

## **Avoiding Supply Chain Disruption in International Trade Commission Section 337 Investigations**

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Companies invest in securing supply chains from disruption by economic and political factors, financial difficulties of suppliers, and, as we've recently seen, global pandemics. For those either importing goods or relying on goods being imported into the United States there is another potential threat to supply chains: an exclusion order issued by the U.S. International Trade Commission (ITC). The ITC has the power to exclude unfairly imported goods into the United States, and those orders are enforced by US Customs and Border Protection (CBP).

An exclusion order could cause headaches for companies by preventing them from supplying or receiving goods, depending on what side of the supply chain you stand. Additionally, most ITC investigations are about the products and "components thereof" which could further endanger the supply of parts for warranty and repair. The ITC presents possible risks to be sure, but there are limitations on the ITC's reach and ways to mitigate or avoid the ITC interrupting your supply chain.

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The ITC is tasked with enforcing Section 337 of the 1930 Tariff Act (19 U.S.C. § 1337) which prohibits, among other things, “importation into the United States, the sale for importation, or the sale within the United States after importation” of goods that infringe a patent, trademark, or copyright.

A party (called a Complainant) that believes others are importing goods that infringe its patent can file a complaint requesting the ITC to institute an investigation. The complaint must identify the accused goods and also name the companies who manufacture, import, or sell after importation the accused goods as proposed respondents.

The ITC will review the complaint and vote whether to institute an investigation in 30 days and most investigations are instituted.

An Administrative Law Judge (ALJ) presides over the investigation which might also include a staff attorney from the Office of Unfair Import Investigations (OUII) who represents the public interest in the investigation.

If the ITC finds that the imports violate Section 337, it will issue either a limited exclusion order (LEO) that only applies to the named respondents or, in rarer circumstances, a general exclusion order (GEO) that applies to all companies importing infringing goods, whether named as a respondent or not.

Although an exclusion order is the default remedy, the ITC has broad authority to modify exclusion orders if it determines that an exclusion order is contrary to public interest. The public interest (PI) analysis looks at the effect of an exclusion order on the public health and welfare; competitive conditions in the United States

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economy; the production of like or directly competitive articles in the United States; and United States consumers. When PI factors are strong, they can preclude the issuance of any exclusion order, though this is rarely done. More commonly, the ITC will make modifications to the date when the exclusion order begins or allow carve-outs for repair of goods already sold in the United States.

If you sell goods for importation into the U.S. or use those goods in a way that allegedly infringes a patent, you will likely be named as a respondent. If you are further downstream, you might not be named. The closer you are to the infringing action, the more likely you are to be named as a respondent. Respondents have the greatest opportunity to protect the supply chain at the ITC but non-respondents can also participate in the process as discussed below.

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## **1. Public Interest**

The ITC offers opportunities to argue that an exclusion order would

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harm the public interest throughout an investigation. Any person can argue PI at the beginning and end of the investigation, meaning that both proposed respondents and downstream customers can submit PI statements. These PI statements will be considered by the ITC and, if found convincing, the ITC will delegate PI to the ALJ; that is, order the ALJ to consider evidence of the impact of an exclusion order on the public interest. Parties only have eight days to submit PI statements but there are a few strategies to get a head-start on the issue.

When a complaint is filed, the ITC publishes a notice of the complaint **on its docketing system EDIS** and in the Federal Register. The notice requests submissions in the public interest from “[p]roposed respondents, other interested parties, and members of the public.” Any person or company can file a double-spaced submission of no more than five pages addressing the statutory PI factors discussed above: public health and welfare; competitive conditions in the United States economy; the production of like or directly competitive articles in the United States; and United States consumers.

PI submissions are due no later than eight calendar days from publication **in the Federal Register**, so time is of the essence. If you are aware of a bubbling dispute that could affect your business, consider monitoring the Federal Register for notices. But also monitor EDIS. EDIS publishes notices normally within a day or two of receipt, but it takes longer for the Federal Register to publish the notice of receipt of the complaint. Because the ITC counts the eight days from the Federal Register date, if you see the notice on EDIS first it can buy you several extra days (up to a week in some cases) to craft a statement. An added benefit to monitoring is that you might discover investigations where the complainant is seeking a GEO. Those investigations might not name you or your suppliers

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but could sweep you into a GEO that could bar you from importing goods into the US.

If you are submitting a PI statement, be sure to follow the rules. Submissions longer than five pages or that are not double-spaced can be rejected by the ITC.

If the ITC delegates PI and you are a respondent, you should prepare to submit evidence that an exclusion order would harm the public interest. A case based only on attorney argument will fail so be prepared to offer evidence of the damage to the public interest and consider using an expert to testify on the issue. Although downstream customers cannot participate as a party in the investigation, they can assist by providing any documents or information requested by respondents.

If the investigation goes the distance and the ALJ issues an opinion on whether there has been a Section 337 violation, the Commissioners at the ITC can (and often do) review all, or part of, the ALJ's decision. They will, once again, seek input on PI from any interested party, including downstream respondents. This is your final chance to make your public interest case. But be warned that if the ITC did not delegate PI, any public interest statements at the end of the investigation will almost certainly fail.

## **2. The Merits of the Investigation**

The best way a respondent can avoid disruption of supply chains is by winning the case. The ITC is a specialized area of law. For example, because Section 337 is a trade statute, not an IP statute, the complainant must show that the accused products have been imported or sold for importation into the U.S., and that complainant satisfies the domestic industry (DI) requirement by showing (1) that

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the complainant it is practicing at least one claim of the patent (the “technical prong”), and (2) is making significant investments in (a) plant and equipment or (b) labor and capital, or (c) substantial investments in exploitation of the patent, including engineering, research and development, and licensing (the “economic prong”).

ITC investigations are also incredibly fast. Most are completed in 15-18 months which means an evidentiary hearing could be as early as eight months after institution. The complexity and speed of ITC investigations present unique challenges so good representation from attorneys with ITC experience is crucial.

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### **3. Contract Clauses**

Consider inserting clauses into contracts that require a supplier to inform you if they are subject to a complaint at the ITC. This can give you a chance to consider your alternatives both legal and commercial and allow you the opportunity to submit PI statements.

If the imported goods are critical to your company, consider the

costs and benefits of indemnifying your suppliers. Nobody enjoys litigation but indemnification can put you in position to fully defend the goods at the ITC rather than relying on the supplier's decision on how much time and money it is willing to commit to defending the action.

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The ITC has sweeping powers to bar goods from the United States. Companies reliant on secure supply chains (and who isn't?) need to be aware of the power of the ITC and the importance of establishing policies to mitigate the potentially significant harm an exclusion order can have on its business.

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- Under Section 337 of the 1930 Tariff Act, the ITC has broad authority to bar the importation and sale of imported items that infringe a patent, trademark or copyright.
- The ITC allows anybody to argue that an exclusion order would harm the public interest—within specific timeframes.
- Parties to the investigation also have the opportunity to argue the merits of the case before an Administrative Law Judge.
- Companies also can protect their supply chains by inserting clauses into contracts that require a supplier to inform them if they are subject to an ITC complaint.

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