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Foreign-Based Entities, the International Trade Commission, and the Requirement to Establish a Domestic Industry

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Unfair import investigations under 19 U.S.C. § 1337 (Section 337) at the International Trade Commission (ITC) remain popular with patent owners for enforcement of their patents. The ITC's mission is to "Investigate and make determinations in proceedings involving imports claimed to injure a domestic industry or violate U.S. intellectual property rights."¹ Since 2020, complainants filed 196 complaints requesting investigation by the ITC of unfair trade acts under Section 337. Of those complaints, 54 were brought by foreign-headquartered complainants. Given the popularity of ITC investigations with foreign complainants seeing to protect their U.S. domestic industry, consideration must be given to proving the existence of such an industry.

Some advantages of patent enforcement through a Section 337 investigation, as compared to federal court litigation, include:

1. Section 337 investigations are notoriously fast, with evidentiary hearings (i.e., trials) regularly taking place 8–10 months after institution and a

Commission final decision on the merits issuing approximately 16–18 months after institution; and

2. The ITC issues powerful remedies in the form of exclusion orders, similar to injunctions, enforced by the United States Customs and Border Patrol against the importation of infringing products.

Unlike a plaintiff in district court, complainants in the ITC must prove a "domestic industry" in the United States. One of the main goals of Section 337 investigations is to protect U.S. domestic industries; therefore, there must be an established U.S. industry, or one in the making, for the ITC to protect. Two "prongs" of the domestic industry requirement must be satisfied under Section 337: the technical prong and the economic prong.

The technical prong is more straightforward. In essence, complainants must show they are practicing the statutory intellectual property (registered patent, trademark, mask work, or copyright) they seek to enforce.² Ultimately, there is no domestic industry if complainants, or their licensees, are not actually practicing the patent with an article that is the subject of investments in the United States. The test as to whether a complainant satisfies the

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technical prong is the same as for infringement, i.e., a comparison of the domestic industry product (DI Product) to the patent claim(s). To prevail, complainants must show that they practice at least one claim of each asserted patent either literally or under the doctrine of equivalents. The technical prong can be satisfied by either direct or indirect practice of the claim.

The economic prong requires a more complex analysis. Again, there is no domestic industry if complainants, or their licensees, do not have enough domestic expenditure or investment – capital, labor, facilities, etc. – within the United States. Furthermore, the investments to consider under this analysis are those that exist at the time of filing the complaint, as a Section 337 investigation rarely allows consideration of post-filing domestic industry activities. Section 337(a)(3) sets forth the overall criteria for the economic prong analysis – satisfaction of any one of subparts (A), (B), or (C) is sufficient.

For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned—

- (A) significant investment in plant and equipment;
- (B) significant employment of labor or capital; or
- (C) substantial³ investment in its exploitation, including engineering, research and development, or licensing.⁴

Foreign-based entities may be uncertain whether they can satisfy the domestic industry requirement and, therefore, whether a Section 337 investigation is the right procedural tool to use against infringing importers. Therefore, while satisfaction of the economic prong of domestic industry is highly fact dependent, analyzing Section 337 investigations where complainants have satisfied the economic prong, compared with those where they have failed, allows future foreign-based complainants to better present evidence of their domestic activities to support a Section 337 investigation.

INVESTIGATIONS WHERE FOREIGN-HEADQUARTERED COMPLAINANTS SATISFIED THE ECONOMIC PRONG

Non-Volatile Memory Devices

A domestic industry is not required to already be in place before filing the Section 337 investigation. Complainants can satisfy the economic prong by demonstrating they are *in the process* of establishing a domestic industry. One such example appears in *Certain Non-Volatile Memory Devices and Products Containing the Same*.⁵ In this investigation, the complainants were Macronix International Co., Ltd. (a Taiwanese company and owner of the asserted patents) and Macronix America, Inc. (a U.S. subsidiary) (collectively, Complainants).

To demonstrate a domestic industry in the process of being established, complainants in the ITC must show that (1) they are taking the necessary tangible steps to establish such an industry, and (2) there is a “significant likelihood” that the industry requirement will be satisfied “in the future.” In the case in question, Complainants devoted significant resources in the United States—a large research team and dedicated New York and Vermont facilities—for researching and developing the patented technology. Complainants also made significant investments in domestic plant and equipment, employment of labor and capital, and domestic exploitation of the asserted patents during the design and manufacture of the DI Products.

The Administrative Law Judge (ALJ) found that there was insufficient evidence of a domestic industry in the process of being established but the Commission reversed that finding. The ALJ determined that the DI Product was not ready for the marketplace and was not likely ever to be sold as a commercial product itself. But the Commission interpreted “article,” as that term is used in the statute, as not limited to “commercial goods.” The Commission held that a domestic industry in “the process of being established” does not require proving “commercial production” of the article. Instead, the domestic industry must only “*relat[e]* to articles protected by the patent” (emphasis added). Therefore, the Commission rejected the idea that a protected article “must be a product that came to market, or is expected to come to market.”

Furthermore, Complainants “detailed tangible steps [they] ha[d] already taken and [their] further planned work to be undertaken in order to bring this industry to fruition within the foreseeable future.” According to the Commission, although Complainants had “not yet arrived at the final stages of commercializing” the DI Product, a domestic industry could still be “in the process of being established.”

Takeaway

The domestic industry requirement may be satisfied whether complainants’ DI Product is commercially ready or not. For example, prototypes or other early versions of the DI Product may suffice. For a foreign-based company, the fact that the DI Product is not yet commercially released in the U.S. market need not be a hindrance from filing a Section 337 complaint.

Certain Electronic Devices, Including Mobile Phones, Portable Music Players, and Computers

Generally, activities and investments for exploiting the asserted patent will help complainants satisfy the economic prong, although a nexus to the patented feature (rather than to the patent-practicing product more generally) is only required for investments related to subsection (C). In *Certain Electronic Devices, Including Mobile Phones, Portable Music Players, and Computers*,⁶ complainants were Nokia Corporation (a Finnish corporation and owner of the asserted patents) and Nokia Inc. (a U.S. subsidiary) (collectively, Complainants). In this investigation, Complainants relied solely on Section 337(a)(3)(C)—relating to the exploitation of the patent through engineering, R&D, or licensing—to satisfy the economic prong.

Here, it was undisputed that Complainants developed and sold, as well as conducted general and field testing on, DI Products at their U.S. facilities. For one of the DI Products, this included “at least \$10 million invested in personnel costs.” Further, Complainants used U.S. facilities to build prototypes and maintain product inventory for the purpose of performing repairs and replacements as necessary for warranty purposes—including a dedicated team of employees focused on repairs and warranties. While the respondent argued that

Complainants’ domestic industry was contracting at the time of filing the Section 337 investigation, the ALJ held that although the domestic industry “may be waning, it currently maintains at least some of said activities” that exploit the asserted patent. Therefore, the ALJ found the activities sufficient to satisfy the economic prong.

Interestingly, the respondent also argued that the economic prong could not be met because the DI Products would shortly be obsolete, as the next iteration of the product would soon be released. Here, the DI Products had “a brief commercial lifespan,” and the ALJ held that it would be impractical to require constant disclosure of the newer products throughout a Section 337 investigation. According to the ALJ, this issue would be “more appropriately raised as a remedial issue” and not for consideration during the economic prong analysis.

Additionally, this investigation offered insight into investments for “optional” features of DI Products. Here, a portion of Complainants’ investments and activities pertained to software and applications that implemented optional features of its DI Products. Against respondent’s argument that these investments were too disconnected from “exploitation” of the patent, the ALJ held that expenditures directed to products that incorporate the patented technology at issue, “including optional features, may count toward meeting” the economic prong requirement.

Takeaway

Activities and investments that “exploit” the asserted patent, even if only directed to optional features of the DI Product, can help complainants satisfy the economic prong. Foreign-based entities that manufacture abroad but conduct substantial R&D in the United States may rely on that R&D for the economic prong.

Certain Percussive Massage Devices

Domestic activities and investments must be quantitatively substantial or significant to satisfy the economic prong. In *Certain Percussive Massage Devices*,⁷ Complainant was a domestic entity—however, the investigation illustrates activities and/or investments that foreign-based complainants can use to help quantitatively satisfy the economic

prong because all of Complainant's manufacturing was performed in China. In this investigation, the complainant was Hyperice, Inc., a company incorporated under the laws of, and with its principal place of business in, California.

In the Initial Determination, the ALJ found that Complainant's activities and investments were quantitatively significant. In so finding, the ALJ held that the quantitative significance is "best represented" by Complainant's growth from five employees to fifty employees in a three-year period. The ALJ also focused on the significant increase in domestic industry expenditures over the same period, which related to product design, engineering, supply chain management, sales, warranty, customer service, and other business operations related to the DI Products. The ALJ analyzed the DI Product's domestic sales versus its international sales, finding that domestic sales were significant in comparison. Finally, the ALJ found that the DI Products held 50% of the U.S. market for this type of product.

In reviewing the Initial Determination, the Commission affirmed the ALJ's findings. Further, the Commission noted that Complainant's domestic activities and investments resulted in "significant growth" relating to the DI Products, and that labor expenses relating to the DI Product nearly doubled from 2018 to 2019 alone. With the exception of "contract manufacturing" performed in China, the Commission found that Complainant made "all the investments necessary" to create, develop, sell, service, and repair the DI Products in the United States. The Commission held such evidence is "indicative of quantitative significance" and concluded that the Complainant satisfied the economic prong of the domestic industry analysis.

While the precise investments and activities were redacted from the public opinion, this investigation highlights the results such investments and activities produced, including the substantial growth in labor, sales, and other expenditures over the short period of time.

Takeaway

When explicitly listing out its domestic activities and investments, a foreign-based entity should additionally demonstrate the results such domestic activities and investments have had on the business, including detailing substantial or significant

improvement over previous years, or compared to its international activities and investments.

Unmanned Aerial Vehicles and Components Thereof

In *Certain Unmanned Aerial Vehicles and Components Thereof*,⁸ complainant Autel Robotics USA, LLC (Autel USA) was the U.S. subsidiary of Autel Robotics, a Chinese company. Notably, Autel USA was the assignee and owner of the asserted patents, instead of the parent company. Autel Robotics relied on Autel USA for sales, marketing, and customer support services in the United States. Autel USA also devoted time and resources to the design, development, and technical support for the DI Product. The evidence showed that Autel USA's teams "worked on advanced algorithms for flight path planning and objection detection" and "developed mobile applications to control" the DI Product on U.S. soil. Additionally, the ALJ found that the expenses for such were a "considerable fraction" of Autel USA's overall U.S. expenses.

The respondents argued that Autel USA's teams declined from 2017 to 2019, and that since R&D spending by these teams had ceased, they should not be counted. However, the ALJ found that the reduction was due to a diminished need for "product development" after the DI product was released and, therefore, the reduction was reasonable and consistent with normal product development. Overall, the evidence presented by complainants regarding the economic prong analysis led the ALJ to find Autel's U.S. activities were "quantitatively" and "qualitatively" significant. The Commission did not review the domestic industry finding.

Takeaway

This investigation shows that the way a U.S. subsidiary is used can have a major impact on the domestic industry analysis. If the subsidiary's activities are essentially just those of an importer, the economic prong might not be satisfied. But in Autel USA's case, the U.S. entity conducted meaningful technical research on the DI product and devoted a large fraction of its budget to that purpose. While a variety of factors will doubtlessly affect how any foreign-based company staffs its U.S. affiliate, placing substantive and technical functions with the

U.S. subsidiary will bolster its ability to make use of the ITC's procedures and remedies.

INVESTIGATIONS WHERE FOREIGN-HEADQUARTERED COMPLAINANTS FAILED TO SATISFY THE ECONOMIC PRONG

Oil-Vaping Cartridges, Components Thereof, and Products Containing the Same

A foreign complainant may rely on both the activities of its licensees and its U.S. subsidiaries to establish the existence of a domestic industry. In *Certain Oil-Vaping Cartridges, Components Thereof, and Products Containing the Same*,⁹ the complainant was Shenzhen Smoore Technology Limited (a Chinese company and owner of the asserted patents, hereinafter Smoore). To show its domestic industry, Smoore relied on the activities of its two "licensed partners" (Jupiter Research, LLC (Jupiter) and Greenlane Holdings, LLC (Greenlane)), several of Jupiter's customers, and Smoore's U.S. subsidiary, Spectrum Dynamic Research.

In this investigation, the ALJ found that Smoore failed to satisfy the economic prong of the domestic industry. Smoore itself did not have any U.S. operations. The fact that the products were saleable in the United States in the condition in which they were imported, without any further activity, suggested that the licensed partners were mere importers of the purported DI products. This was further shown by Smoore's drop-shipping of products directly to customers in the United States. The activities of the licensed distribution partners, then, were not the "industry-creating, production-driven" investments that section 337 is intended to promote and protect.¹⁰ The activities of the licensed partners' customers were also not cognizable because the products, once sold, were no longer articles protected by the patent under the patent exhaustion principle. Regarding Smoore's U.S. subsidiary, the ALJ found that Smoore overstated its domestic expenditures because portions of the expenditures could not be tied to the DI products. As a result, the domestic subsidiary's expenditures did not reflect properly cognizable domestic industry investments. For these reasons, Smoore failed to establish a domestic industry.

Takeaway

Whether relying on licensees or subsidiaries, a complainant should stress and provide evidence of the value-add to the DI product itself, and not merely a value-add to the domestic operations, distribution, or sales of the products or industry. Further, when showing domestic R&D expenditures as related to plant, equipment, or labor, a complainant should still show how the R&D expenditures have improved or modified the DI products to support the economic prong of domestic industry. Finally, activities of customers cannot generally be used to support a complainant's domestic industry.

Magnetic Tape Cartridges and Components Thereof

To help satisfy the economic prong, complainants should demonstrate domestic investments and activities that are both quantitatively and qualitatively significant. In *Certain Magnetic Tape Cartridges and Components Thereof*,¹⁰ Complainants failed to demonstrate that their expenditures in the United States were both qualitatively and quantitatively significant. In this investigation, the complainants were Sony Corporation (a Japanese company and owner of the asserted patents), Sony Storage Media Solutions Corporation (a Japanese subsidiary), Sony Storage Media Manufacturing Corporation (a Japanese subsidiary), Sony DADC US Inc. (a U.S. subsidiary), and Sony Latin America Inc. (another U.S. subsidiary) (collectively, Complainants).

Through the Sony Latin America Inc. subsidiary, Complainants performed "tracking sales and inventory, maintaining supply chains and distribution channels for shipping products to customers, processing orders, responding to customer complaints, and packaging and labeling products." Further, through the Sony DADC subsidiary, Complainants asserted that they "perform[] warehousing, distribution, customer support, and certain labeling options in the United States," including investments for costs and fees of labor, facilities, customer service activities, and transportation services.

However, the ALJ found that the asserted U.S. activities were akin to those of a "mere importer," which Section 337 investigations were not designed to protect. The ALJ stated it was not necessary to "fully" manufacture the DI Product in the United States, but performance of some other significant

qualifying activity is required to rise above being a “mere importer.”

Complainants did not meet this threshold here. Apart from adding a label to the product once it arrived in the United States, the DI Products were almost entirely manufactured in Japan. Moreover, while the Commission questioned the necessity of the label for the DI Product’s functionality, it further found that the label was already included on a majority of the DI Products when imported—only a small portion of them required the label’s fixation once here in the United States. Additionally, Complainants’ U.S. warehouses and distribution activities did not relate to the *practice* of the asserted patent.

Notably, the Commission emphasized that the DI Products did not require any further processing to “be saleable to the consumer.” Stated otherwise, foreign entities relying on domestic finishing steps in their manufacturing process should have domestic investments and activities in which the DI Product “could not be exploited without the domestic activities and their attendant costs.”

Takeaway

Foreign-based entities should not forget to focus on the qualitative assessment of their domestic activities, in addition to the quantitative assessment. Activities need to rise above those of “mere” importation and distribution to help satisfy the economic prong.

Printing and Imaging Devices and Components Thereof

In a similar investigation, the Commission reversed the ALJ’s finding that complainants satisfied the economic prong when relying on post-manufacturing domestic activities. In *Certain Printing and Imaging Devices and Components Thereof*,¹¹ the complainants consisted of Ricoh Company, Ltd. (a Japanese company and owner of the asserted patents), Ricoh Americas Corporation (a U.S. subsidiary), and Ricoh Electronics, Inc. (a U.S. subsidiary) (collectively, Complainants).

Here, Complainants relied “strictly on the service and repair of its C200 series printers and MFPs to meet the economic prong” because its products were entirely manufactured abroad and entered the United States ready for sale and installation. The Commission stated that in particular

circumstances, Complainants may satisfy the economic prong by demonstrating that their “service and repair activities and investments are significant.” Among other things, the Commission considers the “value added to the article” in the United States by the domestic activities and investments to determine whether such activities and investments qualify as substantial or significant. The Commission also looks at the DI Product’s related foreign activities compared to the domestic activities to discern the value added to the DI Product in the United States.

The Commission here, however, found Complainants did not “submit[] evidence to show how [their] activities were important,” or added value, to the DI Products in the context of the company’s operations, marketplace, or industry in question. The Commission hinted that a comparison of a complainant’s domestic activities to its foreign activities could show its domestic expenses were “significant.” However, the lack of evidence submitted on this point left the ALJ to consider only the magnitude of the expenditures and investments in an absolute sense, and not whether Complainants’ “undertakings had a direct bearing on the practice of the patent.” This, the Commission found, was enough to reverse the ALJ’s finding that Complainants satisfied the economic prong of the domestic industry requirement.

Takeaway

The “magnitude of the investment” cannot be analyzed in a silo without “the context of the marketplace or industry in question.” Complainants should submit evidence demonstrating how activities and investments are significant in relation to complainants’ entire operations, either as a whole or as to the DI Products.

Kinesiotherapy Devices and Components Thereof

Complainants should not rely solely on the qualitative assessment of the domestic activities and investments—satisfaction of the economic prong cannot be proven with qualitative analysis alone. In *Certain Kinesiotherapy Devices and Components Thereof*,¹² the Commission found that complainants satisfied the economic prong of the domestic industry because U.S. sourced components were essential to the DI Products. Essentially, the Commission

held the economic prong was satisfied based on the qualitative assessment of the domestic activities and investments alone, even though they were insubstantial compared to the overall activities and investments. However, on appeal, the Federal Circuit reversed the Commission's ruling.¹³ Complainants were Standard Innovation Corporation (a Canadian Corporation and owner of the asserted patents) and Standard Innovation (US) Corporation (a U.S. subsidiary) (collectively, Complainants).

Here, the DI Products were assembled in China and then imported to the United States and distributed by the U.S. subsidiary. The ALJ found that four components of the DI Product were manufactured in the United States by domestic subcontractors and used in the production of the DI Products. The ALJ found that these components "were critical to the function" of the DI Product. However, the ALJ also found that the costs of the U.S. manufactured components only accounted for 5% of the overall product cost compared to the costs incurred from activities outside the United States. Furthermore, the ALJ found that Complainants only provided the total amount they spent on these components but did not break that cost down into costs to manufacture, research, customize, engineer, or develop the components to which the ALJ could apply to the domestic industry analysis. Therefore, the ALJ held the economic prong was not satisfied.

The Commission reversed, holding that Complainants' "investments in U.S. subcontracted components and services can be relied upon to establish the economic prong." These investments "promote manufacturing in the United States by the subcontractor as if the complainant was itself producing the components." While 5% of the cost could be considered relatively modest (not substantial) when viewed in isolation, the Commission found that the parts made from this 5% were critical components for the commercial marketability of the DI Products. Further, the DI Product for which those components were made was Complainants' flagship product and, therefore, was considered more substantial than if the raw 5% expenses were viewed in isolation.

However, on appeal, the Federal Circuit held that the Commission applied the requirements of 337(a)(3) incorrectly. According to the Federal Circuit, the Commission erred when it found Complainants' 5% domestic investment not substantial nor

significant, but found the economic prong satisfied because of the critical nature of the components that the 5% investment procured. Accordingly, the appellate court held that qualitative factors "cannot compensate for quantitative data that indicate insignificant investment and employment," and that the Commission's finding that 5% was insubstantial meant that Complainants must fail the economic prong requirement.

Interestingly, the Federal Circuit noted that Complainants failed to provide any evidence of the "magnitude of labor" or the "amount the suppliers invested in their equipment" to fulfill Complainants' orders. Although the Federal Circuit found the suppliers to be retailers selling "off-the-shelf" components, it may have been possible for Complainants to rely on quantitative data of the suppliers to assist in satisfying Complainants' economic prong analysis.

Takeaway

Complainants must prove that their domestic activities and investments are quantitatively substantial/significant, even if the activities and investments are qualitatively substantial/significant, because qualitative characteristics cannot compensate for a lack of quantitative data. For a foreign-based complainant, a quantitative analysis could entail comparing the level of investment in the United States or the value added by manufacturing steps in the United States with that occurring abroad.

CONCLUSION

Each determination of whether a complainant satisfies the economic prong of the domestic industry requirement depends on the evidence presented. Foreign-based entities should take a broad view of relevant information to determine their likelihood of satisfying the test. Most importantly, foreign-based entities should determine whether their domestic activities and investments are likely to be both qualitatively and quantitatively significant. While focusing on activities and investments that relate to the protected article or exploit the patent, foreign-based entities should explain in detail how their domestic activities and investments compare in the context of their business and the overall market, including such aspects as their own foreign activities and investments or their prior products and how the domestic activities and investments improved them.

Notes

1. About the USITC, Mission, available at https://www.usitc.gov/press_room/about_usitc.htm.
2. Non-statutory unfair methods of competition such as unregistered trademarks or antitrust do not require satisfaction of the technical prong of domestic industry. See 19 U.S.C. § 1337(a)(2).
3. While subsection (C) uses the adjective “substantial” instead of “significant,” as used in subsections (A) and (B), there is little practical difference between the terms in application.
4. 19 U.S.C. § 1137(a)(3); Certain Magnetic Tape Cartridges and Components Thereof, Inv. No. 337-TA-1036, Initial Determination (Jan. 25, 2018).
5. Certain Non-Volatile Memory Devices and Products Containing the Same, Inv. No. 337-TA-1046, Comm’n Op. (Oct. 26, 2018).
6. Certain Electronic Devices, Including Mobile Phones, Portable Music Players, and Computers, Inv. No. 337-TA-701, Initial Determination Granting Summary Determination of Satisfaction of Economic Prong (Nov. 18, 2010) (unreviewed).
7. Certain Percussive Massage Devices, Inv. No. 337-TA-1206, Comm’n Op. (Jan. 4, 2022). Note: attorneys at Dentons represented the participating respondents in this investigation.
8. Certain Unmanned Aerial Vehicles and Components Thereof, Inv. No. 337-TA-1133, Initial Determination (March 2, 2020). Note: attorneys who represented Autel USA in this investigation are now practicing at Dentons.
9. Certain Oil-Vaping Cartridges, Components Thereof, and Products Containing the Same, Inv. No. 337-TA-1286, Initial Determination (Feb. 1, 2023). The Commission reviewed the initial determination and took no position on the economic prong of domestic industry, finding that the complainant also failed to show that it satisfied the technical prong. Comm’n Notice at 4 (Apr. 24, 2023). Accordingly, the Commission made no findings on the position of economic prong of domestic industry. See *Beloit Corp. v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir. 1984). The ALJ’s findings are instructive however on factors that complainants should consider. Note: attorneys at Dentons represented multiple respondents in this investigation.
10. Certain Magnetic Tape Cartridges and Components Thereof, Inv. No. 337-TA-1036, Initial Determination (Jan. 25, 2018) (Comm’n review with no modification).
11. Certain Printing and Imaging Devices and Components Thereof, Inv. No. 337-TA-690, Comm’n Op. (Feb. 17, 2011).
12. Certain Kinesiotherapy Devices and Components Thereof, Inv. No. 337-TA-823, Comm’n Op. (July 12, 2013).
13. *Lelo Inc. v. Int’l Trade Comm’n*, 786 F.3d 879 (Fed. Cir. 2015).

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