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COURT OF INTERNATIONAL TRADE MARKS 25TH ANNIVERSARY

As the Court of International Trade (CIT) Nov. 1 marked the 25th anniversary of its creation by the Customs Court Act of 1980, many members of the trade bar are calling for international dispute-settlement tribunals to be reconstituted based on the CIT model. Speakers at a conference held at the court in conjunction with its anniversary praised the expertise and experience that CIT judges bring to the trade cases they adjudicate and bemoaned the lack of such qualities among members of World Trade Organization (WTO) and NAFTA panels.

> Unlike CIT judges who devote full time to a narrow specialized field of law, WTO and NAFTA panelists often work only part time on panels, may not have close knowledge of U.S. trade laws and standards of review, and, in some cases, may have conflicts of interest if they practice trade law, speakers said.

Although trade lawyers and government agencies aren't always happy with CIT rulings, they acknowledge that the Customs Court Act achieved its purpose: consolidating most trade and customs law cases in one court, creating a bench filed with judges with specialized knowledge in the field, and giving the court the same full powers to enforce its rulings as any Article III court. Even lawyers in the agencies whose decisions the CIT reviews and sometimes overturns praised the court. "It's nice to know there is a court that has background and knowledge on an issue," said International Trade Commission (ITC) General Counsel James Lyons.

Over the last 25 years, the CIT has asserted its authority, established its power to issue injunctions and writs of mandamus, and clarified the standards of review, speakers said. One of the issues that continues to come to the court is whether the rulings of the ITC and International Trade Administration (ITA) are based on "substantial evidence" on the record.

The CIT's establishment, along with enactment of the 1979 Trade Agreements Act and the transfer of antidumping and countervailing duty cases to Commerce from Treasury, also helped create a new field of law. In addition to the traditional practice of trade law, which concentrated on Customs classifications and appraisals, the new branch focuses almost exclusively on the administrative and judicial review of dumping and CVD cases and has its locus in Washington rather than New York.

Looking to the future, one panel of speakers predicted the court would play a bigger role in judging how international and bilateral trade agreements apply to U.S. trade laws. Richard Cunningham of Washington, D.C.'s Steptoe & Johnson questioned whether U.S. courts would continue to follow the Supreme Court's 1804 dictum in *Charming Betsy*, which said U.S. law should be read to conform to international law whenever possible. "The real question is if

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there is much left in *Charming Betsy* after *Corus Staal*," he said, referring to a Court of Appeals for the Federal Circuit ruling in January that rejected the application of a WTO panel ruling on the issue of "zeroing" (see **WTTL**, Jan. 31, page 1).

> Joseph Dorn of King & Spalding agreed that WTO and NAFTA panel rulings will play a larger role in future CIT cases. He also foresaw an increased debate over the nationality of U.S. petitioners and respondents and which side represents domestic producers, as industries become more globalized and the sourcing of materials and production becomes more multinational.

G-20 STYMIES U.S. EFFORT TO GET DEAL ON SECTORIAL TARIFF CUTS

Emerging market countries belonging to the G-20 group of nations, especially Brazil and India, are blocking U.S. efforts to get an agreement in the Doha Round that would cut industrial tariffs in several sectors to zero, according to U.S. trade officials. Before going forward with talks on a "zero-for-zero" tariff deal in these sectors, many G-20 countries are insisting the that Doha negotiators first reach agreement on the formula and coefficients that will be used to reduce tariffs in broader Non-Agriculture Market Access (NAMA) talks, one source told WTTL.

> U.S. officials complain that the G-20 countries have not yet made adequate offers in the NAMA negotiations. This lack of progress on industrial goods has been used by the European Union (EU) as one justification for not improving the agriculture market access offer it made on Oct. 28 (see **WTTL**, Oct. 31, page 4).

The U.S. wants a sectorial deal that would eliminate tariffs in seven or eight product areas, including electronics, energy service products, medical devices, chemicals and wood products. Its proposal seeks to get 90% of WTO members to agree on eliminating tariffs among themselves. If that "critical mass" of participation is reached, then the tariffs would be bound and cut for all WTO members on a most-favored-nation (MFN) basis.

While there seems to be wide support for the use of the so-call "Swiss Formula" for cutting tariffs in the NAMA talks – making deeper cuts in higher tariffs than in lower tariffs – there has not yet been agreement on the percentage cuts that would be made in each tier. G-20 members want to wait until they see how much they would have to cut tariffs under the Swiss Formula before agreeing to eliminate the tariffs entirely in the sectoral talks.

Meanwhile, on Nov. 3, the U.S., EU, Japan, South Korea and Taiwan announced an agreement to eliminate tariffs among themselves on multi-chip packages (MCPs) ahead of the completion of the Doha Round. Effective Jan. 1, 2006, the deal will eliminate tariffs that run from 8% to 2.6%. These semiconductor packs weren't covered by the 1996 Information Technology Agreement, which dropped tariffs on most computer and telecommunications-related products, because they didn't exist then. China agreed to apply a zero tariff to MCPs in its WTO accession agreement, so the new accord will cover more than 70% of the trade in these products.

DHS WANTS TO PILOT TEST PRIVATE COLLECTION OF TRADE DATA

Looking ahead to what they call the "second generation" of cargo security, Department of Homeland Security (DHS) officials are proposing the pilot testing of a private-sector initiative to collect trade transportation and shipping information that would be made available to any government that wants to adopt trade security systems similar to those in the U.S. DHS Deputy Secretary Michael Jackson told the Customs Trade Symposium Nov. 3 that such a system would reduce the need for duplicate reporting of trade shipment information as other nations that are concerned about imports of terrorist items impose tougher border controls.

Jackson suggested that either a private company or a non-profit organization could be established to receive information on the content of shipments, the country of origin of the contents,

the factory where the goods were made and the transportation and shipping routes over which they traveled. The criteria for the information collected would be established by governments, which could then access the data to conduct their own risk assessments.

> As other countries step up their border protection measures, especially in light of the bombings in London, Madrid and Bali, they are likely to seek the same manifest data the U.S. now obtains under advanced filing requirements. They also may seek to establish a presence in foreign ports similar to the U.S. Container Security Initiative (CSI), Jackson suggested. The result could be a duplication of paperwork and personnel at foreign ports.

DHS officials have held informal talks with other countries and with the trade community about the idea but have not made a formal proposal. The idea, however, is more than merely blue sky thinking, Jackson indicated. "We've put some considerable work and energy into it and I think it's a very solid set of ideas that we can take to the market," he told reporters after his speech. "We obviously have a considerable number of issues to work through on data privacy compliance, but this framework seems a lot easier to me than the alternatives," he said.

U.S. CAN USE "ZEROING" IN ADMINISTRATIVE REVIEWS, WTO PANEL RULES

Government trade lawyers say they won a significant victory in the WTO Oct. 31 when a dispute-settlement panel said the International Trade Administration's (ITA) use of "zeroing" in the administrative review of antidumping orders was permissible under the WTO Antidumping Agreement. While the panel also ruled that such a methodology was not permitted in original dumping investigations, the lawyers say the U.S. had already lost that argument in a previous panel ruling on softwood lumber from Canada. Both the U.S. and the EU, which brought the complaint to the WTO, are expected to appeal different parts of the ruling.

> Whether the bar to using zeroing in investigations hurts ITA's ability to find dumping – and thus not have any orders to review administratively – will depend on how it applies weighted-average normal values to weighted-average export prices. Under current practices, ITA disregards above normal value export sales in calculating dumping margins, declaring above normal sales to be "zero."

While zeroing isn't permitted in the investigation phase under the AD Agreement, the panel rejected the EU claim that the Trade Act requires the practice and "as such" violates WTO rules. It cited a U.S. Court of Appeals for the Federal Circuit ruling in *Corus Staal* which said the law didn't mandate zeroing. Nonetheless, ITA "acted in breach of Article 2.4.2 of the AD Agreement when in antidumping investigations at issue [it] did not include in the numerator used to calculate weighted average dumping margins any amounts by which average export prices in individual averaging groups exceed the average normal value for such groups," it said.

The panel read the AD Agreement to apply a different standard to administrative reviews, which it considered to be "proceedings" and not investigations. Citing past panel and Appellate Body rulings, it saw a clear pattern. The investigation phase "has been consistently distinguished from duty assessment and reviews as a unique phase with a distinct purpose and as as consequence, rules applicable to investigations have been found not to be ipso facto applicable to other phases of countervailing duty and antidumping proceedings," it ruled.

U.S., CHINA EXPECTED TO SIGN TEXTILE AGREEMENT

U.S. Trade Representative (USTR) Rob Portman is expected to sign a comprehensive textile agreement restraining imports of Chinese textiles when he meets in Geneva Nov. 8 or 9 with China's Commerce Minister Bo Xilai, industry sources predict. If the deal isn't signed then, it could be signed the following week when Portman visits Beijing, they say. Most of the groundwork for an agreement was completed during talks in Washington the week of Oct. 31

between U.S. Chief Textile Negotiator David Spooner and his Chinese counterparts (see **WTTL**, Oct. 17, page 1). The two sides reportedly have settled on the products to be covered in the accord, and the Chinese have agreed to have the restrictions imposed until the end of 2008. Still unresolved are the growth rates that will be allowed during each of the next three years.

> U.S. textile producers want a growth rate close to the 7.5% rate allowed under the textile safeguard rules if no agreement is reached. China wants a greater rate because it considers the opening of the U.S. market one of the major benefits it won by joining the WTO. In addition, Beijing doesn't want a deal tougher than it negotiated with the EU because it fears the Europeans might come back and ask for the same terms Washington gets. It also is concerned other countries may use the U.S. accord as a model to restrict Chinese textile and apparel imports.

DOHA ROUND AMBITIONS SHRINKING AS HONG KONG NEARS

As USTR Rob Portman heads to London on Nov. 7 and Geneva Nov. 8 and 9 for more talks with his key trade counterparts, expectations for the WTO Ministerial Meeting in Hong Kong in December and the whole Doha Round are declining sharply. With the EU's agriculture proposal boxed in by its Common Agriculture Policy (CAP) and G-20 countries not making significant offers in non-agriculture market access (NAMA) and services, negotiators may have to accept a much less ambitious conclusion to the round or see the talks extend two more years.

> EU officials say the U.S. proposal to cut the highest farm tariffs by 90% is implausible. "This is simply not reality," one EU official said. They point to the seven rounds of GATT industrial tariff cutting talks that preceded the Uruguay Round, suggesting that the Doha Round isn't intended to be the final round of talks on agriculture. "We are only at the second round," the EU official said.

* * * BRIEFS * * *

EXPORT ENFORCEMENT: Two executives of Jackmoon USA, which is now part of Tyco Electronics, will pay $5,500 each as part of agreements with BIS for allegedly causing filing of false information on SED. Lei Jack Chen, president of Jackmoon, and Spencer Clark Rogers, its vice president for sales, sold foreign-origin sealing products to U.S. exporter but claimed they were U.S. origin. This caused exporter to list U.S. as country of origin falsely on SED, BIS charged. Agency also imposed two-year denial of export licensing privileges on the pair, but suspended one year of denial and said it would waive second year, if they remained in compliance with export control regulations.

ANTIBOYCOTT: Epstein, Edell, Shapiro, Finman & Lytle, Rockville, MD, patent law firm, has agreed to pay $17,000 civil fine as part of settlement agreement with BIS for allegedly furnishing boycott-related information in document it sent to Syria. Firm voluntarily self-disclosed its action.

BAHRAIN: During non-markup-markup Nov. 3, House Ways and Means Committee approved draft legislation to implement U.S.-Bahrain FTA (see **WTTL**, Oct. 31, page 1).

JAPAN: USTR Rob Portman Nov. 2 praised progress Japan is making as he released fourth annual report to President Bush and Prime Minister Koizumi on Tokyo's promised regulatory reform efforts. Areas where positive steps have been taken include mobile wireless, trade in fruits and vegetables, IPR, medical devices and drugs, Portman said. USTR, however, is now focusing attention on Tokyo's privatization of Japan Post, its postal system, he said. One major remaining problem area is Japan's import ban on U.S. beef because of BSE concerns. Portman and Agriculture Secretary Mike Johanns told House hearing Nov. 2 that they were pleased with findings of Japanese health board which found U.S. beef posed no greater risk than Japanese beef. But they are reviewing conditions that Tokyo has placed on final lifting of ban.

SHRIMP: Despite last December's tsunami, lifting of dumping order on frozen warmwater shrimp and pawns from India and Thailand would lead to continuation or recurrence of injury to U.S. industry, ITC determined Nov. 2 on 6-0 vote in changed circumstance review (see **WTTL**, Sept. 19, page 4).

RICE: U.S. filed complaint Nov. 2 at WTO against Turkey's import restrictions on U.S. rice, including import licensing and domestic purchase requirements.