

## Foreign Companies Embracing ITC As Perceptions Shift

By **Matthew Bultman**

*Law360, New York (April 13, 2017, 9:23 PM EDT)* -- The U.S. International Trade Commission has long dealt with the perception that it is biased against foreign companies. Congress has even heard concerns about the impact it might have on international relations.

But the outside view of the ITC could be changing, experts say, as foreign companies have become more sophisticated at operating within the U.S. patent system and have realized the same trade laws that have been wielded against them could be used against their competitors.

“Instead of just getting beaten over the head by the ITC, they have an opportunity to use the ITC against somebody else,” Latham & Watkins LLP partner Bert Reiser said. “There’s no doubt in my mind that as they’ve become more sophisticated, acquired more U.S. patents, their perception of the venue has changed.”

The ITC, a bipartisan, quasi-judicial agency focused on trade, was created with the intent to protect U.S. industry from unfair imports. Money damages are not an option — the sole remedy it offers if patent infringement is found is an order banning imports of the infringing product into the U.S.

Whether its reputation for protectionist bias is deserved has been matter of debate. But there is no doubt those feelings have existed, at least in some circles. Reiser recalled speaking to a technology group in Beijing several years back and fielding questions about the ITC.

“Their perception then was that this was sort of the leading edge of the anti-Chinese commerce arm of the government,” he said. “They absolutely thought there was a dead bias against them.”

And it’s not just foreign companies that have been dragged before the commission that felt there was a bias. Santa Clara University law professor Colleen Chien wrote in 2008 that suspicion “still lingers among scholars and governments that the ITC is protectionist and may violate international law.”

Her paper cited testimony that John Thomas, a professor at the Georgetown University Law Center, gave to a Senate committee in 2007, stating that “the perceived favoritism for U.S. industry over foreign firms may send a conflicting message as the United States proceeds against [its] trading partners for perceived lapses in their intellectual property regimes.”

But it appears more foreign companies have started to feel comfortable at the ITC.

Between 2014 and 2016, the commission initiated an investigation in roughly 30 patent cases brought by a foreign-headquartered company, according to data compiled by Law360. These cases, brought by companies from around the globe, including places like Japan, Liechtenstein and Norway, accounted for about 23 percent of all patent investigations at the ITC during that span.

The number isn't overwhelming. But it does represent an upswing from years ago.

In a research paper published in 2007, Robert Hahn, then director of the AEI-Brookings Joint Center, analyzed data that included 467 patent cases completed at the ITC between 1972 and 2006. A foreign complainant was identified in 12 percent of those cases.

Bart Showalter, chair of the intellectual property department at Baker Botts LLP, said part of the reason there weren't a lot of filings on the part of foreign companies back then could be due to an unfamiliarity with the ITC and procedures at the commission.

"Over the last few years, because they've been hailed into the ITC as respondents, I think they've realized that you can really get some justice," he said.

Going back several decades, experts said companies from places like Japan and Taiwan started to find themselves in front of U.S. courts and the ITC more regularly as they became bigger players in the electronics field and other industries.

There wasn't — at least not then — a level of sophistication about U.S. patent law among these companies, which didn't have a lot of U.S. patents, attorneys said. But as time went on, they started to become more aggressive in their patent acquisition and enforcement.

Other factors likely contributed too.

For example, Congress in the late 1980s made it easier to prove the existence of a domestic industry, a requirement at the ITC. Adduci Mastriani & Schaumberg LLP partner Jonathan Engler said companies have also expanded their U.S. footprints in terms of research and development and similar activities.

"Ten years ago, for a lot of the Asian complainants, it would have been hard to meet the domestic industry requirement," he said. "But now so many of them have major research and development operations that it's a lot easier to do."

To be sure, there are large multinational companies like LG Electronics Inc. and Nokia Corp., headquartered in South Korea and Finland, respectively, that have been active at the commission for years. But there also appears to be some relative newcomers, both foreign and domestic.

"If you look at this over the past 10 years, or even 15, 20 years, you would definitely be able to show a whopping number of new people coming to the commission and a lot of them being foreign-based," said Daniel Yonan, who leads the ITC practice at Sterne Kessler Goldstein & Fox PLLC.

Attorneys said the main appeal of the ITC for foreign companies is largely the same as it is for domestic companies — proceedings are faster than in district court and an ITC exclusion order banning importation of the infringing products carries a powerful punch.

The ITC has also been reluctant to pause an investigation when an accused infringer challenges the

patent at the Patent Trial and Appeal Board, which attorneys said can help a patent owner maintain leverage and save valuable time in cases against a competitor.

Yonan said the inter partes review factor “is a primary driver” to a recent increase in ITC activity overall.

For many observers, there’s no reason to expect a major drop-off in the ITC’s overall caseload, or to see foreign companies shy away from bringing a complaint. Generally speaking, Reiser said the commission isn’t an unfriendly place for foreign companies that have a presence in the U.S.

“In other words, the commission, I think, doesn’t ever genuinely think about, ‘Is this a foreign company?’ It’s pretty straightforwardly focused on the issue and the merits,” he said.

--Editing by Mark Lebetkin and Bruce Goldman.