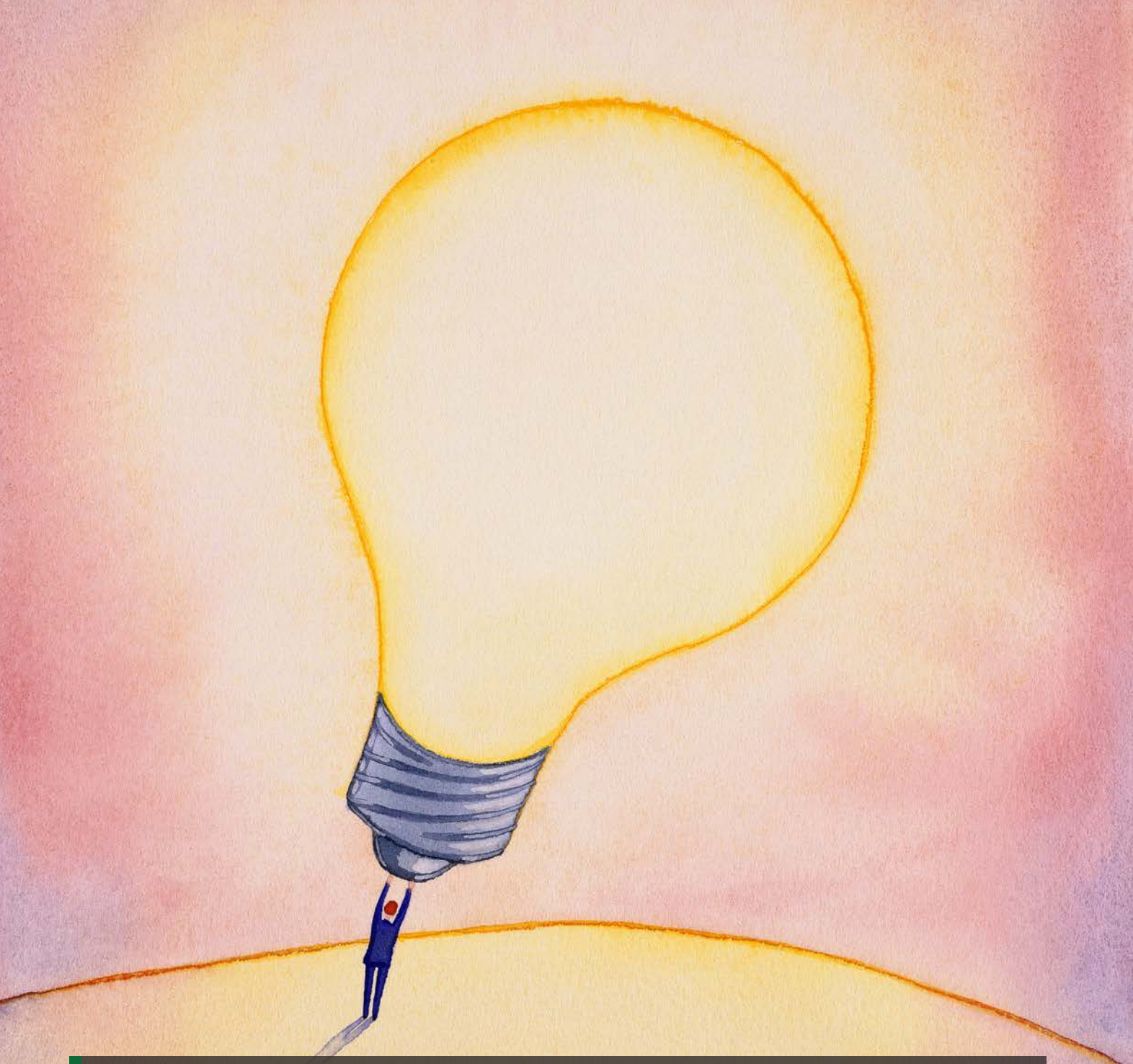

Over the past decade, the U.S. International Trade Commission has emerged as a serious player in the realm of intellectual property enforcement. The ITC uses its quasijudicial procedures to resolve a surprising number of intellectual property disputes, wielding a great deal of power in doing so. The ITC's use of this power has not come without some controversy and calls for reform. In our increasingly global economy, however, the ITC is likely to remain an essential tool for the toolbox of every intellectual property litigator. This makes getting comfortable with the sometimes unusual aspects of the ITC all the more important.

**By J. Scott Culpepper**

# An Alternative Quasijudicial Forum to Resolve Intellectual Property Disputes

## *The U.S. International Trade Commission*

The U.S. International Trade Commission (ITC) recently received some uncharacteristic mainstream press attention when President Barack Obama's administration refused to let stand an ITC import ban (or exclusion order) against some of Apple's popular iPads® and iPhones®.[1] The ban resulted from a complaint filed by Samsung alleging that these Apple products infringed upon Samsung's patent rights. Such mainstream press is rather unusual for a small federal administrative agency like the ITC. For many who don't practice intellectual property law—and perhaps even some who do—it might have come as a surprise that the ITC was so centrally involved in a big-time patent infringement dispute between large multinational companies.

But in fact, over the past 10 to 15 years, the ITC has become a very popular venue for intellectual property, particularly patent, disputes. This has happened for a variety of reasons, including swift determinations, greater availability of injunctive-style relief, relaxed domestic industry requirements, and fewer and lower patent damage awards in federal district court. While the total number of intellectual property disputes at the ITC can't rival the number of intellectual property cases filed in some of the most popular federal district courts, the increase in intellectual property disputes at the ITC has been nothing short of spectacular. Over a period of a little more than a decade, the number of intellectual property disputes filed at the ITC increased almost sixfold.[2]

But this popularity has not come without some controversy. In both patent law and trade policy circles, the ITC's increased involvement in patent disputes has generated some criticism.[3] But although the rise in the number of ITC investigations has caused the dissenting voices to become louder,[4] barring a legislative change, the popularity of the ITC for patent disputes is unlikely to decline anytime soon.

## The Purpose and Work of the ITC

Broadly, the missions of the commission are to:

> … make determinations in proceedings involving imports claimed to injure a domestic industry or violate U.S. intellectual property rights; provide independent tariff, trade and competitiveness-related analysis and information; and maintain the U.S. tariff schedule.[5]

The last two of these missions—providing competitiveness-related analysis to other branches of government and maintaining the tariff schedule for imported goods—both seem like straightforward roles for a federal administrative agency. It is the first, however, that is intriguing. More than just a typical administrative agency, the commission has been given the role of a quasijudicial agency with "broad investigative responsibilities on matters of international trade."[6] These powers not only include an investigative function, but also the power to adjudicate disputes related to allegations of intellectual property infringement.[7]

The commission's adjudicative powers are rooted in statute, specifically 19 U.S.C. §1337. In ITC lingo, this statute is referred to as Section 337, and investigations under this statute are referred to as Section 337 investigations. Section 337 first expressly forbids:

> [u]nfair methods of competition and unfair acts in the importation of articles … into the United States … the threat or effect of which is … to destroy or substantially injure an industry in the United States ….[8]

Then, the statute states that "[t]he Commission shall investigate any alleged violation" of this section and "make [a] determination" whether there was a violation.[9] Furthermore, if the "Commission determines, as a result of an investigation" that there has been a violation of Section 337, it "shall direct that the articles concerned … be excluded from entry into the United States …."[10]

Although the statute permits investigations for any "unfair method of competition," most Section 337 investigations involve allegations of patent infringement.[11] As of 2008, one commentator estimated that as much as 85 percent of the commission's investigations were related to allegations of patent infringement.[12]

## The Origin and Evolution of the ITC

In its beginning, the commission did not have the broad power to investigate and adjudicate intellectual property disputes. Originally known as the U.S. Tariff Commission,[13] its primary concern was with setting and providing information on tariff rates.[14] Even so, investigating and setting tariff rates was no minor role. As cleverly pointed out by Dr. Colleen Chien, it was essentially a tariff dispute that gave rise to the Boston Tea Party, one of the acts associated with the founding of the United States.[15] Once the United States became an independent country, the issue of setting tariff rates continued to be a hotly debated topic and developed into a highly contentious political issue by the 1800s.[16] Out of this political rancor came the U.S. Tariff Commission, created by Congress in 1916.[17] Some historians see its creation as an attempt to remove the politics from tariff setting, while others see it as a political maneuver in and of itself.[18] Regardless of the motivation, it was an important shift in U.S. trade policy in that authority for investigating and setting tariff rates was effectively moved from the legislative branch of government to the executive branch.[19]

**The current, more expanded powers of the U.S. Tariff Commission started to emerge with the Tariff Act of 1922. The act still maintained the principal role of the U.S. Tariff Commission as advising on appropriate tariff rates. However, it added a new role in the form of Section 316, which gave the U.S. Tariff Commission the right to investigate unfair methods of competition related to the importation of products in the United States.**

The current, more expanded powers of the U.S. Tariff Commission started to emerge with the Tariff Act of 1922.[20] The act still maintained the principal role of the U.S. Tariff Commission as advising on appropriate tariff rates.[21] However, it added a new role in the form of Section 316, which gave the U.S. Tariff Commission the right to investigate unfair methods of competition related to the importation of products in the United States.[22]

The Smoot-Hawley Tariff Act of 1930 slightly modified the commission's powers and replaced Section 316 with the first iteration of the more familiar Section 337.[23] This new section gave the U.S. Tariff Commission the authority to *investigate* allegations of unfair competition resulting from imported products and then make recommendations, but it could not really do much about violations, leaving the commission as largely just an investigative body.[24] Perhaps for this reason, or for others related to how investigations were conducted, Section 337 was not widely used over this 40-year period.[25]

The Trade Act of 1974 changed this by not only changing the name of the U.S. Tariff Commission to the International Trade Commission, but also establishing what we know as the modern ITC.[26] The Trade Act of 1974 transformed the ITC into a truly independent agency with the authority to determine whether there is a statutory violation and then to impose a final remedy for the violation[27] in the form of injunctive relief.[28] It was these changes that set the stage for the dramatic increase in popularity of the ITC as a forum for intellectual property disputes.

## The Structure of the ITC

### *The Commission*

The ITC comprises six commissioners serving overlapping nine-year terms,[29] with one of the six terms set to expire every 18 months.[30] The President appoints each commissioner, who is then confirmed by the Senate.[31] In practice, the commissioners

often serve past the official expiration of their nine-year terms, as involving both the President and the Senate sometimes adds a little extra time to get a person nominated, confirmed, and sworn in.[32]

While establishing the commission as an independent body, the statute also contemplates that it will be politically neutral, or at least attempts to minimize the impact of politics on decisions and reports by requiring that no more than three of the commissioners be from any one political party.[33] In addition, the chairmanship of the commission rotates every two years, alternating between the two major political parties.[34]

The current commissioners are:

- Irving A. Williamson (D)
  (term expiring June 16, 2014)
- Dean A. Pinkert (D), Vice Chairman
  (term expiring December 16, 2015)
- Meredith Broadbent (R), Chairman
  (term expiring June 16, 2017)
- David S. Johanson (R)
  (term expiring December 16, 2018)
- F. Scott Kieff (R)
  (term expiring June 16, 2020)
- Rhonda K. Schmidtlein (D)
  (term expiring December 16, 2021)

Because the ITC is still first and foremost a trade policy organization, most commissioners have strong experience in trade policy and trade regulation. The exception to this general rule is one of the newer commissioners, F. Scott Kieff, who is a former practicing patent attorney and law professor with extensive patent experience.[35] Although one cannot be sure, his appointment by President Obama likely reflects a recognition of the importance of intellectual property investigations at the modern ITC. It will be interesting to see Mr. Kieff's impact on the commission, as he brings his unique specialized experience to this forum.

***The Administrative Law Judges***

The Trade Act of 1974 not only expanded the powers of the commission, it also ushered in the use of administrative law judges (ALJs) to oversee investigations under the requirements of the Administrative Procedures Act.[36] With the appointment of ALJs, the commission gained an excellent mechanism for investigation, fact finding, and record building. The role of ITC administrative law judges includes just those types of activities: presiding over the collection of evidence and the conduct of investigations, presiding over a judicial-style hearing to take evidence, and generally building a record upon which remedies can either be recommended or denied.[37]

The current ITC administrative law judges are Charles Bullock (chief judge); Theodore Essex; Edward Gildea; Thomas Pender; David Shaw; and Sandra Dee Lord. A number of them are fairly new to the ITC, as three of the judges—Judges Pender, Shaw, and Dee Lord—have all been appointed since October 2011. While new to the ITC, they all have prior ALJ experience and an excellent understanding of the ITC's role and function.[38]

As ALJs at the ITC, these judges quickly gain a great deal of experience with intellectual property enforcement and technology. While the ALJs conduct investigations other than under Section 337, they have very active intellectual property dockets.[39] For example, the ITC reported that it had 124 investigations and ancillary proceedings active during fiscal year 2013.[40]

***The Office of Unfair Import Investigations***

The Office of Unfair Import Investigations (OUII) is also a very important player in modern ITC investigations. Although technically a part of the ITC,[41] the OUII operates somewhat independently of the ALJs and the commission in all of its several roles. At the outset, it is the OUII that initially reviews an ITC complaint and makes recommendations to the commission as to whether it should investigate.[42]

Once the commission institutes an investigation, the OUII, in its discretion, may participate, acting essentially as an additional party.[43] This means that an OUII staff attorney may attend depositions and question witnesses, file briefs on motions, and examine witnesses at the formal hearing.[44] As a full participant, the OUII assists the commission in developing a full and complete record. For attorneys accustomed to practicing in federal district court, this makes for an unusual litigation dynamic. The attorney must deal with the wild card of including and communicating with a party that does not have a direct financial or business interest in the outcome of the investigation, but that can surely impact the outcome.[45] Because the OUII is not the adjudicative body, the parties and their attorneys are free to have *ex parte* contact with the OUII staff attorney assigned to their investigation. Naturally, this results in extensive lobbying and information sharing by the parties' attorneys as they try to persuade the OUII staff attorney to side with their client in the investigation. Having the OUII staff attorney argue for your client's position can be a powerful weapon at the ITC.

**Under a new staffing plan introduced in 2011, an OUII staff attorney does not fully participate in every investigation or even have to participate in every issue in an investigation. The impetus for this new staffing plan was, quite simply, the need to reduce the huge workload on OUII staff attorneys. These attorneys now decide when to be involved in an investigation and the extent of their involvement.**

Under a new staffing plan introduced in 2011, an OUII staff attorney does not fully participate in every investigation or even have to participate in every issue in an investigation.[46] The impetus for this new staffing plan was, quite simply, the need to reduce the huge workload on OUII staff attorneys. These attorneys now decide when to be involved in an investigation and the extent of their involvement. The OUII has been somewhat coy

about the exact criteria it uses to decide its level of involvement in a particular investigation. It can be guessed, however, that the OUII likely bases its involvement upon whether there is an important public interest or strategic public policy related to the subject matter of the investigation.

## The Conduct of an Investigation

### *The Complaint and Institution*

Similar to litigation in federal district court, an ITC investigation begins with the filing of a complaint. This is a verified document setting out the alleged violations of Section 337, as well as the factual support for the alleged violations.[47] Because of the specialized requirements of the ITC rules, the complaint, along with its various exhibits and attachments, can run into the hundreds, if not thousands, of pages.

**In contrast to a federal district court case, discovery in the investigation begins the day after the notice is published. There is no need to wait on a case management conference, serve initial disclosures, or conduct a Fed. R. Civ. P. 26(f) discovery conference.**

The commission, along with the OUII, reviews the complaint for sufficiency and compliance with the ITC's rules.[48] The commission has up to 30 days to decide whether to institute an investigation based on the allegations and facts in the complaint.[49] When the ITC votes to institute an investigation, the complaint is served on each respondent and a notice of institution is published in the Federal Register, officially starting the process.[50] A named respondent then has 20 days to answer the complaint.[51]

In contrast to a federal district court case, discovery in the investigation begins the day after the notice is published. There is no need to wait on a case management conference, serve initial disclosures, or conduct a Fed. R. Civ. P. 26(f) discovery conference. As such, most parties in an ITC investigation serve discovery the day after the notice appears in the Federal Register. Because discovery responses in the ITC are due in only 10 days, a respondent will typically be serving responses before the answer is due.

### *The Schedule*

Once instituted, the ITC assigns the investigation to an ALJ.[52] The assigned ALJ then issues a case schedule fairly quickly. Some of the judges hold a hearing to discuss the schedule with the parties and the OUII. But even if no hearing is held, the parties often have some limited input on the dates of the investigation. However, the ALJ usually sets the most important dates on his or her own.

The most important date in the schedule is what is known as the target date for completing the investigation. This can be thought of as the finish line for the case and is the date by which the commission will issue its final determination for the investigation. Currently, target dates are generally set 16 to 18 months from the date the investigation is started, or instituted. The remainder of the case schedule is set by the ALJ, working backward from this target date.

The ALJ generally sets the due date for his or her initial determination four months prior to the target date. Continuing to work backward, a formal hearing is usually scheduled for about three months prior to the due date for the initial determination. This complies with the provisions of the Administrative Procedures Act, giving parties an opportunity to present evidence and make arguments.[53] As such, at the formal hearing, witnesses are offered and cross-examined, evidence is taken, and sometimes, depending on the ALJ, opening statements are heard.[54] The ALJ presides over the formal hearing according to the ITC Rules of Practice, his or her ground rules, and generally in accordance with the Federal Rules of Evidence.[55] Usually the ALJ allows approximately five days for the formal hearing.

For an investigation operating on a 16-month target date schedule, this means the formal hearing will occur about nine months after the institution of the investigation. Before the hearing, there will typically be about six months of fact discovery, followed by about a month or two of expert discovery, and a month or so of hearing preparation.

### *The Determinations in an ITC Investigation*

As mentioned above, there are a few determinations issued during an ITC investigation. The ALJ's initial determination is the rough equivalent of a federal district court trial verdict. It explains the ALJ's determination of every contested issue (and possibly some stipulated issues) along with the ALJ's reasoning for the result.[56] The ALJ also issues what is known as a recommended determination on remedy, which contains the ALJ's recommendation on an appropriate remedy (an exclusion order and/or a cease and desist order) for any violation found.[57] The ALJ's initial determination and recommended determination are immediately available for review by the full commission.

Any party to the investigation, including the OUII, may file a petition for review with the commission.[58] Alternatively, the commission may on its own initiative decide to review some or all of the issues addressed in the initial determination.[59] Regardless of the impetus for the review, once the commission decides to review an issue, its review is *de novo* on both legal and factual issues.[60] The commission does not, however, have to review every issue addressed in the initial determination. If there is an issue that it decides not to review, then the ALJ's initial determination on that issue will automatically become the final determination of the commission.[61]

### *The Presidential Review Period*

If the commission rules in favor of the complainant and imposes an exclusion order, the matter can then get political. After the commission issues its final determination, the President then has a 60-day review period, through the U.S. Trade Representative (USTR), and may decide not to enforce the exclusion order for policy reasons.[62] Lobbying is common at this stage of the ITC process, as the contact with the USTR does not have to be put on the record. In addition, because the President may refuse to enforce an exclusion order simply for policy reasons without further explanation or definition, there is a great deal of opportunity for mischief.

Statistically, the President or the USTR have rarely exercised the power to deny an exclusion order. In fact, they have refused to enforce an exclusion order only a handful of times. Certainly, the late 2013 controversy surrounding the refusal to enforce an exclusion order against Apple in its high-profile patent fight with Samsung[63] was newsworthy given the ubiquity of the parties and technology involved. However, the refusal was also notable for practitioners using the ITC who want to be able to rely on an exclusion order to protect their clients' interests. The action of the Obama Administration calls into question whether refusals to enforce will continue to be rare, particularly where the patent rights holder is not a U.S.-based company. (Several commentators suggested that the refusal to enforce in the Samsung case smacked of protectionism.[64])

***Review by the Federal Circuit Court of Appeals***

The final determination may be appealed directly to the Federal Circuit Court of Appeals.[65] Even though this administrative process then enters the U.S. federal court system, the rules applied differ from those in litigation initiated there. At the federal circuit, factual findings of the ITC are reviewed under the substantial evidence standard.[66] This, of course, is a more deferential standard than that afforded to federal district courts, whose factual findings are reviewed under the clearly erroneous standard of review. Legal findings, on the other hand, are reviewed *de novo*, just like federal district court legal findings on appeal.[67] The decision of the commission on remedy is reviewed under an arbitrary and capricious/abuse of discretion standard.[68]

## Distinctive Characteristics and Procedures of the ITC

While the terminology differs, an advocate representing a client in an ITC investigation will likely find the forum similar to federal district court litigation in many ways. The substantive intellectual property law applied by the ITC is much the same as in the federal district court.[69] An ITC investigation involving an allegation of patent infringement, for example, still requires proof of ownership and infringement in the same manner, and with the same burdens of proof, as in federal district court. A party accused of importing infringing articles also has the ability to challenge a patent's validity and enforceability in the same manner, and with the same burdens of proof, as in federal district court.

Many of the procedural aspects of an ITC investigation will also be familiar to a practitioner familiar with federal court.[70] Much of

the discovery process, for example, involves the same discovery tools—depositions, interrogatories, requests for production of documents, etc.—mirroring in many ways the Federal Rules of Civil Procedure.[71] Each ALJ even has his or her own ground rules reminiscent of local rules in the various federal district courts.[72]

The ITC, however, is not an Article III court, and a number of aspects of how the ITC operates drive home this fact. As the federal circuit has pointed out, "a Sec. 1337 proceeding is not purely private litigation 'between the parties,' but rather is an 'investigation' by the Government into unfair methods of competition or unfair acts in the importation of articles into the United States."[73] Because the ITC is "a creature of statute"[74] with a sharp focus on building a complete and accurate record during an investigation, some significant differences worth keeping in mind exist between an ITC investigation and a federal district court case.

**The speed with which an ITC investigation moves can be breathtaking. This is by design, and it arises from several sources. To start, the statute requires the ITC to be fast. Section 337 states that "[t]he Commission shall conclude any such investigation and make its determination under this section at the earliest practicable time after the date of publication of notice of such investigation."**

***The ITC Is Very Fast***

The speed with which an ITC investigation moves can be breathtaking. This is by design, and it arises from several sources. To start, the statute requires the ITC to be fast. Section 337 states that "[t]he Commission shall conclude any such investigation and make its determination under this section at the earliest practicable time after the date of publication of notice of such investigation."[75] In practice, this "target date" for completing the investigation is usually set at no more than 18 months from institution, and can be as short as 15 months.[76] As noted above, the target date locks in a formal hearing date 9 to 10 months from institution, and ALJs notoriously refuse to move a formal hearing date. This can be contrasted with the typical two-plus years it might take a federal district court to go from complaint filing to trial.

In addition to the formal hearing coming quickly and with certainty, the way the ITC oversees discovery also ensures a brisk pace to investigations. As noted above, discovery responses are due only 10 days from service of the request.[77] In addition, the common litigation tactic of using discovery motion practice to stall production of information is not as common in the ITC. The large number of discovery tools available to a party, combined with the general disposition of ALJs to permit broad discovery, generally yields fewer discovery disputes. Parties realize fairly quickly that it is a poor strategy to waste time and valuable capital with the ALJ by forcing discovery motion practice.

Another feature that reduces the number of discovery disputes is the presence of an OUII staff attorney in the investigation. The OUII staff attorney often acts as the adult in the room between bickering private parties—negotiating discovery deals and providing blunt advice on what will happen before the ALJ. In addition to this more *ad hoc* role, some ALJs require the formation of a "discovery committee" comprising lead counsel for each private party and the OUII staff attorney.[78] The discovery committee is required to hold conference calls every other week to discuss all outstanding discovery issues. The committee reports to the ALJ on the meetings, and no discovery motion can be brought unless the issue was first raised and addressed during a discovery committee meeting. This also reduces the number of discovery disputes and keeps the investigation moving.

The ALJs also typically do not allow motions or other procedures to slow down the investigation. For example, several of the ALJs refuse to hold separate claim construction hearings. The ALJs also typically do not set aside time for parties to file motions for summary determination (the ITC's term for summary judgment), along with time for a hearing and judge consideration of those motions. The investigation moves right from fact discovery to expert discovery to hearing preparation to formal hearing.

***The ITC Requires a Fact-Based Verified Complaint***

The statute contemplates that an ITC investigation will start either with a private party filing a verified complaint with the commission or on the commission's own initiative.[79] An ITC complaint differs from what one usually sees in federal district court. The ITC Rules of Practice have very specific, detailed requirements for what must be included in the verified complaint.[80] These essentially require the complainant to state its case and support the allegations with facts.[81] Notice pleading is not acceptable. For example, for a complaint alleging patent infringement, the complainant must not only identify the patent at issue and the accused products, but also produce "a chart that applies each asserted independent claim of each involved U.S. patent to a representative involved article of each person named as violating section 337… ."[82] In other words, the complainant cannot just allege infringement; he or she must outline the facts that prove it.

***Scope of the ITC's Ability to Remedy Unfair Trade Practices***

The basic idea behind Section 337 is to give the ITC the ability to protect "domestic industries" from unfair trade practices due to the importation of infringing products. There are several limitations on the ITC's power that are apparent from this statement of purpose. First, there must be a "domestic industry" in the United States to protect (although not necessarily a domestic complainant, i.e., a foreign entity can avail itself of the ITC's relief). Second, the accused goods must be imported into the United States from another country. While these requirements limit the ITC's ability to remedy unfair trade practices, the commission's unique jurisdictional requirements actually allow complainants to seek remedies impacting foreign parties over which personal jurisdiction could not be obtained in federal district court.

*Personal Jurisdiction Over a Respondent Is Not Required*

A complainant at the ITC does not have to establish personal jurisdiction over the respondent.[83] The ITC has nationwide jurisdiction over allegations related to products imported into the United States. The jurisdiction of the ITC is a type of *in rem* jurisdiction over the accused imported products.[84]

The fact that the ITC's jurisdiction is so broad has a number of practical and tactical benefits for a complainant. For example, service on foreign companies is not the hassle it can be under the rules of the Hague Convention. The ITC takes care of service of the respondents.[85] In addition, because jurisdiction is over the imported products, the complainant does not necessarily even need to know every party that is actually importing the accused products.

*Determining Whether There Is Domestic Industry*

Before instituting an investigation, the ITC requires there to be a "domestic industry" to protect. More precisely, the statute requires that a domestic industry in the intellectual property is either in existence or in the process of being established at the time the complaint is filed.[86] When one first hears this requirement, it is natural to assume this means an industrial use of the intellectual property; in other words, a product made in the United States embodying the intellectual property. Prior to 1988, this assumption would have been more or less correct. In 1988, however, Congress amended Section 337 to add the possibility of establishing domestic industry through licensing activity.[87] The legislative history of the 1988 amendments to Section 337 make it clear that Congress specifically intended to permit companies and individuals that do not manufacture a product to take advantage of the ITC.[88]

The test for whether there exists a domestic industry (or if one is in the process of being established) consists of two prongs: an economic prong and a technical prong.[89] Under the economic prong, the complainant has to establish "significant or substantial economic activities and investments" in "plant and equipment"; in employment of labor or capital; or in exploitation of the intellectual property, including "engineering, research and development, or licensing."[90] Before Jan. 9, 2014, if a complainant was going to establish a domestic industry for exploitation by licensing, this was the end of the inquiry, which was consistent with the legislative history of the 1988 amendments.[91] In January 2014, however, the ITC reversed course.[92] Now, no matter the type of domestic industry a complainant wishes to establish, the complaint must also meet the technical prong of the domestic industry test. Under this prong, the ITC conducts an infringement analysis of the complainant's product (or a licensee of the complainant's product) to determine whether the product meets the elements of a claim of the asserted intellectual property.[93]

*The Complainant Must Prove Importation of the Accused Products*

The requirement that the allegedly infringing good is imported into the United States is also critical to obtaining relief from the ITC; in fact, it is a statutory requirement.[94] In a typical district court patent case, where the accused product originates is not necessarily of concern. The requirement of importation, however, does not say anything about the home country of the respondent. The requirement is straightforward in that the issue is simply whether the accused product is manufactured outside of the United States and whether it ends up in the United States.

An interesting nuance to the statutory importation requirement is that the products accused of infringement must be infringing at time of importation.[95] So, if the patent claims are to the way the product operates when in use (e.g., a method patent claim), then proof of direct infringement is very unlikely, since the accused product is unlikely to be in operation at the time of importation.[96] Currently, a federal circuit panel recently decided there is uncertainty as to whether the ITC has the statutory authority even to address indirect infringement of a method claim in any circumstances.[97]

***ITC Remedies Are Limited***

Monetary damages are not available to a complainant at the ITC. As "a creature of statute,"[98] the ITC simply does not have the power to award monetary damages.[99] Rather, the remedies are injunctive in nature: exclusion and/or cease and desist orders.[100] An exclusion order bars infringing products at the border—the products are excluded from the United States.[101] Although these are enforced by Customs and Border Protection, the ITC typically assists.[102]

A cease and desist order from the ITC is a little different. This remedy is directed at companies located in the United States, and primarily this type of order is used to prevent an entity located in the United States from distributing infringing articles imported into the United States that are currently warehoused in the United States.

Although the ITC's primary remedies are injunction-style remedies, the same strictures placed on federal district courts for imposing equitable injunctive relief are not imposed on the ITC. The Supreme Court has made clear that, in federal district courts, before an injunction can issue, the court must analyze the traditional equitable factors supporting an injunction.[103] The Federal Circuit has specifically held, however, that the ITC does not have to consider these additional equitable factors.[104] For this reason, while the only remedy is injunctive in nature, it is generally more available in the ITC than in federal district courts.

## Relationship to District Courts and Other Forums

It is not uncommon for the same patents at issue in a federal district court case or other forum also to be the subject of an ITC investigation. For example, it is a common strategy for a patent owner to file a complaint in a federal district court at the same time it files an ITC complaint on the same intellectual property. As noted above, the ITC cannot award damages. For that reason, if the patent owner wants damages for patent infringement, it will need to go to federal district court at some point. Filing the complaints in parallel ensures that the patent owner gets its preferred jurisdiction for the resolution of its damages claim while also potentially getting a form of injunctive relief from the ITC long before the federal district court case runs its course.

Federal statutory law contemplates parallel patent enforcement activity. Not only can a respondent in an ITC investigation request that a district court stay a parallel case, but when the respondent makes a timely request, the court must, by statute, stay the parallel litigation.[105] This statutory provision, however,

only applies if the respondent is requesting the stay. If the patent owner requests the stay, the judge has his or her usual level of discretion as to whether or not to grant the request.

Successfully requesting an ALJ to stay an ITC investigation is a very different matter. The ITC does consider motions to stay an investigation,[106] and it applies a five-factor test reminiscent of tests applied for federal district courts.[107] However, it rarely stays investigations for parallel proceedings. Not only does this general inclination include parallel proceedings in federal district court, but it also includes investigations where the patents at issue are the subject of a re-examination at the U.S. Patent and Trademark Office. Because the ITC does not have the ability to award damages, it generally sees the situation as "justice delayed is justice denied."[108] A stay at the ITC would essentially result in a royalty-free license for the accused infringer.

The forums also differ in how they treat prior results. As noted previously, the standards for infringement and validity are the same in an ITC investigation as in the federal district courts. This is at least part of the reason that the ITC applies some level of preclusion to issues previously adjudicated in a federal district court.[109] The reverse, however, is not true. Although a federal district court can admit the ITC record into evidence,[110] the court is not bound to follow the determination at the ITC, even if the result of the investigation was to find the patent invalid.[111] Thus, there is a possibility of inconsistent results.[112]

## Conclusion

As a unique and changing organization, the ITC has seen a marked increase in investigations, particularly involving intellectual property disputes, in recent years. As the time to trial continues to increase in many of the more popular federal district courts for filing patent disputes, and the likelihood of being awarded an injunction or patent damages in federal district court becomes more uncertain,[113] the ITC offers a level of certainty in both time and remedy that will continue to appeal to litigants. Accordingly, the ITC has been modifying its rules and procedures in response to the increased demand and rise in relative importance.[114] The subject matter of ITC investigations will also continue to evolve. Recently, with cybersecurity and piracy at the fore, the ITC has investigated an increasing number of allegations related to trade secret misappropriation. Under a recent appellate decision of one such case, the Federal Circuit expanded the ITC's jurisdiction holding that it may investigate even when the alleged misappropriation occurred entirely outside of the United States.[115] While unlikely to become the most prominent of governmental agencies, the ITC, as a responsive forum with a seemingly increasing jurisdictional reach, is certain to continue being a vital alternative forum for the resolution of intellectual property disputes. ⊙

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## Endnotes

[1]Technically, the U.S. Trade Representative of the Obama Administration refused to let the exclusion order stand. For articles on the Samsung/Apple ITC Investigation, *see e.g.*, Brian X. Chen, *Obama Administration Overturns Ban on Apple Products*, N.Y. Times (Aug. 3, 2013) *available at* bits.blogs.nytimes.com/2013/08/03/obama-administration-overturns-ban-on-apple-products/?_php=true&_type=blogs&_r=0 (last visited May 15, 2014); Connie Cuglielmo, *President Obama Vetoes ITC Ban on iPhone, iPads; Apple Happy, Samsung Not*, Forbes (Aug. 3, 2010) *available at* www.forbes.com/sites/connieguglielmo/2013/08/03/president-obama-vetoes-itc-ban-on-iphone-ipads-apple-happy-samsung-not/ (last visited May 15, 2014); Chris O'Brien, *White House Overrules ITC Trade Ban on Apple iPhones, iPads*, Los Angeles Times (Aug. 3, 2013) *available at* articles.latimes.com/2013/aug/03/business/la-fi-tn-white-house-overrules-trade-ban-on-apple-iphones-ipads-20130803 (last visited May 15, 2014); Kim Tae-Jong, *Fears Grow Over US Protectionism*, Korea Times, *available at* www.koreatimes.co.kr/www/news/biz/2013/08/123_140477.html (last visited May 15, 2014).

[2]*See* U.S. Int'l Trade Comm'n, *Number of Section 337 Investigations Instituted by Calendar Year*, available at www.usitc.gov/intellectual_property/documents/cy_337_institutions.pdf (last visited May 15, 2014).

[3]*See, e.g.*, Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 Wm & Mary L. Rev. 63, 77 (2008).

[4]*See, e.g.*, Dennis Crouch, *Is it Time to End the USITC's Jurisdiction Over Patent Cases?* (Aug. 5, 2013) *available at* patentlyo.com/patent/2013/08/is-it-time-to-end-the-usitcs-jurisdiction-over-patent-cases.html (last visited May 15, 2014); K. William Watson, Cato Institute Policy Analysis No. 708, *Still a Protectionist Trade Remedy, The Case for Repealing Section 337* (Sept. 19, 2012).

[5]U.S. Int'l Trade Comm'n, *Strategic Plan FY2014-2018*, 5; *See also*, Former Commissioner Shara L. Aranoff, *The U.S. International Trade Commission, Section 337, and Patents—Looking Back and Looking Forward, The ITC Comes to Silicon Valley*, 3 (May 18, 2010).

[6]U.S. Int'l Trade Comm'n, *Budget Justification, Fiscal Year 2015*, 1.

[7]*Id.*

[8]19 U.S.C. §1337(a)(1)(A).

[9]19 U.S.C. §§1337(b)(1) and 1337(c).

[10]19 U.S.C. §1337(d).

[11]Aranoff, *supra* at 3 (noting that "patent-based actions have come to dominate the section 337 docket.").

[12]*See* Chien, *supra* at *70.*

[13]The name of the U.S. Tariff Commission was changed to the U.S. International Trade Commission in the Trade Act of 1974. *See* 19 U.S.C. §2231.

[14]Karen E. Schnietz, *The 1916 Tariff Commission: Democrats' Use of Expert Information to Constrain Republican Tariff Protection*, 23 Business and Economic History 176 (1994).

[15]Chien, *supra* at 66.

[16]*See, e.g.*, Schnietz, *supra* at 177-78.

[17]Schnietz, *supra* at 176-77.

[18]Schnietz, *supra* at 177.

[19]Michael Borrus and Judith Goldstein, *U.S. Trade Protectionism: Institutions, Norms, and Practices*, 8 Nw. J. Int'l L. & Bus. 328, 337 (1987); Schnietz, *supra* at 176-77.

[20]J. Stephen Simms, *Scope of Action Against Unfair Import Trade Practices Under Section 337 of the Tariff Act of 1930*, 4 Nw. J. Int'l L. & Bus. 234, 240 (1982).

[21]Simms, *supra* at 240.

[22]*See* Simms, *supra* at 240-41; Edward R. Easton and Jeffrey S. Neeley, *Unfair Competition in the U.S. Import Trade: Developments Since the Trade Act of 1974*, 5 Md. J. Int'l L. 203, 204-205 (1980); Aranoff, *supra* at 4.

[23]Easton, supra at 204-205.

[24]*See* Aranoff, *supra* at 5-7; Terry Lynn Clark, *The Future of Patent-Based Investigations Under 337 After the Omnibus Trade and Competitiveness Act of 1988*, 38 Am. Univ. L. Rev. 1149, 1153-54 (1989); Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 Fla. Bar Rev. 529, 540-41 (2009).

[25]Simms, *supra* at 241-42; Aranoff, *supra* at 7-8.

[26]Simms, *supra* at 242-43.

[27]Easton, *supra* at 205 (1980).

[28]The ITC has the power to impose an exclusion order or a cease and desist order. An "exclusion order" is simply an order by the ITC that articles should be "excluded from entry into the United States." 19 U.S.C. §1.337(d)(1). *See also,* Aranoff, *supra* at 9.

[29]19 U.S.C. §1330 (a) (stating that that ITC "…. shall be composed of six commissioners who shall be appointed by the President, by and with the advice and consent of the Senate."); 1330 (b)

[30]*See* U.S. Int'l Trade Comm'n, *Annual Performance Plan, FY 2014-2015 and Annual Performance Report, FY 2013*, 5.

[31]19 U.S.C. §1330 (a).

[32]19 U.S.C. §1330(b)(2) ("any commissioner may continue to serve as a commissioner after an expiration of his term of office until his successor is appointed an qualified."). For example, Commissioner Daniel Pearson's term expired in June 2011. However, his replacement, Scott Kieff, was not sworn in until Oct. 21, 2013. *See* U.S. Int'l Trade Comm'n, *Annual Performance Plan, FY 2014-2015 and Annual Performance Report, FY 2013*, 5 (noting that a "Commissioner may, however, continue to serve after the expiration of his or her term until a successor is appointed and qualified.")

[33]19 U.S.C. §1330 (a) (stating that "Not more than three of the commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable.").

[34]*See* U.S. Int'l Trade Comm'n , *Annual Performance Plan, FY 2014-2015 and Annual Performance Report, FY 2013*, 5.

[35]U.S. Int'l Trade Comm'n, *Commissioner Bios, Commissioner F. Scott Kieff*, *available at* www.usitc.gov/press_room/kieff.htm (last visited May 15, 2014).

[36]*See* 19 U.S.C. §1337(c); Aranoff, *supra* at 9.

[37]*See, e.g.*, 19 C.F.R. §§ 210.33, 210.35, 210.36, 210.37, 210.42. *See also*, U.S. Int'l Trade Comm'n, *Budget Justification, Fiscal Year 2015*, 17.

[38]All three of these judges were previously ALJs with the Social Security Administration before assuming the same role at the ITC. Judge Shaw, prior to serving as an ALJ with the Social Security Administration, was for 23 years an Attorney-Advisor with ITC ALJs.

[39]*See, e.g.*, David L. Schwartz, *Courting Specialization: An Empirical Study of Claim Construction Comparing Patent Litigation Before Federal District Courts and the International Trade Commission*, 50 Wm. And Mary Law Rev. 1699, 1702 (2009).

[40]*See* U.S. Int'l Trade Comm'n, *Annual Performance Plan, FY 2014-2015 and Annual Performance Report, FY 2013*, 46.

[41]*See Id* at 6.

[42]19 C.F.R. §207.101; U.S. Int'l Trade Comm'n, *Budget Justification, Fiscal Year 2015*, 17 (explaining that "[t]he Office of Unfair Import Investigations (OUII) conducts pre-institution review of complaints, advises the Commission on institution of investigations, and participates (when appropriate) as a party to the proceedings.").

[43]U.S. Int'l Trade Comm'n, *Budget Justification, Fiscal Year 2015*, 17 (explaining that "[t]he Office of Unfair Import Investigations (OUII) conducts pre-institution review of complaints, advises the Commission on institution of investigations, and participates (when appropriate) as a party to the proceedings.").

[44]*See* 19 C.F.R. §210.3 (definition of "party"); 19 C.F.R. §210.27; 19 C.F.R. §210.36(d).

[45]*See* Chien, *supra* at 79-80.

[46]Final Rulemaking, 76 Fed. Reg. 24363 (May 2, 2011) (amending 19 C.F.R. §210.3).

[47]*See* 19 U.S.C. §1337(b)(1); 19 C.F.R. §210.12.

[48]19 C.F.R. §210.9(a); U.S. Int'l Trade Comm'n, *Section 337 Investigations, Answers to Frequently Asked Questions*, ITC Publ. No. 4105 at 15 (March 2009); Easton, *supra* at 218.

[49]19 C.F.R. §210.10(a).

[50]19 C.F.R. §210.10(b); 19 C.F.R. §210.11(a).

[51]19 C.F.R. §210.13(a).

[52]*See, e.g.*, U.S. Int'l Trade Comm'n, *Section 337 Investigations, Answers to Frequently Asked Questions*, ITC Publ. No. 4105 at 1-2 (March 2009).

[53]19 C.F.R. §210.36(a)(1).

[54]Of interest to federal district court practitioners, most ITC ALJs generally do not permit a witness to offer "live" direct testimony. *See, e.g., In the Matter of Certain Products Having Laminated Packaging, Laminated Packaging, and Components Thereof*, Inv. No. 337-TA-874, Order No. 2, Judge Essex's Ground Rules, Section 9.4.1, page 22 (March 28, 2013). Most ALJs prefer to accept the direct examination in writing. Typically, therefore, only the cross-examinations are conducted live at the hearing.

[55]While the federal rules of evidence come into play, there are some differences. The ITC Rules only require that [r]elevant, material, reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, or unduly repetitious evidence

shall be excluded." 19 C.F.R. §210.37(b). In practice, the rules of evidence are generally more relaxed at the ITC, consistent with what might be expected for an administrative hearing.

[56]19 C.F.R. §210.42(d).

[57]19 C.F.R. §210.42(a)(1)(ii). In practice, the initial determination and the recommended determination on remedy are often issued at the same time, even though the due dates are technically different. 19 C.F.R. §210.42(a)(1)(ii).

[58]19 C.F.R. §210.43(a)(1).

[59]19 C.F.R. §210.44.

[60]*See, e.g.*, *In the Matter of Certain Acid-Washed Denim Garments and Accessories*, Inv. No. 337-TA-324, Comm'n Op. at 3-5 (Aug. 20, 1992).

[61]19 C.F.R. §210.42(h).

[62]19 U.S.C. §1337(j)(2). In reality, it is the U.S. Trade Representative (USTR) who makes the decision, as the President delegated his statutory power to the USTR by executive order in 2005. *See*, Assignment of Certain Functions Under Section 337 of the Tariff Act of 1930, 70 Fed. Reg. 43251 (July 26, 2005).

[63]Letter from Ambassador Michael B. G. Forman to Irving A. Williamson, Chairman, U.S. Int'l Trade Comm'n (Aug. 3, 2013).

[64]Kim Tae-Jong, *Fears Grow Over US Protectionism*, Korea Times, *available at* www.koreatimes.co.kr/www/news/biz/2013/08/123_140477.html (last visited May 15, 2014).

[65]19 U.S.C. §1337(c). The unique timing of actions in the ITC creates some interesting timing for when a notice of appeal is due. One might think that this is typically due 60 days after issuance of the "final determination." This is the case if the commission finds in favor of the respondent in the final determination. However, a determination in favor of a complainant is not "final" until after the conclusion of the presidential review period. Thus, the time begins to run after presidential review, and not from the final determination. This also means that the deadlines might be different for different asserted intellectual property—depending on the ruling of the commission.

[66]*See, e.g., Gen. Protecht Group v. U.S. Intern. Trade Com'n*, 619 F.3d 1303, 1306-7 (Fed. Cir. 2010) (noting that the Federal Circuit "reviews the Commission's legal determinations *de novo* and its factual findings for substantial evidence.").

[67]*Id.*

[68]*See Spansion, Inv. V. ITC*, 629 F.3d 1331, 1358 (Fed. Cir. 2010).

[69]*See, e.g.*, Joel W. Rogers and Joseph P. Whitlock, *Is Section 337 Consistent with the GATT and the TRIPs Agreement?*, 17 Am. U. Int'l L. Rev. 459, 471 (2002); Schwartz, *supra* at 1710. While this is generally true, there are some key differences between the substantive patent law applied by the ITC and the substantive patent law applied in federal district courts. *See, e.g.*, Kumar, *supra* at 551-57.

[70]*See, e.g.*, U.S. Int'l Trade Comm'n, *Section 337 Investigations, Answers to Frequently Asked Questions*, ITC Publ. No. 4105 at 2 (March 2009).

[71]*See, e.g.*, 19 C.F.R. §§ 210.27-210.34.

[72]*See, e.g.*, U.S. Int'l Trade Comm'n, *Section 337 Investigations, Answers to Frequently Asked Questions*, ITC Publ. No. 4105 at 2 (March 2009); Int'l Trade Comm'n Trial Lawyers Assoc., *ALJ Groundrules*, *available at* www.itctla.org/resources/alj-groundrules/term/summary (last visited May 15, 2014) (providing links to sample ground rules of the current ITC ALJs). Although reminiscent of local rules in federal district court, the ground rules of the ALJs are often more specific with respect to what a particular judge requires of the parties.

[73]*Young Engineers, Inc v. U.S. Intern. Trade Com'n*, 721 F.2d 1305, 1315 (Fed. Cir. 1983).

[74]*Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1355 (Fed. Cir. 2008) (referring to the ITC as "a creature of statute").

[75]19 U.S.C. §1337(b)(1).

[76]Before 1988, the practice of setting a target date of 18 months or less was a statutory requirement. The Trade Act of 1974 set the time limit for the target date for an investigation to 12 months, but no more than 18 months for a complex case. *See* Rogers and Whitlock, *supra* at 479-80. This was relaxed with the 1994 Uruguay Round Agreements Act amendments of the statute to the current language simply encouraging speed. 19 U.S.C. §1.337(b)(1); Rogers and Whitlock, *supra* at 478-81. Interestingly, this change was largely the result of a 1988 GATT (General Agreement on Tariffs and Trade) panel report finding certain practices discriminatory against foreign manufacturers in violation of international law. *See* Chien, *supra* at 76-77; Rogers and Whitlock, *supra* at 474-81.

[77]19 C.F.R. §§ 210.29(b)(2), 210.30(b)(2).

[78]*See, e.g.*, *In the Matter of Certain Products Having Laminated Packaging, Laminated Packaging, and Components Thereof*, Inv. No. 337-TA-874, Order No. 2, Judge Essex's Ground Rules, Section 4.1.1, page 9 (March 28, 2013).

[79]19 U.S.C. §1337(b)(1) (stating that "The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative.").

[80]*See* 19 C.F.R. §210.12.

[81]*See* 19 C.F.R. §210.12.

[82]19 C.F.R. §210.12(a)(9)(viii).

[83]*See Sealed Air Corp. v. United States Int'l Trade Comm'n*, 645 F.2d 976, 985-85 (C.C.P.A. 1981).

[84]*Id.*

[85]19 C.F.R. §210.11(a).

[86]*See* 19 U.S.C. §1.337(a)(1)(A)(i)-(ii); *see also*, Clark *surpa*, 1182.

[87]*See* Clark *supra* 1185-86.

[88]Clark *supra* 1182; *Interdigital Communications v. ITC*, at 9-13 (2013) (discussing the legislative history of the changes to the domestic industry requirement in the Omnibus Trade and Competitiveness Act of 1988).

[89]*In the Matter of Certain Computers and Computer Peripheral Devices, and Components Thereof, and Products Containing Same*, Inv. No. 337-TA-841, USITC Pub. No. ____, Comm'n Op. at 26 (Jan. 2014) (citing *Alloc, Inc. v. ITC,* 342 F.3d 1361, 1375 (Fed. Cir. 2003)).

[90]*In the Matter of Certain Computers and Computer Peripheral Devices, and Components Thereof, and Products Containing Same*, Inv. No. 337-TA-841, USITC Pub. No. ____, Comm'n Op. at 26 (Jan. 2014) (citing *Certain Variable Speed Wind Turbines and Components Thereof,* Inv. No. 337-TA-376, USITC Pub. No. 3003, Comm'n Op. at 21 (Nov. 1996)).

[91]*In the Matter of Certain Computers and Computer Peripheral Devices, and Components Thereof, and Products*

*Containing Same*, Inv. No. 337-TA-841, USITC Pub. No. ____, Comm'n Op. at 27-28 (Jan. 2014); *see also*, *In the Matter of Certain Computers and Computer Peripheral Devices, and Components thereof, and products Containing Same*, Inv. No. 337-TA-841, USITC Pub. No. ____, Dissenting Views of Commissioner Shara L. Aranoff at 1 (Jan. 2014) (observing that the majority opinion is inconsistent with "nearly 25 years of agency practice" and with the reason Congress amended the statute in 1988).

[92]*Id.*

[93]*In the Matter of Certain Computers and Computer Peripheral Devices, and Components Thereof, and Products Containing Same*, Inv. No. 337-TA-841, USITC Pub. No. ____, Comm'n Op. at 26-27 (Jan. 2014).

[94]19 U.S.C. §1337(a) (forbidding the "importation into the United States … of articles … ").

[95]*See Suprema, Inc. v. Int'l Trade Comm'n*, No. 2012-1170, ___F.3d ___, 2013 WL 6510929 at *20 (Fed. Cir. Dec. 13, 2013); *In the Matter of Certain Electronic Devices with Image Processing Systems, Components Thereof, and Associated Software*, Inv. No. 337-TA-724, USITC Pub. No. 4374, Comm'n Op. at 13-14 (Feb. 2013).

[96]*In the Matter of Certain Electronic Devices with Image Processing Systems, Components Thereof, and Associated Software*, Inv. No. 337-TA-724, USITC Pub. No. 4374, Comm'n Op. at 14 (Feb. 2013).

[97]*See Suprema, Inc. v. Int'l Trade Comm'n*, No. 2012-1170, ___F.3d ___, 2013 WL 6510929 at *26 (Fed. Cir. Dec. 13, 2013). However, on May 14, 2014, the Federal Circuit issued an Order on Petition for Rehearing En Banc agreeing to rehear the case *en banc*.

[98]*Kyocera Wireless*, 545 F.3d at 1355 (referring to the ITC as "a creature of statute").

[99]*See* 19 U.S.C. §1337.

[100]19 U.S.C. §§ 1337(d), 1337(f); *see also*, Simms, *supra* at 254.

[101]There are, technically, two types of exclusion orders available from the ITC: a general exclusion order and a limited exclusion order. The difference between these two types of exclusion orders is that the general variety applies to all products found to infringe—regardless of source. The limited variety of exclusion order only applies to products from the respondents specifically named in the complaint. See Kyocera Wireless, 545 F.3d at 1355-56 (discussing the two types of exclusion orders available at the ITC).

[102]*See* U.S. Int'l Trade Comm'n, *Annual Performance Plan, FY 2014-2015 and Annual Performance Report, FY 2013*, 46.

[103]*eBay, Inc. v. MercExchange*, 547 U.S. 388, 391 (2006).

[104]*Spansion, Inc. V. ITC*, 629 F.3d 1331, 1357-60 (Fed. Cir. 2010).

[105]28 U.S.C. §1659(a). Interestingly, this provision was changed as a result of a GATT Panel ruling against the United States. *See, e.g.*, Rogers and Whitlock, *supra* at 475-81.

[106]*See* 19 C.F.R. §210.15(a)(1).

[107]*See, e.g.*, *In the Matter of Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same*, Inv. No. 337-TA-605, Comm'n Op. at 3 (May 27, 2008) (applying the following five factors: "(1) the state of discovery and the hearing date; (2) whether a stay will simplify the issues and hearing of the case; (3) the undue prejudice or clear tactical disadvantage to any party; (4) the state of the PRO proceedings; and (5) the efficient use of Commission resources"); *see also*, *In the Matter of Certain Video Analytics Software, Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-852, Order No. 4 at 2 (Sept. 7, 2012)(using the five-factor test for consideration of a stay due to parallel ITC investigations); *In the Matter of Certain Course Management Systems Software Products*, Inv. No. 337-TA-677, Order No. 5 at 5 (July 24, 2009) (stating the test as applying to "related litigation or administrative proceeding").

[108]*See, e.g.*, *In the Matter of Certain Video Analytics Software, Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-852, Order No. 4 at 3 (Sept. 7, 2012); *In the Matter of Certain Course Management Systems Software Products*, Inv. No. 337-TA-677, Order No. 5 at 7 (July 24, 2009).

[109]*See, e.g., Young Engineers, Inc. v. U.S. Intern. Trade Com'n*, 721 F.2d 1305, 1316 (Fed. Cir. 1983) (explaining that "where the 'infringement claim' which is the basis for the Sec. 1337 investigation is a claim which would be barred by a prior judgment if asserted in a second infringement suit, that infringement claim may also be barred in a Sec. 1337 proceeding.").

[110]28 U.S.C. §1659(b).

[111]Chien, *supra* at 74-75, 104.

[112]At least one author has noted that "[o]f the twenty-two parallel cases from 1972 to 2006, nine of them had conflicting decisions." Kumar, *supra* at 539 (2009) (citing Robert W. Hahn and Hal J. Singer, *Assessing Bias in Patent Infringement Cases: A Review of International Trade Commission Decisions*, 21 Harv. J.L. & Tech. 457, 480-81 (2008)).

[113]*See, e.g.*, *eBay*, 547 U.S. at 391 (addressing the requirements for imposing an injunction in a patent case), *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1315 (Fed. Cir. 2011) (rejecting the use of the long-used "25 percent rule" for reasonable royalty damages).

[114]U.S. Int'l Trade Comm'n, *Budget Justification, Fiscal Year 2015*, 18; *see also,* U.S. Int'l Trade Comm'n, *Annual Performance Plan, FY 2014-2015 and Annual Performance Report, FY 2013*, 47.

[115]*Tian Rui Group Co. Ltd. V. U.S. Intern. Trade Com'n*, 661 F.3d 1322 (Fed. Cir. 2011).