NOTE

RETHINKING SECTION 337:
THE CASE FOR REMOVING THE SUBSTANTIAL INJURY
REQUIREMENT FOR TRADE SECRETS

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I. INTRODUCTION

The United States government is concerned about the foreign misappropriation of U.S. trade secrets.1 This foreign misappropriation cannot be adequately handled by district courts because personal jurisdiction and the presumption against extraterritoriality prevent district courts from having jurisdiction over many foreign defendants.2 The United States International Trade Commission (“ITC” or “Commission”), on the other hand, overcomes these concerns through its in rem jurisdiction3 and jurisdiction over trade secret misappropriation that occurs entirely abroad.4 The drawback to bringing a trade secret misappropriation claim in the ITC is the “substantial injury” requirement.

Under the “substantial injury” requirement, complainants must prove that the respondent’s importation of the accused product threatens or actually “destroy[s] or substantially injure[s] an industry in the United States.”5 Proving “substantial injury” is a fact-intensive, complex, and expensive inquiry that entails heightened pleading requirements,6 testimony from economic experts, and hiring economic counsel in addition to counsel for the intellectual property (“IP”) claim.7 Statutory causes of action, such as patent, registered copyright, and registered

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Trademark infringement claims, however, do not have to prove “substantial injury” because the Omnibus Trade and Competitiveness Act of 1988 removed the “substantial injury” requirement with respect to cases involving statutory unfair acts. Because trade secrets are now statutory due to the Defend Trade Secrets Act of 2016, Congress should amend Section 337 to give trade secrets its own provision and, therefore, remove the difficult-to-prove and expensive-to-litigate “substantial injury” requirement.

This Note starts in Part II by providing background on Section 337 and the International Trade Commission, and discusses trends in trade secrets litigation generally and, more specifically, in the ITC. Part II then reviews the current landscape of trade secret litigation in the ITC, explaining how trade secrets fall in the general provision of Section 337 and that complainants must prove “substantial injury.” It then discusses the challenges for complainants in litigating the “substantial injury” requirement, including extensive pleading requirements, a high burden to meet, and expense. Part III analyzes the 1988 amendment to Section 337 removing the “substantial injury” requirement for cases involving statutory unfair acts, and suggests that because trade secrets are now statutory due to the Defend Trade Secrets Act of 2016, the same motivations for the 1988 amendment apply to removing the “substantial injury” requirement for trade secret cases. Part III also argues that the “substantial injury” requirement should be presumed due to the fragility of trade secret protection, difficulty in monetarily measuring injury to complainants, and the long-standing presumption of irreparable harm in federal courts. Finally, Part IV concludes that amending Section 337 to remove the “substantial injury” requirement for trade secrets would benefit domestic complainants harmed by foreign trade secret misappropriation and make the ITC a more attractive venue for trade secret litigation.

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9 See 18 U.S.C. § 1839 (creating a federal cause of action for trade secret misappropriation).
10 See infra Section II.A, B.
11 See infra Section II.C.
12 See infra Section II.D.
13 See infra Section III.A.
14 See infra Section III.B.
15 See infra Part IV.
II. BACKGROUND

In order to understand why the “substantial injury” requirement should be removed for trade secrets, it is important to understand Section 337, the International Trade Commission, and complainants’ challenges in litigating “substantial injury” for trade secrets claims.

A. SECTION 337 AND THE INTERNATIONAL TRADE COMMISSION

Congress initially established the International Trade Commission as the U.S. Tariff Commission in 1916. The ITC is a quasi-judicial federal agency that, among other duties, administers Section 337 investigations. Section 337 of the Tariff Act of 1930—as amended, 19 U.S.C. § 1337—makes unlawful “[u]nfair methods of competition and unfair acts in the importation of articles.” Once a complainant files a Section 337 action, the ITC commences an investigation that is delegated to an Administrative Law Judge (“ALJ”). The ALJ presides over the investigation, including discovery, evidence, and hearings, and then makes a final initial determination on whether respondents violated Section 337. Another party to the investigation is the Office of Unfair Import Investigations (“OUII”), who can appoint a staff attorney to act as an independent party to the investigation and file its own discovery requests, conduct its own investigations, and take a position. Once the ALJ makes the final initial determination, the Commission, comprised of six commissioners, can review, or decline to review, the ALJ’s determination, resulting in the final determination. If the ITC orders a remedy, the President has sixty days to reconsider the Commission’s determination.

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16 Act to Increase the Revenues, and for Other Purposes, ch. 463, § 700, 39 Stat. 756, 795 (1916) (“That a commission is hereby created and established, to be known as the United States Tariff Commission.”).
20 Id. § 210.42 (2023).
22 19 C.F.R. § 210.45.
President disapproves the determination, there is no appeal and the investigation ends. If the President expressly approves the decision or fails to act at the end of sixty days, the determination becomes final. Any person adversely affected by the ITC’s final determination under specific subsections of Section 337 can appeal to the United States Court of Appeals for the Federal Circuit.

Section 337 began as Section 316 of the Tariff Act of 1922 and focused exclusively on unfair acts in trade and did not mention intellectual property. The evolution of Section 337 from solely affecting trade into having a greater impact on intellectual property was solidified by the Omnibus Trade and Competitiveness Act of 1988, in which statutory IP was explicitly written into Section 337. For the ITC to have jurisdiction, a complainant must prove that the accused products are imported into the United States, sold for importation into the United States, or sold within the United States after importation. Section 337 investigates two categories of importation activities: (1) articles that infringe statutory intellectual property, like patents, copyrights, and trademarks, and (2) unfair methods of competition.

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25 See Duracell, Inc. v. U.S. Int’l Trade Comm’n, 778 F.2d 1578, 1581 (Fed. Cir. 1985) (holding that a President’s disapproval of an ITC determination was not reviewable).


27 Id. § 1337(c).


31 Id.

32 Id.
and acts that substantially injure a U.S. industry, prevent the establishment of an industry, or restrain or monopolize trade in the U.S.\textsuperscript{33} The second category of importation activities falls in the general provision of the statute and includes non-statutory causes of action, like trade secret misappropriation, unregistered trade dress infringement, and antitrust violations.\textsuperscript{34}

For statutory IP, like patents, copyrights, and trademarks, the complainant must also prove the domestic industry requirement under Section 337(a)(2).\textsuperscript{35} Domestic industry is “an industry in the United States, relating to the articles protected” by the statutory IP that “exists or is in the process of being established.”\textsuperscript{36} A statutory IP holder may satisfy the domestic industry requirement by showing “significant investment in plant and equipment,” “significant employment of labor or capital,” or “substantial investment in its exploitation, including engineering, research and development, or licensing.”\textsuperscript{37} The formal domestic industry requirements, on the other hand, do not apply to non-statutory IP, like trade secrets, because “there is no express requirement in the general provision that the domestic industry relate to the intellectual property involved in the investigation.”\textsuperscript{38} Non-statutory IP’s version of the domestic industry requirement is that complainants must prove that the importation of accused products have the threat or effect of which is “to destroy or substantially injure an industry in the United States.”\textsuperscript{39}

\textsuperscript{33} Id.


\textsuperscript{35} 19 U.S.C. § 1337(a)(2).

\textsuperscript{36} Id.

\textsuperscript{37} Id. § 1337(a)(3)(A)(C).


ITC litigation differs from district court litigation in four prominent ways: (1) faster schedule;\textsuperscript{40} (2) in rem jurisdiction;\textsuperscript{41} (3) ability to proceed against multiple respondents;\textsuperscript{42} and (4) injunctive relief as default remedy.\textsuperscript{43} The first difference is that a litigant in the ITC will generally receive a decision faster than in district court.\textsuperscript{44} In 2022, the average Section 337 investigation in which the Commission rendered a final determination on the merits was around 17 months.\textsuperscript{45} In the United States District Court for the Eastern District of Texas, however, it takes, on average, “two years and six months to get to a jury trial and three years and 10 months to get to a bench trial.”\textsuperscript{46} The second difference is that the ITC has in rem jurisdiction.\textsuperscript{47} In rem jurisdiction is “a court’s power to adjudicate matters directed against property” instead of a person.\textsuperscript{48} District courts, however, have only personal jurisdiction over a defendant and the defendant must satisfy “minimum contacts” with the forum state.\textsuperscript{49} The implication of in rem jurisdiction is that

\begin{itemize}
  \item \textsuperscript{41} See Sealed Air Corp. v. U.S. Int’l Trade Comm’n, 645 F.2d 976, 986 (C.C.P.A. 1981).
  \item \textsuperscript{43} 19 U.S.C. § 1337(d)–(f).
  \item \textsuperscript{44} Section 337 mandates prompt investigations. See 19 U.S.C. § 1337(b)(1) (“The Commission shall conclude any such investigation and make its determination under this section at the earliest practicable time.”).
  \item \textsuperscript{46} Freitas, supra note 40.
  \item \textsuperscript{47} See Sealed Air Corp. v. U.S. Int’l Trade Comm’n, 645 F.2d 976, 486 (C.C.P.A. 1981) (holding that the ITC does not require in personam jurisdiction).
  \item \textsuperscript{48} In rem, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/in_rem [https://perma.cc/9RLE-4XTP].
  \item \textsuperscript{49} Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).
\end{itemize}
foreign defendants of an imported article will be subject to ITC jurisdiction while the defendants may not be subject to jurisdiction in district courts. The third difference is that a complainant in the ITC only needs to file one complaint to proceed against multiple respondents. In district courts, however, plaintiffs commonly need to file separate complaints for each defendant to comply with venue laws. The fourth difference is that the ITC can only award injunctive relief and cannot award money damages. The ITC’s two available remedies include: (1) exclusion orders directed to U.S. Customs and Border Patrol to prevent infringing imports from entering the U.S; and (2) cease and desist orders directed to U.S. companies prohibiting unfair activity with infringing products that have been imported into the U.S prior to the exclusion order’s effective date. To obtain an injunction in district court, however, the party seeking relief would have to satisfy the traditional four-factor test from eBay v. MercExchange, LLC:

(1) that it has suffered an irreparable injury;
(2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
(3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and

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50 See Sealed Air Corp., 645 U.S. at 486 (finding that the ITC does not require in personam jurisdiction to exclude the infringing goods of a foreign manufacturer).
51 Capati, supra note 42.
52 See 28 U.S.C § 1400(b) ("Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."); see also TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 581 U.S. 258, 262 (2017) (holding that a domestic corporation “resides,” for the purposes of 28 U.S.C. § 1400(b), only in its State of incorporation).
54 Id. § 1337(d).
55 Id. § 1337(f).
(4) that the public interest would not be disserved by a permanent injunction.\textsuperscript{56}

Although the Supreme Court issued the eBay test in a patent dispute, courts have applied this test to other areas of intellectual property as well.\textsuperscript{57} Circuits are split on how eBay affects injunctive relief for trade secrets cases.\textsuperscript{58} The Tenth Circuit has distinguished eBay from trade secret cases since eBay dealt with a patent infringement claim and, instead, has relied on pre-existing trade secret precedent.\textsuperscript{59} The Second Circuit, on the other hand, has rejected that there is a presumption of irreparable harm when trade secrets have been misappropriated and has applied the eBay test.\textsuperscript{60} The eBay test, however, does not affect the ITC. The ITC does not apply the eBay test for injunctive relief because Congress intended injunctive relief to be the “normal remedy” for Section 337 violations.\textsuperscript{61}


\textsuperscript{57} See Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc., 736 F.3d 1239, 1249 (9th Cir. 2013) (applying the eBay test to trademark injunctions); see also Salinger v. Colting, 607 F.3d 68, 77 (2d Cir. 2010) (applying the eBay test to copyright injunctions).

\textsuperscript{58} Compare Star Fuel Marts, LLC v. Sam’s East, Inc., 362 F.3d 639, 651 (10th Cir. 2004) (relying on pre-existing trade secret precedent and not mentioning eBay for trade secret) with Faiveley Transp. Malmo AB v. Wabtec Corp., 559 F.3d 110, 118 (2d Cir. 2009) (applying the eBay test to trade secrets).

\textsuperscript{59} Star Fuel Marts, LLC, 362 F.3d at 651.

\textsuperscript{60} See Faiveley Transp. Malmo AB, 559 F.3d at 118 (rejecting the proposition that a “presumption of irreparable harm automatically arises upon the determination a trade secret has been misappropriated”).

\textsuperscript{61} Spansion, Inc. v. Int’l Trade Comm’n, 629 F.3d 1331, 1359 (Fed. Cir. 2010) (Fed. Cir. 2010) (“Given the different statutory underpinnings for relief before the Commission in Section 337 actions and before the district courts in suits for patent infringement, this court holds that eBay does not apply to Commission remedy determinations under Section 337.”).
B. TRADE SECRET LITIGATION

Trade secret misappropriation is both a federal and state cause of action.\textsuperscript{62} Prior to 2016, trade secrets were only protected under state law.\textsuperscript{63} In order to improve consistency in trade secret law among states, the Uniform Law Commission created the Uniform Trade Secrets Act (“UTSA”), which has been adopted by the majority of states.\textsuperscript{64} In 2016, Congress enacted the Defend Trade Secrets Act (“DTSA”), which created a federal private civil cause of action for trade secret misappropriation.\textsuperscript{65} The DTSA is modeled after the UTSA.\textsuperscript{66} Under the DTSA, trade secrets are defined as:

all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain

\textsuperscript{62} See 18 U.S.C § 1836; see also UNIF. TRADE SECRETS ACT (1979) (UNIF. L. COMM’N, amended 1985).

\textsuperscript{63} Elizabeth A. Rowe, Unpacking Trade Secret Damages, 55 HOUS. L. REV. 155, 156-57 (2017) (explaining that prior to DTSA’s enactment “the development of civil trade secret law in the United States . . . occurred exclusively under state law and largely in state courts”).


\textsuperscript{65} 18 U.S.C. § 1836 (b)(1).

\textsuperscript{66} Elizabeth A. Rowe, eBay, Permanent Injunctions, and Trade Secrets, 77 WASH. & LEE L. REV. 553, 560 (2020) [hereinafter, eBay, Permanent Injunctions, and Trade Secrets].
economic value from the disclosure or use of the information.  

Misappropriation under the DTSA entails (1) acquiring a trade secret and knowing, or having a reason to know, that it was acquired by improper means; or (2) disclosing or using the trade secret without express or implied consent. “Improper means” includes theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage. The ITC has the following elements for trade secret misappropriation:

(1) a protectable trade secret exists  
(2) the complainant is the owner of the trade secret  
(3) the complainant disclosed the trade secret to respondent while in a confidential relationship or that the respondent wrongfully took the trade secret by unfair means; and  
(4) the respondent has used or disclosed the trade secret causing injury to the complainant.

The federal government has expressed concern about foreign misappropriation of United States companies’ trade secrets. On January 5th, 2023, President Biden signed into law the Protecting American Intellectual Property Act, which imposes sanctions on “any individual or firm that has knowingly engaged in, or benefitted from, significant theft of trade secrets of United States persons.” The theft of U.S. trade secrets by foreign corporations, in particular, motivated the creation of the Protecting American Intellectual Property

68 Id. § 1839(5).  
69 Id. § 1839(6).  
71 See, e.g., Robin L. Kuntz, How Not to Catch a Thief: Why the Economic Espionage Act Fails to Protect American Trade Secrets, 28 BERKELEY TECH. L.J. 901, 903 (2013) (“[T]he legislative history behind the [Economic Espionage Act of 1996] reveals that Congress was especially worried about foreign threats to American economic prosperity.”).  
This concern over trade secret misappropriation is also reflected by an increase of trade secret filings. In 2022, cases filed in district court under the DTSA grew by 111% (an increase of 314 cases). Trade secret cases in the ITC are also increasing. From 2017 to 2019, there were only seven solely trade secret claims. From 2020 to 2022, however, there were 20 solely trade secret claims.

This increase of alleged trade secret misappropriation can be attributed to a “more mobile workforce, increased use of contractors and consultants, and increased outsourcing of infrastructure.”

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75 See id.


77 Id. These statistics do not state how many cases that allege a trade secret claim in combination with another unfair act claim.

C. CURRENT LANDSCAPE OF TRADE SECRET LITIGATION IN THE ITC

The Commission has long held that trade secrets fall under unfair acts within the scope of Section 337.79 The ITC’s in rem jurisdiction,80 injunctive relief remedy,81 and potentially preclusive effect makes it a favorable venue for trade secret litigation.82 Although the U.S. government is concerned about the foreign misappropriation of U.S. trade secrets,83 there are jurisdictional challenges to bringing a foreign trade secret misappropriation claim in district courts, such as personal jurisdiction84 and the presumption against extraterritoriality.85 District courts, because of their personal jurisdiction, often are unable to enforce injunctions and damages against foreign defendants.86 The ITC overcomes this jurisdictional challenge for foreign defendants because it has in rem jurisdiction over products.87

79 See, e.g., In re Certain Processes for the Manufacture of Skinless Sausage Casings & Resulting Prod., Inv. No. 337-TA-148/169, USITC Pub. 2812, 2814 (Sept. 1994) (“There is no question that misappropriation of trade secrets, if established, is an unfair method of competition of unfair act which falls within the purview of Section 337.”).


81 19 U.S.C. § 1337(d)–(f).


84 See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985).


For district courts, there is also a presumption that federal statutes do not apply to foreign conduct and only apply within the United States’ territorial jurisdiction unless congressional intent indicates otherwise.⁸⁸ The ITC overcomes this presumption against extraterritoriality with respect to trade secrets because Section 337 expressly deals with unfair acts in the “importation of articles.”⁹⁰ Since Section 337 expressly deals with unfair acts in the importation of articles, the Federal Circuit held that it was “reasonable to assume that Congress was aware, and intended, that the statute would apply to conduct (or statements) that may have occurred abroad.”⁹⁰ Additionally, the ITC’s default remedies of exclusion orders and cease and desists benefit trade secret cases.⁹¹ Injunctive relief is especially valuable for trade secrets because public disclosure of a trade secret can destroy the information’s status as a protected trade secret.⁹² Therefore, if the party misappropriating the trade secret has not yet revealed it, preventive action in the form of a cease and desist can be the difference between keeping and losing trade secret protection. Lastly, if a trade secret owner has a victory at the ITC, it is potentially preclusive in district court litigation.⁹³

⁸⁸ See Morrison, 561 U.S. at 256; Elizabeth A. Rowe & Daniel M. Mahfood, Trade Secrets, Trade, and Extraterritoriality, 66 Ala. L. Rev. 63, 64 (2014).


⁹¹ Id. (holding that Section 337 applies to imported goods produced through the exploitation of trade secrets in which the act of misappropriation occurred abroad).


Currently, trade secret misappropriation falls under the general provision of Section 337, which states:

(A) Unfair methods of competition and unfair acts in the importation of articles (other than articles provided for in subparagraphs (B), (C), (D), and (E)) into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is—

(i) to destroy or substantially injure an industry in the United States;
(ii) to prevent the establishment of such an industry; or
(iii) to restrain or monopolize trade and commerce in the United States.\(^94\)

Other types of intellectual property like patents, copyrights, and trademarks, however, do not fall in the general provision of Section 337 and have their own provisions.\(^95\) Patents and copyrights fall under Section 337(a)(1)(B)\(^96\) and trademarks fall under Section 337(a)(1)(C).\(^97\) Patents, copyrights, and trademarks have their own provisions because they are statutory, and the Omnibus Trade and Competitiveness Act of 1988 gave statutory intellectual property their own provisions.\(^98\) The difference between acts in the general provision (i.e., trade secrets) versus acts having their own provisions (i.e., statutory IP like patents, copyrights, and trademarks) is that those acts in the general provision have to prove an extra requirement—that the importation of respondent’s articles have the threat or effect to \textit{substantially injure} an industry in the United States.\(^99\) Complainants alleging trade secret misappropriation must prove that the

importation of the infringing articles have the “threat or effect of which is to (i) to destroy or substantially injure an industry in the United States; (ii) to prevent the establishment of such an industry; or (iii) to restrain or monopolize trade and commerce in the United States.” Hereinafter, this is referred to as the “substantial injury” requirement.

D. CHALLENGES WITH LITIGATING THE “SUBSTANTIAL INJURY” REQUIREMENT

The “substantial injury” requirement is challenging to litigate because it requires a fact-intensive complaint, is burdensome to prove, and is expensive.

1. Heightened Pleading Requirements

The difficulty of the “substantial injury” requirement begins in the pleading requirements for the complaint. A complaint alleging non-statutory unfair acts, including trade secret misappropriation, must “state a specific theory and provide corroborating data” of substantial injury to a domestic industry. Corroborating data of substantial injury include (1) the volume and trend of production, sales, and inventories; (2) the facilities, number, and type of workers employed in its production; (3) profit-and-loss information covering overall operations and operations specific to the involved domestic article; (4) pricing information; (5) volume and sales of imports (when available); and (6) any other pertinent data. These fact-intensive complaint requirements “make commencing a Section 337 action – particularly one involving non-statutory IP – somewhat more burdensome than district court actions.”

102 Id.
103 Id.
104 Rowe & Mahfood, supra note 88, at 88.
2. **Burdensome to Prove**

To satisfy the “substantial injury” requirement, a Section 337 complainant must establish that the U.S. industry is (1) suffering actual substantial injury from the accused imports; or (2) threatened with probable substantial injury.\(^{105}\) For proof of actual “substantial injury” to the complainant, the ITC often considers: (1) respondent’s volume of imports; (2) complainant’s lost sales due to the unfairly traded imports; (3) underselling by the respondent; (4) evidence of complainant’s declining production, profitability, and sales; and (5) harm to goodwill and reputation.\(^{106}\) The ITC does not consider these factors in isolation, but considers them in the context of marketplace realities.\(^{107}\) For example, in *Corning Glass Works v. ITC*, the Federal Circuit affirmed the Commission’s holding that the respondent selling millions of dollars of the infringing optical waveguide fibers in the U.S. did not “substantially injure” the domestic industry because the infringing fiber sales were insubstantial in comparison with “the total sales of fiber in the U.S. market, as well as with the volume of sales of Corning and its domestic licensees.”\(^{108}\)

Since the ITC applies these factors in context and there is not an absolute rule by which to determine injury, there is a lack of predictability in the ITC’s injury determinations.\(^{109}\) Additionally, proving “substantial injury” is especially difficult if the complainant is profitable or has increasing sales.\(^{110}\) This is evident in *Combination Locks*, in which the Commission did not find substantial injury, noting that Presto’s total sales on domestic and world markets were increasing and profits

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\(^{105}\) 19 U.S.C. § 1337(a)(1)(A) (2018) (stating that the importation of accused products must have the threat or effect of which is to destroy or substantially injure a U.S. industry).


\(^{107}\) See *Corning Glass Works v. U.S. Int’l Trade Comm’n*, 799 F.2d 1559, 1569 (Fed. Cir. 1986) (“[W]hether the amount [of sales] is ‘significant’ cannot be determined by the dollar amount in vacuo. ‘Significant’ requires some further inquiry once the amount of sales is found.”).

\(^{108}\) See *id.* at 1562, 1569.


were steady.\footnote{Id.} In effect, a non-statutory IP owner must meet a stronger test in getting relief from the ITC against infringing imports than that against domestic infringers in district court.\footnote{See Trade Reform Legislation: Hearings Before the Subcomm. on Trade of the H. Comm. on Ways and Means, 99th Cong., 354 (1986) (statement of Ambassador Clayton Yeutter).}

For proof of threatened “substantial injury” to the complainant, the ITC often considers: (1) the extent of foreign manufacturing capacity; (2) the imported product’s ability to undersell the domestic product; (3) lower foreign production costs and prices; and (4) the respondent’s intention to penetrate the U.S. market, including efforts to certify its products for U.S. sale, attendance at U.S. trade shows, efforts to target, contact, or market to complainant’s customers, and aggressive promotional campaigns.\footnote{See In re Certain Lithium Ion Batteries, Inv. No. 337-TA-1159, 35 (Mar. 4, 2021) (Comm’n Op.).} The threat must be based on reliable evidence, not speculation.\footnote{See In re Certain Activity Tracking Devices, Sys., & Components Thereof, Inv. No. 337-TA-963, USITC Pub. 4924, 77, 81 (Aug. 23, 2016) (Determination).}

Furthermore, it is not sufficient to just show evidence of actual or threatened substantial injury to establish a Section 337 claim. The complainant must also prove that the substantial injury was foreseen and that there is “a causal connection between the action of the respondents and the threatened injury.”\footnote{In re Certain Rubber Resins & Processes for Mfg. Same, Inv. No. 337-TA-849, USITC Pub. 4816 at 64 (Aug. 2018).} The ITC may find that the casual connection is severed by injury from other domestic competitors, decline in overall industry demand, modifications to the complainant’s operations, or by intervening events, such as changes in market trends or consumer preferences.\footnote{In re Certain Vertical Milling Machs. & Parts, Attachments, & Accessories Thereto, Inv. No. 337-TA-133, USITC Pub. 1512, 42–43 (Mar. 1984) (Final), aff’d sub nom. Textron, Inc. v. U.S. Int’l Trade Comm’n, 753 F.2d 1019, 1019 (Fed. Cir. 1985).}

For example, in \textit{Vertical Milling Machines}, Textron alleged that respondents engaged in false advertising by using a photograph of Textron’s Bridgeport vertical milling machine in their advertising and infringed Textron’s “Bridgeport” trademark by using the name “Bigport” on
their machines.\textsuperscript{117} While the Commission found that respondents infringed Textron’s trademark and engaged in false advertising, the Commission held that there was no violation of Section 337 because Textron failed to prove that the respondents’ infringing acts caused its injury.\textsuperscript{118} The Commission found that non-infringing factors, such as the drastic decline in the entire machine tool industry’s demand, Textron’s change in method of distribution that increased expenses and lost goodwill with customers, and competitors decreasing their prices while Textron increased their prices, severed the causal connection between the respondent’s importation of infringing products and Textron’s decreased sales, net income, and employment.\textsuperscript{119}

The complexity of the “substantial injury” requirement is evident from an ALJ’s initial determination in the paragraph below:

Moreover, the unrebutted testimony of respondents’ economic expert witness, Dr. Haldi, indicates an increased elasticity of demand, caused by buyers’ perceptions of the functional equivalency among many screws in the drywall market, which has resulted in greater price competition. That Buildex recognizes the increasing importance of price in the protection of its market share is evidenced by its offer of discounts to Kass and other customers. Because complainant has traditionally outpriced all members of the market, it is possible that Buildex is especially susceptible to this recent market phenomenon. There is record evidence demonstrating that twenty workers, of which 28% or 5.6 people, are allocated to the S-12 product line, have been furloughed at Buildex’s Mineral Wells plant. The record further indicates, however, that employee furloughs from the 1977-1981 period were a result of reduced business in Buildex’s total product line, and thus were not necessarily directly attributable to Yamashina’s activities.\textsuperscript{120}

\textsuperscript{117} Id. at 5–6.
\textsuperscript{118} Id. at 47.
\textsuperscript{119} Id. at 45–46.
Recently, the ITC in Certain Foodservice Equipment and Components Thereof and Certain Activity Tracking Devices, Systems, and Components Thereof denied relief for trade secret misappropriation claims under Section 337 because the complainants failed to satisfy the “substantial injury” requirement. In Certain Foodservice Equipment and Components Thereof, complainants Illinois Tool Works, Vesta, and Adcraft brought a claim in the ITC against Rebenet for misappropriating complainants’ trade secrets for commercial kitchen equipment. Complainants argued that they met the “substantial injury” requirement because they could identify specific customers that had been lost to importers of Rebenet products, complainants’ had lost revenue, and Rebenets’ products were priced less than complainants’ products. The administrative law judge (“ALJ”) determined that while complainants had been injured by respondents’ alleged unfair acts, the injury was “not substantial.” The ALJ reasoned that complainants’ injuries “with respect to market share, goodwill, and price competition are primarily injuries to Vesta, a Chinese manufacturer that does not make any qualifying domestic industry investments” and the domestic industry participants’ “lost profits may affect their domestic industry investments, but the amounts of these investments are not substantial.” Despite the ALJ finding that respondents had misappropriated complainant’s trade secrets, the ALJ denied complainants otherwise available relief in the ITC because they failed to meet the “substantial injury” requirement.


123 Id. at *91–92.

124 Id. at *94.

125 Id. at *96–97.

126 Id. at *100.
In *Certain Activity Tracking Devices, Systems, and Components Thereof*, complainant Jawbone argued that respondent Fitbit’s alleged misappropriation of Jawbone’s trade secrets substantially injured Jawbone’s domestic industry because:

1. The alleged trade secrets provide “cost and time avoidance” for Fitbit that allows products to be released earlier than expected;
2. The earlier release and lower cost of Fitbit products will impact the sales of Jawbone products; and
3. The lower sales of Jawbone products will injure Jawbone’s domestic investments in research and development.127

The ALJ determined that this was insufficient to establish “substantial injury” because Jawbone’s expert failed to “quantify these advantages” and “any opinion regarding future injury [was] thus merely speculation”128 These two ITC cases demonstrate how the “substantial injury” requirement negatively affects complainants in trade secret misappropriation cases.

3. **Expensive to Litigate**

Not only can the “substantial injury” requirement be difficult to prove, but it is expensive to litigate. Proving the “substantial injury” requirement typically requires detailed testimony from an economic expert to substantiate.129 For non-statutory causes of action, there are essentially two trials: a technical trial and an economic trial.130 The first trial deals with the technical issues in which the IP owner has to prove that the respondents infringed or misappropriated, depending on the cause of action, the intellectual property.131 The second trial deals with economic issues in which the IP owner has to prove that they have been substantially injured by the respondents unfair acts and that they satisfy domestic industry.132 “Normally, two separate groups of counsel, having particular

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128 *Id.* at 79.
130 Clark, *supra* note 7, at 1168.
131 *Id.*
132 *Id.*
expertise on either the technical issues or the economic issues, present the respective trials.”133 While removing the “substantial injury” requirement would not remove the domestic industry requirement, it lessens the cost of litigation because it is one less requirement to prove.

The Government Accountability Office (“GAO”), formally the General Accounting Office, issued a statement on strengthening IP rights protection under Section 337 before the Subcommittee on Trade and House Committee on Ways and Means, further showing the economic implications of the “substantial injury” requirement.134 In 1986, the GAO estimated that the cost of Section 337 litigation “generally ranged between $100,000 and $1 million, with a few costing as much as $2.5 million.”135 The legal costs for satisfying the economic tests,136 including the “substantial injury” requirement, can “equal more than 50 percent of the total litigation expenses.”137

These economic requirements and legal costs affect the outcomes of Section 337 investigations, settlement rates of Section 337 investigations, and the amount of Section 337 claims filed.138 The GAO found that eleven complainants from 1974 to 1986 were unable to meet the economic criteria, that firms have “terminated their proceedings or accepted settlement agreements which they judged not in their best interests because they could not meet all of the statute’s economic tests,” and that firms “may be discouraged from even initiating proceedings because of these tests.”139 Relying in part on these GAO findings, Congress in the 1988 amendments to Section 337 removed the “substantial injury” requirement for statutory causes of action.140

133 Id.


135 Id. at 731.

136 The economic tests, in 1986, for Section 337 actions included: (1) substantial injury; (2) domestic industry; and (3) efficiently and economically operated. Id. at 730.

137 Id. at 731–32.

138 Id. at 731.

139 Id.

140 H.R. Rep. No. 100-40, pt. 1, at 156 (1987) (stating that the “cost of section 337 litigation is extremely high . . . and the legal costs of satisfying the economic
Therefore, removing the “substantial injury” requirement for trade secrets would benefit complainants by lowering the current burdensome pleadings, reducing litigation expenses, and increasing the likelihood of being within ITC jurisdiction. Furthermore, the removal would benefit the ITC. By eliminating the “substantial injury” requirement, the ITC would have fewer issues to decide and more time to consider the technical issues and remaining economic issues.

III. ANALYSIS/DISCUSSION

Congress should remove the “substantial injury” requirement for trade secret cases because (1) the 1988 amendments to Section 337 removed the requirement for statutory IP\(^\text{141}\) and now trade secrets are statutory due to the Defend Trade Secrets Act of 2016;\(^\text{142}\) and (2) the “substantial injury” requirement should be presumed due to the fragility of trade secret protection,\(^\text{143}\) difficulty in monetarily measuring injury to complainants,\(^\text{144}\) and the long-standing presumption of irreparable harm in federal courts.\(^\text{145}\)

A. The Motivations Behind Congress Removing the “Substantial Injury” Requirement for Statutory IP Now Apply to Statutory Trade Secrets

The same motivations behind Congress removing the “substantial injury” requirement for statutory IP in the Omnibus Trade and Competitiveness Act of 1988 now applies to trade secrets because (1) trade secrets are statutory due to the DTSA\(^\text{146}\) and (2) trade secret complainants have been denied otherwise available criteria are reportedly equal to more than half of the total litigation expenses”.


\(^\text{142}\) See 18 U.S.C § 1836 (b)(1) (creating a federal cause of action for trade secret misappropriation).

\(^\text{143}\) See Toren, supra note 92.

\(^\text{144}\) David McGowan, Irreparable Harm, 14 LEWIS & CLARK L. REV. 577, 582 (2010).

\(^\text{145}\) eBay, Permanent Injunctions, and Trade Secrets, supra note 66.

\(^\text{146}\) See 18 U.S.C § 1836 (creating a federal cause of action for trade secret misappropriation).
relief under Section 337 because the complainants did not satisfy the “substantial injury” requirement.\textsuperscript{147}

1. **The Omnibus Trade and Competitiveness Act of 1988**
   Removed the “Substantial Injury” Requirement for Statutory Intellectual Property

Prior to 1988, all Section 337 actions required the complainant to prove the “substantial injury” requirement.\textsuperscript{148} Congress passed the Omnibus Trade and Competitiveness Act of 1988 which amended Section 337 by removing the “substantial injury” requirement for statutory causes of action.\textsuperscript{149} Statutory causes of action at the time of the 1988 amendment included patent infringement (Title 35 of the United States Code), registered trademark infringement (chapter 22 of Title 15), copyright infringement (Title 17), mask work infringement (chapter 9 of Title 17), and designs (chapter 13 of Title 17).\textsuperscript{150} While Congress removed the “substantial injury” requirement for statutory causes of action, Congress maintained the requirement with respect to non-statutory based causes of action.\textsuperscript{151} Trade secrets, at the time of the 1988 amendments, were not statutory and, therefore, still have the “substantial injury” requirement.\textsuperscript{152} As of 2016, however, trade secret law is now statutory due to the DTSA.\textsuperscript{153}


\textsuperscript{148} See 19 U.S.C. § 1337(a)(1).


\textsuperscript{152} See 19 U.S.C. § 1337(a)(1).

\textsuperscript{153} See 18 U.S.C § 1836 (creating a federal cause of action for trade secret misappropriation).
2. Trade Secrets Are Now Statutory Due to the Defend Trade Secrets Act of 2016

The DTSA provides a federal cause of action for trade secret misappropriation.\(^{154}\) This Act puts trade secrets on the same federally protected level as patents, registered trademarks, and registered copyrights. Because the Omnibus Trade and Competitiveness Act of 1988 removed the “substantial injury” requirement for statutory IP\(^{155}\) and trade secrets are now statutory due to the DTSA,\(^{156}\) Congress can amend Section 337 to remove the “substantial injury” requirement for trade secrets.

3. Legislative History of the 1988 Amendment Supports Removing the “Substantial Injury” Requirement for Statutory Trade Secrets

During the time of the 1988 amendments, Congress was concerned with foreign infringement of U.S. intellectual property.\(^{157}\) Congress also was concerned with the Federal Circuit’s decisions in Textron and Corning in which the Federal Circuit denied otherwise available relief under Section 337 because the complainants did not satisfy the “substantial injury” requirement.\(^{158}\) The removal of the “substantial injury” requirement for statutory unfair acts was “intended to make [S]ection 337 a more effective weapon against infringing imports by reducing

\(^{154}\) Id.


\(^{156}\) See 18 U.S.C. § 1839 (creating a federal cause of action for trade secret misappropriation).


Congress rationalized the removal of the “substantial injury” requirement for statutory IP by explaining:

Unlike dumping or countervailing duties . . . the owner of intellectual property has been granted a temporary statutory right to exclude others from making, using, or selling the protected property. The importation of any infringing merchandise derogates from the statutory right, diminishes the value of the intellectual property, and thus indirectly harms the public interest. Under such circumstances, the Committee believes that requiring proof of injury . . . should not be necessary.

Essentially, Congress enacted a presumption of substantial injury once the complainant proves infringement of a statutory cause of action. In a hearing before the House Committee on Ways and Means, the Vice President of Intellectual Property Owners, Inc. recommended “covering trade secrets and semiconductor chip ‘mask works,’ as well as patents, trademarks, and copyrights, in subparagraphs (B) and (C) in section 337(a)(1).”

159 Clark, supra note 7, at 1160.


161 See 134 Cong. Rec. 20086 (statement of Sen. Lautenberg) (“To exclude foreign goods, proof of piracy should be enough. That is what this trade measure would do, by removing the requirement that injury be proved. Infringement is injury.”).

Like how Congress was concerned with foreign infringement of U.S. intellectual property during the 1988 amendments, today the United States government is concerned about the foreign misappropriation of U.S. trade secrets. Additionally, like how Congress during the 1988 amendments was concerned with the Federal Circuit’s decisions in Textron and Corning in which the Federal Circuit denied otherwise available relief under Section 337 because the complainants failed to satisfy “substantial injury,” the ITC recently in Certain Foodservice Equipment and Components Thereof and Certain Activity Tracking Devices, Systems, and Components Thereof denied relief for trade secret claims under Section 337 because the complainants failed to satisfy the “substantial injury” requirement. Therefore, the legislative history of the 1988 amendment supports removing the “substantial injury” for trade secret misappropriation.

B. THE “SUBSTANTIAL INJURY” REQUIREMENT SHOULD BE PRESUMED FOR TRADE SECRETS

The “substantial injury” requirement should be presumed for trade secret cases in the ITC because (1) the value of a trade secret is destroyed if the information is no longer secret; (2) the harm from trade secret misappropriation

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163 134 CONG. REC. 20086 (statement of Sen. Lautenberg) (“The continued broad jurisdiction of the International Trade Commission will help U.S. industry address the unfair activity of foreign competitors.”).


is difficult to quantify; and (3) federal courts have long held that the comparable doctrine of “irreparable injury” is presumed for trade secrets.

1. Fragility of Trade Secret Protection

It is extremely easy to lose trade secret protection. Once a trade secret is revealed, it can never be recovered. The fragility of trade secret protection is unlike patent protection. Once the United States Patent and Trademark Office (“USPTO”) issues a patent, the inventor receives twenty years of exclusive rights, even if the invention becomes independently discovered or becomes public knowledge. Trade secrets, however, are no longer protected if the information was leaked, reverse engineered, or independently discovered. Losing trade secret protection is especially devastating for businesses with information that is unpatentable and for small businesses that cannot afford to protect their information through patents. Trade secret law covers all types of information while patent law only covers information with subject matter eligibility. Pure data, such as customer and supplier lists, proprietary distribution schemes, and business plans, are not patent eligible but are trade secret eligible. Furthermore, patent prosecution is expensive and can quickly escalate into the “$100,000-$200,000 plus range for a global strategy.” In addition to legal fees and filings costs, prior art searches and translation costs all add to the expense. Due to the high stakes involved, the threat of trade secret

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168 McGowan, supra note 144, at 582.
169 eBay, Permanent Injunctions, and Trade Secrets, supra note 66, at 557.
170 Toren, supra note 92.
171 Id.
173 Bauer, supra note 167.
177 Id. at 208.
178 Id.
misappropriation in and of itself constitutes a substantial injury and, therefore, substantial injury should be presumed.

2. **Injury From Trade Secret Misappropriation is Immeasurable**

Trade secret misappropriation “combines a reasonably high probability of some adverse effect on the plaintiff’s business with a low probability of specifying that effect with any precision, given that competition is dynamic and probabilistic in the first place.”\(^{179}\) The ITC measures “substantial injury” by respondent’s volume of imports, lost sales, underselling by respondent, decline in profitability and sales, and harm to reputation.\(^{180}\) The most persuasive of these measurements are quantifiable measurements, like respondent’s import volumes and complainant’s lost sales. Injury by trade secret misappropriation, however, oftentimes cannot be measured by quantifiable indicators, especially monetary indicators.

A complainant’s injury from trade secret misappropriation can manifest through unquantifiable indicators, such as loss of business reputation, decline in employee morale, and incentive for others to misappropriate.\(^{181}\) Trade secret misappropriation can also heavily impact business reputation, which can be manifested through loss of customer goodwill.\(^{182}\) Loss of consumer goodwill could result in “untold losses in future sales of unrelated products,” which is extremely difficult to quantify.\(^{183}\) Trade secret misappropriation can additionally result in the decline of employee morale and productivity when employees feel like “the fruits of their labor are being siphoned off by the misappropriator, or when employees react adversely to stricter security measures instituted by their employer to prevent further appropriations of information.”\(^{184}\) Furthermore, if an employee sees others benefitting from misappropriating their employer’s trade secret, it

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179 McGowan, *supra* note 144, at 588 (citing Hess Newmark Owens Wolf, Inc. v. Owens, 415 F.3d 630, 632 (7th Cir. 2005)).


182 *Id.* at 825.

183 *Id.*

184 *Id.* at 826.
creates an incentive for the employee “to exploit their inside know how,’ causing their employer injury for which there is no accurate measure.”

3. **Long-Lasting Presumption of Irreparable Injury in Federal Courts**

The “substantial injury” requirement in the ITC resembles the “irreparable injury” requirement for injunctions in district courts. District courts, however, traditionally have applied a presumption of irreparable injury for injunctions when the court determines that trade secrets have been misappropriated. The rationale behind the presumption is that “if in most cases Y follows from X, then presuming Y once X is shown saves everyone time and expense.” Therefore, for trade secrets, if in most cases irreparable harm follows from misappropriation, then presuming irreparable harm once misappropriation is shown saves the parties and the courts time and expense. The irreparable harm that results from trade secret misappropriation is that “[a] trade secret once lost is, of course, lost forever.”

An additional reason, as observed by the Sixth Circuit in *Allied Erecting & Dismantling Co. v. Gensis Equip. & Mfg., Inc.*, is that it is difficult or impossible to measure monetary damages resulting from loss of a trade secret.

While courts have abandoned the presumption of irreparable harm for patent cases due to *eBay*, “there has not been an abrupt shift away from the application of general equitable principles or effective abandonment of the presumption of irreparable harm” for trade secret cases. Even for the courts that have shifted away from the presumption of irreparable harm after *eBay*, the

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185 *Id.* (quoting Ecolaire Inc. v. Crissman, 542 F. Supp. 196, 205 (E.D. Pa. 1982)).
186 *eBay Inc. v. MercExchange, L.C.C.*, 547 U.S. 388, 391 (2006) (stating that to obtain an injunction in district courts, plaintiffs must prove that it has suffered an irreparable injury).
187 *eBay, Permanent Injunctions, and Trade Secrets*, supra note 66, at 557.
188 McGowan, supra note 144, at 582.
189 *See FMC Corp. v. Taiwan Tainan Giant Indus. Co., Ltd.*, 730 F.2d 61, 63 (2d Cir. 1984).
190 *See Allied Erecting & Dismantling Co. v. Genesis Equip. & Mfg., Inc.*, 511 F. App’x 398, 6 (6th Cir. 2013) (noting that the presumption of irreparable harm rests on the assumption that harm will be difficult to measure in monetary terms).
191 *eBay, Permanent Injunctions, and Trade Secrets*, supra note 66, at 607 (conducting an empirical analysis of *eBay’s* effect on injunctions in trade secret cases).
concerns behind the shift do not apply to the ITC. First, the federal courts want to comply with the precedential effect of eBay. This is not a concern for the ITC, however, because the ITC does not apply the eBay test for injunctive relief since Congress intended injunctive relief to be the “normal remedy” for Section 337 violations.\textsuperscript{192} Second, some federal courts have been hesitant with permanent injunctions for trade secrets misappropriation when the plaintiff is already receiving monetary relief.\textsuperscript{193} This double relief, however, is not a concern in the ITC as there are no monetary damages. Therefore, because district courts have long applied a presumption of irreparable injury for trade secret injunctions and the justifications for the slow shift away from the presumption in light of eBay do not apply to the ITC, the “substantial injury” requirement should be presumed for trade secret cases in the ITC.

C. THE DOMESTIC INDUSTRY REQUIREMENT MAINTAINS SECTION 337 AS A TRADE STATUTE

Opponents of removing the “substantial injury” for trade secret misappropriation may argue that it transforms Section 337 into a solely IP statute, which deviates from the statute’s origins as a trade statute. However, removing the “substantial injury” requirement does not transform Section 337 into a solely IP statute because complainants alleging trade secret misappropriation still must prove domestic industry.\textsuperscript{194} For statutory IP holders to prove domestic industry, they must satisfy the technical prong and the economic prong.\textsuperscript{195} The technical prong is that the “industry in the United States, relat[es] to the articles protected” by the IP.\textsuperscript{196} The economic prong is that the industry in the U.S. has “significant investment in plant and equipment,” “significant employment of labor or capital,” or “substantial investment in its exploitation, including engineering, research and

\textsuperscript{192} See Spansion, Inc. v. Int’l Trade Comm’n, 629 F.3d 1331, 1358 (Fed. Cir. 2010) (“Given the different statutory underpinnings for relief before the Commission in Section 337 actions and before the district courts in suits for patent infringement, this court holds that eBay does not apply to Commission remedy determinations under Section 337.”).

\textsuperscript{193} See CardiAQ Valve Tech., Inc. v. Neovasc Inc, 708 F. App’x 654, 12 (Fed. Cir. 2017) (denying a permanent injunction because the injunction would have been duplicative of the monetary relief received by plaintiff).


\textsuperscript{195} See InterDigital Commc’n, LLC v. Int’l Trade Comm’n, 707 F.3d 1295, 1298 (Fed. Cir. 2013).

\textsuperscript{196} See 19 U.S.C. § 1337(a)(2).
development, or licensing.” Conversely, for non-statutory IP holders, such as trade secret holders, to prove domestic industry, they do not have to prove the technical prong that “an industry in the United States, relat[es] to the articles protected” by the IP because “there is no express requirement in the general provision that the domestic industry relate to the intellectual property involved in the investigation” and must only prove the economic prong. The ITC often considers the same economic prong criteria that apply to statutory causes of action, such as plant and equipment, labor and capital, research and development, and licensing in the United States, when determining domestic industry for non-statutory causes of action. If Congress amended Section 337 to give trade secrets its own provision, it can make trade secrets subject to 19 U.S.C. § 1337(a)(2) like the rest of the statutory IP and add the technical prong or keep in line with precedent and have trade secrets be only subject to the economic prong of domestic industry. Either way, trade secret complainants will still have to prove domestic industry and importation of an infringing article which maintains Section 337 as a trade statute.

IV. CONCLUSION

The “substantial injury” requirement is a high hurdle for complainants bringing trade secret misappropriation claims in the ITC. The “substantial injury” requirement is burdensome to prove due to the heightened pleading requirements and causal nexus requirement, and expensive to litigate due to the expert testimony and extra-counsel needed to establish the economic injury. Additionally, the ITC’s two recent decisions in Certain Foodservice Equipment and Components Thereof and Certain Activity Tracking Devices, Systems, and Components Thereof in which the ITC denied relief for trade secret claims under Section 337 because the complainants did not satisfy the “substantial injury” requirement illustrates the requirement’s adverse effect on trade secret complainants. Removing the “substantial injury” requirement for trade secrets aids the U.S. government in its initiative against foreign trade secret misappropriation by

197 See id. § 1337(a)(3)(A)–(C).
198 See id. § 1337(a)(2).
200 See In re Certain Hand Dryers & Housings for Hand Dryers, Inv. No. 337-TA-1015, 2017 WL 2709424, at *20 (June 2, 2017) (analyzing the categories of investments listed in Section 337(a)(3) when determining whether there is a domestic industry under Section 337(a)(1)(A)).
making it easier, through a reduction in burden and litigation expense, for complainants in trade secret cases. Like how the 1988 amendments to Section 337 removed the “substantial injury” requirement for statutory IP, Congress can amend Section 337 to remove “substantial injury” requirement for trade secrets since trade secrets law is now statutory due to the DTSA of 2016.