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ANSWERS

Q1. How are Section 337 proceedings initiated?

A: One or more companies (“Complainants”) file a proposed complaint with the International Trade Commission (ITC) identifying, among other things, the imported items at issue, the nature of the proposed claims with respect to such items (*e.g.*, patent infringement, trademark infringement, etc.) and the proposed Respondents who are claimed to be engaged in importation of infringing goods, the resale of imported infringing goods or other unfair competition.

If the ITC votes to institute an investigation based on the complaint (a decision it normally makes within 30 days after the proposed complaint is filed), it will publish a notice and serve the complaint on the Respondents (who then have 20 days to respond). If a parallel federal district court case has been filed against a Respondent based on the same claims as in the ITC complaint, the Respondent may have the district court case stayed pending the completion of the ITC investigation.

Q2. What should the complaint include?

A: A complaint filed in the ITC for a Section 337 investigation must include significantly more detail than a complaint filed in federal district court in the United States. In order to ensure that the complaint contains sufficient information, a Complainant may consult with a branch of the ITC and submit a draft of the complaint for review prior to filing. These aspects of Section 337 actions also mean that a Complainant will likely have done a considerable amount of preparation before filing the case, which can put Respondents at a significant disadvantage.

A copy of the governing statute and the Commission’s Rules, including the rules that identify the requirements for a properly filed complaint, are among the reference materials available on the Commission’s Web site at www.usitc.gov. The requirements for the contents of a Section 337 complaint are set forth at 19 C.F.R. §§ 210.4, 210.8 and 210.12.

Q3. How long do Section 337 investigations last?

A: Pursuant to Section 337, investigations must be completed “at the earliest practicable time.” Accordingly, the Commission places great emphasis on the expeditious adjudication of Section 337 investigations. The Commission recently amended 19 C.F.R. §§ 210.42, 210.43 and 210.51 to increase from 15 to 16 months the amount of time that the ALJ may set for the investigation. Historically, the Commission has strived to complete most investigations in 12 to 16 months. However, factors such as the complexity of the subject matter and number of unfair acts at issue, as well as the workloads of the ALJs during a particular period, have resulted in longer target dates in a number of investigations.

Q4. What types of products can be the subject of Section 337 investigations?

A: Following are examples of some of the products and claims involved in recent investigations:

- Set-top cable television boxes – patent infringement
- Yellow self-stick repositionable note products – trademark infringement
- Bearings – gray market trademark infringement
- Semiconductors – patent infringement

- Agricultural vehicles – gray market trademark infringement
- Plastic bags – patent infringement
- Batteries – patent infringement
- Color television receivers and display monitors – patent infringement

Q5. How does the speed of a Section 337 investigation compare to a litigation in U.S. Federal District Court?

A: While some procedures followed in Section 337 investigations are similar to those used in U.S. federal district courts, Section 337 investigations proceed more quickly than a typical federal district court case. The evidentiary hearing in a Section 337 investigation will generally occur less than one year after the investigation is instituted, whereas a district court case involving similar types of claims might take several years before it goes to trial.

This speed is accomplished in part by compressing schedules and by requiring the parties to respond in much less time to various types of requests and pleadings than would be required in federal court. For example, the ITC rules, like the federal district court rules, permit the parties to engage in various types of pre-hearing discovery designed to learn about the opposing party’s evidence, such as written interrogatories to which written answers must be provided and requests for production of documents and things. In federal district court, a party would normally have 30 days to respond to interrogatories and document requests. By contrast, the ALJs at the ITC generally require parties to respond to interrogatories and document requests in only 10 days.

Respondents served with a complaint in a Section 337 investigation should take immediate steps to investigate and evaluate the claims in the complaint and possible defenses, respond to the complaint, prepare to serve and respond to discovery, and develop an overall strategy for the case (including deciding whether and when to seek a settlement). Respondents can be at a disadvantage at this stage, because the Complainant may have already spent months preparing its case. The pace of the case will also typically remain intense through the hearing and post-hearing briefing.

Q6. What is an ALJ and how are they involved in a Section 337 investigation?

A: When the ITC institutes an investigation, it will assign the case to one of the four Administrative Law Judges (“ALJs”) who preside over Section 337 investigations. The ALJ will establish a procedural schedule which will typically require that all discovery be completed five to seven months after the filing of the complaint, and schedule a hearing seven to nine months after the filing of the complaint. The ALJ will also issue a set of procedural “Ground Rules” to supplement the ITC’s own rules governing Section 337 investigations.

Most of the activity early in the investigation is focused on the discovery process used to develop evidence concerning the parties’ claims and defenses. Parties may use the discovery process to obtain documents, written interrogatory responses and deposition testimony from other parties. They may also ask the ALJ to issue subpoenas requiring non-parties to provide documents and/or testimony. Discovery disputes will be resolved by the ALJ, often more quickly than in a federal district court case. If the parties believe that any issues can be resolved without the need for an evidentiary hearing, they may file motions for summary determination (similar to motions for summary judgment).

Q7. What type of relief is available at the ITC?

A: Relief that may be ordered by the ITC includes:

- A “limited exclusion order” prohibiting only the named Respondents from importing the products at issue;
- A “general exclusion order” prohibiting *all* imports of the products at issue by anyone, including non-parties to the investigation; and/or
- A “cease and desist order” prohibiting Respondents from continuing to import and/or sell the products (including sales from pre-existing inventories).

Both limited and general exclusion orders are enforced by the U.S. Bureau of Customs and Border Protection (part of the Department of Homeland Security). Cease and desist orders are enforced by the ITC.

A Complainant may also seek a “temporary exclusion order” at the outset of an investigation to bar imports of the accused product during the pendency of the investigation, similar to a preliminary injunction proceeding in federal district courts. Temporary exclusion orders are not sought very often and are granted even less frequently.

Q8. How can confidential business information be protected in a filing with the ITC?

A: When the case is first assigned to an ALJ, the ALJ will issue a “Protective Order” that will establish procedures for parties or non-parties providing documents, testimony or other types of information during discovery to protect information that is competitively sensitive or would otherwise cause harm if made public, by designating such information as “confidential.” Typically, the Protective Order provides that only outside counsel for the parties and independent experts retained by outside counsel are permitted to have access to such confidential information. Outside counsel and experts must agree in writing to abide by the terms of the Protective Order. The Order typically precludes the parties themselves, including their inside counsel, from having access to confidential information and documents, and ALJs generally deny requests to modify the terms of their standard Protective Orders.

Q9. Are pending Section 337 claims frequently resolved by settlement?

A: Yes. Many Section 337 claims are resolved by settlement before an evidentiary hearing is conducted. Because any settlement means that the ITC would be terminating part or all of an investigation, settlement agreements must be approved by the ITC. Except as to any particular terms that are confidential, settlement agreements are on the public record. Some settlements include an agreement to have the ITC enter a “consent order” (enforceable by the ITC) prohibiting the settling Respondent from engaging in certain conduct, such as importing the products at issue.

Q10. Will there be a hearing on the issues underlying the Section 337 action?

A: Assuming the case is not resolved by settlement or motions, an evidentiary hearing will take place in Washington, D.C. before the ALJ, typically lasting one to two weeks. The hearing will proceed much like a trial in federal district court before a judge, except that some ALJs may be more liberal in admitting certain types of evidence. In addition, there is often significant pressure on the parties to present their evidence quickly because of the relatively short time allotted for the hearing. A further distinguishing

feature is that an ITC staff attorney from the ITC Office of Unfair Import Investigations participates in the hearing as an additional party representing the public interest.

The ALJ typically will require extensive prehearing filings, including exhibit lists, objections to exhibits, witness lists and prehearing briefs, as well as extensive post-hearing briefing and proposed findings of fact.

Q11. What happens after the hearing?

A: After the post-hearing briefing, the ALJ will issue a decision, typically less than a year after the complaint was filed. The decision will consist of an “Initial Determination” as to whether Respondents violated Section 337 and a “Recommended Determination” as to what relief should be ordered if the ITC finds a violation.

Q12. Is an ALJ’s Initial Determination on the merits subject to review by the Commission?

A: Yes. Under the ITC’s Rules, the parties may file petitions requesting that the full Commission review any part of the Initial Determination that was decided against them. Parties may petition for Commission review of an ALJ’s ID if they believe that it (1) contains a clearly erroneous finding of material fact, (2) contains an erroneous legal conclusion, or (3) affects Commission policy. Petitions for review to the full Commission are limited to 100 pages by 19 C.F.R. 210.43.

Within 45 calendar days after service of the ID, the Commission decides, either on the basis of a petition for review or on its own initiative, whether to review some or all of the ID. Any part of the Initial Determination that the ITC decides not to review is automatically adopted by the ITC as its own Final Determination on the issue of whether Section 337 was violated.

The ITC will seek submissions from the parties and the public on what relief is appropriate if a violation is found, and also as to whether the public interest would warrant declining to order relief even if a violation is found.

Q13. When is the Commission’s Final Determination subject to Presidential review?

A: If the ITC finds that Respondents violated Section 337 and issues an order imposing relief, a 60-day review period follows during which the President has the power to disapprove the order on “policy grounds.” The Office of the U.S. Trade Representative coordinates the review, with input from various federal agencies. The President has exercised this power only five times, most recently in 1988.

Q14. Are Commission decisions in Section 337 investigations appealable?

A: An ITC decision, whether in favor of or against the Complainant, may be appealed to the U.S. Court of Appeals for the Federal Circuit, the same appellate court that hears all appeals from federal district courts in patent cases. (Where the President has disapproved an ITC order, however, neither the order nor the Presidential disapproval is subject to court review.)

A losing party may also file a petition for writ of certiorari asking the U.S. Supreme Court to review a decision of the Federal Circuit, but such review is discretionary and rarely is granted.

Q15. What are some of the potential benefits to a Complainant filing at the ITC?

A: Some of the potential benefits to a Complainant filing at the ITC include:

- Respondents are required to come to the ITC in Washington, D.C.
- An ITC investigation can be cost effective for a Complainant in comparison to a litigation in U.S. District Court.
- The ITC provides a fast track to trial and decision.
- Commission decisions are less likely to be overturned on appeal.
- A Complainant has the possibility of obtaining a general exclusion order.
- An ITC investigation places pressure on Respondents to settle:
 - Expedited proceedings
 - Quick and broad discovery
 - Motions are expedited
 - Substantial prehearing and post-hearing requirements
 - Heavy investment of time and money – limited resources usually are not accepted as a good basis for not meeting discovery and other obligations
- Possible collateral estoppel effect in U.S. district court civil damages actions – except on patent issues.

Q16. What are some of the potential risks and costs that can be incurred by a Complainant filing at the ITC?

A: Some of the potential risks and costs include:

- Complainant must be prepared to invest substantial amounts and divert substantial management time very early in the case.
- Complainant also will be subject to intense and broad discovery – little sympathy for a Complainant not prepared to respond quickly to discovery.
- Limited ITC relief and delay of additional relief:
 - Separate action required for damages
 - No ITC relief for articles that are both manufactured and sold domestically
 - Pending completion of ITC investigation, Respondents may stay any district court action involving the same issues
- Potential adverse collateral estoppel effects.
- Non-parties subject to a general exclusion order may be able to relitigate defenses (*e.g.*, patent invalidity) in enforcement proceedings.