19TH JUDICIAL CONFERENCE

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ETHICS AND LEGAL PRACTICE: CHALLENGES FOR TRADE LAWYERS

Proper Basis for Jurisdiction in Appeals of Overlapping DOC and CBP Decisions

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This paper provides recent case examples in which counsel has had to navigate challenges involving trade matters that overlap decisions by the Department of Commerce (DOC or Department), Customs and Border Protection (CBP), and the courts.

PROPER BASIS FOR JURISDICTION IN APPEALS OF OVERLAPPING DOC AND CBP DECISIONS

A Department determination involving antidumping (AD) or countervailing (CVD) cases is very often followed by liquidation instructions to CBP. Sometimes a decision by the DOC may be favorable to the client, but the liquidation instructions and their implementation by CBP do not always afford the client an ability to reap the rewards of that decision in practice. It is in those situations that counsel may be faced with a difficult decision on whether to appeal the DOC determination, the CBP liquidation of entries subject to the Department's determination, or both. This paper examines the issues faced by counsel in this decision making process in the context of two recent cases.

DOC's Revocation Under a Changed Circumstances Review vs. CBP's Automatic Liquidation – §1581(c) Claim

The first illustrative case involves a DOC changed circumstances review (CCR) in the AD case on Wooden Bedroom Furniture (WBF) from China. Interested parties can request a CCR to address questions about the applicability of an antidumping order to specific products pursuant to 19 C.F.R. § 351.222(g). These CCRs are also known as "no interest revocations" where partial or total revocation of the order is warranted because domestic parties (petitioners) are no longer interested in covering certain products.

Some background on the CCR process may be helpful to provide context for the eventual jurisdictional conflict that may arise. As this case demonstrates, the lesson for counsel is to carefully monitor the schedule of the Department's CCR proceeding and the pace of liquidation by Customs and Border Protection (CBP) of any import entries subject to the CCR. This is because the Department's normal practice is to apply the revocation retroactively to unliquidated entries on or after the day following the last day of the most recently completed administrative review under the order.[2]

[2] See e.g., Hand Trucks and Certain Parts Thereof From the People's Republic of China: Initiation and Preliminary Results of Changed Circumstances Review, and Intent To Revoke Order In Part, 80 Fed. Reg. 11396, 11397 (Dep't Comm. March 3, 2015); Steel Wire Garment Hangers From the People's Republic of China: Final Results of Changed Circumstances Review, and Revocation in Part of Antidumping Duty Order, 74 Fed. Reg. 50956, 50957 (Dep't Comm. October 2, 2009); Stainless Steel Bar From the United Kingdom: Notice of Final Results of Changed Circumstances Review and Revocation of

A CCR can in some instances be expedited, with the DOC's decision issued in 45 days after initiation of the proceeding. But in many cases, a full-term CCR can result in a final determination up to 270 days after the date on which the proceeding was initiated.[3]

Based on the CCR's schedule, it is important for counsel to confirm the scheduled liquidation dates for a client's entries subject to the proceeding, particularly the older ones. Since it is CBP's practice to automatically liquidate entries 314 days from the date of importation, it is possible that some of the older entries may be nearing liquidation. This is especially likely if the Department conducts a full length CCR, which can last 270 days.

Often importers request CCRs to cover past entries of the merchandise. This is precisely what occurred in the case at issue. CBP automatically liquidated the importer's entries of WBF from China and collected AD cash deposits. The importer timely protested this liquidation pending the outcome of DOC's CCR determination. When the DOC issued its final determination in the CCR, it revoked AD duties retroactively to a period preceding the importer's entries. The importer was pleased with the DOC's favorable outcome and believed that since its entries were within the revocation window, it would be entitled to AD duty refunds.

However, this favorable outcome was short lived and was effectively nullified when DOC subsequently issued corresponding liquidation instructions that limited the revocation to unliquidated entries.

For the importer, the purpose of the revocation achieved by the CCR was entirely frustrated by the liquidation instructions. Indeed, the situation exposed a procedural and legal shortcoming in instances when the CCR proceeding lasts almost as long at the liquidation cycle. In those situations, liquidation is almost assured for certain entries while the CCR carries on.

Once the Department's CCR determination was published, the importer needed to decide whether to appeal the decision at the Court of International Trade (CIT) within 30 days. Since CBP had not yet ruled on the pending protest, the importer decided to file an

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Order, in Part, 72 Fed. Reg. 65706, 65707 (Dep't Comm. November 23, 2007); see also Notice of Final Results of Antidumping Duty Changed Circumstances Review and Revocation of Order In Part: Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, 71 Fed. Reg. 66163, 66164 (Dept' Comm. November 13, 2006).

[3] See 19 C.F.R. § 351.216(e).

appeal under 28 U.S.C. § 1581(c)[4]. The importer claimed that the DOC's practice to only apply the results of a CCR determination to unliquidated entries and not to entries that have already liquidated, irrespective of whether the liquidated entries were made after the effective date of revocation, was unsupported by substantial evidence and contrary to law.

In response, the government moved to dismiss the importer's complaint for lack of subject-matter jurisdiction. The government claimed the action was moot because all of importer's entries covered by the CCR had liquidated, rendering the controversy moot and depriving the court of jurisdiction.

The importer decided to withdraw the complaint and to consider refiling the case under another jurisdictional provision. The following recent case provides additional guidance on whether an alternative jurisdictional basis can remedy a seemingly inequitable outcome arising from a favorable DOC decision.

DOC's Revocation Under a Sunset Review vs. CPB's Automatic Liquidation - §§ 1581(a) and (i) Claims

Another recent case involving a similarly challenging overlap between a DOC revocation decision and CBP's liquidation has offered a different jurisdictional approach for consideration.

The case challenged the actions of CBP in refusing to liquidate an importer's entries of corrosion-resistant steel (CORE) without AD duties when those duties were revoked retroactively by the DOC's 5-year "sunset" review determination. Liquidation of the importer's subject entries was initially suspended pending DOC's annual administrative review process. No interested party requested an administrative review, however, and therefore DOC lifted the suspension of liquidation and issued instructions to CBP to liquidate at the AD rate deposited upon entry. CBP thereafter liquidated the entries with AD duties pursuant to liquidation instructions issued by the DOC.

A few months later, following a negative determination in the ITC's sunset review of the order, DOC officially revoked the AD order and issued superseding revocation instructions advising CBP to liquidate without AD duties the same entries it had previously instructed CBP to liquidate at the AD rate deposited upon entry. In doing so, DOC instructed that these instructions applied to "unliquidated".

[4] 28 U.S.C. § 1581(c), "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A or 517 of the Tariff Act of 1930."

Shortly after the conclusion of the sunset review, the importer protested CBP's liquidation of certain entries that had already liquidated subject to DOC's first set of instructions after no administrative review was conducted. The importer also appealed to the CIT under 28 U.S.C. § 1581(a), challenging CBP's decisions. In subsection 1581(a), Congress set out an express scheme for administrative and judicial review of Customs' actions.[5]

In the same complaint, the importer also filed an alternative claim under 28 U.S.C. § 1581(i), arguing that DOC's liquidation instructions were contrary to law and insisting that because the entries were timely protested, the liquidation process was not yet final, and the entries remained "unliquidated" within the meaning of the law and within the scope of Commerce's liquidation instructions. The scope of the CIT's review for actions brought pursuant to § 1581(i) is limited to the administrative record developed before the agency.[6]

The government moved to dismiss the importer's claim against CBP for lack of subject matter jurisdiction on the basis that CBP's actions were not protestable, such that the court lacked jurisdiction under § 1581(a). The government also moved for judgment on the pleadings with respect to importer's alternative claim. The court agreed, finding that the government was entitled to judgment as a matter of law and granted its motion for judgment on the pleadings.

The court found that the importer failed to establish § 1581(a) jurisdiction for several reasons. First, the court ruled that the importer's protests were untimely because they were filed before the CBP had time to consider whether the DOC's sunset revocation encompassed the importer's entries, noting that CBP had six months to apply those instructions before subject entries would be considered liquidated by operation of law. In other words, the court found the protests to be anticipatory and, thus, invalid.

Second, the court noted that the importer failed to establish that CBP denied its protests because jurisdiction pursuant to § 1581(a) must be predicated on the actual "denial of a protest." CBP had in fact "rejected" the importer's challenges "as non-protestable", thus, without a denial of importer's protests, the court found it had no jurisdiction under § 1581(a).

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[5] See Hartford Fire Ins. Co. v. United States, 544 F.3d 1289, 1291 (Fed. Cir. 2008).

[6] See Camp v. Pitts, 411 U.S. 138, 142 (1973); 5 U.S.C. § 706 (In making a determination under section 706, "the court shall review the whole record or those parts of it cited by a party . . . .").

The court also ruled that the importer's alternative § 1581(i) claim failed as a matter of law. As a threshold matter, the court confirmed that it had jurisdiction over the importer's alternative claim.[7] However, the court found that DOC's sunset review liquidation instructions were in accordance with the statutory provision regarding the revocation of an AD order pursuant to 19 U.S.C. § 1675(d)(3) (stating that a "determination to revoke an order . . . shall apply with respect to unliquidated entries"). The court disagreed with the importer's interpretation that timely protested entries meant that their liquidation was not final. Rather, the court explained that the fact that a valid protest concerning a decision of CBP can lead to a modification of the "final" computation of duties does not mean that no "final" computation of duties has taken place.

Thus, while the court agreed that the term "unliquidated" logically extends to entries for which there has been no final accounting, it does not extend to the importer's entries that were previously liquidated. The court reasoned that the focus of sunset reviews is entirely prospective, with the key inquiry being whether termination of suspended investigations "would be likely to lead" to the dumping of foreign imports into a particular market in the future." Therefore, even though the effective date of the sunset revocation instructions was retroactive, the court interpreted the term "unliquidated" to mean "not previously-liquidated" because this ensures that the effect of the sunset review "is entirely prospective," in that it applies only to future liquidations.

The court concluded that the DOC's sunset revocation instructions were not only in strict accordance with the wording of 19 U.S.C. § 1675(d)(3), but also appeared to be in accordance with the purpose of the statutory scheme and with the court's understanding of the term "unliquidated" as meaning "not previously-liquidated."

Conclusions

In both examples above, the importer obtained a favorable outcome at the DOC through retroactive revocation of AD orders resulting from a CCR and a sunset review, respectively. However, the implementation of that revocation was ultimately frustrated by CBP's automatic liquidation of the subject entries before the DOC's decisions were issued, despite the fact that those liquidations were timely protested. Since the DOC's revocation instructions only applied to "unliquidated" entries, the importer appeared to be left with no recourse through judicial review to remedy the perceived inequity.

[7] Carbon Activated Corp. v. United States, 791 F.3d 1312, 1317 (Fed. Cir. 2015) (a party bringing a challenge to "Commerce's erroneous instructions to Customs . . . c[an] invoke § 1581(i) jurisdiction.").

Based on these cases, a claim under § 1581(c) risks dismissal for lack of subject matter jurisdiction on mootness since entries have liquidated. A claim under § 1581(a) was dismissed by the court due to lack of jurisdiction because the protests were deemed "not protestable" by CBP and, thus, were not actually "denied." Finally, a § 1581(i) claim failed because the court found that under the statute the DOC's revocation instructions are limited to "unliquidated" entries since the effect of the sunset review is intended to be prospective.

However, these interpretations do not appear to have been completely reconciled and still leave certain issues for counsel to consider, particularly in the context of a §§ 1581(a) and (i) claims. For instance, the court agreed that liquidation is the final computation of duties and is meant to establish the ultimate sum owed by the importer, and that certain decisions of CBP are not final and conclusive when timely and validly protested. However, a retroactive revocation of AD duties under a CCR or sunset review by its nature is a correction and refund of duties that were previously collected. Clearly, the ultimate sum owed by the importer under such circumstances was established by the revocation, meaning the previous sum collected by CBP was in error. A view that the effect of a sunset review or CCR is "prospective" seems inapposite considering the DOC's corresponding liquidation instructions were retroactive.

Moreover, the fundamental purpose of the protest process is to permit an administrative procedure by which an importer may appropriately redress its grievance that its entries were liquidated in error. An importer that properly seeks redress through the CCR, sunset review or another DOC proceeding, and obtains a favorable result should not be deprived of that favorable result by CBP, particularly when the protest provision was appropriately utilized. From the importer's perspective, the government's collection -- by way of an administrative anomaly -- of AD duties that were effectively revoked appears disappointingly ill gotten.

CIT CONFERENCE: CONFIDENTIAL INFORMATION OBTAINED IN USITC TITLE VII INVESTIGATIONS

The United States International Trade Commission ("Commission") supports efforts to assure the maximum transparency in agency and judicial filings and decisions. Nonetheless limitations on confidential information in briefs may be problematic both in terms of the Commission's role as issuer and enforcer of its administrative protective orders as well as the Commission's separate role as an advocate that defends its determinations in it reviewing Courts. This paper will provide a brief background summarizing the Commission's statutory obligation to safeguard confidential information, and the practical effects of limiting confidential information in court filings.

1. The Commission's Statutory Obligation to Safeguard Confidential Information

Under Title VII, the obligation to protect the confidentiality of information submitted to the Commission is statutory. Section 777 of the Tariff Act of 1930 provides that, as a general rule "information submitted to the administering authority or the Commission which is designated as proprietary by the person submitting the information shall not be disclosed to any person without the consent of the person submitting the information . . . ." 19 U.S.C. § 1677f(b)(1)(A).

Pursuant to this statutory authority and obligation, the Commission has promulgated strict rules concerning the submission and protection of confidential information.[1] Underlying the Commission's framework for assuring the protection of confidential information is the important role that such information plays in the Commission's execution of its mandatory investigative duties. Because of the protections that the statute provides, the Commission is able to obtain confidential information essential for its investigations. Indeed the guarantee that confidential information will remain protected allows the Commission to develop a fulsome

[1] *See* 19 C.F.R. §§ 201.6, 207.7, 207.93, 210.5, 210.34. In Title VII investigations, the Commission Secretary, upon applications from authorized counsel, issues the APOs. The Commission's regulations define confidential information as information "which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information." 19 C.F.R. § 201.6(a).

administrative record and conduct effective investigations, and do so within the timeframes imposed by statute.[2]

Under Title VII, the Commission safeguards the confidentiality of information of a business proprietary nature, particularly of questionnaire data received from individual companies, both parties and non-parties to the investigation. The Commission has the authority to require additional justification for confidential designations made by submitters, and will not treat information that is available from a public source as confidential. *See* 19 U.S.C. § 1677f(b)(2). Due to the focus of Commission investigations, however, much of the information it receives and relies on is company-specific financial and trade information that is by nature confidential. While the Commission strives to make public as much aggregate data as possible, the rules of mathematics place restraints on this exercise. For example, where there are only one or two domestic producers in an industry, the Commission cannot disclose any of the financial or trade data for the industry, because doing so could presumptively cause competitive harm to each of those producers: In a one-producer market, market information is the same as producer information. In a two-producer market, disclosure of aggregate information would enable each market participant to easily calculate its competitor's data.

2. Practical Effects of Limiting Confidential Information

Any appeals of Commission determinations to its reviewing Courts often involve significant amounts of confidential information, information without which the Commission cannot adequately perform its duties. Imposition of limitations on the use of confidential information in litigation could hamper parties' ability to adhere to the APO, and may frustrate the statutory and regulatory mandate to protect confidential information.

Additionally, from the Commission's perspective, it depends upon the voluntary submission of confidential information from both parties and non-parties. In addition to information submitted by interested parties during Title VII investigations, the Commission routinely collects confidential information from other entities, such as purchasers. All firms that provide this information, often in response to Commission questionnaires, provide the information under the APO with the understanding and knowledge that the Commission will safeguard the information. From a practical perspective, without knowledge that their confidential information will be protected throughout Commission investigations and any subsequent appeals, parties and non-parties may be reluctant to voluntarily provide confidential information to the Commission. Indeed, due to the Commission's aggressive stance in safeguarding confidential information, parties and non-parties alike generally cooperate in providing their confidential information to the Commission.

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[2] *See* 19 U.S.C. §§ 1671b(a)(1), 1671d(b)(2), 1673(b)(a)(1), 1673d(b)(2), 1675(c)(5). *See generally Akzo N.V. v. USITC*, 808 F.2d 1471, 1483-84 (Fed. Cir. 1986).

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USCIT ADVISORY COMMITTEE POSITION PAPER ON LARGE AND RELATED CASE MANAGEMENT

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In 2014, the CIT Advisory Committee on rules was asked to evaluate the Court's management of "large" and/or "related" cases and address whether the Court's rules should be amended to address these cases. The initial intent was to review issues related to "large case management", but as we researched the question, it became clear to us that our analysis also should include "related" cases – that is, situations where numerous cases raise the same issue or where a number of actions are brought challenging determinations that are in one way or another related to each other. As a result, the Committee's analysis covers "large and related case management", otherwise known as "LRCM".

Summary and Recommendations

The Advisory Committee reviewed the CIT's rules and procedures, collected substantial anecdotal evidence of the CIT's LRCM practices, and interviewed members of the CIT bar about LRCM practices. Based on this information, the Advisory Committee concluded that there is not widespread support in the international trade and customs bar for mandatory LRCM practices, but that a mechanism for elective, tailored LRCM practices would be appropriate if the CIT believes that LRCM procedures are necessary. Consistent with our commission, the Advisory Committee attempted to define and identify large and related cases; catalogue LRCM practices, problems, and issues; and recommend solutions and best LRCM practices. The Advisory Committee made its recommendations with a view toward ensuring that efforts to streamline the litigation process do not detract from the Court's role in providing judicial review that safeguards the public legitimacy of agency decisions.

Discussion

Definitions of Large and Related Cases and The CIT's Existing LRCM Practice

1. Large And Related Cases

The Advisory Committee spent considerable time trying to define what constitutes a large or related case and what constitutes the CIT's existing LRCM practices. The Advisory Committee concluded that few, if any cases, rise to the level of a "large" case warranting case management

procedures beyond those set forth in the CIT Rules. One example is the steel antidumping and countervailing duty cases filed in the early 1990s. Nevertheless, related cases frequently are filed at the CIT which, from time to time, warrant active case management. Beyond that, the Advisory Committee found that the term "large" or "related" case defies easy definition. Is a large or related case one that involves multiple claims, multiple parties, and/or products from more than one country? Is it a case that involves multiple administrative determinations (*i.e.*, more than one administrative review, the conflation of antidumping ("AD") and countervailing duty ("CVD") determinations in the same action, or the conflation of actions challenging decisions from the U.S. International Trade Commission ("ITC") and the Commerce Department)? Or is a large or related case requiring management a case that involves more than one of these features? The Advisory Committee concluded that no uniform definition applies. All of these features, either alone or in concert with other features, can qualify a case as a large or related case warranting some measure of LRCM. The Advisory Committee also concluded that large or related cases requiring management arise less frequently in CIT actions involving decisions of U.S. Customs and Border Protection ("Customs"), Customs Section 1592 penalties, or decisions challenged under the CIT's residual jurisdiction, 28 U.S.C. § 1581(i), than they do in cases involving AD and CVD determinations.

2. The CIT's LRCM Practices

The Advisory Committee also found that LRCM practices in the CIT are fragmented and in many instances problematic for practitioners. Nevertheless, certain LRCM practice trends emerge. For example, the CIT employs LRCM in which the assigned judge requests the Clerk of the Court to engage the parties and manage the case ("Court-Directed LRCM"). Court-Directed LRCM typically consists of outreach by the Clerk to the parties in newly filed international trade cases in which the Clerk encourages the parties to adopt measures that will promote the efficient adjudication of the actions. Such measures include consolidation or severance of actions, limitations on the number of issues raised, page or word limits for briefs, and the use of joint "issues" briefs.

A second example of the CIT's LRCM practice is the use of three-judge panels under 28 U.S.C. § 255 for related cases involving constitutional issues or issues that have broad or significant implications in the administration or interpretation of the law. Examples of the CIT's use of three-judge panels in constitutional cases include cases challenging the constitutionality of the Continued Dumping and Subsidy Offset Act ("CDSOA") (*SKF USA v. United States*), the Harbor Maintenance Tax (*U.S. Shoe v. United States*), and the Harmonized Tariff System on gender discrimination grounds (*e.g., Rack Room v. United States*). Three-judge panels also have been used in cases with broad or significant implications in the administration or interpretation of the law (*Washington Int'l Ins. Co. v. United States,* 11 CIT 249 (1987)). In these cases, the CIT frequently adjudicates a single case involving the central constitutional or significant issue and uses its discretion to stay other cases involving the same issue pending final appellate resolution of the "lead case." An example of this LRCM practice is the Court's handling of the constitutional CDSOA litigation.

A third, closely related, example of the CIT's LRCM practice is the test case/suspension calendar procedure under CIT Rule 84. Under this procedure, when cases involving similar issues are filed, one case is designated as a "test case" while the other, similar, cases are placed on the

CIT's suspension calendar pending resolution of the common issue. This LRCM practice also has been used in conjunction with a three-judge panel (*e.g.*, the HMT constitutional litigation), and is frequently used in Customs cases.

A fourth example of LRCM is the use of consolidation under Rule 42 to combine cases for administrative purposes. The most common use of Rule 42 is to consolidate the petitioners' and respondents' actions challenging the same administrative determination into one action. Consolidation in these cases ensures that one final court judgment will be dispositive as to all entries subject to the challenged administrative determination. Absent consolidation, the petitioners' actions and the respondents' actions could proceed on separate timelines, which could delay the implementation of a court judgment until the companion case also reaches final judgment.

The remaining LRCM practices tend to be specific to individual CIT judges. For example, certain judges require the parties to submit pre-brief issues statements in an effort to clarify and narrow the issues subject to review. Other judges impose a staggered briefing schedule in which the defendant-intervenors' briefs are filed after the Government's briefs are filed and are restricted to certain issues. Still other judges (and the CIT's Standard Chambers Procedures) impose page or word limits on briefs or require the parties on the same side of the case (typically respondents) to file joint briefs and to allocate pages or words among themselves.

Problems Presented by The CIT's LRCM Practice

The main LRCM problem cited by practitioners interviewed by the Advisory Committee is the use of Court-Directed LRCM and the potential for this tool to compromise substantive rights and detract from the Court's role in providing judicial review that ensures the public legitimacy of agency action. For example, Court-Directed LRCM that encourages the narrowing of claims may cause some parties to drop claims they otherwise would pursue. This concern is compounded by the fact that Court-Directed LRCM interposes the Clerk of the Court between the parties and the judge even though the Clerk does not have substantive decision making authority. In addition, the practitioners interviewed by the Advisory Committee expressed concern that, in at least one instance, Court-Directed LRCM resulted in a separate, non-public, non-searchable "sub-docket" of submissions to the Clerk and, therefore, to the CIT. Similarly, Court-Directed LRCM frequently involves some off-the-record, *ex parte* discussions that may then be further communicated to the CIT judge assigned to the case. The action challenging the AD determination on *Wood Floorings from China* was frequently cited in these discussions. These transparency issues were of particular concern to the Department of Justice.

The Advisory Committee is aware that some people may view Court-Directed LRCM as similar to mediation and, therefore, that no record should be generated during Court-Directed LRCM just as no record is typically generated during mediation. The Advisory Committee notes, however, that Court-Directed LRCM is distinct from mediation in at least two significant ways: (1) mediation is entirely confidential between the parties and the mediator; Court-Directed LRCM, by contrast, necessarily involves the submission of the confidential information, views, and positions of the parties to the assigned judge and (2) mediation is a self-contained, non-binding proceeding in which the mediator and parties either settle the case in whole or in part or refer it back to the assigned judge for adjudication in the first instance; Court-Directed LRCM, by contrast

is a preliminary phase of the adjudication in which important procedural issues are resolved with implications for the merits of the substantive case. *See* CIT Guidelines For Court-Annexed Mediation. Accordingly, the fact that no record is developed during a mediation is no reason to eschew the development of a record during Court-Directed LRCM.

The practitioners interviewed by the Advisory Committee also objected to the requirement that parties submit Issues Statements before formal briefing commences. As with Court-Directed LRCM, Issues Statements are perceived as pressuring parties to drop otherwise meritorious claims before they can be fully presented to the CIT during the briefing process. At a minimum, Issues Statements are duplicative of the complaint, which under the standards set forth in *Bell Atlantic Corp*. v. *Twombly* and *Ashcroft v. Iqbal*, already provides the Court and the parties with adequate notice of issues being presented. They also compound the costs of litigation by forcing the parties to prepare "mini-briefs" before the formal briefs are prepared and submitted. The Advisory Committee believes that, during the full time allotted for briefing, the parties are better able to more efficiently and thoroughly address questions such as the standard of review and to focus and narrow the key issues.

Recommendations and Best Practices

1. Procedural Recommendations

The Advisory Committee uniformly believes that LRCM procedures should be suggested in the first instance by the parties rather than by the Court. The Advisory Committee has drafted a proposed Case Management Rule that addresses the concerns described in section 3 above. *See* Appendix A, attached. The proposed Case Management Rule is similar to the order directing initial disclosures for Customs cases in the CIT and/or other initial disclosure requirements set forth in the Federal Rules of Civil Procedure. The Advisory Committee believes that most LRCM issues will be resolved by the proposed Case Management Rule and expects that the Court will initiate LRCM procedures only in rare circumstances and when the parties cannot agree on some issue covered by the Case Management Rule. The Advisory Committee also believes that this process will eliminate the concerns raised by practitioners with respect to Court-Directed LCRM.

The Advisory Committee notes that, among other features of the proposed Case Management Rule, the Rule provides for the resolution of case management disputes by use of a special master designated under Rule 53 of the Court's Rules. *See* CMR ¶ 6. Unlike a Court-Annexed Mediator, Special Masters are charged with the responsibility of making a substantive report to the assigned judge but are subject to the procedural safeguards in Rule 53.

2. Quantitative Recommendations

The Advisory Committee endorses the use of page or word limits on briefs as a way to make concise the arguments being presented to the CIT. The Advisory Committee believes that the word limits in the CIT's Standard Chambers Procedures are sufficient for this purpose.

The Advisory Committee does not endorse a quantitative limitation on the number of issues that a party may raise. In particular, in AD/CVD cases, the Commerce Department has to make numerous substantive decisions on a number of issues in order to reach a final determination. Each decision affects the final margin, and each is an independently reviewable issue. If the CIT were

to impose arbitrary limits on the number of issues a party may raise, it would deprive the party of the opportunity to secure complete relief by decreasing or increasing the final margin applicable to its or its competitor's entries. Moreover, unlike in federal district court actions, where plaintiffs have a fair amount of control over the timing and contents of their complaints, CIT plaintiffs in trade cases have a mere 30 days to file a summons and, within 30 days thereafter, a complaint and must raise all challenges to an agency action at that time.

3. Recommendations On The Selective Use Of Accelerated Briefing

The Advisory Committee also considered whether the CIT can effectuate the purposes of LRCM by promoting early briefing of threshold or dispositive issues, while issues that do not drive the disposition of other issues or the entire case be briefed in accordance with the normal schedule or, in some instances, be delayed until the threshold or dispositive issue has been decided. In particular, the Advisory Committee considered accelerated briefing of surrogate country issues in non-market economy ("NME") antidumping cases; issues related to the existence of subsidies in CVD cases; certain dispositive issues of statutory construction; and analogs to the selected use of accelerated briefing in investigations conducted under Section 337 of the Tariff Act of 1930.

Notwithstanding certain advantages arising from accelerated briefing, the Committee does not recommend the regular use of accelerated briefing as an LRCM tool. First, not many cases present truly dispositive issues, as petitioners and respondents both raise enough issues to ensure that the other party's issues are non-dispositive. Second, issues decided by the Court frequently are not dispositive because the outcome of the purportedly dispositive issue often depends on the Commerce Department's implementation of the Court's judgment. Third, although certain threshold issues may affect ancillary issues, the accelerated briefing of the threshold issue combined with a delay in the briefing of the ancillary issue will only prolong the final resolution of the case and liquidation of the entries.

4. Recommendations On The Selective Use Of Delayed Briefing

By contrast, the Advisory Committee endorses a rule or practice by which the Court delays briefing of a recurring issue. A recurring issue is one that is being litigated in at least one other case in the Federal Circuit (*e.g.*, zeroing) and will affect the outcome of the case in which delayed briefing is ordered. Once the issue has been finally resolved in the first case, briefing may proceed. The CIT's current practice is to allow the same issue to be briefed and decided in all cases in which it is presented except in certain limited circumstances (*e.g.*, CDSOA). The selected use of delayed briefing would avoid the unnecessary expense of having parties brief the same issue repeatedly and forcing the CIT and the Federal Circuit to decide the issue repeatedly.

5. Recommendations On The More Efficient Use Of Existing LRCM Tools

The Advisory Committee also makes recommendations on the use of existing LRCM tools to streamline litigation before the CIT by either combining issues for briefing in a single case or by separating issues for briefing in different cases by different judges.

First, the Advisory Committee recommends that the CIT continue its practice of combining issues that are common to all parties into one briefing before one judge. This procedure would work particularly well, for example, for cases involving issues common to multiple respondents

arising from the same AD or CVD order. An example of this procedure was the General Issues Appendix used in the challenges to the decisions in the steel investigations in the 1990s. The CIT can always order separate briefing among different judges on country-specific issues.

Second, the Advisory Committee recommends that the CIT continue to separate certain issues for adjudication and assign separate cases to different judges as a case management tool. For example, the Advisory Committee endorses the CIT's general practice to separate actions challenging the injury determinations versus the AD/CVD determinations arising from the same order(s). Further, subject to certain exceptions, the Advisory Committee endorses separating CIT actions challenging AD versus CVD order(s) covering the same product. In addition, the Advisory Committee endorses the CIT's current practice of separating by country the actions challenging Commerce's AD/CVD decisions covering the same product exported from multiple countries. Exceptions to this latter recommendation include challenges to the Commerce Department's scope determinations or other instances in which the adjudication of an issue in one case would affect decision-making in the other case.

EXCERPTS FROM MODEL RULES OF PROFESSIONAL CONDUCT

Preamble

1. A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

2. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

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9. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Rule 1.2 – Scope Of Representation And Allocation Of Authority Between Client And Lawyer

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(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Rule 1.7 – Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.9 – Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10 – Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.