

Rule and Procedural Developments at the ITC in 2023

BY DANNY YONAN AND BROOKE MCLAIN

2023 was a calm year for the International Trade Commission (“ITC”) with no revisions to the USITC Rules & Procedures.¹ And while the number of Section 337 complaints filed experienced a three-year low, administrative law judges (“ALJs”) focused on fine tuning their rules and procedures and training new attorneys.

Complaints filed, OUII participation, & public interest. After the sharp increase in Section 337 complaints filed in 2021 and 2022, 2023 saw a slowdown in the number of Section 337 complaints filed. As of October 10, 2023, fifty-five Section 337 complaints and ancillary proceedings were filed in 2023. Although the Commission has not released the number of complaints and ancillary proceedings filed in the final quarter of 2023, the number will certainly be lower than the seventy-one complaints and ancillary proceedings filed in 2022 and eighty-two complaints and ancillary proceedings filed in 2021.² The decreased number of complaints and ancillary proceedings filed this year could be a return to normal—the average number of Section 337 complaints and ancillary proceedings filed per year for 2012-2022 is 62.18 filings per year—the number of complaints filed in 2021 and 2022 are statistical outliers. Or the decrease in Section 337 filings this year could be a reflection of the current legal market—clients may be hesitant to file an ITC proceeding in view of uncertain finances and a market featuring inflation and constant predictions about whether the economy is facing a recession.

Compared to the number of complaints filed, the number of investigations where an Office of Unfair Import Investigations (“OUII”) staff attorney was assigned did not change significantly. Staff attorneys are independent third-parties that help facilitate the

investigation, including discovery disputes. In 2022, a staff attorney was assigned in twenty-eight investigations.³ As of October 2023, a staff attorney was assigned in twenty-four cases. At present, there are nineteen investigative staff attorneys at the OUII.⁴

The decreased number of complaints also did not appear to impact the rate at which the Commission delegated public interest—consistent with previous years, public interest was delegated in less than a quarter of the investigations instituted. The Commission reports that in 2022 it assigned “the statutory public interest factors to the presiding ALJ in about 14 percent of total new investigations.”⁵ And in the first quarter of 2023,⁶ the ITC delegated public interest in two of eight investigations. The low percentage of public interest assignment is not favorable for Respondents as a finding that an exclusion order is not in the public interest can prevent the ITC from issuing an exclusion order even if the Commission finds a Section 337 violation.

The AAIA & NPEs.

In the past few years, certain Congress members have taken issue with how the Commission handles public interest, along with how the Commission evaluates the domestic industry prong and addresses non-practicing entities (“NPEs”). On May 18, 2023, U.S. Representative Schweikert (R-AZ) introduced H.R. 3535, the “Advancing America’s Interests Act” (“AAIA”) in the House of Representatives for the third time. The AAIA was previously introduced in the House of Representative in 2020 and again in 2021.

¹ “UTIC Rules of Practice and Procedure (337 Investigations) including updates through March 19, 2020”, USITC (Mar. 29, 2020), https://www.usitc.gov/sites/default/files/secretary/rules/337_investigations_2020-05767.pdf.

² As of October 10, 2023, 55 Section 337 complaints had been filed before the Commission compared to 71 complaints filed in 2022 and 82 complaints in 2021. See “Number of New, Completed, and Active Investigations by Fiscal Year (Updated Quarterly)”, USITC (Oct. 12, 2023), https://www.usitc.gov/intellectual_property/337_statistics_number_new_completed_and_active.htm.

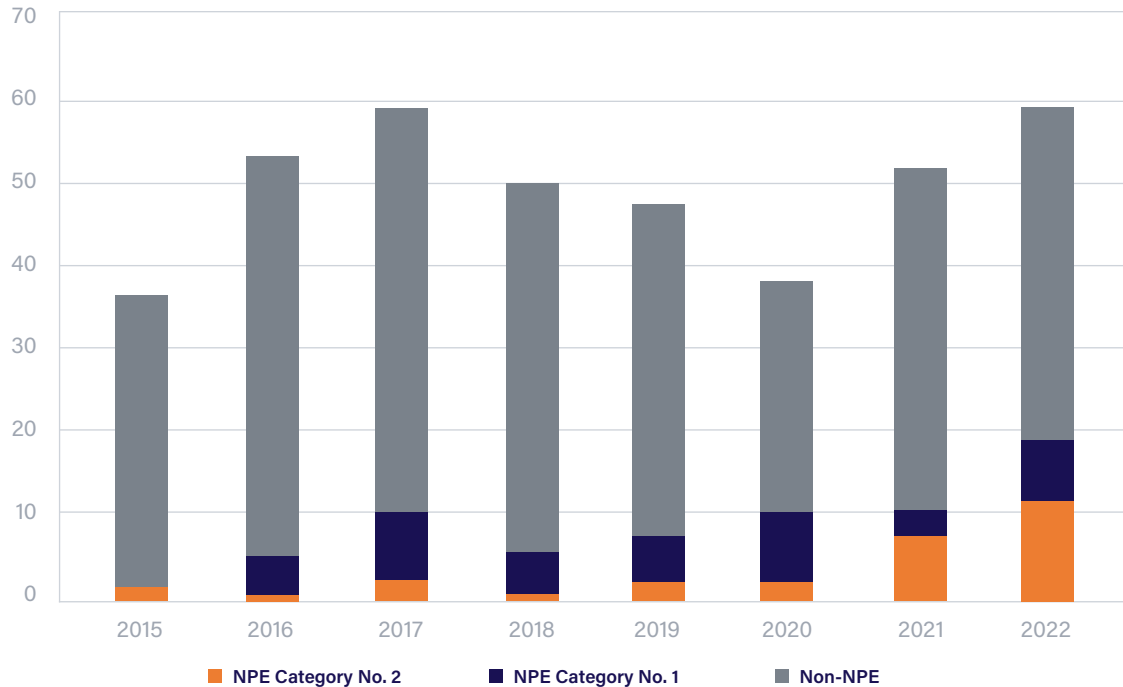
³ See “Search,” USITC, <https://ids.usitc.gov/search> (using “OUII Participation Level” field) (last accessed December 22, 2023).

⁴ “Staff Directory For the Office of Unfair Import Investigations,” USITC, https://www.usitc.gov/intellectual_property/contacts.htm (last accessed Dec. 23, 2023).

⁵ “Identification and Number of Cases Delegating Public Interest (Updated Quarterly)” USITC (Arp. 12, 2023), https://www.usitc.gov/337_stats_delegating_public_interest.

⁶ As of the publication of this article, the ITC has only released public interest data from the first quarter of 2023.

NPE Category Nos. 1 & 2 ITC Filings (2015-2022)



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The AAIA would reframe how the Commission addresses the domestic industry requirement and public interest. Specifically the bill proposes: (1) a Section 337 complainant may only rely on licensing activities that result in an actual product to satisfy the domestic industry prong; (2) a Section 337 complainant may only rely on licensing activities wherein the licensee affirmatively joins the Complaint; (3) the Commission must affirmatively determine that an exclusion order does not harm the “public interest” before issuance, and (4) the Commission must address whether potentially dispositive issues are appropriate for an early Initial Determination. Essentially, the proposed amendments are aimed at reducing NPE complaints by making it more difficult for NPEs to satisfy the domestic industry requirement and obtain an exclusionary order. The amendments also aim at protecting U.S. licensees from third-party subpoenas arising from 337 investigations and codifying the ITC’s existing “100-day early disposition program.” H.R. 3535 was referred to the House Committee on Ways and Means on the same day it was introduced in Congress.⁷ It is unlikely that H.R. 3535 will advance

past committee as both of the AAIA bills introduced in 2020⁸ and 2021⁹ stalled in committee after being introduced. The large majority of Congress does not appear to be interested in managing how the ITC handles Section 337 investigations.

Despite the AAIA’s likely fate, the AAIA highlights an ongoing ITC trend—NPE complainants are increasing at the ITC. The Commission divides NPEs into two categories. Category 1 NPEs are “inventors who may have conducted R&D or built prototypes but do not make a product covered by the asserted patents and therefore rely on licensing to meet the domestic industry requirement; research institutions, such as universities and laboratories, that do not make products covered by the patents, and therefore rely on licensing to meet the domestic industry requirement; start-ups that possess IP rights but do not yet manufacture products that practice the patent; and manufacturers whose own products do not

⁷ H.R.3535—118th Congress: Advancing America’s Interests Act,” Congress, [https://www.congress.gov/bill/118th-congress/house-bill/3535/committees?s=1&r=1&q=%7B%22search%22%3A%22H.R.+3535%22%7D](https://www.congress.gov/bill/118th-congress/house-bill/3535/committees?s=1&r=1&q=%7B%22search%22%3A%22H.R.+3535%22%7D&s=1&r=1&q=%7B%22search%22%3A%22H.R.+3535%22%7D) (last accessed Dec. 8, 2023).

⁸ H.R.5184—117th Congress: Advancing America’s Interests Act,” Congress, <https://www.congress.gov/bill/117th-congress/house-bill/5184/all-actions?q=%7B%22search%22%3A%22%5C%22Advancing+America%27s+Interests+Act%5C%22%22%7D&s=6&r=2> (last accessed Dec. 8, 2023).

⁹ H.R.8037—116th Congress: Advancing America’s Interests Act,” Congress, <https://www.congress.gov/bill/116th-congress/house-bill/8037/all-actions?q=%7B%22search%22%3A%22%5C%22Advancing+America%27s+Interests+Act%5C%22%22%7D&s=6&r=3> (last accessed Dec. 8, 2023).

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practice the asserted patents.”¹⁰ Category 2 NPEs “do not manufacture products that practice the asserted patents and their business model primarily focuses on purchasing and asserting patents.”¹¹

The table on page 20 shows the number of Section 337 complaints filed by a NPE as reported by the ITC.¹² In 2022, 22.2% of Section 337 complaints were brought by a Category No. 2 NPE. This is a sharp increase from 2021 where Category No. 2 NPEs only brought 13.5% of the complaints.

Although the AAIA’s purpose is to target Category 2 NPEs complainants, the AAIA as it currently written would impact both Category Nos. 1 and 2 NPE complainants. If the AAIA ever gains traction, the Commission may choose to change how it evaluates public interest and the domestic industry prong to avoid broad legislation that impacts both patent pools and research institutions. However given the conservative nature of the Commission, this is unlikely to happen anytime soon.

Changes to ALJ Ground Rules.

Perhaps the biggest change at the ITC during 2023 were revisions to the ALJ’s ground rules. This is largely due in part to the fact that three of the six current ITC ALJs were appointed in the past two years—ALJ Bhattacharyya was appointed in September 2021, ALJ Moore was appointed in May 2022, and ALJ Hines was appointed in February 2023. It is no surprise that one of the newer ALJs, ALJ Moore, revised his ground rules more than four times this year while ALJ McNamara, the most senior ALJ at the ITC,¹³ made no changes to her ground rules this year.

A quick summary of the changes each ALJ made to their ground rules is provided below.

- **ALJ Moore** revised Ground Rule 2.1 so that parties must now obtain judicial approval for an extension of time to respond to a subpoena. Several of ALJ Moore’s revisions focused on managing remote witnesses post-pandemic. ALJ Moore “disfavors” remote witnesses (see new Ground Rule 13.6.11) and parties must identify potential remote witnesses as part of their preliminary conference filings (see revised Ground Rule 3). ALJ Moore, like many in the legal field, is transitioning to Box and now requires discovery dispute letters be uploaded to Box (see revised Ground Rule 5.4.1.1.). And Ground Rule 5.4.2.1 has been revised to warn parties that one means one—ALJ Moore added to his existing requirement that a party may only file one motion summary determination motion without leave the following language: “The parties should not attempt to circumvent this rule by addressing more than one issue in the motion.”

- **ALJ Cheney** added a footnote to Ground Rule 1.9.2 stating: “Questions or general correspondence should not be submitted to the email address Cheney1327@usitc.gov. Questions or correspondence sent to this mailbox will not be answered. See Ground Rule 15.” ALJ Cheney likely added this ground rule after parties sent general questions and correspondence to his email address instead of his staff’s email address.

- **ALJ Elliot** added Ground Rule 3.41.1, requiring parties arrange a telephone conference with the ALJ in an attempt to resolve discovery disputes before filing a motion. This change was likely made to avoid parties filing discovery motions and help facilitate discovery. As discussed further below, Ground Rule 16 was added to address the NEXT Advocates program. And Ground Rule 7 was revised to address supplemental

¹⁰ NPE Investigations, USITC (Feb. 15, 2023), https://www.usitc.gov/intellectual_property/337_statistics_number_section_337_investigations.htm.

¹¹ *Id.*

¹² NPE Investigations, USITC (Feb. 15, 2023), https://www.usitc.gov/intellectual_property/337_statistics_number_section_337_investigations.htm.

¹³ ALJ McNamara was appointed in August 2015 and ALJ Elliot was appointed in April 2019.

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expert reports—a party must seek leave to prepare and serve supplemental reports unless a supplemental report is already part of the procedural schedule.

- **ALJ Bhattacharyya** revised her ground rules to have parties submit an electronic copy of all demonstratives to Box within one business day of their use (see revised Ground Rule 9.5.7.1).

- **ALJ Hines** clarified how parties should send courtesy copies and request access to chambers' Box account."

NEXT Advocates Program.

All ALJs now endorse the NEXT Advocates program. "To ensure greater participation by less-experienced attorneys in the trial phase of section 337 proceedings," the ITC in 2022 announced its "Nurturing Excellence in Trial Advocates ("NEXT Advocates") program,¹⁴ modeled after the Patent and Trademark Office's LEAP Program. According to the Commission, ALJs are to: (1) address with counsel opportunities for less-experienced attorneys to participate in substantive oral arguments or to examine witnesses at the evidentiary hearing; (2) consider requests for oral arguments on substantive motions if a "substantive portion of such oral argument is presented by a less-experienced attorney;" and (3) "[p]ermit a more-experienced attorney to assist a less-experienced attorney, if necessary, and will permit a more-experienced attorney to clarify any statements on the record before the conclusion of the session, if necessary."

All ALJs now have a Ground Rule specifically addressing the NEXT Advocates program: ALJ McNamara's Ground Rule 11; ALJ Elliot's Ground Rule 16; ALJ Bhattacharyya's Ground Rule 14; and ALJ Moore's Ground Rule 15. These ground rules are identical, encouraging participation in the program and reiterating the requirements set by the Commission. ALJ Moore, ALJ Hines,

and ALJ Cheney's ground rules go beyond reiterating the Commission's requirements. ALJ Moore, and ALJ Hines's ground rules require that parties discuss participation in the program as part of the preliminary conference. And ALJ Cheney's ground rules require that parties discuss NEXT Advocate participation as part of an investigation's preliminary and pre-hearing conferences. (See Ground Rules 3(j) and 13.1).

In particular, it appears that ALJ Cheney actively encourages and discusses NEXT advocate participation during hearings with counsel, leading to greater participation in the program. For example, five NEXT advocates—three from complainants' side and two from respondents' side—participated in one trial.¹⁵

In addition to giving younger associates opportunities to participate in ongoing investigations, the ITCLA launched the Inaugural ITCLA Mock Hearing Program this year.¹⁶ For a \$250 fee, ITCLA members with three or fewer oral arguments or witness examinations in any federal tribunal could apply to participate in a mock hearing before ITC ALJs. Law firms were limited to two nominees and had to identify an experienced ITC practitioner to serve as coach for one team. (Not all nominated coaches were needed.) Participants were placed in teams of two to participate as Complainant and Respondent and took the direct and cross-examination of an expert witness provided by actual expert firms on October 12, 2023.

Participation in the NEXT Advocates program may increase as ALJs and law firms become more familiar with the program, similar to the increased participation seen in the PTO's LEAP program. Or participation may remain steady given the smaller number of Section 337 investigations as compared to PTAB proceedings and the reluctance to let junior attorneys argue in a forum where there's a risk of an exclusion order.

¹⁴ "NEXT Advocates: Nurturing Excellence in Trial Advocates," USITC, https://www.usitc.gov/next_advocates_nurturing_excellence_in_trial_advocates.htm (last accessed Dec. 8, 2023).

¹⁵ See *Hearing Tr., In re Certain Wet Dry Surface Cleaning Devices*, Inv. No. 337-TA-1304 (Dec. 9, 2022).

¹⁶ "2023 Mock Hearing Program," ITCLA, <https://itcla.org/events/EventDetails.aspx?id=1760002> (Last accessed Dec. 8, 2023).

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Breaches of Protective Orders.

While rules and procedures may slightly change at the ITC, the ITC's concern for protecting confidential business information ("CBI") never changes. "Since 1991, the Commission has published annually a summary of its actions in response to violations of [protective orders] and rule violations."¹⁷ On December 1, 2023 the Commission released its annual "Summary of Commission Practice Relating to Administrative Protective Orders."¹⁸ The 2023 report addressed nine protective order ("PO") violations, providing a summary of the facts, the mitigating and aggravating factors, and the Commission's sanction. A large majority of the cases discussed by the Commission arose from an attorney publicly filing unredacted confidential business information ("CBI") on Electronic Document Information System ("EDIS"), the ITC's docketing system. The Commission issued private letters of reprimand or warning letters to the attorneys responsible for publicly disclosing CBI on EDIS.

The remaining PO violation examples provided by the Commission address improper retention of documents, breaches arising from email communication, and access to CBI information before a finalized cross-use agreement is in place.

In particular, the Commission discussed a case where multiple PO violations occurred when a law firm retained CBI documents past an investigation's termination date, an unauthorized attorney at the firm accessed an improperly retained document, used that document as a template in an unrelated section 337 investigation, and inadvertently disclosed CBI to opposing counsel in the unrelated investigation.¹⁹ The breach was discovered by the law firm who later destroyed CBI documents and confirmed that it did

not possess any other CBI from the terminated investigation. However, five years later the law firm discovered that it still had CBI documents from the terminated investigation in a misnamed archived folder that was inaccessible without permission.

The Commission issued a private letter of reprimand to the law firm because none of the individuals responsible for the breach still worked at the law firm when the Commission issued the sanction. The Commission further required that any of the PO signatories of the terminated investigation submit affidavits confirming the destruction of all CBI from the terminated investigation and confirming that the law firm had not retained CBI from any other terminated investigation.

In another case,²⁰ the Commission found a PO violation occurred where one attorney emailed draft documents containing CBI to an unauthorized recipient, who then shared the CBI with additional unauthorized individuals. The breach was discovered twenty days later, and the breaching parties self-reported to the Commission. The Commission issued a private letter of reprimand to the attorney who emailed the CBI and warning letters to the attorneys copied on the breach email who failed to identify the breach because as PO signatories, "they had an opportunity to immediately discover" the breach and "prevent the second breach from occurring."²¹

In another case²² the Commission found three PO violations occurred where the parties had not finalized a cross-use agreement to use CBI information in a related district court case. The attorneys provided CBI to an associate attorney who was not PO signatory—and not familiar with ITC practices. The parties also sought permission from opposing counsel to use a CBI exhibit in the district court case. Opposing counsel denied the request and the attorneys instructed

¹⁷ "Summary of Commission Practice Relating to Administrative Protective Orders," at 9-17 (Dec. 1, 2023), https://www.usitc.gov/sites/default/files/secretary/fed_reg_notices/rules/apo_notice12012023sgl.pdf.

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 10-11.

²⁰ *Id.* at 11-12.

²¹ *Id.* at 12.

²² *Id.* at 14-16.

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the associate to remove the CBI exhibit from the filing. The associate instructed the paralegals to remove the CBI exhibit but did not confirm that the CBI exhibit had actually been removed from the filing. The CBI exhibit was subsequently filed on the district court's electronic case-filing system, PACER.

The Commission issued private letters of reprimand to the partner who served as lead counsel and senior counsel as both were part of the decision to use the CBI in the district court filing and provided the CBI to the associate attorney and delegated removing the exhibit to the associate. The Commission issued a warning letter to another partner who worked on the district court filing, was aware of the associate's access to CBI, but was not involved in finalizing the filing.

The report and the cases discussed above are good practice reminders for clients and attorneys to always be cognizant of what information is CBI and who has access to it. Attorneys should always check whether any filing contains CBI before uploading to EDIS and monitor the email recipients of an email containing CBI. Clients should alert counsel if they have a belief they were inadvertently sent CBI of the opposing party. And parties should timely negotiate cross-use agreements to prevent inadvertent disclosure in related proceedings.

* * *

Although 2023 did not see any major changes at the Commission level, that may be in-part because of the lower number of Complaints filed. Despite the AAIA bill being introduced to Congress for the third time, the Commission does not appear to be interested in addressing the rising number of Category No. 2 NPE complainants or increase the rate at which they delegate public interest. 2024 may be a more interesting year at the ITC as newer ALJs settle into their position, gain experience, and further revise their ground rules and procedures.

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