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Accomplishing the Legislative Goals for the U.S. Court of International Trade: More Speed! More Speed!

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Abstract

Part I of this Article describes the congressional goals for the CIT in 1979 and 1980. Part II focuses on the actual performance of the CIT with regard to one of those goals, speedy resolution of antidumping and countervailing duty disputes. Furthermore, Part II documents the level of delay during the four main phases of an initial CIT review of antidumping or countervailing duty administrative determination. Part III examines the supplemental impact of CIT-ordered remands on speedy resolution. Part IV briefly comments on the effect of appellate review of CIT decisions on both speed and certainty in these actions. This Article concludes that more speed is needed in CIT proceedings.

ACCOMPLISHING THE LEGISLATIVE GOALS FOR THE U.S. COURT OF INTERNATIONAL TRADE: MORE SPEED! MORE SPEED!†

*Leonard M. Shambon**

INTRODUCTION

Since the passage of the Trade Agreements Act of 1979 (the "1979 Trade Act")¹ and the Customs Courts Act of 1980 (the "1980 Act"),² judicial review of administrative decisions in antidumping and countervailing duty cases has come to represent a very large portion of the overall activities of the U.S. Court of International Trade (the "CIT"). In the three and three-quarter years from January 1986 through September 1989, 46.3% of all CIT opinions resulted from antidumping and countervailing duty litigation.³ In light of the great importance for the CIT of this work, it is appropriate to examine the success of the CIT in meeting the legislative goals for handling these judicial reviews.

Part I of this Article describes the congressional goals for the CIT in 1979 and 1980. Part II focuses on the actual performance of the CIT with regard to one of those goals, speedy

† 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 views expressed in this Article are personal to the Author.

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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].

3. The Court of International Trade (the "CIT") issued 601 slip opinions in the period January 1986 through September 1989. Of those, 278 opinions were in antidumping ("AD") or countervailing duty ("CVD") cases. The annual breakdown is as follows:

<u>Period</u>	<u>Total Opinions</u>	<u>AD/CVD Opinions</u>	<u>AD/CVD As Percent of Total</u>
1986	142	50	35.2%
1987	146	67	45.9%
1988	177	91	51.4%
1989 (3 Qtrs.)	<u>136</u>	<u>70</u>	<u>51.5%</u>
TOTAL	601	278	46.3%

resolution of antidumping and countervailing duty disputes. Furthermore, Part II documents the level of delay during the four main phases of an initial CIT review of an antidumping or countervailing duty administrative determination. Part III examines the supplemental impact of CIT-ordered remands on speedy resolution. Part IV briefly comments on the effect of appellate review of CIT decisions on both speed and certainty in these actions. This Article concludes that more speed is needed in CIT proceedings.

I. THE LEGISLATIVE INTENT

In 1979 and 1980, Congress set forth the legislative goals for the CIT in the area of antidumping and countervailing duty actions. These goals were: (1) judicial protection of the extensive transparency and procedural rights needed, in Congress' view, at the administrative level in order to control executive branch discretion; (2) increased rights for domestic interested parties to seek judicial redress; (3) uniform judicial review through centralization of review in an expert judicial body, the CIT, and its court of appeals, then the U.S. Court of Customs and Patent Appeals, now the U.S. Court of Appeals for the Federal Circuit; and (4) speedy resolution of judicial challenges through the elimination of *de novo* review.⁴

A. The Trade Agreements Act of 1979

The legislative history of the 1979 Trade Act⁵ contains a number of concrete goals for revamping judicial review of antidumping and countervailing duty determinations.⁶ In addition to the clearly stated interest in increased transparency and procedural rights and in greater opportunity for domestic interested parties to seek judicial review, there was a congressional interest in speed and uniformity of judicial decision-making. The report of the Ways and Means Committee of the U.S. House of Representatives (the "House Report")⁷ is the most interesting piece of legislative history in this regard. The

4. H.R. REP. NO. 317, 96th Cong., 1st Sess. 179-81 (1979); S. REP. NO. 96, 96th Cong., 1st Sess. 245-52 (1979); S. REP. NO. 466, 96th Cong., 1st Sess. 1-4 (1979); H.R. REP. NO. 1235, 96th Cong., 2d Sess. 20, 28-30 (1980).

5. 19 U.S.C. § 2515 (1988).

6. See, e.g., H.R. REP. NO. 317, 96th Cong., 1st Sess. (1979).

7. *Id.*

House Report pointed out that the legislation eliminated *de novo* judicial review of antidumping and countervailing duty determinations because *de novo* review was "both time consuming and duplicative."⁸ *De novo* review was no longer needed because the legislation increased access to information at the administrative level and required the creation of a record for appeal.⁹ In place of the standards associated with *de novo* review, the 1979 Trade Act provided for "a standard of review whereby the administrative level determination is upheld unless unsupported by substantial evidence on the record."¹⁰ The House Report went on to say that:

A further advantage of requiring an evidentiary record and review on that record would be the reduction in redundant proceedings. Under present procedures, the importers and foreign manufacturer/exporters, whose interests are generally aligned, have three separate opportunities to present their claim: first, when the foreign manufacturer/exporter supplies Treasury, both during the fair value investigation and during the assessment phase, with home market data; second, when the importer protests an assessment of dumping duties; and third, when the importer seeks *de novo* review in the Customs Court of a denial of his protest. At each stage, new evidence may also be presented.¹¹

In addition to abolishing *de novo* review, the 1979 Trade Act accelerated the judicial review procedure by permitting any party with standing the right to challenge judicially an administrative determination. The challenge was to be filed within thirty days of notice of that determination. Judicial review no longer had to await liquidation, protest, and the two years that the U.S. Customs Service might take to consider the protest.¹²

B. *The Customs Courts Act of 1980*

The legislative history of the 1980 Act¹³ echoes the congressional themes found in the 1979 Trade Act. The report of

8. *Id.* at 181.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. 28 U.S.C. § 1581 (1988).

the Senate Judiciary Committee¹⁴ accompanying the Customs Courts Act of 1979 (the "1979 Act")¹⁵ stressed among its purposes the need for speed and uniformity of decision-making:

[C]larification of jurisdiction [consolidating jurisdiction with the CIT and away from the district courts] will eliminate the possibility of conflicting decision on any one point of dispute. This, coupled with their current expertise in the area, would enable the customs courts to render extremely expeditious decisions in matters which are important to both our country and to our trading partners.¹⁶

The consolidation would assure

our trading partners that administrative determinations in this area will be subject to judicial review only by a limited number of courts which are in a position to render expeditious decisions. The clarification and expansion of the customs courts' jurisdiction is warranted not only because it will eliminate the considerable jurisdictional confusion which now exists, but because of two other important considerations: considerations of judicial economy, and the need to increase the availability of judicial review in the field of international trade in a manner which results in uniformity without sacrificing the expeditious resolution of import related disputes.¹⁷

The report of the Committee on the Judiciary of the U.S. House of Representatives¹⁸ accompanying the House bill¹⁹ contained similar statements of purpose.

II. *SPEED: FROM START TO FIRST DECISION ON THE MERITS*

Part I of this Article enumerated four legislative goals.²⁰ The legislation itself and the CIT's subsequent activities (in concert with the activities of the U.S. Department of Commerce and the U.S. International Trade Commission (the "ITC")) have since largely accomplished the first two. Cer-

14. S. REP. NO. 466, 96th Cong., 1st Sess. (1979).

15. S. 1654, 96th Cong., 1st Sess. (1979).

16. S. REP. NO. 466, 96th Cong., 1st Sess. 3-4 (1979).

17. *Id.* at 4.

18. H.R. REP. NO. 1235, 96th Cong., 2d Sess. 29 (1980).

19. H.R. 7540, 96th Cong., 2d Sess. (1980).

20. See *supra* note 4 and accompanying text.

tainly when compared with the pre-1980 era there is now substantial administrative transparency and procedural protection in antidumping and countervailing duty proceedings for both domestic and foreign parties affected by the actions of the Department of Commerce and the ITC. With regard to the third legislative goal, uniformity of judicial decisions, that goal was largely met by making the CIT the exclusive jurisdiction for initial judicial review. It is the fourth goal, speedy resolution of actions, that has been least accomplished. The parties involved are better off than in the era of protests and *de novo* review, but review based on the administrative record, with its substantial evidence standard for review, has fallen far short of being speedy.

In order to evaluate the amount of time that the CIT takes to dispose of a judicial challenge to an antidumping or countervailing duty administrative determination, this Article first reviews the activities in the period leading to the CIT's initial decision on the merits. This period (referred to in this Article as Round One) encompasses all activity from the month of commencement of the judicial review, by means of the filing of the summons, through the month of the initial decision on the merits, usually through a ruling on a Rule 56.1 motion.²¹

At the end of Round One, there are two possible outcomes: (1) a final dispositive decision on the merits, or (2) a remand to the relevant administrative agency. If the judge makes an initial decision to remand an action back to the relevant administrative agency, Round One will be followed by Round Two. Round Two encompasses the period from the judge's remand order to the date of the judge's next decision on the merits. Usually this decision affirms the remand results or mandates a second remand. There have been a few instances of actions involving a Round Three, initiated by a second remand.²²

Table 1 sets out each step in the Round One process with the associated time permitted under the CIT's rules or currently assumed by observers of the CIT as reasonable for the particular activity.²³ Based upon the schedule in Table 1, the

21. See CT. INT'L TRADE R. 56.1, 28 U.S.C. app. (1988).

22. See *infra* notes 45-49 and accompanying text (discussing impact of remands).

23. See Table 1, reproduced in the Appendix to this Article.

initial decision on the merits would occur 14.7 months after commencement of the action, assuming both an oral argument and post-hearing briefs.²⁴ Even if actions were disposed of according to this schedule, they would take too long. In fact, the data shows that few cases meet the schedule described in Table 1.²⁵

To learn the actual amount of time needed for Round One, the Author measured its length in each of the 112 antidumping and countervailing duty actions having Round One decisions during the period January 1986 through September 1989.²⁶ The median length of Round One during that 3.75-year period was twenty-two months.²⁷ Table 2 contains a summary of the Round One dispositions that were made during each year of the period, the median length of Round One for each year and for the whole period, and the comparable mean figures. Because the very long delays in several actions skew the picture for all of the actions, particularly in 1988 and 1989, the median figures are preferable to the mean values for use in the analysis. In some of the actions, it has taken over five years, and in one over eight years, for the initial disposition to occur.²⁸ Having noted the preferability of the median figures, it is also worth noting that the length of Round One varies widely from one action to another.²⁹ The median figures thus can best be viewed as central tendencies rather than strong predictors of the length of time that Round One takes.³⁰

Using the median figure of twenty-two months for the full

24. If there were no oral argument, the scheduled day for decision would be Day 340, 11 months after commencement.

25. Compare Table 1 with Table 2, reproduced in the Appendix to this Article (empirical data suggests schedule not being met).

26. See Table 2, reproduced in the Appendix to this Article.

27. See *id.* This figure was calculated by the Author. To arrive at these figures the Author took the length of time for each decision and calculated a mean and a standard deviation.

28. Several of these actions are beginning to look like *Jarndyce and Jarndyce*: Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. . . . Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it.

C. DICKENS, *BLEAK HOUSE* 4 (Oxford Univ. Press 1971).

29. See Tables 2 & 3, reproduced in the Appendix to this Article.

30. See Graphs 1-5, reproduced in the Appendix to this Article. The graphs list the individual Round One dispositions by the CIT, and the length of time needed for each disposition, for each year and the aggregate 3.75 years.

3.75-year period, the time to first decision may be quite respectable when compared with the time required for judicial review by other federal courts of other types of administrative actions. When compared with the legislative intent of the 1979 Trade Act and the 1980 Act, however, it is too slow. Legislative benchmarks in the 1979 Trade Act show a clear expectation of speedy resolution. For instance, the absolute maximum time permitted by statute for an antidumping investigation is fourteen months (420 days).³¹ The anticipated time for a section 751 review³² is one year.³³ It is difficult to believe, therefore, that the U.S. Congress, in providing for judicial review, desired that the review process take almost two additional years, at least 1.5 times the length of time for the underlying administrative activity, before an initial judicial decision on the merits would occur.

Further, if the litigants wanted the Department of Commerce in the subsequent section 751 review to follow judicial precedent emanating from earlier stages of the same administrative proceeding, the twenty-two months for Round One would probably be too long for the Commerce Department to do so. Because timely decisions are not made in Round One, the result is multiple judicial challenges to the same Department of Commerce practices. Indeed, the twenty-two month figure demonstrates that the kind of situation seen in *Fundicao Tupy S.A. v. United States*,³⁴ *OKI Electric Industry Company v. United States*,³⁵ and other cases³⁶ may occur frequently in the future.³⁷

31. An ordinary antidumping investigation is to last a little over nine months (280 days), and a countervailing duty investigation a little under seven months (205 days).

32. 19 U.S.C. § 1675(a) (1988).

33. *Cf. id.* § 1675(a)(1); H.R. REP. NO. 1156, 98th Cong., 2d Sess. 181 (1984). While the text of the statute does not expressly mention one year as a specific time frame, it is the Author's experience that one year is an implied standard.

34. 669 F. Supp. 437 (Ct. Int'l Trade), *motion granted*, 671 F. Supp. 27 (Ct. Int'l Trade 1987).

35. 669 F. Supp. 480 (Ct. Int'l Trade 1987).

36. *See, e.g.,* Cambridge Lee Indus., Inc. v. United States, 723 F. Supp. 1518 (Ct. Int'l Trade 1989); *cf. Asociacion Colombiana de Exportadores de Flores v. United States*, 704 F. Supp. 1114 (Ct. Int'l Trade 1989).

37. *See* 19 C.F.R. §§ 353.22(a) & (e), 355.22(a) & (g) (1990). The deadline for requesting a first section 751 administrative review is twelve months after the month of the original antidumping or countervailing duty order. *Id.* If a party fails to ask for a review, the Department of Commerce automatically assesses the affected entries at the rate of cash deposit required at the time of entry of the merchandise. *Id.*

It may result in parties either seeking injunction of automatic assessment, or alternatively being forced to undergo a section 751 review to keep their challenges to initial agency determinations meaningful.

To identify the particular activities of Round One that might cause the slippage, Round One can be divided into four phases. Responsibility for Phase 1, from the filing of the complaint to the filing of the administrative record, rests with the agency whose action is the subject of judicial review. The speed of Phase 2, from the filing of the administrative record to the filing of the plaintiff's motion for judgment on the agency record, is largely within the joint control of the plaintiff and the defendant. It is, however, at this stage that the plaintiff can lose control over the shape and speed of the litigation through motions to intervene or motions to dismiss. Phase 3, from the filing of the plaintiff's motion for judgment on the record to either the filing of the last brief or the oral argument, is controlled by the litigants. The judge obviously is responsible for Phase 4, the issuance of the decision.

To examine the contributions of each of these four phases to the overall delay, the Author examined the docket sheets for a sample of forty of the 112 actions with Round One decisions during the January 1986-September 1989 period.³⁸ The length of Round One for each of these forty was within the range of nineteen to twenty-five months, that is, within plus or minus three months of the median value of twenty-two months for all 112 actions. Table 3 sets out the actual experience in each phase in the forty actions, using median values for each phase.³⁹

As is evident in Table 3, Phase 1, which is scheduled in Table 1 to take forty days, in actuality took two months.⁴⁰ Phase 2, which is scheduled in Table 1 to take a little over four months, in fact took six months.⁴¹ Phase 3, which is scheduled

38. See Table 3, reproduced in the Appendix to this Article.

39. *Id.*

40. *Id.* After review of all forty docket sheets, there appears to be no significant problem with delays beyond the Table 1 schedule in the filing of the administrative record by either the ITC or the Commerce Department. Most were filed in two or three months. The Commerce Department does seem to have a habit of filing numerous requests for short (usually two-week) extensions of time for filing the record, which may create the impression of great delay.

41. *Id.*

in Table 1 to take anywhere from two to five and a half months depending on whether there is an oral argument, in fact took seven months.⁴² Finally, Phase 4, where the benchmark is three months, in fact took five months.⁴³

In sum, all four phases contributed somewhat to the delays past the benchmark schedule in Table 1. The bulk of the delay was the result of the second, third, and fourth phases.⁴⁴

III. REMANDS: ROUNDS TWO AND THREE

The overall delay in Round One does not fully reflect the CIT's failure to meet the legislative goal of speedy resolution of the dispute. It is exacerbated by the time needed by the agencies for further consideration during remands and the time needed for judicial review of those remand results. As can be seen in Table 4, the likelihood of one remand is significant.⁴⁵

In actions where Round One has ended with a remand, the time from the month of remand to the month of (1) approval of the agency's remand results, (2) the vacating of the remand order, or (3) an order for a second remand constitutes a second round of activity. Table 5 describes the length of time needed for Round Two during the three periods from 1986 through 1988.⁴⁶ The median time for Round Two during the three years was six months. Round Three assumes a second remand. It begins with the month of the second remand and ends with the month of approval of the additional remand results. There are instances of Round Three ending with either a settlement of the case or the ordering of a third remand. Those decisions are also included in the analysis. Table 6 describes the time needed for Round Three during the

42. *Id.*

43. *Id.*

44. *Id.*

45. See Table 4, reproduced in the Appendix to this Article.

46. See Table 5, reproduced in the Appendix to this Article. The Author has not included the three quarters of 1989 because the median length of time for Round Two for the first three years is longer than the period available for analysis of any remand in most of 1989. Therefore, the three quarters of 1989 would have presented a skewed picture of only those remands completed faster than the median value.

same three years.⁴⁷ The median time for Round Three during the three years was five months.

The median length of time for disposing of an initial remand or even a second remand is not surprising. Not only do the agencies regularly take sixty to ninety days to file their remand results, the parties can then ask for the same protective order access, briefing, and oral argument opportunities on the remand results as they had with regard to the original Rule 56.1 motion. If the Round One decisions were occurring in eleven to fifteen months, an additional six months for a remand might be tolerable. Recognizing also that a remand can involve as much work for the agency as the original decision that was subject to judicial review, it is questionable whether the full time allotted for judicial briefing and argument are really necessary in the limited context of reviewing a remand result.

Remanding itself is well-accepted as the appropriate judicial response to an improper agency decision.⁴⁸ In the normal course of events, the CIT, like all courts reviewing the actions of administrative agencies, is expected to remand to the

47. See Table 6, reproduced in the Appendix to this Article. As with Round Two, the Author has not analyzed 1989 remands. See *supra* note 46.

48. See, e.g., C.H. KOCH, *ADMINISTRATIVE LAW AND PRACTICE* §§ 8.7, 8.12 (1985). The remand mechanism, however, has not been completely free of criticism. For instance, in 1965, Professor Louis Jaffe wrote that

[t]he most usual form of judgment adverse to an agency is a remand "for such proceedings, not inconsistent with this opinion, as may be appropriate." This is the form of remand where doctrine has been insufficiently formulated or the findings are inadequate, where doctrine appears to have been inconsistently or improperly applied, or (the largest category) where an irrelevant element has been considered or a relevant element has been neglected. In a number of famous cases the remand has achieved no more than new rationalization for the same result. Is a remand thus futile because the agency will adhere stubbornly to that which it has once willed? There is no doubt that to some extent such an attitude is at work. I would suggest by way of mitigation the hypothesis that when another case comes before it, the agency will be more disposed to follow the judicial admonition. In other words, the effectiveness of judicial supervision should be judged not only in terms of the case in which the correction was administered, but in its effect on doctrine in the long run. This is as I have said an hypothesis for investigation. It would require a detailed examination of particular doctrines announced by the courts to determine the effect of a judicial correction on subsequent administrative behavior.

L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 589 (1965) (footnotes omitted).

agency in the event that the court does not find proper interpretation of the law or substantial evidence to support the agency decision. The frequency of remands, however, is troubling.

The remand frequency may be attributable to several causes. New statutory provisions adopted in 1979, 1984, and 1988 presented many purely legal issues to be resolved. Similarly, in many instances the first application of the new legal standards to factual situations deserved the CIT's oversight. The much lower rate of remand in 1989 may indicate that the administration of the antidumping and countervailing duty laws is now settling down. Nonetheless, the statistics for likelihood of remand should be carefully watched. A return to the frequency of 1987 and 1988 would indicate a significant problem in the agencies' administration of the laws or in the CIT's oversight review of the decisions of the agencies.⁴⁹ In any event, the CIT should ask itself whether a remand in an action is truly necessary, and whether the basic outcome of the action will be substantially improved through the deferral of the final determination by one or more remands. The affected businessmen, the plaintiffs and intervenors, are not ordinarily interested in whether the cash deposit rate should be twenty-five percent rather than twenty-seven percent. They are not interested in perfection over certainty. Similarly, while the agencies have no financial stake in the outcome, they have (or should have) a strong interest in obtaining certainty in order to facilitate their administration of the antidumping and countervailing duty laws.

IV. APPELLATE REVIEW

The U.S. Congress in enacting the 1979 Trade Act and the 1980 Act expressed a general concern about judicial review being repetitive and potentially inconsistent with prior U.S. Customs Service consideration. The legislation cured a significant portion of the problem by switching away from *de novo* review, thus eliminating one level of delay and conflict. At the same

49. Second remands may well be viewed as the result of insufficiently directed first remands. Certainly, the private litigants (the plaintiffs and intervenors) are not well served, and the resources of the Department of Commerce and the ITC are not well spent if an action drags on through multiple remands.

time, the legislation did not address the peculiar structure for judicial review of customs and international trade actions, namely the existence of a two-tiered judicial review mechanism that predates the 1979 Trade Act.⁵⁰ The necessity for judicial review by both the CIT and the Federal Circuit must be dispassionately assessed. While the Author has not attempted to measure the time added through appeals to the Federal Circuit, the potential for significant delay of final judicial dispositions is obvious.

The two-tiered structure may also encourage the parties to "forum shop."⁵¹ Realistically, the agencies may follow judicial direction more quickly and more explicitly if additional opportunities for appeal did not exist. Further, a single court that always sits in three-judge panels should be seriously considered. The agencies would then have no reason to believe that there would be a "better" answer before another judge of the same court.

CONCLUSION

During the past several years, there has been a significant decline in the number of antidumping and countervailing duty petitions filed by U.S. industry. In addition, parties have increasingly decided not to cooperate with the Commerce Department in its data gathering and analysis.⁵² There also have

50. Of course, the hypothetical review system has three tiers, but the third tier (the U.S. Supreme Court) is not really relevant. For virtually all cases in this area, the Supreme Court would most likely deny the writ of certiorari.

51. The agencies are unwilling to follow the instructions of a single CIT judge. In a recent final results of review in *Television Receivers from Japan*, 54 Fed. Reg. 35,517, 35,519 (Aug. 28, 1989), for example, the Department of Commerce rejected Zenith Electronics Corporation's request that the Department of Commerce implement the CIT ruling in *Zenith Electronics Corp. v. United States*, 633 F. Supp. 1382 (Ct. Int'l Trade 1986). Under the ruling, the Department of Commerce was to add indirect taxes to the U.S. price only to the extent that they are passed through and included in the price in the home market. The Department of Commerce stated that it did not agree with the CIT but had not had the opportunity to appeal on the merits. 54 Fed. Reg. 35,519, 35,520-21. In the same notice, Mitsubishi argued that the Commerce Department should not deduct direct selling expenses from U.S. price but rather should follow the CIT's ruling in *Timken Co. v. United States*, 673 F. Supp. 495, 506 (Ct. Int'l Trade 1987), and make a circumstance of sale adjustment to Foreign Market Value for the difference. *Id.* The Department of Commerce commented that it disagreed with the CIT ruling in *Timken* and was addressing the issue in a remand in that case as well as litigating it in *Zenith*.

52. See, e.g., *Commerce Department's Preliminary Determination of Sales at Less Than Fair*

been frequent instances of private parties to an antidumping or countervailing duty investigation, or to a section 751 review, choosing not to exercise their rights to judicial review even though their cases against the U.S. government may have been strong.

There are good business explanations for the decline in the use of, and participation in, antidumping and countervailing duty proceedings. There is also, however, noticeable disenchantment with the length of time and the expense involved in these proceedings and with the lack of certainty at the apparent end of the investigation or particular review. A major contribution to the declining interest in these laws comes from the prolonged period that it takes for judicial review of agency action.⁵³ In short, the basic legislative goal for speedy and certain outcomes has not been accomplished.

It may be that the legislation was inherently flawed in its attempts to reach speedy resolution because of its parallel efforts to increase the accuracy of the determinations by the agencies. Certainly the two agencies, particularly the Department of Commerce, are under increasing pressure to simplify their investigations. There are many voices, including the Author's, calling for a rougher form of justice at the administrative level in order to promote speedier as well as less costly disposition. Similarly, the CIT could consider using a rougher standard of justice in its judicial review activities.

Yet even without sacrificing the existing legislative goals for precision, there should be a concerted effort to speed up the process of judicial review. The CIT might well consider publishing new benchmark time limits in the CIT rules. It is the Author's view that the CIT should consider benchmarks for Rule 16 scheduling of the review of protective order material and for Rule 56.1 motions. Similarly, the briefing schedule rules could be structured to minimize extensions of time. Significant improvement will require *cooperative* reexamination by all of the participants—the agencies, the CIT, and the private

Value: Certain Small Business Telephone Systems and Subassemblies Thereof From Japan, 54 Fed. Reg. 31,978, 31,979 (Aug. 3, 1989) (notifications of Toshiba and Matsushita Corporations to Commerce Department that they were withdrawing from participation in investigation).

53. Also contributing to the decline is the uncertainty that the agency will follow judicial directives even if the party prevails in its judicial challenge.

litigants (*i.e.*, the trade bar)—of their respective contributions to the delays and uncertainties.

APPENDIX

TABLE 1

STANDARD TIMES FROM SUMMONS
TO FIRST DECISION ON THE
MERITS

	Day 0	—	Summons is filed.
(Phase 1)	Day 30	—	Complaint is filed (CIT Rule 3(a)(2)).
	Day 45	—	Action is assigned to a particular judge.
(Phase 2)	Day 70	—	Administrative record is filed (CIT Rule 71(a)).
	Day 90	—	Answer to complaint is filed (CIT Rule 12(a)).
	Day 135	—	Scheduling conference is held and scheduling order is issued; protective order materials are released.
(Phase 3)	Day 195	—	Motion for judgment on the agency record is made (CIT Rule 56.1), after review of protective order materials.
	Day 230	—	Response briefs are due (CIT Rule 56.1(d)).
	Day 250	—	Reply briefs are due (CIT Rule 56.1(d)).
	Day 275	—	Order is issued granting oral argument.
(Phase 4)*	Day 305	—	Oral argument occurs.
	Day 335	—	Transcript is made available.
	Day 350	—	Post-hearing briefs, if any, are due.
	Day 440	—	Judge's opinion is issued.

* If there is no oral argument, then Phase 4 begins with the filing of the reply briefs. If there is an oral argument and the judge permits post-argument briefing, then Phase 4 begins with the filing of the last brief on the merits.

TABLE 2

ANTIDUMPING & COUNTERVAILING DUTY
INITIAL DISPOSITIONS ON THE
MERITS (ROUND ONE)*

<u>Period</u>	<u>Number</u>	<u>Median Time to Issuance</u>	<u>Mean Time to Issuance</u>
1986	17	20 months	19.7 months
1987	29	24 months	25.6 months
1988	39	21 months	28.7 months
1989 (3 Qtrs.)	<u>27</u>	<u>24 months</u>	<u>28.3 months</u>
OVERALL	112	22 months	26.5 months

* The standard deviations and ranges for the four periods are as follows:

<u>Period</u>	<u>Standard Deviation</u>	<u>Range</u>
1986	6.7 months	7 - 31 months
1987	10.8 months	10 - 52 months
1988	21.1 months	2 - 98 months
1989 (3 Qtrs.)	<u>15.9 months</u>	<u>9 - 64 months</u>
OVERALL	16.1 months	2 - 98 months

For a normal (Gaussian) distribution, approximately two-thirds of the observations fall within \pm one standard deviation of the mean, and approximately ninety-five percent of the observations lie within \pm two standard deviations.

TABLE 3

LENGTH OF THE FOUR PHASES OF ROUND
ONE — 40 ACTIONS*

<u>Period</u>	<u>Median Length Phase 1</u>	<u>Median Length Phase 2</u>	<u>Median Length Phase 3</u>	<u>Median Length Phase 4</u>
1986	2 months	8 months	3 months	6 months
1987	2 months	4 months	7 months	5 months
1988	2 months	7 months	9 months	3 months
1989 (3 Qtrs.)	<u>3 months</u>	<u>4 months</u>	<u>5 months</u>	<u>8 months</u>
<u>OVERALL</u>	2 months	6 months	7 months	5 months

* The number of actions analyzed were fairly well spread over the full 3.75-year period:

1986	—	7 actions
1987	—	11 actions
1988	—	13 actions
1989 (3 Qtrs.)	—	9 actions

TABLE 4
LIKELIHOOD OF ONE REMAND

<u>Period</u>	<u>Number of Remands Ordered</u>	<u>Total Number of Decisions</u>	<u>Likelihood of Remand</u>
1986	7	17	41.2%
1987	15	29	51.7%
1988	23	39	59.0%
1989 (3 Qtrs.)	<u>8</u>	<u>27</u>	<u>29.6%</u>
TOTAL	53	112	47.3%

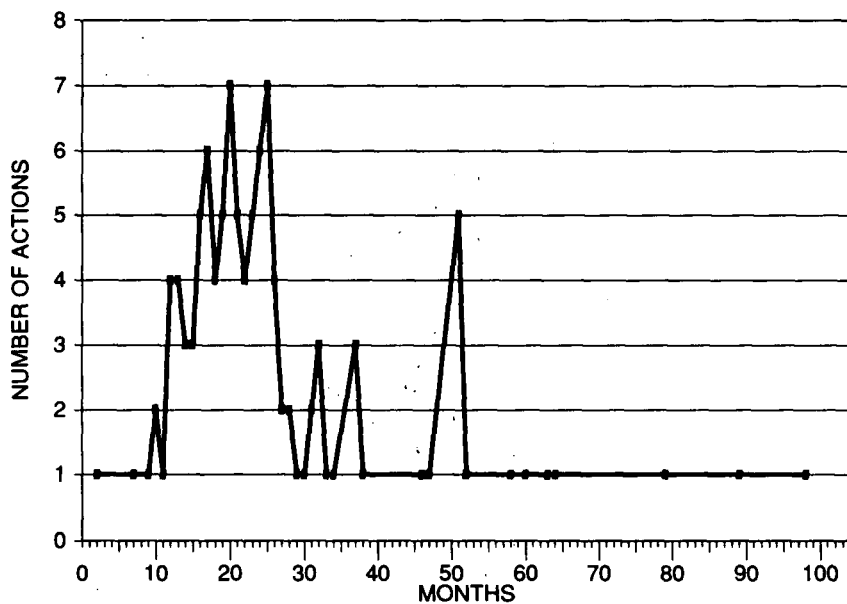
TABLE 5
DISPOSITION OF INITIAL REMANDS
(ROUND TWO)

<u>Period</u>	<u>Number Completed</u>	<u>Median Months to Issuance</u>	<u>Mean Months to Issuance</u>
1986	11	6 months	9.4 months
1987	15	8 months	8.9 months
1988	<u>20</u>	<u>5.5 months</u>	<u>7.5 months</u>
TOTAL	46	6 months	8.4 months

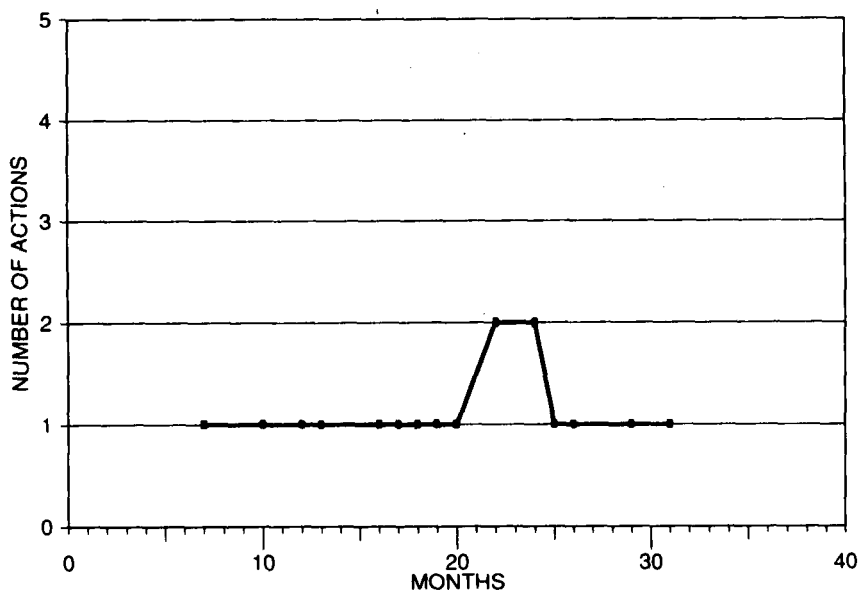
TABLE 6
DISPOSITION OF SECOND REMANDS
(ROUND THREE)

<u>Period</u>	<u>Number Completed</u>	<u>Median Months to Issuance</u>	<u>Mean Months to Issuance</u>
1986	3	11 months	11.3 months
1987	5	5 months	6.4 months
1988	<u>4</u>	<u>5 months</u>	<u>5.0 months</u>
TOTAL	12	5 months	7.2 months

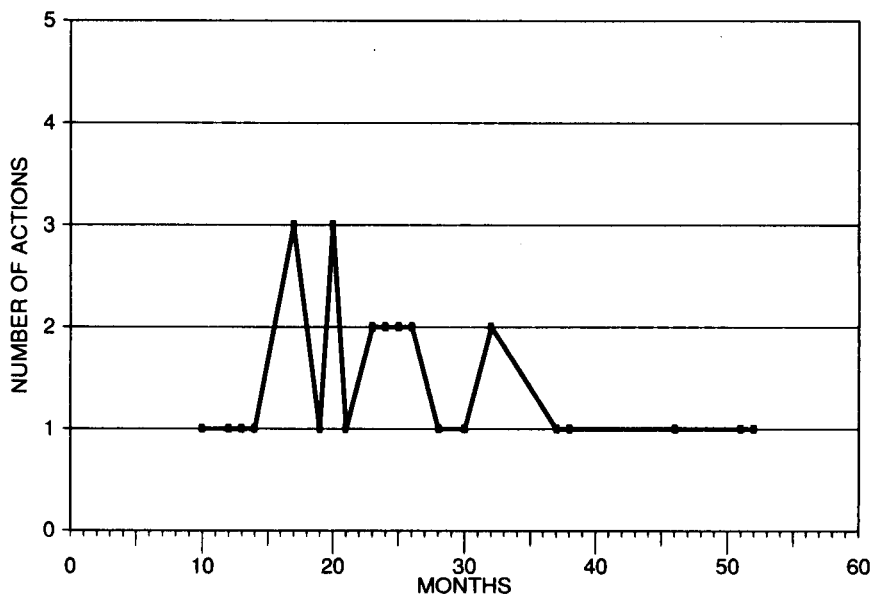
GRAPH 1

**LENGTH OF TIME FOR CIT ROUND ONE DECISIONS
JANUARY 1986 THROUGH SEPTEMBER 1989**

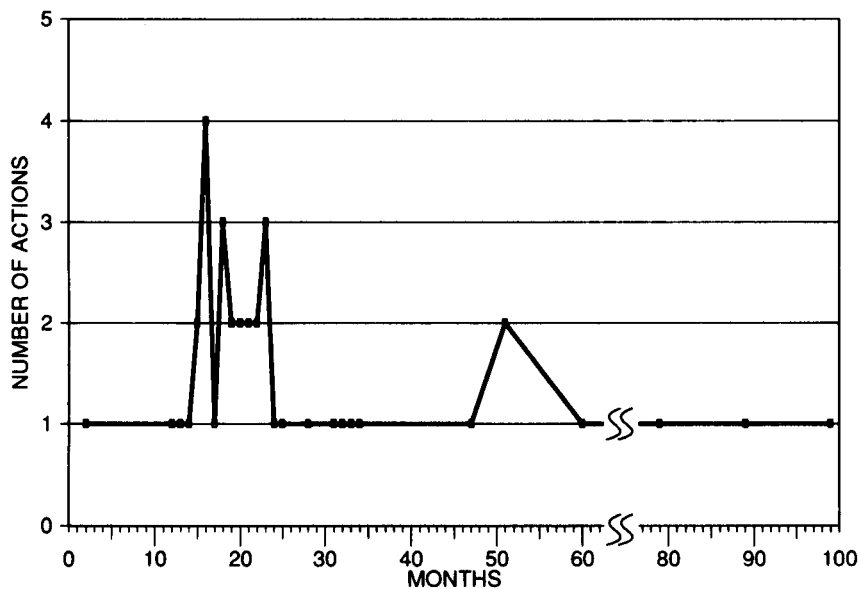
GRAPH 2

**LENGTH OF TIME FOR CIT ROUND ONE DECISIONS
1986**

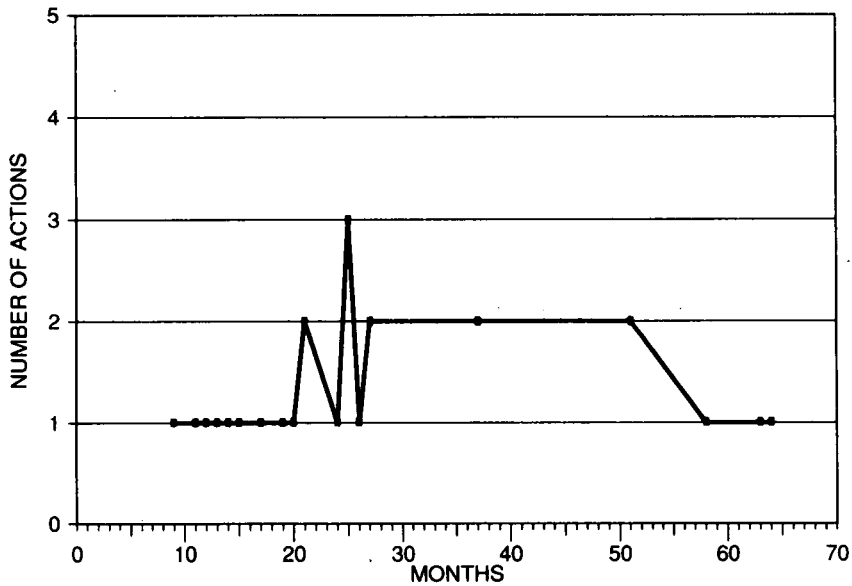
GRAPH 3
LENGTH OF TIME FOR CIT ROUND ONE DECISIONS
1987



GRAPH 4
LENGTH OF TIME FOR CIT ROUND ONE DECISIONS
1988



GRAPH 5
LENGTH OF TIME FOR CIT ROUND ONE DECISIONS
JANUARY THROUGH SEPTEMBER 1989



1986 AD/CVD CIT OPINIONS

CASE NAME	CITATION	TIME TO INITIAL DETERMINATION (r) = remand)
1) Ansaldo Componenti, S.p.A. v. United States	628 F. Supp. 198 (Ct. Int'l Trade 1986)	16 months
2) Bingham & Taylor, Div. Va. Indus. v. United States	627 F. Supp. 793 (Ct. Int'l Trade 1986)	7 months (r)
3) Philipp Bros. v. United States	630 F. Supp. 1317 (Ct. Int'l Trade 1986)	22 months (r)
4) Kenda Rubber Indus. Co. v. United States	630 F. Supp. 354 (Ct. Int'l Trade 1986)	19 months
5) Kokusai Elec. Co. v. United States	632 F. Supp. 23 (Ct. Int'l Trade 1986)	13 months
6) ICC Indus. v. United States	632 F. Supp. 36 (Ct. Int'l Trade 1986)	25 months
7) Huffy Corp. v. United States	632 F. Supp. 50 (Ct. Int'l Trade 1986)	31 months
8) Badger-Powhatan v. United States	633 F. Supp. 1364 (Ct. Int'l Trade 1986)	12 months (r)
9) Zenith Elecs. Corp. v. United States	633 F. Supp. 1382 (Ct. Int'l Trade 1986)	10 months (r)
10) Atlantic Steel Co. v. United States	636 F. Supp. 917 (Ct. Int'l Trade 1986)	29 months
11) Ceramica Regiomontana, S.A. v. United States	636 F. Supp. 961 (Ct. Int'l Trade 1986)	26 months
12) Luciano Pisoni Fabbrica Accessori Instrumentali Musicali v. United States	640 F. Supp. 255 (Ct. Int'l Trade 1986)	20 months (r)
13) Philipp Bros. v. United States	640 F. Supp. 1340 (Ct. Int'l Trade 1986)	18 months

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| 14) | Chemical Prods.
Corp. v. United
States | 645 F. Supp. 289
(Ct. Int'l Trade
1986) | 24 months (r) |
| 15) | Chemical Prods.
Corp. v. United
States | 650 F. Supp. 178
(Ct. Int'l Trade
1986) | 24 months (r) |
| 16) | Lone Star Steel Co.
v. United States | 650 F. Supp. 183
(Ct. Int'l Trade
1986) | 17 months |
| 17) | American Permac,
Inc. v. United States | 656 F. Supp. 1228
(Ct. Int'l Trade
1986) | 22 months |

1987 AD/CVD CIT OPINIONS

CASE NAME		CITATION	TIME TO INITIAL DETERMINATION (r) = remand)
1)	PQ Corp. v. United States	652 F. Supp. 724 (Ct. Int'l Trade 1987)	25 months (r)
2)	USX Corp. v. U.S. International Trade Comm'n	655 F. Supp. 487 (Ct. Int'l Trade 1987)	23 months (r)
3)	East Chilliwack Fruit Growers Coop. v. United States	655 F. Supp. 499 (Ct. Int'l Trade 1987)	19 months (r)
4)	Hyundai Pipe Co. v. U.S. Int'l Trade Comm'n	670 F. Supp. 357 (Ct. Int'l Trade 1987)	32 months
5)	Atcor, Inc. v. United States	658 F. Supp. 295 (Ct. Int'l Trade 1987)	12 months (r)
6)	Toho Titanium Co. v. United States	657 F. Supp. 1280 (Ct. Int'l Trade 1987)	26 months (r)
7)	Washington Red Raspberry Comm'n v. United States	657 F. Supp. 537 (Ct. Int'l Trade 1987)	21 months (r)
8)	PPG Indus. v. United States	660 F. Supp. 965 (Ct. Int'l Trade 1987)	26 months
9)	PPG Indus. v. United States	662 F. Supp. 258 (Ct. Int'l Trade 1987)	38 months
10)	Canadian Meat Council v. United States	661 F. Supp. 622 (Ct. Int'l Trade 1987)	20 months (r)
11)	Al Tech Specialty Steel Corp. v. United States	661 F. Supp. 1206 (Ct. Int'l Trade 1987)	52 months (r)
12)	Yuasa-General Battery Corp. v. United States	661 F. Supp. 1214 (Ct. Int'l Trade 1987)	25 months (r)

1988 AD/CVD CIT OPINIONS

CASE NAME	CITATION	TIME TO INITIAL DETERMINATION (r) = remand)
1) Fundicao Tupy S.A. v. United States	678 F. Supp. 898 (Ct. Int'l Trade 1988)	19 months
2) Silver Reed Am., Inc. v. United States	679 F. Supp. 12 (Ct. Int'l Trade 1988)	51 months (r)
3) Seattle Marine Fishing Supply Co. v. United States	679 F. Supp. 1119 (Ct. Int'l Trade 1988)	51 months
4) Copperweld Corp. v. United States	682 F. Supp. 552 (Ct. Int'l Trade 1988)	23 months
5) Keyes Fibre Co. v. United States	682 F. Supp. 583 (Ct. Int'l Trade 1988)	31 months (r)
6) Cementos Guadalajara S.A. v. United States	686 F. Supp. 335 (Ct. Int'l Trade 1988)	16 months
7) RSI (India) Pvt. v. United States	687 F. Supp. 605 (Ct. Int'l Trade 1988)	15 months (r)
8) Alhambra Foundry Co. v. United States	685 F. Supp. 1252 (Ct. Int'l Trade 1988)	24 months (r)
9) IPSCO, Inc. v. United States	687 F. Supp. 614 (Ct. Int'l Trade 1988)	22 months (r)
10) IPSCO, Inc. v. United States	687 F. Supp. 633 (Ct. Int'l Trade 1988)	23 months (r)
11) Cementos Anahuac del Golfo, S.A. v. United States	687 F. Supp. 1558 (Ct. Int'l Trade 1988)	28 months (r)
12) Far East Mach. Co. v. United States	688 F. Supp. 610 (Ct. Int'l Trade 1988)	16 months (r)
13) Maverick Tube Corp. v. United States	687 F. Supp. 1569 (Ct. Int'l Trade 1988)	13 months (r)
14) Avesta AB v. United States	689 F. Supp. 1173 (Ct. Int'l Trade 1988)	32 months

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| 15) | Algoma Steel Corp.
v. United States | 688 F. Supp. 639
(Ct. Int'l Trade
1988) | 23 months |
| 16) | Cementos Anahuac
del Golfo, S.A. v.
United States | 689 F. Supp. 1191
(Ct. Int'l Trade
1988) | 18 months |
| 17) | Borlem, S.A. v.
United States | Slip Op. 88-77 (Ct.
Int'l Trade June 15,
1988) | 12 months (r) |
| 18) | Fuji Elec. Co. v.
United States | 689 F. Supp. 1217
(Ct. Int'l Trade
1988) | 60 months |
| 19) | Asociacion
Colombiana de
Exportadores de
Flores v. United
States | 693 F. Supp. 1165
(Ct. Int'l Trade
1988) | 15 months (r) |
| 20) | Cabot Corp. v.
United States | 694 F. Supp. 949
(Ct. Int'l Trade
1988) | 22 months (r) |
| 21) | Asahi Chem. Ind. v.
United States | 692 F. Supp. 1376
(Ct. Int'l Trade
1988) | 98 months (r) |
| 22) | Gold Star Co. v.
United States | 692 F. Supp. 1382
(Ct. Int'l Trade
1988) | 20 months (r) |
| 23) | Sonco Steel Tube
Div., Ferrum, Inc. v.
United States | 694 F. Supp. 959
(Ct. Int'l Trade
1988) | 25 months (r) |
| 24) | National Ass'n of
Mirror Mfrs. v.
United States | 696 F. Supp. 642
(Ct. Int'l Trade
1988) | 16 months |
| 25) | Floral Trade
Council of Davis,
Cal. v. United
States | 692 F. Supp. 1387
(Ct. Int'l Trade
1988) | 2 months (r) |
| 26) | Chaparral Steel Co.
v. United States | 698 F. Supp. 254
(Ct. Int'l Trade
1988) | 33 months (r) |
| 27) | Monsanto Co. v.
United States | 698 F. Supp. 275
(Ct. Int'l Trade
1988) | 21 months |
| 28) | Monsanto Co. v.
United States | 698 F. Supp. 285
(Ct. Int'l Trade
1988) | 17 months |
| 29) | Timken States Co.
v. United States | 699 F. Supp. 300
(Ct. Int'l Trade
1988) | 16 months (r) |

30)	Floral Trade Council of Davis, Cal. v. United States	698 F. Supp. 925 (Ct. Int'l Trade 1988)	18 months
31)	Mitsubishi Elec. Corp. v. United States	700 F. Supp. 538 (Ct. Int'l Trade 1988)	34 months (r)
32)	Negev Phosphates, Ltd. v. United States	699 F. Supp. 938 (Ct. Int'l Trade 1988)	14 months
33)	Companhia Siderurgica Paulista, S.A. v. United States	700 F. Supp. 38 (Ct. Int'l Trade 1988)	21 months
34)	American Permac, Inc. v. United States	703 F. Supp. 97 (Ct. Int'l Trade 1988)	47 months (r)
35)	Floral Trade Council of Davis, Cal. v. United States	704 F. Supp. 233 (Ct. Int'l Trade 1988)	20 months (r)
36)	Floral Trade Council of Davis, Cal. v. United States	704 F. Supp. 241 (Ct. Int'l Trade 1988)	19 months
37)	PPG Indus. v. United States	702 F. Supp. 914 (Ct. Int'l Trade 1988)	89 months (r)
38)	PPG Indus. v. United States	702 F. Supp. 917 (Ct. Int'l Trade 1988)	79 months (r)
39)	Citrosuco Paulista, S.A. v. United States	704 F. Supp. 1075 (Ct. Int'l Trade 1988)	18 months (r)

JANUARY THROUGH SEPTEMBER 1989 AD/CVD CIT
OPINIONS

CASE NAME		CITATION	TIME TO INITIAL DETERMINATION (r) = remand)
1)	Asociacion Colombiana de Exportadores de Flores v. United States	704 F. Supp. 1114 (Ct. Int'l Trade 1989)	21 months (r)
2)	Florex v. United States	705 F. Supp. 582 (Ct. Int'l Trade 1989)	20 months
3)	NAR, S.p.A. v. United States	707 F. Supp. 553 (Ct. Int'l Trade 1989)	
4)	NTN Bearing Corp. of America v. United States	705 F. Supp. 594 (Ct. Int'l Trade 1989)	25 months
5)	Chinsung Indus. Co. v. United States	705 F. Supp. 598 (Ct. Int'l Trade 1989)	37 months
6)	U.H.F.C. Co. v. United States	706 F. Supp. 914 (Ct. Int'l Trade 1989)	63 months
7)	Olympic Adhesives, Inc. v. United States	708 F. Supp. 344 (Ct. Int'l Trade 1989)	64 months
8)	Hannibal Indus. v. United States	710 F. Supp. 332 (Ct. Int'l Trade 1989)	19 months (r)
9)	Rhone Poulenc, Inc. v. United States	710 F. Supp. 341 (Ct. Int'l Trade 1989)	12 months
10)	Borlem S.A. - Empreeditmentos Industriais v. United States	710 F. Supp. 797 (Ct. Int'l Trade 1989)	21 months (r)
11)	Rhone Poulenc, Inc. v. United States	710 F. Supp. 348 (Ct. Int'l Trade 1989)	17 months
12)	Daewoo Elecs. Co. v. United States	721 F. Supp. 931 (Ct. Int'l Trade 1989)	51 months (r)
13)	PPG Indus. v. United States	712 F. Supp. 195 (Ct. Int'l Trade 1989)	27 months

14)	LMI - La Metalli Industriale, S.p.A. v. United States	712 F. Supp. 959 (Ct. Int'l Trade 1989)	25 months
15)	Tai Yang Metal Indus. Co. v. United States	712 F. Supp. 973 (Ct. Int'l Trade 1989)	11 months
16)	Sony Corp. of Am. v. United States	712 F. Supp. 978 (Ct. Int'l Trade 1989)	14 months
17)	Funai Elec. Co. v. United States	713 F. Supp. 420 (Ct. Int'l Trade 1989)	25 months
18)	Vitro Flex, S.A. v. United States	714 F. Supp. 1229 (Ct. Int'l Trade 1989)	51 months (r)
19)	Granges Metallverken AB v. United States	716 F. Supp. 17 (Ct. Int'l Trade 1989)	26 months
20)	Ipsco, Inc. v. United States	715 F. Supp. 1104 (Ct. Int'l Trade 1989)	13 months
21)	Bomont Indus. v. United States	718 F. Supp. 958 (Ct. Int'l Trade 1989)	37 months (r)
22)	Wieland Werke, AG v. United States	718 F. Supp. 50 (Ct. Int'l Trade 1989)	27 months
23)	Marsuda-Rodgers Int'l v. United States	719 F. Supp. 1092 (Ct. Int'l Trade 1989)	24 months (r)
24)	Floral Trade Council of Davis, Cal. v. United States	716 F. Supp. 1580 (Ct. Int'l Trade 1989)	9 months
25)	Roses, Inc. v. United States	720 F. Supp. 180 (Ct. Int'l Trade 1989)	58 months
26)	AOC Int'l, Inc. v. United States	721 F. Supp. 314 (Ct. Int'l Trade 1989)	32 months (r)
27)	Sandvik AB v. United States	721 F. Supp. 1322 (Ct. Int'l Trade 1989)	21 months