STREAMLINING DISCOVERY:
Does The Nature Of The Practice Before The U.S. Court Of International Trade Provide Suggestions For How To Accomplish It? *

Beverly A. Farrell
U.S. Department of Justice
International Trade Field Office

Presented at the 18th Judicial Conference of the
United States Court of International Trade
New York, New York
December 1, 2014

STREAMLINING DISCOVERY:
Does The Nature Of The Practice Before The U.S. Court Of International Trade Provide Suggestions For How To Accomplish It?

By Beverly A. Farrell[1]

"And yet nothing truly valuable can be achieved except by the unselfish cooperation of many individuals." Albert Einstein

I. INTRODUCTION

There is a natural tension present between Rule 1 of the Rules of the U.S. Court of International Trade (USCIT) calling for "the just, speedy, and inexpensive determination of every action and proceeding" and Rules 26 through 37 (Depositions and Discovery) which contemplate liberal discovery. The tension may be particularly acute when the damages claimed in an action are but a fraction of anticipated discovery costs. The nature of the practice before the USCIT may provide the key to expediting discovery and keeping costs in check. Additionally, although the current practice before the USCIT is one primarily based in paper, if the practice transitions, as expected, to one grounded in electronic discovery, what processes might help reduce the likely increased costs for retrieval and production of electronically stored information (ESI)?

This paper explores whether opportunities exist to streamline the discovery phase of litigation for cases commenced in the USCIT. While the ideas proposed in this paper are made with an eye toward the typical classification case, the concepts could be applied in any USCIT case in which discovery is conducted.

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[1] Ms. Farrell is a Trial Attorney in the International Trade Field Office, U.S. Department of Justice. This paper reflects the views of the author and does not necessarily represent the position of the government.

II. BENCHMARKS FOR POSSIBLE STREAMLINING

The types of cases permitting discovery that are heard by the USCIT are somewhat limited in nature.[2] As a result, with respect to disclosure and discovery, familiar ground is often trod and attorneys for the parties typically know what to expect from each other. Indeed, with the government as a repeat customer, discovery requests are almost *pro forma*. Accordingly, the plaintiff's bar is able to anticipate the types of documents and information that the government will seek in actions such as classification cases, drawback cases, value cases, or preference cases.[3] In light of this knowledge, perhaps the documents and information typically sought by the parties during the discovery phase of litigation could be provided earlier.

A. From Summons to the Filing of a Complaint[4]

There can be no doubt that "samples are potent witnesses and have great probative effect respecting the purpose for which they are designed."[5] Indeed, access to a sample was crucial to the court in *Estee Lauder* in enabling it to determine that the retail model of the good contained a brush roll.[6] Because samples are such potent witnesses,

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[2] Many actions commenced in the USCIT do not engage in discovery because court decisions are limited to the information set forth in the administrative record. *See, e.g.*, USCIT Rule 73.3.

[3] *See* 19 U.S.C. § 1514.

[4] The USCIT rules are unique in that they permit a plaintiff to commence litigation by simply filing a summons

[5] *Springs Creative Prods. Group v. United States*, Court No. 10-00067, 2013 WL 4307857, 35 ITRD 1955 (Aug. 16, 2013 Ct. Int'l Trade); *see also Marshall Field & Co. v. United States*, 45 C.C.P.A. 72, 81 (1958) (noting that the samples before the court served as "most potent witnesses).

[6] *Estee Lauder, Inc. v. United States*, Court No. 07-00217, 2011 WL 770001, *7 (Ct. Int'l Trade Mar. 1, 2011) (in addressing an argument that the brush roll was not included in the cosmetic kits at issue the court relied on a sample of a retail model and information displayed on the model that listing a makeup brush canister as being included).

the government often seeks them in discovery.[7] It may move the case more quickly were the plaintiff, where possible, to file samples with the Court at the time it files its summons. Although the government is required to file certain documents with the court, which may include a sample,[8] if the plaintiff submits a sample when it files its summons, it could serve the dual purposes of preserving evidence and providing both the court and the defendant with trustworthy evidence.[9]

Reliable evidence could also be submitted in connection with the filing of the complaint. A plaintiff could attach to its complaint certain documents itemized in USCIT Rule 73.1. By attaching such documents to the complaint, the plaintiff would able to place documents, possessing an imprimatur of trustworthiness,[10] into consideration in advance of the discovery phase.[11]

By submitting a sample and including documents with the complaint, a plaintiff may help to streamline the litigation process.

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[7] Although the government is obligated to provide the court with certain documents and things, *see* USCIT Rule 73.1, because cases are heard *de novo* by the USCIT and the Federal Rules of Evidence apply, the plaintiff is required to provide sufficient information to enable the court to conduct a proper review and issue a ruling supported by the evidence.

[8] *See* USCIT Rule 73.1.

[9] The application of USCIT Rule 11 to the submission of a sample at the time the summons is filed, *i.e.* the commencement of the litigation, serves to support the trustworthiness of the sample.

[10] Like the submission of the sample, *see* n. 9 *supra*, the inclusion of these documents with the complaint would serve to support their trustworthiness.

[11] Although the government submits documents to the USCIT and these documents become part of the court file, documents in the court file do not necessarily constitute admissible evidence. *See BP Oil Supply Co. v. United States*, Court No. 04-00321, 2014 WL 1673744, * (Ct. Int'l Trade April 29, 2014) (discussing admissibility of documents constituting the court file).

B. The Formal Discovery Process

After the complaint has been answered, the USCIT Rule 26(f) conference has occurred and the USCIT Rule 16 scheduling order has been entered, the parties provide one another with initial disclosures pursuant to USCIT Rule 26(a)(1)(A). USCIT Rule 26(a)(1)(A) provides:

> Rule 26. Duty to Disclose; General Provisions Governing Discovery
>
> (a) Required Disclosures.
> (1) Initial Disclosure.
> (A) In General. Except as exempted by Rule 26(a)(1)(B), or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:
> (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
> (ii) a copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
> (iii) a computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and
> (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Rule 26(a)(1)(A)(ii) provides an opportunity to streamline discovery. Although a party need only provide a description by category and location of those documents it may

use to support its claims or defenses, the rule contemplates that a party could provide a copy of the documents it intends to use to make its case. Therefore, rather than awaiting a document request for documents identified in an initial disclosure, the discovery process could be advanced by actually providing copies of the documents at this step in the process.

Additionally, as part of the initial disclosures, a party should consider producing documents that establish the *Carborundum* factors,[12] such as the general physical characteristics of the good; the expectation of the ultimate purchasers; the channels of trade in which the good moves; and how the good is advertised, displayed, and marketed. This type of information is typically sought in document requests in classification cases, even those not involving a principal use provision.[13]

Of course, in connection with the Rule 26(f) conference, the parties formally could agree to (i) provide copies of initial disclosures rather than simply identifying them and their location; and (ii) produce documents establishing the *Carborundum* factors. Formalizing these agreements during the Rule 26(f) conference may require including them in the Rule 16 scheduling order with discrete deadlines. However, leaving these agreements less formal may promote greater cooperation between the parties.

Given the nature of the USCIT where the government is always a party and non-governmental parties often are represented by counsel who repeatedly practice before this

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[12] *United States v. Carborundum Co.*, 63 C.C.P.A. 98, 536 F.2d 373, 377 (1976).

[13] "Principal use provisions are governed by HTSUS Additional U.S. Rule of Interpretation 1, which states, in part, that 'a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.'" *Streetsurfing LLC v. United States*, 11 F. Supp. 3d 1287, 1294 n.7 (Ct. Int'l Trade 2014).

court, the opportunity for cooperation between the parties may be enhanced further by keeping such arrangements informal. That the parties practicing before the USCIT appear to be able to resolve discovery disputes without resort to the court seems borne out by the case law. A Westlaw® search of the "fint-cit" database for "motion /s compel /s (discovery or disclosure or document or information)" produced sixty rulings from 1972 to 2014, including decisions rendered by the Customs Court. Of these, twenty-nine related to discovery disputes for cases in which discovery was permitted. This small number of determinations suggests that the parties have been able to cooperate with one another in conducting discovery and avoiding motion practice.

III. DISCOVERY MEDIATION

The current practice before the USCIT can probably best be described as being paper-based. The documents provided to the court pursuant to Rule 73.1 are produced in paper format. Although the Rules of the USCIT contemplate discovery of electronically stored information, the bulk of discovery exchanged between the parties is in a paper format. However, the ubiquitous presence of computers and digital information is likely to force a transition from paper to electronically stored information even for the smallest importer.

Such a transition may lead to an increase in discovery disputes between the parties. In anticipating potential disputes, should the USCIT expand the concept of court-annexed mediation to include discovery mediation? Parties may feel more comfortable freely airing electronic discovery disputes and seeking court guidance with a mediator judge rather than the presiding judge. Further, discovery mediation could be staffed by

USCIT judges who have a special interest in electronic discovery and could be instrumental in guiding the transition from paper to electronic discovery.

IV. CONCLUSION

The unique nature of the practice before the USCIT in the nature of the actions commenced and discovery sought along with the generally cooperative nature of the attorneys who appear before the court suggest that litigation can be streamlined. Under the USCIT Rules, the parties can shift the disclosure of relevant information to the beginning of the litigation rather than waiting for formal discovery requests.

*This is a draft of an article that is forthcoming in 23 Tul. J. Int'l & Comp. L. (2015). Reprinted with the permission of the Tulane Journal of International and Comparative Law.