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Intellectual Property Alert

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Pilot program: Expediting case-dispositive intellectual property issues at the International Trade Commission

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The ITC's new pilot program pertaining to interim initial determinations offers a procedural alternative for early resolution of case-dispositive issues.



What's the Impact?

- / By allowing administrative law judges to issue interim initial determinations, parties have a new opportunity for cost-effective dispute resolution
- / The pilot program aims to streamline the process compared to conventional investigations before the ITC

On May 12, 2021, the International Trade Commission (ITC or Commission) implemented a new pilot program allowing its administrative law judges (ALJs) to issue interim initial determinations (IDs) on case-dispositive issues to cost-effectively resolve its investigations.

[Section 337 litigation before the Commission](#) moves quickly, and the new pilot program will resolve qualifying cases even more expeditiously. With the pilot program, the ALJ may issue interim IDs on discrete issues that could (1) narrow the investigation prior to the evidentiary hearing or (2) dispose of the investigation altogether. This allows ALJs to issue interim IDs on

fewer than all issues in an investigation. It is expected that interim ID issues will be case-dispositive, such as infringement, invalidity, patent eligibility, standing, or the domestic industry requirement. Conceptually, this pilot program is similar to the ITC's 100-day proceeding that authorizes the Commission to identify potentially dispositive issues and direct the ALJ to rule on these dispositive issues within 100 days from institution of the investigation.¹ In contrast to the ITC's 100-day proceeding, under the new pilot program, ALJs retain discretion on the dispositive issues that fall within the program, set a schedule that runs parallel to the investigation, and issue an interim ID 45 days prior to the evidentiary hearing.² The parameters of the pilot program follow:

- / The ALJ may *sua sponte* assign issues to the program or allow parties to move particular issues into the program;
- / The ALJ will fully develop the factual record and arguments, including by seeking briefing on those issues and holding a focused evidentiary hearing as appropriate;
- / The ALJ may stay discovery on other issues during the interim ID process while avoiding extending the target date for resolution of the investigation;
- / The ALJ will issue an interim ID no later than 45 days before the main evidentiary hearing;
- / Petitions for review of the interim ID are due eight calendar days after the interim ID issues, and responses are due five business days later;
- / The ALJ may suspend the procedural schedule while the interim ID is reviewed by the Commission, all while avoiding extending the target date; and
- / But for good cause, the Commission will determine whether to review an interim ID within 45 days and resolve any review within another 45 days.

Id. The Commission hopes that its new pilot program will “resolve significant issues in advance of the main evidentiary hearing[] and could facilitate settlement or otherwise resolve the entire dispute between the parties.” *Id.*

To date, the new pilot program remains untested, as neither ALJs nor the ITC has used the new pilot program in an active investigation. However, the Commission has signaled how it will potentially identify investigations that are ripe for the pilot program. In *Certain Electrolyte Containing Beverages and Labeling and Packaging Thereof* (“*Electrolyte Containing Beverages*”), Inv. No. 337-TA-1269, the Commission instituted the investigation and did not direct the ALJ to conduct a 100-day proceeding on any issues. See 86 Fed. Reg. 35532 (July 6, 2021). But in the Notice of Institution of Investigation, the Commission noted “that issues regarding whether the domestic industry requirement of section 337 is met may be present here. In instituting this investigation, the Commission has not made any determination as to whether

¹ United States International Trade Commission, “[Pilot Program Will Test Early Disposition of Certain Section 337 Investigations](#),” (June 24, 2013); 19 C.F.R. § 210.10(b)(3).

² United States International Trade Commission, “[Pilot Program Will Test Interim ALJ Initial Determinations on Key Issues in Sec. 337 Investigations](#),” (May 12, 2021).

complainants have satisfied this requirement. The presiding Administrative Law Judge may wish to consider this issue at an early date, including through use of the interim initial determination (ID) pilot program.” *Id.* at 35532-33. Shortly after institution, respondents moved for entry into the pilot program for an interim ID on whether complainants satisfy the domestic industry requirement. See EDIS Doc. ID 747575. The presiding ALJ in *Electrolyte Containing Beverages* has not yet ruled on whether the investigation will initiate the pilot program as of the date of this writing.

In another investigation, *Certain Televisions, Remote Controls, and Components Thereof* (“*Televisions*”), Inv. No. 337-TA-1263, the Commission did not recommend entry into the new pilot program in the Notice of Institution of Investigation. See 86 Fed. Reg. 26542 (May 14, 2021). Subsequently, respondents moved for entry into the pilot program to determine whether the lone asserted claim of one asserted patent is indefinite. See EDIS Doc. ID 748726. Similar to *Electrolyte Containing Beverages*, the presiding ALJ in *Televisions* has not yet ruled on whether the investigation will be entered into the pilot program as of the date of this writing.

ALJs always have had the inherent authority to issue interim IDs on less than all issues, but the pilot program provides a clear procedural avenue for ALJs to exercise their authority to identify and decide potentially case-dispositive issues early in an investigation.³ Practically speaking, the new pilot program presents an opportunity for parties to further streamline and cost-effectively resolve their disputes compared to a conventional investigation before the ITC on all issues and certainly compared to federal court litigation.

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³ [“The Case for Early Adjudication of Potentially Dispositive Issues at the USITC,”](#) Langdon, E., and P. Bartkowski, 10 No. 5 *Landslide* 13 (May/June 2018).