



Frequently Asked Questions on International Trade Commission § 337 Investigations

By Richard J. Oparil

1. What Is a § 337 Investigation?

As an agency of the federal government, the International Trade Commission (ITC), under § 337 of the Tariff Act of 1930 (19 USC § 1337), has authority to investigate claims of patent, trademark, and copyright infringement. The ITC may investigate other forms of unfair competition, such as misappropriation of trade secrets, trade dress infringement, passing off, false advertising, and violations of the antitrust laws, may also be asserted. Law also allows the ITC to issue orders to stop unfair methods of competition and unfair acts in the importation and sale of imported infringing products, specifically by means of an exclusion order enforced by U.S. Customs and Border Protection that stops accused products from entering the United States. In addition, the commission may issue cease and desist orders against named importers and other persons engaged in unfair acts that violate § 337. Expedited relief in the form of temporary exclusion orders and temporary cease and desist orders may also be available in certain exceptional circumstances.

A significant advantage to companies looking to enforce their IP rights is that the ITC moves at a very fast pace and provides a faster means for seeking injunctive relief for IP infringement or unfair competition. Target dates for completion of an investigation are generally set for less than 16 months.

2. How Are § 337 Investigations Initiated?

Much like District Court litigation, an ITC proceeding can be initiated when a petitioner files a complaint against one or more respondents. The ITC then decides whether to begin an investigation. Typically, the ITC makes its decision within 30 days from the date the complaint is filed.

The complaint in the ITC filing must be detailed to provide the ITC with a basis to determine whether or not it will initiate an investigation. The required contents of the complaint and supporting documentation are set forth in ITC Rule 210.12, 19 C.F.R. § 210.12. The relevant sections include:

- (a) The name, address, and phone number of the complainant or its authorized representative (attorney), and a certification under oath stating that the contents of the complaint are true and accurate.
- (b) A detailed statement of facts that explain the alleged unfair acts or unfair competition.
- (c) Description of specific instances of importation of the alleged unlawful articles and the Harmonized Tariff Schedule of the United States heading or subheading under which the subject article was imported.
- (d) Statement of the name, address, and nature of the business (when known) of each person alleged to be violating § 337.
- (e) Statement of whether the alleged unfair methods of competition and unfair acts, or the subject matter, have been involved in other litigation.
- (f) Description of the domestic industry affected, or if complaint alleges restraining or monopolizing trade and commerce in the United States, a description of the trade and commerce affected.



- (g) Description of the complainant's business and its interests in the domestic industry.
- (h) Statement of a specific theory and corroborating data to support the allegations in the complaint concerning the existence of a threat or effect to destroy or substantially injure a domestic industry, to prevent the establishment of a domestic industry, or to restrain or monopolize trade and commerce in the United States. The information that should normally be provided includes the volume and trend of production, sales and inventories of the domestic article; a description of the facilities and number and types of workers employed in the production of the domestic article; profit-and-loss information covering overall operations; pricing information for the domestic article; and volume and sales of imports when available.
- (i) A request for relief.

There are substantial additional requirements for complaints that include a request for temporary relief. 19 C.F.R. §§ 210.8(a)(2), 210.52-.56.

Unlike District Court litigation, before filing a complaint with the ITC, the petitioner has the opportunity to meet with the ITC's Office of Unfair Import Investigations (OUII). The OUII staff provides an initial review of the complaint and ensures that the information provided therein is sufficient. This process is confidential and is favored by the ITC because it increases efficiency and ensures that the issues are fully developed prior to initiation of the action.

The ITC decides whether it will initiate an investigation without hearing from any of the respondents. If it determines to institute an investigation, the ITC itself serves the complaint and notice of investigation on the named respondents to the investigation, as well as the embassy of each foreign respondent.

3. How Are ITC Proceedings Conducted?

After an investigation is initiated, an administrative law judge (ALJ) is appointed to make an initial determination as to whether there has been a § 337 violation. In addition, the ITC appoints staff attorneys to also participate in the proceeding with the parties. The ITC staff attorney acts as an impartial representative of the public interest and has equal opportunity to participate in the proceedings by submitting briefs on issues and questioning witnesses.

An investigation is conducted using procedural rules that are based on the federal rules of civil procedure. However, the ITC's rules and a particular ALJ's own "ground rules" are more detailed as to discovery, motions, and other prehearing procedures.

The parties are entitled to obtain discovery by interrogatories, document requests, requests for inspection, and the like. 19 C.F.R. § 210.27, *et seq.* However, the deadlines for responding to requests are much faster than District Court litigation. For example, interrogatory responses are due 10 days after service. *Id.* § 210.29(b)(2). Discovery disputes also are heard and resolved quickly by the ALJ.

The ALJ conducts an evidentiary hearing on the merits of a § 337 case. The parties have the right to present and object to evidence, conduct cross examinations of witnesses, and other rights essential to a fair hearing.

Following the hearing, the presiding ALJ issues a decision on the dispute, called an initial determination. The full ITC commission may review and adopt, modify, or reverse the initial determination. It may also decide not to review the initial determination.

If the ITC finds that § 337 has been violated, it may then issue an exclusion order barring the products at issue from being imported into the United States, as well as a "cease and desist" order directing the violating parties to stop



certain actions. Commission orders are effective within 60 days of issuance, unless disapproved for policy reasons by the president (or his designee, the U.S. trade representative). 19 U.S.C. § 1337(j); 70 Fed. Reg. 43251 (July 26, 2005). ITC rulings may be appealed to the U.S. Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(6).

4. What Must Be Proven to Prevail in an ITC Proceeding?

Bringing an unfair competition claim in the ITC would require showing the following:

- a. Unfair methods of competition or unfair acts in the importation of articles into the United States. Unfair acts and unfair methods of competition can include such activities as product disparagement, tortious interference with contractual relationships, fraud, misappropriation of trade dress, antitrust violations and prevention of establishment of an industry in the United States. The term “industry” in this context is broadly interpreted and could include a distribution chain.
- b. Importation into the United States of articles, or the sale of such articles by the owner, importer, or consignee, the threat or effect of which is to destroy or substantially injure such an industry in the United States, to prevent the establishment of such an industry in the United States, or to restrain or monopolize trade and commerce in the United States.
- c. The alleged unfair acts or unfair methods of competition relate to, or affect, a domestic industry in the United States which exists, or is in the process of being established.
- d. A nexus between the alleged unfair acts or unfair methods of competition and a substantial injury to the domestic industry, such as loss of sales or profits, loss of customers, or loss of potential sales caused by the accused imports.

5. Can a § 337 Investigation Be Settled?

Yes. A petitioner can enter into a settlement agreement with one or more of the respondents and move to terminate all or part of the investigation. The motion will be granted unless the ITC determines that the agreement would be contrary to the public interest. A proceeding can also be resolved through a consent order. 19 C.F.R. § 210.21.

6. What Remedies Can the ITC Grant?

As a remedy for a § 337 violation, the ITC can grant an exclusion order, which directs the U.S. Customs and Border Protection to exclude products from entry into the United States. There are two types of exclusion orders. 19 U.S.C. § 1337(d). A general exclusion order precludes the import of all infringing articles, without regard to source. A limited exclusion order is directed at a product from a specific respondent in the ITC investigation. In addition, the ITC may issue a cease and desist order directing a respondent to cease its unfair acts, including selling infringing products already imported into the United States, and may seek civil penalties for violations. 19 U.S.C. § 1337(f).

7. Can the ITC Award Money Damages?

No. The ITC is authorized to only grant injunctive-type relief. However, an IP owner can file an action in District Court seeking damages.

The additional cost of filing the parallel action is lessened by three factors. First, the discovery and issue development in the ITC and the District Court is largely the same/duplicative. Thus, much of the work performed in an ITC action is directly applicable to a District Court action. Second, the District Court action may be stayed by the respondent pending resolution of the ITC investigation pursuant to 28 USC § 1659, thereby avoiding additional expense until after the ITC action is concluded. This is done in the vast majority of District Court cases in which an ITC action is also filed.



While the District Court does not have to apply any findings or ruling of the ITC (the ITC's decisions are not legally binding on the District Court), the District Court will do so in most cases. Thus, if a favorable ruling has been obtained before the ITC, there is an increased likelihood that that same result can be obtained in the District Court. However, an adverse decision before the ITC does not preclude an action in District Court due to the difference in procedure and standards applied.

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