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U.S. International Trade Commission Launches New Pilot Program for Interim Section 337 Initial Determinations

The U.S. International Trade Commission (ITC) has [announced a new pilot program](#) to allow its Administrative Law Judges (ALJs) to issue interim initial determinations on fewer than all issues in a Section 337 investigation. This new pilot program is the ITC’s latest effort to promote the efficient resolution of Section 337 proceedings.

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Section 337 investigations address allegations of unfair import trade practices, serving as another forum to litigate patent infringement allegations, as well as other intellectual property violations and unfair acts. These cases are statutorily mandated to move quickly – ITC investigations go to trial less than a year after the complaint is filed. Due to this pace and the many fact issues often present in an ITC case, summary determinations (the ITC equivalent to summary judgment) are rarely granted.

Several years ago, the ITC announced (and later codified) [an early disposition program](#), allowing an ALJ to issue an Initial Determination on a case-dispositive issue within 100 days of institution. But this program has seen little use over the years, having been used only about a dozen times in only a small percentage of investigations. Often, the ITC has declined to use this program because the potentially dispositive issue was “too complex” to be resolved in 100 days.

As a result, more than half of ITC cases go to trial – exponentially more than in district court. This can be costly, both to parties and to ITC resources. With this new pilot program, the ITC aims to resolve dispositive issues prior to the main evidentiary hearing, ideally facilitating early settlement or resolution of the entire dispute between the parties without the expense of the full trial.

How the Pilot Program Will Work

The pilot program will apply to all investigations instituted on or after May 12, 2021, as well as any investigations instituted prior to that date at the discretion of the presiding ALJ. Under the program, a presiding ALJ may put issues within the pilot program and allow parties to file motions to place issues within the program. Examples of appropriate issues include, but are not limited to, infringement, patent invalidity, patent eligibility, standing, or satisfaction of the ITC’s unique “domestic industry” requirement.

The ALJ will then fully develop the factual record and arguments on the issues within the program through briefing and holding an evidentiary hearing. Within no later than 45 days before the scheduled start of the main evidentiary hearing, the ALJ will issue an interim initial determination on the discrete issues brought within the program. These interim initial determinations will be based on a full evidentiary record and all applicable legal standards and burdens of proof, including all requirements set forth by the Administrative Procedure Act (APA).

During the interim initial determination process, the ALJ may choose to stay discovery on other issues or place the remaining procedural schedule of the investigation on hold. The Commission will also waive any Commission rules as needed for the pilot program, in the interest of more efficient and expedient resolution of investigations. Throughout the process, ALJs must still take into account the need to complete investigations expeditiously and avoid extensions of the target trial date.

Parties may petition for review of the interim initial determination. These petitions will be due eight calendar days after the issuance of the initial determination; responses will be due five business days later. The Commission will normally determine whether to review the initial determination within 45 days of issuance and resolve that review within another 45 days, but may set a different time frame for good cause.

The pilot program will be in place for the next two years, during which the Commission will modify the program as needed and invite feedback from the ALJs, the Office of Unfair Import Investigations, private parties, and the bar. After two years are up, the Commission will decide whether to permanently allow interim initial determinations.

Takeaways and Potential Consequences

At first blush, this program may appear to primarily benefit respondents, as it may facilitate the early resolution of issues that have been often the subject of 100-day program requests – for example, patent eligibility, domestic industry, etc. – but where the Commission has frequently decided the issues are too complex to be decided within 100 days.

But *complainants* may strategically seek to use this program to get early resolution of a subset of critical issues in their favor as well, especially where a complainant is seeking a monetary settlement rather than the exclusion order itself. It remains to be seen whether the pilot program will achieve its goals of meaningfully streamlining ITC practice, or if it will fall into the same disuse as the 100-day program. Either way, practitioners and litigants alike should keep these changes in mind when pursuing claims at the ITC.