

## Overview

The United States International Trade Commission (USITC) is an independent, nonpartisan agency meant to promote competitiveness and ensure U.S. companies have a level playing field, even when a foreign company falls outside the jurisdiction of U.S. federal courts. In a previous [Basic](#), we explored the advisory and research support functions the Commission fulfills through Section 332 fact finding investigations, but the USITC exerts much of its influence and enforcement power through Section 337, or “unfair import” investigations. These investigations look into products manufactured overseas, either by American or foreign companies, and whether that product violates intellectual property (IP) protections of American companies.

This Basic examines the process of Section 337 investigations and the USITC’s impact on imports and domestic IP enforcement.

## Section 337 Investigations

Most investigations under Section 337 at the USITC involve claims of patent or trademark infringement by imported goods. While less common, claims of copyright infringements, misappropriated trade secrets, and antitrust claims relating to imported goods may also be asserted. If a defendant is found to have infringed upon IP protections, the USITC’s administrative court may take remedial action by issuing an exclusion order, which will direct Customs to stop the imported goods in question from entering the United States. For defendants that have already imported some of their product into the States, a cease-and-desist order may be issued barring all further marketing or merchandising of the product in question.

After a plaintiff, usually a patent or trademark holder, brings a complaint of an unfair import violation, the Commission will commence with an initial review of the case to determine whether the complaint falls within their jurisdiction. If the complaint satisfies the requirements of the Commission’s rules, a full investigation will be initiated. Section 337 cases are carried out through formal evidentiary hearings in accordance with the Administrative Procedure Act and overseen by one of the Commission’s six administrative law judges (ALJs).

Following the evidentiary hearing, the ALJ will release an initial determination on all accused violations of the import in question. The Commission will review the initial determination and adopt, modify, or reverse the ALJ’s decision. As part of their review, the Commissioners are directed to consider four factors of public interest, and may withhold exclusion orders they find to have potential negative impacts on:

1. The public health and welfare of U.S. consumers
2. The competitive conditions of the U.S. economy
3. The production of like or directly competitive products in the U.S.
4. Domestic consumers’ interests

## Center Forward Basics

Center Forward brings together members of Congress, not-for profits, academic experts, trade associations, corporations and unions to find common ground. Our mission: to give centrist allies the information they need to craft common sense solutions, and provide those allies the support they need to turn those ideas into results.

In order to meet our challenges we need to put aside the partisan bickering that has gridlocked Washington and come together to find common sense solutions.

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While Congress explicitly wrote these four factors into the bill chartering the USITC and made the review for public interest a major focus in the administrative courts' processes, it is historically rare for the Commission to reverse the ALJ's initial determination at this stage. If a violation is found and adopted by the Commission, the USITC may issue an exclusion order. Pending the final resolution of an investigation, complainants may also move for additional temporary relief in addition to long-term remedial action if they can demonstrate irreparable harm in the absence of such solutions.

The statute language of the Tariff Act of 1930 mandates the USITC complete Section 337 investigations at the "earliest practicable time", and requires the Commission to establish a target date for its final decision within forty-five days of the ALJ's initial ruling. Although it is not uncommon for cases to encounter delays and for the Commission to extend this deadline, the "earliest practicable time" directive means the USITC will often not wait for other Article III courts or other executive agencies' findings and determinations to inform their final decision. From start to finish, an on-schedule Section 337 investigation takes around eighteen months.

Once the final determination has been issued, there is a sixty-day presidential review period in which the United States Trade Representative (USTR) may make a recommendation to the President to veto and thus reverse USITC's decision. After that period, the decision is final. Respondents may appeal the final ruling through federal circuit courts.

## Inter-Agency Tension: PTAB and USITC

In recent years, an increasing number of Section 337 cases have been filed at the USITC on the grounds of patent violation. This sharp trend has caused growing concern among some policymakers and industry leaders. Following the America Invents Act in 2011, Congress intended for questions of patent validity to be adjudicated at the Patent and Trial Appeal Board (PTAB). The courts at the United States Patent and Trademark Office (PTO) were chartered and built with special consideration and the expertise to handle patent and trademark issues. The USITC is intended to enforce and inform trade policy, inclusive of IP disputes, with broader consideration to the public's interest. As part of the USITC's role, it is also tasked with determining whether asserted patents are valid before moving on to determine potential infringement and remedy. The interplay and lack of coordination between the agencies sometimes lead to a contradictory finding, where the USITC finds an IP violation for a patent the PTAB has deemed invalid.

Due to the USITC's intentionally independent structure and mandate to complete cases in a reasonable time, Section 337 cases are rarely stayed for any reason. The Commission typically will not wait for PTAB or other courts to conclude investigations, take input from ongoing cases, or consider other entities' findings on invalid patents when issuing their own remedial action. If PTAB has completed a case and issued a decision on a patent in question at the USITC, that decision can be entered into evidence, but this rarely occurs.

In cases where the same patent is being litigated for infringement at the USITC and validity at the PTAB, one party will often file the same patent infringement case in Article III courts. If the PTAB and USITC come to contradictory conclusions in their cases, the ALJ will usually stay enforcement of any exclusion order or remedial action until Article III cases have concluded.

To address this ambiguity, Rep. Darrell Issa (R-CA) introduced H.R. 5902 in the 117th Congress, the CLEAR Patents Act of 2021. This bill directly addresses the contradictory cases between the PTAB and the USITC, where the Commission issues an exclusion order on a patent that the PTO's court deems invalid. Rep. Issa has stated his bill would require the USITC or any other federal agency hearing or investigation on patent infringement to stay any further proceedings until the PTAB finishes its review.

## Returning to the Commission's Roots: Refocusing USITC's Mission

The USITC was originally chartered with the intent to protect domestic industries and companies from foreign actors using unfair trade practices or breaking U.S. laws. Increasingly, however, U.S.-based companies are finding themselves on the receiving end of complaints at the USITC, and occasionally from foreign competitors. This has raised concerns that the

administrative court is no longer fulfilling its mission to protect domestic industry against foreign actors' bad practices.

The tension between PTAB and the USITC and the increasing burden of domestic IP infringement cases at the Commission has not gone unnoticed on the Hill. In May of 2023, Reps. Don Beyer (D-VA) and David Schweikert (R-AZ) introduced H.R. 3535, the Advancing America's Interests Act. The bill aims to reform the process for unfair import investigations to prevent the USITC from being misused by patent assertion entities (PAEs). Sometimes called "non-practicing entities", PAEs operate solely to acquire patents from inventors and license them to new companies that will use the IP to develop products. They do not develop or use the products on their own, but run their business through enforcing IP licenses and protections.

If passed by Congress and signed by the President, the act would first strengthen the "domestic industry" standard for Section 337 investigations by requiring PAEs to demonstrate their patent has led to the adoption or development of a new product that incorporates the patented technology in question. In this sense, the bill is reforming the Commission's process to ensure investigations and trials intended to serve and protect domestic industry are protecting patents that have led to domestic innovation or growth.

The second major change in the bill would increase the USITC's obligation to consider "public interest." The legislation aims to reinforce the Commission's "public interest" consideration, and make it their paramount consideration in exercising exclusion orders. Under the proposed bill, the USITC would have to affirmatively determine that any remedial action serves the "public interest" before issuance.

By the USITC's own metrics, nearly one in three Section 337 cases brought to the Commission were filed by a non-practicing entity in 2022. That portion has grown in the past decade and may continue to grow if no action is taken. Some attribute part of this increase to private equity and venture capital groups funding litigation for some PAEs to defend their market interests and knock down competitors. In the 117th Congress, Rep. Darrel Issa (R-CA) and Sen. Chuck Grassley (R-IA) introduced a set of companion bills to address this issue. The Litigation Funding Transparency Act of 2021 would require lawyers for plaintiffs to disclose any agreements with outside businesses not related to the case to receive payment contingent on the lawsuit's outcome. The bills were never voted out of committee, and have not been reintroduced.

Conversations of reforming the USITC and concerns it no longer serves domestic industries and consumers are not new. Proposals to reform "domestic industry" and "public interest" standards date back to the 113th Congress, when Rep. Tony Cárdenas (D-CA) introduced H.R. 4763, the "Trade Protection not Troll Protection Act" in 2014. Recent proposals to reform the USITC have gone through numerous updates and iterations until today, and nearly all have had bipartisan cosponsors, but never enough to pass the floor. Leaving these contradictions and concerns unresolved may create uncertainty for some businesses practicing in the U.S. and leave Congress's original mission for the USITC to protect American industry unaddressed.

## Links to Other Resources

- USITC - [Understanding Section 337 Investigations](#)
- USITC - [Statistics on Section 337 Cases](#)
- USITC - [Section 337 FAQs](#)
- Rep. Dave Schweikert - [Announcing Advancing America's Interests Act](#)
- Rep. Tony Cárdenas - [Trade Protection not Troll Protection Act](#)
- Rep. Darrell Issa - [CLEAR Patents Act](#)
- IP Watchdog - [USITC v. PTAB Tensions](#)