Florida Journal of International Law

Volume 3 | Issue 2 Article 3

January 1988

The Impact of Interlocutory Judicial Decisions Upon Anti-Dumping and Countervailing Duty Proceedings

J. Kevin Horgan

THE IMPACT OF INTERLOCUTORY JUDICIAL DECISIONS UPON ANTI-DUMPING AND COUNTERVAILING DUTY PROCEEDINGS*

*J. Kevin Horgan***

I. INTRODUCTION

In 1979, Congress enacted a comprehensive scheme for judicial review of anti-dumping and countervailing duty determinations.[1] One of its primary objectives was to ensure that the right to judicial relief from unlawful administrative determinations was not rendered meaningless by the passage of time during the course of a party's efforts to obtain judicial relief.[2] Domestic parties seeking relief from dumped or subsidized imports had been complaining that judicial review of an erroneous administrative determination was ineffective because the courts could only grant prospective relief.[3] Decisions rendered in these

*This article is based upon the author's presentation at the Fourth Annual Judicial Conference on the Court of International Trade (1987).

**Barnes, Richardson & Colburn, Chicago, Illinois. The author gratefully acknowledges the assistance of Brian F. Walsh in the preparation of this article.

1. Trade Agreements Act of 1979, Pub. L. No. 96-39, Title X, 93 Stat. 300 (1980).

2. S. REP. NO. 249, 96th Cong., 1st Sess. 252 (1979); H. Rep. No. 317, 96th Cong., 1st Sess. 182 (1979).

3. *Id.* Under the former § 516 of the Tariff Act of 1930, *amended by* 19 U.S.C. § 1516 (1978), an American manufacturer, producer or wholesaler of merchandise of the same class or kind as that subject to a negative dumping or subsidy determination could contest that determination

cases affected only that merchandise which entered the stream of United States commerce after publication of the judicial decision. Thus, even if the domestic party ultimately prevailed in an action challenging an anti-dumping or countervailing duty determination, it would receive no relief with respect to the unfairly priced or subsidized imports with which it had to compete during the pendency of the judicial action.

Importers were also complaining about the ineffectiveness of judicial review of anti-dumping and countervailing duty determinations under the former law.[4] In order to recover unlawfully assessed duties, importers had to protest every entry of merchandise subject to a subsidy or dumping finding. This procedure required importers to wait until the subject entries had been liquidated and the protests concerning the entries had been denied, before they could seek judicial review.[5] This process delayed judicial relief for years, during which time importers and foreign exporters incurred the competitive disadvantages associated with being subject to a contingent liability of unknown proportions. There were also the irrecoupable costs associated with posting bonds for estimated anti-dumping and countervailing duties.[6]

Congress sought to address these perceived deficiencies in the former law by creating section 516a of the Tariff Act of 1930. Section 516a grants all interested parties who participate in the administrative proceedings the right to institute a judicial action contesting a final anti-dumping or countervailing duty determination immediately upon publication of the determination in the *Federal Register*.[7] Congress

---

by instituting an action in the Customs Court within 30 days after publication of the determination. However, during the pendency of the action, liquidations of entries of the subject merchandise would continue unabated. If the cause of action was sustained, only that merchandise entered after publication of the court's decision was assessed with anti-dumping or countervailing duties.

4. *Implementation of the Multilateral Trade Negotiations: Hearings Before the Subcommittee on International Trade of the Senate Committee on Finance*, 96th Cong., 1st Sess. 44 (1979) (Statement of Lee Greenbaum, Jr., Vice Pres., Am. Importers Ass'n).

5. Since the former § 516, *supra* note 3, was limited to actions instituted by an "American manufacturer, producer or wholesaler," importers, in order to obtain judicial review of a dumping or subsidy determination, were required to await the liquidation of a subject entry, file a protest, await denial of the protest, and then institue an action in the United States Customs Court pursuant to § 514 of the Tariff Act of 1930, to contest the denial of the protest.

6. *See supra* note 4.

7. 19 U.S.C. § 1516a (1979). The term "interested party" may include: a foreign manufacturer, producer or exporter; an importer; a trade or business association; a foreign government; a manufacturer, producer or wholesaler in the United States of a like product; or a union or group of workers engaged in the manufacture, production or wholesaling in the United States of a like product. 19 U.S.C. § 1677(a) (1979). An anomaly in § 516A permits an interested party to institute an action contesting the scope of an anti-dumping or countervailing duty order within 30 days after the date that the determination is mailed to the interested party. *See* 19 U.S.C. § 1516(a)(2)(A)(ii) (1979).

also empowered the United States Customs Court, the predecessor of the United States Court of International Trade (CIT), to enjoin liquidation of entries of the subject merchandise during the pendency of the court action.[8] This injunction is to further protect a party's ability to obtain meaningful judicial relief in section 516a actions. Entries enjoined from liquidation under section 516a are liquidated in accordance with the final judicial decision.[9] Thus, an interested party who successfully challenges an anti-dumping or countervailing duty determination in court cannot obtain both prospective and retrospective judicial relief in some cases.[10]

While section 516a has allowed the CIT and the Court of Appeals for the Federal Circuit (Federal Circuit) to accord meaningful relief in a wide array of anti-dumping and countervailing duty cases, the timing of judicial decisions continues to be a source of concern and frustration. The issuance of a final judicial decision, or the failure to issue one, can have a dramatic impact upon the course of pending administrative proceedings and upon the competitive standing of the interested parties. Furthermore, notwithstanding the availability of preliminary injunctive relief under section 516a, the timing of a judicial decision may still affect the final assessment of anti-dumping and countervailing duties.

II. BACKGROUND

To appreciate fully the impact that the timeliness of a judicial decision may have upon a party's ability to obtain meaningful judicial relief in an anti-dumping or countervailing duty case, one needs to keep in mind the unique process used to implement the anti-dumping and countervailing duty laws.

Two distinct phases exist in anti-dumping and countervailing duty proceedings. The first phase consists of an investigation of the less than fair value (LTFV) or subsidy by the Department of Commerce's

---

8. 19 U.S.C. § 1516a(c)(2) (1979). At that time, the Customs Court did not possess the full equity powers conferred upon the renamed Court of International Trade by the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 11727 (1980).

9. 19 U.S.C. § 1516(e) (1979).

10. The issuance of an injunction against liquidation is not automatic. The decision to issue an injunction preventing the liquidation of entries of merchandise potentially subject to a judicial decision is committed to the discretion of the court, which is directed to consider: "(1) the plaintiff's likelihood of success on the merits; (2) the potential for irreparable harm; (3) the public interest; and (4) the potential harm to other parties." 19 U.S.C. § 1516a(c)(2) (1979). *See also* Zenith Radio Corp. v. United States, 553 F. Supp. 1052 (Ct. Int'l Trade 1982), *rev'd*, 710 F.2d 806 (Fed. Cir. 1983).

International Trade Administration (ITA) and an injury investigation by the International Trade Commission. Together, these investigations culminate in the issuance of, or a determination not to issue, an anti-dumping or countervailing duty order. The issuance of an anti-dumping or countervailing duty order triggers the second phase. In the second phase, the ITA reviews the preliminary assessments and determines the actual anti-dumping or countervailing duty rates.

A. *The Investigation Phase*

Anti-dumping and countervailing duty proceedings are ordinarily initiated in response to a petition filed simultaneously with the Department of ITA and the International Trade Commission (ITC). In the petition, an interested party alleges that imported merchandise is being dumped or subsidized and that those imports are causing or threaten to cause material injury to a domestic industry.[11] Upon receiving a petition, the ITA has to determine within twenty days, first, whether the petition alleges the elements necessary for the imposition of anti-dumping or countervailing duties and second, whether the petition is supported by evidence reasonably available to the petitioner.[12] If the ITA's determination is affirmative, the ITA commences an LTFV or subsidy investigation and notifies the ITC of its determination that the petition is sufficient. If the ITA determines that a petition is not sufficient, the petition is dismissed, and no further administrative proceedings take place.[13]

Within forty-five days of the receipt of an anti-dumping or countervailing duty petition, the ITC is required to make a preliminary determination as to whether there is a reasonable indication that

(1) an industry in the United States —
  (a) is materially injured, or
  (b) is threatened with material injury, or
(2) the establishment of an industry in the United States is materially retarded by reason of imports of the merchandise which is the subject of the investigation by the administering authority.[14]

---

11. 19 U.S.C. §§ 1671a, 1673a (1979). The ITA is also authorized to self-initiate anti-dumping and countervailing duty proceedings. *Id.* For the sake of simplicity, this discussion assumes that the administrative proceedings have been initiated by petition.

12. 19 U.S.C. §§ 1671a(c), 1673a(c) (1979).

13. 19 U.S.C. §§ 1671a(c)(3), 1673a(c)(3) (1979).

14. 19 U.S.C. §§ 1671b, 1673b (1979).

If the ITC determines that no reasonable indication of injury exists, both the ITA and the ITC terminate their investigations.[15]

If the ITC's preliminary injury determination in a countervailing duty investigation is affirmative, the ITA makes a preliminary determination of "whether there is a reasonable basis to believe or suspect that a subsidy is being provided with respect to the merchandise which is the subject of the investigation."[16] In an anti-dumping case, the ITA must determine "whether there is a reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold at less than fair value."[17] In a countervailing duty case, the ITA ordinarily has to make this determination within eighty-five days after the petition is filed.[18] In an anti-dumping case, the ITA has to make a preliminary determination within 160 days after the filing of the petition. In either case, the ITA may not make a preliminary determination prior to the ITC's preliminary injury determination.[19] Under certain conditions, these time periods may be extended.[20]

An affirmative preliminary determination by the ITA suspends the liquidation of entries of the class or kind of merchandise subject to the investigation and requires importers to post security, by bond or cash deposit. The security is for the payment of anti-dumping or countervailing duties on entries made on or after the date of publication of the preliminary determination in the *Federal Register*.[21] If the ITA's preliminary determination is negative, the investigation goes forward, but liquidations are not suspended.

Within seventy-five days of its preliminary determination, the ITA ordinarily has to make a final determination in its LTFV or subsidy investigation.[22] If the ITA's final determination is negative, both the ITA and the ITC terminate their proceedings.

---

15. 19 U.S.C. §§ 1671b(a), 1673b(a) (1979).

16. 19 U.S.C. § 1671b(b) (1979).

17. 19 U.S.C. § 1673b(b) (1979).

18. 19 U.S.C. § 1671(b) (1979).

19. 19 U.S.C. §§ 1671b(b), 1673b(b) (1979).

20. If the ITA makes a determination that the case is extremely complicated and that additional time is necessary to make a determination, these periods may be extended to 150 days for countervailing duty cases and 210 days for anti-dumping duty cases. 19 U.S.C. §§ 1671b(c), 1673b(c) (1979).

21. Section 703b of the Tariff Act, *amended by* 19 U.S.C. § 1761(b), in regard to countervailing duty cases and § 737 of the Act, *amended by* 19 U.S.C. § 1673b(b) in regard to anti-dumping cases.

22. 19 U.S.C. §§ 1671d, 1673d (1979). This period may be extended under certain conditions. Section 735(a)(2) of the Act, *amended by* 19 U.S.C. § 1673d(a)(2), grants the ITA the authority to postpone making its final determination until not later than the 135th day after the date the prehearing determination was published:

Following an affirmative final determination by the ITA, the ITC issues its final determination.[23] Within seven days of notification of an affirmative final determination by the ITC, the ITA has to publish a final anti-dumping or countervailing duty order.[24] The order includes a description of the merchandise upon which the Customs Service is to assess the duties, and requires the deposit, at the time of entry, of estimated anti-dumping or countervailing duties.[25] Whereas after an affirmative preliminary determination by the ITA importers may post security for estimated duties in the form of a bond, after the issuance of the final order they have to post security in the form of cash deposits.

B. *The Review and Assessment Phase*

The ITA's final determination does not immediately establish the anti-dumping and countervailing duty rates. For both anti-dumping and countervailing duty investigations, the ITA examines entries made during a period of time prior to the filing of the petition.[26] Entries made prior to the filing of the petition are not subject to anti-dumping or countervailing duties, and their liquidation is never suspended. Instead, the ITA initially uses the rates resulting from the phase one investigation only as an estimate of actual duty rates.

If a request in writing for such a postponement is made by —
(A) Exporters who account for a significant proportion of the exports of the merchandise which is the subject of the investigation, in a proceeding in which the preliminary determination by the administrating authority under § 733(b) was negative.

The due date for final subsidy determinations may be extended to coincide with the due date for a final determination in an LTFV investigation which was instituted simultaneously with the subsidy investigation and involves merchandise of the same class or kind from the same or other countries.

23. The period in which the ITC must make this determination varies according to the results of the preliminary determination of the ITA, § 705(b), *amended by* 19 U.S.C. § 1671d(b) (1979) with respect to countervailing duty cases and § 735a(b), *amended by* 19 U.S.C. § 1673d(b) (1979) with respect to anti-dumping cases.

If the ITA's preliminary determination was affirmative, then the ITC must make its final injury determination before the latter of, the 120th day after the ITA's determination, or the 45th day after the ITA's final determination.

If the ITA's preliminary determination was negative, but its final determination was affirmative, then the ITC is required to make its final injury determination within 75 days of the ITA's final affirmative determination.

24. 19 U.S.C. §§ 1671e, 1673e (1979).

25. *Id.*

26. *See* Full-scale Investigation, 19 C.F.R. § 353.38 (1987).

This estimate serves as the basis for posting security for duties on merchandise entered on or after the date of publication of a preliminary or final affirmative ITA determination.[27]

Any interested party may obtain an administrative review to determine the *actual* duty rates by filing a request for review during the anniversary month of the publication of the anti-dumping or countervailing duty order.[28] If a request for review is timely, an administrative review in an anti-dumping case ordinarily covers entries made during the twelve months immediately preceding the anniversary month.[29] An administrative review in a countervailing duty case will ordinarily cover the most recently completed reporting year of the government of the affected country.[30] When the ITA completes an administrative review, it assesses anti-dumping and countervailing duties on the entries made during the review period at the rates established in the review.

If the ITA does not receive a timely request for review during any anniversary month, the ITA does not examine the entries made during the immediately preceding time period. Instead, the Department of Commerce instructs the Customs Service to assess anti-dumping duties at rates equal to the amount of the security posted according to the rates determined in the phase one investigation.[31] The ITA also instructs the Customs Service to continue to collect estimated duties on future entries at the last established rate.[32]

C. *Judicial Review*

Section 516a of the Tariff Act of 1930, as amended, permits an interested party who participates in an anti-dumping or countervailing duty proceeding to obtain judicial review of any determination which terminates or concludes an investigation or an administrative review.[33]

---

27. *See generally*, PPG Industries, Inc. v. United States, 660 F. Supp. 965 (Ct. Int'l Trade, 1987).

28. 19 U.S.C. § 1675 (1979).

29. Administrative Review of Orders, Findings, and Suspension Agreements, 19 C.F.R. § 353.53a(b)(2) (1987). The first administrative review of an anti-dumping duty order will cover the period from the date when liquidation of entries was initially suspended until the end of the month immediately preceding the first anniversary month.

30. Administrative Review of Orders and Suspension Agreements, 19 C.F.R. § 355.10(b)(1) (1987).

31. Administrative Reviews of Orders, Findings, and Suspension Agreements, 19 C.F.R. §§ 353.53a(d); 355.10(d) (1987).

32. *Id.*

33. 19 U.S.C. § 1516a (1979).

Thus, a private party may obtain judicial review of a decision not to initiate an investigation, a determination by the ITC not to conduct a changed circumstances review, or a negative preliminary injury determination by the ITC.[34] A party may also institute an action in the CIT to contest any final agency determination in an anti-dumping or countervailing duty investigation or administrative review.[35]

Additionally, an interested party may obtain judicial review of an ITC determination of whether an agreement suspending an anti-dumping or countervailing duty investigation has eliminated the injurious effects of the dumping or subsidization,[36] or an ITA determination of whether a particular type of merchandise falls within the scope of an existing anti-dumping or countervailing duty order.[37]

A party may appeal a final judgment by the CIT to the Federal Circuit.[38] Decisions of the court of appeals are reviewable by writ of certiorari in the United States Supreme Court.[39]

However, despite these opportunities for judicial review, the institution of judicial proceedings does not ordinarily have an immediate impact upon the course of administrative proceedings. Section 516a(c) provides that the liquidation of entries of merchandise that is the subject of an anti-dumping or countervailing duty proceeding shall continue in accordance with the challenged administrative determination unless such liquidation is enjoined. Therefore, absent an injunction, a judicial proceeding will not affect the liquidation of entries, until notice of a final court decision not in harmony with the administrative determination is published in the *Federal Register*.[40]

III. The Need for Finality in Judicial Review of Anti-dumping and Countervailing Duty Determinations

Despite these extensive opportunities for judicial review, difficulties in obtaining the final resolution of issues that recur in reviews of the same case or that are central to many other cases have frustrated both private parties and the government.

An interlocutory judicial decision, which is not in harmony with the contested administrative determination, affects more than the spe-

34. 19 U.S.C. § 1516a(a)(1) (1979).
35. 19 U.S.C. § 1516a(a)(2) (1979).
36. 19 U.S.C. § 1516a(a)(2)(B)(v) (1979).
37. 19 U.S.C. § 1516a(a)(2)(B)(vi) (1979).
38. 28 U.S.C. § 1295(a)(5) (1982).
39. 28 U.S.C. § 1254 (1966).
40. 19 U.S.C. § 1516a(e) (1979).

cific determination under review. It casts a shadow of doubt upon all administrative proceedings in which similar issues may arise. Unless the government chooses to acquiesce immediately in an adverse trial court decision, the government will continue to adhere to its original position in related proceedings presenting the contested issue until it has exhausted its right to appellate review.[41]

The government's posture following an adverse judicial decision, though perhaps necessary in order to preserve its own right to judicial review, has several unfortunate consequences. The posture postpones the time when private parties actually obtain complete judicial relief. It also compels interested parties to institute new actions challenging successive administrative determinations in order to secure the relief to which they may be entitled by virtue of an initial favorable judicial decision. Moreover, it requires the government to expend its own resources to carry out administrative proceedings of dubious validity.[42]

---

41. An example of this phenomenon has occurred with respect to the ITA's treatment of taxes which are rebated or not collected upon exportation of merchandise subject to anti-dumping duty proceedings. In the final results of its second administrative review of the finding of dumping covering television receivers from Japan (50 Fed. Reg. 24278 (1985)), the ITA was required to make an adjustment to offset a commodity tax imposed by the government of Japan on television receivers sold in the home market, but not collected on television receivers exported to the United States. The ITA made the adjustment by assuming that the tax was fully passed through by Japanese TV manufacturers to consumers in the home market, and deducting the full amount of the tax from home market prices.

In Zenith Electronics Corp. v. United States, 633 F. Supp. 1382 (Ct. Int'l Trade 1986) the Court of International Trade (Watson, J.) reversed the ITA with respect to the adjustment for the Japanese commodity tax, holding that the ITA erred by assuming full pass through of the tax and by failing to make the adjustment by adding the amount of the tax to the United States price rather than deducting it from foreign market value. The court remanded the matter for recalculation of the dumping margins in a manner consistent with court's decision. After some delays, the results of the remand were issued by the ITA on April 14, 1987. However, as of September 30, 1987, the Court of International Trade had not yet entered a final judgment in the action contesting the final results of the second administrative review of the finding of dumping covering television from Japan.

In the time since *Zenith*, was decided, the ITA has had several opportunities to make adjustments in anti-dumping duty proceedings for commodity taxes imposed in foreign countries which are rebated or not collected on merchandise exported to the United States. Notwithstanding the decision in *Zenith*, the ITA has uniformly made adjustments for such taxes by assuming full pass-through and deducting the full amount of the tax from foreign market value. *E.g.* Color Televisions Receivers from Korea; Final Results of Anti-dumping Duty Administrative Review, 51 Fed. Reg. 41365 (1986); Color Televisions Receivers, Except for Video Monitors, from Taiwan; Final Results of Anti-dumping Duty Administrative Review, 51 Fed. Reg. 46895 (1986); Television Receivers, Monochrome and Color, from Japan; Final Results of Anti-dumping Duty Administrative Review, 52 Fed. Reg. 8940 (1987).

42. If the government is required to complete remand proceedings before it has an opportunity to seek appellate review, both the government and private interested parties may incur needless expense without regard to the outcome on appeal. If the government does prevail on appeal,

In view of the foregoing, delays in reaching a conclusive judicial decision as to the propriety of an administrative determination clearly contravene the general interest in the efficient and predictable administration of the anti-dumping and countervailing duty law. In addition, delays in achieving finality may have specific consequences resulting from the unique procedures used to assess anti-dumping and countervailing duties.

One possible consequence is that subsequent administrative review of the challenged administrative decision may overtake the lawsuit and render it moot. *PPG Industries, Inc. v. United States*[43] illustrates this possiblility. *PPG Industries* involved three consolidated actions challenging the ITA's final affirmative countervailing duty determination in its investigation of automotive glass from Mexico. When the ITA published the final results of its first administrative review, (i.e. 751 review), of the countervailing duty order the government moved to sever and dismiss as moot the two actions instituted by the domestic party (PPG Industries) challenging the negative aspects of an otherwise affirmative subsidy determination. The court granted the government's motion, stating the following:

> It is of signal importance to understand the basis for the *actual* assessment or collection of countervailing duties and deposit rates on future entries subsequent to the 751 review *is* the 751 review results. *After the 751 review has been completed, neither the actual assessment of duties nor the estimation of duty rates for future entries are based on the net subsidy determined in the final countervailing duty order and determination. See Alhambra Foundry v. United States*, ____ CIT ____, 635 F. Supp. 1475 (1986). In the instant case, any remand directing the ITA to alter the amount of deposit rates determined in the final affirmative countervailing duty order, after the 751 review has already been published establishing the countervailing duties to be assessed or deposited on future entries, would be futile, since the remand could never affect the amount of the actual countervailing duty assessments nor the deposits of estimated duties. The results of the 751 review have finally fixed the actual assessments and have set new estimated deposit rates for future entries.[44]

---

the parties will have needlessly incurred the costs associated with the remand proceedings. I the government does not prevail on appeal, the parties will likely be required to incur additiona costs in correcting inconsistent administrative determinations made subsequent to the initia adverse judicial decision.

43. 660 F. Supp. 965 (Ct. Int'l Trade 1987).

44. *Id.* at 970. [emphasis in original].

In *PPG Industries*, the court perceived that a final affirmative countervailing duty determination merely establishes whether an order should be issued, and sets a temporary countervailing duty deposit rate.[45] Consequently, the only meaningful judicial relief available in an action challenging an affirmative original determination is a judgment invalidating the order or adjusting the deposit rate. Since PPG Industries, as the domestic petitioner, was not challenging the validity of the countervailing duty order, the court recognized that when the deposit rate established in the first administrative review superseded the deposit rate set in the orginal determination, PPG Industries could no longer obtain meaningful judicial relief in its challenge to the original determination. The court stated the following: "In the present case, the Court is asked to give relief where none is needed and none can be given. Any relief granted in the form of an opinion would be advisory at best. Such action by this Court is impermissible under Article III of the United States Constitution."[46]

The mootness doctrine has also resulted in the dismissal of actions, even after an issue has been decided adversely to the government, when the final results of the administrative review were published before the proceedings were complete.[47] Thus, delays in obtaining a *final* court decision may deprive a private party of the benefits of a hard-won victory.[48]

---

45. *Id.* at 969.

46. *Id.* at 973.

47. *See* Alhambra Foundry v. United States, 635 F. Supp. 1475 (Ct. Int'l Trade 1986); Silver Reed Am., Inc. v. United States, 581 F. Supp. 1290 (Ct. Int'l Trade 1984); Cabot Corp. v. United States, Ct. No. 83-07-01044 (unpublished order granting motion for partial vacatur and final judgment Nov. 20, 1986).

48. In *PPG*, 660 F. Supp. at 972, the court expressed the opinion that the decisions in Silver Reed Am., Inc. v. United States, 581 F. Supp. 1290 (Ct. Int'l Trade 1984), *rev'd and remanded on other grounds sub nom.* Consumer Products Div., SCM Corp. v. Silver Reed Am., Inc., 753 F.2d 1033 (Fed. Cir. 1985) and Cabot Corp. v. United States, 620 F. Supp. 722 (1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986), reversing ITA determinations as to particular issues, "had *stare decisis* effect on matters of law in subsequent administrative reviews" even though the remand orders resulting from those reversals were vacated as moot. 660 F. Supp at 972. While the opinions of the court as to those particular issues may certainly be regarded as persuasive authority, it does not appear that they constitute binding precedents. In vacating its remand order in each case, the court ruled that its decision as to those issues upon which it reversed the ITA were not essential to its final judgment sustaining the validity of the anti-dumping and countervailing duty orders at issue in *Silver Reed* and *Cabot*, respectively. In these circumstances, the government, having had no opportunity to appeal these adverse decisions, may choose to adhere to its original disapproved methodology in subsequent related and unrelated administrative proceedings until it has an opportunity to appeal. *See supra* note 41. A judge of the Court of International Trade reviewing those later determinations would not be bound under *stare decisis* to adhere to the earlier decision of the court. *See infra* note 60.

Another consequence of these delays is that it is possible for liquidation to continue in accordance with a challenged administrative determination, even after the issuance of an inconsistent judicial decision. Section 516a(c) provides that unless liquidation of entries is enjoined, entries shall be liquidated in accordance with the challenged administrative determination, if the merchandise is entered on or before the date of publication in the *Federal Register* of a notice of a judical decision not in harmony with that determination.[49] Such liquidation of entries will deprive a party of all meaningful relief as to those entries.[50] Since the government does not presently publish notices in the *Federal Register* of non-final judicial decisions which are inconsistent with agency determinations, such non-final decisions will not affect liquidations under the challenged administrative determination until after final judgment in the action.[51]

The ITA has further interpreted section 516a(c) to require that, until a *final* judicial decision is published, other administrative proceedings short of liquidation must also be conducted in accordance with the challenged administrative determination.[52] Consequently, in

---

49. 19 U.S.C. § 1516a(c)(1) (1979).

50. United States Steel Corp. v. United States, 792 F.2d 1101 (Fed. Cir. 1986); East Chilliwack Fruit Growers Coop. v. United States, 655 F. Supp. 499 (Ct. Int'l Trade 1987).

The likelihood that liquidations may occur before a final judicial decision is reached in an action challenging an initial anti-dumping or countervailing duty determination has been increased by the 1984 amendment to § 751 of the Tariff Act of 1930, *amended by* 19 U.S.C. § 1675, providing that administrative reviews of anti-dumping and countervailing duty orders will only be conducted upon the request of an interested party. The current regulations, 19 C.F.R. §§ 353.53a, 355.10, provide that if no request for review is received during the anniversary month of an order, the entries made during the immediately preceding review period will be assessed with duties in the amounts of the estimated duties collected at the time of entry. Thus, when no request for review is received, entries made during the review period may be liquidated a year earlier than they would if a review were requested. In Fundicao Tupy v. United States, Slip Op. 87-93 (Aug. 3, 1987), *appeal pending*, App No. 87-1570 (Fed. Cir. 1987), a three-judge panel of the Court of International Trade denied a motion for a preliminary injunction preventing the liquidation of entries pursuant to § 353.53a during the pendency of an action contesting original anti-dumping duty determinations by the ITA and the ITC.

51. *See* United States Steel Corp. v. United States, 569 F. Supp. 874, 876 (Ct. Int'l Trade 1983). ("Moreover, because this decision did not dispose of the entire action and was not intended to be final . . ., even publication of notice of its result could not affect entries until after the final judgment in the entire action on all the numerous issues involved.") *See also* Melamine Chemicals, Inc. v. United States, 732 F.2d 924, 934 (Fed. Cir. 1984) ("The administrative handling of the involved entries . . . can be affected only by (1) a preliminary injunction . . . or (2) a *final* court decision adjudicating the validity, *vel non*, of the challenged determination." [Emphasis in original]).

52. *See* Powell, Browne, Shannon, Migdal, McInerney, *Impact of the Court of International Trade on the Department of Commerce's Administration of the Anti-dumping and Countervailing Duty Laws* 45-61 (1986) [hereinafter Powell] (Paper presented at the Third Annual Judicial

cases where the ITA has terminated anti-dumping or countervailing duty investigations because of a negative preliminary injury determination, the ITA has refused to resume the investigations until the ITC has exhausted its appeals for CIT decisions reversing such negative determination.[53] For the purposes of section 516a(c), the ITA has concluded that a judicial decision is not "final" until all appeals have been exhausted.[54]

IV. ACHIEVING FINALITY IN ACTIONS UNDER SECTION 516a

As the foregoing indicates, the term "final," when used to describe a judicial decision in an anti-dumping and countervailing duty case may have more than one meaning. A decision of the CIT may be "final" for the purpose of determining its appealability when the court has entered an order which "ends the litigation on the merits and leaves nothing for the court to do but to execute judgment."[55] However, as described above, an order which is final for the purpose of appeal may not necessarily be "final" for the purpose of fully implementing a judicial decision in the administrative proceedings underlying an action brought under section 516a.[56]

In these circumstances, a private party may not simply relax and expect to enjoy the fruits of victory after obtaining a favorable non-final decision from the CIT in an action contesting an anti-dumping or courtervailing duty determination. In order to obtain complete and

---

Conference of the United State Court of International Trade). *See also United States Steel Corp.*, 569 F. Supp. at 876 ("To be meaningful, [§ 1516a(c)(1)] has to be read as requiring that all the administrative acts preparatory to liquidation have to be done in accordance with the challenged administrative determination for entries made while the action is pending.").

53. Powell, *supra* note 52.

54. In support of this interpretation, the ITA has relied upon the decision of the Court of Appeals for the Federal Circuit in Melamine Chemicals, Inc. v. United States, 732 F.2d 924 (Fed. Cir. 1984). In *Melamine*, the Court of Appeals addressed the question whether the challenged administrative determination or an inconsistent decision by the Court of International Trade should govern the liquidation of entries during the pendency of an appeal to the court of appeals. The court stated: "Absent an injunction, [§ 1516a] requires that the challenged administrative determination shall govern the liquidation of entries 'while the litigation is proceeding.'" *See* S. REP. NO. 96-249, 96th Cong., 1st Sess. 248 (1979). The litigation is proceeding on appeal and there has been no final court decision on the validity of the challenged determination. 732 F.2d at 934.

55. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373 (1981), *quoted in* Cabot Corp. v. United States, 788 F.2d 1539, 1542 (Fed. Cir. 1986).

56. *See* Melamine Chemical Corp. v. United States, 732 F.2d 924 (Fed. Cir. 1984). *See also* The Timken Co. v. United States, 6 CIT 76, 77 (1983), in which Judge Maletz observed that "finality is not a monolithic, immutable concept, and hence an order may be final for some purposes, but interlocutory for others."

meaningful judicial relief when the court reverses an agency determination, the prevailing party will need to get a conclusive judicial determination if the agency does not acquiesce in the decision.

As the ITA has interpreted section 516a(c), the issuance of an appealable decision by the CIT may be only an intermediate step in reaching the final decision in the case. While the final CIT decision may become the final decision if no party files an appeal from that decision, the ITA may decline to fully implement the court's decision until the various parties have either waived or exhausted their rights to appeal.[57] The critical step in achieving complete relief, i.e. full implementation of a favorable decision, comes when the government foregoes its opportunity to appeal. At that point, the decision of the CIT is clearly final for the purposes of section 516a. The government becomes obligated to publish the judicial decision in the *Federal Register* and to liquidate future entries in accordance with that decision.[58] Additionally, the decision will likely obligate the government to conduct its future administrative proceedings in accordance with the judicial decision, at least in connection with the same anti-dumping or countervailing duty order.[59]

If the government or any party does pursue an appeal, the Federal Circuit's decision binds the CIT and the administrative agencies as well as the court of appeals in future cases presenting the same issue.[60]

---

57. *See supra* note 50 and accompanying text.

58. 19 U.S.C. § 1516a(e) (1979).

59. If the government foregoes an opportunity to appeal from an adverse decision in an action contesting an anti-dumping or countervailing duty determination, it may, in some circumstances, be collaterally estopped from relitigating that issue in another action contesting a subsequent determination issued pursuant to the same anti-dumping or countervailing duty order. *See* Horgan, *Res Judicata and the Effect of Decisions of the Court of International Trade Upon Successive Anti-dumping and Countervailing Duty Proceedings* at 32 (Paper presented at the Third Annual Judicial Conference of the United States Court of International Trade). It is doubtful, however, whether the government would be estopped from relitigating the issue in actions arising from other anti-dumping or countervailing duty orders.

60. The decision to accord precedential effect to an earlier decision of the Court of International Trade in an anti-dumping or countervailing duty case is committed to the discretion of the court. This principle is illustrated by the decision of the Court of International Trade in American Lamb Co. v. United States, 611 F. Supp. 979 (Ct. Int'l Trade 1985), *remanded with instructions to vacate*, 785 F.2d 994 (Fed. Cir. 1986). In *American Lamb*, the government asked the court not to follow earlier decisions in which the Court of International Trade had reversed negative preliminary injury determinations made by the ITC. The court declined, stating: "Defendant's arguments have been rejected three times within the year by two judges of this Court with broad experience in this complex area of the law. Under these circumstances, *stare decisis* counsels the court to follow the prior decisions." 611 F. Supp. at 981. While the court in *American Lamb* chose to follow the prior decisions of the Court of International Trade relevant to the issue before it, the court clearly was not obligated to do so. *See also* Cabot Corp. v.

In contrast, a decision of the CIT binds only the parties before the court in that action.[61] In keeping with the principle of *stare decisis*, only a decision of the Federal Circuit sitting *en banc* or a decision of the United States Supreme Court may overturn Federal Circuit precedent.[62]

A private party may advance the time when it achieves full implementation of a favorable CIT decision in two ways. First, the party may press for entry of a final judgment and thereby compel the government or any other party to exercise or waive its right to appeal. Second, the party may cooperate with the government in the pursuit of an interlocutory appeal which might result in the issuance of a conclusive judicial precedent.

A. *Obtaining a Final Judgment*

The most certain means for a prevailing party to obtain full implementation of a favorable decision is to secure a final judgment from the CIT. This will compel the government, as well as any other adverse party, to either acquiesce in or appeal the court's decision. However, forcing the issue in this manner may not always be a simple task.

Anti-dumping and countervailing duty cases usually present more than one issue. Frequently, not all of the issues raised by the parties are resolved by the court simultaneously.[63] Additionally, the immediate result of a favorable decision may be an order remanding the matter to the agency for further administrative proceedings.[64]

A judicial decision that resolves only some of the issues before the court, or one that requires further administrative proceedings, the results of which have to be reported back to the court, does not constitute a final judgment giving rise to a right to appeal.[65] Thus, a favorable decision will not be fully implemented, at least, until all of

---

United States, 620 F. Supp. at 722, which discusses the earlier inconsistent decisions of the Court of International Trade relative to the question whether benefits available on a nonpreferential basis are countervailable.

61. *See* Mother's Restaurant Inc. v. Mama's Pizza, Inc., 723 F.2d 1566 (Fed. Cir. 1983).

62. The extremely limited opportunity for further review of a decision by the Court of Appeals for the Federal Circuit may effectively render it the court of last resort in anti-dumping and countervailing duty cases. Since 1979, no anti-dumping or countervailing duty cases have been reviewed by the Supreme Court or by the Court of Appeals for the Federal Circuit sitting *en banc*.

63. *See* United States Steel v. United States, 569 F. Supp. 874 (Ct. Int'l Trade 1983).

64. *See* Zenith Elec. Corp. v. United States, 633 F. Supp. 1382, 1382 (Ct. Int'l Trade 1986).

65. Badger-Powhatan v. United States, 808 F.2d 823, 825 (Fed. Cir. 1986); Jeannette Sheet Glass Corp. v. United States, 803 F.2d 1576, 1583 (Fed. Cir. 1986); Cabot Corp. v. United States, 788 F.2d 1539, 1543 (Fed. Cir. 1986).

the issues in the case have been resolved, and all remand proceedings have been concluded and approved by the CIT.

A party wishing to hasten the entry of final judgment may do so by streamlining its own cause of action. While having to jettison some possibly meritorious claims because of their low impact upon the underlying subsidy rate or dumping margin may be a hard pill to swallow, asking the courts to correct every perceived error in the underlying determination may delay the implementation of favorable judicial decision on high-impact issues.

A private party may also hasten the entry of a comprehensive final judgment by asking the court to include in its remand order, to the extent possible, explicit instructions as to how any remand proceedings should be carried out. The more mechanical the remand proceedings are, the less potential there exists for delay or for further litigation contesting the results of the remand.

A party who prevails on a discrete portion of an action should also consider asking the CIT to direct the entry of a final judgment as to that portion of the action pursuant to Rule 54(b) of the Rules of the Court. Rule 54(b) allows the court, in the exercise of its discretion, to enter a final judgment "as to one or more but fewer than all of the claims or parties" in an action "upon an express determination that there is no just reason for delay."

In *Jeannette Sheet Glass Corp. v. United States*,[66] the Federal Circuit indicated that entry of a partial final judgment may be appropriate where the interlocutory judicial decision involves a discrete product or finding subsumed in an administrative determination encompassing several products and findings. The Federal Circuit also made it clear, however, that the CIT determines in its sole discretion whether an interlocutory decision is suitable for entry of a Rule 54(b) final judgment. The Federal Circuit reasoned that the CIT's "knowledge, bred of [its] proximity to the case, can be brought to bear on the question of the propriety of immediate review."[67]

B. *Interlocutory Appeals*

A second means by which a prevailing party may hasten the implementation of a favorable interlocutory judicial decision is to cooperate in the process of obtaining certification of the decision for interlocutory appeal. As explained above, it is frequently in the government's interest to obtain, as soon as possible, the conclusive judicial

66. 803 F.2d 1576 (Fed. Cir. 1986).

67. *Id.* at 1580, *quoting* Samuel v. University of Pittsburgh, 506 F.2d 355, 361 (3d Cir. 1974).

resolution of an issue which has broad implications for the administration of the anti-dumping or countervailing duty law.[68] Similarly, where a private party is subject to successive administrative reviews of the same anti-dumping or countervailing duty order, the establishment of a binding judicial precedent will relieve the party of the need to file successive judicial actions challenging the order.[69]

Generally, the Federal Circuit has jurisdiction to hear "an appeal from a *final* decision of the United States Court of International Trade."[70] There are, however, exceptions to the general requirement of finality.

A statutory exception to the requirement of finality is contained in 28 U.S.C. § 1292(d)(1), which allows for interlocutory appeal of issues in which there is a "substantial ground for difference of opinion," and for which "an immediate appeal from that order may materially advance the ultimate termination of the litigation."[71] A second exception, which has been judicially created, is the "collateral order" exception.[72]

A two-step process is involved in appealing a decision under section 1292(d)(1). First, the CIT has to certify that the matter involves an issue in which there is substantial ground for difference of opinion and for which an immediate appeal may materially advance the termination of the litigation. The judge has to include in his order a statement to that effect. Without certification, the court of appeals cannot hear the case.[73] If the CIT does certify an issue for interlocutory appeal, the decision to accept the appeal lies within the discretion of

---

68. *See supra* notes 41-42 and accompanying notes. *See also* Cabot Corp. v. United States, 788 F.2d 1539 (Fed. Cir. 1986), in which the government's effort to pursue an interlocutory appeal as of right was unsuccessful.

69. *See supra* notes 41-42 and accompanying text.

70. 28 U.S.C. § 1295(a)(5) (1982) (emphasis added). Cabot Corp. v. United States, 788 F.2d 1539, 1542 (Fed. Cir. 1986) discusses the traditional basis for the doctrine of finality: "the requirement of finality has been called 'an historic characteristic of federal appellate procedure.'" Flanagan v. United States, 465 U.S. 259, 263 (1984). The final judgment rule requires that "a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." The Supreme Court has consistently held that as a general rule an order is final only when it "ends the litigation on the merits and leaves nothing for the court to do but execute judgment." Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373 (1981); Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978).

71. Section 1292(c) of title 28, United States Code, also permits appeals from interlocutory decisions of the Court of International Trade granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.

72. *See* Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949).

73. Badger-Powhatan v. United States, 808 F.2d 823, 826 (Fed. Cir. 1986).

the Federal Circuit.[74] Thus, both courts must approve a party's request for interlocutory appellate review before an appeal may go forward.

On occasions when the Federal Circuit has dismissed appeals for lack of finality, it has referred explicitly to the certification process, indicating that it may have entertained the appeals, had they been properly certified by the court below.[75] When the government does elect to request certification of an adverse judicial decision for interlocutory appeal, the prevailing party, as well as the CIT, should consider carefully whether postponing the appeal truly serves the interest of the prevailing party or the court. Delaying the appeal may also delay the time when the previling party receives complete relief.

The collateral issue exception to the rule of finality allows for the appeal of issues which "fall into that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[76] In order for the court of appeals to accept a case under the collateral order doctrine, the lower court's order or decision has to determine completely a separable issue which would be unreviewable if the final judgment were appealed.

With respect to the collateral order doctrine, the Federal Circuit has adopted the rationale that the doctrine only permits appeals of "'certain remedial and procedural matters that are separable from and not ingredients of any identifiable claim for relief.' Further, the doctrine does not apply when the collateral matters 'themselves constitute the claims for relief.'"[77] In light of this interpretation, the "collateral order" exception to the rule of finality is necessarily an inappropriate means of securing final substantive relief in an anti-dumping or or countervailing duty case.[78]

---

74. *Id.*

75. *See Badger-Powhatan* 808 F.2d at 826; *Cabot Corp.*, 788 F.2d at 1543.

76. *Badger-Powhatan*, 808 F.2d at 823, 825-26 *quoting* Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949).

77. *Jeannette Sheet Glass*, 803 F.2d 1576, 1581, *quoting* Hooks v. Washington Sheraton Corp., 642 F.2d 614, 618 (D.C. Cir. 1980).

78. The collateral order doctrine has been construed to permit an appeal from an interlocutory order granting discovery when the information sought is in the custody of a third party and the putative appellant can neither resist nor force the custodian to resist compliance with the discovery order. Montgomery Ward & Co. v. Zenith Radio Corp., 673 F.2d 1254, 1259 (C.C.P.A.), *cert. denied* 103 S. Ct. 256 (1982).

V. CONCLUSION

In the essentially two-tier scheme for judicial review of anti-dumping and countervailing duty determinations, a decision by the CIT which reverses, wholly or partially, an underlying administrative determination places the law in a period of uncertainty. During this period, the prevailing private party may often be denied the relief to which it is entitled. This state of uncertainty may continue until the decision of the court becomes final, either through the acquiescence of the government or the completion of the appellate review process.

It is in the interest of the concerned government agencies, the courts, and private parties to minimize these periods of uncertainty. The interest in achieving finality should guide litigants in fashioning their claims for relief. It should also guide the CIT in exercising its authority to bring about conclusive judicial decisions at the earliest practical opportunity. In this fashion, the CIT can ensure full implementation of its decisions and accord to the parties who appear before it complete judicial relief.