The Role of Defendant-Intervenors Before the U.S. Court of International Trade

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In an appeal of antidumping ("AD") or countervailing duty ("CVD") determinations, the government (the U.S. International Trade Commission ("ITC") or the U.S. Department of Justice on behalf of the U.S. Department of Commerce ("Commerce")) and defendant-intervenor will, in most cases, both defend the challenged administrative determination before the U.S. Court of International Trade ("USCIT"). Despite the agreed-upon outcome—*i.e.*, affirming the agency determination—the government and defendant-intervenor often have divergent interests in litigating the matter. The defendant-intervenor often has more at stake than the government and accordingly, Congress has provided a special role for the defendant-intervenor in challenges to Title VII determinations.

The distinct and sometimes divergent interests in how to litigate the appeal stem from differing perspectives, familiarity, and motivations. On the one hand, the industry intervenor contributed to the creation of the agency's administrative record and, on the side of the defense, has the economic stake in the litigation's outcome. Adverse court decisions result in the loss of tariff *protection* for the domestic industry or give rise to tariff *liability* for the U.S. importer and lost market access for the foreign producer. On the other hand, the government's interests in defending any given determination are more generalized, as it administers thousands of segments of hundreds of AD/CVD orders and formulates myriad policy decisions associated with each proceeding. Consequently, the interests of industry intervenors necessarily differ from those of a government agency tasked with neutral administration of the U.S. trade remedy laws. These divergent interests are often most starkly visible when an intervenor appeals an adverse USCIT decision to the U.S. Court of Appeals for the Federal Circuit, absent government participation.

Congress emphasized the importance of a defendant-intervenor's voice in appellate proceedings by creating a special right to intervene in AD/CVD proceedings so long as the intervenor is an interested party that was a party to the challenged proceeding. By fully acknowledging and addressing unique arguments advanced by defendant-intervenors—as Congress intended—USCIT opinions can better and more comprehensively account for the tripartite nature of these proceedings. Addressing defendant-intervenor arguments also allows for better professional development of younger litigators in the trade bar.

--Interested Parties Have Statutory Rights to Petition for AD/CVD Protection, Participate in Proceedings, and Appeal the Results--

The AD/CVD law's *raison d'être* is to provide relief to domestic industries and their workers from injury due to unfairly traded imports. Accordingly, the Tariff Act of 1930, as amended, grants domestic producers, labor unions, and certain industry associations the right to petition Commerce and the ITC to impose AD/CV duties. 19 U.S.C. §§ 1671a(b), 1673a(b), 1677(9). Commerce and the ITC act as neutral decisionmakers in adversarial proceedings. These proceedings require the adjudication of arguments made by domestic parties, foreign producers, and/or U.S. importers concerning whether imports are traded unfairly (*i.e.*, were dumped or subsidized) and whether those imports cause injury or threaten to cause injury to the domestic

industry and/or its workers. These federal agencies render determinations in AD/CVD investigations, periodic AD/CVD administrative reviews, and quinquennial "sunset" reviews of AD/CVD orders. These determinations are based upon an administrative record developed primarily by the parties to that proceeding, *e.g.*, their questionnaire responses, allegations, deficiency comments, rebuttal information, and briefs.

Once a proceeding concludes, interested parties to that proceeding have the statutory right to appeal the agency's final determination to the USCIT. *See* 19 U.S.C. § 1516a. Under its standard of review of AD/CVD proceedings, the USCIT will assess whether the determination was supported by substantial evidence and was otherwise rendered in accordance with law. In such actions, the United States or ITC is named as defendant and must defend the legality and record support for the challenged determination.

Unique among appeals before the USCIT, Congress additionally granted parties to the proceeding an absolute statutory right to intervene as plaintiff or defendant in appeals of AD/CVD proceedings before the USCIT. 28 U.S.C. § 2631(j)(1)(B); *see also id.* § 2631(j)(1)(C) (granting a similar right in actions relating to APO disclosures). Consequently, the USCIT deals with intervention with perhaps more regularity than any other Article III court. Indeed, to facilitate exercise of this right, the USCIT Rules require that plaintiffs "promptly" notify *all* parties to the administrative proceeding underlying such appeals upon filing the summons with the court. USCIT R. 3(f); *see also* 28 U.S.C. § 1581(c).

--*Three or More Parties with Divergent Interests*--

Underlying this special statutory scheme for intervention is Congress' recognition that the U.S. government; foreign producers, exporters, and governments; and domestic interested parties each have divergent interests in litigation, and each played a different role in the administrative proceedings that precipitated the challenged determination. For example, the parties may disagree with respect to administrative, monetary, and record aspects of the proceedings even if two or more parties agree on the ultimate outcome (*i.e.*, affirming or reversing the challenged administrative determination).

Framed in administrative terms, the U.S. government seeks to protect its means and methods of adjudicating AD/CVD proceedings and to preserve its administrative resources. Foreign producers and U.S. importers seek to minimize their AD/CVD liability and maximize market access. Domestic interested parties seek to obtain (and maintain) tariff protection from unfair trade. To oversimplify, foreign producers and domestic interested parties are generally incentivized to favor interpretations of the law, facts, and procedures that support an outcome favorable for their pecuniary interests. On the other hand, Commerce and the ITC have interests broader than the specific case at bar; *viz*., methodologies, procedures, and deference to their weighing of the evidentiary record. As administrative adjudicators calling balls and strikes, neither Commerce nor the ITC are truly on one side or the other as the dispute unfolds and is subject to appeal.

Framed in monetary terms, although AD/CV tariffs are paid to the U.S. Treasury and tariff refunds are paid out of the same, the United States does not collect AD/CV duties for the purpose

of generating revenue, but rather as a consequence of its neutral administration of the AD/CVD laws. Thus, unlike defending a suit in tort, the United States is not "in it for the money" *per se*. Nor is the United States incentivized to *increase* AD/CV tariffs beyond what it originally calculated. For foreign producers and exporters, on the other hand, AD/CV tariffs represent a direct cost incurred on U.S. sales that could result in lost market share. As for domestic interested parties, despite being the intended beneficiaries of the AD/CVD laws, they do not receive any tariff monies collected. Yet, they have an interest in offsetting any injurious trade and leveling the playing field with unfairly traded imports to safeguard their market share and/or stabilize prices.

Finally, framed in terms of the record itself, and using the example of Commerce's antidumping proceedings, the domestic industry is responsible for providing Commerce with a factual basis to initiate an investigation, whereupon foreign producers and exporters are primarily responsible for creating the administrative record through their responses to Commerce's questionnaires. Domestic interested parties further contribute to the administrative record by commenting upon foreign producer questionnaire responses, marshalling factual information in rebuttal, and filing certain allegations. Both sides then contribute briefing and arguments concerning methodologies. Ultimately, Commerce reviews these submissions and adjudicates disputes. And, while Commerce may submit factual information and raise issues on its own, these are primarily the tasks of the parties, as the courts have recognized.

Given these divergent interests, even where the defendant and defendant-intervenor are aligned as to the ultimate results of a given AD/CVD proceeding, they are unlikely to speak with one voice.

--*Consideration of Defendant-Intervenors' Arguments Will Yield Fulsome Legal Analysis*--

Intervenors have the right to file briefs before the court and generally expend considerable time and resources preparing, refining, and vetting the arguments presented therein. In this regard, however, plaintiff- and defendant-intervenors are not usually similarly situated. That is, most plaintiff-intervenors might join the action primarily to preserve their rights to relief by filing "me too" submissions that merely adopt the lead plaintiff's argument by reference. A defendant-intervenor, by contrast, would gain little by simply invoking the defendant's brief.

Just like plaintiffs, defendant-intervenors invest time and resources in the underlying administrative proceeding, are often closer to the record (as they helped compile it), and typically have more resources at their disposal than the government party. Such additional resources also include industry experts. Indeed, given the strictures of the exhaustion doctrine, defendant-intervenors have generally argued the very points at issue before the court throughout the underlying administrative proceedings. This experience elucidates what is contained in a Commerce "Issues and Decision Memorandum" or ITC Views.

Despite this potential to benefit the court's review of the determination on appeal, many USCIT decisions fail to reference the arguments and discussions of record evidence offered by defendant-intervenor briefs. Of course the government is best positioned to defend what the government decided administratively, as purely *post hoc* rationalizations cannot be relied upon;

but defendant-intervenors may present a path to affirmance based on a "reasonably discernible" administrative rationale. Indeed, had Congress intended to limit intervention in these cases to plaintiffs or to instances of complete divergence in government and industry interests, it could have left the USCIT to simply apply Rule 24. It did not. But intervention on the side of defendant is of virtually no use unless the arguments intervenor advances are addressed. Moreover, given the intervenor's differing interests, participation in administrative proceedings, and contributions to the administrative record, the court is encouraged to look to defendant-intervenor as a resource to fully investigate the cases before it.

-- Defendant-Intervenors' Statutory Participation in Appellate Proceedings Also Offers More Opportunities for Young Litigators Before the USCIT--

As discussed, the defendant-intervenor's right to be heard is grounded in the statute and makes practical sense, given defendant's and defendant-intervenor's divergent interests. Although Congress' creation of this right may complicate litigation with multiple viewpoints, a further tangential benefit is that it creates more professional development opportunities for young trade litigators to be heard before the USCIT. Much like other USCIT litigation experience, the chance to argue perspectives and approaches particular to a defendant-intervenor allows young litigators to more quickly hone their craft, thereby enhancing the overall quality and depth of the USCIT bar. We hope this tangential benefit further encourages the Court to regularly hear from defendant-intervenors and consider their arguments when resolving disputes.