ITC Section 337 Investigations: The Injury Requirement

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A Practice Note discussing the injury requirement for Section 337 investigations at the US International Trade Commission (ITC) that involve causes of action other than infringement of federal intellectual property rights. This Note identifies when the injury requirement applies and how to plead and prove an actual or threatened injury to a US industry from unfairly imported goods.

Most cases before the US International Trade Commission (ITC or Commission) under Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) concern infringement of US patents. However, the ITC investigates many other forms of unfair competition under its Section 337 authority. Although all Section 337 complainants must demonstrate one or more imported goods, an industry in the US (a US or domestic industry), and an unfair act, complainants asserting causes of action other than federal intellectual property (IP) infringement may also need to establish a less-understood, fourth element: an actual or threatened **injury** to the US industry.

This Note discusses how to:

- Identify the circumstances requiring proof of injury.
- Comply with the pleading requirements for non-federal IP causes of action.
- Prove the required elements of an actual or threatened injury to a US industry and a nexus between that injury and the alleged unfair act.

LEGAL FRAMEWORK

Most Section 337 investigations are based on allegations of patent or other federally-protected IP infringement. However, the statute also applies to other unfair trade practices, some of which may require proof of an actual or threatened injury to a US industry. Before litigating a Section 337 investigation that is not based on federal IP, counsel should understand:

- The types of unfair trade practices prohibited by the statute (see Unfair Trade Practices Prohibited by Section 337).
- The categories of investigation requiring proof of injury (see Injury Requirement by Investigation Type).

UNFAIR TRADE PRACTICES PROHIBITED BY SECTION 337

Section 337 prohibits two forms of unfair trade practices:

- Unfair methods of competition and unfair acts in the importation of articles the threat or effect of which is to:
  - destroy or substantially injure a US industry;
  - prevent the establishment of a US industry; or
  - restrain or monopolize trade and commerce in the US.

  (19 U.S.C. § 1337(a)(1)(A).)
- Importation of articles that infringe a federally registered US:
  - patent;
  - copyright;
  - trademark;
  - semiconductor mask work; or
  - boat hull design.

(19 U.S.C. § 1337(a)(1)(B)-(E).)

Unlike Section 337(a)(1)(B)-(E), which expressly identifies each type of IP infringement that qualifies as an unfair practice under the statute (often referred to as "statutory IP"), Section 337(a)(1)(A) does not specify the types of unfair acts or methods of competition that it covers. Rather, courts interpret "unfair methods of competition" and "unfair act" in Section 337(a)(1)(A) as "broad and inclusive ... and intended to allow [the ITC] wide discretion in determining what practices are to be regarded as unfair" (*In re W.C. Von Clemm*, 229 F.2d 441, 444 (C.C.P.A. 1955)).

The ITC institutes investigations under Section 337(a)(1)(A) covering a wide range of alleged unfair acts, including:

- Trade secret misappropriation.
- False advertising.

- Trade dress infringement.
- Common law trademark infringement.
- False country of origin designation.
- Tortious interference with contract or prospective economic advantage.
- Digital Millennium Copyright Act violations.
- Antitrust violations.

Although complainants have successfully based Section 337 complaints on the acts listed above, the potential practices that may qualify as unfair acts under Section 337(a)(1)(A) are not limited to the listed examples. For example, it has been suggested that the ITC may use Section 337(a)(1)(A) to investigate imported products that allegedly violate:

- Child labor laws.
- Environmental standards.
- Product safety standards.
- Conflict minerals regulations.

All Section 337 investigations are guided by the substantive federal law that governs the underlying alleged unfair act (*In re Certain Carbon and Alloy Steel Prods.*, Inv. No. 337-TA-1002, Comm'n. Op., 2018 WL 7572059, at *7 (Mar. 19, 2018); see also *Tianrui Grp. Co. v. Int'l Trade Comm'n*, 661 F.3d 1322, 1327 (Fed. Cir. 2011) ("We hold that a single federal standard, rather than the law of a particular state, should determine what constitutes a misappropriation of trade secrets sufficient to establish an 'unfair method of competition' under section 337."). For example, when the ITC is asked to address an allegation of patent infringement in the importation of goods under section 337, it follows substantive US patent law (see Practice Note, ITC Section 337 Patent Investigations: Overview: Differences from District Court Patent Litigation (2-505-6571)). As a result, a complainant's counsel should carefully consider the applicable substantive law before asserting that a particular activity supports a violation finding under Section 337.

INJURY REQUIREMENT BY INVESTIGATION TYPE

ITC Section 337 investigations can be divided into three categories. These are investigations that involve:

- Federal IP rights (Investigations Involving Federal IP Rights).
- Unfair acts falling exclusively under Section 337(a)(1)(A) (Investigations Involving an Unfair Act Under Section 337(a)(1)(A)).
- Both federal IP rights and unfair acts under Section 337(a)(1)(A) (Investigations Involving Multiple Types of Unfair Acts).

Only the latter two investigation types may require proof of injury to the domestic industry.

Investigations Involving Federal IP Rights

Complainants alleging Section 337 violations based on infringement of any of the federal IP rights listed in Section 337(a)(1)(B)-(E) must demonstrate that there is:

- Infringement of the IP right.
- A US industry relating to articles protected by the IP right that:
  - exists at the time the complaint is filed; or
  - is in the process of being established.

(19 U.S.C. § 1337(a)(2)).

Congress exempted these types of unfair acts from the injury requirement by amendments passed in 1988. Section 337 complainants proceeding under these sections therefore are not required to prove injury to the US industry. Injury is presumed from a showing that the imported products infringe one of the listed IP rights.

Despite the amendments, the ITC continues to rely on pre-1988 appellate and Commission decisions interpreting the injury requirement in patent and other federal IP-based investigations for investigations involving other types of alleged unfair acts. Although the 1988 amendments substituted the words "threat [to injure]" for the former "tendency [to injure]," the ITC treats the concepts as substantively identical.

Investigations Involving an Unfair Act Under Section 337(a)(1)(A)

If a complainant is not alleging infringement of one of the federal IP rights that is expressly listed in 19 U.S.C. § 1337(a)(1)(B)-(E), then the complaint must be brought under 19 U.S.C. § 1337(a)(1)(A)(i)-(iii).

Most complaints under Section 337(a)(1)(A) are brought under the first subsection, Section 337(a)(1)(A)(i). By its terms, that section prohibits import activity the threat or effect of which is to "destroy or substantially injure a US industry." Therefore, a complainant must prove injury to establish a violation of Section 337 under this sub-section.

An ITC complainant may also base a Section 337 complaint on import activity that either:

- Prevents the establishment of a US industry (19 U.S.C. § 1337(a)(1)(A)(ii)).
- Restrains or monopolizes trade and commerce in the US (19 U.S.C. § 1337(a)(1)(A)(iii)).

Injury to a domestic industry is not a required element of a complaint filed under these sections. This is because harm under:

- Subsection (ii) is defined by the unfair act's outcome (i.e., preventing the establishment of a US industry) (*In re Certain Electric Power Tools*, Inv. No. 337-TA-284, ID, 1989 WL 608746, at *104 (June 2, 1989)).
- Subsection (iii) occurs from an actual or threatened monopolization "irrespective of whether there is injury" to a US industry (see *Carbon and Alloy Steel Products*, 2018 WL 7572059, at *11 & n.13).

Complainants, however, rarely base Section 337 complaints exclusively on these grounds.

Investigations Involving Multiple Types of Unfair Acts

A complainant may also seek relief in one investigation from unfair acts and unfair methods of competition under both 19 U.S.C. § 1337(a)(1)(A) and (a)(1)(B)-(E). For example, a complainant may allege both patent infringement and trade secret misappropriation (see *In re Certain Crawler Cranes and Components Thereof*, Inv. No. 337-TA-887, Notice, 2013 WL 12313393 (July 11, 2013)). Complainants may also combine registered trademark infringement allegations with trade dress infringement allegations or common law trademark infringement (see, for example, *In re Certain Ink Markers and Packaging Thereof*, Inv. No. 337-TA-522, Notice, 2004 WL 7340486, (Aug. 18, 2004)).

For purposes of both the domestic industry and injury requirements, the ITC separately analyzes each alleged unfair act. Therefore, combining statutory (federal) IP infringement allegations with other allegations does not relieve the complainant of the need to prove injury regarding each non-statutory IP cause of action. As a result, an ITC complainant's counsel should carefully consider the additional burden posed by the injury requirement when determining whether to assert a non-statutory IP allegation in the complaint.

PLEADING INJURY

The ITC is a fact-pleading jurisdiction. A Section 337 complaint must provide a detailed factual basis for each required element of each allegation (19 C.F.R. § 210.12).

DOMESTIC INDUSTRY

The ITC Rules of Practice and Procedure (ITC Rules) (19 C.F.R., pts. 201 and 210) provide specific instructions on what complaints alleging a violation under 19 U.S.C. § 1337(a)(1)(A)(i) must contain concerning the **domestic industry** requirement, including a detailed description of:

- Whether:
  - a domestic industry currently exists; or
  - there is a significant likelihood that a domestic industry will be established.
- How the domestic industry is affected, including the relevant operations of any licensees.
- The complainant's business and its interests in the domestic industry.

(19 C.F.R. § 210.12(a)(6)(ii), (iii) and § 210.12(a)(7).)

INJURY

The ITC Rules specify what complaints alleging a violation under 19 U.S.C. § 1337(a)(1)(A)(i) must include concerning the **injury** requirement, including:

- Whether the injury is actual or threatened.
- Corroborating data showing substantial injury or threat of substantial injury to the domestic industry, including for each involved domestic article:
  - the volume and trend of production, sales, and inventories;
  - the facilities and number and type of workers employed in its production;
  - profit-and-loss information covering overall operations and operations;
  - pricing information;
  - volume and sales of imports (when available); and
  - any other pertinent data.

(19 C.F.R. § 210.12(a)(8).)

Although not specified in the ITC Rules, if the predicate unfair act requires a particular type of harm to establish a claim under federal law, the complainant must allege and demonstrate that harm in addition to the actual or threatened injury required by Section 337(a)(1)(A)(i). For example, if the alleged unfair act is an antitrust violation, the complaint must include allegations of an antitrust injury. Antitrust injury is a specific harm resulting from a competition-reducing aspect or effect of the respondent's conduct (*Carbon and Alloy Steel Products*, 2018 WL 7572059, at *16 (Mar. 19, 2018)). If the antitrust allegation is based on a respondent's pricing practices, it must also include the two elements of predatory pricing:

- The product is priced below an appropriate measure of costs (below-cost pricing).
- The respondent is likely to recoup its investment (recoupment).

(*Id.* at *11.)

ITC complainants typically include a declaration from a corporate representative that describes the alleged US industry and the nature of the complainant's investments and activities relating to it (see Standard Document, ITC Section 337 Investigations: Complaint: Drafting Note: Complainant Satisfies the Domestic Industry Requirement (w-001-1059)). ITC complainants alleging unfair acts under Section 337(a)(1)(A)(i) should also describe the alleged injury or threatened injury in the same or a separate declaration, depending on the declarant's knowledge.

PROVING INJURY

To satisfy the injury requirement, a Section 337 complainant must:

- Demonstrate that a US industry exists or is being established (see The Domestic Industry).
- Establish that the US industry is:
  - suffering present injury from the accused imports (see Actual Injury); or
  - threatened with probable injury (see Threat of Injury).
- Show a nexus between the alleged unfair act and the alleged injury.

Complainants typically rely on both fact and expert testimony to demonstrate the existence of a US industry and actual or threatened injury.

THE DOMESTIC INDUSTRY

Defining the Scope of the Domestic Industry Affected by the Accused Imports

A complainant seeking to establish injury must first define the relevant US industry that it alleges is affected by the unfair trade practices. When determining the domestic industry under 19 U.S.C. § 1337(a)(1)(A)(i), the ITC considers:

- The facts specific to the investigation, including the realities of the marketplace (see *In re Certain Batteries & Electrochemical Devices Containing Composite Separators*, Inv. No. 337-TA-1087, Notice, 2018 WL 4331965, at *2 (Sept. 7, 2018)).
- Whether the industry is within the scope of the investigation as defined by the Notice of Investigation (NOI).

The scope of the investigation may sometimes broaden the domestic industry (see, for example, *In re Certain Rubber Resins and Processes for Mfg. Same*, Inv. No. 337-TA-849, ID, 2013 WL 4495127, at *223 (June 17, 2013), affirmed in relevant part, Comm'n Op., 2014 WL 7497801 (Feb. 26, 2014) (determining that the relevant domestic industry was not limited to the "tackifier resins" in the accused imports but also included "rubber resins")).

The industry does not have to practice any asserted non-statutory IP right. For investigations involving federal IP infringement, the statute limits the domestic industry's scope to "articles protected by" the asserted intellectual property right (19 U.S.C. § 1337(a)(2)). For example, if the alleged unfair act is patent infringement, the domestic industry must relate to products that practice a claim of the asserted patent. This requirement is known as the technical prong of the domestic industry requirement (see Practice Note, ITC Section 337 Investigations: Pre-Suit Considerations: Domestic Industry (4-564-7945)).

For investigations brought under 19 U.S.C. § 1337(a)(1)(A), in contrast, there is no technical prong requirement (*TianRui Grp. Co. Ltd. v. Int'l Trade Comm'n*, 661 F.3d 1322, 1337 (Fed. Cir. 2011)). The complainant must instead establish only that:

- A US industry exists or is being established.
- There is an actual or threatened injury to the industry.
- It made a substantial investment in the US industry (see Identifying the Required Economic Investments).

(*Ink Markers*, Inv. No. 337-TA-522, Order No. 30, 2005 WL 6964314, at *29-31 adopted by Notice, 2007 WL 4861333 (Dec. 3, 2007).)

How the complainant defines the domestic industry may affect other aspects of the case. For example, the ITC may not find an injury if the domestic industry products:

- Do not compete with the accused imports.
- Compete in a different market segment than the accused imports.

(*In re Certain Prods. with Gremlins Character Depictions*, Inv. No. 337-TA-201, Comm'n Op., 1986 WL 1369558, at *9-12 (Jan. 16, 1986); *In re Certain Rotary Wheel Printing Sys.*, Inv. No. 337-TA-185, Comm'n Op., at *31-33, 1986 WL 1369559 (Aug. 12, 1985).)

A complainant's counsel therefore should carefully consider how to best define the domestic industry so as to align with the evidence it presents on the economic investments establishing the existence of an industry (see Identifying the Required Economic Investments) and on the injury to that industry (see Actual Injury and Threat of Injury).

Identifying the Required Economic Investments

Section 337(a)(3) expressly lists the economic requirements for establishing that a US industry exists in an investigation involving any of the federal IP rights listed in Section 337(a)(1)(B)-(E). The complainant must establish that it or its licensee has made a significant US investment in one or more of the following:

- Plant and equipment.
- Labor or capital.
- Exploiting the IP right, including through:
  - research and development;
  - engineering; or
  - licensing.

(19 U.S.C. § 1337(a)(3)(A)-(C).)

The investments' significance must be measured on a quantitative, not qualitative, basis (*Lelo Inc. v. Int'l Trade Comm'n*, 786 F.3d 879, 883 (Fed. Cir. 2015)). For more information on Section 337's domestic industry requirement, see Practice Note, ITC Section 337 Investigations: Pre-Suit Considerations: Domestic Industry (4-564-7945).

Section 337 does not specify any criteria for establishing that an industry exists when non-statutory unfair acts are the basis for investigation. However, the ITC often considers the same categories of investments listed in Section 337(a)(3)(A)-(C) when determining whether there is a domestic industry under Section 337(a)(1)(A). In particular, qualified investments are not limited to manufacturing investments but may include other investments in plant, equipment, labor, or capital (see *Crawler Cranes*, Order No. 17, 2014 WL 644479, at *3 (Feb. 12, 2014), unreviewed in relevant part, 2014 WL 12778878 (Mar. 19, 2014)). Counsel should therefore go about proving the required economic investments in the same way as it does in an investigation involving federal IP rights.

Considering Overlapping Industries in Mixed Investigations

Depending on the nature of the alleged unfair acts and the types of imports at issue, the Commission may determine that there are separate domestic industries for each alleged unfair act. In those cases, the complainant must demonstrate actual or threatened injury to each separately-defined industry. However, the Commission more commonly finds that the potential domestic industries overlap, resulting in only one domestic industry for which the complainant must demonstrate injury.

When determining whether the alleged industry consists of multiple, separate industries or a single industry, the Commission considers several factors, including whether:

- The same facilities were used to manufacture complainant's products.
- There was overlap in the investments made to exploit any asserted IP.
- All of complainant's products use any asserted IP.

(See *Ink Markers*, 2005 WL 6964314, at *30 (July 25, 2005) (unfair acts included trade dress and registered trademark infringement); *In re Certain Woodworking Machines*, Inv. No. 337-TA-174, Comm'n Op., 1987 WL 1564200, at *57 (June 18, 1985) (unfair acts included passing off and patent and trademark infringement).)

ACTUAL INJURY

Once the relevant domestic industry is defined, the complainant must demonstrate that the effect of the unfair act is to "destroy or substantially injure" the domestic industry. Because Section 337 covers a wide variety of unfair trade practices, there is no single definition of injury that applies in every case (*Textron, Inc. v. Int'l Trade Comm'n*, 753 F.2d 1019 (Fed. Cir. 1985)). As a result, proving injury is a fact-intensive task that depends on the nature and context of the complainant's allegations.

The Commission considers a wide range of factors when assessing whether the unfair act is substantially injuring the domestic industry, including:

- Import volumes and the degree of their US market penetration.
- Lost sales.
- Underselling, meaning selling at a lower price than the complainant.
- Reductions in the complainant's, production profits or employment levels.

(*Railway Wheels*, 2009 WL 4261206, at *32, citing *Certain Electric Power Tools, Battery Cartridges, and Battery Chargers*, Inv. No. 337-TA-284, USITC Pub. 2389, ID at 246 (June 1991).)

Other factors, such as lost royalties and reputational harm, may be relevant depending on the type of industry and the nature of the unfair act. Therefore, complainant's counsel should tailor evidence and arguments on injury to fit the facts of the case.

The Commission also considers whether the accused imports represent a significant:

- Share of the US market.
- Amount of sales.

(*Corning Glass Works v. Int'l Trade Comm'n*, 799 F.2d 1559 (Fed. Cir. 1986).)

In evaluating whether any injury is substantial, the Commission applies these criteria in the context of the marketplace realities for the imports in question. For example, if the accused product is complex and costly then the lease of only one product may be sufficient to establish substantial injury (*Crawler Cranes*, Order No. 17, 2014 WL 644479, at *4 (Feb. 12, 2014), unreviewed in relevant part, 2014 WL 12778878 (Mar. 19, 2014) (heavy cranes used for major construction)). Conversely, several million dollars in lost sales may be insubstantial if representing a small percentage of total US sales (*Corning*, 799 F.2d at 1568; see also *In re Certain Indus. Automation Sys.*, Inv. No. 337-TA-1074, ID, 2018 WL 6119536, at *36 (Oct. 23, 2018), unreviewed, 2018 WL 6809282 (Dec. 28, 2018) (in case involving programmable controllers, visualization hardware, and other industrial devices, no injury from alleged tortious interference where the imports were a small fraction of complainant's sales)). For additional discussion of ITC and court precedent relating to substantial injury, see Box, Key Precedents Regarding Substantial Injury.

THREAT OF INJURY

A Section 337 complainant may allege a threat of substantial injury in addition or in the alternative to an actual injury.

To establish the required threat, a complainant must present evidence of circumstances from which probable future injury may be inferred (*Corning*, 799 F.2d at 1568). The threat must be based on reliable evidence, not speculation (see *In re Certain Activity Tracking Devices, Sys.*, Inv. No. 337-TA-963, ID, 2016 WL 11596099, at *41 (Aug. 23, 2016) (rejecting "conclusory" expert testimony), unreviewed, 2016 WL 10688980 (Oct. 20, 2016)). A "substantial" threat of injury is a threat to the US industry's survival. *Von Clemm*, 229 F.2d 441; see also *In re Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Prod. of Paper*, Inv. 337-TA-82, 1981 WL 50521, at *29-30 (April 1, 1981) (Commissioner Stern, dissenting).

To evaluate whether a threat of injury exists, the ITC considers:

- The extent of foreign manufacturing capacity.
- The imported product's ability to undersell the domestic product.
- Lower foreign production costs and prices.

(*Rubber Resins*, 2013 WL 4495127, at *217.)

- The respondent's intention to penetrate the US market, including:
  - efforts to certify its products for US sale;
  - attendance at US trade shows;
  - efforts to target, contact, or market to complainant's customers; and
  - aggressive promotional campaigns.

(See *Railway Wheels*, 2009 WL 4261206, at *33-34; *In re Certain Air Impact Wrenches*, Inv. No. 337-TA-311, ID, 1991 WL 12016661, at *76-78 (May 7, 1991), unreviewed, 1991 WL 12016661, at *1 (June 18, 1991).)

By contrast to actual injury claims, the respondent's importation of a comparatively small volume of accused products does not necessarily resolve a threat claim in the respondent's favor. This is because the ITC gives more weight in threat cases to other evidence, including:

- The respondent's production capacity.
- The inferior quality of the imported products, if applicable.

(See *Air Impact Wrenches*, 1991 WL 12016661, at *76-77.)

PROVING CAUSATION

It is not sufficient to show evidence of actual or threatened injury, such as underselling, to establish a violation of Section 337. The complainant must also demonstrate that there is a nexus between the unfair act and the alleged injury.

To prove the required causal connection, the complainant should present evidence linking the unfair acts to the alleged injury. The complainant's expert and fact witnesses typically identify the basis for concluding that the unfair acts caused the injury when explaining the actual or threatened injury that the complainant is suffering or expects to suffer.

However, the ITC may find the unfair act's link to the alleged injury outweighed or severed by other factors, including:

- Injury from other domestic competitors.
- Decline in overall industry demand.
- Modifications to the complainant's operations.
- Intervening events, such as changes in:
  - market conditions; or
  - consumer preferences.

(See *In re Certain Vertical Milling Machines*, Inv. No. 337-TA-133, Comm'n Op., 1984 WL 63738, at *19-20 (Mar. 22, 1984); *In re Certain Large Video Matrix Display Sys.*, Inv. No 337-TA-75, Comm'n Op., 1985 WL 1172788, at *14 (June 19, 1981); *In re Expanded, Unsintered Polytetrafluoroethylene in Tape Form*, Inv. No. 337-TA-4, Comm'n Op., 1976 WL 41436, at *9 (Apr. 3, 1976).)

TRYING THE INJURY CASE

The complainant bears the burden of proving that it suffered or faces the threat of a material injury resulting from the alleged unfair act. Fact and expert testimony on all issues, including injury, may be presented at the evidentiary hearing using either witness statements or live direct testimony depending on the preference of the Administrative Law Judge (ALJ) presiding over the evidentiary hearing. If the ALJ requires direct testimony in the form of written witness statements, the witness is then subject to live cross examination by the opposing party and, if participating, an attorney assigned by the ITC's Office of Unfair Import Investigations (OUII).

The complainant typically presents the factual basis for its injury allegations, including testimony and documentary evidence, from the

testimony of designated corporate representatives or from deposition designations when a witness is not available (19 C.F.R. § 210.28(h)).

Although not required, it is generally advisable for the complainant's counsel to retain an economic expert to testify regarding:

- The existence and nature of the domestic industry.
- The extent of the alleged injury.

(*In re Certain Television Sets, Television Receivers, Television Tuners, and Components Thereof*, Inv. No. 337-TA-910, ID, 2015 WL 13818922, at *116 n.32 (Feb. 27, 2015) (noting the value of a "qualified, reasonably objective economic expert" on economic issues)).

In preparing for the evidentiary hearing, counsel should carefully review the presiding ALJ's Ground Rules to comply with any unique requirements regarding the order of witnesses and other procedural aspects of the evidentiary hearing. Some ALJs also have different rules for allegations involving federal IP causes of action as compared to allegations under Section 337(a)(1)(A).

KEY PRECEDENTS REGARDING SUBSTANTIAL INJURY

The following is a summary of key precedents regarding the meaning of "substantial" injury:

- In *Certain Large Video Matrix Display Sys.*, Inv. No. 337-TA-75, the complainant patent owner was a manufacturer of large video displays, such as scoreboards for professional sports venues. Respondents were a Swiss manufacturer of large video displays and the Milwaukee Brewers Baseball Club, Inc. Although there was only one sale at issue, the Commission concluded that the domestic industry suffered substantial injury. Due to the nature of the product, "the loss of a single sale in this case caused sufficient injury to meet the section 337 standard" (Comm'n Op., 1985 WL 1172788, at *13 (June 19, 1981)).
- In *Corning Glass Works v. Int'l Trade Comm'n*, 799 F.2d 1559 (Fed. Cir. 1986), affirming *Certain Optical Waveguide Fiber*, Inv. No. 337-TA-189, the complainant patent owner was a manufacturer of optical waveguide fibers for use in telecommunications and other applications. The respondent was a Japanese optical fiber manufacturer. Although the respondent sold several million dollars of the accused product in the US, the Federal Circuit affirmed the ITC's rationale finding those sales insubstantial in comparison with "the total sales of fiber in the U.S. market, as well as with the volume of sales of Corning and its domestic licensees" (799 F.2d at 126-27).
- In *Certain Cast Steel Railway Wheels, Certain Processes for Mfg. or Relating to Same*, Inv. No. 337-TA-655, affirmed by *TianRui Grp. Co. Ltd. v. Int'l Trade Comm'n*, 661 F.3d 1322, 1337 (Fed. Cir. 2011), the complainant trade secret owner was a manufacturer of cast steel railway wheels. The respondents were a Chinese steel railway wheel manufacturer and its joint venture partner and distributor. In finding substantial injury, the ITC noted that complainant and respondent were the only entities selling the products at issue in the US and that there was "no known customer preference, or functional difference" between their products (ID, 2009 WL 4261206, at *33 (Oct. 16, 2009)).
- In *Certain Crawler Cranes and Components Thereof*, Inv. No. 337-TA-887, the complainant patent and trade secret owner was a Wisconsin manufacturer of heavy cranes. The respondents were a Chinese crane manufacturer and its US subsidiary. The accused products, cranes used in major construction projects, were so complex and costly and the market one in which "very few sales are made annually" that the lease of one accused product was sufficient to establish substantial injury (2014 WL 644479, at *4 (Feb. 12, 2014)).

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