

U.S. Insight: Effects of the Coronavirus (COVID-19) in International Trade Proceedings

There is no doubt that the SARS-CoV-2 pandemic is shaping the form we work and we do businesses. U.S. Federal agencies have also been impacted by the restrictive measures and have been constrained to adapt to telework and increase their flexibility in dealing with international trade investigations. In order to conceal the United States Trade Representative (“USTR”) Agenda which specifically announces the “aggressive enforcement of U.S. trade laws to protect the interests of American business and workers”¹ and staff available resources in the current circumstances, some agencies have also decided to toll filing deadlines. Here is what you need to know on the latest developments.

1. Commerce Tolls Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to SARS-CoV-2

On April 24, 2020, the Department of Commerce (“Commerce”) announced that in response to operational adjustments due to SARS-CoV-2, it decided to uniformly toll deadlines for all antidumping duty (AD) and countervailing duty (CVD) administrative reviews by 50 days. This determination applies to both Commerce determinations (such as preliminary and final determinations in AD/CVD administrative reviews), and also pending deadlines for actions by parties to administrative reviews (such as the submission of AD/CVD questionnaire responses, supplemental questionnaire responses, and case and rebuttal briefs). This tolling is expected to impact around 200 pending review investigations.

The decision of tolling deadlines does not affect AD/CVD on-going investigations and remand proceedings which continue under the original schedule. Similarly, the tolling determination does not apply to scope inquiries, anti-circumvention proceedings, changed circumstances reviews, or sunset reviews. It also does not apply to new shipper reviews, unless a pending new shipper review has been aligned with an administrative review pursuant to 19 C.F.R. § 351.214(j).

For those AD-CVD reviews subject to the Commerce Department’s tolling of deadlines, the biggest practical effect will be a 50 day delay in the Commerce Department rendering final AD-CVD review determinations. This is important because, under U.S. law, AD-CVD review are typically only changed when the Commerce Department renders a final AD-CVD review determination.

¹ USTR, The President’s 2020 Trade Agenda and Annual Report, February 2020, available at: https://ustr.gov/sites/default/files/2020_Trade_Policy_Agenda_and_2019_Annual_Report.pdf.

2. Administrative/Court Hearings

In accordance with the USITC response to SARS-CoV-2, the USITC has suspended all in-person hearings in AD-CVD injury proceedings. Instead, interested parties have the opportunity to provide witness testimony and responses to staff questions through written submissions, in addition to post-conference briefs. The USITC provides further guidance to parties in the context of each affected investigation. Our experience is that the USITC is allowing parties to set forth their views in the context of the proceeding on the procedural changes.

The adaptation of a “hearing” in writing may seem at odds with the requirement under 19 U.S.C. 1677c imposing on the USITC the obligation to conduct a hearing “in the course” of an injury investigation when parties demand it and “before making a final determination”. This provision, however, does not define “hearing” or impose any specific limits on the nature of that hearing. The statute thus leaves to the Commission the discretion to decide what process will constitute the “hearing” for a particular case, given the circumstances of that case. The adaptation of the “hearing” rules also seems to strike a right balance between procedural fairness, due process rights, the strict statutory deadlines for making a final determination, and the current uncertainty as to the duration of social distancing measures. These elements make a request for postponement of a in-person hearing by a party difficult to prevail.

Likewise, the Court of International Trade sitting in New York has also restricted access to the courthouse until further notice.² So far, the Court continues to be operational and all filing deadlines remain in effect. Under Administrative Order No. 20-1, and upon the approval of the assigned judge, parties are able to participate in hearing proceedings via teleconference.³ The Court has published further instructions as to how parties and the general public can follow a hearing through the website.⁴ In the case of parties, the Case Manager will provide the parties with the dial-in number and access codes for participating in the proceeding via teleconference. As to the general public any person may register for listening to the proceeding the day before the hearing via an email to publicaccess@cit.uscourts.gov. The Case Management will later provide the dial-in information.

² Court of International Trade, Information Regarding the Coronavirus Disease (COVID-19) and United States Court of International Trade Operations; and Audio Recordings of Select Public Court Proceedings (April 2, 2020) available at: <https://www.cit.uscourts.gov/news/information-regarding-coronavirus-disease-covid-19-and-united-states-court-international-trade>.

³ Administrative Order No. 20-01, Access to Court proceedings as it relates to COVID-19, available at: <https://www.cit.uscourts.gov/sites/cit/files/AO%2020-01%20Access%20to%20Proceedings%20By%20Teleconference.pdf>.

⁴ Court of International Trade, Upcoming Court Proceedings Accessible via Teleconference, available at: <https://www.cit.uscourts.gov/upcoming-court-proceedings-accessible-teleconference>.

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