



INTERNATIONAL TRADE



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Dumping, Countervailing Duties

Supreme Court Asked to Review Byrd Amendment Free Speech Case

A domestic ball bearing manufacturer Dec. 28 asked the U.S. Supreme Court to review and overturn a U.S. Court of Appeals for the Federal Circuit decision upholding a requirement in the Byrd Amendment that a party must express support for a dumping or countervailing duty petition to qualify for a share of duties collected (*SKF USA Inc. v. U.S. Customs and Border Protection*, U.S., No. 09-767, 12/28/09).

The petition for certiorari, filed by SKF USA Inc., stated that as much as \$1 billion in distributions in over 40 pending cases are affected by the Federal Circuit's decision, which rejected SKF's free speech challenge to the Byrd Amendment's support requirement.

Under the now repealed Byrd Amendment, duties collected in dumping and countervailing duty cases were distributed to "affected domestic producers." The statute defined "affected domestic producers" as producers of the like domestic product who supported the petition or were petitioners in the case filed.

Congress in 2005 repealed the Byrd Amendment—also known as the Continued Dumping and Subsidy Offset Act—after an adverse World Trade Organization decision (20 ITR 188, 1/23/03), but U.S. firms could still receive dumping and subsidy duties collected before Oct. 1, 2007.

Divided Appeals Court. The dispute in this case goes back to 2005 when the International Trade Commission and the Bureau of Customs and Border Protection denied SKF USA's request for Byrd distributions on the grounds that SKF was not an affected domestic producer because it had not been a petitioner or supporter with respect to the petition resulting in the relevant antidumping duty order covering antifriction bearings from Japan. In fact, SKF said in a government questionnaire that it opposed the petition.

A divided Federal Circuit rejected the notion that the support requirement in the Byrd Amendment impinges on Constitutional free speech guarantees (26 ITR 290, 2/26/09) (30 ITRD 2121). The Federal Circuit reasoned that the statute could be saved from invalidity by construing it "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings" even though the government disclaimed this purpose. The majority applied the less rigorous standard applicable to commercial speech.

Circuit Judge Richard Linn filed a blistering dissent. Linn criticized the majority for substituting a purpose expressly disclaimed by the government in lieu of the government's "actual, asserted interest."

En Banc Review Denied. The full Federal Circuit divided 8-4 in denying en banc review (26 ITR 1401, 10/15/09) (31 ITRD 1453). The dissent in that ruling said that the majority opinion establishes a new and ambiguous exception: speech in circumstances that are sufficiently similar to commercial speech—but are not actually commercial speech—such that the commercial speech test "seems appropriate." The dissenters warned that "[o]pening up this kind of exception should not be done lightly."

This certiorari petition followed. The question presented is whether the government engages in viewpoint discrimination barred by the First Amendment when it denies eligibility for monetary benefits solely on the basis of an applicant's publicly expressed opposition to a government investigation.

"The Federal Circuit's decision violates important First Amendment principles established by a consistent line of this Court's decisions prohibiting government viewpoint discrimination," the petitioner argued. The opinion authorizes the federal government to withhold federal benefits solely on the basis of a speaker's public opposition to a proposed government course of action, SKF told the justices.

Further, the Federal Circuit justifies "facial viewpoint discrimination on the basis of a contrived purpose no-

where found in the statute and expressly disclaimed by the government.” The opinion applies the lesser scrutiny of the commercial speech doctrine to political speech regarding important government policy, SKF said.

Over 40 cases involving dozens of different products turn on the outcome of this case, SKF told the court.

SKF said that the importance of the question presented goes beyond the trade context since a statutory

support requirement implicates the core of protected speech. Under the Federal Circuit’s reasoning, Congress might use monetary incentives to encourage support for, and discourage dissent from, a wide range of government policies and decisions, SKF said.

Steptoe & Johnson LLP is representing the petitioner.

BY ROSSELLA BREVETTI