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TRADE AND CUSTOMS LITIGATION

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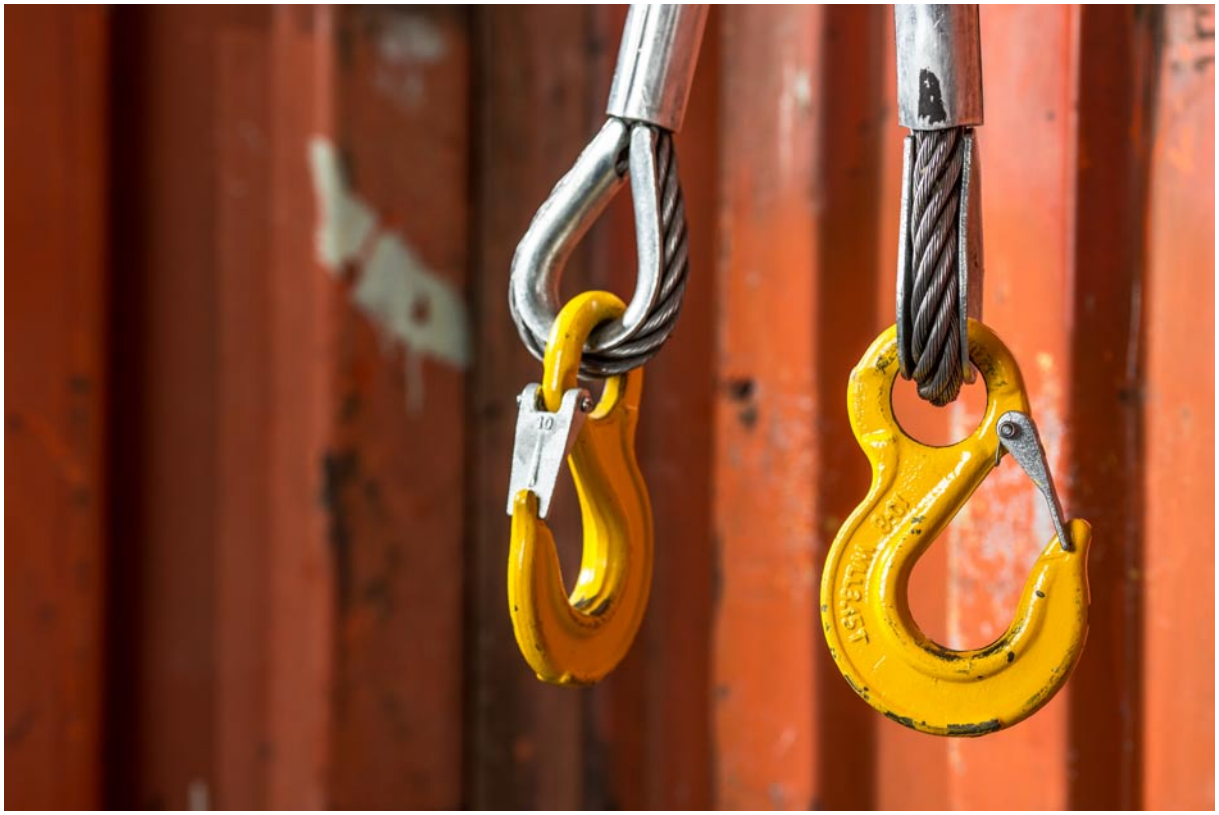
HOT TOPIC

TRADE AND CUSTOMS LITIGATION



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Michael Cone manages the New York and Washington, DC offices of FisherBroyles. He concentrates his practice in the areas of administrative, customs and international trade law. He counsels clients on a wide array of regulatory compliance issues, with administrative expertise that includes matters falling under the jurisdiction of US Customs and Border Protection and the panoply of other administrative bodies that regulate the importation, marketing and sale of merchandise. He represents clients in all phases of litigation before federal and state courts, including the US Court of International Trade and the US Court of Appeals for the Federal Circuit. Mr Cone also helps businesses comply with domestic laws and regulations applicable to their imported merchandise.

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Renato Antonini focuses on EU trade and WTO laws relating to trade protection measures and dispute settlement. He has extensive experience in EU and Italian customs and export control law. He also advises clients in EU and Italian competition law, particularly in cartels, state aid and abuse of dominance issues. Mr Antonini has assisted clients in many EU and BRIC trade defence investigations, such as antidumping, antisubsidy, and anticircumvention investigations, as well as a full range of other trade matters, and he has successfully defended clients' interests before governments and courts.

CD: What key trends have you seen in trade and customs litigation over the past 12-18 months? To what extent has there been a rise in investigation and enforcement activity by government authorities?

O'Brien: We have seen a general increase in the level of enforcement of cross-border intellectual property rights. For example, seizures of counterfeit products by US Customs and Border Protection (CBP) significantly increased this past year, in part due to closer cooperation and joint enforcement operations with exporting country governments. Similarly, enforcement actions under the Economic Espionage Act have risen substantially, as trade secret misappropriation continues to take on increasing importance. And patent actions continue to command a high level of attention in the district courts and in several federal agencies.

Cone: Importers continue to challenge the way CBP classifies their merchandise under the US tariff schedule. The US Court of International Trade (CIT) has been siding frequently with importers in these disputes, leading to significant customs duty refunds. On the other hand, CBP and the US Department of Justice (DOJ) have been actively pursuing penalty actions against importers and individuals they think are responsible for underpayments of customs duties. In terms of investigation and enforcement, CBP's budget has been growing year after year. The agency recently stated its intention to increase the number of customs compliance audits and dedicate new assets to enforcing trade laws and not just to fighting terrorism. A recent upgrade of CBP's computer networks and the inter-agency electronic platforms it uses to enforce the laws of 40 other agencies has led to heightened enforcement activity for imported commodities across the board.

Schwechter: The increased focus of US government agencies in the export controls and embargoes and sanctions area that began a number of years ago has continued unabated with ever increasing and large penalty settlements. The most prominent of these was the guilty plea and the $8.9bn settlement of embargo and sanctions violations by BNP Paribas earlier this year. Other significant foreign banks are also reportedly under investigation. In addition, a Commerce Department investigation of the oilfield services company, Weatherford International, resulted in the largest export control penalty case in US history, with the company making a $100m payment in 2013. Moreover, the Commerce Department recently settled with a subsidiary of Intel Corporation in one of the first cases brought against a US exporter for exports of encryption items without required licences.

Antonini: In the field of Trade Defence Instruments (TDIs), there has been a slight increase in the number of new investigations being initiated in the European Union (EU) as compared to the previous year. Indeed, in 2013, a mere nine investigations were initiated, while in the first 10 months of 2014, the number already stood at 12. This is nevertheless far from the peak of the past decade of 36 investigations being initiated in 2006. At the level of the World Trade Organization (WTO), the number of requests for consultations, which is the first step in WTO dispute settlement, appears average for 2014. Indeed, while in 2013 there were 20 requests for consultations, in the first 10 months of 2014 there were 11 requests for consultations. While this appears low in comparison, it must be borne in mind that there were six requests for consultations in the final two months of 2013.

CD: Could you provide an insight into the nature and sources of common disputes in this area?

Cone: The common denominator of disputes in this area is that some federal agency thinks importers and their merchandise failed to comply with federal law. For example, German motor vehicles must comply with pollution control provisions of the Environmental Protection Agency; mussels from New Zealand must comply with Food and Drug Administration regulations; children's toys made in Guangdong province must have undergone testing mandated by the Consumer Products Safety Commission – and so on. CBP's own regulations require the importer to properly classify goods, pay the correct amount of customs duties, mark the goods with their correct country of origin, and comply with complicated free trade agreement regimes when preferential duty rates are claimed. When a dispute over imported merchandise arises, the menu of unsavoury prospects remains the same regardless of which agency's rules were allegedly broken – detentions, seizures, fines, penalties, administrative enforcement actions and litigation are all on the table.

Antonini: The bulk of EU TDI disputes concern anti-dumping investigations, with an increasing number of anti-subsidy investigations. China is often the target of the EU's trade defence investigations. In the first 10 months of 2014, imports from China were the target of four out of 12 investigations. Russian and Turkish imports were each the target of two investigations. However, in 2013, Chinese imports were targeted in six out of nine investigations, with India, Indonesia and Vietnam each being the target of one investigation. Most WTO dispute settlement cases concern TDIs. In the first 10 months of 2014, four out of 11 requests for consultations targeted TDIs, while the remaining disputes concerned myriad measures. Nevertheless, the most high profile cases principally concern regulatory measures, such as

the recent US-Tuna II (Mexico) and EC-Seal Products disputes and the ongoing Australia-Tobacco Plain Packaging disputes. While the US and the EU have by far initiated, as well as defended, the highest number of disputes, there is an increasing trend in the use of the WTO dispute settlement system by developing countries, especially by emerging economies such as China, India, Brazil and recently Russia.

Schwechter: A significant trend that has occurred in connection with embargo and sanctions enforcement is that, for financial entities, it is not just the federal authorities that are investigating and seeking to impose penalties. The New York State Department of Financial Services (DFS) is now also very much a significant player in bringing actions against banks that violate sanctions prohibitions. In some cases, the DFS has brought two actions against the same foreign bank. For example, in 2013, Bank of Tokyo Mitsubishi UFJ paid DFS $250m related to sanctions violations, and in November 2014 the bank agreed to pay an additional $315m for misleading regulators regarding the transactions related to those violations. Disciplinary action against the responsible employees was also mandated. Elsewhere, litigation at the US Court of International Trade and the US Court of Appeals for the Federal Circuit regarding customs disputes, as well as appeals of antidumping and countervailing duty administrative proceedings, continue, with the recent *Trek Leather* decision, having gained considerable attention. Finally, an important growth area in trade and customs litigation involves Section 337 petitions brought at the US International Trade Commission which seeks to exclude US imports of foreign-origin items allegedly infringing US patents or other intellectual property rights. These proceedings, which proceed much more expeditiously than alternative district court litigation, have exploded in recent years. A large number of recent cases have involved computer and telecommunications products.

O'Brien: Some cases involve multiple exporters located in jurisdictions where enforcement of rights can be difficult or impossible. For these situations, actions by CBP, the US International Trade Commissions (US ITC) or other government agencies may be the only practical approach to effective relief. Other cases involve short lifecycle products, where the time to litigate a case in US district court and through appeals may be longer than the relevant commercial life of the product. A third category includes brand protection. Rights owners are properly concerned with the serious damage that can be quickly caused by counterfeit or grey market product, and US trade laws provide avenues can often provide for fast, effective relief.

CD: Have any recent cases caught your eye? What lessons can we draw from their outcome?

Schwechter: The *en banc Trek Leather* decision by the US Court of Appeals for the Federal Circuit is one that has garnered a lot of attention in the international trade community. In that case, the senior executive of a company that had improperly imported merchandise was found to be personally liable for customs penalties related to the failure to declare assists, even though the company was the importer of record, and even though the subject violations did not involve a fraud level of culpability. Notwithstanding the fact that there were some unusual facts at play that are not likely to exist in connection with imports by major corporations, the case has created substantial concern for many compliance officials at importing companies because they are concerned that CBP might also look to them individually for penalties where entries are improperly made by the companies for whom they work. One other case to mention is the Deferred Prosecution Agreement (DPA) and related $21m 2014 settlement that the Dutch airplane manufacturer, Fokker, reached with the US authorities for export control and sanctions violations following submission of a voluntary self-disclosure. There, despite requests from the government to accept the proposed settlement, the judge has, so far, not accepted it, apparently out of a concern that it may be too favourable to Fokker, and partly due to questions about whether the voluntary self-disclosure actually qualified as such a disclosure. If the judge rejects the DPA, it would be most unusual.

O'Brien: One significant recent decision was the disapproval by the Office of the United States Trade Representative (USTR) of the determination by the US ITC in the patent litigation involving Apple and Samsung. USTR disapprovals of decisions by the USITC are extremely rare. In that case, the decision at issue involved standard essential patents (SEPs), which is a subject of high interest in various US government agencies, including the DOJ and the Federal Trade Commission (FTC). The USTR held that policy questions involving competition in the US market and the public interest weighed in favour of disapproval, which sent a signal to owners of SEPs regarding issues to be addressed in future ITC investigations.

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>
> *Kevin O'Brien, Baker & McKenzie*

Cone: In September 2014, the CIT's appellate body announced the first unanimous en banc decision in its 32-year history, and the result was foreboding for people who work inside or alongside importers. *United States v. Trek Leather* held that an individual who did not act as the importer of record but who participated in activities giving rise to customs violations could be held directly liable for grossly negligent conduct under the customs penalty statute. Prior to this decision, the law seemed fairly settled that company officers, in-house compliance personnel and outside consultants could only be held liable for unpaid customs duties and penalties if they intentionally aided or abetted an importer engaged in customs fraud. Now, anyone involved in or responsible for customs activities can theoretically be held directly liable even for unintentional customs violations. The lesson is clear: management will ignore internal customs compliance controls at its own peril.

Antonini: Out of the bulk of recent noteworthy cases, there are two that are particularly remarkable. Firstly, the recent settlement between the EU and China in the Telecoms case avoided the *ex officio* initiation of anti-dumping and anti-subsidy investigations in the EU, i.e., an investigation launched by the EC on its own initiative, without an official complaint by the domestic industry. The matter was a politically and economically sensitive dispute, with over €1bn worth of Chinese exports to the EU. The settlement shows that the EU and China manage to find a political solution to trade defence disputes in highly sensitive sectors, which started with the Solar Panels case. Secondly, without taking position on the recent settlement between the US and Brazil in the Cotton dispute, which has been heralded by some and denounced by others, it marked the end, for now, of a decade-long dispute between the two giants, whereby the US essentially paid off Brazil in order to continue subsidising its own cotton sector. This once again shows that when trade disputes arise between powerful nations in sensitive sectors, it is not uncommon for a political agreement to be struck.

"Now, anyone involved in or responsible for customs activities can theoretically be held directly liable even for unintentional customs violations."

Michael Cone, FisherBroyles

CD: What roles do various courts and agencies have in resolving trade disputes? In your opinion, how effective is the system and its mechanisms?

Antonini: Within the EU, the EC is the investigating authority for TDIs. The Regulations imposing TDIs can be challenged before the General Court by those with standing, like exporting producers subject to the measures. The General Court's ruling can be appealed on points of law before the Court of Justice. Persons without standing can challenge the validity of the regulations imposing TDIs before national courts, which may have to seek a preliminary ruling from the Court of Justice. Unfortunately, in certain Member States, national courts are reluctant to do so, forcing interested parties to continue the litigation up to the court of last instance. As regards customs matters, a review procedure often exists before the national authorities. Customs matters brought before the national court also often lead to preliminary ruling requests to the Court of Justice. The European Anti-Fraud Office (OLAF) is responsible for investigating the evasion of import duties on imports into the EU, in cooperation with national customs authorities. The recovery of such customs duties is taken care of by the national customs authorities, on the basis of OLAF's findings. The rights of interested parties are often harmed as a result of the secrecy of OLAF investigations. Trade disputes between WTO Members can be brought before the WTO Dispute Settlement Body by a government of a WTO Member. Although WTO proceedings take increasingly long, they are still significantly quicker than procedures before, for instance, the Court of Justice.

Schwechter: Most US trade disputes involve the US government as a party and, therefore, they generally begin as administrative proceedings, with administrative determinations appealed to the courts. The CIT has exclusive jurisdiction over import matters. In some cases, such as antidumping and countervailing duties, the CIT performs 'on the record' reviews, acting as if it were an appellate court. In others, such as customs disputes and penalties, it conducts trials and acts as a court of first instance. This system generally works effectively.

O'Brien: Several different courts and agencies can be involved. For example, a rights owner can at various times be in front of the district courts, the US ITC, the USTR, CBP and the US Patent Office (US PTO) seeking enforcement or defending its rights. In addition, agencies such as the FTC and the DOJ are increasingly interested in the effects of patents on competition both within and outside of the United States. These various courts and agencies differ significantly in the relief available and in basic rules of practice involving transparency, timeliness and uniformity. As such, an intellectual property owner

needs to carefully assess the optimal avenues for relief in any particular situation.

Cone: Agencies are frontline enforcers of their own regulations. Thus, if CBP stops a shipment of python skin handbags because the importer did not present the required international wildlife permits, the US Fish & Wildlife agency will take over, seize the handbags, and may issue penalties. Each agency has its own personality, but most allow the importer to file petitions for relief from seizures and penalties. Federal courts get involved when a dispute does not settle at the administrative level. For example, the importer can file suit to demand release of its goods, and DOJ can file an enforcement action to collect an unpaid penalty. The system works fairly well because impartial federal courts place checks on zealous agencies. One problem is that even where an importer eventually prevails, it might have spent years waiting for a final resolution with a Sword of Damocles dangling over its head.

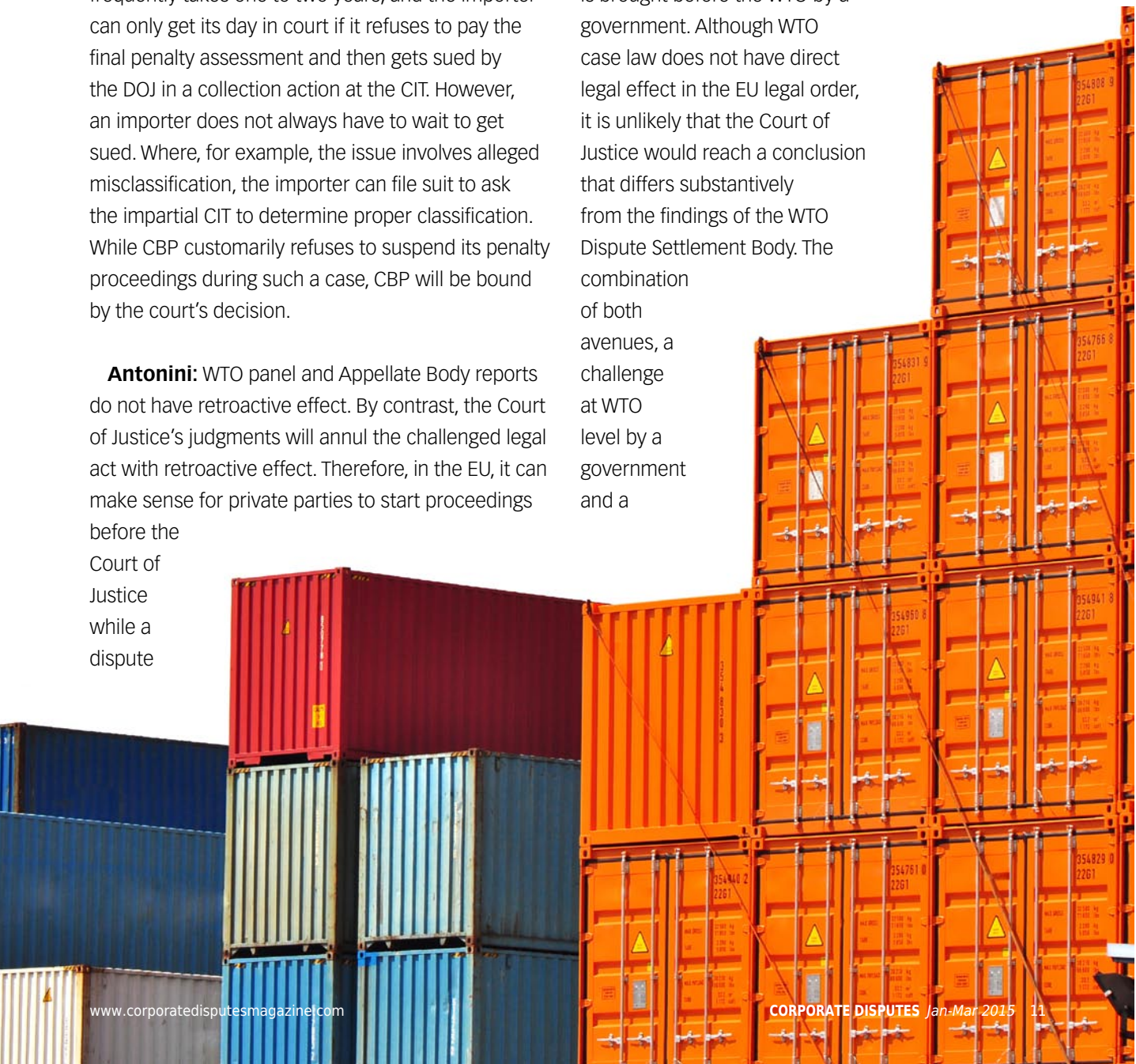
CD: What opportunities and challenges exist in terms of conducting multiple proceedings involving the same dispute?

O'Brien: Before initiating an enforcement effort, the rights owner must be aware of the speed, cost and relief available in each forum. US ITC proceedings, for example, are 'rocket docket' litigations where a party should expect immediate intense discovery followed by a full evidentiary hearing within eight to nine months. This often presents significant procedural advantages to those plaintiffs that can prepare cases prior to filing, requiring many defendants to play catch up in a short time window. Commensurate with that speed, however, is that costs often will be incurred faster than in most district court litigations, which might have a time to trial of two to three years. Also, it is not uncommon to have multiple proceedings in parallel, such as at the US PTO and in district court, requiring that parties to consider how positions in one forum could affect the proceedings in another. And, of course, the relief available can differ dramatically.

Cone: One strategy is for the importer to file a lawsuit in order to challenge the premise of an administrative penalty action being pursued by CBP. CBP's penalty actions are often commenced after dialogue with an importer concerning classification or valuation, and CBP remains unsatisfied with the importer's initial conduct or response. Unfortunately, the administrative penalty process

frequently takes one to two years, and the importer can only get its day in court if it refuses to pay the final penalty assessment and then gets sued by the DOJ in a collection action at the CIT. However, an importer does not always have to wait to get sued. Where, for example, the issue involves alleged misclassification, the importer can file suit to ask the impartial CIT to determine proper classification. While CBP customarily refuses to suspend its penalty proceedings during such a case, CBP will be bound by the court's decision.

Antonini: WTO panel and Appellate Body reports do not have retroactive effect. By contrast, the Court of Justice's judgments will annul the challenged legal act with retroactive effect. Therefore, in the EU, it can make sense for private parties to start proceedings before the Court of Justice while a dispute is brought before the WTO by a government. Although WTO case law does not have direct legal effect in the EU legal order, it is unlikely that the Court of Justice would reach a conclusion that differs substantively from the findings of the WTO Dispute Settlement Body. The combination of both avenues, a challenge at WTO level by a government and a



challenge at EU level by a private party, can thus allow a private party to obtain retroactive effects.

CD: Could you explain some of the common ways trade and customs disputes are resolved? For example, do cases involving government agency investigations 'settle' in the same sense as private party litigation?

Cone: Importers usually resolve enforcement actions during the administrative process, even if they believe the agency is dead wrong. A lot of money must be at stake before litigation makes sense. The administrative resolution and settlement process is fairly common across the federal agencies, and rarely includes the return of seized merchandise. Instead, importers normally make better progress petitioning the agencies for relief from proposed penalties. If importers can show that non-compliance was not the result of recklessness and they have implemented internal controls to help prevent a recurrence, agencies frequently reduce penalty demands. In addition to the payment of penalties, agencies sometimes require importers to enter into consent decrees stating that they will no longer violate federal regulations. Nevertheless, agencies do not generally negotiate with the same flexibility as private parties. Not only do they represent the government, but they essentially have unlimited resources – and they know it.

Antonini: While it cannot exactly be equated to a 'settlement' in private party litigation, in the field of TDIs there is a measure known as an 'undertaking'. Exporting producers subject to a trade defence investigation may offer the investigating authority an undertaking, whereby they agree to respect a minimum import price, a maximum volume, or a combination of both. While the investigating authority is not obliged to accept such an undertaking, it can be a useful tool to resolve politically sensitive cases. For instance, a price undertaking within a fixed annual volume was accepted by the EC in the widely publicised Solar Panels case. More recently, the EU and China settled the EU trade defence investigation into Chinese telecoms, through a political agreement. At the WTO, disputes are also occasionally settled, such as the recent settlements with respect to the compliance by the US with the Dispute Settlement Body's findings in the Cotton dispute, settled between the US and Brazil, and in the Clove Cigarettes dispute, settled between the US and Indonesia.

Schwechter: Most enforcement cases against major corporations in the international trade area end up getting settled. Very few large corporations want to risk litigating against the federal government, fearing even larger penalties and damage to their reputations may result if they are not successful in the litigation. This is true even though the US government is seeking increasingly harsh settlement terms, such as insisting on guilty pleas in some

cases, as it did in the BNP Paribas case. While some individuals will litigate against the government in compliance matters, many such cases settle, as well.

O'Brien: Unlike in district courts, in many cases government agencies initiate investigations that cannot simply be dismissed by the private parties. For example, in US ITC proceedings involving intellectual property – Section 337 cases – settlement agreements and consent orders must be approved by the Commission to terminate an investigation. If an agreement or consent order is not deemed to be in the public interest or is otherwise objectionable, then the investigation can continue regardless of the agreement between the parties. Similarly, if a complainant waits too long it may lose the ability to even unilaterally terminate an investigation by withdrawing the complaint. In the same way, appeals and other challenges to agency decisions may, for precedential or other reasons, be difficult or impossible to resolve through settlement.

CD: Could you outline the various options available to a domestic producer faced with counterfeit or gray market imports?

Antonini: Regarding counterfeit imports, domestic producers in the EU can enforce their IP rights by means of an application submitted in a Member State. Depending on the basis of the IP rights, such application will result in enforcement in a single Member State basis or in more than one Member State. As such, a producer may file a Union application with the relevant Member State customs authority should its IP rights be based on EU law producing effects throughout the Union. In such a case, action by the customs authorities of the Member State in question as well as of one or more other Member States is requested, and the application will be granted equal legal status among all Member States involved. However, the producer will have to file a national application with the relevant Member State customs authority should its IP rights merely enjoy national protection. Concerning

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gray market and parallel imports, domestic producers in principle have virtually no available remedy in case of intra-EU trade, in light of the principle of EU trademark exhaustion. In case of extra-EU trade, domestic producers can rely on their IP rights to prevent such imports into the EU.

O'Brien: There is a menu of options available to a potential rights holder. The rights holder could initiate a court action under state or federal unfair competition laws. The marks could be recorded with CBP as part of an effort to seize unlawful products at the port of entry. An action could be initiated at the US ITC seeking an exclusion order barring entry of the products. A complaint could be submitted to the USTR if the country of manufacture or export is tolerating the production and distribution of unlawful products. And the DOJ and State agencies could be encouraged to initiate criminal actions. In any particular case, some or all of these actions may be appropriate, and the rights owner needs to carefully chart out the proper sequence to obtain quick, cost effective relief.

Cone: A domestic producer should record its federally registered trademarks with CBP, an inexpensive but highly effective move. CBP will then look to seize and destroy imported counterfeit products, and impose fines against people involved in the infringing shipment. After CBP seizes counterfeit merchandise, it discloses to the owner of the mark the identity of the manufacturer, exporter and importer so that additional action can be taken. Grey market goods are goods manufactured abroad under a validly licensed trademark, and can be excluded – but not seized – if the trademark owner objects. In general, CBP will only exclude grey market goods if they are 'physically and materially different' from the products intended for the US market. Domestic producers can also petition the US International Trade Commission to issue an exclusion order forbidding named parties from shipping goods into the US which infringe a trademark or which constitute impermissible grey market merchandise.

"We expect to see continued aggressive enforcement of US export control, and embargo and sanctions laws, with significant penalties being imposed."

Melvin Schwechter, Baker & Hostetler LLP

CD: What are your predictions for trade and customs litigation in the months and years ahead?

Schwechter: We expect to see continued aggressive enforcement of US export control, and embargo and sanctions laws, with significant penalties being imposed. Customs litigation which, for a long time, has seen fewer and lower cases due to generally low duty rates, is likely to continue at its current level with cases brought by private parties only when significant amounts are involved. The level of antidumping and countervailing duty litigation will depend on the number of such proceedings that are brought at the administrative level. In a growing economy, large numbers of such cases are unlikely. Finally, Section 337 cases at the ITC are likely to keep increasing.

Cone: First, importers with significant customs duties at stake will continue filing suit at the CIT to contest CBP's determinations regarding classification, valuation and eligibility for free trade preferences. Although the average rate of customs duties across all products is less than 2 percent, the enormous volume of US imports can render even small margins highly relevant. Second, all three branches of government have combined to suggest a steady uptick in administrative and judicial enforcement actions in coming years. Congress is increasing CBP's budget year after year. CBP is increasing field audits and otherwise heightening its enforcement of trade laws. And the Judicial Branch's decision in *Trek Leather* provided the government a fresh new army and lots of new targets in its centuries-old battle to combat customs violations. Over the next few years we will see whether this new atmosphere presents a perfect storm for unwary importers and those who run them.

O'Brien: There will likely be continued efforts to address short lifecycle products, increasing the demand in forums that afford fast relief like the US ITC. There will also likely be a further effort to discourage weak and frivolous cases, such as an increase in the frequency of awarding attorneys fees to the prevailing party. In addition, the US courts and agencies will continue to wrestle with the unique issues raised in the assertion of SEPs, including whether and how licences should be offered under terms that are Fair, Reasonable and Non-Discriminatory (FRAND). Cross-border digital transmissions will increasingly present new and complex challenges to enforcement. And trade secret theft and misappropriation will continue to rise as an area of focus and concern. In general, protection and enforcement of intellectual property rights will be of increasing importance, and we will hopefully see more frequent instances of collaboration and joint operations among countries. CD

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