PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of **CERTAIN REPLACEMENT AUTOMOTIVE LAMPS**	**Investigation No. 337-TA-1291**

COMMISSION OPINION

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I. INTRODUCTION

On August 24, 2022, the Commission determined to review in its entirety an interim initial determination[1] ("IID") issued on July 1, 2022, finding that complainants Kia Corporation of Seoul, Korea and Kia America, Inc. of Irvine, California (collectively, "Kia") have satisfied the economic prong of the domestic industry requirement. On May 11, 2023, the Commission determined to review in its entirety a final initial determination ("Final ID") issued by the presiding administrative law judge ("ALJ") on January 24, 2023. 88 Fed. Reg. 31520-22 (May 17, 2023). On review, the Commission has determined that the economic prong of the domestic industry requirement is not satisfied for any of the asserted patents, and therefore there has been no violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337"), with respect to any asserted patent. This opinion sets forth the Commission's reasoning in support of that determination.[2]

II. BACKGROUND

A. Procedural History

On January 24, 2022, the Commission instituted this investigation under section 337 based on a complaint filed on behalf of Kia. 87 Fed. Reg. 3584-85 (Jan. 24, 2022). The complaint, as supplemented and amended, alleges a violation of section 337 in the importation

[1] The IID was issued pursuant to a Commission pilot program that allows an ALJ to develop a full evidentiary record on a potentially case-dispositive or significant issue, and to resolve that issue in an IID, subject to review by the Commission on an expedited basis. *See* https://www.usitc.gov/press_room/featured_news/337pilotprogram.htm (last accessed Jan. 8, 2023).

[2] Commissioner Schmidtlein agrees that Kia has failed to establish the economic prong of the domestic industry requirement for any of the asserted patents. She therefore agrees that there has been no violation of section 337 in this investigation. However, she does not join the majority's opinion because in her view it goes beyond what is necessary to dispose of the investigation. She explains her views in the attached concurring opinion.

into the United States, the sale for importation, and the sale within the United States after importation of certain replacement automotive lamps by reason of infringement of U.S. Design Patent Nos. D592,773 ("the '773 patent"); D635,701 ("the '701 patent"); D636,506 ("the '506 patent"); D650,931 ("the '931 patent"); D695,933 ("the '933 patent"); D705,963 ("the '963 patent"); D709,218 ("the '218 patent"); D714,975 ("the '975 patent"); D714,976 ("the '976 patent"); D720,871 ("the '871 patent"); D749,757 ("the '757 patent"); D749,762 ("the '762 patent"); D749,764 ("the '764 patent"); D774,222 ("the '222 patent"); D774,223 ("the '223 patent"); D776,311 ("the '311 patent"); D781,471 ("the '471 patent"); D785,833 ("the '833 patent"); D785,836 ("the '836 patent"); and D792,989 ("the '989 patent") (together, "the Asserted Patents"). *Id.* at 3584. The notice of investigation names as respondents TYC Brother Industrial Co., Ltd. of Tainan, Taiwan, and Genera Corporation (dba TYC Genera) of Brea, California (together, "TYC"); LKQ Corporation of Chicago, Illinois, and Keystone Automotive Industries, Inc. of Exeter, Pennsylvania (together, "LKQ") (collectively, "Respondents"). The Office of Unfair Import Investigations is not participating in this investigation.

On February 7, 2022, the Chief ALJ ("CALJ") ordered an evidentiary hearing for both Inv. Nos. 337-TA-1291 and 337-TA-1292[3] on the economic prong pursuant to the Commission's pilot program for IIDs. Order No. 6 (Feb. 7, 2022). The combined evidentiary hearing was held on April 20, 2022. On July 1, 2022, the CALJ issued an IID finding that Kia has satisfied the economic prong of the domestic industry requirement with respect to all 20 of the Asserted Patents. The investigation was reassigned to the presiding ALJ on July 6, 2022. On August 24,

[3] Inv. No. 337-TA-1292, entitled *Certain Replacement Automotive Lamps II*, concerns the same respondents and their replacement automotive lamps, although it involves different complainants (Hyundai Motor Company and Hyundai Motor America, Inc.) and different asserted design patents. Hyundai Motor Company partially owns Kia Corporation. https://worldwide.kia.com/int/company/ir/info/shareholders (Last accessed Feb. 13, 2024).

2022, the Commission determined to review the IID, and requested briefing from the parties on certain issues. Notice (Aug. 24, 2022). On September 9, 2022, Kia[4] and Respondents[5] filed their respective initial written responses. On September 16, 2022, Kia[6] and Respondents[7] each filed a reply submission.

From August 16 through August 18, 2022, the presiding ALJ held a final evidentiary hearing on the remaining issues of infringement, invalidity, the technical prong of the domestic industry requirement, and remedy. After the hearing, the parties filed initial and responsive post-hearing briefs.[8]

On October 11, 2022, the presiding ALJ requested additional post-hearing briefing on two technical prong issues: (1) whether Kia's alleged "mirror image"[9] products practiced the asserted patents and (2) whether Kia proved that its alleged representative domestic industry products are indeed representative of other products. Order No. 37 (Oct. 11, 2022). The parties

[4] Complainants' Submissions to the Commission on Issues Under Review (Sept. 9, 2022) ("Kia IID IR").

[5] Respondents' Initial Written Submission in Response to the Commission's Notice of Review (Sept. 9, 2022) ("Respondents IID IR").

[6] Complainants' Reply Submission to the Commission on Issues Under Review (Sept. 16, 2022) ("Kia IID Reply").

[7] Respondents' Reply Submission in Response to the Commission's Notice of Review (Sept. 16, 2022) ("Respondents IID Reply").

[8] Complainants' Initial Post-Hearing Brief (Sept. 2, 2022) ("CIB/FID"); Respondents' Final Evidentiary Hearing Initial Post-Hearing Brief (Sept. 2, 2022) ("RIB/FID"); Complainants' Post-Hearing Responsive Brief (Sept. 13, 2022); Respondents' Final Evidentiary Hearing Responsive Post-Hearing Brief (Sept. 13, 2022).

[9] The "mirror image" issue refers to whether a design patent claim covers a "mirror image," *i.e.*, a design that is not identical to the claim but rather is a "mirror image" of the claim. This issue impacts, for example, whether a design patent claim for a driver's side headlamp design covers a passenger's side headlamp.

submitted initial and reply supplemental briefs addressing those issues, as well as addressing how rulings on those issues would impact the alleged economic prong investment values.[10]

On January 24, 2023, the presiding ALJ issued a Final ID finding a violation of section 337 by Respondents with respect to the '773, '701, '506, '931, '933, '218, '975, '976, '871, '762, '764, '222, '223, '311, '833, '836, and '989 patents. Final ID at 1. The Final ID finds no violation with respect to the '963, '757, and '471 patents based on noninfringement and failure to satisfy the technical prong of the domestic industry requirement. *Id.* at 1, 284-86. The Final ID also finds that no Asserted Patent is invalid as anticipated or obvious. *Id.* Regarding the "mirror image" issue, the Final ID finds that each Asserted Patent is not limited to only the particular side depicted in the claim. Concerning the economic prong of the domestic industry requirement, the Final ID reduced Kia's alleged investments due to Kia's failure to establish that certain of its alleged domestic industry products are representative of other alleged domestic industry products but affirmed the IID's finding that the economic prong was satisfied based on the representative products. *Id.* at 33-37 and 43.

The Final ID also contains the ALJ's recommended determination ("RD") on remedy and bonding. The RD recommends that, if the Commission finds a violation, it should issue a limited exclusion order but not issue cease and desist orders against any of Respondents.

On February 6, 2023, Respondents filed a petition for review challenging the Final ID's findings on the economic prong of the domestic industry requirement, infringement, and

[10] Complainants' Supplemental Post-Hearing Brief in Accordance with Order No. 37 (Oct. 17, 2022); Respondents' Reply to Complainants' Supplemental Post-Hearing Brief in Accordance with Order No. 37 (Oct. 24, 2022); Complainants' Reply in Support of Their Supplemental Post-Hearing Brief in Accordance with Order No. 37 (Oct. 28, 2022).

validity.[11] Also on February 6, 2023, Kia filed a petition for review challenging the Final ID's findings of noninfringement and contingently petitioning regarding the Final ID's findings concerning non-satisfaction of the technical prong of the domestic industry requirement regarding the '963, '757, and '471 patents.[12] On February 14, 2023, Kia[13] and Respondents[14] filed responses to each other's petitions.

On January 25, 2023, the Commission requested submissions regarding the public interest. 88 Fed. Reg. 5919-20 (Jan. 30, 2023). On February 15, 22-24, and March 1, 2023, the Commission received submissions from Thomas Lee, Dennis Shiau, Peter Nguyen, John Chang, Raymond Tsai, Christopher Patti, Edward Salamy, Paul Tetrault, Clark Plucinski, Gay Gordon-Byrne, the Alliance for Automotive Innovation, and Gregory Cote.[15] The Commission also received submissions on the public interest from respondents TYC[16] and LKQ[17] pursuant to Rule 210.50(a)(4).

On May 11, 2023, the Commission determined to review the Final ID in its entirety and sought briefing from the parties on certain issues under review and briefing from the parties,

[11] Respondents' Petition for Review of the Initial Determination on Violation of Section 337 (Feb. 6, 2023).

[12] Complainants' Petition for Review of the Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond (Feb. 6, 2023).

[13] Complainant's Response to Respondents' Petition for Review of the Initial Determination on Violation of Section 337 (Feb. 14, 2023).

[14] Respondents' Response to Complainant's Petition for Review of the Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond (Feb. 6, 2023).

[15] EDIS Doc. IDs 790432, 790854, 790861, 790933, 790940, 791083, 791116, 791490, 790997, 791014, 790863, 790984, respectively.

[16] Respondents TYC Brother Industrial Co., Ltd. and Genera Corporation's Public Interest Statement Pursuant to Commission Rule 210.50(a)(4)(i) (Mar. 6, 2023).

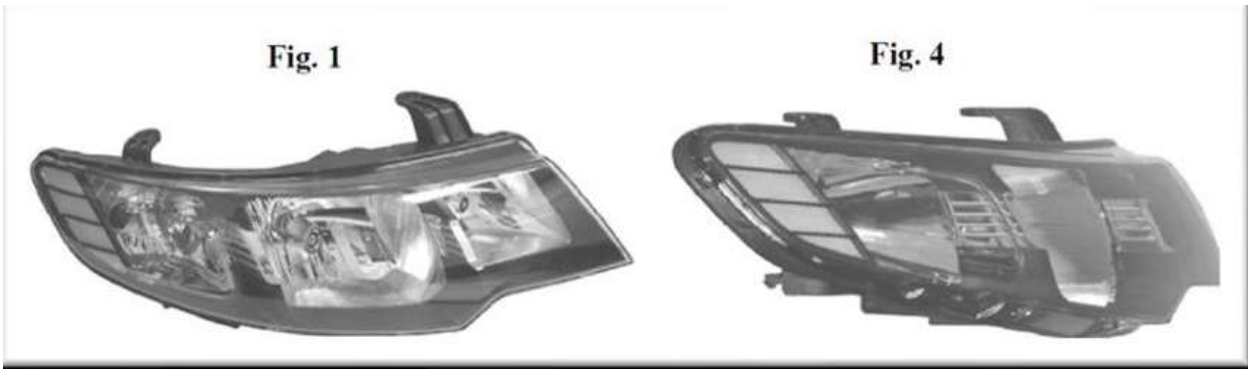
[17] Respondents LKQ Corporation's and Keystone Automotive Industries, Inc.'s Public Interest Statement (Feb. 23, 2023).

interested government agencies, and the public concerning remedy, bonding, and the public interest. 88 Fed. Reg. 31520-22 (May 17, 2023). Kia[18] and Respondents[19] filed initial submissions on May 25, 2023, and reply submissions[20] on June 1, 2023.

On June 15, 2023, Respondents moved to strike an attachment to Kia's reply submission, on the grounds that the attachment, the declaration of Brian Sciumbato, is untimely and lacks foundation. On June 26, 2023, Kia opposed the motion.

B. The Asserted Design Patents

Each of the 20 Asserted Patents depicts a design for either a headlamp or a taillamp. IID at 4. The asserted '773 patent, for example, includes the following exemplary figures:



Complainants' Initial Pre-hearing Brief at 4 (Sept. 2, 2022) ("Kia IID IPHB").

C. The Accused Products

The accused products are headlamps and taillamps imported by Respondents and intended to replace headlamps or taillamps on specific model years of Kia automobiles. Kia

[18] Complainants' Initial Written Submission in Response to the Commission's Notice of Review of Final Initial Determination (May 25, 2023) ("Kia Init. Sub.").

[19] Respondents' Initial Written Submission in Response to the Commission's Notice of Review (May 25, 2023) ("Resp. Init. Sub.")

[20] Complainants' Reply Submission to the Commission on Issues Under Review (Jun. 1, 2023) ("Kia Rep. Sub."); Respondents' Reply Submission in Response to the Commission's Notice of Review (Jun 1, 2023) ("Resp. Rep. Sub.").

IPHB at 21. The parties stipulated that certain of Respondents' parts were representative of other parts for the purpose of infringement. Joint Stipulation Regarding Representative Accused Products and Domestic Industry Products (Jun. 8, 2022).

D. The Domestic Industry Products

Kia alleged that each of the 20 Asserted Patents cover a design for a headlamp or taillamp for several model years of a specific Kia automobile model. Kia IID IPHB at 22-26. Kia alleges that each domestic industry lamp is protected by a single design patent, and thus no product is alleged to be protected by multiple, overlapping patents. *Id.* Kia alleged that its patents correspond to lamps for automobile models as follows:[21]

Asserted Patent	Kia Model	Model Year	Part Description
'762 Patent	Sorento	2016-18	Taillamp
'764 Patent	Sorento	2016-18	Taillamp
'222 Patent	Optima	2016-18	Headlamp
'773 Patent	Forte	2009-13	Headlamp
'701 Patent	Optima	2011-13	Headlamp
'506 Patent	Sportage	2013-16	Headlamp
'931 Patent	Soul	2012-13	Headlamp
'933 Patent	Forte	2014-16	Taillamp
'963 Patent	Sorento	2014-15	Taillamp
'218 Patent	Forte	2014-16	Headlamp
'975 Patent	Soul	2014-19	Headlamp
'976 Patent	Soul	2014-19	Taillamp
'871 Patent	Optima	2014-15	Taillamp
'775 Patent	Sedona	2015-18	Taillamp

[21] These products will be referred to as the "DI Products."

'223 Patent	Optima	2016-20	Taillamp
'311 Patent	Sportage	2017-19	Headlamp
'471 Patent	Sportage	2017-19	Taillamp
'833 Patent	Forte	2017-18	Headlamp
'836 Patent	Forte	2017-18	Taillamp
'989 Patent	Sedona	2015-18	Taillamp

IID at 5-7. For each design patent, Kia contended that one Kia part practices the design patent, and that the part is representative of several other parts that also practice the design. Kia IID IPHB at 23-27. The Final ID, however, finds that Kia failed to show that any part is representative of any other part, and thus finds that Kia failed to establish the technical prong of the domestic industry requirement with respect to the so-called represented products. Final ID at 33-37.

III. COMMISSION REVIEW OF THE FINAL ID

When the Commission reviews an initial determination, in whole or in part, it reviews the determination *de novo*. *Certain Soft-Edged Trampolines and Components Thereof*, Inv. No. 337-TA-908, Comm'n Op. at 4 (May 1, 2015). Upon review, the "Commission has 'all the powers which it would have in making the initial determination,' except where the issues are limited on notice or by rule." *Certain Flash Memory Circuits & Prods. Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 9–10 (July 1997) (quoting *Certain Acid-Washed Denim Garments & Accessories*, Inv. No. 337-TA-324, Comm'n Op. at 5 (Nov. 1992)). With respect to the issues under review, "the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge." 19 C.F.R. § 210.45(c). The Commission also "may take no position on specific issues or portions of the initial determination," and "may make any finding or conclusions that in

its judgment are proper based on the record in the proceeding." *Id.*; *see also Beloit Corp. v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir. 1984).

IV. ANALYSIS

The Commission finds no violation of section 337 based on complainant Kia's failure to satisfy the economic prong of the domestic industry requirement. The Commission has determined to take no position on the issues of infringement, satisfaction of the technical prong of the domestic industry requirement, and invalidity. To the extent the Final ID's other findings, conclusions, and supporting analysis are not inconsistent with the Commission's opinion herein, the Commission affirms and adopts those findings. The Commission's findings and analysis as to the economic prong of the domestic industry requirement are set out below.

A. Economic Prong of the Domestic Industry Requirement

When a section 337 investigation is based on allegations of patent infringement, the complainant must show that "an industry in the United States, relating to the articles protected by the patent . . . exists or is in the process of being established." 19 U.S.C. § 1337(a)(2). "[A]n industry is considered to exist if there is in the United States, with respect to the articles protected by the patent . . . concerned –

> (A) significant investment in plant and equipment ["Prong A"];
>
> (B) significant employment of labor or capital ["Prong B"]; or
>
> (C) substantial investment in its exploitation, including engineering, research and development, or licensing."

19 U.S.C. § 1337(a)(3). The "industry in the United States" requirement, also called the domestic industry requirement, is commonly described as having two prongs: "the 'economic prong,' which requires that there be an industry in the United States, and the 'technical prong,' which requires that the industry relate to articles protected by the patent." *InterDigital*

Commc'ns, LLC v. Int'l Trade Comm'n, 707 F.3d 1295, 1298 (Fed. Cir. 2013). A complainant has the burden to show by a preponderance of the evidence every element of a violation of section 337,[22] including that the economic prong of the domestic industry requirement is satisfied. *Certain Electronic Candle Products and Components Thereof*, Inv. No. 337-TA-1195, Comm'n Op. at 11 (Oct. 4, 2022) ("*Elec. Candle Prods.*").

Section 337 requires that a complainant prove that a domestic industry exists for each patent asserted in an investigation based on patent infringement. Where one domestic industry product practices only one patent, without overlapping protection of other patents, a complainant must show significant or substantial investments in each product separately. *See John Mezzalingua Assocs., Inc. v. Int'l Trade Comm'n*, 660 F.3d 1322, 1330-31 (Fed. Cir. 2011) (complainant erred in arguing combined investments for multiple patents and failing to allocate for single design patent); *Certain Electronic Imaging Devices*, Inv. No. 337-TA-850, Comm'n Op. at 89 (Apr. 21, 2014) ("*Electronic Imaging Devices*") (where first product practiced one patent and second product practiced a second patent, the complainant was required to show significant investment in each product separately); *Certain Electronic Stud Finders, Metal Detectors and Electrical Scanners*, Inv. No. 337-TA-1221, Comm'n Op. at 48-50 (Mar. 14, 2022) ("*Electronic Stud Finders*") (requiring that a domestic industry be shown for each asserted patent); *Certain Audio Digital-to-Analog Converters and Products Containing Same*, Inv. No. 337-TA-499, Initial Determination at 113 (Nov. 15, 2004) ("*Audio Digital-to-Analog*

[22] *See, e.g., Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, Initial Determination at 3, Order No. 29 (Mar. 15, 2012), *unreviewed by* Comm'n Notice (Apr. 11, 2012) ("a complainant has the burden of proving a violation of section 337."); *see also* 5 U.S.C. § 556(d) (stating that "the proponent of a rule or order has the burden of proof"); 19 C.F.R. § 210.37 ("The proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.")

Converters"), *unreviewed in relevant part*, Comm'n Op. (Mar. 3, 2005) (complainant must demonstrate the existence of two domestic industries where the articles that practice the two asserted patents do not overlap). In short, the language of Section 337 explicitly requires that the domestic industry "relat[e] to the articles protected by the patent." 19 U.S.C. § 1337(a)(3). By contrast, nothing in the statute suggests that a complainant can pad its domestic industry numbers in articles protected by one patent with investments in other articles protected by an entirely different patent.

1. The IID Proceedings

a. Kia Economic Prong Arguments Prior to the IID

In briefing to the CALJ, Kia contended that it satisfied the economic prong of the domestic industry requirement under Prongs A and B based on: (1) investments in facility rent, equipment, and machinery, and the employment of labor and depreciation, by SL Alabama[23] regarding its manufacturing of lamps protected by the '222, '762, and '764 patents from 2016 to 2018; (2) the employment of labor and depreciation in assembling vehicles containing lamps protected by the '222, '223, '701, '762, '764, '871, and '963 patents by Kia Georgia[24] from 2016 to 2020; (3) investments in facility rent and operating expenses, and the employment of labor and depreciation, regarding warehousing and distributing lamps protected by all 20 asserted patents by Mobis Parts America[25] ("MPA") from 2017 until the first half of 2021; and (4) investments in

[23] SL Alabama is a manufacturing facility located in Alexander City, Alabama that manufactures certain headlamps and taillamps for Kia. IID at 12 (citing JX-0007C at 57:22-58:17).

[24] Kia Georgia is a wholly-owned subsidiary of Kia America, and assembles certain Kia vehicles in the United States, including certain Optima and Sorrento vehicle models with DI Products. IID at 12 (citing CX-0218C (Sullivan Decl.) at ¶ 3; CX-0134C).

[25] MPA is an authorized distributor of Kia service parts that receives imported DI Products and domestically manufactured DI Products intended for aftersales maintenance and repairs. *Id*. (citing CX-0220C (Sohn Decl.) at ¶ 3).

facility rent and operating expenses, and the employment of labor and depreciation, in facilitating distribution of and warranty repairs for new vehicles containing lamps protected by all 20 Asserted Patents by Kia America[26] from 2016 to 2021. Kia IID IPHB at 21-55. Kia alleged that investments by each of the four entities were significant. *Id.* at 28-29, 36-37, 44, 54. With respect to SL Alabama, Kia asserted its investments were significant, citing that [redacted] of SL Alabama's activities, including activities related to the manufacturing, warehousing, and distribution of DI Products are performed in the U.S.," lamp production accounts for "[redacted] [SL Alabama's] sales over the period," and [redacted] total SL Alabama sales are DI product sales to Kia" over the period. Kia IID IPHB at 28. Kia then included a table, Table 11, showing SL Alabama's investments (not allocated by patent) as a share of total investments for Prong A and Prong B. *Id.* at 29. Kia made no argument in its initial post-hearing brief regarding any investment in ongoing qualifying activities after past significant investment with respect to the patents practiced by the SL Alabama DI products. With respect to Kia Georgia, Kia asserts its investments are significant, citing that "DI products made up [redacted] of Kia Georgia's domestic investment in headlamps and taillamps, as measured by COGS," during the period for Prong B investments. *Id.* at 36-37. With respect to MPA, Kia asserts its investments are significant, citing that "DI Investments in the context of MPA's investment in all headlamps and taillamps" are shown in a table indicating that Prong A investments are [redacted] of lamp investments and Prong B investments are [redacted] of lamp investments. *Id*. at 44. With respect to Kia America, Kia asserts its investments are significant, citing that Kia America's "DI investments [under Prong A and B combined] in the

[26] Kia America is a wholly-owned subsidiary of Kia Corporation, and is the exclusive distributor of Kia-branded automobiles and automobile parts in the United States. IID at 3 (citing Complaint at ¶ 11-12).

context of Kia America's investments in all headlamps and taillamps [during the period] . . . accounted for [redacted] of Kia America's total investments in lamps" and including at table that shows that shows that percentage for Prongs A and B separately. *Id.* at 54. Kia made no assertions with respect to any of the four entities that their investments on a patent specific basis were significant. Kia then argued that the combined investments from the four entities were significant. *Id.* at 55-58. Kia aggregated the four entities' investments for DI Products for all 20 Asserted Patents as follows:

Table 29: Summary of Domestic Industry Investments

[redacted]

Id. at 56. Kia then: (1) derived patent-specific allocation factors based on SL Alabama's DI product sales revenue for a particular patent divided by SL Alabama's total DI product sales revenue, and multiplied the allocation factors by SL Alabama's total alleged Prong A and Prong B expenses;[27] (2) derived patent-specific allocation factors based on Kia Georgia's DI Products

[27] CDX-0001C.0027-28, .0110-11.

assembled in vehicles for a particular patent divided by Kia Georgia's total DI Products assembled in vehicles, and multiplied the allocation factors by Kia Georgia's total alleged Prong B expenses;[28] and (3) derived patent-specific allocation factors based on MPA's DI Product sales revenue for a particular patent divided by MPA's total DI Product sales revenue, and multiplied the allocation factors by MPA's and Kia America's total alleged Prong A and Prong B expenses.[29] Kia then summed the investments across all four entities as follows:

[28] CDX-0001C.0040-41; CDX-0144C.

[29] CDX-0001C.0050-51; CDX-0145C; CDX-0001C.0059-60, CDX-0145C. The MPA allocation data rely on MPA sales data from 2017 through the first half of 2021, whereas the Kia America allocation data rely on MPA sales from 2016 through the first half of 2021. *Id.* Kia provides no reason for the discrepancy and provides no reason why Kia America's investments should be allocated based on MPA's sales.

Table 30: Summary of Domestic Industry Investments by Asserted Patent

Patent [A]	Prong A [B]	Prong B [C]	Total DI Investments [D]
'218			
'222			
'223			
'311			
'471			
'506			
'701			
'757			
'762			
'764			
'773			
'833			
'836			
'871			
'931			
'933			
'963			
'975			
'976			
'989			
Total			

Id. at 57. Kia alleged that the aggregated investments are "quantitatively and qualitatively significant relative to the Domestic Industry" and that "[t]he total DI investments [*i.e.*, the sum of the Prong A and Prong B investments in Table 30] at the per-patent level are also quantitatively and qualitatively significant because total DI investments for each patent are significant in comparison with the total MPA aftermarket replacement sales[30] of DI Products covered by the

[30] SL Alabama manufactures lamps for both new vehicles and as replacements, Kia Georgia manufactures new vehicles using those lamps, and MPA distributes lamps for replacement only. IID at 12-13.

corresponding patent." *Id.* at 56-57. Kia's only explanation for why these investments are quantitatively significant is that, although the '989 patent had the lowest total DI investment (*i.e.*, the sum of Prong A and Prong B investments) [redacted], that number was still significant because it is [redacted] of MPA's sales revenue of [redacted] for lamps protected by the '989 patent.[31] *Id.* at 57-58. Kia's quantitative significance analysis therefore relied upon the total investments for a single patent and did not assert or explain why any investment was significant with respect to the other 19 patents (*i.e.*, besides the '989 patent) or with respect to Prong A or Prong B individually.

Respondents' initial post-hearing brief in the IID proceeding on the economic prong contends, *inter alia*, that Kia did not have a domestic industry at the time of the filing of the complaint in 2021 with respect to the '222, '762, and '764 patents because SL Alabama's manufacturing of those products ceased in 2018 and Kia presented no ongoing qualifying activities. Respondents' Initial Post-Hearing Brief at 17-24 (May 2, 2022). Respondents' reply post-hearing brief contends, *inter alia*, that Kia's significance analysis improperly aggregates investments under Prong A and Prong B. Respondents' Responsive Post-Hearing Brief at 21-22 (May 9, 2022). Respondents further argued that Kia's significance analysis "contains no comparisons or contextual analysis as to any patent and does not compare total-per-patent investments to MPA's sales." *Id.* at 23. Respondents additionally argued that Kia's alleged total DI investments include lamp manufacture, part distribution, and automobile production, and

[31] Kia's example compares the sum of the four entities' investments to MPA's sales. Some of these investments are directed to lamps for installation in new vehicles (*i.e.*, SL Alabama and Kia Georgia), and some of these investments are directed to replacement lamps (*i.e.*, SL Alabama, MPA, and Kia America). IID at 12-13. MPA's sales, however, are directed only to replacement lamps. *Id.* at 13. Kia provides no explanation why comparing investments in lamps for new vehicles and for replacement to sales of lamps for replacement is appropriate. The Commission also notes that [redacted].

there is no logical reason to compare such investments to lamp sales to determine significance. *Id.* at 24.

In its reply post-hearing brief, Kia contends, *inter alia*, that although SL Alabama's investments and employment ceased in 2018, MPA's and Kia America's activities constitute qualifying ongoing activities which allow Kia to rely upon SL Alabama's past investments. Complainants' Post-Hearing Responsive Brief on the Economic Prong of the Domestic Industry at 12 (May 9, 2022) ("Kia IID RPHB") (citing *Certain Television Sets, Television Receivers, Television Tuners, & Components Thereof*, Inv. No. 337-TA-910, Comm'n Op. at 69 (Oct. 30, 2015) ("*Television Sets*")).

b. The IID's Findings

The IID finds that Kia satisfied the economic prong of the domestic industry requirement under both Prongs A and B with respect to each of the Asserted Patents. IID at 12-13, 20-23, 30-33, 35-38. The IID considers the Asserted Patents in two groups: 1) the '222, '762, and '764 patents that covered products manufactured by SL Alabama in the United States until 2018 or earlier, and 2) the '773, '701, '506, '931, '933, '218, '975, '976, '871,'223, '311, '833, '836, '963, '757, '471 and '989 patents. Final ID at 1. *Id.*

The IID finds, *inter alia*, that SL Alabama's manufacturing expenditures with respect to the DI Products protected by the '222, '762, and '764 patents are significant because they occurred in the United States, and thus [redacted] of the value of the articles was added in the United States. IID at 18. Although SL Alabama's manufacturing investments ceased in 2018, prior to the 2021 filing date of the complaint in this investigation, the IID finds that MPA's investments in the DI Products in 2021 were sufficient ongoing, qualifying activities to satisfy the requirement that an industry in the United States exists. *Id.* at 17-20 (citing *Television Sets* at 69). Specifically, the IID finds that MPA made "ongoing investments" under Prongs A and B in

2021 for each of the three domestically-manufactured DI Products' patents. *Id.* at 19-20. To do so, although not advocated by either party, the IID allocates Kia's asserted MPA's investments in plant and equipment and labor and capital to the domestically-manufactured DI Product patents using the IID's own sales-based allocation methodology not used by either party. *Id.* at 20. The IID finds that while the resulting amounts "may not be large amounts when compared with the original investments in manufacturing, the Commission has not required that continuing investments be independently significant" and that "the realities of the marketplace are such that one would expect any continuing investments in the Domestically Manufactured Domestic Industry Products to be relatively small." *Id.* The IID does not separately consider the significance of the alleged investments for Prongs A and B. *Id.* at 14-23.

With respect to the remaining 17 asserted patents, the IID finds significant MPA's Prong A investments in facility rent and operating expenses and Kia America's investments in facility rent and administrative expenses for warehousing and distribution of foreign-manufactured lamps. *Id.* at 23-36. Although the IID rejects all of Kia's arguments as to why those investments are significant because Kia improperly aggregated its investments, the IID independently performs its own calculation,[32] dividing Kia's combined Prong A investments (allocated on a patent-by-patent basis) by MPA's sales revenue (also allocated on a patent-by-patent basis):

[32] This calculation is discussed in detail in Section IV.A.4.b.ii, below.

Patent No.	Investments in Plant and Equipment (CDX-0001C at 108)	Sales of Domestic Industry Products (CDX-0001C at 50)	Investments/Sales
218	[redacted]		
223			
311			
471			
506			
701			
757			
773			
833			
836			
871			
931			
933			
963			
975			
976			
989			

Id. at 32-33. Neither party argued for such calculations, and thus no party had an opportunity to challenge them before the CALJ. The IID concludes that the resulting ratios of approximately [redacted] are quantitatively significant for each asserted patent. *Id.* at 34.

Also, with respect to the remaining 17 asserted patents, the IID finds significant Kia America's Prong B expenditure of [redacted] on mechanic labor directed to making repairs of the lamps allegedly protected by all 20 asserted patents. *Id.* at 37-38. Although the IID acknowledges that Kia failed to allocate that expenditure on a patent-by-patent basis, the IID infers that such investment would be significant on a patent-by-patent basis. *Id.* at 38-39.

Respondents, but not Kia, petitioned for review of the IID.[33]

[33] Respondents' Petition for Review of the Interim Initial Determination on the Economic Prong of Domestic Industry (Jul. 12, 2022).

2. Final ID Proceedings

On October 11, 2022, the presiding ALJ requested additional post-hearing briefing on two technical prong issues—the mirror image and representativeness issues. Order No. 37 (Oct. 11, 2022). The parties submitted initial and reply supplemental briefs addressing those issues, as well as how rulings on those issues would impact the alleged economic prong investment values. Although the IID neither calculated nor relied upon a sales-to-investment ratio for the '222, '762, and '764 patents, Kia presented such calculations for those patents for the first time in its supplemental briefing. Complainants' Supplemental Post-Hearing Brief in Accordance with Order No. 37 at 7 (Oct. 17, 2022).

The Final ID finds, *inter alia*, that the IID's significance calculations assumed that Kia would be able to satisfy the technical prong of the domestic industry requirement for all of the alleged DI Products. Final ID at 39. Kia argued that a single part for each asserted patent satisfied the technical prong and the single part is representative of several additional parts, but upon consideration of the parties' briefing, the Final ID finds that Kia failed to show that the single parts were representative of additional parts, and thus finds that Kia cannot rely upon investments in those additional parts. *Id.* at 39-40, 33-37. The Final ID therefore removes the so-called represented products from both the investment and sales columns of the IID's investment and sales chart and recalculates the investment-to-sales ratios as follows:

Patent No.	Final ID's Reduced Plant and Equipment Investments	Final ID's Reduced Sales of Domestic Industry Products	Final ID's Recalculated Investment-to-Sales Ratio
'218	[redacted]		
'222			
'223			
'311			
'471			
'506			
'701			
'757			
'762			
'764			
'773			
'833			
'836			
'871			
'931			
'933			
'963			
'975			
'976			
'989			

Id. at 40-42.[34] The Final ID's calculations above show investment to sales ratios for the patents practiced by the SLA Alabama domestic industry products as well as the remaining 17 patents. The Final ID concludes that the reduced investment numbers are still significant because the recalculated ratios are "either higher or are not materially different than the percentages Chief ALJ Cheney already found to be quantitatively significant." *Id.* at 42-43. The Final ID addresses only Kia's alleged Prong A investments and does not separately analyze whether Kia independently satisfied the economic prong of the domestic industry requirement through the employment of labor or capital under Prong B. *Id.* at 43. Respondents, but not Kia, petitioned

[34] The Final ID adopts Kia's calculations provided in Complainants' Supplemental Post-Hearing Brief in Accordance with Order No. 37, at 11-12 (Oct. 17, 2022).

for review of the Final ID's findings regarding the economic prong of the domestic industry requirement.[35]

3. Commission Review of the Final ID

Given that the IID's and Final ID's significance findings center around investment-to-sales ratios that were never raised by the parties, the Commission in its notice of review of the Final ID requested, *inter alia*, that the parties brief the following question:

> Please discuss whether Kia satisfied its burden of proof that it has satisfied the economic prong of the domestic industry requirement through significant investments in plant and equipment based on the revised patent-by-patent investments to account for the non-representative products. Please also identify, with citation to the record prior to the Final ID, where Kia satisfied its burden of proof as to the significance of the revised investments for each patent.

Comm'n Notice, 88 Fed. Reg. 31521 (May 17, 2023).

Kia's initial submission states that "[t]he CALJ correctly found that Kia's investments under Prong (A) are quantitatively significant for each asserted patent," citing one of its previous submissions that also identified the CALJ's IID as the reason why Kia's investments are quantitatively significant, as well as a demonstrative exhibit that separately showed Kia's asserted total revenues and total investments for DI products by patent.[36] Kia Init. Sub. at 21-25. Respondents' initial submission argues that Kia failed to carry its burden of proof because Kia never explained why comparing plant and equipment investments to the sale of an

[35] Respondents' Petition for Review of the Initial Determination on Violation of Section 337 (Feb. 6, 2023) (petitioning for review of the Final ID's findings regarding the economic prong of the domestic industry requirement); Complainants' Petition for Review of the Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond (Feb. 6. 2023) (petitioning for review of the Final ID's findings regarding infringement, the technical prong of the domestic industry requirement, remedy, and bonding only).

[36] Kia appears to assert that the IID calculated an investment to sales ratio for the '222, '762, and '764 patents practiced by the SL Alabama DI products. Kia Init. Sub. at 22. However, the IID only calculates such ratios for the remaining 17 patents. IID at 33.

automotive lamp demonstrated significance, and that such comparison was not conducted until the CALJ chose to do so without adequate explanation and after Respondents had the opportunity to respond or present rebuttal evidence. Resp. Init. Sub. at 17-19.

In reply, Kia argues that the investment-to-sales ratio did not appear for the first time in the IID, but rather that, for quantitative significance, Kia compared the sum of its Prong A and Prong B investments to sales revenue for the '989 patent as an example in its initial post-hearing brief to the CALJ. Kia. Rep. Sub. at 10 (citing Kia IID IPHB at 57-58). Respondents' reply submission argues that Kia's initial submission fails to cite any record evidence where it satisfied its burden of proof to show significance of its investments and fails to explain why the investment-to-sales ratio demonstrates significance. Resp. Rep. Sub. at 9-10.

4. The Economic Prong Was Not Satisfied for Any of the Asserted Patents[37]

Because Kia is asserting 20 design patents, and each domestic industry product practices only one asserted design patent, Kia was required to demonstrate that investments in products that practice each of the 20 Asserted Patents are independently significant under Prong A or Prong B. As explained below, the Commission finds that Kia's reliance on the significance of its combined, total expenditures for multiple patents is fatal to its domestic industry argument. The Commission therefore finds that Kia has failed to satisfy the economic prong of the domestic industry requirement with respect to any of the 20 Asserted Patents.

[37] As discussed below, the Commission has determined to take no position on the FID's findings regarding the technical prong of the domestic industry requirement. However, the Commission notes that whether or not the technical prong was satisfied as to some or all of the DI products, the Commission's conclusion regarding the economic prong would not be affected because the error as to the economic prong is not dependent on a specific technical prong finding.

In a section 337 investigation, "[t]he burden is on the complainant to show by a preponderance of the evidence that the domestic industry requirement is satisfied." *Elec. Candle Prods.*, Comm'n Op. at 11. According to the plain language of section 337 and Commission precedent, Kia was required to establish the existence of a domestic industry through significant or substantial investments with respect to articles protected by each Asserted Patent in order to establish a violation of section 337, but it failed to do so. The Commission also finds that the IID and Final ID err by finding significance based on a "per-patent investments divided by per-patent sales revenue" methodology when Kia did not argue, in its initial post-hearing brief on the economic prong, for that methodology, and Respondents did not have an opportunity to challenge that methodology before the CALJ. *See* Order No. 2 at Ground Rules 11.2, 14.2, 14.3. Moreover, the calculated per-patent investment to sales percentages the IID calculated do not represent a meaningful percentage by which to evaluate the significance of Kia's investments for the Asserted Patents, as explained below. The IID and Final ID therefore err by using them as a basis to conclude that Kia has satisfied the economic prong of the domestic industry requirement with respect to any of the Asserted Patents.

a. Kia Failed to Meet Its Burden of Proof to Demonstrate Significant Investment with Respect to Each Asserted Patent

The Commission finds that Kia failed to satisfy its burden of proof to establish the economic prong of the domestic industry requirement with respect to any of the 20 asserted patents under Prong A or Prong B. For investigations that seek to establish a domestic industry under Prongs A or B, "[t]he plain text of § 337 requires a quantitative analysis in determining whether a petitioner has demonstrated a 'significant investment in plant and equipment' or 'significant employment of labor or capital.'" *Lelo Inc. v. U.S. Int'l Trade Comm'n*, 786 F.3d 879, 883 (Fed. Cir. 2015). The term "significant" requires "an assessment of the relative

importance of the domestic activities,"[38] which requires a "proper contextual analysis to support the claim of a substantial or significant industry."[39]

The economic prong of the domestic industry requirement must be shown on a patent-by-patent basis, and it is not appropriate to aggregate investments directed to different articles protected by different patents for determining significance. *Electronic Stud Finders*, Comm'n Op. at 48-50 (requiring that a domestic industry be shown for each asserted patent); *see also John Mezzalingua Assocs.*, 660 F.3d at 1330-31 (requiring that a domestic industry be shown for each asserted patent). The Federal Circuit has similarly interpreted the statute, noting that, "[w]ith respect to subparagraph (A) of paragraph 337(a)(3), the 'significant investment in plant or equipment' that is required to show the existence of a domestic industry must exist 'with respect to the *articles protected by the patent*' in question," and "[s]imilarly, with respect to subparagraph (B) of paragraph 337(a)(3), the 'significant employment of labor or capital' that is required to show the existence of a domestic industry must exist 'with respect to the *articles protected by the patent*.'" *InterDigital*, 707 F.3d at 1297 (emphasis added).

The Federal Circuit has affirmed the Commission's interpretation of section 337 as requiring the existence of a domestic industry specifically for the articles protected by the patent at issue. In *John Mezzalingua Associates*, the Court affirmed the Commission's finding that the complainant failed to satisfy the domestic industry requirement for one patent (the '539 patent) out of four asserted patents. 660 F.3d at 1322, 1330-31. The Court held that the complainant "had presented no evidence of any investment in research and development that related

[38] *Certain Concealed Cabinet Hinges and Mounting Plates*, Inv. No. 337-TA-289, Comm'n Op., 1990 WL 10608981 at *11 (Jan. 8, 1990) ("*Cabinet Hinges*").

[39] *Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing Same*, Inv. No. 337-TA-1097, Comm'n Op. at 31 (Jun. 29, 2018).

specifically to the ’539 design patent, nor did it offer any allocation of its investment to that patent.” *Id*. at 1330. The Court further held that complainant did not “identify how much of its investment in research and development related to the design protected by the ’539 design patent, as opposed to the ’509 family more generally, and it failed to do so.” *Id*. at 1331. The Court affirmed the Commission’s determination, and specifically noted “that the Commission based its ruling on [complainant’s] failure to offer evidence sufficient to satisfy its burden of proof” as to the domestic industry requirement. *Id.*

Commission precedent also demonstrates that aggregating investments in articles that *are* protected by a specific patent with investments in articles that *are not* protected by that patent precludes meaningful consideration of the relevant investments under section 337. In *Audio Digital-to-Analog Converters*, the Commission explained that “[b]ecause complainant is asserting the ’928 patent and the ’501 patent, and the articles that practice said patents do not overlap, complainant must demonstrate the existence of two domestic industries.” *Audio Digital-to-Analog Converters*, ID at 113. Similarly, in *Electronic Imaging Devices*, the Commission held that:

> Because the investments in each Motorola product are specific to only one patent, Flashpoint must separately establish that Motorola’s investments in the Admiral were sufficient to establish a domestic industry for the ’471 patent and that the investments associated with the Razr Maxx were sufficient to satisfy the economic prong for the ’538 Patent.

Comm’n Op. at 89.

Recently, in *Electronic Stud Finders*, Inv. No. 337-TA-1221, the Commission confirmed that a complainant erred in arguing that a single “stud finder” domestic industry existed based on the total investments from all asserted patents and numerous different products. Comm’n Op. at 48-54. The Commission explained that “aggregating investments in different domestic products that practice different patents effectively precludes the Commission from quantifying the

amounts of the investments in each statutory category and determining the significance of [complainant's] investments with respect [to] each of its asserted patents." *Id.* at 48. The complainant in that investigation provided no arguments or evidence as to the separate investments or the alleged significance of investments for individual products or patents, which was fatal to its domestic industry arguments. *Id.*

Kia, like the complainants in *Electronic Stud Finders*, *Audio Digital-to-Analog Converters*, and *Electronic Imaging Devices*, chose to assert patents that cover distinct inventions or designs, and then erred by relying on combined investments across multiple patents when each domestic industry product is protected by only one Asserted Patent. Like those complainants, Kia was required to separately establish a domestic industry with respect to articles protected by each of the Asserted Patents through significant investments in plant and equipment; significant employment of labor or capital; or substantial investments in the exploitation of the patent but failed to do so.

The Commission's analysis of Kia's initial post-hearing brief at the IID phase demonstrates that Kia failed to satisfy its burden of proof on the economic prong of the domestic industry requirement. First, Kia's submissions repeatedly rely on aggregated investments in multiple products covered by different patents instead of establishing the satisfaction of the domestic industry requirement on a patent-by-patent basis under either Prong A or Prong B. *See Stud Finders* at 48-50 (rejecting reliance on aggregated investments). Kia's quantitative significance arguments relied on, for example, the assertions that: (1) [redacted] of "related Kia vehicles" include the aggregated DI Products "as measured by the sales of the [DI Products] at issue relative to sales of lamps in the related Kia vehicles"; (2) for the automobiles produced by Kia Georgia, [redacted] of all lamps include aggregated DI Products "as measured by Cost of

Goods Sold"; (3) MPA's aftermarket sales of aggregated DI Products constitutes [redacted] of its overall aftermarket sales of lamps;[40] (4) SL Alabama's activities occur in the United States and its aggregated sales of DI Products to Kia from 2016 to 2020 constitutes [redacted] its total sales;[41] (5) Kia Georgia's aggregated expenditures on labor and depreciation from 2016 to 2020 regarding seven asserted patents are significant; (6) the aggregated expenditures for SL Alabama, Kia Georgia, MPA, and Kia America regarding all 20 Asserted Patents are significant; and (7) a comparison of aggregated investments across all 20 Asserted Patents to SL Alabama's lamp sales for DI vehicles shows significance. Kia IPHB at 1-2, 28, 31-32, 56, 59-60. Kia's attempts to rely on these analyses fail to carry Kia's burden of proof because they improperly rely on the alleged significance of aggregated investments across multiple patents rather than the significance of expenditures under Prong A or Prong B on patent-by-patent basis.

In addition to improperly aggregating investments across multiple patents, Kia's contextual analyses often fail to assess the expenditures themselves. Subsection 337(a)(3) requires "significant investment in plant and equipment" and "significant employment of labor or capital." 19 U.S.C. § 1337(a)(3). While Kia relies on metrics that describe the percentage of Kia vehicles that contain DI Products or the percentage of overall lamp sales revenue that is due to aggregated DI Products, such metrics did not address the investments made towards DI Products, and Kia did not explain why such metrics nonetheless relate to the question of whether its domestic investments are significant.

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[40] The IID correctly rejected arguments (1)-(3) because Kia incorrectly aggregated investments and thus failed to establish the economic prong on a patent-by-patent basis. IID at 32.

[41] Kia also argues that SL Alabama's production of lamps (*i.e.*, both DI and non-DI lamps) accounts for [redacted] of its sales revenue, and that SL Alabama's sales of lamps (*i.e.*, both DI and non-DI lamps) to Kia accounts for [redacted] of SL Alabama's total sales revenue. Kia IID IPHB at 28. Neither of these figures relates specifically to the DI Products.

Further, with respect to arguing significant investments with respect to articles protected by the '222, '762, and '764 patents and manufactured by SL Alabama, Kia fails to assert significance based on past significant investments with any investment in ongoing qualifying activity with respect to those articles.[42] Kia IID IPBH at 28-29.[43]

Kia's post-IID hearing briefing contains a single instance in which Kia contended that its asserted investments are significant on a patent-by-patent basis. Specifically, Kia provided a table detailing alleged investments for Prong A, Prong B, and "Total DI Investments" (*i.e.*, Prong A investments + Prong B investments), and then concluded without explanation that "[t]he total investments at the per-patent level are also quantitatively and qualitatively significant because total DI investments for each patent are significant in comparison with the total MPA aftermarket replacement sales of DI Products covered by the corresponding patent." Kia IID IPHB at 57. However, Kia's argument fails for at least three reasons. First, Kia improperly relied on the aggregate of its asserted Prong A and Prong B investments. *Id.* The statutory text of subsection 337(a)(3) does not state that the domestic industry requirement can be satisfied based on the aggregate of Prong A and Prong B investments, but rather requires "significant investment in plant and equipment" ***or*** "significant employment of labor or capital." 19 U.S.C. § 1337(a)(3).[44]

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[42] *See Television Sets*, Comm'n Op. at 69 ("where production, development or sales of protected articles have declined or even ceased entirely, a domestic industry may nevertheless be established based on past significant or substantial investments relating to the protected articles provided that complainant continues to maintain ongoing qualifying activities under section 337(a)(3) at the time the complaint was filed.").

[43] As discussed below, Kia also abandoned, and therefore waived, by the time of the Final ID its arguments from its IID IPHB that SL Alabama's investments were significant based, for example, on [redacted] of its activities occurring in the United States.

[44] *See also Certain Carburetors and Products Containing Such Carburetors*, Inv. No. 337-TA-1123, USITC Pub. 5080, Comm'n Op. at 21 (Sept. 12, 2019) (rejecting an economic prong allegation that "add[ed] together the three investment values for subparagraphs (A), (B), and

Furthermore, Kia actually performs that numerical comparison for only the '989 patent—arguing that the combined Prong A and Prong B expenditures for the DI Products covered by the '989 patent [redacted] are significant because the sum is [redacted] of the sales revenue for those DI Products [redacted]—and therefore provides no comparison (and thus no significance argument) for the remaining 19 asserted patents. *Id.* at 57-58.

Second, Kia failed to explain the relevance of comparing the sum of all four entities' investments to MPA's sales. KIA IID IPHB at 55-58. Some of these investments are directed to lamps for installation in new vehicles (*i.e.*, SL Alabama and Kia Georgia), and some of these investments are directed to replacement lamps (*i.e.*, SL Alabama, MPA, and Kia America). IID at 12-13. MPA's sales, however, are directed only to replacement lamps. *Id.* at 13. Kia provides no explanation why comparing investments in lamps for both new vehicles and for replacement to sales of lamps for replacement only is appropriate.

Third, while Kia contends that dividing a [redacted] investment regarding the '989 patent from Table 30 by [redacted] '989 patent sales revenue from Table 20 represents a [redacted], Kia IID IPHB at 57-58, Kia's assertion is wrong for several reasons. For example, [redacted]. Moreover, Table 20 contains neither a [redacted] nor any investments directed towards the '989 patent. Kia IID IPHB at 43. Finally, Kia's comparison divides '989 patent investments (allocated based on '989 DI Product sales revenue) by '989 DI Product sales revenue, thereby cancelling out the '989-patent-specific portion from the equation in a manner similar to the equation described in more detail in

(C)"). Accordingly, whether the sum of the prong A and prong B expenditures is significant is irrelevant under section 337.

Section.IV.A.4(b)(ii), *infra*. Given these errors, it is unclear how Kia is even attempting to show significance.

Finally, the Commission's notice of review specifically requested that Kia explain, with citations to the record, whether it satisfied its burden of proof on the economic prong of the domestic industry requirement, including "where Kia satisfied its burden of proof as to the significance" of its investments "for each patent." Comm'n Notice, 88 Fed. Reg. 531521 (May 17, 2023). In its response, Kia failed to identify where in the record it carried its burden. While Kia's initial briefing response asserted that the burden was satisfied, including on the issue of significance of its investments on a per-patent basis, Kia cites only the IID, the Final ID and a previous submission that argued the burden of proof was satisfied by the CALJ's findings in the IID, which cited a demonstrative exhibit (CDX-0001C) that separately showed Kia's investments and sales revenue for DI products.[45] Kia Init. Sub. at 21-23 (citing the Final ID at 39-43, IID at 33-34, and Complainants' Submissions to the Commission on Issues Under Review at 10-16 (Sept. 7, 2022). Kia's reply briefing similarly explained that the burden of proof was satisfied by the CALJ's findings in the IID at pages 33 to 36 and the presiding ALJ's findings in the Final ID at pages 39-43. Kia Reply Sub. at 6-11.[46] Kia, however, has the burden of proof to establish the economic prong of the domestic industry requirement by a preponderance of the

[45] Kia's responses also include a string citation to several exhibits, Kia Init. Sub. at 23, Kia Rep. Sub. at 8, but Kia failed to identify where it had argued that those exhibits establish quantitative significance or how those exhibits demonstrate the satisfaction of the economic prong of the domestic industry requirement.

[46] Kia also asserts that it previously argued that the sum of the prong A and prong B expenses of the '989 patent should be compared to MPA's sales revenue for the '989 patent in its initial post-hearing brief for the IID proceedings, Kia Reply Sub. at 10, but ignores that neither the IID nor the Final ID relied on that analysis. Moreover, as explained *infra*, section 337(a)(3) requires significant investment under prong A or significant employment under prong B, neither of which is established by alleging that the combined sum of prong A and prong B is significant.

evidence for each of the 20 Asserted Patents. Kia cannot meet its burden merely by pointing to the methodology that was independently derived by the CALJ, when Kia, as discussed above, did not present such a basis for determining the significance of its domestic investments on a per-patent basis, and Respondents had no opportunity to address any such arguments from Kia before the CALJ. While Kia cites CDX-0001C, Kia cannot meet its burden of proof to show the significance of its investments on a patent-by-patent basis by citing a demonstrative exhibit that separately shows investments and revenue of the DI products by patent without any comparison of the two sets of data. Nowhere in its submissions prior to the IID's findings did Kia itself compare its investments and revenues in DI products using the figures shown in the cited demonstrative exhibit on a patent-by-patent basis or assert significance on the basis of such a comparison, and Respondents had no opportunity to respond to any such arguments before the CALJ. By failing to do so, Kia waived any argument that it satisfied the economic prong of the domestic industry on this basis requirement for each of the Asserted Patents. Order No. 2 at Ground Rule 14.2; *Kyocera Wireless Corp. v. U.S. Int'l Trade Comm'n*, 545 F.3d 1340, 1352 (Fed. Cir. 2008).

Accordingly, Kia's significance arguments during the IID proceeding: (1) improperly aggregated investments across multiple patents; (2) improperly aggregated investments across multiple prongs; and/or (3) addressed the importance of the DI Products in general rather than the significance of investment in each particular DI Product. Kia also fails to assert past significant investments with any investment in ongoing qualifying activities in articles protected by the '222, '762 and '764 patents and manufactured by SL Alabama prior to 2019 when asserting that SL Alabama's investments are significant. Kia abandoned all other significance

arguments by failing to include them in its initial post-hearing brief.[47] Kia therefore failed to carry its burden of proof to establish the satisfaction of the domestic industry requirement of any of Kia's 20 Asserted Patents.

b. The IID and Final ID Err by Finding Significance Despite Kia's Failure to Meet its Burden of Proof and Reliance on a Flawed Methodology

The IID errs by finding the economic prong satisfied. Kia failed to meet its burden of proof to show the significance of its domestic investments on a patent-by-patent basis under either subsection 337(a)(3)(A) or 337(a)(3)(B), and the IID errs in nonetheless finding significant investments with respect to each of the 20 asserted patents based on methodologies that Kia had waived, as explained below. Accordingly, the Commission has determined to vacate the IID. Because the Final ID's significance analysis for the economic prong relies upon the IID's now-vacated significance analysis, the Commission has determined to vacate the Final ID's significance analysis as well.

Additionally, as explained below, the methodology employed by the IID and Final ID to calculate per patent investment to sales ratios is itself flawed and fails to provide a meaningful metric by which to evaluate the significance of those investments. This provides an additional

[47] Under the ALJ Ground Rules in effect at the time, Kia abandoned all arguments on which Kia had the burden of proof but which Kia failed to make in its initial post-hearing brief. Order No. 2 (Jan. 25, 2022) at Ground Rule 14.2 (stating that the initial post-hearing brief must address "issues upon which the party bears the burden of proof" and that "[a]ny contentions for which a party has the burden of proof that are not set forth in detail in the post-hearing initial brief shall be deemed abandoned or withdrawn."). These abandoned arguments are waived. *Kyocera Wireless Corp. v. U.S. Int'l Trade Comm'n*, 545 F.3d 1340, 1352 (Fed. Cir. 2008) (finding that arguments not presented to the ALJ are waived). Kia also abandoned, and therefore waived, by the time of the Final ID, its arguments from its IID IPHB that SL Alabama's investments were significant based, for example, on [redacted] of its activities occurring in the United States.

independent basis for the Commission to vacate the IID's and Final ID's economic prong analysis.

i. The IID's Finding of Significance Regarding the '222, '762, and '764 Patents

The IID finds that the economic prong of the domestic industry requirement is satisfied with respect to the '222, '762, and '764 patents based on SL Alabama's manufacturing activities from 2016 to 2018 and MPA's ongoing investments in sales and warehousing in 2021. IID at 14-23. The IID relies on *Television Sets*, in which the Commission found that "where production, development or sales of protected articles have declined or even ceased entirely, a domestic industry may nevertheless be established based on past significant or substantial investments relating to the protected articles provided that complainant continues to maintain ongoing qualifying activities under section 337(a)(3) at the time the complaint was filed." *Television Sets* at 69.

When the presiding ALJ requested briefing on how a rejection of Kia's alleged representative DI Products would impact Kia's economic prong case, Kia did not address the IID's findings with respect to SL Alabama's investments in domestically-manufactured DI Products that practiced the '222, '762, and '764 patents, and instead expanded the investment-to-sales ratio table that the IID had relied upon for the other 17 Asserted Patents to include all 20 Asserted Patents. *See* Complainants' Supplemental Post-Hearing Brief in Accordance with Order No. 37, at 11-12 (Oct. 17, 2022). Kia's briefing in response to the Commission's question on where Kia established its burden of proof similarly identifies only the investment-to-sales ratios for all 20 Asserted Patents. Kia Init. Sub. at 21-25; Kia Rep. Sub. 6-11. While the Final

ID adopted Kia's proposal, it contains no discussion of changing the significance rationale for the '222, '762, and '764 patents. Final ID at 39-43.[48]

Accordingly, Kia waived (1) any argument that SL Alabama's investments were significant based on past investments in ongoing qualifying activities with respect to the domestically-manufactured DI Products by not asserting such an argument in its IID initial post-hearing brief, (2) any argument that it satisfied its burden of proof on the economic prong with respect to the three domestically-manufactured DI Products' patents with respect to past investments made by SL Alabama, by abandoning them at the Final ID stage, and (3) any argument that investments with respect to the three patents were significant based on a comparison of investments to sales ratios (as Kia purports to show in its Order No. 37 Supplemental Brief) because it failed to assert such a basis in its post-hearing briefing at the IID stage. Order No. 2 at Ground Rule 14.2; *Kyocera*, 545 F.3d at 1352. Because the IID's and Final ID's significance findings with respect to the '222, '762, and '764 patents relied on theories that Kia had waived, both the IID's and the Final ID's economic prong findings are in error. Accordingly, the Commission vacates the IID's findings with respect to the '222, '762, and '764 patents.

ii. The IID's Finding of Significance Under Prong A Regarding the Remaining 17 Asserted Patents

The IID finds that the economic prong of the domestic industry is satisfied under Prong A with respect to the remaining 17 asserted patents based on MPA's investments in facility rent and operating expenses for warehousing and distributing the DI Products and Kia America's

[48] In its Supplemental Briefing, Kia represented that it was updating the "table on pages 33 of the Interim ID." Complainants' Supplemental Post-Hearing Brief in Accordance with Order No. 37 at 11. However, Kia did not simply update the table on those pages of the IID but it added rows for the '222, '762, and '764 patents. *Id.* at 11-12.

investments in facility rent and operating expenses for warranty coordination. IID at 23-36. The IID correctly rejected all of Kia's arguments regarding significance for improperly aggregating investments across multiple patents and across multiple prongs. *Id.* at 32. However, although not advocated for by any party, the IID determines significance by comparing the combined allocated Prong A investments of MPA and Kia America from 2016 to 2021 to MPA's allocated aftermarket sales revenue from 2017 to 2021. *Id.* at 33 (citing CDX-0001C.0108 and .0050). The IID then divides the allocated investments by the allocated aftermarket sales revenue for all of 17 remaining asserted patents, finds that the resulting ratio for each patent is [redacted], and concludes that these ratios show that the investments for all 17 patents are quantitatively significant. *Id.* at 33-34. Respondents did not have an opportunity to challenge this methodology before the CALJ.

The IID errs by making a series of significance findings that were never raised by any party. In particular, no party argued that significance should be determined by comparing the entities' combined Prong A investments to MPA's aftermarket sales revenue, no party argued that such a comparison should be conducted by dividing such allocated investments by allocated sales revenue, and no party argued that a resulting value of [redacted] demonstrates quantitative significance. The IID's significance findings are substantially different from the significance case presented by Kia, and the disclosure of that significance rationale for the first time in the IID after the close of briefing prevented Respondents from having the opportunity to respond before the ALJ to that line of reasoning and to present rebuttal evidence.

Moreover, the IID's significance analysis is flawed. As described below, due to a fundamental flaw in its construction, the "sales-based" allocation method set forth in the IID

does not meaningfully allocate the alleged investments on a per-patent basis. *See* IID at 33-34. As such, the resulting percentages have no relation to the significance of the per-patent investments. Accordingly, even if the argument were not waived, as elaborated below, there is no analysis on the record of whether the alleged investment for each of these seventeen patents is significant.

In the IID, the calculated per-patent percentages of alleged investments to sales are essentially identical for each Asserted Patent despite the per-patent investment amounts varying by [redacted], as shown in the chart below:

Patent No.	Investments in Plant and Equipment (CDX-0001C at 108)	Sales of Domestic Industry Products (CDX-0001C at 50)	Investments/Sales
218	[redacted]		
223			
311			
471			
506			
701			
757			
773			
833			
836			
871			
931			
933			
963			
975			
976			
989			

IID at 33.

Simple algebra demonstrates the error in IID's analysis, which was adopted by the Final ID. Final ID at 41-42. The values in "Investments in Plant and Equipment" column are derived by two two-step equations, which are then added. The first step is the patent-specific sales

divided by the total domestic industry products sales to calculate the per-patent revenue percentage. *See* CDX-0001C at 50-51, 59-60. Because Kia uses the 2017-2021 timeframe for MPA and the 2016-2021 timeframe for Kia America, the numbers are not the same. *Id.* at 93-96. For example, for the '218 patent, the patent revenue percentage is [redacted] for MPA and [redacted] for Kia America (which are calculated below):

[Total '218 patent sales (2017-2021) of [redacted]] / [Total DI products sales (2017-2021) of [redacted]]	= [redacted]

[Total '218 patent sales (2016-2021) of [redacted]] / [Total DI products sales (2016-2021) of [redacted]]	= [redacted]

Id. at 50-51, 59-60. The second step multiplies that per-patent revenue percentage by the total plant and equipment investment for each entity. *See* CDX-0001C at 93-96. For example, the '218 patent plant and equipment investment is [redacted] for MPA and [redacted] for Kia America (which are calculated below).

['218 patent revenue percentage ([redacted])] x [Total MPA Prong A of [redacted]] = [redacted]
['218 patent revenue percentage ([redacted])] x [Total Kia America Prong A of [redacted]] = [redacted]

Id. The sum of [redacted] and [redacted] results in [redacted], which is the total "Investments in Plant and Equipment" found in the IID's chart. IID at 33; CDX-0001C at 108. That per-patent plant

and equipment investment is then divided by the per-patent sales to calculate the investments/sales percentage (see below). *Id.*

$$\frac{\text{['218 patent Prong A of [redacted]]}}{\text{[Total '218 patent sales (2017-2021) of [redacted]]}} = \text{[redacted]}$$

However, if the equations are considered together, the calculation cancels out the per-patent sales and reduces to the total plant and equipment investments divided by the total DI Products sales, which results in the *exact same investments/sales percentage* for every Asserted Patent. For example:

$$\frac{\text{[Total '218 patent sales]}}{\text{[Total DI Products sales]}} \times \text{[Total Prong A Investments]}$$

$$\frac{}{\text{[Total '218 patent sales]}}$$

reduces[49] to:

$$\frac{\text{[Total Prong A Investments]}}{\text{[Total DI Products sales]}}$$

Accordingly, every alleged "investment to sales" percentage for each Asserted Patent is essentially the same and, thus, is meaningless. The only reason why the percentages vary slightly on a patent-by-patent basis is the IID used of different time ranges for the calculations—

[49] Dividing two fractions is the same as multiplying the numerator-fraction by the reciprocal (inverse) of the denominator-fraction. Here, the numerator is multiplied by (1/[Total '218 patent sales [redacted]]). Next, the [Total '218 patent sales [redacted]] in both the numerator and denominator cancel each other out.

2017-2021 for MPA, and 2016-2021 for Kia America. Kia's arguments as to the per-patent allocation of investments made only after issuance of the IID suffers from the same problematic methodology because Kia adopts the IID methodology, as does the Final ID which also adopts the same methodology. Kia' Supplemental Post-Hearing Brief in Accordance with Order No. 37 at 7 (Oct. 17, 2022); Kia Init. Sub. at 22-25; Final ID at 41-42.

In conclusion, the IID's Prong A analysis for the remaining 17 patents erroneously denied Respondents the opportunity to respond to the significance reasoning and to provide rebuttal evidence. Further, the analysis also erroneously used a flawed metric. By relying solely on the IID's flawed significance analysis, Kia waived any other argument why its investments are significant. The Commission has therefore determined to vacate the IID's Prong A analysis for the remaining 17 patents. Because the Final ID's Prong A analysis for all 20 Asserted Patents relies on the IID's erroneous Prong A analysis, the Commission has determined to vacate the Final ID's Prong A analysis as well.

iii. The IID's Finding of Significance Under Prong B Regarding the Remaining 17 Asserted Patents

The IID finds that the economic prong of the domestic industry requirement is satisfied under Prong B with respect to the remaining 17 Asserted Patents based on Kia America's aggregated expenditure of [redacted] on mechanic labor for warranty repairs across all 20 asserted patents. IID at 38-39. The IID's analysis, however, considers only the total warranty investment for all of the domestic industry products that practice the remaining Asserted Patents without taking the additional step of allocating the warranty investments on a per-patent basis and determining whether the investments in each patent are significant. *Id*. This is error. *See Electronic Stud Finders*, Comm'n Op. at 48. The IID correctly notes that "where each asserted patent covers only one product, a domestic industry must be determined to exist with respect to

each patented product," but the IID fails to apply that principle in its analysis for Prong B. *Compare* IID at 32 *with id*. at 37-39.

In particular, the IID's error affects the quantitative significance analysis. IID at 37-39; *see Lelo*, 786 F.3d at 883. The IID's sole finding for quantitative significance of the labor and capital investments for the remaining 17 patents is: "With more than [redacted] of warranty expenses tied to the Domestic Industry Products specifically at issue in this investigation, it is very reasonable to infer the investment on a per product basis is significant." *Id*. at 39. The IID's significance findings are thus erroneous as they are not based on investments in domestic industry articles as to each Asserted Patent (where each domestic industry article practices only one of the Asserted Patents).

iv. Summary

The Commission finds that Kia has not shown satisfaction of the economic prong based under prong A or B and that the IID and Final ID erred in finding otherwise. Accordingly, the Commission vacates the IID's and Final ID's economic prong findings and finds that Kia has failed to satisfy the domestic industry requirement with respect to any of the Asserted Patents.[50]

B. Infringement, Technical Prong of the Domestic Industry, and Invalidity

The Commission's finding that Kia failed to establish the economic prong of the domestic industry requirement for any of the 20 Asserted Patents is a dispositive finding that results in a finding of no violation of section 337 as to any asserted patent by any respondent. Based on the dispositive nature of the economic prong findings, the Commission has determined to take no position on the issues of infringement, satisfaction of the technical prong of the

[50] The Commission notes that, by vacating the IID and the FID's economic prong analysis based on the above analysis, it is not reaching other economic prong issues, such as what expenses are cognizable for satisfaction of the economic prong.

domestic industry requirement, and invalidity. *Beloit Corp. v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir. 1984).

V. CONCLUSION

The Commission has considered all of the other arguments by the parties and does not find them persuasive. Therefore, for the reasons set forth herein, the Commission determines that Kia has not established a violation of section 337 by Respondents with respect to any of the 20 Asserted Patents. Accordingly, the investigation is terminated with a finding of no violation of section 337.[51]

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: March 7, 2024

[51] The Commission denies as moot Respondents' motion to strike the Declaration of Brian Sciumbato. *See* Respondents' Motion to Strike the Declaration of Brian Sciumbato and Related Portions of Complainants' Reply Submission to the Commission on Issues Under Review or For Leave to File a Sur-Reply to Such Submission (June 15, 2023).

In the Matter of **CERTAIN REPLACEMENT AUTOMOTIVE LAMPS**	**Investigation No. 337-TA-1291**

CONCURRING VIEWS OF COMMISSIONER SCHMIDTLEIN

I agree with today's outcome that complainants have failed to establish the economic prong of the domestic industry requirement for any of the asserted patents, and therefore agree that there has been no violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. I do not, however, join the majority's opinion because it goes beyond what is necessary to dispose of the investigation.

In my view, complainants failed to establish the economic prong of the domestic industry requirement based on their failure to assert the significance of the asserted domestic investments on a patent-by-patent basis under either subsection 337(a)(3)(A) or 337(a)(3)(B).[52] Specifically, at the interim ID stage, complainants' post-hearing brief failed to allege significance of the

[52] *See John Mezzalingua Assocs., Inc. v. Int'l Trade Comm'n*, 660 F.3d 1322, 1330-31 (Fed. Cir. 2011) (complainant erred in arguing combined investments for multiple patents and failing to allocate for single design patent); *Certain Electronic Stud Finders, Metal Detectors and Electrical Scanners*, Inv. No. 337-TA-1221, Comm'n Op. at 48-50 (Mar. 14, 2022) ("[A]ggregating investments in different domestic products that practice different patents effectively precludes the Commission from quantifying the amounts of the investments in each statutory category and determining the significance of [complainant's] investments with respect [to] each of its asserted patents."); *Certain Electronic Imaging Devices*, Inv. No. 337-TA-850, Comm'n Op. at 89 (Apr. 21, 2014) (where first product practiced one patent and second product practiced a second patent, the complainant was required to show significant investment in each product separately).

asserted domestic investments on a per-patent basis under either subsection 337(a)(3)(A) or 337(a)(3)(B). Moreover, after the interim ID and in response to the presiding ALJ's and the Commission's requests for briefing on the economic prong,[53] complainants abandoned the significance arguments they did present in their post-hearing brief and instead relied on a method for showing significance that they never presented prior to the interim ID.[54] In that briefing after the interim ID, complainants relied on the method that the interim ID independently derived to address significance on a per-patent basis.[55] The interim ID calculated an investment-to-sales ratio for each patent, which the interim ID found showed the significance of the asserted investments. IID at 33-34. By not arguing in favor of this method of showing significance in its post-hearing brief at the interim ID stage, complainants waived their ability to assert that method. Moreover, even if this argument was not waived by complainants, it appears that the investment-to-sales ratio approach used in the interim ID and later advanced by complainants is unreliable because it cancels out per-patent information. This is because the same sales data that is used to apportion the domestic investments on a per-patent basis is then used to generate the investment-to-sales ratio. The result is that the approach yields an investment-to-sales ratio that effectively is total plant and equipment investments for all patents divided by the total domestic industry

[53] The Commission sought economic prong briefing from the parties as part of its review of the interim ID and its review of the Final ID. Also, the ALJ requested post-interim ID briefing on the impact of technical prong issues on the economic prong analysis. *See* Order No. 37 (Oct. 11, 2022).

[54] For example, complainant abandoned any argument it may have made in its post-hearing interim ID brief that SL Alabama's investments were significant based on the percentage of activities occurring in the United States.

[55] The interim ID's approach addressed the significance of the asserted domestic investments by dividing complainants' subsection 337(a)(3)(A) investments (allocated on a patent-by-patent basis) by MPA's sales revenue (also allocated on a patent-by-patent basis). IID at 32-34.

products sales for all patents. Accordingly, the investment-to-sales ratio is nearly the same for all the asserted patents and does not appear to show significance on a per-patent basis. *See* IID at 33.

For these reasons I agree with the majority's decision to vacate the interim ID and economic prong findings in the final ID. I also agree with the majority's determination to take no position on the issues of infringement, satisfaction of the technical prong of the domestic industry requirement, and invalidity.