvall et. al., *Unfair Competition and the ITC* 410 (Philip J. McCabe & John W. Bateman eds., Thomson West 2008) (1990).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> Busey, *supra* note 3, at 11, 33-34.

<sup>246</sup> 19 C.F.R. § 177.0 (2007). See 19 C.F.R. § 177.1-13 for details on the procedure for obtaining an administrative ruling.



<sup>247</sup> *Eaton Corp. v. United States*, 395 F. Supp. 2d 1314 (Ct. Int'l Trade 2005).

<sup>248</sup> *Id.* at 1317.

<sup>249</sup> *Id.* at 1319.

<sup>250</sup> *Id.* at 1320.

<sup>251</sup> *Id.* at 1315.

<sup>252</sup> *Id.* at 1329.

<sup>253</sup> 19 U.S.C. § 1514 (2006).

<sup>254</sup> *Id.* § 1514(c)(2).

<sup>255</sup> 28 U.S.C. § 2636 (2006).

<sup>256</sup> 19 U.S.C. § 1337 (2006).

<sup>257</sup> Busey, *supra* note 3.

<sup>258</sup> Busey, *supra* note 3, at 32-33.

<sup>259</sup> 19 U.S.C. § 1337(j).

<sup>260</sup> Busey, *supra* note 3, at 33-34.

<sup>261</sup> Busey, *supra* note, at 333-34.

<sup>262</sup> Sun Tzu, *The Art of War 13* (James Clavell ed., Dell Publishing 1988) (1983).

