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I. Introduction and Executive Summary

Chairman Issa, Ranking Member Nadler, and distinguished members of the Subcommittee: thank you for the opportunity to testify. It is an honor to engage in this discussion with you today.

I have been privileged to be part of the international trade and intellectual property community for more than twenty-five years. I spent a portion of my early career on Capitol Hill before serving on the U.S. International Trade Commission ("ITC") for twelve years, including two terms as Chairman. Since 2012 I have been a partner at Adduci, Mastriani & Schaumberg, LLP, an international trade law firm based in Washington, DC. I appear today, however, in my individual capacity and not on behalf of the firm or any of its clients.

As you know, the ITC is an independent, nonpartisan administrative agency that was established by Congress in 1916. The ITC administers U.S. trade remedy laws in a fair and objective manner, provides Congress, the President, and the U.S. Trade Representative with information and support on matters relating to tariffs and international trade and competitiveness, and maintains the Harmonized Tariff Schedule of the United States.

The trade remedy law we are discussing today is 19 U.S.C. § 1337, known as Section 337. This statute authorizes the ITC to investigate unfair methods of competition and unfair acts, including infringement of intellectual property rights ("IPR"), in the importation of articles into the United States. In essence, the purpose of the law is to assure that competition from products made overseas respects U.S. property rights, especially those protected by statute.

A few years ago, some commentators began to argue that Section 337 was inappropriately serving the interests of so-called non-practicing entities ("NPEs"), and that the ITC was not judiciously administering the statute. I disagreed with such contentions then and shared my views with this Subcommittee in April 2013. I appreciate the invitation to appear again to share why, today, in light of updated data on filings, recent case law, and administrative developments, my disagreement with such criticisms is even stronger.

In my capacity as a former member and Chairman of the ITC, I offer a few key points for the Subcommittee's consideration. First, the ITC is an expert trade agency that, in administering Section 337, provides an effective remedy to combat the pervasive problem of infringing imports, thereby providing essential protection to U.S. IPR owners and fostering U.S. competitiveness and innovation. Second, through its decisions and administrative actions, the ITC has sent a clear message that only entities with substantial domestic ties will succeed under Section 337. The data demonstrate that NPEs rarely file cases at the ITC, and that, when they do, they typically do not succeed. I respectfully submit, therefore, that Section 337 is functioning exactly as Congress intended and that proposals to amend the statute are misguided.

II. Importance of Protecting American IPR

There is a direct link between the protection of U.S. IPR and American competitiveness. Section 337, by serving as a mechanism for protecting U.S. IPR, promotes economic growth and domestic job creation.

Innovation is a primary driver of U.S. economic growth. IP-intensive industries account for more than $5 trillion in value added, or approximately 35 percent of U.S. gross domestic product.[1] According to the U.S. Intellectual Property Enforcement Coordinator, IP-intensive industries account for over 60 percent of U.S. exports and over 30 percent of U.S. employment.[2]

Constitutionally protected patent rights incentivize investments in innovation, a key engine of economic growth. Indeed, the U.S. economy is highly dependent on the innovation produced by universities, small businesses, and start-ups, which deploy significant investment in research and development and licensing programs. Notably, IP licensing is one of the few industries in which the United States enjoys a significant trade surplus, delivering billions to the U.S. economy every year.[3] Licensing revenues facilitate a cycle of innovation, allowing IP owners to fund the research and development of future creations. According to the U.S. Chamber of Commerce, more than 50 percent of annual economic growth is attributable to technological innovation.[4]

Acknowledging that development of IPR had become an increasingly critical source of value for the U.S. economy, and that some manufacturing had moved overseas, Congress amended Section 337 in 1988 expressly to authorize NPEs to bring complaints. Congress modified the statute so that companies making a "substantial investment in [a patent's] exploitation, including engineering, research and development, or licensing," could establish the existence of a domestic industry and obtain relief under the statute.[5] Congress recognized that large and small U.S. companies—as well as universities and research institutions—that develop and utilize IPR being infringed by unfair imports should be afforded protection under Section 337.

Infringement of IPR is a pervasive problem that harms companies, consumers, and all levels of government.[6] Section 337 serves as the front line of IP trade enforcement. In addition to protecting against patent infringement by foreign manufacturers, Section 337 prevents the importation of products that violate U.S. copyright, trademark, and trade secret laws. This has proven particularly useful with respect to infringing products from China: between 2008 and 2015, approximately 80

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[1] Economics and Statistics Administration and U.S. Patent and Trademark Office joint report, "Intellectual Property and the U.S. Economy: Industries in Focus," at 45 (Mar. 2012).

[2] https://www.whitehouse.gov/blog/2012/04/11/intellectual-property-and-us-economy.

[3] *Id.* at 56-59. *See also id.* at 2 (stating that IP licensing helps drive the U.S. economy forward by "[c]reating a platform for financial investments in innovation" and "[e]nabling a more efficient market for technology transfer and trading in technology and ideas.").

[4] https://www.uschamberfoundation.org/enterprisingstates/assets/files/Executive-Summary-OL.pdf. *See also* http://www.uspto.gov/about-us/news-updates/us-department-commerce-issues-report-role-patent-reform-supporting-innovation (Department of Commerce report finding that approximately 75 percent of the nation's post-World War II growth is linked to technological innovation).

[5] *See* 19 U.S.C. § 1337(a)(3)(C).

[6] *See* U.S. Congress Joint Economic Committee, "The Impact of Intellectual Property Theft on the Economy," at 1, 4 (Aug. 2012).

percent of products accused in Section 337 investigations were imported from China. By helping to combat this infringement, Section 337 strengthens U.S. competitiveness.

Companies that I have advised highlight the advantages of asserting IPR under Section 337, including expeditious adjudication, expert ITC judges, *in rem* jurisdiction, and effective remedies that typically cannot be obtained in district court. While the spectrum of products, industries, and types of IPR considered by the Commission is broad, the prevalence of high-technology products with short life cycles underscores why these attributes make the ITC an attractive venue for U.S. industries battling infringing imports. I struggle to understand why Congress would want to weaken an effective tool for our most innovative companies seeking relief from infringing imports.

Weakening Section 337 would also have international implications. Our trading partners increasingly recognize that innovation is *the* fundamental competitive advantage; accordingly, countries such as China are modifying their laws to strengthen IP protection, while the European Union has adopted a unitary patent court. It would make little sense for the United States to move in the opposite direction, particularly at a time when U.S. trade negotiators have been working hard to raise IPR standards in agreements such as the Trans-Pacific Partnership and Trans-Atlantic Trade and Investment Partnership. Diminishing Section 337 would send the wrong message to our trading partners and undermine our competitive advantage in innovation.

III. Responses to Criticisms of Section 337

A. Background and Applicable Data

Section 337 filings increased in 2010 and 2011, including a number of high-profile cases involving smartphone and tablet technology. As a reaction to those business- and technology-driven developments, a few companies launched a lobbying campaign to amend Section 337. I understand another bill seeking to amend the statute, H.R. 4829, was introduced last month. The so-called reforms would radically limit who can seek Section 337 relief, complicate and restrict the Commission's case-by-case adjudication of the statute (thus encroaching on the Commission's discretion), and make it more difficult to keep infringing imports out of the U.S. market. The proposed amendments are neither necessary nor well-reasoned.

As a threshold matter, the proposed reforms are premised on the faulty argument that NPEs have been abusing the ITC. Data clearly demonstrate otherwise. In 2014 and 2015, only 5 of the 75 total Section 337 investigations—under seven percent—were brought by NPEs.[7] In fact, according to Commission data, between 2006 and 2015:

- Category 1 NPEs (research institutions, start-ups, and individual inventors) have accounted for just 8 percent of Section 337 investigations.
- Category 2 NPEs (whose business model focuses on purchasing and asserting patents) have accounted for just 9 percent of Section 337 investigations.[8]

[7] https://www.usitc.gov/intellectual_property/337_statistics_number_section_337_investigations.htm

[8] *Id.*

I encourage you to evaluate this data with two foundational points in mind. First, Congress amended the statute in 1988 specifically to allow entities whose business focuses on engineering, research and development, or licensing—such as start-ups and universities—to avail themselves of Section 337 protection. Second, even if the 1988 amendments were misguided (and I submit they were not), the data confirm that NPEs have not overtaken the ITC. The data unequivocally demonstrates that NPEs represent a very small portion of the Section 337 docket.

In addition, overall Section 337 filings have decreased significantly in the past few years. The number of cases instituted in each calendar year from 2011 through 2015 was 69, 40, 42, 39, and 36. The ITC is not inundated with frivolous cases, nor is its caseload unmanageable. Moreover, of the 67 exclusion orders issued by the Commission since May 2006,[9] only four were on behalf of NPEs.[10] And in each of those investigations, the involved NPE or its subsidiary had developed the technology at issue.

B. Case Law and Administrative Developments

Some have also criticized the Commission's handling of Section 337 investigations, particularly as to the issues of domestic industry and public interest. I suggest that an analysis of ITC data, including recent decisions, demonstrates that the Commission is, in fact, appropriately analyzing these issues and making reasoned determinations on a case-by-case basis that protect the rule of law.

1. Domestic Industry

Critics claim NPEs are easily satisfying the domestic industry requirement through dubious investments in efforts to license their patents. Consequently, they propose amending Section 337 to require complainants who rely on licensing to prove a domestic industry to show that the licensing activities led "to the adoption and development of articles" that practice the asserted patent. This proposal is both unwise and unwarranted.

The proposal is unwise because adding such a requirement would create a host of interpretive challenges and thrust the ITC and its litigants into an upheaval of unsettled law. For example, how could a complainant prove that its technology, not another's, led to the "adoption" or "development" of a new article that did not exist before? How would the Commission define those terms? Would the process of their definition result in uncertainty and, consequently, additional litigation costs? Moreover, this type of restriction would reward infringing parties for dilatory tactics during license negotiations, as no licensing-based domestic industry could be established after the "claimed patent" has been adopted. That is, the restriction could incentivize potential licensees to avoid taking a license. Additionally, the temporal restriction would feasibly cut off any work performed after the

[9] May 2006 is when the U.S. Supreme Court issued its decision in *eBay Inc. v. MercExchange*, LLC, 547 U.S. 388, which harmonized the standard for obtaining an injunction in patent infringement cases. Critics of the ITC have claimed that, following this decision, NPEs have flocked to the ITC due to the difficulty of obtaining an injunction in district court. The claim clearly is not supported by the facts.

[10] https://www.usitc.gov/press_room/documents/featured_news/337facts.pdf

“adoption” or “development” of an article, thus implying that only the first license involving the patent is relevant to the domestic industry analysis.

The proposal is unwarranted because the ITC is already scrutinizing licensing-based domestic industries in a rigorous manner. The ITC has interpreted the statute’s “substantial investment” standard very carefully and has not permitted entities with questionable domestic activities to obtain relief under Section 337.

In the seminal 2011 case concerning a licensing-based domestic industry, the Commission held that the complainant must meet three threshold requirements: (1) the investments must constitute an exploitation of the individual asserted patent; (2) the investments must relate to licensing; and (3) the investments must be domestic, i.e., occur in the United States.[11] Factors to assess in determining whether there has been a substantial investment include the number of licensees, the amount of revenue generated from license agreements, and the number of U.S. employees involved in the relevant licensing efforts.[12] Litigation expenses, alone, are insufficient to satisfy the test.

Since that landmark 2011 decision, many NPEs have failed in their efforts to litigate at the ITC. In particular, over the subsequent 4.5 years, the following has occurred:

- A total of just three NPEs have succeeded in establishing a licensing-based domestic industry before the Commission.[13]
- In 2012 alone, three NPEs *which had previously satisfied the domestic industry requirement* failed to prove that their licensing investments were sufficient.[14]

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[11] *Certain Multimedia Display & Navigation Devices & Systems*, Inv. No. 337-TA-694, Comm’n Op. (Aug. 8, 2011).

[12] *Id. See also Certain Light-Emitting Diodes*, Inv. No. 337-TA-640, Initial Determination (May 2009).

[13] *Certain Liquid Crystal Display Devices*, Inv. No. 337-TA-741/749, Comm’n Op. (July 2012) (the complainant was Thomson Licensing SAS, a subsidiary of Technicolor SA); *Certain Wireless Consumer Electronics Devices*, Inv. No. 337-TA-853, Comm’n Op. (Mar. 21, 2014) (the complainant was Technology Properties Limited, LLC); *Certain 3G Mobile Handsets*, Inv. No. 337-TA-613, Comm’n Op. (Mar. 26, 2014) (the complainant was InterDigital Technology Corporation).

[14] *Certain Semiconductor Chips*, Inv. No. 337-TA-753, Comm’n Op. (Aug. 2012); *Certain Integrated Circuits*, Inv. No. 337-TA-786, Comm’n Op. (Oct. 2012); *Certain Video Game Systems & Controllers*, Inv. No. 337-TA-743, Comm’n Op. (Jan. 20, 2012).

- From 2013 through March 2016, a handful of NPE complainants failed to establish a domestic industry based on licensing investments,[15] and additional NPEs failed to satisfy the requirement because their research and development activities were insufficient.[16]

The case law thus demonstrates that the Commission has, through its application of carefully crafted standards, denied relief to multiple complainants based on failure to establish the required domestic industry. In fact, the Commission is conducting such a strict analysis of domestic industry that even companies which invest millions of dollars in the United States cannot obtain early decisions (summary determination) affirming their domestic industry.

Moreover, the U.S. Court of Appeals for the Federal Circuit has affirmed the Commission's handling of this issue—both where activities were sufficient to establish a domestic industry and where such activities were insufficient.[17] In addition, the Federal Circuit has held that, even where a domestic industry is based on licensing or research and development (as opposed to manufacturing), the complainant's investments must relate to articles protected by the asserted patent—a requirement that has made it much more difficult for NPEs to succeed at the ITC.[18] The Federal Circuit also held that licensing investments must be part of an effort to "encourage adoption and development of articles," creating yet another barrier to certain types of NPEs.[19] The Federal Circuit further heightened the domestic industry standard by holding that, where a complainant's imported products

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[15] *Certain Microprocessors*, Inv. No. 337-TA-781, Initial Determination (Dec. 14, 2012) (the domestic industry finding was vacated by the Commission in a Feb. 15, 2013 notice, without reaching the merits, because the finding was non-dispositive in view of the Commission's adopted claim constructions); *Certain Products Having Laminated Packaging*, Inv. No. 337-TA-874, Comm'n Op. (Sept. 3, 2013); *Certain Lithium Metal Oxide Cathode Materials, Lithium-Ion Batteries for Power Tool Products Containing Same, & Power Tool Products With Lithium-Ion Batteries Containing Same*, Inv. No. 337-TA-951, Initial Determination (Mar. 10, 2016) (but domestic industry found based on other activities and investments; decision currently pending possible review by the Commission).

[16] *See Certain Integrated Circuit Chips*, Inv. No. 337-TA-859, Comm'n Op. (Aug. 22, 2014); *Certain Sulfentrazone, Sulfentrazone, Compositions, and Processes for Making Sulfentrazone*, Inv. No. 337-TA-914, Initial Determination (Apr. 10, 2015) (domestic industry finding set aside by the Commission because no violation was found based on other grounds); *Certain Television Sets, Television Receivers, Television Tuners, and Components Thereof*, Inv. No. 337-TA-910, Comm'n Op. (Oct. 30, 2015).

[17] *See, e.g.*, *InterDigital Communications v. ITC*, 707 F.3d 1295 (Fed. Cir. 2013) (affirming Comm'n Op. in *Certain 3G Mobile Handsets*, Inv. No. 337-TA-613); *John Mezzalingua Assocs. v. ITC*, 660 F.3d 1322 (Fed. Cir. 2011) (affirming Comm'n Op. in *Certain Coaxial Cable Connectors*, Inv. No. 337-TA-650).

[18] *See InterDigital Communications, LLC v. ITC*, 707 F.3d 1295 (Fed. Cir. 2013); *Microsoft Corp. v. ITC*, 731 F.3d 1354 (Fed. Cir. 2013). These appellate rulings led to the failure of the NPE complainant in the 841 investigation. *See Certain Computers and Computer Peripheral Devices*, Inv. No. 337-TA-841, Comm'n Notice (Dec. 19, 2013).

[19] *Motiva, LLC v. ITC*, 716 F.3d 596, 600 (Fed. Cir. 2013).

do not contain sufficient U.S. "value-added" from U.S. employees or investment, a domestic industry cannot exist.[20]

In sum, it has become more, not less, difficult to establish a domestic industry under Section 337. The Commission and Federal Circuit are applying the statute judiciously and have not permitted questionable entities to obtain unwarranted relief. This has put significant pressure on NPE complainants and has greatly reduced their leverage to extract a settlement. The past 4.5 years have not been kind to NPEs seeking relief under Section 337.

2. <u>Public Interest</u>

Before issuing any remedial orders, the Commission is required by statute to consider the effect of such relief on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers.[21] The Commission analyzes these factors prudently, as demonstrated through various recent developments.

First, the ITC has tailored exclusion orders due to public interest concerns. In *Certain Baseband Processor Chips*, Inv. No. 337-TA-543, the Commission provided carve-outs from the exclusion order in view of the then-developing 3G wireless network and the need for first responders to use that network. In *Certain Personal Data & Mobile Communications Devices*, Inv. No. 337-TA-710, the Commission: (a) delayed enforcement of the remedial orders by four months to provide network carriers time to replace infringing smartphones; and (b) permitted the respondent to import replacement parts to be provided to customers under warranties and insurance contracts.

Second, ALJs have recommended modified remedies on account of public interest concerns. That occurred, for example, in *Certain Microprocessors*, Inv. No. 337-TA-781, an investigation in which the complainant was an NPE. The ALJ found no violation but recommended, in the event the Commission found a violation, a nine-month delay of the entry of any exclusion order to allow respondents time to adjust their manufacturing operations to incorporate non-infringing components.[22] Similarly, in *Soft-Edged Trampolines*, Inv. No. 337-TA-908, the ALJ recommended that, if the Commission were to find a violation, it tailor the exclusion order based on public interest concerns. The ALJ stated that "not allowing customers to obtain replacement, repair, or warranty parts for their already-purchased trampolines would create a real safety issue. This is exacerbated by the fact that the propriety components of the accused trampolines are presumably not readily available

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[20] *Lelo, Inc. v. ITC*, 786 F.3d 879 (Fed. Cir. 2015).

[21] *See* 19 U.S.C. § 1337(d)-(f).

[22] The Commission ultimately terminated the investigation with a finding of no violation. *See Certain Microprocessors,* Inv. No. 337-TA-781, Notice of Commission Determination (Feb. 15, 2013).

on the open market." Accordingly, the ALJ opined that any exclusion order should include an exception for replacement, repair, and warranty parts.[23] [24]

Third, the ITC has taken meaningful administrative actions in this context. In November 2011, the Commission issued new rules that enhance the evidentiary record on the public interest factors.[25] This decision was inspired by the increasing number of investigations involving products of significant interest to the general public, as well as the U.S. Trade Representative's interest in having an expanded record for use in the Presidential policy review of ITC remedial orders.

- The new rules require complainants to submit a separate statement with their complaint providing specific information on the public interest factors. The statement must explain the domestic use of the accused products, identify any public health, safety, or welfare concerns relating to the requested relief, identify similar products that could replace the accused products, discuss the domestic capacity to replace the accused products, and state how the requested relief might affect U.S. consumers. A notice soliciting comments from respondents, the public, and federal agencies is then published in the Federal Register. Third-parties have taken advantage of these procedures, with submissions being filed by trade associations, federal agencies, members of Congress, and others.
- After consideration of the complaint and the statement and comments regarding public interest, the Commission may direct the ALJ to oversee discovery, receive evidence, and make findings on the public interest implications of the requested relief.
- Since these procedures went into effect, at least 55 investigations have been delegated to ALJs for public interest fact-finding. In 2015, the Commission delegated public interest to the ALJ in over 25 percent of new investigations.[26]
- Notably, over half of investigations where public interest was delegated to the ALJ have ended in a settlement, and at least seven of those investigations ended by withdrawal of the complaint. It therefore appears the Commission's heightened focus on public interest

[23] *Certain Soft-Edged Trampolines and Components Thereof*, Inv. No. 337-TA-908, Recommended Determination (Dec. 18, 2014). The Commission ultimately terminated the investigation with a finding of no violation. *See* Inv. No. 337-TA-908, Commission Opinion (April 6, 2015).

[24] ITC staff attorneys have also advocated for tailored remedial orders on account of public interest concerns. *See, e.g.*, *Certain Reduced Ignition Proclivity Cigarette Paper Wrappers*, Inv. No. 337-TA-756, Initial Determination (Feb. 1, 2012) (arguing for a stay of any exclusion order for a commercially reasonable period of time to allow cigarette manufacturers to obtain the FDA approval and fire-safety re-certifications needed to sell redesigned cigarettes in the United States); *Certain Microprocessors*, Inv. No. 337-TA-781, Initial Determination (Dec. 14, 2012) (arguing, consistent with the ALJ's conclusion, that the public interest factors weighed against issuance of any exclusion order, but that if the Commission determined to issue an exclusion order, the order should be tailored to mitigate harmful effects on consumers and the U.S. economy).

[25] *See* Commission Rule 210.8(b)-(c).

[26] *See* https://www.usitc.gov/intellectual_property/337_statistics_identification_and_number_cases.htm

is affecting parties' decisions either to pursue, settle, or back away from Section 337 actions.

Finally, critics fail to appreciate the additional public interest protections built into Section 337. Remedial orders are not final until the conclusion of a 60-day period for Presidential review, and the President can disapprove of any remedy "for policy reasons."[27]

The facts above demonstrate that the ITC is appropriately adjudicating Section 337 investigations. It has become more difficult to establish a domestic industry, remedies have been tailored based on economic factors, and due consideration is being given to public interest and policy concerns.

3. Regulatory Actions

The Commission has also taken various administrative steps to protect the tribunal from abuse. The new public interest rules, discussed above, are a prime example of this, as they deter patent assertion entities from filing an ITC case. Additional examples of the Commission's concerted efforts to prevent abuse include the following:

- The Commission implemented a program to identify a potentially dispositive issue—e.g., domestic industry or standing—and instruct the ALJ to issue an up-front, expedited ruling on that issue. This program protects respondents from the expenses of a frivolous case, as a matter may conclude before discovery even begins. In one case with such delegation, the ALJ found, and the Commission affirmed, that the complainant's licensing activities did not satisfy the domestic industry requirement—thus resulting in immediate termination of the investigation.[28] The Commission is currently considering a further modification to its rules that would: (a) allow parties to file a motion within 30 days of institution of an investigation requesting an early ruling on a potentially dispositive issue; and (b) authorize ALJs to designate a potentially dispositive issue for an early ruling.[29]
- The Commission amended its rules pertaining to discovery, inspired in part by the efforts of the Federal Circuit to get courts and the ITC to adopt rules that reduce the cost of litigation.[30] The purpose of the adopted changes is "to reduce expensive, inefficient,

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[27] 19 U.S.C. § 1337(j). The President has delegated this authority to the U.S. Trade Representative. In August 2013, USTR disapproved the exclusion order in the 794 investigation, in which Apple had been found to infringe Samsung's standard essential patents.

[28] *Certain Products Having Laminated Packaging*, Inv. No. 337-TA-874, Comm'n Op. (Sept. 3, 2013).

[29] *See* 80 Fed. Reg. at 57556 (Sept. 24, 2015).

[30] *See* USITC Final Rule, "Rules of General Application and Adjudication and Enforcement," Docket No. MISC-040 (Apr. 11, 2013).

unjustified, or unnecessary discovery practices."[31] The new rules have decreased the expense and burden that parties, particularly respondents, face in Section 337 investigations.[32] The changes were based on information the Commission gathered from a thorough process that sought input from litigants, academics, district court judges and bar associations. The changes simplified electronic discovery procedures and required ALJs to limit discovery under certain circumstances. In addition, the Commission is currently considering amending its rules to clarify that a party can request sanctions for abuse of discovery.[33]

- The Commission is considering amending its rules to clarify that, where a complaint asserts multiple unrelated patents or technologies that would result in an unwieldy or lengthy investigation, it may institute multiple investigations based on that complaint.[34]
- The Commission is considering amending its rules to allow ALJs to sever an investigation into two or more investigations when doing so would provide for more efficient adjudication.[35]
- It should also be noted that the ITC rules require detailed fact pleading for complaints, in contrast to the more liberal notice pleading of district courts. Complaints are reviewed by the Commission's Office of Unfair Import Investigations, and drafting a complaint sufficient to meet the ITC's requirements for institution of an investigation is a serious and expensive undertaking. It can take several months for a prospective complainant to conduct the investigation necessary to satisfy the Commission's detailed pleading requirements. This discourages the filing of frivolous complaints by NPEs or other entities with questionable investments in the U.S. economy.

All of these decisions and initiatives will make the ITC an even more challenging forum for complainants who have a questionable basis for utilizing Section 337.

IV. <u>Uniqueness of Section 337 and the ITC</u>

Three additional points help demonstrate the important purposes served by Section 337 and the ITC. First, Section 337 is a trade, not a patent statute, and also applies to trademark and copyright infringement, trade secret theft, and other unfair importation-related acts. Second, the ITC exercises *in rem* jurisdiction that is very different from the *in personam* jurisdiction exercised by federal courts.

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[31] 77 FED. REG. 60952-60956 (Oct. 5, 2012).

[32] It has been argued that costs for a respondent in a Section 337 investigation are significantly higher than for a defendant in a district court patent matter. However, in a comprehensive June 2015 report, the American Intellectual Property Law Association found that ITC litigation was not more costly. The main difference is that, due to the expeditious nature of a Section 337 proceeding, the costs are borne over a much shorter time period than in a typical district court case. *See* http://files.ctctcdn.com/e79ee274201/b6ced6c3-d1ee-4ee7-9873-352dbe08d8fd.pdf.

[33] 80 Fed. Reg. at 57556 (Sept. 24, 2015).

[34] *Id.* at 57555.

[35] *Id.*

Third, the relief afforded by the ITC is often essential to ensuring meaningful protection of U.S. companies' IPR, particularly in the context of knockoffs from China.

A. Trade Statute Administered by a Trade Agency

Congress created the ITC to protect domestic industries from unfair practices in import trade. As an independent agency, the ITC operates under a different set of statutes and mandates than the federal courts. Although, in conducting investigations under Section 337, the ITC can make a patent-related determination, it is not administering patent statutes. Indeed, Commission findings on infringement and invalidity have no *res judicata* effect.

Because Section 337 is directed at unfair practices in import trade, ITC complainants face evidentiary requirements distinct from or in addition to those of a plaintiff in district court—such as importation, domestic industry, injury (in cases involving non-statutory IPR), and public interest. Moreover, because Section 337 remedies are directed at the infringing articles themselves, these proceedings involve economic analyses that do not occur in district court patent litigation.

The ITC's primary objective is to manage the country's international trade laws and to promote the country's competitiveness in the global marketplace.[36] Because of this focus, Section 337 has different and broader purposes than the patent statutes. The ITC and federal courts are simply not identical adjudicatory bodies.

B. In Rem Jurisdiction

The most common type of jurisdiction in the American legal system is *in personam* jurisdiction, generally called "personal jurisdiction." *In personam* jurisdiction empowers a court to make judgments against a person or an entity that has legal personality, such as a corporation. In IP cases, federal courts exercise *in personam* jurisdiction.

In rem jurisdiction, by contrast, permits a tribunal to rule "against a thing," and therefore against the rights of persons or entities generally with respect to that thing. Section 337 provides the ITC with *in rem* jurisdiction over articles imported into the United States. This explains why U.S. companies whose products are manufactured offshore can be named as respondents in a Section 337 complaint. Such companies can avoid any potential Section 337 liability by manufacturing domestically, as opposed to importing their products from overseas.

The distinctions between *in personam* and *in rem* jurisdiction are manifest in the different types of relief afforded by federal courts and the ITC. Plaintiffs asserting IPR in district court typically seek monetary damages. ITC complainants, on the other hand, may only obtain remedial orders that direct U.S. Customs and Border Protection to block the importation of infringing goods (an exclusion order) or prohibit the marketing and sale of domestic inventories of such goods (a cease and desist order). The Federal Circuit has explained that the *in rem* relief offered by the ITC "follows the long-standing principle that importation is treated differently than domestic activity."[37]

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[36] *See* About the USITC, http://www.usitc.gov/press_room/about_usitc.htm.

[37] *Spansion, Inc. v. U.S. Int'l Trade Comm'n*, 629 F.3d 1331, 1359 (Fed. Cir. 2010).

The ITC's *in rem* jurisdiction underscores that Section 337 is not a patent statute but, rather, a trade statute designed to protect domestic industries from unfair competition resulting from the importation of infringing goods. The ITC is not redundant of federal district courts.

C. <u>Ensuring American Companies Obtain Effective Import Relief</u>

The relief afforded by the ITC is often essential to ensuring meaningful protection of U.S. IPR. A U.S. company cannot easily obtain relief in district court against an infringing foreign manufacturer. Such a plaintiff must first establish personal jurisdiction over that manufacturer, which is typically accomplished through the company's U.S. affiliate. Where a foreign manufacturer does not have a domestic affiliate, therefore—and many do not—it may be impossible to establish jurisdiction in federal court. Sometimes it is impossible even to identify foreign manufacturers. In such circumstances, the ITC's *in rem* jurisdiction ensures that U.S. companies harmed by infringing imports can obtain effective relief.

Indeed, "Congress enacted Section 337 because in many instances foreign individuals or firms committing unfair acts to the detriment of an American industry are beyond the *in personam* reach of the U.S. courts and not amenable to a suit for money damages or injunctive relief."[38] The following examples demonstrate the practical significance of this reality.

- In *Certain Loom Kits for Creating Linked Articles*, Choon's Design of Wixom, Michigan, sought relief from the importation of craft jewelry- and toy-making kits that infringed its patent. The Commission found that many infringing kits were being sold on the internet by anonymous sellers from China.[39] The Commission noted that Choon's had filed nine district court lawsuits against infringers and had sent cease and desist letters to multiple websites selling infringing kits, to little avail. Accordingly, the Commission issued a general exclusion order against all imports of infringing loom kits, providing the type of relief needed to prevent further widespread infringement and the type of relief that Choon's was unable to obtain outside the ITC.
- In *Certain Electronic Paper Towel Dispensing Devices,* Georgia-Pacific of Atlanta, Georgia, sought relief against imports that infringed its U.S. patents. The Commission found, *inter alia*, that: (a) there was interchangeability of manufacturers; (b) the products were easy and inexpensive to manufacture; (c) there were many well-established distribution channels and internet retailers actively selling the articles; and (d) many of the infringing products were being sold unlabeled. The Commission thus concluded it was extremely difficult to identify the sources of the infringing articles. The Commission issued a general exclusion order prohibiting the importation of all electronic paper towel

[38] *Certain Steel Rod Treating Apparatus & Components Thereof*, Inv. No. 337-TA-97, Comm'n Act. & Order at 139 (Jan. 1982).

[39] *See Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm'n Op. at 12-14 (June 26, 2015).

dispensers that infringed the asserted patents.[40] Given the nature of the supply chain, Georgia-Pacific could not have obtained any such relief in district court.

- In *Certain Hair Irons*, Farouk Systems of Houston, Texas, sought relief against the importation of hair irons that infringed its trademarks. The Commission noted that Farouk had litigated 21 district court actions seeking to stop the importation and sale of infringing products. The Commission also cited findings that the infringing manufacturers were improperly marking the country-of-origin of their products in an effort to increase confusion as to the actual source of the articles. Additionally, the Commission found that the infringing hair irons were primarily distributed over the internet, "a method that lends itself to anonymity and makes it difficult to determine the source of the infringing products."[41] The Commission issued a general exclusion order, the type of robust relief Farouk could not obtain from its 21 lawsuits in various federal courts.

- In *Certain Energy Drink Products*, Red Bull Energy Drinks of Santa Monica, California, sought relief against imports that violated its trademark and copyrights. The Commission found that numerous unspecified entities were producing and importing gray market energy drinks. The Commission noted that Red Bull had filed multiple cases in federal courts and had identified 250 suspected parties who were engaged in gray market activities across the United States.[42] The Commission issued a general exclusion order, providing Red Bull with relief it could not attain from its multitude of district court actions.

- In *Certain Inkjet Ink Cartridges with Printheads*, Hewlett-Packard of California and Texas obtained a general exclusion order against products that infringed its U.S. patents relating to inkjet printers.[43] Hewlett-Packard returned to the ITC in *Certain Inkjet Ink Supplies*, in which it obtained a general exclusion order relating to imports that infringed other patents.[44] In each instance the ITC noted that it was difficult to identify the origins of infringing products, in part because the imports were generically packaged and there were numerous, unnamed contract manufacturers involved in the production of the infringing goods.

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[40] *See Certain Electronic Paper Towel Dispensing Devices & Components Thereof*, Inv. No. 337-TA-718, Comm'n Op. on Remedy, the Public Interest, and Bonding (Jan. 20, 2012).

[41] *Certain Hair Irons & Packaging Thereof*, Inv. No. 337-TA-637, Comm'n Op. on Remedy, the Public Interest, and Bonding at 4-5 (June 20, 2009).

[42] *See Certain Energy Drink Products*, Inv. No. 337-TA-678, Comm'n Op. on Remedy, the Public Interest, and Bonding (Sept. 8, 2010).

[43] *See Certain Inkjet Cartridges with Printheads & Components Thereof*, Investigation No. 337-TA-723, Comm'n Op. (Dec. 1, 2011).

[44] *See Certain Inkjet Ink Supplies & Components Thereof*, Inv. No. 337-TA-730, Comm'n Op. (Feb. 24, 2012).

- In *Certain Hydraulic Excavators*, Caterpillar of Peoria, Illinois sought relief against the importation of gray market excavators that infringed its trademarks. A pattern of violation was shown by the identification of thousands of gray market excavators within the United States. Caterpillar proved that it could not establish the sources of these infringing products and that multiple foreign manufacturers were involved in the supply chain. The Commission issued a general exclusion order prohibiting the importation of the infringing excavators.[45] Caterpillar could not have obtained such relief in district court.

These examples demonstrate that the ITC is an indispensable forum for protecting U.S. IP owners from infringing imports. That is especially true with respect to knockoffs from China, the number one source of infringing products seized at the U.S. border.[46] Of the 313 Section 337 investigations instituted between 2008 and 2015, approximately 80 percent of the accused products were imported from China, and over 25 percent of cases involved at least one Chinese respondent.

In addition to those noted above, U.S. companies that have obtained Section 337 relief from Chinese imports in the past few years include A&J Manufacturing of Florida (outdoor grills), Manitowoc Cranes of Wisconsin (hydraulic cranes), SI Group of New York (rubber resins), Litepanels of California (LED devices), and OtterBox of Colorado (cases for phones and tablets). To these American companies, the ITC is certainly not a "redundant" tribunal; instead, the ITC served as an essential forum for obtaining needed import relief.

V. **<u>Conclusion</u>**

The ITC is an expert trade agency that is interpreting Section 337 in a judicious manner. Contrary to the claims of some, it has become more difficult to establish a domestic industry, NPEs are rarely filing cases (much less succeeding on the merits), the Commission is tailoring its remedial orders to reflect economic realities, and public interest concerns are being carefully addressed. The ITC's recent decisions and administrative actions have sent a clear message that this is not the forum for patent holders who do not make the investments in the U.S. economy mandated by Congress.

Against this notable backdrop, Section 337 filings have decreased markedly in the past few years. The proposed "reforms" are, therefore, a solution in search of a problem. Instead of seeking statutory changes that would weaken the ITC's ability to combat foreign infringement, those who claim to want to reduce abusive patent litigation should applaud what is already happening at the Commission.

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[45] *See Certain Hydraulic Excavators & Components Thereof*, Inv. No. 337-TA-582, Comm'n Op. (Feb. 3, 2009).

[46] http://www.cbp.gov/newsroom/national-media-release/2015-04-02-000000/cbp-ice-hsi-report-12-billion-counterfeit-seizures.

Supreme Court doctrine requires deference to the expertise of agencies in administering their enabling statutes.[47] As part of Section 337, "domestic industry" and "public interest" are terms of art whose interpretation is squarely within the discretion and expertise of the ITC. Congressional action should be reserved for a time when there is clear evidence that the Commission is abusing its statutory mandate or harming U.S. businesses. At present, there is absolutely no such evidence.

[47] *See Nat'l Labor Relations Board v. Hearst Publ'ns*, 416 U.S. 267 (1974) (mandating deference to an administrative agency's interpretation of the term "employee" within its enabling statute); *Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683 (1948) (giving significant weight to the FTC's interpretation of "unfair competition" within its enabling statute); *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (recognizing that the regulatory scheme is technical and complex and that those with expertise and charged with responsibility for administering the provision are in the best position to do so).