

## 3 International Trade Cases To Watch: Midyear Report

By Jennifer Doherty

*Law360 (August 13, 2024, 4:44 PM EDT)* -- The Federal Circuit is on track to issue its final word in challenges to duties on Chinese products and a lumber dispute seeking the court's guidance despite an ongoing trade pact arbitration, while the World Trade Organization's dispute tribunal is hashing out Brussels' beef over Colombia's tariffs on frozen french fries.

Here, Law360 highlights three cases to watch during the second half of this year:

### Section 301 Appeal Could Gain from Chevron Decision

The U.S. Supreme Court's overturning of the 40-year-old Chevron deference standard that was afforded to the executive branch's interpretation of ambiguous laws could come up in a pending Federal Circuit appeal of a test case representing claims from thousands of companies opposing the third and fourth rounds of tariffs the Trump administration imposed on China between 2018 and 2019

Crowell & Moring LLP partner John Brew questioned how the appeals court could stand behind the U.S. Court of International Trade decision upholding the enlarged duties, given the Federal Circuit's decision last year affirming the president's authority to modify safeguard tariffs under the Trade Act of 1974 to make them more restrictive.

Part of the panel's decision in last year's case — brought by a Solar Energy Industry Association-led group, which lost its rehearing bid Tuesday — turned on the minor nature of the changes the White House made to the solar safeguard duties.

In contrast, the additional duties the Trump administration imposed to counter China's allegedly unfair trade practices under Section 301 of the same statute took the program from levying \$50 billion worth of goods from China to over \$300 billion.

"Is that the best interpretation of the Section 301 statute: to give the president authority to make major changes to the imposition of tariffs?" Brew asked rhetorically.

The case is HMTX Industries LLC v. U.S., case number 23-1891, in the U.S. Court of Appeals for the Federal Circuit.

### Canadian Lumber Co. Calls Fed. Circ. Into Duty Dispute

Another appeal pending before the Federal Circuit seeks an injunction against the U.S. Department of Commerce for requiring cash deposits based on old duty rates during an administrative review of Canadian lumber duties, even though a United States-Mexico-Canada Agreement arbitration panel is already examining the resulting duties from the review.

In June, a three-judge panel heard arguments from Canadian lumber company J.D. Irving Ltd. calling for the court to bar Commerce from requiring importers to pay cash deposits based on duty rates they carried in the past when newer tariff calculations are available.

But reaching JDI's claims could mean stepping into a dispute that a USMCA panel is already navigating. The U.S. Court of International Trade dismissed JDI's claims in January 2023, saying it lost jurisdiction when Canada brought claims over Commerce's determination in the 2019 antidumping duty review to the arbitration forum.

During oral arguments, JDI's counsel attempted to distinguish its claims regarding preliminary cash payments from Canada's objections to the final duty calculations. Further, while a USMCA panel can remand final rates, it lacks the federal courts' authority to enjoin the broader Commerce practice of requiring payment based on "outdated" rates, JDI said.

Commerce's instructions during the review forced JDI to cough up estimated duties of 11.59%, even though its rate had more recently been set at 1.57%, the company said.

The case is J.D. Irving Ltd. v. United States, case number 23-1652, in the U.S. Court of Appeals for the Federal Circuit.

### **Arbitration Keeps the Heat Low in French Fry Dispute**

In June, the European Union relaunched a dispute it first brought to the World Trade Organization in 2019 over antidumping duties Colombia imposed on frozen french fries from three EU countries. The case marked the first appeal decided by the Multi-Party Interim Appeal Arbitration Arrangement, or MPIA, a temporary substitute for the WTO's nonfunctioning Appellate Body, with arbitrators coming down largely in support of the EU.

While the December 2022 MPIA decision didn't end the transatlantic tater tiff — Brussels is now seeking consultations over alleged shortcomings in the policies Colombia implemented in response to it — the alternative arbitration forum headed off potential escalation, according to Alan Yanovich, an international trade attorney at Akin Gump Strauss Hauer & Feld LLP.

Current EU law allows Brussels to retaliate against uncooperative respondents in WTO disputes, such as those who block a dispute settlement body report from going into effect by lodging an appeal with the shuttered Appellate Body. Doing so throws the case into indefinite limbo, preventing further proceedings until the body starts hearing appeals again.

"We would've had perhaps Colombia maintaining the measures in place as they were, and then the EU imposing trade barriers on Colombian exports," Yanovich told Law360. "That hasn't happened thanks to the MPIA, thanks to the fact that the parties agreed and they were able to adjudicate the matter on appeal, and at least for one of the exporters, the situation has improved."

The case is Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands, case number DSDS591, before the WTO Dispute Settlement Body.

--Editing by Orlando Lorenzo.

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