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Impact of the Court of International Trade on the Department of Commerce's Administration of the Antidumping and Countervailing Duty Laws

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I. Introduction

Since January 1980 the International Trade Administration (ITA) of the Department of Commerce has been responsible for administering two of the country's most important unfair trade laws, the antidumping and countervailing duty provisions. With this responsibility, the Department received a statutorily mandated set of procedures, governing investigations and administrative reviews, that did not exist during the extensive prior history of these laws. These procedures were intended to ensure that parties were guaranteed access to the facts and were given an opportunity to comment before the final determination was made.

To complement these new, more open and participatory administrative procedures, Congress also changed the standard of review by the Court of International Trade (CIT). *De novo* review of antidumping and countervailing duty determinations was eliminated. The CIT now reviews Commerce determinations based on the administrative record created during the proceeding and

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will overturn an agency determination if it is not supported by substantial evidence on the record or is not otherwise in accordance with law.

Although the more open and participatory administrative procedures and the new judicial review standard have been in effect since 1980, only in the last two years has court opinion brought into focus issues involving the relationship between the agency and the courts, and the separate powers of each. The issues discussed in this paper concern the relationship of the Court of International Trade and the Court of Appeals for the Federal Circuit (CAFC) to Department of Commerce ("Department," "Commerce," or "agency") proceedings.

We begin with recent court decisions regarding when a party must exhaust its administrative remedies, and what standing requirements a party must meet in order to maintain an action. We then explore the various aspects of when a CIT decision is "final," including at what point an adverse decision by the CIT requires that the agency change its administrative actions so that they are consistent with the court decision and not with the agency's original determination. We turn next to the related issue of the court's recent opinions on the requirement that the agency perform a remand ordered by the CIT before it can appeal that decision. Finally, we look at what a Department decision on remand means and how and when it can be appealed. The last section of the paper gives our view of what changes by the Congress, the courts, or the agency are needed.

These issues have been the subject of intense, controversial litigation in recent months. We are aware that some international trade practitioners hold the view that certain positions taken by the government on these issues may be inspired in part by a desire to avoid the natural consequences of having an agency finding overturned by the courts. This view is incorrect.

As the author of the antidumping and countervailing duty judicial review provisions, the Department has the greatest respect for the statutory scheme of judicial review by the CIT and the CAFC of Commerce's interpretation of these complex laws and their application to specific factual situations. Not only does the Department strongly support giving parties their "day in court," it welcomes judicial review as the best guarantee that the administrative process will be objective, open, and characterized by well-reasoned decisions.

The Department's motivation in approaching the exhaustion, standing, and finality issues is to see that all parties, including the Department, have the benefit of the carefully structured judicial review provisions of the statute. Among other things, this means ensuring that the agency has the chance to correct its own errors by exploration of the issues during the administrative proceeding. It also means that parties must have a meaningful opportunity to appeal CIT decisions. We hope this article will make clear the Department's position on these important issues.

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

There are two limitations on a plaintiff's (or intervenor's) ability to sue or raise claims against the Department of Commerce in the Court of International Trade over Department determinations in antidumping and countervailing duty proceedings: that a plaintiff first exhaust its administrative remedies, and that a plaintiff must have been an interested party who was a party to the administrative proceeding. The doctrine of exhaustion is imposed on the court by a statute which also allows discretion in its application.[1] The standing requirement is also imposed by law, but it is not defined.

These requirements greatly affect both the Department of Commerce[2] and private parties, and are becoming increasingly important in light of the great number of appeals to the CIT in this area. The doctrine of exhaustion is of great importance to any administrative agency whose actions are reviewed by a court, and to the participants of the administrative proceedings. A clear interpretation of the doctrine results in greater understanding of what issues may properly be appealed, on the part of the agency and private parties, and prevents the wasteful expenditure of substantial resources on unnecessary and fruitless litigation. In addition, a clear understanding of the doctrine informs the parties to the administrative proceeding of what issues and remedies they must pursue at the administrative level. This prevents the unfortunate situation in which the parties find that their voices may not be heard at all if they have failed to raise an issue at the administrative level.

Interpretations of the particular standing requirement in judicial appeals of antidumping and countervailing duty proceedings are of equal importance to interpretations of the doctrine of exhaustion, and have a similar effect. Parties

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[1] 28 U.S.C. § 2637 (1980) provides:

§ 2637. Exhaustion of administrative remedies

(a) A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced, except that a surety's obligation to pay such liquidated duties, charges, or exactions is limited to the sum of any bond related to each entry included in the denied protest.

(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 may be commenced in the Court of International Trade only by a person who has first exhausted the procedures set forth in such section.

(c) A civil action described in section 1581(h) of this title [to review a ruling issued by the Secretary of the Treasury] may be commenced in the Court of International Trade prior to the exhaustion of administrative remedies if the person commencing the action makes the demonstration required by such section.

(d) In any civil action not specified in this section [such as an action under section 516A of the Tariff Act of 1930, contesting an antidumping or countervailing duty determination] the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.

[2] The antidumping and countervailing duty laws are administered by the Import Administration of the International Trade Administration, United States Department of Commerce.

also have a substantial interest in knowing who will be allowed to appeal such determinations, as well as being spared the obligation of maintaining their position with respect to claims brought by those who are not entitled to do so.

The Court of International Trade has recently had several opportunities to interpret these requirements. At first glance, it is very difficult to see a thread of common ideas in either the cases interpreting the doctrine of exhaustion or those interpreting the standing requirement. However, a closer look reveals similarities, and pinpoints the differences in approach by various judges of the court.

A. *Overview of the Doctrine of Exhaustion of Administrative Remedies*

The CIT is directed by statute to require the exhaustion of administrative remedies "where appropriate." The doctrine of exhaustion, however, is a creation of the judiciary which over the years has developed the rule and established certain exceptions in response to particular concerns involved in reviewing functions committed to an administrative body by statute. It is therefore important to take a step back and examine the purposes of the doctrine and its general application by the courts, viewing the CIT's exercise of discretion against a background of longstanding precedents.

Courts have widely accepted the doctrine of exhaustion of administrative remedies as a limitation on their authority to review appeals of agency determinations. Nearly fifty years ago the Supreme Court acknowledged "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[3] The Supreme Court subsequently declared that

> [s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.[4]

The Court summarized the main purpose behind the doctrine as follows: "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies."[5] The Supreme Court has found the "necessity for prior administrative

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[3] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938).

[4] United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952).

[5] Parisi v. Davidson, 405 U.S. 34, 37 (1972) (citing McKart v. United States, 395 U.S. 185, 194–95 (1969)); McGee v. United States, 402 U.S. 479, 485 (1971); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.01 *et seq.* (Supp. 1970). *Accord* Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Bowen v. City of

consideration of an issue" particularly compelling when a "decision calls for the application of technical knowledge and experience not usually possessed by judges."[6]

McKart v. United States[7] contains the Supreme Court's most complete exposition of the reasons for requiring the exhaustion of administrative remedies. In that case the Court focused upon several principles of administrative law and responsible jurisprudence which the doctrine is intended to preserve:

> A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals.
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> Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its actions, or else has clearly exceeded its jurisdiction. As Professor Jaffe puts it, '[t]he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy.' This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise.
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> . . . In addition, other justifications for requiring exhaustion in cases of this sort have nothing to do with the dangers of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may

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New York, 106 S. Ct. 2022, 2032 (1986). *See also* Unemployment Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action").

[6] Federal Power Comm'n v. Colorado Interstate Gas Co., 348 U.S. 492, 501 (1955).

[7] 395 U.S. 185 (1969).

> never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.[8]

Thus, the main concerns that the doctrine of exhaustion addresses may be summarized as respect for the autonomy of the administrative body, and greater efficiency in both administrative and judicial matters. The administrative body is granted the authority by statute to administer the law in the first instance, often with some discretion. This is on the assumption that it is usually more capable of collecting the facts, and has special expertise. This respect helps ensure that the agency's activities are not interrupted by premature or frivolous lawsuits, and that the courts are not requested to provide the same relief the agency itself might have provided, had it been given the opportunity.

The exhaustion rule is not, however, applied woodenly. "[U]nless exhaustion of administrative remedies is mandated by statute, application of the exhaustion doctrine is within the discretion of the court."[9] The courts have widely acknowledged that certain considerations may outweigh the policies behind the doctrine, carving out exceptions to the rule in those cases. This is consistent with the Court's recognition that the doctrine of exhaustion "must be applied in each case with an understanding of its purposes and of the particular administrative scheme involved."[10] It is also generally recognized that exhaustion should not be required "where the obvious result would be a plain miscarriage of justice."[11] But for the most part, the courts have attempted to maintain a balance, preserving the validity of the doctrine while weighing the considerations present in particular cases. The generally recognized exceptions have been well reasoned and narrowly drawn.[12]

Exceptions have been made, for example, (1) where a significant question of law was not considered or ruled upon by the administrative agency, and because of an intervening court decision, strict adherence to the rule might have resulted in injustice to the plaintiff;[13] (2) "when an attempt to gain the desired relief

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[8] *Id.* at 193–95 (quoting L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 425 (1965)).

[9] Timken Co. v. United States, 630 F. Supp. 1327, 1334 (Ct. Int'l Trade 1986) (citing SEC v. G.C. George Securities, Inc., 637 F.2d 685, 688 n.3 (9th Cir. 1981)).

[10] *Parisi*, 405 U.S. at 37 (quoting *McKart*, 395 U.S. at 193). *Accord Weinberger*, 422 U.S. at 765.

[11] Hormel v. Helvering, 312 U.S. 552, 558 (1941).

[12] The author of one treatise has taken a very different view. Mr. Davis has commented that "[t]he answer to the question whether administrative remedies must be exhausted before a court may review administrative action has always been yes and no, with no clear guides to when it is yes and when it is no." K. DAVIS, ADMINISTRATIVE LAW TREATISE 279 (Supp. 1982). Mr. Davis attributes this perceived lack of consistency to "the judicial inclination to decide exhaustion questions on the basis of the equities of the whole case, including the merits as well as the aspects related to exhaustion." *Id.* at 280.

[13] *Hormel*, 312 U.S. at 552.

from the agency in question would obviously be a futile act";[14] (3) in cases where the agency is alleged to have patently exceeded its statutory authority;[15] (4) where the agency was pursuing "a system-wide, unrevealed policy that was inconsistent in critically important ways with established regulations" and the policy did not "depend on the particular facts of the case before it";[16] (5) in suits brought by plaintiffs challenging the constitutionality of state welfare practices, under the Civil Rights Act.[17]

B. *The CIT's Interpretation of the Doctrine of Exhaustion*

The Customs Courts Act of 1980,[18] which created the CIT, vested the court with exclusive jurisdiction of civil actions appealing the Department's decisions in antidumping and countervailing duty proceedings.[19] It also added to U.S. law an entire section which directs the court to require the exhaustion of administrative remedies in the cases before it.[20] Under subsection (d), the court is directed to require the exhaustion of administrative remedies "where appropriate" in appeals of antidumping and countervailing duty determinations. Hence, the statute clearly grants the court the authority to exercise discretion in the application of the doctrine of exhaustion.

On the other hand, the court is strictly limited to judicial review on the administrative record by § 516A of the Tariff Act of 1930.[21] With the addition of that section in the Trade Agreements Act of 1979,[22] Congress eliminated *de novo* review of antidumping and countervailing duty determinations. It provided that the standard of review shall be whether the administrative determination is supported by substantial evidence on the record or is otherwise in accordance with law. Furthermore, the legislative history demonstrates that Congress intended § 516A to serve some of the same goals as the doctrine of exhaustion, that is, greater efficiency and increased emphasis on the decisionmaking ability

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[14] United Black Fund, Inc. v. Hampton, 352 F. Supp. 898, 902 (D.D.C. 1972).

[15] Skinner and Eddy Corp. v. United States, 249 U.S. 557, 562 (1919); Leedom v. Kyne, 358 U.S. 184, 188 (1958); Hines v. United States, 263 U.S. 143, 147 (1923).

[16] *Bowen*, 106 S. Ct. at 2032.

[17] King v. Smith, 392 U.S. 309, 312 n.4 (1968). It is also notable that the Supreme Court refused to allow an exception in a class action brought on behalf of persons who had not exhausted their administrative remedies, essentially precluding that avenue of relief. Weinberger v. Salfi, 422 U.S. 749 (1975).

[18] Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified as amended in scattered sections of Title 28 of the United States Code).

[19] 28 U.S.C. § 1581(c) (1984).

[20] *See supra* note 1 and accompanying text.

[21] 19 U.S.C. § 1516a (1982).

[22] Pub. L. No. 96-39, 93 Stat. 144 (codified as amended at scattered sections of titles 19 and 26 of the United States Code).

of the administrative body.[23] Congress explicitly stated that traditional administrative law principles, of which the doctrine of exhaustion is clearly one, were embodied in the provision.[24]

The CIT's recent decisions indicate that although the court believes that exhaustion of administrative remedies is required as a general rule, it freely allows exceptions in circumstances which are similar to those in which exceptions have been granted by other courts. However, the court has not always fully analyzed the impact of, or justification for, allowing an exception in that particular case. The analysis of the requirement of exhaustion in light of the particular circumstances of a case, as we have already seen, is at the very heart of the doctrine. The extent to which it has allowed exceptions in some instances implies that the burden is usually upon the government to show that it would be "appropriate" to require exhaustion in a given case. On the other hand, the CIT expends significant effort in discussing the importance of the doctrine. The court's decision in *Kokusai Electric Co. Ltd. v. United States,*[25] demonstrates that it will enforce the requirement in at least some circumstances.

In *Kokusai* the court held that plaintiff had failed to exhaust its administrative remedies. The court, however, declined to decide whether the Department had improperly included subassemblies in the scope of its antidumping duty investigation of cell site transceivers from Japan because the plaintiff had not raised the issue before the Department until after its final determination. The court's ruling that exhaustion was required was based upon what the court considered clear evidence in the administrative record that the plaintiff was aware of the Department's actions but completely failed to raise the issue in a timely fashion.

The court's opinion contains a discussion of the doctrine of exhaustion which recognizes that "[g]enerally, a reviewing court would usurp the function of the agency if it were to set aside an administrative determination upon a ground not previously presented, thereby depriving the agency of a chance to consider the matter."[26] It then qualified that statement by referring to an administrative

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[23] Section 516A would remove all doubt on whether *de novo* review is appropriate by excluding *de novo* review from consideration as a standard in antidumping and countervailing duty determinations. *De novo* review is both time-consuming and duplicative. The amendments made by Title I of the Trade Agreements Act provide all parties with greater rights of participation at the administrative level and increased access to information upon which the decisions of the administering authority and the International Trade Commission are based. These changes, along with the new requirement for a record of the proceeding, have eliminated any need for *de novo* review. S. Rep. No. 96-249, 96th Cong., 1st Sess. 251–52 (1979); reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 637.

[24] "Section 516A would make it clear that traditional administrative law principles are to be applied in reviewing antidumping and countervailing duty decisions where by law Congress has entrusted the decisionmaking authority in a specialized, complex economic situation to administrative agencies . . . ." S. Rep. No. 96-249 at 252; 1979 U.S. CODE CONG. & ADMIN. NEWS at 638.

[25] 632 F. Supp. 23 (Ct. Int'l Trade 1986).

[26] 632 F. Supp. at 28 (citing Unemployment Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143, 145 (1946).

law treatise which notes that courts have the power to exercise discretion by taking into account the particular circumstances and "the Court's idea as to what justice requires."[27]

In spite of its reliance upon the latter authority, which appears to support sweeping powers of discretion in applying the doctrine, the court in *Kokusai* stated firmly that only exceptional circumstances would justify departure from the requirement:

> [I]n the absence of *extraordinary circumstances* excusing the neglect to raise before Commerce the issue 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.[28]

The court then found the particular circumstances less than "exceptional." It stated that, by failing to raise the issue before Commerce during the investigation, the "plaintiff slept on its rights."[29] The court placed great weight on the fact that the plaintiff was apparently aware of the Department's inclusion of the contested product throughout the investigation:

> The . . . Court finds not only did plaintiff fail to offer an excuse for not raising the issue before Commerce, but further plaintiff participated in the Commerce investigation proceedings as though related subassemblies were within the scope of the investigation. Plaintiff cannot be heard to complain at this juncture in the proceedings that the issue, which it wished to have considered but never brought up before Commerce, did not receive full consideration.[30]

In contrast to its strict interpretation of the exhaustion rule in *Kokusai*, however, the court allowed plaintiffs to escape the requirement with relative ease in three other decisions.

In *Washington Red Raspberry Commission v. United States*[31] the CIT refused to give any consideration to the Department's claim that plaintiff had not properly exhausted its administrative remedies. *Washington Red Raspberry Commission* was a CIT decision on an appeal of the final antidumping determination with respect to red raspberries from Canada. The plaintiff, petitioner in the investigation below, raised numerous issues on appeal. One of its arguments concerned whether a relationship existed between Canadian raspberry growers and the cooperatives to which they belonged and which processed and sold their mer-

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[27] K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.7 at 444 (2d ed. 1983).
[28] 632 F. Supp. at 28 (emphasis added).
[29] *Id.* at 27.
[30] *Id.* at 28.
[31] No. 87-29, slip op. at 7 (Ct. Int'l Trade, March 17, 1987).

chandise. The plaintiff contended that there was no relationship and that therefore Commerce should not have disregarded the prices of transactions between these parties.

The court refused to consider seriously Commerce's argument that plaintiff had failed to exhaust its administrative remedies regarding this issue. It found that the plaintiff had no reason to raise this issue below. The court explained its decision in a brief footnote that evidences something close to contempt for the doctrine of exhaustion:

> During oral argument on plaintiffs' motion, counsel for the defendants admitted that the co-operatives do not "fit neatly" into any of the statutory definitions of related parties. Rather, counsel sought refuge on the procedural point that the petitioners had not raised this issue below. The plaintiffs rebutted this argument, persuasively, through their claim that there had been no reason to raise it below in view of past ITA precedent and the absence of factual justification to disregard the prices paid to the growers.[32]

Although this is not spelled out in the opinion, the court apparently reasoned that plaintiff's claim would have been futile if raised below, because of the apparent rigidity of Commerce's position on the disregard of transaction prices between related parties. That position, however, still left room for discretion regarding the definition of "related." Moreover, the court essentially ignored the fact that the plaintiff was fully aware of and had ample opportunities to comment on this decision, which was made in the early stages of the investigation, before the preliminary and final determinations.

A second decision, *Philipp Brothers, Inc. v. United States*,[33] involved the second administrative review of the countervailing duty order on pig iron from Brazil under § 751 of the Tariff Act of 1930.[34] During the investigation, the Department had estimated duties for the largest exporters on a company specific basis. In the second administrative review (as in the first such review), the Department assessed duties on a country-wide basis. The plaintiff failed to comment on this issue. Nevertheless, the plaintiff brought suit in the CIT to challenge the country-wide method of assessment in the second administrative review, claiming that there were material differences in the amount of benefits which had not been accounted for. Consequently, the Department raised as a defense the plaintiff's failure to exhaust its administrative remedies.

In *Philipp Brothers* the court placed great emphasis on the exhaustion requirement, citing several cases which established the requirement as a general rule.[35]

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[32] *Id.* at 7 n.6.
[33] 630 F. Supp. 1317 (Ct. Int'l Trade 1986).
[34] 19 U.S.C. § 1675 (1984).
[35] 630 F. Supp. at 1319–20.

It noted, however, that a "plaintiff's failure to exhaust its administrative remedies is not always fatal to its case,"[36] and proceeded to carve out an exception to the general rule.

The plaintiff's position was that it was excused from raising the issue before the Commerce Department because it was entitled to "rely on the expectation that Commerce would act in accordance with this court's decision in *Florsheim*."[37] *Ambassador Division of Florsheim Shoe Co. v. United States*[38] was decided the day after the preliminary results were issued in the contested review. The *Florsheim* decision involved an issue entirely different from the subject of the original complaint in *Philipp Brothers*. Its holding was that countervailing duties could not be assessed retroactively; it had nothing whatsoever to do with the issue of country-wide versus company specific margins. The plaintiff's contention (which it had also failed to present before the Department) was that under *Florsheim* the administrative review would have no effect, so that the plaintiff was not required to raise the issue of the country-wide margin during the review.

The court accepted the plaintiff's argument to a degree. It qualified its decision, noting that "[e]ven in such a situation, plaintiff might have the burden of presenting alternative arguments to ITA prior to raising those arguments to this court."[39] It found, however, that "further aggravating factors exist."[40] The plaintiff's access to the confidential record, which the court seemed to believe exclusively contained the facts upon which the argument would have been based, was preempted by Commerce's failure to give timely notice of the deadline for requesting confidential information. The deadline had been published in the *Federal Register*, but the court deemed the published notice inadequate.

The court held that the combination of these two factors "tipped the scale" in favor of hearing the plaintiff's new claim despite the failure to raise it before the Department:

> Separately, neither of these factors necessarily tips the scale against requiring exhaustion of administrative remedies, but the result is clear if they are weighed together. The court considers it 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.[41]

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[36] *Id.* at 1320.
[37] *Id.*
[38] 577 F. Supp. 1016 (Ct. Int'l Trade 1983), *rev'd*, 748 F.2d 1560 (Fed. Cir. 1984).
[39] 630 F. Supp. at 1321.
[40] *Id.*
[41] *Id.*

Thus, the court appears to have fashioned an exception to the exhaustion requirement unique to the facts of this case in an attempt to avoid what it perceived as a substantial injustice to the plaintiff. The decision may be criticized, however, for a number of reasons. First, the court overlooked the negligence of the plaintiff in failing to raise, during the administrative review, a fundamental issue—the method of calculating the countervailing duty margin. Second, the court deemed the publication of a deadline in the *Federal Register* inadequate in spite of the statutory provision prescribing such notice. Third, the court characterized as "clearly applicable precedent" a CIT decision the relevance of which had not been argued by plaintiff, and which the CIT itself might have subsequently chosen not to follow, if it had not been reversed by the Court of Appeals for the Federal Circuit.

A week after the *Philipp Brothers* decision, the Court issued its opinion in *Timken Co. v. United States*.[42] This decision is a model of thorough analysis of the application of the exhaustion doctrine by the CIT. The court not only demonstrated its usual respect for the doctrine in *Timken*, but also examined the propriety of requiring exhaustion by evaluating the purposes of the doctrine in light of the actual facts of the case and the relative harm to each of the parties, and based its decision upon that analysis.

In *Timken* the CIT interpreted 28 U.S.C. § 2637(d) as not posing a bar to the exercise of jurisdiction because it allows the court discretion: "The relevant statute provides only that the Court of International Trade shall 'where appropriate' require exhaustion of administrative remedies, and so does not create a jurisdictional bar to review of issues not raised below."[43] The court also ruled that where there has been a judicial interpretation of existing law after the administrative decision which "could have a substantial *impact*"[44] upon the agency's determination, plaintiff's claim will not be barred because of failure to exhaust administrative remedies.

The court held that exhaustion was not required with respect to both issues that plaintiff was attempting to raise for the first time before the court. The plaintiff's first claim related to the Department's reliance upon outdated data in its determination of whether to revoke an antidumping duty order. In *Freeport Minerals Co. v. United States*,[45] decided after the Department's determination in *Timken*, the Court of Appeals ruled that such reliance constituted an abuse of discretion.[46] The *Timken* court distinguished *Freeport Minerals*, emphasizing that the issue in *Timken* was legal rather than factual, so that the court could not be

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[42] 630 F. Supp. 1327 (Ct. Int'l Trade 1986).
[43] *Id.* at 1334 n.2.
[44] *Id.* at 1334.
[45] 776 F.2d 1029 (Fed. Cir. 1985).
[46] *But see* UST, Inc. v. United States, 831 F.2d 1028 (1987).

accused of usurping the agency's fact finding function. Additionally, the court took into account the fact that the plaintiff had not intentionally refrained from raising the issue in order to obtain some "special advantage." Since the decision in *Freeport Minerals* was issued after the Department's determination that was contested in *Timken*, it presumably took the plaintiff by surprise.

The second claim in *Timken* involved the Department's alleged failure to obtain complete data of another type, both during the contested review and the first remand proceeding.[47] The Department admitted that plaintiff was correct, and requested a remand to collect the additional information. But the defendant-intervenor contested the claim on the ground that the plaintiff had failed to raise the issue during the administrative review. The court decided that the circumstances warranted an exception to the exhaustion doctrine and agreed to decide the issue, supporting its decision with a litany of reasons.

The court began its analysis by pointing out that it possesses discretion in applying the doctrine of exhaustion.[48] The court found that, because the Department itself was requesting a remand to correct these "grave" errors, the desire for finality was outweighed by the public interest in reaching the right result. The position of the Department also obviated the concern that the court might be usurping the agency's function by failing to require exhaustion. The court also noted that the Department had violated a significant public policy by failing to provide the same quality of review in this review of a Department of Treasury determination as it provides in other reviews of proceedings handled from their inception. The court did acknowledge that defendant-intervenor would incur substantial costs and inconvenience in the event of a second remand and that plaintiff "could and should have raised its concerns . . . during the original proceeding before the ITA."[49] It noted that two considerations underlying the exhaustion doctrine were fairness to the litigants, and the discouragement of delay in raising claims. But the court found "on balance that the interests of justice require a remand."[50]

Two earlier decisions of the Court of International Trade also contain interpretations of the doctrine of exhaustion. The court's decision in *Miller and Co. v. United States*[51] actually has more bearing on the court's interpretation of the standing requirement, but it also includes a ruling with respect to the exhaustion

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[47] Timken Co. v. United States, 7 Ct. Int'l Trade 319 (1984).

[48] The court cited CAB v. Delta Air Lines Inc., 367 U.S. 316, 321 (1961), for the proposition that "[w]henever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other." 630 F. Supp. at 1340 (footnote omitted).

[49] 630 F. Supp. at 1341.

[50] *Id.*

[51] 598 F. Supp. 1126 (Ct. Int'l Trade 1984).

doctrine. In *Miller* the CIT recognized that an exception to the general rule was created "when a plaintiff alleges that an agency has exceeded its statutory powers."[52] While this is an accepted exception to the exhaustion rule, the court applied the exception to an allegation which did not even raise the possibility of an action so egregious as to exceed statutory authority.

Miller involved an importer which had not participated in the administrative review of the countervailing duty order on pig iron from Brazil. The importer challenged the review anyway, alleging that Commerce had exceeded its authority by conducting a review after the statutory deadline, and assessing duties retroactively. The plaintiff cited *Florsheim Shoe* as support for its argument.[53] When the plaintiff moved to amend its complaint to assert additional grounds for jurisdiction, the Department opposed the motion and requested summary judgment on the grounds that the plaintiff had no standing.

The court denied the motion to amend, but issued an opinion reserving its decision on the standing of the plaintiff until the merits of the case had been briefed. The court's holding was based on the fact that because the plaintiff was alleging an *ultra vires* act of the Department, it might be exempted from the requirement of exhaustion of administrative remedies, and therefore might have standing on that basis. The court stated that a mere challenge to the agency's authority to make a decision was insufficient to excuse the failure to exhaust administrative remedies. A "patent violation of agency authority,"[54] an agency action which is *ultra vires*, had to be alleged.

In another action before the CIT, *Rhone Poulenc, S.A. v. United States*,[55] the plaintiffs attempted to raise a new claim which had not been ruled upon at the administrative level, by invoking a CIT decision which had been issued after the Department's contested determination. The court allowed the claim to be heard. The timing of that claim demonstrates an extreme example of the latitude the court affords parties who raise new arguments based upon intervening decisions of the court.

In *Rhone Poulenc* the plaintiffs moved to amend their complaint to include a new allegation challenging the Department's application of the exporter's sale price (ESP) offset cap pursuant to regulation. The CIT had struck down that portion of the regulation in *Silver Reed America, Inc. v. United States*,[56] which was decided shortly before oral argument in *Rhone Poulenc*. The plaintiffs first raised the issue at oral argument. The Department objected, arguing that the issue had not been raised during the contested proceeding. The court, however,

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[52] *Id.* at 1130 (citing Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562 (1919)).

[53] 577 F. Supp. 1016 (Ct. Int'l Trade 1983).

[54] 598 F. Supp. at 1130 (citing Leedom v. Kyne, 358 U.S. 184, 189 (1958)).

[55] 583 F. Supp. 607 (Ct. Int'l Trade 1984).

[56] 581 F. Supp. 1290 (Ct. Int'l Trade 1984), *rev'd*, Consumer Products Division, SCM Corp. v. Silver Reed America, Inc., 753 F.2d 1033 (Fed. Cir. 1985).

ruled that the exhaustion of administrative remedies was not required. It relied upon *Hormel v. Helvering*,[57] in which "the Supreme Court had just issued an opinion which made the previously unraised issue determinative, therefore the court considered the new point of law even absent administrative exhaustion."[58] The court concluded that it would have been futile for the plaintiffs to propose that the Department disobey its own regulation, as the regulation was apparently mandatory. It is generally recognized that plaintiffs should not be required to perform futile acts at the administrative level. Finally, the court found that the failure to exhaust administrative remedies did not result in prejudice to the Department.

The court also discussed its interpretation of the exhaustion rule: "[T]his court need only require exhaustion of administrative remedies 'where appropriate.'"[59] Although it admitted that exhaustion is "normally . . . required before a litigant will be allowed to raise a claim via a civil action,"[60] the former statement implies a reluctance to apply the doctrine at all.

In addition, the court's decision is based upon the erroneous assumption that the Department would automatically dismiss any argument questioning the validity of one of its regulations, so that any request for relief of that kind would necessarily be futile. While it may not have been within the Department's power to ignore the regulation completely in that case, the Department is vested with a certain amount of discretion in applying its regulations and certainly has the power to amend them. If the Department had been given the opportunity to hear the claim in the first instance, the plaintiffs' concerns might have been addressed sufficiently through the administrative process.

C. *The Requirement of Standing*

An integral part of the requirement that a plaintiff (or intervenor) must have first exhausted its administrative remedies in antidumping and countervailing duty proceedings before taking its case to the CIT is that a plaintiff or intervenor must have been an "interested party who was a party to the proceeding." This requirement was imposed by the Trade Agreements Act of 1979,[61] and has been codified in two sections of the statute.[62]

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[57] 312 U.S. 552 (1941).

[58] 583 F. Supp. at 610.

[59] *Id.* at 611.

[60] *Id.* at 609.

[61] Pub. L. No. 96-39, 93 Stat. 144 (codified as amended at scattered sections of titles 19 and 26 of the United States Code).

[62] 19 U.S.C. § 1516a(d) (1984) provides:

> (d) Standing
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> Any interested party who was a party to the proceeding under section 1303 of this title or subtitle IV of this chapter shall have the right to appear and be heard as a party in interest before the United States Court of International Trade. The party filing the action shall notify

The Court of International Trade has accepted without reservation that a plaintiff or intervenor must comply with these statutory prerequisites of standing.[63] There have been conflicting views, however, as to the meaning of the term "interested party who was a party to the proceeding," as it is not defined in either the statute or legislative history.

The Trade Agreements Act of 1979 did define the term "interested party" for purposes of the antidumping and countervailing duty laws. The Trade and Tariff Act of 1984[64] slightly amended that definition. "Interested party" is currently defined as

> (A) a foreign manufacturer, producer, or exporter, or the United States importer, of merchandise which is the subject of an investigation under this title or a trade or business association a majority of the members of which which are importers of such merchandise,
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> (B) the government of a country in which such merchandise is produced or manufactured,
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> (C) a manufacturer, producer, or wholesaler in the United States of a like product,
>
> (D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product,
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> (E) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States, and
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> (F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to a like product.[65]

The statute does not, however, define "party to the proceeding." In an attempt to remedy that omission, the Department included a definition of "party to the proceeding" in the 1980 regulations which implemented the Trade Agreements Act of 1979:

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all such interested parties of the filing of an action under such section, in the form, manner, style, and within the time prescribed by rules of the court.

28 U.S.C. § 2631(j)(1)(B) (1984) provides:

(j)(1) Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that

(B) in a civil action under section 516A of the Tariff Act of 1930, only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right.

[63] *See, e.g., Rhone Polenc, S.A. v. United States*, 583 F. Supp. 607, 611 (Ct. Int'l Trade 1984).

[64] Pub. L. No. 98-573, 98 Stat. 3024 (codified at scattered sections of Title 19 of the United States Code).

[65] 19 U.S.C. § 1677(a) (1984).

> (i) *Party to the proceeding.* "Party to the proceeding" means:
> (1) The petitioner;
> (2) The government of the country in which the merchandise subject to the investigation is manufactured or produced, or from which it is exported;
> (3) Foreign manufacturers, producers and exporters of the merchandise subject to the investigation; and
> (4) Any other interested party, within the meaning of paragraph (c) [which is exactly the same as the 1979 Act], who informs the Secretary in writing of his intent to become a party to the proceeding within 20 days after the preliminary determination or who demonstrates to the satisfaction of the Secretary good cause for intervention.[66]

Under the Department's regulations, parties to the proceeding are furnished with certain exclusive rights. Interested parties, on the other hand, are not entitled to these rights. These rights include, the right to be notified of the Department's actions in an antidumping or countervailing duty proceeding, the right to receive confidential information subject to an administrative order, the right to request a hearing, and the right to request a disclosure of the information that formed the basis of a preliminary determination or administrative review. The statute, however, uses the terms indiscriminately.

It is practically impossible to provide a complete overview of the court's recent decisions regarding the standing requirement, as those decisions are often made in the context of the grant or denial of a motion to intervene and are unaccompanied by a formal opinion. Nevertheless, three opinions issued within the last two years demonstrate that although the court does not permit exceptions to the requirement that a party to a lawsuit must have been an "interested party who was a party to the proceeding," its view as to the meaning of that term is not quite clear. It is quite apparent, however, that the court does not strictly follow the definitions in the Commerce Department regulations.

In *Special Commodity Group on Non-Rubber Footwear from Brazil v. United States*,[67] the court addressed the issue of whether a trade association may be permitted to intervene "when it qualified as an 'interested party' during the administrative

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[66] 19 C.F.R. §§ 353.12(i), 355.7(i) (1985). The Department's recently proposed regulations define "party to the proceeding" as:

> any interested party, within the meaning of paragraph [(i) or (k)] of this section, which has actively participated, through written submissions of factual information or written argument, in a particular decision by the Secretary subject to judicial review. Participation in a prior reviewable decision will not confer on any interested party "party to the proceeding" status in a subsequent decision by the Secretary subject to judicial review.

50 Fed. Reg. 24,127 (1985) (to be codified at 19 C.F.R. § 355.2(j)) (proposed June 10, 1985); 51 Fed. Reg. 29,056 (1986) (to be codified at 19 C.F.R. § 353.2(j)) (proposed August 13, 1986).

[67] 620 F. Supp. 719 (Ct. Int'l Trade 1985).

proceedings notwithstanding that by the time the action was commenced its composition had changed so that a majority of its members were [no longer] manufacturers, producers or wholesalers of a like product."[68] The court granted the association's motion to intervene under the following analysis.

First, the court noted that to intervene as a matter of right, the trade association must satisfy the statutory definition of interested party, and it must have been a party to the proceeding. It stated that the "statute does not allow permissive intervention."[69] The parties did not dispute that the association had been a party to the proceeding. The sole issue was whether it qualified as an interested party. The court then held that the remedial purpose of the statute, as described in *American Grape Growers v. United States*,[70] justified allowing the association to intervene. In *American Grape Growers* the Court had ruled that an association had standing because half of its membership qualified as interested parties. The court reasoned that Congress had intended the "majority" requirement of the Trade Agreements Act of 1979 to exclude broad-spectrum, general organizations who would always have some interested parties, and not as a strict numerical minimum. Because the association in *Special Commodity Group* still had a 47 percent membership of interested parties, it was deemed to have a strong interest in the action, and thus its "composition at the administrative proceeding is sufficient to place it within the intention of the statute."[71]

This decision seems reasonable. The court interpreted the standing requirement in light of the purpose of the law, and a more narrow and literal reading would have resulted in injustice to a group that clearly had a significant interest in both the administrative proceeding and the appeal thereof.

In *Miller and Co. v. United States*[72] the plaintiff, an importer, had not participated in any way in the administrative review that it wished to contest. It brought suit under 28 U.S.C. § 1581(i), and moved to amend its complaint to allege jurisdiction under 28 U.S.C. § 1581(c). The Department moved for dismissal of the suit, or summary judgment, on the grounds that (1) plaintiff lacked standing because it had not been a party to the administrative proceeding, as required by 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), and (2) the court lacked jurisdiction, because plaintiff could not use section 1581(i), the "residual jurisdiction" clause, to circumvent the jurisdictional prerequisites of section 1581(c).

The court denied the plaintiff's motion to amend its complaint, ruling that the plaintiff had not been a party to the proceeding as required by sections 1516a and 1581(c):

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[68] *Id.* at 720.
[69] *Id.* at 721.
[70] 604 F. Supp. 1245 (Ct. Int'l Trade 1985).
[71] *Id.* at 722.
[72] 598 F. Supp. 1126 (Ct. Int'l Trade 1984).

> A suit may be brought under § 1581(c), however, only by "an interested party who is a party to the proceeding in connection with which the matter arises." 19 U.S.C. § 1516a(a)(2)(A). Plaintiff may be "an interested party," but plaintiff was not a party to the administrative proceeding out of which this action arises. Unlike the plaintiff in *First Miss, Inc. v. United States*, CIT , Slip Op. 84-14 (March 6, 1984) (cited by plaintiff), plaintiff here does not point to a particular employee or agent who represented it in the agency proceedings, nor can it point to any reason why the ITA should have realized that it was participating in those particular proceedings. Absent these factors, it is irrelevant whether or not plaintiff's failure to participate prejudiced defendant or whether plaintiff's participation would have been futile. It is not enough that some of the participants have the same general interest as plaintiff. Under the statutory scheme plaintiff itself must participate. Thus, it appears that if this action must be brought under § 1581(c), it may not be maintained by plaintiff, because plaintiff did not participate in the relevant administrative proceedings. *Cf. Matsushita Electric Industrial Co. v. United States*, 2 CIT 254, 257–58, 529 F. Supp. 664, 668–69 (1981).[73]

With respect to the second issue, the court noted that a plaintiff may not use § 1581(i) to circumvent the specific jurisdictional requirements of § 1581(c): "[I]f § 1581(c) provides an adequate avenue of relief, plaintiff may not proceed under § 1581(i)."[74] The court, however, found that it was not yet clear whether the plaintiff was required to become a party to the proceeding below due to the nature of its claim. The plaintiff alleged that the Department had committed an *ultra vires* act. Since there is an exception from the requirement of exhaustion in cases in which the administrative body is alleged to have exceeded its statutory authority, the court reasoned that the plaintiff might not have been required to participate in the administrative proceeding if the act complained of was patently beyond the Department's authority. The court ruled that jurisdiction under § 1581(i) was dependent upon the answer to this last question and reserved judgment until the question had been fully briefed on its merits.

What the court seems to have done in *Miller* is to confuse the discretion it has in applying the requirement of exhaustion, which is not a jurisdictional limitation, with the standing requirement, which goes to the very heart of jurisdiction and with which the court has no discretion. At the very least, this has now created an opportunity for a plaintiff to do just what the court said it would not allow—to circumvent the standing requirements of the law by filing a suit under the residual jurisdiction clause of § 1581(i).

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[73] *Id.* at 1128–29.
[74] *Id.* at 1129.

Finally, *Kokusai Electric Co., Ltd. v. United States*[75] presented the issue of whether a company should be permitted to intervene when the Department had reportedly refused to grant it "party to the proceeding" status during the antidumping investigation. The Department contended that the company did not qualify as an interested party (i.e., an importer) when it requested to be considered a "party to the proceeding" because it was not the importer of record. It later notified the Department that it had become the importer of record, but the Department claimed to have denied it that status because the deadline for requesting party status had elapsed. The Department could not produce a written denial of the later request, and the company filed briefs and appeared at the hearing during the investigation.

The court granted the company's request to intervene. It held that regardless of the Department's view that the company had not satisfied its regulations, the company was deemed to have demonstrated "to the satisfaction of the Secretary good cause for intervention" pursuant to 19 C.F.R. § 353.12(i)(4) in the absence of a Department denial of the company's request. The court noted the company's participation in the investigation, remarking that it was "not now attempting to interject itself in the civil proceeding after sitting out the administrative proceeding."[76] The court, however, carefully explained that "mere participation in the ITA hearing" did not automatically make the company a party to the proceeding.[77] It took into account the company's first timely request to become a party, albeit prior to its qualification as an interested party, noting that the time bar of 19 C.F.R. § 353.12(i) is not absolute.

On balance, this decision is quite reasonable. The Department took a very narrow view of its definitions of "interested party" and "party to the proceeding" and failed to establish that it had ultimately denied the intervenor the latter classification. The company had actually participated in the administrative proceeding. Furthermore, the court took great pains to consider all of the relevant facts and the interests of the parties in arriving at its conclusion.

D. *Conclusion*

This body of relatively recent case law tells us several things about the CIT's interpretation of the statutory requirements regarding exhaustion of administrative remedies and standing in appeals of the Department's antidumping and countervailing duty determinations.

First, the lengthy discussion often devoted to the exhaustion requirement demonstrates significant respect for the doctrine. The court has not voiced the

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[75] 613 F. Supp. 1249 (Ct. Int'l Trade 1985).
[76] *Id.* at 1252.
[77] *Id.*

view that its discretion is unfettered, nor has it dismissed the rule out of hand in any of these decisions. In this respect, the court's interpretation fits into the body of case law which developed and continues to apply the judicial doctrine of exhaustion. The court is not actively developing its own rules simply because the statute grants the court discretion.

Second, *Kokusai* demonstrates that the court will apply the doctrine to prevent a claim, although it is the only decision of its kind that the CIT has recently made in an appeal of an antidumping or countervailing duty proceeding. The facts of the case present a rather extreme example of failing to exhaust administrative remedies, which leads to the possible conclusion that the CIT might only apply the exhaustion rule in the clearest of cases. On the other hand, many of the other decisions involve circumstances at the other end of the spectrum, for example, where the Department itself did not raise the exhaustion doctrine as a defense, or where the issue was legal rather than factual and based upon an intervening decision of the CIT.

Third, the court is particularly apt to find that exhaustion is not required if there has been a decision of the CIT after the contested determination which affects the parties' rights. There is a sound basis for this exception in the precedent of other courts, including the Supreme Court. The CIT seems to be stretching the exception beyond its intended purpose, however, by invoking it in cases where the intervening court decision was issued in time for the plaintiff to bring it to the attention of the Department, or where the decision has nothing whatsoever in common with the gravamen of plaintiff's complaint, and only arguably affects the outcome of the case.

Fourth, the CIT is extremely sensitive to where the equities lie, although it is sometimes too easily swayed by the pleas for help from the party asserting a claim. The court gives great attention to the potential effect of its decision upon the parties involved, which is both commendable and entirely consistent with the doctrine of exhaustion. On the other hand, the court sometimes fails to consider the big picture, forgetting that the doctrine is intended not only to permit the administrative body to carry out the functions it is statutorily required to perform, but also to promote a more efficient use of resources by everyone. Indeed, the court must not lose sight of the fundamental notion that the doctrine was created to address primarily the autonomy of the administrative agency and the efficiency of the judicial and administrative schemes.

With respect to the requirement of standing, it is imperative that the court develop a clear definition of "interested party who was a party to the proceeding" so that time and resources are not wasted through futile appeals and needless disputes over standing. So far the court's decisions seem to indicate that it interprets the definition with due discretion. With the exception of the decision in *Miller*, the court's decisions indicate that it does not plan to abuse that discretion by interpreting it too broadly. They also demonstrate that the

court is most concerned with whether a plaintiff or an intervenor actually participated in the proceeding below so as to qualify it as a "party to the proceeding."

The court is not, then, strictly following the definition of "party to the proceeding" contained in the Department's regulations, although it has given that definition considerable weight. It is very important that the court take note of the Department's characterization during the administrative proceeding of those who call themselves "parties to the proceeding" when they appear before the court. One reason is that the Department only allows parties to the proceeding to have access to business proprietary information received or created during the proceeding. If, for example, the court were to allow "Acme Imports" to bring suit or intervene in an action before the court, even though it was not considered a party to the Commerce proceeding, Acme will most likely have access to proprietary documents under a judicial protective order that it was not allowed to receive during the administrative proceeding. This leads one to question whether Acme exhausted its administrative remedies. If access to the information is required to pursue its claim in the litigation, that implies that it should also have applied to become a party to the proceeding at the administrative level, so that it could also have those documents and fully pursue its complaint before the Commerce Department. Such requests are normally granted as a matter of course, so long as the requester qualifies as an interested party, under Department regulations.

III. MUST COMMERCE ACT WHEN THE CIT OVERTURNS A NEGATIVE PRELIMINARY INJURY FINDING BY THE ITC WHICH THE ITC APPEALS?

A. *Introduction*

The Department of Commerce asserts that it is not, and should not be, required to resume an investigation when the CIT overturns a negative preliminary injury finding made by the International Trade Commission (ITC), if the ITC is appealing the CIT decision. Certain members of the domestic industry disagree, and have filed actions designed to ensure that Commerce resumes its investigations after the ITC issues an affirmative injury determination pursuant to a remand.[78] The Department's responsibility for conducting antidumping

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[78] Various avenues have been used by plaintiffs to this end. For instance, in Armstrong Rubber Co. v. United States, No. 86-15, slip op. (February 14, 1986), the plaintiffs tried to have Commerce officials held in contempt for refusing to reinitiate a less than fair value investigation after an ITC negative preliminary injury determination was reversed and remanded by the CIT. The Department declined to reinitiate an investigation during the pendency of the ITC's appeal to the CAFC even though the ITC had issued an affirmative redetermination pursuant to the remand. Judge Watson in *Armstrong* refused to hold the Commerce officials in contempt:

duty and countervailing duty proceedings is dependent upon coterminous findings of injury by the ITC.[79] Absent a preliminary affirmative injury determination by the ITC, the Department cannot continue its investigation.[80] The effect that a judicial decision has on an ITC preliminary determination is, therefore, crucial to the Department when assessing its statutory obligations to proceed with an investigation.

The impact that this issue can have on the administrative proceedings of the Department of Commerce can be illustrated by the Department's investigation of iron construction castings. The domestic industry filed petitions with the Department and the ITC alleging that light and heavy iron construction castings

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> Even though it may be said that the court [in the original suit] expected its judgments with respect to erroneous ITC determinations (determinations which had the effect of terminating investigations) to lead inexorably to the continuation of the investigation by the Commerce Department, it did not include a direction to that effect in its judgment. . . . Since making this motion for contempt, plaintiff has commenced a separate action to compel the Department of Commerce to resume the investigation. The substance of the dispute will be reached in the new action.

That "new action" was brought pursuant to 28 U.S.C. § 1581(i), and is still pending before the court. The Department does not agree with the substantive aspect of the action, although it does not contest the jurisdiction of the CIT to hear an appeal on the matter filed pursuant to § 1581(i). On the other hand, the Department contends that there is no right to request the CIT to issue a mandatory order pursuant to 19 U.S.C. § 1516a as part of an order affirming ITC remand results and directing Commerce to initiate an investigation based on the ITC's new affirmative injury finding since the issue is not appropriately before the court under those circumstances. (See government's brief in Bingham & Taylor v. United States, Court No. 85-07-00909).

[79] Title VII and section 303 of the Tariff Act of 1930 require an injury test in all antidumping cases and in all subsidy cases involving dutiable goods from countries which are members of the Subsidies Code of the General Agreement on Tariffs and Trade or involving nondutiable goods from a country entitled to an injury test by the international obligations of the United States. 19 U.S.C. §§ 1303, 1671(b), 1673b.

[80] The statutory scheme is provided in 19 U.S.C. § 1671b (1984), which states in part:

> (a) DETERMINATION BY COMMISSION OF REASONABLE INDICATION OF INJURY—Except in the case of a petition dismissed by the administering authority under section 702(c)(3), the Commission . . . shall make a determination . . . of whether there is a reasonable indication that —
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> (1) an industry in the United States —
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> (A) is materially injured, or
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> (B) is threatened with material injury,
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> or
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> (2) the establishment of an industry in the United States is materially retarded,
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> by reason of imports of the merchandise which is the subject of the investigation by the administering authority. If that determination is negative, the *investigation shall be terminated.* (emphasis added)
>
> (b) PRELIMINARY DETERMINATION BY ADMINISTERING AUTHORITY—Within 85 days after the date on which a petition is filed under section 702(b), or an investigation is commenced under section 702(a), *but not before* an affirmative determination by the Commission under subsection (a) of this section, the administering authority shall make a determination . . . of whether there is a reasonable basis to believe or suspect that a subsidy is being provided with respect to the merchandise which is the subject of the investigation. If the determination of the administering authority under this subsection is affirmative, the determination shall include an estimate of the net subsidy. (emphasis added)

See also 19 U.S.C. § 1673b(a) and (b) (1986) for parallel antidumping provisions.

from Brazil, Canada, India, and the People's Republic of China were being sold in the United States at less than fair value (LTFV). The petitions also alleged that light and heavy iron construction castings imported from Brazil were being subsidized, and that these dumped and subsidized imports were causing or were threatening to cause material injury to a domestic industry. On July 3, 1985, the ITC published a preliminary determination that there was a reasonable indication that a domestic industry was being materially injured by reason of LTFV imports of light and heavy iron construction castings from Brazil, Canada, India, and China.[81] Additionally, the ITC determined that there was a reasonable indication that the domestic industry was being materially injured by subsidized imports of heavy iron construction castings from Brazil. At the same time, however, the ITC found that there was no reasonable indication of injury by reason of subsidized imports of light iron construction castings from Brazil.

In reaching its varying preliminary determinations, the ITC cumulated the effects of LTFV imports from Brazil, Canada, India, and China, but it did not cross-cumulate these with the effects of the subsidized imports from Brazil. In consequence of the ITC's negative preliminary injury determination, the countervailing duty investigation of light iron construction castings from Brazil was terminated by operation of law. The ITA continued the countervailing duty investigation only of heavy iron construction castings.

The domestic petitioners then instituted an action with the CIT. They alleged that the ITC's negative preliminary injury determination with respect to subsidized imports of light iron construction castings from Brazil was not in accordance with law or supported by substantial evidence. This was because the ITC had not cross-cumulated the effects of both the dumped and the subsidized imports in assessing the injury to the domestic industry.[82]

The CIT issued a judgment in the action on February 14, 1986, holding that the ITC had erred in failing to cross-cumulate. The CIT remanded the matter for a redetermination consistent with the decision of the court.[83] On remand, the ITC cross-cumulated the effects of the dumped imports with the subsidized imports and determined that a domestic industry was being materially injured by imports of subsidized light iron construction castings from Brazil.[84] In its redetermination, the ITC expressly reserved its right to appeal the judicial decision which had resulted in the affirmative redetermination.

The ITC moved the court for an order affirming the agency's redetermination, which would serve as the basis for an appeal to the CAFC. In response to the ITC's motion, the plaintiffs requested for the first time that the court issue an order affirming the results of the remand, and directing the Department to

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[81] 50 Fed. Reg. 27,498 (1985).

[82] Bingham & Taylor v. United States, No. 85-07-00909, slip op. (Ct. Int'l Trade, June 2, 1986).

[83] *Id.*

[84] 51 Fed. Reg. 12,217 (1986).

initiate a countervailing duty investigation of light iron construction castings from Brazil. The Department opposed the plaintiffs' proposed order and the CIT did not adopt it when it affirmed the remand.[85]

The issue of the Department's obligation in light of the ITC's appeal of the CIT order is, however, still unresolved. If the Department were to continue an investigation before a final order had been rendered, the agency would be moving forward with an investigation based on a contested ITC determination. Despite the fact that the ITC's affirmative preliminary injury determination is not final, the Department would be required to send out questionnaires to potential respondents, analyze responses, perform verifications, conceivably require the suspension, or liquidation, of entries, and make findings on all the issues raised by the parties regarding the importation of light iron construction castings from Brazil.

The Department contends that, under these circumstances, the statute does not require the agency to resume an investigation when the CIT overturns a negative preliminary injury finding made by the ITC which the ITC is appealing. This conclusion is supported by the language of the Tariff Act of 1930 and the framework within which the antidumping and countervailing duty laws function with respect to the agencies and the courts.

B. *Discussion*

The statutory framework devised by Congress to govern the effect of administrative determinations while judicial review is underway is found in 19 U.S.C. §§ 1516a(c) and (e).[86] The most telling aspect of these sections is the requirement

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[85] *Bingham*, No. 85-07-00909. Since initial distribution of this paper, the CAFC has issued an opinion in Bingham & Taylor v. United States, No. 86-1440, slip op. (Ct. Int'l Trade, March 31, 1987) affirming the opinion of the CIT. Consequently, absent certification to the United States Supreme Court, the Department will proceed with its countervailing duty investigation of light iron construction castings from Brazil.

[86] 19 U.S.C. § 1516a(c) (1984) reads as follows:

> (c) LIQUIDATION OF ENTRIES —
> (1) LIQUIDATION IN ACCORDANCE WITH DETERMINATION—Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) shall be liquidated in accordance with the determination of the Secretary, the administering authority or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision . . . .

19 U.S.C. § 1516a(e) (1984) reads as follows:

> (e) LIQUIDATION IN ACCORDANCE WITH THE FINAL DECISION—If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or if the United States Court of Appeals for the Federal Circuit -
> (1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which are entered, or withdrawn

that entries, absent an injunction, "shall be liquidated in accordance with the *final* court decision in the action."[87] In other words, entries should not be subject to liquidation, suspension, and reliquidation every time a court rules with respect to those entries. Instead, the agency determination being challenged should remain in effect and govern the liquidation of the entries until all appeals have been decided. Accordingly, if a preliminary negative injury determination by the ITC has not been overturned by a final court decision, the Department cannot take action which would lead to the suspension of liquidation at a premature stage of the proceeding. The logic of this statutory scheme is seen in the effect it has on entries, on the parties, and on the Department's conduct of its investigations.

C. *Effect on Entries*

The statute's command that the Department refrain from continuing an investigation until a final court decision has been entered follows from the Congressional intent to prevent entries from facing the "yo-yo effect" of constantly changing duty obligations and liquidations.[88] For example, based on an underlying ITC preliminary negative injury determination, entries of the merchandise investigated would not be subject to a suspension of liquidation. If, however, the Department were required to reinitiate an investigation based on the ITC's preliminary affirmative injury determination made pursuant to a remand decision which it appeals, the Department could issue an affirmative preliminary determination which would require the suspension of liquidation of the entries and the deposit of estimated duties. Following administrative review of these entries under either the "fast track" provisions of § 736(c) of the Act,[89] which provide for review within 90 days after an antidumping duty order, or under the review-on-request provisions of § 751(a) of the Act,[90] duties actually would be assessed on the entries. If at a later date the CAFC overturns the CIT's decision and upholds the ITC's original preliminary negative injury determination, administrative reviews of the order would still be required on all suspended entries made before the CIT reversed itself based on the CAFC

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from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and

(2) entries, the liquidation of which was enjoined under subsection (c)(2), shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

[87] 19 U.S.C. 1516a(e) (1984) (emphasis added).

[88] *See* Melamine Chemicals, Inc. v. United States, 732 F.2d 924, 934 (Fed. Cir. 1984), which held that Congress could not have intended the "yo-yo effect" liquidations that could result from a CIT order controlling liquidations, that is later overturned on appeal, requiring the recommencement of the original administrative determination.

[89] 19 U.S.C. § 1673e(c) (1986).

[90] 19 U.S.C. § 1675 (1984).

order. In addition, no refund would be available for those entries on which duties had been assessed in the absence of an injunction.[91]

Subjecting foreign companies to the burdens of an investigation with the possibility of suspended liquidations, final affirmative determinations by the ITC and Commerce, deposits of estimated duties, and perhaps even irreversible assessment of duties, only to have the CIT decision overturned by the CAFC at a later date, is not logical, nor is it supported by the statutory scheme. The underlying determination should not be disturbed during the pendency of litigation—until there is a "final court decision."[92] That would be either a decision by the CIT that is not appealed or, if an appeal is taken, the completion of the appellate process.

There is strong support for this interpretation of the Department's obligations under 19 U.S.C. § 1516a in the CAFC opinion in *Melamine Chemicals, Inc. v. United States*.[93] In *Melamine* the court determined that "[a]bsent an injunction, 19 U.S.C. § 1516a requires that the challenged determination shall govern the liquidation of entries 'while the litigation is proceeding.'"[94] The CAFC overturned a CIT decision which rescinded a Commerce Department final negative determination because the court found that a CIT decision should not control liquidations, as the CIT did not have the authority to alter the administrative proceeding. The court held that the challenged Commerce negative final determination should have governed the entries during the pendency of the litigation. The CAFC's reasoning and approach in *Melamine* is applicable as well to situations where there is an ITC negative preliminary injury determination. The challenged ITC negative injury finding, reviewable (as was the determination in *Melamine*) pursuant to 19 U.S.C. § 1516a, must govern the status of the proceeding during the pendency of the litigation. This avoids the "yo-yo effect" to which entries could be subjected if they are suspended as a result of a Commerce affirmative determination, and then perhaps released again after a CAFC decision upholding the challenged ITC negative injury finding. Under the statutory scheme, the Department should not be ordered to continue an investigation and alter its position with respect to merchandise subject to the

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[91] *See* 19 U.S.C. § 1516a(e) (1984). Also note that under this scenario, if the underlying dispute is over an ITC affirmative injury determination which the court reversed, obligating the Department to revoke the order, entries would be liquidated without reference to antidumping or countervailing duties, and such duties would never be collected on that merchandise, despite the fact that the affirmative finding might later be reinstated.

[92] 19 U.S.C. 1516a(e) (1984).

[93] 732 F.2d 924 (1984).

[94] *Id.* at 934, citing S. REP. No. 96-249, 96th Cong., 1st Sess. 248, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 634. The Court of Appeals found that the administrative proceeding could be affected only by (1) a preliminary injunction pursuant to 19 U.S.C. § 1516a(c)(2), or (2) a final court decision adjudicating the legality, *vel non*, of the challenged determination. *Id.*

litigation until either a final court decision on appeal has been issued, or all appeals have been withdrawn or dismissed.[95]

D. *Effect on the Parties and the Agency's Resources*

An interpretation of the statute which concludes that the Department should not change its position until a final court order has been entered adjudicating the underlying issues is fair for both domestic and foreign interests. For example, the Department believes the law precludes its resuming an investigation after the ITC issues an affirmative preliminary determination reached solely in compliance with a remand subject to appeal. This may delay potential relief for the domestic industry. The Department, however, would also not act, for example, to revoke an order if a CIT decision overturning a final affirmative ITC injury determination, which is changed to a negative determination as a result of remand, is being appealed.[96] The Department would continue to enforce the order until judicial proceedings are complete. The order would not be revoked prematurely. The foreign respondents would still be liable to post any estimated

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[95] Note, however, that in determining whether the court was mandated to issue a stay pending an appeal of a CIT decision in Badger-Powhatan, Inc. v. United States, No. 86-68, slip op. (Ct. Int'l Trade, June 27, 1986), the CIT held that *Melamine* could not be interpreted as preventing an agency from changing its final determination subject to a CAFC decision on appeal. Instead, Judge Restani believed *Melamine* to be applicable only to the question before it involving whether a negative determination of the agency should govern the process of liquidation pending appeal of a decision rescinding the determination. The finality aspect of *Melamine* was not deemed applicable to the situation in *Badger-Powhatan* because in the latter case neither the determination by the ITC nor that of the ITA would lead to immediate liquidation of the entries—duties could not have been assessed until after the first administrative review.

Similarly, in the situation discussed in this paper, liquidation could not occur immediately after the ITA resumed its investigation since assessment does not occur until an administrative review. Thus, some might rely on the dictum in *Badger-Powhatan* to argue that since liquidation is not imminent, the agency is required to continue its investigation after an ITC determination made pursuant to a remand order which is appealed.

We believe such reliance would be misplaced. The factual situation was an odd one. After petitioner sued, Commerce asked for a remand, having come to the view that petitioner's contention was sound. The foreign manufacturer opposed the remand, Badger-Powhatan v. United States, No. 86-38 slip op. (Ct. Int'l Trade, April 2, 1986), and, when the CIT granted the agency's motion, moved to stay the remand pending appeal. Judge Restani found that, under these circumstances, even a broad reading of *Melamine* did not justify a stay because the most recent determination of the agency—to recalculate dumping margins based on its altered position—would in fact govern entries pending appeal. Badger-Powhatan v. United States, No. 86-68 slip op. at 6 (Ct. Int'l Trade, June 27, 1986). The court has in essence held here nothing more than that the agency is entitled to change its mind when it has been challenged and the issue is the subject of the appeal.

[96] *See* Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556 (Fed. Cir. 1984). In this case the CAFC reversed the lower court's finding of insubstantial evidence on the record to support the final ITC material injury determination, reinstated the determination, and ordered that the resulting antidumping order be reinstated as well. In fact, the ITA had never revoked this order when the CIT overturned the ITC's final affirmative injury finding.

deposits which the Department had determined were due, and the interests of the domestic industry would, in this case, be secured.

Thus, as the prior examples illustrate, the nonresumption of investigations until a final court decision has been handed down does not discriminate among, or favor, the domestic industry, the importers, or the foreign producers.

If the Department were to resume an investigation or revoke an order based upon an unsettled decision of the ITC, at least three proceedings could simultaneously affect the merchandise in the short run: the court case, the Commerce investigation, and the ITC investigation. Any of these, after a CAFC decision, could be mooted. The parties would be required to follow the court case on appeal and argue the validity or nonvalidity of the ITC's initial determinations. In addition, the parties would be required to argue the merits of the Commerce Department's continuing investigation based on an ITC determination which could be overturned. Finally, they would be required to follow a continuing ITC investigation conducted under protest, which is further complicated by the uncertainties of the appellate proceeding. Instead, by refusing to change its position until the underlying judicial proceedings are final, the Department will simplify the administrative proceeding and allow interested parties to follow the appeal to its completion, and thereafter determine where their interests and liabilities lie.

It is also necessary, when assessing the Department's obligations, to consider the fact that the resumption of an investigation while the ITC continues to appeal a CIT decision requires the unnecessary expenditure of scarce public resources if the ITC ultimately prevails. Continuing the investigation includes the preparation of questionnaires, analysis of responses, verification of responses, preparation and publication of determinations, and possibly defense of any ensuing litigation. Yet, if the ITC appeal was upheld, the Department would have used taxpayer resources to conduct a useless investigation which Congress determined should have halted after an ITC negative preliminary injury determination.[97]

The expenditure of Commerce Department (and ITC) resources for this type of exercise is not limited to one anomalous case. The Department's obligations, in the face of disputed ITC preliminary determinations, have been an issue in no fewer than ten investigations since 1984.[98] In each of these cases the CIT

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[97] *See supra* note 3 and accompanying text.

[98] A review of recent investigations discloses three thin sheet glass cases from Switzerland, Belgium, and the Federal Republic of Germany (Jeannette Sheet Glass Corp. v. United States, No. 85-2554, slip op. (Ct. Int'l Trade, June 2, 1986)); two antidumping and two countervailing duty investigations involving wine from France and Italy (American Grape Growers Alliance v. United States, No. 85-104, slip op. (Ct. Int'l Trade, October 7, 1985)); one antidumping investigation involving radial tires from Korea (Armstrong Rubber Co. v. United States, No. 86-15, slip op. (Ct. Int'l Trade, February 28, 1986)); and one countervailing duty investigation on light iron construction castings from Brazil

overturned a negative preliminary determination by the ITC. A departmental investigation of these ten cases, based on a controverted preliminary determination, would not only waste the agency's limited resources on investigations and reviews that might be overturned before they are finished, but also create chaos for the parties which must attempt to evaluate their position while confronted with the obligations imposed by the agencies and the courts pursuant to the most current interpretation of the antidumping and countervailing duty laws.

In sum, the negative consequences from resumption of an investigation absent a final court decision support the Department's interpretation of its obligations under 19 U.S.C. § 1516a in light of an ITC affirmative injury determination subject to appeal. The judicial precedent, both directly and by analogy, supports the agency's interpretation. The counterargument is that there is a greater interest in an expeditious continuation of the investigation. This is not persuasive, however, because the statutory prerequisite of an affirmative preliminary injury determination by the ITC issued before the Department issues its preliminary determination, does not exist.

IV. WHEN SHOULD COMMERCE BE REQUIRED TO PERFORM A REMAND PRIOR TO APPEAL?

A. *Introduction*

Recent decisions have circumscribed the Department's right to appeal a CIT decision to the CAFC before completing a CIT remand.[99] The Department argues that it has a right, in many instances, to appeal a CIT decision prior to performing a remand, and thus that a stay of the remand should issue in the interim. The CAFC, however, has concluded that a trial court remand to the administrative agency for additional findings is not appealable as of right, even though the order resolves the central legal issue. Further, the CIT has in recent decisions denied the agency's motions for a stay of the remand.

The Department does not view the dispute over the "timing" of an appeal as an academic matter, because of the implications of a denial of early appellate review for administration of the statute. For instance, the agency may be required, pursuant to a remand, not only to recalculate a dumping margin, but also to abandon a prior calculation methodology and instead use a method which the CIT has deemed in its order to be more reasonable. If this remand

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(Bingham & Taylor, Inc. v. United States, No. 85-07-00909, slip op. (Ct. Int'l Trade, February 14, 1986), *aff'd*, No. 86-1440, slip op. (Fed. Cir. 1987)).

[99] Cabot Corp. v. United States, No. 86-720, slip op. (Ct. Int'l Trade, April 9, 1986). An appeal from a CIT decision before completion of the remand in Philipp Brothers, Inc. v. United States, No. 86-67, slip op. (Ct. Int'l Trade, June 27, 1986), was also denied in an unpublished opinion by the CAFC.

were not appealable immediately, the Department would be forced to issue a new dumping determination which it would not view as correctly decided. If the dumping margin calculated under the new methodology did not alter the size of the dumping margin originally determined, the Department's opportunity to appeal the decision on methodology after the CIT affirmed the Department's remand results could be precluded as moot. In these circumstances, parties might argue that the Department is obligated to use this court-ordered methodology in other investigations even though the Department considers the method unsupported by the statute, and even though it lost the opportunity to appeal the validity of the court decision.

The above example illustrates merely one of the problems the agency can confront when either determinations are remanded by the CIT without granting appellate review, or a stay is denied in the interim. The agency may lose its right to appeal certain issues. Additionally, it may be required to issue new orders which could immediately affect the positions of the parties to the underlying proceedings. Finally, it could even be required to expend its resources to satisfy a remand, which itself could be overturned upon later appellate review.

Of course, in most instances a remand is entirely appropriate and should be completed in an expeditious manner. In other instances, however, as exemplified above, the possible negative consequences of immediate compliance with a remand order make the timing of appellate court review of CIT decisions of critical importance to the agency and to those whose interests are affected by agency decisions.

B. *Discussion*

The CAFC has "exclusive jurisdiction . . . of an appeal from a final decision of the United States Court of International Trade."[100] The sticking point of this provision is the meaning of the term "final decision." The CAFC in *Cabot Corp. v. United States* held to a very strict interpretation of the requirement of finality explaining that:

> It helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice.[101]

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[100] 28 U.S.C. 1295(a)(5) (1984).

[101] *Cabot*, No. 86-720, slip op. at 5 (Ct. Int'l Trade, April 9, 1986) (citing Flanagan v. United States, 465 U.S. 259, 263–64 (1984)); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

Further, the court in *Cabot* cited to a corollary rule "that an order remanding a matter to an administrative agency for further findings and proceedings is not final."[102]

While the CAFC's deference to finality is a fundamental piece in the puzzle of judicial proceedings, there are strong arguments for utilizing a more pragmatic approach to the finality requirement where the potential appeal is from a remand order. A CIT decision that consists of a remand to the agency for further proceedings is a decision which, more frequently than not, has ruled on a substantive issue unfavorably for the agency and requires further agency action in light of that determination.[103] By complying with the terms of the remand, the agency is changing the substance of its administrative determination before it has had an opportunity to appeal the CIT's ruling on the very issues at stake in the litigation. Yet, if the agency were to refuse to comply with the terms of the remand it would be subject to contempt.

Therefore, the agency is required to complete an administrative proceeding based on underlying methodologies or factors with which it does not agree. This may require new information, verification, responses, comments, and calculation to reach a determination which it may appeal and may win, or as illustrated earlier, from which it may have no opportunity to appeal, once the CIT has ruled on the final results of remand.[104] Arguably, "finality" was reached in a pragmatic sense when the CIT first issued its decision on the substantive issue. This conclusion is supported by decisions of the Supreme Court and the Courts of Appeals for the Ninth, Tenth, and District of Columbia circuits.[105]

This lengthening line of decisions adopting a pragmatic approach to finality has held, under the authority of *Gillespie v. United States Steel Corp.*,[106] and *Cohen*

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[102] *Cabot*, No. 86-270, slip op. at 5.

[103] It may also consist of a substantive determination with respect to certain of the counts, and remand for a redetermination or explanation as to others, or be a remand solely for recalculation or explanation.

[104] For example, in Philipp Brothers v. United States, No. 86-67, slip op. (Ct. Int'l Trade, June 27, 1986), the Department lost the right to appeal what it considered a very fundamental issue—the appropriate application of the traditional administrative law principle of exhaustion of administrative remedies. Because the CAFC denied the Department's appeal from the CIT's remand order, the Department completed the remand. The basis for an appeal by the Department became moot when the Department's determination on the issue, which plaintiff failed to argue to the agency during the administrative proceeding, was upheld. *Id.* The only relief the Department could request from the CAFC would be a decision which reversed the CIT in concept, but not in fact. In consequence, a CIT decision which the Department argues undermines the careful administrative procedure which Congress provided for when it gave the agency the authority to conduct the investigation in the first place, could remain as precedent without challenge.

[105] *See* Regents of University of California v. Heckler, 771 F.2d 1182 (9th Cir. 1985); Stone v. Heckler, 722 F.2d 464 (9th Cir. 1983); Paluso v. Matthews, 573 F.2d 4 (10th Cir. 1978); Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974).

[106] 379 U.S. 148 (1964).

v. Beneficial Industrial Loan Corp.,[107] that the "requirement of finality is to be given a 'practical rather than a technical construction.'"[108] Instead of applying a blanket rule with respect to the finality of remands, these opinions hold that a remand order is final and appealable if (1) it has decided the controlling law of the case, (2) a result of the remand will be to preclude later appellate review of the controlling legal issue, or (3) the ruling involves an issue of far-reaching consequences which will affect a large number of claimants. Unfortunately, the CAFC has not yet accepted this approach to remands. Nor has the CAFC been willing to entertain appeals from a remanded decision under an alternative avenue—the collateral order doctrine.[109]

The approach the CAFC has suggested as appropriate for appeal of a remand order is a request for certification for interlocutory appeal under 28 U.S.C. § 1292(d)(1). The Department has in the past had appeals of CIT remand orders certified to the CAFC.[110] A certification for appeal is discretionary with the CIT. Certification would not be appropriate in cases where the agency on remand is merely required to perform further calculations, issue a clarification of the record, or explain the agency's actions. Frequently, however, a remand decision will in itself decide a controlling issue of law. In those cases, the agency will not only desire an immediate interlocutory appeal, but will also likely request a stay of the remand.

There are compelling reasons for granting an interlocutory appeal and a stay of the remand. Plaintiffs and the court will by necessity focus on a single agency determination affecting particular merchandise from one country. However, the court's views on controlling legal issues immediately affect literally dozens of other ongoing investigations and administrative reviews. Further, the court's opinion has an impact on domestic industries' preparation of antidumping and countervailing duty petitions, as well as on governments and companies in many

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[107] 337 U.S. 541 (1949).

[108] Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964) (quoting Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949)).

[109] *See* Cabot Corp. v. United States, No. 86-720, slip op. (Ct. Int'l Trade, April 9, 1986). As described in *Cabot*, the "collateral order" exception covers orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). To come within the exception, the order must at a minimum "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). The CAFC did not find the collateral order exception applicable to the facts in *Cabot*. The appeal from *Philipp Brothers*, denied by the CAFC, was also based in the alternative on the collateral order doctrine.

[110] *See, e.g.*, Silver Reed America, Inc. v. United States, 581 F. Supp. 1290 (Ct. Int'l Trade 1984) *rev'd, rem. sub nom.* SCM Corp. Consumer Products Div. v. Silver Reed America, Inc., 753 F.2d 1033 (Fed. Cir. 1985).

countries that are attempting to ensure that their exports to the United States will not be be subject to antidumping and countervailing duties. This enormous expenditure of resources necessarily occasioned by a far-reaching judicial decision, which the parties have not had the opportunity to appeal, is often of far greater concern than the harm to the plaintiff of a possible delay in relief as a result of immediate appeal and a stay of the remand.

A party may be entitled to a discretionary stay pursuant to Rule 62(d) of the CIT, which provides in part that "when an appeal is taken, the appellant . . . may obtain a stay . . . ."[111] In determining whether to issue a discretionary stay pending appeal, the trial court generally uses a four-part burden analysis. The factors considered by the court are (1) whether the petitioner is likely to prevail on the merits of the appeal, (2) whether, without a stay, the petitioner will be irreparably injured, (3) whether issuance of a stay will substantially harm other parties interested in the proceeding, and (4) wherein lies the public interest.[112]

Most courts give the first factor little weight since it in effect requires the trial court to second-guess the validity of its own original holding.[113] With respect to the second factor, whether the petitioner will be irreparably injured, where the petitioner is the agency, the most frequent harm to the agency is the administrative expenditure of time and money on what can often prove to be a useless task. Every remand removes administrative personnel from other cases pending before the agency in order to comply with the remand instructions and concerns of the court. The agency's own concerns are subordinated to this task which may prove to be moot after an appellate decision. Additionally, if the court orders the agency to continue with the remand, rather than allowing an appeal or granting a stay, the agency may lose the chance to litigate the issue.

This occurred in *Jeannette Sheet Glass Corp. v. United States*.[114] The ITC appealed a CIT decision affirming the ITC's preliminary affirmative injury determination made pursuant to the CIT's remand of the ITC's original negative preliminary determination. The CAFC dismissed this appeal because it was not from a "final" order under 28 U.S.C. § 1295(a)(6). While the CAFC opinion was not published and may not be cited as precedent, it does raise questions as to the extent of an agency's right to appeal a CIT decision upholding an agency remand. The possibility exists that, once the Department completes its remand incorporating the disputed issue, an agency appeal will, according to the CAFC,

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[111] CT. INT'L TRADE R. 62(d).

[112] *See supra* note 104 and accompanying text.

[113] *See* American Grape Growers Alliance for Fair Trade v. United States, No. 85-104, slip op. at 5 (Ct. Int'l Trade, Oct. 7, 1985).

[114] Appeal No. 85-2554 (Ct. Int'l Trade, June 2, 1986).

be moot. Therefore, the agency, as petitioner for a stay, can face potential irreparable injury due to the lack of opportunity to appeal its claim.

The third factor, the harm to other parties interested in the proceeding, will vary considerably depending on the facts of each case. If, after an affirmative determination, suspension of liquidation is enjoined, neither the interests of the importers nor of the domestic parties will be impaired by a stay. Importers will not have their merchandise liquidated at a disputed rate, and the domestic industry's interests will be protected by the suspension and cash deposit. However, if the dispute arises from a negative determination which, after the remand, could become affirmative, the domestic industry may be harmed as it awaits relief that it might have obtained by an affirmative determination and imposition of duties.

The last factor, that of the public interest, is a rather amorphous concept. Its evaluation provides the court, by its nature, a good deal of discretion. Courts have found that there is some public interest in denying stays pending appeal "because they interrupt the ordinary process of judicial review and postpone relief for the prevailing party."[115] In particular, Judge Restani in *Philipp Brothers* placed a strong emphasis on the public's interest in an expeditious resolution of a proceeding.[116]

An interest in expediency, however, may be outweighed by other considerations, such as the resolution of the underlying issues. All participants in an antidumping or countervailing duty case are affected by the continuation of administrative proceedings, while the administrative standard is on appeal. The uncertainty created when controlling issues of law are not finally resolved also creates chaos for the agency in other reviews, as it must decide which standard to follow as a result of pending litigation. This makes it difficult for other parties to assess their own position vis-a-vis the agency's obligations. The public may have an interest in the stability of a stay of the proceedings until the underlying issues are finally resolved. At least recently, the CIT has not accorded due weight to this factor, which in many ways is unique to the antidumping and countervailing duty area.

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[115] Dellums v. Smith, 577 F. Supp. 1456, 1457 (N.D. Cal. 1984); *see also* Badger-Powhatan, No. 86-68, slip op. at 13 (Ct. Int'l Trade 1986); Philipp Brothers, No. 86-67, slip op. at 12 (Ct. Int'l Trade 1986).

[116] Judge Restani seemed to find support for expediency in the continuation of the administrative proceeding not only from the twelve month statutory time period provided for administrative review determinations in section 1675(a)(1) of the Tariff Act of 1930, but also in the much shorter time restrictions imposed in the *investigative* stages of the proceeding which allow additional time only in "extraordinarily complicated cases." Note, however, that deadlines which apply to the original investigation are by their terms not applicable to the administrative review proceeding in question in *Philipp Brothers*.

C. *Conclusion*

A party need not appeal every remand order with which it does not agree, nor is a stay warranted in every case. However, when a remand order decides a controlling issue of law and there is a substantial risk that the issue will escape review absent an appeal prior to completion of the remand, or when the agency or parties would be unduly burdened by completion of the remand prior to appellate review, an appeal from this "final judgment" or collateral order, or, alternatively, an interlocutory appeal through certification, as well as a stay of the remand pending review, should be granted. In using its discretion to grant or deny review, the court must consider the terms of the scheme for appellate review provided by Congress in 28 U.S.C. § 1295, as well as the substantial interest in the fair and efficient conduct of the administrative process with which the agency is entrusted.

V. ARE REMAND RESULTS SUBJECT TO CHALLENGE ANEW?

A. *Introduction*

Traditionally, the Department of Commerce[117] has believed that a well-established scheme governed the circumstances in which parties to antidumping and countervailing duty proceedings could seek judicial review of final administrative determinations in those proceedings. In Commerce's view, the scheme was as follows: A party[118] adversely affected by a final determination was required to bring an action in the CIT within thirty days of its publication in the *Federal Register*.[119] Once one party had initiated a challenge in the CIT, other interested parties who wished to contest the issues raised in that action, or to protect their interests by supporting the Department's position, were required to intervene in order to preserve these rights.[120] Parties who wished to raise issues not already before the CIT were required to commence a separate action within the original thirty-day deadline.[121] If the CIT remanded the determination to Commerce for further consideration, the CIT retained jurisdiction over the issues remanded until the remand results were reported back to that court. Thus, there was no final, appealable decision until the CIT either affirmed or overturned the remand results. In Commerce's view, it followed that parties to an admin-

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[117] More precisely, the Office of the Deputy Chief Counsel for Import Administration.

[118] The term "party" refers to an "interested party" who is also a "party to the proceeding" as those two terms are defined in 19 C.F.R. 353.12(c) and (i) and 355.7(c) and (i).

[119] Royal Business Machines v. United States, 669 F.2d 692 (Fed. Cir. 1982).

[120] The CIT has been liberal regarding the circumstances in which intervention is permitted. *See* CT. INT'L TRADE R. 13. *See also* Silver Reed America, Inc. v. United States, 600 F. Supp. 846 (Ct. Int'l Trade 1984).

[121] Funi Electric Co. v. United States, 595 F. Supp. 1152, 1153 (Ct. Int'l Trade 1984); Nakajima All Co. v. United States, 2 Ct. Int'l. Trade 170 (1981).

istrative proceeding who did not become parties to a CIT suit arising from that proceeding could not later challenge Commerce's determination on remand.[122]

The opinion of the Court of Appeals in *Freeport Minerals Co. v. United States*[123] shook Commerce's understanding of this whole scheme. In *Freeport* the CAFC not only permitted a domestic interested party to challenge a final determination of antidumping duties in an administrative review almost a year after that determination was published,[124] but also seemed to say that the CIT lost jurisdiction over the action on the remand to the Department of Commerce.[125] In consequence, the plaintiff was permitted to challenge in the CIT the September 1983 remand results of an August 1982 suit even though the plaintiff had never intervened in that suit. To Commerce, this result seemed to prop open the door to judicial review in the CIT permanently, and threatened to nullify the finality of its administrative determinations.

Later opinions of the CAFC and the CIT have clarified the issues to some extent and suggest that the scheme as originally viewed by Commerce has been revised rather than replaced. This section describes the decisions which have brought about that revision, and presents Commerce's current view of the rules governing remand results.

B. *The* Freeport *Decision*

Freeport arose out of an antidumping duty order on sulphur from Canada issued by the Treasury Department in 1973 (the "sulphur order").[126] Shortly after Commerce assumed responsibility for administering the antidumping laws in 1980, it initiated a review of imports from five of the approximately fifty Canadian sulphur exporters, covering mainly the period from January 1, 1976, through February 8, 1979.[127] In April 1981 Commerce published the preliminary results of this review, finding no imports at less than foreign market value (FMV) during the review period for any of the five exporters, and announcing its intention to revoke the sulphur order with respect to all of them as of February 8, 1979.[128]

In January 1982, Commerce published the final results of its review with respect to two of the five exporters, confirming the absence of less-than-FMV

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[122] As provided in 19 U.S.C. § 1515a(c)(3).

[123] 758 F.2d 629 (Fed. Cir. 1985).

[124] *Id.* at 633.

[125] *Id.* at 636.

[126] 38 Fed. Reg. 34,655 (1973).

[127] For Canadian Superior Oil, Ltd., the period reviewed was from July 1, 1976, through February 8, 1979. For Gulf Oil Canada, Ltd., Houston's Bay Oil & Gas, Ltd., Chevron Standard, Ltd., and Shell Canada (with the exception of one sale) the period reviewed was from January 1, 1976, through February 8, 1979.

[128] 46 Fed. Reg. 21,214 (1981).

sales during the review period.[129] Freeport Minerals, a domestic interested party, promptly challenged this determination in the CIT.[130]

In July 1982, Commerce published the final results of its review with respect to the other three exporters, including Chevron Standard.[131] This notice confirmed the absence of less-than-FMV sales by these three exporters during the review period. Commerce announced, however, that it was exercising its discretion to postpone revocation of the sulphur order with respect to them until they persuaded a fourth Canadian company, Cansulex Ltd., of which they were significant shareholders, to furnish the Department with data it had long sought regarding Cansulex's sales of sulphur in third countries. Chevron promptly challenged this postponement in the CIT.[132] Freeport neither challenged Commerce's final determination of no less-than-FMV sales for the three companies, nor sought to intervene on the Department's side in Chevron's challenge to the postponement of revocation.

In May 1983, the CIT ruled that Cansulex's failure to furnish information on third country sales was irrelevant to Chevron's review and was not a permissible basis for postponing revocation of the sulphur order.[133] The court therefore remanded the case to Commerce with instructions to make a new determination on Chevron's revocation, without taking Cansulex's conduct into account.[134] Commerce duly submitted a remand determination to the CIT in June 1983, which announced revocation of the sulphur order as to Chevron. The CIT then affirmed the revocation, and also affirmed its implicit basis—Commerce's determination of no less-than-FMV sales during the review period.[135] Commerce published a notice of final revocation of the sulphur order with respect to Chevron in September 1983.[136]

Shortly thereafter, Freeport brought an action in the CIT contesting the final revocation.[137] Freeport's action raised a number of issues unique to the final revocation order, but it also challenged, for the first time, the process by which Commerce reached its July 1982 determination that Chevron's margin during the review period was zero.[138] Freeport brought the action under 19 U.S.C.

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[129] 47 Fed. Reg. 3,812 (1982).

[130] This action resulted in the CIT's decision in Freeport Minerals Co. v. United States, 590 F. Supp. 1246, *rev'd*, 776 F.2d 1246 (Fed. Cir. 1984).

[131] 47 Fed. Reg. 31,911 (1982).

[132] Chevron commenced its action by filing a summons on August 20, 1982.

[133] Chevron Standard Ltd. v. United States, 563 F. Supp. 1381 (Ct. Int'l Trade 1983).

[134] *Id.* at 1384.

[135] Chevron Standard Ltd. v. United States, 5 Ct. Int'l Trade 260 (1983). The issue of whether there had been less-than-FMV sales was never raised in the court proceedings.

[136] 48 Fed. Reg. 40,760 (1983).

[137] Freeport's summons was filed in the CIT on, or about, October 8, 1983. The complaint was filed on, or about, October 31, 1983.

[138] Final revocation was based on a tentative revocation issued by the Treasury Department on February 8, 1979, 44 Fed. Reg. 8,057 (1979). Freeport disputed Commerce's refusal to grant it access to materials relating to Treasury's tentative revocation.

1516a(a)(2),[139] which requires challenges to determinations in administrative reviews[140] to be brought within thirty days of their publication in the *Federal Register*. Freeport therefore characterized its action entirely as an appeal of Commerce's September 1983 final revocation, properly brought in October 1983.

Commerce disagreed. In its view, a final determination that Chevron's margin for the review period was zero had been published in July 1982, and Freeport was barred from contesting that determination after August 1982. Commerce also maintained that, since Chevron had brought an action which raised the merits of revocation and the CIT had ruled on that issue, Freeport had lost its right to contest that issue by failing to intervene in Chevron's action.[141]

The Court of International Trade agreed with Commerce, and dismissed Freeport's action as out of time.[142] The CIT ruled that Freeport's action was also barred as a collateral attack on its June 1983 affirmance of the remand result in *Chevron*, since Freeport had never become a party to that action.[143] In effect, the CIT found that the validity of the margin had been raised in Chevron's challenge to the postponement of revocation, so that Freeport was then barred from challenging either determination.[144]

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[139] 19 U.S.C. § 1516a(a)(2) provides in pertinent part as follows:

> Review of determinations on the record —
> (A) In general—Within thirty days after
> (i) the date of publication in the Federal Register of —
> (I)notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph (B), or
> (II)an antidumping . . . order based upon any determination described in clause (i) of subparagraph (B),
> . . .
> an interested party who is a party to the proceeding . . . may commence an action [in the CIT] . . . .
> (B) Reviewable determinations—The determinations which may be contested under subparagraph (A) are as follows:
> (i) Final affirmative determinations . . . under section . . . 1673(d) of this title [§ 735 of the Tariff Act of 1930].
> (ii)A final negative determination . . . under section . . . 1673(d) of this title.
> (iii) A final determination . . . under section 1675 of this title.

[140] Administrative reviews are governed by section 751 of the Tariff Act of 1930, 19 U.S.C. § 1675 (1984), as amended, which provides in pertinent part as follows:

> Administrative review of determinations
> (a) Periodic review of amount of duty —
> (1) In general—At least once during each 12-month period beginning on the anniversary of the date of publication of . . . an antidumping duty order under this title, . . . the administering authority, if a request for such a review has been received . . . shall —
> . . .
> (B) review, and determine . . . the amount of any antidumping duty . . .
> . . .
> and shall publish the results of such review . . . in the Federal Register.

[141] Reply Brief in Support of Defendant-Intervenor's Motion to Dismiss the Complaint (Mar. 2, 1984), Freeport Minerals Co. v. United States, 83 F. Supp. 586 (Ct. Int'l Trade 1984).

[142] Freeport Minerals Co. v. United States, 83 F. Supp. 586 (Ct. Int'l Trade 1984).

[143] *Id.* at 590.

[144] *Id.* The CIT appeared to find that, to the extent the merits of Commerce's July 1982 determi-

Freeport appealed to the CAFC, which reversed the CIT's decision.[145] Freeport argued before the CAFC that it had not been required to appeal the revocation in July 1982 since there had been no final determination on revocation until September 1983. Freeport contended that a 1982 appeal would have made no sense because of Commerce's favorable ruling, and would have wasted judicial and legal resources.[146] The Government countered that zero margins are not favorable to domestic parties. It pointed out that domestic parties regularly challenge such margins in the CIT within thirty days, as they are bound to do under the Act, notwithstanding that zero margins routinely do *not* result in final revocation of the antidumping order in question.

The CAFC agreed with Freeport and held that, since Freeport filed its appeal within the thirty-day limit, its October 1983 action was not out of time.[147] Implicit in this ruling is that issues regarding the basis for revocation should be raised, not in a challenge to a determination on margins in the administrative review (as the CIT had in effect ruled), but rather in a challenge to the final determination on revocation. The CAFC also rejected the CIT's theory that Freeport's challenge to the revocation order was impermissible as a collateral attack.[148] The Court adopted Freeport's view that the CIT's June 1983 order was limited solely to the issue of Commerce's postponement of revocation, and that Freeport therefore could not be collaterally estopped from challenging the revocation on other grounds.[149]

Finally, the CAFC rejected Chevron's argument that Freeport could not challenge the final revocation since it was simply the result on remand of Chevron's 1982 suit, to which Freeport had never been a party. The court ruled that the final revocation was an independent determination, which could therefore serve as the basis for a separate cause of action.[150]

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nation of no less-than-FMV sales had not been at issue in the original action, they had been raised when the court remanded the case. The CIT pointed out that its order of remand had directed Commerce to make a determination in the final results of its administrative review consistent with the facts ascertained from its dumping investigation and relation to sales at not less than fair value.

[145] 758 F.2d 629 (Fed. Cir. 1985).

[146] *Id.* at 633.

[147] The CAFC held that Commerce's September 1983 revocation was a determination to revoke under section 1675 and therefore was reviewable under section 1516a(a)(2)(B)(iii), while the findings underlying that determination were reviewable as provided in section 1516a(a)(2)(A)(i). *Id.* Since subsection (A)(i) refers to subsection (B)(iii), it would appear that the CAFC ruled that *both* the July 1982 notice and the September 1983 notice were appealable as provided in section 1516a(a)(2)(A)(i). Such an interpretation, however, renders meaningless the statutory thirty day time limit on the first opportunity to appeal. (References hereinafter to *Freeport* refer to this CAFC decision).

[148] The CIT had reasoned that, since its June 1983 affirmation of the revocation in *Chevron*, had also affirmed the basis for the revocation (the zero margin), *Freeport's* failure to intervene in *Chevron* barred it from raising that issue in a different action.

[149] 758 F.2d at 638. This holding contradicted the CIT's express statement that it *was* upholding the basis for the revocation, including Commerce's determinations of zero margins.

[150] *Id.* at 636.

1. Comment on *Freeport*

Much of the confusion in *Freeport* seems to have resulted from analyzing Commerce's determination of a zero margin for Chevron in the administrative review and its determination to revoke the sulphur order with respect to Chevron as one determination. Although a finding of zero (or *de minimis*) margins is one precondition to revocation, the two determinations are distinct.[151] Aside from the analytical question, importers have a legitimate expectation that their entries of merchandise will be liquidated, and administrative reviews of entries subject to antidumping orders must be performed regardless of whether or not they lead to revocation. The margins determined in administrative reviews may therefore be challenged independently of any related determinations regarding revocation.

Not only are the results of administrative reviews and determinations regarding revocation distinct, but the outcome in *Freeport* of the disputes over timeliness and collateral attack should have been different with regard to each. With respect to timeliness, for example, Freeport's challenge to the July 1982 determination of zero margins should have been made by August 1982 and was therefore out of time by October 1983. Freeport was correct, however, in raising issues unique to the final revocation (such as the likelihood of resumed sales at less-than-FMV) in October 1983. This is because no final determination on these issues was published by Commerce until September 1983.[152] With respect to collateral estoppel, Freeport's suit should have been barred to the extent it raised issues decided by the CIT in *Chevron* (such as the propriety of delay). But Freeport should have been free to contest issues not decided in *Chevron*, provided they were neither integral to Chevron's cause of action nor out of time.

Both courts' efforts would have been better spent deciding whether the margin determined in the administrative review was so integral to Chevron's suit that Freeport was compelled to raise that issue on intervention or not at all. In effect, the CIT ruled that the margin was integral to Chevron's suit, whereas the CAFC decided that it was properly raised in a challenge of the final revocation order. Thus, jurisdiction to rule on the margin became attached as an incidental bonus to jurisdiction over whichever of the two competing

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[151] Several additional criteria must be satisfied in order to obtain a revocation, in addition to zero or *de minimis* margins during the appropriate review period, including a finding that there is no likelihood of resumed less-than-FMV sales. *See* 19 C.F.R. § 353.54.

[152] Should the courts continue to accept elaborate arguments by parties about when they are actually "aggrieved" by apparently adverse decisions (as the CAFC did in *Freeport*), it will be difficult to say that any action is out of time. For example, some domestic party may soon argue that it was not immediately aggrieved by a revocation because there were no (or a low volume of) imports of the subject merchandise that year, and that it should therefore be allowed to challenge the revocation in the CIT several years later, on the basis of a subsequent increase in imports.

issues raised by the parties (postponement of revocation in *Chevron* or notice of revocation in *Freeport*) was adopted as dominant by the CAFC.[153] In fact, since no party raised this issue in a timely manner, it should have been considered closed.

More fundamentally, *Freeport* left Commerce in doubt about the status of cases remanded to it by the CIT, and the ability of nonparties to CIT actions to challenge remand results. In the CAFC, Commerce and Chevron had asserted that the CIT had maintained jurisdiction over the question of revocation during the remand to Commerce.[154] Hence, they argued, revocation was simply the CIT-ordered outcome of Chevron's CIT suit—which was *res judicata* and therefore could not be challenged anew in the CIT.[155] When the CAFC rejected this argument, it seemed to Commerce to be saying that the CIT lost jurisdiction over issues remanded to Commerce, and that the result of the remand (revocation) was a new administrative decision which any party to the original administrative proceeding could challenge in the CIT.[156] It would follow that a party to an administrative proceeding could challenge Commerce's determination and obtain a different determination on remand (acceptable to the CIT), which could itself be challenged in the CIT by either the original plaintiff or any other party to the administrative proceeding. Implicitly, the whole process could be repeated indefinitely.[157]

2. Subsequent Interpretation

The courts have not interpreted *Freeport* as broadly in subsequent cases as Commerce feared they might. Both the CAFC and the CIT have ruled that the CIT retains jurisdiction on remand over issues remanded to Commerce, and the CIT has made it clear that issues redetermined by Commerce on remand

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[153] Once a court had decided to rule separately on the validity of the determination in the administrative review and the validity of the determination to revoke, it could also have decided which of these determinations Freeport was permitted to challenge according to the timeliness of the challenge.

[154] The CIT's December 21, 1983 decision in Roquette Freres v. United States, 6 Ct. Int'l Trade 329 (1983), provides authority for this proposition. In *Roquette*, the CIT ruled that the jurisdiction acquired by the filing of the summons and the complaint "is continuing until that action is finally decided." *Id.* at 330. The court held that its jurisdiction "once vested . . . is neither so fleeting nor illusory as to dissipate upon the court's exercise of its inherent discretionary power to require further deliberation by the administrative body." *Id.* at 331.

[155] The CIT decision could only be appealed, and not by *Freeport*, since it was not a party to the CIT action in which the decision was handed down.

[156] The court advised that Congress had not granted the CIT "authority to assume control of an agency case, once that case has come to it for judicial review, and retain control over it regardless of the statutes which the agency must follow." 758 F.2d at 636.

[157] Some additional implications of the theory that the CIT loses jurisdiction over issues remanded to Commerce would be (1) that the CIT lacks authority to enforce its decisions, and (2) to ensure that Commerce performs remands within the deadlines it establishes, except through the filing of a new complaint based on the court's remand.

in accordance with that court's decisions may not be raised anew in the CIT. On the other hand, there is still some doubt about issues which arise in an administrative proceeding that is already the subject of litigation in the CIT, where those issues have not been raised in that litigation. The principal relevant decisions are discussed below.

C. *The CAFC's Decision in* Cabot

The *Cabot* decision[158] arose out of a countervailing duty order against carbon black from Mexico, on which Commerce determined that the Mexican government was conferring a net bounty or grant of 0.88 percent.[159] The Cabot Corporation, a domestic producer of carbon black, challenged Commerce's final affirmative determination in the CIT. The basis of its challenge, *inter alia*, was that Commerce had erred in finding that the Mexican government's provision of feedstock and natural gas to Mexican producers did not constitute a subsidy because they were "generally available" in Mexico at the prices the government had charged. The CIT held in Cabot's favor, and remanded the case to Commerce for a new determination consistent with its holding on the "generally available" standard.[160]

Not wanting to perform a remand under a standard which it subsequently would be seeking to overturn, the government appealed.[161] In support of its argument to the CAFC that the decision was a final and appealable order, the government cited *Freeport* for the proposition that the CIT had lost jurisdiction over the issue of countervailability on remand. Cabot responded that the CIT's decision remanding the case to Commerce was not a final order, because it plainly called for further action by Commerce prior to final action by the CIT.

The CAFC ruled that the CIT's remand decision was not final and that the government could not appeal at that time.[162] The court dismissed the government's *Freeport* argument summarily, explaining only that "*Freeport* did not deal with the appealability to [the CAFC] of a [CIT] order remanding to the ITA."[163]

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[158] Cabot Corp. v. United States, 788 F.2d 1539 (Fed. Cir. 1986).

[159] 48 Fed. Reg. 29,564 (1983).

[160] The CIT ordered Commerce to determine whether the benefit in question, notwithstanding its general availability in Mexico, conferred a "competitive advantage" on the Mexican producers. 620 F. Supp. 722 (Ct. Int'l Trade 1986).

[161] 28 U.S.C. § 1295 provides in pertinent part:

> (a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction
> . . .
> (5) of an appeal from a final decision of the United States Court of International Trade.

The government did not, as the CAFC pointed out, request that the CIT certify the issue for interlocutory appeal under 29 U.S.C. § 1292(d)(1), because it believed that the order was final, not interlocutory. 788 F.2d at 1543.

[162] 788 F.2d at 1539.

[163] *Id.* at 1543.

Since the CAFC did not explain whether the result would have been different if, for example, the foreign respondent had challenged the remand determination in the CIT and appealed a dismissal to the CAFC, it may be that the CAFC simply wished to limit *Freeport* to its facts, or nearly so.[164]

Although *Cabot* stops well short of explaining the uncertainties of *Freeport*, the CAFC did state unequivocally its view that the CIT does not lose jurisdiction over issues remanded to Commerce for redetermination, and that a remand order is not final and appealable "even though [it] resolves an important legal issue such as the applicable standard for countervailability."[165]

D. *The CAFC's Decision in* Badger-Powhatan

A decision handed down by the CIT shortly after *Cabot* confirmed that court's agreement with the latter position. *Badger-Powhatan v. United States* arose from an antidumping duty investigation of brass fire-protection equipment fittings from Italy. The investigation covered seven categories of fittings, all of which Commerce determined were being sold at less than fair value. The ITC, however, determined that only two of the seven categories were injuring U.S. industry. Commerce's final antidumping duty order covered only those two categories for which both dumping and injury had been found.[166] Domestic petitioner Badger-Powhatan challenged the final order in the CIT, arguing that it should have covered all seven categories of fittings. The CIT rejected Badger-Powhatan's argument and upheld the order.[167]

Following its unsuccessful challenge to the scope of Commerce's order, Badger-Powhatan asked the CIT to remand the case to Commerce so that the deposit rate, which is the same as the weighted-average dumping margin, could be recalculated solely on the basis of the two categories of fittings covered by the order. The deposit rate in the original order had been calculated on the basis of all seven categories. Commerce conceded the issue, and joined Badger-Powhatan in requesting a remand for this purpose over the opposition of the Italian manufacturer. The CIT then remanded the case to Commerce with instructions to recalculate the deposit rate on the basis of the two categories of fittings.[168] Commerce performed the remand as ordered and published a final antidumping duty order reflecting the new deposit rate in the *Federal Register*.[169]

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[164] These facts, as the CAFC pointed out, were "unusual," in that Commerce had published a notice stating that *Freeport* was entitled to revocation, but postponing it on grounds unrelated to that administrative proceeding. 758 F.2d at 629. If *Freeport* is limited to these facts, it is narrow indeed.

[165] *Id.* The CAFC repeated this position in its order in Philipp Brothers, Inc. v. United States, Appeal No. 86-1122.

[166] 50 Fed. Reg. 8,354 (1985).

[167] Badger-Powhatan v. United States, 608 F. Supp. 653 (Ct. Int'l Trade 1985) [hereinafter *Badger-Powhatan I*].

[168] Badger-Powhatan v. United States, 633 F. Supp. 1364 (Ct. Int'l Trade 1986) [hereinafter *Badger-Powhatan II*].

[169] 51 Fed. Reg. 17,783 (1986).

When the Italian manufacturer appealed the CIT's order of remand, the Federal Circuit dismissed for lack of jurisdiction.[170] The Federal Circuit concluded, citing *Cabot*,[171] that the remand order was not final,[172] explaining that "the parties will still need to appear before the [CIT] if any of them challenges the amended determination . . . ."[173]

Badger-Powhatan adds substantial confusion to the problem of when remand results become final and appealable. This is because there are two types of remand orders: the CIT may remand a case to Commerce with instructions to make a new determination in accordance with the order and then report back to the court (as it did in *Cabot*); or it may instruct Commerce to publish the new results directly in the *Federal Register* (as it did in *Badger-Powhatan*). Where the CIT orders Commerce to report back, a new order, either affirming or overturning the results, will be produced, providing an occasion for appeal.[174] Where remand results are published in the *Federal Register* directly, however, there is no apparent avenue back to the CIT. Since it is not clear when the CIT order becomes final,[175] the deadline by which an appeal must be brought is also unclear. A new action in the CIT on the same issue would be barred as *res judicata*.

E. *The CIT's decision in* Al Tech

Al Tech Specialty Steel Corp. v. United States[176] was a challenge by a domestic party to an early determination of antidumping duties[177] on tool steel from the Federal Republic of Germany.[178] Al Tech complained that Commerce had failed to adjust the cost of production of one German respondent, ARBED Saarstahl,

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[170] Order of December 29, 1986 (Appeal No. 86-1251).

[171] "This result comports with the policies underlying the finality rule and in particular avoids unnecessary piecemeal appellate review of the legal issue or any other determination made on a complete administrative record." *Cabot*, 788 F.2d at 1543.

[172] 28 U.S.C. § 1295(a)(5) gives the Court of Appeals for the Federal Circuit jurisdiction over appeals from "final decision[s]" of the CIT.

[173] Order of December 29, 1986 (Appeal No. 86-1251) at p. 5. The Court followed this statement with a citation to 19 U.S.C. § 1516a(a)(2), implying that Commerce's determination on remand in *Badger-Powhatan II* would have given rise to an entirely new cause of action in the CIT, involving identical parties and raising the identical issues just litigated in that court. Since such a new action would be barred by *res judicata*, it seems more plausible to read the Federal Circuit's order as requiring simply that the CIT indicate that the issues raised before it may have been finally resolved, so that the parties may appeal (there being nothing left to litigate in the CIT). What this mechanism might be is not apparent.

[174] The Federal Circuit may have thought that this was the case in *Badger-Powhatan I*, since it described the situation there as "strikingly similar" to *Cabot*. In fact, the situation in *Cabot* was different in that the CIT had ordered Commerce to report back.

[175] *See* 28 U.S.C. § 1295(a)(5) (1984).

[176] Al Tech Specialty Steel Corp. v. United States, 633 F. Supp. 1376 (Ct. Int'l Trade 1986).

[177] Pursuant to section 736(c) of the Tariff Act of 1930, 19 U.S.C. § 1673e(c).

[178] 49 Fed. Reg. 29,995 (1984).

to account for a domestic subsidy it had received. Like Freeport in *Chevron*, Saarstahl did not intervene in Al Tech's action in the CIT.

Upon considering Al Tech's complaint, Commerce concluded that it had overlooked the issue during the review and consented to a remand of the case. On remand, Commerce decided that the subsidy should not be added to Saarstahl's cost of production in that case. In addition, however, Commerce discovered and corrected a number of errors in the calculation of Saarstahl's margin, which increased it from 8.09 percent to 19.35 percent. When Saarstahl learned of this increase, it moved to intervene in Al Tech's CIT suit. Commerce opposed the intervention.

Before the CIT, Commerce argued that under *Freeport* the CIT had lost jurisdiction on remand and that Commerce's action was therefore a separate determination. There was thus no ongoing CIT action in which Saarstahl could intervene, and Saarstahl had to bring a new suit to challenge the remand results. The CIT agreed that Saarstahl could not intervene, but not because the court had lost jurisdiction over the remand. Instead, the CIT found that it never had jurisdiction over the recalculation insofar as it related to the alleged error because the issue of those errors had never been brought before it.[179]

The CIT concluded that the new margins resulting from correction of the alleged errors gave rise to an entirely new cause of action. The court also ruled that Commerce's determination not to factor the domestic subsidy into the dumping margin was the remand result, over which it had not lost jurisdiction.[180] Accordingly, it ruled that Saarstahl could not intervene with respect to that issue, since it had not been a party to Al Tech's action. The court distinguished *Freeport* on the basis that Commerce's decision on remand in *Al Tech* (not to adjust for the subsidy) was the same as its original determination, whereas, in *Freeport*,[181] the result (to revoke) was different.[182]

F. *Conclusion*

From the foregoing, it seems clear that the CIT does not lose jurisdiction over issues it remands to Commerce for redetermination, and that orders of remand may not be appealed.[183] It also appears, at least from the CIT cases,

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[179] The court stated that the dumping margin was "a wholly independent act of ITA," having "nothing to do with the case at hand." 633 F. Supp. at 1381.

[180] *Id.* at 1379.

[181] Chevron Ltd. v. United States, 563 F. Supp. 1381 (Ct. Int'l Trade 1983).

[182] 633 F. Supp. at 1379. This basis for distinguishing *Freeport* here seems to follow the CAFC's rationale in *Freeport* that a party to an administrative proceeding need not raise an issue until it is harmed by a determination on that issue. It would follow that, had Commerce taken the subsidy into account and increased the margin, Al Tech would have been free to intervene, even though it had not intervened in the original action raising that precise issue.

[183] Except as certified for interlocutory appeal under 28 U.S.C. § 1292(d)(1).

that remand results, insofar as they merely implement the resolution of issues already litigated before the CIT, may not be challenged anew in that court. Additionally, remand results which finally resolve issues for the first time (or which resolve them contrary to Commerce's initial resolution) create new causes of action in the CIT.

This system seems logical, but it may prove very difficult to implement. First, as described above, there is substantial confusion regarding when remand results become final and appealable. Second, the issues in antidumping and countervailing duty cases are often too complex to be neatly circumscribed and tend to shift on remand. As a result, even if the CIT identifies the issues to be resolved on remand quite clearly, it may not always be possible to discern whether the issues raised by a challenge to the remand results are old or new.

If the courts do not succeed in segregating old issues from new ones, one result will be to nullify the statutory deadlines for challenging Commerce determinations in the CIT.[184] This potential is best illustrated by considering the result in *NEC v. United States*, in which the plaintiffs sought to challenge Commerce's second review of televisions from Japan.[185] The CIT dismissed NEC's suit as untimely,[186] and the Federal Circuit affirmed.[187] The result of the second review of televisions from Japan was also challenged by the domestic petitioner, however, and was subsequently remanded by the CIT to Commerce.[188] In performing the remand, Commerce reached the same basic result, but, because of a slight difference in the way in which the adjustment concerned was made, NEC's margin decreased from 0.86 percent to 0.77 percent.[189]

Under the cases discussed above, it should be clear that the lower margin, once published as final, will not give NEC a new cause of action in the CIT. Even if NEC's margin ultimately should increase substantially because of the issues raised by Zenith in the CIT, NEC should be barred from challenging that action in the CIT because it failed to intervene in Zenith's suit. Only to the extent that NEC's margin in the second review increases because of new factors that were neither present in Commerce's original determination nor raised by Zenith should NEC be able to challenge the remand results, and then only the increase in its final margin over the margin in Commerce's original determi-

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[184] *See* 19 U.S.C. § 1516a (1984).

[185] 50 Fed. Reg. 24,278 (1985).

[186] 622 F. Supp. 1086 (Ct. Int'l Trade 1985); *reh'g denied*, 628 F. Supp. 976 (Ct. Int'l Trade 1986). The action was untimely because of plaintiff's failure to affix adequate postage on the envelope containing the summons.

[187] Slip op. of November 28, 1986.

[188] Zenith v. United States, 633 F. Supp. 1382 (Ct. Int'l Trade 1986). The remand opinion directed Commerce to recalculate its adjustment for a commodity tax imposed on televisions sold in Japan, but not on televisions exported to the United States.

[189] Determination on remand of April 14, 1986.

nation specifically attributable to those new factors. Any other result would be contrary to the Federal Circuit's decision in *NEC*.

VI. OVERVIEW AND RECOMMENDATIONS FOR CHANGE

The issues discussed in this article can be consolidated under the theme of what the courts, the Department, and private litigants think the effect of CIT decisions should be on the antidumping and countervailing duty determinations of the Department. Of course it is the Department's statutorily mandated obligation to investigate, review, and make final determinations on whether parties are subsidizing or selling their exports at less than fair value to the United States and, if so, at what rate.[190] It is the function, also statutorily mandated, of the courts to review the record made by the agency during the administrative proceedings and decide whether a challenged determination is supported by substantial evidence or is otherwise in accordance with law.[191] The court can then either affirm the agency's action or reverse it in whole or in part and remand to the agency for further proceedings consistent with its opinion.

All of this appears to be a fairly straightforward scheme. In practice, however, a great many disputes arise which indicate that private litigants, the Department, and the courts often have very different ideas about the following issues: How broad are the courts' discretionary powers with regard to exhaustion and standing? At what point does an agency determination cease, and a court decision commence, to govern agency action? When should an agency have to perform a remand before it can appeal? What is the effect of an agency redetermination on remand, whether the agency intends to appeal or not? What are the rights of other parties and nonparties with respect to a redetermination?

Even after outlining the issues and the disputes arising from these situations, however, many private litigants may ask "So what?" Why discuss these issues as part of one broad principle which requires consistency and uniformity in its application? Why not let the courts decide these issues on a case-by-case basis, doing whatever seems equitable based on the facts of each case?

It is logical that this case-by-case approach would be acceptable to private litigants. They realize that these issues are neutral in that they do not favor one type of party (i.e., domestic interests, foreign exporters, importers) over another. Attorneys who represent private parties in these cases would rather see these issues remain unsettled and decided case by case because they want the flexibility to argue for the application of the law based on the unique facts of their particular case and be able to win in various circumstances depending on which side of the issue they find themselves. For example, if the courts do not have a

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[190] See 28 U.S.C. § 1581(c) (1986).

[191] 19 U.S.C. § 1516a (1984)

very clear standard of when they will require a party to exhaust its administrative remedies, then, depending on whether the party is the one that failed to exhaust its administrative remedies or the one who will be harmed if the court allows new issues to be raised, the party will argue that its situation either warrants an exception to the requirement of exhaustion or that the facts of the case require exhaustion. Clearly, from the private litigant's point of view, uncertainty in this area has its advantages.

It is also clear that judges do not want to make broad rulings on these procedural matters since they want flexibility to decide these matters based on the facts and the equities of each situation. Of course, the courts' rulings should not be broader than the dispute presented to them. However, by ruling on the procedural questions in a very fact-specific manner, the court is withholding guidance from the Department and private parties, and is encouraging repetitious litigation on these points. Court cases which, while only ruling on the single factual dispute raised in the case before them, explain the broader legal principles on which they rely, provide guidance to agencies and private parties which will allow them to conform their actions to the court's views.

The Department's concerns about the law on these procedural issues involving relationships between the courts and the Department are different from those of the courts or of private litigants. These concerns result from the fact that the Department is almost always the defendant in litigation and from the fact that the Department is continually conducting administrative proceedings in a large number of cases which can be affected by the courts' rulings on these issues. Because they deal with particular cases, the courts rule without addressing how the decision could be applied in the hundreds of other similar situations before the Department. Private parties, even when they lose an issue in litigation, are often only affected in that one case since they may never be in the same situation again.

The Department, on the other hand, will be in the same situation many times in the future. The agency must make decisions every day based on how it believes the courts will rule if the decision is challenged. If the courts state the general principles of law on which they base their decisions, the Department can predict how a court is likely to rule in other similar cases and act accordingly. If the courts are not clear about the principles which they are applying, and instead decide issues on very narrow factual grounds, the Department cannot set up the rules for its proceedings with any certainty and cannot elicit the cooperation of private parties, since they may feel free to ignore the agency and take a chance on setting up a sympathetic fact pattern for the courts.

Aside from the Department's very real need for a degree of predictability from court decisions so that it can take actions that will be upheld, the Department is also greatly concerned about the recent tendency of parties to file contempt of court actions against agency officials and motions for sanctions

because the agency has failed to take some action. Many of these contempt and sanction actions arise in the types of cases that this article has discussed. In an area where decisions are few and often contradictory, or so limited by the facts of the case that they cannot be generalized to other situations, the Department has the burden of attempting to act in accordance with law in the area where the law is very unclear. Because the law is not settled and because these issues involve the very sensitive area of relationships between the courts and the agencies, bad faith allegations and motions for contempt are most often brought up in the context of these matters. While courts and private parties may see no common thread or necessity for discussion and clarification, from the Department's point of view, these issues are the ones that cause the most disruption of its administrative proceedings and are most wasteful of its resources, both in fighting repetitious litigation and in redoing administrative determinations. Although the Department has not been found in contempt, been sanctioned, or been found guilty of bad faith, the mere threat that a private litigant will allege that the Department is ignoring the authority of the court could have a chilling effect on the Department's ability to make good faith arguments when issues involving the relationship between the courts and the agency are involved. Good law in these areas will only come about through adversarial proceedings in which both sides are free to make their views known to the court.

The issues discussed in this article are all part of the broad subject of the relationship of the courts to the agency, the role of the courts in agency proceedings, or the effect of court decisions on agency actions. Each instance reflects the basic issue of the balance of powers between the courts and the Commerce Department. Each of the issues discussed illustrates the problems of knowing clearly what the law is, as well as the difficulties the Department has in attempting to act in accordance with law. In order to focus these issues for discussion and perhaps future legislative and agency action, we summarize below where the law appears to be with regard to each issue and suggest whether changes in legislation or by the agency are needed or whether further court decisions on the issues may resolve any remaining uncertainties.

A. *Exhaustion of Administrative Remedies*

The first issue discussed in this article is the doctrine of exhaustion of administrative remedies. This issue strikes at the very heart of the separation of powers between the court and the Commerce Department. If a party is allowed to raise an issue for the first time in the court proceeding, then there is no administrative record on which to base judicial review. Commerce will always argue for a very strict reading of the requirement of exhaustion. Not to require exhaustion is in most cases to allow the court to take over the function of the Department. Since these cases are subject to review on the record, not requiring

a party to exhaust will result in a remand to the Department to allow the party to raise the issue, allow other parties to comment, and allow the Department to make a determination on the issue. In other words, the Department will have to reprocess the administrative proceeding for the new issue. The Department is required to expend time and limited resources to do something which could have been done in a timely manner during the original administrative proceeding. This disrupts the Department's processing of administrative cases. The situation is even worse if the court decides to entertain the issue but does not remand the issue to the agency; then the court is not applying the proper standard of review and is conducting a *de novo* review of that issue.

As we stated earlier, the CIT has acknowledged the exhaustion doctrine and agrees that it applies to cases under these laws. In some cases, however, the court has used its discretion in applying the doctrine to allow exceptions which, from an agency view, appear to write the doctrine out of existence. In one case[192] the court has required a party to exhaust; in others the court has found a carefully circumscribed exception to exhaustion; and in other cases the court appears to have developed excuses rather than refuse to allow a party to raise an issue for the first time in the court.[193] It is clear that the standard of review in these trade cases clearly supports the requirement of exhaustion in most situations, that the courts have acknowledged that exhaustion applies to these cases, and that the court opinions are varied but still too few in number to suggest any definite trend on this issue. Because of these factors, there is probably no need for a legislative change at this time.

There is very little that the Department can do to affect this doctrine. It is impossible for the Department to make a determination and explain its reasons on the record for each of the hundreds of hidden decisions that may be made in every antidumping and countervailing duty proceeding just in case the court allows a party to raise a question about one of these decisions for the first time in court.

B. *Standing*

The second issue in the court-agency relationship concerns the standing of parties to maintain a lawsuit on antidumping and countervailing duty cases. This issue is very similar to exhaustion in its impact on the Department's proceedings. The effect of allowing someone who was not a party to the proceeding and, thus, does not have standing, to maintain a lawsuit against the

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

[193] *See, e.g.*, Washington Red Rasberry Comm'n v. United States, No. 87-29, slip op. (March 17, 1987); Philipp Brothers v. United States, 630 F. Supp. 1317 (Ct. Int'l Trade 1986); Timken Co. v. United States, 630 F. Supp. 1327 (Ct. Int'l Trade 1986).

Department harms the authority of the Department's proceedings and the rights of other parties who did participate in the administrative proceedings. On this issue it would seem that the government and most private litigants would at least generally agree. It is not in the interest of any of the parties who participated in the administrative process to have a nonparty file an action in court to overturn what they spent a great deal of money and time to achieve at the administrative level. Of course, there will be disagreements over exactly what the standing requirement is in its precise application to specific facts.

The courts have been consistent in their holding that a party cannot sue unless it was a party to the proceeding below. Although the CIT has sometimes drawn the line at a slightly different point from where the Department would have drawn it, these differences have not been of the type that allowed totally new parties who never appeared in the administrative proceeding to appear for the first time in a court challenge. In one case, while completely agreeing with the Department's position that a party who had not been a party to the proceeding did not have standing, the court nonetheless allowed full briefing on the merits of the case and reserved judgment on jurisdiction until it could be determined whether the Department had acted "patently" beyond its authority so that the party could maintain its action under 28 U.S.C. 1581(i).[194] A decision such as this, while acknowledging the standing requirement, almost completely writes it out of the law by allowing an exception which, based on its facts, almost anyone would be able to meet. The exception for actions "patently" beyond the authority of the agency should be limited to extreme situations and not used in a case where the issue is so unclear that a full briefing on the merits is needed before it can be determined whether the agency was acting "patently" beyond its authority.

Decisions such as this weaken the authority of the Department to conduct administrative proceedings and to require interested parties to comply with its rules. Decisions which allow parties to evade the technical requirements of maintaining an action against the Department tell parties that the administrative rules are not really important. It tells parties that they can ignore the Department and bring their complaint to the court because it is more important that anyone with a complaint be heard than that the agency be able to enforce its procedures in its hundreds of cases. The statute is clear that there is a standing requirement and the Department is attempting to clarify further what is meant by "party to the proceeding" in its new regulations.[195] It does not appear, therefore, that legislative or further Departmental changes are needed on this

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[194] Miller and Co. v. United States, 598 F. Supp. 1126, 1130–31 (Ct. Int'l Trade 1984).

[195] 19 U.S.C. § 1516a (1984) provides that a suit may be brought by an "interested party to the proceeding."

issue. We are hopeful that further court decisions will be adequate to settle the issue.

C. *Challenges to Remand Results*

Our third issue, concerning what point in time a CIT decision commences, and an original agency determination ceases, to govern the administrative actions of the agency, is central to our overall theme of the balance of powers between the courts and the agency. This issue must be viewed in the context of the unique nature of antidumping and countervailing duty cases, the continuing entries of merchandise covered by these cases, and the realities of the customs liquidation procedures. The statute clearly takes account of these factors by providing that liquidation of entries shall be governed by the contested agency determination until there is a final court decision inconsistent with that agency determination.[196] This issue should not be viewed as a case of an agency showing disrespect for court decisions. It is only a question of the timing and effectiveness of agency and court decisions.

It is understandable that the CIT would hesitate to rule that the effect of its decisions should be delayed. The CAFC's *Melamine* decision, however, has held that this should be the result when the lower court decision in these antidumping and countervailing duty cases is appealed. In addition, because of the continuing nature of administrative proceedings and the fact that entries of merchandise are continually being made while court cases are proceeding, it is necessary that there be an orderly and identifiable time when court decisions inconsistent with the original agency opinion will commence to govern agency action. This identifiable time should also not result in the back and forth pattern—liquidation/suspension of liquidation, administrative review/nonadministrative review—which causes unnecessary disruption of trade and which encourages parties to file cases even if only in the hope of getting the *status quo* changed for a short time. At the time this article is being written, there are no court rulings other than the *Melamine* decision on this issue. It could be that this issue will not be clearly decided even in the cases pending before the CIT. Since the CAFC in *American Lamb Co. v. United States*[197] has overruled a CIT decision that had overturned the International Trade Commission's preliminary injury standard, and because this is the underlying issue in the other cases[198] where the effect of a CIT decision is at issue, it is possible that those cases will be disposed of on other grounds and the CIT will not rule on the issue in the near future. At this time, therefore, the only judicial interpretation on this issue is that found

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[196] 19 U.S.C. § 1516a (1984).

[197] 785 F.2d 994 (Fed. Cir. 1986).

[198] *See supra* note 98 and accompanying text.

in *Melamine*. The government argues that this case supports its position that when the statute says that a final court decision inconsistent with the agency determination will govern agency action, final means after the appeal process is over.

The position of private litigants on this issue, of course, varies according to whether they are supporting the agency's original interpretation or are opposing it. The party who wins at the CIT would of course like to have that victory translate into immediate agency action while the agency and the party supporting the agency would like the chance to appeal first. As we have pointed out with regard to the Department's position on other issues involving the relationship between the courts and the Department, our position—that the agency determination governs until after a *final*, nonappealable court decision inconsistent with it—is neutral in its application to different types of parties. This is not a "protectionist" or a "free trade" position. If, after filing an antidumping petition, a U.S. industry gets an affirmative ruling from both the ITA and the ITC, and an order is issued, all liquidation of entries of the subject merchandise will be suspended until it is determined whether antidumping duties are due. Under the theory that the CIT decision is final, if the foreign manufacturers challenge the ITA or ITC in the CIT and win a decision that either the ITA or ITC determination should have been negative, then the order would have to be revoked; all entries would be liquidated and could never be subjected to antidumping duties even if the CIT decision is then overturned by the CAFC. The same harm would result to the foreign manufacturers and importers if they first get a negative ITA or ITC determination, which is then overturned by the CIT. The fact that the finality issue is neutral in its impact on domestic and foreign parties suggests that arguments should be based on strict legal principles and the intent of the statute, and not on charges that the Department is making arguments for "policy" reasons. From the Department's view, there can be no doubt that issues of convenience and efficiency play a role in its position. It certainly is more efficient for the agency to expend its limited resources on administering the investigations and reviews with which it is charged rather than on conducting investigations which may never result in any final action because the underlying court decision is reversed on appeal. Administrative convenience, however, is by no means the primary motivation. In fact, from the standpoint of saving resources, it would be better for the Department to revoke orders when the CIT rules that a determination should have been negative because even if this decision is reversed on appeal the Department will have avoided forever the work it would have had to do to review those entries. From the Department's view, however, its position on this issue is the most consistent with the intent of the statute, is neutral in its impact on parties, and is the most reasonable and efficient interpretation. This is an issue which the court needs to address further before legislative or Departmental

changes are proposed. Nonetheless, in these times of stable or declining agency resources, the Department has the responsibility to be prepared to propose to Congress that the wiser use of Commerce resources will follow from the finality decision of *Melamine*.

Another issue which is closely related to the question of when a CIT decision becomes controlling is the question of when the agency can appeal a CIT opinion before completing the remand ordered by the court. To set this question in perspective, it is necessary to understand that the recent CIT and CAFC opinions on this topic responded to the Department's view that the CAFC opinion in *Freeport* meant that the CIT lost jurisdiction of a case after it ruled and remanded the case to the agency to act. Under that theory, it was necessary for the Department to appeal any CIT decision before it acted on the remand or risk losing its right to appeal. It now appears from recent decisions that neither the CIT nor the CAFC interprets the law in this manner. Therefore, the present state of judicial decisions seems to suggest that in most cases when the CIT rules and orders a remand to the Department, the decision cannot be appealed until the remand is reported back to the CIT and affirmed. There are undoubtedly some cases where the CIT's decision would be final and appealable immediately, even though a remand to the agency is ordered. For purposes of this discussion, however, we will examine the situations where the court orders a remand and permission to appeal immediately is denied because the decision is found not to be final. In this situation the question becomes whether the CIT should grant the Department a stay of a remand and allow interlocutory appeal. This question is very unsettled at the present time.

Clearly, the CIT has granted interlocutory appeal and a stay in cases involving the Department. At present, however, it is not clear how the CIT is likely to rule on questions of stays of remands while an appeal is taken. In cases where a remand is merely for the purpose of clarifying an agency position, correcting a procedural error, or making a finding of fact not based on a new legal theory, it will often be the case that the agency should complete the remand before it appeals so that the CAFC has a complete record on which to base its decision. However, when the court's remand orders the Department to apply a whole new theory of law or to develop a new methodology based on an interpretation of the statute with which the agency disagrees, the Department believes it is in everyone's best interest to allow the appeal before the agency is required to comply with the remand.

The Department's position is based on the nature of its ongoing investigative and review functions and the impact of a court decision involving an important legal question on decisionmaking in many other agency cases. When the court makes a decision on a legal issue, such as that the Department's regulation on an exporter's sales price offset cap is invalid, this decision will have an impact in the many other proceedings before the Department. For the Department to

perform the remand and report back to the court would have wasted time. Such was the case in *Silver Reed*, in which the court's decision was clear and results of the remand would not have narrowed the issues any more for the appellate court.[199] In the meantime, the CIT's ruling that one of the Department's regulations was invalid was causing every foreign respondent and importer to argue that the Department could not apply the regulation in its investigation or review. Not wanting to concede the issue, the Department continued to apply the regulation in all administrative cases and the parties filed lawsuits to challenge the application of the regulation. As long as the issue remained pending in the CIT on remand, and until there was a final CAFC opinion, the Department was facing a backlog of court cases and potential remands if it eventually lost the issue at the appellate level. By allowing the immediate appeal of the issue the CIT allowed the Department to get a ruling on a legal issue and thereby stop the flood of lawsuits and the uncertainty that existed with regard to this question. Even if the Department had lost at the appellate level, the interlocutory appeal would still have saved resources for the government and for private parties because the Department would have discontinued the use of the rule in its administrative cases at an earlier date, thereby saving lawsuits and remands. It is the Department's position that when a remand involves a legal issue which will arise in other cases, it is almost always more efficient and equitable for all parties to certify the question for appeal and stay the remand. The uncertainty in all ongoing administrative cases and the proliferation of lawsuits makes a speedy appellate decision in these antidumping and countervailing duty cases a necessity.

As with several of the other issues in this paper, it appears we need more judicial decisions on this issue before we can say with certainty that legislative or administrative changes are needed. When it has decided to appeal, the Department will continue to apply the law as it interprets it in all administrative determinations until the CAFC rules on the issues. To do otherwise would be for the Department to concede the issue in other cases and not be able to appeal it. The Department would not be able to change these determinations if it eventually won the issue in the CAFC in the first case.

Any harm to particular private parties can be minimized. In an administrative determination in which the Department continues to apply its interpretation of the law, a party who believes the Department should have applied the law as the CIT interpreted it in a particular court case will be able to file suit against the Department's determination. The party will be able to move for an injunction to prevent the liquidation of entries based on what it believes is the incorrect

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[199] Silver Reed America, Inc. v. United States, 581 F. Supp 1290 (Ct. Int'l Trade 1984), *rev'd Consumer Products Division, SCM Corp. v. Silver Reed America, Inc.*, 753 F.2d 1033 (Fed. Cir. 1985).

Department interpretation and, if successful, the entries will be liquidated in accordance with the court's interpretation. If the Department does not take the position that it must apply the law as it interprets it until overturned by an appellate court decision, then the government could be forced to make "wrong" determinations in several proceedings which it will never be able to correct even if it eventually wins the issue on appeal.

The final issue in this article is what a remand to the Department means and what are the rights and obligations of all parties in relation to a determination that the Department makes and publishes pursuant to a remand order from the court. The issues in this area are probably the least clear of any discussed in this article. The questions about remands came about as a result of the *Freeport* decision by the CAFC. That ruling made it appear that the CAFC had very different ideas about the role of the CIT after it remands a case to the Department and about the nature of a published remand determination. As discussed in the paper, there have been several court decisions which have attempted to explain or distinguish the *Freeport* decision. Although these opinions have not reconciled *Freeport* with the judicial review framework of the statute, it is perhaps because that decision cannot be justified in any broader context than its own unique facts.

The Department's view of a remand proceeding (since the court has rejected the Department's interpretation of *Freeport* in several discussions) is just about back to where it was before *Freeport*: The court does not lose jurisdiction of the case when it remands to the Department; however, the remand proceeding itself is an administrative matter and the court should not interfere while that is proceeding except for issues concerning timing of the final results to the court. When the final remand results are reported back to the court it will then make its final ruling on the case. When the court affirms the remand results, the Department can appeal the court's final order, including any and all prior interlocutory rulings in the case. This is important because in the final order the court usually affirms what the Department has done even though the Department only reached the result because of the court's prior ruling reversing the Department's determination.

All of this may seem quite obvious to private litigants and they sometimes believe that the Department is inventing problems that will never happen. It has been the Department's experience, however, that in procedural issues involving the courts' review function, if the Department does not challenge ambiguous rulings by raising the issue in other cases the issues will not be clarified. If these issues are not clear, an apparently limited court decision may be used in some future action to deny the Department a right to appeal or to force the Department to take an action with which it does not agree. The Department does not have the luxury of letting small time bombs tick away in obscure cases. Since the Department is always the defendent and presently is involved in nearly

two hundred lawsuits, it is almost certain that when one of these time bombs goes off the Department will be injured. It therefore becomes the Department's burden to test issues in cases so that they will be decided and clarified through other court decisions. The Department will then know what the law is and be able to act accordingly. It is for this reason that the Department interpreted the *Freeport* decision and then attempted to follow it in other cases. The Department forced the court to consider the issue, and even though the Department's view has not been adopted, the Department now has a better idea of how the courts will rule on the issue so that it can perform its remands accordingly. It is less likely to face a creative *Freeport* argument that would change the rules on the Department in the middle of an important case.

The final issue in this paper also deals with the concept of what a published remand determination is and what are the rights of parties to challenge it. The *Freeport* case at first caused the Department concern that a case would never end in the courts because parties who did not intervene in a case could file a new suit against the remand determination if the court overturned the Department. It now appears the courts will not take such a broad view of the rights of parties to challenge a published remand determination. Although the Department will await live cases to decide on a position here, it would appear that there may be circumstances in which the Department would agree that a party could challenge certain aspects of a court ordered remand determination. These aspects could not be issues already challenged and therefore at issue in the court case or issues which existed and should have been challenged within thirty days of the original determination.

The question of exactly what is the court's authority over a remand proceeding and what are the rights of parties to challenge a remand determination in a new court case are far from settled. The CAFC opinion in *Badger-Powhatan* has served only to further complicate this issue. Until there is another CAFC opinion on this issue that actually addresses the problem, it is impossible to know exactly what the court had in mind in *Freeport*. The Department will attempt to follow what it now believes is the law as interpreted by the CIT and the CAFC. Remands will continue to be treated as administrative actions but the final remand results will be returned to the court to be affirmed (or remanded again) before they are published. The Department will continue to argue that there is a very limited right to file a new suit against published remand determinations. Legislative changes would not be easy to fashion in this area since it is very much a question of jurisdiction and the rights of parties to sue.

By our statement of the basis for the Department's positions on the exhaustion, standing, and finality issues discussed in this article, we have necessarily made clear our views on changes we feel the courts and the private international

trade bar should make. There are changes the Department should make as well.

With the exhaustion requirement, the Department demands that parties give it the chance to address an issue before raising the issue in court. The corollary to the exhaustion requirement is that the Department must provide parties with clearly stated and consistently applied rules for timely presentation of issues. If the issue is presented on a timely basis, Commerce must also be willing to explore the issue thoroughly, both to provide parties with a meaningful opportunity to influence the administrative determination, and to preclude a later claim, based on the exhaustion rule, that the Department did not address the issue. The agency needs to keep in mind that the exhaustion rule does not exist to satisfy some *pro forma* need to touch base first with the agency, but to give the agency the opportunity to correct its own mistakes or avoid committing error in the first instance. Such an opportunity avoids needless expenditure of resources on litigation by private parties, the courts, and the Department.

With regard to remands and appeals, we are aware that some have viewed the Department's approach to these subjects as self-serving, or worse. We hope this article has given the reader a better understanding of the purpose behind the Department's positions. On the other hand, the Department must clearly recognize that immediate appeal, or any appeal at all, may delay relief to private litigants if the CAFC affirms. For this reason, the Department should exercise special care in deciding whether immediate appeal and a stay of the remand is appropriate. The agency should examine closely whether its desire for immediate appellate review serves well the purposes we have articulated here.

Further, the Department should ensure that every decision as to whether to request appeal at all is made in the exercise of its most considered judgment. Not every disagreement in legal interpretation between the CIT and Commerce needs to be resolved by the CAFC. Reconsideration by Commerce of its position when the issue next arises, or fuller development of the facts in another investigation, may cause the Department or the CIT to change position. Even if the Department or the court does not alter its position, the reasons may be articulated more completely in the context of differing factual situations. Only when the issue has been fully explored in this manner, or when it is among the fundamental principles of the Department's administration of the law, should the appellate court be called in to resolve the dispute.

We have said that the Department has great respect for the statutory scheme of judicial review. It is the responsibility of the Department to continue to translate that respect into action in its day-to-day relationship with the court.