THE FUTURE OF RULE 11 SANCTIONS FOR UNETHICAL CONDUCT BEFORE THE U.S. COURT OF INTERNATIONAL TRADE*

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I. INTRODUCTION

This article addresses a potential imminent increase in motions to impose Rule 11 sanctions before the U.S. Court of International Trade. This specialized Article III court has jurisdiction to review trade remedy investigations conducted by the U.S. Department of Commerce and the U.S. International Trade Commission. While fraud perpetrated against these government agencies is not a new development, the brazenness and sophistication of recent fraudulent actions have undeniably reached a shocking new level, and the issues created by such fraud will soon likely reach the Court of International Trade.

After providing a brief introduction to the Court of International Trade and the relevant U.S. trade remedy laws, this article will review some of the more disturbing recent findings made by the U.S. Department of Commerce of overt wrongful conduct in trade remedy investigations. Perhaps even more troubling than the occurrence of fraud findings in recent cases are the legitimate questions they raise concerning the extent of involvement by counsel. The authors posit that, as the number and severity of fraud and misrepresentations before the Department of Commerce and the International Trade Commission increase, it is probable that the Court of International Trade will more frequently find itself in a position to adjudicate instances of misconduct by respondents in these investigations, and possibly even by counsel. While the

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Court of International Trade has not been forced to impose sanctions under Rule 11 with any frequency in the past, sadly, this may soon change.

II. OVERVIEW OF THE U.S. COURT OF INTERNATIONAL TRADE AND U.S. TRADE REMEDY LAWS

A. The U.S. Court of International Trade

The Court of International Trade ("CIT") is a specialized Article III court with exclusive jurisdiction over certain international trade issues. The origins of the court date back to 1890, with the creation within in the Treasury Department of a quasi-judicial administrative unit responsible for determining the amount of duties to be paid on imports.[2] In 1926, this "Board of General Appraisers" was replaced by the United States Customs Court, initially established under Article I of the Constitution but declared by Congress to be an Article III court in 1956.[3] The Customs Courts Act of 1980,[4] arguably the most significant piece of legislation to affect the institution, changed the name of the court to its current form, in order to more accurately reflect the court's changing judicial role.

Today, the CIT is composed of nine Presidentially-appointed and Senate-confirmed judges[5] (plus four additional judges with senior status). The Court has nationwide geographic jurisdiction with both specific grants of exclusive subject matter jurisdiction as well as residual jurisdiction to hear any civil action against the United States that is connected to an international trade law. As an Article III court, the CIT has complete powers in law and equity.

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2 *History of International Trade Litigation*, Website of the United States Court of International Trade (Sept. 29, 2010), http://www.cit.uscourts.gov/informational/about.htm#HISTORY.

3 *Id.*

4 *Id.*

5 *Composition of the Court*, Website of the United States Court of International Trade (Sept. 29, 2010), http://www.cit.uscourts.gov/informational/about.htm#COMPOSITION.

The CIT predominantly hears cases involving decisions of U.S. Customs and Border Protection, as well as matters arising out of antidumping and countervailing duty investigations. The latter, two types of trade remedy investigations, provide relief to U.S. manufacturers that have been injured, or are threatened with injury, as a result of unfairly priced imports.

B. General Overview of U.S. Antidumping and Countervailing Duty Laws

Under the antidumping ("AD") statute, adopted as part of the Tariff Act of 1930,[6] members of a particular domestic industry may petition the U.S. government to investigate imports of similar foreign goods. Compensating duties on imports will be imposed where two threshold requirements are met: 1) the imports are sold in the United States at less than fair value; and 2) the low-priced imports are a cause of (or threaten to cause) material injury to the domestic industry.[7] In a countervailing duty ("CVD") investigation, the U.S. government must determine: 1) whether imports are subsidized by the government of the exporting country; and 2) whether the subsidized imports are a cause of (or threaten to cause) material injury to the domestic injury.[8]

Generally, AD and CVD investigations are conducted together on parallel tracks before both the U.S. International Trade Commission ("ITC" or the "Commission") and the Department of Commerce ("Commerce" or the "Department"). The ITC – an independent, quasi-judicial, federal agency – determines whether a domestic industry is materially injured or threatened with material injury by the dumped or subsidized imports. The Department is responsible for

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6 19 U.S.C. § 1673.

7 19 U.S.C. § 1673(1) and (2).

8 19 U.S.C. § 1671(a).

determining whether dumping or subsidization is taking place and, if so, the appropriate amount of compensating duties to be assessed.[9]

1. Antidumping Duty Investigations

In an AD case, the Department ascertains whether the imported products are being sold at less than fair value – or "dumped" – into the U.S. market and calculates the appropriate duty. The dumping duty is based on the difference between the "normal value" of the product and the export price charged for it in the United States.[10] Following a preliminary investigation that results in positive determinations from both the ITC and the Department, a dumping duty deposit is immediately imposed on all imports of the subject products.

Once an antidumping investigation is initiated, the Department of Commerce will launch its investigation to determine whether dumping is occurring. To do so, Commerce first calculates normal value, an amount which is based on prices in the foreign producers' home market.[11] Alternatively, if there are insufficient sales of comparable merchandise in the home market, Commerce will use the price on sales by the foreign producer to third countries. If all home market and third country sales are determined to have taken place at below-cost prices, normal value will be based on the fully distributed cost of production plus profit. [12]

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9 *Trade Remedy Investigations, Import Injury Investigations*, USITC – United States International Trade Commission (Sept. 29, 2010) http://www.usitc.gov/trade_remedy/index.htm.

10 19 U.S.C. § 1677(35).

11 *Id*. If the target country is a non-market economy ("NME") (e.g., China), the Department uses a special procedure to calculate normal value. In such cases, Commerce makes its calculation by identifying the actual "factors of production" necessary to manufacture the subject product. 19 C.F.R. § 351.408(a). For example, in a steel investigation, Commerce would obtain from the NME producer the hours of labor, quantity of raw material and units of electricity the producer actually uses in manufacturing each ton of steel. Those input factors are assigned values using the cost of labor, raw materials and energy in a comparable – or "surrogate" – market economy, such as India. Commerce then adds amounts for reasonable overhead and profit (also based on data from the surrogate country) to arrive at the normal value for each ton of steel. *Id*. The surrogate normal value is then compared with the adjusted U.S. price in determining the dumping margin for an NME producer.

12 19 U.S.C. § 1677(35); 19 C.F.R. § 351.401.

The export price into the United States (officially called the "export price" or "constructed export price") is determined by the Department using similar means, including a downward adjustment to reflect transportation costs (both foreign and local), importation expenses, U.S. processing and other such costs. Additional adjustments are made for differences in quality, credit and other circumstances of sale unique to the foreign producers.

After these adjustments to normal value and U.S. export price, the Department makes its dumping calculation. The product is considered to be "dumped" if the export price – the price of the good in the U.S. market – is lower than the normal value of that product in the foreign producer's home market.[13] The difference between the two prices is the margin of dumping, which is then divided by the U.S. price to arrive at the dumping duty percentage.[14]

2. Countervailing Duty Investigations

Similarly, the countervailing duty statute authorizes the imposition of compensating duties to "countervail" subsidies paid by a foreign government to its country's exporters. In a CVD case, the Department is responsible for determining the nature and extent of the government subsidies provided to the foreign producers at issue. Thus, the threshold issue in a CVD investigation is whether a foreign government subsidizes the production or export of merchandise that is then imported into the United States.

Subsidizing occurs when a foreign government provides financial assistance to benefit the production, manufacture or exportation of a good. Subsidies can take many forms, including direct cash payments, credits against taxes, and loans at terms that do not reflect market

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[13] 19 U.S.C. § 1677(34).

[14] 19 U.S.C. § 1677(35)(C).

conditions. The CVD statute and accompanying regulations establish standards for determining when an unfair subsidy has been conferred.[15]

The amount of subsidies the foreign producer receives from the government is the basis for the subsidy rate by which the subsidy is offset through higher import duties. Just as with an antidumping duty, a countervailing duty is immediately imposed on all imports of the suspect products following positive preliminary determinations from the ITC and the Department.

3. The Investigative Process

Domestic companies and industry trade associations begin the investigative process in both cases by simultaneously filing a petition with the Department of Commerce and with the International Trade Commission. After the investigation is initiated, opposing and neutral companies are required (under threat of subpoena) to provide information necessary to the investigation. Foreign producers who do not fully cooperate with the investigation can be subject to the application of "adverse facts available," which results, in effect, in the relevant agency drawing negative inferences against the foreign producers and in favor of the domestic producers.

The investigative process is data intensive, requiring respondents to complete detailed questionnaires and to provide a myriad of supporting documents. In conjunction with the investigation, the Department of Commerce will frequently travel to the respondents' offices in a process called "verification," to audit their books and records in an attempt to confirm the veracity of their questionnaire responses. The facts that are successfully authenticated during verification (as well as findings that other of the respondent's assertions are unverifiable) form a

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[15] 19 U.S.C. § 1671.

central part of the evidence of record, upon which the Department ultimately makes its determination.

Before the antidumping and/or countervailing duties can be imposed, the ITC must first determine that the imports are a cause of material injury (or threat thereof) to the U.S. industry. In this regard, injury is defined simply as harm that is more than inconsequential, insignificant or immaterial.[16] Indeed, the domestic industry can demonstrate injury in a number of ways, including through downward trends in financial data (production, shipments, profits, etc.). However, operating losses are not a necessary component of material injury if it is otherwise clear that the industry would have been better off absent the subject imports. As long as the dumped and/or subsidized imports are found to be a cause of material injury or threat thereof, the ITC will make an affirmative determination, even if there are other, more important causes of such injury or threat.

It is these decisions by the Department of Commerce and by the International Trade Commission, regarding dumping, subsidies and material injury, that are frequently reviewed by the CIT on appeal. It is also these investigations, as discussed in detail below, in which evidence of massive fraud has been uncovered.

III. THE PROBLEM: INCREASED UNETHICAL CONDUCT IN ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

This article will review of some of the more extreme and blatant examples of fraud and other unethical conduct that have occurred in antidumping and countervailing duty investigations. These cases involve a wide variety of subject matter – from crawfish, to magnesium, to activated carbon. The cases cited below are not meant to represent an exhaustive

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[16] 19 U.S.C. § 1677(7).

list, but rather to demonstrate the seriousness of the current problem. There are numerous other recent cases – including those involving oil country tubular goods and tissue paper – where compelling evidence of wrongdoing has been found.

The Crawfish from China[17] case may have been the first in the most recent wave of blatant unethical conduct in trade remedy investigations. In Crawfish, the Department sent personnel on a verification trip to the respondent's factory in China (as is normal practice in certain investigations). As a result of this auditing trip by U.S. government officials, the respondents ultimately withdrew from verification, in the face of evidence that their responses were fraudulent.

The Department's observations are included in its official verification report,[18] which indicates that the U.S. government officials were taken to a hotel to conduct the verification instead of the respondent's factory (where verification would normally occur), due to the respondent's claims that its factory did not have convenient facilities for reviewing documents. Department officials were taken to a hotel room that contained no documents. Upon request of the Commerce officials, the respondent's employees would bring documents on a piecemeal basis from an adjacent hotel room. In response to a question from the Commerce officials, the respondent indicated that their records were kept in only paper form, not electronically.

The Commerce officials eventually insisted to be shown the room containing the records. Upon arrival in that room, they found only a computer, a copy machine, a printer and a dresser, along with four Respondent employees – no paper records. For the next several hours, the

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[17] *See Freshwater Crawfish Tail Meat from the People's Republic of China*: *Notice of Preliminary Results of Antidumping Duty Administrative Review, Final Rescission, in Part, and Intent to Rescind, in Part*, 68 Fed. Reg. 58,064 (Dep't Commerce Oct. 8, 2003).

[18] *See id.* (citing *Antidumping Duty Administrative Review of Freshwater Crawfish Tail meat from the People's Republic of China (PRC) (A-570-848): Verification Report for Shanghai Taoen International Trading Co., Ltd.* (Sept. 29, 2003)).

respondent's employees insisted that the Department officials leave the room, as a string of bizarre events took place:

- the power on the floor where verification was taking place – but not in any other hotel wing – was shut off (meaning that the computer containing the respondent's records could not be accessed);
- a hotel employee came to request the return of the computer, claiming that it was on loan to the respondent from the hotel;
- Commerce officials were preventing from making calls to the United States from the hotel phones; and
- the Department's translator recognized one of the four employees in the room as an employee from a separate company involved in the investigation. When confronted, the identified employee first attempted to run away. When the Commerce officials finally caught up with her, she claimed that she was not the recognized person, providing an implausible story to explain the lack of identifying information on her person and her inability to remember her home address.

After more than an hour, the Commerce officials finally were able access the computer and copy information onto two floppy disks. Perhaps most troubling is that, upon this development, the respondent's counsel appeared and indicated that the respondent wished to withdraw from verification. The counsel warned the Commerce officials that the situation was "growing beyond their control" and that the floppy disks had to be returned.

Another case, Magnesium from China,[19] is also instructive with regard to the surprising extent of fraud which has recently occurred in the Department's investigations. Several days

[19] *See Pure Magnesium From China: Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*; 73 Fed. Reg. 37409 (July 1, 2008).

into the verification process in that case, Department officials began to suspect that a set of documents provided by the respondent were not authentic.[20] The documents were suspiciously pasted into bound books, seemingly in place of the original, genuine documents. The respondent's employees then locked the Commerce officials out of a room that the officials believed had the actual needed information, insisting that no one was in the room and there was no way it could be entered, despite the fact that noises were emerging from within. Department officials proceeded to an adjoining stairwell where, to their surprise, they observed books being tossed out from the window of the locked, and supposedly inaccessible, room. The Department officials went downstairs to find other respondent employees gathering the tossed books.

Even after being caught red-handed by the Commerce officials, the respondents refused to open the room. It was not until the Department officials threatened to terminate verification on the spot that the respondents finally granted the officials access to the room.[21] Inside, Department officials discovered five of the respondent's employees, accounting books and ledgers and a variety of cutting and pasting materials.[22] The respondent employees then refused to allow Department officials to fully inspect the records in the office, claiming that the books and boxes contained confidential legal documents. This untenable position was maintained even when Department officials pointed out that the so-called "top secret legal documents" were marked as being the exact records that the Department officials were there to verify.[23] The

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[20] *See* Memorandum from Eugene Degnan, Program Manager, to Wendy J. Frankel, Director, Re: Verification of the Sales and Factors Responses of Tianjin Magnesium International, Ltd. In the 2007-2008 Administrative Review of the Antidumping Duty Order on Pure Magnesium from the People's Republic of China (Nov. 4, 2009) ("Pure Magnesium Verification Report").

[21] Pure Magnesium Verification Report at 41.

[22] Pure Magnesium Verification Report at 41-42.

[23] Pure Magnesium Verification Report at 43.

Commerce officials were eventually forced to leave without seeing these documents. Interestingly, the respondent's U.S.-based and China-based counsel were present during this entire episode.[24]

One final example is the case of Certain Activated Carbon from China.[25] In that case, the respondent misrepresented its relationship with another company in order to gain certain advantages in the Department's investigation. The respondent's answers to a Department questionnaire inadvertently included a two-paragraph segment that exposed the falsity of other statements in the response. The first paragraph described a set of employment relationships, which would have been helpful to the respondent in the investigation. The second paragraph – which, presumably, was unintentionally left in the document upon its submission to the Department – appeared to be an internal response to the first paragraph. This paragraph stated that the information in the prior paragraph was false; in fact, the employment relationships described did not exist. Rather, it was part of an ongoing fraud the respondent was perpetrating on the Department. Ironically, the second paragraph went on to express the respondent's fear that its fabrication could be discovered by the Department due to other respondent disclosures.

IV. RULE 11 SANCTIONS AND THE CIT

As discussed above, the Department of Commerce has recently identified a number of occurrences of deliberate and glaring fraud in trade remedy investigations. Such instances of fraud show no signs of abating. Furthermore, the role of the attorneys involved in these matters has been the subject of some debate. Accordingly, it is probable that the CIT will face these

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[24] Pure Magnesium Verification Report at 40-44.

[25] *Certain Activated Carbon from China*, A-570-904 (2009).

issues, sooner rather than later, and there is a good chance that it could lead to an increase in Rule 11 sanctions.

Rule 11 provides that, before filing a pleading, motion or other paper with the Court, an attorney has an affirmative obligation to ensure that (1) all assertions made in the documents have a reasonable and non-frivolous legal and factual basis, and (2) that the papers are not being filed solely for reasons of harassment or delay, or to increase costs to other parties. Specifically, the rule reads:

> By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after any inquiry reasonable under the circumstances:
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> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
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> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
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> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.[26]

When counsel violates this rule, sanctions must be applied by the Court.[27] Additionally, the CIT has the authority to, by motion of another party or on its own initiative, order a law firm, attorney or party to show cause why certain conduct does not violate USCIT Rule 11.[28]

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[26] USCIT R. 11(b). The Court has noted the rule's similarity to Rule 11 of the *Federal Rules of Civil Procedure*, the central purpose of which is to "deter baseless filings" and "streamline the administration and procedure of the federal courts." *Wire Rope Importers' Association v. United States*, 18 CIT 478, 481 (1994) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990)).

[27] *Refac Int'l, Ltd. v. Hitachi, Ltd.*, 921 F.2d 1247, 1257 (Fed. Cir. 1990) ("Imposition of sanctions once a violation has been found is mandatory").

In considering the imposition of sanctions, the Court determines whether, "after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[29] Where an attorney fails to conduct an objectively reasonable investigation into the legal or factual grounds for a filing, he or she may be sanctioned even in the absence of subjective bad faith.[30]

The Court has some discretion to determine exactly how it will sanction the offending attorney. The Court's rule provides that: "A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."[31]

Given the increased frequency, brazenness and sophistication of fraud and misrepresentations in trade remedy investigations before the Department of Commerce, it is only reasonable to assume that these unfortunate occurrences will increasingly appear before the CIT. Perhaps more troubling than the fraudulent behavior in the fact-finding sections of the investigations (which is, although on the rise, not necessarily a new phenomenon), are issues

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[28] USCIT R. 11(c)(3).

[29] *Wire Rope*, 18 CIT 481; *see also United States v. Koo Chow*, 850 F. Supp. 39, 42 (CIT 1994) ("Rule 11 thus imposes an obligation on attorneys to conduct a reasonable inquiry to ensure documents filed with the court are well grounded in fact and the position taken in them is warranted by existing law, and to not file a document for any improper purpose").

[30] *Wire Rope*, 18 CIT 481 (citing *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d. Cir. 1985)).

[31] Fed. R of Civ. Proc. 11(c)(4).

connected with subsequent decisions made by counsel. Previously, an expectation existed that once such unethical behavior was discovered, counsel would take all actions required by the relevant ethics rules including, as appropriate, termination of the representation. However, in several recent cases, counsel have not fired their clients. Rather, attorneys in some cases have continued to submit written argument and analysis attempting to defend such behavior. While the ethical obligation to zealously represent a client's interests is well-established, Rule 11 makes clear that an attorney's signature on a pleading is a certification that the factual contentions are, to "the best of the person's knowledge, information, and belief, formed after any inquiry reasonable under the circumstances," proper and have evidentiary support and that "denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information." To the extent that appeals from investigations which are tainted with blatant fraud appear before the CIT, counsel will have a higher duty of inquiry and responsibility regarding their factual and legal representations to the Court.

The CIT is unlikely to have much patience for counsel who violate their ethical obligations in connection with the obviously fraudulent behavior of their clients, and an increase in Rule 11 sanctions may not be far behind. It is difficult to predict at this early stage exactly what form these sanctions may take. Sadly, however, we may have the answer sooner than we think.

V. **CONCLUSION**

The CIT is a specialized Article III court empowered to decide appeals from Department of Commerce and International Trade Commission determinations in trade remedy cases, specifically antidumping and countervailing duty investigations. These cases, which can provide relief to U.S. manufacturers and their workers who have been injured by unfairly priced imports,

are two of the most important trade remedy actions under U.S. law. Recently, there has been a wave of fraudulent activity in these investigations. There appears to be an increasing audacity and frequency in regard to this wrongful conduct, and there are questions regarding the role of the attorneys involved. While the CIT has not traditionally been required to grant Rule 11 sanctions motions with any frequency, it is reasonable to expect that the increase in misrepresentations to the agencies will carry over to CIT. Should this happen the Court may well be forced to sanction counsel who have violated their ethical obligations.

* This is a draft of an article that is forthcoming in 19 Tul. J. Int'l & Comp. L. (2011). Reprinted with the permission of the Tulane Journal of International and Comparative Law.