

NOTE

INTEGRATING PUBLIC INTEREST INTO THE TOOLBOX OF
RESPONDENTS TO TERMINATE INVESTIGATIONS:
A PATH TO BALANCED PATENT ENFORCEMENT AT THE ITC

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I. INTRODUCTION

Imagine a small biotechnology company based in the United States that developed a groundbreaking advancement in insulin delivery systems to help combat Type 1 diabetes. This new biotechnological device will help the people of this country manage their diabetes when more traditional methods of treatment are not effective. Within the device, there are a few sensors, which are critical for wireless communication, patented by a foreign company that does not deal in medical devices or the biotechnology industry at large. Feeling cheated out of their intellectual property rights, the foreign company filed a complaint in the International Trade Commission to gain an exclusion order that would prevent the U.S.-based company from importing any infringing sensors. Even though the foreign company has met the statutory requirements for instituting an investigation at the International Trade Commission (“ITC” or “the Commission”), by having patents from the United States Patent and Trademark Office (“USPTO”) and a U.S.-based manufacturing/testing facility, it does not work in the same field as the American company. It simply just wants to be the only company that utilizes the technology found in their patents.

If the International Trade Commission finds a violation of its statutes, it is only then that the U.S.-based company can rely on the effects of its products when contextualized by the broader public interest.¹ The U.S.-based company will rely on public health and safety or a lack of a suitable alternative in United States commerce.² The American company argues that without the insulin delivery device, there is no suitable alternative in the American economy, and its absence will create a decline in public health, leading to a detrimental impact on the country as a whole. These factors could warrant a denial of an exclusion order, but this can only happen at the remedial stage.³ If the International Trade Commission possessed the authority to terminate investigations solely on these public interest

¹ See *Certain Baseband Processor Chips & Chipsets, Transmitter & Receiver (Radio) Chips, Power Control Chips, & Prod. Containing Same, including Cellular Telephone Handsets*, Inv. No. 337-TA-543, USITC Pub. 4258, at 136–48 (Oct. 2011) (Comm’n. Op.) [hereinafter *Certain Baseband Processor Chips*] (holding that the public welfare and safety would be adversely affected if the exclusion order went into effect and prohibited the respondents products, certain electronic chips, into the United States).

² See *id.*; see also *Certain Fluidized Supporting Apparatus and Components*, Inv. No. 337-TA-182, USITC Pub. 1667, at 25 (Oct. 1984).

³ 19 U.S.C. § 1337.

factors, it would save unnecessary legal costs, prevent harm to public health, and help sympathetic respondents.

One of the drafters of the United States Constitution, James Madison, once wrote “[a] power ‘to promote the progress of science and useful arts, . . .’” The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged . . . to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors.”⁴ The Founding Fathers of the United States of America believed that the protection and fostering of innovation in the United States was a foundational principle for the blossoming republic.⁵ This strong desire to, “promote science and the useful arts,” worked its way into the United States Constitution.⁶ Through the last two hundred and fifty years, many forums have been established to help realize the directive in the Constitution: The United States Patent and Trademark Office (“USPTO”)⁷, the⁸, and the traditional federal court system.⁹ Each of these forums for intellectual property rights enforcement has a different role to play in the American intellectual property system.¹⁰ This Note will focus on the International Trade Commission and its role as an intellectual property enforcement mechanism in the context of its public interest mandate.

The USITC was founded in 1916 under a different name, the United States Tariff Commission.¹¹ It was not until the Tariff Act of 1930 that the U.S. Tariff Commission received the powers and responsibilities to investigate unfair trade practices.¹² Within this newly delegated power from Congress, the Commission

⁴ THE FEDERALIST NO. 43 (James Madison).

⁵ *Id.*

⁶ U.S. CONST. art. I, § 8, cl. 8 (colloquially known as the Intellectual Property Clause).

⁷ 35 U.S.C. § 1.

⁸ 19 U.S.C. § 1330.

⁹ U.S. CONST. art. III (establishes the federal court system in the United States); Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 122, 127, 96 Stat. 25, 36–37 (1982) (codified as 28 U.S.C. § 1295(a) (2006) (creation of the Federal Circuit).

¹⁰ 35 U.S.C. § 2 (The role of the USPTO); 19 U.S.C. § 1330 (The role of the U.S. ITC); 28 U.S.C. § 1338(a) (giving district courts original jurisdiction over cases involving patents); 28 U.S.C. § 1295(a).

¹¹ Revenue Act, 39 Stat. 795; 19 U.S.C. § 2231.

¹² Tariff Act of 1930, 19 U.S.C. § 1654.

was tasked with investigating potential importations of articles that infringe upon United States intellectual property rights and unfair methods of trade.¹³ Within the same statute today is the Commission's public interest mandate.¹⁴ This mandate allows the Commission to alter or suspend a remedial order¹⁵ if there are countervailing public interest concerns present with respect to the respondent's articles.¹⁶ This mandate is already used to curtail the effects of violations, but it does not find it appropriate to use traditional methods of remediation.¹⁷

Over the last eight years, over ninety percent of § 337 investigations were conducted solely on patent infringement.¹⁸ The likelihood that an investigation will conclude on the merits is greater than that of district courts. When compared, twenty percent of investigations end with a conclusion on the merits,¹⁹ as opposed to district court litigation, where over ninety percent of patent litigation cases end before trial.²⁰ Over this same period, for investigations that survived to final

¹³ 19 U.S.C. § 1337.

¹⁴ *Id.*

¹⁵ A remedial order is the relief granted by the International Trade Commission. It is akin to an injunction or a temporary restraining order. David Hickerson et al., *Navigating The Range Of Remedial Orders At The ITC*, JDSUPRA (July 27, 2022), <https://www.jdsupra.com/legalnews/navigating-the-range-of-remedial-orders-4287798/#:~:text=Overview%20of%20Section%20337%20Remedial,and%20a%20general%20exclusion%20order> [https://perma.cc/6BY6-6SN4].

¹⁶ 19 U.S.C. § 1337.

¹⁷ *Id.*

¹⁸ See *Section 337 Statistics: Types of Unfair Acts Alleged in Active Investigations by Fiscal Year (Updated Annually)*, USITC, https://www.usitc.gov/intellectual_property/337_statistics_types_unfair_acts_alleged_active.htm [https://perma.cc/A6CM-FP5L] [hereinafter *Types of Unfair Acts Alleged in Active Investigations by Fiscal Year*] (showing 867 of 962 active cases from 2017 to 2024 involved solely patent infringement allegations).

¹⁹ See *id.*; see also *Section 337 Statistics: Number Cases in Which Violation Is Found/Yr*, USITC, https://www.usitc.gov/intellectual_property/337_statistics_number_cases_which_violation.htm [https://perma.cc/NL56-GJ8J] [hereinafter *Number Cases in Which Violation is Found/Yr*] (calculating that 193 of 962 investigations from 2017 to 2024 ended with a decision on the merits).

²⁰ LEX MACHINA, PATENT LITIGATION REPORT 2023 18 (Feb. 2023).

determination, violations were found in over sixty percent of them.²¹ This shows that it is easier for complainants to obtain favorable decisions as opposed to their parallel litigation forums.²² The ITC is also known as a forum of fast-paced litigation. The typical investigation lasts between seventeen and eighteen months.²³ Because the average time between the institution of an investigation to final determination time is on average half that of a district court case, it requires that complainants come into the investigation fully prepared and ready to go, while respondents can be caught off guard. Respondents lack a mechanism to counter these institutional leanings towards complainants, so another tool in their arsenal of defenses will provide some teeth to combat this institutional imbalance.

With the Commission being a complainant friendly forum, it is important to analyze aspects of an investigation and to *see* if they align with the purposes of the Commission's creation. Currently, the public interest factors have the biggest impact in the remedial stage of an investigation.²⁴ This delay in consideration of the public interest combined with a system that favors complainants, results in a forum that has been sliding away from its intended purpose. This purpose for the ITC is to protect American trade interests and further broader goals, where the enforcement of intellectual property is a tool.²⁵ This Note will discuss implementing a new test for public interest considerations that will allow respondents of § 337 investigations to terminate proceedings if they meet the evidentiary standard articulated below.

A call for reform on the use of the public interest mandate of the Commission is not necessarily new. The most recent legislation that touches the

²¹ See *Number Cases in Which Violation is Found/Yr*, *supra* note 19 (showing that through 193 investigations concluded on the merits, 118 found violations).

²² David A. Hickerson, *Is the International Trade Commission the Most Patent-Friendly Venue with a Complainant Success Rate Near 90%?*, FOLEY & LARDNER LLP (Apr. 24, 2018), <https://www.foley.com/insights/publications/2018/04/is-the-international-trade-commission-the-most-pat/> [<https://perma.cc/A9B2-WRNV>].

²³ See *Section 337 Statistics: Average Length of Investigations*, USITC, https://www.usitc.gov/intellectual_property/337_statistics_average_length_investigations.htm [<https://perma.cc/6KKF-H2QS>] [hereinafter *Average Length of Investigations*].

²⁴ See 19 U.S.C. § 1337; Bryan S. Conley, *Public Interest Considerations in Section 337 Investigations*, WOLF GREENFIELD (Aug. 16, 2023), <https://wolfgreenfield.com/articles/public-interest-considerations-in-section-337-investigations> [<https://perma.cc/N9XJ-CLGN>].

²⁵ See 19 U.S.C. § 1337; Conley, *supra* note 24.

public interest at the International Trade Commission is the Advancing America's Interests Act ("AAIA").²⁶ However, the Advancing America's Interest Act recently failed in front of Congress for the third time.²⁷ This bill *seeks* to amend 19 U.S.C. § 1337 and, among other things, allow the administrative law judge presiding over the investigation to terminate proceedings if it is in the public's best interests; however, it does not give any substantive framework for doing so.²⁸ In the 116th Congress, the first introduction of the AAIA died in committee.²⁹ The same happened for the AAIA in the 117th Congress.³⁰ With the end of the 118th Congress, the bill became a victim of the 'Groundhog Day' effect³¹, being forced to live out the same congressional demise as its predecessors.

This Note will discuss how Congress should amend the 19 U.S.C. § 1337 or the AAIA legislation and write a clearer, more discrete test to help improve upon its current vague wording and return the ITC to its more original goal, by adding teeth and weight for respondents in investigations while giving a greater understanding of how this change in policy will align with the Commission's foundational principles. First, this Note will discuss the process of an investigation at the International Trade Commission, then transition into the history of the public interest mandate. Following the background, this Note will look at the application of the public interest factors in the International Trade Commission jurisprudence and the deficiencies in the current proposed legislation. Finally, this Note will discuss a framework to allow respondents to terminate investigations earlier in the process, including evidence types, evidentiary standards, implementations, and addressing counterarguments.

II. BACKGROUND

The ITC's role interacting with the intellectual property rights of persons and entities within the United States and the importation of infringing goods is

²⁶ H.R. 3535, 118th Cong. (2023).

²⁷ See H.R. 3535; see also H.R. 5184, 117th Cong. (2021); H.R. 8037, 116th Cong. (2020).

²⁸ H.R. 3535.

²⁹ See H.R. 8037.

³⁰ See H.R. 5184.

³¹ *Groundhog Day*, THEIDIOMS (Dec. 21, 2025), <https://www.theidioms.com/groundhog-day/> [https://perma.cc/CKN6-AJBY].

important. This section will discuss the ITC in general and the administrative proceeding it implements to solve matters before it.

A. THE INTERNATIONAL TRADE COMMISSIONS'S ROLE IN PROTECTING DOMESTIC INDUSTRY AND THE PUBLIC GOOD

The United States International Trade Commission is an independent, non-partisan executive agency whose primary objective is to “investigate and make determinations in proceedings involving imports claimed to injure a domestic industry or violate U.S. intellectual property rights; provide independent analysis and information on tariffs, trade and competitiveness; and maintain the U.S. tariff schedule.”³² The International Trade Commission’s organic statute lays the foundation for the scope of its responsibilities and powers.³³ These powers include investigating “allegations of patent or registered trademark infringement . . . misappropriation of trade secrets, trade dress infringement, passing off, false advertising, and violations of the antitrust laws.”³⁴ These are commonly known as § 337 investigations, which are put before an administrative law judge (“ALJ”) to adjudicate whether the respondent has infringed upon United States intellectual property rights and is therefore in violation.³⁵

Despite the involvement of the International Trade Commission as a quasi-judicial agency in traditional intellectual property adjudication proceedings, the Commission is not a patent court that creates preclusive findings on the patents asserted.³⁶ Since the ITC is a forum that cannot award monetary damages, its greatest asset to complainants is powerful equitable relief in the form of limited or general exclusion orders³⁷ and cease and desist orders.³⁸ These remedial orders will

³² *About the USITC*, USITC, https://www.usitc.gov/press_room/about_usitc.htm [<https://perma.cc/69SF-32EK>].

³³ 19 U.S.C. § 1330 (The International Trade Commission’s organic statute for Section 337 investigations).

³⁴ *Section 337 Investigations: Answers to Frequently Asked Questions*, USITC Pub. 4105, at 7 (Mar. 2009).

³⁵ William P. Atkins & Justin A. Pan, *An Updated Primer on Procedures and Rules in 337 Investigations at the U.S. International Trade Commission*, 18 U. BALT. INTELL. PROP. L.J. 105, 113–18 (2010).

³⁶ *Section 337 Investigations: Answers to Frequently Asked Questions*, USITC Pub. 4105, at 20 (Mar. 2009); *Tandon Corp. v. USITC*, 831 F.2d 1017, 1019 (Fed. Cir. 1987).

³⁷ 19 U.S.C. § 1337.

³⁸ *Id.*

prevent the importation of the violating articles into the country or the continuation of any interactions with articles currently within the United States that are found to be in violation.³⁹

The remedies available to the parties are not the only difference between the ITC and district courts. Since the primary goal of the ITC is to protect American interests, economy, and the public at large, there is a difference in pleading requirements between the two forums.⁴⁰ The ITC requires pleadings of specific facts that would amount to the unfair act alleged by the complainant, while district courts are satisfied with a general notice pleading standard.⁴¹ Additionally, there are no juries in an ITC investigative hearing, as opposed to district courts, where a jury trial is a possibility for every case.⁴² Further, ITC investigations take priority and stay any pending parallel district court litigation.⁴³ The ITC also has a public interest mandate baked into its organic statute, while district courts need only consider it in the cases of an injunction.⁴⁴

B. SECTION 337 INVESTIGATIONS: AN EXPEDIENT, EFFICIENT
ALTERNATIVE TO DISTRICT COURT LITIGATION

The typical § 337 investigation at the International Trade Commission has four parties involved: the complainant (a district court analog to plaintiff), the respondent (a district court analog to defendant), the administrative law judge (the trier of fact and law), and unique to the ITC, the Staff attorney from the Office of

³⁹ H. Mark Lyon & Sarah E. Piepmeier, *ITC Section 337 Patent Investigations: Overview*, THOMSON REUTERS PRACTICAL LAW, <https://us.practicallaw.thomsonreuters.com/2-505-6571> [<https://perma.cc/3H8X-U9SB>].

⁴⁰ Matthew N. Bathon, *IP Enforcement: Domestic and Foreign Litigants in the ITC and U.S. District Courts*, 10 U. PA. E. ASIA L. REV. 1, 2 (2014).

⁴¹ *Id.*

⁴² Lyon & Piepmeier, *supra* note 39.

⁴³ 28 U.S.C. § 1659.

⁴⁴ 19 U.S.C. § 1337; *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (holding that the four factors needed to be considered when ruling on a motion for injunctive relief are: “(1) that it has suffered an irreparable injury; (2) that remedies available at law 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 (4) that *the public interest would not be disserved by a permanent injunction*”) (emphasis added).

Unfair Import Investigations (“OUII”).⁴⁵ The Staff Attorney for the Commission acts as an independent third party in the investigation and acts on behalf of the Commission and the public interest.⁴⁶

§ 337 investigations are known to be expeditious ensured by the governing statutes and regulations.⁴⁷ A complainant must file its complaint with the Commission in paper alleging specific facts that relate to the unfair trade practices that the respondent(s) are engaging in.⁴⁸ In conjunction with the complaint, the complainant must file a public interest statement on how the requested relief may impact the Commission’s enumerated public interest factors and “may not exceed five pages.”⁴⁹ Once the complaint is filed, the Secretary of the Commission must publish in the Federal Register the notice of the potential investigation.⁵⁰ This publication provides a notice and comment period of eight calendar days for potential respondents, government agencies, or other third parties to submit written responses regarding the alleged public interest interactions that may arise from the potential investigation.⁵¹ These responses also cannot exceed five pages in length.⁵² This is to allow some procedural mechanism for third parties to give the Commission some idea of the impact of this investigation, but not to delay the expediency of the process. The Complaint is also passed to OUII for vetting and help in establishing if an investigation should be instituted.⁵³ If the Commission decides to institute an investigation within the statutory thirty-day decision period, then the rigorous investigation process commences.⁵⁴

There is a reason that the ITC is the go-to place for speedy adjudication. It is baked into the statute surrounding the § 337 investigation, mainly that, “The

⁴⁵ Tracy Lea Sloan, *The 1988 Trade Act and Intellectual Property Cases Before the International Trade Commission*, 30 SANTA CLARA L. REV. 293, 299–300 (1990).

⁴⁶ *Office of Unfair Import Investigations (OUII)*, USITC, <https://www.usitc.gov/offices/ouii> [<https://perma.cc/FD69-QUB8>].

⁴⁷ Lyon & Piepmeier, *supra* note 39.

⁴⁸ 19 C.F.R. § 210.8(a)(1) (2025); 19 C.F.R. § 210.12 (2025).

⁴⁹ *Id.* § 210.8(b).

⁵⁰ *Id.* § 210.8(c).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Section 337 Investigations: Answers to Frequently Asked Questions*, USITC Pub. 4105, at 15.

⁵⁴ 19 C.F.R. § 210.10(a) (2025).

Commission shall conclude any such investigation and make its determination under this section at the earliest practicable time after the date of publication of notice of such investigation.”⁵⁵ This typically falls within a typical timeline of around fifteen to eighteen months.⁵⁶ Another incentive for the expeditious proceeding is the fact that the ALJ is not subject to appeal if the target date of the conclusion of the investigation does not exceed sixteen months.⁵⁷ In contrast, district courts are overwhelmed with a combination of cases involving everything legally allowed under the sun.⁵⁸ This does not allow a district court judge to focus on the specific intentions of the parties involved.

Although there is a substantially shorter timeline for a typical § 337 investigation, there are significant litigation costs associated with it.⁵⁹ Because of the accelerated timeline in comparison to their district court counterparts, a § 337 investigation must account for the typical litigation process while balancing time and money.⁶⁰ This creates a medium for attorneys to bill many hours in these investigations, raising the cost of the proceedings. For instance, in district courts, the response time for discovery is thirty days, while at the ITC, it is only ten days.⁶¹

⁵⁵ 19 U.S.C. § 1337 (b)(1).

⁵⁶ *Average Length of Investigations*, *supra* note 23.

⁵⁷ 19 C.F.R. § 210.51(a)(1) (2025).

⁵⁸ 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

⁵⁹ *The Cost of Combat: Deconstructing Drug Patent Litigation in the Pharmaceutical Age*, DRUGPATENTWATCH (Feb. 2, 2026), <https://www.drugpatentwatch.com/blog/the-cost-of-combat-deconstructing-drug-patent-litigation-in-the-pharmaceutical-age.com> [https://perma.cc/X8DG-FXW2] (“The general average cost of patent litigation is cited as \$2.8 million, but for cases over \$25 million, the median cost is over \$4 million.¹ For Hatch-Waxman (ANDA) litigation, that median rises to \$5 million, and for Section 337 (ITC) cases, it can hit \$8 million.”).

⁶⁰ Jeff Nall, *Suggested Improvements to Mandatory Mediation Scheduling during International Trade Commission (ITC) Section 337 Investigations*, 12 CYBARIS 1, 15 (2021) (“Failure to meet submission deadlines for discovery, claim construction, depositions, expert reports, invalidity claim charts, and non-infringement claim charts might all result in sanctions. Having the extremely short response deadlines in ITC investigations 'drastically increase[s] the producing party's costs as they scramble to meet aggressive deadlines, and this increase could give an advantage to parties with more economic resources.”).

⁶¹ Lyon & Piepmeier, *supra* note at 39.

The time to respond to motions is also only ten days, as opposed to the weeks given at the district court.⁶² These tighter timelines are essential to the efficiency of the ITC, but they incur monetary costs as a consequence.

In the name of efficiency and speed, the ITC promulgated regulations in 2018 to introduce early determinations.⁶³ Within the Code of Federal Regulations, ITC “may order the administrative law judge to issue an initial determination within 100 days of institution of an investigation as provided in § 210.42(a)(3) ruling on a potentially dispositive issue as set forth in the notice of investigation.”⁶⁴ This power provides the Commission, albeit a wide discretion, to fast track investigations on issues that would, “entirely dispose of an investigation rather than to decide subsidiary issues, which are best addressed under other available procedures.”⁶⁵ These issues can include but are not limited to establishment of domestic industry, standing, importation issues.⁶⁶ The ITC explained that the purpose of this unique procedure is to, “limit unnecessary litigation, saving time and costs for all parties involved.”⁶⁷ Though it is not an exhaustive list, the public interest is noticeably absent from the official statement. This omission highlights the back seat that public interest factors have been taking in § 337 investigations.

Even though the ITC is typically thought to be a faster forum for intellectual property rights enforcement, that is becoming less and less true.⁶⁸ From 2006 to today, the time it takes to reach a meritorious decision has grown significantly.⁶⁹ In this time period, the timelines for § 337 investigations have increased from 3.5 months to 9.04 months for the average shortest investigations, 19.0 months to 29.2 months for the average longest investigations, and 12.0 months to 18.04 months for the typical average investigation.⁷⁰ These increases in

⁶² *Id.*

⁶³ 19 C.F.R. § 210.10(b)(3) (2025).

⁶⁴ *Id.*

⁶⁵ Rules of General Application, Adjudication and Enforcement, 83 Fed. Reg. 21140, 21147 (May 8, 2018) (to be codified at 19 C.F.R. pt. 210).

⁶⁶ *Pilot Program Will Test Early Disposition of Certain Section 337 Investigations*, USITC, https://www.usitc.gov/press_room/featured_news/pilot_program_will_test_early_disposition_certain.htm [<https://perma.cc/UL56-RNHY>].

⁶⁷ *Id.*

⁶⁸ *Average Length of Investigations*, *supra* note 23.

⁶⁹ *Id.*

⁷⁰ *Id.*

investigation lengths point to the fact that the ITC is falling in expediency from its earlier years. As mentioned before, with the tighter timelines of litigation practices at the ITC in conjunction with the longer investigation lengths, it is only going to be more expensive to go through a § 337 investigation. That is why it is imperative that deserving respondents have another tool to use in terminating investigations earlier.

Moving on to the requirements for a successful complainant, when dealing with a § 337 investigation, a complainant must demonstrate a domestic industry (“DI”) for each patent asserted and the asserted practicing domestic articles.⁷¹ Within the DI requirement there are two parts: the technical prong and the economic prong.⁷²

The technical prong of the DI requirement has been construed to mean that the complainant must show, “that its domestic industry products are ‘protected by the patent’ at issue.”⁷³ According to the Commission, the technical prong reads that, “the patent claim used to satisfy the technical prong does not have to be the same as the patent claim the complainant alleges is infringed by a respondent.”⁷⁴ So a hypothetical complainant can have domestic industry articles practicing claim one of a patent and then accuse a respondent of infringing upon claim twelve of that same patent and that is satisfactory with respect to the technical prong.⁷⁵

The economic prong of the DI requirement requires a complainant to establish a domestic industry through investments in one of three categories.⁷⁶ 19 U.S.C § 1337(a)(3) lays out that the economic prong can be met:

[A]n industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected

⁷¹ Lyon & Piepmeier, *supra* note 39 at 4–5.

⁷² Hyosung TNS Inc. v. USITC, 926 F.3d 1353, 1354 (Fed. Cir. 2019).

⁷³ Zircon Corp. v. USITC, 101 F.4th 817, 821 (Fed. Cir. 2024) (holding that although the technical prong is not at issue in the case at hand, the general requirement to meet the technical prong of the domestic industry requirement is that the asserted articles by the Complainant must practice a claim of the asserted patents).

⁷⁴ See Certain Soft-Edged Trampolines and Components Thereof, Inv. No. 337-TA-908, USITC Pub. 4867, at 12, 15 (Feb. 2019) (Comm’n Op.).

⁷⁵ Zircon, 101 F.4th at 821.

⁷⁶ 19 U.S.C. § 1337(a)(3); Zircon, 101 F.4th at 821 (“That provision is referred to as the “economic prong” of the domestic industry requirement.”).

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) substantial investment in its exploitation, including engineering, research and development, or licensing.⁷⁷

The economic prong has long been regarded as the harder of the two DI prongs to meet.⁷⁸ Since the ITC has not given clear definitions as to what “substantial” or “significant” mean in the context of § 337, it has created a difficulty when applying and arguing the economic prong test of the DI requirement.⁷⁹ However, a DI does not need to be fully established to succeed on the economic prong.⁸⁰ The Commission has expressly rejected a minimum threshold to the economic prong as it is counter to “the flexible approach to the domestic industry analysis.”⁸¹

Once the complainant has satisfied the DI requirement sufficiently through the complaint, the three litigation parties initiate something similar to district court litigation.⁸² This includes fact discovery, claim construction, expert discovery, witness statements, motions for summary determination, prehearing

⁷⁷ 19 U.S.C. § 1337(a)(3).

⁷⁸ See Matthew J. Rizzolo & Matthew R. Shapiro, *Talkin’ Trade: Demystifying the Domestic Industry Requirement*, LEXOLOGY (June 15, 2021), <https://www.lexology.com/library/detail.aspx?g=74a8f16f-784f-47ec-9ca4-de7c1123826f> [<https://perma.cc/5WZH-JNL6>]. (inferring that the fact-intensive, case-by-case analysis required by the economic prong is more demanding than the technical prong).

⁷⁹ *Id.*

⁸⁰ Michael Franzinger et al., *Foreign-Based Entities, the International Trade Commission, and the Requirement to Establish a Domestic Industry*, 36 INTELL. PROP. & TECH. L. J. 3, 2 (Mar. 2024).

⁸¹ Certain Carburetors and Prods. Containing Such Carburetors, Inv. No. 337-TA-1123, at 2–3 (Oct. 11, 2019) (Comm’n Notice).

⁸² See Jacqueline Tio, *ITC Litigation: The Section 337 Investigation Timeline*, FISH & RICHARDSON (July 9, 2020), <https://www.fr.com/insights/ip-law-essentials/itc-litigation-section-337-investigation-timeline/> [<https://perma.cc/SX2D-BL7F>].

briefs, and *ex parte* meetings with OUII.⁸³ After the evidentiary hearing ends, the ALJ files an initial determination on whether a violation has occurred.⁸⁴ After the ALJ releases the initial determination, any of the parties can request a review of the determination by the Commission who has the authority to take many actions similar to that of an Appellate court.⁸⁵ After the decision by the Commissioners, the President has the authority within sixty days to either agree or disagree with the Commission.⁸⁶ After the statutory review period, if there is approval or no action by the President, the determination becomes final.⁸⁷ Additionally, if the parties are not happy with the final determination, the parties can appeal to the United States Court of Appeals for the Federal Circuit.⁸⁸ Now that the basics of a § 337 investigation have been laid out, next is the evolution of the public interest mandate at the Commission.

III. HISTORY OF THE INTERNATIONAL TRADE COMMISSION'S PUBLIC INTEREST MANDATE

Within 19 U.S.C. § 1337(d)(1), there is the Commission's public interest mandate which implicitly tells the Commission to act in the best interest of the American people and the U.S. broader goals.⁸⁹ As stated earlier, the public's interest is primarily considered after the finding of a violation.⁹⁰ Currently, there are a series of factors that the Commission can consider when tailoring or modifying a remedial order: "(1) the public health and welfare, (2) Competitive conditions in the United States economy, (3) production of competitive articles in the United States, and (4) the United States consumers."⁹¹ These factors were not present in the original form of § 1337 in 1930.⁹² It was not until the amendment from the Trade Act of 1974 where the public interest factors showed up in their

⁸³ *Id.*

⁸⁴ Sloan, *supra* note 45, at 301.

⁸⁵ *Id.*

⁸⁶ 19 U.S.C. § 1337(j).

⁸⁷ *Id.* § 1337(j)(4).

⁸⁸ *Id.* § 1337(c).

⁸⁹ *Id.* § 1337(d)(1).

⁹⁰ *See id.*

⁹¹ *Id.*

⁹² *See* Tariff Act of 1930, 19 U.S.C. § 1654.

current form.⁹³ The remainder of this Part will explore the history of the public interest mandate for the International Trade Commission throughout the early twentieth century into the present.

A. PROTECTING INDUSTRIES IN THE UNITED STATES FROM UNFAIR FOREIGN COMPETITION

The Tariff Act of 1930 established the § 337 investigation and did so with a goal to give the Commission the power to investigate unfair trade practices through importation of articles into the United States.⁹⁴ Traveling ahead to the Trade Act of 1974, these goals were reaffirmed and elaborated upon.⁹⁵ In the Senate report on these now enacted amendments, the purpose of the bill in part was to, “provide[] a new program of community assistance specifically designed to help those communities adversely impacted by trade to adjust to foreign competition.”⁹⁶ The Committee for Finance continued on by further stating the purpose of these changes was to, “adopt policies for the sound growth of the economy and the long-term benefit of the American people.”⁹⁷ This sentiment was reciprocated by the House of Representatives.⁹⁸ The House Committee included reasons:

(6) to amend and improve the import relief (escape clause) provision of existing trade law in order to assure greater accessibility and more effective delivery of import relief to industries which may be seriously injured or threatened with serious injury from increased imports; ...

(8) to improve the procedures and means of dealing with problems of unfair trade practices in the United States and abroad;

⁹³ 19 U.S.C. § 1337.

⁹⁴ *Id.* § 1654.

⁹⁵ See S. REP. NO. 93-1298, 1974 WL 11696, at *7199 (1974).

⁹⁶ *Id.* at *7200.

⁹⁷ *Id.*

⁹⁸ H.R. REP. NO. 93-571, at 2 (1973).

(9) to improve domestic public procedures to insure the consideration of the economic interest of all citizens, producers and consumers, importers and exporters.⁹⁹

This trade reformation legislation was trying to reconcile and improve the balance between free trade ideas and American protectionism.¹⁰⁰ During the long debates and discussions of these bills, there was little to no discussion about intellectual property rights.¹⁰¹ However, after the passing of this legislation, the ITC became a new powerhouse for patent owners to pursue actions under § 337.¹⁰² The ability for the ITC to hand down decisions that were subject to the president was a catalyst for the Commission's popularity.¹⁰³ However, even the legislature and the President knew the Commission was not supposed to be a patent court because the ITC was not bound to the Patent Act.¹⁰⁴ According to the Federal Circuit, the ITC does not have preclusive effect in district court with regard to patent determinations, particularly on issues of validity and infringement.¹⁰⁵ In *Tandon Corp. v. U.S. Int'l Trade Comm'n*, the Federal Circuit held that a decision of the ITC "does not estop fresh consideration by other tribunals."¹⁰⁶ In its reasoning, the Court used the legislative history of the Commission by quoting:

[I]n patent-based cases, the [ITC] considers, for its own purposes under section 337, the status of imports with respect to the claims of U.S. patents. The Commission's findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws in particular factual contexts. Therefore, it seems clear that any disposition of a Commission action by a Federal Court

⁹⁹ *Id.*

¹⁰⁰ Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529, 543 (2009).

¹⁰¹ *Id.*

¹⁰² *Id.* at 544.

¹⁰³ *See id.* at 543.

¹⁰⁴ *Id.* at 544.

¹⁰⁵ Jonathan Bachand & Sheila Swaroop, *Issue Preclusion at the ITC: New Developments for Trademark-Based Claims*, KNOBBE MARTENS (Aug. 20, 2019), <https://www.knobbemartens.com/updates/issue-preclusion-itc-new-developments-trademark-based-claims/> [<https://perma.cc/QHL9-QAUT>].

¹⁰⁶ *Tandon Corp. v. USITC*, 831 F.2d 1017, 1019 (Fed. Cir. 1987).

should not have a res judicata or collateral estoppel effect in cases before such courts.¹⁰⁷

All of these factors and consequences led to a shift in the use of the ITC as a forum was noticed by a massive increase in investigations being instituted by complainants following the Trade Act of 1974.¹⁰⁸ Following the Trade Act of 1974, the next big change to the ITC came in the form of the Omnibus Trade and Competitiveness Act of 1988.¹⁰⁹ This language change for 19 U.S.C. § 1337 spelled out more discrete acts that count as violations under the statute.¹¹⁰ In doing so, Congress lowered the bar for Complainants to meet DI requirements and “failed to strengthen balancing requirements under § 337(d) to prevent issuance of exclusion orders when domestic companies would be unduly harmed.”¹¹¹

The Omnibus Trade and Competitiveness Act of 1988 amended the official text of the public interest factors within the United States Code to its present form.¹¹² The Senate Report of this Act of Congress details the the public interest factors are to be weighed against the violation of the statute.¹¹³ The International Trade Commission after the 1988 amendments to its organic statute had a broader discretion in its remedies when considering the new public interest factors.¹¹⁴ For example, if a respondent were to default in an investigation, the Commission can still evaluate the exclusion order in light of the public interest factors.¹¹⁵ During an investigation, the Commission’s administrative law judge under the new § 337(e) can use the same public interest factors for evaluating a temporary exclusion order.¹¹⁶ This weighing of public interest factors brought the ITC’s temporary

¹⁰⁷ Bachand & Swaroop, *supra* note 105 (quoting S. REP. NO. 93-1298).

¹⁰⁸ Kumar, *supra* note 100, at 546.

¹⁰⁹ 19 U.S.C. § 1337; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat.1107.

¹¹⁰ *Id.*

¹¹¹ Kumar, *supra* note 100, at 550.

¹¹² Omnibus Trade and Competitiveness Act, 102 Stat. at 1213–14 (changing the current language about the public interest factors into 19 U.S.C. § 1337); *see* S. REP. NO. 100-71, at 127 (1987) (Conf. Rep.) (“If the Commission finds that a violation of this statute has occurred and determines...”).

¹¹³ *See* S. REP. NO. 100-71, at 127 (1987) (Conf. Rep.).

¹¹⁴ *See id.* at 127–28.

¹¹⁵ *Id.* at 132.

¹¹⁶ *See id.* at 130–31.

injunctive relief analysis similar to that of federal district courts.¹¹⁷ Further interactions between the weighing of public interest factors and the Commission's remedial orders include: the President of the United States has a review period of 60 days to deny the exclusion order or cease and desist order for policy reasons;¹¹⁸ the ability to justify issuing a cease and desist order and an exclusion order based on public interest factors;¹¹⁹ and that the role of the exclusion order is to both enforce the intellectual property rights of American interests while also considering the greater public interest of the nation.¹²⁰

B. HOW THE PUBLIC INTEREST FACTORS HAVE INFLUENCED REMEDIAL MEASURES

Having examined the process through which the International Trade Commission received its public interest mandate, it is important to consider how the Commission has exercised this power from the late 20th century through to 2025.

1. *When Public Interest Warranted Modification or Denial of Exclusion Orders*

The International Trade Commission has deemed it appropriate to either modify or outright deny exclusion orders based on public interest factors. This Section will look at *In the Matter of Certain Crankpin Grinders*¹²¹, *In the Matter of Certain Fluidized Supporting Apparatus and Components*¹²², and *In the Matter of Certain*

¹¹⁷ *Id.*; Andrew Muscato, *The Preliminary Injunction in Business Litigation*, 3 N.Y.U.J.L. & BUS. 649, 651 (2007) ("In general terms, preliminary injunctive relief may be granted or denied based upon the district court's discretionary review of the equitable factors set forth in the so-called traditional "four-part test": (1) the moving party's likelihood of success on the merits; (2) the likelihood that the moving party will suffer irreparable harm if an injunction is denied; (3) the balancing of the relative hardships to the various parties resulting from the grant or denial of an injunction; and (4) *the effect of the grant or denial of an injunction on the public interest, if any.*") (emphasis added).

¹¹⁸ 19 U.S.C. § 1337.

¹¹⁹ S. REP. NO. 100-71, at 131.

¹²⁰ *Id.* at 129.

¹²¹ *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022 (Dec. 1979) (Comm'n Op.).

¹²² *Certain Fluidized Supporting Apparatus and Components*, Inv. No. 337-TA-182, USITC Pub. 1667 (Oct. 1984).

*Baseband Processor Chips & Chipsets, Transmitter & Receiver (Radio) Chips, Power Control Chips, & Prod. Containing Same, Including Cellular Telephone Handsets.*¹²³

In *Certain Crankpin Grinders*, this investigation involved technology related to grinders which are used in the manufacturing of automobile crankshafts which are responsible for grinding all the crankpins in a crankshaft.¹²⁴ According to the Commission, “a crankpin is a critical component of every internal combustion engine...” and vital to the automotive industry.¹²⁵ The complainant in this investigation was a United States based company, Landis Tool Company and the respondent was a company based in the United Kingdom, Newall Machine Tool Company, Ltd.¹²⁶ The complainant sought an exclusion order to prevent the importation of these grinders that were alleged to have infringed on one of the patents owned by the complainant.¹²⁷ The ALJ initially held the patent claims were valid, enforceable, and infringed by the Respondent’s products thus in violation for the purposes of the investigation.¹²⁸

On review by the Commissioners of the ITC, they acknowledged the role that the public interest factors play in the enforcement of the Commission’s agenda.¹²⁹ By opining that Congress enacted, “public interest factors to be the overriding considerations in the administration of the statute,” they used the public interest factors for the first time to, “preclude imposition of a remedy.”¹³⁰ When evaluating the public interest factors, the Commission took written submissions from The Department of Health, Education, and Welfare, the Federal Trade Commission, General Motors Corporation, and the Caterpillar Tractor Company.¹³¹ With the four parties taking various positions, the Commission

¹²³ *Certain Baseband Processor Chips*, Inv. No. 337-TA-543.

¹²⁴ *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, at 6.

¹²⁵ *Id.*

¹²⁶ *Id.* at 2.

¹²⁷ *Id.*

¹²⁸ *Id.* at 2–3 (affirming that the patent in this case is valid after an anticipation, an obviousness, and a use requirement analysis).

¹²⁹ *See id.* at 17.

¹³⁰ *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, at 17.

¹³¹ *Id.* at 3. The administrative agencies had no comment for the imposition of an exclusion order, but the two corporations had competing viewpoints. The General Motors Corporation took the view of extending the exclusion order to take a more expansive view to include exclusion of orders taken place prior to the patent’s expiration but imported after the patent’s expiration. Caterpillar Tractor Company gave its written statement stating that the

weighed the evidence presented and concluded that it would not impose an exclusion order.¹³² The Commission found that, “neither complainant nor its domestic licensee can make delivery on a new order to a domestic customer prior to the expiration of the patent.”¹³³

An executive from the Ford Motor Company alleged that the crankpin grinders in question are, “a critical element in Ford's program to meet the fuel economy standards mandated by Congress.”¹³⁴ Without the readily available crankpin grinders or a reasonable alternative, Ford Motor Company contended that it would be increasingly more difficult if not impossible to meet the federal mandate of improving the fuel economy of the automotive industry.¹³⁵ The Commission stated that the federal mandates enacted by Congress and the importance of the automotive industry to have a competitive nature justify the denial of a remedial order.¹³⁶ This fact is important because this is the seminal case for the public interest factor analysis.¹³⁷ Having the federal mandate as a way for the Commission to give injunctive relief helps to show that the ITC will balance the intellectual property rights of the holder with the broader interest of the American public.

Furthermore, *Certain Fluidized Supporting Apparatus* is an important investigation decision based on the public health and safety factors, as well as the use of the public interest factors for analyzing cases for temporary relief.¹³⁸ This investigation was centered around a special type of hospital bed that “have fluidized support means which are particularly adapted for use by patients with severe burns or other injuries where it is painful or not conducive to recovery to lie on an ordinary bed.”¹³⁹ The complainants in this investigation, Support Systems International, Inc. headquartered in Charleston, South Carolina filed a complaint

exclusion order would negatively impact the ability to manufacture engines and would be detrimental to the U.S. industry. *Id.*

¹³² *Id.* at 20–21.

¹³³ *Id.* at 18.

¹³⁴ *Id.*

¹³⁵ *Id.* at 19.

¹³⁶ *Id.* at 17.

¹³⁷ See Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 19–21 (2012).

¹³⁸ See *Certain Fluidized Supporting Apparatus and Components*, Inv. No. 337-TA-182, at 1–2.

¹³⁹ *Id.* at 1.

against several foreign based respondents.¹⁴⁰ Earlier in the investigation, the ALJ filed an Initial Determination that held there was no violation and denied the subsequent motion for temporary relief.¹⁴¹ Upon review by the Commission, the Commissioners found that there was a reason to believe that the patent was valid, enforceable, and infringed by the respondents.¹⁴² Due to these circumstances, the Commission had to conduct the temporary relief analysis which included the public interest factors.¹⁴³

While assessing the public interest factors, the Commission relied on the public health and welfare by concluding, “it appears that public health considerations override SSI’s interests as an exclusive patent licensee.”¹⁴⁴ The prevention of importation by the respondents would have negatively impacted the public health and welfare because the complainant could not fulfill the requisite need of the American industry.¹⁴⁵ Thus the Commission deemed it appropriate under its discretion to not allow temporary relief under the public interest factors despite the reasonable understanding that there is a violation.¹⁴⁶ This case helps to show that when outside the context of a federal mandate, there are other ways that respondents can show a countervailing public interest to deny exclusion orders.

Certain Baseband Processor Chips emerged and rounded out the pro-modification/denial landscape.¹⁴⁷ This investigation involves two American companies involved in the design and manufacturing of semiconductor chips, specifically baseband chips used in wireless communication in electronic devices.¹⁴⁸ The complainant, Broadcom, filed a complaint against respondent,

¹⁴⁰ *Id.* at 6.

¹⁴¹ *Id.* at 1.

¹⁴² *Id.* at 7–8, 13. The ALJ found that the patent was valid and enforceable. The difference is that the Commission found the Respondent’s products to be infringing while the ALJ did not based off licensing discrepancies, not based off the products and the related patent claims. *Id.*

¹⁴³ *Id.* at 22.

¹⁴⁴ *Certain Fluidized Supporting Apparatus and Components*, Inv. No. 337-TA-182, at 25.

¹⁴⁵ *Id.* at 23.

¹⁴⁶ *Id.* at 25.

¹⁴⁷ *See Certain Baseband Processor Chips*, Inv. No. 337-TA-543, at 22.

¹⁴⁸ *Id.* at 2.

Qualcomm for the infringement of several patents and importing those infringing products.¹⁴⁹ Broadcom sought a limited exclusion order against the respondent.¹⁵⁰ The ALJ in his final Initial Determination found that Qualcomm was in violation of § 337 and recommended that there be an issuance of a limited exclusion order.¹⁵¹

Upon review of the Commission, there was a request for submissions tailored to the impact of exclusion orders through the lens of the public interest factors.¹⁵² From Contributions from the parties, federal agencies, public officials, and OUII, the Commission determined that the public interest would be adversely impacted if the initially proposed exclusion order was imposed.¹⁵³ The Commission found that public health and welfare would be adversely impacted due to the increasing reliance on wireless communication by first responders in emergency situations.¹⁵⁴

Additionally, the Commission invoked the consumers' interest factor and stated that, "the record indicates that excluding at least some 3G devices could limit consumers' access to enhanced services offered by 3G networks."¹⁵⁵ The Commission emphasized that the downstream relief sought by the complainants would have a drastic impact on the public interest and in its reasoning held that, "we must balance the negative impact against the important public interest of protecting intellectual property rights."¹⁵⁶ By implementing its own precedent the Commission was hesitant to deny the remedial orders but did impact the scope of the limited exclusion order.¹⁵⁷ This hesitation from the Commission shows the limited nature and difficulty it takes to get the Commission to deny exclusion orders even when there is clear countervailing public interest factors.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 8.

¹⁵² *Id.*

¹⁵³ *Certain Baseband Processor Chips*, Inv. No. 337-TA-543, at 136–48.

¹⁵⁴ *Id.* at 148 ("[P]ublic safety officials appear to be increasingly relying on the data capabilities of 3G telecommunications networks in carrying out their functions, and anticipate that this reliance will greatly increase in the near future.").

¹⁵⁵ *Id.* at 149.

¹⁵⁶ *Id.* at 149–50.

¹⁵⁷ *Id.* (holding that taking the public interest factors analysis seriously, the Commission "has *denied relief on public interest grounds only three times* in the history of Section 337") (emphasis added).

2. *When Public Interest Did Not Warrant the Modification or Denial of Exclusion Orders*

Now that specific investigations have clarified the circumstances under which the ITC may modify or deny an exclusion order based on public interest factors, it is equally important to consider the opposite outcome. This Section will look at *In the Matter of Certain Ink Cartridges and Components Thereof*,¹⁵⁸ *In the Matter of Certain Personal Data and Mobile Communications Devices and Related Software*,¹⁵⁹ and *In the Matter of Certain Digital Models, Digital Data, & Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances, the Appliances Made Therefrom, & Methods of Making the Same*.¹⁶⁰

To begin, *In the Matter of Certain Ink Cartridges*, the complainant, Epson, filed a complaint against several respondents, including Ninestar Technology Co., with the intention of obtaining an general exclusion order for allegedly infringing ink cartridges.¹⁶¹ The ALJ found that the patents asserted by the complainant were valid and enforceable and respondent's products infringed on those patents.¹⁶² Upon review by the Commission for remedy, bonding, and public interest analysis, the Commission found to uphold the ALJ's finding in part and reverse in part, particularly if some claim infringement thus limited the scope of the recommended general exclusion order.¹⁶³

Moving to the public interest analysis, the Commission quickly found that there was no countervailing public interest that would be adversely affected if remedial measures were issued.¹⁶⁴ The Commission held that, "Ink cartridges are not the sort of product that have been found by the Commission in the past to raise public interest concerns, and we are not aware of any public interest

¹⁵⁸ *Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-565, USITC Pub. No. 4195 (Dec. 2010).

¹⁵⁹ *Certain Personal Data and Mobile Communications Devices and Related Software*, USITC Inv. No. 337-TA-710, Comm'n Op. (Dec. 29, 2011).

¹⁶⁰ *Certain Digital Models, Digital Data, & Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances, the Appliances Made Therefrom, & Methods of Making the Same*, Inv. No. 337-TA-833, USITC Pub. 4555 (Nov 2017) (Comm'n Op.) [hereinafter *Certain Digital Models*, Comm'n Op.].

¹⁶¹ *Certain Ink Cartridges and Components*, Inv. No. 337-TA-565, at 2.

¹⁶² *Id.* at 2-3.

¹⁶³ *Id.* at 16.

¹⁶⁴ *Id.* at 63.

considerations that militate against the general exclusion order, ... directed to certain domestic respondents.”¹⁶⁵ This goes to bolster the idea that the Commission is already hesitant to use the public interest factors for certain products and is ripe for tailoring a new test for a subset of imports.

Proceeding to the investigation *In the Matter of Certain Personal Data and Mobile Communications Devices and Related Software*, this case involves technology surrounding phones and related communication devices and software.¹⁶⁶ The complainant, Apple Inc., filed a complaint against respondent, HTC America Inc., in hopes of obtaining an exclusion order that would prevent the importation of certain mobile devices and the software embedded within them.¹⁶⁷ The ALJ found at least one of the patents asserted by Apple were deemed to be not invalid, enforceable, and infringed by HTC through its imported products.¹⁶⁸ Upon review by the Commission, these findings of a violation were upheld, but the Commission deemed it appropriate to change the scope of the remedial orders.¹⁶⁹ When turning to the public interest factor analysis, the Commission began with the impact on the American consumer.¹⁷⁰ Respondents argued that the exclusion order would limit the choices for the American consumer, but the Commission was not persuaded because the exclusive use of a patented technology is one of the precise rights granted by a patent.¹⁷¹ The public health and welfare and competitive articles were similarly shot down by the Commission as having no compelling argument.¹⁷²

The competitiveness of the industry factor was the closest HTC got to a modified exclusion order, however it was nothing more than a delay in implementation of the exclusion order.¹⁷³ The Commission “recognize[d] that this case raises some important competitiveness concerns,” but still, there was “not

¹⁶⁵ *Id.*

¹⁶⁶ *Certain Personal Data and Mobile Communications Devices and Related Software*, Inv. No. 337-TA-710, at 4.

¹⁶⁷ *Id.* at 3.

¹⁶⁸ *Id.* at 35.

¹⁶⁹ *Id.* at 73.

¹⁷⁰ *Id.* at 72.

¹⁷¹ *Certain Personal Data and Mobile Communications Devices and Related Software*, Inv. No. 337-TA-710, at 69–71 (holding that “[t]he right to exclude under a patent, 35 U.S.C. § 154, is the right to exclude a competitor’s products; such exclusion necessarily affects consumer choice”).

¹⁷² *Id.* at 73–77.

¹⁷³ *Id.* at 73–78, 81.

need to choose between an immediate exclusion order and no exclusion order at all.”¹⁷⁴ Ultimately, the Commission settled on a four month transition period until the exclusion order went into effect.¹⁷⁵ This case is helpful as the investigation and opinion highlighted the importance of walking through the four factors that make-up the public interest and it also highlights what does not meet the threshold of a countervailing interest.

Finally, to wrap up the discussion on when the Commission does not find public interest factors strong enough to affect remedial orders: *Certain Digital Models*.¹⁷⁶ This investigation began in 2012 when the complainant, Align Technology, Inc., filed its complaint against two respondents: ClearConnect Operating and its foreign counterpart, ClearConnect Pakistan.¹⁷⁷ In the complaint, Align Technology alleged that ClearConnect were infringing patents and importing articles into the United States related to, “incremental dental positioning adjustment appliances,” or more commonly known as, clear dental aligners.¹⁷⁸ The importation of the allegedly infringing products was done electronically through the files for the clear dental aligners that were to be manufactured in the United States.¹⁷⁹ After a lengthy investigation containing multiple patents claims, the ALJ issued an Initial Determination finding that ClearConnect was in violation and did not recommend an exclusion order but did recommend a tailored cease and desist order against the respondents.¹⁸⁰

Upon review, the Commissioners entertained the public interest arguments from the parties.¹⁸¹ ClearConnect argued that the cease-and-desist letter would negatively impact the public interest, mainly public welfare.¹⁸² The offered harm to the public interest came from Align selling the clear dental aligners, which was inappropriate and it would negatively affect the dental industry and the

¹⁷⁴ *Id.* at 79, 81.

¹⁷⁵ *Id.* at 81.

¹⁷⁶ *Certain Digital Models, Digital Data, & Treatment Plans for Use, in Making Incremental Dental Positioning Adjustment Appliances Made Therefrom, & Methods of Making the Same*, Inv. No. 337-TA-833 (May 6, 2013) (Initial Determination).

¹⁷⁷ *Id.* at 5.

¹⁷⁸ *Id.* at 4.

¹⁷⁹ *See id.* at 10.

¹⁸⁰ *Id.* at 147.

¹⁸¹ *Certain Digital Models, Comm’n Op.*, Inv. No. 337-TA-833, at 149.

¹⁸² *Id.*

associated healthcare providers.¹⁸³ Align countered by submitting that the proposed remedial order would not be adverse to the public interest and the arguments proffered by ClearConnect were unsubstantiated at best.¹⁸⁴ Further, both the Staff Attorney and Align relied on the fact that these dental aligners are not life-saving treatment options or, “detrimental to the orthodontic market.”¹⁸⁵ Ultimately the Commission found in favor of the complainant’s and the Staff Attorney’s arguments against adverse impacts against the public interest and decided not to modify the cease-and-desist order.¹⁸⁶

Through this tour of the Commission’s use of the public interest factors and lack thereof, it is clear to *see* that the Commission will only use its powers to modify or deny remedial orders in specific cases. If a respondent can put forth these reasons for countervailing public interest factors in an earlier point in the investigation, it will allow the Commission to determine these issues more efficiently and adjudicate the investigations quicker. Before the final proposed framework for these early terminations, it is important to discuss the consistently doomed pieces of legislation that lay on the cutting room floor of Congress.

IV. THE AAIA & ITS DEFICIENCIES

As discussed *supra* Part I,¹⁸⁷ the Advancing America’s Interest Act has been a recurring yet failing piece of legislation for half of a decade.¹⁸⁸ According to the Congressional Research Service, the goal of this legislation is amending the International Trade Commission’s organic statute for several reasons.¹⁸⁹ This includes changing some limitations on the domestic industry matter, particularly in the economic prong, licensing activities, and touching public interest.¹⁹⁰ Focusing on the changes to the aspects of the organic statute that involve the public interest, it is overly vague and is not easily implementable for the Commission and

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 150.

¹⁸⁶ *Id.* at 152–53.

¹⁸⁷ *See supra* Part I.A.

¹⁸⁸ *See* H.R. 3535; H.R. 5184; H.R. 8037.

¹⁸⁹ *See* CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., IF11195, AN INTRODUCTION TO SECTION 337 INTELLECTUAL PROPERTY LITIGATION AT THE U.S. INTERNATIONAL TRADE COMMISSION 1 (2024).

¹⁹⁰ *See id.* at 1–2.

the ALJ.¹⁹¹ Within the current landscape of Administrative law in this country, ambiguity and vagueness is not something a statute can afford.¹⁹² The particular provisions in the AIA that are important for this Note are:

“(4) (A) The Commission shall identify, at the beginning of an investigation, whether the investigation presents a dispositive issue appropriate for an expedited fact finding and an abbreviated hearing limited to that issue, and shall direct the assigned administrative law judge to issue an initial determination on such issue not later than 100 days after the investigation is instituted.

“(B) Any initial determination by the assigned administrative law judge under subparagraph (A) shall stay the investigation pending Commission action.”

(3) Subsection (c) is amended—

(A) by striking the first sentence and inserting the following: “(1) The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section, except that the Commission—
...

“(B) may determine during the course of the investigation that the exclusion of articles under investigation would not be in the interest of the public, after considering the nature of the articles concerned and the effect of such exclusion upon the public health and welfare, the United States economy (including competitive conditions), the production of like or directly competitive articles by the complainant and its licensees, and United States consumers, and terminate any such investigation, in whole or in part, without making any further determination.”¹⁹³

¹⁹¹ See *id.* at 2.

¹⁹² See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 390 (2024) (holding that the *Chevron* analysis for statutory interpretation is overturned, and administrative agencies are not afforded deference in its interpretation of a governing statute).

¹⁹³ H.R. 3535.

These amended provisions attempt to do something akin to what this Note hopes to achieve, particularly the Commission's mandate to delegate the determination of an overriding public interest on the outset of an investigation.¹⁹⁴ Within the proposed language, the AAIA does attempt to codify the expedited hearings for dispositive issues found in the ITC's regulations.¹⁹⁵ The AAIA also eliminates the discretion of the Commission to choose whether to order the ALJ to focus on a dispositive issue and instead compels the Commission to make a judgment on the outset of the investigation whether the ALJ will hold an expedited hearing.¹⁹⁶ The issue is not allowing public interest immediately as an enumerated category of discrete dispositive issues.

Another issue arises when there is not a clear path for the Commission to determine whether any of the public interest factors are a problem that warrants an expedited process.¹⁹⁷ What is lacking within this statute is a pleading standard and more discrete applications which would allow respondents to take advantage of the expedited process. As previously mentioned, when filing a complaint, a complainant must file a statement of public interest that must not exceed five pages.¹⁹⁸ With this minuscule amount of work pages, it incentivizes the downplay of an impact that any one remedial order may have. To compound this effect, responses during the notice and comment period can only be five pages and must be submitted within eight calendar days of the publication of notice.¹⁹⁹ This is not enough time or enough work-product to adequately give the Commission the true scope of the potential effects the requested remedial orders would have on public interest. A better notice and pleading standard for a respondent who wishes to use the termination mechanism for a § 337 investigation is important to combine with the statutory framework. This will allow respondents to put the Commission and OUII on greater notice to *see* if the forgoing statutory amendments should be utilized in an investigation.

¹⁹⁴ *See id.*

¹⁹⁵ *See* H.R. 3535; 19 C.F.R. § 210.42(a)(3) (2025); 19 C.F.R. § 210.10(b)(3) (2025).

¹⁹⁶ *Compare* H.R. 3535, *with* 19 C.F.R. § 210.42(a)(3) (2025); 19 C.F.R. § 210.10(b)(3) (2025).

¹⁹⁷ *See* H.R. 3535 ("The Commission shall identify, at the beginning of an investigation, whether the investigation presents a dispositive issue appropriate for an expedited fact finding.").

¹⁹⁸ *See* 19 C.F.R. § 210.8(b) (2025).

¹⁹⁹ *See id.* § 210.8(c).

V. ANALYSIS

The items needed for this proposed solution include the burden of proof, types of evidence allowed and required, definitions, scope of statute, and the statutory language itself. This Part will take each one in turn. Since there is only a constantly dying piece of legislation that attempts at adding this into law,²⁰⁰ this Part will flush out a more definitive and discrete test for these “Early Investigation Termination Upon Demonstration of Public Interest.”²⁰¹

The Burden of Proof that this test will work with is clear and convincing evidence. This will be like showing patent invalidity at the International Trade Commission.²⁰² This is important because if a respondent can terminate an investigation based off an invalid patent, then the investigation should be able to be terminated based on the same evidentiary standard.

The types of evidence allowed for an “Early Investigation Termination Upon Demonstration of Public Interest” include submissions from the parties themselves, other federal agencies (FTC, FDA, USDA, FCC, SEC, DOE, DOD, DOT, etc.),²⁰³ and third parties (other competitors in the relevant industry, prominent members found within the relevant industry, and other persons/entities who have an opinion on how the remedial order would impact the public interest). This is not an exhaustive list, but it is meant to be illustrative of the parties from whom written submissions may be received.

The purpose of this proposed amendment to 19 U.S.C. § 1337²⁰⁴ is to implement a new test for respondents in § 337 investigations to terminate said investigations prior to incurring unnecessary costs. Additionally, this is for the International Trade Commission to use its power to act upon the best interests of United States and the public good. This test is to be used in a limited manner in the context of a federal mandate, health and safety, or a substantial detriment to an American industry or the American consumer. Currently the ITC can use the following public interest factors: “[T]he public health and welfare, Competitive

²⁰⁰ See H.R. 3535; H.R. 5184; H.R. 8037.

²⁰¹ This is a proprietary term for my unique test that this Note is trying to develop. It is by no means trying to take someone else’s name for this type of test.

²⁰² See *Guangdong Alison Hi-Tech Co. v. ITC*, 936 F.3d 1353, 1359 (Fed. Cir. 2019) (“[A] challenger at the ITC must prove invalidity by clear and convincing evidence.”) (citing *One-E-Way, Inc. v. Int’l Trade Comm’n*, 859 F.3d 1059, 1062 (Fed. Cir. 2017)).

²⁰³ 19 U.S.C. § 1334.

²⁰⁴ See *id.* § 1337.

conditions in the United States economy, production of competitive articles in the United States, and the United States consumers.”²⁰⁵ The Commission and the Administrative Law Judges are not to use this liberally, but in the case where it is deemed appropriate, this test will allow for greater judicial efficiency and economy. The test is to be used in a manner that would terminate the investigation but not preclude any parallel litigation arguing the same claims. Since there is no preclusive effect for the patent determinations from the International Trade Commission, this will not preclude the United States Patent and Trademark Office or the federal court system from granting the relief sought by the complainants.²⁰⁶

A. PROPOSED STATUTORY FRAMEWORK

This Note contains a comprehensive statutory framework for implementing its goals. The first part of the statute does incorporate the good of what the AAIA does in codifying the expedited hearings but does so with incorporating the public interest.

“The Commission shall identify, at the beginning of an investigation, whether the investigation presents a dispositive issue regarding public interest for an expedited fact finding and an abbreviated hearing limited to that issue, and shall direct the assigned administrative law judge to issue an initial determination on such issue not later than 100 days after the investigation is instituted.”²⁰⁷

This minor change to the proposed language has a major impact because it forces the Commission to consider public interest at the outset of an investigation. Through the AAIA’s ‘shall’ language²⁰⁸ and the Commission’s

²⁰⁵ *Id.* § 1337(d)(1).

²⁰⁶ *See Texas Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1569 (Fed. Cir. 1996) (“Based on this legislative history, we have stated that Congress did not intend decisions of the ITC on patent issues to have preclusive effect.”) (citing *Tandon Corp. v. United States Int’l Trade Comm’n*, 831 F.2d 1017, 1019 (Fed. Cir. 1987)).

²⁰⁷ H.R. 3535. This section is to codify the promulgated regulations for dispositive issues that would not have serious effects on the merits. There is one amendment to the proposed legislative language: by inserting the following language after dispositive issue “regarding public interest.”). *Id.*; *see also infra* Appendix.

²⁰⁸ *See id.*

regulations on expedited hearings on dispositive issues,²⁰⁹ this proposed provision begins this Note's statutory test on "Early Investigation Termination Upon Demonstration of Public Interest."

Following the institution of an investigation and the expedited hearing on public interest, the initial procedures are as follows:

If the Commission finds that an expedited hearing is necessary, the ALJ presiding over the investigation shall take an initial briefing from the parties within 10 days of institution to establish which Executive Agencies shall be subpoenaed to submit a written response as to the effects of remedial order should a violation be found. The ALJ shall set her own briefing schedule and hearing schedule so long as it complies with the 100-day target date.

This language helps to establish the procedural timeline for these expedited hearings. In continuation of ITC practice, the parties are treating the institution of investigation as an analogy to an order from the ALJ/Commission. In doing so, the ten-day response time for the initial briefing is standard and helps to further the goal of efficient adjudication.²¹⁰ The subpoena from the ALJ to another Executive agency within the purview of the ITC²¹¹ needs to be incorporated for the ALJ to get a quick response for the expedited hearing.

It is important not to allow this specialized hearing to be flooded with irrelevant information. The tailored nature of an expedited hearing on the sole issue of public interest should be confined to only that issue so any extra evidence introduced should be excluded and prevented from being considered. The goal of "no evidence except the evidence relevant to the public interest analysis" is accomplished by the following provision: "This evidentiary hearing does not allow for evidence on the merits of a violation, but merely to determine whether the Respondent's articles provide a countervailing reason to prevent an investigation on the merits."²¹² This provides a mechanism for the ALJ to tailor and keep the hearing and evidence to a particular area of interest of the parties. It will also further the goal of a more efficient adjudication process.

Once the temporal and subject matter elements of the expedited hearing are laid out, the substantive requirements help to illuminate the remainder of this

²⁰⁹ See 19 C.F.R. § 210.10(b)(3) (2025); 19 C.F.R. § 210.42(a)(3) (2025).

²¹⁰ See Lyon & Piepmeier, *supra* note 39, at 3.

²¹¹ See 19 U.S.C. § 1334.

²¹² See *infra* Appendix.

Note's test. To keep in line with the Commission's/ALJ's decision making and appealability, this proposed statute lays out the burden of proof and effect on the underlying investigation:

Through the use of subsection (o)(1), if a Respondent can show by clear and convincing that for one of the factors listed in subsection (o)(1)(c) or a combination thereof, the ALJ or upon review of the Commission, can terminate the investigation in whole or in part with respect to the asserted patents in which the Respondent's alleged violating articles infringe.²¹³

This provision's goal is to give guidance to the Commission and the ALJ on what standards to use for assessing the public interest analysis. This standard, as discussed above, is to mirror some other dispositive issues in which the expedited hearing is used for, such as patent invalidity. The ability for the Commission and the ALJ to dispose of an investigation in whole or in part is vital to furthering institutional efficiency. Through the process of expedited hearings, several patents could be determined no longer a part of the investigation because the accused articles have survived the public interest hearing. This will allow the remainder of the investigation on the merits to be tailored and more efficient. These results save time, money, and resources.

To address the lack of particularization of the categories in which the AAIA would allow the early determination of a § 337 investigation, this proposed statutory change enumerates four discrete categories:

The Commission shall expedite the initial determination under subsection (o)(1)(a) if there is one of the following present:

- i. A federal mandate governing the articles in question; or
- ii. A public health emergency or other federally recognized health initiative in which the articles in question are a part of; or
- iii. A safety protocol in which the articles in question are a part of; or
- iv. A substantial detriment to an American industry or the American consumer; or

²¹³ See *infra* Appendix.

v. Those factors enumerated in 19 United States Code Section 1337(d)(1).²¹⁴

Through the line of investigations discussed above in Section III.B,²¹⁵ the Commission determined cases in which it is more willing to *see* countervailing public interest considerations. The public mandate considerations come from *In the Matter of Certain Crankpins*, where it was emphasized that the Commission denied an exclusion order due to the importance of the automotive industry to comply with the Congressional mandate to increase fuel economy standards.²¹⁶ The public health emergency and substantial detriment to an American Industry can be pulled out of *In the Matter of Certain Fluidized Supporting Apparatus*, where the Commission found that the denial of the exclusion order was appropriate absent a federal mandate, as *seen* in *Certain Crankpins* and the impact it would have on the American hospital and patient care industries by limiting the access of burn beds and the lack of substitutes.²¹⁷ The remainder of the enumerated categories are derived from the existing public interest factors in the Commission's organic statute.²¹⁸ These discrete categories will help the Commission with determining whether to institute an expedited hearing based on public interest as well as give respondents the only areas in which this procedure should be invoked.

This Note's proposed framework is not intended to take away any other mechanisms that the ITC gives to parties. The following provision is designed to allow a public interest analysis outside the context of the expedited hearing on public interest.

If the Motion for Early Investigation Termination Upon Demonstration of Public Interest is denied,

- i. that does not preclude the use of public interest factor analysis for the purposes of tailoring any remedial order the Commission deems appropriate; and

²¹⁴ See 19 U.S.C. § 1337(d)(1).

²¹⁵ See *supra* Part III.B, at 21–31.

²¹⁶ See *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, at 18–19.

²¹⁷ See *Certain Fluidized Supporting Apparatus and Components*, Inv. No. 337-TA-182, at 19.

²¹⁸ See 19 U.S.C. § 1337 (d)(1).

- ii. that does not preclude the use of public interest factor analysis as described above in this subsection.²¹⁹

Within the proposed statutory change, there is a new pleading requirement for respondents who wish to use the public interest expedited hearing.

If a Respondent wishes to use the Early Investigation Termination Upon Demonstration of Public Interest procedure, in its public interest supplement submitted in conjunction with its answer to the investigation complaint, the Respondent must:

- i. State that the Commission should consider the early termination of the investigation should it choose to initiate the investigation; and
- iii. Particularize which public interest factor or combination thereof from subsection (o)(1)(c); and
- iv. Point to potential pieces of evidence that the Respondent could reasonably use to support the public interest factor(s) particularized in subsection (b) of this provision.²²⁰

With the new ability for respondents to terminate investigations, some may find that abuse of this new procedure would counter the test's objective in more efficient adjudication of investigations. If the respondent succeeds in invoking the new termination procedure, then it will be less than 150 days from the date of filing the complaint to initial determination by the ALJ, which is far less than the typical § 337 investigation timeline of 12-19.7 months.²²¹ Complainants could argue abuse of the test through meritless claims of public interest designed for gumming up the investigation and delaying a just outcome, but this should not be of serious concern. The new pleading standard as discussed in this Note and the Commission Review process when determining whether to institute an

²¹⁹ See *infra* Appendix.

²²⁰ See *infra* Appendix.

²²¹ See *Average Length of Investigations*, *supra* note 23.

investigation will deter frivolous claims of public interest. By having to point to the explicit public interest factor in which the respondent intends to rely on, it puts a heightened standard for respondents to be sure they have a good faith claim to this expedited hearing on public interest. Any failure of the pleading standard means a denial of the expedited hearing on public interest and continuation of a traditional investigation. Additionally, by having other parties and government agencies weigh in on the articles at issue, it is less likely that meritless claim of public interest survives the entire 100-day limited investigation. If the large consensus of submissions to the ALJ are not in favor of termination, the ALJ is in her right to deny the motion to terminate and proceed with a standard § 337 investigation.

Finally, the new definitions for the proposed statutory change. Within the proposed language, there are several terms that may produce some contention, and these definitions are intended to prevent unnecessary litigation over this new test.

Public Interest Definitions:

a. Federal Mandate:

- i. “Any provision in statute or regulation or any Federal court ruling that imposes an enforceable duty upon State, local, or tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.”²²²

b. Public Health Emergency:

- ii. A public health emergency shall maintain the definition contained in the United States Code under 42 U.S.C. § 247d.²²³

c. National Health Initiative:

- iii. A national health initiative is a statement, executive order, or directive by the President, Heads of Executive Departments, or Congress to address a particularized issue in public health.²²⁴

²²² 2 U.S.C. § 1555.

²²³ See 42 U.S.C. § 247d.

²²⁴ See *infra* Appendix.

With two of the three definitions being pulled from other areas of the United States Code, there is either plenty of case law or settled understanding of the terms. The final definition comes from a less official capacity for law and more of a public policy mind.

This Note's proposed statutory framework is a comprehensive procedural and substantive description on how the ALJ of an investigation and the Commission at large can implement. This detailed test will allow a path for respondents at the ITC to end investigations regardless of whether a violation would be found. The test balances the ITC's typical complainant friendly forum with the efficient and expeditious nature of the § 337 investigation. By allowing respondents this off ramp for § 337 investigations, it helps the ITC come back to its original public interest mandate and contributes to the efficiency of the Commission's adjudication of investigations.

B. APPLICATION

Revisiting the small biotechnology company from the beginning of this Note, how would it fare under this proposed public interest regime?

First, the patent holder would file its complaint at the ITC in the hopes of preventing the importation of the biotechnology company's insulin sensor. Upon seeing this complaint in the Federal Register, the respondent company will file its response as any other respondent would and include its public interest supplement. Within this public interest supplement, the respondent should request an expedited hearing solely on public interest and point to the United States Centers for Disease Control's National Diabetes Prevention Program.²²⁵ In compliance with the particularization requirement in proposed section (o)(2), the respondent will articulate that there is a national health initiative to tackle diabetes in the United States.

Additionally, the respondent should point to a substantial detriment to an American Industry as this goes to the diabetes treatment and patient care industries would be directly impacted if an exclusion order is issued. The Commission will take the pleadings from the parties and choose to institute an investigation but find that there is a discrete issue on public interest that would dispose of the entire investigation. Since that is the case, the Commission orders the ALJ presiding over the case to conduct an expedited hearing. The ALJ then orders the parties to brief the initial issues of public interest, with particular emphasis on what government agencies are important to determining the impact

²²⁵ See *About the National Diabetes Prevention Program*, CDC, <https://www.cdc.gov/diabetes-prevention/programs/index.html> [<https://perma.cc/36YS-BPY7>].

a remedial order would have on the public interest. In these briefings, the respondent will submit that the CDC, HHS, and FDA are the most knowledgeable in this investigation. After reading the briefs, the ALJ subpoena's the mentioned agencies for written submissions.

With the ALJ requested briefings, the other agencies' written submissions, and the parties' own evidence, the ALJ will conduct the actual hearing within 100 days. The respondent will show that it is the only product like it in the United States market currently, it is saving lives across the country, and without it, there will be catastrophic effects on the American people. The complainant will attempt to show that there are other alternatives to the respondent's products, but this carries little weight when compared to the overwhelming evidence in favor of the respondent. Having satisfied the clear and convincing evidence standard, the ALJ makes an initial determination terminating the investigation. Holding that the respondent's product absent an investigation on the merits of a violation have a countervailing purpose in the public interest and thus an exclusion order would be improper. The complainant could attempt to appeal to the Commission but is unlikely to be successful given the high evidentiary burden.

Thus, the small biotechnology company can still import the sensors, but it is still open to other litigation forums, such as district court. It should look to licensing the technology from the patent holder to prevent further disputes over the technology.

VI. CONCLUSION

The International Trade Commission has the important responsibility to balance the intellectual property interests of American intellectual property rights with the best interest of the United States and its people. Throughout the history of the Commission, it has strayed away from its original public interest mandate in favor of a more patent enforcement tribunal. The above-mentioned proposed statutory change to the International Trade Commission's organic statute pushes the parties and the Commission to utilize public interest and terminate investigations. This allows the Commission to use the public interest earlier on in the investigation process and dispose of investigation regardless of the merits. By reserving the adjudication on the merits only for the investigations which will not affect public interest, it will allow the ITC and the litigating parties to save time, money, and resources. This narrowly defined test, which is not to be utilized on a whim, would be a vital weapon for respondents to help themselves and protect the American public. The Early Termination of Investigation Through the Demonstration of Public Interest paves the path for the ITC to reignite its public interest mandate and become an even more fair and efficient forum for intellectual property disputes.

Appendix

19 U.S.C. § 1337(o):

1. Early Investigation Termination Upon Demonstration of Public Interest
 - a. "The Commission shall identify, at the beginning of an investigation, whether the investigation presents a dispositive issue [regarding public interest] for an expedited fact finding and an abbreviated hearing limited to that issue, and shall direct the assigned administrative law judge to issue an initial determination on such issue not later than 100 days after the investigation is instituted."²²⁶
 - i. If the Commission finds that an expedited hearing is necessary, the ALJ presiding over the investigation shall take an initial briefing from the parties within 10 days to establish which Executive Agencies shall be subpoenaed to submit a written response as to the effects of remedial order should a violation be found. The ALJ shall set her own briefing schedule and hearing schedule so long as it complies with the 100-day target date.
 - ii. This evidentiary hearing does not allow for evidence on the merits of a violation, but merely to determine whether the Respondent's articles provide a countervailing reason to prevent an investigation on the merits.
 - b. Through the use of subsection (a), if a Respondent can show by clear and convincing that for one of the factors listed in subsection (c) or a combination thereof, the ALJ or upon review of the Commission, can terminate the

²²⁶ H.R. 3535 (This section is to codify the promulgated regulations for dispositive issues that would not have serious effects on the merits. There has been an amendment to the proposed legislative language: by inserting the following language after dispositive issue "regarding public interest.").

investigation in whole or in part with respect to the asserted patents in which the Respondent's alleged violating articles infringe.

- c. The Commission shall expedite the initial determination under subsection (a) if there is one of the following presents:
 - i. A federal mandate governing the articles in question; or
 - ii. A public health emergency or other federally recognized health initiative in which the articles in question are a part of; or
 - iii. A safety protocol in which the articles in question are a part of; or
 - iv. A substantial detriment to an American industry or the American consumer; or
 - v. Those factors enumerated in Section 1337(d)(1).²²⁷
 - d. If the Motion for Early Investigation Termination Upon Demonstration of Public Interest is denied,
 - i. that does not preclude the use of public interest factor analysis for the purposes of tailoring any remedial order the Commission deems appropriate; and
 - ii. that does not preclude the use of public interest factor analysis as described above in this subsection.
2. If a Respondent wishes to use the Early Investigation Termination Upon Demonstration of Public Interest procedure, in its public interest supplement submitted in conjunction with its answer to the investigation complaint, the Respondent must:

²²⁷ See 9 U.S.C. § 1337(d)(1).

- a. State that the Commission should consider the early termination of the investigation should it choose to initiate the investigation; and
- b. Particularize which public interest factor or combination thereof from subsection (o)(1)(c); and
- c. Point to potential pieces of evidence that the Respondent could reasonably use to support the public interest factor(s) particularized in subsection (b) of this provision.

3. Public Interest Definitions:

- a. Federal Mandate:
 - i. "Any provision in statute or regulation or any Federal court ruling that imposes an enforceable duty upon State, local, or tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program."²²⁸
- b. Public Health Emergency:
 - i. A public health emergency shall maintain the definition contained in the United States Code under 42 U.S.C. § 247d.²²⁹
- c. National Health Initiative:
 - i. A national health initiative is a statement, executive order, or directive by the President, Heads of Executive Departments, or Congress to address a particularized issue in public health.

²²⁸ 2 U.S.C. § 1555.

²²⁹ See 42 U.S.C. § 247d.