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Abstract

This Article will present come impressions of the effect on the U.S. International Trade Commission of key elements of the 1979-1980 reforms contained in the Trade Agreements Act of 1979 and the Customs Courts Act of 1980. The reforms established the current system for the judicial review of antidumping and countervailing duty determinations. This Article will first address some of the observable impacts of the judicial review system on the operation of the Commission and will then attempt to examine the operation of the U.S. Court of International Trade as an expert tribunal with first-level appellate responsibility over trade cases. Finally, this article will present views on the potential effects of the current judicial review process on litigants.

THE U.S. COURT OF INTERNATIONAL TRADE AND THE U.S. INTERNATIONAL TRADE COMMISSION AFTER TEN YEARS—A PERSONAL VIEW†

*James A. Toupin**

INTRODUCTION

This Article will present some impressions of the effect on the U.S. International Trade Commission (the "Commission") of key elements of the 1979-1980 reforms contained in the Trade Agreements Act of 1979 (the "1979 Trade Act")[1] and the Customs Courts Act of 1980 (the "1980 Act").[2] These reforms established the current system for the judicial review of antidumping and countervailing duty determinations. This Article will first address some of the observable impacts of the judicial review system on the operation of the Commission and will then attempt to examine the operation of the U.S. Court of International Trade (the "CIT") as an expert tribunal with first-level appellate responsibility over trade cases. Finally, this Article will present views on the potential effects of the current judicial review process on litigants.

As this Article will make clear, the frequency with which the CIT has held the Commission to have erred is not determinative of the effectiveness of the current system of judicial review. The current system of judicial review would have impor-

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† This Article is adapted from a paper submitted to the Sixth Annual Judicial Conference of the U.S. Court of International Trade on November 3, 1989. The paper formed the basis for the Author's participation in a panel discussion at that conference on the subject of how the courts, agencies, and litigants have responded to the judicial review process established by the Trade Agreements Act of 1979 and the Customs Courts Act of 1980. The views expressed in this Article are personal to the Author and do not necessarily represent those of the U.S International Trade Commission.

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1. Codified at scattered sections of 19 U.S.C. (1988) [hereinafter 1979 Trade Act].

2. Codified at scattered sections of 28 U.S.C. (1988) [hereinafter 1980 Act].

tant effects even if Commission determinations were always sustained on appeal. This Article will focus on the effects of the process on the institutions involved rather than on the effects of important substantive decisions. Such an approach renders empirical observations largely impractical and therefore this Article will be informal.

I. *HAS JUDICIAL REVIEW ALTERED COMMISSION DECISION MAKING?*

The 1979 amendments[3] to the Tariff Act of 1930[4] clarified the procedures for making Commission injury determinations in antidumping and countervailing duty investigations reviewable in the CIT.[5] One point that should be made clear is that it is futile to measure the success of judicial review by whether there has been a shift in the outcomes of Commission determinations. The focus should not be on whether Commission determinations now have a greater tendency to favor domestic interests over the importer's interests or vice versa. When Congress spoke about its expectations concerning the substantive effects of the 1979 legislation, it explicitly indicated that it did not intend the amendments to alter the standards the Commission applied in making its injury determinations.[6] Moreover, even if judicial review has made an outcome-determinative difference, that difference would be difficult to measure because of changes in the substantive law since 1979.

A. *Commission Determinations*

The U.S. Congress, in 1979, broadly intended to create greater transparency regarding antidumping and countervailing duty decision making. The U.S. Senate Finance Committee stated that the amendments were intended to provide parties with "increased access to information upon which the decisions of the administering authority and the [Commission] are based."[7] While the statute accomplished this end, in part

3. 1979 Trade Act, 19 U.S.C. § 2501 (1988); 1980 Act, 28 U.S.C. § 1581(c) (1988).

4. Codified at scattered sections of 19 U.S.C. (1988).

5. 1979 Trade Act, 19 U.S.C. § 1516a (1988); 1980 Act, 28 U.S.C. § 1581(c) (1988); *see* S. REP. No. 249, 96th Cong., 1st Sess. 74 (1979).

6. *See* S. REP. No. 249, 96th Cong., 1st Sess. 74 (1979).

7. *Id.* at 251-52.

by requiring the Commission in both its preliminary and final determinations to notify parties "of its determination and of the facts and conclusions of law upon which the determination is based,"[8] this requirement was not in itself an innovation.[9]

The regularization of judicial review required by title X of the 1979 Trade Act provided an important device for clarification of the window of transparency.[10] This influence has exceeded expectations based on the number of times the CIT has held that the Commission has inadequately explained its determination. In several cases, the CIT has remanded determinations to the agency for further explanation when the underlying basis of its determinations were not adequately articulated.[11] In doing so, however, the CIT has not taken the explanation requirement as far as some private litigants have urged. In particular, the CIT has held that the Commission's ultimate conclusions need not be stated in statutory terms so long as its reasoning is clear.[12] Furthermore, the Commission's determinations need not make issue findings on a statutorily enumerated factor of injury analysis simply because parties submitted evidence on such factor.[13] Additionally, the CIT does not require the Commission to respond to every ar-

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8. 1979 Trade Act, 19 U.S.C. §§ 1671b(f), 1671d(d), 1673b(f), 1673d(d) (1988) (all containing this language).

9. *See* Pub. L. No. 93-618, 88 Stat. 2043 (1974); Pasco Terminals, Inc. v. United States, 477 F. Supp. 201, 219 n.14 (Cust. Ct. 1979); *see also id.* at 218-19 (discussing prior law).

10. As the court observed in SCM Corp. v. United States Int'l Trade Comm'n, 404 F. Supp. 124 (D.D.C. 1975), *rev'd*, 549 F.2d 812 (D.C. Cir. 1977), by the late 1970s "[i]mporters [had] long been granted . . . review of affirmative [antidumping] determinations in proceedings before the Customs Court, notwithstanding the absence of specific statutory authority for such review." *Id.* at 130 (citing Imbert Imports, Inc. v. United States, 475 F.2d 1189 (C.C.P.A. 1973) (citing City Lumber Co. v. United States, 457 F.2d 991 (C.C.P.A. 1972))). As for the uncertainties surrounding jurisdiction over the Commission's affirmative determinations in countervailing duty cases on the eve of the 1979 Trade Act, see SCM Corp. v. United States Int'l Trade Comm'n, 549 F.2d 812 (D.C. Cir. 1977); SCM Corp. v. United States, 450 F. Supp. 1178 (Cust. Ct. 1978).

11. *E.g.*, USX Corp. v. United States, 655 F. Supp. 487 (Ct. Int'l Trade 1987); Maine Potato Council v. United States, 613 F. Supp. 1237 (Ct. Int'l Trade 1985).

12. *E.g.*, American Spring Wire Corp. v. United States, 590 F. Supp. 1273 (Ct. Int'l Trade 1984), *aff'd sub nom.* Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985).

13. *E.g.*, Gifford-Hill Cement Co. v. United States, 615 F. Supp. 577, 587 (Ct. Int'l Trade 1985); Jeannette Sheet Glass Corp. v. United States, 607 F. Supp. 123, 130 (Ct. Int'l Trade 1985).

gument presented during the course of its investigations.[14]

Although some private litigants have suggested that this practice is insufficient, the empirical evidence suggests that the discipline of review has at least contributed to making Commission explanations more fulsome.[15] Table 1[16] presents a comparison of determinations issued in the year prior to the effective date of the 1979 Trade Act and determinations issued during the period August 1988 to August 1989. This table reflects the fact that in the past ten years Commission determinations have greatly increased in length. It is the Author's impression that the realization that the CIT judges are now an expected, regular, and significant audience for Commission determinations has contributed mightily to this profusion of words.[17] It stands to reason that commissioners generally do not like to have their findings disapproved as inadequate, and particularly do not like to have to rewrite decisions. This influence has occurred even though some of the CIT's decisions have required the commissioners to expend fewer words.[18]

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14. *E.g.*, Granges Metallverken AB v. United States, 716 F. Supp. 17, 24 (Ct. Int'l Trade 1989); National Ass'n of Mirror Mfrs. v. United States, 696 F. Supp. 642, 648-49 (Ct. Int'l Trade 1988); Empire Plow Co. v. United States, 675 F. Supp. 1348, 1354 (Ct. Int'l Trade 1987); British Steel Corp. v. United States, 593 F. Supp. 405, 414-15 (Ct. Int'l Trade 1984).

15. This term is used in the sense given by definition 1 of Webster's Ninth New Collegiate Dictionary—"characterized by abundance: COPIOUS"—rather than that given in definition 3b—"OBSEQUIOUS." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 497 (1984).

16. Table 1 is reproduced in the Appendix to this Article.

17. Commissioners seldom have occasion to address the influence of court review on their decision making. However, in testimony to the U.S. Senate Finance Committee, Commissioner Eckes stated:

> We don't tend to divide along partisan lines, and I think that is a deliberate effort on the part of Congress and the Executive Branch to create an independent, quasi-judicial agency which can be responsive and evaluate matters on the facts and make decisions that are, after all, going to hold up in court.
>
> We have to be sensitive to the fact that a judge on the Court of International Trade or on the Court of Appeals for the Federal Circuit may reverse us, will review cases involving unfair intellectual property rights or countervailing duty and dumping cases; and I think those factors influence our approach to the law far more than do partisan consideration.

USTR and ITC Budget Authorization for Fiscal Year 1989: Hearings Before the Subcomm. on Int'l Trade of the Senate Comm. On Finance, 100th Cong., 2d Sess. 10 (1988) (statement of Alfred E. Eckes, Acting Chairman, U.S. Int'l Trade Comm'n).

18. *E.g.*, American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984) (finding domestic industry not to be materially injured, Com-

B. *Investigations*

The CIT's influence on the conduct of Commission investigations has been both crucial and appropriately modest. Some years ago, comments in certain CIT decisions gave rise to the apprehension that CIT judges might engage in detailed supervision of the conduct of Commission investigations.[19] However, in view of the holding of the U.S. Court of Appeals for the Federal Circuit in *Atlantic Sugar, Ltd. v. United States*[20] that "[n]othing in the best information rule or its legislative history defines a standard of investigative thoroughness,"[21] the CIT has in fact generally refrained from reviewing the Commission's allocation of resources during its investigations.

As the CIT observed in *Hannibal Industries, Inc. v. United States*,[22] "[i]n challenges to the Commission's investigative thoroughness, the Court has remanded determinations only for failure to *seek* necessary information."[23] Like the Federal Circuit, the CIT has recognized that the Commission faces great difficulties in obtaining information within its short statutory deadlines.[24] The CIT decisions, therefore, recognize that the Commission in many cases can neither obtain every piece of relevant information nor postpone rendering a decision until its information collection is completed. The CIT has not faulted the Commission for failure actually to obtain information, provided that the necessary information was reasonably sought. Rather, the CIT has only remanded cases for lack of an adequate investigation in which the Commission failed to seek information necessary for resolution of the case as the Commission actually decided it.[25]

The effect of this case law is salutary. Within the con-

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mission need not address whether subject imports are cause of injury), *aff'd sub nom.* Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985).

19. *See* Roquette Freres v. United States, 583 F. Supp. 599, 604 (Ct. Int'l Trade 1984) ("It is incumbent on the ITC to acquire all obtainable or accessible information from the affected industries on the economic factors necessary for its analysis.").

20. 744 F.2d 1556 (Fed. Cir. 1984).

21. *Id.* at 1561.

22. 710 F. Supp. 332 (Ct. Int'l Trade 1989).

23. *Id.* at 336 (emphasis added) (citations omitted).

24. *Id.* at 337 (citing Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1560 (Fed. Cir. 1984)).

25. *See, e.g.*, Mitsubishi Elec. Corp. v. United States, 700 F. Supp. 538 (Ct. Int'l Trade 1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990).

straints of the short statutory deadlines, the Commission staff endeavors to seek complete information on the issues that the commissioners may need to resolve. However, the Commission need not be concerned that the CIT will scrutinize every step it takes to see whether data collection might in hindsight have been more effective.

C. *Sources of Law*

It is well known that the Office of General Counsel within the Commission (the "General Counsel") regularly writes predecisional memoranda for the commissioners concerning legal issues raised by investigations. Until recently, the Commission made these memoranda publicly available. Although the CIT has properly held that the General Counsel's views are not binding on the Commission, litigants have occasionally attempted to use these memoranda against the Commission when it appeared that the commissioners did not follow the General Counsel's legal advice.[26]

In the fall of 1986, the Commission decided to assert its privilege not to disclose the advice it received from the General Counsel. In doing so, the Commission asserted rights that the framers of title VII of the 1979 Trade Act had written into law. Both the 1979 Trade Act and the CIT Rules state that the record of investigations may include privileged documents.[27] In every case challenging the Commission's claim of privilege since 1986, the CIT has declined to permit litigants access to those portions of the record over which the Commission has made its assertion of privilege.[28]

General Counsel memoranda thus are no longer a public source of reference. General Counsel lawyers who advise the Commission may now write these memoranda without being inhibited by the concern that litigants may use their advice against the Commission if commissioners do not follow it.

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26. *See* Copperweld Corp. v. United States, 682 F. Supp. 552, 564 (Ct. Int'l Trade 1988) ("Although the Court deems a memorandum from a former official of an agency charged with administration of a statute to be persuasive authority, such a memorandum cannot be held an official pronouncement by the agency of the meaning of that statute.").

27. *See* 1979 Trade Act, 19 U.S.C. § 1516a(b)(2)(B) (1988); CT. INT'L TRADE R. 71(c), 28 U.S.C. app. (1988).

28. *See, e.g.*, USX Corp. v. United States, 664 F. Supp. 519 (Ct. Int'l Trade 1987).

D. *Legislative Change*

Perhaps the most fundamental recent change in the Commission decision making process was a legislative enactment that may be a byproduct of judicial review. The 1979 Trade Act authorized the Commission to release certain business proprietary information under administrative protective order to representatives of participants in Commission proceedings.[29] The Commission's rules provided for access to limited amounts of confidential information during its proceedings.[30] Only on review before the CIT did counsel for litigants gain access to the entire confidential portion of the record.[31]

In part at the urging of members of the private bar, the U.S. Congress has now provided access during congressional investigations to virtually all business proprietary information collected by the U.S. Department of Commerce and the Commission.[32] It appears that members of the private bar, scrutinizing the records that they obtained after filing suit, decided that they could represent their clients more effectively if they could obtain access during the investigations to the confidential facts presented by other participants. These confidential facts may provide substantial evidence on which the CIT will sustain an adverse Commission determination. Advocates may therefore have found that disclosure only at the time of judicial review of business proprietary information in the record, particularly that information supporting other parties' contentions, came too late for them to mount rebuttals.

The lobbying that led to the 1988 amendment[33] can be read in part, then, as evidence of the success of the CIT in adhering to the substantial evidence standard and requiring parties to make their factual cases to the agencies.[34] The Au-

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29. *See* 1979 Trade Act, 19 U.S.C. § 1677f(b)-(c) (1988).

30. *See* 19 C.F.R. § 207.7 (1990).

31. *See, e.g.*, Japan Exlan Co. v. United States, 1 CIT 286 (1981).

32. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 § 1332, 102 Stat. 1207 (1988) (amending 19 U.S.C. § 1677f).

33. *Id.*

34. This result in part reflects the effectiveness of the CIT in adapting its procedures for review of decisions on the record. In an early case, one factor that led the CIT to look to materials beyond the administrative record appears to have been the existence of a discovery phase in the case. *See* Sprague Elec. Co. v. United States, 488 F. Supp. 910 (Cust. Ct. 1980). The case law restricting advocacy to information on the administrative record was quickly clarified. *See, e.g.*, Atlantic Sugar, Ltd. v. United

thor is not competent to judge whether access to the confidential record has improved the advocacy of the bar before the Commerce Department or the Commission. The Author can, however, confidently predict that increased access during investigations will in one respect change the relationship between counsels' advocacy before the Commission and before the CIT. CIT case law clearly requires that if a participant is aware of legal issues raised by the facts of a case during an administrative proceeding, then the participant must raise the issue before the agency in order not to be estopped from raising the issue in court.[35] Increased access during the administrative process will force litigants to frame their cases below or they will not be able to make their cases on appeal.

II. *WHAT ARE THE CONSEQUENCES OF THE DECISION TO ASSIGN JURISDICTION OVER TITLE VII CASES TO A SPECIALIZED, TRIAL-LEVEL COURT?*

A. *Independence and Expertise of CIT Judges*

In granting the CIT exclusive jurisdiction in countervailing and antidumping duty cases brought pursuant to 19 U.S.C. § 1516a, the U.S. Congress regularized an unusual mode of review. It placed responsibility for appeals on the record of title VII decisions in the first instance in the hands of a trial court. The legislative history is not entirely clear as to the reason for this decision, but it appears to have been the result of a recognition that the CIT judges would gain expertise in import matters by virtue of their *de novo* jurisdiction in customs matters, and this expertise would prove useful in deciding trade cases.[36]

There is, it seems to the Author, a natural consequence of this approach, namely, that the judges of the CIT have strong, independently-reached views as to the proper administration

States, 85 Cust. Ct. 128, 131 (1980); Melamine Chems., Inc. v. United States, 2 CIT 113 (1981).

35. *See, e.g.*, Wieland Werke, AG v. United States, 718 F. Supp. 50, 55 (Ct. Int'l Trade 1989).

36. The Senate Report to the 1979 Trade Act makes it clear that the review of antidumping and countervailing duty determinations followed classification and valuation cases to the Customs Court. *See* S. REP. No. 249, 96th Cong., 1st Sess. 249 (1979).

of the trade laws and that the judges are free to disagree with each other.

The legal independence of judges of the CIT has recently been restated by its own reviewing court, the U.S. Court of Appeals for the Federal Circuit. In *Algoma Steel Corporation v. United States*,[37] the court considered arguments that Judge Restani of the CIT had improperly varied from earlier decisions by Judge Newman of the CIT. The Federal Circuit opinion stated that

> among trial courts it is unusual for one judge to be bound by the decisions of another and, if it is to occur, such a rule should be stated somewhere. That is not done here; with all the criticism directed by appellants toward Judge Restani for not following Judge Newman, nowhere is anything pointed out saying she must. She, herself, accepts an analysis of Judge Newman's decisions as precedents which we deem in part mistaken, but she is right in making her own decision nevertheless.[38]

It is integral to this system that agency decision makers will not necessarily view the decision of one judge on the CIT as definitive if that judge's view will not necessarily be controlling in the review of a subsequent agency decision. Whether or not intended by the Congress that established the system, this is a natural consequence of the structure, since commissioners and their counterparts at the Department of Commerce were themselves appointed to become experts in title VII law.

The independence of CIT judges and the exclusivity of the CIT's initial jurisdiction in this respect creates a system of judicial review and administrative response that affords some of the problems and benefits of appellate review in the various

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37. 865 F.2d 240 (Fed. Cir.), *cert. denied*, 109 S. Ct. 3244 (1989).

38. *Id.* at 243. To emphasize the independence of CIT judges is not to say that they do not or should not follow each other's decisions as a matter of stare decisis. In at least one case in which the Commission urged otherwise, a judge of the CIT found that "*stare decisis* counsels the Court to follow the prior decisions" that had been rendered "by two judges of this Court with broad experience in this complex area of law." American Lamb Co. v. United States, 611 F. Supp. 979, 981 (Ct. Int'l Trade 1985). That judge, however, properly certified the disputed question for interlocutory appeal, notwithstanding the consensus that judges who had considered the issue had developed. *See* American Lamb Co. v. United States, 785 F.2d 994, 996-97 (Fed. Cir. 1986).

regional circuits. This result may be a counterpart of the fact that appeal from the CIT lies exclusively in the U.S. Court of Appeals for the Federal Circuit.[39] By making the Federal Circuit the sole circuit court to which appeal may be taken, the U.S. Congress has eliminated one of the traditional rationales for certiorari to the U.S. Supreme Court, namely conflict among the circuits.[40] Generally, CIT decisions resolve disputed legal issues. However, when conflicts appear as a result of CIT decisions, either among the judges or between the judges and the agencies, these conflicts can be resolved in the Federal Circuit.

If the consequences of this system have not always been fully understood, this is in part because the judges of the CIT have not always been explicit about their disagreements. For example, in *USX Corporation v. United States* ("*USX I*")[41] the CIT applied the law concerning cumulation of the effects of imports from various countries prior to the passage of the 1984 mandatory cumulation provision. One CIT judge remanded the Commission's determination in part because the Commission had failed adequately to explain why disparate trends among imports should lead the Commission not to cumulate. A year and a half later, without citing or discussing the *USX I* case, a decision in another case remanded a pre-1984 decision by the Commission to cumulate imports on the grounds that "[i]t is unfair to the plaintiff . . . to have an injury determination based on import statistics covering both Japanese and Italian imports when Japanese imports were decreasing and Italian imports were increasing."[42]

In *USX Corporation v. United States* ("*USX II*"),[43] the CIT specifically observed that firms at times fail to behave as ra-

39. 28 U.S.C. §§ 1292(c)-(d), 1295 (1988).

40. *See* SUP. CT. R. 17, 28 U.S.C. app. (1988) (specifying split in circuits as grounds for review upon writ of certiorari). During the ten years with which this Article is concerned, the Supreme Court has granted no petition for writ of certiorari from appeal of any decision involving the Commission, whether the case has gone from the CIT to the Court of Appeals for the Federal Circuit or has involved instead a Commission determination under 19 U.S.C. § 1337, subject to the direct review of the Federal Circuit.

41. 655 F. Supp. 487 (Ct. Int'l Trade 1987).

42. Asahi Chem. Indus. Co. v. United States, 692 F. Supp. 1376, 1381 (Ct. Int'l Trade 1988), *dismissed as moot*, 727 F. Supp. 625 (Ct. Int'l Trade 1989).

43. 682 F. Supp. 60 (Ct. Int'l Trade 1988).

tional profit maximizers.[44] The CIT, therefore, disapproved a form of injury analysis based in part on assumptions about the behavior of profit maximizers. Two days later another judge reversed a negative preliminary determination of the Commission in part because "[t]he reliance on irrational conduct to explain away economic developments which can be analyzed in a more conventional and traditional way is . . . a sign of arbitrariness in the decisional process."[45] The latter decision did not cite or distinguish the former.

The Author has chosen these two examples of unacknowledged conflicts of opinions only because they do not appear to portend continuing conflicts within the CIT. This is true because the basis for the Commission's cumulation determination reviewed in *USX I* and *Asahi* are now superseded by legislative action and the decision in *Armstrong Rubber Co. v. United States* has been vacated as moot.[46]

Such conflicts reflect predictable institutional characteristics of the CIT. First, the CIT judges have their own views about the law. Second, prior to the issuance of an individual opinion, the CIT judges are not required, as are panels of the U.S. Court of Appeals for the Federal Circuit, to circulate their decisions to the other members of the bench in order to assure consistency with prior statements of the CIT. The Author's complaint with such examples is not that the judges should be in disagreement, which appears to be a function of the structure of the CIT, but rather that their opinions do not always discuss other decisions of their fellow judges with which their opinions can be read to disagree. Thus, individual decisions can falsely appear to set to rest legal issues that the CIT really has left open or, alternatively, by failing to provide rationales as to why apparently conflicting statements are in fact harmonious, the opinions can leave it open to the CIT's audience to find conflicts in the law. Instances of unacknowledged conflict, which are fortunately the exception rather than the rule, tend to defeat one of the advantages of placing the initial review

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44. *Id.* at 67.

45. Armstrong Rubber Co. v. United States, 685 F. Supp. 252, 256 (Ct. Int'l Trade), *vacated*, 887 F.2d 1094 (Fed. Cir. 1988).

46. Armstrong Rubber Co. v. United States, 887 F.2d 1094 (Fed. Cir. 1988); *see* 19 U.S.C. § 1677(7)(c)(iv) (1988).

stage for title VII determinations in a single court rather than spreading review among the district courts.

The Author has speculated that one advantage that the U.S. Congress may have calculated in placing review of title VII determinations in the CIT, which is responsible for the trial of customs matters, was that the judges of the CIT would bring from that latter area of their jurisdiction expertise relevant to the former area. Curiously, one of the few subjects of recent acknowledged conflict among the judges of the CIT concerned one of the few questions in which their customs law experience might most inform their trade law decisions: whether and under what circumstances the CIT may enjoin liquidation of entries pending decision of an appeal of a final title VII determination when the importer has not requested an annual review from the Department of Commerce.[47] In this instance, however, the judges helpfully stated their disagreement.

It would have been difficult to predict, and is still impossible to calculate, whether placing review of title VII determinations in an expert court would lead to greater or lesser deference to the administrative agencies. On the one hand, the judges of a court who frequently review the decisions of an agency are less likely to make intrusive decisions that are based on ignorance of the law or of the exigencies under which the agencies administer the law. On the other hand, judges who are used to reviewing issues under a particular substantive law might regard themselves as experts and, therefore, improperly substitute their judgment for that of the agency to which administration of the statute has been delegated.

This is a question on which, obviously, the jury will forever be out. In cases over the last ten years in which the Commission has appealed decisions of the CIT on the merits to the U.S. Court of Appeals for the Federal Circuit, the Federal Circuit has more often than not agreed with the agency's complaint that the CIT did not properly defer to the agency.[48]

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47. *See* LMI-La Metalli Industriale, S.p.A. v. United States, 720 F. Supp. 176 (Ct. Int'l Trade 1989) (summarizing case law). Since the original presentation of this paper, the Federal Circuit has resolved the conflict. *See* Asociacion Colombiana de Exportadores de Flores v. United States, 916 F.2d 1571 (Fed. Cir. 1990).

48. *Compare* Borlem S.A.—Empreedimentos Industriais v. United States, 913 F.2d 933 (Fed. Cir. 1990) *and* Bingham & Taylor Div., Va. Indus., Inc. v. United

Likewise, over the past ten years when private litigants have appealed CIT decisions affirming Commission determinations on the merits, the Federal Circuit has invariably affirmed the decision.[49]

This is obviously not a fair sample on which to judge the quality of CIT decisions. The sample is too small and the Commission has not invariably appealed CIT decisions with which it reserves the right to disagree, it often being a more orderly way to administer the proceedings in a given case simply to comply with a remand order.[50] Moreover, the Author imagines that private litigants and even individual judges of the CIT do not necessarily assume that decisions of the Federal Circuit, while binding, are of superior quality to those of the CIT. The Author's personal impression is that, while by no means perfect, the CIT generally succeeds at striking the balance.

B. *The Expedition of Decision*

One of the benefits that might accrue from assigning jurisdiction over trade cases to an expert court, rather than to the district courts, is expedition in the rendering of decisions. It is clear that one of the purposes of the 1979 Trade Act was to accelerate decision making by the administrative agencies[51]

States, 627 F. Supp. 793 (Ct. Int'l Trade 1986), *aff'd*, 815 F.2d 1482 (Fed. Cir. 1987) *with* Marsuda-Rodgers Int'l v. United States, Nos. 90-1298 & 90-1316, slip op. (Fed. Cir. Nov. 29, 1990) (reversing Marsuda-Rodgers Int'l v. United States, 719 F. Supp. 1092 (Ct. Int'l Trade 1989)) *and* Chaparral Steel Co. v. United States, 901 F.2d 1097 (Fed. Cir. 1990) *and* American Lamb Co. v. United States, 785 F.2d 994 (Fed. Cir. 1986) *and* Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556 (Fed. Cir. 1984) *and* Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927 (Fed. Cir. 1984).

49. *See* Sandvik AB v. United States, 721 F. Supp. 1322 (Ct. Int'l Trade 1989), *aff'd*, 904 F.2d 46 (Fed. Cir. 1990); Algoma Steel Corp. v. United States, 865 F.2d 240 (Fed. Cir.), *cert. denied*, 109 S. Ct. 3244 (1989); Fundicao Tupy S.A. v. United States, 859 F.2d 915 (Fed. Cir. 1988); American Permac, Inc. v. United States, 831 F.2d 269 (Fed. Cir. 1987); Armco Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985); Border Brokerage Co. v. United States, 646 F.2d 539 (C.C.P.A. 1981); Pasco Terminals, Inc. v. United States, 634 F.2d. 610 (C.C.P.A. 1980); Voss Int'l Corp. v. United States, 628 F.2d 1328 (C.C.P.A. 1980).

50. *See* Molded Pulp Egg Filler Flats from Canada, USITC Pub. 2106, Inv. No. 731-TA-201 (Aug. 1988).

51. "A major objective of this revision of the antidumping duty law is to reduce the length of an investigation." S. REP. No. 249, 96th Cong., 1st Sess. 75 (1979), *quoted in* Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1560 (Fed. Cir. 1984).

and, additionally, to achieve expedition on review.[52] The CIT has acknowledged this policy of expedition.[53]

Nevertheless, the pace of decisions in antidumping and countervailing duty appeals remains a matter of some dispute. In the new United States-Canada Free-Trade Agreement, the governments of Canada and the United States agreed to design binational panel reviews, which can be substituted for judicial review of antidumping and countervailing duty determinations, to be completed within 315 days.[54]

To accomplish such expedition, the rules governing the binational panels[55] dispense with or alter several procedures that are integral to procedures governing antidumping and countervailing duty cases in the CIT. For example, those rules, while requiring a complaint, do not require the filing of an answer as does Rule 12 of the CIT.[56] Whether dispensing with the answer will deprive the panel of a useful device remains to be seen, but the case law of the CIT indicates that answers have limited utility in appeals on the record.[57] Likewise, instead of a rule that provides for entry of a scheduling order within ninety days of assignment of an action,[58] the rules of the binational panel set the dates for submission of briefs within sixty days of the filing and also set the time within which oral argument must be held.[59] Since the time for the filing of plaintiff's motion under Rule 56.1 of the CIT does not usually run until, at minimum, sixty days after the scheduling order, the CIT is seldom, if ever, in a position to require briefing as early as will always occur in the binational panels.

This comparison is not intended to urge on the CIT adop-

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52. "The new provisions contemplate . . . expedited appeals from administrative determinations." S. REP. No. 249, 96th Cong., 1st Sess. 245 (1979); *see* H.R. REP. No. 317, 96th Cong., 1st Sess. 180 (1979).

53. *See* A. Hirsch, Inc. v. United States, slip op. 88-104, at 6 n.2 (Ct. Int'l Trade Aug. 3, 1988).

54. United States-Canada Free-Trade Agreement, ch. 19, art. 1904, ¶ 14, 102 Stat. 1851, 1878, 100th Cong., 2d. Sess. 297, 517 (1988).

55. Rules of Procedure for Article 1904 Binational Panel Reviews, 53 Fed. Reg. 53,212 (Dec. 30, 1988).

56. CT. INT'L TRADE R. 12, 28 U.S.C. app. (1988).

57. *Cf.* Beker Indus. Corp. v. United States, 585 F. Supp. 663 (Ct. Int'l Trade 1984).

58. CT. INT'L TRADE R. 16, 28 U.S.C. app. (1988).

59. Binational Panel Rules 60, 69, 53 Fed. Reg. at 53,220, 53,221 (Dec. 30, 1988).

tion of a system like that of the binational panel. The panel rules would eliminate the flexibility that the CIT has, for instance, to handle preliminary disputes such as whether certain counsel should receive access to business proprietary information under judicial protective order.[60] Likewise, the binational panel rules do not allow the tribunal, even with the consent of the parties, to hold up briefing pending decision of controlling issues in other cases.[61]

Nevertheless, it may be appropriate to raise the question whether the CIT rules themselves build in unnecessary delay inconsistent with the general policy of expedition. Some of the reasons for allowing delay may be historic. As discussed above, in investigations prior to the 1988 amendments to title VII, the parties to Commission proceedings did not have access to at least most of the business proprietary portions of the administrative record until they obtained protective orders on appeal.[62] This reason has now been mitigated, if not eliminated, by the 1988 amendments governing access to business proprietary information during administrative proceedings.

III. *HOW WELL HAS JUDICIAL REVIEW SERVED THE INTERESTS OF THOSE WHO BRING CASES?*

One of the unstated premises of this Article has been that the 1979-1980 reforms of judicial review, by regularizing procedures for appeal of Commission determinations, also increased the importance of judicial review. Table 2[63] presents the percentages, by year, of appealable Commission determinations in antidumping and countervailing duty cases that have in fact been appealed to the CIT. As the table indicates, for the first years after the 1979 Trade Act, appeal rates were relatively low. For several years beginning in the middle of the eighties, however, the rate of appeal remained fairly constant at two-thirds of determinations challenged.

The relatively low rate of appeals in the years 1980-1981

60. *Cf.* A. Hirsh, Inc. v. United States, 657 F. Supp. 1297 (Ct. Int'l Trade 1987).

61. During 1988, briefing in several cases challenging Commission determinations was suspended pending decision by a three-judge panel and then the Federal Circuit in Fundicao Tupy S.A. v. United States, 678 F. Supp. 898 (Ct. Int'l Trade), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988).

62. *See supra* notes 29-35 (discussing Commission practice prior to 1988).

63. Table 2 is reproduced in the Appendix to this Article.

appears to reflect that it took some time before appeals became regarded as a normal aspect of title VII cases. The early low rate of appeal may reflect that trade lawyers were not familiar with the appeal process and only gradually became sanguine about recommending appeals as the law concerning the review function became established.

The Author is puzzled, however, at how high the rate of appeal of Commission determinations became. Appeals of Commission determinations have very seldom accomplished commercial benefit for the clients on whose behalf appeals have been pursued. First, the CIT has historically remanded to the Commission only a minority of determinations. Second, even in response to remands, the Commission's negative determinations have very seldom changed to affirmatives or affirmatives to negatives.

Both of these phenomena should have been predictable. As for the first, the standard of review only requires that the Commission's resolution of factual issues be reasonable and does not require that it be supported by a preponderance of the evidence. Assuming that the commissioners are simply conscientious, one would expect their determinations to be able to meet that standard in the vast majority of cases.

The second phenomenon, that outcomes of determinations seldom change after remands, is a predictable consequence of the nature of the decisions that the 1979 Trade Act calls upon the Commission to make. Both the ultimate yes-or-no determinations that the Commission makes about injury, and most of the underlying findings that it makes to reach those determinations, are based on a consideration of a number of factors, none of which is in itself dispositive. An error in a Commission finding concerning some specific element, or a failure by the Commission adequately to explain a finding, will not generally render the overall determination of the Commission *per se* unlawful. On remand, the commissioners may look at the overall evidence with a corrected view of some element of the analysis and nevertheless reach the same outcome.[64]

64. *See, e.g.*, USX Corp. v. United States, 698 F. Supp. 234 (Ct. Int'l Trade 1988); Alberta Pork Producers' Mktg. Bd. v. United States, 683 F. Supp. 1398 (Ct. Int'l Trade 1988). From the outset, the CIT was clear that "orders of remand [for further

In this respect, the usefulness to clients of the judicial review of Commission determinations stands in contrast to the usefulness of judicial review of the Commerce Department determinations. A Commerce Department dumping margin, for instance, may depend upon resolution of a number of legal and factual issues. A litigant who is successful in challenging the Commerce Department's resolution of only one of those issues may not, in any given case, obtain the reversal of an affirmative determination. Nonetheless, the litigant may obtain a commercial benefit if success on that issue significantly reduces the margin.

What, then, explains that for years more than half of the appealable Commission determinations ended up in court? Certainly members of the private trade bar could offer on this topic better informed hypotheses than can the Author. Nevertheless, the Author wishes to venture three possible explanations: low marginal cost to clients, the desire of clients to present their views another time, and the desire of lawyers to affect the law.

As this Article indicates, there may be commercial reasons to challenge a Department of Commerce determination even when there is little or no chance of obtaining the reversal of the Commerce Department's overall outcome. Having made the financial commitment to sue the Commerce Department, companies may feel that the extra marginal cost to them of also suing the Commission is low enough that the second case ought also to be brought. Likewise, if the pursuit of or response to investigations by the agencies have involved high legal costs, the additional costs involved in an appeal may appear minor. If these factors weigh in their calculation, companies may conclude that an appeal is worthwhile even given the low chance that the Commission's basic determination will change. The Author, however, has no evidence on which to base the conclusion that these calculations actually take place.

If the Author's experience in private practice is any guide, there are also times when clients simply cannot believe that the decision maker did not see the overwhelming persuasiveness of their point of view and may want to pursue the next avenue

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explanation] did not oblige the Commission to arrive at a different substantive result." SCM Corp. v. United States, 544 F. Supp. 194, 196 (Ct. Int'l Trade 1982).

for bringing their argument even if there is virtually no chance of a commercially valuable success. As the CIT observed in the *USX II* decision, businesses do not always make decisions as rational profit maximizers.[65] That clients of trade lawyers are not immune from this penchant seems to be indicated by the frequency with which the Commission faces arguments in court that the commissioners, to decide as they did, must have ignored the substantial evidence supporting the contrary view. Such argumentation, of course, misses the point on at least two scores. First, it is settled past peradventure that substantial evidence may support two conflicting results, both of which would pass muster on review.[66] Second, an agency is presumed to have considered all of the evidence in the record unless there is a specific indication that it did not do so.[67] The CIT, however, is required continually to reiterate these basic premises.

Finally, the evidence in Table 2[68] can be read as indicating that trade lawyers resort to the CIT when it provides the only "game in town" for vindication of their views of the way title VII should operate. In 1988, when consideration by the U.S. Congress of amendments to title VII provided an alternative "playing field," the rate of appeal of Commission determinations was about fifteen percent less than the rate that had prevailed over the previous three years. The point of some appeals, then, may be to vindicate views of the law that will be useful in other investigations. The 1988 fall-off may also in part be attributable to the settling of some legal issues raised by the 1984 amendments to title VII. Nevertheless, the hypothesis, that counsel brought arguments to Congress rather than the courts in 1988 while legislation was pending, is sub-

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65. USX Corp. v. United States, 682 F. Supp. 60, 67 (Ct. Int'l Trade 1988); *see supra* note 44 and accompanying text (discussing fact that businesses are not always rational profit maximizers).

66. *See* Maine Potato Council v. United States, 617 F. Supp. 1088, 1091 (Ct. Int'l Trade 1985); American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984), *aff'd sub nom.* Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985); *see also* Gifford-Hill Cement Co. v. United States, 615 F. Supp. 577, 587 (Ct. Int'l Trade 1985); Jeannette Sheet Glass Corp. v. United States, 607 F. Supp. 123, 130 (Ct. Int'l Trade 1985).

67. *See, e.g.*, National Ass'n of Mirror Mfrs. v. United States, 696 F. Supp. 642, 648 (Ct. Int'l Trade 1988).

68. Table 2 is reproduced in the Appendix to this Article.

stantiated by the fact that the rate of appeals made a significant jump in 1989, to the second highest annual rate in the decade. It appears that passage of the Omnibus Trade and Competitiveness Act of 1988 returned the CIT to the center of argumentation about the administration of the antidumping and countervailing duty laws.

CONCLUSION

The prime purposes for the creation of the current system of appellate review for antidumping and countervailing duty cases was to make the operation of the trade laws more transparent and to impose the discipline of accountability on the decision makers. An understanding of the CIT's success in helping achieve those ends depends upon an understanding of the nature of the institution that the U.S. Congress created. It neither has the primary responsibility for administration of those laws nor is it the final arbiter as to their interpretation. CIT judges are authorized to decide cases independently so that the CIT need not speak with one voice and so that they may decide cases under a deferential standard of review.

So far as the Author can observe, the system is working fairly well. In the Author's experience, the commissioners take seriously the need for transparency and accountability for their views to a reviewing court. The CIT has become an integral element in the development of the trade laws, and the CIT judges have developed such expertise that their decisions, even when not the last word on some issues, greatly enhance that development.

APPENDIX

TABLE 1

AVERAGE LENGTH OF COMMISSION DETERMINATIONS: YEAR PRECEDING EFFECTIVE DATE OF 1979 TRADE ACT AND ELEVEN YEARS LATER*

ANTIDUMPING

	2/79-2/80	8/88-8/89	% change
1. Total pages per investigation:	13.6	70	510
2. Total pages per case:	9.1	37	400
3. Majority's total per investigation:	12.9	36.4	280
4. Majority's total per case:	8.6	19.3	220

COUNTERVAILING DUTY

	2/79-2/80	8/88-8/89	% change
1. Total pages per investigation:	10.3	70.4	680
2. Total pages per case:	8.4	52.8	630
3. Majority's total per investigation:	9.9	29.7	300
4. Majority's total per case:	8.1	22.3	270

* Figures represent all Commission original determinations from February 1979 to February 1980 and August 1988 to August 1989; remand determinations are not included. The effective date of 19 U.S.C. § 1516a was January 1, 1980, but the first Commission determination pursuant to the provision of the Trade Agreements Act of 1979 and its judicial review provision took place in March 1980. *See* Spun Acrylic Yarn from Japan and Italy, Inv. No. 731-TA-1-2, USITC Pub. No. 1046 (Mar. 1980) (replacing AA1921-212, 214).

TABLE 2

RATE OF APPEAL OF COMMISSION TITLE VII INVESTIGATIONS

YEAR	NUMBER OF APPEALABLE CASES	NUMBER OF CASES APPEALED	PERCENTAGE OF CASES APPEALED
1980	77	31	40%
1981	11	4	36%
1982	86	69	80%
1983	46	25	54%
1984	44	26	59%
1985	55	39	71%
1986	60	39	65%
1987	64	42	66%
1988	15	8	53%
1989	94	72	76%