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# The Impact of the Court on ITA Policies and Procedures – Too Much or Too Little?

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# The Impact of the Court on ITA Policies and Procedures—Too Much or Too Little?

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## I. INTRODUCTION

The Trade Agreements Act of 1979 (TAA)[1] provided for a number of changes in the administration of our antidumping and countervailing duty laws. One significant change was the expansion of the provisions for judicial review of the International Trade Administration's (ITA) decisions. These provisions expanded upon and clarified such questions as which parties were entitled to judicial review of decisions relating to countervailing and antidumping determinations, which decisions could be so challenged, what type of review would be provided, and which entries would be affected by a judicial determination. In general, access was limited to parties with a direct commercial interest as opposed to broad-spectrum organizations;[2] only a few limited decisions prior to a proceeding's final determination could be challenged;[3] the judicial review provided for would be a review on the agency record rather than *de novo* as had previously been the rule;[4] and only entries made after the court's determination would be covered by such determination unless the entry's liquidation had been enjoined by the court.[5]

This paper addresses those judicial review issues relating to the requirement of exhaustion of administrative remedies as applied by the Court of International Trade (CIT) in recent cases, and the question of when a decision by the Court of International Trade on an issue raised under 19 U.S.C. § 1516a is, or should be, considered final. The larger issue lurking behind these is whether

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* Mudge Rose Guthrie Alexander & Ferdon.
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[1] 19 U.S.C.A. § 1516a (West Supp. 1980). Title X of the Trade Agreements Act of 1979 amended Title V of the Tariff Act of 1930 by the insertion of a new section, § 516A "Judicial Review in Countervailing and Antidumping Duty Proceedings." Pub. L. No. 96-39. *See also* H.R. Rep. No. 317, 96th Cong., 1st Sess. 179–83 (1979).

[2] 19 U.S.C.A. § 1516a(d) (West Supp. 1980).

[3] 19 U.S.C.A. § 1516a(a) (West Supp. 1980).

[4] 19 U.S.C.A. § 1516a(b) (West Supp. 1980).

[5] 19 U.S.C.A. §§ 1516a(c), (e) (West Supp. 1980).

judicial review has been "overdone" and what, if any, changes should be adopted in these areas to improve the system.

## II. EXHAUSTION OF REMEDIES

In a recent decision, Judge Skelley Wright of the Court of Appeals for the District of Columbia listed four primary purposes served by the general rule requiring exhaustion of administrative remedies:

> First, it carries out the congressional purpose in granting authority to the agency by discouraging the frequent and deliberate flaunting of administrative processes [that] could encourag[e] people to ignore its procedures. *McKart v. United States*, 395 U.S. 185, 195, 89 S.Ct. 1657, 1663 (1969). Second, it protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise, exercise whatever discretion it may have been granted, and correct its own errors. Third, it aids judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding. Fourth, it promotes judicial economy by avoiding needless repetition of administrative and judicial factfinding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency.[6]

The judicial branch, to serve these purposes, devised the exhaustion rule which requires that all possible administrative remedies be pursued first before a case be brought to court.[7] At the same time, it is recognized that there are times when the application of the rule is inappropriate. Thus, "courts tailor the exhaustion requirement to individual situations because of the valid argument that exhaustion can sometimes be as damaging as premature legal involvement."[8]

Congress codified this judicial requirement for the exhaustion of remedies in cases arising under the antidumping and countervailing duty law in subsection (d) of § 2637 of Title 28 of the United States Code which provides that "the Court of International Trade shall, *where appropriate*, require the exhaustion of administrative remedies."[9] Clearly, Congress also realized that the purposes of the exhaustion doctrine would not always be served best if the rule was applied blindly in every case. The court must use its discretion as to when the application

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[6] Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. Cir. 1984).

[7] *See also* K.C. DAVIS, ADMINISTRATIVE LAW § 182 at 615 (1941).

[8] C.H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 10.22 at 178 (1985) [hereinafter KOCH].

[9] 28 U.S.C.A. § 2637(d)(West Supp. 1982) (*emphasis added*).

of the requirement was appropriate and would further, rather than frustrate, the ends of both justice and judicial expediency.[10]

The failure to exhaust administrative remedies can have one of two effects, depending on the type of agency action involved. Either the court will tell the litigants to go back to the agency for a determination or the litigant will lose the use of the defense.[11] In cases filed under 19 U.S.C. 1516a, the latter result occurs—the party loses the ability to make the claim or defense. Because of this somewhat drastic result, it is imperative that the factors be weighed carefully in determining whether the exhaustion requirement is indeed appropriate in a particular case. If one is to err in such a balancing act, it should be on the side of the party who may lose the right to bring up a certain issue if exhaustion is required—no matter how meritorious the issue might have been.

### A. *The Court Has Applied the Exhaustion Doctrine in a Manner Consistent with the Statute*

A review of some example cases illustrates that the court has correctly and judiciously applied the statutory provision in § 2637(d) to require the exhaustion of remedies where appropriate. In practice, the court has applied a "rule of reason."[12] On the one hand, the court has stated that it will not rescue parties who have "slept on their rights" in the proceeding below.[13] On the other hand, the court has recognized that strict application of the rule is inappropriate in cases where parties have not had an opportunity to raise the issue before the agency.[14]

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[10] The Court of International Trade is fully cognizant of this grant of discretion. For example, in its opinion in *Rhone Poulenc, S.A. v. United States*, the court distinguished certain cases where the filing of protests was a statutory requirement for review: "[I]n both cases, statutes expressly barred judicial review of legal claims not raised administratively. *In contrast, this court need only require exhaustion of administrative remedies 'where appropriate'* as long as the statutory requirement of participation in the administrative proceeding is met. 28 U.S.C. § 2637(d) (1982)." 583 F. Supp. 607 (Ct. Int'l Trade 1984) (*emphasis added*).

[11] KOCH, *supra* note 8, § 10.22 at 177.

[12] This "rule of reason" is perhaps best illustrated by the court's discussion in Al Tech Speciality Steel Corp., v. United States, No. 87-59, slip op. at 8–9 (Ct. Int'l Trade May 22, 1987) of its application of the exhaustion doctrine:

> Congress did not intend § 2637(d) to be jurisdictional in nature . . . . While the notions of the integrity of the administrative process, as embodied in the statute, suggest that exhaustion should be the "general rule," the courts must resist inflexible applications of the doctrine—characteristic of jurisdictional rules—which frustrate the ability to apply exceptions developed to cover "exceptional cases or particular circumstances . . . where injustice might otherwise result" if it were applied strictly.

*Id.*

[13] Kokusai Electric Co. v. United States, 632 F. Supp. 23, 27 (Ct. Int'l Trade 1986).

[14] *See* Philipp Brothers, Inc. v. United States, 630 F. Supp. 1317 (Ct. Int'l Trade 1986).

The general rule requiring exhaustion of administrative remedies is best illustrated by the case of *Kokusai Electric Co. v. United States*,[15] in which the plaintiff challenged the scope of the Department's final antidumping determination and the resulting antidumping duty order. Plaintiff argued to the court that the antidumping order against cell site transceivers should not include "related subassemblies."[16] Unfortunately, plaintiff never raised this issue to the Department and first raised it before the International Trade Commission (ITC) after the Department had issued a final determination treating cell site transceivers and subassemblies as part of the same class or kind of merchandise.[17]

The court determined that the plaintiff clearly had notice of the action the Department intended to take throughout the investigation and failed to raise the issue in the administrative proceeding before the Department.[18] The court noted that "the reviewing court has power to exercise discretion in light of the circumstances and the court's idea as to what justice requires."[19] Under the facts of this case, the court found that exhaustion was clearly appropriate. The court held that "in the absence of extraordinary circumstances excusing the neglect to raise before Commerce the issue of whether or not the related subassemblies were within the scope of the investigation, the court will not permit the plaintiff to raise the issue after Commerce closed its investigation."[20] Accordingly, under the circumstances of this case, plaintiff's failure to raise the issue before the Department was fatal to its attempt to raise the issue before the court.

The case of *Philipp Brothers*[21] involved an appeal of a final determination in a § 751 annual review of a countervailing duty order. Plaintiff challenged as unlawful the imposition of a weighted-average countervailing duty against imports of pig iron from Brazil rather than the imposition of company-specific countervailing duties that had been used in the underlying countervailing duty order.[22] The government argued, as a jurisdictional defense, that plaintiff had neither requested a hearing nor offered written comments on the changes it was now contesting in court when the use of company-specific rates had been proposed in the preliminary determinations.[23]

On its face, the case appears to be another good candidate for the use of the exhaustion rule. But plaintiff contended that it should be excused from the exhaustion requirement for two reasons. First, within days of the publication

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[15] *Kokusai*, *supra* note 13.

[16] *Id.* at 25–26.

[17] *Id.* at 26–27.

[18] *Id.* at 27.

[19] *Id.* at 28, *citing* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.7 at 444 (2d ed. 1983).

[20] *Id.* at 28.

[21] 630 F. Supp. 1317 (Ct. Int'l Trade 1986).

[22] *Id.* at 1319, 1321–22. Apparently, the use of a weighted-average rate increased the countervailing duty over what it would have been had company-specific rates been applied to plaintiff's Brazilian supplier.

[23] *Id.* at 1319.

of the preliminary determination by the Department, the Court of International Trade had issued its determination in *Ambassador Division of Florsheim Shoe v. United States*,[24] which prohibited the Department of Commerce from retroactively assessing increased countervailing duties. Accordingly, plaintiff assumed that the Department would follow the court's decision, in which case the Department would be barred from implementing the weighted-average rate because it would, *de facto*, result in retroactively increased countervailing duties. The Department did not inform plaintiff or the public until its final determination that it was appealing the lower court's decision in *Florsheim* and would not follow the decision until the appeal was completed.[25] Plaintiff's second argument was that it did not receive notification of the preliminary determination until after the expiration of the time in which to request access to the confidential information necessary to present its arguments that this new methodology would in fact result in increased countervailing duties.[26]

Weighing these two reasons together, the court held that it was "inappropriate to require plaintiff, under the doctrine of exhaustion of administrative remedies, to argue to ITA for adherence to clearly applicable precedent, to anticipate disregard of the precedent, and to then raise alternative arguments to the agency, the basis for which plaintiff could not know."[27] In doing so, the court specifically noted that neither factor necessarily "tips the scale" requiring exhaustion. Indeed, the court indicated that under other circumstances the plaintiff might not have been relieved of its obligation to seek additional time to obtain access to the confidential administrative record which it needed to make its argument. "[A]bsent the situation created by ITA's disregard of the lower court opinion in *Florsheim*, which plaintiff had no reason to anticipate, plaintiff would not be relieved of its obligation to seek additional time to obtain access to the confidential administrative record, which it needed to make presentation of alternative arguments possible."[28]

A second "exhaustion" issue that arose in *Philipp Brothers* is important because of the regularity with which it arises in cases before the Department. Plaintiff challenged a change in methodology that the Department made for the first time in its final determination.[29] Plaintiff could not raise the issue during the administrative procedure because plaintiff had no knowledge that the issue existed until the Department's final determination was published. At that point it was obviously too late to raise the issue at the Department. Nonetheless, the government asserted that plaintiff was barred from raising the issue before the

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[24] 577 F. Supp. 1016 (Ct. Int'l Trade 1983), *rev'd*, 748 F.2d 1560 (Fed. Cir. 1984).

[25] 630 F. Supp. at 1321.

[26] *Id.*

[27] *Id.*

[28] 630 F. Supp. at 1321.

[29] *Id.* at 1319, 1324. The issue raised here involved the Department's treatment of the lag time in collection of an export credit offset tax.

court because it had failed to raise the issue at the administrative level.[30] The court correctly pointed out that "there was no opportunity to raise the issue at the administrative level" and found the requirement of exhaustion of remedies inappropriate under the circumstances.[31]

The third major precedent in the area is *Timken Co. v. United States*[32] This case is a precedent for the exception to the exhaustion rule dealing with intervening judicial interpretations of existing law. In this case, plaintiff challenged the Department's final determination to revoke an antidumping order against tapered roller bearings from Japan based upon a finding that the dumping margins were *de minimis*.[33] In its review, the Commerce Department had analyzed prices during the period April 1, 1978 through November 14, 1979, which had been the date of a tentative notice to revoke published previously by the Treasury Department.[34] The Commerce Department's notice of its preliminary results and its tentative determination to revoke were published on February 17, 1981[35] and the final revocation was published on June 15, 1982.[36] The Commerce Department did not update the Japanese information through the Commerce Department's tentative determination to revoke, nor did plaintiff request that the Department do so at any time prior to the publication of the final revocation.[37]

While on appeal to this court, the decision in the case of *Freeport Minerals Co. v. United States*,[38] was issued by the Court of Appeals for the Federal Circuit. In *Freeport Minerals* the CAFC held that before the Department could revoke an order, it had to update and review the information on which it was basing the revocation up to the time just prior to the Department's preliminary determination.[39] In *Timken* the preliminary determination had been issued sixteen months after the end of the period covered by the review. Therefore, plaintiff claimed a remand was necessary to collect the additional information in accordance with the ruling in *Freeport Minerals*.[40]

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[30] *Id.* at 1324.

[31] *Id.*

[32] 630 F. Supp. 1327 (Ct. Int'l Trade 1986).

[33] *Id.* at 1331.

[34] *Id.* at 1333. The original notice had been published by the Department of the Treasury because prior to the Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69 (1979) (to be codified at 19 U.S.C.A. § 2171), Treasury rather than the Department of Commerce had responsibility for administering the countervailing duty and antidumping duty laws.

[35] Tapered Roller Bearings and Certain Components thereof from Japan (prelim. admin review) 46 Fed. Reg. 14,371 (1981).

[36] Tapered Roller Bearings and Certain Components thereof from Japan (final admin. review) 47 Fed. Reg. 25,757 (1982).

[37] Plaintiff first raised the issue in a brief supplementing its motions for summary judgment. 630 F. Supp. at 1331, 1333.

[38] 590 F. Supp. 1246 (Ct. Int'l Trade 1984), *rev'd*, 776 F.2d 1029 (Fed. Cir. 1985).

[39] 776 F.2d at 1033–34.

[40] 630 F. Supp. at 1335.

The court granted plaintiff's motion citing *Hormel v. Helvering*[41] for the proposition that one exception to the rule is those cases "in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result."[42] In explaining its decision in *Freeport Minerals*, the appeals court also noted that certain policies underlying the exhaustion doctrine were not present in this case: (1) the issue was one of law, not fact, and therefore the court did not usurp the agency's factfinding function by ruling on the issue; and (2) since the issue was one of law and the court decision on which plaintiff now relied occurred after the administrative proceedings, plaintiff could not be said to have intentionally refrained from raising the issue below.[43]

*Timken* seems to be a more difficult decision than the other exhaustion cases and yet one that is clearly in line with the Supreme Court's holding in *Hormel*. It is a closer call, however, because both before and after the intervening determination in *Freeport Minerals*, plaintiff had been free to raise the same issue that the plaintiff in *Freeport Minerals* had raised. In *Timken* plaintiff simply had not raised the issue. Nonetheless, it is clear that the spirit that motivated the Court in the *Hormel* decision was alive in this case:

> Rules of practice and procedure are devised to promote the ends of Justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.[44]

In *Timken*, as in *Hormel*, an intervening judicial interpretation, if applied, would have been legally determinative. The fact that the precedent did not exist at the time of the underlying agency determination should not, in and of itself, have prevented the results of that precedent from being applied. As a result, the court found the application of the doctrine of exhaustion to be inappropriate.[45] All things considered, it is not an unreasonable exception.[46]

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[41] 312 U.S. 552 (1941).

[42] 312 U.S. at 558–59.

[43] 630 F. Supp. at 1334.

[44] 312 U.S. at 557.

[45] Indeed, since at the time of the administrative proceeding both the agency position and the lower court's position was not to require up-to-date data, Plaintiff's failure to raise the issue until the appeals court reversed those prior determinations might also have been excused due to the perceived futility of doing so.

[46] A second and more bizarre exhaustion issue was raised concerning an issue raised for the first time on remand before the agency. The factual issue involved the question of what constituted similar merchandise in the fair value comparisons. Plaintiff did not raise the issue in the initial proceeding. Plaintiff did not raise the issue on appeal when it consented to a remand to the Department for certain limited purposes. It then raised this new issue at the remand stage and appealed the Department's

The rule of reason that appears to emerge from these cases is a good one: Did the parties have a reasonable and realistic opportunity to raise an issue and, if so, did they raise it in a timely fashion? It is one thing for the parties to be on notice of an issue throughout the administrative proceedings (especially a factual issue), fail to raise it, and then ask the court to examine the issue. This was precisely the situation faced by the courts in *Kokusai*. It is quite another thing for the Department to raise and decide an issue literally days before its final determination without input from any of the parties in the case, or for relevant case law to change radically after the administrative proceeding being appealed. The court has recognized this distinction, and has not been sympathetic to the government's argument that the parties did not exhaust their administrative remedies. Insofar as changes in case law or interpretation are concerned, the court has correctly recognized that these circumstances were beyond the control of the parties to the administrative action, and therefore should be an exception to the exhaustion requirement. For those instances, however, when the parties fail to address a certain issue during the proceedings because of the Department's failure to apprise the parties that the issue exists, a simple administrative solution exists. The solution is not that the court strictly apply an exhaustion requirement, but rather that the Department devise new rules so that all parties to the proceeding can have meaningful input. This would avoid last minute determinations in which neither party has an opportunity for comment. Until this occurs, however, the court's rule of reason remains the only adequate solution.

### B. *The Standing Requirement As It Relates to the Exhaustion Requirement*

There appears to be a strong tendency at the Department of Commerce to confuse the requirement of standing with the requirement to exhaust administrative remedies. Standing has to do with who—or what party—has a sufficient interest to be permitted to contest the determination. It is a jurisdictional requirement quite apart from any exhaustion requirement.[47]

Nonetheless, the Department has proposed changing its definition of "party to the proceeding" as contained in its regulations in a manner which would limit the parties who can contest issues to only those parties who raised those

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failure to address the issue. The precedential value of this portion of the case appears to be nil, however, because of the peculiar facts of that case as well as the fact that the Department itself joined in the request for a second remand and agree that the doctrine of exhaustion should not apply.

[47] 28 U.S.C.A. § 2631(c) (West Supp. 1982). "A civil action contesting a determination listed in section 516A of the Tariff Act of 1930 may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter arose." *Id.*

very issues below.[48] Such change would not further the purposes of either standing or exhaustion. To meet the standing requirement a party must be an interested party who was a party to the proceeding. Under the current regulations, this means that the party must have filed the requisite notice of intent with the Secretary of Commerce or demonstrated good cause to the Secretary for intervention.[49] If such a party later wants to contest some aspect of the determination, it should not have the additional burden of being the same party—or even one of the same parties—who raised or commented on that particular issue before the agency. It should be sufficient that some party raised the issue so that the agency could deal with it. Neither the standing requirement nor the exhaustion doctrine require, nor are their purposes served by a requirement, that the *same* party must raise an issue at both the administrative and judicial levels. A party who is a "party to the proceeding" may decline to raise a certain issue at the agency level, and then later be the party to raise it judicially for any number of reasons. Such circumstances should have no bearing on whether the party has standing and/or whether remedies have been exhausted.[50]

Last year's decision by the Court of International Trade in *Kokusai Electric Co. v. United States*[51] involved the questions of whether the party moving to participate as an intervenor was an "interested party" and whether it had been a "party to the proceedings." One argument advanced by the Department was that at the time the proposed intervenor notified the Department of its intent to become an interested party, it was not the "importer of record" and, therefore, did not qualify as an interested party.[52] In this case, the court was able to avoid ruling on the government's position that an "importer," for purposes of being an interested party, meant only the "importer of record" since it found the intervenor to have been the importer of record during at least part of the

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[48] Note the Department of Commerce's proposed amendments to its regulations on countervailing duty determinations wherein the Department proposes to define "Party to the Proceeding" as "any interested party, within the meaning of paragraph (i), which has actively participated, through written submissions of factual information or written argument, *in a particular decision* by the Secretary subject to judicial review." 50 Fed. Reg. 24,207 (1985) (emphasis added). Similar language is provided for in the proposed amendments to the antidumping regulations as well. 51 Fed. Reg. 29,046 (1986).

[49] 19 C.F.R. §§ 353.12(i), 355.9(i).

[50] Another example of the confusion that exists concerning these concepts is the case of Miller and Co. v. United States, 598 F. Supp. 1126 (Ct. Int'l Trade 1984), *rev'd on other grounds*, 824 F.2d 961 (CAFC 1987). In that case, an importer was attempting to challenge the liquidation of plaintiff's entries of pig iron from Brazil in accordance with a § 751 final administrative review of a countervailing duty order by the Department. The importer had not been a party to the administrative proceeding and so challenged the *ultra vires* actions of the Department under the residual jurisdiction of § 1581(i). While the language of the determination talks in terms of the doctrine of exhaustion of remedies, the case really appears to involve the issue of standing, *i.e.*, whether or not plaintiff had been a "party to the proceeding."

[51] 613 F. Supp. 1249.

[52] *Id.* at 1251.

proceedings.[53] For future cases which must decide the issue of what an "importer" means, it should be recognized that the importer of record is often a customs broker who is merely acting as an agent. It does not make sense to limit the meaning of importer in a way which excludes the true "interested party" and allows only an agent to have standing. The court should recognize this and be prepared to look behind the transaction to determine the real, "beneficial" importer, as the proposed intervenor in *Kokusai* argued it should do.[54] Such an interpretation would be consistent with the Court of International Trade's decision in *Special Commodity Group v. United States*, where the court liberally construed the meaning of a "majority" in order to interpret the standing provisions in the context of the legislative history.[55]

Finally, with regard to both standing and exhaustion, it is noted that one of the major purposes behind the Trade Agreements Act of 1979 was to broaden the availability of judicial review, not to curtail it.[56] The goal of administrative and judicial efficiency—which was promoted by establishing criteria for who may contest decisions and by requiring the exhaustion of remedies where appropriate—is certainly an important one. But clearly it was not the *only*, nor the most important, goal of the Trade Agreements Act of 1979. Correct and fair application of the trade laws, with judicial review to help assure such application, was the primary goal of the judicial review amendments of the TAA. An overly restrictive view of who may contest ITA determinations, and which issues the party may contest, will not further and indeed will frustrate this goal.

## III. FINALITY OF DECISIONS

Over the last couple of years a number of questions concerning the finality of decisions and related issues regarding remands, interlocutory appeals, and stays pending appeal have plagued both the courts and the parties. While it is impossible to point to nice, neat guidelines to be derived from the cases, the decisions do provide some general directions in which to proceed.

### A. *Appeals of Remands and Stays Pending Appeals*

One issue that arises frequently when a decision by the Court of International Trade is appealed is whether the ITA should have to implement that decision

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[53] *Id.* at 1252.

[54] *Id.* at 1251.

[55] 620 F. Supp. 719, 721–22.

[56] H.R. Rep. No. 317, 96th Cong., 1st Sess. 4 ("Title X will provide increased opportunities for appeal of certain interlocutory and all final rulings in antidumping and countervailing duty cases") and 179–83 (1979).

by remand or otherwise while the appeal is pending. A corollary to this is whether the ITA should have to conduct an investigation in an instance where a negative ITC preliminary decision was overturned by the CIT and that decision is on appeal.

The judicial review provisions of § 1516a specify the manner in which court decisions will be applied in only one specific area, that of liquidation.[57] The liquidation of entries is governed by § 1516a(c)(1), (2), and (e) which provide that unless liquidation is enjoined it is to proceed in accordance with the decision by the Department of Commerce or the ITC.[58] Only entries whose liquidations were enjoined and entries which were actually made after the date of a final court decision are to be liquidated in accordance with the final court decision.[59] These provisions were reviewed and discussed by the Court of Appeals for the Federal Circuit (CAFC) in its decision in *Melamine Chemicals, Inc. v. United States*.[60] The court held that entries made after the lower court's decision reversing the agency's negative determination were not to be treated in accordance with that lower court decision when an injunction had not been obtained. Rather, the liquidation of the entries was to proceed in accordance with the agency's determination until the final decision was rendered by the appeals court.[61]

The application of a lower court's decision, when that decision is on appeal, in areas other than litigation is not so clearly laid out and must be derived largely from the case law itself. Similarly, the procedures for appealing are not always clear.

For instance, with regard to the timing of an appeal of a lower court decision, the Court of Appeals for the Federal Circuit in *Cabot Corp. v. United States*[62] found that a decision by the lower court remanding a case back to the Department of Commerce is not a final decision for which an appeal can be heard. Accordingly, since the lower court had not certified the issue for appeal, the remand had to be performed. The problem with this approach is that the availability of timely appellate review is now entirely in the discretion of the CIT judge, who will decide whether or not to certify the issue for appeal. It was argued in *Cabot* that the CAFC should adopt the practical approach to finality developed by the Supreme Court in *Gillespie v. United States Steel Corp.*,[63] and followed by the CAFC (and its predecessor court, the Court of Customs

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[57] "Liquidation" is defined in the Customs Regulations as being the final computation or ascertainment of the duties accruing on an entry. 19 C.F.R. § 159.1.

[58] 19 U.S.C.A. § 1516a(c)(1) and (2) (West Supp. 1980).

[59] 19 U.S.C.A. § 1516a(e) (West Supp. 1980).

[60] 732 F.2d 924 (Fed. Cir. 1984), *rev'ing and vacating* 561 F. Supp 458 (Ct. Int'l Trade 1983).

[61] *Id.* at 934.

[62] 788 F.2d 1539 (Fed. Cir. 1986).

[63] 379 U.S. 148 (1964).

and Patent Appeals) in several cases, including *Maier v. Orr.*[64] This approach would have alleviated some of the problems posed by having to rely on discretionary certification. The CAFC, in rejecting this approach, distinguished *Maier* and limited the rationale in *Gillespie* to the unique facts in that case, thereby eliminating any possibility of an interlocutory appeal without certification by the CIT.

Given the decision in *Cabot*, the issue then becomes when the CIT should certify such decisions for appeal. It seems that a common sense approach to these issues should be adopted in order to minimize many of the difficulties faced by the parties in a remand situation.

Limited interlocutory appeals are provided for in 28 U.S.C. § 1292(b), and require that the order from which an appeal is to be certified must involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. It has been said that § 1292(b) should not be used in "run of the mill" cases and is intended for "exceptional cases" where appeal may avoid "protracted and expensive" litigation.[65] Whether the court would have certified *Cabot* for interlocutory appeal is not known, but certainly the argument can be made that a determination on what "generally available" means in a countervailing duty case is a controlling question of law, the resolution of which would materially advance the case so as to avoid protracted and expensive litigation.

Although requests for certification have not occurred very often, the Court of International Trade was requested to and did certify one of the numerous cases[66] which arose and were pending all at about the same time involving an important issue of the manner in which the ITC made its preliminary determinations. In those cases there was clearly a "controlling question of law" and the immediate appeal could "materially advance the ultimate termination of the litigation." Difficulties arose, however, in some of the other cases involving this same issue where the court refused to certify the case for appeal.

The case of *Jeannette Sheet Glass Corp. v. United States*[67] demonstrates the hardship caused when such cases are not certified for appeal. In *Jeannette Sheet Glass* the ITC had made a negative preliminary determination, thereby termi-

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[64] 754 F.2d 973 (Fed. Cir. 1985). This approach would generally find a remand order to be final and appealable when the results of the remand are a foregone conclusion.

[65] C. WRIGHT, LAW OF FEDERAL COURTS § 102 at 518 (3d ed. 1976).

[66] American Lamb Co. v. U.S., 611 F. Supp. 979 (Ct. Int'l Trade 1985) was certified for appeal. Those cases which were not certified include Jeannette Sheet Glass Corp. v. United States, 607 F. Supp 123 (Ct. Int'l Trade 1985) and American Grape Growers Alliance for Fair Trade v. United States, No. 85-104, slip op. (Ct. Int'l Trade Oct. 7, 1985).

[67] Appeal No. 85-2554 (Fed. Cir. June 2, 1986).

nating the proceeding prior to the Department of Commerce's fair value investigation. The Court of International Trade held that the manner in which the determination was made was not proper under the statute and remanded the case back to the ITC for a new determination.[68] Based upon the court's instructions as to the proper standard to apply, the ITC was forced to issue an affirmative decision. Although the appeals court had reversed the lower court on the basis of its decision in *American Lamb Co. v. United States*[69] with regard to the same issue of the appropriate standard for ITC preliminary decisions, it could not do so in *Jeannette Sheet Glass* since the case had not been certified. The Department of Commerce was then faced with the possibility of conducting an investigation in a case where it was clear that the ITC had used the wrong standard in issuing its preliminary affirmative determination. If the case had been forced to completion, the issue of the correctness of the preliminary determination (an issue which had already been decided the other way by the CAFC) would never have been raised at the CAFC because at that point in time, only the final decision would be contestable. Luckily for the respondent-defendants, the CIT eventually granted their motion to reconsider, which had been pending for more than two years, and affirmed the ITC in light of *American Lamb*.[70]

In other types of cases, such as when a remand is ordered, the question of whether or not certification is warranted is less clear. However, the criterion is the same. The effect of conducting the remand, on the litigation as well as on the parties, should be closely examined along with the issue of law involved.

An additional problem related to finality is the issue of stays pending appeal. In most instances, a stay pending appeal will also be requested by the party filing the appeal. However, it is clear that not every case in which a remand decision is appealed should be stayed. As the court correctly noted in *Badger-Powhatan, Inc. v. United States*[71] a stay will be issued only where the interests of justice are served. The factors to be considered in making this determination include 1) whether petitioner is likely to prevail on the merits of his appeal; 2) whether, without a stay, the petitioner will suffer irreparable harm; 3) whether the issuance of a stay will substantially harm other parties interested in the proceeding; and 4) where the public interest lies.[72] The *Badger-Powhatan* court correctly found that the imposition of increased duty deposits, which if ulti-

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[68] 607 F. Supp 123 (Ct. Int'l Trade 1985).
[69] 785 F.2d 994 (Fed. Cir. 1986).
[70] Jeannette Sheet Glass Corp. v. United States, No. 87-4, slip op. (Ct. Int'l Trade Jan. 9, 1987).
[71] 638 F. Supp. 344, (Ct. Int'l Trade 1986).
[72] *Id.* at 349.

mately decided to be incorrect would be refunded with interest, did not warrant the issuing of a stay.[73]

The denial of a stay pending an appeal in *American Grape Growers Alliance for Fair Trade v. United States*[74] is more difficult to accept. In examining the four factors, the Court of International Trade was probably correct in putting little weight on the first criterion as the case was one of first impression before the court. After all, as the court noted, if the judge believed petitioner was likely to succeed on appeal it is unlikely the judge would have ruled as he did in the first place.[75] Normally, the issue is more adequately addressed in terms of how the public interest will best be served and which party will suffer the greater injury.

The irony in cases such as *American Grape Growers* is that a primary question is whether the petitioner will be irreparably harmed without a stay. In this type of case, the injury incurred by the plaintiff-petitioner is that he does not receive relief for the injury he claims that he is suffering while awaiting the appeal. He is, however, appealing a decision in which the ITC found he had not shown a reasonable indication of injury. While it is true that the Court of International Trade overturned that determination by the Commission, it was not because the court found the Commission's factual determination was incorrect, but because the court believed the Commission had applied too high a standard and had looked beyond the four corners of the petition.[76]

Under such circumstances, where, as the court pointed out, the investigations are complicated and time-consuming, how is the public interest best served?[77] It is difficult to see how the public interest is served by continuing such investigations at the administrative level when there is any sort of realistic chance for reversal of the lower court's decision. There is a very real economic cost, resulting from the conduct of these investigations, which society bears no matter what the outcome of the case. No one really gains from the investigation itself (except in the sense that such investigations harass respondents, thereby benefitting petitioners). Therefore, it seems clear that the public does not benefit from pursuit of a complicated and time-consuming investigation when it can be determined very early on that the investigation is not warranted. The avoid-

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[73] *Id.* at 349–50. It is noted that the stay requested in *Badger-Powhatan* was pending the appeal from a remand decision, not an order for a remand. However, the analysis as to whether a stay should be granted or not is the same for either.

[74] No. 85-104, slip op. (Ct. Int'l Trade Oct. 7, 1985).

[75] This is not always the case, however, as where a judge feels bound to follow his brethren on the same court in a particular issue, but may actually believe the decision likely to be reversed on appeal.

[76] No. 85-104, slip. op. at 2–3. The court held that "the investigation had been terminated unlawfully due to the application of the excessively stringent standard for determining whether there was a reasonable indication of injury at the preliminary stage."

[77] *Id.* at p. 8.

ance of such an unwarranted procedure was one reason for the origination of the thirty-day preliminary injury investigation in the 1974 Trade Act.[78]

As alluded to above, it might be that the domestic party benefits from the continuation of an investigation if it is not stayed pending appeal. Such benefit must be weighed against the injury caused to both the respondents and the agency itself. The costs accruing to these parties for conducting an investigation that may ultimately prove to have been totally unnecessary, are tangible, measurable, and extremely high. The cost or injury to the party who has filed the case, whether or not the case is meritorious, is by its very nature much more nebulous and speculative. Indeed in these particular types of cases the Commission has already found that there is no reasonable indication of injury. In view of the fact that such appeals are usually decided within a relatively short time, it is impossible to see how, in any but the most extreme cases, the weighing of injury to each of the concerned parties will favor the denial of a stay.[79]

### B. *Standing to Appeal or Intervene in a Remand*

Another important issue relating to the requirement of standing that the court has faced on a number of occasions is whether parties should be able to sue the Department over a remand when they did not sue on the original determination. Related to this is the issue of whether a party should be allowed to intervene concerning the results of a remand.[80] An analysis of the CIT's decisions in this area indicates that they are viewing these issues similarly to the way the court decides issues involving the exhaustion requirement. The court looks closely at whether or not the party had the opportunity and the reason to sue on or intervene in the original decision. Where the original decision did not provide a reason upon which a party normally would sue, i.e. the decision was favorable to the party even though the party may have disagreed with certain findings of the decision, the party will not be found to have waived its rights when, upon remand, the agency changes the decision and it then becomes unfavorable to the party for the first time. For example, in *Freeport Minerals Co. v. United States*,[81] the Court of Appeals for the Federal Circuit held that the lower court had erred in finding that Freeport's action was untimely where the action was filed within thirty days after a determination on remand rather than

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[78] *See* Trade Reform Act of 1974, Report of the Committee on Finance, S. Rep. No. 1298, 93d Cong., 2d Sess. 32 and 171 (1974).

[79] On the other hand, the scale seems more clearly tipped to denying a stay as the CIT did in Philipp Brothers, Inc. v. United States, 640 F. Supp. 261 (Ct. Int'l Trade 1986) where *the only* harm any party could point to in performing the remand was that of administrative inconvenience to the agency.

[80] Intervention is permitted by rule of the Rules of the Court of International Trade and 28 U.S.C.A. § 2631(j) (West Supp. 1982).

[81] 758 F.2d 629 (Fed. Cir. 1985), *reversing* 583 F. Supp. 586 (Ct. Int'l Trade 1984).

thirty days after the original determination. The original determination had found no less-than-fair-market-value sales by the respondent in the case, but had determined not to revoke the outstanding order. Freeport, the petitioner, was satisfied that the order was not to be revoked, and argued that

> it would have made no sense and would have wasted judicial and legal resources for it to have sought review upon publication of the 1982 notice postponing revocation for the purpose of challenging the finding that Chevron had not been selling elemental sulphur at less than fair value, because the end result of review at that time was *favorable* to Freeport. As a domestic producer, Freeport's concern was and remains *continuation* of the antidumping order against Chevron and the Canadian companies. It wasn't until ITC's 1983 notice revoking the order regarding those companies that Freeport believed it was aggrieved.[82]

The appeals court stated that its statutory analysis led it to believe the ITA notice to revoke the order which was published pursuant to a remand determination was a reviewable decision under § 1516a(a)(2)(B)(iii) so that an appeal filed within thirty days of that notice was timely.[83] It is clear from the case that where a particular party to a proceeding is not harmed by the initial administrative decision, that party cannot be held to have waived its right to appeal an adverse administrative decision when, upon remand, the agency issues a decision which for the first time is adverse that party.[84]

It is interesting to compare this decision to a case with a somewhat similar factual pattern, though not involving a remand, that of *Canadian Meat Council v. United States*.[85] The plaintiff in *Canadian Meat Council* filed an action to contest certain aspects of the ITA's affirmative determination of sales at less than fair value.[86] The defendant and the defendant-intervenors moved to dismiss the action based on the fact that no order had been issued in the case, since the ITC had found no injury with regard to the plaintiff's products.[87] However, the court refused to dismiss the action in view of the fact that the "no injury" determination was being challenged by the defendant-intervenors in a separate

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[82] 758 F.2d at 633.

[83] *Id.* at 634.

[84] In Al Tech Specialty Steel Corp. v. United States, 633 F. Supp. 1376 (Ct. Int'l Trade 1986) a party to the proceeding attempted to intervene after a remand determination on issues which were newly raised by the remand. The court denied such intervention on the basis that the party was really raising new claims which were not already a part of that action and therefore required the filing of a new action. The court again noted that the remand determination was a determination on which an action could be filed under 19 U.S.C.A. § 1516a(a)(2)(B)(iii)(West Supp. 1986).

[85] 644 F. Supp. 1125 (Ct. Int'l Trade 1986).

[86] Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 Fed. Reg. 31,931 (Dep't Comm. 1985)(final admin. review).

[87] 644 F. Supp. at 1126.

action. A reversal of the ITC injury determination would leave the plaintiff with an adverse ITA determination, which would then have an effect on the plaintiff, but no way to challenge that determination: by the time the ITC determination was reversed, a challenge to the ITA determination would no longer be timely. Hence, notwithstanding the fact that the "bottom-line" determination in the case had been favorable to the Canadian Meat Council, it was permitted to challenge the adverse aspects of the proceeding.

## IV. CONCLUSION

The Trade Agreements Act of 1979 continued the trend started in the Trade Act of 1974 toward allowing broader access to the court, while simultaneously limiting access to parties with a demonstrable economic interest who participated in the agency proceedings. Generally speaking, as clearly evidenced by the court's determinations in the exhaustion area, the court has applied a rule of reason consistent with the intent of Congress and with common sense. Many of the exceptions to the general rule of exhaustion are unavoidable—for instance, where there are intervening judicial decisions during the pendency of the appeal. On the other hand, dealing with the exhaustion issue arising when opportunity for comment is not extended by the Department is a problem that should be resolved by a change in Department procedures. Until that occurs, the court's approach to that exhaustion issue is proper.

Similarly, the court appears for the most part to approach issues of appeal and remand with the same common sense. There may still be room for further analysis in the area of "balancing the hardships." However, issues concerning when one should appeal or intervene have been judiciously treated by ensuring that the party has a proper day in court—or at least has such an option—while not allowing parties to sit on their rights and then still expect to be heard.