Chapter 28
LITIGATION

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References:

Statute:
- The Tariff Act of 1930, as amended (the Act)
  - Section 777 - ex parte communications
  - Section 516A - judicial review in antidumping duty proceedings
- Uruguay Round Agreements Act (URAA)
  - Sections 123 and 129 - WTO dispute settlement procedures and implementation of WTO decisions
- 28 U.S.C. § 1581 - CIT jurisdiction
- 28 U.S.C. § 2645(c) - Federal Circuit jurisdiction

Department of Commerce (DOC) Regulations:
- 19 CFR. 351.104

SAA:
- SAA at 659, 1011, 1014, 1016-18, 1021, and 1025-1027

WTO Antidumping Agreement
- Article 13 - judicial review

WTO Understanding on Rules and Procedures Governing the Settlement of Disputes

North American Free Trade Agreement
- Section 1904 - Panel Procedures
- Section 1904.13 - Extraordinary Challenges

I. CIT AND CAFC LITIGATION AND NAFTA PANELS

Under the Act, certain decisions of the Department are subject to judicial review by the CIT and, if appealed further, the CAFC. Specifically, the following types of decisions are subject to review: 1) determinations not to initiate an investigation; 2) a final determination to revoke based upon no or an inadequate response to a sunset review initiation; 3) a final, negative or affirmative, determination of sales at less-than-fair value; 4) final results of reviews, including administrative, new shipper, changed circumstances, and sunset; 5) a final determination to suspend an investigation; and 6) a final scope or anti-circumvention ruling. Pursuant to the

NAFTA, when the underlying investigation or review involves Canada or Mexico, these same determinations, except decisions to suspend investigations, may be challenged before a NAFTA Panel instead of the Federal Court.

II. CHALLENGES AND THE ADMINISTRATIVE RECORD

A challenge to the Department's decision is usually initiated by filing a summons (or a summons and complaint, concurrently) 30 days after the publication of the final agency decision. A NAFTA challenge to the Department's decision is initiated by the filing of a Request for Panel Review, instead of a summons. Complaints may be filed simultaneously or within 30 days of the first Request for Panel Review. (If Canada or Mexico wish to seek judicial review, rather than Panel review, they must serve a "Notice of Intent to Commence Judicial Review" 20 days from the date of the determination being challenged.) When we receive a summons and complaint or a Request for Panel Review, it is the analyst's responsibility to prepare the court record, consisting of the entire administrative record of the segment of the proceeding at issue. The procedures for preparing the court record are set out in the Operations Handbook.

Most often, review of the agency's decision is limited to whether the decision is in accordance with law and supported by substantial evidence. (Under certain circumstances, e.g., when the Department has conducted an expedited sunset review, the Court looks to whether the agency has acted arbitrarily and capriciously.) Review is, therefore, normally limited to the administrative record; thus, it is imperative that the record be complete. With some exceptions, a party may not raise an issue in litigation that it has not raised with the Department. Furthermore, the Department cannot rely upon extra-record material or information to defend its decision. Care should therefore be given to document a complete explanation for the agency's decision with citations to the pertinent record evidence.

The record consists of 1) all information presented to or obtained by the Department during the course of the administrative proceeding, including governmental memorandum pertaining to the case and records of *ex parte* meetings; 2) the final decision; 3) transcripts of hearings; 4) and all related Federal Register notices. See, generally, 19 CFR 351.104; see also 19 U.S.C. § 1677f(a)(3) (regarding *exparte* communications). Because each segment of the proceeding[1] is distinct, if you are relying upon information gathered or presented during a different segment, such information must be moved onto the record of the ongoing segment. Further, all oral communications should be documented. A party contesting the agency's decision is entitled to have the full record and can challenge the completeness of the record. If it can establish that the record is incomplete because of bad faith or negligence, it may request discovery by the Court,

[1] "Segments of a proceeding" refer to the various discrete activities pertaining to a particular AD or CVD order, such as the initiation, investigation, and the subsequent administrative reviews of the order.

which might involve the taking of testimony, under oath, from the case analysts and other Department officials. Under NAFTA, no discovery provisions exist; however, parties may move to supplement the record if it is not complete. Accordingly, err on the side of caution. If you are uncertain about the scope of the record, please alert your team attorney, who will work with you to compile a complete record. Ordinarily, the record is due to the Court 40 days after service of the complaint and to the NAFTA Panel 60 days after the Request for Panel is filed.

III. INJUNCTIONS, REMANDS, AND APPEALS

Within 30 days of the filing of a complaint, a party may obtain an injunction from the CIT, enjoining the Department and U.S. Customs and Border Protection ("CBP") from liquidating entries. Typically, the Department issues liquidation instructions within 15 (or if a NAFTA country is involved, within 45) days of publication, unless there is notice that the final decision is being challenged. Because the Court of Appeals has found that the liquidation of entries constitutes irreparable harm, we ordinarily consent to injunctions. Nevertheless, the draft injunction should be reviewed to confirm it covers the correct party and merchandise for the correct period of time. Once the injunction is issued, the analyst should inform CBP of the injunction via an e-mail. (Refer to the Operations Handbook for procedures concerning communicating with CBP.) The Court of Appeals has concluded that injunctions issued by the trial court survive throughout appeals. Accordingly, the analyst should contact the team attorney before issuing any instructions to CBP to liquidate entries that are or have been the subject of litigation. While injunctive relief is not available in NAFTA proceedings, the statute provides for continued suspension of liquidation, upon request in cases involving administrative reviews. This is not the case, however, when an investigation is challenged. NAFTA makes no provision for suspension in such cases.

Normally, following the filing of the complaint with the Court, the parties will agree to a briefing schedule. NAFTA contains a briefing schedule to be followed in NAFTA proceedings. Upon receipt of the parties' briefs, the team attorney will forward a copy of the brief to the team. The team is encouraged to review the brief and provide timely feedback.

The staff attorney prepares the briefs and will give Operations an opportunity to review them in a timely manner. As the due date for the government's brief approaches, the analyst should let the managers know that the brief is due so that the managers can make time to review the brief.

Because of the limited standard of review, the Court or Panel may either sustain the agency's decision or remand the decision for further explanation or with instructions. A remand, in essence, constitutes a mini administrative proceeding. Depending upon the scope of the remand and any limitations imposed by the Court or Panel, the Department may reopen the record. Whether the remand instructions require the collection of additional information or simply further explanation, it is preferable to release a draft of the remand results to the parties for comment. Then, as with an Issues and Decision Memorandum, the Department will address the

parties' comments in the final remand results. Upon completion of the remand, the agency's final remand results are submitted to the Court or Panel, as appropriate, for review. Typically, the parties are granted an opportunity to comment upon the remand and the Department may file responses to the parties' comments. As with final decisions, a record will be filed along with the remand results. See the Operations Handbook for more information.

Although the Department's decisions are traditionally challenged under 28 U.S.C. 1581(c), the CIT also possesses "residual" jurisdiction by which it may, for example, consider whether the instructions to CBP accurately implement the Department's decision. Challenges brought pursuant to the Court's "residual" jurisdiction may be brought up to two years from the date of the action or decision being challenged. Substantively and procedurally, actions brought pursuant to the Court's residual jurisdiction may differ in that, for example, the Department may be required to file an answer, before a brief in opposition to the plaintiff's motion for judgment, and review may not be limited to the record. (The Court also possesses jurisdiction to review decisions rejecting an application for admission to the protective order.)

On occasion, an interested party might attempt to challenge the initiation of a review or a preliminary decision or might seek to compel the Department to take some action. In those instances, that suit may receive expedited consideration. Under the statute, initiations and preliminary determinations are not among the particular decisions that may be challenged before the Court. Therefore, we would likely file a motion to dismiss on the basis of jurisdiction, arguing that the Court cannot entertain such challenges. The Department of Justice and the team attorney may need immediate assistance from the team in such a case.

Once the trial court has issued a decision, a party, including the Department, may appeal the trial court's decision. The Court of Appeals applies the same standard of review, i.e., in accordance with law and supported by substantial evidence. If a decision is appealed by an interested party, the team attorney will forward the team copies of the briefs, and the team is again encouraged to provide comments. If the Department wishes to appeal a decision of the CIT, the team should advise the team attorney as soon as possible, as the Chief Counsel must request that the Solicitor General at the Department of Justice approve the appeal. NAFTA does not provide for appeal of Panel decisions; instead, in limited circumstances an "extraordinary challenge" may be brought. Specifically, an "extraordinary challenge" may only be brought if a Panel decision has been materially affected by a "serious conflict of interest," if the Panel departed from a "fundamental rule of procedure," or manifestly exceeded its authority. Such a violation must rise to the level of threatening the integrity of the Panel process for an Extraordinary Challenge Committee to reverse a Panel decision.

IV. WORLD TRADE ORGANIZATION CONSULTATIONS AND DISPUTE SETTLEMENT

The United States is a member of the World Trade Organization ("WTO"), and the Tariff Act, as

amended, implements the responsibilities of the United States under the WTO antidumping and countervailing duty agreements. In implementing the WTO Agreements, Congress expressly indicated that neither WTO Dispute Settlement Panel decisions nor WTO Appellate Body rulings change U.S. law. SAA at 659. Accordingly, arguments relating to the WTO Agreements and decisions of the WTO dispute settlement panels ("Panel) or Appellate Body are ordinarily not relevant to administrative proceedings. Likewise, neither the CIT nor the Federal Circuit is bound by decisions of WTO Panels or Appellate Bodies. Instead, the Federal courts consider whether Department regulations, practices, and decisions are consistent with U.S. law (and supported by substantial evidence).

However, if another member of the WTO believes that a regulation, decision, or practice of the Department is inconsistent with the obligations of the United States under the WTO antidumping or subsidy agreements, it may request "consultations." SAA at 1011. The complaint may be that a regulation, for example, is inconsistent with our WTO obligations or that our application of a regulation in a particular situation is inconsistent with our WTO obligations. In consultations, the country may pose questions with regard to the matter believed inconsistent, and the Department, through the United States Trade Representative ("USTR"), responds to such questions. Accordingly, Operations analysts work closely with the staff attorney and USTR to respond to the consultation questions, and may participate in the consultations.

If a WTO member country continues to believe that a decision of the Department, for example, is inconsistent with a WTO agreement, it may request the establishment of a dispute settlement Panel. Again, the Department works with USTR to respond to the allegations. Because proceedings before a Panel are fairly expedited, it is particularly important that analysts provide prompt comments to briefs (incoming and response drafts), responses to questions, and record documentation. The Panel's decision is automatically adopted by the WTO sixty days after it is issued, unless the decision is appealed or there is a consensus to reject the Panel's ruling. SAA at 1014. A party who is dissatisfied with a Panel decision may appeal to the Appellate Body. Appeals last between 60 and 90 days, so, again, timely assistance from the team is critical to the defense of the Department. Id. Within 30 days of the Appellate Body's decision, the Appellate Body's ruling is automatically adopted by the WTO, unless there is a consensus to reject it. As consensus by all WTO members is needed to reject either an (unappealed) Panel or an Appellate Body decision, these decisions are difficult to reverse.

If the Department's decision, for example, is found to be inconsistent with our WTO obligations, the United States, through USTR, decides whether to implement the Panel and/or Appellate Body ruling, otherwise compromise with the complaining country, or accept retaliation (such as the suspension of concessions). SAA at 1016-18. If the ruling requires a change in regulation or written practice, section 123 of the URAA provides for USTR to consult with Congress, among other things, before a change may be adopted. SAA at 1021. The Department must publish the proposed change and an explanation of the change in the Federal Register and solicit comments from the public. There is also a 60-day period for additional consultations between USTR, the

Department, and Congress before the changes to the regulation or written practice may become effective. The Department publishes the final rule or modification in the Federal Register. For example, as a result of the decision in United States - Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/R (October 31, 2005), in a Federal Register notice entitled Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 FR 11189 (March 6, 2006), the Department solicited comments regarding the calculation of the weighted-average dumping margin in an antidumping duty investigation. As a result of the decisions in United States--Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina, WT/DS268/AB/R (November 29, 2004), the Department modified aspects of its sunset regulations. Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 60 Fed. Reg. 62061 (October 28, 2005).

If the WTO ruling relates to a particular decision by the Department, USTR may direct the Department to make a determination "not inconsistent" with the WTO's ruling. Upon such direction, the Department has 180 days to arrive at a determination "not inconsistent" with the WTO ruling. SAA at 1025. Before the proposed revised determination may be implemented, however, the Department and USTR must consult with Congress. Id. After such consultations, USTR may direct the Department to implement the revised determination. The revised determination may not be implemented unless, and until, USTR directs the Department to implement the determination. Id. The Department then publishes a notice of implementation in the Federal Register, affording parties an opportunity to comment, and may hold a hearing regarding the determination. For example, following the decision in United States - Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (Dec. 9, 2002), the Department revisited particular decisions. Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Steel Products From the European Communities, 68 Fed. Reg. 64858 (November 17, 2003).

Implementation is prospective; therefore, if implementation results in revocation of an order, for example, entries made prior to the date of the USTR's direction to implement remain subject to the duty. SAA at 1026. Subsequent to implementation, if the complaining party believes the implementation is inconsistent with our WTO obligations, the party may challenge the implementation. Ordinarily, the original Panel will consider the challenge to the implementation. The Department's implementation may also be challenged before the Federal Court. SAA at 1027.