

Gov't Meets Skeptical Fed. Circ. In Defending Steel Duties

By **Bryan Koenig**

Law360, Washington (February 12, 2018, 7:52 PM EST) -- A Federal Circuit panel on Monday questioned the U.S. government's support of a Court of International Trade decision preventing Thyssenkrupp from challenging 10 percent anti-dumping duties imposed on certain German steel imports.

Thyssenkrupp Steel North America Inc. lost its CIT challenge after the court concluded in part it lacked jurisdiction to hear the case because the U.S. Customs and Border Protection's decision to impose the tariff was little more than "ministerial."

Thyssenkrupp contends that the decision was more than ministerial. And the judges pressed the government Monday to explain why the company lacks the ability to challenge 10.02 percent import duties imposed on some "corrosions-resistant" steel even as the U.S. Department of Commerce put the anti-dumping duties on hold as it pursued a "sunset" revocation review to see if they were still needed.

"Why isn't this a proper protest?" Circuit Judge Timothy B. Dyk asked.

Arguing for the government, U.S. Department of Justice attorney Justin R. Miller contended that the CBP denied the protest merely based on a "straightforward application" of clear instructions from Commerce, leaving Thyssenkrupp nothing to protest.

Company attorney Robert L. LaFrankie of Crowell & Moring LLP argued, however, that CBP clearly and subjectively interpreted its role in handling the protest of the decision to "liquidate," or process, the anti-dumping cash deposits it made on steel imports at the Port of Mobile, Alabama.

Importers must make the deposits of various duties as their goods are brought into the country. The CBP later moves to liquidate, or process and keep, the money, reconciling any overpayments or underpayments. LaFrankie argued that the agency is interpreting a Commerce instruction on processing "unliquidated" deposits, which were to exclude the anti-dumping duties. Thyssenkrupp contends its deposits clearly counted as unliquidated, and thus the 10 percent duty should have been given back because the funds' liquidation had not yet been finalized.

The problem with Commerce's instructions on unliquidated assets — the only kind of deposits that Congress permits to be freed up under sunset revocations of old duties — is that the term lacks a clear definition and according to Thyssenkrupp, even different ports of entry have defined the term differently.

“There’s not a specific definition,” LaFrankie said, arguing one can’t be found “in the statute or anywhere.”

When the panel turned to Miller for a definition, he agreed that there’s no express definition of the term and instead argued that its meaning is made clear in context — the government contends unliquidated doesn’t refer to deposits held up by protests. He further argued that CBP was merely enforcing the duty rates set by Commerce, with no interpretation that could be challenged, just a following of “the plain meaning of the terms.”

Those assertions drew pushback in particular from Judge Dyk, who said CBP appears to have interpreted the meaning of unliquidated and wondered why Congress would foreclose challenges to sunset review liquidations, which he called “fairly common” features.

“Wouldn’t you expect them to say something more explicit if they wanted to bar protests under these circumstances?” Judge Dyk asked.

Circuit Judge Richard G. Taranto expressed similar concerns, asking why it wouldn’t make sense for unliquidated duties to apply to instances where no final debt has been calculated or at least the time to protest has not yet run out.

As for Miller, he argued that the phrase is used so frequently that its meaning is evident. If Congress would have wanted to allow challenges, he said, the language would allow for them regardless of the status of liquidation — challenges can only be brought before liquidations are finalized.

Agencies, Miller argued further, must continue to impose antidumping duties while reviews are underway to see if they should be sunset — sunset reviews yield a revocation of duties, imposed to offset products allegedly being sold into the U.S. at unfairly low market rates, if the government concludes the duties’ absence won’t harm American industry being protected in the first place.

“Protests are intended to be directed towards substantive determinations of Customs. And revocation decisions are not substantive decisions of Customs. They’re the decisions of the ITC and Commerce. And so therefore the protest remedies were never intended to keep that question open,” Miller said.

CBP would only have created a “protestable” interpretation if its ruling letter denying the challenge read unliquidated “beyond its plain meaning,” Miller said. He also warned against expanding the definition of liquidation beyond its normal understanding, only for Judge Taranto to wonder why the government never raised concerns of “chaos” in its briefs.

Interpreting liquidation to include broader claims, Miller argued, would make for “ambiguous” interpretations.

Circuit Judges Alan D. Lourie, Timothy B. Dyk and Richard G. Taranto sat on the panel.

The government is represented by Justin R. Miller and Amy Rubin with the U.S. Department of Justice and Beth C. Brotman with the U.S. Bureau of Customs and Border Protection.

Thyssenkrupp is represented by Robert L. LaFrankie and Alexander Schaefer of Crowell & Moring LLP.

The case is Thyssenkrupp Steel v. U.S., case number 17-1407, in the U.S. Court of Appeals for the Federal Circuit.

--Editing by Jill Coffey.

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