

## Anti-Competitive Conduct Claims In ITC Section 337 Cases

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Last week in Investigation No. 337-TA-1002 (certain carbon and alloy steel products); the U.S. International Trade Commission instituted an investigation of imported steel products from China. The investigation will include trade secret and antitrust claims. This marks a historic implementation, because antitrust claims are not typically utilized as grounds for an ITC investigation of unfair importation practices. And the ITC has only once found an antitrust violation. The U.S. Steel case could be pioneering in fleshing out the grounds for antitrust cases before the ITC.



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Under Section 337 of the Tariff Act of 1930, the ITC has authority to investigate unfair acts including the importation of articles that infringe a patent, trademark or copyright.[1] It also may investigate unfair acts in the form of trade secret misappropriation and other anti-competitive conduct[2] (noting that the ITC's authority under Section 337 is broader than patent infringement matters). If the ITC finds that articles are unfairly imported on any of the statutory-available bases, it can issue a ban on their importation.[3]

Notwithstanding the breadth of Section 337 causes of action, a majority of ITC complainants (and the resulting investigation) rely on patent infringement as the "unfair" act of importation.[4] According to one measure, of 90 Section 337 investigations in 2013-2014, 85 included assertions that the imported articles infringed a patent.[5] Because of the volume of intellectual-property related matters that come before it, the ITC and its staff are generally recognized as having a depth of expertise in the arena. There have also been a few high profile trade secrets and trademark investigations as of late.

U.S. Steel's complaint is thus unique. It alleges unfair acts of importation by a variety of Chinese entities not only in misappropriation of trade secrets and false designation of origin, but also anti-competitive price fixing. The complaint stands out because of its lack of any patent assertion and its assertion of anti-competitive price fixing claims.

Trade secret claims are less common than patent claims in the ITC, but have been more common in recent years, likely as a result of complainant-friendly developments at the Federal Circuit on what a complainant must demonstrate. [6] There have also been a number of unfair trade practices claims (generally sounding in the Lanham Act), in which complainants assert that respondents have engaged in unfair, deceptive or misleading claims about imported products, including their geographic designation of origin.[7]

Antitrust claims, however, are relatively uncommon. The only time the ITC has ever found a Section 337 violation for an antitrust cause of action was in *Certain Welded Steel Pipe & Tube*, No. 337-TA-29, from 1978. The determination was subsequently vetoed by the president of the United States. Nonetheless, the cause of action remains available; it is an option for aggrieved plaintiffs interested in pursuing an importation ban. U.S. Steel’s complaint, and the ITC’s institution of investigation, resurrects its use.

But what must a complainant prove? The statutory language of Section 337’s unfair competition provision does not specifically define what constitutes an unfair act. It is generally recognized that for a variety of reasons the violation should overlap with the Sherman Act. See *Schaumburg* at §3(D). Indeed, the U.S. Steel complaint specifically cites the Sherman Act as a basis for identifying the anti-competitive conduct. But the ITC has noted that it does not adopt “all analogous case law” because of differences in the respective statutes.[8]

Strategically, a party harmed by an importer’s anti-competitive behavior may want to think about the benefits of a Section 337 action. The ITC’s relatively quick timetable for resolving matters can create pressure on respondents. There used to be a statutory requirement providing a number of months, which has now been changed to “the earliest practical time.”[9] Even without a specific timetable, the Commission tends to schedule investigations to be completed in about 16 months. The ITC’s schedule is inordinately quick compared to the typical course of a trade secrets or antitrust case in district court. While the process is intense, it is also efficient, and is a cost-effective mechanism for addressing issues that could take many years to resolve in district court. In addition, Section 337 provides advantages in terms of the ITC’s scope of jurisdiction, in the sophistication of the administrative law judges and staff, in the availability of preliminary remedies and in the ability to obtain an exclusion order for the imported goods (either limited to the respondents or generally applicable to the goods at issue).

Practitioners with a depth of experience in not only ITC investigations but also intellectual property, unfair trade practices and unfair competition and antitrust, will be watching the U.S. Steel Investigation with interest. It could prove informative for cases that involve some combination of overlapping intellectual property, unfair trade practices and antitrust claims. It highlights the attractiveness of leveraging Section 337 in addressing antitrust issues, particularly those that intersect with intellectual property disputes. It could encourage more complainants to bring antitrust claims to the ITC. And it could result in the second time the ITC has ever found an antitrust violation.

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[1] 19 U.S.C. §1337(a)(1)(B).

[2] 19 U.S.C. §1337(a)(1)(A); e.g., *Corning Glass Works v. U.S. International Trade Commission*, 799 F.2d 1559, 1567 (Fed Cir. 1986)

[3] 19 U.S.C. §1337(d).

[4] 19 U.S.C. §1337(a)(1)(B)

[5] Tom M. Schaumberg, *A Lawyer's Guide to Section 337 Investigations Before the U.S. International Trade Commission*, §3(A), 3d Ed. 2016.

[6] *Id.*, at §3(d)(4); *TianRui Group Co. Ltd. v. U.S. International Trade Commission*, 661 F.3d 1332, 1324-28, 1336-37 (Fed. Cir 2011).

[7] *Id.*

[8] *Certain Cast-Iron Stoves*, Investigation No. 337-TA-69, Opinion of the Commission, at 6 (1980).

[9] 19 U.S.C. §1337(b)(1).

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