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## Pilot Program: Expediting Case-Dispositive Intellectual Property Issues at the International Trade Commission

By Evan Langdon, Vincent C. Capati and Joshua W. Rodriguez

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.

### THE NEW PILOT PROGRAM

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.

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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.<sup>1</sup>

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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 no later than 45 days prior to the evidentiary hearing.<sup>2</sup> The parameters of the pilot program follow:

1. The ALJ may sua sponte assign issues to the program or allow parties to move particular issues into the program;

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2. 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;
  3. The ALJ may stay discovery on other issues during the interim ID process while avoiding extending the target date for resolution of the investigation;
  4. The ALJ will issue an interim ID no later than 45 days before the main evidentiary hearing;
  5. 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;
  6. The ALJ may suspend the procedural schedule while the interim ID is reviewed by the Commission, all while avoiding extending the target date; and
  7. 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.<sup>3</sup>

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.”<sup>4</sup>

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*”),<sup>5</sup> the Commission instituted the investigation and did not direct the ALJ to conduct a 100-day proceeding on any issues.<sup>6</sup> The Commission did, however, note in the Notice of Institution of Investigation:

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 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.<sup>7</sup>

Shortly after institution, respondents moved for entry into the pilot program for an interim ID on whether complainants satisfy the domestic industry requirement.<sup>8</sup> The ALJ stated in her procedural schedule order that the schedule may change because “an interim initial determination may issue on domestic industry requirement if issued through use of the interim initial determination (ID) pilot program [], in the form of an ID . . . if that appears to be warranted.”<sup>9</sup> To date, the investigation has proceeded without use of the pilot program.

In *Certain Televisions, Remote Controls, and Components Thereof* (“*Televisions*”),<sup>10</sup> the Commission did not recommend entry into the new pilot program in the Notice of Institution of Investigation.<sup>11</sup> Subsequently, respondents moved for entry into the pilot program to determine whether the lone asserted claim of one asserted patent is indefinite.<sup>12</sup> Similar to *Electrolyte Containing Beverages*, no order regarding the disposition of respondents’ request has been issued and the investigation has proceeded without use of the pilot program.

Similarly, in *Certain Automated Put Walls and Automated Storage and Retrieval Systems, Associated Vehicles, Associated Control Software, and Component Parts Thereof* (“*Retrieval Systems*”),<sup>13</sup> the proposed respondents requested entry into the new pilot program during the pre-institution phase to determine whether the accused product infringes the asserted patents.<sup>14</sup> The Commission did not recommend entry into the new pilot program and, to date, the respondents have not renewed their request.<sup>15</sup>

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The new pilot program was recently implemented for the first time in two related investigations: *Certain Replacement Automotive Lamps (I)* (“*Automotive Lamps (I)*”),<sup>16</sup> and *Certain Replacement Automotive Lamps (II)* (“*Automotive Lamps (II)*”).<sup>17</sup> The respondents in both investigations initially

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requested entry into the 100-day proceeding, which the Commission denied.<sup>18</sup> Unlike the investigations discussed above, the Commission did not recommend, and respondents did not subsequently request, use of the interim ID pilot program.<sup>19</sup> Both investigations were assigned to the chief ALJ, who *sua sponte* ordered that “[a] joint evidentiary hearing on the economic prong of the domestic industry requirement will convene on April 20, 2022, pursuant to the Commission’s pilot program for interim initial determination.”<sup>20</sup>

The chief ALJ’s use of the pilot program for *Automotive Lamps (I)* and *(II)* is likely because of the overlapping nature of the domestic industry issues in both investigations. For example, the complainants in *Automotive Lamps (I)*, Kia Corporation and Kia America, Inc. (“Kia”), and the complainants in *Automotive Lamps II*, Hyundai Motor Company and Hyundai Motor America, Inc. (“Hyundai”), are affiliated entities represented by the same law firm that sued the same set of respondents in both investigations. The two complainants, however, assert infringement of different patents protected by different domestic industry products – Kia’s headlamps and taillamps in *Automotive Lamps (I)*, and Hyundai’s headlamps and taillamps in *Automotive Lamps (II)*.<sup>21</sup> In addition, Kia and Hyundai appear to rely on at least some of the same domestic investments for purposes of satisfying the economic prong of the domestic industry requirement.<sup>22</sup> Early resolution of the economic prong requirement could therefore streamline both investigations, which would serve the pilot program’s purpose of resolving significant issues that are potentially case-dispositive before the full evidentiary hearing.

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**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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*Automotive Lamps (I)* and *(II)* also highlight a key difference in the timeline for resolution between investigations placed in a 100-day proceeding

under Commission Rule 210.10(b)(3) and investigations in the interim ID pilot program. For example, under the Commission’s 100-day proceeding for early resolution on a case-dispositive issue, the parties are afforded approximately 40–45 days for discovery, 10–14 days for prehearing briefing, a one-day hearing, 10–14 days for posthearing briefing; the ALJ issues its ID approximately 40 days after the hearing.

By contrast, the procedural schedule in *Automotive Lamps (I)* and *Automotive Lamps (II)* allows an additional 14–20 days for discovery, an additional 10 days for prehearing briefing, additional time for hearing preparation and an additional 30 days for the ALJ to issue its ID, all of which amounts to an approximately 160-day proceeding. Future investigations that utilize the interim ID pilot program may not necessarily follow the same procedural schedule as that of *Automotive Lamps (I)* and *(II)*, but those investigations provide at least some road map for the timing parties can expect for investigations placed in the pilot program.

## CONCLUSION

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.<sup>23</sup> 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.

## Notes

1. U.S. 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), [https://www.usitc.gov/press\\_room/featured\\_news/pilot\\_program\\_will\\_test\\_early\\_disposition\\_certain.htm](https://www.usitc.gov/press_room/featured_news/pilot_program_will_test_early_disposition_certain.htm).
2. U.S. International Trade Commission, “Pilot Program Will Test Interim ALJ Initial Determinations on Key Issues in Section 337 Investigations,” (May 12, 2021), [https://www.usitc.gov/press\\_room/featured\\_news/337\\_pilotprogram.htm](https://www.usitc.gov/press_room/featured_news/337_pilotprogram.htm).
3. *Id.*
4. *Id.*
5. Inv. No. 337-TA-1269.

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6. See 86 Fed. Reg. 35532 (July 6, 2021).
  7. *Id.* at 35532-33.
  8. See *Electrolyte Containing Beverages*, Inv. No. 337-TA-1269, Motion for Interim ID Pilot Program for Complainant's Domestic Industry Requirements (July 22, 2021) (EDIS Doc. ID 747575).
  9. See *Electrolyte Containing Beverages*, Inv. No. 337-TA-1269, Order No. 6 at 1 (July 27, 2021).
  10. Inv. No. 337-TA-1263.
  11. See 86 Fed. Reg. 26542 (May 14, 2021).
  12. See *Televisions*, Inv. No. 337-TA-1263, Respondents' Motion for Entry into the Early Disposition Program (August 4, 2021) (EDIS Doc. ID 748726).
  13. Inv. No. 337-TA-1293.
  14. See *Retrieval Systems*, Inv. No. 337-TA-1293, Respondents' Request for Entry into the Interim ID Pilot Program (January 5, 2022) (EDIS Doc. ID 759776).
  15. See 87 Fed. Reg. 4290 (January 2, 2022).
  16. Inv. No. 337-TA-1291.
  17. Inv. No. 337-TA-1292.
  18. See *Automotive Lamps (I)*, Inv. No. 337-TA-1291, Order Denying Request for Entry into Early Disposition Program (January 18, 2022); *Automotive Lamps (II)*, Inv. No. 337-TA-1292, Order Denying Request for Entry into Early Disposition Program (January 19, 2022).
  19. See 87 Fed. Reg. 3583-84 (January 24, 2022).
  20. See *Automotive Lamps (I)*, Inv. No. 337-TA-1291, Order No. 6 at 2 (February 7, 2022); *Automotive Lamps (II)*, Inv. No. 337-TA-1292, Order No. 7 at 2 (February 7, 2022).
  21. See *Automotive Lamps (I)*, Inv. No. 337-TA-1291, Compl. (December 15, 2021) (EDIS Doc. ID 758663); *Automotive Lamps (II)*, Inv. No. 337-TA-1292, Compl. (December 16, 2021) (EDIS Doc. ID 758699).
  22. See *id.*
  23. Langdon, E., and P. Bartkowski, "The Case for Early Adjudication of Potentially Dispositive Issues at the USITC," 10 No. 5 *Landslide* 13 (May/June 2018), <https://www.adduci.com/uploads/201805-06-The-Case-for-Early-Adjudication-of-Potentially-Dispositive-Issues-at-the-USITC-ABA-Landslide-PMB-EHL.pdf>.

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