

# Client Alert

October 2019

## Wondering How Much Domestic Industry Is Enough For The ITC? The Answer May Never Be Absolute

It's a question we are inevitably asked whenever the International Trade Commission (ITC) becomes a potential forum for a client's intellectual property dispute, on both the complainant and respondent sides:

*How much domestic industry is enough?*

Companies seeking to file an ITC complaint want to ensure they meet the economic prong of the domestic industry requirement under section 337(a)(3)—comfortably—and will be able to withstand any challenges to the investigation on that basis. Companies named in a complaint, and against which an investigation is instituted, want to know the likelihood they can defend against and terminate an investigation based on a complainant's lack of domestic industry.

If you have been in the ITC, you know this is not an easy question to answer. There is no bright-line standard; investments can be quantitative or qualitative; and investment context matters. In addition, the ITC takes confidential business information seriously: orders and opinions, especially those containing sensitive financial information, are often redacted to the point of being unhelpful to ITC participants and counsel in future investigations.

### Can We Get A Bright-Line Standard?

Chief Administrative Law Judge Bullock recently appeared to articulate a standard by which others could judge whether alleged economic activities and investments in any given investigation are sufficient to meet the domestic industry requirement. *Carburetors and Products Containing Such Carburetors*, Inv. No. 337-TA-1123, Order No. 77 (Aug. 12, 2019).

Respondents in *Carburetors* moved for summary determination that the complainant failed to satisfy the economic prong of the domestic industry requirement, arguing multiple defects in complainant's analysis. Order No. 77 at 1-2. Not surprisingly, complainant opposed. *Id.* at 1. Somewhat surprisingly, the Commission Investigative Staff—who were participating in this investigation, and tend to weigh in on ITC-specific issues like domestic industry—did not respond. *Id.* Chief Judge Bullock assumed complainant's calculations of its investments were correct, but went on to grant the motion and stay the investigation pending Commission review, finding complainant failed to meet the requirement.

### Could 5% Of US Sales Be A Threshold?

After setting forth the criteria for determining the existence of an economic domestic industry, explaining that section 337(a)(3) requires relevant US investment and employment to be either "significant" or "substantial," Chief Judge Bullock noted, "There is no threshold amount [of monetary expenditure] that a complainant must meet." *Id.* at 3.

That said, however, he went on to effectively set a threshold of 5% of US sales:

The undersigned was unable to locate any opinion in the past four years in which the Commission has held that an investment amounting to less than 5% of sales qualified as ‘significant’ or ‘substantial.’

*Id.* at 5-6. As the complainant’s investments did not meet that threshold, Chief Judge Bullock found “such investments are not significant or substantial.” *Id.*

He rejected complainant’s argument that its domestic industry expenditures were significant in absolute terms, finding that, while the relied-upon “investments include dollar amounts which may appear large, [] these numbers must be viewed in their proper context.” *Id.* at 3-4. Because complainant “is a large, multinational company” with presumably large worldwide revenue—(unfortunately, the precise numbers are redacted in the public order)—it “should be expected to invest larger dollar amounts” for investments to be considered significant or substantial. *Id.* at 4.

For ITC participants and practitioners, missing from the opinion were citations to prior ITC orders. Chief Judge Bullock found that some of complainant’s investments in labor and capital constituted “a percentage [of US sales] that the Commission has deemed significant in the past.” *Id.* at 6. But, in a footnote, he stated: “Because the investment amounts and corresponding percentages are deemed confidential in these opinions, the undersigned cannot cite to any specific opinion to support this statement.” *Id.* at 6 n.6. (He also went on to find that worldwide sales, not US sales, provided the proper investment context in this investigation, which rendered complainant’s investments “clearly minimal” and not significant or substantial. *Id.* at 6-7.)

## **No: The Commission Rejects A Minimum Threshold**

On review, the Commission affirmed Chief Judge Bullock’s finding that respondents were entitled to summary determination that complainant failed to satisfy the domestic industry requirement. *Carburetors and Products Containing Such Carburetors*, Comm’n Notice at 2 (Oct. 11, 2019). The Commission terminated the investigation on this basis, a win for respondents.

However, while the Commission did not issue a full opinion, it stated the following in its Notice, explicitly rejecting a minimum threshold:

... the Commission declines to adopt certain statements on pages 4, 5, and 6 in [Order No. 77] that could be misinterpreted as applying a minimum threshold and as inconsistent with the flexible approach to domestic industry analysis.

*Id.* at 2-3.

Economic domestic industry thus continues to be a “you (hope) you know it when you see it” issue. There may never be an absolute dollar value or percentage of investment that is—or is not—sufficient to satisfy the domestic industry requirement.

We understand the frustration in not having complete confidence in what exactly constitutes enough investment to meet the economic prong of domestic industry. But no matter the side of the investigation you are on, we will continue to do our best to provide you with high-quality information to devise a winning strategy on domestic industry.

## **Contacts**

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