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Toward a Fuller Appreciation of Nonacquiescence, Collateral Estoppel, and Stare Decisis in the U.S. Court of International Trade

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David A. Hartquist, Jeffrey S. Beckington, and Kathleen W. Cannon

Abstract

This Article explores the extent to which the agencies charged with administering the antidumping and countervailing duty laws are refusing to acquiesce in decisions of the CIT and the justifications, if any, for the practice of nonacquiescence. This article considers the use of devices with the potential of controlling or limiting agency nonacquiescence, such as collateral estoppel and stare decisis, as mechanisms to ensure uniformity among decisions by both the agencies and the CIT. The authors believe that nonacquiescence should be curtailed by the CIT so that the judiciary's power "to say what the law is" will remain separate from exercises of power by the legislative and executive branches of government.

TOWARD A FULLER APPRECIATION OF NONACQUIESCENCE, COLLATERAL ESTOPPEL, AND STARE DECISIS IN THE U.S. COURT OF INTERNATIONAL TRADE†

David A. Hartquist*
Jeffrey S. Beckington**
Kathleen W. Cannon***

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive.

MONTESQUIEU, THE SPIRIT OF LAWS

Laws are a dead letter without courts to expound and define their true meaning and operation.

HAMILTON, THE FEDERALIST NO. 22

It is emphatically the province and duty of the judicial department to say what the law is.

MARSHALL, *Marbury v. Madison*

INTRODUCTION

An issue that has taken on increased importance in the U.S. federal judicial system is the practice of federal administrative agency nonacquiescence in decisions of the judiciary. Such nonacquiescence has been prominently engaged in for years by the Internal Revenue Service (the "IRS"), the National Labor Relations Board (the "NLRB"), and the Social Security Administration (the "SSA") in response to rulings by courts reviewing decisions of these agencies. A survey of recent decisions by the International Trade Administration (the "ITA"), a branch of the U.S. Department of Commerce, suggests that the ITA may be joining these three agencies in a greater willingness not to acquiesce in the decisions of its re-

† This Article is adopted 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 one of the Authors' participation in a panel discussion at that conference. The views expressed in this Article are personal to the Authors.

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viewing court, the U.S. Court of International Trade (the "CIT").

This Article explores the extent to which the agencies charged with administering the antidumping and countervailing duty laws are refusing to acquiesce in decisions of the CIT and the justifications, if any, for the practice of nonacquiescence. This Article considers the use of devices with the potential of controlling or limiting agency nonacquiescence, such as collateral estoppel and stare decisis, as mechanisms to ensure uniformity among decisions by both the agencies and the CIT. As the quotations at the outset of this Article punctuate, the Authors believe that nonacquiescence should be curtailed by the CIT so that the judiciary's power "to say what the law is" will remain separate from exercises of power by the legislative and executive branches of government. If the judiciary's power to state the law definitively is not safeguarded, the strength of the CIT's review to resolve disputes and set precedent in trade cases is likely to be eroded seriously.

I. ADMINISTRATIVE AGENCY NONACQUIESCENCE AND ITS GROWING IMPORTANCE IN THE FEDERAL SYSTEM

A. Background

The role of administrative agency nonacquiescence in our federal constitutional scheme of government is a fairly obscure one, but one that has come increasingly to the fore in recent years. A canvassing of the literature on this subject reveals a basic agreement as to what constitutes the practice of nonacquiescence. In essence, "administrative agency nonacquiescence" refers to the practice of a federal governmental agency that persists in following, in subsequent cases, an administrative policy that has been struck down in a given case by a federal court's contrary, unappealed holding.¹ As this definition suggests, any debate over administrative agency nonacquiescence is rooted in the fundamental constitutional doctrine of separation of powers. A distinguished commentator in this

1. Note, *Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847, 847 (1986).

area, Senior Circuit Judge Joseph F. Weis, Jr. of the U.S. Court of Appeals for the Third Circuit, expressed the following view:

I believe that the courts will increasingly find themselves called upon to resolve disputes between citizens and the federal government—specifically, the administrative agencies. That is not to say that there has not been substantial activity in that field before now, but I would hazard a guess that the allocation of authority between courts and agencies will be the focus of much future litigation. This confrontation is essentially a separation of powers controversy.²

B. A Historical Overview of Federal Administrative Agency Nonacquiescence

The growing phenomenon of federal administrative agency nonacquiescence has spurred a corresponding proliferation of case law, articles, and congressional attention devoted to this topic. At this juncture, no final resolution to this problem has emerged. Indeed, on such a seminal matter as the balance of power among the three branches of the federal government, it is realistic to expect that an ongoing debate will continue as long as the United States perseveres in its constitutional experiment of republican democracy. The dynamic tension inherent in the U.S. Constitution's system of checks and balances virtually ensures continual disagreement over the respective roles and authority of the federal courts and administrative agencies. The following observations should contribute to the understanding of the debate over administrative agency nonacquiescence and help to put it into proper perspective.

1. Origins of the Practice of Nonacquiescence

The term "nonacquiescence" was created by the IRS during the 1920s. Under the prevailing law, the Commissioner of the IRS had one year to appeal decisions against the IRS by the Board of Tax Appeals (the "Tax Board").³ In order to apprise taxpayers in a timely manner of the IRS's position on a ruling

2. Weis, *Agency Non-Acquiescence—Respectful Lawlessness or Legitimate Disagreement?*, 48 U. PITT. L. REV. 845, 845 (1987).

3. See Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity — A View From Within*, 43 TAXES 756, 771 (1965).

by the Tax Board, the IRS began to issue announcements. An announcement of "acquiescence" meant that the IRS would not challenge the Tax Board's decision and that taxpayers could rely upon and treat that decision as final before the full, one-year period to appeal had run. Conversely, an announcement of "nonacquiescence" signified the IRS's intent to appeal. As the law was amended gradually to reduce the time to appeal first to six months, and later to three months, the original purpose of nonacquiescence was undercut. Nevertheless, the IRS persisted in announcing its acquiescence and nonacquiescence to decisions by the Tax Board as informal, precedential guidance for IRS personnel and taxpayers.⁴

2. Evolution of Nonacquiescence

From these beginnings at the IRS, nonacquiescence has spread to other agencies—most prominently to the NLRB and to the SSA—and has taken on a new and different significance. Nonacquiescence originally conveyed simply that the IRS would appeal a Tax Board decision, since the Tax Board was "an independent agency in the executive branch of the Government."⁵ In other words, in a situation in which those two administrative bodies were at loggerheads, one of the agencies would have judicial recourse to resolve the dispute.

In stark contrast, nonacquiescence as it has subsequently been practiced by some federal agencies has contested the very existence of the judiciary's authority.⁶ Thus, as long ago as 1944, the NLRB disregarded lower-court precedent. In *National Labor Relations Board v. Waples-Platter Co.*,⁷ the court had refused to award back-pay to employees who chose neither to resign their union membership nor accept a transfer.⁸ Despite this clear holding, the NLRB in similar circumstances in *In re*

4. See *id.*

5. I.R.C. § 900(k) (1924) (Tax Revenue Act of 1924); see B. BITTKER & L. STONE, *FEDERAL INCOME ESTATE AND GIFT TAXATION* 941 (4th ed. 1972). Although the Tax Board was renamed "The Tax Court of the United States" in 1942, it remained "not a court at all but merely an administrative agency." *Lasky v. Commissioner*, 235 F.2d 97, 98 (9th Cir. 1956), *aff'd*, 352 U.S. 1027 (1957).

6. An excellent study of this area, relied upon heavily in this Article, is Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471 (1986).

7. 140 F.2d 228 (5th Cir. 1944).

8. *Id.* at 230.

*Schmidt*⁹ awarded back-pay to employees.¹⁰ In defense of its decision to ignore the appellate decision, the NLRB noted that the question had not been decided by the U.S. Supreme Court.¹¹ In acknowledging its failure to petition for a writ of certiorari in the *Waples-Platter* case, the NLRB stated: "Our determination to forego review by the Supreme Court in that case rested upon administrative considerations having no relationship to the merits of the back-pay issue."¹²

Another example of an agency that has engaged in nonacquiescence is that of the SSA under the direction of the Secretary of Health and Human Services. In 1967, the SSA commenced a policy of publishing its formal nonacquiescence decisions as social security rulings. Through 1982, the SSA promulgated at least ten such rulings.¹³ The most notable instance of nonacquiescence by the SSA was probably its defiance of the courts' interpretation of the Social Security Act. Ten federal circuits determined that the act prevented the Secretary from terminating benefits of persons previously deemed to be disabled until the Secretary produced evidence of medical improvement.¹⁴ Despite these rulings, the SSA continued to terminate benefits without producing evidence of improvement.¹⁵

As a final view of how far nonacquiescence has metamorphosed since the IRS's early days, it is instructive to look at the IRS's current program. Under the Tax Reform Act of 1969, the U.S. Congress transformed the Tax Board from an administrative agency into a court of record under Article I of the U.S. Constitution.¹⁶ Despite this fundamental change, the IRS prepares and publishes "actions on decisions" in its Internal

9. 58 N.L.R.B. 1342 (1944).

10. *Id.* at 1345.

11. *Id.* at 1344 n.3.

12. *Id.* at 1344-45; see Maranville, *supra* note 6, at 478-79 nn.18-20 (discussing cases concerning NLRB nonacquiescence).

13. See Maranville, *supra* note 6, at 477 n.15.

14. See *Holden v. Heckler*, 584 F. Supp. 463, 472-74 (N.D. Ohio 1984) (surveying decisions in each circuit).

15. See Radder, *Agency Nonacquiescence: Implementation, Justification, and Acceptability*, 42 WASH. & LEE L. REV. 1233, 1235-46 (1985) (detailing background of SSA nonacquiescence).

16. I.R.C. § 4940 (1969) (Tax Reform Act of 1969); see B. BITTKER & L. STONE, *supra* note 5, at 941. Interestingly enough, the U.S. Tax Court has followed the decisions by courts of appeals with limited exceptions since becoming an article I court,

Revenue Bulletin whenever the IRS loses a case in the U.S. Tax Court and treats these pronouncements as formal acquiescences and nonacquiescences. On the other hand, the IRS does not issue publicly its acquiescence and nonacquiescence actions on decisions from federal district courts and courts of appeals.¹⁷

3. U.S. Administrative Agency Attempts to Justify Nonacquiescence: U.S. Judicial and Congressional Responses

In considering the legitimacy of nonacquiescence, a basic distinction is commonly drawn between "intercircuit" and "intracircuit" nonacquiescence. Intercircuit nonacquiescence comports with the concept of the "law of the circuit," by which the decisions of a given court of appeals bind the courts in that circuit but not in other circuits. Thus, an administrative agency may follow one policy in a given circuit in accordance with that circuit court's ruling, but follow a contrary policy in another circuit where the question has not been reached or has been resolved in a contrary fashion. Intracircuit nonacquiescence, however, arises when the administrative agency faithfully executes a court's holding in the adjudicated case, but then refuses to follow the holding in other cases within the same circuit.¹⁸

Intercircuit nonacquiescence seems to cause little controversy. Just as one circuit will view precedent from a different circuit as being merely persuasive and not controlling, so administrative agencies feel at liberty to argue afresh in one circuit a question of law that has been decided in another circuit. This conflict among the circuits is not only accepted generally, but is even welcomed.¹⁹ In this fashion, difficult legal issues are aired thoroughly before reaching the Supreme Court for a national resolution.

even though it had engaged in nonacquiescence when still an administrative agency. See Maranville, *supra* note 6, at 478 n.17.

17. See Radder, *supra* note 15, at 1252-53.

18. Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582, 583-84 (1985) [hereinafter Note, *Intracircuit Nonacquiescence*]; see Maranville, *supra* note 6, at 484-86.

19. See *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 177 (1984) (White, J., concurring).

Intracircuit nonacquiescence, however, is at the heart of a basic constitutional controversy. Intracircuit nonacquiescence has two stages: first, the agency application of administrative laws or regulations to private parties in a manner contrary to that prescribed by a court of appeals; second, subsequent argument against the law of the circuit when that case reaches litigation in a court within the circuit.²⁰ This practice has elicited considerable criticism.

When pressed to substantiate their intracircuit nonacquiescence, administrative agencies have tended to rely upon three rationales. First, the agencies stress the need to administer their statutes uniformly throughout the United States. For example, in a case involving the liability of an employer for failure to provide safety belts to employees, the Occupational Safety and Health Review Commission (the "OSHRC") chose not to adhere to precedent of the U.S. Court of Appeals for the Fifth Circuit, stating that "an administrative agency charged with the duty of formulating uniform and orderly national policy in adjudications is not bound to acquiesce in the views of U.S. courts of appeals that conflict with those of the agency."²¹ The IRS, SSA, and NLRB have also subscribed to this position.²² The logical extension of this policy is that an agency may continue with its ruling until overruled by the U.S. Supreme Court.²³

Second, administrative agencies defend intracircuit nonacquiescence on the basis of their roles as primary policymakers under their respective statutes. They point out that in interpreting statutes, the Supreme Court often sides with the agencies rather than the lower courts. In particular, the NLRB espouses this view.²⁴

Third, administrative agencies contend that intracircuit nonacquiescence is appropriate when the statute at issue al-

20. See Note, *Intracircuit Nonacquiescence*, *supra* note 18, at 583; see also *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 383 (Fed. Cir. 1983) (criticizing NLRB for failing to follow circuit law).

21. *S & H Riggers & Erectors, Inc. v. Occupational Safety and Health Review Comm'n*, 659 F.2d 1273, 1278 (5th Cir. 1981) (quoting OSHRC opinion at 15).

22. See Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 695 & 708 (1989); see also *Stacey Mfg. Co. v. Commissioner*, 237 F.2d 605, 606 (6th Cir. 1956); Note, *Intracircuit Nonacquiescence*, *supra* note 18, at 589 n.47.

23. See *In re Ins. Agents' Int'l Union*, 119 N.L.R.B. 768, 773 (1957).

24. See Estreicher & Revesz, *supra* note 22, at 708 n.154.

lows venue to lie in a broad range of circuits. They argue that the U.S. Congress designed the statute this way in order to assure the agency a stream of test cases in which Supreme Court review can be sought from unfavorable lower-court rulings. The agencies point out that as a practical matter, where venue lies in many districts, the statute creates uncertainty as to which court will ultimately decide the issue. In such a case, agencies argue that a requirement of agency acquiescence in the adverse opinion of a certain court is arbitrary.²⁵

Reactions by the U.S. judiciary and Congress to these rationales have varied from sharp condemnation, to mild censure, to indecision and ambivalence. Thus, at one end of the spectrum a succession of cases excoriate intracircuit nonacquiescence as "contumacious" behavior²⁶ and "obstinance [that] will not be tolerated."²⁷ These courts are generally concerned with rudimentary constitutional precepts. For example, in the appeal of the SSA's refusal to accept the circuit court's ruling on the statute regarding termination of benefits, the U.S. Court of Appeals for the Ninth Circuit stated that

[t]he Secretary's ill-advised policy of refusing to obey the decisional law of this circuit is akin to the repudiated pre-Civil War doctrine of nullification. . . . The Secretary's non-acquiescence not only scoffs at the law of this circuit, but flouts some very important principles basic to our American system of government—the rule of law, the doctrine of separation of powers imbedded in the Constitution, and the tenet of judicial supremacy. . . . The government expects its citizens to abide by the law—no less is expected of those charged with the duty to faithfully administer the law.²⁸

On at least one occasion, Congress has registered disapproval of intracircuit nonacquiescence:

Litigation to which the United States Government is a party sharply points up the consequences of a system under which the number of nationally binding decisions is severely lim-

25. See Schwartz, *Nonacquiescence, Crowell v. Benson, and Administrative Adjudication*, 77 GEO. L.J. 1815, 1819 (1989).

26. *Beverly Enters. v. NLRB*, 727 F.2d 591, 592-93 (6th Cir. 1984) (per curiam).

27. *Valdez v. Schweiker*, 575 F. Supp. 1203, 1205 (D. Colo. 1983).

28. *Lopez v. Heckler*, 713 F.2d 1432, 1441 (9th Cir.) (order denying stay) (Pregerson, J., concurring), *stay granted*, 463 U.S. 1328, *motion to vacate stay denied*, 464 U.S. 879 (1983).

ited. Questions relating to the administration of Government programs or the interpretation of Government regulations may be litigated again and again—within the agency, in the district courts, and in the courts of appeals—because the questions have not been resolved by a tribunal whose decision is binding on all who may be affected. The result is to burden not only the courts and the litigants, but also those who deal with the Government and cannot be certain of the rule that will be applied to their transactions. The lack of an authoritative answer also encourages forum shopping and permits differential treatment of persons who are similarly situated.

These consequences can be attributed in part to the litigation policies of the United States Government. Professor Paul Carrington, who conducted an empirical study of appeals by the United States in civil cases, concluded that the Federal Government "is quite prepared to continue to litigate in other circuits a question that has been resolved in only one; even in the same circuit, the United States may be willing to relitigate an issue if minor factual distinctions can be made between the pending matter and the preceding decision."²⁹

Despite the strong terms condemning intracircuit nonacquiescence, this condemnation is by no means universal. In some cases, courts rebuke the administrative agencies lightly, if at all.³⁰ Interestingly enough, during the debate over the SSA's termination of benefits, Congress was equivocal about intracircuit nonacquiescence. In enacting the Social Security Disability Benefits Reform Act of 1984³¹ and legislating an end to the underlying issue of how benefits were to be determined, the House of Representatives and the Senate were unsure of how to deal with intracircuit nonacquiescence. While the House of Representatives was prepared to mandate that the SSA either acquiesce or petition for certiorari,³² the Senate

29. Commission on Revision of the Federal Court Appellate Systems, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 349-50 (1975) (footnote omitted).

30. See *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1252 (5th Cir. 1978); *Coletti's Furniture, Inc. v. NLRB*, 550 F.2d 1292, 1293 (1st Cir. 1977) (per curiam); *NLRB v. Gibson Prods. Co.*, 494 F.2d 762, 769-70 (5th Cir. 1974).

31. 42 U.S.C. § 423 (1988).

32. H.R. REP. NO. 618, 98th Cong., 2d Sess. 4, 22-26, 54, & 58 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3059-63.

considered simply requiring the SSA to report decisions of acquiescence and nonacquiescence to Congress and to publish an account of these decisions in the Federal Register.³³ In conference it was agreed that a statement would be adopted in which the SSA would be exhorted to limit its nonacquiescence and urged to secure an early Supreme Court test of the lawfulness of nonacquiescence.³⁴

4. Summary

From relatively recent beginnings, nonacquiescence has taken root in a number of federal administrative agencies. Its implications for the constitutional doctrines of separation of powers, checks and balances, and judicial supremacy have spawned far-reaching debate. It now appears that nonacquiescence will demand the CIT's careful attention in its consideration of trade cases brought to it on appeal.

C. Whether the Arguments in Defense of Intracircuit Nonacquiescence Make Sense With Respect to the U.S. Court of International Trade

Since passage of the Customs Courts Act of 1980,³⁵ the CIT has been an article III court under the Constitution with all legal and equitable powers of a district court.³⁶ Very significantly, the CIT is one of the few remaining federal courts of specialized jurisdiction and has judicial cognizance in the first instance over essentially all import-related matters appealed from federal agencies' administrative determinations.³⁷ The result of this congressional scheme is a nine-judge federal national court at the trial level presiding over import-related matters, an unusual circumstance of direct relevance to the issue of intracircuit nonacquiescence and its justification in CIT cases.

The principal reasons usually listed by federal administrative agencies in an effort to validate their intracircuit nonacqui-

33. S. REP. NO. 466, 98th Cong., 2d Sess. 3, 21 (1984).

34. H.R. REP. NO. 1039, 98th Cong., 2d Sess. 3, 37-38 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3080, 3095-96. By passing the 1984 Social Security Disability Benefits Reform Act, of course, Congress prevented such an appeal in these cases.

35. Codified at scattered sections of 28 U.S.C. (1988).

36. 28 U.S.C. § 1585.

37. *Id.* § 1581.

escence are: (1) national uniformity in the administration of their statutes; (2) the agencies' role as policymaker that has often been deferred to by the Supreme Court; and (3) the uncertainty caused by broad venue provisions and the desirability of having several test cases work their way through the federal judiciary for a definitive judgment by the Supreme Court.³⁸ None of these reasons is persuasive in CIT cases. This is precisely because the CIT is a national court of specialized jurisdiction.

First, the CIT's unique status saps the vitality from the contention that intracircuit nonacquiescence is necessary for uniform nationwide implementation of the statutes under agency purview. Because the CIT is a single court, it achieves uniformity of interpretation and action at the trial level unless its holding is fragmented. Second, there is no doubt that venue lies solely with the CIT or that an agency will be making arbitrary decisions by acquiescing in the CIT's decisions.³⁹

Finally, questions remain as to whether intracircuit nonacquiescence in CIT decisions is justified on the basis of congressional delegation to the agencies of the authority to create and carry out policy or whether intracircuit nonacquiescence is justified on the basis of rejections of the CIT's holdings by the CIT's appellate courts. These questions may be answered only in light of a close analysis of the constitutional debate over nonacquiescence's role with respect to the doctrines of separation of powers, checks and balances, and judicial supremacy in determining the law.

In the Authors' opinion, the agencies and the CIT would be wise to act in concert to strengthen, not weaken, the constitutional structure of the federal government. Nonacquiescence breeds disrespect for the judiciary and creates the risk of upsetting the balance of power among the three branches. Federal agency expertise in administering statutes cannot and should not replace agency accountability before the courts and, through the courts, to the parties affected by agency determinations. As Montesquieu recognized, there is no liberty

38. See *supra* notes 18-25 and accompanying text (discussing justifications for intracircuit nonacquiescence).

39. The arguments of broad venue, resultant arbitrariness if an agency acquiesces, and test cases appear to apply to intercircuit nonacquiescence and not to intracircuit nonacquiescence.

without a separate judiciary power. In trade cases, the adjudicatory role of the federal administrative agencies is both limited and superseded by the power of the judiciary generally and the CIT specifically. The rule of law as pronounced by the courts has given stability and integrity to the federal government for over two centuries and should not be undermined by nonacquiescence on the part of administrative agencies in the executive branch.

D. Practice of Agencies Administering the Trade Laws in Response to Decisions by the Court of International Trade

Although from the short track record of the administering agencies it is difficult to get a clear picture of whether or not the agencies will adopt the strong nonacquiescence practices observed by the IRS, NLRB, and SSA, distinct trends have emerged on the part of each agency. Curiously, the trends observed with regard to “acquiescing” in CIT decisions by the International Trade Administration of the Department of Commerce and the International Trade Commission (the “ITC”), the two entities charged with administering the antidumping and countervailing duty laws, have diverged significantly. The International Trade Administration of the Department of Commerce has, on several occasions, stated its disagreement with a CIT opinion and refused to follow the rule of law enunciated by the CIT in subsequent investigations and administrative reviews.⁴⁰ The ITC, on the other hand, has generally attempted to follow the holdings of the CIT, often incorporating specific language of the CIT in setting policy and making determinations.⁴¹

1. The ITA’s Growing Trend Toward Nonacquiescence

The ITA has taken the position that it is free to ignore the holdings of the CIT in a number of scenarios. Although the practice of ignoring the CIT’s holdings in these circumstances may not yet be “nonacquiescence” akin to that of the IRS or NLRB, the ITA appears to be moving in that direction. The

40. See *infra* notes 42-59 and accompanying text (discussing ITA nonacquiescence with CIT decisions).

41. See *infra* notes 60-74 and accompanying text (discussing ITC compliance with CIT decisions).

ITA has certainly made clear on several occasions that it does not feel bound by decisions of the CIT, at least until such decisions are affirmed by the U.S. Court of Appeals for the Federal Circuit. Moreover, the instances in which the ITA has announced its refusal to adhere to a particular CIT decision have increased in recent years. The ITA's increasing refusal to follow the holdings of the CIT shows a definite trend toward a practice of nonacquiescence by the ITA.

A recent instance of the ITA's refusal to follow the CIT's holdings occurred in August 1989 in the ITA's administrative review of *Television Receivers, Monochrome and Color, from Japan*.⁴² In the final results of its review proceeding, the ITA refused to implement the CIT's ruling in *Zenith Electronics Corporation v. United States*⁴³ regarding the commodity pass-through tax.⁴⁴ Zenith had argued in the review proceeding that the ITA should add to the U.S. price the amount of the commodity tax forgiven upon exportation only to the extent that the taxes were "passed through" and included in the price of televisions sold in Japan, based on the CIT's holding in *Zenith*.⁴⁵

The ITA rejected Zenith's argument, stating:

We do not agree with the court in *Zenith* but have not had an opportunity to appeal the decision on its merits. . . . We do not agree that the statutory language limiting the amount of the adjustment to the amount of the commodity tax "added to or included in the price" of televisions sold in Japan requires the Department to measure the incidence of the tax in an economic sense. Furthermore, applying such an interpretation would be contrary to the obligations of the United States under the General Agreement on Tariffs and Trade (GATT).⁴⁶

The agency further stated that it would add the amount of the tax to the U.S. price, as *Zenith* had instructed, but that it would then perform a circumstance of sale adjustment *not* sanctioned by the *Zenith* court, essentially undercutting its ad-

42. Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part, 54 Fed. Reg. 35,517, 35,519 (Aug. 28, 1989) [hereinafter Final Results].

43. 633 F. Supp. 1382 (Ct. Int'l Trade 1986).

44. Final Results, *supra* note 42, at 35,519.

45. *Id.*

46. *Id.*

dition to the U.S. price.⁴⁷

Not only did the agency refuse to follow the CIT's holding in *Zenith*, but it set forth its own interpretation of the statute and reasserted the validity of its previously rejected position. Given the *Zenith* court's prior rejection of the specific arguments advanced by the ITA regarding the statutory language,⁴⁸ the ITA presented a weak rationale for its departure from the CIT's holding. Under these circumstances, the ITA has effectively set itself up as not only the administering agency, but also as judge and jury, in direct contravention of the principle of separation of powers. Such nonacquiescence by the agency thwarts the statutory scheme and forces domestic companies to incur the expense of repeated litigation in order to obtain the result originally intended by the CIT.

Another recent pronouncement by the ITA of its disagreement with a CIT holding and its intention to depart from that holding is more disturbing, in some ways, than the ITA's refusal to adhere to the *Zenith* decision. In the context of proposing regulations to "codify" the methodology used to determine the existence and value of countervailable subsidies, the ITA expressly set forth its intention of adopting a regulation inconsistent with a CIT holding.⁴⁹ The ITA proposed adopting a regulation regarding research and development assistance, stating:

Notwithstanding any other provision of this section, assistance provided by a government to a firm in order to finance research and development does not confer a countervailable benefit where the Secretary determines that the results of such research and development have been, or will be, made available to the public, including competitors of the firm in the United States.⁵⁰

In explaining its rationale for the proposed regulation, the ITA stated that the regulation was consistent with ITA practice although inconsistent with the CIT's decision in *Agrexco, Agri-*

47. *Id.*

48. See *Zenith Elecs. Corp. v. United States*, 633 F. Supp. 1382, 1394-99 (Ct. Int'l Trade 1986).

49. Notice of proposed rulemaking and request for public comments, 54 Fed. Reg. 23,366 (May 31, 1989) [hereinafter ITA Notice].

50. *Id.* at 23,382.

cultural Export Company v. United States.⁵¹

The *Agrexco* court had specifically rejected the agency-imposed limitation on the countervailability of research and development subsidies, stating that "it is immaterial whether the information is disseminated to all groups, but whether the research and development is targeted to assist a particular, rather than a general industry."⁵² Pursuant to this holding, the CIT remanded this program to the ITA with instructions to determine its valuation. Despite this clear holding of the CIT in *Agrexco*, the ITA has been unwilling to alter its practice of finding no countervailable subsidy if the results of the research are disseminated to the public.

In taking the further step of proposing to adopt a regulation that directly conflicts with the CIT's holding, the ITA stated that "[a]lthough this practice was called into question in *Agrexco* . . . , the Department [of Commerce] *disagrees* with that aspect of the decision, and, in any event, the decision has become moot due to the completion of subsequent administrative reviews of the CVD [countervailing duty] order in question."⁵³ The ITA's assertion that it need not follow the principles set forth by the CIT whenever the practical effects of the decision have become moot as a result of the completion of a subsequent administrative review is not supported by case law. As the CIT recognized in *Cabot Corporation v. United States*,⁵⁴ even though the CIT may vacate an opinion as the result of the ITA's completion of its administrative review, "the Court [does] not abrogate the legal reasoning and principle of" that opinion.⁵⁵ Because the legal principles enunciated by the CIT continue to have force regardless of the further procedural developments in the particular investigation at issue, the ITA's refusal to follow the CIT's teachings in such circumstances is tantamount to nonacquiescence in the CIT's holding.

Another area in which the ITA has disregarded the CIT's holdings is with respect to final orders issued by the CIT that overturn decisions of the ITC.⁵⁶ Although the functions of the

51. 604 F. Supp. 1238 (Ct. Int'l Trade 1985).

52. *Id.* at 1241-42.

53. ITA Notice, *supra* note 49, at 23,373 (emphasis added).

54. 694 F. Supp. 949 (Ct. Int'l Trade 1988).

55. *Id.* at 955.

56. See Rosenthal & Cannon, *Can the U.S. Government Ignore Final Orders of the Court*

ITA and ITC are separate, the investigation of each agency is triggered by the decision of the other. In situations where the CIT has overturned a preliminary determination of the ITC and instructed the ITC to issue a revised determination, thus triggering further investigation by the ITA, the ITA has refused to proceed with its investigation if the ITC has appealed the determination to the U.S. Court of Appeals for the Federal Circuit.⁵⁷

The ITA's refusal to proceed with its investigation has not been based on obtaining a stay of the CIT's order pending resolution of the ITC's appeal, but rather on its contention that the decision by the CIT is not "final" and need not be followed.⁵⁸ The finality argument has been subject to much controversy in the courts.⁵⁹ The CIT, however, has never indicated whether the ITA's practice of ignoring its statutory mandate to investigate that is triggered by an ITC decision is or can be sanctioned.

The ITA's practice of refusing to follow a holding of the CIT until the holding is upheld by the Federal Circuit is another indication of nonacquiescence by the ITA. Although the ITA has attempted to advance technical arguments in support of this position, at bottom, the ITA's disregard of CIT decisions pending appeal, without even seeking a stay of judgment,

of International Trade Solely Because an Appeal Has Been Taken? 10 B.C. INT'L & COMP. L. REV. 259 (1987) (containing detailed discussion of ITA nonacquiescence).

57. See, e.g., *Armstrong Rubber Co. v. United States*, 10 CIT 75 (1986); *Bingham & Taylor, Div. Va. Indus., Inc. v. United States*, 627 F. Supp. 793 (Ct. Int'l Trade 1986), *aff'd*, 815 F.2d 1482 (Fed. Cir. 1987); *Jeannette Sheet Glass Corp. v. United States*, 607 F. Supp. 123 (Ct. Int'l Trade 1985).

58. See, e.g., *Memorandum in Support of Defendant's Motion for Summary Judgment or, Alternatively, to Dismiss this Action for Lack of Jurisdiction or Failure to State a Claim for Which Relief Can be Granted*, *Jeannette Sheet Glass Corp. v. United States*, 607 F. Supp. 123 (Ct. Int'l Trade 1985) (No. 85-10-01485); *Defendant's Reply to Plaintiff's Response to Motion to Affirm Agency Determination*, *Bingham & Taylor, Div. Va. Indus., Inc. v. United States*, 627 F. Supp. 793 (Ct. Int'l Trade 1987) (No. 85-07-00909).

59. *Badger-Powhatan, Div. of Figgie Int'l, Inc. v. United States*, 633 F. Supp. 1364 (Ct. Int'l Trade 1986), *stay denied*, 638 F. Supp. 344 (Ct. Int'l Trade 1986), *appeal dismissed*, 808 F.2d 823 (Fed. Cir. 1986); *American Grape Growers Alliance for Fair Trade v. United States*, 622 F. Supp. 295 (Ct. Int'l Trade 1985); *Melamine Chems., Inc. v. United States*, 561 F. Supp. 458 (Ct. Int'l Trade 1983), *rev'd*, 732 F.2d 924 (Fed. Cir. 1984); *Roses Inc. v. United States*, 538 F. Supp. 418 (Ct. Int'l Trade 1982), *aff'd in relevant part*, 706 F.2d 1563 (Fed. Cir. 1983).

is another indication of lack of respect for the CIT's decision-making authority.

2. The ITC—Basic Acquiescence in CIT Decisions

In contrast to the ITA, the ITC has been willing to accept the CIT's holdings and to adhere to its instructions. Although there have been instances of individual ITC commissioners questioning a particular CIT holding, the ITC as a whole, as well as the individual commissioners, has generally attempted to conform to the law as articulated by the CIT. Indeed, frequently the ITC will make specific reference to a CIT holding relevant to an ITC determination and note that its decision is premised upon the law as set forth by the CIT, including, where necessary, a change in past practice to reflect the CIT ruling.

A recent example of an ITC attempt to adhere to a CIT decision is set forth in the ITC's final determination in *Certain Brass Sheet and Strip from The Netherlands*.⁶⁰ ITC Commissioner Rohr, in separate views, made reference to the CIT's recent determination in *Asociacion Colombiana de Exportadores de Flores v. United States* ("*Asocoflores*"),⁶¹ which addressed the ITC's method of dealing with cumulation in the context of a threat determination.⁶² In analyzing the aggregate impact of the imports in his threat determination, Commissioner Rohr specifically attempted to incorporate the type of aggregation or cumulation analysis envisioned by the CIT in the *Asocoflores* decision, reflecting an appreciation for the CIT's interpretation of the law of cumulation as applied in threat determinations.⁶³

Similarly, following the decision of the CIT and, subsequently, the decision of the U.S. Court of Appeals for the Federal Circuit in *American Spring Wire Corporation v. United States*,⁶⁴ the ITC made a concerted effort to set forth its views in consonance with the CIT's holding regarding the two prongs—material injury and causation—of the ITC's analysis.⁶⁵ Although

60. USITC Pub. 2099, Inv. Nos. 731-TA-379 & 380 (July 1988).

61. 693 F. Supp. 1165 (Ct. Int'l Trade 1988).

62. *Certain Brass Sheet*, USITC Pub. 2099, at 32 n.11.

63. *Id.*

64. 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).

65. *See, e.g.,* Cellular Mobile Telephones and Subassemblies Thereof from Ja-

Commissioner Stern determined that it was not analytically appropriate to analyze the questions of material injury and causation separately, she appeared to base her decision on an interpretation of the *American Spring Wire* holding. Commissioner Stern did not state that she disagreed with the decision or that she refused to follow it.⁶⁶

Indeed, while there have been instances in which a commissioner expressed disagreement with a particular CIT holding or statutory interpretation, those instances have not resulted in any discernible practice of nonacquiescence by individual ITC commissioners or the ITC as a whole. For instance, following the CIT's recent decision in *Citrosuco Paulista S.A. v. United States*,⁶⁷ in which the ITC as a whole was instructed to reconsider a remanded determination, Commissioner Newquist noted his concern that a remand to the entire ITC was not appropriate under the facts of the case.⁶⁸ Nonetheless, Commissioner Newquist and the other members of the ITC followed the CIT's instructions that the remand be addressed by all members of the ITC,⁶⁹ and the ITC has continued to recognize the CIT position in subsequent cases.⁷⁰

Commissioner Liebler also questioned, but ultimately conformed with, a series of CIT decisions overturning the "five-factor analysis" she had developed.⁷¹ On remand of the ITC's decision in *Cold-Rolled Carbon Steel Plates & Sheets from Argentina*,⁷² Commissioner Liebler joined the opinions of her colleagues, whose analysis had been upheld by the CIT, and then attempted to explain the rationale for her determination.⁷³ When the CIT did not accept this rationale in subsequent cases, Commissioner Liebler departed from her five-

pan, USITC Pub. 1786, Inv. No. 731-TA-207 (Dec. 1985) at 20-21 (views of Commissioner Eckes).

66. *Id.* at 18-19.

67. 704 F. Supp. 1075 (Ct. Int'l Trade 1988).

68. Frozen Concentrated Orange Juice from Brazil, USITC Pub. 2154, Inv. No. 731-TA-326 (Feb. 1989) at 2 n.2 (views on remand).

69. *Id.* at 1 n.1.

70. See, e.g., Tubeless Steel Disc Wheels from Brazil, USITC Pub. 2179, Inv. No. 731-TA-335 (Apr. 1989) (views on remand).

71. See *USX Corp. v. United States*, 682 F. Supp. 60, 64-68 (Ct. Int'l Trade 1988); *Maverick Tube Corp. v. United States*, 687 F. Supp. 1569 (Ct. Int'l Trade 1988).

72. USITC Pub. 2089, Inv. No. 731-TA-175 (June 1988).

73. *Id.* at 6.

factor analysis altogether and joined in the analysis used by another commissioner, rather than continuing to employ and defend her five-factor test in light of the CIT's contrary holding.⁷⁴

In sum, a review of the ITC's response to decisions of the CIT does not reveal a policy of nonacquiescence like that of the ITA. Even though many of the commissioners are not attorneys, the ITC, as a whole and individually, has been deferential to CIT decisions and has attempted to incorporate in subsequent cases the holdings of the CIT on issues of basic statutory interpretation. The express statements of disagreement and departure from established CIT precedent that mark the ITA's notices are absent from ITC decisions.

3. Conclusion

The practices of the ITA and ITC, therefore, appear to differ markedly in their response to CIT decisions, with the ITC exhibiting considerably more deference to CIT decisions than the ITA. One potential explanation for this discrepancy is that the ITC has rarely been overturned by the CIT, making instances in which the ITC would need to be concerned with nonacquiescence much less frequent than those facing the ITA. Alternatively, the ITC's willingness to accede to those CIT decisions that do not accord with its prior interpretation of the law could be merely the willingness of the ITC to accept and respect the decisions of the courts in accordance with the deference to the judiciary that the U.S. constitutional system of checks and balances envisions.

II. *COLLATERAL ESTOPPEL/STARE DECISIS*

CIT policies in the areas of collateral estoppel and stare decisis appear to have encouraged ITA nonacquiescence. With respect to collateral estoppel, the CIT has generally refused to apply this doctrine in antidumping and countervailing duty cases. The CIT has similarly been reluctant to apply strictly the doctrine of stare decisis with respect to previous CIT decisions. The combination of these responses to CIT

74. See, e.g., *Granular Polytetrafluoroethylene Resin from Italy*, USITC Pub. 2112, Inv. Nos. 731-TA-385 & 386 (June 1988) at 31; *Certain Brass Sheet*, USITC Pub. 2099 (Aug. 1988) at 37.

precedent by the CIT itself may be responsible, in part, for the ITA's failure to acquiesce in CIT decisions.

A. Collateral Estoppel

Collateral estoppel, or issue preclusion, prohibits the re-trial of an issue of fact or law that was actually litigated and determined in another proceeding involving the same parties if that issue was expressly decided in the other proceeding and was essential to the other judgment.⁷⁵ In determining whether collateral estoppel should be applied in a particular action, the CIT has made reference to the analysis adopted by the U.S. Court of Appeals for the Federal Circuit, which in turn is based on the RESTATEMENT (SECOND) OF JUDGMENTS.⁷⁶ The CIT stated in *Cabot Corporation v. United States*⁷⁷ that the doctrine of collateral estoppel is applicable only where the issue determined in the prior litigation has resulted in a *final* judgment on the merits⁷⁸ and where the party against whom the earlier decision was rendered had a "full and fair opportunity" to litigate the issue.⁷⁹ The CIT further noted that although the rule of collateral estoppel had initially required mutuality of the parties, that rule has been substantially modified in federal practice.⁸⁰

In the *Cabot* case, the CIT found the doctrine of collateral estoppel inapplicable because the prior case had not resulted in a judgment on the merits from which the U.S. government could have obtained a review.⁸¹ Thus, under the exception cited above for judgments that are not "final," the CIT held that collateral estoppel could not be asserted against the government.⁸² More importantly, the CIT also noted in *Cabot* that

75. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1988).

76. *Cabot Corp. v. United States*, 694 F. Supp. 949, 954 (Ct. Int'l Trade 1988) (relying on RESTATEMENT (SECOND) OF JUDGMENTS); see *Young Engineers v. United States Int'l Trade Comm'n*, 721 F.2d 1305, 1314 (Fed. Cir. 1983); *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1569-70 (Fed. Cir. 1983).

77. 694 F. Supp. 949 (Ct. Int'l Trade 1988).

78. *Id.* at 954; see *Equitable Trust Co. v. Commodity Futures Trading Comm'n*, 669 F.2d 269, 272 (5th Cir. 1982).

79. *Cabot*, 694 F. Supp. at 954; see *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81 (1982).

80. *Cabot*, 694 F. Supp. at 954 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-31 (1979)).

81. *Cabot*, 694 F. Supp. at 954-55.

82. *Id.*

even though collateral estoppel did not preclude the raising of the issues at the outset of the case, the legal reasoning and principles set forth by the CIT in the earlier case "appl[y] perforce to the facts of this case."⁸³ While the *Cabot* decision held that collateral estoppel was inapplicable against the government under the facts of the case because there was no final, appealable judgment in the prior action, the statement in *Cabot* that the principles announced by the CIT are equally applicable in subsequent actions involving the same issues provides an alternative means of accomplishing the same result.

Another principle recently enunciated by the U.S. Supreme Court restricts even more severely the ability of parties to assert the doctrine of collateral estoppel against the government. In *United States v. Mendoza*,⁸⁴ the Supreme Court held that the doctrine of nonmutual offensive collateral estoppel may not be applied against the government in cases involving different plaintiffs.⁸⁵ The unique status of the government as a litigant and the pressure on the government to pursue every appeal on every adverse point to avoid issue preclusion were the major considerations influencing the Court's decision in *Mendoza*.⁸⁶ The Supreme Court's decision in *Mendoza* substantially restricts the use of collateral estoppel in cases before the CIT.

In addition to these legal impediments to the application of collateral estoppel, there exist a number of practical impediments to the doctrine's application in trade cases. In *Lone Star Steel Company v. United States*,⁸⁷ the CIT was faced with a case involving two separately-filed antidumping petitions covering the same products. The CIT found the doctrine of collateral estoppel inapplicable because the cases involved different time periods, meaning the issues were not identical because different determinations might result under the facts of the separate cases.⁸⁸

Similarly, in *PPG Industries, Incorporated v. United States*,⁸⁹

83. *Id.* at 955.

84. 464 U.S. 154 (1984).

85. *Id.* at 162.

86. *Id.* at 160-62.

87. 649 F. Supp. 75 (Ct. Int'l Trade 1986).

88. *Id.* at 76.

89. 712 F. Supp. 195 (Ct. Int'l Trade 1989).

the CIT held that issue preclusion was inapplicable because there had not been a sufficient demonstration that the issues sought to be precluded were identical with issues previously adjudicated by the CIT.⁹⁰ In reaching this conclusion, the CIT in *PPG Industries* commented specifically on the unique nature of the factual inquiry present in trade cases that will often preclude application of collateral estoppel:

The burden on the party seeking issue preclusion is and should be exacting. This is especially so in trade cases, since Congress has made specific provision for periodic administrative reviews in countervailing duty and dumping cases. Since the agencies involved perform the function of expert finders of fact concerning different programs, different time frames, economic statistics and other factors in countervailing duty and dumping investigations as well as similar functions during periodic reviews, principles of issue preclusion should be carefully applied. To hold otherwise would have a chilling effect upon the administrative processes envisioned by the Congress.⁹¹

The position of the CIT concerning the limited applicability of collateral estoppel in trade cases due to the statutory scheme is well taken. Congress clearly envisioned, by providing for appeals not only from original investigations but also from each and every administrative review conducted by the particular agency, that similar issues involving slightly different factual circumstances would be presented to the courts. An overly rigid application of the doctrine of collateral estoppel to preclude, at the outset, the raising of issues in an appeal involving slightly different facts would be inconsistent with the broad scheme of judicial review of trade cases established by the U.S. Congress.

As these cases and their underlying rationale reveal, the application of collateral estoppel in trade cases has been, and should continue to be, an infrequent occurrence. The requirements of finality of judgment and of identity of factual issues, coupled with the exception for issue preclusion as applied against the U.S. government in cases involving different plain-

90. *Id.* at 198-99.

91. *Id.* at 199 (citation omitted).

tiffs, severely limit the doctrine's application in antidumping and countervailing duty cases.

B. *Stare Decisis*

The doctrine of stare decisis requires that courts "abide by, or adhere to decided cases."⁹² This term generally encompasses both the concept that a lower court is bound to follow the determination on a point of law made by a higher court⁹³ as well as the concept that judges are obliged to follow other decisions rendered by members of their own court.⁹⁴ Although the CIT has consistently followed the holdings of the Federal Circuit in rendering its decisions, the CIT has often departed from its own prior legal determinations.⁹⁵ This willingness of the CIT to depart from prior determinations in turn acts as a catalyst for ITA resistance to following CIT decisions.

A prominent example of this problem is the ITA's practice of finding subsidies that are generally available not to be countervailable under the U.S. countervailing duty laws. The CIT has been presented with a challenge to the ITA's practice of finding generally available subsidies not countervailable on a number of occasions. In most cases, the CIT has rejected the standard ITA interpretation of the statute as barring "generally available" benefits from qualifying as subsidies, often citing its holding in *Cabot Corporation v. United States*.⁹⁶ Prior to the issuance of the decision in *Cabot*, however, the CIT had upheld the agency's "generally available" practice in *Carlisle*

92. BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). Although this Article does not attempt to explore the doctrine of stare decisis in detail, the concept is discussed briefly because of the impact it may have on agency nonacquiescence.

93. 20 AM. JUR. 2d Courts § 183 (1965).

94. J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.402[2] (2d ed. 1984).

95. Compare *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834 (Ct. Int'l Trade 1983) with *Cabot Corp. v. United States*, 620 F. Supp. 722 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986), *vacated* (Nov. 20, 1986) (addressing issue of "general availability"); compare *British Steel Corp. v. United States*, 647 F. Supp. 928 (Ct. Int'l Trade 1986), *modified*, 661 F. Supp. 68 (1987) with *OKI Elec. Indus. Co. v. United States*, 669 F. Supp. 480 (Ct. Int'l Trade 1987) (addressing issue of CIT jurisdiction to entertain motions to enjoin liquidation where no administrative review was requested).

96. 620 F. Supp. 722 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986), *vacated* (Nov. 20, 1986); see *PPG Indus. Inc. v. United States*, 662 F. Supp. 258 (Ct. Int'l Trade 1987); *Bethlehem Steel Corp. v. United States*, 590 F. Supp. 1237 (Ct. Int'l Trade 1984).

Tire & Rubber Company v. United States.⁹⁷

The ITA, therefore, has been confronted with inconsistent CIT opinions. Not surprisingly, the agency referred to the CIT's decision in *Carlisle* upholding its practice and expressed disagreement with and refused to follow the CIT's holding in *Cabot*.⁹⁸ Thus, while not acquiescing in the most recent and most consistent holdings of the CIT on the "generally available" issue, the ITA argues that its practice is consistent with a CIT holding on this point that has not been overturned.

This type of inconsistent ruling by the CIT on a critical legal issue would appear to encourage the ITA to pursue a policy of nonacquiescence. If the ITA is aware that one CIT judge will not necessarily follow another judge's decision on a particular legal issue and that a subsequent appeal of the same issue may yield a different result, there is certainly less incentive for the ITA to conform its policies and practices to CIT decisions.

III. CAN THE COURT DISCOURAGE FUTURE NONACQUIESCENCE BY THE AGENCY?

A review of the practices of the agencies charged with administering antidumping and countervailing duty laws reveals that the ITA, while not engaging in nonacquiescence in the manner of the NLRB, the IRS, and the SSA, appears to be moving clearly in that direction. The question, therefore, is whether there is anything the CIT can or should do to prevent the ITA from being identified in the future as the fourth major administrative agency that does not acquiesce in the decisions of its reviewing court.

The constitutional doctrines and judicial policies discussed in this Article suggest that a policy of agency nonacquiescence should, if at all possible, be discouraged by the CIT. The justification for the IRS policy of intracircuit nonacquiescence with respect to the need for a nationwide rule of law and uniformity in the Tax Code's implementation simply does not apply to CIT decisions. The CIT is the only lower court re-

97. 564 F. Supp. 834 (Ct. Int'l Trade 1983).

98. Suspension of Countervailing Duty Investigation; Certain Red Raspberries from Canada, 51 Fed. Reg. 1005, 1007 (1986); Final Affirmative Countervailing Duty Determination; Certain Welded Carbon Steel Pipe and Tube Products from Turkey, 51 Fed. Reg. 1268, 1272 (1986).

viewing ITA and ITC decisions in trade law cases; hence, a decision by the CIT will be *a fortiori* the nationwide rule of law on a particular issue unless and until it is reversed by the U.S. Court of Appeals for the Federal Circuit. The fact that other circuits do not review ITC and ITA decisions and cannot issue potentially inconsistent rulings leaves those agencies in a very different position, vis-à-vis acquiescing in decisions of their appellate courts, than other federal agencies. Where a decision by the CIT is clear in rejecting an agency practice (*i.e.*, where the CIT has not issued potentially conflicting decisions on an issue), there is no real justification the ITA can proffer for its refusal to acquiesce in the CIT decision that the statutory scheme contemplates.⁹⁹

On the other hand, numerous policy considerations counsel against the practice of nonacquiescence by administrative agencies. Nonacquiescence creates inequities between persons appearing before the agency based upon who can afford to sue the agency. Parties without the financial resources to contest agency nonacquiescence are stuck with an agency decision inconsistent with the decision that they could obtain if they could afford judicial review.

Nonacquiescence also creates the potential for conflicts among agency decisions where decisions of more than one agency, for example the ITA and ITC, overlap. Although in general the decisions of the ITA and ITC are distinct, areas exist—such as the definition of the domestic industry for purposes of determining standing—in which ITA and ITC decisions are related. Adherence to CIT decisions would ensure harmony in the agencies' practices.

A more fundamental problem with agency nonacquiescence is that it upsets the sensitive system of checks and balances that underlies our federal governmental system. An agency's failure to adhere to decisions by its reviewing court breeds disrespect for the judiciary and elevates the agency to a decision-making level not contemplated by the U.S. Constitution or the laws promulgated thereunder. The CIT should, therefore, attempt to prevent agency nonacquiescence in trade law decisions to the greatest extent possible.

99. See 19 U.S.C. § 1516a (1988) (governing judicial review in countervailing duty and antidumping duty proceedings).

In light of this goal, the difficult question of whether there is anything the CIT can do to encourage acquiescence or, alternatively, to prevent nonacquiescence by the agency remains. In this context, the doctrines of collateral estoppel and stare decisis become relevant. The limitations that have been placed on the doctrine of collateral estoppel by higher courts and the limitations inherent in applying the doctrine in the area of the trade laws make it unlikely that the CIT will be able to use this doctrine effectively as a device for controlling administrative agency nonacquiescence. Nonetheless, consistent adherence to the principle laid down in *Cabot* that the legal reasonings and principles set forth in an earlier action "appl[y] perforce" to a later action addressing the same issue¹⁰⁰ would go a long way toward discouraging agency nonacquiescence in future cases.

An increased use of the principle of stare decisis by the CIT in terms of following its own decisions would be a useful weapon against the practice of agency nonacquiescence. If the CIT were to follow consistently its own decisions, the ITA would be less likely to continue to adhere to rejected CIT interpretations of law in the hopes that a different judge would view the practice differently. Stricter adherence to stare decisis principles would also make it less likely that the ITA would litigate repeatedly positions that had been rejected by the CIT.

In sum, the conflict between the judiciary and the agencies that has resulted, in some instances, in nonacquiescence by the ITA in the CIT's judgments is a problem that both the CIT and the ITA should strive to avoid. The CIT, using devices such as a stricter application of principles of stare decisis with consistent adherence to the legal reasoning and principles set forth in earlier cases involving the same issue, should encourage the agency to treat the views of the CIT as final and binding. The ITA, in turn, should respect the statutory scheme and the power of judicial review that the U.S. Congress entrusted to the CIT. Where disagreements exist between the ITA and the CIT, they should be handled within the statutory framework by appealing the CIT's determination to the U.S. Court of Appeals for the Federal Circuit or, alternatively, seeking legislation that addresses the issue. Unless the ITA and

100. *Cabot Corp. v. United States*, 694 F. Supp. 949, 955 (Ct. Int'l Trade 1988).

the CIT attempt to work together to eliminate the trend toward nonacquiescence, the effectiveness of judicial review in resolving trade cases will be undermined severely.