INTERNATIONAL TRADE LAW AND THE ROLE OF THE LAWYER*

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International trade is more important to our nation today than ever before. As the impact of international trade on the American economy has grown, there has been a corresponding increase in disputes within the international trade community: particularly among nations, individuals, foreign and domestic manufacturers, consumer groups, trade associations, labor unions and affected citizens.

In view of the ever-increasing importance of the law of international trade, all members of the international trade community should acquaint themselves with the jurisdiction of and practice before the United States Court of International Trade. Even those lawyers familiar with the practice before the court's predecessor, the United States Customs Court, should note the significant changes in the jurisdiction and powers of the court brought about by the Trade Agreements Act of 1979 and the Customs Courts Act of 1980.[1]

On November 1, 1980, the effective date of the Customs Courts Act, the Court of International Trade entered the mainstream of the federal judicial system. As an Article III court, the Court of International Trade has all the powers in law and equity possessed by, or conferred by statute upon, a federal district court.[2]

Although the court is located in New York City, it is a national court; a trial originating in the Court of International Trade may be had in any United States courthouse or federal courtroom throughout the country.[3] Additionally, the court is authorized to hold

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1. Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980); Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979). For an introduction to the work of the United States Court of International Trade, see De Concini, *Introductory Statement (International Trade Law Symposium)*, 26 N.Y.L. SCH. L. REV. 431 (1981).

2. 1980 Act, 28 U.S.C. § 1581 (Supp. IV 1980).

3. *Id.* § 256(a).

hearings in foreign countries.[4]

With certain necessary exceptions, the Federal Rules of Evidence apply to all civil actions before the court.[5] Moreover, with some modifications to accommodate the requirements of international trade law practice, the Rules of the Court of International Trade are modeled after the Federal Rules of Civil Procedure.[6]

The most significant aspects of the Customs Courts Act of 1980 are those relating to the expansion of the jurisdiction of the court and conferring upon it the power to grant appropriate relief, whether legal or equitable.[7] The Act was intended to afford persons involved in international trade disputes the same access to judicial review and judicial remedies as is available to other persons who deem themselves aggrieved by administrative action. More than two years after the law's enactment, it is now appropriate to review how the Court of International Trade has addressed the elemental issues which have arisen in the interpretation and application of its new statutory authority.

I. ADMINISTRATIVE LAW

Much of the court's work involves the application of administrative law. Administrative law has been defined as "the system of legal principles which settle the conflicting claims of executive or administrative authority on the one side, and of individual or private right on the other."[8] More recently, Professor Kenneth Culp Davis, author of a leading work on administrative law, described administrative law as:

> not the substantive law produced by the agencies, and . . . not the substantive law created by legislative bodies or courts and administered by the agencies; instead administrative law is the law that governs the powers and procedures of the agencies.[9]

In its broadest terms, administrative law is the law which governs the machinery of government. It determines the manner in which agencies may exercise the powers delegated to them. It further provides courts with the remedial devices which make judicial

4. *Id.* § 256(b).

5. *Id.* § 2641(a).

6. For the procedure in the Court of International Trade, see *id.* §§ 2631 *et seq.*

7. 28 U.S.C. §§ 1581, 1582, 1585 (Supp. IV 1980). *See* S. REP. No. 466, 96th Cong., 1st Sess. (1979); H.R. REP. No. 1235, 96th Cong., 2d Sess. (1980).

8. E. FREUND, CASES ON ADMINISTRATIVE LAW 1 (1911), *quoted in* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 3 n.3 (1958).

9. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 2 (2d ed. 1978).

review of administrative actions meaningful.[10]

Numerous cases have caused the Court of International Trade to examine the adjudicatory, investigatory, supervisory, prosecutorial and advisory powers of the various federal agencies and officials involved in the administrative decision-making process. In some instances, the court has affirmed and applied traditional doctrines of administrative law. In other cases, the court has fashioned novel applications of the principles and rules of administrative law.

A few specific examples may prove enlightening. As an exercise of its traditional jurisdiction, *Mount Washington Tanker Co. v. United States*[11] represents the court's affirmation of the basic principles of administrative law. In *Mount Washington*, an oil tanker, documented under the laws of the United States, was repaired by a foreign crew while the ship was on the high seas. The court interpreted the pertinent acts of Congress and held that, for the purposes of the customs laws, ship repairs made on the high seas were made in a "foreign country."[12] In examining whether the plaintiff was entitled to a remission of duties, the court discussed the principles of administrative law which govern judicial review of the discretionary authority reposed in the Secretary of the Treasury. Based on the reasoning of *Suwannee Steamship Co. v. United States*,[13] the court held that the Secretary's authority to remit duties was subject to judicial review.[14] The court noted that the decisional law on the subject indicates that the scope and standard of review, in cases of express delegation of discretionary authority, are of a limited nature.[15] If it is shown that the decision of the administrative official or agency has a rational basis in fact and is not contrary to law, the court will sustain the administrative decision. The court pointed out that it will not substitute its discretion for that of the administrator. Judicial review must be available, however, to assure that the discretion is not abused and is exercised reasonably within the intention of the governing legislation.[16]

More recent cases, involving the court's expanded jurisdiction,

10. The types of relief that the Court of International Trade may order are specified in the 1980 Act, 28 U.S.C. § 2643.

11. 1 Ct. Int'l Trade 32, 505 F. Supp. 209 (1980), *aff'd*, 665 F.2d 340 (Fed. Cir. 1981).

12. 505 F. Supp. at 215.

13. 435 F. Supp. 389 (Cust. Ct. 1977).

14. 505 F. Supp. at 211-12.

15. *Id.* at 212.

16. *Id.*

have focused attention on other facets of administrative law. In *Haarman & Reimer Corp. v. United States*,[17] the court was concerned with the issue of whether, during the course of a dumping investigation, a finding by the Department of Commerce that "critical circumstances" did not exist was judicially reviewable. The negative finding as to the existence of "critical circumstances" was made during the Commerce Department's preliminary determination that natural menthol imported from the People's Republic of China was being, or was likely to be, sold in the United States at less than fair value.[18] The plaintiff contended that even though the Trade Agreements Act of 1979 did not specifically provide for judicial review of a negative determination as to the existence of "critical circumstances," judicial review could be predicated upon the court's residual jurisdictional provision, 28 U.S.C. § 1581(i).[19] Citing *Abbott Laboratories v. Gardner*,[20] plaintiff submitted that, in the absence of a persuasive showing that Congress did not intend judicial review of a final administrative determination, judicial review would be available under general principles of administrative law and the Administrative Procedure Act.[21] After applying the final agency action test of *Abbott Laboratories*, the court concluded that "the entire legislative scheme (of the Trade Agreements Act of 1979 and the Customs Courts Act of 1980) . . . evinces a congressional intent to bar judicial review of the agency action in question."[22]

Juxtaposed to *Haarman & Reimer* is *Republic Steel Corp. v. United States*.[23] In that action, *Republic Steel* sought judicial review of a Commerce Department finding, made in the course of a countervailing duty investigation, that certain coal subsidy programs did not constitute a subsidy within the meaning of 19 U.S.C.

17. 1 Ct. Int'l Trade 148, 509 F. Supp. 1276 (1981), *reh'g denied*, 1 Ct. Int'l Trade 207 (1981).

18. *See* Tariff Act of 1930 § 731, 19 U.S.C. § 1673 (Supp. IV 1980).

19. 28 U.S.C. § 1581(i) (Supp. V 1981) provides in pertinent part:

(i) [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —
(1) revenue from imports or tonnage;
(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

20. 387 U.S. 136 (1967).

21. 509 F. Supp. at 1278.

22. *Id.* at 1279.

23. 4 Ct. Int'l Trade 17 (1982).

§ 1671b(b).[24] The subsidy finding in question was one of many contained in what was predominantly an affirmative preliminary countervailing duty determination as to the West German steel industry.

The government moved to dismiss on the basis that the Commerce Department's determination was monolithic and had to be viewed in its entirety as an affirmative determination. Alternatively, the government claimed that plaintiff was challenging negative aspects of an affirmative determination. In either event, the government contended that judicial review was unavailable prior to the Commerce Department's final determination.[25]

After considering the various provisions of the Trade Agreements Act of 1979 dealing with the reviewability of negative determinations, and reviewing relevant legislative history, the court rejected the government's contentions. The court held that the characterization of the overall determination as an *indivisible* affirmative determination, which could not be judicially reviewed at the preliminary stage, was "a highly questionable proposition." Rather, the court found that it was

> far more reasonable to treat an investigation of this type, into the existence of more than one subsidy or involving more than one producer, as resulting in a series of *discrete and severable determinations*, each of which resolves a question of whether imported merchandise was receiving a subsidy. In these terms, a preliminary determination that a particular practice is *not* a subsidy is a negative determination. A preliminary determination that a particular producer is *not* receiving a subsidy is a negative determination.[26]

The government's motion to dismiss was denied, and the court took jurisdiction over the action.[27]

In the context of the recent steel dumping and subsidy cases, the court has also reviewed the Department of Commerce's discretionary modification of the scope of a subsidy investigation in a countervailing duty proceeding initiated by a private party. In a second case, *Republic Steel Corp. v. United States*,[28] the plaintiff filed a petition alleging that the steel products in question were the

24. *Id.* at 17-18.

25. *Id.* at 18.

26. *Id.* at 19 (emphasis added in part).

27. *Id.*

28. 4 Ct. Int'l Trade 33, 544 F. Supp. 901 (1982), *appeal docketed*, No. 82-34 (Fed. Cir. Aug. 6, 1982).

beneficiaries of subsidies from ten European countries and the European Economic Community (EEC).[29]

After reviewing plaintiff's petition, the Commerce Department instituted a subsidy investigation of certain European nations, but not the EEC. The Commerce Department contended that it would investigate the existence of EEC subsidies by including them in its investigation of each European nation. Plaintiff contended that the language of the Trade Agreements Act of 1979 required the Commerce Department to treat the EEC and the existence of EEC subsidies separately from its investigation of the individual European countries. The court agreed with the plaintiff, holding that in a situation where a private party petition triggers a subsidy proceeding, the Department of Commerce has a limited ministerial function.[30] The court stated that the Department of Commerce "has an obligation to maintain the proceeding in a form which corresponds to the petition . . . . This means that it must not do anything which has the effect of altering the over-all investigation by precluding, or making discretionary, that which should be mandatory."[31]

United States Cane Sugar Refiners' Ass'n v. Block[32] questioned the President's authority to impose both duties and a quota on the importation of sugar. One of the major issues was whether plaintiff had exhausted its administrative remedies prior to bringing the action. After reviewing the governing statutes and case law, the court assumed jurisdiction over the action and held, in an opinion by Judge Newman, that review by the Customs Service would prove futile in view of the fact that the President's proclamation legally foreclosed the customs officials from granting the relief sought by plaintiff.[33] Relying on *United States v. Bush & Co.*,[34] the court concluded that the President's action was authorized by the relevant statutes. The court was therefore precluded from inquiring or probing into the reasoning which prompted the President's

29. 544 F. Supp. at 903.

30. *Id.* at 904.

31. *Id.* While the appeal in this action was *sub judica* by the Court of Appeals for the Fedral Circuit, the United States and EEC governments settled the underlying steel dispute. Thereafter, the Federal Circuit Court issued an order pursuant to United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950), vacating the judgment of the lower court and remanding the action for dismissal on the grounds of mootness. Subsequently, this action was dismissed as moot. 5 Ct. Int'l Trade —, slip. op. 83-1 (Jan. 6, 1983).

32. 544 F. Supp. 883 (Ct. Int'l Trade 1982), *aff'd*, 683 F.2d 399 (Fed. Cir. 1982).

33. *Id.* at 895.

34. 310 U.S. 371 (1940).

actions.[35]

Trade adjustment assistance cases, such as *Woodrum v. Donovan*,[36] have afforded the opportunity to reexamine the mandatory nature of various administrative procedures. In *Woodrum*, the Secretary of Labor failed to publish certain Federal Register notices and to conduct an investigation into the plaintiff's petition for certification of eligibility for trade adjustment assistance benefits. The court concluded that the pertinent statutory provisions required the Secretary to observe those administrative procedures because they were intended to protect important rights conferred upon the plaintiff.[37]

Other applications of administrative law principles are evident in the court's recent decision in *United States v. Bavarian Motors, Inc.*[38] In that case, an administrative agency sought enforcement of administrative action prior to the completion of the administrative review process. After examining the applicable case law, Judge Maletz concluded that the doctrine of the exhaustion of administrative remedies applied with equal force to both the government and private parties. The court found no reason for a different standard to prevail depending upon the party who instituted the lawsuit.

These cases illustrate how the Court of International Trade has interpreted and applied the jurisdictional provisions contained in the Trade Agreements Act of 1979 and the Customs Courts Act of 1980. Moreover, these cases demonstrate the court's commitment to striking a proper balance between the interests of the executive and administrative authorities *vis à vis* the rights of aggrieved parties.

II. EQUITY JURISDICTION

In addition to the expansion of its subject matter jurisdiction, the conferral of plenary equity jurisdiction on the Court of International Trade is the most important single consequence of the Customs Courts Act of 1980.[39] Equity, at early common law, was a

35. The Supreme Court stated in *Bush*: "The President's method of solving the problem was open to scrutiny neither by the Court of Customs and Patent Appeals, nor by us." *Id.* at 379.

36. 4 Ct. Int'l Trade 46, 544 F. Supp. 202 (1982), *reh'g denied*, 4 Ct. Int'l Trade 130 (1982).

37. 544 F. Supp. at 205.

38. 4 Ct. Int'l Trade 83 (1982).

39. *See* Re, *Litigation before the United States Court of International Trade*, 26 N.Y.L. SCH. L. REV. 437, 442 (1981).

jurisprudential system which existed apart from the ordinary courts of law. The term "equity" denotes the spirit of fairness, justice and good conscience which should govern all human activity. Equity seeks to mitigate the rigor of legal rules and is grounded in ethical rather than legal considerations.

Professor Zechariah Chafee, Jr., affectionately dubbed the last of the Harvard Chancellors, made the following pertinent observations about the nature and scope of equity: "Equity is a way of looking at the administration of justice; it is a set of effective and flexible remedies admirably adapted to the needs of a complex society; it is a body of substantive rules".[40]

The principal thrust of Professor Chafee's comments is that equity is flexible and adaptable. Without the power to do equity, the Customs Court could not properly carry out its assigned task; it could not provide complete justice for international trade litigants. This limitation upon the court's remedial powers lead to a confusing and bifurcated system of judicial review. The result was an abundance of inconsistent judicial decisions. Some litigants obtained relief, while others were denied relief because they had selected the wrong forum in which to institute suit. With equity powers, the Court of International Trade may now render complete justice and adjust the conflicting rights and claims of all parties involved in international trade disputes. This adjustment is not limited to litigation between individuals, but also includes, and indeed is most appropriate, in balancing the rights of private parties and those of the public and society.

With 28 U.S.C. § 1585 as the basis of its authority,[41] the Court of International Trade has begun to implement equitable principles and remedies in international trade litigation. The most recurrent issue of equity before the court is that of injunctive relief. In a series of cases, the court has defined the essential factors which it will consider before granting a preliminary injunction. In *American Air Parcel Forwarding Co. v. United States*,[42] the court set forth the factors that will be considered in granting a preliminary injunction: (1) the threat of immediate irreparable harm; (2) that the public interest would be better served by issuing rather than denying the

40. Chafee, *Foreword* to E. RE, SELECTED ESSAYS ON EQUITY iii (1955); *see also* E. RE, REMEDIES 229 (1982).

41. 28 U.S.C. § 1585 provides: "The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."

42. 1 Ct. Int'l Trade 293, 515 F. Supp. 47 (1981).

injunction; (3) the likelihood of success on the merits; and (4) that the balance of hardships on the parties favors plaintiff.[43]

Although the party seeking an injunction bears the burden of persuasion and a heavy burden of proof, the court in *American Air Parcel* noted that the case law developed in the federal courts did not require the plaintiff to sustain that high burden of proof as to each of the four factors. Rather, the court indicated that the balance of the hardship test permits the exercise of sound discretion and flexibility in the interaction of the four factors in granting or denying a request for interlocutory injunctive relief. The court has adopted a standard "under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors."[44]

Attempts to prevent the disclosure of confidential business information have given the court two recent opportunities to exercise its equitable power. In *Sacilor, Acieries, et Laminoirs de Lorraine v. United States*,[45] foreign steel producers sought to enjoin the Department of Commerce from disclosing confidential information submitted by them in the course of an antidumping duty investigation. The foreign producers alleged that the Commerce Department's decision to release confidential business information to counsel for domestic steel producers was based upon requests that lacked the specificity and supporting reasons required by law and the Commerce Department's regulations.[46]

In accepting jurisdiction pursuant to 28 U.S.C. § 1581(i), the court found no statute that expressly or implicitly precluded the action. Judge Watson stressed that the disputed decision was one clearly contemplated by Congress when it enacted section 1581(i).[47]

Moreover, in light of *Abbott Laboratories v. Gardner*,[48] the court viewed this action "as a conventional challenge to final

43. These factors were set forth by the United States Court of Customs and Patent Appeals in S. J. Stile Associates v. Snyder, 646 F.2d 522 (1981). Although a preliminary injunction is not available unless all four factors are satisfied, the court will allow a lesser showing of the likelihood of success on the merits if the hardship suffered would be substantial without a preliminary injunction. *See* 515 F. Supp. at 53.

44. Washington Metropolitan Area Transit Comm'n v. Holiday Tours Inc., 559 F.2d 841, 844 (D.C. Cir. 1977), *quoted in* American Air Parcel Forwarding Co. v. U.S., 515 Supp. 47, 52 (Ct. Int'l Trade 1981).

45. 3 Ct. Int'l Trade 191, 542 F. Supp. 1020 (1982).

46. 542 F. Supp. at 1021-22.

47. *See* H.R. REP. No. 1235, 96th Cong., 2d Sess. 47, 48 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3758-60.

48. 387 U.S. 136 (1967).

agency action by an aggrieved party," and thus found it to be "in harmony with the best principles of administrative law."[49]

As to the merits, the Trade Agreements Act of 1979 showed "extreme sensitivity" to the handling of all confidential business information submitted in the course of an antidumping proceeding. Section 777(c) of the Tariff Act of 1930[50] specifically requires the requesting party to describe with particularity the information desired and to set forth reasons for the request. The concomitant regulation[51] requires a demonstration of good cause for disclosure and imposes a duty upon the Secretary of Commerce to balance the needs of the requesting party against the needs for continued confidentiality.[52]

In reviewing the statute and the regulation, the court stated that their requirements "must be viewed with the utmost seriousness," for they touch upon "some of the most sensitive decisions that have to be made in the administrative process."[53] The court, concluding that the Commerce Department failed to honor the clear language of the statute and regulation, granted the foreign producer's motion for injunctive relief.[54] Judge Watson noted that a determination by the Commerce Department to disclose confidential business information must be the result of a reasoned decision which carefully evaluates the need of the applicant as opposed to the demands of confidentiality.[55]

The *Sacilor* case was followed by *Arbed, S.A. v. United States*,[56] in which foreign steel producers again sought injunctive relief to prevent disclosure by the Commerce Department of confidential business information submitted in the course of an antidumping duty investigation. *Arbed* involved the same parties and issues as *Sacilor*, except that in *Arbed* the Commerce Department adhered to the requisite procedures.

The question before the court was whether the decision to release confidential business information was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In particular, the court dealt with the critical issue of the sufficiency of

49. 542 F. Supp. at 1023-24.
50. 19 U.S.C. § 1677f(c) (1980).
51. 19 C.F.R. § 353.30 (1982).
52. *Sacilor, Acieries et Laminoirs de Lorraine*, 542 F. Supp. at 1025.
53. *Id.* at 1024.
54. *Id.*
55. *Id.*
56. 4 Ct. Int'l Trade 132 (1982).

the need for disclosure to the domestic producers. The domestic producers predicated their claim on a general need to examine, analyze and comment on the information submitted by the plaintiffs in order to present fully their views of the accuracy of the data and the computations made by the Commerce Department. Principally, the domestic producers sought cost of production information since it, instead of home market value, was used by the Commerce Department as a basis for determining sales at less than fair value.

The court rejected the foreign producers' contention that a showing of general need was insufficient and that a showing of specific need was required. The court was not convinced that "the general need to subject certain underlying data to critical scrutiny is unreasonable, or that the verification of this data by the [department] was intended to be the limit of its exposure in the investigation."[57] The court stated that the Commerce Department must have latitude in those areas where it reasonably expects that the comments and the analyses of the parties will assist it. The court's main concern with the exercise of the Commerce Department's discretion was not with the needs of a party as they relate to its full and complete participation in the administrative process. Rather, it was most important that "the needs of a party conform to, or reasonably complement, the need of the agency to be as fully informed as possible in arriving at the objectives of the investigation."[58]

The court concluded that while the general reasons found sufficient for disclosure "may not compel disclosure," it was within the Commerce Department's discretion to grant disclosure. The court added a caveat, stating that its acceptance of the Commerce Department's discretion was not final or absolute, and reserved to a later proceeding a more refined analysis of the problem. Suffice it to say that the court was satisfied that the Commerce Department neither abused its discretion nor acted contrary to law. On that basis, the court denied the foreign producers' request for injunctive relief.

These cases have considered the substantive rules that must be applied in resolving the competing claims for equitable relief. Equity's flexible and adaptable precepts will permit the Court of International Trade to address effectively the questions that are critical to the proper functioning of lawyers and business persons in today's

57. *Id.* at 136.
58. *Id.*

highly competitive and changing world. In reaching its decisions in these and other important international trade cases, the court will continue to strike that delicate balance between the rights of the individual and the interests of the public and society.

III. THE ROLE OF THE LAWYER

In each of the cases discussed, the question presented included and required the interpretation and application of a statutory provision. Each judicial question dealt with the *meaning* of the applicable statutory provision or term and its *application* to the facts of the particular case. In the performance of this important judicial function, the court has been greatly aided by the submission of competent and helpful briefs prepared by counsel.

In the interpretation and application of a new statutory provision, as occurs in every case of novel impression, the lawyer has perhaps the best opportunity to aid the client, the court and the administration of justice. Seldom is the question presented so clearly that the answer is to be found by a simple reading of the plain language of the statute. After all, if the specific question presented had been expressly answered by the explicit language of the statute, the problem would not be before the court, but would have been resolved at the administrative level. Indeed, problems of statutory interpretation may arise even in cases in which the statutory language seems clear. Justice Holmes has alerted us that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[59]

The court must often look to legislative history and other pertinent sources to determine the legislative purpose and intent that will cast light on the meaning of statutory language. Indeed, many of the cases presented for adjudication present problems that were not specifically considered by the legislature. These are the cases where there exists a void or *lacuna* which the court must fill. This category represents that large area of decided cases in which it has been said that the judiciary is permitted to legislate "interstitially," that is, it may fill the interstices of the statute. Again, we are reminded of Justice Holmes who stated: "I recognize without hesitation that judges do and must legislate, but they can do so only

59. Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.).

interstitially . . . ."[60] In the face of congressional silence, the court must "discern dispositive legislative intent by 'projecting as well as it could how the legislature would have dealt with the concrete situation if it had but spoken.' "[61]

Most of the court's recent cases have dealt with problems of statutory interpretation and application, and much can be learned on that important subject by a reading of these cases. They discuss and apply the most authoritative sources on what has been traditionally called "statutory construction." Further, they review fundamental principles and canons of interpretation for these legislative acts.

As in many other cases recently decided by the court, decisions by the United States Supreme Court, as well as the United States Court of Appeals for the Federal Circuit and the other courts of appeals, are points of beginning. The teachings of the federal courts are most helpful and usually provide an excellent point of departure in the search for the specific solution to the particular international trade problem presented.[62]

Once legislative intent has been ascertained, the court must apply the meaning found. Clearly, in all cases, it is the function of the court to give effect to the legislative purpose. It cannot be questioned that, in areas in which the Congress can speak with final authority, the court must strive to implement and fulfill the legislative will and to be faithful to the legislative purpose.[63]

On other occasions, I have had the opportunity of highlighting the contribution that the bar may make by the thorough and competent presentation of cases. I have stated that the responsibility of counsel to present competently the facts of a case cannot be disputed. Obviously, the court is not expected to know the facts. Apart from the doctrine of judicial notice, cases are decided on the basis of the record made at the trial. Counsel's responsibility, how-

60. Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

61. District of Columbia v. Orleans, 406 F.2d 957, 958 (D.C. Cir. 1968), *citing* City of Chicago v. FPC, 385 F.2d 629, 635 (D.C. Cir. 1967), *quoted in* Asahi Chemical Industry Co. v. U.S., 4 Ct. Int'l Trade 120, 124, 548 F. Supp. 1261, 1265 (1982).

62. *See* American Air Parcel Forwarding Co. v. United States, 1 Ct. Int'l Trade 293, 515 F. Supp. 47 (1981). This case held that 28 U.S.C. § 1581 accomplishes, as to the Court of International Trade, the same purpose served by § 1331 (federal question jurisdictional provision) for the district courts. The court analogized Supreme Court and federal court of appeals cases to reach this conclusion.

63. *See generally* Mount Washington Tanker Co. v. U.S., 1 Ct. Int'l Trade 32, 36-37, 40-41, 505 F. Supp. 209, 212, 215-16 (1980); Elizabeth River Terminals, Inc. v. U.S., 1 Ct. Int'l Trade 165, 174-75, 509 F. Supp. 517, 523-24 (1981).

ever, is not limited to the competent presentation of the facts of the case; counsel is also responsible for the competent presentation of the applicable law.[64]

All lawyers know, as do all judges, that there is no substitute for careful and painstaking preparation. Thorough preparation is not merely an obligation or responsibility owed to the client. It is a professional responsibility with ramifications that directly affect counsel's duty to the court. The counselor acts as an officer to the court as well as to society in general. Although the immediate objective is the vigorous presentation of the case so that counsel may succeed, the contribution to the judicial process goes beyond the success of the moment. Counsel's presentation of the case, if professionally competent, should render valuable assistance to the court or judge charged with the responsibility of decision.[65]

This realization of the role of counsel adds a new dimension to the indispensable requirements of thorough preparation and competent presentation of a case. The lawyer, by applying professional skills, will succeed in attaining several goals. First, counsel will discharge the responsibility to the client; second, counsel will render necessary assistance to the court or judge who must decide the case justly and according to law; and third, counsel will perform a vital public function in shaping, developing and improving the law itself.[66]

Too often judges and the public, as well as lawyers, think of the decisional process as the sole responsibility of the judge. That belief falls far short of reality and does violence to the cooperative effort that must prevail between bench and bar if the adversary system is to function fairly and succeed.

For too long, attempts to understand the judicial process have focused solely on the mental process of the judge. The judicial process seemed naturally to imply the judge's mental process. The inquiry seemed to be: How does the judge decide the case presented? What factors does the judge consider and what are the elements that motivate the judicial decision?[67]

It is time we recognize that the lawyer also has an essential role

64. *See* Re, *The Lawyer as a Lawmaker*, 52 A.B.A. J. 159 (1966).

65. *See generally* MODEL RULES OF PROFESSIONAL CONDUCT, 69 A.B.A. J. 1671 (1983).

66. *See* Re, *supra* note 64.

67. *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921); *see also* R. ALDISERT, THE JUDICIAL PROCESS (1976); Re, *Book Review*, 38 U. PITT. L. REV. 431, 433 (1976) (for helpful insights on the methodology used by the courts to reach and justify judicial decisions).

in the judicial process. Most notable is the contribution made by counsel's submission of competent briefs.

Justice Rossman, a former Justice of the Oregon Supreme Court, summarized well the point I wish to make. He wrote: "If better briefs are written, the courts will produce better decisions."[68] This statement highlights the direct relationship between the input or contribution of the lawyer, who in the first instance must prepare the case and submit authorities for adjudication, and the judicial opinion which memorializes the law. Justice Brandeis stated the point most candidly when he said: "A judge rarely performs his functions adequately unless the case before him is adequately presented."[69]

The references to brief writing by these distinguished jurists indicate that, by the proper performance of a professional responsibility to the client, counsel is also fulfilling the important function of helping to shape the judicial opinion and the law itself.[70]

IV. CONCLUSION

Congress has provided the Court of International Trade with the necessary powers to make judicial review a meaningful process for those adversely affected by administrative decisions relating to import transactions. In its two years of existence, the Court of International Trade, with the able assistance of the bar, has begun to develop its own specific applications of the principles of administrative law and equity.

The best joint efforts of bench and bar are necessary if the court is to perform its important statutory function and to continue to serve as an effective arm of the federal judiciary. Every lawyer who practices before the court will have an opportunity to influence its development in its early formative years. Together, bench and bar can perform an invaluable public service, and illuminate the complex and important world of international trade law.

68. Rossman, *Appellate Practice and Advocacy*, 34 OR. L. REV. 73 (1955).

69. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 470 (1916).

70. *See The Adversary System: Influence of the Brief Upon the Judicial Opinion*, in E. RE, BRIEF WRITING AND ORAL ARGUMENT 82-84 (5th ed. 1983).