Looking Back to the Road Ahead: Testing the Boundaries of Customs and Trade Litigation

The 2008 Judicial Conference of the United States Court of International Trade

Making Your Case: Best Practices and Lessons Learned [±]

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Court of International Trade Judicial Conference:

Making Your Case: Best Practices and Lessons Learned*

Typical antidumping and countervailing duty cases, as well as cases arising out of the Court's jurisdiction under 28 U.S.C. § 1581(i), present special challenges to counsel handling them. Because these cases arise from a complex statutory scheme, they often present highly discrete and sometimes arcane issues that must be placed in their proper context for counsel to persuasively advocate the positions taken. The unique nature of the statutory scheme also affects procedure. Although by no means exhaustive, this brief paper outlines some common procedural issues that arise in typical cases, with insight and suggestions for how best to address them.

I. Preparing Your Case

Trade cases and cases arising under the Court's section 1581(i) jurisdiction involve, to one degree or another, the usual litigation events — complaints, answers (in 1581(i) cases), motions to dismiss, and briefing upon the merits. However, at each of these stages, these cases raise unique issues specific to the antidumping and countervailing duty statutory scheme. For example, although complaints must be filed to secure the Court's jurisdiction, no answer is required in the typical trade case. But answers *are* required in response to a complaint alleging jurisdiction under section 1581(i). Preliminary injunctions to enjoin liquidation of entries are routinely sought and are often consented-to by the Government. The rules of the Court have created special procedures that streamline the administrative record review once jurisdiction is established. Advance knowledge of the these rules, as well as knowledge of the Government's typical practice regarding commonly arising issues ensures that the litigation will proceed smoothly.

A. Complaints, Preliminary Injunctions, And Intervention In Cases Brought Under 28 U.S.C. 1581(c)

In cases reviewed pursuant to 28 U.S.C. 1581(c), plaintiffs must file a summons and complaint before the Court's jurisdiction attaches.[1]

The Department of Commerce ("Commerce") issues liquidation instructions 15 days after the publication of its final results.[2] Therefore, it is in everyone's

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[1] 19 U.S.C. § 1516a(a)(2)(A)(ii); *see also Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986) (holding that both the summons *and* complaint must be filed for jurisdiction to attach).

[2] The Court has sustained Commerce's practice as reasonable. *See Mittal Steel Galati S.A. v. United States*, Slip op. 07-73 (May 14, 2007); *Mukand Int'l Ltd. v. United States*, 452 F. Supp. 2d 1329, 1334 (Ct. Int'l Trade 2006); *but see Tianjin Machinery Import & Export Corp. v. United States*, 353 F. Supp. 2d 1294 (Ct. Int'l Trade 2004), *aff'd without opinion*, 146 Fed. Appx. 493 (Fed. Cir. 2005) (unpublished). The appeal in *Tianjin* concerned an additional issue unrelated to Commerce's 15-day policy. Because the Federal Circuit affirmed the decision

interest (the parties and the Court) for plaintiffs to provide Government counsel with a draft preliminary injunction as soon as possible after the final results are issued. The earlier the parties can agree to a proposed preliminary injunction order, the less need there will be for plaintiffs to seek temporary injunctive relief. Changes proposed by Government counsel are intended to make the ultimate order as precise as possible, to ensure that the proper entries are enjoined from liquidation. Using previously acceptable language can increase the speed with which plaintiffs receive comments from Government counsel and, if proposed early in the process, can, again, obviate the need for the Court's involvement.

Additionally, a party seeking to enjoin liquidation of its entries should provide Government counsel with a copy of the complaint. The complaint (and summons) must be filed either before or with the motion for preliminary injunction to ensure that the Court possesses jurisdiction to entertain the motion. Although Government counsel may consent to the issuance of an injunction (assuming a complaint has been filed), he or she will generally request plaintiff to include a statement in its motion that the United States consents to issuance of an injunction but does not consent that plaintiff is likely to succeed on the merits of its claims.[3]

Often, parties will request consent to intervene as defendant-intevernor. The Government will generally consent to these requests as long as there is jurisdiction and the party was a party to the administrative action below.[4] Occasionally, a party will seek consent to intervene as a plaintiff-intervenor. In those cases, Government counsel will request a copy of the motion to ensure that the proposed plaintiff-intervenor does not seek to expand the scope of the original complaint.[5]

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without opinion, there is no discussion of the 15-day policy in the decision.

[3] *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983) (liquidation of entries results in irreparable harm). Acknowledging this, the Government generally consents to the issuance of a preliminary injunction, provided that it has no reason to believe the Court lacks jurisdiction to entertain the complaint. The Government does not, however, agree that the remaining preliminary injunction factors have been met and requests plaintiffs to reflect that position in their motions.

[4] Motions to intervene are due 30 days after filing of the record with the Court. USCIT R. 56.2(a). "[O]nly an interested party who was a party to the proceeding in which the matter arose may intervene, and such person may intervene as a matter of right." 28 U.S.C. § 2631(j)(1)(B).

[5] *See Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("[A]n intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted

There is currently disagreement whether a plaintiff-intervenor may have its entries enjoined from liquidation. Specifically, the Court has recently issued two conflicting decisions on the issue.[6] The Government maintains that an intervenor's entries are beyond the scope of the plaintiff's complaint and opposes these motions.

B. Responding To The Complaint: Answers And Jurisdictional Issues In Cases Brought Under 28 U.S.C. § 1581(i)

When a complaint is brought pursuant to 28 U.S.C. § 1581(c), no answer is required.[7] However, in cases brought pursuant to 28 U.S.C. § 1581(i), the Government must file an answer within 60 days of service of the complaint.[8] Occasionally, plaintiffs may file a complaint asserting jurisdiction pursuant to *both* 28 U.S.C. § 1581(c) and 28 U.S.C. § 1581(i). In those instances, the United States' answer will address only those allegations arising under 28 U.S.C. § 1581(i). Although an answer is required for section 1581(i) cases, these cases are still reviewed upon the administrative record.[9]

Jurisdictional issues often arise early in proceedings, particularly if plaintiffs have raised issues concerning the scope of the Court's jurisdiction pursuant to 28 U.S.C. § 1581(i). To ensure the speedy resolution of these important issues, the Government will often file motions to dismiss, or partial motions to dismiss, and

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to enlarge those issues or compel an alteration of the nature of the proceeding."); *Torrington Co. v. United States*, 731 F. Supp. 1073, 1076 (Ct. Int'l Trade 1990) (rejecting intervenor's claims as "clearly beyond the scope of the original litigation"); *National Assoc. of Mirror Mfg. v. United States*, 670 F. Supp. 1013, 1015 (Ct. Int'l Trade 1987) (rejecting intervenor's claims as "unduly enlarg[ing] the pleadings").

[6] *Compare Laizhou Auto Brake Equip. Co. v. United States*, 477 F. Supp. 2d 1298, 1300 (Ct. Int'l Trade 2007) (holding that plaintiff-intervenors may not obtain injunctions for their own entries) *with NSK v. United States*, 537 F. Supp. 2d 1312 (Ct. Int'l Trade 2008) (holding that plaintiff-intervenors may obtain injunctions without expanding the scope of the original plaintiff's complaint).

[7] USCIT R. 7(a); 12(a)(1)(A)(i) .

[8] USCIT R. 12(a)(1).

[9] *See Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1343 (Ct. Int'l Trade 2001) (quoting 5 U.S.C. § 706 (2)(A)) (cases arising under 28 U.S.C. 1581(i) are reviewed on the administrative record). Motions for judgment on the administrative record that do not fall within the Court's section 1581(c) jurisdiction must be filed pursuant to Rule 56.1.

will sometimes request that it be permitted to file the administrative record only after the critical jurisdictional issues have been resolved.[10]

C. The Administrative Record And Briefing Schedules

Commerce must file the record with the Court within 40 days of the commencement of the action. This poses special considerations for Government counsel in cases involving Commerce's antidumping and countervailing duty determinations. Sometimes a party may wish to have the briefing schedule expedited, but the Department of Justice attorney always requires adequate time to review the record before preparing briefs regarding the agency's determination. Because Commerce now sends the records out to a contractor for placement onto compact disks, the record is often inaccessible for a significant period of time. Accordingly, the Government will agree to briefing schedules that afford Government counsel adequate time to review the record before preparing and filing briefs.

D. Consolidation

Often, multiple respondents will challenge Commerce's final determination or results and complaints arising from the same administrative action may concern similar issues. Although, in the past, the Government has frequently consented to consolidation requests, consolidation often poses unique challenges for Government counsel. For example, in cases concerning multiple plaintiffs, there can be upwards of ten discrete issues presented — a magnitude that can make briefing inefficient and complicated. Government counsel must then ensure that it may file a brief in excess of the Court's page limits. Most importantly, the Government must receive sufficient time to address what can often be triple or quadruple the number of issues facing any one individual plaintiff. Finally, before proposing consolidation, plaintiffs may wish to consider the Court of Appeals for the Federal Circuit recent order in *Koyo Seiko v. United States*, Nos. 2007-1556, -1557, -1558, 2008-1038, enforcing the court of appeals' practice rule that parties represented by the same counsel (including counsel from different offices of the same law firm) file one brief.[11]

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[10] Commerce must file the administrative record within 40 days of the service of the complaint. 28 U.S.C. § 2635(b)(1).

[11] FRAP 28, FCR 28, Practice Note ("[w]hen there are multiple parties represented by the same counsel, only one brief can be filed.").

II. Briefing

The parties' written submissions, either in the form of procedural motions or motions (and responses) for judgment upon the administrative record, provide the Court with first, and often lasting impressions of arguments and positions. Accordingly, counsel should strive to make each submission as clear and professional as possible both for the Court's convenience and for the convenience of the other parties.

A. Content

It is critical that briefs present the issues as simply and succinctly as possible. Counsel struggle with how much detail to provide the Court, particularly when the Court or the Federal Circuit have ruled on the issue several times. Given the technical nature of the subject matter, and the level of expertise in the bar and at the Court, parties often assume the reader will able to wade through extremely detailed and technical arguments. Instead, parties should attempt to crystalize the issues for the Court and be sure to provide sufficient record evidence to support all points.

The Court's Rules currently require any appendix materials to be attached to parties' briefs, with references in the briefs to include the public record and confidential record numbers from the administrative record.[12] Some judges have recently begun requesting parties to submit joint appendices — a practice more similar to the Federal Circuit's joint appendix requirement. Given the volume of many administrative records, it is especially useful in trade cases to carefully select the appropriate pages to include in the appendix, but also to ensure that sufficient surrounding pages are included to provide context.

B. Questions From The Court Prior To Argument

Recently, the Court has begun commenting upon the briefs or particular arguments before the Court holds oral argument. For instance, the Court may have concerns about arguments raised in the opening briefs. This kind of response is most helpful to the parties if provided either before briefing begins, or after briefing is completed.

C. Communications With The Court

To ensure that the record of Court proceedings is clear, the parties' communications with the Court always should be formal and in accordance with the Court's Rules. Unless specifically directed otherwise, counsel should not

[12] Standard Chambers' Procedures, ¶ 2(C).

address the Court via letter, nor should they initiate oral communications with chambers, and certainly not *ex parte*.

Increasingly, parties have been writing to judges to bring new matters to light or to request action by the Court with regard to a particular matter. The Court's Rules, however, prescribe means to bring matters to the Court's attention in written filings. If a particular filing is not authorized by the Court's Rules, then the party always may file a motion for leave to file the document in question, and the opposing party will have notice and an opportunity to respond. The increased practice of letter-writing creates confusion because it is uncertain whether letters will or will not be filed on the docket. If the Court takes action in response to a letter, it may be unclear to the reviewing court precisely why the Court took a particular action, potentially precluding effective judicial review of the Court's action. Accordingly, to avoid confusion and to prevent unfair advantage to a particular party, communications with the Court should be formal and in accordance with the Court's rules.

III. Oral Argument

A. Preparation

The Government prepares heavily for oral argument, insisting that attorneys perform at least one moot court in preparation. Moot judges are carefully selected to ensure that attorneys receive the best preparation. The parties are always grateful for the Court's advance questions, which allow the parties to tailor the presentations to the particular judge's concerns.

B. Argument

The format of oral argument can differ depending upon the particular judge. Some judges issue detailed questions in advance and prefer counsel to limit their comments to only those prescribed issues. Others take a more free-form approach. Similarly, judges differ regarding the length of oral argument. In particular, when there are multiple plaintiffs and defendant-intervenors, judges have differing preferences regarding the order in which argument will proceed. Some judges prefer all parties to speak concerning an issue before moving to the next issue. Others prefer all issues to be addressed at once. From the parties' perspective, it is helpful to know the Court's preferences in advance. Although defendant-intervenors and the Government frequently take similar positions in their briefs, the two entities are not necessarily aligned, and it is critical for the Court to permit the defendant a full opportunity to present its views.

IV. Remands

The Court frequently issues remand orders requiring Commerce to reconsider a particular determination and, if necessary, reopen the administrative record. Remands can arise in two ways.

First, after careful review of the administrative record, the Government may request a voluntary remand to consider a particular issue that Commerce may not have fully considered during the administrative proceedings. Sometimes, the Government may request a voluntary remand after plaintiffs have filed their opening briefs on the merits.[13]

Second, and more typically, the Court may remand a particular issue to Commerce for additional consideration, or for reconsideration in light of the Court's holding regarding an issue of law. It is especially helpful if these remand orders include specific direction to Commerce regarding the nature of the reconsideration ordered. In particular, the Court may consult with counsel to develop an appropriate schedule for remand proceedings. During remand proceedings, Commerce often will provide parties the opportunity to comment upon draft remand results. The manner in which parties respond to these comments can give rise to unique exhaustion issues.

After Commerce issues a remand determination, parties again have the opportunity to comment further before the Court rules upon the determination. It is tempting at that stage of proceedings to dive directly into the specifics of the remand determination. However, as with initial briefing, comments regarding remand determinations should not sacrifice clarity simply because parties expect the Court to be already well-versed on a particular issue.

V. Appeals

The Government does not automatically appeal an adverse judgment from the Court of International Trade. Rather, the Department of Justice – including the Solicitor General or his designee – makes a considered assessment as to whether appeal of the adverse judgment is in the best interests of the United States, relying upon the recommendations of the Civil Division within the Department of Justice, as well as those of the interested

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[13] The Government may seek a voluntary remand: (1) to reconsider its decision because of intervening events outside of the agency's control; (2) to reconsider its previous position even if there are no intervening events; or (3) because it believes that its original decision was incorrect on the merits and it wishes to correct the result. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001).

agencies. The decision whether to appeal an adverse judgment involves a thoughtful and sometimes time-consuming process.

Often the Government's ability to appeal an adverse judgment is delayed substantially due to the unique finality issues that arise in antidumping duty and countervailing duty cases. For example, the Court may remand the matter for further consideration and action, over Commerce's objection. However, the Court's decision will not be appealable at that time, and the case may undergo several additional remands before final judgment is ultimately entered, sustaining the revised determination by Commerce, albeit under protest. In some cases, the Government may wish to appeal the earlier remand decision, and, at the time final judgment is entered, the assigned attorney will prepare a package seeking permission of the Solicitor General to appeal.

Once on appeal, presenting the case to the Federal Circuit poses different challenges then presenting the case before the Court of International Trade. Parties should tailor their briefs and oral argument to the appellate process, focusing more precisely upon discrete and hopefully fewer issues than presented at the Court of International Trade.

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