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:: Pilot Program Will Test Early Disposition of Certain Section 337 Investigations

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The U.S. International Trade Commission (USITC) has launched a pilot program to test whether earlier rulings on certain dispositive issues in some section 337 investigations could limit unnecessary litigation, saving time and costs for all parties involved.

The pilot program is the Commission's latest action in its ongoing efforts to improve its section 337 investigation procedures and meet its obligation to complete investigations expeditiously.

Section 337 investigations involve allegations of unfair practices in import trade. The majority of complaints filed under this statute involve patent infringement allegations, but they may also allege infringement of trademarks, copyrights, mask works, and other forms of intellectual property, theft of trade secrets, and other unfair acts.

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Under the pilot program, the Commission will identify, at institution, investigations that are likely to present a potentially dispositive issue and direct the assigned Administrative Law Judge (ALJ) to rule on that issue early in the investigation through expedited factfinding and an abbreviated hearing limited to the identified issue.

One such issue could be the existence of a domestic industry. A key determination in the course of a section 337 investigation is whether an industry in the United States exists or is in the process of being established. If the USITC finds that there is no domestic industry, no remedies can be provided under the law.

While the pilot program is not limited to the issue of domestic industry (for example, other possible issues might include importation and standing), it provides a good example to explain how the pilot program will work.

Typically, the initial ruling on domestic industry has come relatively late in an investigation, often after several months of litigation (including an evidentiary hearing) when the ALJ issues his initial determination (ID) on whether there is a violation of section 337. The pilot program will reduce this time for this initial ruling to 100 days (subject to a limited extension for good cause).

If an investigation is designated to participate in the pilot program, the Commission will set out specific timeframes for expedited activities in its notice of institution. In general, for such investigations, the Commission will direct the presiding ALJ to expedite factfinding in the investigation on the domestic industry requirement (including an early evidentiary hearing) and issue an early ID on this matter within 100 days of institution. (The presiding ALJ will have the discretion to grant a limited extension of the early ID for good cause shown.)

Petitions for review of IDs issued under the pilot program will be due five calendar days after the ID has been served on the parties, and replies will be due three business days after any petition for review has been served. The Commission will determine whether to review the early ID within 30 days after the ALJ issues it; if the Commission does not review the ID, it will become the Commission's final determination. Commission review will normally be completed within 30 days.

If the ALJ issues an early ID finding that there is no domestic industry, that action would stay the investigation pending Commission action. Any other decision would not stay the investigation or delay a final ID covering other issues of the investigation. The Commission does not expect any delays in other investigations assigned to the presiding ALJ.

The Commission employed the pilot program's approach recently when it instituted Inv. No. 337-TA-874, *Certain Products Having Laminated Packaging, Laminated Packaging, and Components Thereof*. In its [notice of institution](#) for this investigation, the Commission directed the ALJ in this case to collect facts and issue an early ruling on the domestic industry issue within 100 days of the investigation's institution, as described above.

The Commission recognizes that resolving issues in pilot program investigations will be challenging for the ALJs and the parties. However, it notes that the complainant controls the timing of the complaint's filing and should be prepared to prove its case, including such elements as domestic industry, importation, and standing, without extensive discovery on these issues. While some complainants rely on licensees' activities to satisfy the domestic industry requirement, such complainants should have acquired the necessary information from licensees prior to filing the complaint and have a well-developed plan for obtaining any necessary discovery immediately upon institution.

The Commission may make appropriate adjustments to the program over time. The Commission will evaluate the results of the pilot program to determine whether to promulgate specific rules and implement this procedure on a permanent basis. The Commission may also make other changes to its rules in light of its experience with the program.



Details about other USITC efforts to improve its Section 337 procedures can be found at the following links:

[Notice of Final Rulemaking: E-Discovery in Section 337](#)

[Notice of Final Rulemaking: Rules Related to Procedures in Section 337 Investigations](#)

[E-Discovery: Commission Adopts Final Rules](#)

[Section 337: Building the Record on the Public Interest](#)