

## EXTENDING EXTRATERRITORIAL ACCOMMODATIONS IN FOREIGN INSOLVENCY PROCEEDINGS

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### I. INTRODUCTION

The complexities inherent in an insolvency proceeding involving a debtor whose assets, creditors or business transactions transcend international boundaries may prove insurmountable without the cooperation of foreign tribunals and a mechanism by which to address the varied and often conflicting rights of the parties involved. Prior to 1979, applicable law in the United States was applied in a piecemeal and sometimes inconsistent fashion.<sup>1</sup> The Bankruptcy Reform Act of 1978 (Bankruptcy Code)<sup>2</sup> provided a flexible means to achieve an economic and efficient administration of creditors' claims and debtors' assets in foreign insolvency proceedings, while recognizing well-established principles of international law.<sup>3</sup> Moreover, if implemented properly, the Bankruptcy Code provisions can effectively address the increasingly complex issues arising in foreign bankruptcy proceedings.

Since the codification of the Bankruptcy Code, a surprisingly small number of courts have utilized the procedural mechanisms afforded parties involved in foreign insolvency proceedings.<sup>4</sup> The resulting decisions, however, have consistently applied the Bankruptcy Code's flexible approach in determining the interests of competing claimants based upon the underlying policy of equality of distribution.<sup>5</sup> More importantly, many of the decisions reflect a

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1. See Becker, *International Insolvency: The Case of Herstatt*, 62 A.B.A.J. 1290 (1976); Becker, *Transnational Insolvency Transformed*, 29 AM. J. COMP. L. 706 (1981); Morales and Deutsch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 BUS. LAW. 1573 (Aug. 1984); Nadelmann, *Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company*, 52 N.Y.U. L. REV. 1 (1977); Riesenfeld, *The Status of Foreign Administrators of Insolvent Estates: A Comparative Survey*, 24 AM. J. COMP. L. 288 (1976); see also *Banque de Financement, S.A. v. First Nat'l Bank of Boston*, 568 F.2d 911 (2d Cir. 1977); *Israel-British Bank (London), Ltd. v. Federal Deposit Ins. Corp.*, 536 F.2d 509 (2d Cir. 1976), cert. denied, 429 U.S. 978 (1976); 2 W. COLLIER, COLLIER ON BANKRUPTCY, ¶ 304.01, at 304-2 to -14 (15th ed. 1985).

2. 11 U.S.C. § 101 et seq. (1979 & Supp. 1986).

3. See 11 U.S.C. § 304. Section 304 has no precursor in the Bankruptcy Act of 1898. See also H.R. Doc. No. 137, 93rd Cong., 1st Sess., pt. II, at 69-71 (1973).

4. For further discussion, see *infra* notes 66-81 and accompanying text.

5. *Id.*; see *Israel-British Bank*, 536 F.2d at 513.

judicial deference toward international adjudications, which attempt to comport with the principles of international law.<sup>6</sup> However, several courts have acknowledged that the Bankruptcy Code does not provide the exclusive means to resolve the issues that arise in foreign insolvency proceedings.<sup>7</sup> Therefore, an understanding of the options available to parties for obtaining appropriate relief in foreign bankruptcies is crucial.

This article will initially introduce and analyze the provisions of the Bankruptcy Code that pertain to foreign insolvency proceedings. The analysis will focus upon the definitional requirements for utilizing the relevant provisions, jurisdictional concerns, dismissal and venue considerations, guidelines for obtaining appropriate relief and the scope of relief available. The article will next focus upon the implications arising from recent decisions which recognize the non-exclusivity of the Bankruptcy Code provisions. Alternative means to obtain appropriate relief will then be considered. Finally, the article will conclude with a summary of relevant considerations in utilizing the available mechanisms designed to address the issues which arise in foreign insolvency proceedings.

## II. FOREIGN INSOLVENCY PROCEEDINGS UNDER THE BANKRUPTCY CODE

### A. ANCILLARY PROCEEDINGS

Section 304 of the Bankruptcy Code implements the traditional accommodations extended to foreign bankruptcy tribunals by expressly authorizing a "foreign representative"<sup>8</sup> to commence in the U.S. bankruptcy courts a proceeding ancillary to a "foreign proceeding".<sup>9</sup> An ancillary proceeding commenced under section

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6. See *supra* note 4 and accompanying text; Gitlin & Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 BUS. LAW. 307 (1987).

7. See *infra* notes 87-91 and accompanying text.

8. See *infra* text accompanying notes 45-47.

9. 11 U.S.C. § 304(a) (1979 & Supp. 1986). Section 304 provides as follows:

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may-

(1) enjoin the commencement or continuation of-

(A) any action against (i) a debtor with respect to property involved in such foreign proceeding; or (ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

304, however, is not a true bankruptcy proceeding with its attendant benefits and burdens.<sup>10</sup> A section 304 proceeding has a limited function — to aid in a proceeding pending in a foreign court.<sup>11</sup> Consequently, the procedural mechanisms for initiating an ancillary proceeding and the remedies available differ substantially from a full-scale bankruptcy proceeding.

According to the accompanying legislative history, section 304 was designed to permit a foreign representative of a foreign bank-

- (2) order turnover of the property to such estate, or the proceeds of such property, to such foreign representative; or
- (3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with-

- (1) just treatment of all holders of claims against or interests in such estate;
- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of such estate;
- (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
- (5) comity; and
- (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

*Id.*

10. A case under § 304 is not a full-scale bankruptcy case with an automatic stay prohibiting dismemberment of assets by vigilant creditors or with avoiding powers given to a fiduciary, be it a trustee or debtor-in-possession, to ensure equality of distribution among creditors. *See Cunard Steamship Co., Ltd. v. Salen Reefer Serv.* AB, 773 F.2d 452 (2d Cir. 1985). Rather, a § 304 case is a limited one, designed to function in aid of a proceeding pending in a foreign court. *See In re Trakman*, 33 Bankr. 780, 783 (Bankr. S.D.N.Y. 1983); *In re Culmer*, 25 Bankr. 621, 624 (Bankr. S.D.N.Y. 1982); H.R. REP. NO. 595, 95th Cong., 1st Sess. 324-25 (1977); S. REP. NO. 989, 95th Cong., 2nd Sess. 35 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS, 5787, 5821, 6280-81; 2 W. COLLIER, *supra* note 1, ¶ 304.01, at 304-2 to -14.

"A chapter 11 case, on the other hand, gives rise to an automatic stay and, unless a trustee is appointed for cause, clothes the debtor-in-possession with the ability to avoid transfers which, absent bankruptcy, it could not otherwise undo." Kennedy, *The Commencement of a Case Under the New Bankruptcy Code*, 4 WASH. & LEE L. REV. 977, 1019 (1979).

11. *Cunard*, 773 F.2d at 456; *see* 2 W. COLLIER, *supra* note 1, at 304-6. "If the court grants a petition under section 304, there is no trustee or debtor in possession, and there is no 'estate' within the meaning of section 541. Therefore, none of the marshalling or avoiding powers under the Code would be available to the foreign representative." 2 W. COLLIER, *supra* note 1, at 304-6.

The ancillary proceeding was conceived as a more efficient and less costly alternative to commencing a plenary proceeding which would be duplicative of a foreign proceeding. Congress retained the option of commencing a full bankruptcy case if the estate in the United States is substantial or complicated enough to require a full case for proper administration.

*Cunard*, 773 F.2d at 457.

ruptcy estate, or the legal equivalent thereof, to file a petition under the Bankruptcy Code "in order to administer assets located in this country, to prevent dismemberment by local creditors of assets located here, or for other appropriate relief."<sup>12</sup> The provisions of section 304 were designed "to give the court maximum flexibility in handling ancillary cases. Principles of international comity and respect for the judgments and laws of other nations suggest that the court be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules."<sup>13</sup>

Section 304 simply provides a means "for the courts in this country to aid foreign courts and accommodate the increasing number of foreign insolvency proceedings having extraterritorial effects within the United States."<sup>14</sup> The legislative history clearly establishes Congressional intent underlying the drafting of section 304. However, the application of section 304, although not complicated, is often problematic. Therefore, a working knowledge of the procedural requirements and the mechanisms by which appropriate relief can be obtained is critical to understanding the operation of section 304.

### 1. *Definitional Requirements*

Subsection 304(a) governs who may request the relief available.<sup>15</sup> To commence an ancillary proceeding, there must first be a pending foreign bankruptcy proceeding against a particular debtor. The initial determination, therefore, is whether there exists a "foreign proceeding" for purposes of section 304.

The definition of the term "foreign proceeding" is contained in section 101(22) of the Bankruptcy Code.<sup>16</sup> A "foreign proceeding" "is any proceeding, whether judicial or administrative and whether or not under the bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by compo-

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12. H.R. REP. No. 595, *supra* note 10, at 324-25; S. REP. No. 989, *supra* note 10, at 35, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787.

13. 1978 U.S. CODE CONG. & ADMIN. NEWS 5821.

14. 2 W. COLLIER, *supra* note 1, ¶ 304.01 and authorities cited therein.

15. That subsection provides in pertinent part as follows: "a case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative." 11 U.S.C. § 304(a) (1979 & Supp. 1986).

16. 11 U.S.C. § 101(22).

sition, extension, or discharge, or effecting a reorganization.”<sup>17</sup> To understand the scope of this definitional prerequisite and the parameters for commencing an ancillary proceeding, other relevant provisions of the Bankruptcy Code must be considered.

Under the Bankruptcy Code, relief is available only to individuals or entities not specifically excluded from qualifying as debtors.<sup>18</sup> The definition of the term “foreign proceeding,” however, does not appear to restrict the application of section 304 to qualified debtors. Therefore, the question arises as to whether an ancillary proceeding can involve individuals or entities which otherwise would not qualify for bankruptcy relief, as the bankruptcy laws of many foreign countries often have less restrictive qualifying criteria.<sup>19</sup>

Recognizing that the definition of the term “foreign proceeding” in section 101(22) of the Bankruptcy Code refers to the domicile, residence, principal place of business or principal assets of a “debtor,”<sup>20</sup> the definition of the term “debtor” is controlling. “Debtor” is defined in section 101(12) to mean persons or municipalities concerning which a case under the Bankruptcy Code is commenced.<sup>21</sup> “Persons” is defined to include individuals, partnerships and corporations, but does not generally include governmental units.<sup>22</sup> Based on these definitional provisions, it is clear that a foreign representative of a decedent’s estate, for example, could not commence an ancillary proceeding under section 304.<sup>23</sup> Since the qualifying provisions of section 304 are governed by the Bankruptcy Code’s definition of the term “debtor,” all individuals or entities otherwise excluded under that definition could not have an ancillary proceeding commenced against them under section 304.<sup>24</sup>

Section 109(a) of the Bankruptcy Code sets out who may be a

17. *Id.*

18. 11 U.S.C. § 109; *see infra* text accompanying notes 25-33.

19. *Id.*; Nadelmann, *Insolvent Decedents’ Estates*, 49 MICH. L. REV. 1129 (1951).

20. *See supra* note 18.

21. 11 U.S.C. § 101(12).

22. 11 U.S.C. § 101(35). That section provides, however, “that any governmental unit that acquires an asset from a person as a result of an operation of a loan guarantee agreement, or as a receiver or liquidating agent of a person, will be considered a person for purposes of section 1102 of this title.” *Id.*

23. It is well established that a probate estate is not a “person” within the meaning of the Bankruptcy Code. *See generally In re Goerg*, 64 Bankr. 321 (Bankr. N.D. Ga. 1986); *In re Brown*, 16 Bankr. 128 (Bankr. D.D.C. 1981); *In re Jarrett*, 19 Bankr. 413 (Bankr. M.D.N.C. 1982); 2 W. COLLIER, *supra* note 1, ¶ 304.01, at 304-7.

24. *See* 11 U.S.C. § 109 (1979 & Supp. 1986). This section determines who may qualify as a debtor under the Bankruptcy Code.

debtor under the Bankruptcy Code and provides that, "[n]otwithstanding any other provision of this section, only a person that resides or has a domicile, place of business, or property in the United States or a municipality, may be a debtor under this title."<sup>25</sup> Relying upon this language, the Bankruptcy Court for the Northern District of Georgia specifically found that there must be a "debtor" within the meaning of section 109(a) to invoke the court's jurisdiction under section 304.<sup>26</sup>

In *In re Goerg*, a bankruptcy trustee from the Federal Republic of Germany sought to utilize the provisions of section 304 to commence an ancillary proceeding in Georgia against a deceased and insolvent German national.<sup>27</sup> The Georgia administrator of the decedent's estate moved to dismiss the section 304 petition based upon, *inter alia*, lack of subject matter jurisdiction.<sup>28</sup> After a thorough review of the relevant definitional requirements of section 304, the *Goerg* court rendered its "unavoidable conclusion" that one must qualify to be a "debtor" under the Bankruptcy Code before jurisdiction will be exercised under section 304.<sup>29</sup> The *Goerg* court reasoned that "by not including probate estates as entities eligible for relief under the Bankruptcy Code, Congress deliberately chose [the] state systems for disposing of property in probate estates over the national bankruptcy system provided for in the Code."<sup>30</sup> As a result, the court concluded that Congress did not intend to make an exception for foreign probate estates. Accordingly, other non-qualifying entities under the Bankruptcy Code would be similarly proscribed from invoking the bankruptcy court's jurisdiction under provisions of section 304.

The conclusion reached by the *Goerg* court appears to correctly apply the law.<sup>31</sup> However, the decision left one question unanswered. In reaching its conclusion, the court relied on a report to

25. *Id.* § 109(a).

26. *In re Goerg*, 64 Bankr. 321 (Bankr. N.D. Ga. 1986).

27. *Id.* at 320-21.

28. *Id.*

29. *Id.* at 324.

30. *Id.*; see also *In re Toga Mfg., Ltd.*, 28 Bankr. 165 (Bankr. E.D. Mich. 1983); *In re Culmer*, 25 Bankr. 621 (Bankr. S.D.N.Y. 1982); *In re Petition of Thume & Roll*, No. 80 B 12058(RB) (Bankr. S.D.N.Y.), *dismissed by stipulation*, Nov. 24, 1981. Compare *Angulo v. Kedzep, Ltd.*, 29 Bankr. 417 (S.D. Tex. 1983) (where a foreign company could qualify as "debtor" under Chapter 11, thereby meeting the threshold prerequisites for applying section 304); *In re Gee*, 53 Bankr. 891 (Bankr. S.D.N.Y. 1985) (only the requirements of section 109(a) must be satisfied in order to qualify for relief under section 304).

31. See 2 W. COLLIER, *supra* note 1, at ¶ 304.01, at 304-7 to -9. *But see Gee*, 53 Bankr. at 900.

the Judiciary Committee which seems to require that a debtor involved in an ancillary proceeding must have assets in the United States.<sup>32</sup> This interpretation of section 304 could severely impair its value. The *Goerg* court, however, sidestepped this language and found that if the debtor either has its domicile or place of business in the United States, as required by section 109(a), the jurisdictional requirements of section 304 are satisfied.<sup>33</sup>

The United States Bankruptcy Court for the Southern District of New York found that the presence of property in the United States is not a prerequisite to granting relief under section 304. In *In re Gee*,<sup>34</sup> the creditors who controverted the initiation of an ancillary proceeding under section 304 argued that property must be present in the district in which the foreign proceeding is commenced, relying on a trilogy of early cases applying section 304. These cases contained statements requiring a debtor to have property in the district in which the proceeding is initiated for relief to be granted.<sup>35</sup>

The court first distinguished the ruling in *In re Stuppel* by the nature of the relief sought.<sup>36</sup> In *Stuppel*, which involved the commencement of an ancillary proceeding to recover property that purportedly was fraudulently transferred, the district court, in reversing the bankruptcy court's decision to dismiss the ancillary proceeding on jurisdictional grounds, held that the mere allegation of a fraudulent transfer was sufficient to obtain *in rem* jurisdic-

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32. *In re Goerg*, 64 Bankr. 321, 324 (Bankr. S.D. Ga. 1986). The Judiciary Committee Report stated:

This section governs cases filed in the bankruptcy courts that are ancillary to foreign proceedings. That is, where a foreign bankruptcy case is pending concerning a particular debtor *and that debtor has assets in this country*, the foreign representative may file a petition under this section, which does not commence a full bankruptcy case, in order to administer assets located in this country, to prevent dismemberment by local creditors of assets located here, or for other appropriate relief.

SENATE COMM. ON THE JUDICIARY, S. REP. NO. 989, 95th Cong., 2d Sess. 35 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5821 (emphasis supplied); *Goerg*, 64 Bankr. at 324.

33. See *supra* note 18; see also *Goerg*, 64 Bankr. at 324.

34. 53 Bankr. 891 (Bankr. S.D.N.Y. 1985).

35. *Id.* at 897-99; see *In re Stuppel*, 17 Bankr. 413 (S.D. Fla. 1981); *In re Trakman*, 33 Bankr. 780 (Bankr. S.D.N.Y. 1983); *In re Toga Mfg.*, 28 Bankr. 165 (Bankr. E.D. Mich. 1983); see also *Angulo v. Kedzep, Ltd.*, 29 Bankr. 417, 419 (S.D. Tex. 1983) (there must be property in the United States, rather than in a particular district, to commence an ancillary proceeding).

36. See *Gee*, 53 Bankr. at 898.

tion.<sup>37</sup> The *Gee* court also noted that the cases of *In re Trakman* and *In re Toga Mfg.* both involved section 304 petitions in which the relief sought was a turnover of assets and an injunction protecting property.<sup>38</sup> Accordingly, *in rem* jurisdiction could be established.

In addition, the *Gee* court reviewed the ruling in the *Angulo* case, which relied on *Stuppel* in support of its position, arguing that in *Angulo v. Kedzep, Ltd.*,<sup>39</sup> the requested relief was discovery.<sup>40</sup> The *Gee* court held, however, that this case "cannot be read to mandate that in every case where discovery is the primary relief sought there must be a showing that there was property in the district where the section 304 petition was filed."<sup>41</sup>

Instead, the *Gee* court found that as long as a strong nexus exists with this country and the particular district of the Bankruptcy Court, relief is appropriate.<sup>42</sup> The court concluded, "[g]iven that section 304 was drafted 'to permit courts to make appropriate orders under the circumstances of each case considering the principles of international comity', it is most appropriate that the judiciary not engraft onto section 304 a rule of jurisdiction so restrictive as to preclude the very flexible approach to international bankruptcies which Congress sought to promote."<sup>43</sup> The *Gee* court also relied on the special venue provisions of section 304 which recognize that jurisdiction may be conferred upon a bankruptcy court although assets of the debtor may not be present within the judicial district.<sup>44</sup>

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37. *Stuppel*, 17 Bankr. at 415.

38. *In re Trakman*, 33 Bankr. 780 (Bankr. S.D.N.Y. 1983); *In re Toga Mfg.*, 28 Bankr. 165 (Bankr. E.D. Mich. 1983).

39. 29 Bankr. 417 (S.D. Tex. 1983).

40. *Gee*, 53 Bankr. at 898; see *Angulo*, 29 Bankr. at 417.

41. *Gee*, 53 Bankr. at 898.

42. *Id.* at 899.

Since, as the 304 petition alleges, the debtor's corporate management, its legal counsel and accountants are all here resident, some of its corporate books and records are here, it maintained numerous bank accounts here which were closed less than two years ago, and it may have other assets including its \$10,000,000 share capital here, there is a sufficient jurisdictional predicate to allow discovery to ascertain the existence and location of the debtor's assets, including any causes of action which it may possess. And, of course, in arguing to this court that there is a sufficient nexus for the maintenance of a comprehensive chapter 11 case, Universal [controversing debtor] has necessarily conceded by implication that there is a sufficient nexus for the maintenance of the more limited bankruptcy case created by section 304.

*Id.* at 898.

43. *Id.* at 899 (citing *Angulo*, 29 Bankr. at 419).

44. *Id.*; see 28 U.S.C. § 1410(c) (1984 & Supp. 1986); see *infra* text accompanying notes



In rendering its decision, the *Gee* court correctly distinguished *in rem* versus *in personam* jurisdiction and their application to section 304. More importantly, the court recognized the practical limitations that would have been imposed on parties seeking to utilize section 304 if the court ruled otherwise.<sup>45</sup> Indeed, a contrary ruling could arguably have rendered meaningless the court's ability to order "other appropriate relief" under section 304. At a minimum, however, the individual or entity against which section 304 relief is sought must satisfy the definitional requirements of sections 101(22) and 109(a) of the Bankruptcy Code.

Section 304 also requires that a foreign ancillary proceeding be commenced only by a "foreign representative."<sup>46</sup> The term "foreign representative" is defined as a duly selected trustee, administrator, or other representative of an estate in a foreign proceeding.<sup>47</sup> Therefore, a mere creditor of the debtor cannot initiate an ancillary proceeding as a foreign representative. Such a claimant, however, may have other alternatives available to obtain necessary relief in a situation involving a pending foreign insolvency proceeding.<sup>48</sup>

Assuming that the definitional prerequisites are satisfied, an ancillary proceeding under section 304 can be commenced. The commencement of an ancillary proceeding does not, however, assure that relief will be granted. Substantive protections have been incorporated into section 304 for both the foreign debtor and local creditors.

## 2. *Controverting and Converting a Section 304 Proceeding*

Under section 304(b), a party in interest may contest the commencement of an ancillary proceeding.<sup>49</sup> Unlike a full-scale bank-

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The specially-created venue provisions for 304 cases found at 28 U.S.C. § 1410 and which are pegged to the nature of the relief sought in the petition buttress the conclusion that Congress envisioned the maintenance of 304 cases in which the debtor has a place of business in the United States but does not necessarily have any assets here.

*Gee*, 53 Bankr. at 899.

45. See *Gee*, 53 Bankr. at 891. This approach has been supported unequivocally in a case involving a foreign representative's effort to recover preferential or fraudulent conveyances, where the only asset in the United States was the property sought to be recovered. *In re Metzeler*, 78 Bankr. 674, 678-80 (Bankr. S.D.N.Y. 1987).

46. 11 U.S.C. § 304(a) (1979 and Supp. 1986).

47. *Id.* § 101(23).

48. See *infra* text accompanying notes 87-102.

49. 11 U.S.C. § 304(b).

ruptcy proceeding, any party in interest can controvert the initiation of a section 304 proceeding. If the section 304 petition is not timely controverted, or after a trial on the merits, the court may then take various actions depending upon the relief requested and the facts of a particular case.<sup>50</sup> When a petition under section 304 is timely controverted, the bankruptcy court should first rule on the objections to the petition.<sup>51</sup> Assuming the bases for controverting the petition are insufficient to compel a court to refrain from exercising its jurisdiction under section 304,<sup>52</sup> the court should proceed to the next issue of determining appropriate relief.

It is important to note, however, that in determining whether sufficient grounds exist to controvert the initiation of an ancillary proceeding, the court should also consider the provisions of section 305.<sup>53</sup> Section 305(a)(1) permits any party in interest, including a foreign representative, to seek dismissal or suspension of a pending bankruptcy proceeding, provided that the necessary elements of section 304(c) warrant such action.<sup>54</sup> However, only a foreign representative, as defined under section 101(20), can seek dismissal or suspension of a pending bankruptcy proceeding under section 305(a)(2).<sup>55</sup> A court has wide discretion in determining whether to dismiss or suspend a case under section 305(a)(2)(B).<sup>56</sup> Moreover, a decision under section 305(a) is not reviewable on appeal.<sup>57</sup>

Section 305 can also be interpreted to confer authority on the court to convert an involuntary case commenced under section

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50. *Id.*; see *supra* note 9 and *infra* text accompanying section IV.

51. *In re Egeria Societa per Azioni di Navigazione*, 20 Bankr. 625 (Bankr. E.D. Va. 1982), *rev'd on other grounds*, 26 Bankr. 494 (E.D. Va. 1983), *dismissed*, 723 F.2d. 900 (4th Cir. 1983).

52. See, e.g., *In re Gee*, 53 Bankr. 891 (Bankr. S.D.N.Y. 1985).

53. 11 U.S.C. § 305 (1979 & Supp. 1986). That section provides as follows: "(a) [t]he court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if, - (2)(A) there is pending a foreign proceeding; and (b) the factors specified in section 304(c) of this title warrant such dismissal or suspension." *Id.*; see, e.g., *In re Gee*, 53 Bankr. 891 (Bankr. S.D.N.Y. 1985).

54. *Id.*; see *In re Gee*, 53 Bankr. 891, 897 (Bankr. S.D.N.Y. 1985). The requirements of section 305(a)(2)(A) and (B) are conjunctive and therefore both elements must be met.

55. 11 U.S.C. § 305(b) (1979 & Supp. 1986).

56. H.R. REP. No. 595, *supra* note 10, at 324-25; S. REP. No. 989, *supra* note 10, at 35-36. However, if actions have already been taken in a pending bankruptcy proceeding, the provisions of section 305 may become inoperative. A court cannot suspend or dismiss jurisdiction it has exercised over part of a case. See H.R. REP. No. 595, *supra* note 10, at 325; S. REP. No. 989, *supra* note 10, at 35. For an example of cases where the courts have exercised their authority under section 305, see *Gee*, 53 Bankr. at 904-85; *In re Trakman*, 33 Bankr. 780 (Bankr. S.D.N.Y. 1983); *In re Bahamas Spas*, No. SA-80-00096-PE, slip op. (Bankr. C.D. Ca., Feb. 25, 1980).

57. 11 U.S.C. § 305(c) (1979 & Supp. 1986).

303(b)(4) to an ancillary proceeding under section 304, if the factors specified in section 304(c) compel such relief.<sup>58</sup> It has been noted that a conversion from a section 303 involuntary case to a section 304 ancillary proceeding would be appropriate where few creditors in the United States are involved, the debtor's assets in this country are minimal, and access to and communication with the country where the foreign proceeding is pending is relatively convenient.<sup>59</sup> Arguably, the mechanisms for converting an ancillary proceeding should allow both the purported debtor and any party in interest to contest the action.

Therefore, in determining whether to seek relief under section 304, a party in interest must consider the interplay between other sections of the Bankruptcy Code. A claimant or foreign representative must also determine whether a pending bankruptcy proceeding can or should be dismissed, suspended or controverted under section 305. An appearance by a foreign representative in a bankruptcy proceeding for relief under sections 303, 304 or 305, however, does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose.<sup>60</sup> Other relevant considerations that should be addressed are discussed later in this article.

### III. VENUE

Assuming that the definitional prerequisites of section 304 have been met, the next determination concerns appropriate venue of the ancillary proceeding. Section 304 has its own venue provisions which are based upon the nature of the relief requested.<sup>61</sup> Basically, if the relief requested is to restrain or enjoin the commencement or continuation of an action or enforcement of a judgment, venue lies in the district where the state or federal court in

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58. 2 W. COLLIER, *supra* note 1, ¶ 304.01, at 304-6 to -7, 304-11 n.24. Such a conversion would be consistent with Congress' purpose to assure the most economical and expeditious administration of the estate. See H.R. REP. No. 595, *supra* note 10, at 324; S. REP. No. 989, *supra* note 10, at 35. Cf. Honsberger, *Conflict of Laws and the Bankruptcy Reform Act of 1978*, 30 CASE W. RES. L. REV. 631, 656 (1979-1980). Honsberger cites the factors for a bankruptcy court to consider in deciding whether to grant a foreign representative's petition for relief under section 304(c). A court may dismiss a section 303 case and convert the case into an ancillary proceeding, order turnover of the assets in this country to the duly selected foreign representative, and impose conditions on such turnover to avoid prejudice against U.S. creditors. 2 W. COLLIER, *supra* note 1, ¶ 304.01, at 304-6 n.24.

59. *See id.*

60. *See* 11 U.S.C. § 306 (1979 & Supp. 1986).

61. 28 U.S.C. § 1410 (1984 & Supp. 1986).

which the action or proceeding is filed.<sup>62</sup> If the relief relates to enjoining the enforcement of a lien or the turnover of property, venue lies in the district in which the property at issue is located.<sup>63</sup> Finally, venue for all other forms of relief is in the district where the debtor's principal assets or principal place of business is located.<sup>64</sup> However, if a proceeding is commenced in the wrong district, venue can be transferred to another district "in the interest of justice or for the convenience of the parties."<sup>65</sup>

#### IV. RELIEF AVAILABLE

##### A. PRINCIPLES OF COMITY

Under the provisions of section 304(b), there are several alternative forms of relief that a bankruptcy court may fashion if a party in interest has not timely controverted a section 304 petition or a pending bankruptcy is not dismissed, suspended or converted under section 305. In determining whether to grant relief under subsection (b) of section 304, a court is to be guided by one underlying principle: what will best assure an economic and expeditious administration of the foreign estate.<sup>66</sup> The application of this principle, however, must be consistent with six factors which are utilized to determine what relief, if any, should be granted.<sup>67</sup> The six factors are as follows:

1. just treatment of all holders of claims against or interests in such estate;
2. protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
3. prevention of preferential or fraudulent dispositions of property of such estate;
4. distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
5. comity; and

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62. *Id.*; see *In re Banco de Descuento*, 78 Bankr. 337 (Bankr. S.D. Fla. 1987).

63. *Id.*

64. *Id.*; see *supra* note 44 and accompanying text. The use of the qualifier "principal" is troublesome. If the debtor's principal assets or place of business is not located within the relevant district, as in *In re Gee*, *supra* notes 34-43, the determination of proper venue becomes undeterminable. See, e.g., *In re Metzeler*, 78 Bankr. 674, 680 (Bankr. S.D.N.Y. 1987).

65. 28 U.S.C. § 1412; see, e.g., *Angulo v. Kedzep, Ltd.*, 29 Bankr. 417, 418 (S.D. Tex. 1983).

66. 11 U.S.C. § 304(c) (1979 & Supp. 1986).

67. *Id.*

6. if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.<sup>68</sup>

Section 304 is designed to give a court maximum flexibility in addressing the problems attendant to ancillary insolvency proceedings. Most of the provisions of this subsection are self-explanatory, discretionary and fact sensitive. In many cases, however, the provisions of subsection (c) have been interpreted to merely expand the principle of comity under international law when the court determines whether to grant "appropriate relief."<sup>69</sup> That is, unless the other factors enumerated in subsection (c) are clearly compelling, the courts often rely upon the principle of comity in rendering their decision and fashioning appropriate relief.

In the United States, the leading case on the concept of comity is *Hilton v. Guyot*.<sup>70</sup> In that case, the Supreme Court described comity as:

[T]he recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.<sup>71</sup>

Comity will be granted to the decision or judgment of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated.<sup>72</sup> The concept of comity has been described by the Third Circuit Court of Appeals as:

[M]ore than mere courtesy in accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interests of the nation called upon to give it effect.<sup>73</sup>

68. *Id.*

69. See *infra* notes 70-81 and accompanying text.

70. 159 U.S. 113 (1895).

71. *Id.* at 164.

72. See *Clarkson Co. v. Shaheen*, 544 F.2d 624, 629 (2d Cir. 1976); *Kenner Prod. Co. v. Societe Fonciere et Financiere Agache A-Willot*, 532 F. Supp. 478, 479 (S.D.N.Y. 1982).

73. *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3rd Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) (citing L. ORFIELD & E. RAE, *INTERNATIONAL LAW*, 736-37 (1965)).

Under the principle of comity, it has been recognized that "foreign-based rights should be enforced unless the judicial enforcement of such [rights] would be the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."<sup>74</sup>

Based on these interpretive guidelines, the bankruptcy courts have usually applied a narrow focus to determine whether, in applying the principle of comity, the grant of extraterritorial application to a foreign judgment would violate American law or public policy. The amount of weight given the comity factor under section 304(c), however, can often overshadow the other factors enumerated by Congress in section 304.<sup>75</sup> This does not appear to comport with the drafter's intent. Under section 304(c), the principle of comity is merely one of six factors that guide a court in granting appropriate relief.<sup>76</sup> Moreover, the legislative history does not indicate that subsection (c)(5) is to be given more weight than the remaining five factors in balancing the equities of the case.<sup>77</sup> However, many courts continue to find that comity is the "most significant" factor to be considered.

One of the misunderstandings the courts face in applying the principle of comity has to do with the vagaries involved in foreign bankruptcy proceedings. In contrast to the enforcement of a foreign judgment under principles of comity, a bankruptcy proceeding involves various interests, claimants and practical ramifications. It is well established that in granting comity to a foreign court's award of money judgment against a defendant, the foreign court must have obtained valid personal jurisdiction over the defendant.<sup>78</sup> This principle reflects and is in accord with our concept of due process that, in order for comity to be extended, the foreign court must abide by fundamental standards of procedural fairness.<sup>79</sup> The rationale underlying the granting of comity to a final

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74. *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 13, 254 N.Y.S.2d 527, 529, 203 N.E.2d 210, 212 (1964); *accord Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918). For a discussion of the application of the principles of comity, see *Remington Rand Corporation-Delaware v. Business Systems, Inc.*, 830 F.2d 1260 (3rd Cir. 1987).

75. *In re Culmer*, 25 Bankr. 621, 629 (Bankr. S.D.N.Y. 1982).

76. See *supra* text accompanying note 68.

77. See 1978 U.S. CODE CONG. & ADMIN. NEWS 5821. Since the granting of comity is discretionary, the standard for review is abuse of discretion. *Remington Rand*, 830 F.2d at 1266.

78. See, e.g., *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano del Cafe*, 566 F.2d 861, 863 (2d Cir. 1977) (per curiam); *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 441 (3rd Cir. 1971).

79. See *Cunard Steamship Co., Ltd. v. Salen Reefer Serv.* AB, 773 F.2d 452, 457 (2d

foreign judgment is that litigation should end after the parties have had an opportunity to present their cases fully and fairly to a court of competent jurisdiction.<sup>80</sup>

The extension of comity to a foreign bankruptcy proceeding, by staying or enjoining the commencement or continuation of an action against the debtor or its property, however, has a somewhat different rationale. The granting of comity to a foreign bankruptcy proceeding enables the assets of the debtor to be disposed of in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities.<sup>81</sup> Unfortunately, the provisions of section 304(c) seek to temper the interests of foreign courts and creditors with the varied and often competing interests of similar parties in the United States.<sup>82</sup> Based upon this reasoning, the principle of comity cannot always be considered the most significant factor to be determined in a section 304(c) analysis.<sup>83</sup>

Under section 304, the court is given certain specific factors to consider in granting appropriate relief. Recognizing the flexible nature of those factors, a court must consider each factor on equal footing in order to make the appropriate orders under all the circumstances of each case. To rely solely on comity as the determinative factor is to return the to inflexible rules that precipitated the enactment of section 304.<sup>84</sup>

### B. FORMS OF RELIEF

If a court opts to grant appropriate relief under section 304(b)(3), the type of relief may be both unique and far reaching. Obviously, the provisions of subsection (b) are suggestive of the relief available, such as enjoining enforcement of a judgment or other action against property of the foreign debtor, as well as a turnover of property. However, because of the broad language of

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Cir. 1985).

80. *Id.*

81. *See, e.g., In re Colorado Corp.*, 531 F.2d 463, 468 (10th Cir. 1976); *Kenner Prod. Co. v. Societe Eonciere et Financiere Agache A-Willot*, 532 F. Supp. 478, 479 (S.D.N.Y. 1982); *Cornfeld v. Investors Overseas Serv., Ltd.*, 471 F. Supp. 1255, 1259 (S.D.N.Y. 1979), *aff'd*, 614 F.2d 1286 (2d Cir. 1979). *But see Canada Southern Railway v. Gebhard*, 109 U.S. 527, 539 (1883); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS, §§ 99, 386 (1971).

82. *See, e.g., In re Culmer*, 25 Bankr. 621, 628-29 (Bankr. S.D.N.Y. 1982).

83. *In re Gee*, 53 Bankr. 891, 901 (Bankr. S.D.N.Y. 1985); *Culmer*, 25 Bankr. at 629.

84. H.R. REP. No. 595, *supra* note 10, at 325; S. REP. No. 989, *supra* note 10, at 35.

subsection (b)(3) regarding "other appropriate relief," the courts have used this provision to mold appropriate relief in near blank fashion.<sup>85</sup> Recognizing that the application of section 304(b) is fact sensitive, clear guidelines on "appropriate relief" cannot be readily established. Examples of how courts have applied this language, however, may be illustrative. In *In re Trakman*, the court suspended all proceedings to allow parties to uncover evidence of preferential transfers.<sup>86</sup> In a case out of the Eastern District of Virginia, the court decided in the affirmative that a preference action can be brought in an ancillary proceeding.<sup>87</sup> In another case, the Bankruptcy Court for the Southern District of Florida creatively utilized section 304(b)(3) to appoint a co-trustee with authority over the debtor's assets and affairs in the United States.<sup>88</sup> Finally, section 304(b)(3) has been utilized simply to facilitate discovery.<sup>89</sup> Therefore, it is obvious that the scope of relief available under the catch-all provisions of subsection 304(b)(3) is virtually whatever is deemed appropriate under the facts of each case.

#### V. NON-EXCLUSIVITY OF SECTION 304

The mechanisms contained in section 304 of the Bankruptcy Code provide both an equitable and flexible means to assist foreign courts having jurisdiction over a pending insolvency proceeding that involves assets or creditors in the United States. When an issue arises in connection with a foreign proceeding, however, the provisions of section 304 are not the exclusive remedy available to the parties involved. For example, under the Bankruptcy Code, a foreign representative or any other creditor may commence an involuntary case in the United States against a debtor involved in a foreign proceeding to administer assets in this country.<sup>90</sup>

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85. See, e.g., *In re Trakman*, 33 Bankr. 780, 783 (Bankr. S.D.N.Y. 1983) (citing *Culmer*, 25 Bankr. 621). It is clear, however, that a representative of a foreign bankruptcy proceeding is limited by the powers available under the laws of the country where the foreign proceeding is pending. *In re Metzeler*, 78 Bankr. 674, 677 (Bankr. S.D.N.Y. 1987); cf. *In re Comstat Consulting Serv., Ltd.*, 10 Bankr. 134 (Bankr. S.D. Fla. 1981); *In re Egeria Societa per Azioni di Navigazione*, 20 Bankr. 625 (Bankr. E.D. Va. 1982), *rev'd on other grounds*, 26 Bankr. 494 (E.D. Va. 1983), *dismissed*, 723 F.2d 900 (4th Cir. 1983).

86. *Trakman*, 33 Bankr. at 784.

87. *Egeria Societa per Azioni di Navigazione*, 26 Bankr. at 494.

88. *In re Lineas Aereas de Nicaragua, S.A.*, 13 Bankr. 779 (Bankr. S.D. Fla. 1981); see also *In re Lineas Aereas de Nicaragua, S.A.*, 10 Bankr. 790 (Bankr. S.D. Fla. 1981) (in the same court's initial decision, actions were permitted to proceed but parties were enjoined from enforcing judgments they obtained).

89. See *Angulo v. Kedzep, Ltd.*, 29 Bankr. 417 (S.D. Tex. 1983).

90. H.R. REP. NO. 595, *supra* note 10, at 322; S. REP. NO. 989, *supra* note 10, at 33.



A critical distinction between an ancillary proceeding under section 304 and an involuntary case under section 303(b)(4) is that under the latter provision, an independent case under title 11 is commenced.<sup>91</sup> This independent case may be administered concurrently with a foreign proceeding.<sup>92</sup> The benefits or drawbacks attendant to such a proceeding depend upon the perspective of the parties involved. Normally, a local creditor would prefer the administration of assets through a proceeding in the United States. However, the debtor is afforded additional protections under an independent case under title 11.<sup>93</sup> In addition, the cost and expense of a proceeding under title 11 may be prohibitive. Even if an involuntary case is commenced against a debtor who is involved in a foreign proceeding, a foreign representative can move to dismiss or suspend the case under section 305.<sup>94</sup> Similarly, the debtor can controvert the initiation of an involuntary proceeding and the entry of an order for relief under the Bankruptcy Code.

In addition to an involuntary petition against a foreign debtor, the debtor may commence a voluntary petition under section 301, or may have an involuntary petition filed against it under section 303(b).<sup>95</sup> If an involuntary case is commenced, the debtor has the right to contest the petition under section 303.<sup>96</sup> Moreover, under section 304, the petitioning creditor must demonstrate that the elements of section 303(h)(1) or 303(h)(2) can be satisfied.<sup>97</sup> Similarly, the elements necessary to commence a proceeding under section 304, including the existence of a pending foreign proceeding against the debtor, a foreign representative entitled to initiate such a proceeding and the presence of property within the district or a "strong nexus" with that district may be insurmountable.<sup>98</sup> Therefore, foreign or domestic creditors and parties in interest may be compelled to seek alternative avenues for obtaining appropriate relief.

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91. See *supra* note 10 and accompanying text. See generally 11 U.S.C. § 101 *et seq.* (1979 & Supp. 1986).

92. Kennedy, *supra* note 10, at 1019.

93. 11 U.S.C. § 303(i).

94. *Id.* § 305(b); see notes 53-60 and accompanying text.

95. Kennedy, *supra* note 10, at 1007.

96. 11 U.S.C. § 303. Compare the provisions of § 304(b) which allows any "party in interest" to controvert a petition filed under section 304.

97. 11 U.S.C. § 303(h)(1), (2) (1979 & Supp. 1986).

98. See *In re Centre de Tricots de Gaspé, Ltd.*, 10 Bankr. 148 (Bankr. S.D. Fla. 1981) (nothing precludes a foreign representative from seeking relief under either sections 303(b)(4) or 304).

In addition to the various alternatives under the Bankruptcy Code, recent cases from the Second and Fourth Circuit Courts of Appeal have unequivocally established that when a debtor is involved in a foreign bankruptcy proceeding, section 304 of the Bankruptcy Code is not the exclusive remedy for a trustee or representative of the debtor who wishes to stay or enjoin creditor actions in the United States.<sup>99</sup> In *Cunard Steamship Co. Ltd. v. Salen Reefer Serv. AB*,<sup>100</sup> the plaintiff-appellant appealed from an order of the District Court for the Southern District of New York which vacated an attachment Cunard Steamship Company had obtained against the Defendant-Appellee, Salen Reefer Services, AB.<sup>101</sup>

The court phrased the threshold issue as follows: "whether, when a debtor is involved in a foreign bankruptcy proceeding, section 304 of the Bankruptcy Code is the exclusive remedy for a trustee or representative of the bankrupt who wishes to stay or enjoin creditor's actions in the United States."<sup>102</sup> Answering the question in the negative, the court recognized that "it would have been eminently proper for the District Court to have referred the case to a bankruptcy 'unit' of the Court."<sup>103</sup> However, even though the district court did not refer the case, the court of appeals held that it did not constitute reversible error.<sup>104</sup>

We do not find in the statute or in the legislative history a clear Congressional mandate, either expressed or implied, that section 304 was to be the exclusive remedy for a foreign bankrupt. The statute is not phrased in mandatory or exclusive terms, and the language of the accompanying House and Senate reports is permissive. For example, both the House and Senate reports state that, 'the foreign representative *may* file a petition under this section.'<sup>105</sup>

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99. See *In re Enercons Virginia, Inc.*, 812 F.2d 1469 (4th Cir. 1987); *Cunard Steamship Co., Ltd. v. Salen Reefer Serv. AB*, 773 F.2d 452 (2d Cir. 1985). Compare *RBS Fabrics, Ltd. v. G. Beckers & Le Hanne*, 24 Bankr. 198 (S.D.N.Y. 1982) (action commenced in state court and removed to federal district court; the district court suggested that the case should be handled by the bankruptcy court under section 304).

100. 773 F.2d 452 (2d Cir. 1985).

101. *Id.* at 454.

102. *Id.*

103. *Id.* at 455; see *RBS Fabrics*, 24 Bankr. at 200; 28 U.S.C. § 151, *et seq.* (1979 & Supp. 1986).

104. *Cunard*, 773 F.2d at 455.

105. *Id.*; see S. REP. No. 989, *supra* note 10, at 35; H.R. REP. No. 595, *supra* note 10, at 324; 1978 U.S. CODE CONG. & ADMIN. NEWS 5821, 6281; see also *In re Enercons*, 812 F.2d 1469, 1472 (4th Cir. 1987).

The second case, *In re Enercons Virginia, Inc.*,<sup>106</sup> could also have been decided on its facts. This case involved a foreign trustee for an Italian bankrupt creditor of a debtor who filed an action seeking declaratory judgment that the trustee had exclusive standing to represent Italian creditors and the disallowance of any proofs of claims filed by foreign creditors against debtor.<sup>107</sup> Under section 501, proofs of claims may be filed by creditors.<sup>108</sup> Creditors are defined in section 101(9) which includes a foreign trustee.<sup>109</sup> Accordingly, a trustee in the *Enercons* case could have simply filed on his own in the local proceeding and resolved the dispute.

A hybrid result has come about from the cases in which the action involving a foreign insolvency proceeding is brought in the United States district court, which has original jurisdiction over all bankruptcy proceedings. Rather than transfer or refer the case to the bankruptcy court or decide the case on grounds of comity, in one case the district court fashioned equitable remedies based on the standards set forth in section 304.<sup>110</sup> To the extent virtually identical elements of section 304 were utilized in that decision, the case should have been referred to the bankruptcy court to allow a consistent application of the elements contained in section 304.<sup>111</sup>

## VI. SUMMARY OF RELEVANT CONSIDERATIONS

Depending on the bases for involvement with or as a foreign debtor, and the nature of the relief sought, there are numerous factors that must be considered prior to invoking the provisions of the Bankruptcy Code. The primary issue is under what provision of the Code the necessary relief should be sought. A foreign debtor can obtain relief through a voluntary or involuntary petition in bankruptcy. As a result, a creditor in either situation will obtain appropriate substantive protections. However, an ancillary proceeding, for various reasons, may prove to be an attractive alternative, because the conversion or dismissal of an ancillary proceeding is available under section 305, and is the likely result.

Under section 304, the primary question is whether the defini-

106. 812 F.2d 1469 (4th Cir. 1987).

107. *Id.*

108. *Id.*; see 11 U.S.C. § 501(a) (1979 & Supp. 1986).

109. *Id.* § 101(9).

110. See, e.g., *Victrix Steamship Company, S.A. v. Salen Dry Cargo AB*, 65 Bankr. 466 (S.D.N.Y. 1986).

111. See *Norton, Lilly & Co., Inc. v. Cape Lines, Ltd.*, 75 Bankr. 8, 9-10 (S.D.N.Y. 1985); *RBS Fabrics, Ltd. v. G. Beckers & LeHanne*, 24 Bankr. 198, 200 (S.D.N.Y. 1982).

tional prerequisites can be satisfied. Assuming the elements are satisfied, the second question would be the likelihood of a party in interest controverting the proceeding, or, in the event a bankruptcy proceeding is pending, the suspension or dismissal of that proceeding. If the pending proceeding was commenced against the foreign debtor as an involuntary proceeding, a request for conversion of the case may occur.

The next determination is the type of relief being sought. Obviously, the broad language of section 304(b)(3) could support a grant of virtually any form of relief that is deemed to be "appropriate." In addition, certain other forms of relief normally obtained in a bankruptcy proceeding are available. However, because section 304 is not the exclusive mechanism to address situations involving a foreign debtor, other non-bankruptcy mechanisms for obtaining relief should be considered.

Although the considerations listed above are by no means exhaustive, they provide a general outline of the primary concerns of the parties who may be involved in foreign insolvency proceedings. The dearth of the case law on section 304 makes a well-informed decision virtually impossible. However, the decisions to date have adequately addressed the parameters of section 304 and must be considered for guidance.

## VII. CONCLUSION

Section 304 provides a flexible mechanism to address the varied and complex issues that arise in foreign insolvency proceedings. If utilized properly, section 304 can assure that the administration of creditors' claims and debtors' assets is done both economically and efficiently under the circumstances in each particular case. However, claimants and potential debtors must be cognizant of the limitations imposed under section 304 and its interplay with other provisions of the Bankruptcy Code. In addition, alternative means to obtain appropriate relief must be considered. Provided that the courts, in applying the provisions of section 304, do not rely solely on the principle of comity in rendering their decisions, or give that principle undue weight, the mechanisms of section 304 will allow the courts to consistently accommodate the increasing number of foreign insolvency proceedings having extraterritorial ramifications in the United States.

## ABANDONING THE DEFERENCE RULE IN ITC INTERPRETATIONS OF THE ANTIDUMPING DUTY LAW

Kevin C. Kennedy\*

### I. INTRODUCTION

In a recent law review article<sup>1</sup>, I analyzed three opinions of the Court of Appeals for the Federal Circuit (CAFC) in which the Court was asked to review administrative determinations of the International Trade Administration (ITA) of the Department of Commerce under the antidumping duty law.<sup>2</sup> I concluded that the CAFC accorded the ITA more deference than appropriate on questions of statutory interpretation,<sup>3</sup> a conclusion premised in large part on the Federal Circuit's unique status within the federal court system as an Article III court possessing exclusive appellate jurisdiction over international trade matters.<sup>4</sup> Given this status, I argued, little or no judicial deference ought to be given ITA antidumping duty determinations involving decisions of statutory interpretation.<sup>5</sup>

In this article, I undertake a similar review of three recent Federal Circuit opinions<sup>6</sup> involving an interpretation of the antidumping duty statute by the U.S. International Trade Commission (ITC). In two instances,<sup>7</sup> the CAFC upheld the ITC's statutory interpretation of the antidumping duty law; in the third decision,<sup>8</sup> the court rejected the ITC's view. In this article, I argue that in the two cases where the Federal Circuit sustained the ITC's interpretation of the antidumping duty law, the court conducted an independent review, notwithstanding its purported deference to the Commission's expertise. In the third case, *Bingham & Taylor*

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1. Kennedy, *Judicial Review of Commerce Department Antidumping Duty Determination: Deference or Abdication?*, 11 N.C.J. INT'L L. & COM. REG. 19 (1986).

2. 19 U.S.C. §§ 1673-1677h (1982 & Supp. 1985).

3. Kennedy, *supra* note 1, at 37-38.

4. *Id.* at 33; see 28 U.S.C. § 1295(a)(5) (1982).

5. Kennedy, *supra* note 1, at 33.

6. *Bingham & Taylor Div., Virginia Industries, Inc. v. United States*, 815 F.2d 1482 (Fed. Cir. 1987); *ICC Industries, Inc. v. United States*, 812 F.2d 694 (Fed. Cir. 1987); *American Lamb Co. v. United States*, 785 F.2d 994 (Fed. Cir. 1986).

7. *ICC Industries*, 812 F.2d at 694; *American Lamb*, 785 F.2d at 994.

8. *Bingham*, 815 F.2d at 1482.

*Div., Virginia Industries, Inc. v. United States*,<sup>9</sup> the CAFC rejected the ITC's interpretation of the antidumping duty law, concluding that the deference rule was not applicable. The result of these three cases is that the Federal Circuit has effectively abandoned the deference rule in its review of ITC interpretations of the antidumping duty law.

Even though the scrutiny which the Federal Circuit gave the ITC's interpretations seem in my view more intense than that to which the court has subjected the Commerce Department's interpretations of the antidumping duty law, certainly no more deference is due one agency than the other. On the contrary, of the two, the ITC is probably more deserving of judicial deference given its superior resources. In any event, as I discuss more fully, in recognition of the Federal Circuit's expertise in the field of international trade, all citation to and seeming reliance on the deference rule should be abandoned in CAFC cases treating either an ITA or ITC statutory interpretation of the antidumping duty law. There is only one "master" of the antidumping duty law, and that is the Federal Circuit.<sup>10</sup> Any other conclusion is nothing short of the tail wagging the dog.

## II. STATUTORY OVERVIEW

The metes and bounds of the antidumping duty law have been described so well in the literature<sup>11</sup> that I will only give the briefest of thumbnail sketches here. As presently enacted, the antidumping duty law is essentially the product of two statutes, Title VII of the

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9. *Id.*

10. In *Consumer Prod. Div., SCM Corp. v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985), the court referred to the Commerce Department as the "master" of the antidumping duty law.

11. Readers unfamiliar with the statutory background should find the following articles helpful. See, e.g., Horlick, *Summary of Procedures Under the United States Antidumping and Countervailing Duty Laws*, 58 ST. JOHN'S L. REV. 828 (1984); Barshefsky & Cunningham, *The Prosecution of Antidumping Actions Under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 307 (1981); Hemmendinger & Barringer, *The Defense of Antidumping and Countervailing Duty Investigations Under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 427 (1981); Potts & Lyons, *The Trade Agreements Act: Administrative Policy and Practice in Antidumping Investigations*, 6 N.C.J. INT'L L. & COM. REG. 483 (1981); Barringer & Dunn, *Antidumping and Countervailing Duties Investigations Under the Trade Agreements Act of 1979*, 14 J. INT'L L. & ECON. 1 (1979); Note, *Administering the Revised Antidumping Law: Allocating Power Between the ITC and the Court of International Trade*, 22 VA. J. INT'L L. 883 (1982); Note, *The Trade Agreements Act of 1979: Countervailing Duty and Antidumping Duty Procedures*, 14 J. INT'L L. & ECON. 63 (1979).

Trade Agreements Act of 1979,<sup>12</sup> which substantially altered the former antidumping duty law,<sup>13</sup> and Title VI of the Trade and Tariff Act of 1984,<sup>14</sup> which made minor adjustments to the 1979 act.

The law, an international version of the Robinson-Patman Act,<sup>15</sup> is designed to prevent price discrimination between national markets. An antidumping duty proceeding typically involves five stages,<sup>16</sup> beginning administratively with the ITA, which is responsible for determining the sufficiency of the petition and whether imports of merchandise are being sold in the United States at less than fair value.<sup>17</sup> The ITC, in turn, is responsible for determining whether a domestic industry is being materially injured or is likely to be injured by reason of such imports.<sup>18</sup> The ITC and the ITA each conduct a two-step administrative proceeding lasting nine months to one year, that results in preliminary and final determination.<sup>19</sup> If both agencies reach final affirmative determinations, then a duty is imposed on imports of the offending merchandise in an amount equal to the margin of dumping.<sup>20</sup> The dumping duty

12. Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at scattered sections of titles 5, 7, 13, 19, 26, 28, 31 U.S.C.).

13. The Tariff Act of 1930, ch. 497, §§ 160-171, 46 Stat. 763 (1931) (codified at 19 U.S.C. § 1202 *et seq.* (1982 & Supp. 1985)).

14. Pub. L. No. 98-573, 98 Stat. 2948 (1986) (codified at 19 U.S.C. § 1654 (1982 & Supp. 1985)).

15. 15 U.S.C. § 13(a) (1982).

16. For a brief overview of the antidumping duty administrative process, see *American Lamb Co. v. United States*, 785 F.2d 994, 998-99 (Fed. Cir. 1986).

17. 19 U.S.C. §§ 1673-1673a (1982 & Supp. 1985). Merchandise is sold at less than fair value when the foreign market value of the merchandise exceeds the U.S. price for that merchandise. *Id.* § 1673. "Foreign market value" is generally the price of merchandise in the foreign manufacturer's home market. In essence, the antidumping duty law is intended to prevent price discrimination between the home market and the U.S. market.

18. *Id.* The term "material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant." *Id.* § 1677(A)(7); see Bello & Holmer, *Recent Developments Regarding Antidumping and Countervailing Duty Injury Determinations*, 20 INT'L L. 689 (1986); Note, *Injury Determinations Under United States Antidumping Laws Before and After the Trade Agreements Act of 1979*, 33 RUTGERS L. REV. 1076 (1981). See generally Ablondi & McCarthy, *Impact of the United States International Trade Commission on Commercial Transactions*, 3 DICK. J. INT'L L. 163 (1985); Minchew & Webster, *Regulating Unfair Practices in International Trade: The Role of the United States International Trade Commission*, 8 GA. J. INT'L & COMP. L. 27 (1978); Leonard & Foster, *The Metamorphosis of the U.S. International Trade Commission Under the Trade Act of 1974*, 16 VA. J. INT'L L. 719 (1976).

19. 19 U.S.C. §§ 1671b, 1671d, 1673b, 1673d. If the Commission reaches a negative preliminary injury determination, the entire antidumping duty investigation is terminated. *Id.* § 1673b(a).

20. *Id.* § 1673.

order is enforced until revoked. It will only be revoked when injury or sales at less than fair value have ceased, and it cannot be revoked for at least two years after imposition, absent good cause shown.<sup>21</sup>

An aggrieved party may seek judicial review in the Court of International Trade,<sup>22</sup> whose decisions may be appealed as of right to the Federal Circuit.<sup>23</sup> The scope of judicial review in antidumping duty cases is whether the administrative determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law,"<sup>24</sup> the same standard found in the Administrative Procedure Act.<sup>25</sup> It is the application by the Federal Circuit of the "otherwise not in accordance with law" standard of review to ITC antidumping duty injury determinations which this article examines next.<sup>26</sup>

### III. CAFC REVIEW OF ITC STATUTORY INTERPRETATIONS UNDER THE ANTIDUMPING DUTY LAW

In three recent decisions, *Bingham & Taylor Div., Virginia Industries, Inc. v. United States*,<sup>27</sup> *ICC Industries, Inc. v. United States*,<sup>28</sup> and *American Lamb Co. v. United States*,<sup>29</sup> the Federal Circuit was asked to review various ITC interpretations of the antidumping duty statute. In the *Bingham* decision, the court struck down the ITC interpretation,<sup>30</sup> while in the *ICC Industries* and *American Lamb* cases, the ITC's view was sustained.<sup>31</sup>

In *Bingham*, five unfair trade petitions, four involving allegations of dumping and one of unlawful subsidization, were filed by an American trade association of iron construction casting manu-

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21. *Id.* § 1675(b).

22. *Id.* § 1516a; 28 U.S.C. § 1581(c) (1982).

23. 28 U.S.C. § 1295(a)(5) (1982 & Supp. 1985).

24. 19 U.S.C. § 1516(1)(B).

25. 5 U.S.C. § 706 (1982).

26. Although the three cases discussed in this article concern the antidumping duty law, the injury criteria are identical in both antidumping duty cases and countervailing duty cases. Thus, my analysis is equally applicable to both kinds of proceedings. For two recent Federal Circuit decisions applying the substantial evidence standard to ITC antidumping duty injury determinations, see *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927 (Fed. Cir. 1984); *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556 (Fed. Cir. 1984).

27. 815 F.2d 1482 (Fed. Cir. 1987).

28. 812 F.2d 694 (Fed. Cir. 1987).

29. 785 F.2d 994 (Fed. Cir. 1986).

30. *Bingham*, 815 F.2d at 1487.

31. *ICC Industries*, 812 F.2d at 700; *American Lamb*, 785 F.2d at 1004.



facturers.<sup>32</sup> In its preliminary injury determinations<sup>33</sup> in the four antidumping duty cases, the ITC found a reasonable indication of material injury to the domestic light and heavy iron construction castings industries by reason of less-than-fair value sales of imports from India, Canada, the Peoples Republic of China, and Brazil.<sup>34</sup> With respect to the countervailing duty proceeding involving allegedly subsidized imports of light iron construction castings from Brazil, however, the ITC found no reasonable indication of injury to the domestic industry.<sup>35</sup> The issue for review was whether section 771(7)(C)(iv) of the Tariff Act of 1930, as amended by the Trade and Tariff Act of 1984,<sup>36</sup> required the ITC to cumulate the volume and price effects of imports subject to an antidumping duty investigation, with import of like products subject to countervailing duty investigation. In rejecting the ITC's position against cross-cumulation, the Court of International Trade answered this question in the affirmative.<sup>37</sup> The CAFC affirmed.<sup>38</sup>

Writing for the Federal Circuit, Judge Davis began by conceding that the language of section 771(7)(C)(iv) was not clear on its

32. *Bingham*, 815 F.2d at 1483.

33. In antidumping duty and countervailing duty cases, both the Commerce Department and the ITC make preliminary and final determinations. See 19 U.S.C. §§ 1671b, 1671d, 1673b, 1673d (1982 & Supp. 1985). For a general discussion of ITC injury determinations, see Mock, *Cumulation of Import Statistics in Injury Investigations Before the International Trade Commission*, 7 N.W. J. INT'L L. & Bus. 433, 434-39 (1986).

34. *Bingham*, 815 F.2d at 1483.

35. *Id.*

36. Section 771(7)(C)(i), (ii) & (iv) of the Tariff Act of 1930, as amended by Trade and Tariff Act of 1984, 19 U.S.C. § 1677(7)(C)(i), (ii) & (iv) (1982 & Supp. 1985), provides:

(i) Volume.—In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.

(ii) Price.—In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—

(I) there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

(iv) Cumulation.—For purposes of clauses (i) and (ii), the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market.

37. *Bingham & Taylor Div., Virginia Industries, Inc. v. United States*, 627 F. Supp. 793, 795 (Ct. Int'l Trade 1986).

38. See *Bingham*, 815 F.2d at 1483.

face insofar as the cross-cumulation question was concerned.<sup>39</sup> Judge Davis also noted that the ITC, as an entity, had never cross-cumulated, although individual commissioners had aggregated dumped and subsidized imports in their cumulation analyses.<sup>40</sup> Against this muddied backdrop of ambiguous statutory language, coupled with an ITC practice adverse to cross-cumulation, the court turned to the legislative history of the Trade and Tariff Act of 1984, the act which added the cumulation requirement to the antidumping duty law.<sup>41</sup> The portion of the report of the House Ways and Means Committee on section 771(7)(C)(iv) quoted by the CAFC in support of a cross-cumulation requirement stated:

The purpose of mandating cumulation under appropriate circumstances is to eliminate inconsistencies in Commission practice and to ensure that the injury test adequately addresses simultaneous unfair imports from different countries . . . . The Committee believes that the practice of cumulation is based on the sound principle of preventing material injury which comes about by virtue of several unfair acts or practices.<sup>42</sup>

Relying on this paper-thin piece of legislative history, the court concluded that "the Committee's use of generic terms collectively describing dumped and subsidized imports in the committee report . . . suggests that the statutory phrase 'subject to investigation' was intended to require cumulation of dumped and subsidized imports."<sup>43</sup> The CAFC buttressed its conclusion with the additional observation that the cumulation provision was placed in the definitions section applicable generally to antidumping duty and countervailing duty proceedings.<sup>44</sup> To the argument advanced by the ITC that the court should defer to its interpretation of the cumulation provision,<sup>45</sup> the CAFC responded that because the ITC's interpretation was neither longstanding nor consistent with congressional intent, no deference was due it.<sup>46</sup> Unfortunately, an opinion which was otherwise a tour de force was marred by the court's irrelevant, and worse illogical, observation that Congress

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39. *Id.* at 1485.

40. *Id.*

41. *Id.*

42. *Id.* (citing H.R. REP. NO. 725, 98th Cong., 2d Sess. 37, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 5164).

43. *Bingham*, 815 F.2d at 1485-86.

44. *Id.* at 1486.

45. *Id.* at 1487.

46. *Id.*

had made no exception or exclusion for cross-cumulation,<sup>47</sup> suggesting that the absence of any reference to cross-cumulation established the affirmative of the proposition, that cross-cumulation was statutorily mandated.

In *ICC Industries*,<sup>48</sup> a decision rendered less than two months before the *Bingham* case, the Federal Circuit considered two issues. The first was whether an importer could be assessed with retroactive antidumping duties because it knew or should have known that the imported merchandise was being sold at less than fair value.<sup>49</sup> The second issue was whether the ITC was required to conduct a separate injury investigation for the period in which massive imports were occurring in order to impose antidumping duties retroactively.<sup>50</sup> The court affirmed the Commerce Department's determination that the importer possessed the requisite knowledge to warrant retroactive imposition of antidumping duties, and further held that the ITC was not required to conduct a separate injury investigation.<sup>51</sup>

Most of the *ICC Industries* opinion took up the question of the ITA's conclusion that the importer had knowledge of less-than-fair-value sales.<sup>52</sup> With regard to the issue of whether the ITC was required to make a separate injury determination that massive imports of the subject merchandise during the critical circumstances period were a discrete cause of material injury under the critical circumstances provision of the Trade Agreements Act of 1979,<sup>53</sup> the court purported to defer to the ITC's interpretation of the antidumping duty statute.<sup>54</sup>

The importer argued<sup>55</sup> that the ITC was required to make one injury determination under 19 U.S.C. section 1673d(b)(1)(A)(i)<sup>56</sup>

47. *Id.* at 1486.

48. 812 F.2d 694 (Fed. Cir. 1987).

49. *Id.* at 695. The International Trade Administration of the Department of Commerce is responsible for this phase of the antidumping duty proceeding. See 19 U.S.C. §§ 1673d(a)(3), (b)(4)(A) (1982 & Supp. 1985).

50. *ICC Industries*, 812 F.2d at 695.

51. *Id.*

52. *Id.* at 696-99.

53. "Critical circumstances" refers to either a history of dumping or massive imports of the merchandise under investigation of which the importer knows or has reason to know is being sold at less than fair value. 19 U.S.C. § 1673b(e) (1982 & Supp. 1985). If critical circumstances are found to exist, antidumping duties will be assessed retroactively 90 days. *Id.*

54. *ICC Industries*, 812 F.2d at 699.

55. *Id.*

56. That section provides:

The Commission shall make a final determination of whether —

and a second, separate injury determination under 19 U.S.C. section 1673d(b)(4)(A).<sup>57</sup> While in effect conceding that the importer's interpretation was reasonable, the CAFC summarily disposed of it with the observation that "it is not the interpretation made by the Commission."<sup>58</sup> After reciting the "judicial-deference-to-agency-interpretation" litany,<sup>59</sup> the court turned to the legislative history of the critical circumstances provision. There the CAFC found persuasive an excerpt from the House Ways and Means Committee report on the Trade Agreements Act of 1979, which highlighted the need for expeditious relief to domestic industries injured by massive imports of competing merchandise.<sup>60</sup> Consequently, the court concluded,

[t]he Commission's interpretation [of the antidumping duty statute as permitting one material injury finding to be used in both the critical circumstances and final injury determination phases] is consistent with the congressional goal of providing meaningful relief to the domestic industries under the time limitations within which a final determination must be made.<sup>61</sup>

Even though the CAFC appears to have based its decision on deference to agency discretion, a closer look indicates that in fact it undertook an independent review, examining the legislative history

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(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of the merchandise with respect to which the administering authority [International Trade Administration, Department of Commerce] has made an affirmative determination under subsection (a)(1) of this section (19 U.S.C. § 1673d(a)(1)).

57. That section provides:

If the finding of the administering authority under subsection (a)(2) of this section is affirmative, then the final determination of the Commission shall include a finding as to whether the material injury is by reason of massive imports described in subsection (a)(3) of this section to an extent that, in order to prevent such material injury from recurring, it is necessary to impose the duty imposed by section 1673 of this title retroactively on those imports.

58. *ICC Industries*, 812 F.2d at 699.

59. *See id.* The "judicial-deference-to-agency-interpretation" litany goes as follows: "An agency's interpretation of a statute is to be sustained unless unreasonable," "an agency's interpretation of a statute is to be sustained unless plainly inconsistent with the statute," "an agency's interpretation of a statute is to be held valid unless weighty reasons require otherwise," and "an agency's interpretation of a statute need not be the only reasonable interpretation or the one the court views as the most reasonable." *Id.*

60. *Id.* at 699-700.

61. *Id.* at 700.

for itself<sup>62</sup> and reaching its own conclusion that the ITC's interpretation was reasonable.<sup>63</sup>

The third CAFC decision, *American Lamb Co. v. United States*,<sup>64</sup> laid to rest an issue that had long plagued the ITC in litigation before the Court of International Trade:<sup>65</sup> whether it was permissible for the ITC to weigh all conflicting evidence in its preliminary injury determinations.<sup>66</sup> This practice of the ITC, in effect since 1974,<sup>67</sup> was rejected by the Court of International Trade.<sup>68</sup> The domestic industry objected to this practice, in the main, because it resulted in more negative preliminary injury determinations than would otherwise have been the case.<sup>69</sup> The Federal Circuit accepted the ITC's view.<sup>70</sup>

In making its preliminary injury determination, the ITC is directed to make a determination "based upon the best information available to it at the time of the determination, of whether there is a reasonable indication"<sup>71</sup> that a domestic industry is being materially injured by reason of the imports subject to investigation. After invoking the obligatory "judicial-deference-to-agency-interpretation" litany,<sup>72</sup> the CAFC found the ITC's 12-year interpretation to be within the antidumping duty statutory framework,<sup>73</sup> particularly given the Commission's requirement that before an investigation is terminated at the preliminary stage, the record as a whole must contain clear and convincing evidence that no material injury exists.<sup>74</sup> The Federal Circuit pointed out the absurdity of any other interpretation:

[T]he notion that allegations in a petition found unsupported because of overwhelming contradictory evidence should nonetheless

62. *See id.* at 699-700.

63. *See id.* at 700.

64. 785 F.2d 994 (Fed. Cir. 1986).

65. *See Jeanette Sheet Glass Corp. v. United States*, 607 F. Supp. 123 (Ct. Int'l Trade 1985); *Republic Steel Corp. v. United States*, 591 F. Supp. 640 (Ct. Int'l Trade 1984).

66. *American Lamb*, 785 F.2d at 997.

67. *See id.* at 999.

68. *See Jeanette Sheet Glass*, 607 F. Supp. at 123; *Republic Steel*, 591 F. Supp. at 640.

69. By precluding the ITC from considering any evidence negating allegations of material injury at the preliminary injury stage, affirmative preliminary determinations would result whenever information accompanying the petition raised the possibility of material injury. *See American Lamb*, 785 F.2d at 1001. A negative preliminary injury determination terminates an antidumping duty proceeding. 19 U.S.C. § 1673b(a) (1982 & Supp. 1985).

70. *American Lamb*, 785 F.2d at 1001.

71. 19 U.S.C. § 1673b(a).

72. *See American Lamb*, 785 F.2d at 1001.

73. *Id.*

74. 19 U.S.C. § 1673d(b) (1982).

result in a full investigation and potential imposition of provisional remedies is directly contrary to Congress' intent . . . of eliminating "unnecessary and costly investigations" and the "impediment to trade" that would reside in an unwarranted imposition of provisional remedies.<sup>75</sup>

Through a process of gathering and considering all available evidence within the 45-day preliminary injury investigation period, the CAFC concluded that this legislative purpose would be effectuated.<sup>76</sup> Thus, while purporting to defer to agency statutory interpretation, the court in *American Lamb* again conducted an independent review of the legislative history, satisfying itself that the ITC's interpretation was consistent with congressional intent before approving the agency's view.

At first blush, these three decisions appear to be run-of-the-mill administrative law cases. The *ICC Industries* and *American Lamb* opinions both echo the standard rules regarding judicial deference to agency interpretations of the statute which the agency is charged with administering. Even the *Bingham* opinion acknowledged that ordinarily deference is due an agency's statutory interpretation.<sup>77</sup> Given the wealth of Supreme Court decisions that are the foundation for the deference rule,<sup>78</sup> these three Federal Circuit cases certainly are in the mainstream. However, the deference rule and its rationale that the expert agency view on the subject ought to be followed by the judiciary are not immutable shibboleths. The Supreme Court itself has recognized that expert discretion has its limits. "Expert discretion is the lifeblood of the administrative process," the Court has acknowledged, "but unless we make the requirements for administrative action strict and demanding, ex-

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75. *American Lamb*, 785 F.2d at 1004 (quoting S. REP. No. 1298, 93rd Cong., 2d Sess. 171, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7308).

76. *Id.*

77. See *Bingham*, 815 F.2d at 1487.

78. See, e.g., *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 104 S. Ct. 2778, 2782 (1984); *United States v. Clark*, 454 U.S. 555, 565 (1982); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 451 (1978); *Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1, 10 (1976); *Udall v. Tallman*, 380 U.S. 1 (1965); 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.16, at 400 (1978); R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 7.7, at 405-07 (1985) [hereinafter PIERCE, SHAPIRO & VERKUIL]; Levin, *Federal Scope-of-Review Standards: A Preliminary Restatement*, 37 ADMIN. L. REV. 95, 97 (1985); Boudreau, *To Defer or Not to Defer: The Question for the D.C. Circuit in Reviewing FCC Decisions* 36 FED. COM. L.J. 293 (1984); Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587 (1984); Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175 (1981); Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action* 31 ADMIN. L. REV. 329 (1979) [hereinafter Woodward & Levin].

*pertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion."<sup>79</sup> Thus, agency discretion is far short of unbridled. As the Court has noted, "[t]he deference owed to an expert tribunal cannot be allowed to slip into judicial inertia."<sup>80</sup> In international trade litigation before the Federal Circuit, the force of the deference rule is especially weak and should be abandoned in cases involving issues of agency statutory interpretation.

#### IV. ABANDONING DEFERENCE IN CAFC REVIEW OF ITC STATUTORY INTERPRETATIONS

Review by the Federal Circuit of ITC interpretations of the antidumping duty statute differs little in form from appellate review of agency decisions currently conducted by the other 12 courts of appeals.<sup>81</sup> The standard of review of agency decisions contained in *Universal Camera Corp. v. NLRB*,<sup>82</sup> and codified in the Administrative Procedure Act,<sup>83</sup> is whether the agency's decision is supported by the substantial evidence on the record or is otherwise in accordance with law.<sup>84</sup> This standard, however, tells reviewing courts little of the process to be followed in applying it to a given case.

While the Federal Circuit and the other courts of appeals use the same standard of review when reviewing agency action, the unusual element in CAFC review is that ITC antidumping duty determinations come to the Federal Circuit only after they have been reviewed first by the Court of International Trade.<sup>85</sup> Even though

79. *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (emphasis in original).

80. *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 271 (1968).

81. These courts have reviewed agency determinations from the National Labor Relations Board (see 29 U.S.C. § 160(e) (1982)); the Nuclear Regulatory Commission (see 28 U.S.C. § 2342(4) (1982); 42 U.S.C. § 2239 (1982)); the Interstate Commerce Commission (see 28 U.S.C. § 2321 (1982)); or the Federal Communications Commission (see 47 U.S.C. § 402(a) (1982); 28 U.S.C. § 2342(2) (1982)).

82. 340 U.S. 474 (1951). In that case, Justice Frankfurter candidly noted the unavoidable role that judicial discretion plays in the review of agency action:

A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry.

*Id.* at 488-89.

83. 5 U.S.C. § 706 (1982).

84. 19 U.S.C. § 1516a(a)(2) (1982 & Supp. 1985).

85. See 28 U.S.C. §§ 1581(c), 2640(b) (1982 & Supp. 1985); 19 U.S.C. §§

judicial scrutiny of antidumping duty determinations has been doubled, paradoxically the CAFC treats antidumping duty and countervailing duty appeals essentially as if the Court of International Trade had never initially reviewed the matter. In *Matsushita Electric Industrial Co. v. United States*,<sup>86</sup> the Federal Circuit was called upon to review an antidumping duty order revocation proceeding conducted by the ITC. The threshold question addressed by the CAFC was whether "in reviewing determinations of injury or likelihood of injury in antidumping cases, we review the Court's [Court of International Trade's] decision to determine if it is based on a fair assessment of the record . . . or whether we directly review the determination of the Commission . . . ." <sup>87</sup> The court gave the following answer:

There is no question but that under our jurisdictional statute it is the Court's decision that is before us . . . . However, resolution of whether the Court correctly held that the Commission's decision was not supported by the substantial evidence requires consideration of the evidence presented to and the analysis by the Commission. Thus, to determine whether the Court correctly applied the statutory standard of [review], we must review the Commission's decision . . . . Only if we agree with the lower court's conclusion on this initial question would we reach the question whether the court properly disposed of the case by reversal, rather than remand.<sup>88</sup>

Thus, the Federal Circuit reviews an ITC determination virtually as if no review had taken place at the Court of International Trade.<sup>89</sup>

The wisdom of having this additional layer of judicial review in light of the attendant delay and cost is questionable.<sup>90</sup> More im-

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1516a(a)(2)(B)(i)-(iii) & 1516a(b). See generally Note, *Administering the Revised Antidumping Law: Allocating Power between the ITC and the Court of International Trade*, 22 VA. J. INT'L L. 883 (1982).

86. 750 F.2d 927 (Fed. Cir. 1984).

87. *Id.* at 932 (emphasis in original).

88. *Id.* (footnotes and citations omitted).

89. See *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984) ("We review that court's review of an ITC determination by applying anew the statute's express judicial review standard.").

90. Kennedy, *A Proposal to Abolish the U.S. Court of International Trade*, 4 DICK. J. INT'L L. 13, 22 (1985). In 1983, a bill was introduced in the Senate to repeal the jurisdiction of the Court of International Trade in antidumping duty and countervailing duty cases. S. 1672, 98th Cong., 1st Sess., 129 CONG. REC. 10,755-57 (1983). The bill was designed to reduce litigation expense and delay in antidumping duty and countervailing duty appeals. As noted in the fact sheet accompanying the bill:

Under current law, the U.S. Court of International Trade is the court for review of AD/CVD cases. The bill would assign this responsibility to the Court of Appeals



portantly and pertinent in the present context, however, is that if Congress genuinely intended for the courts to defer to the determinations of the ITC, granting litigants two opportunities to appeal such determinations to the Federal judiciary as a matter of right — one opportunity more than is typically the case in administrative law cases — would seem inconsistent with this intent. If ITC determinations, and for that matter, ITA determinations as well, are entitled to great judicial deference, why expose such determinations twice to the gauntlet of judicial review? At least one answer, of course, is that Congress did not believe that deference was due to such determinations because of an apprehension that political considerations might shape them. By screening these determinations through the courts twice, the administering agencies would be on notice that if extralegal considerations enter into a determination, that determination runs a substantial risk of ultimately being reversed. A fair inference from this two layer scheme of judicial review is that Congress is not convinced that ITA and ITC anti-dumping determinations should be shielded from intense judicial probing.

Although it can only be inferred from this dual judicial review scheme that Congress intended little or no deference be accorded ITC determinations, a more explicit congressional pronouncement found in the legislative history of the Customs Courts Act of 1980,<sup>91</sup> substantially undercuts the “agency expertise” rationale for

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for the Federal Circuit.

AD/CVD cases are currently subject to a two-step appeals process, in which determinations are first appealed to the Court of International Trade and then to the Court of Appeals for the Federal Circuit. The only function of the courts in these cases is to conduct an appellate review of the agency proceedings. By eliminating the first step in the process, the bill brings the import relief area into conformity with the usual administrative practice and reduces the costs associated with appellate review by two different courts.

129 CONG. REC. 10,757 (1983). The Senate bill was deleted from the final version of the Trade and Tariff Act of 1984.

91. Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified in scattered sections of 28 U.S.C.). The Customs Courts Act of 1980 was chiefly designed to clarify and enlarge the jurisdiction of the Court of International Trade. See H.R. REP. NO. 1235, 96th Cong., 2d Sess. 1, 19-20, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 3729. See generally Cohen, *Recent Decisions of the Court of International Trade Relating to Jurisdiction: A Primer and a Critique*, 58 ST. JOHN'S L. REV. 700 (1984); Vance, *The Unrealized Jurisdiction of 28 U.S.C. § 1581(i): A View from the Plaintiff's Bar*, 58 ST. JOHN'S L. REV. 793 (1984); Cohen, *The “Residual Jurisdiction” of the Court of International Trade Under the Customs Courts Act of 1980*, 26 N.Y.L. SCH. L. REV. 471 (1981); Rodino, *The Customs Courts Act of 1980*, 26 N.Y.L. SCH. L. REV. 459 (1981).

judicial deference. In the House Report<sup>92</sup> on that 1980 Act, repeated reference was made to the "specialized expertise"<sup>93</sup> of the Federal Circuit in international trade litigation:

The Customs Courts Act of 1980 creates a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise of the United States Customs Court [the predecessor court of the Court of International Trade] and the United States Court of Customs and Patent Appeals [which was merged with the Court of Claims in 1982 to form the Court of Appeals for the Federal Circuit].<sup>94</sup>

In addition, in listing the major goals of the Customs Courts Act, the House Report emphasized "Congress' intent that the expertise [of the Court of International Trade and the Federal Circuit] be exclusively utilized in the resolution of conflicts and disputes arising out of the tariff and international trade laws . . . ."<sup>95</sup> Thus, given Congress' explicit recognition of the CAFC's special expertise in international trade matters, it is highly debatable whether the Federal Circuit should show *any* deference to the ITC in cases of statutory interpretation.

Although the CAFC stated in these three cases that deference is due to ITC interpretations of the antidumping duty law, does the Federal Circuit in fact defer? Posing the questions somewhat differently, would the results have differed in the three cases under discussion if the CAFC had reviewed the ITC determinations using a "no deference even if sufficiently reasonable" standard of review?

## V. THE "NO DEFERENCE" STANDARD OF REVIEW

In *Bingham*, the Federal Circuit concluded that the ITC's interpretation of the cumulation provision of the Trade and Tariff Act of 1984 was directly at odds with congressional intent regarding the issue of cross-cumulation.<sup>96</sup> The court consequently had no difficulty rejecting the ITC's view in favor of one which it considered to be congruous with what Congress intended. Had there been a longstanding agency practice on the cross-cumulation question, the case might have been closer. Given that there was none,<sup>97</sup> the

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92. H.R. REP. No. 1235, *supra* note 91.

93. *Id.* at 20.

94. *Id.*

95. *Id.* at 28.

96. *Bingham*, 815 F.2d at 1487.

97. *See id.*

CAFC was not put to any hard choices. But even had there been such a practice, the court in all likelihood would have still rejected the ITC's position because it would have run counter to the Federal Circuit's reading of the objective of the cumulation provision as revealed in the legislative history.<sup>98</sup> In short, because the CAFC found the ITC's statutory interpretation to be unreasonable, there would have been no opportunity to apply a "no deference even if sufficiently reasonable" standard of review.

In *ICC Industries*, the court in effect conceded that the importers' interpretation of the critical circumstances statute was reasonable.<sup>99</sup> Although the CAFC recited the "judicial-deference-to-agency-interpretation" boilerplate,<sup>100</sup> its acceptance of the ITC's interpretation seems less predicated on deference to agency action than on that interpretation's consistency with congressional intent.<sup>101</sup> The legislative history available was scant, but it did nevertheless support the ITC's position for prompt relief. Thus, the Federal Circuit was not writing on a clean slate but rather had some legislative history, albeit meager, to guide it through the statutory shoals. On balance, while the *ICC Industries* case might have been closer had a no deference standard of review been applied, the result would have probably been the same.

Finally, in *American Lamb*, the court was placed in the position of having to vacate the decision of the Court of International Trade in order to uphold the ITC's interpretation of the anti-dumping duty statute, unlike in *Bingham* and *ICC Industries*, where the CAFC affirmed the Court of International Trade. Furthermore, the court in *American Lamb* had to vacate a lower court decision whose reasoning was "fully acceptable."<sup>102</sup> Once again, however, what was decisive for the CAFC in upholding the ITC's view in *American Lamb*, as it was in sustaining that view in *ICC Industries* and rejecting it in *Bingham*, was congressional intent:

Congress' requirement that ITC conduct a thorough investigation, using the best information available to it, Congress' expectation of opportunity for interested parties to present their views, and Congress' provision of the "reasonable indication" standard for use in investigations initiated in response to a petition and in ITC's self-

98. *See id.*

99. *ICC Industries*, 812 F.2d at 699 (where the court stated that the importers' view "may be one of the possible interpretations").

100. *Id.*

101. *See id.* at 699-700.

102. *See American Lamb*, 785 F.2d at 1001.

initiated investigations — all militate against a view that Congress intended ITC to disregard evidence that clearly and convincingly refutes the allegations in a petition.<sup>103</sup>

The Federal Circuit added that the Court of International Trade's reading of "reasonable indication" of injury (as being synonymous with "mere possibility" of injury) did not conform with the congressional desire to weed out nonmeritorious cases at an early stage of an investigation.<sup>104</sup>

Considering that the CAFC had to work against the momentum of a lower court decision invalidating the ITC's interpretation, the case might have been closer had the court applied a no deference standard of review in *American Lamb*. However, it is fair to state that the decision of the Court of International Trade was simply out of step with the wealth of legislative history supporting the ITC's interpretation.

## VI. CONCLUSION

If application of a "no deference even if sufficiently reasonable" standard of review would not have changed the result in any of these three cases, why adopt such a standard? Indeed, the need for adoption of such a rule seems minimal because *de facto*, the Federal Circuit appears to be applying such a standard and merely paying lip service to the deference rule. As commentators are quick to point out, no matter how much deference is shown, a court never actually affirms an agency interpretation of a statutory provision without first independently analyzing it and its legislative history.<sup>105</sup> If the court finds a conflict, it reverses under any standard of review.<sup>106</sup>

A no deference standard of review ought to be formally adopted by the Federal Circuit if for no other reason than judicial candor, but several other more compelling reasons exist for doing so. First, adopting a "no deference even if sufficiently reasonable" standard of review would firmly establish the CAFC's status as the expert tribunal in the field of international trade law, a position it could rightfully claim, given its exclusive appellate jurisdiction

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103. *See id.* at 1003.

104. *Id.* at 1001-02.

105. PIERCE, SHAPIRO & VERKUIL, *supra* note 78, at 376-77; Woodward & Levin, *supra* note 78, at 332-35.

106. *See id.*

over the subject area. As noted,<sup>107</sup> Congress has implicitly and expressly recognized this judicial expertise, most revealingly through the double-layered scheme of judicial review to which ITC anti-dumping duty and countervailing duty determinations are subjected.

A second reason for CAFC adoption of a no deference rule is that every antidumping duty determination reached by the ITC touches upon matters of international importance, because every such determination affects international trade between one or more other countries and the world's largest economic power.

A third reason for explicitly rejecting the deference rule in CAFC review of either ITC or ITA statutory interpretations, is the *in terrorem* effect such a declaration would have on these agencies should they become emboldened by the deference rule to stray far afield of congressional intent. Adoption of a no deference standard of review would send a message to those agencies that they are not superior to courts in the interpretation of the antidumping duty statute while reaffirming that statutory interpretation is quintessentially and ultimately a judicial, not an administrative, function.<sup>108</sup>

None of the foregoing should suggest that the ITC is unable or unwilling to take into account considerations of the public interest or that the Federal Circuit should exhibit an overweening attitude toward the Commission. Given the depth of expertise and the breadth of views brought to the Commission by the six commissioners and staff, its views on the meaning of the U.S. trade laws should not be cavalierly rejected by the courts.<sup>109</sup> At the same time, however, a panel of court of appeals judges who are themselves members of an expert Federal court, should not be daunted by the prospect of rejecting an ITC interpretation of the anti-dumping duty law. Indeed, the CAFC should not hesitate to do so, even in cases where the court believes that the ITC's interpretation

107. See *supra* notes 92-95 and accompanying text.

108. See, e.g., *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (where it is stated that the courts are "final authorities on issues of statutory construction").

109. The six ITC commissioners are appointed by the President with the advice and consent of the Senate, serve for a term of nine years, and must be qualified to develop expert knowledge of international trade matters. 19 U.S.C. § 1330(a)-(b) (1982). Not more than three of the commissioners may be members of the same political party. *Id.* § 1330(a). The Commission has the support of an expert staff of attorneys, economists, accountants, and statisticians. See Berg, *Petitioning and Responding Under the Escape Clause: One Practitioner's View On How To Do It*, 6 N.C.J. INT'L L. & COM. REG. 407, 409 (1981).

is reasonable, if the court would have reached a different conclusion had the issue come before it initially in a judicial proceeding.