

**RECONSIDERING THE PATENT JURISDICTION OF THE  
INTERNATIONAL TRADE COMMISSION**

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ABSTRACT

The International Trade Commission (“ITC”), established in 1916 to protect American markets from unfair foreign imports, has transformed into an alternative court for adjudicating patent infringement disputes, often between domestic companies. While the ITC can impose powerful exclusion orders barring the importation of foreign-manufactured goods into the United States, it is not bound by judicial precedent concerning injunctive relief. What’s more, the ITC undertakes a duplicative infringement and invalidity analysis of asserted patents, often in parallel with district courts adjudicating the same disputes, with no estoppel effect. As a result, the ITC’s patent jurisdiction, as it has expanded over the years, substantially increases costs for parties and creates inefficiency and unpredictability in the patent enforcement system with little benefit other than the tactical litigation advantage it gives to patent asserters. Today, the ITC’s authority to issue exclusion orders enforced by Customs and Border Protection could easily be handed over to federal courts, as could the ITC’s in rem jurisdiction over infringing articles. Accordingly, and particularly in view of the Supreme Court’s recent reduction of deference to agency determinations in *Loper Bright v. Raimondo*, it may be time to renew calls to reconsider the ITC’s patent jurisdiction and possibly to eliminate it entirely.

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## I. INTRODUCTION

The U.S. Tariff Commission, predecessor to the International Trade Commission (“ITC”), was established in 1916 as an independent,

bipartisan agency charged with advising the President on foreign import tariffs.<sup>1</sup> In 1922, Congress expanded the agency's investigative purview to cover "unfair methods of competition and unfair acts" pertaining to U.S. imports.<sup>2</sup> Over the next decade, "unfair acts" were interpreted to include the importation of products that infringed U.S. intellectual property rights, including patents.<sup>3</sup> The ITC assumed its current form and name under the Trade Act of 1974,<sup>4</sup> when its authority was upgraded from investigative to adjudicatory. Under Section 337 of the 1974 Act, the ITC was empowered to conduct hearings and to make formal determinations of violations.<sup>5</sup> If the ITC finds a violation, the Act directs that "the articles concerned ... be excluded from entry into the United States."<sup>6</sup>

The 1974 Act transformed the ITC from an advisory body into an administrative court with powerful remedial powers.<sup>7</sup> In the half-century since, the ITC has become a popular venue for litigating the infringement of intellectual property rights — primarily patents.<sup>8</sup> Before the 1974 Act, the ITC completed only thirty-five full investigations under Section 337,<sup>9</sup> an average of less than one per year.

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1. See An Act to Increase Revenue, and for Other Purposes (Revenue Act, 1916), ch. 463, Pub. L. No. 64-271, 39 Stat. 756. The original name of the agency was the Tariff Commission; it became the ITC in 1974. See Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2009 (1975).

2. See An Act to Provide Revenue, to Regulate Commerce with Foreign Countries, to Encourage the Industries of the United States, and for Other Purposes (Tariff Act of 1922), ch. 356, Pub. L. No. 67-318, § 316(a), 42 Stat. 858, 943. In 1930, Congress enacted the Smoot-Hawley Tariff Act, which preserved the structure of the 1922 Act in terms of unfair acts, but renumbered Section 316 as Section 337. See Tariff Act of 1930, Pub. L. No. 71-361, § 337, 46 Stat. 590, 703 (codified as amended at 19 U.S.C. § 1337).

3. See *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247, 260 (C.C.P.A. 1930), *cert. denied sub nom. Frischer & Co. v. Tariff Comm'n*, 282 U.S. 852 (1930).

4. See Trade Act of 1974.

5. See *id.*, § 337.

6. *Id.*, § 341(a) (amendment to § 337(d) of the Tariff Act of 1930).

7. See *id.*

8. Patent infringement claims have been raised in nearly ninety-three percent of ITC Section 337 cases from 2010 to 2023 (author's calculation based on data obtained from the ITC's Investigations Database System (IDS), <https://ids.usitc.gov> [<https://perma.cc/FJF9-79CM>]). These results are consistent with earlier studies. See 1 JERRY COHEN & MATTHEW MCCULLOUGH, INT'L TRADE PRACTICE § 2:14 (2024) (ITC patent case percentage is ninety percent); Bill Watson, *Preserving the Role of the Courts Through ITC Patent Reform*, R STREET SHORTS NO. 57, at 1 (2018) [hereinafter Watson, *Preserving the Role of the Courts*], <https://www.rstreet.org/wp-content/uploads/2018/04/Final-Short-57-1.pdf> [<https://perma.cc/4LJP-ERUP>] ("Between 2013 and 2017, there were 233 new Section 337 investigations initiated, roughly ninety percent of which were patent cases."); Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529, 532 (2009) ("[I]n recent years, more than ninety-four percent of all § 337 investigations have involved a patent infringement allegation.") (citing U.S. INT'L TRADE COMM'N, YEAR IN TRADE 2007: OPERATION OF THE TRADE AGREEMENTS PROGRAM 59TH REPORT 2-10 (2008); U.S. INT'L TRADE COMM'N, YEAR IN REVIEW: FISCAL YEAR 2006, at 14 (2006)).

9. V. James Adduci II, Sarah E. Hamblin, Louis S. Mastriani, Deanna Tanner Okun, & Tom M. Schaumburg, *Intellectual Property Investigations*, in A CENTENNIAL HISTORY OF

From 2006 to 2023, the agency completed more than 1,000 such investigations,<sup>10</sup> with the number of patent cases over the past decade averaging sixty-two per year.<sup>11</sup>

There are several reasons for the ITC's popularity with U.S. patent holders. First, the ITC is reputed to be fast. Since the ITC's procedures were amended in 1988, it has typically completed investigations under Section 337 within 12–18 months — less than half the average time of patent infringement litigation in district court.<sup>12</sup> A speedy resolution generally favors plaintiffs in patent cases, as it both accelerates the discontinuation of infringement and pushes the parties toward an earlier settlement often involving a payment to the patentee.<sup>13</sup> Second, ITC decisions are often perceived as favoring patent holders on a variety of procedural and substantive grounds.<sup>14</sup> Third, bringing a case in the ITC

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THE UNITED STATES INTERNATIONAL TRADE COMMISSION 310, 323 n.835 (Paul R. Bardos ed., 2017) (citing U.S. Tariff Comm'n, 1974 Annual Report 13 (1975)). Figures include cases brought under Section 316 of the ITC Act, which preceded Section 337.

10. See *Section 337 Statistics: Number of New, Completed, and Active Investigations by Fiscal Year (Updated Quarterly)*, U.S. INT'L TRADE COMM'N, [https://www.usitc.gov/intellectual-property/337\\_statistics\\_number\\_new\\_completed\\_and\\_active.htm](https://www.usitc.gov/intellectual-property/337_statistics_number_new_completed_and_active.htm) [https://perma.cc/AM64-EJXL]; Andrew Karpan, *After 'Historic Low' in 2023, Number of ITC Cases Soar in 2024*, LAW360 (Mar. 4, 2025), <https://www.law360.com/articles/2305755/print?section=ip>

11. Author's calculation is based on data compiled from IDS, *supra* note 8. While the number of ITC patent cases dipped in 2023 to 31, *see id.*, this dip corresponded with a similar dip in the number of patent cases filed in the district courts in 2023 — a downward trend that seems to have reversed with increased case filing numbers in 2024. See Nisha Shetty, *US District Court, PTAB and ITC Case Filings on the Rise*, INTELL. ASSET MGT. (July 10, 2024), <https://www.iam-media.com/article/us-district-court-ptab-and-its-case-filings-the-rise> [https://perma.cc/ZMT7-D35W].

12. See Nisha Shetty, *Fewer ITC Cases in 2023, but More Headlines due to Apple Watch Saga*, INTELL. ASSET MGT. (Jan. 29, 2024), <https://www.iam-media.com/article/fewer-its-cases-in-2023-more-headlines-due-apple-watch-saga> [https://perma.cc/7MXW-ZRRW]; INT'L TRADE COMM'N, BUDGET JUSTIFICATION FISCAL YEAR 2023, at 36 (2022) [hereinafter ITC 2023 BUDGET JUSTIFICATION], [https://www.usitc.gov/documents/fy\\_2023\\_congressional\\_budget\\_justification.pdf](https://www.usitc.gov/documents/fy_2023_congressional_budget_justification.pdf) [https://perma.cc/7F94-PQSL] (in 2021 average length of § 337 investigation on the merits was 18.2 months); Watson, *Preserving the Role of the Courts*, *supra* note 8, at 2; Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 WM. & MARY L. REV. 63, 101 (2008) [hereinafter Chien, *Patently Protectionist*].

13. While the ITC is reputed to make determinations as to remedial orders more quickly than the district courts, this comparison does not generally take into account district court determinations as to preliminary injunctions, which occur much more quickly than post-trial decisions on permanent injunctive relief. LexMachina statistics show that for the 776 patent cases pending between Jan. 1, 2009 and Sept. 11, 2024, in which a motion for preliminary injunction was granted, the median time from filing to a determination was only 54 days, and for the 492 cases in which a motion for preliminary injunction was denied, the median time was 194 days (query performed by the author on Sept. 11, 2024, at [law.lexmachina.com](http://law.lexmachina.com)).

14. See Robert Greene Sterne, *Patent Infringement Practice Before the United States International Trade Commission*, 2 INT'L TRADE L.J. 190, 242 (1977) (“[P]atent infringement actions before the [ITC] favor the interests of the domestic patentee.”); Christopher A. Cotropia, *Strength of the International Trade Commission as a Patent Venue*, 20 TEX. INTELL. PROP. L.J. 1, 6 (2011) (“[T]here is a perception, that the ITC is patent friendly.”); Chien, *Patently Protectionist*, *supra* note 12, at 68 (“Due to its favorable procedural and substantive

does not prevent a patent holder from seeking to enforce the same patents against the same defendants in district court, either later or simultaneously, and the results of ITC cases do not have preclusive effect on district court proceedings.<sup>15</sup> Thus, a patent holder enjoys two opportunities to prove infringement and obtain a remedy — what has been referred to as a “second bite at the apple.”<sup>16</sup> Fourth, the ITC — particularly its administrative law judges (“ALJs”) — are viewed as having substantial expertise, or at least interest, in patent matters.<sup>17</sup> And, finally, the ITC is authorized to issue not only cease and desist orders and limited exclusion orders (“LEOs”) against the named respondents in a particular case, but “general” exclusion orders (“GEOs”), which apply to all importers of a product that is found to be infringing.<sup>18</sup> Together, these features of the ITC give patent holders tactical advantages over alleged infringers, making the ITC a popular litigation venue in the increasing number of patent cases involving products manufactured or assembled overseas.<sup>19</sup>

Despite patent holders’ understandable attraction to the ITC, it is not clear why, as a policy matter, an additional forum for patent litigation should exist alongside the federal courts that are otherwise charged with adjudicating patent disputes.<sup>20</sup> As Judge O’Malley of the

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rules, the ITC is also perceived to be biased in favor of plaintiffs . . . .”); Robert W. Hahn & Hal J. Singer, *Assessing Bias in Patent Infringement Cases: A Review of International Trade Commission Decisions*, 21 HARV. J.L. & TECH. 457, 464 (2008) (finding “evidence that the ITC favors patent holders vis-à-vis district courts by a significant margin”).

15. See *infra* note 38 and accompanying text.

16. See Chien, *Patently Protectionist*, *supra* note 12, at 105.

17. See Cotropia, *supra* note 14, at 6; Hahn & Singer, *supra* note 14, at 464; David L. Schwartz, *Courting Specialization: An Empirical Study of Claim Construction Comparing Patent Litigation Before Federal District Courts and the International Trade Commission*, 50 WM. & MARY L. REV. 1699, 1709 (2009).

18. 19 U.S.C. § 1337(d)(2):

The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19. In 2021, U.S. firms imported over \$2.4 trillion in goods and services into the United States. U.S. CENSUS BUREAU, RELEASE NUMBER: CB23-0207, A PROFILE OF U.S. IMPORTING AND EXPORTING COMPANIES, 2020-2021, at 4 fig.1 (2023), <https://www.census.gov/foreign-trade/Press-Release/edb/edbrel2021.pdf> [<https://perma.cc/KNS4-M2RT>]. Approximately 20.4 percent of all intermediate goods were imported by manufacturers into the United States. NAT’L INST. STANDARDS & TECH., NIST AMS 600-13-UPD1, ANNUAL REPORT ON THE U.S. MANUFACTURING ECONOMY: 2023, at 23 (2023), <https://nvlpubs.nist.gov/nistpubs/ams/NIST.AMS.600-13-upd1.pdf> [<https://perma.cc/NWF9-WKNV>].

20. The U.S. is not the only country in which the importation of infringing products may be prevented through quasi-judicial or administrative procedures. See, e.g., Maria Fernanda Canepa, *How to File a Claim with INDECOPI: Protecting Rights in Peru*, LEXOLOGY (Oct.

Federal Circuit has written, the ITC should not be “a substitute for district courts when the district court is not as convenient a forum or the remedy sought is more difficult to obtain.”<sup>21</sup>

The dual jurisdiction of the courts and the ITC over patent infringement matters has led commentators over the past two decades to critique the ITC’s patent jurisdiction.<sup>22</sup> Their concerns may be grouped into four broad categories:

- (1) *Duplication*: The ITC’s patent jurisdiction is largely duplicative of judicial infringement litigation, making it unnecessary to protect U.S. patent interests, and instead increasing costs for parties and the system while giving patent asserters an undeserved “second bite at the apple”;

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30, 2023), <https://www.lexology.com/library/detail.aspx?g=8e9a8105-453d-4aaa-b22d-68df35e6ad8c> [https://perma.cc/U52Y-PHHS] (describing administrative forum for unfair competition disputes in Peru); Marion Briatta, *Building a “Fortress Europe” in the Air: A Critical Review of the European Customs Enforcement of IPRs*, 22 J. WORLD INTELL. PROP. 289 (2019) (discussing European border control mechanisms for intellectual property); Thomas F. Cotter, *The International Trade Commission: Reform or Abolition? A Comment on Colleen V. Chien & Mark A. Lemley*, Patent Holdup, the ITC, and the Public Interest, 98 CORNELL L. REV. ONLINE 43, 49 n.36 (2013) (discussing Korea Trade Commission’s power to block imports of infringing products); Jacqueline Lee, *Is the U.S. International Trade Commission Protectionist? A Comparative Study of Border Enforcement Measures*, 40 AIPLA Q.J. 593 (2012) (comparing U.S., Japanese, Korean, and European border enforcement systems). However, I am aware of no other country in which border control procedures have taken on the prominence and complexity of ITC proceedings in the U.S., or which exhibit the particular features of the ITC that are addressed in this Article. Further comparative study of these different systems is warranted.

21. *Suprema, Inc. v. Int’l Trade Comm’n*, 796 F.3d 1338, 1368 (Fed. Cir. 2015) (en banc) (O’Malley, J., dissenting). In a case pending at this writing, Google has asked the Federal Circuit to overrule *Suprema* on the basis that the ITC exceeded its statutory authority in barring non-infringing products from importation. Petition for Rehearing En Banc by Cross-Appellant Google LLC at 3, *Sonos, Inc. v. Int’l Trade Comm’n*, No. 2022-1421 (Fed. Cir., filed June 24, 2024).

22. See, e.g., Chien, *Patently Protectionist*, *supra* note 12; Hahn & Singer, *supra* note 14; Kumar, *supra* note 8; Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1 (2012); K. William Watson, *Still a Protectionist Trade Remedy: The Case for Repealing Section 337*, CATO INST. POLICY ANALYSIS (2012) [hereinafter Watson, *Still a Protectionist Trade Remedy*], <https://www.cato.org/sites/cato.org/files/pubs/pdf/PA708.pdf> [https://perma.cc/A8XH-R6EZ]; Cotter, *supra* note 20; Jorge Contreras, *The Topsy-Turvy ITC*, INFOJUSTICE.ORG (June 16, 2013) [hereinafter Contreras, *Topsy-Turvy*], <http://infojustice.org/archives/29909> [https://perma.cc/DVR9-9AGH]. Notwithstanding these criticisms, the ITC has its supporters, who generally dispute the various issues raised by critics of the agency. See, e.g., Linda Sun, *The ITC Is Here to Stay: A Defense of the International Trade Commission’s Role in Patent Law*, 17 NW. J. TECH. & INTELL. PROP. 137, 139 (2019) (“critiques of the ITC neglect its major contributions to the field of patent law.”); *International Trade Commission Patent Litigation: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 114th Cong. 7 (2016) (statement of Deanna Tanner Okun, former Chairman, Int’l Trade Comm’n) [hereinafter House Hearings on ITC Patent Litigation (2016)]; Cotropia, *supra* note 14, at 23 (suggesting increase in ITC patent cases “suggests that the other advantages-jurisdictional-breadth, speed of adjudication, high-likelihood of injunctive relief-have tremendous perceived individual value to the patentee”).

- (2) *Inconsistency*: There are significant inconsistencies between ITC and judicial standards for relief, creating systemic uncertainty;
- (3) *Subversion*: The use of the ITC by foreign firms and patent assertion entities subverts the purpose of the ITC to protect domestic markets from unfair foreign imports; and
- (4) *Bias*: ITC proceedings are inherently biased in favor of domestic over foreign holders of U.S. patents and domestic firms that manufacture abroad, possibly violating U.S. trade agreements.

Despite these critiques, little has been done to curb the ITC's patent jurisdiction, which it has steadfastly asserted. Recently, however, in *Loper Bright v. Raimondo*,<sup>23</sup> the Supreme Court reduced the degree of judicial deference that must be given to administrative agency determinations. This ruling has already led litigants and commentators to question some of the ITC's more aggressive jurisdictional assertions,<sup>24</sup> such as its broad interpretation of the domestic industry requirement<sup>25</sup> and the issuance of exclusion orders against the importation of *non-infringing* products that may or may not be used to infringe a U.S. patent.<sup>26</sup> In fact, commentators have speculated that *Loper Bright* may have emboldened the Federal Circuit in *Lashify v. ITC* to reject the ITC's most recent positions on the "domestic industry" requirement.<sup>27</sup> As such, this may be an appropriate time to evaluate anew the systemic impact of the ITC's patent jurisdiction and to consider its abridgement or wholesale elimination, while retaining the ITC's authority to police dumping and other legitimate international trade functions.

The remainder of this essay proceeds as follows: Part II considers objections that have been raised to the ITC's patent jurisdiction in light of new empirical data on ITC and district court litigation. Part III then assesses a range of reforms that have been proposed with respect to the

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23. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) ("*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority . . .").

24. See Ryan Davis, *Chevron's End May Put Target on ITC and Patent Office Policy*, LAW360 (June 28, 2024, 10:38 PM EDT), <https://www.law360.com/articles/1852785/chevron-s-end-may-put-target-on-itc-and-patent-office-policy> [<https://perma.cc/ZCU2-2PT2>] (discussing potential challenges to ITC's determinations).

25. See *infra* notes 106–110 and accompanying text (discussing ITC's broad interpretation of domestic industry requirement).

26. See *infra* note 87 and accompanying text (discussing ITC's issuance of exclusion orders against non-infringing products under *Suprema, Inc. v. Int'l Trade Comm'n*).

27. See Nisha Shetty, *Federal Circuit Lashify Ruling Expands ITC Domestic Industry Requirement*, INTELL. ASSET MGT. (Mar. 12, 2025), <https://www.iam-media.com/article/federal-circuit-expands-itc-domestic-industry-requirement> [<https://perma.cc/XUV7-9NXG>].

ITC's patent jurisdiction over the past fifteen years. This essay concludes briefly with considerations for potential legislative action to address the issues raised by the ITC's patent jurisdiction, including the removal of that jurisdiction from the ITC's statutory authority.

## II. ISSUES RAISED BY THE ITC'S PATENT JURISDICTION

This Part summarizes and examines the four categories of objections raised against the ITC's patent jurisdiction. The order of presentation is not intended to signify the relative importance of the issues raised.

### *A. Duplication*

One of the principal critiques of the ITC's patent jurisdiction is that it largely duplicates the patent jurisdiction of the federal courts. This duplication occurs both when the same or related patents are simultaneously asserted in the courts and the ITC against the same defendants, and when the issues litigated in court or the ITC are relitigated in the other jurisdiction, sometimes to a different result. As discussed below, both of these variants result in increased costs to the litigants, the government and the public.

#### 1. Parallel Litigation

Originally, the ITC's patent jurisdiction was established in order to afford patent holders a remedy when the overseas manufacturers of imported products were beyond the jurisdictional reach of the U.S. courts.<sup>28</sup> But this rationale is seldom relevant today, because as discussed below, most ITC actions involve domestic, as well as foreign, respondents, and litigation is typically brought in district court with respect to the same patents that are before the ITC or closely related patents that are within the same patent family.

In a study of ITC patent litigation initiated between 1995 and 2007, Professor Colleen Chien observed that only fourteen percent of these cases were brought solely against foreign respondents that were likely beyond the jurisdictional reach of the U.S. courts, whereas most ITC patent cases (eighty-six percent) included at least one U.S. respondent.<sup>29</sup> This trend, fueled by the favorability of the ITC to U.S.

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28. See Adduci et al., *supra* note 9, at 318 (the predecessor to Section 337, enacted in 1922, made it "possible for the President to prevent unfair practices, even when engaged in by individuals residing outside the jurisdiction of the United States" (quoting U.S. Tariff Comm'n, 1922 Annual Report, 3-4)).

29. See Chien, *Patently Protectionist*, *supra* note 12, at 89 tbl.3.



patent enforcers,<sup>30</sup> has become even more pronounced in recent years, with a mere six percent of ITC patent cases brought during 2022 and 2023 targeting only foreign defendants.<sup>31</sup> All other cases named at least one U.S. respondent subject to the jurisdiction of the U.S. courts, and a full thirty percent named *only* U.S. respondents.<sup>32</sup>

Underscoring this point, Chien observed that between 1995 and 2007, sixty-five percent of ITC cases concerned patents that were also being enforced against the same defendants in district court.<sup>33</sup> Today, that figure has risen to eighty-three percent.<sup>34</sup> The duplicative nature of ITC litigation is well-known to the practicing bar. As one litigator has observed, “almost any time that an ITC complainant files a Section 337 complaint, that complainant will also file a U.S. district court case asserting the same underlying claims that form the basis of the alleged violation.”<sup>35</sup> Thus, as Chien found sixteen years ago, “the data ... portray a venue that has outgrown its original purpose: the ITC is no longer reserved for the specific threat of foreign piracy.”<sup>36</sup>

## 2. Relitigation

Despite this duplicative nature, the ITC’s determinations in patent cases are not binding on courts in these parallel proceedings. Thus, while federal court decisions bind the ITC,<sup>37</sup> the converse is not true, and ITC determinations of fact and law in patent cases do not have *res judicata* effect in court.<sup>38</sup> As a result, parties in district court must often

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30. See *supra* notes 12–19 and accompanying text.

31. Author’s calculation based on data compiled from IDS, *supra* note 8. A total of 88 ITC cases involving patent claims were brought in 2022 and 2023.

32. Author’s calculation based on data compiled from IDS, *supra* note 8. This figure is substantially higher than Chien’s observation of fifteen percent of cases involving only domestic respondents during the period 1995–2007. Chien, *Patently Protectionist*, *supra* note 12, at 89 tbl.3.

33. Chien, *Patently Protectionist*, *supra* note 12, at 92–93; see also Watson, *Preserving the Role*, *supra* note 8, at 3 (“Among the 53 investigations initiated at the ITC in 2016 for infringement of a statutory IP right, there were only eight in which the respondents were solely foreign parties who were not also being sued in court.”).

34. Author’s calculation based on data compiled from IDS, *supra* note 8. District court cases involving the same patents asserted in ITC actions were identified using LexMachina. See also Saurabh Vishnubhakat, *Patent Inconsistency*, 97 IND. L.J. 59, 73 (2022) (“the share of patents that are asserted in the ITC and are also involved in federal court litigation is 86.6%.”).

35. Matthew J. Rizzolo, Matthew R. Shapiro & Meredith E. Cox, *Talkin’ Trade: Examining the Interplay Between the ITC and District Courts*, Ropes & Gray (Nov. 29, 2022), <https://www.ropesgray.com/en/pdf/insights/podcasts/2022/11/podcast-talkin-trade-examin-ing-the-interplay-between-the-its-and-district-courts> [<https://perma.cc/7QMA-38W6>].

36. Chien, *Patently Protectionist*, *supra* note 12, at 71.

37. See *Young Eng’rs, Inc. v. U.S. Int’l Trade Comm’n*, 721 F.2d 1305, 1316 (Fed. Cir. 1983).

38. See *Bio-Tech. Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1563–64 (Fed. Cir. 1996); *Texas Instruments, Inc. v. U.S. Int’l Trade Comm’n*, 851 F.2d 342, 344 (Fed. Cir. 1988); see

relitigate decisions previously made at the ITC. For example, in *Convertible Rowing Exerciser Patent Litigation*,<sup>39</sup> the ITC had previously determined that the plaintiff's asserted patent was invalid as obvious over the prior art (a finding later affirmed by the Federal Circuit).<sup>40</sup> Nevertheless, the district court did not give preclusive effect to the ITC's determination, holding that "[a]n ITC proceeding under section 337 involving a patent raises questions of unfair trade practices which is distinct in both form and substance from the question before a federal District Court under [28 U.S.C. § 1338]; therefore, administrative *res judicata* is inappropriate."<sup>41</sup>

Likewise, though district courts have been required since 1995 to stay proceedings concerning "any claim that involves the same issues involved in the proceeding before the [ITC],"<sup>42</sup> such stays are sometimes denied on the ground that the district court action involves different patents, parties, or issues than the parallel ITC proceeding.<sup>43</sup> Moreover, any respondent in an ITC action may elect to forego a stay

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also COHEN & McCULLOUGH, *supra* note 8, at § 11:14; SCHAUMBERG, *infra* note 42, at 244-45; Kumar, *supra* note 8, at 559-63; Chien, *Patently Protectionist*, *supra* note 12, at 74-75. Interestingly, even Federal Circuit decisions that review ITC proceedings are not binding on district courts that later adjudicate the same issues. See *Tandon Corp. v. Int'l Trade Comm'n*, 831 F.2d 1017, 1019 (Fed. Cir. 1987) (discussed in Kumar, *supra* note 8, at 559). However, given that the lack of ITC determination preclusive effect in patent cases is based on the exclusive jurisdiction over patent matters conferred on the federal courts under the Patent Act, ITC determinations on non-patent matters may have preclusive effect in district court cases. See COHEN & McCULLOUGH, *supra* note 8, at 464-65. The preclusiveness of ITC determinations in copyright cases remains unclear. See *id.* at 465-66.

39. *In re Convertible Rowing Exerciser Patent Litig.*, 721 F. Supp. 596 (D. Del. 1989), *aff'd*, *Diversified Prods. Corp. v. U.S. Int'l Trade Comm'n*, 824 F.2d 980 (Fed. Cir. 1987).

40. *Diversified Products Corp. v. U.S. Int'l Trade Comm'n*, 824 F.2d 980 (Fed. Cir. 1987).

41. *In re Convertible Rowing*, 721 F. Supp. at 603.

42. 28 U.S.C. § 1659(a); see TOM M. SCHAUMBERG, A LAWYER'S GUIDE TO SECTION 337 INVESTIGATIONS BEFORE THE U.S. INTERNATIONAL TRADE COMMISSION 240-42 (2d ed. 2012). This provision was adopted in order to address allegations made by the European Economic Community ("EEC") that Section 337 was inconsistent with U.S. obligations to afford national treatment to foreign patent holders under the General Agreements on Tariffs and Trade ("GATT"). See Joel Davidow, *U.S. Patent Litigation: International Aspects and Key Developments*, 2 J. WORLD INTELL. PROP. 475, 477 (1999); Adduci et al., *supra* note 9, at 327-28.

43. See *Wirtgen Am., Inc. v. Caterpillar Inc.*, No. CV 17-770 2021, 2021 WL 7209780 (D. Del. May 27, 2021) (where only one of twelve patents asserted in litigation was also being considered by ITC, court declined to stay proceedings for the eleven patents not before the ITC); *Micron Tech., Inc. v. Mosel Vitelic Corp.*, No. CIV 98-0293, 1999 WL 458168 (D. Idaho Mar. 31, 1999) (where four of eleven patents asserted against two allegedly infringing products were before ITC, court stayed proceedings as to four patents before ITC, but not seven other patents asserted against same products); *Intervideo Digital Tech. Corp. v. Dell, Inc.*, No. C 05-3317, 2006 WL 8462414, at \*3 (N.D. Cal. Jan. 17, 2006) ("Plaintiff is not the respondent in [the ITC] action; thus, the Court cannot grant Plaintiff's request to stay this action under section 1659."); see also Chien, *Patently Protectionist*, *supra* note 12, at 104-05 ("[D]espite the availability of automatic stays of parallel district court cases, 40 percent of the time . . . the district court case proceeded without a stay.").

of litigation for tactical reasons and thereby force the plaintiff to litigate in both forums simultaneously.<sup>44</sup>

In addition, the availability of litigation in the ITC alongside district court litigation gives patent asserters two independent opportunities to prove infringement and obtain a remedy against the same defendants — a “second bite at the apple.” Critics view this extra opportunity for relief as unjustified,<sup>45</sup> and it further enhances the tactical benefits that the ITC provides to patent asserters.

### 3. Costs

Both parallel litigation and relitigation at the ITC increases costs for the parties and witnesses as well as the government. These costs are not insignificant. In order to maintain two separate legal proceedings in the United States, parties must incur substantial legal fees and expenses. According to the 2023 AIPLA Report of the Economic Survey, the median cost reported by large law firms of maintaining an ITC Section 337 action with respect to *a single patent* from initial case management through final appeal was approximately \$10 million, with \$5 million attributable to discovery, preliminary motions, and claim construction.<sup>46</sup> Likewise, the federal government must maintain two parallel but separate adjudicatory systems to hear the same disputes. In its 2023 budget request to Congress, the ITC requested approximately \$40 million (more than thirty percent of the agency’s total budget) with respect to unfair import investigations, most of which concern patents.<sup>47</sup> These amounts are significant, both for private parties and the government, representing a substantial waste of private and public resources.<sup>48</sup>

#### *B. Inconsistency*

Beyond the simple fact of duplicative litigation, the ITC, which is an administrative agency and not a court, abides by a different set of remedial rules and procedures than courts. Thus, while the ITC must follow judicial precedent relating to substantive questions of patent

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44. See Rizzolo et al., *supra* note 35 (Matt Shapiro speaking); Chien, *Patently Protectionist*, *supra* note 12, at 105.

45. Watson, *Preserving the Role of the Courts*, *supra* note 8, at 1; Chien, *Patently Protectionist*, *supra* note 12, at 105.

46. AM. INTELL. PROP. L. ASSN., AIPLA 2023 REPORT OF THE ECONOMIC SURVEY I-172 (Oct. 2023).

47. ITC 2023 BUDGET JUSTIFICATION, *supra* note 12, at 60; *see also supra* note 8 and accompanying text (noting that patent claims were raised in 90 percent of recent ITC matters).

48. See Cotter, *supra* note 20, at 53 (“[U]nnecessary duplication of effort is a social waste.”); Chien, *Patently Protectionist*, *supra* note 12, at 71 (“[T]wo-track system [invites] judicial waste and expose[s] parties to the risk of duplicative litigation . . .”).

law,<sup>49</sup> it is not bound by judicial precedent regarding its procedures or remedies. Accordingly, the results of judicial and ITC determinations are often inconsistent or contradictory, even when addressing the same products, patents, and parties.<sup>50</sup> Different outcomes from different tribunals within the same jurisdiction can muddy the law and complicate compliance for parties.<sup>51</sup> As Kumar comments, “[t]he limits of a patent in the ITC are unknown, because the ITC and Federal Circuit have taken a piecemeal approach to determining which parts of the Patent Act apply.”<sup>52</sup> A few examples of the inconsistency between federal court and ITC adjudication are discussed below.

### 1. The *eBay* Framework for Injunctive Relief

The U.S. Patent Act provides that “courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”<sup>53</sup> Historically, U.S. courts routinely issued permanent injunctions to prohibit the sale of products found to infringe a valid and enforceable patent.<sup>54</sup> But in *eBay v. MercExchange*,<sup>55</sup> the Supreme Court revisited the standard for issuing injunctive relief in patent cases and required that a plaintiff must satisfy the following four factors in order for a permanent injunction to be granted: (1) it has suffered an irreparable injury; (2) remedies available at law (i.e., monetary damages) are inadequate to compensate it for that injury; (3) considering the balance of hardships between the

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49. The Court of Appeals for the Federal Circuit reviews the ITC’s legal determinations, including those relating to claim interpretation and patent validity, de novo, without deference. *Checkpoint Sys., Inc. v. U. S. Int’l Trade Comm’n*, 54 F.3d 756, 760 (Fed. Cir. 1995); *Alloc, Inc. v. Int’l Trade Comm’n*, 342 F.3d 1361, 1367 (Fed. Cir. 2003).

50. *See Kaisha v. Bombardier, Inc.*, No. SA CV 00-549, 2001 WL 1388911, at \*2 (C.D. Cal. Mar. 9, 2001) (“[B]y allowing parallel proceedings and indeed almost encouraging them, Congress has created the real possibility of inconsistent results between [ITC] and district court proceedings.”).

51. In addition to inconsistency with decisions of the federal courts, the ITC has also issued decisions on patent validity that are inconsistent with those of the Patent Trial and Appeals Board (PTAB). *See* Ryan Davis, *Fed. Circ. Probes Case with Apple Watch Import Ban at Stake*, LAW360 (July 12, 2024, 8:03 PM EDT), <https://www.law360.com/articles/1854019/fed-circ-probes-case-with-apple-watch-import-ban-at-stake> [<https://perma.cc/LG79-3HLZ>] (describing that in a patent dispute between Apple and AliveCor, the ITC found patents nonobvious while PTAB found them invalid as obvious, possibly due in part to the parties’ failure to present evidence to the PTAB that was subject to an ITC protective order).

52. Kumar, *supra* note 8, at 555.

53. 35 U.S.C. § 283.

54. *See* Jorge L. Contreras, *Injunctive Relief in U.S. Patent Cases*, in PATENT LAW INJUNCTIONS 3, 7 (Rafał Sikorski ed., 2018).

55. *eBay v. MercExchange LLC*, 547 U.S. 388 (2006).

plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by the award of an injunction.<sup>56</sup>

In addition, four justices of the Supreme Court, in a concurring opinion, expressed concern that entities that obtain patents “not as a basis for producing or selling goods” but “primarily for obtaining licensing fees” (i.e., patent acquisition entities or PAEs) could use injunctive relief as “a bargaining tool to charge exorbitant fees” to potential licensees.<sup>57</sup> This reasoning has been interpreted as signaling that courts should treat requests for injunctive relief by PAEs with greater skepticism. Given these heightened standards, district courts following the *eBay* decision have granted permanent injunctive relief in approximately seventy-five percent of patent cases,<sup>58</sup> and only sixteen percent to twenty-six percent of cases brought by PAEs.<sup>59</sup>

The ITC, however, is an Article I agency, not an Article III court, and as such it is not bound to follow the Supreme Court’s *eBay* decision or other judicial precedent.<sup>60</sup> Instead, the ITC’s statutory authorization under Section 337 provides that the ITC “shall direct” that imported articles determined to infringe a U.S. patent “be excluded from entry into the United States.”<sup>61</sup> There is no requirement that a patent holder prove any injury (let alone irreparable harm) to be entitled to an exclusion order.<sup>62</sup> This non-discretionary directive has led to the near automatic issuance of exclusion orders under Section 337 when infringement is determined. Thus, from 2014 to 2023, every ITC

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56. *Id.* at 391.

57. *Id.* at 396 (Kennedy, J., concurring).

58. See, e.g., Jorge L. Contreras & Jessica Maupin, *Unenjoined Infringement and Compulsory Licensing*, 38 BERKELEY TECH. L.J. 661, 690 (2023) (seventy-two percent grant rate from *eBay* to mid-2021); Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. 1949, 1982–83 (2016) (72.5 percent grant rate from *eBay* to 2013); THOMAS F. COTTER, *COMPARATIVE PATENT REMEDIES: A LEGAL AND ECONOMIC ANALYSIS* 103 (2013) (seventy-five percent grant rate from 2007 to 2011); Chien & Lemley, *supra* note 22, at 9–10 (seventy-five percent grant rate from *eBay* to 2011); Chien, *Patently Protectionist*, *supra* note 12, at 98–99 (finding seventy-nine percent grant rate in year following *eBay*).

59. Chien & Lemley, *supra* note 22, at 10 (finding that from *eBay* to 2011, PAE success rates in obtaining permanent injunctions were twenty-six percent, but when PAE’s request for an injunction was contested (i.e., not the result of a default judgment, etc.), success rate dropped to seven percent); Seaman, *supra* note 58, at 1988 (overall PAE success rate of sixteen percent).

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

61. 19 U.S.C. § 1337(d).

62. See Kumar, *supra* note 8, at 549 (describing 1988 Trade Act’s elimination of any injury requirement under Section 337).

investigation in which a determination of infringement was made resulted in the entry of an exclusion order or cease-and-desist order.<sup>63</sup>

The divergence between courts and the ITC is even more pronounced when considering the success of PAEs in obtaining exclusionary relief. Because the *eBay* factors require a court to consider whether a patent holder can adequately be compensated by monetary damages and to balance the hardships between the plaintiff and defendant in granting an injunction, PAEs have been much less successful than operating entities in obtaining injunctive relief from courts, as noted above.<sup>64</sup> Yet at the ITC, the success rate of PAEs seeking exclusion orders has been one hundred percent, as it has been for other patent holders.<sup>65</sup> Thus, a considerable gap exists between remedial outcomes at the ITC and the courts. As noted by a member of the House Intellectual Property Subcommittee during hearings on the ITC's patent jurisdiction, PAEs, aware of the ITC's "almost automatic" issuance of injunctions after *eBay*, "were flocking to the ITC" in order to "exploit[] this risk [of an exclusion order] to pressure defendants into settling even frivolous cases."<sup>66</sup>

## 2. Complex Product Considerations

In his concurring opinion in *eBay*, Justice Kennedy also addressed the issue of patents that cover only a small portion of the functionality of a complex product. He stated that:

When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.<sup>67</sup>

Courts appear to have taken this advice to heart, rarely granting injunctive relief when a patent is found to cover only a small component

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63. Author's calculation based on data compiled from IDS, *supra* note 8. These results are consistent with those that Chien reported for the period from 1995 to 2007. Chien, *Patently Protectionist*, *supra* note 12, at 99 (finding one hundred percent rate of issuance of injunctive relief by ITC when infringement was found).

64. *See supra* note 58 and accompanying text.

65. *See supra* note 62 and accompanying text.

66. House Hearings on ITC Patent Litigation (2016), *supra* note 22, at 4 (statement of Del. Jerrold Nadler, Member, H. Comm. on the Judiciary).

67. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396–97 (2006) (Kennedy, J., concurring).

of a complex product.<sup>68</sup> As the Federal Circuit explained in *Apple v. Samsung*, when infringing products have large numbers of features, an injunction should be issued only if there is “some connection” — a causal nexus — between the patented technology and customer demand for the infringing product.<sup>69</sup>

Although the ITC once considered the incremental value of an infringing technology to a downstream product that incorporated the infringing technology under its so-called *EPROM* factors,<sup>70</sup> the *EPROM* analysis has become less relevant following the Federal Circuit’s decision in *Kyocera v. ITC*, in which limited exclusion orders are no longer available against manufacturers of downstream products that are not named in the original complaint.<sup>71</sup> Moreover, the *EPROM* factors were never applicable when the infringing product is imported by a named respondent, even if the patented technology covers only a small feature of the infringing product. This point is illustrated by the ITC’s recent exclusion order against Apple watches based on their infringement of two patents claiming light-based pulse oximetry technology that enables the watch to monitor the wearer’s blood oxygen level.<sup>72</sup> While interesting, blood pressure monitoring is only one of hundreds of features embodied in an Apple Watch, many of which are arguably more central to its market appeal (e.g., displaying the time and temperature in multiple locations, Bluetooth connectivity, touch screen display, reminder alerts, haptic feedback, contactless battery charging, audio input and output, iPhone integration, etc.).

This is not to say, of course, that a court evaluating a request for injunctive relief in this case would not have granted it after analyzing

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68. See Seaman, *supra* note 58, at 1998 n.304 (“District courts only granted injunctions fourteen percent of the time (2 of 14 cases) where the district court found that the patent covered a ‘small component.’”).

69. *Apple Inc. v. Samsung Corp.*, 809 F.3d 633, 642 (Fed. Cir. 2015). As explained by the court, the infringement of a patent by a cup holder in a car should not support an injunction against sales of the car, even if consumers are willing to pay a nominal extra amount for the cup holder. *See id.* at 641 n.1.

70. *See* Certain Erasable Programmable Read-Only Memories, Components Thereof Products Containing Such Memories, and Processes for Making Such Memories, ITC Inv. No. 337-TA-276, USITC Pub. 2196, at 124–26 (May 1989) (Final), <https://www.usitc.gov/publications/337/pub2196.pdf> [<https://perma.cc/4ZCM-UWEH>]. As explained by Chien and Lemley, under the *EPROM* factors, “[w]hen the value of the invention is small compared to the value of the enjoined article that incorporates the invention downstream, the ITC has paused to consider whether the patentee deserves an injunction and if so, what type of injunction is appropriate.” Chien & Lemley, *supra* note 22, at 30.

71. *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1357–58 (Fed. Cir. 2008). *See* Cotropia, *supra* note 14, at 3; Chien & Lemley, *supra* note 22, at 30.

72. *See* Notice of the Commission’s Final Determination Finding a Violation of Section 337; Issuance of a Limited Exclusion Order and a Cease and Desist Order; Termination of the Investigation, Certain Light-Based Physiological Measurement Devices and Components Thereof, ITC Investigation No. 337-TA-1276 (Oct. 26, 2023) [hereinafter ITC Apple-Masimo Exclusion Order].

the *eBay* factors and applying the Federal Circuit’s “nexus” test.<sup>73</sup> However, the ITC did not conduct this analysis, and simply found that because Apple violated Section 337 by infringing the claims of two asserted patents, “the appropriate form of relief is [a limited exclusion order] prohibiting . . . the unlicensed entry of infringing . . . devices . . . .”<sup>74</sup>

### 3. Public Interest

Finally, there appears to be a significant divergence between the “public interest” analysis conducted by courts applying the *eBay* factors and the analysis conducted by the ITC under Section 337. Courts applying the public interest prong of the *eBay* test have considered a range of public harms that could arise from the removal of an infringing product from the market. These include potential adverse effects on public health and safety, the availability of consumer products, and harm to the environment.<sup>75</sup>

Christopher Seaman reports that, between 2006 and 2015, when district courts, after finding infringement, denied a permanent injunction, the public interest factor weighed against injunctive relief in fifty-two percent of cases (thirty-one of sixty).<sup>76</sup> John Jarosz and coauthors identified virtually the same rate with respect to preliminary injunctions that were denied in patent cases between 2013 and 2020.<sup>77</sup>

The ITC’s public interest test is set forth in Section 337 and requires the ITC to consider, before issuing an exclusion order, “the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States

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73. Patents claiming the same functionality are also being asserted by Masimo in the U.S. District Court for the Central District of California, where Masimo unsuccessfully sought a preliminary injunction based on a trade secret claim but did not seek an injunction based on its twelve asserted patents. *See* Order Regarding Motion for Preliminary Injunction, Masimo Corp. v. Apple Inc., Case No. SACV 20-00048 (C.D. Cal. Sep. 16, 2020). In the U.S. District Court for the District of Delaware, Masimo’s counterclaims asserting the same patents asserted in the ITC, and seeking both preliminary and permanent injunctive relief, have been stayed pending the completion of the ITC matter. *See* Order Granting Unopposed Motion of Plaintiff and Counterclaim Defendant Apple Inc. to Stay Certain Patent Counterclaims Pending ITC Determination Pursuant to 28 U.S.C. § 1659, *Apple Inc. v. Masimo Corp.*, C.A. No. 22-1378-MN (D. Del., Jan. 10, 2023).

74. ITC Apple-Masimo Exclusion Order, *supra* note 72, at 3.

75. Peter Georg Picht & Jorge L. Contreras, *Proportionality Defenses in FRAND Cases: A Comparative Assessment of the Revised German Patent Injunction Rules and U.S. Case Law*, 72 *GRUR INTL.* 435, 437–38 (2023) (discussing cases involving 4th *eBay* factor).

76. Seaman, *supra* note 58, at 1995.

77. John C. Jarosz, Jorge L. Contreras & Robert L. Vigil, *Preliminary Injunctive Relief in Patent Cases: Repairing Irreparable Harm*, 31 *TEX. INTELL. PROP. L.J.* 63, 78 fig.4 (2023). For preliminary injunctions, courts apply a test announced by the Supreme Court in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), decided two years after *eBay*. *See id.* at 77–78.



consumers.”<sup>78</sup> The Federal Circuit has held that the ITC’s statutory public interest test is distinct from the equitable analysis conducted under *eBay*, and does not require the ITC to follow cases interpreting the public interest factor under *eBay*.<sup>79</sup>

In contrast to the courts, over the half-century that the ITC has had a statutory public interest test, it has denied an exclusion order on the basis of the public interest only three times in cases involving, respectively, medical products (hospital beds), atomic research, and tools for making automobile parts.<sup>80</sup> In 2011, the ITC allowed a narrow exception to an exclusion order concerning mobile communication technology on public interest grounds so as to enable the continued use of the technology by emergency first responders.<sup>81</sup> Thus, while the ITC assesses potential public harm arising from its exclusion orders, public interest considerations seldom prevent the issuance of ITC exclusion orders and are applied far less frequently than they are by courts under the *eBay* framework.

#### 4. Additional Divergence

In addition to the areas of divergence described above, commentators have identified several other areas in which ITC procedures differ from proceedings in district court and other tribunals, often to the benefit of patent enforcers. These include:

- (1) The inapplicability of defenses under Sections 271(g)(1) and (2) of the Patent Act to Section 337 proceedings at the ITC;<sup>82</sup>
- (2) The ITC’s lack of pre-trial *Markman* hearings to establish patent claim scope prior to other substantive determinations;<sup>83</sup>
- (3) The ITC’s failure to adopt joinder limitations on the number of respondents that can be named in a single action, as

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78. 19 U.S.C. § 1337(d)(1).

79. *Spanion, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1358–60 (Fed. Cir. 2010).

80. See SCHAUMBERG, *supra* note 42, at 214–19 (discussing cases).

81. Commission Opinion on Remedy, the Public Interest, and Bonding, Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, Including Cellular Telephone Handsets, ITC Inv. No. 337-TA-543 (June 19, 2007) [hereinafter Baseband Processor Chips], <https://edis.usitc.gov/external/attachment/276412-322907.pdf> [<https://perma.cc/B8NY-499V>], *rev’d in part sub nom.*, *Kyocera Wireless Corp. v. U.S. Int’l Trade Comm’n*, 545 F.3d 1340 (Fed. Cir. 2008).

82. See *Kinik Co. v. Int’l Trade Comm’n*, 362 F.3d 1359, 1361 (Fed. Cir. 2004); see also Kumar, *supra* note 8, at 553–54.

83. See SCHAUMBERG, *supra* note 42, at 172–73 (explaining that conduct of Markman hearing at ITC is in discretion of ALJ, with result that “Markman hearings have traditionally been the exception rather than the rule at the Commission”).

required of district courts under Section 299 of the Patent Act;<sup>84</sup>

- (4) Uncertainty and inconsistency in the treatment of ITC patent jurisdiction in relation to the Patent Trial and Appeal Board (“PTAB”), including the degree to which ITC actions trigger the one-year bar on bringing PTAB challenges;<sup>85</sup>
- (5) The *ex parte* nature of ITC claim construction determinations that are made in connection with GEOs when the named parties fail to appear;<sup>86</sup>
- (6) The ability of the ITC to issue exclusion orders against the importation of *non-infringing* products that may or may not be used, after importation, to infringe a U.S. method patent;<sup>87</sup> and
- (7) The ITC’s lack of a mechanism by which complaints can be terminated with prejudice, permitting the re-filing of terminated complaints.<sup>88</sup>

Though a full discussion of these critiques is beyond the scope of this essay, each further demonstrates the divergence between the ITC and the judicial system.

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84. See Chien & Lemley, *supra* note 22, at 15; Colleen V. Chien, *Protecting Domestic Industries at the ITC*, 28 SANTA CLARA COMP. & HIGH TECH. L.J. 169, 175 (2011) [hereinafter Chien, *Domestic Industry*].

85. See Vishnubhakat, *supra* note 34, at 88–89.

86. Sarah Wasserman Rajec identifies two situations in which the ITC will make claim construction determinations affecting interested parties (in one case, the alleged infringer, and in the other, the patent holder) without their involvement in the proceedings (i.e., on an *ex parte* basis): (1) “if the named parties default and the patent holder has requested a GEO, the ALJ must make claim-construction determinations and evaluate the appropriateness of a GEO with no participation from those having interests adverse to the patent holder”; and (2) “[i]f Customs excludes goods at the border, the importer may file a protest [], and if denied, may file a civil suit in the U.S. Court of International Trade (USCIT) to dispute Customs’s application of the GEO to its goods. The proceeding [] is between the importer and Customs, and no other person is permitted to intervene, including the patent holder.” Sarah R. Wasserman Rajec, *Patents Absent Adversaries*, 81 BROOK. L. REV. 1073, 1098, 1110 (2016).

87. *Suprema, Inc. v. Int’l Trade Comm’n*, 796 F.3d 1338, 1352–53 (Fed. Cir. 2015) (en banc). See *id.* at 1368–69 (O’Malley, J., dissenting) (giving ITC power to exclude importation of non-infringing goods before direct infringement has occurred goes beyond power of district court to bar induced infringement: “[b]y premising Customs’s power to exclude goods on the importer’s alleged intent for how the goods may be used, goods that can be used in both infringing and non-infringing ways likely will be denied entry based on the perception that they *could be* used to infringe a method claim . . .”).

88. See P. Andrew Riley, *Vape IP Ruling Shows Stark Contrast Between ITC and Courts*, LAW360 (May 1, 2025), <https://www.law360.com/articles/2332719/vape-ip-ruling-shows-stark-contrast-between-itc-and-courts> [] (discussing issue with respect to ITC Inv. Nos. 337-TA-1073, 337-TA-1312 and 337-TA-1381).

*C. Subversion*

As noted above, the ITC was created more than a century ago to protect U.S. markets from foreign imports deemed to be unfair, whether because those imports were “dumped” at below-cost prices, they infringed U.S. intellectual property rights, or they otherwise unfairly exploited U.S. markets to the detriment of domestic suppliers. But today, the ITC’s Section 337 jurisdiction has expanded to encompass cases that have little bearing on this original purpose and, in fact, often contravene it.<sup>89</sup> The subversion of the ITC’s original purpose occurs today in three forms: as a forum in which foreign producers can block imports of products by domestic firms, as a forum for the litigation of patent disputes between purely domestic firms, and as a forum where PAEs that manufacture no products at all can assert patents against manufacturers.

## 1. A Forum for Foreign Interests

The ITC today hears an increasing number of cases initiated by *foreign* companies against *domestic* respondents, whose products can be barred from importation into the United States if those products were manufactured or assembled overseas. Chien found that, between 1995 and 2005, fifteen percent of ITC patent cases were brought by foreign complainants against domestic companies.<sup>90</sup> In 2022 and 2023, that number grew to thirty-one percent as foreign companies have incorporated U.S. subsidiaries that can take advantage of ITC jurisdiction.<sup>91</sup> The high-profile 2013 case initiated by Korean electronics giant Samsung<sup>92</sup> against Apple exemplifies this “topsy turvy”<sup>93</sup> phenomenon.<sup>94</sup> In that case, the ITC issued an exclusion order against the importation of Apple smartphones and tablets that were manufactured abroad,<sup>95</sup> essentially allowing a foreign corporation to

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89. Charles Duan, *The U.S. International Trade Commission: An Empirical Study of Section 337 Investigations*, R STREET POLICY STUDY NO. 246, at 8 (2021), [https://www.rstreet.org/wp-content/uploads/2021/11/REALFINAL\\_22Nov21\\_RSTREET246-1.pdf](https://www.rstreet.org/wp-content/uploads/2021/11/REALFINAL_22Nov21_RSTREET246-1.pdf) [<https://perma.cc/PYY8-KDMW>].

90. Chien, *Patently Protectionist*, *supra* note 12, at 90.

91. Author’s calculation based on data compiled from IDS, *supra* note 8.

92. Foreign firms can bring complaints in the ITC through their U.S. subsidiaries and affiliates.

93. See Contreras, *Topsy-Turvy*, *supra* note 22.

94. Commission Opinion, *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, ITC Inv. No. 337-TA-794 (July 5, 2013), <https://edis.usitc.gov/external/search/document/512742> [<https://perma.cc/7QVX-MHQN>].

95. *Id.* This exclusion order was subsequently disapproved by the President. See *infra* notes 156–157 and accompanying text.

use a U.S. trade agency to block the domestic sale of a major U.S. corporation's products.

Likewise, there are significant ITC cases that involve foreign complainants (through their U.S. subsidiaries) asserting patents against foreign respondents, turning this U.S. agency into a forum for foreign producers to hash out their differences. One prominent example of this scenario is the recent ITC litigation between Ericsson (based in Sweden) and Lenovo (based in China),<sup>96</sup> which supplements the parties' concurrent patent litigation in the Eastern District of North Carolina.<sup>97</sup>

## 2. A Forum for Domestic Disputes

Another deviation from the original purpose of the ITC occurs when it is used as no more than a second (or third or fourth) litigation venue in disputes between domestic parties. The recent ITC action by Masimo, a California company, against Apple, another California company, is such a domestic-domestic dispute, as is the recent ITC action by an Atlanta company against thirty domestic wig makers based in Florida, New Jersey, Pennsylvania, Texas, Georgia, New York, California, and Illinois.<sup>98</sup> As Fiona Scott Morton, former chief economist of the U.S. Department of Justice, has observed, the expansion of ITC litigation "is mostly a U.S.-on-U.S. problem."<sup>99</sup> Nowhere in the legislative history of the ITC was it contemplated that the agency should serve as a forum for disputes between domestic parties, yet that is now one of its principal uses.

The fact that ITC actions are brought against U.S. companies that have their products manufactured or assembled overseas also impacts the competitiveness of U.S. firms that seek to lower their costs by utilizing the most efficient manufacturing services for their products yet still earn the bulk of their revenue in the U.S. market.<sup>100</sup> Subjecting these firms to heightened litigation risks and costs could be deterring U.S. firms from pursuing cost-saving measures, potentially raising

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96. *See* Certain Mobile Phones, Components Thereof, and Products Containing Same, ITC Inv. No. 337-TA-1375; Certain Electronic Devices, Including Mobile Phones, Tablets, Laptops, Components Thereof, and Products Containing the Same, Inv. No. 337-TA-1376.

97. *See* Telefonaktiebolaget LM Ericsson v. Lenovo (U.S.), Inc., No. 5123-CV-00569 (E.D.N.C.).

98. In The Matter of Certain Pre-Stretched Synthetic Braiding Hair and Packaging Therefor, Inv. No. 337-TA-1415 (investigation initiated Sep. 3, 2024).

99. House Hearings on ITC Patent Litigation (2016), *supra* note 22, at 44 (statement of Fiona M. Scott Morton, Theodore Nierenberg Professor of Economics, Yale School of Management).

100. *See* SUZANNE BERGER, MAKING IN AMERICA: FROM INNOVATION TO MARKET 4 (2013) (noting that technology companies like Apple, Qualcomm, and Cisco "have virtually all of their production abroad but . . . still reap the majority of their profits in the United States.").

prices for U.S. consumers and harming the competitiveness of these firms in international markets (i.e., against foreign firms that do not suffer the same litigation penalty in their own countries).

Critics might suggest that domestic firms could eliminate their exposure to ITC litigation if they simply stopped manufacturing products abroad and instead returned manufacturing to the United States, thereby bolstering domestic industry. But today the ITC is viewed as such an integral part of domestic patent litigation that even this approach has proven to be problematic. Take, for example, the view of the U.S. District Court for the District of Delaware in a patent case between two domestic companies in the construction equipment industry: Wirtgen (a subsidiary of John Deere) and Caterpillar.<sup>101</sup> In an earlier ITC action between the parties, the ITC issued an exclusion order against Caterpillar's importation of an infringing machine that it manufactured in Italy.<sup>102</sup> In order to comply with the ITC's order, Caterpillar moved its manufacturing operation to the United States.<sup>103</sup> Yet, remarkably, the District Court viewed this response as "sneaky or, at the very least, underhanded."<sup>104</sup> As a consequence, the court imposed enhanced damages on Caterpillar.<sup>105</sup> Apparently, the ITC's exclusion order was viewed as so definitive by the district court that even Caterpillar's domestication of its manufacturing operation did not exonerate Caterpillar from the effect of that order.

### 3. PAEs and Domestic Industry

The ITC was created to protect U.S. markets from unfair foreign imports, and Section 337 thus provides that the ITC will issue a remedy against an infringing imported product if it would "destroy or substantially injure an industry in the United States [or] prevent the establishment of such an industry" (the so-called "domestic industry" requirement).<sup>106</sup> In 1988, Congress amended this provision to list "licensing" as one of the activities that constituted a domestic industry.<sup>107</sup> Chien argues that the legislative history of this amendment demonstrates that it was intended to protect "licensing activities that promote technological commercialization" by patent holders "such as

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101. *Wirtgen American, Inc. v. Caterpillar, Inc.*, No. 17-cv-00770, 2024 WL 4216057 (D. Del., Sep. 17, 2024).

102. *Id.* at \*10–11.

103. *Id.*

104. *Id.* at \*20.

105. *Id.* at \*27.

106. 19 U.S.C. § 1337(a)(1)(A)(i)–(ii).

107. 19 U.S.C. § 1337(a)(3)(C) ("[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 by the patent . . . (C) substantial investment in its exploitation, including engineering, research and development, or licensing.").

universities, startups, and companies that license their patents to manufacturers,” not PAEs that do little to promote technological development.<sup>108</sup> The U.S. Federal Trade Commission has agreed, recommending that the ITC “consider interpreting the domestic industry requirement as not satisfied by ex post licensing activity solely focused on extracting rents from manufacturers based on products already on the market.”<sup>109</sup>

Yet the ITC has interpreted the domestic industry requirement as encompassing the patent enforcement and monetization business conducted by PAEs, thereby permitting PAEs to bring complaints before the ITC. Accordingly, despite some limitations on PAEs’ ability to claim that they operate a domestic industry,<sup>110</sup> PAEs are increasingly taking advantage of the ITC as a litigation venue.<sup>111</sup> This strategy is enhanced by PAEs that claim that their domestic licensees — often companies threatened with suit that have taken licenses in order to avoid or settle litigation — represent a domestic industry operating under the asserted patents.<sup>112</sup> Given that PAEs themselves do not

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108. See Chien, *Domestic Industries*, *supra* note 84, at 179.

109. U.S. FEDERAL TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 242 (2011), <https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf> [<https://perma.cc/F8KN-9QKM>].

110. The domestic industry requirement generally requires the satisfaction of two “prongs”: a technical prong and an economic prong. The technical prong requires that, for a claim to be sustained in the ITC, the complainant must exploit in the domestic market products that are covered by the claims of the asserted patents. Because PAEs, which rely on patent licensing as their “domestic industry,” do not have products, the ITC does not require them to satisfy the technical prong. See, e.g., Order No. 72 at 4–5, *Certain Short-Wavelength Light Emitting Diodes, Laser Diodes and Products Containing Same*, ITC Inv. No. 337-TA-640 (June 10, 2009) (Final), <https://edis.usitc.gov/external/attachment/404956-511367.pdf> [<https://perma.cc/JRX4-CXTC>]; SCHAUMBERG, *supra* note 42, at 64; Chien, *Domestic Industry*, *supra* note 84, at 180. The economic prong provides that a domestic industry exists with respect to patented articles if there is “(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.” 19 U.S.C. § 1337(a)(3). NPEs generally satisfy part (C) of the economic prong by making investments in licensing their patents. See SCHAUMBERG, *supra* note 42, at 74–79. However, in at least one case, the ITC has ruled, and the Federal Circuit affirmed, that the economic prong was not satisfied by a PAE whose sole investment in the asserted patents was litigation against an importer. Rather, in order to satisfy the economic prong, licensing and litigation must be “substantial and directed toward a licensing program that would encourage adoption and development of articles that incorporated [the complainant’s] patented technology.” *Motiva, LLC v. Int’l Trade Comm’n*, 716 F.3d 596, 600–01 (Fed. Cir. 2013).

111. See Duan, *supra* note 89, at 11; Chien & Lemley, *supra* note 22, at 26–27.

112. See Josh Landau, *The ITC In 2020: Anything But Typical*, PATENTPROGRESS (July 6, 2021), <https://patentprogress.org/2021/07/the-its-in-2020-anything-but-typical/> (discussing “practice of ‘domestic industry by subpoena,’ where a company which doesn’t have its own U.S. industry forces a company that does to take a license under the threat of litigation. Then, once that licensee has signed up, the patent owner forces the licensee to pay for lawyers and disclose technical information in the ITC, all on behalf of the same company that threatened them with litigation to get them to pay for a license in the first place.”).

produce products for sale in the domestic market, and their licensees are often unwilling, this trend also appears to subvert the original purpose of the ITC and its authorizing statute.

*D. Bias Against Foreign Holders of U.S. Patents*

Another criticism of the ITC is that its rules and procedures are improperly biased in favor of domestic over foreign holders of U.S. patents. Specifically, the ITC's role in protecting U.S. markets against unfair foreign imports puts it into tension with U.S. treaty obligations that assure equal and "most favored" treatment of foreign trading partners. As a result, in 1987, the European Economic Community (EEC), supported by Canada, Japan, South Korea, and Switzerland, brought a claim before the Dispute Settlement Panel for the General Agreements on Tariffs and Trade (GATT), alleging that the ITC's enforcement of Section 337 was inconsistent with U.S. obligations to give national treatment to foreign patent holders.<sup>113</sup> The Panel found six grounds on which the ITC's procedures violated the GATT.<sup>114</sup> These violations included the ITC's "expedited" 12-18 month case resolution schedule, which resulted in foreign infringers being subject to penalties more rapidly than domestic infringers being sued in district court.<sup>115</sup> As a result, Congress amended Section 337 in 1995 as part of the GATT Uruguay Round negotiations to address the specific violations found by the GATT Panel.<sup>116</sup>

Notwithstanding these amendments, some commentators still contend that the ITC's procedures violate U.S. obligations under the TRIPS Agreement by treating imported products less favorably than domestic ones and by offering domestic patent holders enhanced remedies that are not available to foreign patent holders.<sup>117</sup> To this end, in 2000, the European Community, joined by Canada and Japan, filed

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113. See Report of the Panel, *United States — Section 337 of the Tariff Act of 1930*, ¶¶ 1.1–1.4, L/6439–36S/345 (Nov. 7, 1989) [hereinafter GATT Panel Report]. A similar challenge was brought by Canada in 1983, but did not result in a ruling against the U.S. Report of the Panel, *United States — Imports of Certain Automotive Spring Assemblies*, L/5333, GATT BISD (30th Supp.), at 107 (1984) (panel report adopted May 26, 1983). See Ernest P. Shriver, *Separate but Equal: Intellectual Property Importation and the Recent Amendments to Section 337*, 5 MINN. J. GLOB. TRADE 441, 446 (1996).

114. GATT Panel Report, *supra* note 113, at ¶ 5.20. See also Watson, *Still a Protectionist Trade Remedy*, *supra* note 22, at 7; Anne Elise Herold Li, *Is the Federal Circuit Affecting U.S. Treaties? The ITC, § 271(g), GATT/TRIPS and the Kinik Decision*, 16 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 601, 622–32 (2006).

115. GATT Panel Report, *supra* note 113, at ¶ 5.20. See also Watson, *Still a Protectionist Trade Remedy*, *supra* note 22, at 7; Li, *supra* note 114, at 622–32.

116. See Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, § 321 (1994).

117. See Cotter, *supra* note 20, at 53; Watson, *Still a Protectionist Trade Remedy*, *supra* note 22, at 7; Shriver, *supra* note 113, at 455–65; Chien, *Patently Protectionist*, *supra* note 12, at 68 n.15.

a new complaint against the United States at the WTO, alleging that the ITC Act and procedures continue to violate the TRIPS Agreement.<sup>118</sup>

### *E. Patent Exceptionalism*

In response to these critiques, supporters of the ITC's patent jurisdiction point to the many real and perceived advantages that ITC litigation offers to patent holders: its speed, its expertise, its propensity to issue exclusion orders, and the like.<sup>119</sup> These advantages are real and, in many cases, the very reasons that others object to the ITC's patent jurisdiction. Yet even if, in some general balancing of interests, the systemic advantages of the ITC's current patent jurisdiction outweighed the drawbacks described in Part II, there remains the very real question why patent litigation, over all other forms of litigation (toxic torts, false advertising, medical malpractice, construction defects, etc.)<sup>120</sup> should be privileged with this special, additional tribunal. Giving patent asserters, exclusively among plaintiffs, a second taxpayer-funded litigation venue is hard to justify on any rational basis. It is, rather, a form of patent exceptionalism that, while compelling to patent holders, lacks a clear jurisprudential justification.

Thus, rather than funding a special non-judicial litigation forum for patent holders, the government could devote further resources to improving district court litigation across the board. Improvements are possible. For example, the district courts in the Eastern District of Virginia and the Eastern and Western Districts of Texas have earned reputations as speedy tribunals for patent cases.<sup>121</sup> Their techniques, such as fast-track case schedules,<sup>122</sup> could be adopted more broadly across the judicial landscape. Likewise, for better or worse, different

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118. Request for Consultations by the European Communities and their Member States, *United States — Section 337 of the Tariff Act of 1930 and Amendments Thereto*, WTO Doc. WT/DS186/1 (adopted Jan. 18, 2000). This matter has not been resolved and is currently inactive. Rochelle Dreyfuss has suggested that the complainants' motivation to pursue this claim has been reduced as a result of the ability of foreign companies to bring ITC claims through their U.S. subsidiaries.

119. See *supra* notes 12–19 and accompanying text.

120. Though the ITC is also authorized to investigate infringement of other forms of intellectual property including trademark, copyright, and trade secret, the vast majority of investigations concern patent infringement. Of ITC investigations initiated in 2022–2023, only two percent did not include patent infringement assertions, and ninety-two percent included only patent infringement assertions. Author's calculation based on data compiled from IDS, *supra* note 8. See also Duan, *supra* note 89, at 6 fig.2 (showing historical trend).

121. See J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L.J. 419, 455 (2021) (discussing speed of patent case resolution in Western District of Texas); J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PENN. L. REV. 631, 677 (2015) ("Some districts have made the speed with which they dispense justice an integral part of the district's culture."); Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 414–15 (2010) (ranking US district courts by speed to resolution of patent cases).

122. Anderson & Gugliuzza, *supra* note 121, at 455–61 (discussing use of "fast track" case schedules in Western District of Texas).



judicial districts have developed reputations as more or less patent “friendly.”<sup>123</sup> Thus, even among the district courts, patent holders can shop for more or less favorable venues, making the systemic need for the ITC even less clear.

### III. ITC REFORM PROPOSALS

Serious critique of the ITC’s rules and procedures began to emerge in 2007 as a result of the confluence of several factors: (1) the Federal Circuit’s holding in *Kinik v. ITC*<sup>124</sup> that a respondent in the ITC was not entitled to the benefit of the defenses available under Section 271(g) of the Patent Act;<sup>125</sup> (2) the ITC’s June 2007 exclusion order issued against chipsets sold by the domestic firm Qualcomm and then incorporated into cellular phones and other devices assembled overseas;<sup>126</sup> and (3) a growing realization that the ITC would not follow the Supreme Court’s precedent in *eBay*.<sup>127</sup> These events precipitated significant interest in the ITC and its reform among academics and policymakers, resulting in law review articles and public interest statements by the FTC and *amici curiae* in ITC investigations.<sup>128</sup> In 2012, a lobbying organization called the ITC Working Group was formed primarily to seek legislation limiting the ability of PAEs to take advantage of the ITC as a litigation forum.<sup>129</sup> Hearings were held by the House Subcommittee on Courts, Intellectual Property, and the Internet in 2012 and 2016.<sup>130</sup> Bills seeking to amend Section 337 were introduced in the House Ways and Means Committee in 2016 and

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123. See Anderson & Gugliuzza, *supra* note 121, at 427 (studying “emergence of Waco as a patent litigation hotbed”); Anderson, *supra* note 121, at 649–59 (discussing Eastern District of Texas, District of Delaware and Northern District of Virginia); Lemley, *supra* note 121, at 410 (“[T]he jurisdiction in which a case is litigated has a significant impact on its outcome.”).

124. *Kinik Co. v. U.S. Int’l Trade Comm’n*, 362 F.3d 1359 (Fed. Cir. 2004).

125. See *id.* at 1363. This decision led to Congressional hearings on the issue in May 2007. See *Process Patents: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 4 (2007).

126. Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, Including Cellular Telephone Handsets, ITC Inv. No. 337-TA-543, 72 Fed. Reg. 32682–83 (June 7, 2007), *rev’d in part sub nom.*, *Kyocera Wireless Corp. v. U.S. Int’l Trade Comm’n*, 545 F.3d 1340 (Fed. Cir. 2008).

127. See *supra* Section II.B.1.

128. See, e.g., Third Party United States Federal Trade Commission’s Statement on the Public Interest, Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof, ITC Inv. No. 337-TA-752 (2012), <https://edis.usitc.gov/external/attachment/482237-751877.pdf> [<https://perma.cc/82CG-R9QW>].

129. See Jan Wolfe, *Tech-Sector Lobbying Group Wants ‘Patent Trolls’ Out of the ITC*, CORP. COUNS. (Mar. 22, 2012, 12:00 AM), <https://www.law.com/corpcounsel/almID/1202546599138/> [<https://perma.cc/85FF-F2BN>] (identifying members of the ITC Working Group, according to a filing under the Lobbying Disclosure Act, as Hewlett-Packard, Apple, Google, Intel, Oracle, Cisco, Broadcom, and Avaya).

130. House Hearings on ITC Patent Litigation (2016), *supra* note 22; *International Trade Commission and Patent Disputes: Hearing before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 112th Cong. (2012).

2017,<sup>131</sup> and 2020, 2021, and 2023.<sup>132</sup> The result of this burst of interest in the ITC was a series of reform proposals, the most salient features of which are summarized below.

### *A. Eliminating Jurisdictional Overlap*

As noted in Part II, one of the principal critiques of the ITC's patent jurisdiction is its overlap with district court jurisdiction in cases involving domestic parties (i.e., the large majority of ITC cases today).<sup>133</sup> Several proposals have sought to reduce or eliminate this jurisdictional overlap.

#### 1. Statutory Limitations on ITC Jurisdiction

One approach to reducing the duplication of jurisdiction currently shared by the ITC and the federal courts, is to limit the ITC's patent jurisdiction via statutory amendment. Such an amendment would limit the ITC's jurisdiction to cases in which the federal courts lack personal jurisdiction over the parties.<sup>134</sup> This reform would drastically reduce the ITC's jurisdictional authority to the handful of cases each year (six percent in 2022-23)<sup>135</sup> that involve only foreign respondents beyond the jurisdictional reach of the U.S. courts.

Others have proposed what I refer to as a "pick one" regime, in which filing an infringement suit in district court would preclude a patent holder from commencing a parallel action in the ITC,<sup>136</sup> or in which an ITC respondent would have the right to remove an ITC action filed against it to federal district court, provided that the respondent waived any jurisdictional objections and accepted personal jurisdiction in that court.<sup>137</sup>

#### 2. Res Judicata

A related, and more modest, approach would extend preclusive effect in district court to ITC determinations, thereby eliminating some of the duplication of effort that is currently required to litigate in both

131. Trade Protection Not Troll Protection Act, H.R. 4829, 114th Cong. (2016); Trade Protection Not Troll Protection Act, H.R. 2189, 115th Cong. (2017).

132. Advancing America's Interests Act, H.R. 8037, 116th Cong. (2020); Advancing America's Interests Act, H.R. 5184, 117th Cong. (2021); H.R. 3535, Advancing America's Interests Act, 118th Cong. (2023) [hereinafter AAIA (2023)]. See Duan, *supra* note 89, at 4–5 (discussing bills).

133. See *supra* Section II.A.1.

134. See Contreras, *Topsy-Turvy*, *supra* note 22; Kumar, *supra* note 8, at 551; Chien, *Patently Protectionist*, *supra* note 12, at 106; Hahn & Singer, *supra* note 14, at 488.

135. Author's calculation based on data compiled from IDS, *supra* note 8.

136. See Watson, *Preserving the Role of the Courts*, *supra* note 8, at 4.

137. The author thanks Joshua Landau for this suggestion.

jurisdictions.<sup>138</sup> Yet others, cautious of the perceived bias of the ITC and its other procedural shortcomings, have been reluctant to endorse the extension of preclusionary effect to ITC determinations, notwithstanding potential efficiency gains.<sup>139</sup>

### *B. Tightening the Domestic Industry Requirement*

#### 1. Using the Existing Framework

As noted in Section II.C.3, above, many of the critiques of the ITC's patent jurisdiction arise from its tendency to attract PAE litigants. Chien argues that the ITC has made it particularly easy for PAEs to bring actions at the ITC by failing to apply the "technical" prong of the domestic industry requirement to PAEs.<sup>140</sup> She recommends that the ITC apply the technical prong of the domestic industry requirement to all complainants, which would disqualify many PAEs from bringing claims at the ITC.<sup>141</sup> Likewise, patent attorney Matthew Duescher has recommended that the ITC more actively scrutinize PAEs for compliance with the economic prong of the domestic industry requirement to ensure that their licensing and litigation expenditures are "substantial and directed toward a licensing program that would encourage adoption and development of articles that incorporated [the complainant's] patented technology," as required by *Motiva v. ITC*.<sup>142</sup> Despite these proposals, it appears that the domestic industry requirement has recently become looser, rather than tighter, as a result of the Federal Circuit's decision in *Lashify v. ITC*.<sup>143</sup>

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138. See Kumar, *supra* note 8, at 558–65 (arguing that an ITC action should not have *res judicata* effect precluding a subsequent district court action, given the ITC's inability to award monetary damages, but that determinations made by the ITC should have collateral estoppel effect with respect to the same issues when raised in court (i.e., issue preclusion)); Note: *Recasting the U.S. International Trade Commission's Role in the Patent System*, 126 HARV. L. REV. 2337, 2339 n.16 (2022) (collecting sources re. proposals to apply collateral estoppel to ITC determinations). Presumably, the preclusive effect of ITC determinations would not apply to the ITC's *ex parte* determinations. See Wasserman Rajec, *supra* note 86, at 1085.

139. See Chien, *Patently Protectionist*, *supra* note 12, at 110–11.

140. See *supra* note 110 and accompanying text.

141. Chien, *Domestic Industry*, *supra* note 84, at 183–85.

142. *Motiva, LLC v. Int'l Trade Comm'n*, 716 F.3d 596 (Fed. Cir. 2013); see also Matthew Duescher, *Controlling the Patent Trolls: A Proposed Approach for Curbing Abusive Section 337 Claims in the ITC*, 96 J. PAT. & TRADEMARK OFF. SOC'Y 614, 632–34 (2014) (arguing for greater application of *Motiva* test by ITC); *supra* note 110 (discussing *Motiva*).

<sup>143</sup> See Ryan Davis, *More ITC Patent Cases Expected After Fed. Circ. 'Sea Change'*, LAW360 (Mar. 12, 2025), <https://www.law360.com/articles/2309213/more-its-patent-cases-expected-after-fed-circ-sea-change-> [] (discussing *Lashify v. ITC*, 130 F.4th 948 (Fed. Cir. 2025)).

## 2. Amending the Definition of Domestic Industry

Numerous proposals have also been made to amend Section 337 to limit the ability of PAEs to initiate investigations in the ITC, primarily by tightening its “domestic industry” requirement. Thus, Chien has suggested eliminating “pure licensing activities” from the scope of “domestic industry” entirely.<sup>144</sup>

This approach, however, would exclude from the ITC more benign NPEs such as universities and research-and-development labs that perform legitimate research that they can only monetize through patent licensing. Thus, more recent legislative proposals have focused on narrowing the licensing prong of the “domestic industry” inquiry to require that, in order to bring a claim at the ITC, a patent holder must have made a “substantial investment in licensing activities that leads to the adoption and development of articles that incorporate the patent,” either itself or through its licensees.<sup>145</sup> This adjustment to the domestic industry requirement would screen out PAEs that engage solely in the assertion of patents against existing products, but would permit entities that license patents in furtherance of legitimate technology development and commercialization efforts to continue to bring claims at the ITC.

*C. Giving Greater Deference to the Public Interest*

## 1. ITC’s Discretionary Authority

Several commentators have suggested that the ITC should give greater deference to the public interest when deciding whether to issue an exclusion order.<sup>146</sup> Doing so would bring the ITC’s remedial approach more in line with the Supreme Court’s *eBay* framework. The public interest has also been relevant to the ITC’s analysis of standards-essential patents (“SEPs”). In 2013, the U.S. Trade Representative (“USTR”) disapproved (vetoed) an ITC exclusion order issued against Apple smartphones and tablets in a case initiated by Samsung.<sup>147</sup> In

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144. Chien, *Patently Protectionist*, *supra* note 12, at 110. This proposal is in accord with Judge Newman’s view, which she expressed in a dissenting opinion in *InterDigital Comm’n v. Int’l Trade Comm’n*, 707 F.3d 1295, 1304 (Fed. Cir. 2013) (Newman, J., dissenting), that Congress did not intend to authorize the issuance of exclusion orders on the basis of domestic licensing activity without some corresponding product manufacture or sale.

145. *See, e.g.*, AIAA (2023), *supra* note 132, § 3(a) (comparable provisions included in each bill listed in *supra* notes 131–132).

146. *See* Chien & Lemley, *supra* note 22, at 5 (“We think the ITC should pay more attention to the public interest, using prevailing economic theory and its precedents to assess the impact of patent injunctions on consumers and competitive conditions.”).

147. Letter from Michael B. G. Froman, Ambassador, to Hon. Irving A. Williamson, Chair, Int’l Trade Comm’n (Aug. 3, 2013) (disapproving ITC Exclusion Order in 337-TA-794) [hereinafter “Apple Disapproval Letter”].

disapproving the exclusion order, the USTR cited, among other things, the importance of standardized products to the U.S. economy. This action suggested to some that the ITC would give greater deference to the public interest in making its determinations. That, however, does not appear to have happened. Accordingly, in 2022, the FTC's Chair and one Commissioner submitted a Public Interest statement again urging the ITC not to grant relief where "a court has been asked to resolve [patent licensing] terms and can make the SEP holder whole."<sup>148</sup> Yet the ITC has continued to disregard such requests, including in cases involving SEPs.<sup>149</sup>

The ITC could give greater weight to the public interest in its decisions without a change to its governing statute. Such voluntary deference could be supplemented by minor adjustments to the ITC's procedural rules. Chien and Lemley observe that the ITC has previously revised these rules to conduct the public interest analysis earlier in a case,<sup>150</sup> which now occurs in a small number of cases.<sup>151</sup>

Likewise, in each ITC investigation, the agency designates an internal staff attorney from the Office of Unfair Import Investigations ("OUII") to participate as a full party representing the public interest.<sup>152</sup> Chien has suggested that this attorney could take a more active role in advocating for the interests of the public during the ITC's proceedings.<sup>153</sup> Yet despite hopes that the ITC would more actively consider the public interest when deciding whether to issue exclusion orders,<sup>154</sup> it has still not yet denied an exclusion order on public interest grounds in the twenty-first century.

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<sup>148</sup> Written Submission on the Public Interest of Federal Trade Commission Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter, in the Matter of Certain UMTS and LTE Cellular Communication Modules and Products Containing the Same, United States International Trade Commission, Inv. No. 337-TA-1240, at 5 (May 16, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Written\\_Submission\\_on\\_the\\_Public\\_Interest\\_of\\_Chair\\_Khan\\_and\\_Commissioner\\_Slaughter\\_to\\_ITC.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Written_Submission_on_the_Public_Interest_of_Chair_Khan_and_Commissioner_Slaughter_to_ITC.pdf)

<sup>149</sup> See, e.g., In re Certain Video Capable Electronic Devices, Including Computers, Streaming Devices, Televisions, and Components and Modules Thereof, United States International Trade Commission, Inv. No. 337-TA-1380, Initial Determination on Violation Of Section 337 and Recommended Determination on Remedy and Bond (Dec. 20, 2024) (describing ALJ final determination of SEP infringement recommending limited exclusion order).

<sup>150</sup> Chien & Lemley, *supra* note 22, at 28; see also 19 CFR § 210.10(b)(2).

<sup>151</sup> See Mareesa A. Frederick & Reginald D. Lucas, *Working with OUII — The Staff Attorney's Role and Practical Guidance on Interacting with the Staff Attorney*, FINNEGAN (July 2023), <https://www.finnegan.com/en/insights/articles/working-with-ouii-the-staff-attorneys-role-and-practical-guidance-on-interacting-with-the-staff-attorney.html> [<https://perma.cc/6WC2-RJVM>] (finding that ITC delegated to ALJ obligation to develop record on public interest prior to completion of investigation in fourteen percent of new investigations in 2022).

<sup>152</sup> See *Office of Unfair Import Investigations (OUII)*, U.S. INT'L TRADE COMM'N, <https://www.usitc.gov/offices/ouii> [<https://perma.cc/TK9Q-5MHQ>].

<sup>153</sup> Chien, *Patently Protectionist*, *supra* note 12, at 110.

<sup>154</sup> See Chien & Lemley, *supra* note 22, at 27 ("Recent ITC action suggests that the Commission may be open to rethinking its public interest case law.").

## 2. Relying on Presidential Review

Even if the ITC itself does not alter its practices regarding the public interest, all ITC orders remain subject to Presidential review.<sup>155</sup> Accordingly, the President, acting through the USTR may assess whether an ITC order negatively affects the public interest, as occurred in 2013 with respect to the exclusion order against Apple.<sup>156</sup> While the 2013 disapproval was only the sixth Presidential disapproval of an ITC order in history,<sup>157</sup> it could have signaled greater oversight of the ITC by the White House. Yet it seemingly did not, as there has been no other disapproval of an ITC order in the last dozen years.

## 3. Reversing the Public Interest Presumption

To address the public interest gap in a structural manner, the Advancing America's Interests Act ("AAIA") introduced by Representatives Suzan DelBene (D-Wash.) and David Schweikert (R-Ariz.) in 2020, 2021, and 2023 would expressly reverse the presumption underlying the application of the ITC's public interest test. That is, rather than permitting the ITC to issue an exclusion order *unless* that order would contravene the public interest, the agency would be permitted to exclude infringing products *only if* that exclusion "is in the interest of the public."<sup>158</sup>

*D. Harmonizing Standards for Relief: eBay at the ITC*

Another of the frequent critiques of the ITC is that it is not bound to follow the Supreme Court's *eBay* framework for awarding injunctive relief.<sup>159</sup> As a result, some commentators have urged that the ITC apply the four-factor *eBay* framework when deciding whether to issue an exclusion order,<sup>160</sup> or that the President consider the *eBay* factors when deciding whether to disapprove an ITC order.<sup>161</sup> In 2013, responding to the increase of PAE litigation in the United States,<sup>162</sup> the White House called on Congress to "[c]hange the ITC standard for obtaining an

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155. 19 U.S.C. § 1337(j)(2) (giving President a 60-day period from publication of any ITC determination to disapprove, and thereby nullify, such order for "policy reasons").

156. Apple Disapproval Letter, *supra* note 147.

157. See Watson, *Preserving the Role of the Courts*, *supra* note 8, at 2.

158. See, e.g., AAIA (2023), *supra* note 132, § 3(a)(4) (amending 19 U.S.C. § 1337(d)(1)).

159. See *supra* Section II.B.1.

160. See Hahn & Singer, *supra* note 14, at 489. *But see* Kumar, *supra* note 8, at 575–76 (arguing that first two *eBay* factors cannot realistically be applied by the ITC, given its inability to award monetary relief).

161. See Chien, *Patently Protectionist*, *supra* note 12, at 109–10.

162. See EXEC. OFF. OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION (2013), [https://obamawhitehouse.archives.gov/sites/default/files/docs/patent\\_report.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/patent_report.pdf) [<https://perma.cc/CNB8-XQ5Q>].

injunction to better align it with the traditional four-factor test in *eBay Inc. v. MercExchange*, to enhance consistency in the standards applied at the ITC and district courts.”<sup>163</sup> Thus far, such legislation has not been introduced.

### *E. Adjusting Remedies*

In addition to altering the standards by which the ITC decides whether or not to award relief, some proposals have been made regarding adjustments to the forms of relief that may be granted by the ITC (and, correspondingly, by district courts).

#### 1. Tailoring ITC Remedies Under Existing Rules

As noted by the Federal Circuit, the ITC “has broad discretion in selecting the form, scope and extent of the remedy” that it awards.<sup>164</sup> Accordingly, one of the more modest approaches to ITC reform would retain the ITC’s existing structure and procedures but have the agency exercise greater flexibility in fashioning its remedial awards. Thus, Chien and Lemley proposed in 2013 that the ITC should (1) revive its *EPROM* factors<sup>165</sup> to consider the proportionality of the exclusion order remedy in view of the value of the patented technology to the product into which it is incorporated;<sup>166</sup> (2) tailor exclusion orders to cover only new product models, thus allowing product already on the market to continue to be imported;<sup>167</sup> (3) postpone the effectiveness of exclusion orders to enable infringers to design around the patented technology;<sup>168</sup> and (4) consider “whether the patentee is a PAE, whether the defendant is a willful infringer, and whether the patent is standards-essential” when determining whether to issue an exclusion order.<sup>169</sup> The ITC’s exercise of greater remedial flexibility could reduce the opportunistic use of the ITC in support of patent hold-up.<sup>170</sup>

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163. *FACT SHEET: White House Task Force on High-Tech Patent Issues*, WHITE HOUSE (June 4, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues> [<https://perma.cc/2APG-XKZY>].

164. *Viscofan, S.A. v. U.S. Int’l Trade Comm’n*, 787 F.2d 544, 548 (Fed. Cir. 1986).

165. See *supra* note 70 and accompanying text.

166. Chien & Lemley, *supra* note 22, at 29–31.

167. *Id.* at 32–33. This approach was used by the ITC in *Baseband Processor Chips*, *supra* note 81, at 124 (“[T]he order would exclude only newly designed handsets and downstream products that contain the infringing chip, while ‘grandfathering’ models already on the market.”). However, this order was rejected by the Federal Circuit in *Kyocera Wireless Corp. v. U.S. International Trade Commission*, 545 F.3d 1340, 1356 (Fed. Cir. 2008), which held that the ITC has no authority to extend an exclusion order to downstream products not listed as respondents in the case.

168. Chien & Lemley, *supra* note 22, at 34–36.

169. *Id.* at 40–42. See also Contreras, *Topsy-Turvy*, *supra* note 22 (proposing exclusion of standards-essential patents from scope of ITC exclusion orders).

170. Chien & Lemley, *supra* note 22, at 43.

## 2. Modifying ITC Remedies for Infringement

As noted above, the ITC's relief is currently limited to the issuance of exclusion and cease-and-desist orders prohibiting the importation of infringing products into the United States. Scholars Robert Hahn and Hal Singer suggest that "in the absence of alternative [i.e., monetary] remedies, the ITC is extremely likely to issue injunctive relief following a finding of infringement."<sup>171</sup> As a result, Chien suggests a range of adjustments — both expansions and contractions — to the ITC's remedial power. For example, she observes that if the ITC were given the authority to award monetary damages, its remedial powers would more closely resemble those of the courts, thereby reducing the incentive to litigate in both fora.<sup>172</sup>

In the alternative, she suggests that the ITC could be limited to issuing general exclusion orders (GEOs), which require a higher standard of proof than cease-and-desist orders and limited exclusion orders.<sup>173</sup> This being said, Professor Sarah Wasserman Rajec questions the legality of the ITC's GEO remedy when applied to firms that were not named in the proceeding, making the further extension of GEO authority questionable.<sup>174</sup>

## 3. Enhancing the Remedial Powers of District Courts

Conversely, some commentators suggest expanding the remedial powers of the district courts to resemble more closely those of the ITC. Such measures could include amending the Patent Act to give district courts *in rem* jurisdiction over infringing products, and the authority to issue cease-and-desist orders and exclusion orders that are enforceable by Customs and Border Protection ("CBP").<sup>175</sup>

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171. Hahn & Singer, *supra* note 14, at 462.

172. Chien, *Patently Protectionist*, *supra* note 12, at 108. Another possible effect of permitting the ITC to grant monetary relief would be the effective preclusion of further litigation in district court after a plaintiff is awarded full compensation for its injury by the ITC.

173. Chien, *Patently Protectionist*, *supra* note 12, at 107:

This way, the ITC could continue to address the multiple-infringer scenario for which it was originally intended, but it would not hear disputes that could just as easily be resolved in a district court. By forcing plaintiffs that seek cease and desist or limited exclusion orders to request them from a district court, such a reform would substantially decrease the overlap between ITC and district court decisions . . . [and] dramatically shrink use of the venue.

174. See Wasserman Rajec, *supra* note 86, at 1098, 1110 (critiquing *ex parte* nature of ITC determinations when a general exclusion order is issued).

175. See Watson, *Still a Protectionist Trade Remedy*, *supra* note 22, at 12; Kumar, *supra* note 8, at 579–80; Chien, *Patently Protectionist*, *supra* note 12, at 109.



*F. Abolishing ITC Patent Jurisdiction*

Finally, a number of commentators, dissatisfied with the piecemeal proposals described above, have recommended that the ITC's patent jurisdiction be abolished,<sup>176</sup> either by removing patents from the scope of Section 337 or repealing Section 337 in its entirety.<sup>177</sup> Eliminating the ITC's patent jurisdiction, while preserving the ITC's antidumping, countervailing duty, and other trade-related functions, would restore exclusive jurisdiction over patent cases to the federal courts, where it was intended to reside, and restore the ITC to its original charge "to regulate international commerce."<sup>178</sup>

## IV. CONCLUSION: PATENT LITIGATION WITHOUT THE ITC?

As shown in Part III, a variety of proposals to reform the ITC's patent jurisdiction have been advanced over the last two decades. Table 1 below maps the issues identified in Part II to the reform proposals described in Part III, showing which issues are fully or partially addressed by which proposals.

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176. See Cotter, *supra* note 22, at 52–53; Watson, *Still a Protectionist Trade Remedy*, *supra* note 22, at 12; Kumar, *supra* note 8, at 580.

177. As discussed in *supra* note 120, the vast majority of Section 337 cases today involve patent infringement. The analysis of the use of Section 337 in trade secret misappropriation and other cases is beyond the scope of this essay.

178. *Suprema, Inc. v. Int'l Trade Comm'n*, 796 F.3d 1338, 1344 (Fed. Cir. 2015) (en banc).

Table 1: ITC Patent Jurisdiction Solution Space

Issue/Solution	[1] Limit Jurisdiction (II.A.1)	[2] Res Judicata (II.A.2)	[3] Domestic Industry (II.B)	[4] Public Interest (II.C)	[5] Harmonize <i>eBay</i> (II.D)	[6] Tailor remedies (II.E)	[7] Abolish (II.F)
[1] Duplication (I.A)	Yes	Partial	No	No	No	Partial	Yes
[2] Inconsistency — <i>eBay</i> (I.B.1)	No	Partial	No	Partial	Yes	No	Yes
[3] Inconsistency — Complex Products (I.B.2)	No	Partial	No	No	Partial	Partial	Yes
[4] Inconsistency — Public Interest (I.B.3)	No	Partial	No	Yes	Yes	No	Yes
[5] Subversion — Foreign Complainants (I.C.1)	Partial	No	No	No	No	No	Yes
[6] Subversion — PAEs (I.C.2)	No	No	Yes	No	Partial	No	Yes
[7] Bias Against Foreign Patentees (I.D)	No	No	No	No	No	No	Yes
[8] Patent Exceptionalism (I.E)	Partial	No	No	No	No	No	Yes

Thus, as shown in Table 1, proposals that would require the ITC to follow the Supreme Court's *eBay* (and related) jurisprudence when deciding whether to issue an exclusion order (Section III.D) would address the current inconsistency between judicial and ITC standards for remedial relief (hence “yes” in Rows 2 and 4). This adjustment would also partially (but not completely) address the current advantages enjoyed by PAEs at the ITC (Row 6). But it would do little to address issues such as the duplication of proceedings (Row 1) and the ability of foreign complainants to take advantage of the forum (Row 5). Likewise, tightening the ITC's domestic industry requirements to eliminate PAE litigation and licensing as qualifying for ITC jurisdiction would address the current advantages enjoyed by PAEs at the ITC (Row 6), but not much else. As Table 1 indicates, there is only one proposed reform that addresses all of the issues identified with respect to the ITC's patent jurisdiction: the abolition of that jurisdiction entirely. As such, that is the recommendation of this essay.

While the repeal of Section 337, at first blush, may appear to be a radical proposal, I contend that it is not. American markets and patent

holders would lose little by eliminating the ITC's duplicative and costly patent jurisdiction, and the broader marketplace and innovation economy would benefit from the elimination of this unnecessary and burdensome apparatus.

Of course, a small number of patent cases today might not be amenable to adjudication in the courts. These are the six percent of cases exclusively involving foreign manufacturers who import products into the United States from beyond the jurisdictional reach of the courts, and for which the ITC is the sole available venue. Yet mechanisms could easily be put into place to address these cases without the need for the current sprawling Section 337 apparatus. One possibility is that ITC jurisdiction could be preserved but limited to this small subset of cases (the proposal discussed in Section III.A.1); however, this approach would require the continued maintenance of the Section 337 bureaucracy, and opportunistic parties would likely find ways to use it to their advantage, notwithstanding its limitations. It would be more effective to permit federal courts, through a modest amendment to the Federal Rules of Civil Procedure, to obtain *in rem* jurisdiction over infringing articles and then to advise CBP, which is already active in policing articles that infringe U.S. copyrights and trademarks,<sup>179</sup> to seize those infringing articles at the border (i.e., substituting the courts for the ITC as the agency with responsibility for advising CBP of patent infringement).<sup>180</sup>

On balance, the systemic costs, inconsistencies, and bias that the ITC introduces into the U.S. patent litigation system are greater than the marginal benefits that the ITC offers to a handful of domestic patentees bringing actions solely against foreign respondents. The abolition of the ITC's patent jurisdiction would substantially simplify, rationalize, and reduce the transactional costs of the patent litigation system and return the ITC to its roots as a trade regulation agency. As the ITC's own predecessor recognized early in its history, "[a]t present there is concurrent jurisdiction (respecting imports) on patents by the Federal courts and the Tariff Commission. The Commission believes that all problems connected with patents should be dealt with by one branch of the Government, and that obviously should be the Federal

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179. In fiscal year 2022, CBP seized over 20,000 shipments containing nearly 25 million counterfeit goods with a total estimated value of nearly \$3 billion. U.S. CUSTOMS & BORDER PROTECTION, CBP PUBLICATION NO. 3101-032, FY 2022 FACT SHEET: INTELLECTUAL PROPERTY RIGHTS 3 (2023), <https://www.cbp.gov/sites/default/files/assets/documents/2023-Mar/IPR%20Fact%20Sheet%20FY2022%20Final%20Draft%20%28508%29%20%28004%29%20%282%29.pdf> [<https://perma.cc/Q4UB-6KBY>].

180. The scope and details of such a proposal are currently the subject of ongoing research.

courts.”<sup>181</sup> Accordingly, this essay recommends that exclusive jurisdiction over patent disputes should be restored to the federal courts.

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181. U.S. TARIFF COMM’N, NINETEENTH ANNUAL REPORT OF THE UNITED STATES TARIFF COMMISSION 19 (1935). The author thanks Prof. Barbara Lauriat for bringing this material to my attention.