

# THE GLOBAL TRADE LAW JOURNAL

Volume 3, Number 6

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# Why the International Trade Commission Might Be the Best Forum to Enforce Your Trade Secrets

Rhonda Schmidtlein, Derek Gosma, and Salus Kim\*

*In this article, the authors discuss Section 337 investigations at the International Trade Commission as an underutilized yet strategic enforcement tool for cross-border disputes in the context of trade secret misappropriation.*

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Trade secrets sit at the intersection of innovation and competition, protecting the proprietary know-how that allows companies to differentiate themselves in crowded markets. When those secrets are misappropriated, the resulting harm can be immediate and irreversible—making effective and timely enforcement of trade secret rights an essential component of any sophisticated litigation strategy. While federal and state trade secret laws are robust enforcement tools, they are limited in some critical respects—particularly when misappropriation occurs overseas or when a fast injunction is needed.<sup>1</sup>

For disputes involving imported products, the U.S. International Trade Commission (ITC) offers a powerful, and often overlooked, forum for policing such misconduct, including when misappropriation occurs overseas. Section 337 of the Tariff Act of 1930 empowers the ITC to investigate unfair acts involving imported goods and to issue injunctions that ban the importation of subject goods. This significant remedy, combined with the ITC's accelerated schedules and experienced judges and staff, has made the ITC a favored venue for high-stakes intellectual property disputes, particularly patent, trademark, and copyright cases brought under Section 337(a)(1)(B). Since 2016, the ITC has resolved hundreds of these investigations, with an average time from complaint to final disposition of approximately 17 months.<sup>2</sup>

By contrast, Section 337(a)(1)(A)—which authorizes the ITC to adjudicate other forms of unfair competition, including trade secret misappropriation—has been far less frequently invoked. Although

the ITC has seen hundreds of patent infringement cases since 2016, complainants have brought trade secret misappropriation claims across only a handful of cases in that same timeframe.<sup>3</sup> This disparity suggests that the ITC remains significantly underutilized as a forum for trade secret disputes, notwithstanding the procedural and remedial advantages it offers for precisely that category of harm.

As detailed below, ITC Section 337 investigations have unique procedural and substantive advantages that companies can wield to protect their trade secrets.

## **Enforcement Challenges in Federal and State Court**

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For decades, trade secret enforcement in the United States was largely a matter of state law—rooted in common-law principles and, in most jurisdictions, later codified through some version of the Uniform Trade Secrets Act. That changed in 2016, when Congress enacted the Defend Trade Secrets Act (DTSA), creating a federal civil cause of action for trade secret misappropriation tied to interstate or foreign commerce. As predicted at the time,<sup>4</sup> trade secret disputes have increasingly been litigated in federal district courts, with multiple commentators reporting sustained growth in federal filings since the law was enacted.<sup>5</sup>

But the DTSA, while powerful, can be harder to deploy in cross-border misappropriation cases—especially when the key acts of acquisition, disclosure, or use occur overseas. In such cases, district court remedies may be uncertain in scope or difficult to enforce quickly. The ITC can offer a more direct, U.S.-focused remedy by targeting the importation of products tied to the misappropriation.

For example, consider a U.S. employee who leaves for a foreign competitor and then relocates abroad. After the move, the employee discloses the company's trade secrets to the competitor, which uses them overseas to improve a competing product that is later sold in the United States. Depending on the facts, a DTSA claim may face threshold challenges because the critical disclosure or use occurred outside the United States. And even if the company secures an injunction and damages in district court, enforcement may be slow or impractical where the foreign competitor has no U.S. presence.

As another example, imagine a U.S. company shares technical know-how with an overseas contract manufacturer, supplier,

or joint venture partner for a limited purpose. The relationship later ends, requiring the foreign partner to discontinue using the trade secrets. In reality, the overseas partner continues using the know-how abroad to develop or manufacture competing goods, begins importing those goods into the United States, and the misappropriation only comes to light well after importation has started. In addition to the cross-border enforcement concerns in the first example, the U.S. company may also face a statute-of-limitations issue if a court concludes the misappropriation should have been discovered earlier. The DTSA's three-year limitations period runs from when misappropriation is or should have been discovered with reasonable diligence. This contrasts with the ITC, where there is no strict time bar imposed on bringing a trade secret misappropriation claim.

## Benefits of ITC Trade Secret Litigation

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In the scenarios above—and in many others involving imported products—the ITC can be a particularly effective forum for trade secret enforcement for at least five separate reasons: jurisdiction over the imported articles, powerful prospective remedies enforced at the border, speed, institutional expertise, and finality.

### Authority Over Imported Articles

Unlike federal district courts, which generally require personal jurisdiction over defendants for litigation to proceed, ITC investigations under Section 337 are aimed at unfair acts in import trade and operate against *the imported articles themselves*, not the manufacturing or importing party. This difference matters in the types of cross-border trade secret cases discussed above: even if key conduct occurred abroad or the principal actor is outside the United States, the ITC can still provide meaningful relief because its authority targets the importation of the resulting products.

### Powerful, Practical Remedies

As discussed above, Section 337 grants the ITC authority to enjoin unfair acts in trade. Upon finding a violation of Section

337 based on trade secret misappropriation, the ITC may issue an exclusion order banning the importation of all goods resulting from the misappropriated trade secrets.<sup>6</sup> The ITC can (and typically does) also issue cease and desist orders to prohibit the sale of subject goods that are already within the United States (including those held by distributors or other agents of the misappropriating party).<sup>7</sup> Although money damages are not available, the expansive reach of ITC exclusion orders can create tremendous leverage that can help resolve commercial disputes and in some cases even prevent the competitive harm to begin with.

## **Relative Speed**

Section 337 investigations run on a comparatively compressed schedule, with a typical path from complaint to “final determination” measured in months rather than years. Once a complaint is filed, the ITC typically institutes an investigation and determines whether to delegate fact-finding on public interest issues to an administrative law judge (ALJ) within 30 days. Cases immediately proceed to discovery and then an evidentiary hearing, with a preliminary “initial determination” by the ALJ on the merits within 12-13 months. The ITC can (and often does) review the ALJ’s findings, and issues its final determination (along with any exclusionary orders) within 16-17 months. That speed matters in trade secret cases involving imports, where delay can translate into continuing market displacement.

## **Institutional Expertise**

The ITC’s ALJs and staff also see Section 337 matters routinely—in fact, the “primary role” of the ALJs is to conduct the trial phase of Section 337 investigations.<sup>8</sup> This expertise reduces the “learning curve” that can slow complex trade secret disputes in generalist courts. Furthermore, every ALJ either had technical depth and intellectual property specialization prior to becoming an ITC ALJ, or has gained such experience during a long tenure on the bench.<sup>9</sup> And several have previously led separate careers within the ITC—including ALJ Bhattacharyya and ALJ Moore, who were both investigative attorneys in the Office of Unfair Import Investigations at the ITC<sup>10</sup> for nine and seven years, respectively.

Additionally, certain ALJs have tended to see a large percentage of cases in different areas, giving them significant depth of expertise. For instance, ALJ Elliot has seen numerous cases involving digital communication technologies, while ALJ McNamara has overseen a large number of consumer electronics cases.<sup>11</sup>

## **Lasting, Binding Impact**

Finally, a favorable ITC merits outcome can, in some circumstances, constrain re-litigation of the same trade secret issues in other fora and can serve as meaningful leverage in any parallel or follow-on proceedings.<sup>12</sup> For example, a federal district court in Wisconsin found that the issue of trade secret misappropriation was precluded by the ITC's determination, even though there was technically a Wisconsin standard separate from the federal standard used by the ITC.<sup>13</sup> A federal district court in Michigan also applied issue preclusion along with claim preclusion to trade-dress claims presented to it because "the ITC's Final Determination in the parallel proceeding [was] sufficiently final" and the parties already had a full and fair opportunity to litigate before the ITC.<sup>14</sup> The First, Second, and Fourth Circuits have similarly given ITC decisions preclusive effect on subsequent district court proceedings.<sup>15</sup>

## **Conclusion**

In sum, though it is currently underutilized, the ITC offers distinct advantages that trade secret holders should consider when deciding which forum will be best to enforce their intellectual property.

## **Notes**

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1. Although injunctions are technically available under the Defend Trade Secrets Act and the Uniform Trade Secret Act, they require a showing of irreparable harm, among other factors.

2. U.S. Int'l Trade Comm'n, Section 337 Statistics: Average Length of Investigations, [https://www.usitc.gov/intellectual\\_property/337\\_statistics\\_average\\_length\\_investigations.htm](https://www.usitc.gov/intellectual_property/337_statistics_average_length_investigations.htm) (investigations completed on the merits).

3. U.S. Int'l Trade Comm'n, Section 337 Statistics: Types of Unfair Acts Alleged in Active Investigations by Fiscal Year, [https://www.usitc.gov/intellectual\\_property/337\\_statistics\\_types\\_unfair\\_acts\\_alleged\\_active.htm](https://www.usitc.gov/intellectual_property/337_statistics_types_unfair_acts_alleged_active.htm).

4. Andrea Weiss Jeffries & Derek Gosma, *California Trade Secrets vs. DTSA*, Daily J. (May 4, 2016), [https://www.wilmerhale.com/-/media/files/shared\\_content/editorial/publications/documents/2016-05-11-california-trade-secrets-vs-dtsa.pdf](https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/documents/2016-05-11-california-trade-secrets-vs-dtsa.pdf).

5. Charles River Associates, *Trade Secret Litigation Watch: August 2025* (Aug. 22, 2025) (reporting continued increases in DTSA federal filings); Steve Hanle et al., *Navigating the New Frontier: The Rise of U.S. Trade Secret Litigation in a Globalized Economy* (Oct. 8, 2025) (observing that since DTSA's passage, trade secret disputes have "steadily increased"); Maia Biermann, *Trade Secret Report 2025: The Key Trends Shaping DTSA Litigation*, IAM (Dec. 16, 2025), <https://www.iam-media.com/trade-secrets/article/trade-secret-report-2025-the-key-trends-shaping-dtsa-litigation>.

6. See *Certain Raised Garden Beds and Components Thereof*, Inv. No. 337-TA-1334, Notice of a Commission Determination Finding a Violation of Section 337; Issuance of a Limited Exclusion Order and Cease and Desist Order; Termination of Investigation, 89 Fed. Reg. 21270 (Mar. 27, 2024), [https://www.usitc.gov/system/files?file=secretary/fed\\_reg\\_notices/337/337\\_1334\\_notice03212024sgl.pdf](https://www.usitc.gov/system/files?file=secretary/fed_reg_notices/337/337_1334_notice03212024sgl.pdf) (announcing limited exclusion order prohibiting "the unlicensed entry of raised metal garden beds that are manufactured using Vego Garden's Product Manufacturing Trade Secret and are manufactured, imported, or sold by or on behalf of Green Giant and/or Utopban...").

7. *Id.* (issuing cease and desist order prohibiting "unlicensed importation, sale, and marketing" of raised metal garden beds resulting from the misappropriated trade secrets).

8. U.S. Int'l Trade Comm'n, Office of the Administrative Law Judges, <https://www.usitc.gov/glossary/term/office-administrative-law-judges>.

9. U.S. Int'l Trade Comm'n, Administrative Law Judges Bios, [https://www.usitc.gov/alj\\_bios](https://www.usitc.gov/alj_bios).

10. The ITC's Office of Unfair Import Investigations (OUII) is a staff office that, when assigned, participates as a full party in Section 337 investigations to represent the public interest and to advocate an independent position on the issues before the ALJ and ITC. Because Section 337 investigations most frequently involve patent infringement, OUII's investigative attorneys routinely litigate core patent-merits questions—participating in discovery, briefing,

and taking positions on motions and the elements of an alleged Section 337 violation. U.S. Int'l Trade Comm'n, Office of Unfair Import Investigations (OUII), <https://www.usitc.gov/offices/ouii>.

11. Paige McKirahan & Jeffrey Dorfman, A Conversation with WIT's ITC Chair: Key Insights on Administrative Law Judges in Section 337 Investigations, Mondaq/WIT Legal (Aug. 15, 2025), <https://www.mondaq.com/unitedstates/government-contracts-procurement-ppp/1666440/a-conversation-with-wits-itc-chair-key-insights-on-administrative-law-judges-in-section-337-investigations>.

12. The Supreme Court recognizes that in "situations in which Congress has authorized agencies to resolve disputes, 'courts may take it as given that Congress has legislated with the exception that the principle will apply except when a statutory purpose to the contrary is evident.'" *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110 (1991)). In other words, as long as Congress has not indicated otherwise, administrative agency decisions can have a preclusive effect. Notably, the Federal Circuit has held that the ITC's decisions on patent issues do not have preclusive effect in subsequent district court proceedings. *Texas Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1569 (Fed. Cir. 1996).

13. *Manitowoc Cranes LLC v. Sany America Inc.*, Nos. 13-C-677, 15-C-647, 2017 WL 6327551, at \*2-3, \*5 (E.D. Wis. Dec. 11, 2017) (applying collateral estoppel after comparing the Wisconsin trade secret misappropriation standard against the federal standard and finding them to be the same).

14. *Mahindra & Mahindra Ltd. v. FCA US LLC*, 503 F. Supp. 3d 542, 551 (E.D. Mich. 2020).

15. See, e.g., *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, \*7-8 (1st Cir. 1992) (barring second action based on res judicata after the ITC's decision on unfair trade and trademark infringement causes of action); *Union Mfg. Co., Inc. v. Han Baek Trading Co., Ltd.*, 763 F.2d 42, \*45 (2d Cir. 1985) (concluding that "ITC adjudications of unfair trade practice and trademark infringement causes of action are entitled to res judicata effect."); *Baltimore Luggage Co. v. Samsonite Corp.*, 977 F.2d 571, 1992 WL 296368, at \*4-5 (4th Cir. 1992) (table decision) (affirming district court's application of both collateral estoppel and res judicata for antitrust and unfair competition claims previously decided by the ITC).