

Client Alert

July 2019

Not a No-Brainer: Institution of an ITC Investigation Means Careful Consideration of the Complaint

Draft a complaint, prepare your exhibits, file your papers, and soon an International Trade Commission (ITC) investigation to determine if you are entitled to an exclusion order preventing US importation and sale of certain goods by others will begin as requested, right? Not always.

After receipt of a Section 337 complaint, ITC Commissioners have 30 days to vote whether to institute an investigation (with extensions in exceptional circumstances). As we've noted in the past, most complaints filed do result in institution.¹ Section 337 itself states that the ITC "shall investigate any alleged violation of this section on complaint." 19 U.S.C. § 1337(b)(1).

But sometimes the investigation instituted deviates from the investigation requested. This happened twice recently, for very different reasons, demonstrating that the ITC carefully examines complaints prior to institution of an investigation and institution decisions can be complicated.

No Investigation of Parties as Respondents Without Prima Facie Evidence of Importation

On May 30, 2019, Illinois Tool Works, Vesta, Vesta Global, and Adcraft filed a complaint requesting an investigation into alleged misappropriation of trade secrets related to design and manufacture of foodservice equipment by a number of Chinese companies, as well as four individuals, all named as proposed respondents. *Certain Foodservice Equipment and Components Thereof*, Inv. No. 337-TA-1166, Complaint (May 30, 2019). The complaint also alleged unfair competition through i) breach of agreements and ii) tortious interference.

While the ITC instituted an investigation, it declined to include two of the four individuals as respondents. Inv. No. 337-TA-1166, Notice of Institution (June 27, 2019). The ITC explained that the complaint, exhibits, and supplements did not describe "a specific instance of an importation into the United States, the threat or effect of which is to destroy or substantially injure an industry in the United States"—required by Section 337 and the ITC rules—by those individuals. Inv. No. 337-TA-1166, Barton Correspondence to Sobin (June 27, 2019). (The ITC also declined to institute with respect to the breach of agreements claim, but did not provide its reasoning for that decision.)

Unwieldy Complaints May Be Severed Into Multiple Investigations (By the ITC and ALJs)

On April 30, 2019, Lighting Science Group and Healthe filed a complaint requesting an investigation into alleged infringement of seven asserted patents by more than ten proposed respondents (each accused of infringing various patents), and alleged false advertising by one of the proposed respondents. *Certain Light-Emitting Diode Products, Systems, and Components Thereof (I)*, Inv. No. 337-TA-1163, Complaint (April 30, 2019).

¹ See Hunton Andrews Kurth's June 3, 2019 client alert, [Real or Fake? ITC Investigating Allegations of Importation and Sale of Counterfeit Dresses, Jumpsuits, and Maxi Skirts](#).

The ITC instituted two investigations. In one, the ITC is investigating infringement of two asserted patents by five respondents, as well as false advertising. *Certain Light-Emitting Diode Products, Systems, and Components Thereof (II)*, Inv. No. 337-TA-1164, Notice of Institution (June 20, 2019). In the other, the ITC indicated that it would investigate infringement of five asserted patents by twelve respondents (including the five respondents named in the 1164 investigation). Inv. No. 337-TA-1163, Notice of Institution (June 20, 2019).

Subsequently, an Administrative Law Judge (ALJ) ordered that the 1163 investigation be further severed into two investigations, with two asserted patents in one investigation, three asserted patents in the other, and overlap among the respondents in each. Inv. No. 337-TA-1163, Order 10 (July 10, 2019). This means that the complainants and some respondents will participate in three co-pending ITC investigations, which could be a heavy burden on those parties and their counsel.

Takeaways for Complainants, Respondents, and Practitioners

Institution of these investigations, including the ALJ's additional severing of the 1163 investigation, provides important lessons to those thinking of seeking an exclusion order from the ITC (and those who may be named as proposed respondents in a complaint). Although the ITC shall investigate alleged violations of Section 337 as instructed by the statute, it will only do so based on complaints that conform to the requirements of the statute and ITC rules. In addition, both the ITC and ALJs will strive to ensure that adjudication of investigations is expeditious and efficient, again in conformance with the statute and rules.

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