Florida Journal of International Law

Volume 3 | Issue 3 Article 3

June 1988

Procedural Issues and Remedies in the Administration and Judicial Resolution of Customs and International Trade Cases: The Role of Sanctions, Contempt, Assessment of Costs, and Extraordinary Legal Remedies in Reforming Practice Before the Court of International Trade

Eugene L. Stewart

PROCEDURAL ISSUES AND REMEDIES IN THE ADMINISTRATION AND JUDICIAL RESOLUTION OF CUSTOMS AND INTERNATIONAL TRADE CASES: THE ROLE OF SANCTIONS, CONTEMPT, ASSESSMENT OF COSTS, AND EXTRAORDINARY LEGAL REMEDIES IN REFORMING PRACTICE BEFORE THE COURT OF INTERNATIONAL TRADE*

*Eugene L. Stewart***

---

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

**B.S. 1948, J.D. 1951, Georgetown University; Senior partner, Stewart and Stewart. Great appreciation is due Terence P. Stewart, John M. Breen, and Lane Steven Hurewitz of Stewart and Stewart for their invaluable assistance in the research reflected in this paper.

I. INTRODUCTION

Congress expanded and clarified the jurisdiction of the Court of International Trade (CIT) with the enactment of the Customs Court Act of 1980.[1] The Act creates "a comprehensive system for judicial review of civil actions arising out of import transactions and federal statutes affecting international trade."[2] "Of equal significance to the Court's expanded jurisdiction in the 1980 Act was Congress' explicit conferral upon the Court of International Trade of 'all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.'"[3] "Thus, the Act granted this court 'remedial powers co-extensive with those of a federal district court.'"[4] "The legisla-

1. Pub. L. No. 96-417, 94 Stat. 1727 (1980).

2. Statement of President Carter, 16 WEEKLY COMP. PRES. DOC. 2183 (Oct. 11, 1980). *See* H.R. REP. NO. 1235, 96th Cong., 2d Sess. 18-20, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3729.

3. United States v. Mizrahie, 606 F. Supp. 703, 707 (Ct. Int'l Trade 1985), *citing* 28 U.S.C. § 1585 (1982).

4. *Id.* at 707, *citing* H.R. REP. NO. 1235, 96th Cong., 2d Sess. 61 (1980). *See also* Budd Co. Ry. Div. v. United States, 1 Ct. Int'l Trade 175, 176-78 (1981).

tive history of the Customs Courts Act of 1980 leaves no doubt that 28 U.S.C. § 2643(c)(1) 'is a general grant of authority for the Court of International Trade to order any form of relief that it deems appropriate under the circumstances.'"[5]

Since 1980, literally hundreds of cases have been filed and litigated before the CIT seeking clarification of legal rights, adherence to agency and judicial precedent, and administrative determinations in keeping with the full record compiled by the agency in question. In a number of cases in the last eight years, litigants have requested that the CIT invoke one or more of its remedial tools to assure compliance with a CIT earlier ruling, to obtain adherence to a statutory or regulatory requirement, to curb perceived dilatory tactics or to maintain control of the litigation process. The CIT has generally proceeded cautiously in the utilization of available judicial tools. It attempted to outline appropriate responses by the party against whom a motion has been filed, while often expediting consideration of the issue in contention or imposing tight timetables for admittedly required agency action.

The Chief Judge of the CIT states in his prepared remarks at the Second Judicial Conference that —

> Americans have a right to expect that public officials act lawfully, within the bounds of law, and that they strive to secure the rights of the persons whom they have sworn to serve, to the best of their ability, and under the law.
>
> The CIT has used the "tool" of judicial review to ascertain and shed light on how the agencies perform their delegated responsibilities. Without the beneficial scrutiny of judicial review, government officials may on occasion forget that all public servants are duty bound to obey the law, and to protect the rights of the persons whom they are to serve. By subjecting administrative action to judicial review, we help achieve and preserve a lawful society consistent with the constitutional guarantees of due process and equal protection of the law.[6]

Stated somewhat differently, due process of law in customs and international trade cases, as in other federal cases, depends upon *meaningful* judicial relief being provided in fact. To the extent that there is a perception that litigants may face problems in seeking relief

---

5. *Mizrahie*, 606 F. Supp. at 707, *citing* H.R. REP. No. 1235, 96th Cong., 2d Sess. 61 (1980).

6. Edward D. Re, Chief Judge, Statement at the Second Annual Judicial Conference of the United States Court of International Trade (Oct. 23, 1985).

and in having relief, in fact, implemented at the appropriate government agency, prompt remedial action by the court is required. In such circumstances, the full panoply of tools wisely used by federal district courts to protect their jurisdiction, control their proceedings, and command respect and compliance with their judgments and decrees may be used to improve the delivery of justice to CIT litigants.

This paper attempts to review broadly the nature of the special powers available to the CIT, how other federal courts have used such powers in accomplishing the objectives articulated by Chief Judge Re, the experience of litigants before the CIT in seeking the utilization of the special powers, and areas where the need for CIT action may arise in the future.

II. SANCTIONS

A. *Federal Rules of Civil Procedure Rule 11 Sanctions*

1. Amended Rule 11 of the Federal Rules of Civil Procedure

The Supreme Court adopted the 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure (FRCP) because of widespread concern over frivolous lawsuits and abusive tactics by attorneys. Amended FRCP Rule 11 was intended to discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses through greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate.[8]

Prior FRCP Rule 11 was not effective in deterring abuses.[9] The ineffectiveness was a consequence of the confusion as to (1) the circumstances that should trigger a pleading or motion or taking disciplinary action, (2) the standard conduct of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions.[10] Consequently, courts were reluctant to impose sanctions.[11]

There are several differences between former and amended FRCP Rule 11. First, the old rule required only that the document have

---

7. Schwarzer, *Sanctions Under the New Federal Rule 11-A Closer Look*, 104 F.R.D. 181 (1985).

8. FED. R. CIV. P. 11 advisory committee's note.

9. *Id. See also* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1334 (1969).

10. *See* advisory committee's note, *supra* note 8, *citing* RHOADES, RIPPLE & MONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 64-65 (1981).

11. *See* advisory committee's note, *supra* note 8.

"good ground to support it" and be "not interposed for delay." The new rule which requires prefiling "reasonable inquiry" is geared to "existing law" and speaks of not being interposed "for any improper purpose."[12] Second, motions are now specifically within FRCP Rule 11, by specific reference in both FRCP Rules 11 and 7(b)(3).[13] Third, "other papers" such as memoranda, briefs, reports, notices, etc., but not discovery papers (covered under FRCP Rule 26(g)) are not included.[14] Fourth, parties are now subject to sanctions, even if represented by an attorney.[15] Fifth, sanctions have been expanded to include anything "appropriate." Sixth, sanctions under amended FRCP Rule 11 are now mandatory.[16]

Amended FRCP Rule 11 is intended to deter misuse or abuse of the litigation process and streamline litigation by the imposition of sanctions.[17] Under amended FRCP Rule 11, an attorney's signature on a pleading or motion, certifies that: he has read the document; to the best of his knowledge, there was a solid legal premise to support it; and the document was not interposed for delay.[18] Literally, the rule is directed at the legal merits of a document and attempts to prevent the filing of frivolous papers.[19] The final prong is concerned with papers which are not necessarily frivolous, but which are found to be interposed for an improper purpose.[20] Although the threat of sanctions for misuse or abuse may tend somewhat to inhibit attorneys, this is not equivalent to chilling vigorous advocacy.[21] Vigorous advocacy is not contingent on lawyers being free to pursue litigation tactics that have no legitimate justification.[22] FRCP Rule 11 in substance requires the signing lawyer or party, based on a reasonable prefiling inquiry, to be informed and believe that the paper has a factual and legal basis and not interposed for delay.[23] The court may take into

---

12. Outline of Remarks of Irving R.M. Panzer, D.C. Bar Seminar on Rule 11, at 1 (June 30, 1987).

13. *Id.*

14. *Id.*

15. *Id.*

16. Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985).

17. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 500 (1986). *See also* advisory committee's note, *supra* note 8.

18. Cavanagh, *supra* note 17, at 503.

19. 104 F.R.D. 181, 195 (1985).

20. *Id.*

21. *Id.*

22. *Id.*

23. *See* advisory committee's note, *supra* note 8, *citing* Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975 (E.D. Pa. 1973); *see also* Glaser v. Cincinnati Milacron,

account whether the charges appear disproportionate, keeping in mind the penal and deterrent purpose of FRCP Rule 11.

FRCP Rule 11 has been invoked in numerous cases in the federal courts since its amendment in 1983. FRCP Rule 11 violations fall into two general categories: (1) failure to adequately inquire into the facts or legal merits, and (2) improper purpose, such as harassment, engaging in dilatory tactics, or needlessly adding to litigation costs.[24]

Inadequate prefiling inquiry by counsel. Amended Rule 11, imposes an affirmative obligation upon the attorney to make some prefiling inquiry into both the facts and law.[25] "The standard is one of reasonableness under the circumstances." "Reasonableness" is determined by investigating the following factors: (1) the time available for preparation, (2) the extent to which the attorney had to rely on the client for the underlying facts, (3) whether the document contains "a plausible view of the law," or (4) whether the attorney relied on local counsel or other members of the bar.[26] Under the amended rule the test is objective, what was reasonable to believe under the circumstances at the time of filing,[27] as opposed to the subjective test of whether the document was signed without bad intentions.

Under amended FRCP Rule 11, the courts have addressed the issue of whether the rule goes to the filing of the document as well as the research. In *Burger King Corp. v. Rudezewicz*,[28] the Supreme Court held incomplete research does not result in a FRCP Rule 11 violation since the rule goes to the filing of the document, not to the research. Conversely, a total lack of research can result in a FRCP Rule 11 violation.[29] In *Taylor v. Belger Cartage Service*,[30] the Court held that the failure to ascertain "existing law" violates FRCP Rule 11.

Inc., 808 F.2d 285 (3d Cir. 1986) (discussing the "willfulness" standard under former Rule 11 and distinguishing *Kinee*).

24. Note, *Rule 11 Sanctions: Contrasting Applications in the Second and Fourth Circuits*, 46 MD. L. REV. 470, 477 (1987).

25. Cavanagh, *supra* note 17, at 511. *See also* Chang v. Meese, 660 F. Supp. 782 (D.P.R. 1987).

26. Cavanagh, *supra* note 17, at 511-12.

27. D.C. Bar Seminar on Rule 11, *supra* note 12, at 2.

28. 471 U.S. 462 (1985).

29. D.C. Bar Seminar on Rule 11, *supra* note 12, at 5. *See also* Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (1986).

30. 102 F.R.D. 172 (W.D. Mo. 1984). *See also* Weisman v. Rivlin, 1 Fed. R. Serv. 3d 1527 (D.D.C. 1984) (minimal Rule 11 sanction ($200) imposed where complaint, while relying upon diversity of citizenship jurisdiction, shows on its face that there is no diversity); Rowland v. Fayed, 115 F.R.D. 605 (D.D.C. 1987) (sanctions imposed in diversity action, attorneys had knowledge of foreign citizenship of the plaintiff and of two defendants, and even the most unsavory of research would have revealed lack of diversity).

The most extreme case illustrating the new degree of prefiling inquiry required is *Unioil, Inc. v. E.F. Hutton.*[31] In *Unioil*, plaintiff's attorney was penalized over $290,000 for instituting a lawsuit without adequate prefiling inquiry. Counsel filed a massive class action against a number of large stock brokerage firms, although he had little contact with co-counsel and the main plaintiff. The Ninth Circuit determined the standard of "reasonable inquiry" under amended FRCP Rule 11 included foreseeing a suit, which threatens massive liability to multiple defendants, that would arouse "a vigorous and costly defense."[32]

The lack of "reasonable inquiry" has been found in many cases.[33] Many courts have found a suit to be groundless where obvious deficiencies in the plaintiff's complaint demonstrate that even a minimal investigation by the attorney would have revealed the frivolity of the client's suit.[34]

In determining whether allegations of an amended complaint were well-grounded in fact, the District Court for the Northern District of California in *Kendrick v. Zanides*[35] held that in light of the record, it did not appear that a semblance of "reasonable inquiry" had been made. Similarly, defendants were ordered to pay all reasonable expenses, including attorney's fees, incurred as a result of defendants' motion to dismiss the complaint that sought relief against defendant corporate officers individually. Since the defendants completely ignored firmly established precedents directly contrary to their position, there could be no doubt that counsel failed to conduct the reasonable

---

31. 809 F.2d 548 (9th Cir. 1986); Bar Seminar on Rule 11, *supra* note 12, at 6-7.

32. *See also* Calloway v. Marvell Ent. Group, 5 Fed. R. Serv. 3d 1335 (S.D.N.Y. 1986) (over $200,000 imposed on plaintiff and attorney, jointly and severally, where plaintiff falsely asserted that the signature on license agreements was not genuine, and was not sufficiently investigated by the attorney).

33. *See* Excalibur Oil, Inc. v. Sullivan, 659 F. Supp. 1539 (N.D. Ill. 1987) (no reasonable basis for making at least two critical allegations in complaint); AM Int'l, Inc. v. Eastman Kodak Co., 39 Fed. R. Serv. 2d 433 (N.D. Ill. 1984) (sanctions were imposed where defendant's counsel implied, but failed to make a reasonable inquiry, that opposing counsel misrepresented the state of health of a witness to be deposed based solely on opposing counsel's rescheduling the deposition until three weeks later).

34. Cavanagh, *supra* note 17, at 518 n.136. *See* Kuzmins v. Employee Transfer Corp., 587 F. Supp. 536, 538 (N.D. Ohio 1984); Steinberg v. St. Regis/Sheraton Hotel, 583 F. Supp. 421, 426 (S.D.N.Y. 1984); Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248, 1250-51 (D. Minn. 1984); Viola Sportswear, Inc. v. Mimun, 574 F. Supp. 619, 621 (E.D.N.Y. 1983); *see also* Smith v. United Transp. Union Local No. 81, 594 F. Supp. 96, 100-01 (S.D. Cal. 1984) (defendant's counsel did not meet minimal standards of practice inasmuch as previously stricken affirmative defenses were raised in response to amended complaint).

35. 609 F. Supp. 1162 (N.D. Cal. 1985).

inquiry as to whether the motion was warranted by existing law or a good faith argument to expand existing law.[36]

In contrast, a "reasonable basis" was found to exist in *Leema Enterprises v. Willi*,[37] where the court dismissed the complaint on the ground of lack of personal jurisdiction and improper venue. In addition, the court denied a motion for FRCP Rule 11 sanctions against plaintiff's counsel. In *Leema Enterprises*, the plaintiff corporation maintained four correspondent bank accounts in New York, and though this was held to be an insufficient contact to satisfy due process, the murky state of the law of personal jurisdiction warranted the conclusion that a valid argument could be made that minimum contacts with the state existed.

The reasonableness of the investigation should be determined in light of the situation existing and facts known at the time the pleading, motion or paper is submitted.[38] In *Lee v. Criterion Ins.*,[39] the district court ruled that insured's decision to proceed with second action against insurer for disability benefits prior to the final judgment which concluded that the insured was not entitled to any disability benefits, did not warrant FRCP Rule 11 sanctions. The court held that, in determining whether to award FRCP Rule 11 sanctions, the question to be addressed using an objective standard is whether plaintiff's counsel could have believed, after reasonable inquiry, that pleadings filed were well grounded in both fact and law.

Improper Purpose of the Pleading. FRCP Rule 11 sanctions will be imposed where a motion is filed for harassment purposes. Under this standard the District Court of Colorado in *Wold v. Minerals Eng*[40] assessed attorney's fees against counsel who filed a motion to disqualify the opposing law firm, which was not based upon a reasonable inquiry into the relevant facts, but was interposed for the improper purpose of harassing opposing counsel.

While amended FRCP Rule 11 deleted specific language authorizing the court to strike sham pleadings,[41] courts, nevertheless, maintain the power to tailor sanctions to a particular violation. Striking a pleading therefore is an appropriate remedy in some cases.[42] Federal courts,

---

36. National Survival Game, Inc. v. Skirmish U.S.A., Inc., 603 F. Supp. 339 (S.D.N.Y. 1985).
37. 582 F. Supp. 255 (S.D.N.Y. 1984).
38. *In re* Ramada Inns Sec. Litig., 550 F. Supp. 1127 (D. Del. 1982).
39. 659 F. Supp. 813 (S.D. Ga. 1987).
40. 575 F. Supp. 166 (D. Colo. 1983).
41. Cavanagh, *supra* note 17, at 513-14.
42. *Id.*

however, have been more inclined to impose attorney's fees on the party introducing sham pleadings. In *Hedison Manufacturing v. NLRB*,[43] the district court imposed attorney's fees and all expenses in light of the totally frivolous nature of the employer's contentions. Similarly, the plaintiff's and her attorneys' intentional and knowing conduct in reasserting claims under the Investment Company Act which were identical to claims that the First Circuit dismissed and stamped expressly as meritless, warranted dismissal of the claims as a sham and imposition of sanctions, including attorney's fees.[44]

A motion to dismiss or to strike for failure to comply with FRCP Rule 11 should not be granted unless the moving party has been severely prejudiced or misled by the pleader's failure to sign. In *Covington v. Cole*,[45] the Fifth Circuit decided that *sua sponte* dismissal of a complaint with prejudice is not a proper disposition, in light of a possible technical defect occurring when the spouse signs her husband's complaint as "attorney in fact." But the court in *United States ex rel. Sacks v. Philadelphia Health Management*[46] held that the defense attorney's failure, in a False Claims Act action brought by a private individual, to sign the answer which contained defendant's counterclaim provided a sufficient basis for striking the counterclaim.

Federal courts have deemed sanctions appropriate where the pleadings or motions filed have been deemed frivolous. The District Court of Arizona in *Felix v. Arizona Department Health Services Goods (Vital Record Section)*,[47] has determined that where plaintiff's allegations purporting to establish plaintiff's action as one in admiralty were so entirely frivolous and patently groundless, defendants were entitled to attorney's fees. Similarly, a lawsuit involving the illegal abduction of a child taken out of the country, brought under the Federal Tort Claims Act for failure to enforce a statute prohibiting any person from leaving the United States without a passport, was held to be frivolous and filed in violation of FRCP Rule 11. A sanction of attorney's fees was imposed against the filing attorney.[48] Similarly, under FRCP Rule 11, plaintiff's counsel, who brought actions against seven medical schools after prior action against those schools had been dismissed, was required to pay the defendants' costs and attorneys' fees incurred

43. 643 F.2d 32 (1st Cir. 1981).
44. Andre v. Merrill Lynch Ready Assets Trust, 97 F.R.D. 699 (S.D.N.Y. 1983).
45. 528 F.2d 1365 (5th Cir. 1976).
46. 519 F. Supp. 818 (E.D. Pa. 1981).
47. 606 F. Supp. 634 (D. Ariz. 1985).
48. Dore v. Schultz, 582 F. Supp. 154 (S.D.N.Y. 1984).

in litigating a motion to dismiss based on *res judicata* in the District Court of Illinois.[49]

In many cases the courts, even applying the new and stricter standard, have concluded that FRCP Rule 11 has not been violated and sanctions are unwarranted. In *Marco Holding Co. v. Lear Siegler, Inc.*,[50] the court held that the defendants' legal theories were not so unreasonable or so devoid of deposition testimony subject to interpretation as to justify sanctions in connection with their unsuccessful motion for summary judgment on plaintiff's antitrust claims. Also, in *Robinson v. C.R. Laurence Co.*,[51] the court decided when defendant failed to show that the claim was frivolous when filed, and plaintiff's willingness to confess judgment on the motion to dismiss added further support that the plaintiff did not act vexatiously or in bad faith, the filing of the claim was not so meritless as to give rise to an award of fees.

Sanctions are Mandatory under FRCP Rule 11. The most significant aspect of amended FRCP Rule 11 is that sanctions are now mandatory.[52] In *McLaughlin v. Bradlee*,[53] the court emphasized that "the amended language of Rule 11 *requires* the [d]istrict [c]ourt to impose some form of sanction when warranted by groundless or abusive practices."[54] The courts can impose sanctions on their own motion to detect and punish violations of the signature requirement.[55] Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties.[56]

The courts retain discretion to tailor the sanction in light of the kind of violation involved. For example, the court in *Taylor v. Belger*

---

49. Cannon v. Loyola Univ. of Chicago, 609 F. Supp. 1010 (N.D. Ill. 1985).

50. 606 F. Supp. 204 (N.D. Ill. 1985).

51. 105 F.R.D. 567 (D. Colo. 1985).

52. Eastway Constr. Corp. v. City of New York, 762 F.2d at 254 n.7; Cavanagh, *supra* note 17, at 513.

53. 803 F.2d 1197 (D.C. Cir. 1986).

54. *Id.* at 1205 (emphasis in the original), *citing* Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174 (D.C. Cir. 1985). *But see* Golemi v. Creative Food Design, Ltd., 116 F.R.D. 73 (D.D.C. 1987); Cabell v. Perry, 6 Fed. R. Serv. 3d 1078 (4th Cir. Feb. 5, 1987). *But compare* Bell v. Bell, an unpublished opinion of the Fifth Circuit issued September 17, 1986, holding that the district judge did not err in not sanctioning a defendant even though the judge found violations of Rule 11 and Rule 26(g). An "appropriate sanction" could include no sanction.

55. North Am. Foreign Trading Corp. v. Zale Corp., 83 F.R.D. 293 (S.D.N.Y. 1979).

56. 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 11.01(4), at 11-6 (1987).

Cartage Services[57] held that when attorneys lost sight of their duty to file and pursue only those cases which they reasonably believe are well-grounded in fact and warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law, the party or parties who directly suffer from the attorney's lapse must be compensated both to make them whole and to remind other lawyers that they must continuously be aware of their professional responsibility.[58]

Sparrow v. Reynolds[59] is an example of an extreme sanction imposed under FRCP Rule 11. The district court in *Sparrow*, in addition to imposing attorney's fees and costs, enjoined the plaintiff from further access to the federal courts. In addition, the court in *Crooker v. United States Marshalls' Service*[60] imposed a sanction under FRCP Rule 11 in the form of an order requiring a plaintiff, who brought over sixty lawsuits under the Freedom of Information Act for harassment purposes, to attach to any future complaint a memorandum of law stating why his claim is not barred by *res judicata*. Even ultimate success on the merits does not excuse a litigant or counsel from FRCP Rule 11 liability for discovery and pretrial abuses.[61]

Combining FRCP Rule 11 Sanctions with Sanctions under 28 U.S.C. § 1927 and FRCP Rule 26(g) and FRCP Rule 37. An increasing number of courts are combining sanctions under amended FRCP Rule 11 with sanctions under 28 U.S.C. § 1927.[62] The federal district courts have consistently held that the term "vexatiously" in section 1927 requires a subjective "bad faith" test.[63] This interpretation is contrary to *Christiansburg Garment Co. v. EEOC*[64] in which the Supreme Court held that "vexatiously . . . in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him."

---

55. North Am. Foreign Trading Corp. v. Zale Corp., 83 F.R.D. 293 (S.D.N.Y. 1979).

56. 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 11.01(4), at 11-6 (1987).

57. *Taylor*, 102 F.R.D. at 181.

58. *Id.* at 172.

59. 646 F. Supp. 834 (D.D.C. 1986).

60. 641 F. Supp. 1141 (D.D.C. 1986).

61. Perkinson v. Houlihan's / D.C., Inc., 108 F.R.D. 667 (D.D.C. 1985).

62. D.C. Bar Seminar on Rule 11, *supra* note 12, at 12. 28 U.S.C. § 1927 authorizes awards of costs, including attorney's fees against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously."

63. *See* Zaldivar v. Los Angeles, 780 F .2d 823 (9th Cir. 1986).

64. 434 U.S. 421 (1978).

In addition, FRCP Rule 11 sanctions are interrelated with sanctions for excessive discovery abuses under FRCP Rule 26(g) and refusals to permit discovery under FRCP Rule 37.[65] Amended FRCP Rule 11 together with the discovery rule sanctions have provided "parties to civil litigation in district courts with a vast array of weapons to recover fees incurred in litigation engendered by an attorney or a party's failure to adhere to reasonable professional standards in bringing or prosecuting an action, responding to discovery, or participating in pretrial proceedings."[66]

Unsettled Questions Under FRCP Rule 11. Important questions concerning FRCP Rule 11 remain to be settled by the federal courts.[67] These questions are also highly applicable to the CIT's ability to control the litigation process through future use of CIT Rule 11. The concerns underlying FRCP Rule 11 include the extent to which an attorney must make a prefiling inquiry. Also unsettled, are the standards for determining when a pleading is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." Thirdly, the possibility remains that FRCP Rule 11 sanctions will prove counterproductive by clogging the courts with costly satellite litigation. Finally, the effect of the certification requirement on discovery summary judgment motions, remains unsettled.[68]

Amended FRCP Rule 11 has been effective in deterring frivolous litigation and abusive practices of attorneys; but concern exists that it has been applied too broadly.[69] At the May, 1987 Annual Meeting of the American Law Institute, amended FRCP Rule 11 was attacked by some speakers as "an unmitigated disaster" and the most objectionable part of the Federal Rules.[70]

The federal courts appear to have applied amended FRCP Rule 11 too broadly as a tool for document management and have undermined the value of open access to court embodied in the liberal pleading

---

65. *See* Patton, *Review of Sanction Cases in the District of Columbia*, presented to Annual Meeting, District of Columbia Bar, June 30, 1987, at 9.

66. Seldon, *Using Monetary Sanctions Under Rule 37 to Improve Your Position on the Merits*, D.C. Bar Seminar on Rule 11, *supra* note 12, at 3.

67. Cavanagh, *supra* note 17, at 516-17.

68. *Id.*

69. *See* Nelken, *Sanctions Under Amended Federal Rule 11 - Some Chilling Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986).

70. D.C. Bar Seminar on Rule 11, *supra* note 12, at 13, *citing* 55 U.S.L.W. 2650 (U.S. June 2, 1987).

regime of the Federal Rules of Civil Procedure.[71] Current interpretations of the amended FRCP Rule 11 requirements conflict with the liberal pleading regime of the Federal Rules by demanding greater specificity in pleading and by discouraging the pleading of novel legal theories.[72] FRCP Rule 11 should be interpreted in light of the liberal pleading rules and in accordance with the legal premises underlying them.[73] Thus, the new criteria for attorney conduct may "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."[74]

2. Court of International Trade Rule 11

CIT Rule 11 is essentially identical to amended FRCP Rule 11. The CIT Rule 11, as amended January 1, 1985, provides for sanctions regarding the signing of pleadings, motions and other papers. CIT Rule 11 essentially requires that an individual "attorney of record" sign every pleading. In addition, CIT Rule 11 provides if an attorney of record does not sign a pleading "it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." Further, if a party violates this rule the court will "impose upon the person who signed it, a representing party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee."[75]

The CIT has considered only one case involving CIT Rule 11. The court in *Daewoo Electronics v. United States*,[76] stated that the "failure to be a member of the CIT bar when [the attorney] signed . . . [the] summons was a mere technical defect which was promptly cured and which has neither prejudiced nor misled anyone."[77] The court also determined that the summons was valid and did not have to be refiled. To date, however, the court has not reached a determination on the merits for noncompliance with CIT Rule 11.

In applying amended FRCP Rule 11, courts must be discerning in evaluating cases, and should take precautions to avoid overinclusive,

---

71. Note, *Plausible Pleadings: Developing Standards For Rule 11 Sanctions*, 100 HARV. L. REV. 630, 631 (1987).

72. *Id.*

73. *Id.* at 651.

74. Fed. R. Cir. P. 11 advisory committe's note.

75. Ct. Int'l Trade R. 11.

76. 655 F. Supp. 508 (Ct. Int'l Trade 1987).

77. *Id.* at 512.

heavy-handed approaches which would undercut the policies of the Federal Rules of Civil Procedure.[78] The federal courts, including the CIT, must strive to achieve a balance when implementing remedial tools, such as Rule 11 sanctions, to ensure the effective delivery of justice.

B. *Contempt Sanctions*

1. Contempt Power in the Federal Courts

"A contempt of court consists of the disregard of judicial authority."[79] A court's ability to punish a contempt is thought to be an inherent and integral element of its power and has deep historical roots.[80] The Supreme Court in *Ex Parte Robinson*[81] stated that the "power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice."[82]

The power of a district court to punish a contempt by fine or imprisonment is limited by statute. The legislative statement of the contempt sanction is 18 U.S.C. § 401. Under

> section 401 of Title 18, contempt of a federal court constitutes misbehavior by any person in the court's presence or so near thereto as to obstruct the administration of justice, misbehavior of any of its officers in their official transactions, or disobedience or *resistance to its lawful writ, process, order, rule, decree, or command issued in a proceeding pending before that court.*[83]

The court can punish an individual with a number of different sanctions for failing to comply with an order of a federal court. The most common sanctions are imposition of a fine, imprisonment, or both, but a federal court's discretion includes the power to frame a sanction to fit the violation.[84] Dismissal of an action is an appropriate sanction where

---

78. Note, *supra* note 71, at 639.

79. 11 C. WRIGHT & A. MILLER, *supra* note 9, § 2960, at 581.

80. *Id.* at 582.

81. 86 U.S. (19 Wall.) 505, 510 (1874).

82. *See also* Levine v. United States, 362 U.S. 610, 615 (contempt power is rooted in the inherent power of the judiciary), *reh'g denied*, 363 U.S. 858 (1960); Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3d Cir. 1985) (en banc) (federal district courts have inherent power to sanction attorneys for abuse of the judicial process).

83. 11 C. WRIGHT & A. MILLER, *supra* note 9, § 2960 (emphasis added).

84. Lance v. Plummer, 353 F.2d 585 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966).

there is a clear record of delay or willful contempt and a finding that a lesser sanction will not suffice.[85]

An important distinction, although indefinite and difficult to draw, is made between acts constituting criminal contempt and those involving civil contempt.[86] In general, a contempt of court for which punishment is inflicted for the primary purpose of vindicating public authority is denominated criminal. Those in which the ultimate object of the punishment is the enforcement of the rights and remedies of a litigant are civil contempts.[87] The relief granted in civil contempt proceedings is compensatory or coercive.[88] This often takes the form of a fine in the amount of the damage sustained by the plaintiff and an award of costs and attorney's fees.[89]

A litigant's opponent may also be injured if the litigant violates a court order.[90] Thus, a party who is harmed by his opponent's violation of a court order may institute a private action for civil contempt.[91] The Supreme Court in *McCrone v. United States*[92] has stated that civil contempt proceedings to enforce a civil remedy and to protect the rights of parties to the litigation or someone who has a pecuniary interest in the subject matter of the injunction should be instituted by the aggrieved parties. To invoke the court's power the complaintant must institute a proceeding by presenting the court with an accusation, pleading, affidavit, or information which sets forth the facts constituting the contempt.[93] Proof of the violation must be clear and convincing; a bare preponderance of the evidence will not suffice.[94]

---

85. Hilgeford v. Peoples Bank, Inc., 113 F.R.D. 161 (N.D. Ind. 1986).

86. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911).

87. Penfield Co. v. SEC, 330 U.S. 585 (1947) (In civil contempt, time and imprisonment are employed as coercive sanctions to compel the contemnor to do what the law made it his duty to do.). The test for determining "civil" or "criminal" order is the apparent purpose of the trial court in issuing a contempt judgment. *In re* Hunt, 754 F.2d. 1290 (5th Cir. 1985). *See also* United States v. North, 621 F.2d 1255 (3d Cir. 1980) (en banc) (distinguishing factor between civil and criminal contempt is the purpose for which sentence is imposed).

88. Fireman's Fund Ins. Co. v. Myers, 439 F.2d 834, 837 (3d Cir. 1971).

89. Dow Chem. Co. v. Chemical Cleaning, Inc., 434 F.2d 1212 (5th Cir. 1970), *cert. denied*, 402 U.S. 945 (1971); *Lance*, 353 F.2d 585. *See also* Piambino v. Bestline Prods., Inc., 645 F. Supp. 1210 (S.D. Fla. 1986) (civil contempt is remedial action designed and intended to obtain compliance with a court order or to compensate for damages sustained as a result from noncompliance).

90. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 620 (1983).

91. *Id. See* Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction*, 1980 U. ILL. L.F. 971.

92. 307 U.S. 61 (1939).

93. 11 C. WRIGHT & A. MILLER, *supra* note 9, § 2960, at 588.

94. Stringfellow v. Haines, 309 F.2d 910, 912 (2d Cir. 1962); Heinold Hog Mkt., Inc. v.

The district courts disagree on the precise standards for determining what constitutes contemptuous behavior. Often the district courts require willfulness and deliberateness.[95] The limitations on the contempt sanction include the requirement of willful misconduct and judicial regard of the contempt sanction as a measure of the last resort.[96]

Some courts appear to impose an even higher standard for imposing contempt sanctions. For example, the District Court for the Northern District of Georgia employs a "flagrant disregard" standard. The court in *Dean v. Ellington*[97] determined that absent evidence of a flagrant bad faith pattern or of plaintiff's repeated refusals to attend depositions, or of an attempt by defendants to proceed their motion to dismiss with a motion to compel plaintiff to attend deposition, so that plaintiff's failure to attend the deposition was in contempt of a specific order, a dismissal of plaintiff's *pro se* action was not warranted. However, a subsequent violation of a court's order, which compelled the plaintiff's to appear absent an adequate excuse, could constitute flagrant disregard and willful disobedience of the court's discovery order required to sustain dismissal as a remedy. However, in *Dean*, the court found that the plaintiff was not in contempt of any specific court order.

But the desire to maintain the incentive for individuals to bring socially desirable private actions is so important, however, that district courts sometimes do not require willfulness in imposing contempt sanctions. The Fifth Circuit Court of Appeals in *Cook v. Ochsner Foundation Hospital*[98] upheld the propriety of plaintiffs' recovery of damages

---

McCoy, 700 F.2d 611, 615 (10th Cir. 1983); *Piambino*, 645 F. Supp. 1210; Duracell, Inc. v. Global Imports, Inc., 660 F. Supp. 690 (S.D.N.Y. 1987).

95. Some commentators have suggested that the "contempt sanction is replete with limitations which hamper its effectiveness." Note, *Civil Procedure — Federal District Courts Have Inherent Power to Sanction Attorneys for Abuse of the Judicial Process*, 31 VILL. L. REV. 1073, 1073-74 (1986).

96. *See* Pennsylvania v. Local 542 Int'l Union of Operating Eng'rs, 552 F.2d 498, 510 (3d Cir.), *cert. denied*, 434 U.S. 822 (1977); Comment, *Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 UCLA L. REV. 855, 862 (1979). *See* Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472 (S.D. Fla. 1984) (deliberate, willful and contamacious disregard of judicial processes and rights of opposing parties justifies most severe sanction); Joshi v. Professional Health Servs., Inc., 606 F. Supp. 302 (D.D.C. 1985) (to be held in contempt, party must have knowledge of court's order, ability to comply with order, and must have directly violated specific court order); General Motors Corp. v. Gibson Chem. & Oil Corp., 627 F. Supp. 678 (E.D.N.Y. 1986) (power of civil contempt is properly exercised if order was clear and unambiguous, person had knowledge of the order, and proof of noncompliance with the order is clear and convincing).

97. 115 F.R.D. 576 (N.D. Ga. 1987).

98. 559 F.2d 270 (5th Cir. 1977).

and attorneys' fees compensating them for "bringing the appellants' contempt to the court's attention," despite the absence of proof that the contemnors' noncompliance had been deliberate.[99]

In a number of cases, a question has arisen whether an attorney may be cited for contempt for delaying or failing to make a response to a court order compelling discovery. Discovery rules may be used as a tactical device designed to obstruct the judicial process.[100] "These abuses frustrate the goal of the Federal Rules to secure the just, speedy and inexpensive determination of every action."[101] While the federal courts are authorized to impose sanctions under FRCP Rule 37(b) for failure to comply with a discovery order, federal courts have also taken the position that contempt is a proper sanction for the obstruction of the progress of discovery proceedings where an attorney willfully or deliberately disregards a court order.[102] Conversely, where there was no order of a court, or where there was an absence of willful and deliberate noncompliance by an attorney, opposite results have been reached.[103]

Contempt proceedings have a special application in the area of administrative law as illustrated by administrative use of the subpoena power. To enforce a subpoena, Congress has required each agency to petition the appropriate district court for an enforcement order.[104] "Thus, in the administrative context, contempt proceedings occur only after a subpoena recipient fails to comply with the court's enforcement order."[105] "Failure to comply with a court order enforcing a subpoena

---

99. Mallor, *supra* note 90, at 622. CBS Inc. v. Pennsylvania Record Outlet, Inc., 598 F. Supp. 1549 (W.D. Pa. 1984) (behavior may be construed as contemptuous even in the absence of willfulness); Alberti v. Klevenhagen, 610 F. Supp. 138 (S.D. Tex. 1985) (defendant's intent is not in issue in a civil contempt proceeding since willfulness is not an element); Perry v. O'Donnell, 759 F.2d 702 (9th Cir. 1985); *Piambino*, 645 F. Supp. 1210 (failure to comply with contempt order need not be with the intent to disobey court order, as intent to disobey is not a prerequisite to finding of civil contempt).

100. Note, *The Use of Rule 37(b) Sanctions to Enforce Jurisdictional Discovery*, 50 FORDHAM L. REV. 814 (1982).

101. *Id.*; FED. R. CIV. P. 1.

102. *See* Chapman v. Pacific Tel. & Tel. Co., 613 F.2d 193 (9th Cir. 1979); Payne v. Coates Miller, Inc., 386 N.E.2d 398 (Ill. App. 3d 1979).

103. *See In re* Attorney General, 596 F.2d 58 (2d Cir.), *cert. denied*, 444 U.S. 903 (1979); Van Hyning v. Hyk, 397 N.E.2d 566 (Ill. App. 3d 1979).

104. Comment, *Requirement of Notice of Third-Party Subpoenas Issued in SEC Investigations: A New Limitation on the Administrative Subpoena Power*, 33 AM. U.L. REV. 701, 702 703 (1984). "Generally, contempt for noncompliance with an administrative subpoena does not lie until a federal district court has ordered compliance. A few agency enabling statutes, however, contain little-used provisions that allow direct agency prosecution for failure to comply with an agency subpoena." *Id.*

105. *Id.* at 703.

does not justify a contempt holding by the agency that issued the subpoena."[106] Consequently, the initiation of contempt proceedings against a noncomplying subpoena recipient can be delayed for long periods of time.[107]

Constitutional limitations on the use of contempt sanctions are also relevant. The contemnor is not entitled to an indictment proceeding or jury trial before civil contempt sanctions are imposed. However, due process protections, including ample notice and the opportunity to be heard, are required.[108] What constitutes sufficient notice and opportunity is determined by the circumstances of a particular case.[109] "Alleged civil contemnors also have a due process right to a public hearing to the extent that such a right does not undermine the secrecy of grand jury proceedings."[110]

The leading case concerning contempt sanctions and the privilege against self-incrimination is *United States v. Edgerton.*[111] The court reversed the district court's order which held the defendant guilty of civil contempt for failing to answer questions at a contempt hearing. The court reasoned that because the defendant asserted the privilege against self-incrimination to avoid compelled testimony related to documents, the order violated the defendant's fifth amendment rights.[112] Two factors influenced the court's decision. First, the district court issued the contempt order because of the defendant's refusal to testify and not for his failure to produce documents. Accordingly, the defendant was not precluded from invoking the fifth amendment privilege at the contempt proceeding.[113] Second, because his fear of self-incrimination was reasonable, the defendant properly invoked the privilege.[114]

---

106. *Id.* at 703 n.10, *citing* United States v. Vivian, 217 F.2d 882, 883 (7th Cir. 1955) ("contempt holding for noncompliance with court order enforcing administrative subpoena requires separate court proceeding"), *cert. denied*, 350 U.S. 953 (1956).

107. *Id.* at 703 n.10, *citing* United States v. Rylander, 460 U.S. 752 (1983) ("expressing dissatisfaction with twenty-one month delay before recipient of I.R.S. subpoena was found to be in contempt for refusing to comply with subpoena").

108. *Thirteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1982-1983*, 72 GEO. L.J. 249, 570 (1983) [hereinafter *Thirteenth Annual Review*], *citing In re* Grand Jury Proceedings, 633 F.2d 754, 756 (9th Cir. 1980).

109. *In re* Grand Jury Proceedings, 633 F.2d at 756.

110. *Thirteenth Annual Review*, *supra* note 108, at 570, *citing* Matter of Fula, 672 F.2d 279, 283 (2d Cir. 1982); *but compare* In re Bongiorno, 694 F.2d 917, 921-22 (2d Cir. 1982).

111. 734 F.2d 913 (2d Cir. 1984).

112. *Id.* at 921-22. *See* Note, *Constitutional Law - Fifth Amendment/Civil Contempt*, 62 U. DET. L. REV. 521-31 (1985).

113. *Edgerton*, 734 F.2d at 921-22.

114. *Id.*

This decision is in accord with the Third Circuit[115] in *United States v. Mahady & Mahady*.[116] The *Mahady* court held that although a partner in a law firm can be ordered to produce documents pursuant to an IRS summons, he cannot be forced to testify. The contempt order, therefore, was vacated.[117]

Further, the United States District Court, for the Southern District of Florida has held that at all critical stages of a contempt proceeding, the parties are entitled to guarantees of due process, including notice of the substance of the hearing.[118] Thus, the contempt sanctions available to the federal courts, although extremely powerful, are subject to constitutional limitations.

2. The Court of International Trade's Use of Contempt Sanctions

The CIT has considered use of the contempt power in only a few published decisions. In each case private litigants filed a motion to hold the government in contempt of court. The first decision, *American Air Parcel Forwarding Co. v. United States*[119] involved a plaintiff's ex parte motion to hold a District Director of Customs in contempt for failing to honor the court's previous preliminary injunction. The Court of Customs and Patent Appeals reversed, holding that the CIT lacked jurisdiction.[120] Subsequently, the court granted Customs' motion to dissolve the preliminary injunction and dismissed the action. Thus, the court also held the plaintiff's motion to hold the District Director of Customs in contempt as moot.

In *Armstrong Rubber Co. v. United States*,[121] plaintiff moved the CIT to hold certain officials of the Commerce Department in contempt of court for refusing to resume an investigation to determine if merchandise was being sold in the United States at less than fair value. The CIT denied the motion since it did not specifically direct the department to resume the investigation, although this was contemplated. The CIT concluded that "[i]t is a settled safeguard . . . that the *awesome power of contempt* is not to be used unless the party said to be in contempt has been given a clear direction by the court."[122]

---

115. Note, *supra* note 112, at 521-31.
116. 512 F.2d 521 (3d Cir. 1975).
117. *Compare with* Matter of Anonymous, 650 F. Supp. 551 (E.D.N.Y. 1986).
118. Piambino v. Bestline Prods., Inc., 645 F. Supp. 1210 (S.D. Fla. 1986).
119. 557 F. Supp. 605 (Ct. Int'l Trade 1983).
120. United States v. Uniroyal, Inc., 687 F.2d 467 (Fed. Cir. 1982).
121. No. 86-15 (Ct. Int'l Trade Feb. 14, 1986).
122. *Id.* at 3 (emphasis added).

The third case is *Cabot Corp. v. United States.*[123] Previously, the CIT, had upon review of a countervailing duty determination on carbon black from Mexico, ruled that Commerce had applied an erroneous interpretation of the countervailing duty law in holding that subsidies deemed to be "generally available" to industry in the originating country were not countervailable.[124] The CIT on October 4, 1985, remanded that case with instructions to Commerce to reconsider its measurement of countervailable subsidies in light of the rule articulated by the court.[125] Instead of seeking to have the interlocutory order certified, Commerce filed an appeal as of right which was subsequently dismissed as premature.[126]

The remand results were due thirty days after the court dismissed the appeal.[127] Commerce sought a further extension after the dismissal until October 10, 1986, for completing the remand. The CIT granted this extension by order dated July 2, 1986. Instead of completing the remand results, Commerce expedited completion of its first review of the challenged countervailing duty order under section 751 of the Tariff Act of 1930, as amended, in which it did not in fact apply the court's rule. Commerce then moved to suspend and to vacate the remand ordered by the CIT in the original investigation. Cabot Corporation filed a motion to show cause why Commerce should not be held in contempt for failing to obey the remand schedule and delaying action while expediting its section 751 review. The CIT denied Commerce's motion to suspend the remand and required compliance with the remand time schedule contained in its July 2, 1986, order, holding up consideration of Cabot Corporation's motion to show cause and Commerce's motion for vacatur (CIT Order of September 3, 1986). Following completion of the remand, the CIT ruled on the motion for vacatur, vacating a portion of its original judgment, though preserving the portions which described the proper rule to be applied by Commerce in determining whether domestic subsidies are counteravailable.[128]

Despite the negative results in these few cases in which the CIT addressed the possible use of the contempt sanction, the court's rules

---

123. Unpublished decision, Nov. 20, 1986.

124. Cabot Corp. v. United States, 620 F. Supp. 722 (Ct. Int'l Trade), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986).

125. *Id.* at 732.

126. *Id.*

127. Court Order of January 15, 1986.

128. Cabot Corp. v. United States, unpublished decision, Nov. 20, 1986, at 1-2.

provide for numerous applications of contempt sanctions. CIT Rule 63 sets forth detailed provisions for civil contempt proceedings. The sanctions include: (1) a fine including actual damages, (2) other conditions, the performance of which will operate to purge the contempt, and (3) arrest of the contemnor by a United States marshal, and confinement until the performance of the condition fixed in the order and the payment of the fine, or until the contemnor is otherwise discharged pursuant to law.[129] Several specific rules have been promulgated. The court can hold a deponent in contempt for failure to be sworn or to answer a question.[130] A party may also be held in contempt for failure to comply with a discovery order, and the court may issue a disobedience of court order.[131] Under CIT Rules 45(f) and 53(d)(2), the CIT may impose contempt sanctions for the failure of a witness to obey a subpoena. In addition, sanctions may be imposed if an affidavit for summary judgment is presented in bad faith.[132]

Contempt sanctions have provided the federal courts with the means to control their proceedings, and command respect and compliance with their judgments and decrees. The contempt power is one of the most powerful tools available to the federal courts. The CIT has thus far refrained from exercising the power of contempt in cases where private party litigants have sought to have contempt sanctions imposed against the government. However, application of the contempt sanction in the future could also arise against private party litigants who abuse the CIT's judicial process. The court may find it consistent with its standing as a national federal district court to develope standards and apply contempt sanctions where appropriate to control the customs and international trade litigation process, thereby improving the effective delivery of justice to CIT litigants.

III. Litigation Costs

A. *Introduction*

Under the traditional American rule, all parties involved in litigation in the United States have borne their own costs and attorney's fees. However, by the late 1930's, American courts, particularly the federal courts, had developed certain exceptions to the no-fee rule based on their historic power to fashion equitable remedies. Some of

129. Ct. Int'l Trade R. 63.
130. Ct. Int'l Trade R. 37(b).
131. Ct. Int'l Trade R. 37(b)(4).
132. Ct. Int'l Trade R. 56(h).

these exceptions evolved as a product of the "inherent power in the courts to allow attorneys' fees in particular situations."[133]

The federal courts have recognized several judge-made exceptions to the American rule where the overall purpose of litigation is better served. The first exception is when the losing party "has acted in *bad faith*, vexatiously, wantonly, or for oppressive reasons."[134] The judicially created bad faith exception[135] is an exercise of the inherent power of the court to control its docket and the conduct of the attorneys and parties before it.[136] Second, under the contempt sanction, a court may assess attorney's fees for "willful disobedience of a court order . . . as part of the fine to be levied on the defendant."[137] Third, where as a result of a party's efforts, a fund is created or preserved for the benefit of a class, that party may on equitable principles have attorney's fees paid from that fund.[138]

During the past few decades there has been a tremendous growth in the number of statutory causes of action that include a provision for attorney's fees, generally phrased in terms of an allowance to the prevailing party.[139] One of these, and the most relevant to the CIT, is the Equal Access to Justice Act.[140]

In addition, the recent amendments to the Federal Rules of Civil Procedure represent a new departure from the American rule. These rules are mirrored to a large extent by the CIT rules. The recent amendment to FRCP Rule 11, Signing of Pleadings, and to a lesser extent FRCP Rules 16, Pretrial Conferences; Scheduling; Management, and 26, Discovery, go beyond the bad faith exception in authorizing attorney's fees as sanctions against a broad range of conduct, which, though amounting to abuse or misuse of judicial processes, falls short of the willfulness or bad faith requirements. FRCP Rule 37 was amended to provide attorney's fees to parties prevailing on discovery motions and against parties failing to comply with discovery orders.

---

133. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 (1975); *see* 10 C. WRIGHT & A. MILLER, *supra* note 9, §§ 2675-2675.1.

134. F.D. Rich Co. v. United States for use of Indus. Lumber Co., 417 U.S. 116, 129 (1974) (emphasis added).

135. Courts have defined the term "bad faith" narrowly. Cavanagh, *supra* note 17, at 507 n.48. *See* Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

136. *See* Link v. Wabash R.R., 370 U.S. 626, 630-31, *reh'g denied*, 371 U.S. 873 (1962).

137. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

138. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970).

139. Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983) (there are more than 150 existing federal fee-shifting provisions).

140. As extended and amended 28 U.S.C. § 2412(d).

In the sections which follow, the principles discussed are applicable equally to private litigants as well as the government, except where the government only is identified. Under the doctrine of sovereign immunity, the exceptions discussed above to the American rule traditionally have not been applicable to the United States government. The first part of this section discusses how the Equal Access to Justice Act modifies the doctrine of sovereign immunity, with special emphasis on the ability of individuals, small companies and organizations to recover attorney's fees. Next, the legislative history of the statute, and how the federal courts and the CIT have applied the Equal Access to Justice Act are discussed, followed by an evaluation of the bad faith exception as applied to both private litigants and the government. Concluding this section, is an analysis of the CIT rules relating to the award of attorney's fees as well as miscellaneous cases.

B. *The Equal Access to Justice Act*

1. Legislative History of the Equal Access to Justice Act and Application of the Act in the Federal Courts

Congress enacted the Equal Access to Justice Act [EAJA][141] in order to reduce the disparity of resources between the government and individuals seeking enforcement of private rights against the United States government. H.R. Rep. No. 96-1418 sets forth the purpose of the bill:

> The bill rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. Accordingly, the bill entitles certain prevailing parties to recover attorney fees, expert witness fees and other expenses against the United States, unless the government action was substantially justified. Additionally, the bill ensures that the United States will be subject to the common law and statutory exceptions to the American rule regarding attorney fees. This change will allow a court in its discretion to award fees against the United States to the same extent it may presently award such fees against other parties.[142]

141. Pub. L. No. 96-481, tit. II, 94 Stat. 2328 (1980), *codified in* 28 U.S.C. § 2412(d) (1982).

142. H.R. REP. No. 1418, 96th Cong., 2d Sess. 5-6, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4984.

The former version of 28 U.S.C. § 2412, provided that costs, but not attorney's fees, may be awarded against the United States.[143] EAJA makes two major changes in the previous law.[144]

First, EAJA permits a court in its discretion to award attorney's fees and other expenses to prevailing parties in civil litigation against the United States in the same situations where such fees and expenses could be awarded against private litigants.[145] "[T]he change simply reflects the belief that, at a minimum, the United States should be held to the same standards in litigating as private parties."[146] The change reflects the strong movement by Congress under section 2412 towards equalizing the position of the federal government and civil litigants.[147] Thus, the discussion of case law where bad faith tactics were used as a basis for imposition of attorney's fees and expenses is applicable to the United States through the EAJA.

Second, the bill made a significant change in the previous law regarding attorney's fees *for relatively small litigants* by establishing a general statutory exception for an award of fees against the government.[148] Under the new exception certain parties who prevail in adversary adjudications or civil actions brought by or against the United States are entitled to attorney's fees and related expenses unless the government action was substantially justified or special circumstances would make an award unjust.[149] To qualify for this exception, the "party" seeking fees and expenses must qualify under the following definition:

> (B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. § 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association, as defined in section

143. *Id.* at 4987.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id. See* Natural Resources Def. Council v. EPA, 484 F.2d 1331 (1st Cir. 1973).
148. 1980 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 142, at 4987.
149. *Id.*

> 15(a) of the Agricultural Marketing Act (12 U.S.C. § 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association.[150]

Congress was especially concerned with the deterrent effect created by the inability to recover fees against the government in light of the rapid growth of government regulations.[151] "[T]he Government with its greater resources and expertise can in effect coerce compliance with its position."[152] As reviewed above, this special statutory exception to the American rule was focused on those individuals for whom costs may be a deterrent to vindicating their rights.[153] "Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights."[154] Congress desired to improve citizen access to courts and administrative proceedings.[155] By allowing an award of reasonable fees and expenses against the government for those parties least likely to be able to contest government action when the government's action is not substantially justified, the statute was intended to provide individuals an effective legal or administrative remedy where none previously existed.[156] Congress wanted the administrative decisions to reflect informed deliberation.[157] "In so doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority."[158]

Most of the controversy and case law under EAJA has involved the statutory exception for small litigants under section 2412(d)(1)(A). Unless otherwise noted, the following discussion pertains exclusively to the legislative history and case law of this small company/individual exception to the American rule vis-à-vis the United States.

2. 28 U.S.C. § 2412(d)

In section 2412, Congress expressly stated an applicable standard under the special exception and articulated a purpose for the standard. Fees will be awarded under EAJA unless the government can show

---

150. 28 U.S.C. § 2412(d)(2)(B) (1985).
151. 1980 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 142, at 4988.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 4991.
156. *Id.*
157. *Id.*
158. *Id.*

that its action was "substantially justified" or that "special circumstances make an award unjust."[159] "This standard balances the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights."[160] The applicable test of whether the government's action is "substantially justified" is one of reasonableness. Thus, where the government demonstrates that its case had a reasonable basis in both law and fact, no award will be made.[161] Accordingly, Congress placed the burden of proof on the government.

Congress also intended the definition of the term "prevailing party" to be consistent with the law that has developed under existing statutes.[162] The phrase was not intended to be limited to a victor after entry of final judgment following a full trial on the merits.[163] Further, EAJA was intended to be a limited experiment.[164] The bill contained a sunset provision which was to repeal the relevant amendments to titles 5 and 28 at the end of three years.[165]

a. Awards of Litigation Costs in the Federal Courts During the Experimental Period

The federal court cases decided under EAJA during the three year period presented conflicting interpretations of the statutory language.[166] "These conflicts . . . resulted in a paucity of fee awards under the Act."[167] Congress reported that during the three year period only $3.9 million was awarded, which was dramatically less than the $100 million annual projection.[168]

The problem was chiefly attributed to the agencies and courts misconstruing EAJA.[169] During this period it was unclear whether the "position of the United States" included the government's prelitigation actions and its litigation posture.[170] Some courts construed the "position

---

159. *Id.* at 4989.
160. *Id.*
161. *Id.*
162. *Id.* at 4990.
163. *Id.*
164. *Id.* at 4991-92.
165. *Id.*
166. Note, *The Equal Access to Justice Act in the Federal Courts*, 84 COLUM. L. REV. 1089, 1117 (1984).
167. *Id.*
168. H.R. REP. NO. 120, 99th Cong., 1st Sess. 8, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 132, 137.
169. *Id.*
170. Note, *supra* note 166, at 1117.

of the United States" which must be "substantially justified" as limited to the government's litigation position but not the government's action which led to the litigation.[171] Thus, a number of meritorious fee claims were denied because the courts failed to focus attention on the unjustified government activity that formed the basis of the litigation.[172]

Other courts interpreted the section to include both the government's litigation position *and* the government's action which led to the litigation.[173] The District Court for the Eastern District of New York in *Environmental Defense Fund v. Watt*[174] recognized that "[i]f the government's litigation position was the sole consideration, the government could insulate itself from fee liability simply by conceding error or settling, because such actions will always be deemed 'reasonable' litigation positions; thereby having the effect of substantially justifying their position."[175] In *Natural Resources Defense Council v. EPA*,[176] the Third Circuit realized that unless EAJA applied to both the litigation arguments and to the underlying action which made the suit necessary, the incentive for careful agency action would be removed, and congressional intent undermined.[177]

The courts failed to produce a clear standard for ascertaining when the government's action is "substantially justified." Some courts held

---

171. 1985 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 168, at 137 n.14, 140 n.21, *citing* Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983) (The only government "position" to be scrutinized in the context of an EAJA case is that taken in the litigation itself.), *cert. denied*, 466 U.S. 936 (1984)); Tyler Business Servs. v. NLRB, 695 F.2d 73, 75-76 (4th Cir. 1982); Broad Ave. Laundry & Tailoring v. United States, 693 F.2d 1387, 1390-91 (Fed. Cir. 1982); Operating Eng'rs Local Union No. 3 v. Bohn, 541 F. Supp. 486, 493-95 (D. Utah 1982), *aff'd*, 737 F.2d 860 (10th Cir. 1984); Alspach v. District Director of Internal Revenue, 527 F. Supp. 225 (D. Md. 1981); Boudin v. Thomas, 732 F.2d 1107, 1115 (2d Cir.), *reh'g denied*, 737 F.2d 261 (1984); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1487 (10th Cir. 1984), *cert. denied sub nom.* Jarboe-Lackey Feedlots, Inc. v. United States, 469 U.S. 825 (1984). *See also* S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm., 672 F.2d 426 (5th Cir. 1982).

172. 1985 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 168, at 140 & n.22 (citing *Alspach*, 527 F. Supp. 225); Del Mfg. Co. v. United States 723 F.2d 980 (D.C. Cir. 1983); Hill v. United States, 3 Cl. Ct. 428 (1983); Greenberg v. United States, 1 Cl. Ct. 406 (1983); Clark v. United States, 3 Cl. Ct. 194 (1983).

173. 1985 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 168, at 137 n.14 (citing Moholland v. Schweiker, 546 F. Supp. 383, 386 (D.N.H. 1982) ("position" includes agency action)); Nunes-Correia v. Haig, 543 F. Supp. 812 (D.D.C. 1982); Natural Resources Def. Council v. EPA, 703 F.2d 700, 706-7 (3d Cir. 1983); Rawlings v. Heckler, 725 F.2d 1192, 1196 (9th Cir. 1984). *See also* Photo Data, Inc. v. Sawyer, 533 F. Supp. 348 (D.D.C. 1982).

174. 554 F. Supp. 36, 41 (E.D. N.Y. 1982), *aff'd*, 722 F.2d 1081 (2d Cir. 1983).

175. 1985 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 168, at 141.

176. 703 F.2d 700, 710 (3d Cir. 1983).

177. 1985 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 168, at 141.

that "substantial justification" means more than merely reasonable.[178] Other courts have effectively stated that even an administrative decision which was reversed because it was arbitrary and capricious or lacked substantial evidence, may be "substantially justified" under EAJA.[179]

During the experimental period there was also a lack of a clear definition among the federal courts for defining who is a "prevailing party."[180] Although the term "prevailing party" is not defined, the legislative history of EAJA indicates that courts should construe the term consistently with its use in other fee shifting statutes.[181] A major problem was that the district courts failed to articulate a generally applicable standard when interpreting whether a party had prevailed.[182] The *ad hoc* decisions have resulted in conflict over the meaning of "prevailing party." For example, in *Miller v. Schweiker*[183] the district court "found that a party who had lost an administrative adjudication, but whose appeal before a district court resulted in a remand to the agency for reconsideration, was not a 'prevailing party'" because the benefit sought was not received.[184] Conversely, *MacDonald v. Schweiker*[185] held that a party whose case had similarly been remanded was a "prevailing party" for purposes of an EAJA claim.[186]

Although the district courts did not reach uniform results, several general principles for ascertaining who is a "prevailing party" emerged.[187] First, to prevail in a fully litigated suit, the court's decision must benefit the party, and the ruling must be on the case's merits.[188]

---

178. *Id.* at 138 n.15, *citing* Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984); Ulrich v. Schweiker, 548 F. Supp 63, 65 (D. Idaho 1982); Nunes-Correia, 543 F. Supp. 812, 817 (D.C.C. 1982); Wolverton v. Schweiker, 533 F. Supp. 420, 424 (D. Idaho 1982); Enerhaul v. NLRB, 710 F.2d 748 (11th Cir.), *reh'g denied*, 718 F.2d 1115 (1983).

179. 1985 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 168, at 138, *citing* Spencer v. NLRB, 712 F.2d 539, 552-53 (D.C. Cir. 1983) (dicta), *cert. denied*, 466 U.S. 936 (1984); Gava v. United States, 699 F.2d 1367, 1370-71 (Fed. Cir. 1983).

180. Note, *supra* note 166, at 1117.

181. Comment, *United States Liability for Attorneys' Fees Under the Equal Access to Justice Act*, 12 WM. MITCHELL L. REV. 805, 815 (1986). *See* H.R. REP. NO. 1418, *supra* note 142, at 4990, *citing* NLRB v. Doral Bldg. Serv., Inc., 680 F.2d 647 (9th Cir. 1982) (for purposes of defining "prevailing party," EAJA and 42 U.S.C. § 1988 are indistinguishable).

182. Note, *supra* note 166, at 1094.

183. 560 F. Supp. 838 (M.D. Ala. 1983).

184. *Id.*

185. 553 F. Supp. 536 (E.D.N.Y. 1982).

186. Note, *supra* note 166, at 1095.

187. *Id.*

188. *Id.*

A party has prevailed for purposes of EAJA if the party succeeds on a "significant issue in litigation" and derives a "benefit" from the suit.[189] A plaintiff who succeeds on any significant issue and achieves some benefit may be considered a "prevailing party."[190]

b. Subsequent Amendments to the Equal Access to Justice Act

Congress extended certain provisions of EAJA which expired on September 30, 1984. It also made clarifying technical and substantive amendments, and thus made amended EAJA permanent.[191] In the amended statue, Congress clarified its intent to give the language the "position of the United States" which must be "substantially justified" a very broad meaning rather than an overly restrictive one, which had previously been used to help the government escape liability.[192] Congress reiterated that the express intent of the original statute included both the government's litigation position as well as the agency's action which led to the litigation. The statute clarified the congressional intent that the "position of the agency" included both an agency's actions and omissions which formed the basis of the adversary adjudications.[193] The amendment made it clear that "the congressional intent is to provide attorneys' fees when an unjustifiable agency action forces litigation, and the agency then [tries] to avoid such liability by reasonable behavior during the litigation."[194]

By reason of the amendment, the United States will be liable unless the position of the government, including the agency's action or omissions upon which the administrative proceeding or civil action is based,

---

189. Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978). *See also* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (Supreme Court quoted the *Nadeau* standard with approval). *See also* United Handicapped Fed'n v. Andre, 622 F.2d 342, 348 (8th Cir. 1980) (fact that plaintiffs did not prevail under all their theories and did not receive the relief requested did not preclude them from receiving attorneys' fees, but the result attained was to be considered in setting the amount of award of attorneys' fees to the prevailing party pursuant to the statute); Resig v. Dolphin Boating & Swimming Club, 683 F.2d 1271, 1278 (9th Cir. 1982) (Although only prevailing parties may recover attorneys' fees, a party may prevail without obtaining formal relief.).

190. Note, *supra* note 166, at 1095. *See also* Von Luetzow v. Director, OPM, 562 F. Supp. 684, 685-86 (D.D.C. 1983) (EAJA request was denied where claimant had not received any part of the benefits sought); Rico-Sorio v. United States I.N.S., 552 F. Supp. 965, 968 (D. Or. 1982) (Although under EAJA the court may award attorneys' fees to a party who has prevailed on less than all of his case, generally, the court may award such fees only if the plaintiff prevailed on the merits of at least some of his claims.).

191. H.R. REP. NO. 120, *supra* note 168, at 132.

192. *Id.*

193. *Id.* at 137.

194. *Id.* at 140.

as well as the litigation position, is "substantially justified," or unless special circumstances would make an award unjust.[195] "Substantial justification" now means more than merely reasonable.[196] Because of the wide variety of factual contexts and legal issues involved in government disputes, courts will determine what is "substantially justified" on a case-by-case basis.[197]

The House Report states that "[a]gency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act."[198] The Court of Appeals for the District of Columbia Circuit in *Federal Election Commission v. Rose*,[199] has indicated that this statement is an unsupported "offhanded generalization." "This appears, in retrospect, to have been uninformed *ipse dixit*."[200] Further, sponsors in both Houses repudiated this apparently staff-produced statement.[201] The *Rose* court further stated that under EAJA the courts should examine through a prism both the government's litigation position and the underlying conduct.[202] Thus, the court must "reach a judgment independent from that of the merits phase."[203]

The intent of EAJA is not to "chill public officials charged with enforcing the law from vigorously discharging their responsibilities."[204] Changes which merely clarified existing law are to be retroactively applied, while changes which expand or change the law are to take effect on the date of enactment.[205]

c. Awards of Litigation Costs in the Federal Courts After the EAJA Amendments

As reviewed above, there was initially confusion in the federal courts over three issues regarding the implementation of EAJA. Since the 1985 amendment, the courts appear to have adopted more consistent views concerning those three issues and have developed clearer

---

195. *Id.* at 135.
196. *Id.*
197. *Id.* at 138.
198. *Id.*
199. 806 F.2d 1081 (D.C. Cir. 1986).
200. *Id.* at 1090.
201. *Id.*
202. *Id.*
203. *Id.* This analysis was followed by the CIT in Luciano Pisoni Fabbrica Accessori v. United States, 658 F. Supp. 902, (Ct. Int'l Trade 1987), *aff'd*, 837 F.2d 465 (Fed. Cir. 1988).
204. H.R. REP. NO. 120, *supra* note 168, at 139.
205. *Id.*

standards. The courts have adhered to Congress' desire for the entitlement to fees to be based upon a consideration of the government's action which led to the litigation as well as the government's litigation position. For example, the Ninth Circuit in *League of Women Voters v. FCC*[206] recognized that in deciding whether the government is liable for attorney's fees under EAJA, the court should consider both the reasonableness of the government's position at trial and the nature of the challenged government action.[207] The court, however, did not determine whether the underlying government action, enactment of a statute, was reasonable because the government did not argue in support of the statute and did not oppose the plaintiffs in any substantial manner.[208]

The federal courts have also interpreted when the government's position is "substantially justified" in a more consistent manner. The test for whether the government's position was "substantially justified" is whether it posited a colorable interpretation.[209] Thus, once the party seeking an award of attorney's fees and expenses under EAJA demonstrates that it has qualified and has prevailed, the government bears the burden of demonstrating that its position was "substantially justified."[210] To meet this burden, the government must make a strong showing.[211]

The courts have also developed a "substantial evidence test" for determining whether the government's position is "substantially justified." A recent district court case held that an agency's position in litigation is not "substantially justified" and attorney's fees are properly awardable under EAJA where the factual findings of an agency are not supported by "substantial evidence."[212] Similarly, the government's position in litigating a disability claim was not "substantially justified" since the claim was well documented and supported by ample medical evidence, and the administrative law judge refused the claim only by substituting his own medical judgments for that of competent medical witnesses.[213]

---

206. 798 F.2d 1255 (9th Cir. 1986).

207. *Id.* at 1258.

208. *Id.* at 1259.

209. *In re* Hill, 775 F.2d 1037 (9th Cir. 1985); League of Women Voters v. FCC, 798 F.2d 1255 (9th Cir. 1986); Stone v. Heckler, 658 F. Supp. 670 (S.D. Ill. 1987).

210. Viktoria-Schaefer Int'l v. United States Dep't of Army, 659 F. Supp. 85 (D.D.C. 1987); McQuiston v. Marsh, 790 F.2d 798 (9th Cir. 1986). *See* H.R. REP. NO. 1418, 96th Cong., 2d Sess. 10-11 (1980); S. REP. NO. 253, 96th Cong., 1st Sess. 6, 21 (1979).

211. *Stone*, 658 F. Supp. at 675.

212. Walden v. Bowen, 660 F. Supp. 1250, 1254 (N.D. Ill. 1987).

213. Silva v. Bowen, 658 F. Supp. 72 (E.D. Pa. 1987).

The federal courts also have refined the standards for assessing who is a "prevailing party." The test for determining whether a party has "prevailed" has recently been restated in terms of whether the party has substantially received the remedy requested or has successfully disposed of the central issue, or whether plaintiff's lawsuit motivated a settlement wherein the defendant provided the primary relief sought in litigation.[214] The court focuses on the litigation's substance and not merely on the technical outcome of the case to determine whether a plaintiff substantially prevailed in its position.[215] Further, a claimant whose benefits are reinstated after passage of legislation, is a "prevailing party" within the meaning of EAJA.[216] The determination of whether a litigant is a prevailing party is a factual one and the district court's findings of fact may not be disturbed unless clearly erroneous.[217]

The federal courts appear now to be conforming to the legislative intent of EAJA by balancing the inequities of private litigants faced with the task of challenging erroneous government action. The CIT should follow the trend in the other federal courts with a more expansive reading of the EAJA.

d. Equal Access to Justice Act in the Court of International Trade

The first case in which the CIT considered awarding attorney's fees under the EAJA[218] was *Bar Bea Truck Leasing Co. v. United States*[219] [*Bar Bea I*]. In *Bar Bea I*, the plaintiff sought attorney's fees and other expenses as a prevailing party under EAJA. CIT held the plaintiff had "unclean hands" since the plaintiff's sole purpose was to hold a customs house cartage license for use by the co-plaintiff.[220] The court applied the special circumstances "safety valve" of EAJA[221] to deny counsel fee awards as "unjust."[222] On plaintiff's motion for reconsideration, the court in *Bar Bea Truck Leasing Co. v. United*

214. Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985).
215. Kopunec v. Nelson, 801 F.2d 1226, 1229 (10th Cir. 1986).
216. *Stone*, 658 F. Supp. at 670.
217. McQuiston v. Marsh, 790 F.2d 798, 800 (9th Cir. 1986).
218. 28 U.S.C. § 2412 (1985).
219. 4 Ct. Int'l Trade 137 (1982) [hereinafter *Bar Bea I*].
220. *Id.* at 138.
221. The safety valve provision is set forth in 28 U.S.C. § 2412(d)(1)(A), which states "a court shall award to a prevailing party other than the United States fees and other expenses . . . unless special circumstances make an award unjust."
222. *Bar Bea I*, 4 Ct. Int'l Trade at 139.

States[223] [*Bar Bea II*] reiterated its conclusion that the EAJA claim was "totally lacking in merit."

In *Luciano Pisoni Fabbrica Accessori v. United States*[224] pursuant to CIT Rule 68,[225] plaintiffs who successfully challenged an antidumping duty order sought an award of attorneys' fees and expenses under EAJA. The United States Department of Commerce had initially issued a final ruling pursuant to section 735(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673d(a) which determined that products were being sold in the United States at less than fair value. Subsequently, the court issued an opinion remanding the action to the agency. On remand, the Department of Commerce made a merchandise adjustment and found the weighted-average dumping margin to be *de minimis* and concluded the merchandise was not being sold in the United States at less than fair value.[226] The agency then issued a notice revoking the antidumping duty order with respect to the plaintiffs.[227] The CIT denied plaintiffs' request for attorneys' fees finding that

> [i]t is consistent with the intent of the EAJA and its legislative history for a court to conclude that the action taken by the agency at the time was clearly reasonable even though such action is later found to be unreasonable after having run the gamut of the legal process.[228]

The court reached this outcome despite noting a recent standard enunciated by the Court of Appeals for the Federal Circuit in *Gavette v. Office of Personnel Management*.[229] In *Gavette* the court determined that "[i]t is not sufficient for the Government to show merely 'the existence of a colorable legal basis for the government's case.'"[230] Ac-

---

223. Bar Bea Truck Leasing Co. v. United States, 4 Ct. Int'l Trade 167 (1982) [hereinafter *Bar Bea II*]. *See* Donner Mountain Corp. v. United States, 9 Ct. Int'l Trade 331 (1985). CIT also denied a request for attorney's fees and other expenses pursuant to 28 U.S.C. § 2412(d) (1982), although the plaintiff successfully challenged a customs classification. The CIT refrained from reexamining the merits of the position taken by the Customs Service at the administrative level, since the government expeditiously adopted the plaintiff's position in the case at chief. *Id.* at 332.

224. Luciano Pisoni Fabbrica Accessori v. United States, 658 F. Supp. 902 (Ct. Int'l Trade 1987), *aff'd*, 837 F.2d 465 (Fed. Cir. 1988).

225. CIT Form 15 must be filed by an EAJA claimant in the CIT.

226. *Luciano*, 658 F. Supp. at 902.

227. *Id.*

228. *Id.* at 905.

229. 808 F.2d 1456 (Fed. Cir. 1986).

230. *Id.* at 1467.

cording to the court, "'substantial justification' requires that the Government show that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts."[231] Thus, "[t]he government must show that it has not 'persisted in pressing a tenuous factual or legal position, albeit one not wholly without foundation.'"[232] The court in *Luciano* justified the denial of costs, despite the *Gavette* decision, by concluding that the "substantial justification" standard is distinct from whatever standard is applicable to the underlying decision on the merits.[233] Thus, "[a]n independent analysis employing EAJA principles can result in a finding that the position of the United States at the litigation stage and the agency level was 'substantially justified' despite a finding on the merits that the agency action must be reversed because it was unreasonable."[234]

The first EAJA case decided by the CIT in which attorneys' fees were awarded, concerned a Customs decision appeal in *Bonanza Trucking Corp. v. United States*.[235] The court determined that the Customs Service denied the plaintiff meaningful opportunity to be heard, under the fifth amendment, because it refused to provide documents in support of the revocation decision, and denied plaintiff meaningful cross-examination regarding the former president's testimony during the felony prosecution.[236] Following entry of judgment enjoining the Commissioner of Customs for revoking its licenses to cart bonded merchandise and to operate a container station based on the agency record, the plaintiff sought an award of attorney's fees and expenses. The claim was based under section 2412(d)(1)(A) for costs incurred during the judicial proceedings and under section 2412(d)(3) for costs incurred during the underlying administrative proceedings. Plaintiff also sought an award under EAJA subsection (b) which provides the United States "shall be liable for . . . fees and expenses to the same extent that any other party would be liable under the common law."[237]

---

231. *Id.* (emphasis in the original).

232. *Id.*

233. *Luciano*, 658 F. Supp. at 905.

234. *Id. See* FEC v. Rose, 806 F.2d 1081, 1086-90 (D.C. Cir. 1986). The court in *Luciano* was not persuaded by the House Report, H.R. REP. NO. 120, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 132, 138, stating that "[a]gency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act." *Luciano* 654 F. Supp. at 905. The *Luciano* court relied on the *Rose* court's analysis which illustrates this statement is an unsupported generalization, as evidenced by renunciations of the statement in both Houses. *Id. See Rose*, 806 F.2d at 1089-90.

235. No. 87-70 (Ct. Int'l Trade June 18, 1987).

236. Bonanza Trucking Corp. v. United States, 642 F. Supp. 1170 (Ct. Int'l Trade 1986).

237. 28 U.S.C. § 2412(b) (1985).

In contrast to the earlier CIT cases concerning EAJA, the Customs Service "asserted that it was not required to produce any evidence in support of its decisions to revoke the company's licenses."

Bonanza is significant since the court permitted partial recovery despite plaintiff's failure to file within EAJA's specified time period. EAJA requires that a request for an award under subsection (d) be filed "within thirty days of final judgment."[238] The court, following *Luciano*, allowed recovery of attorneys' fees despite plaintiff's filing an EAJA claim ninety days after entry of judgment. *Luciano* held that since the government had sixty days to appeal the underlying judgment, the plaintiff had a total of ninety days within which to file its application.[239] CIT has thus developed a consistent approach to the applicable time periods for filing EAJA claims, which logically interprets the statute.

The plaintiff failed to carefully adhere to CIT Rule 68, which specifies both the form and content of any such application.[240] The court permitted partial recovery of the claimed costs despite several such deficiencies. The court denied recovery of counsel fees for one attorney, however, who failed to provide detailed time records. The same problem existed in another affidavit for small amounts of work performed by several other attorneys and a variety of law clerks. Conversely, fees were permitted to be recovered for one attorney despite plaintiff's failure to submit a bill of costs as required by 28 U.S.C. § 1920, or an itemized statement of expenses as contemplated by EAJA subsection (d)(1)(B). Recovery of a second attorney's fees was also permitted despite an affidavit which contained barely adequate descriptions of the services performed.[241] An award of attorney's fees was also claimed for work performed by a summer law clerk. The court concluded that "[w]hile Congress may not have precisely contemplated law clerk research in defining 'fees and other expenses' in EAJA, the chosen definition is broad enough to cover such work."[242]

The plaintiff sought recovery of attorney's fees at the rate of $175 per hour. Under EAJA subsection (d), attorney's fees are not awarded in excess of $75 per hour unless justified by a "special factor." Fees were awarded for the two attorneys at the rate of only $75 per hour

238. 28 U.S.C. § 2412(d)(1)(B) (1985).
239. *Luciano*, 650 F. Supp. at 904.
240. *Bonanza Trucking Corp.*, No. 87-70, slip op. at 29.
241. *Id.* at 30-31.
242. *Id.* at 32.

since the plaintiff failed to show the existence of a "special factor." The court also permitted recovery of fees for the summer law clerk based upon his rate of compensation, but rejected recovery for those services at the rate of $75 per hour and the rate at which the client was billed for the summer law clerk's services was unreasonable under the circumstances.[243]

During EAJA's initial three year experimental period, CIT decided only *Bar Bea I & II* and *Donner Mountain* under EAJA subsection (d)(1). The court applied EAJA in a conservative manner. CIT's denial of relief is consistent with the approach taken by the federal courts during that period. Less than two percent of the projected funds were actually awarded during the experimental period.[244] Two cases decided after the EAJA amendment, *Luciano* and *Bonanza*, reflect conflicting EAJA analyses. The court in *Bonanza* developed standards consistent with the emerging trend in the other federal courts which should further the legislative intent of EAJA. The CIT should continue to apply EAJA as in *Bonanza* to ensure the effective delivery of justice to CIT litigants who qualify to invoke the special exception of 28 U.S.C. § 2412(d)(1)(A).

C. *Bad Faith Exception*

1. Awards in the Federal Courts under the Bad Faith Exception

The most versatile exception to the American rule is based on the existence of bad faith on the part of one of the litigants, and is avowedly punitive.[245] This exception is applicable to EAJA claimants under subsection (b) which provides for recovery of expenses to the same extent any other party would be liable under the common law and specifically under subsection (c)(2) where the United States has acted in bad faith. In addition to allowing recovery against the government, the bad faith exception is the major doctrine for recovery against a party's private litigant opponents. Clearly, of the major punitive exceptions to the American rule designed to deter abuses of the judicial system, the bad faith exception has the greatest potential for deterring the broadest range of abuses.[246]

Although the bad faith exception arose in equity cases, courts have not limited the exception just to suits in equity.[247] In bad faith excep-

243. *Id.* at 31.
244. *See* H.R. REP. NO. 120, *supra* note 168, at 137.
245. Mallor, *supra* note 90, at 630.
246. *Id.* at 652.
247. *Id.* at 630-31 n.123.

tion cases, the courts typically award fees to prevailing parties only. However, where the bad faith exception is unrelated to the merits of the case, courts have awarded fees to nonprevailing parties.[248] The bad faith exception includes both conduct preceding and occurring during litigation.[249] "The exception embraces three variants of misconduct, all of which constitute abuse of the judicial system: obdurate or obstinate conduct that necessitates legal action; bad faith in propounding a frivolous claim, counter claim or defense; and vexatious conduct occurring during the course of litigation."[250]

Many of the cases are concerned with substantive bad faith which includes the assertion of frivolous claims, counterclaims and defenses.[251] Courts and private parties harmed by frivolous claims are partly compensated by the punitive and deterrence goals of the bad faith exception.[252] Theoretically, groundless litigation decreases since the filing party must pay the portion of the opponent's expenses in opposing the claim.[253] A party can even be held liable for the full defense expenses if bad faith prevades.[254] In determining the existence of bad faith, the trial court considers whether the issue was one of first impression, whether a real threat of injury to plaintiff existed, whether the trial court found the suit frivolous, and whether the record would support that finding.[255]

Developing a workable standard is the district courts' major challenge.[256] The federal courts apply an objective standard to the defendant's prelitigation conduct, but require more to show bad faith when a party is asserting a substantive claim or defense.[257] Except in obvious cases, such as relitigating an issue that is *res judicata* or sham pleadings, what conduct will be awarded attorney's fees is questionable.[258]

---

248. *Id.* at 631-32. *See* McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972); Marston v. American Employers Ins. Co., 439 F.2d 1035, 1042 (1st Cir. 1971). *See also* Weaver v. Bowers, 657 F.2d 1356, 1362 (3d Cir. 1981).

249. Mallor, *supra* note 90, at 632; Huecker v. Milburn, 538 F.2d 1241, 1245 n.9 (6th Cir. 1976).

250. Mallor, *supra* note 90, at 632.

251. *Id.*

252. *Id.* at 638-39.

253. *Id.* at 639. *See* Lipsig v. National Student Mktg. Corp., 663 F.2d 178, 181 n.21 (D.C. Cir. 1980).

254. Ellington v. Burlington Northern, Inc., 653 F.2d 1327 (9th Cir. 1981).

255. Thomas v. First Fed. Sav. Bank, 659 F. Supp. 421 (N.D. Ind. 1987).

256. Mallor, *supra* note 90, at 639.

257. *Id.*

258. *Id.* at 640.

"The weight of authority indicates that a claim will not be found to have been so meritless as to justify an award of fees if it was colorable when instituted."[259] "Even the assertion of claims that appear to be without reasonable legal merit is apparently insufficient to justify the imposition of fees for substantive bad faith."[260]

A two step analysis of the claimant's conduct determines *substantive bad faith.*[261] First, the court determines objectively whether the claim had any legal or factual merit. If the claim was colorable the inquiry ends.[262] However, if a court finds a claim lacks merit, a subjective standard is used to ascertain whether any evidence of improper purpose exists.[263] Several courts justify this rigorous subjective standard as a means to ensure that plaintiffs with meritorious but novel claims are not deterred from bringing a suit.[264]

To prevent the deterrence of meritorious claims from seeking judicial resolution, courts should confine the sanction of imposing attorney's fees to those who should know that the suit is impermissible based on their improper motives.[265] The balance between maintaining free access to the courts and deterring groundless claims is perhaps impossible to strike.[266] The inability of litigants to assess accurately the merit or lack of merit of their claims complicates the formulation of a standard.[267]

Another group of cases are concerned with *procedural bad faith.* A litigant's vexatious conduct that causes the opponent to incur unnecessary expenditures can be assessed the attorney's fees attributable to these bad faith procedural maneuvers.[268] Examples of sanctioned procedural abuse include "the concealment of assets and falsifications of records, the refusal to produce documents ordered by the court, the frivolous removal of a case to federal courts, and the launching

---

259. *Id. See Lipsig*, 663 F.2d at 182; Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980) (an award of fees may not be justified even if the party's claim appears to lack factual merit at the time the case is filed); Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977).

260. Mallor, *supra* note 90, at 640-41. *See* Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18 (2d Cir. 1980).

261. Mallor, *supra* note 90, at 641.

262. *Id.* at 641-42; *see Lipsig*, 663 F.2d at 182.

263. Mallor, *supra* note 90, at 642.

264. *Id. See Nemeroff*, 620 F.2d at 349-50; *Browning Debentures Holders' Comm.*, 560 F.2d at 1088.

265. Mallor, *supra* note 90, at 642.

266. *Id.*

267. *Id.* at 643.

268. *Id.* at 644. *See Browning Debenture Holders' Comm.*, 560 F.2d at 1088-89.

of extensive discovery aimed at making out a class action after the court has denied the maintainability of a class action."[269] Bad faith has also been found where a motion which was completely unsupportable was denied and movant's attorneys were ordered to pay reasonable expenses incurred as a result.[270]

When procedural abuse is alleged, courts are more inclined to determine bad faith on an objective basis.[271] In *Cornwall v. Robinson*, a case dealing with an allegedly frivolous removal to federal court, the court discussed the "intent-laden terminology" and rejected the application of a negligence standard for the bad faith exception.[272] FRCP Rule 11 requires that pleadings be made in good faith. Instead of a subjective bad faith test, awarding attorney's fees requires an objective test of reasonableness under the circumstances.[273] Therefore, the use of an objective standard that would permit a judge to infer bad faith from an observation that a procedural maneuver was unduly dilatory or without reasonable foundation would be justifiable in cases concerning procedural abuse.[274]

Thus, the bad faith exception to the American rule is applicable to awards of attorney's fees against both the government using EAJA, and private litigants. The federal courts have applied the bad faith exception in two major and extremely broad applications, involving both substantive and procedural bad faith. This exception is a very powerful tool which the federal courts have utilized sparingly to control the litigation process.

2. Awards in the CIT under the Bad Faith Exception

The same problems and potential applications concerning the bad faith exception are applicable to the CIT. The court has denied a request for an award of attorney's fees under the bad faith exception of EAJA in *Atochem v. United States*.[275] In *Atochem*, an importer sought an award of counsel fees pursuant to the provisions of EAJA based upon failure of the ITA [International Trade Administration] to revoke an antidumping order. The plaintiff relied on the bad faith exception under EAJA. Plaintiff alleged detrimental reliance on ITA's telephone assurances that there would be a revocation of the dumping

269. Mallor, *supra* note 90, at 644.
270. Vegetable Kingdom, Inc. v. Katzen, 633 F. Supp. 917 (N.D.N.Y. 1987).
271. Mallor, *supra* note 90, at 645; Cornwall v. Robinson, 654 F.2d 685, 687 (10th Cir. 1981).
272. Mallor, *supra* note 90, at 645 n.221.
273. EEOC v. Sears & Roebuck Co., 114 F.R.D. 615 (N.D. Ill. 1987).
274. Mallor, *supra* note 90, at 645.
275. 609 F. Supp. 319 (Ct. Int'l Trade 1985).

finding in the final results of the second 751 review in issue. After plaintiff filed a civil action with the CIT, the ITA later published a notice revoking the dumping finding.[276] The producer of material affected by the antidumping order was not entitled to attorney's fees under the bad faith exception. Although the EAJA claimant in *Atochem* had more meritorious claims than the *Bar Bea's I* and *II* claimant, the CIT rejected plaintiff's request for relief finding "[t]his is not an exceptional case where clear legal rights were ignored or actions were taken entirely without color of authority; nor do 'dominant reasons of justice' exist warranting an award of attorney's fees to plaintiff."[277] Nevertheless, in *Atochem* the court made it clear that an administrative proceeding may form the basis of an application to the court for fees under EAJA, subsection (b).[278]

The CIT in *Bonanza*[279] considered an award of attorney's fees under the bad faith exception to the American rule, pursuant to EAJA subsection (b). One claim was based on section 2412(d)(1)(A) for costs incurred during the judicial proceedings, and one under section 2412(d)(3) for costs incurred during the underlying administrative proceedings. Plaintiff also sought an award under EAJA subsection (b) which provides the United States "shall be liable for . . . fees and expenses to the same extent that any other party would be liable under the common law."[280] The plaintiff in *Bonanza* sought "to equate the irregularities during the administrative proceedings, as well as an alleged attempt by Customs agents to carry out the result thereof . . . with bad faith on the part of the [Customs] Service."[281] The CIT previously ruled that such relief was necessary and appropriate, and enjoined the Customs Service from taking further action based on the agency record.[282] The court based its bad faith analysis on the Supreme Court standard enunciated in *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*[283] The Supreme Court determined that awards of attorney's fees have been made when the unsuccessful party has "acted in bad faith, vexatiously, wantonly or for oppressive reasons." The CIT concluded that the common law standard is broader than the statutory substantial justification standard and requires analysis of

276. *Id.* at 321.
277. *Id.* at 323-324.
278. *Id.* at 322.
279. Bonanza Trucking Corp. v. United States, No. 87-70 (Ct. Int'l Trade June 18, 1987).
280. *Id.* slip op. at 10; 28 U.S.C. § 2412(b) (1985).
281. *Bonanza Trucking Corp.*, No. 87-70, slip op. at 10.
282. *Id.* slip op. at 11.
283. F.D. Rich Co. v. United States for use of Indus. Lumber Co., 417 U.S. 116, 129 (1974).

the motives of the unsuccessful litigant.[284] After such analysis, the court concluded that the agency did not seek in bad faith to revoke the plaintiff's licenses, nor would the court lightly infer bad faith for purposes of awarding attorney's fees.[285] The court borrowed from the Ninth Circuit its characterization of the bad faith exception as applicable "only in exceptional cases and for dominating reasons of justice."[286]

Thus, the CIT imposes a higher standard under the bad faith common law exception than under the substantial justification standard pursuant to EAJA subsection (d)(1)(A). As a result, CIT litigants will find difficulty in invoking the bad faith exception to receive an award for attorney's fees in actions in which the court only determines that agency action was erroneous. The bad faith exception is important because it imposes no ceiling on the hourly rate of attorneys, whereas 28 U.S.C. § 2412(d)(2)(A) limits an award to $75 per hour.

D. *Attorneys' Fees Awarded by the Court of International Trade as a Tool to Control the Legal Process*

1. State Law Claims

The CIT also has equitable powers to award attorney's fees on the basis of relevant state law claims. In *United States v. Mizrahie*,[287] the CIT considered whether a surety seeking indemnification on an import bond, pursuant to 28 U.S.C. § 1583 (1982), may obtain a writ of attachment against an indemnitor's real property located in California.[288] The CIT held it was empowered to issue a writ of attachment affecting property located in California, and that the requirements of California law, for the issuance of the writ, were met. The court stated that "[u]nder California law a written agreement of indemnity is fully enforceable, and may entitle the indemnitor to costs and attorney's fees incurred in prosecuting the indemnification claim."[289] The CIT awarded costs and attorney fees incurred in prosecuting the indemnification claim.

---

284. *Bonanza Trucking Corp.*, No. 87-70, slip op. at 11.

285. *Id.*

286. United States v. Standard Oil of Cal., 603 F.2d 100, 103 (9th Cir. 1979), *quoting* J. MOORE, W. TAGGART & J. WICKER, MOORE'S FED. PRAC. ¶ 54.77(d) at 1709-10 (2d ed. 1972).

287. *Mizrahie*, 606 F. Supp. 703 (Ct. Int'l Trade 1983).

288. *Id.* at 705.

289. *Id.* at 712.

2. Other Court of International Trade Cases Regarding Attorney Fees

In *Timken Co. v. Regan*,[290] the plaintiff alleged that the Customs Service unlawfully liquidated entries subject to an antidumping duty order and requested damages, attorney's fees and costs. The CIT suspended the count requesting fees pending final resolution of the companion case. The companion case, *Timken Co. v. Baldrige*[291] has not yet been finally resolved. Conceivably, the court will render a judgment on the motion for attorney's fees in *Timken Co. v. Regan* at a later time. The CIT subsequently rejected awards of attorneys' fees in *Harwood Manufacturing v. United States*[292] and in *Allen v. Regan*.[293] The court did not discuss the merits of the requests in either case, despite both plaintiffs' prevailing on the merits of their underlying claims.

3. Court of International Trade Rules Which Permit Recovery of Litigation Costs and Related Cases

Several of the CIT's rules, in addition to CIT Rule 11, previously discussed, provide for the recovery of litigation expenses under specific conditions. CIT Rule 26(a) allows parties to have discovery by "depositions upon oral examination by written questions; written interrogatories, production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission." In order to achieve an equitable balance, the rule also provides that "[a]ll costs, charges, and expenses incident to taking depositions shall be borne by the party making application . . . unless otherwise provided for by stipulation or by order of the court."[294] The CIT under CIT Rule 37(a)(3), may also award expenses against a party necessitating a motion for an order compelling discovery. In addition, the CIT could impose litigation expenses against a party for: failure to comply with an order; failure to admit; failure of a party to attend their own deposition, serve answers to interrogatories, or respond to a request for inspection; and failure to participate in the framing of a discovery plan.[295]

290. 552 F. Supp. 47 (Ct. Int'l Trade 1982).
291. No. 82-6-00890 (Ct. Int'l Trade 1982).
292. 7 Ct. Int'l Trade 288 (1984).
293. 607 F. Supp. 133 (Ct. Int'l Trade 1985).
294. Ct. Int'l Trade R. 26(h).
295. Ct. Int'l Trade R. 37(b)-(d), (f).

In *Bethlehem Steel Corp. v. United States*,[296] the CIT considered awarding expenses and attorney's fees incurred in opposing a motion for discovery. In *Bethlehem*, the government's claim for the recovery of costs was based on the ground that plaintiff's motion was frivolous. In denying the government's claim, the CIT determined "[w]ithin reason, attorneys should be free to attempt imaginative or creative approaches and should even, at times, be free to attempt the impossible."[297] Further, the government failed to demonstrate bad faith or vexatiousness on the part of the plaintiff.[298]

Two other CIT Rules provide for the recovery of attorney's fees under appropriate situations. However, the CIT has not considered claims for the recovery of litigation expenses under these rules. CIT Rule 16(f) sets forth sanctions incurred, including attorney's fees regarding postassignment conferences, scheduling and management. The rule provides that "the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust."[299] Further, under CIT Rule 41(e) the court can impose "payments or costs" for a previously dismissed action "[i]f a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant." These rules provide the CIT with potentially powerful tools for controlling the international trade litigation process.

IV. EXTRAORDINARY LEGAL REMEDIES — MANDAMUS AND PROHIBITION

A. *Origin of the Writs*

At common law, the writ of mandamus was a command which a court of law of competent jurisdiction issued to an inferior court, tribunal, or board, or to some corporation or person, requiring the performance of a particular duty. That duty was one which resulted from a legal obligation to act or to refrain from acting.[300] The purpose of the writ of mandamus, and the corresponding writ of prohibition,

296. 4 Ct. Int'l Trade 187 (1982).

297. *Id.*

298. *See also Christiansburg*, 434 U.S. 412, 421-22; United States v. Standard Oil of Cal., 603 F.2d 100, 103 (9th Cir. 1979).

299. Ct. Int'l Trade R. 16(t).

300. *See generally* 52 Am. Jur. 2d *Mandamus* § 1 (1970).

is the enforcement of rights already established, rather than the adjudication of rights which are disputed.[301] The origin of the writ of mandamus is traced to the reign of Edward III of England (1327-1377).[302]

Because of the great power of the writ, restrictions have long surrounded its use. The duty to act or to refrain from acting on the part of the official against whom the writ is sought must be clear and virtually beyond dispute. In addition, the writ is not intended to function as an alternative to other available means of legal action, including appeal of an adverse ruling or decision. Thus, the party seeking a writ of mandamus or prohibition must have no other adequate means of attaining the desired relief[303] and must show that the right to issuance of the writ is "clear and indisputable."[304] Moreover, because the writ is equitable in origin, issuance of the writ is entrusted to the discretion of the court to which the petition is addressed.[305] Thus, even where the petitioner satisfies the legal requirements for the issuance of the writ, a court may exercise its equitable discretion to deny the writ for other reasons.[306]

Only in extraordinary circumstances should the court invoke the writ of mandamus,[307] which provides a remedy "only if the plaintiff has exhausted all of the avenues of relief, and only if the defendant owes the plaintiff a clear nondiscretionary duty."[308] A mandamus is unavailable to compel one to exercise discretion, but may be used to compel one to perform a ministerial act.[309]

B. *Overview of Mandamus and Prohibition in the Federal Courts*

The panoply of restrictions attendant upon application for these writs restricts but does not eliminate the utility of the procedure in

---

301. *Id.* § 4.

302. *See Id.* § 2.

303. Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943).

304. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953), *quoting* United States ex rel. Bernarden v. Duell, 172 U.S. 576, 582 (1899).

305. Kerr v. United States Dist. Ct. for N. Dist. of Cal., 426 U.S. 394 (1976).

306. *E.g.*, American Cetacean Soc'y v. Baldridge, 768 F.2d 426 (D.C. Cir. 1985).

307. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980); *Kerr*, 426 U.S. at 402; *see also* Badger v. United States, 608 F. Supp. 653, 657 (Ct. Int'l Trade 1985). Only exceptional circumstances amounting to a judicial usurpency of power justify the invocation of mandamus. *Allied Chem. Corp.*, 449 U.S. at 35, *citing* Will v. United States, 389 U.S. 90, 95 (1967).

308. Heckler v. Ringer, 466 U.S. 602, 616 (1984).

309. Seaside Realty Corp. v. United States, 607 F. Supp. 1481, 1483 (Ct. Int'l Trade 1985), *citing* Wilbur v. United States, 281 U.S. 206 (1930).

modern federal practice. Although the writs are of common law origin, they are granted in federal courts pursuant to the All Writs Act, which states that:

> (a) The Supreme Court and all courts established by an Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
> (b) An alternative writ or rule *nisi* may be issued by a justice or judge of a court which has jurisdiction.[310]

The ability of a court to issue a writ is premised upon the potential frustration of its jurisdiction. Although the power to issue the writ is premised upon usurpation of, or encroachment upon the jurisdiction of the issuing court, the writ is granted in many cases which have no jurisdictional issues present. Thus, in *Beacon Theatres v. Westover*[311] the Court granted a writ to require the district court to conduct a jury trial, although this arguably did not pose a jurisdictional issue.

The federal courts of appeals have developed established categories of cases in which mandamus may be granted, although again the manner in which the courts act in aid of their jurisdiction is difficult to predict. Courts will regularly consider the grant of the writ in cases involving orders for change of venue,[312] and the grant of order that infringe on first amendment rights. Whether these cases and other extensions of them are doctrinally sound, they demonstrate the substantially broadened use of mandamus in the federal courts.

Federal courts also possess jurisdiction of independent mandamus actions to compel the performance of duties by federal officials.[313] Only in 1962 did the statute confer jurisdiction upon the district courts to hear such actions, although the District of Columbia Code had previously conferred that power on the District Court for the District of Columbia. The same traditional restrictions apply to the consideration of a petition under section 1361. The public official must owe a clear and specific duty to the petitioner, and the petitioner must lack any other useful remedy save the mandamus action.[314] Other courts have spoken of a "peremptory duty" on the part of the federal defendant

---

310. 28 U.S.C. § 1651 (1949).

311. 359 U.S. 500, 511 (1959).

312. *E.g.*, *In re* Fireman's Fund Ins. Co., 588 F.2d 93 (5th Cir. 1979) (denial of motions for refusal); Bell v. Chandler, 569 F.2d 556, 559 (10th Cir. 1978).

313. 28 U.S.C. § 1361 (1962).

314. *E.g.*, Ramirez v. Weinburger, 363 F. Supp. 105 (N.D. Ill. 1973), *aff'd*, 415 U.S. 970 (1974).

which is clear and plainly defined.[315] Regardless of the precise formulation of the test for relief, the burden upon the petitioner is a difficult one.

C. *Mandamus and Prohibition in the Court of International Trade*

In order to keep pace with the "increasing complexities of modern day international trade litigation"[316] Congress enacted the Customs Court Act of 1980, abolishing the Customs Court and creating the CIT. Prior to the passage of this legislation, the Customs Court was not empowered to issue money judgments, nor could it provide equitable relief.[317] In addition, much valid litigation was subject to dismissal in federal district courts for a perceived lack of subject matter jurisdiction.[318]

Section 201 of the Customs Courts Act of 1980[319] granted jurisdiction to the CIT of any civil action arising out of the federal statutes governing import transactions.[320] In addition to this general grant of jurisdiction, Congress in section 1585 granted the CIT "all the powers in law and equity" possessed by a federal district court. Under section 1585, the CIT has authority to afford relief appropriate to the case before it, including, but not limited to, a money judgment, a writ of mandamus or injunctive relief.[321] Section 1585 was not a grant of additional jurisdiction; rather, it merely confirmed the court's power to grant injunctive relief.[322]

In addition to sections 1581 and 1585, Congress also added section 301, which struck the former provisions of chapter 169, title 28 of the United States Code, and substituted seventeen new provisions governing court procedure in the newly formed CIT. One, section 2643, provided the various types of relief that could be ordered by the CIT.[323] In its report on the statute, the Committee on the Judiciary of the House of Representatives stated:

---

315. Save the Dunes Council v. Alexander, 584 F.2d 158, 162 (7th Cir. 1978).

316. H.R. REP. NO. 1235, 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3730.

317. *Id.*

318. *See* Consumers Union of United States, Inc. v. Committee for the Implementation of Textile Agreements, 561 F.2d 872 (D.C. Cir. 1977).

319. 28 U.S.C. § 1581 (1980).

320. H.R. REP. NO. 1235, *supra* note 316, at 19.

321. *Id.* at 21.

322. *See* Manufacture De Machines Du Haut-Rhis v. Von Raab, 569 F. Supp 877 (Ct. Int'l Trade 1983).

323. H.R. REP. NO. 96-1235, 96th Cong., 2d Sess. 23 (1980).

> Subsection (c)(1) [of 28 U.S.C. § 2643] is a general grant of authority for the Court of International Trade *to order any form of relief that it deems appropriate* under the circumstances. It is the Committee's intent that this authorization by deemed to grant the Court of International Trade remedial *powers co-extensive with those of a federal district court.* This provision makes it clear that the court may issue declaratory judgments, writs of prohibition and mandamus, orders of remand, and preliminary or permanent injunctive relief . . . .[324]

As the CIT interpreted the congressional mandate, a perceived conflict has emerged between the court's status as a coequal federal district court, as was intended by 28 U.S.C. § 2643 (and § 1585), and the constraints of the court's jurisdictional mandate embodied in sections 1581-1585. In order for the CIT to exercise its powers pursuant to section 2643, it must, of course, first find jurisdiction under section 1581.

It is well-settled that the plaintiff has the burden of demonstrating that jurisdiction exists when it is challenged.[325] Basically, for the CIT to have jurisdiction, a plaintiff must show that the cause of action arises out of customs or international trade law, although the court does not have jurisdiction over all international trade disputes.[326] Thus, in customs matters, the court has opined that in order for it to have jurisdiction, "it is necessary that the gravamen of the complaint be determined . . . [and if] the thrust of the grievance alleged and the relief sought by the plaintiff relates to the regulations promulgated by customs and their administration and enforcement."[327]

Many litigants allege jurisdiction pursuant to section 1581(i), which Congress intended as "a plenary grant of residual jurisdiction to [the CIT] over international trade litigation."[328] The Report of the House Judiciary Committee on the Customs Courts Act of 1980 states clearly the policy goals behind this provision:

> The purpose of this broad jurisdictional grant is to eliminate the confusion which currently exists as to the demarcation

---

324. H.R. REP. NO. 1235, 96th Cong., 2d Sess. 61, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3729, 3772-73 (bracketed material added).

325. United States v. Biehl, 539 F. Supp. 1218 (Ct. Int'l Trade 1982).

326. *Id.*

327. Schaper Mfg. Co. v. Regan, 566 F. Supp. 894, 896 (Ct. Int'l Trade 1983).

328. Vivitar Corp. v. United States, 585 F. Supp. 1419, 1424 (Ct. Int'l Trade 1984), *aff'd*, 761 F.2d 1552 (Fed. Cir. 1985).

> between the jurisdiction of the district courts and the Court of International Trade. This provision makes it clear that all the suits of the type specified are properly commenced only in the Court of International Trade. The Committee has included this provision in the legislation to eliminate much of the difficulty experienced by international trade litigants who have in the past commenced suits in the district courts only to have these suits dismissed for want of subject matter jurisdiction. The grant of jurisdiction in subsection (i) will insure that these suits will be heard on their merits.[329]

The CIT has frequently grappled with the relationship between the extent of its jurisdiction under section 1581(i) and its power to order any form of equitable relief it deems appropriate. In *National Corn Growers Ass'n v. Baker*[330] [*Corn Growers I*], plaintiffs moved for a preliminary injunction ordering the Commissioner of Customs to require the posting of bonds and to delay liquidation with respect to entries of certain fuel ethanol blends.[331] The government cross-moved to dismiss for want of subject matter jurisdiction.[332] Concerning the dispute surrounding jurisdiction pursuant to section 1581(i), the court stated:

> Although plaintiffs may not use section 1581(i) to create a new cause of action, it is clear that this Court should exercise jurisdiction under section 1581(i) when the usual route through administrative action would result in a "manifestly inadequate" remedy . . . . In this case plaintiffs may well have been foreclosed from obtaining any judicial remedy had they pursued a protest to Customs.[333]

Although the court denied plaintiffs' motion for preliminary injunction in *Corn Growers I*, it deemed it appropriate to exercise jurisdiction under section 1581(i) "for the limited purpose of hearing plaintiffs' application for the extraordinary relief of a preliminary injunction."[334]

---

329. H.R. REP. NO. 1235, *supra* note 316, at 47.

330. No. 85-98 (Ct. Int'l Trade Sept. 20, 1985) [hereinafter Corn Growers I].

331. *Id.* slip op. at 1-2.

332. *Id.*

333. *Id.* slip op. at 5-6, *citing* Luggage & Leather Goods Mfgs. of Am., Inc. v. United States, 588 F. Supp. 1413, 1420 (Ct. Int'l Trade 1984); United States Cane Sugar Refiners' Ass'n v. Block, 544 F. Supp. 883 (Ct. Int'l Trade), *aff'd*, 683 F.2d 399 (C.C.P.A. 1982).

334. Corn Growers I, slip op. at 6.

In *National Corn Growers Ass'n v. Baker*[335] [*Corn Growers II*], the parties returned to the court with renewed requests for the same relief, prompting another discussion of the interrelationship between section 1581(i) and the court's ability to grant extraordinary remedies. The court stated:

> A review of subsections (a) through (h) of 28 U.S.C. § 1581 leads to the conclusion that jurisdiction for this court's power to grant declaratory or mandamus relief in a manner co-extensive with that of a district court in an action such as this must be based on subsection (i).[336]

The court in *Corn Growers II* cited the discussion of the same issue by the Court of Customs and Patent Appeals in *United States v. Uniroyal, Inc.*[337] In *Uniroyal*, the court reversed the CIT's denial of the government's motion to dismiss for want of subject matter jurisdiction, holding that subsection (i) was not the appropriate jurisdictional basis for the importer's concern about a Customs Service practice. For the majority, Judge Baldwin held that Congress did not intend that subsection (i) be "used generally to bypass administrative review by meaningful protest."[338] In a concurring opinion, Judge Nies noted:

> Appellee's argument that as a matter of convenience and efficiency it should be allowed to proceed under 28 U.S.C. § 1581(i) . . . is not . . . persuasive. Section 1581(i) provides jurisdiction "in addition to the jurisdiction conferred . . . by section 1581 (a)-(h)" and may not be construed as an all embracing alternative remedy to those sections. *In my view the broad subject matter jurisdiciton of the court under 1581(i) may be invoked only when no other remedy is available or the remedies provided under other provisions of 28 U.S.C. § 1581 are manifestly inadequate.*[339]

The jurisdictional criteria set forth in Judge Nies' concurring opinion thus effectively mirror the prerequisites which apply to the writ of mandamus. The court has since adopted the position articulated by Judge Nies.

---

335. 623 F. Supp. 1262 (Ct. Int'l Trade 1985) [hereinafter Corn Growers II].
336. *Id.* at 1269.
337. 687 F.2d 467 (C.C.P.A. 1982).
338. *Id.* at 472.
339. *Id.* at 475 (footnote omitted) (emphasis added).

The CIT, consistent with the traditional view that writs of mandamus and prohibition are extraordinary remedies to be granted only when no other remedy is available, has adopted a strict view of the basis for such relief. In fact, in no case in which mandamus was specifically requested has the court to date granted the writ.

The court has adopted rationales which are consistent with those applied by other federal courts for *denial* of the writ. The court has, for example, held that the availability of alternative remedies precludes the issuance of a writ of mandamus. In *UST, Inc. v. United States*,[340] plaintiff sought a writ of mandamus to compel the government to expedite the administrative review of an antidumping duty order. As the Department of Commerce failed to complete the reviews within twelve months allotted by statute, plaintiff argued that commerce was in violation of its duty under the statute as well as its own regulations. Plaintiff sought a writ of mandamus "to compel the ITA to complete the administrative review as set out in the statute and otherwise proceed as required by law."[341] At oral argument, the government proposed a schedule for completion of the various section 751 reviews at issue.[342] The court took the government's proposed schedule into account, while expressing "frustration" at ITA's inability to explain its delays in completing the administrative review process.[343] The court stated that the agency must act within a "reasonable time," despite the fact that the statutory timetable has been held to be directory and not mandatory. With regard to the requested writ of mandamus, the court held: "Because mandamus is an extraordinary remedy to be employed only when there is no meaningful alternative and because defendant's proposed schedule appears to be such an alternative, the [c]ourt will not decide at this point whether or not to issue a writ of mandamus."[344] Although declining to issue a writ of mandamus, the court required the parties to file monthly status reports with the court and to adhere to the government's proposed schedule. Thus, the court was able to find a "meaningful alternative" to the compulsory writ, and declined to grant extrordinary relief.

Similarly, in *PPG Industries v. United States*,[345] the court determined that there was a "meaningful alternative" to mandamus, and

340. 648 F. Supp. 1 (Ct. Int'l Trade 1986).
341. *Id.* at 6.
342. *Id.* at 2.
343. *Id.* at 6.
344. *Id.*
345. 525 F. Supp. 883 (Ct. Int'l Trade 1981).

thus declined to issue the writ. In *PPG Industries*, plaintiff requested a disclosure conference in conjunction with a section 751 review, as statutorily provided by 19 U.S.C. § 1675(d). The government responded that such a conference was not unnecessary. PPG Industries sued, requesting that a writ of mandamus be issued to compel the ITA to hold a disclosure conference as requested. PPG Industries asserted that mandamus was an appropriate remedy to require the ITA to hold the requested hearing, lest ITA make its determination with PPG Industries having had the opportunity to present its view, as provided by the Commerce regulations.[346]

The government claimed that its decision not to hold a disclosure hearing was discretionary, and that judicial review of that decision could be entertained only in the context of a complete review of the complete section 751 review.[347] The court agreed with the government, holding that "all matters having to do with the final determination should be reviewed at the same time, and not in piecemeal fashion."[348] Further, the court noted that PPG Industries may have found the final determinations of the ITA satisfactory, in which case the refusal to grant a disclosure conference would constitute error without injury.[349] However, if PPG were to appeal ITA's final determination in the annual review, that would be a proper time to review all interlocutory decisions, including the refusal of PPG's request for a disclosure conference.[350]

Finally, the court held that mandamus was an inappropriate remedy, since PPG brought its cause of action prematurely. Noting that a mandamus is available "only in extraordinary circumstances and when no meaningful alternatives are available,"[351] the court reasoned that a meaningful alternative legal remedy was available in this case: PPG Industries could appeal the final determination of the section 751 review.[352]

While often finding that the existence of alternative remedies rules out the issuance of a writ of mandamus, the CIT has twice been presented with a hypothetical situation in which the issuance of a writ of mandamus might be appropriate. In *Badger-Powhatan (Div. of*

346. *See* 19 C.F.R. § 353.53(d) (1980).
347. 525 F. Supp. at 884.
348. *Id.* at 885.
349. *Id.*
350. *Id.*
351. *Id. citing* Canadian Tarpoly Co. v. United States Int'l Trade Comm'n, 640 F.2d 1322, 1325 (C.C.P.A. 1981).
352. 525 F. Supp. at 885.

Figgie Int'l) v. United States,[353] a United States producer of brass fire protection products sought a writ of mandamus to compel Commerce to amend its antidumping order to include certain products determined by Commerce to be within the class or kind of foreign merchandise investigated. Commerce discovered that the products in the class were sold at less than fair value, although the ITC [International Trade Commission] found zero dumping margins, based on Commerce's confidential work papers. Thus, Commerce concluded that the products did not cause material injury to the domestic industry.[354] The government responded that an antidumping duty order could not be entered against merchandise which was not causing material injury to a domestic industry and argued that mandamus should not be issued where alternative grounds for relief exist.[355]

The CIT denied plaintiff's application for a writ of mandamus, reasoning that plaintiff's proper avenue for relief in this case was an appeal of ITA's final determination under section 516(A) of the Tariff Act of 1930, as amended by 19 U.S.C. § 1516(a).[356] The court stated:

> To grant the requested writ of mandamus in this instance would further serve to grant the ultimate relief available had plaintiff chose [sic] to bring an action under section 1516a. If plaintiff's request is framed as an issue of statutory construction, as a question of law, the appropriate avenue of recourse is similarly a section 1516a action. *Had the ITA refused to issue the antidumping order following the affirmative determinations, a mandamus action to compel the performance of a ministerial act would have been appropriate.*[357]

The CIT has spoken in other cases of the possibility of seeking a writ of mandamus, although the plaintiff sought relief from agency action on other grounds. In *Nissan Motor Corp. v. United States*,[358] the plaintiff sought a preliminary injunction to prevent the ITA from conducting an administrative review and requiring the submission of

---

353. 608 F. Supp. 653 (Ct. Int'l Trade 1985).

354. *Id.* at 654.

355. *Id.*

356. 19 U.S.C. § 1516(a) (1984).

357. *Supra* note 353, at 658 (emphasis added). *See also* Royal Bus. Machs., Inc. v. United States, 507 F. Supp. 1007, 1014 n.19 (Ct. Int'l Trade 1980), *aff'd*, 669 F.2d 692 (C.C.P.A. 1982) ("Indeed if by some chance the consequences of the less than fair value and injury determinations were not enforced, it would be the petitioner who would have a traditional mandamus action to compel the appropriate official to perform ministerial acts."). *Id.*

358. 651 F. Supp. 1450 (Ct. Int'l Trade 1986).

questionnaire responses therein. The situation was analogous to that presented in *UST*[359] in that the administrative review in question was far behind schedule. The court adopted an approach similar to that adopted in *UST*, requiring the ITA to supply a schedule for completion of the administrative reviews and to adhere to it. On this basis, the court denied the preliminary injunction and dismissed the action. Although the court did not address the possibility of mandamus, should the agency fail to adhere to its schedule for completion of the reviews, presumably a mandamus action would lie if the agency were unable to meet the deadlines in its own schedule. The court thus demonstrated a willingness to fashion a flexible remedy rather than ruling upon the plaintiff's request for extraordinary relief.

As the *Badger-Powhatan* and *Royal Business Machines* cases indicate, the court would issue a writ of mandamus in the unlikely event that ITA refused to issue an antidumping duty order. A mandamus issued to compel publication of the order itself, after the final determination of sales at less than fair value and the ITC's injury determination, would constitute a "ministerial act," and not a matter of discretion. Mandamus is available only "to stimulate action pursuant to some legal duty, and *not to cause the respondent to undo action already taken*, or to correct or revise such action, however, erroneous it may have been."[360]

As mandamus may not be used as a substitute for appeal, the situations in which it may properly issue are necessarily quite limited. Further, since mandamus may not be used to compel the exercise of discretion,[361] and since many agency determinations can be characterized as essentially discretionary statutory interpretations, application for relief in the nature of mandamus is doubtful when the request challenges an agency's interpretation of a statute.[362]

The holdings of the CIT are consistent with those of other federal courts in cases where a duty on the part of a government official is alleged. In *Azurin v. United States*,[363] plaintiffs sought a preliminary injunction and writ of mandamus to compel the Customs Service to

359. 648 F. Supp. 1 (Ct. Int'l Trade 1986).

360. 52 Am. Jur. 2d *Mandamus* § 9 (1970).

361. Wilbur v. United States, 281 U.S. 206 (1930); Seaside Realty Corp. v. United States, 607 F. Supp. 1481 (Ct. Int'l Trade 1985).

362. *See* Work v. United States *ex rel.* Rives, 267 U.S. 175, 177 (1925) ("Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such a case can control by mandamus his interpretation, even if he may think it erroneous.").

363. 632 F. Supp. 30 (Ct. Int'l Trade 1986).

release certain documents in its possession. The CIT, upon examination of the applicable regulations and plaintiffs' due process claim, concluded that there was no basis for the alleged duty to return the documents.[364] In contrast to the prevailing stringent standard under 28 U.S.C. § 1361, plaintiffs in *Azurin* did not even produce a colorable claim of duty on the part of Customs officials.[365]

While consistent with the practice of other federal courts, the practice of the CIT with regard to writs of mandamus and prohibition suggests an emerging flexibility which augurs well for the effective use of these judicial tools in the future. The court has demonstrated a willingness to fashion *sua sponte* alternative remedies which either delay or obviate the need for extraordinary relief. Because of the exhaustive scheme of judicial review which forms the jurisdictional base for the CIT's actions, the court has not yet had occasion to develop that classic aspect of writs of mandamus and prohibition whose purpose is to protect the court's jurisdiction. Where other federal courts must be concerned with changes of venue and other devices which may frustrate their jurisdiction, the CIT is less burdened by such concerns. As a court of limited, albeit, national jurisdiction, its use of writs of mandamus and prohibition is focused more upon compelling, where necessary, the performance of statutorily mandated duties of the agencies whose determinations are subject to its review.

V. DECLARATORY JUDGMENTS

A. *Declaratory Judgments in the Federal Courts*

"The declaratory judgment action is an elastic instrumentality for the better administration of justice."[366] "Actions for declaratory judgments represent a comparatively recent development in American jurisprudence."[367] "The declaratory judgment remedy allows parties to receive speedy adjudication of their rights."[368] Declaratory judgment

---

364. *Id.* at 34.

365. *See also* Seaside Realty Corp. v. United States, 607 F. Supp. 1481 (Ct. Int'l Trade 1985) (mandamus can be used to compel performance of ministerial act).

366. W. Anderson, *Actions for Declaratory Judgments: A Treatise on the Pleading, Practice and Trial of an Action for a Declaratory Judgement, From its Inception to its Conclusion*, 1 (1940).

367. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2751, at 568. "[T]he remedy as it is now known has been recognized in the United States only since 1919 when legislatures began to adopt statutes similar to those still in effect authorizing the declaratory judgement." *Id.* at § 2752, at 571.

368. Note, *Federal Jurisdiction Over Declaratory Judgement Suits — Federal Preemtion of State Law*, 1986 U. ILL. L.F. 127, 142.

plaintiffs can receive early adjudication of their rights without waiting for an adverse party to file suit. Professor Borchard has indicated the six specific advantages of the declaratory judgement; the remedy:

> (1) provides a speedy and inexpensive method to adjudicate legal disputes; (2) allows courts to interpret statutes without requiring prior breach; (3) relieves parties from acting upon their own interpretations of their rights, at their peril, as a precondition of judicial action; (4) removes uncertainty and insecurity from legal relations; (5) enables those persons acting in a fiduciary capacity to obtain authoritative guidance and protection against liability in trust administration; and (6) enables a claimant to choose a mild but adequate form of relief by declaration in place of drastic and harsh coercion which the claimant does not desire or need.[369]

The Federal Declaratory Judgment Act is set forth in 28 U.S.C. §§ 2201 abd 2202. Under section 2201, the courts, upon the filing of an appropriate pleading, may declare the rights and other legal relations of an interested party seeking such declaration (except with respect to certain federal taxes and drug patents), whether or not further relief is or could be sought. Further, such declaration has the force and effect of a final judgment or decree and is reviewable as such. The brevity of section 2202 is astonishing, considering its potential impact on the federal courts' ability to grant extraordinary legal remedies. Section 2202 provides *in toto* "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."[370]

The procedure for obtaining a declaratory judgment pursuant to section 2201 is stated in FRCP Rule 57 which provides that the procedure for obtaining a declaratory judgment shall be in accordance with the Federal Rules of Civil Procedure, and the right to trial by jury may be demanded under the circumstances and in the manner provided in FRCP Rules 38 and 39. "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Further, federal courts are authorized to order a speedy hearing of an action for a declaratory judgment.[371] A

---

369. *Id.* at 142 n.96, *citing* E. BORCHARD DECLARATORY JUDGEMENTS 280-89 (2d ed. 1941).

370. 28 U.S.C. § 2202 (1948).

371. Fed. R. Civ. P. 57.

declaratory judgment action that is subject to the Federal Rules is neither legal nor equitable; it is a civil action.[372]

The Federal Declaratory Judgment Act was originally enacted in 1934 as section 274 of the Judicial Code of 1911.[373] "In enacting the Declaratory Judgments Act in 1934, Congress determined that the remedy of declaratory judgment should be available to litigants in the courts of the United States."[374] Congress has expressly stated that:

> The "declaratory judgment" is a useful procedure in determining jural rights, obligations, and privileges. It confers upon the courts the power to exercise in certain instances preventive relief. It enables parties who are uncertain of their legal rights and who are prejudiced by the adverse claims of others to invoke the aid of the courts for the determination of their rights before any injury has been done. It can also save tedious and costly litigation by ascertaining at the outset of a case the controlling fact or law involved, thus enabling the court to conclude the litigation or confine it to more precise limitations.[375]

In 1935, the Act was amended to expressly prohibit the rendition of declaratory judgments with respect to federal taxes.[376] The judicial code Revision of 1948 carried forward the Declaratory Judgment Act, without material change, as 28 U.S.C. §§ 2201-2202.[377] In 1976, section 2201 was amended to except from the exclusion of suits for declaratory judgments concerning certain federal taxes.[378] In 1978, a further

---

372. 6A J. MOORE, W. TAGGERT & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 57.06, at 57-25 (1986) [hereinafter MOORE'S FEDERAL PRACTICE]. In addition, the majority of states have adopted the Uniform Declaratory Judgments Act; almost all the states now provide some form of declaratory relief. *Id.* at ¶ 57.02(1), at 57-54. The Uniform Act is much more explicit and detailed than the Federal Declaratory Judgement Act, and includes sections on the scope of the remedy, power to construe, time relating to breach, executor provisions, nonexclusivity of other remedies, court discretion, supplemental relief, jury trials, costs, parties liberal construction, words construed, provisions severable, and uniformity of interpretation. *Id.* at 57-5 to 57-8. The Uniform Act together with state jurisprudential experience provides the federal courts with great assistance in their interpretation of the federal act. *Id.* at 57-6.

373. 28 U.S.C. § 400 (1940). 6A MOORE'S FEDERAL PRACTICE, *supra* note 372, ¶ 57.02(2), at 57-8.

374. S. REP. NO. 1916, 83d Cong., 1st Sess. 1, *reprinted in* 1954 U.S. CODE & ADMIN. NEWS 3389.

375. *Id.*

376. 6A MOORE'S FEDERAL PRACTICE, *supra* note 372, ¶ 57.02(2), at 57-8.

377. *Id.*

378. *Id.* at 57-9.

amendment was implemented to except proceedings under 11 U.S.C. §§ 505, 1106 of Title 11. Subsection (b) was added in 1984 to provide certain limitations on actions brought with respect to drug patents pertaining to section 505 of the Federal Food, Drug, and Cosmetic Act.[379] Section 2202, also enacted in 1934, was also based on the second paragraph of 28 U.S.C. § 400 (1940). The provision in section 400, that the court shall require adverse parties whose rights are adjudicated to show cause why further relief should not be granted forthwith, was omitted as unnecessary and covered by the revised section. Provisions relating to the submission of interrogatories to a jury were omitted as covered by FRCP Rule 49.

The Declaratory Judgment Act authorizes federal courts, in cases within their jurisdiction, to grant litigants approximately the same declaratory relief previously administered by a majority of the state courts.[380] "The Act is remedial and procedural in nature; creates no substantive rights or duties; and neither augments nor diminishes federal jurisdiction."[381] The declaratory judgment remedy provides "a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy and in cases in which a party who could sue for coercive relief has not yet done so."[382]

Although the jurisdiction of the courts is not expanded and requests for declaratory judgments may be heard only in cases that otherwise are within their jurisdiction, the new remedy enlarges the judicial process and makes it more flexible by putting a new implement at the disposal of the courts.[383] The uniqueness of the declaratory remedy lies in its potential prophylactic character, and in the fact that it is an all-purpose writ.[384]

The equity form of declaratory judgments was more flexible than the traditional common law forms of action, which were designed to give redress for wrongs already committed.[385] "While redressing actual

379. *Id.*

380. *Id.* ¶ 57.005, at 57-21.

381. *Id.* at 57-21, 57-22.

382. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2751, at 569. *See* Halkin v. Helms, 690 F.2d 977, 1007 (D.C. Cir. 1982) ("The essence of the declaratory judgment remedy is affording a form of relief, on the basis of acts either completed or threatened, that will operate to adjust the rights of the parties in cases in which the award of a prospective coercive judgment would, for any number of reasons be inappropriate."). *Id.* at 1007.

383. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2751, at 569.

384. 6A MOORE'S FEDERAL PRACTICE, *supra* note 372, ¶ 57.05, at 57-22.

385. *Id.*

wrongs, equity often made adjudications before any wrong had been committed or liability incurred."[386] Neither the common law nor equity developed, however, to the point that a litigant could always obtain an adjudication as to his rights or liabilities, although the subject-matter was justiciable and an adjudication would serve a useful purpose.[387] "The Declaratory Judgment Act merely introduced additional remedies."[388] Thus, the declaratory judgment is an all-purpose remedy designed to permit an adjudication whenever the court has jurisdiction, there is an actual case or controversy, and an adjudication would serve a useful purpose.[389]

The constitutional parameters pertaining to declaratory judgments have been established by the Supreme Court. "The great deterrent to the early spread of declaratory judgment statutes in this country was the confusion that existed between declaratory judgments and advisory opinions, and the consequent constitutional doubts."[390] The Supreme Court, in 1927 in *Liberty Warehouse Co. v. Grannis*,[391] held that a state declaratory judgment was in effect an advisory opinion and in conflict with article III "case" or "controversy" requirement. In 1933, the Supreme Court in *Nashville, C. & St. L. Ry. v. Wallace*,[392] reversed its position and held that review of an action brought under a state declaratory judgment statute was within the judicial power. The Court also recognized that if there were an actual controversy between litigants, the constitutional requisites of jurisdiction are met even though the judgment is declaratory and cannot be executed.[393] The constitutionality of the Declaratory Judgment Act is currently beyond serious question.[394] The federal statute authorizing declaratory judgments was upheld by the Supreme Court in *Aetna Life Insurance v. Haworth*.[395] The Court realized in *Aetna* that the application of the Act was restricted to "cases of actual controversy."[396] Further, the constitutional right to a jury trial is not impaired by the Act.[397] "The

386. *Id.*
387. *Id.* at 57-23.
388. *Id.*, *citing* E. Edelmann & Co. v. Triple-A Specialty Co., 88 F.2d 852, 854 (7th Cir. 1937).
389. 6A MOORE'S FEDERAL PRACTICE, *supra* note 372, ¶ 57.05, at 57-24.
390. *Id.* at ¶ 57.03, at 57-17.
391. 273 U.S. 70, 74 (1927).
392. 288 U.S. 249, 264 (1933).
393. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2753, at 574.
394. 6A MOORE'S FEDERAL PRACTICE, *supra* note 372, ¶ 57.11, at 57-79.
395. 300 U.S. 227 (1937); 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2752, at 574.
396. *Id.*; *see also* 6A MOORE'S FEDERAL PRACTICE, *supra* note 372, ¶ 57.04, at 57-20.
397. *Id.*

Act created a new procedural remedy, but it did not broaden the courts' jurisdiction nor alter the concept of justifiability."[398]

The Declaratory Judgment Act enlarges the range of remedies available in federal court by affording the courts a new noncoercive remedy, but the Act did not expand subject matter jurisdiction.[399]

Federal declaratory judgment suits present the courts with difficult questions in applying the well-pleaded complaint rule.[400] In *Skelly Oil v. Phillips Petroleum*,[401] the Supreme Court held that a federal court may exercise jurisdiction over a declaratory action only if the plaintiff's complaint in a hypothetical suit, absent the declaratory remedy, would present a substantial federal question. Thus, federal courts cannot exercise jurisdiction over declaratory complaint through a mechanical application of the well-pleaded complaint rule if a complaint raises any federal claim.[402] The Supreme Court, in *Public Service Commission v. Wycoff Co.*,[403] reiterated the policy established in *Skelly Oil*: the Court will not allow parties to enlarge federal question jurisdiction with declaratory judgment actions.[404]

The Declaratory Judgment Act "provides that 'any interested party' may seek the declaration and this makes applicable to declaratory actions the general law."[405] It applies only in "a case of actual controversy" as set forth under article III, section 2, of the United States Constitution.[406]

According to the Supreme Court, in *Babbitt v. United Farm Workers National Union*,[407] each issue with respect to which a plaintiff

---

398. *Id.* at ¶ 57.11, at 57-79, *citing* Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450 (1945); Altvater v. Freeman, 319 U.S. 359 (1943).

399. Note, *supra* note 368, at 143. *See also*, Hughes Bechtol, Inc. v. West Va. Bd. of Regents, 527 F. Supp. 1366 (S.D. Ohio 1981), *aff'd*, 737 F.2d 540 (6th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

400. Note, *supra* note 368, at 143.

401. 339 U.S. 667, 672 (1950).

402. Note, *supra* note 368, at 143; Note, *The Expanded Federal Question: On the "Independent Viability" of Declaratory Claims*, 57 NOTRE DAME L. REV. 809, 814 (1982).

403. 344 U.S. 237 (1952).

404. Note, *supra* note 368, at 147. *See also* Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 71 n.1 (1983) (section 2201 creates a remedy, not legal rights or subject matter jurisdiction).

405. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2257, at 580-81. *See also* River Park Tenants Ass'n v. 3600 Venture, 534 F. Supp. 45 (E.D. Pa. 1981).

406. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2757, at 578, *citing Aetna Life Ins.*, 300 U.S. 227 (1937); Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941) ("Basically, the question in each case is whether the facts alleged under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgement."). *See also* City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

407. 442 U.S. 289, 298 (1979), *citing* Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93 (1945).

requests declaratory relief should be examined to determine whether it presents "a real, substantial controversy between parties having adverse legal interests, [and is] a dispute definite and concrete, not hypothetical or abstract." A case or controversy must exist at all stages of an action and cannot be predicated on a speculative future event.[408] An *ad hoc* basis is used to determine whether particular facts are sufficiently immediate and real to make an actual controversy.[409]

Generally, "[t]here is little difficulty in finding an actual controversy if all of the facts that are alleged to create liability already have occurred."[410] It is clear, moreover, that a declaratory judgment is proper in some cases even though future developments may determine whether a controversy ever ripens.[411]

Courts, however, should not "express legal opinions on academic theoreticals which might never come to pass."[412] "Courts have declined to hear cases seeking a declaratory judgment on the constitutionality of a particular statute or ordinance when plaintiff has not shown that there is an immediate threat that the statute will be enforced against him."[413] Conversely, the federal courts "have not hesitated to issue a declaration if one or both parties have taken steps or pursued a course of conduct which will result in imminent and inevitable litigation, provided the issue is not settled and stabilized by a tranquilizing declaration."[414]

In order to have an actual controversy the case must be ripe, but the matter must not be moot.[415] Professor Borchard has indicated the essential characteristics of moot cases include a lack of controversy and the decision cannot definitely affect existing legal relations.[416]

For a declaratory judgment to be an apt remedy, it must settle the controversy. "When declaratory relief will not be effective in settling the controversy, the court may decline to grant it."[417] "In using

---

408. 6A MOORE'S FEDERAL PRACTICE, *supra* note 372, ¶ 57.11, at 57-90, *citing* Kidwell ex rel. Penfold v. Meikle, 597 F.2d 1273 (9th Cir. 1979).

409. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2757, at 585.

410. *Id.*

411. *Id.* at 586.

412. *Id.* at 587, *citing* American Cas. Fidelity v. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co., 280 F.2d 453, 461 (5th Cir. 1960); Mayhew v. Krug, 98 F. Supp. 338 (D.D.C. 1951).

413. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2757, at 587.

414. *Id.* at 594, *citing* Bruhn v. STP Corp., 312 F. Supp. 903, 906 (1970); Wembley, Inc. v. Superba Cravats, Inc., 315 F.2d 87, 89 (2d Cir. 1963).

415. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2757, at 601-02.

416. E. BORCHARD, DECLARATORY JUDGMENTS, 82-84 (2d ed. 1941).

417. 6A MOORE'S FEDERAL PRACTICE *supra* note 372, ¶ 57.01(2), at 57-4.

the term 'settling the controversy,' courts do not require that the *broader controversy, i.e.*, the manifold and multifarious issues and legal relationships and interrelationships of the *entire* dispute, be put at rest by the declaratory remedy."[418] In a declaratory action, the controversy at issue must itself be an autonomous and independent dispute which involves questions of great importance to the interested parties.[419] Thus, the declaratory action should be dismissed if it is impossible to separate the issues in such a way that an important, autonomous part of the dispute would be effectively settled by declaratory relief.[420] A declaratory judgment must serve a useful purpose.[421] Accordingly, a judgment does not serve a useful purpose in settling the controversy where plaintiff's rights are inextricably interwoven with the rights of others who are not in privity to the declaratory action. "Thus in the absence of interested parties, a court may refuse to entertain a declaratory action, even though the absent, interested parties have not been found to be necessary or indispensable."[422]

A declaratory judgment may be granted even where there is another effective remedy available.[423] FRCP Rule 57 provides that the existence of "another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." FRCP Rule 57 and "the additional provision that a declaratory judgment may be granted 'whether or not further relief is or could be prayed' was put into the rule to establish beyond doubt that 'declaratory relief is alternative or cumulative and not exclusive or extraordinary.'"[424] The federal courts may, however, in the exercise of discretion in determining whether to grant a declaratory judgment properly refuse to give a judgment if the alternative remedy is better or more effective.[425] "A declaratory action is not barred, even though cumulative relief for the same wrong must be sought in a separate action."[426] The same principles control where there is a pending action raising some of the questions posed by the declaratory action.[427] "The pendency of another suit

418. 6A MOORE'S FEDERAL PRACTICE, *supra* note 372, ¶ 57.08[E], at 57-48 (emphasis added).
419. *Id.*
420. *Id.* at 57-49.
421. *Id.* at 57-50, *citing* Delno v. Market St. Ry., 124 F.2d 965 (9th Cir. 1942).
422. *Id.* at 57-49.
423. Powell v. McCormack, 395 U.S. 486 (1969).
424. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2758, at 620.
425. *Id.* at 621.
426. 6A MOORE'S FEDERAL PRACTICE, *supra* note 372, ¶ 57.07, at 57-27.
427. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2758, at 624.

does not bar declaratory relief, if the issues in the declaratory action will not necessarily be determined in the other suit."[428] However, where the other suit will resolve the parties' controversy, the declaratory action may be dismissed or stayed.[429]

Granting declaratory judgments under the Declaratory Judgment Act is within the federal court's discretion. "The discretionary power of the courts was implied from the fact that the Act merely conferred power to grant a remedy without prescribing the conditions under which it is to be granted."[430] The well settled rule is that great deference is given to the trial court's discretion of whether to grant a declaratory judgment.[431] The courts should exercise their discretion liberally to further the purposes of the Act.[432] The courts within their discretion can refuse jurisdiction where the alternative remedy is better or more effective.[433]

Courts often employ Professor Borchard's formulation that "[t]he two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) *when the judgment will serve a useful purpose* in clarifying and settling the relations in issue, and (2) *when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.*"[434] The test has been restated as "whether the issuance of a declaratory judgment will effectively solve the problem whether it will serve a useful purpose, and whether or not the other remedy is more effective or efficient."[435] Where the

---

428. *Id.* at 625-26.

429. *Id.* at 627, *citing* International Harvester Co. v. Deere & Co., 623 F.2d 1207 (7th Cir. 1980); Sarafin v. Sears, Roebuck & Co., 446 F. Supp. 611 (N.D. Ill. 1978).

430. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2759, at 645.

431. *Id.* at 645 n.4, *citing* Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102, 126 (1968); Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494 (1942), *reh'g denied*, 317 U.S. 704 (1942); National Wildlife Fed'n v. United States, 626 F.2d 917 (D.C. Cir. 1980); Cass County v. United States, 570 F.2d 737, 741 (8th Cir. 1978); Tamari v. Bache & Co. (Lebanon) S.A.L., 565 F.2d 1194 (7th Cir. 1977).

432. 6A MOORE'S FEDERAL PRACTICE, *supra* note 372, ¶ 57.08[2], at 57-37, *citing* Broadview Chem. Co. v. Loctite Corp., 474 F.2d 1391 (2d Cir. 1973) (district courts have broad discretion to mold their decrees to fit the circumstances of the particular case).

433. *Id.* at 57-40. *See also* MacMillan-Bloedel, Inc., v. Fireman's Ins. Co. of Newark, 558 F. Supp. 596 (S.D. Ala. 1983).

434. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2759, at 647-8, *citing* E. BORCHARD, *supra* note 416, at 229 (emphasis added).

435. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2758, at 627-30, *citing* Western v. McGehee, 202 F. Supp. 287, 294 (D. Md. 1962). *See also* Smith v. Metropolitan Property & Liab. Ins. Co., 629 F.2d 757 (2d Cir. 1980).

judgment sought would not settle the litigants' controversy, the courts will likely deny declaratory relief.[436]

Factors that courts have considered as criteria for the denial of declaratory judgment include the inconvenience and burden to litigants who live at a distance and the inequitable conduct of the party seeking the declaration.[437] Further, federal courts "will refuse to entertain a declaratory judgment action if the controversy has been effectively settled by the decision of some other tribunal or if otherwise there is no need for the declaration."[438]

Federal courts also generally refrain from using declaratory judgments to resolve important questions of public law.[439] And, "[d]eclaratory relief ordinarily should not be granted if a special statutory proceeding has been provided for the determination of particular questions."[440]

Declaratory relief will be denied if it would confuse rather than clarify the parties' legal relations and result in piecemeal litigation.[441] However, discretion to deny declaratory relief is not absolute, since the courts cannot refuse to entertain a declaratory judgment action as a matter of whim or personal disinclination.[442] "If a case can be settled most expeditiously in the federal court, that court should exercise its jurisdiction."[443] The fact that future actions involving identical issues might be instituted is not sufficient reason to deny declaratory relief.[444] "Much of the confusion relative to the exercise of judicial

---

436. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2758, at 648. *See* Panama Processes S.A. v. Cities Serv. Co., 362 F. Supp. 735 (S.D.N.Y. 1973), *aff'd*, 496 F.2d 533 (2d Cir. 1974). Section 554(e) of the Administrative Procedure Act provides an administrative declaratory order that parallels the traditional declaratory judgment. *See* Powell, *Sinners, Supplicants, and Samaritans: Agency Advice Giving in Relation to Section 554(e) of the Administrative Procedure Act*, 63 N.C.L. REV. 339-74 (1985); Powell, *Administratively Declaring Order: Some Specific Applications of the Administrative Procedures Act's Declaratory Order Process*, 64 N.C.L. REV. 277-301 (1986).

437. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2759, at 651.

438. *Id.* at 652-53.

439. *Id.* at 654.

440. *Id.* at 642.

441. Higginbotham & Riddle, *Declaratory Judgments*, 8 ALI ABA Course Mat. Judgments 14 (June 1986), *citing* Harris v. United States Fidelity & Guar. Co., 569 F.2d 850, 852 (5th Cir. 1978) (per curiam); State Farm Mut. Auto. Ins. Co. v. MidContinent Gas Co., 518 F.2d 292 (10th Cir. 1975); Travelers Ins. Co. v. Davis, 490 F.2d 536 (3d Cir. 1974); Hogan v. Lukhard, 351 F. Supp. 1112 (E.D. Va. 1972).

442. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2759, at 655-56, *citing* Public Affairs Assoc., Inc. v. Rickover, 369 U.S. 111, 112 (1962); Hollis v. Itawamba County Loans, 657 F.2d 746 (5th Cir. 1981).

443. 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2759, at 657-58.

444. 6A MOORE'S FEDERAL PRACTICE *supra* note 372, ¶ 57.08(3), at 57-44.

discretion with respect to declaratory actions has resulted from a failure at times to distinguish between jurisdiction and the discretionary exercise thereof."[445]

The relationship between declaratory judgments and injunctions. There may be advantages in seeking a declaratory judgment versus an injunction.[446] A court may grant a declaratory judgment prior to the time a damage award or injunctive relief would be available, as well as when the plaintiff anticipates a claim for damages or injunctive relief would be available, as well as when the plaintiff anticipates a claim for damages or injunctive relief being asserted against him.[447] Declaratory judgments also serve as an alternative to the "strong medicine" of an injunction.[448] Alternatively, declaratory and injunctive relief can be sought simultaneously.[449]

B. *Declaratory Judgments in the Court of International Trade*

The CIT has been granted statutory authority to order declaratory judgments. "The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."[450] As the House Committee on the Judiciary stated:

> [S]ubsection (c)(1) is a general grant of authority for the Court of International Trade to order any form of relief that it deems appropriate under the circumstances [and] [i]t is the Committee's intent that this authorization be deemed to grant the Court of International Trade remedial powers coextensive with those of a federal district court.[451]

---

445. *Id.* at ¶ 57.08(1), at 57-32.

446. *See* discussion of injunctions presented at the Second and Third Annual Judicial Conferences of the United States Court of International Trade.

447. Higginbotham & Riddle, *supra* note 441, at 7, 9, *citing* Superior Oil Co. v. Pioneer Corp., 706 F.2d 603 (5th Cir. 1983); *Travelers Ins. Co.*, 490 F.2d 536.

448. Higginbothan & Riddle, *supra* note 441, at 10, *citing* Steffel v. Thompson, 415 U.S. 452 (1974); Bykofsky v. Borough of Middletown, 389 F. Supp. 836, 845-46 (M.D. Pa. 1975).

449. *See* 10A C. WRIGHT & A. MILLER, *supra* note 9, § 2758, at 620.

450. 28 U.S.C. § 1585 (1980). *See* Royal Bus. Machs. v. United States, 507 F. Supp. 1007, 1008 n.3 (Ct. Int'l Trade 1980).

451. H.R. REP. NO. 1235, 96th Cong., 2d Sess. 61 (1980); Wear Me Apparel Corp. v. United States, 511 F. Supp. 814, 818 (Ct. Int'l Trade 1981). *See also* United States v. Mizrahie, 606 F. Supp. 703, 707 (Ct. Int'l Trade 1983); Zenith Radio Corp. v. United States, 505 F. Supp. 216, 219 (Ct. Int'l Trade 1980); Sanho Collections, Ltd. v. Chasen, 505 F. Supp. 204, 208 (Ct. Int'l Trade 1980).

Moreover, the CIT, with certain exceptions, in addition to the orders specified in subsections (a) and (b) of 28 U.S.C. § 2643, "may order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand injunctions, and writs of mandamus and prohibition."[452] Thus, the CIT, with certain limitations, is expressly empowered to grant declaratory relief coextensive with the remedial powers of the federal district courts.

The procedure for obtaining a declaratory judgment pursuant to 28 U.S.C. § 2201 in the CIT is set forth in CIT Rule 57, which is essentially identical to FRCP Rule 57. CIT Rule 57 provides the procedure for obtaining a declaratory judgment pursuant to 28 U.S.C. § 2201, specifying that it shall be in accordance with the CIT's Rules and "the right to trial by jury may be demanded under the circumstances and in the manner prescribed by [CIT] Rules 38 and 39."[453] "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."[454] Further, under Rule 57 "[t]he court may order a speedy hearing of an action for declaratory judgment."[455]

The principles employed by the CIT in determining whether or not to order declaratory relief are identical to those utilized by the other federal courts. For example, the Court in *Corn Growers II*, cited the Supreme Court's rule: "the question in each case is whether the facts alleged, under all [the] circumstances, show that there is substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[456]

---

452. *See* Budd Co., Ry. Div. v. United States, 1 Ct. Int'l Trade 175, 176 (1981).

453. Jury trials in the Court of International Trade are somewhat unusual. CIT Rule 38 clarifies that the right of trial by jury is preserved in accordance with the United States Constitution. CIT Rule 39 sets forth the rules for a trial by jury or by the court, use of an advisory jury, and trial by consent.

454. Ct. Int'l Trade R. 57.

455. The Court of International Trade has indicated that its rules will be strictly enforced. A motion for a declaratory judgment which is untimely will be stricken by the court. 718 Fifth Ave. Corp. v. United States, 7 Ct. Int'l Trade 6 (1984) (where plaintiff sought a declaratory judgment without allowing defendant time to answer in violation of Rule 57; the motion was stricken without prejudice and plaintiff was permitted to make a properly denominated dispositive motion after defendant had an opportunity to answer). *But cf.* Springfield Indus. Corp. v. United States, 655 F. Supp. 506, 508 (Ct. Int'l Trade 1987) (plaintiff's premature motion for declaratory judgment was not stricken given the very substantial portion of the business affected, which justified expedited treatment and alteration of normal procedure).

456. 636 F. Supp. at 939, *quoting* Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941), *cited with continued approval in* City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

Accordingly, the CIT will refrain from ordering declaratory judgments where the plaintiff lacks standing. In *Yuri Fashions Co. v. United States*,[457] an importer challenged the exclusion of merchandise imported from the Commonwealth of Northern Mariana Islands and sought a declaratory judgment that the President's regulation, which defined certain products of insular possessions of the United States as subject to quota restraints, was *ultra vires* and void. Plaintiff alleged jurisdiction pursuant to 28 U.S.C. §§ 1581(a)[458] and 1581(i)(3)[459] and sought a declaratory judgment pursuant to 28 U.S.C. § 2201 and CIT Rule 57. The court examined each issue on which plaintiff requested declaratory judgment to determine whether it presented "a real, substantial controversy between parties having adverse legal interests, [and was] a dispute definite and concrete, not hypothetical or abstract."[460] The CIT concluded that plaintiff lacked standing under section 1581(i) to challenge application of the regulation as applied to the products or to challenge a directive of the Committee for Implementation of Textile Agreements, since the importer did not sufficiently allege it was adversely affected or aggrieved by the regulation.[461]

Several of the cases brought by private litigants against the government have been dismissed for lack of subject matter jurisdiction. In *Detroit Zoological Society v. United States*,[462] the consignee of five entries of merchandise filed a complaint to have all the entries deemed liquidated by operation of law under 19 U.S.C. § 1504(a). The consignee later moved to amend its complaint to assert a separate basis for subject matter jurisdiction, and the United States moved to dismiss for lack of subject matter jurisdiction.[463] The CIT ruled that 28 U.S.C. § 2201, creating declaratory judgment actions, and 28 U.S.C. § 1585,

---

457. 632 F. Supp. 41, 49 (Ct. Int'l Trade 1986).

458. 28 U.S.C. § 1581(a) (1980) provides that the Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

459. 28 U.S.C. § 1581(i)(3) provides the Court of International Trade with exclusive jurisdiction, with certain exceptions, of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety.

460. 632 F. Supp. at 49, *quoting* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

461. *Id.*

462. 630 F. Supp. 1350 (Ct. Int'l Trade 1986).

463. *Id.* at 1353.

giving the CIT powers coextensive with the district courts, do not provide a basis for the exercise of subject matter jurisdiction over the consignee's protest as to customs duties imposed upon the merchandise in question.[464] The CIT noted, however, that under the amended complaint which alleged 28 U.S.C. 1581(a), the court could have exercised jurisdiction had no extensions of liquidation occurred when the protests were filed.[465] The CIT took into account that the plaintiff did not have an opportunity to discover facts relating to jurisdiction because discovery was stayed pending consideration of the motion.[466] The CIT provided the plaintiff with an opportunity to establish subject matter jurisdiction, and permitted the plaintiff to proceed with discovery.[467]

Subject matter jurisdiction was also determined to be lacking in *Pagoda Trading Co. v. United States*.[468] The plaintiff there sought a declaration under 28 U.S.C. § 1581(h)[469] of invalidity of the ruling of the Secretary of Treasury giving guidelines for classification of merchandise. The government alleged the court lacked jurisdiction in its motion to dismiss plaintiff's action.[470] The CIT held that prior to importation, it lacked jurisdiction for the declaratory judgment of the Treasury Department guidelines for classification of the merchandise, since the administrative decision complained of did not rule specifically on the merchandise which the trading company intended to import.[471] "The defect in this action can be characterized in a number of ways — as a lack of ripeness, as a failure to exhaust administrative remedies or most specifically, as the absence of the sort of ruling for which section 1581(h) was intended."[472]

---

464. *Id.* at 1359, *citing* Manufacture De Machines Du Haut Rhin v. Von Raab, 569 F. Supp. 877, 881 (Ct. Int'l Trade 1983) (28 U.S.C. § 1585 (1980) does not grant jurisdiction to the CIT) (*citing* Kidco, Inc. v. United States, 4 Ct. Int'l Trade 103, 104 1982); Smith v. Lehman, 533 F. Supp. 1015, 1018 (E.D.N.Y.) (28 U.S.C. § 2202 (1992) is not jurisdictional but rather remedial), *aff'd*, 689 F.2d 342 (2d Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983).

465. *Detroit Zoological Soc'y*, 630 F. Supp. at 1359.

466. *Id.* at 1360.

467. *Id.*

468. 577 F. Supp. 22 (Ct. Int'l Trade 1983).

469. 28 U.S.C. § 1581(h) (1980) provides the Court of International Trade with "exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given such an opportunity to obtain judicial review prior to such importation.

470. *See Pagoda Trading Corp.*, 577 F. Supp. at 23.

471. *Id.*

472. *Id.* at 24.

Pagoda is consistent with the standards enunciated by the Court of Appeals for the Federal Circuit, although the CIT did not refer to any specific circuit decisions. The Federal Circuit has defined the requirements for invoking the CIT's declaratory judgment jurisdiction under section 1581(h) as: (1) judicial review must be sought prior to importation of goods; (2) review must be sought of a ruling, a refusal to issue a ruling, or refusal to change such ruling; (3) the ruling must relate to certain subject matter; and (4) irreparable harm[473] must be shown unless judicial review is obtained prior to importation.[474]

Actions for declaratory relief have primarily been sought against the Customs Service. In *R.J.F. Fabrics, Inc. v. United States*,[475] an importer under criminal investigation for attempting to violate industry quotas filed for declaratory judgment against the Customs Service to determine the true country of origin of the goods in question. The CIT held that the importer's civil action would be stayed in favor of a criminal case pending against the importer.[476] In *Vivitar Corp. v. United States*,[477] an American trademark owner filed an action seeking declaratory judgment that Customs Service was required to exclude all imports bearing the owner's trademark that were entered without the written consent of the owner. The plaintiff contended that an unqualified right to demand such exclusion is provided under 19 U.S.C. § 1526(a).[478] The plaintiff admitted that its overseas distributors were wholly owned subsidiaries and that it consented to overseas manufacturers' applying the trademark to goods sold overseas.[479] Therefore, the plaintiff admitted that all material facts existed for application of Customs' policy but contested the legality of the policy.[480] Judge Restani denied that request for declaratory relief holding section 1526(a) did not give the plaintiff the unqualified right to demand exclusion of the unauthorized imports bearing its trademark.[481]

---

473. The Court of International Trade has stated that "the standard for proving irreparable harm [in the declaratory judgment context] is essentially identical to that used to determine irreparable injury in cases where injunctive relief is sought." National Juice Prods. Ass'n v. United States, 628 F. Supp. 978, 984 (Ct. Int'l Trade 1986), *citing* 718 Fifth Ave. Corp. v. United States, 7 Ct. Int'l Trade 195, 196 n.3 (1984).

474. 718 Fifth Ave. Corp. v. United States, 7 Ct. Int'l Trade 195, 196 (1984), *citing* American Air Parcel Forwarding Co. v. United States, 718 F.2d 1546, 1551-52 (Fed. Cir. 1983).

475. 651 F. Supp. 1437 (Ct. Int'l Trade 1986).

476. *Id.* at 1441.

477. 593 F. Supp. 420, 422 (Ct. Int'l Trade 1984).

478. *Id.*

479. *Id.* at 425.

480. *Id.*

481. *Id.* at 436.

In a number of cases, requests for declaratory relief have been directed against the executive branch. In *American Ass'n of Exporters & Importers Textile & Apparel Group*,[482] a trade association representing domestic importers of textile and apparel products brought action against the government challenging import restraints imposed by the executive branch. The court held that the trade association failed to state a valid cause of action in its complaint challenging the President's actions which imposed quotas on textile imports. The Court ruled that the quotas were authorized by the Agricultural Act and the findings of fact supporting the decision to impose the restrictions, presented nonjusticiable issues.[483] Similarly, an action was commenced by a trade association and labor union in *Luggage & Leather Goods Manufacturers v. United States*[484] seeking a declaratory judgment that certain products were ineligible for Generalized System of Preferences (hereinafter GSP) treatment,[485] and that the President acted contrary to law in designating such products as eligible articles under the GSP program and by failing to remove the products from the list of eligible articles receiving duty-free treatment under the GSP.[486] Plaintiffs further requested the Court to enjoin defendants from maintaining the products on the list of GSP eligible articles.[487] *Luggage & Leather Goods* is significant since the CIT granted the plaintiffs' requested relief. The court determined that the products were ineligible for duty-free treatment under the GSP, it granted plaintiffs' motion for summary judgment and directed the defendants to remove the items from the list of eligible articles under the GSP.[488] The CIT, however, did not expressly state that the declaratory judgment was granted.[489]

The federal courts, including the CIT, recognized that the declaratory judgment is a nonexclusive remedy. Many of the litigants seeking such relief from the CIT also requested alternative remedies. In *Sea-*

---

482. 583 F. Supp. 591 (Ct. Int'l Trade 1984).

483. *Id.*

484. 588 F. Supp. 1413 (Ct. Int'l Trade 1984).

485. 19 U.S.C. § 2461 *et. seq.* (1984).

486. 588 F. Supp. at 1418.

487. *Id.*

488. *Id.* at 1427.

489. *But cf.* United States Cane Sugar Refiner's Ass'n v. Block, 3 Ct. Int'l Trade 196 (1982) (Requiring the exhaustion of administrative remedies would be inequitable where plaintiff sought declaratory and injunctive relief and customs officials had no authority to override the presidential proclamation imposing import quotas on products. However, application for relief was denied since the import quotas fall within the President's authority. The proclamation was consistent with both the General Agreement of Tariffs and Trade and the International Sugar Agreement.).

side Realty v. United States,[490] an importer commenced an action for a declaratory judgment that importation of a product did not violate the Tariff Act of 1930, for return of the seized product for exportation, or alternatively, for an order in the nature of mandamus directing the Customs Service to commence an action in CIT pursuant to 28 U.S.C. § 1582(1), concerning a violation of 19 U.S.C. § 1592, as it related to the seized merchandise.[491] The government moved to dismiss the action on the ground that the CIT did not have jurisdiction to order the return of the merchandise or issue a declaratory judgment to the effect that section 1592 had not been violated.[492] The CIT determined that the request for declaratory judgment in the section of the Tariff Act of 1930 proscribing fraud in the entry of an item into the commerce was premature and thus, did not grant it since the Customs Service had not yet determined whether an action would be instituted under such section.[493] The CIT also denied the importer's alternative request for mandamus because the request was also premature. The writ may only be used to compel the performance of a ministerial act, and may not be invoked to compel the exercise of discretion.[494]

Many different forms of injunctive relief have been alternatively sought in actions requesting declaratory judgments. In an early CIT decision, *Tropicana Products v. United States*,[495] the plaintiff requested injunctive relief in the form of a preliminary injunction under CIT Rule 65, and by amended complaint, a declaratory judgment. The issue presented was whether plaintiff was engaged in a manufacturing process prohibited by section 562 of the Tariff Act of 1930.[496] The CIT applied the four relevant factors in considering an application for a preliminary injunction: (1) a threat of immediate irreparable harm; (2) the public interest would be better served by issuing than by denying the injunction; (3) a likelihood of success on the merits; and (4) that the balance of hardship on the parties favors the plaintiff.[497] The court concluded that the plaintiff failed to make a requisite showing of the probability of success on the merits, which is particularly important where there is not a clear showing of threat of irreparable injury, and

490. 607 F. Supp. 1481 (Ct. Int'l Trade 1985).
491. *Id.* at 1482.
492. *Id.*
493. *Id.* at 1483.
494. *Id.*
495. 3 Ct. Int'l Trade 171 (1982).
496. *Id.*; 19 U.S.C. § 1562 (1970).
497. 3 Ct. Int'l Trade at 174, *citing* Zenith Radio Corp. v. United States, 505 F. Supp. 216 (Ct. Int'l Trade 1980).

denied the request for a preliminary injunction.[498] In addition, the court also denied the request for a declaratory relief. In a subsequent decision, the plaintiffs in *Bar Bea Truck Leasing Co. v. United States*[499] sought both declaratory relief and injunctive relief in the form of continuance of a temporary restraining order. The CIT denied the plaintiffs' motion for declaratory and injunctive relief and dissolved the temporary restraining order.[500] The CIT determined, however, that Customs' action in declaring the license at issue to be null and void was contrary to law and enjoined defendants from taking any further action with respect to the license to effectuate such nullification.[501]

Judge Restani underscored the nonexclusive nature of the relief sought in actions for a declaratory judgment in *Vivitar Corp.*[502] the plaintiff's complaint originally sought relief in the nature of mandamus.[503] The plaintiff in a subsequent complaint, acknowledged that declaratory relief would be sufficient.[504] "Therefore, the court will treat plaintiff's action as one for declaratory or injunctive relief."[505] Apparently, the CIT, even on its own motion, will alternatively consider granting declarative or other appropriate relief.

Relief in an alternative form can also be sought simultaneously in another federal court. An importer in *Lois Jeans & Jackets, U.S.A. v. United States*[506] filed an action in the CIT seeking injunctive relief to prevent the implementation of a prior Customs' ruling, which plaintiff was not promptly notified of, and filed simultaneously a declaratory judgment action in the United States District Court for the Southern District of New York concerning a related trademark infringement issue. The CIT was persuaded to grant injunctive relief since: (1) the plaintiff demonstrated the likelihood of irreparable harm; (2) the plaintiff was likely to succeed on the merits of its claim that Customs Service had not complied with its notice and opportunity for comment regulations; and (3) the balance of hardships tipped in favor of the plaintiff.[507] The CIT, however, determined "the forum of choice respecting the infringement issue from the standpoint of judicial expertise, economy and efficiency, is clearly in the [d]istrict [c]ourt."[508]

---

498. *See* 3 Ct. Int'l Trade at 176-77.
499. 546 F. Supp. 558 (Ct. Int'l Trade 1982).
500. *Id.* at 566.
501. *Id.*
502. 593 F. Supp. 420, 422 n.1 (Ct. Int'l Trade 1984).
503. *Id.*
504. *Id.*
505. *Id.*
506. 566 F. Supp. 1523 (Ct. Int'l Trade 1983).
507. *Id.* at 1526-29.
508. *Id.* at 1528.

The interrelationship between mandamus, prohibition, declaratory judgments, and injunctions is crucial in comprehending the CIT's use of extraordinary remedies. The CIT has not granted either a writ of mandamus or prohibition. It may be that an effective strategy for CIT litigants in certain situations, where subject matter jurisdiction can be established, would be simultaneously to request declaratory relief and injunctive relief. It remains to be determined, however, whether this tactic would actually increase the likelihood of success for litigants seeking the prompt correction of erroneous agency action.

Declaratory relief has been sought for Customs Service decisions but not as yet for proceedings before the ITA or the ITC. The plenary power of the court to provide relief in the form of a declaratory judgment, may suggest that interested parties aggrieved by agency action believed to be erroneous should seek to correct such action in the specific field of trade utilizing the declaratory judgment, as well as other extraordinary legal remedies in appropriate circumstances. The CIT ought not deprive international trade litigants the benefit of its use of the full panopoly of judicial tools which the court has already extended to customs litigants.

The power of the CIT to provide declaratory relief is vast. It has effectively applied extraordinary remedies in limited areas and ought in accordance with the historical nature of these tools, adapt the standards of the other federal courts and wisely utilize them in international trade cases in appropriate circumstances. The CIT should not hesitate to develop standards sensitive to its unique jurisdiction for utilizing these remedies to control its judicial process and to ensure the effective delivery of justice to all CIT litigants.