

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN ROAD CONSTRUCTION
MACHINES AND COMPONENTS
THEREOF**

Investigation No. 337-TA-1088

**NOTICE OF COMMISSION DETERMINATION TO REVIEW-IN-PART A FINAL
INITIAL DETERMINATION FINDING A SECTION 337 VIOLATION; SCHEDULE
FOR FILING WRITTEN SUBMISSIONS; EXTENSION OF THE TARGET DATE
FOR COMPLETION OF THE INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review-in-part a final initial determination (“FID”) of the presiding administrative law judge (“ALJ”) finding a violation of section 337 of the Tariff Act of 1930, as amended. The Commission also extends the target date for completion of this investigation by five business days to June 21, 2019.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708-4716. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on November 29, 2017, based on a complaint, as supplemented, filed by Caterpillar Inc. of Peoria, Illinois and Caterpillar Paving Products, Inc. of Minneapolis, Minnesota (collectively, “Complainants”). *See* 82 FR 56625-26 (Nov. 29, 2017). The complaint, as supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain road construction machines and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 7,140,693 (“the ’693 patent”);

9,045,871 (“the ’871 patent”); and 7,641,419 (“the ’419 patent”). *See id.* The notice of investigation identifies the following respondents: Wirtgen GmbH of Windhagen, Germany; Joseph Vögele AG of Ludwigshafen, Germany; Wirtgen Group Holding GmbH of Windhagen, Germany; and Wirtgen America, Inc. of Antioch, Tennessee (collectively, “Respondents”). *See id.* The Office of Unfair Import Investigations is not a party to this investigation. *See id.*

The ALJ terminated the ’871 patent from the investigation after finding the asserted claims of that patent to be invalid under 35 U.S.C. § 101. *See* Order No. 18 (May 24, 2018), *currently under review*, Comm’n Notice (July 3, 2018). The Commission terminated the ’419 patent from the investigation after Complainants withdrew their allegations with respect to that patent. *See* Order No. 26 (July 5, 2018), *unreviewed*, Comm’n Notice (July 25, 2018). The Commission also terminated claim 25 of the ’693 patent from the investigation after Complainants withdrew their allegations as to that claim. *See* Order No. 38 (Oct. 16, 2018), *unreviewed*, Comm’n Notice (Nov. 9, 2018).

On February 14, 2019, the ALJ issued the FID finding a violation of section 337 by certain of Respondents’ products by reason of infringement of claim 19 of the ’693 patent. In addition, the FID finds all the asserted claims, except claim 19 of the ’693 patent, to be invalid as anticipated and/or obvious over the prior art. Furthermore, the FID finds that Complainants have satisfied the domestic industry requirement with respect to the ’693 patent. The ALJ also issued a recommended determination (“RD”) recommending that the Commission issue a limited exclusion order (“LEO”) against the infringing products and a cease and desist order (“CDO”) against each respondent. The ALJ further recommended against setting a bond during the period of Presidential review.

On February 27, 2019, both Complainants and Respondents filed petitions for review of the FID. On March 7, 2019, the parties filed responses to each other’s petition. On March 18, 2019, the parties also filed statements on the public interest pursuant to Commission Rule 210.50, 19 CFR 210.50. The Commission issued a Federal Register notice requesting public interest comments. *See* 83 Fed. Reg. 10836-37 (Mar. 22, 2019).

The Commission has determined to review the FID in part. Specifically, the Commission has determined to review the FID’s findings with respect to: (1) claim construction of the term “a retracted position relative to said frame” and any related findings including with respect to infringement, invalidity, and technical prong of the domestic industry requirement; (2) infringement of the asserted method claims, *i.e.*, claims 17-19, 24, 26-28, and 38 of the ’693 patent; (3) invalidity of certain asserted claims of the ’693 patent over Volpe SF-100 T4 in view of U.S. Patent No. 3,633,292 (Ulrich); (4) no invalidity of certain asserted claims over U.S. Patent No. 3,843,274 (Gutman) alone or in combination with other prior art; and (5) no invalidity of claim 19 over Volpe SF-100 T4 in view of Ulrich and WO 97/42377 (Busley). The Commission has determined not to review the remainder of the FID. At this time, the Commission does not request briefing from the parties on the issues under review.

The Commission has also determined to extend the target date by five business days to June 21, 2019.

In addition, in connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (Dec. 1994) (Comm'n Op.).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. See Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should also address the recommended determination by the ALJ on remedy and bonding. Complainants are also requested to submit proposed remedial orders for the Commission's consideration. Complainants are further requested to state the date that the asserted patent expires and the HTSUS numbers under which the accused products are imported, and to supply the names of known importers of the products at issue in this investigation.

Written submissions and proposed remedial orders must be filed no later than close of business on April 30, 2019. Reply submissions must be filed no later than the close of business on May 10, 2019. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number

("Inv. No. 337-TA-1088") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel^[1], solely for cybersecurity purposes. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on [EDIS](#).

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: April 12, 2019

^[1] All contract personnel will sign appropriate nondisclosure agreements.