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“International Trade Commission Patent Litigation”

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I. Introduction and USITC Mission

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

I am the General Counsel of the U.S. International Trade Commission (USITC or Commission). Today I am here to outline the USITC procedures in administering 19 U.S.C. 1337 – section 337.

The USITC is an independent, quasi-judicial federal agency with a wide range of trade-related mandates. The USITC provides independent tariff, trade and competitiveness-related analysis and information to the House Committee on Ways and Means, the Senate Committee on Finance, the President, and the U.S. Trade Representative. The USITC maintains the U.S. Harmonized Tariff Schedule. The USITC also administers certain trade remedy laws. Specifically, the USITC investigates whether imports have materially injured a domestic industry (such as antidumping and countervailing duty investigations) and whether there are unfair practices in the importation of articles (violations of section 337). I appear before you today to address the processes the Commission employs in administering section 337.

The essential structure of the USITC traces its intellectual roots to the Harvard economics professor Frank W. Taussig, who was appointed the first chairman of the USITC’s predecessor (the Tariff Commission). After having long advocated for an independent commission so as to depoliticize the import component of U.S. international trade, Taussig oversaw the creation of an agency structured to do only fact-finding, analysis, adjudication, and technical advising, leaving policy-making to the political branches of government.

The USITC is responsible for investigating alleged violations of section 337 of the Tariff Act of 1930, as amended. Under this statute, complainants may seek protection against infringement of U.S. intellectual property (IP) rights and other unfair acts and methods of competition in the importation of articles. The overwhelming majority of investigations are based upon claims of patent infringement. These investigations often involve complex technologies and multiple accused infringers. Successful complainants receive relief in the form of an exclusion order enforced at the border by U.S. Customs and Border Protection and/or a cease and desist order enforced domestically by the Commission.

The Commission focuses on conducting expeditious, efficient, and technically sound decision-making in section 337 proceedings. The purpose of the law is to assure that products made overseas and imported into the United States respect U.S. intellectual property rights and to protect domestic industries from other unfair acts by imported articles. The statute requires that violations of Section 337 “shall be dealt with in addition to any other provision of law...”¹

Intellectual property holders often file complaints under section 337 because they desire a relatively quick resolution to their disputes. The USITC is statutorily charged with completing its investigations expeditiously, and the USITC’s procedures are specially designed to meet this mandate. The average time to evidentiary hearing in a section 337 investigation is about 9.5 months, and most investigations are completed within 16-18 months.²

As I outline below, the Commission’s Section 337 proceedings provide a technically sound and fair process to resolve allegations of IP infringement and other unfair acts and methods of competition by imported articles that harm U.S. industries. Similar to the federal courts, a section 337 investigation includes all aspects of patent disputes, including topics relating to (1) validity; (2) infringement; and (3) remedy.

Unlike the federal courts, the Commission does not institute an investigation before the sufficiency of the complaint is assessed. Once instituted, the USITC develops a complete administrative record based on discovery and provides a full and fair opportunity for the parties to present testimony and cross-examination at a hearing and to provide legal briefing. The Commission staffs its investigatory process with IP experts and lawyers and qualified administrative law judges (ALJs) solely dedicated to adjudicating IP cases. Moreover, the statute requires the Commission to focus upon whether complainants have adequately established a domestic industry before a violation may be found. Further, the public interest is required to be considered in every investigation where a violation is found and an appropriate remedy is being considered. Finally, the Commission has procedures to address potentially case-dispositive issues, including domestic industry within a matter of months.

¹ 19 U.S.C. § 1337(a)(1).

² USITC, 337Info. Such disputes usually take many years to resolve in other forums such as in U.S. District Courts, where the average time to trial is about 2.5 years. See PWC, 2014 *Patent Litigation Study*, p. 16.

II. Section 337 Process

A. Background

The Commission conducts proceedings to determine whether there has been a violation of section 337 in accordance with the Administrative Procedure Act (APA). The APA affords the parties the opportunity to conduct discovery, to present evidence at a hearing, and to make legal arguments before an ALJ and the Commission. As part of a section 337 investigation, the ALJ conducts a public hearing on the record, which includes testimony from fact and expert witnesses. Documentary and physical evidence also are admitted into the record at the hearing. Hearing evidence and arguments are tested through questioning by attorneys from all parties to a dispute, including, in many cases, by an investigative attorney from the Commission's Office of Unfair Import Investigations (OUII) as well as by the ALJs.

If the respondents fail to appear to answer the complaint and notice of investigation, the statute authorizes the Commission to find such respondents in default, to presume the facts alleged in the complaint to be true, and to issue remedial orders upon consideration of the statutory public interest factors.

The Commission is the final decision-maker, and its deliberations are informed by staff, including IP attorneys from the Commission's Office of General Counsel. The Commission's decision is provided in a written opinion detailing the information gathered and the logic and legal reasoning behind the decision and findings. When remedy orders are issued, they take into account submissions from the parties, other government agencies, and the public with regard to the appropriate remedy and the public interest. While many investigations end by agreement of the parties or withdrawal of the complaint, those that are concluded on the merits are currently decided, on average, in 16.8 months.

Appeals of the Commission decisions in section 337 investigations are made to the U.S. Court of Appeals for the Federal Circuit, the same court that reviews statutory IP decisions of the District Courts.

B. Complaints and Investigation Pre-Institution

Section 337 complainants are typically brought by private parties alleging that certain articles are sold for importation, imported or sold after importation into the United States by means of an unfair act or an unfair method of competition. More than 80 percent of the section 337 complaints filed involve allegations of patent infringement. For example of the 88 active investigations last year, 71 were based solely on allegations of patent infringement.³ The other 20 percent of the complaints are based on allegations of other types of unfair acts, such as trademark infringement, trade dress infringement, copyright infringement, false advertising and/or trade secret misappropriation.

³ https://www.usitc.gov/intellectual_property/337_statistics_types_unfair_acts_alleged_active.htm

The Commission Rules require that complaints contain fact pleadings.⁴ For a complaint to comply with the Commission Rules the complaint must contain a detailed description of why the complainant contends that there is a violation. For instance, a complaint based on an allegation of patent infringement typically includes: an identification of the patent and specific claims being asserted; assignment rights; a nontechnical description of the patent; identification of the proposed respondents and how they relate to the products at issue; a description of the products-at-issue; specific allegations of direct and/or indirect infringement; if indirect infringement is alleged specific facts must support these allegations; a claim chart showing how each element of each asserted independent claim is met by the accused product; proof of importation (sale for importation or sale after importation) of the accused product; related subject matter litigation history; Harmonized Tariff Schedule numbers at issue; and details of the basis for asserting that a domestic industry exists or is in the process of being established, including claim charts demonstrating practice of at least one claim of each asserted patent by the domestic industry product and the nature and extent of the complainant's investments in the United States relating to articles protected by the IP rights concerned.

A typical complaint involving two patents is around 20-25 pages with approximately 5-12 inches of supporting exhibits and about a bankers box of supporting appendices. Complaints involving trade secret misappropriation also would include support that an industry has been injured or there is a threat of injury and can be substantially longer.

Because a section 337 complaint must be sufficiently supported by facts, complainants are encouraged to submit a draft of the complaint to OUII for a confidential review prior to filing. These review meetings provide OUII the opportunity to preview a complaint and discuss with the complainant whether there are issues with the underlying cause of action, and whether there is sufficient information to support the allegations, and relief requested. These meetings are also an opportunity for complainants to ask questions about the USITC process. Most potential complainants take advantage of this draft review process.

Once a complaint is filed at the Commission, OUII formally (1) reviews the complaint and exhibits for sufficiency and compliance with the applicable rules to determine whether they were properly filed; (2) identifies sources of relevant information; and (3) tentatively assures itself of the probable availability of such information.⁵ During this period, the Commission requests input from the potential respondents and the public regarding whether there are statutory public interest considerations raised by the complaint.

OUII recommends to the Commission whether to institute the investigation. The Commission votes on institution within 30 days after the complaint is filed. At this time, the Commission will determine whether there are any particular case dispositive issues that may resolve the investigation early. If so, the Commission may place this investigation in its early disposition

⁴ 19 C.F.R. § 210.12 (2015).

⁵ 19 C.F.R. § 210.9 (2015).

program, the 100-day pilot program. The Commission also will determine whether the public interest considerations warrant the development of a full factual record regarding the statutory public interest factors and thus may delegate this issue to the ALJ for fact-finding. Since 2010, the Commission has delegated 57 investigations to the ALJ for fact-finding related to the public interest.⁶

C. Developing the Record, Decision Making, and Review

Once the investigation is instituted, the Commission assigns the investigation to an ALJ for fact-finding. The Commission's ALJs only preside over section 337 investigations. Each ALJ maintains approximately six active investigations, typically patent based, at a given time.

Upon publication of the Notice of Investigation in the Federal Register, discovery commences immediately. Within 45 days of institution, the ALJ sets the target date (end of the investigation).⁷ Typically, the investigation is in hearing about 9.5 months after institution. In many of the section 337 investigations, an investigative attorney from OUII is an independent party to the investigation. The role of the investigative attorney is to ensure that the factual record is well developed and provides an independent analysis of the facts. Investigative attorneys also assist the parties in resolving discovery disputes, and avoiding unnecessary motions practice, as well as aiding in settlement.

Between institution and the hearing, there is a discovery period. The parties are able to use all the discovery tools available under the Federal Rules of Civil Procedure, including interrogatories, document requests, and requests for inspection, subpoenas, and depositions. Most of these investigations involve an expert discovery period during which each of the parties exchange expert reports and have the opportunity to depose expert witnesses. Parties also have the opportunity to file issue or case dispositive motions.

After the discovery period ends the parties prepare for an evidentiary hearing. All parties are provided an opportunity at the hearing to present the facts of their case to the ALJ. Some ALJs ask the witnesses questions as well. Most hearings last about five days, depending on the number of issues in the investigation. After the hearing the parties provide extensive post-hearing briefs to the ALJ. The ALJ issues his or her final initial determination about 12 months after institution. The ALJ also issues a recommended remedy determination.

After a final initial determination issues, the parties have the opportunity to petition the Commission for review of the final initial determination if the party demonstrates that: (1) a finding or conclusion of material fact is clearly erroneous; (2) a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion, or (3) the determination is one affecting Commission policy.⁸ The Office of the General Counsel reviews

⁶ https://www.usitc.gov/intellectual_property/337_statistics_identification_and_number_cases.htm.

⁷ 19 C.F.R. § 210.51(a) (2015).

⁸ 19 C.F.R. § 210.43(b)(i)-(iii) (2015).

the final initial determination and any petitions for review and drafts advice to the Commissioners regarding whether to review the final ID. Within 60 days from issuance of the final initial determination, the Commission issues a notice regarding whether it will review the initial determination and if so what issues will be reviewed.⁹ Typically, if the Commission determines to review a final initial determination, the Commission also will ask the parties to respond to specific questions regarding substantive and/or procedural issues and, in appropriate circumstances, specific questions regarding the public interest factors. At this time the parties also will provide written submissions on remedy, bonding, and public interest. The Commission issues its final determination 60 days later, including issuance of any remedial orders.

If the Commission determines to issue an exclusion order, the President, through the U.S. Trade Representative, has 60 days to review the order and determine whether he will disapprove the order on policy grounds.

III. Process Improvements

The Commission has long recognized the statutory mandate of resolving cases at the earliest practicable time and has taken a variety of steps toward this end. By doing so, the Commission has made the section 337 process more efficient and less costly for both the agency and litigants. These efforts include new pilot programs, procedural rules improvements, and a substantial investment in the past few years in the Commission's Electronic Document Information System (EDIS).

First, the Commission has explored approaches to resolve potentially dispositive issues¹⁰ concerning a violation at an early stage of the investigation. Beginning in 2006, if before an investigation was instituted the Commission had reason to believe that there was such an issue, the Commission's notice of investigation authorized the presiding ALJ to decide the potentially dispositive issue early in the investigation and waived certain rules to allow prompt Commission action on the ALJ's decision. In most instances, the procedure was employed to decide what could broadly be characterized as jurisdictional issues.¹¹ This practice was recently formalized in the Commission's "100-day pilot program," which was launched in 2013. Additionally, when a potentially dispositive issue becomes apparent only during the course of an investigation, the Commission has established procedures for filing motions before the ALJ seeking an early decision of "no violation" to bring the investigation to a close.

Second, the Commission promulgated new procedural rules during FY 2013. These rules include, among other things, limits on discovery, such as the numbers of interrogatories and

⁹ 19 C.F.R. § 210.42(h)(2) (2015).

¹⁰ A dispositive issue is an issue that by itself could decide the investigation's outcome.

¹¹ Under Federal Circuit precedent, the Commission must institute an investigation if there is a properly pled complaint and then decide issues, including jurisdictional issues, on the merits.

depositions,¹² and new procedures relating to the electronic filing of motions and other items.¹³ Additionally, during FY 2013, the Commission promulgated rules to streamline discovery of electronically stored information or “e-discovery,” such as e-mails and source code, while preserving the opportunity for fair and efficient discovery for all parties.

Third, as part of a separate pilot case management program directed to streamlining the discovery process, several ALJs are experimenting with new ground rules. One set of ground rules requires the parties to make specific initial discovery disclosures at specified times during an investigation. Another set of ground rules being tested requires the parties to confer at the beginning of the investigation regarding e-discovery issues. The Commission assesses these pilots and reports on the results each fiscal year.

Finally, the Commission has increased investments in EDIS to enhance the capability for filing of submissions electronically, as well as to improve the Commission’s management of the large volume of investigation-related materials and the transparency of its investigative process. The Commission is currently exploring the possibility of electronic service in EDIS.

IV. Conclusion

The USITC applies section 337 and the substantive law involved to the facts of each investigation presented to it. The Commission has made a concerted effort to develop procedures that will increase efficiencies, and reduce cost and still ensure a fulsome record. The Commission routinely seeks input into its process and diligently considers feedback from its stakeholders on ways to improve its processes and procedures.

¹² The Federal Register notice, published on April 19, 2013, regarding these new rules can be accessed at http://www.usitc.gov/secretary/fed_reg_notices/rules/MISC_040_notice04112013dbl.pdf

¹³The Federal Register notice, published on May 21, 2013, regarding these new rules can be accessed at http://www.usitc.gov/secretary/fed_reg_notices/rules/Rules_notice05152013sgl.pdf