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# *Pleading Requirements in the ITC and Tips to Starting Off an Investigation on the Right Foot*

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It is no secret the US International Trade Commission (ITC or Commission) has become a popular forum for patent litigation—last year the number of active investigations increased to 88, the most in the ITC’s history and double the number in 2004. The things that make the ITC an attractive choice for claimants are well known, such as its speedy docket, its ability to grant broad injunctive relief, and its patent-savvy adjudicators. But adequate attention rarely is given to the differences between litigating a case in a federal district court and the ITC or the possible snares that await practitioners there because of those differences. This article focuses on those differences—particularly, in the requirements for filing a complaint and the Commission’s approach to motions to amend the complaint or notice of investigation or to stay an investigation—and examines how a well planned and executed pre-suit investigation can help prepare for those differences and lessen the chance of being caught off guard by the fast pace of an ITC investigation.

## **Pleading Requirements for Complaint**

One of the major differences between litigating a patent case in federal district court and the ITC—and something that often surprises attorneys new to ITC practice—is the requirements for filing a complaint. In US district court, a plaintiff is required to plead in its complaint only enough detail sufficient to notify the defendants of the claims and causes of action asserted against them. In the ITC, however, a claimant is required to plead in the complaint detailed facts for many substantive elements of a Section 337 investigation,<sup>1</sup> such as: (1) importation of goods into the United States or sales within the United States after

importation; (2) infringement of a valid and enforceable US patent by the imported goods; and (3) existence of an industry in the United States or an industry being established, relating to the articles protected by the patent—each of which is an element that must be proved to establish a violation of Section 337(a)(1)(B) or Section 337(a)(2) of the Tariff Act. Similar to a complaint filed in federal district court, the detailed pleading and submissions required in a complaint for the ITC serve a notice function by informing each respondent in the investigation of the bases for its alleged violation of Section 337; it also aids the Commission’s decision to institute an investigation, which is based almost entirely on the allegations in the complaint.<sup>2</sup>

Accordingly, one factor the Commission considers when determining whether to institute an investigation is the likelihood the claimant can establish the Commission has jurisdiction over the underlying dispute. The Commission has *in rem* and nationwide jurisdiction over imported articles accused of infringing US patents in violation of Section 337. Consequently, the Commission Rules require the complaint to describe specific instances of the alleged unlawful importations or sales.<sup>3</sup> That required specificity is integral to the Commission’s ultimate determination on whether to institute an investigation because, at an early stage, it gives the Commission information that speaks directly to the jurisdictional issue; without the importation of infringing goods, the ITC is powerless to issue a remedy in any dispute.

The importation or sale of goods in the United States has been interpreted to mean that the unfair acts need only relate to a product that is imported or sold within the United States.<sup>4</sup> The respondent itself need not be shown to have been the importer. Rather, the statute broadly defines as unlawful the “importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee” of an infringing product.<sup>5</sup> As such, a foreign manufacturer of an infringing product can be shown to be in violation of the statute under the “sale for importation” provision—even if the foreign manufacturer has no operations in the United States.

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Likewise, US wholesalers and retailers can be shown to be in violation of the statute under the “sale after importation” provision—even if they have not participated in the actual importation of the product. Indeed, because of the broad reach of the statute, a violation of the statute can be shown on the basis of the sale for importation prior to the actual importation.

Complainants often satisfy the pleading requirement concerning importation by averring that they purchased imported representative accused products for each respondent within the United States and submitting, along with the complaint, receipts for those purchases. (The purchase of representative accused products also helps the complainant satisfy another filing requirement, which is to submit along with the complaint to the ITC exemplars of the representative accused products for each respondent.<sup>6</sup>)

The specificity required in an ITC complaint also helps the Commission assess the likelihood that an imported article infringes an asserted patent—another requirement of a Section 337 violation. The ITC uses, among other things, as guideposts for its infringement inquiries Section 271 of the US Patent Act, which governs patent infringement in federal district courts. To prove infringement, the complainant must demonstrate that each and every limitation set forth in the asserted patent claims is found in the accused device either literally or under the doctrine of equivalents. Hence, the Commission Rules require the complaint to include something close to a prima facie case of infringement: the complaint must include “[a] reference to the specific claims in each . . . [asserted] US patent that allegedly cover the article imported or sold by each [respondent] . . . or the process under which such article was produced.”<sup>7</sup> The complaint also must include an infringement claim chart for each asserted independent claim of each involved US patent for a representative accused product of each respondent.<sup>8</sup> These requirements—particularly the claim charts—also are intended to “help identify the issues at an early stage for all parties concerned, and foster early settlement or disposition of disputes.”<sup>9</sup>

Another important factor in the Commission’s decision to institute an investigation—and a requirement in proving a Section 337 investigation—is whether the claimant has a sufficient domestic industry in the United States. The ITC is an administrative body whose purpose is to protect industries in the United States from unfair competition. And as a prerequisite to showing a violation of Section 337, a claimant must demonstrate that “an industry in the United States, relating to the articles protected by the patent . . . exists or is in the process of being established.”<sup>10</sup> Accordingly, the Commission Rules also provide that the complaint must include a detailed description of the domestic industry affected and the

complainant’s business interests in that industry.<sup>11</sup> Also as part of the description, the complaint is required to include domestic industry claim charts—similar to the infringement claim charts but for the complainants’ own commercial products—showing the practice of a representative claim of each asserted patent by a product of the patentee or licensee.

The required detailed description should address both prongs of the domestic industry requirement of Section 337, which are typically thought of as: the technical prong and the economic prong. Under the technical prong of domestic industry, the claimant must demonstrate that it is practicing or exploiting the patents at issue; the domestic industry claim charts required by the Commission Rules demonstrate that the claimant has at least prima facie evidence that the technical prong can be satisfied. The economic prong of the domestic industry requirement is satisfied by showing:

1. Significant investment in plant and equipment;
2. Significant employment of labor or capital; or
3. Substantial investment in exploitation of the patent, including engineering, research and development, or licensing.<sup>12</sup>

A complainant satisfies this requirement by meeting any one of these criteria. As the legislative history of Section 337 states: “This definition does not require actual production of the article in the United States if it can be demonstrated that significant investment and activities of the type enumerated are taking place in the United States.”<sup>13</sup> Thus, to satisfy the pleading requirement and show the Commission that there is evidence that the economic prong may be satisfied, the detailed discussion in the complaint should include any significant investments by the patentee or licensee in such things as manufacturing facilities and equipment; the number of employees, man-hours and capital spent devoted to the subject matter of the asserted patents; and the exploitation of the asserted patents through engineering, research and development, or licensing.

In addition to the detailed fact pleading in the complaint, the Commission Rules also require—unlike the Federal Rules of Civil Procedure in district court litigations—the submission along with the complaint of voluminous exhibits and appendices. For example, the complaint must identify corresponding foreign patents and applications, licenses of asserted patents, and statements of related litigations.<sup>14</sup> The complainant is required to file with the complaint certified copies of the asserted patents, file histories, and assignments; copies of the prior art references of record for each asserted patent; and copies of all license agreements.<sup>15</sup> Furthermore, the complainant must file along with the complaint

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drawings, photographs, or other visual representations of the products the complainant is relying on for domestic industry and exemplars of the accused products of each respondent.<sup>16</sup>

Notably, one thing the Commission Rules does not require the complaint to specifically identify is each accused product.<sup>17</sup> Indeed, the ITC has consistently held that the scope of an investigation is broad enough to encompass products other than those specifically identified in the complaint.<sup>18</sup> Each article that is the subject of an ITC investigation is defined by the Notice of Investigation; there is no requirement to specifically identify by name or model number each accused product. All the Commission Rules require is that the complaint specifically shows that “a representative article” for each accused respondent has been imported into the United States and infringes at least one independent claim of at least one asserted patent.<sup>19</sup>

In fact, a complainant should not specifically limit the scope of accused products in the complaint, and instead refer to the accused products in general descriptive terms. In the number of investigations in which the complaint specifically identified an accused product by name or model number or otherwise characterized or made reference to a specific class of a respondent’s products, ALJs have held that such reference limited the scope of the investigation to include only those products referred to or not otherwise excluded by the complaint.

If the Rules required otherwise, it would make an investigation almost unworkable, as additional products often are discovered during the course of the investigation—not to mention that respondents do not stop development of products or the development of those products already in their pipeline and set for distribution because an ITC investigation is instituted. Such a requirement would force a complainant to move to amend the complaint and notice of investigation each time a new product was identified during the discovery process. But the Rules do not impose such a burden on the complainant. In the ITC, much as in federal district court, a complainant is required to provide notice to respondents of the products alleged to infringe a patent-in-suit through discovery, in particular, answers to contention interrogatories.<sup>20</sup>

## Amendment to Complaint/ Notice of Investigation

Another difference between litigating in federal district courts and the ITC is the difficulty of amending the complaint and notice of investigation, even early on, in the investigation to add additional respondents, patents, or claims. Such amendments may be made “only by leave of the Commission for good cause shown and upon

such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation.”<sup>21</sup> But because of the shortened schedule in the ITC and the related prejudice on respondents, the Commission historically has been hesitant to allow a complainant to make such amendments to the complaint and notice of investigation.<sup>22</sup>

While there is no clear demarcation of when is too late to move to amend the complaint and notice of investigation to include a new patent in an investigation, the claimant should strive to move for such amendment before discovery actually gets underway. Once a respondent has collected and produced documents, produced witnesses to be deposed, or taken other affirmative steps to further the investigation substantially, a claimant probably will find that it becomes difficult to convince the ALJ and Commission to grant a motion for those types of amendments. And now, in light of the increased filings in the ITC and the Commission’s steadfast determination to complete investigations within or close to the 16-month period, ALJ’s likely will be even more hesitant to grant motions to amend once an investigation gets underway, so as to avoid any need to extend the target date for completion of the investigation.

## Stays in the ITC

That the ITC handles motions to stay an investigation pending resolution of co-pending litigations or reexaminations involving an asserted patent differently from a federal district court is another thing that makes the ITC an attractive forum for claimants. It has become almost commonplace for a defendant in a patent infringement action, usually in a federal district court, to file for reexamination of an asserted patent in the US Patent Office and immediately seek a stay in the district court action pending resolution of the reexamination. And such requests are frequently granted by the district courts. Not so in the ITC.

ALJs usually decline to grant a stay in an investigation.<sup>23</sup> In *Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same*,<sup>24</sup> the ALJ granted the respondents’ motion to stay the investigation pending resolution of reexaminations before the US Patent Office; the Commission reversed the ALJ’s determination and dissolved the stay.<sup>25</sup> The Commission’s hesitancy in granting stays likely is based on reasons similar to those that serve as the foundation for its policy concerning amendments to the complaint and notice of investigation:

- The time-sensitive nature of Section 337 investigations;
- The uncertainty of a US Patent Office’s reexamination; and

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- The prejudice on the parties because of significant resources that are expended during an ITC investigation.

## **A Thorough Pre-Suit Investigation Is the Key to Ensuring a Successful Investigation**

A well thought out and executed pre-suit investigation is imperative to a successful Section 337 investigation. In the ITC, the entire investigation essentially is a race against the clock: It is the Commission's policy to conduct investigations "expeditiously" and typically within a 16-month window.<sup>26</sup> Packed within the first 9 or 10 months is practically the entire case—fact and expert discovery, pre-hearing motions and briefing, the hearing itself, and post-hearing briefing—except for the Administrative Law Judge's initial determination, any petitions to review, and the Commission's final determination. In light of the fast pace in the ITC, it should not come as a surprise that it may be unforgiving for any lapses by a complainant, regardless of how minute or temporary, during the investigation. As such, it is important that a claimant begins thinking about substantive issues prior to institution and starts mapping out a strategy for obtaining the information and cultivating the arguments needed to prove its case before the parties are hunkered down in discovery.

### **Selection of Asserted Patents**

The type of pre-suit investigation that should precede filing a complaint in the ITC is similar, in some respects, to the type of investigation a party would conduct prior to filing a lawsuit in federal district court; it also should delve deeper into substantive issues than those investigations for standard district court litigations. Typically, a pre-suit investigation for a district court case has as its goals to determine which patents to assert, identify potential defendants, and identify accused products; so also for the ITC. But to adequately prepare for an ITC investigation requires a little more time and effort, if only to satisfy the previously mentioned filing requirements for the complaint. The claimant needs to consider the effect asserting each patent against multiple parties may have on claim construction and validity issues and its ability to satisfy the technical prong of the domestic industry requirement; the category of domestic industry the claimant will attempt to establish for the economic prong of the domestic industry, and the evidence needed to satisfy the requirement; and the type of remedy the claimant will seek—usually between a limited or general exclusion order.

Probably the most important thing for a claimant to consider in preparing a complaint for a Section 337 investigation is which patent(s) in its portfolio to assert. That determination should not be made lightly. The goal is not to find patents with readily defensible positions, but to avoid—when possible—any patent or claim that will force the claimant to argue an extreme position that may limit its ability to assert the patent broadly against all respondents, or worse, affect the claimant's credibility before the ALJ. Clearly, the claims of the patents should be examined; the prosecution histories and related patent families also should be reviewed and any potential problems should be identified. Claims that are not clearly supported in the patent's specification probably should be avoided, as well as patents that, based on their prosecution histories, contain amendments or arguments that could limit claim scope and preclude infringement of one or more accused product. Additionally, as part of the review of its patent portfolio, the claimant should consider patent applications in the pipeline to issue early in an investigation, *i.e.*, shortly after institution.

If a claimant would like to assert a patent that appears to be on track to issue early in the investigation (within the first two months after institution), the Commission, the ALJ, and the parties to the investigation—the respondents and the Office of Unfair Import Investigations staff attorney—should all be notified as soon as possible. One way to handle that situation is for the complainant to send the Commission, the ALJ, and all the parties in the investigation a letter once the US Patent Office issues a notice of allowance. The letter should include all the information about the soon-to-issue patent that is required in the complaint for asserted patents: Identification of the claims that will be asserted against each respondent and infringement and domestic industry claim charts. The letter also should include a copy of all allowed claims and the notice of allowance. The complainant should request expedited issuance of the patent and move to amend the complaint and notice of investigation as soon as the patent issues. By notifying all the parties early on about the intention to add another patent and moving quickly to do so, the claimant is able to neutralize a respondent's most effective and powerful argument before the Commission in opposing a motion to amend the complaint and notice of investigation to add another patent: The prejudice and burden caused by such an amendment.

### **Domestic Industry**

During the pre-suit investigation, the claimant should determine which of the categories of domestic industry its activities fall under and begin gathering supporting evidence. As stated previously, those categories are: (1) significant investment in plant and equipment;

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(2) significant employment of labor or capital; or (3) substantial investment in exploitation of the patent, including engineering, research and development, or licensing.

The scope of the domestic industry in patent-based investigations . . . [is based on] the realities of the marketplace and encompasses not only the manufacturing operations but may include, in addition, distribution, research and development and sales.<sup>27</sup> Domestic investments that the ITC has considered relevant in determining whether a complainant satisfies the economic prong of the domestic industry requirement include investment in: customer training and support, manual drafting, product testing, purchase of equipment used for testing, quality assurance, and leasing of facilities.<sup>28</sup> The ITC has not delimited a minimal threshold for satisfying the economic prong of the domestic industry requirement:

[T]he determination is made by “an examination of the facts in each investigation, the article of commerce, and the realities of the marketplace.” . . . The fact that a complainant may be a small business is not preclusive[.] . . . Small businesses in this country can become large ones, and there is a public interest in protecting them against unfair theft of their property rights.<sup>29</sup>

The key is to begin gathering the evidence early on, especially if the claimant’s domestic industry will be on the lower-end of the spectrum.

By gathering this information prior to filing the complaint and in the early-stages of the investigation, the claimant can begin to arrange the evidence in a coherent form and then move for summary determination that the economic prong of domestic industry is satisfied. (Commission Rule 210.18 requires that all motions for summary determination be filed at least 60 days prior to the date fixed for the beginning of the hearing, counting back from the date fixed for the beginning of the hearing beginning with the first calendar day.) This will help streamline the investigation and allow for more time during the discovery period and at the hearing for other, arguably more important, pursuits, such as infringement, validity, and remedy issues.

## Remedy

Early identification of the type of remedy that will be pursued and a strategy for building a case for it are critical determinations that the claimant should make prior to institution. The Commission has the statutory authority under Section 337 to grant exclusionary relief, based on the public interest in protecting patent rights unless such an order would be contrary to the public interest. The Commission may grant two categories of

exclusion order: (1) a limited exclusion order, which only prevents the importation in the United States of infringing goods manufactured or sold by the respondents to the investigation, and (2) a general exclusion order, which prevents the importation into the United States of any infringing goods, regardless of the manufacturer. The Commission also is empowered under 19 U.S.C. § 1337(f) to issue orders directing persons found to be violating Section 337 “to cease and desist from engaging in the unfair methods or acts involved;” this type of order is for domestic respondents that maintain commercially significant inventories of the infringing products. The Commission does not have the authority to grant monetary damages for a Section 337 violation.

A limited exclusion order and a cease and desist order practically are the pro forma types of relief offered by the ITC for most Section 337 violations; the most far-reaching remedy offered by the Commission is a general exclusion order. Section 337 provides that a general exclusion order is appropriate when either: (1) it is “necessary to prevent circumvention of an exclusion order limited to products of named persons or (2) there is a pattern of violation of [the section] and it is difficult to identify the source of infringing products.” The Commission stated in *Certain Airless Paint Spray Pumps and Components Thereof (Spray Pumps)*<sup>30</sup> that a complainant seeking a GEO must prove (1) “a widespread pattern of unauthorized use of its patented invention” and (2) “certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the US market with infringing articles.” The Commission also specifically identified “a Commission determination of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers” as “evidence which might be presented to prove a widespread pattern of unauthorized use of the patented invention.” In that investigation, the Commission also identified a non-exclusive list of types of “evidence which might be presented to prove the ‘business conditions:’”

1. An established demand for the patented product in the U.S. market and conditions of the world market;
2. The availability of marketing and distribution networks in the United States for potential foreign manufacturers;
3. The cost to foreign entrepreneurs of building a facility capable of producing the patented article; and
4. The cost to foreign manufacturers of retooling their facility to produce the patented articles.

Though the Commission Rules do not require the complaint to state the specific type of remedy—a limited or general exclusion order—sought by a complainant, that

determination should be made early on and be based on the claimant's business model and the industry sector or market niche in which it is a member. The claimant should evaluate the growth potential of the industry sector or market niche—if it is a nascent industry or market niche and new competitors are constantly appearing, the claimant would be best served seeking a general exclusion order; in an older and more defined industry—where all the parties are well-known and market share is stable—a limited exclusion order may be all that is needed to maximize the benefit from the Commission's remedy. The claimant also should consider its position in the industry sector and look at the companies competing with its products or services for market share; if the claimant is looking to increase its market share, it should probably start out attempting to build a case for a general exclusion order.

It takes time to gather the evidence needed for a general exclusion order, and all the information needed may not

be readily available from parties to the investigation. A claimant should consider early on the evidence it already has in its possession or readily available to it pertaining to the factors discussed above and the evidence it still needs to gather. Depending on the claimant's relationship with third parties in its industry, getting third-party discovery in the ITC can be a time-consuming process. The ITC's authority to enforce third-party subpoenas is limited, and thus it cannot compel a third party to comply with such a subpoena; to force compliance with a third party subpoena, the claimant must file a motion to compel in a federal district court. Unfortunately for the claimant, it could take weeks or months for the circumstances surrounding a third party subpoena to reach the point where a motion to compel is warranted, so the earlier the claimant can identify third parties that may have valuable information and serve subpoenas, the better.

1. 19 C.F.R. § 210.12(a)(9) (2008).
2. Certain Picture-in-a-Picture Video Add-On Prods. and Components Thereof, Inv. No. 337-TA-269, Initial Determination, Order No. 11, 1987 WL 451169 (Nov. 19, 1987).
3. Enercon GmbH v. Int'l Trade Comm'n, 151 F.3d 1376, 1380 (Fed. Cir. 1998) (*in rem jurisdictional basis*).
4. Certain Sputtered Carbon Coated Computer Disks and Prods. Containing Same, Including Disk Drives, Inv. No. 337-TA-350, Comm'n Op., 1993 ITC LEXIS 893 at \*11 (Nov. 1993).
5. Certain Power Woodworking Tools, Their Parts, Accessories, and Special Purpose Tools, Inv. No. 337-TA-115, Order No. 6, 1982 ITC LEXIS 102 at \*2-3 (Mar. 1982).
6. 19 C.F.R. § 210.12(a)(9)(x).
7. *Id.* § 210.12(a)(9)(vi).
8. *Id.* § 210.12(a)(9)(viii).
9. Int'l Trade Commission, Rules of General Application and Adjudication and Enforcement 8 (June 26, 2008).
10. 19 U.S.C. § 1337(a)(2) (2006).
11. 19 C.F.R. § 210.12(a)(9)(ix).
12. 19 U.S.C. § 1337(a)(3).
13. H.R. Rep. No. 40, 100th Cong. 1st Sess., pt. 1 at 157 (1987).
14. 19 C.F.R. § 210.12(a)(9)(i)-(v).
15. *Id.*
16. *Id.* § 210.12(a)(9)(x).
17. Certain Personal Watercraft and Components Thereof, Inv. No. 337-TA-452, Order No. 26, 2001 WL 884104 (Aug. 6, 2001).
18. *E.g.*, Certain Semiconductor Chips With Minimized Chip Package Size and Prods. Containing Same, Inv. No. 337-TA-605, Order No. 44, 2008 WL 416247 (Feb. 14, 2008) (rejecting argument that the "complaint limits the scope of this investigation to semiconductor chip assemblies . . . named in this investigation."); Certain Wireless Comm'n Equipment, Articles Therein, and Products Containing the Same, Inv. No. 337-TA-577, Order No. 14, 2007 WL 868887 (Jan. 11, 2007) ("the scope of discovery may be broad enough to encompass information about products beyond those specifically identified in the complaint (*e.g.*, by name or model number) because the scope of investigation dictates the scope of discovery."); Certain Static Random Access Memories and Integrated Circuit Devices Containing Same, Processes for Making Same Components Thereof, and Prods. Containing Same, Inv. No. 337-TA-325, Order No. 12, 1991 WL 788690 (July 9, 1991) (once discovery on new products is provided, complainant must decide whether to allege infringement).
19. 19 C.F.R. § 210.12(a)(9)(vii) (2008).
20. *See In re Certain Safety Eyewear and Components Thereof*, Inv. No. 337-TA-433, Order No. 15, 2000 WL 1170065 (Aug. 11, 2000) ("policy reasons of fairness to all parties and resource economies also support compelling an answer to this interrogatory to provide notice whether the Complainants accuse this product of infringement of the '616 Patent").
21. *Id.* § 210.14(b)(1).
22. *See, e.g.*, Certain EPROM, EEPROM, Flash Memory, and Flash Memory Microcontroller Semiconductor Devices and Prods. Containing Same, Inv. No. 337-TA-395, Order No. 18, 1997 WL 817748 (Aug. 27, 1997) (motion was denied because the complainant "failed to meet its burden to show good cause for amending the complaint to add [the new patent]"); Certain HSP Modems, Software and Hardware Components Thereof, Inv. No. 337-TA-439, Order No.12, 2001 WL 115017 (Feb. 8, 2001) (denying motion to amend the complaint to assert a patent against a particular respondent that was previously asserted against other respondents).
23. *See, e.g.*, Certain Bassinet Products, Inv. No. 337-TA-597, Order No. 11, 2007 ITC LEXIS 995, \*3-4 (Sept. 10, 2007).
24. Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same, Investigation No. 337-TA-605.
25. Certain Semiconductor Chips with Minimized Chip Package Size and Prods. Containing Same, Inv. No. 337-TA-605, Comm'n Op., 2008 ITC LEXIS 888 (May 27, 2008).
26. 19 C.F.R. § 210.2 (2008). The default time allotment was changed from 15 months to 16 months by the July 7, 2008 amendments to the Commission Rules, 73 Fed. Reg. 38326 (July 7, 2008).
27. Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same, Inv. No. 337-TA-242, 1987 ITC LEXIS 170, \*93 (Nov. 1987).
28. *See* Certain Network Controllers and Products Containing Same, Inv. 337-TA-531, 2005 ITC LEXIS 884 (July 6, 2005); Certain Switches and Products Containing Same, Inv. 337-TA-589, 2007 ITC LEXIS 1203 (Nov. 7, 2007); Certain Male Prophylactic Devices, Inv. 337-TA-546, Comm'n Op., 2007 ITC LEXIS 860, \*64-69 (Aug. 1, 2007).
29. Certain Male Prophylactic Devices, Inv. 337-TA-546, 2007 ITC LEXIS 860, (62-63 (Aug. 1, 2007).
30. Certain Airless Paint Spray Pumps and Components Thereof, Inv. No. 337-TA-90, USITC Pub. No. 1199, 216 U.S.P.Q. 465 (Nov. 1981). *See also* Vastframe Camera, Ltd. v. Int'l Trade Comm'n, 386 F.3d 1108, 1113 (Fed. Cir. 2004).

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