

Journal of Civil Rights and Economic Development

Volume 17
Issue 2 *Volume 17, Winter/Spring 2003, Issue 2*

Article 1

December 2003

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Recommended Citation

Carman, Gregory W. (2003) "A Critical Analysis of the Standard of Review Applied by the Court of Appeals for the Federal Circuit in Antidumping and Countervailing Duty Cases," *Journal of Civil Rights and Economic Development*. Vol. 17 : Iss. 2 , Article 1.

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ARTICLES

A CRITICAL ANALYSIS OF THE STANDARD OF REVIEW APPLIED BY THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT IN ANTIDUMPING AND COUNTERVAILING DUTY CASES

HON. GREGORY W. CARMAN*

INTRODUCTION

In May 2001, the Federal Circuit Bar Association held its annual meeting highlighting significant issues affecting cases that fall within the jurisdiction of the United States Court of Appeals for the Federal Circuit (“Federal Circuit”). I, along with several distinguished members of the bench and bar,¹ had the

¹ Chief Judge of the United States Court of International Trade. The author would like to acknowledge the assistance of his law clerks, Christopher M. Ryan and Stephen C. Greene, Jr. in the preparation of this article.

¹ The panel was moderated by M. Page Hall of Dorsey & Whitney and included:

opportunity to serve on a panel discussing the Federal Circuit's standard of review in trade cases as compared to that in patent cases. In particular, I was asked to address the basic standard of review applied to cases appealed from the United States Court of International Trade ("CIT").²

A discussion regarding the standard of review applied by the Federal Circuit is of great significance to international trade litigants because the Federal Circuit has adopted a standard of review for antidumping and countervailing duty cases that, in the view of this writer, *appears* to lack substantive legal justification, promotes judicial inefficiency, and duplicates the standard of review utilized by the CIT. This so-called "apply anew" standard applied in countervailing and anti-dumping cases was announced approximately eighteen years ago by the Federal Circuit in *Atlantic Sugar Ltd., v. United States*³ (hereinafter, *Atlantic Sugar*) when the court inexplicably stated "we review [the CIT's] review of United States International Trade Commission ("ITC") determination by *applying anew* the statute's express judicial review standard."⁴ As support for its announcement, the Court stated:

The statute [19 U.S.C. § 1516a] specifies that the standard of judicial review of a final ITC material injury determination in an antidumping case is whether that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." We therefore apply the substantial evidence standard in reviewing the ITC's factual determination that an industry in the United States was materially injured by reason of Canadian sugar sold in the United States at less than its fair value.⁵

Until 1994 the Federal Circuit consistently recited and applied its *Atlantic Sugar* holding without question.⁶ In 1994, however,

Circuit Judge Arthur J. Gajarsa, United States Court of Appeals for the Federal Circuit; Chairman Stephen Koplun, International Trade Commission; Philippe M. Bruno, Dorsey & Whitney; Cecilia H. Gonzalez, Howrey Simon Arnold & White; and Larry L. Shatzer, Foley & Lardner.

² The United States Court of International Trade is a trial level court possessing all the powers in law and equity of a United States district court.

³ 744 F.2d 1556 (Fed. Cir. 1984).

⁴ *Id.* at 1559 n.10 (emphasis added).

⁵ *Id.* at 1559.

⁶ *See, e.g.,* Koyo Seiko Co. v. United States, 20 F.3d 1160, 1164 (Fed. Cir. 1994) (announcing that "this appellate court reviews the trial court's decision by applying anew

the Federal Circuit decided *Suramerica de Aleaciones Laminadas, C.A. v. United States*,⁷ which called into question the propriety of the “apply anew” standard.⁸ Since that time, both the Federal Circuit and academic literature have begun to question either directly or by implication the merits of duplicating the review conducted by the Court of International Trade.⁹ This article is intended to further explore whether the “apply anew” standard is legally and practically appropriate for the Federal Circuit’s review of antidumping and countervailing duty cases. To this end, this article will illustrate the legal and practical difficulties surrounding the “apply anew” standard and offer what is hoped are constructive suggestions that would bring the Federal Circuit’s review of trade cases more in line with the manner in which other appellate courts judge district court reviews of agency determinations. It will provide an overview of the “apply anew” standard, its supposed legal basis, and an account of how the Federal Circuit has applied this standard in past cases. Additionally, this article will explore the practical impact this standard appears to have had on the Federal Circuit’s disposition of trade cases. Finally, this article will argue that the standard of review for cases involving agency determinations articulated by the United States Supreme Court in *Universal Camera Corp. v. NLRB*¹⁰ is an appropriate standard to apply to trade cases before the federal circuit.

the statute’s express judicial review standard”); *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1236 (Fed. Cir. 1992) (stating that “court must apply anew the statute’s express standard of review”); *U.H.F.C. Co. v. United States*, 916 F.2d 689, 696 (Fed. Cir. 1990) (applying *Atlantic Sugar*, 744 F.2d at 1559 n.10, and quoting “[w]e review that court’s review of an [agency] determination by applying anew the statute’s express judicial review standard”); *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1571 (Fed. Cir. 1990) (noting that “with regard to appeals,” standard of review is a new application of “the statute’s express judicial review standard”).

⁷ 44 F.3d 978 (Fed. Cir. 1994).

⁸ *Id.* at 983 n.1 (announcing that “section 1516a is silent on what standard th[e] court should apply when reviewing a Court of International Trade decision”).

⁹ See *Zenith Elecs. Corp. v. United States*, 99 F.3d 1576, 1579 (Fed. Cir. 1996) (Plager, J., concurring) (questioning “whether *Atlantic Sugar* articulates the proper standard of review”); *Id.* at 1582 (Rader, J., concurring) (criticizing *Atlantic Sugar* standard of review). See generally, Herbert C. Shelley, et al., *The Standard of Review Applied by the United States Court of Appeals for the Federal Circuit in International Trade and Customs Cases*, 45 AM. U. L. REV. 1749 (1996) (examining current standards of review and suggesting more appropriate one).

¹⁰ 340 U.S. 474, 491 (1951) (stating that court may “appl[y] a standard of review which satisfies the present Congressional requirement”).

DISCUSSION

STANDARD OF REVIEW APPLIED BY THE FEDERAL CIRCUIT

Historically, appellate review of the international trade laws of the United States has been a morass of ill-defined statutory guidelines and inconsistent judicial practice. Early trade laws drew little to no distinction between judicial review of customs classification or valuation cases and the exceedingly more complex antidumping and countervailing duty cases.¹¹ In fact, these laws either did not address the standards of review to be applied to antidumping and countervailing duty cases or provided standards that were wholly inadequate.¹² In the absence of specific statutory guidance, the Court of Customs and Patent Appeals ("CCPA") largely duplicated the work of the United States Customs Court¹³ by examining directly the administrative record of each case to determine whether the agency's decision was supported by substantial evidence.¹⁴ Case law reveals, however, that the CCPA's duplicative efforts were frequently guided by the reasoning of the Customs Court.¹⁵ Thus, although the CCPA professed to review the Customs Court's standards *de novo*, as a practical matter it accorded significant deference to the prior review by the Customs Court.¹⁶

In 1979, Congress passed the Trade Agreements Act¹⁷ which

¹¹ See *Zenith*, 99 F.3d at 1580 (Fed. Cir. 1996) (Rader, J., concurring) (highlighting "the historical context of judicial review in trade cases").

¹² See S. REP. NO. 96-249, at 245 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 630-31 (recognizing deficiencies of earlier laws and providing a new scope of judicial review).

¹³ The United States Customs Court was the predecessor to the United States Court of International Trade. Congress renamed this court through passage of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 141, 96 Stat. 45 (1982).

¹⁴ See, e.g., *City Lumber Co. v. United States*, 457 F.2d 991, 994 (C.C.P.A. 1972) (reviewing the ITC's findings after the Customs Court had already reviewed them); *Kleberg & Co. v. United States*, 71 F.2d 332, 334 (C.C.P.A. 1933) (reviewing the Customs Court's findings).

¹⁵ See, e.g., *United States v. RMS Elecs., Inc.*, 624 F.2d 1081, 1082 (C.C.P.A. 1980) (approving of the Customs Court's interpretation of statute); *Zwicker Knitting Mills v. United States*, 613 F.2d 295, 296-98 (C.C.P.A. 1980) (agreeing with the Customs Court's reasoning); *City Lumber Co.*, 457 F.2d at 994 (deferring to the Customs Court's reasoning).

¹⁶ *Zenith*, 99 F.3d at 1581-82 (Rader, J., concurring) (stating that in several cases, this court articulated standards of review that suggest deference to Court of International Trade's prior review).

¹⁷ Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 [hereinafter the "1979 Act"] (codified as amended in scattered sections of Title 19 of the United States

“dramatically altered the scope of judicial review for antidumping and countervailing duty actions,”¹⁸ although its impact on the appellate standard of review for these actions was negligible. For example, the 1979 Act increased the standing of litigants to challenge administrative determinations,¹⁹ increased the equitable powers of the Court of International Trade,²⁰ and greatly reduced the frequent interlocutory appeals submitted to the CCPA (and ultimately to the Federal Circuit) by requiring exhaustion of administrative remedies.²¹ In addition, the 1979 Act restricted the CIT’s review of antidumping and countervailing duty cases to the agency record.²² This provision was significant, not only because it restricted the scope of judicial review permitted in antidumping and countervailing duty cases, but also because it established the standard by which those cases must be reviewed. Section 1516a(b)(1)(B)(i) of Title 19 states that “[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.”²³

This standard is distinguishable from that applied by the CIT in Customs cases. In Customs cases, the judges of the CIT may conduct trials and take testimony, unlike the antidumping and

Code).

¹⁸ *Zenith*, 99 F.3d at 1581 (Rader, J., concurring).

¹⁹ See S. REP. NO. 96-249, at 249-50 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 635-36 (stating that new section 516A would greatly expand categories of persons who would be entitled to institute suit in Customs Court in this type of case, as well as greatly expand right of interested parties to appear and be heard in litigation concerning antidumping and countervailing duties); see also 19 U.S.C. § 1677(9) (defining “interested parties” entitled to bring suit).

²⁰ See 28 U.S.C. § 1585 (providing “[t]he 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”); *Zenith*, 99 F.3d at 1581 (Rader, J., concurring) (stating that Congress renamed the Customs Court to the Court of International Trade to more accurately describe its expanded role).

²¹ See 28 U.S.C. § 2637(d) (2000) (stating that in any civil action not specified in this section, the Court of International Trade shall, where appropriate, require exhaustion of administrative remedies).

²² 19 U.S.C. § 1516a(b)(1)(B)(i) & (2) states:

“[T]he record, unless otherwise stipulated by the parties, shall consist of (i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title (ii) and a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.”

See 19 U.S.C. § 1516a(b)(1)(B)(i) & (2).

²³ 19 U.S.C. § 1516a(b)(1)(B)(i) (2002).

countervailing duty cases, where the court must review the record compiled by the responsible agency.²⁴ The statute provides that Customs Court decisions are presumed to be correct, and the importer has the burden of proving otherwise.²⁵ While the statute provides that Customs decisions are accorded a presumption of correctness, the presumption "is a procedural device that is designed to allocate, between the two litigants to a lawsuit, the burden of producing *evidence* in sufficient quantity."²⁶ While the presumption of correctness "certainly carries force on any factual components of a [Customs Court] decision," it "carries no force as to questions of law," which the CIT reviews *de novo*.²⁷ The Federal Circuit, in turn, reviews the CIT's conclusions of law *de novo*.²⁸ Following a trial, the Federal Circuit reviews the CIT's findings of fact for clear error.²⁹ The clearly erroneous standard requires the Federal Circuit to accept the CIT's findings of fact unless the Federal Circuit is left with a "definite and firm conviction that a mistake has been committed."³⁰

With respect to the appellate standard of review for antidumping and countervailing duty cases, the 1979 Act only provided one standard of review expressly applicable to the Federal Circuit. Under this standard, findings of fact made by the CIT could not be set aside unless "clearly erroneous."³¹ This standard also codified the measure of deference to be accorded CIT decisions by stating that "due regard shall be given to the

²⁴ 19 U.S.C. § 1516a(b)(2)(A)(i) (2002) (stating that the record to be reviewed must consist of all materials presented by administering authority).

²⁵ See 28 U.S.C. § 2639(a)(1) (2000) (providing "in any civil action commenced in the Court of International Trade under § 515, 516, or 516A of the Tariff Act of 1930 [19 U.S.C.S. § 1515, 1516, or 1516a], the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.").

²⁶ *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997).

²⁷ *Id.*; see also 28 U.S.C. § 2640(a)(1) (2000) (stating that the CIT shall make its determinations upon the basis of the record made before the court in civil actions contesting denial of protest under section 515 of Tariff Act of 1930).

²⁸ See *Bestfoods v. United States*, 260 F.3d 1320, 1323 (Fed. Cir. 2001) (illustrating an example of Federal Circuit review of CIT judgment *de novo* on appeal).

²⁹ See *Better Home Plastics Corp. v. United States*, 119 F.3d 969, 971 (Fed. Cir. 1997) (stating that, on appeal, the Federal Circuit reviews findings of the CIT and not those of Customs Court for clear error, while deciding questions of law *de novo*).

³⁰ *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

³¹ See 28 U.S.C. § 2601(c) (1980) (repealed Pub. L. No. 97-164 § 140, 96 Stat. 44 (1982)).

Court of International Trade to judge the credibility of witnesses.”³² This standard was ultimately repealed, however, because review of antidumping and countervailing duty cases was restricted to the agency record, thereby eliminating the court’s role as fact-finder.³³ Thus, the only statutorily mandated standard of review applicable to antidumping and countervailing duty cases was that to be applied by the CIT: “The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.”³⁴

The absence of explicit statutory guidance caused the CCPA, and, after 1982, the Federal Circuit,³⁵ to continue to apply the combination *de novo*/deference standard that had historically governed its review of antidumping and countervailing duty cases. In 1984, however, the Federal Circuit decided *Atlantic Sugar*³⁶ and articulated the “apply anew” standard, which continues to govern review of antidumping and countervailing duty cases. In that case the Federal Circuit stated that “[w]e review the [CIT’s] review of an ITC determination by *applying anew* the statute’s express judicial review standard.”³⁷ The court further noted that “[t]he statute specifies that the standard of judicial review . . . in an antidumping case is whether that determination is ‘unsupported by substantial evidence on the record, or otherwise not in accordance with law.’”³⁸ The court failed to explain, however, the basis upon which it made its decision to “apply anew” the standard of review expressly granted to the Court of International Trade by statute. On the contrary, the Federal Circuit relegated its discussion of this standard of review to a footnote.³⁹

Criticism of the “apply anew” standard revolves around the CAFC’s seemingly improvident use of scarce judicial resources at

³² *Id.*

³³ *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 (Fed Cir. 1984) (substituting substantial evidence standard).

³⁴ 19 U.S.C. § 1516 a(b)(1)(B)(i) (1994).

³⁵ The United States Court of Customs and Patent Appeals was renamed as the United States Court of Appeals for the Federal Circuit with the passage of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 141, 96 Stat. 45 (1982).

³⁶ 744 F.2d 1556 (Fed. Cir. 1984).

³⁷ *Id.* at 1559 n.10 (emphasis added).

³⁸ *Id.* at 1559.

³⁹ *See id.* at 1599 n.10.

the appellate level, causing undue delay in the resolution of disputes and resulting in potential unnecessary costs to the parties as well as a drag on national and international commercial intercourse.

PROBLEMS WITH THE FEDERAL CIRCUIT'S STANDARD OF REVIEW

The "Apply Anew" Standard Is Not Legally Required

There are several problems with the Federal Circuit's standard of review in trade cases. First, the "apply anew" standard does not seem to be legally required. In *Atlantic Sugar*, the Federal Circuit stated that it would "apply[] anew the [antidumping] statute's express judicial review standard."⁴⁰ The express judicial review standard the Federal Circuit was referring to is found in 19 U.S.C. § 1516a(b) (1994). Under this standard, the Court of International Trade "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . ."⁴¹ Interestingly, the only court referenced in the statute is the Court of International Trade. Thus, there is no question that the Court of International Trade must apply the "substantial evidence and otherwise in accordance with law" standard. There is nothing in the statute obligating the Federal Circuit to apply this standard. Indeed, no statute requires the Federal Circuit to apply this standard, nor does the legislative history support this interpretation.⁴² Under the doctrine of statutory interpretation known as *expressio unius est exclusio alterius*, it may be inferred that Congress intended to exclude the Federal Circuit from the operation of 19 U.S.C. § 1516a since only the Court of International Trade is specifically mentioned in the statute.⁴³

The Federal Circuit has itself noted this discrepancy on several occasions. In *Suramerica*, the court explained that

⁴⁰ *Id.* at 1559 n.10.

⁴¹ 19 U.S.C. § 1516a (b)(1)(B)(i) (1994).

⁴² *See* 19 U.S.C. § 1516a (failing to mention that federal circuit is obligated to apply this standard of review).

⁴³ *See* BLACK'S LAW DICTIONARY 692 (4th ed. 1951) (defining the phrase as tendency to exclude omissions because inference of intention).

[r]ead as a whole . . . section 1516a does not support this proposition. Section 1516a(b)(1)-(B) provides that ‘the court’ must apply the statutory standard in actions brought under 19 U.S.C. § 1516a(a)(2) (1988). Section 1516a(a)(2) addresses the Court of International Trade’s review of certain ITC determinations. Thus ‘the court’ of section 1516a(b)(1)-(B) is the Court of International Trade. Section 1516a is silent on what standard [the Federal Circuit] should apply when reviewing a Court of International Trade decision.⁴⁴

Finally, in *Zenith Elecs. Corp. v. United States*,⁴⁵ Judge Rader⁴⁶ noted in a concurring opinion that

the statute invoked by *Atlantic Sugar* as the sole explanation for [the Federal Circuit’s] standard of review in fact refers only to the standard of review for the Court of International Trade. Section 1516a(b) does not refer to any other court. Section 1516a therefore does not supply a standard of review for this court on appeal.⁴⁷

It is respectfully submitted that the Federal Circuit’s adoption of the standard of review in 19 U.S.C. § 1516a as its own was a mistake.

The “Apply Anew” Standard Is Duplicative and Time Consuming

Another major problem with the “apply anew” standard of review is that it duplicates the review conducted by the Court of International Trade in the first instance. As a result, the resolution of trade cases is extremely time consuming. These unfortunate by-products of the Federal Circuit’s review process are expressly contrary to Congressional intent. The standard of review set forth in 19 U.S.C. § 1516a and applicable to the Court of International Trade was enacted by Congress to “streamline and expedite the review of antidumping and countervailing duty proceedings by providing for expedited Judicial Review of all

⁴⁴ See *Suramerica De Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 n.1 (Fed. Cir. 1994).

⁴⁵ 99 F.3d 1576 (Fed. Cir. 1996).

⁴⁶ It should be noted that Judge Rader was also the author of the court’s opinion in *Suramerica*.

⁴⁷ *Zenith*, 99 F.3d 1576, 1580 (Rader, J., concurring).

reviewable determinations.”⁴⁸ Congress further noted that the statute “amends present law to eliminate *de novo* review of determinations or assessments made pursuant to the antidumping and countervailing duty laws [and that t]he present standard of *de novo* review is both *time consuming and duplicative*.”⁴⁹ Congress also found that the “advantage of requiring an evidentiary record and review on that record would be the reduction in redundant proceedings.”⁵⁰

The Federal Circuit’s application of the “apply anew” standard is contrary to this goal. From 1984, when the Federal Circuit announced its “apply anew” standard of review, through 2000, it has heard an average of fifty-two appeals per year from the Court of International Trade.⁵¹ That number rose to one hundred and sixty in 2001, an increase of more than 150 percent.⁵² The increase in the number of trade cases filed with the Federal Circuit will certainly have an adverse impact on the time necessary to dispose of them. From 1996 through 2000, the average length of time between date of docketing and date of disposition for cases appealed from the CIT was approximately fourteen months.⁵³ That time will surely increase as the Federal Circuit reviews the record of every case on appeal from the CIT.

The Federal Circuit itself has been critical of this natural outcome of the redundant standard of review, noting that “replication of the record review already performed effectively renders the Court of International Trade’s review superfluous [because in] addition to adding unnecessary time and expense to the appeal process, . . . [it] undercuts the benefits this court derives from the experience and expertise of the Court of International Trade.”⁵⁴

⁴⁸ H.R. REP. NO. 96-317, at 181 (1979).

⁴⁹ H.R. REP. NO. 96-317 (emphasis added).

⁵⁰ H.R. REP. NO. 96-317.

⁵¹ See Memorandum from Edward W. Hosken, Jr., Chief Deputy Clerk for Administration for the U.S. Court of Appeals for the Federal Circuit, to Leo Gordon, Clerk of Court for the U.S. Court of International Trade (Mar. 27, 2002) (on file with author).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Zenith Elecs. Corp. v. United States*, 99 F.3d 1576, 1583 (Fed. Cir. 1996) (Rader, J., concurring) (questioning the propriety of the *Atlantic Sugar* standard).

The “Apply Anew” Standard Is No Longer Consistently Applied

Despite claims that the “apply anew” standard governs Federal Circuit reviews of CIT decisions, the Federal Circuit has been inconsistent in its application of that standard. While the *Atlantic Sugar* standard was applied consistently for almost ten years following its issuance, in the 1994 case *Suramerica*, the Federal Circuit began to question the wisdom of “applying anew” the CIT’s standard of review.⁵⁵ The issue in that case was the propriety of an ITC “threat of material injury” determination.⁵⁶ The *Suramerica* panel recited the “apply anew” standard but then went on to suggest that the *Atlantic Sugar* standard of review was faulty.⁵⁷ The three-judge panel ultimately decided that “[a]lthough reviewing anew the [agency] determination, this court will not ignore the informed opinion of the Court of International Trade. That court reviewed the record in considerable detail. Its opinion deserves *due respect*.”⁵⁸

Supporting this outcome, the Court first noted that the *Atlantic Sugar* decision did not cite any legal authority when announcing the “apply anew” standard.⁵⁹ Second, the Court stated “*Atlantic Sugar* appears to rely on a belief that [section 1516a] prescribes [the CAFC’s] standard of review.”⁶⁰ The Court noted, however, “section 1516a does not support this proposition.”⁶¹ Instead “the court” to which the statute referred was the Court of International Trade; the statute was silent on what standard the Federal Circuit should apply to review a decision of the Court of International Trade.⁶² Third, the panel suggested the standard of review that should be applied is the one outlined by the Supreme Court in *Universal Camera Corp. v. NLRB*:

Whether on the record as a whole there is substantial

⁵⁵ See *Suramerica De Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 982 n.1 (Fed. Cir. 1994) (discussing standard originated in *Atlantic Sugar*).

⁵⁶ *Id.* at 980 (finding that Venezuelan imports of aluminum EC rod pose threat of material injury to the domestic industry).

⁵⁷ *Id.* at 983 n.1 (commenting that section 1516a does not support proposition).

⁵⁸ *Id.* at 983 (suggesting deference despite statutory silence) (emphasis added).

⁵⁹ *Id.* at 983 n.1 (discussing lack of support).

⁶⁰ *Id.* at 983.

⁶¹ *Id.* at 983 n.1 (commenting on section 1516a).

⁶² *Id.* (determining “the court” that section 1516a(b)(1)-(B) referred to is the Court of International Trade).

evidence to support agency findings is a question which Congress has placed in the keeping of the [court reviewing the agency determination]. This Court will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied.⁶³

Finally, the panel stated that “[i]f in a future appeal this court were offered the opportunity to reconsider the *Atlantic Sugar* rule *en banc*, this court might better consider only whether the Court of International Trade misapprehended or grossly misapplied the statutory standard.”⁶⁴

Perhaps the strongest criticism of the *Atlantic Sugar* standard of review came in the form of two concurrences in *Zenith Elecs. Corp. v. United States*.⁶⁵ The issue in *Zenith* was whether Commerce properly calculated the cost of production of the subject merchandise.⁶⁶ In that case the three-judge panel applied the *Atlantic Sugar* standard of review in affirming the CIT.⁶⁷ However, Judges Plager and Rader wrote concurring opinions solely addressing the standard of review. Judge Plager wrote:

The review called for by *Atlantic Sugar* finds support in neither the statutes nor in common sense. . . . For us to purport to review again the agency record of decision to determine if substantial evidence exists has at least three pernicious consequences. First, it encourages disappointed litigants with deep pockets to seek a second bite at the apple, often with no visible benefits except to the litigators since generally we are not likely to reverse on that ground. Second, such appeals waste scarce judicial resources and deflect our attention from substantive issues which might be determinative. And third, the judges of the CIT cannot help but feel their efforts at review of the record, often extensive and thorough, are unappreciated.⁶⁸

Judge Rader noted in his concurring opinion that ever since the *Atlantic Sugar* standard was announced, the Federal Circuit

⁶³ *Id.* at 983 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951)).

⁶⁴ *Id.*

⁶⁵ 99 F.3d 1576, 1579 (Fed. Cir. 1996) (applying antidumping duties to Tawain color television receivers).

⁶⁶ *Id.* at 1578-9 (finding substantial evidence supports the agency determination).

⁶⁷ *Id.* at 1579 (Plager, J., concurring) (describing drawbacks to the *Atlantic Sugar* standard).

⁶⁸ *Id.* at 1582.

has questioned the propriety of that standard and its duplication of the review performed by the Court of International Trade.⁶⁹ Judge Rader focused on a series of cases in which the Federal Circuit articulated standards of review suggesting deference should be given to the CIT's prior review.⁷⁰ However, after articulating such a standard, the respective panels continued to apply the substantial evidence standard to the agency determination at issue. For example, in *Matsushita Elec. Indus. Co. v. United States*, the Federal Circuit stated its review would "determine whether the [CIT] correctly applied the statutory standard of 19 U.S.C. § 1516a(b)(1)(B)."⁷¹ However, the court simultaneously examined whether there was substantial evidence in the administrative record to support the Commission's conclusion.⁷² Additionally, in *Smith Corona Corp. v. United States*, the Federal Circuit stated its intention to determine whether the Court of International Trade committed reversible error.⁷³ However, it then proceeded to determine whether the agency determination was supported by substantial evidence on the record.⁷⁴ Judges Plager's and Rader's concurring opinions clearly demonstrate support for the sentiments raised by the Federal Circuit in *Suramerica*.

The Federal Circuit has also recognized that not only is the CIT's opinion due some measure of respect based on its thorough review of the record, it is also due respect based on its expertise in trade matters. Notably, in *Camargo Correa Metais, S.A. v. United States* the Federal Circuit stated:

Because the Court of International Trade enjoys exclusive jurisdiction to review the decisions of the ITA [International Trade Administration], its decisions on the occasions of such review are of significant import. Given the exclusive

⁶⁹ *Id.* (questioning the wisdom of the *Atlantic Sugar* standard and review of Court of International Trade).

⁷⁰ *See id.* (citing *Belton Indus. Inc. v. United States*, 6 F.3d 756 (Fed. Cir. 1993); *American Permac, Inc. v. United States*, 831 F.2d 269 (Fed. Cir. 1987); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927 (Fed. Cir. 1984)).

⁷¹ 750 F.2d 927, 932 (Fed. Cir. 1984).

⁷² *Id.* at 933 (examining whether substantial evidence supports Commission's determination).

⁷³ 915 F.2d 683, 687 (Fed. Cir. 1990) (reviewing decision by Court of International Trade).

⁷⁴ *Id.* at 688 (finding no reversible error in conclusions based on the *Atlantic Sugar* standard).

authority of the Court of International Trade, the expertise it develops and maintains from its exclusivity is worthy of respect. In the instances when the decisions of the Court of International Trade are either not appealed to this court or are left wholly undisturbed following appeal, those decisions are likely to "serve as valuable guides to the rights and obligations of the international trade community."⁷⁵

Supporting this statement, the Federal Circuit vacated and remanded the case to the Court of International Trade to afford it the opportunity to comply with 28 U.S.C. § 2645(a), which requires the CIT to make findings of fact and conclusions of law supporting a final decision.⁷⁶ If the court had truly been following the apply anew standard there would have been no reason to vacate because the Federal Circuit would have made its own determination as to the substantiality of the evidence at the agency level. However, when the case made its way back to the Federal Circuit after remand, a new panel applied the *Atlantic Sugar* standard of review and affirmed.⁷⁷

The sentiment of providing some measure of respect to the expertise of the CIT is bolstered by the statement of Judge Bryson of the Federal Circuit in the international trade breakout session held at the Fifteenth Annual Judicial Conference of the U.S. Court of Appeals for the Federal Circuit:

If I have a trade case on the morning's argument. [sic] I will tell you, I do not feel much like a specialist. I am struggling to catch up with the arguments that are being made. I, perhaps in five or ten years, may feel a bit more comfortable with it. This is *terra incognita* for me and it is, I think, for most of my colleagues. So, we venture into these areas not with the confidence of an area well familiar to us, but this is alien territory.⁷⁸

Since *Suramerica*, the Federal Circuit appears to be moving

⁷⁵ *Camargo Correa Metais, S.A. v. United States*, 52 F.3d 1040, 1042-43 (Fed. Cir. 1995) (quoting *National Corn Growers Ass'n v. Baker*, 643 F. Supp. 626, 631 (1986)).

⁷⁶ *Id.* at 1043 (vacating and remanding the case).

⁷⁷ *See Camargo Correa Metais, S.A. v. United States*, 200 F.3d 771, 773 (Fed. Cir. 1999) (defining substantial evidence as "more than a mere scintilla" as applied in *Atlantic Sugar*).

⁷⁸ The Fifteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 180 F.R.D. 467, 604 (Oct. 1998).

away from the *Atlantic Sugar* standard of review, with panels citing the *Suramerica* rationale on five occasions, including as recently as March 2002.⁷⁹ It should be noted that, of the seventeen judges presently sitting on the Federal Circuit, ten have served on panels citing *Suramerica*.⁸⁰ Of the remaining seven judges, four are senior judges. Perhaps if the opportunity were to present itself in the near future, the Federal Circuit would be inclined to reconsider the *Atlantic Sugar* rule *en banc*.

Obviously, the standard of review plays a large role in the outcome of a particular case. It would also likely reduce the Federal Circuit's reversal rate of cases on appeal from the CIT. For the appeals filed with the Federal Circuit during the twelve-month period ending September 30, 2000, an overwhelming 54 percent were reversed.⁸¹ This reversal rate could be lower if some deference were accorded CIT opinions. The high reversal rate also adds veracity to Judge Rader's argument that Court of International Trade judges will be discouraged from making findings if their opinions are disregarded at the appellate level.⁸² Furthermore, the reversal rate adds to uncertainty among members of the bar. The moderator of the international trade breakout session at the Federal Circuit's Fifteenth Annual Judicial Conference observed that

many practitioners have perceived that the appellate court's standard of review basically requires them to ignore what

⁷⁹ See *Novosteel, S.A. v. United States*, 284 F.3d 1261, 1269 (Fed. Cir. 2002) (showing respect for Court of International Trade's opinion); *Taiwan Semiconductor Indus. Assoc. v. Int'l Trade Comm.*, 266 F.3d 1339, 1344 (Fed. Cir. 2001) (deferring in its review to the Court of International Trade's decision); *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1368 (Fed. Cir. 1999) (explaining that findings of the Court of International Trade will be shown due respect); *Angus Chem. Co. v. United States*, 140 F.3d 1478, 1483 (Fed. Cir. 1998) (citing *Suramerica* and explaining the need to respect the Court of International Trade's decision); *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997) (showing deference to the opinion of the Court of International Trade as required by *Suramerica*).

⁸⁰ Composition of the CAFC obtained from its website at <http://www.fedcir.gov/judgbios.html> (last visited January 21, 2003) (listing judges of federal circuit).

⁸¹ See Reports of the Proceedings of the Judicial Conference of the United States, Table B-8 U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending During 12-Month Period Ending September 30, 2000, available at <http://www.fedcir.gov/pdf/b08sep00.pdf>. (last visited January 21, 2003) (outlining statistics of federal circuit).

⁸² See *Zenith Elecs. Corp. v. United States*, 99 F.3d 1576, 1584 (Rader, J., concurring) (noting “[t]he trial court, apparently sensing the futility of performing a substantial evidence review which the appellate court would duplicate, entered only cursory findings after this complex adjudication.”).

the trial court has done and to revisit the underlying record. And so, I think that there is a fair amount of confusion in the private bar as to whether or not the trial court's decision should be heavily annotated in the briefs.⁸³

Judge Michel, another participant in the international trade breakout session, commented that:

It is one thing to say that we have this verbiage about how we stand in the shoes of the Court of International Trade judge and so we are really reviewing what she decided, *de novo*, and looking at what the agency did and so forth. But, at another level of analysis, it seems to me you have to make a distinction between mandatory deference and voluntary deference and between fixed deference and sort of a sliding scale of deference.

Judge Restani uses a magic word for me when she says, opinion. 'When I write my opinion' Well, when I get a case that she has written, the first thing I read is her opinion – not your brief, not the Government's brief, her opinion. The standard of review binds me; I cannot depart from it. But, in terms of the intensity of the study, if the challenger's brief raises some question focusing on her opinion that gives me pause, then there is a lot more rigorous review than otherwise would be the case. So, it would seem to me it is another opportunity for creative advocacy to focus on what the trade court judge 'held' and 'found' and said and articulated as the legal test and so forth. Use that as a place to try to get a foothold, as opposed to just going straight to the bottom line of was the evidence sufficient or not.

And it always surprises me how many briefs I read, not only in trade cases but in almost all areas, where neither side even mentions the opinion of the trial judge. It is treated as if it is not important; for advocates it was not there. For us, it is the baseline of our review – the first thing we read. If there was an error, show me where in her opinion. Show me

⁸³ See Reports of the Proceedings of the Judicial Conference of the United States, Table B-8 U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending During 12-Month Period Ending September 30, 2000, available at <http://www.fedcir.gov/pdf/b08sep00.pdf>. (last visited January 21, 2003) (outlining statistics of federal circuit).

what page and what line.⁸⁴

The recitation of the “apply anew” standard of review and its application are clearly not in tandem. The Federal Circuit clearly values the opinions of the CIT - hopefully there will be some action taken to express that through an appropriate standard of review.

ALTERNATIVES TO THE PRESENT REVIEW PROCESS

Several commentators have suggested alternatives to the current review process, ranging from discretionary appeal to the Federal Circuit to a change in the standard of review. Each approach has its benefits and its flaws. The following are the most constructive solutions suggested.

“Misapprehended or Grossly Misapplied”

As noted earlier, in *Suramerica* and *Zenith*, several judges of the Federal Circuit indicated that they had serious reservations about the underpinnings of the *Atlantic Sugar* analysis.⁸⁵ They suggested that if the Court were not bound by precedent, it would likely follow the Supreme Court’s approach in reviewing an administrative action.⁸⁶ In *Universal Camera Corp., v. NLRB* the Supreme Court examined the “effect of the Administrative Procedure Act and the legislation colloquially known as the Taft-Hartley Act on the duty of Courts of Appeals when called upon to review orders of the National Labor Relations Board.”⁸⁷ The Court discussed the substantial evidence standard at length and concluded that the

[National Labor Relation] Board’s findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the

⁸⁴ *Id.* (explaining how the Federal Circuit Court of Appeals judges prefer briefs citing to trial court opinions).

⁸⁵ *See Suramerica De Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994) (noting that the statute announcing the standard of review applies to the Court of International Trade but not to the federal circuit).

⁸⁶ *See id.* (explaining that the Court will only review administrative agency review if substantial evidence standard “appears to have been misapprehended or grossly misapplied”).

⁸⁷ 340 U.S. 474, 476 (1951).

Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.⁸⁸

The Court then discussed its role in reviewing a decision by the Court of Appeals when applying the substantial evidence standard of review:

Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been *misapprehended or grossly misapplied*.⁸⁹

The Supreme Court has consistently applied the "misapprehended or grossly misapplied" standard in administrative review cases.⁹⁰

There has been criticism, however, of applying the Supreme Court's standard of review to administrative appeals being heard at the Court of Appeals level. In *Polcover v. Secretary of the Treasury* the D.C. Circuit stated it would be inappropriate to follow the "misapprehended or grossly misapplied" standard for several reasons.⁹¹ First, the legislature specifically intended for the courts of appeals to bear primary responsibility for review of NLRB cases.⁹² Second, the Supreme Court itself has had

⁸⁸ *Id.* at 490.

⁸⁹ *Id.* at 490-91 (discussing when it will review standard of review by ITC) (emphasis added).

⁹⁰ See, e.g., *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 453 (1986) ("[w]e granted certiorari . . . in order to consider the Commission's claim that in vacating the Commission's order the Court of Appeals misconstrued applicable principles of antitrust law and misapprehended or grossly misapplied the substantial evidence test."); *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) ("Since the Act places responsibility for determining substantial evidence questions in the courts of appeals, 29 U.S.C. § 655(f), we apply the familiar rule that this Court will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied."); see also *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 507 (1978); *Mobil Oil Corp. v. Federal Power Comm.*, 417 U.S. 283, 292 (1974) ("We granted the petitions for certiorari . . . to determine whether the Court of Appeals misapprehended or grossly misapplied the substantial evidence standard." (internal citation omitted)).

⁹¹ See *Polcover v. Sec'y of the Treasury*, 477 F.2d 1223, 1227 (D.C. Cir. 1973) (listing reasons for not applying the Supreme Court's review standard to the present case).

⁹² *Id.* (noting that Congress granted the Court of Appeals specifically with the duty to "grant or deny enforcement of Labor Board orders").

difficulty applying this standard of review.⁹³ Third, this standard would result in either a rubber-stamp of the district court or degenerate into the test the court was previously using.⁹⁴ Ultimately, established circuit precedent precluded the court from adopting the “misapprehended or grossly misapplied” standard of review.⁹⁵

As Herbert Shelley and his colleagues note in their article, these concerns are not valid with regard to Federal Circuit review of trade cases.⁹⁶ They note that the first step of the appellate process that occurs at the CIT is critical. At this stage the administrative record is compiled by the respective agency being reviewed and is screened by the parties.⁹⁷ This first step, they argue, is essential, due to the nature of antidumping and countervailing duty proceedings which they describe as “informal ‘adjudication.’”⁹⁸ Additionally, the article correctly points out that the concerns of the D.C. Circuit are not warranted. First, Congress expressly granted the Court of International Trade primary responsibility for reviewing agency actions. Unlike patent cases from the Patent and Trademark Office or International Trade Commission that are directly appealable to the Federal Circuit, Congress intended the CIT to determine the legitimacy of agency actions.⁹⁹ Second, this standard would certainly be no more difficult to apply than the current conglomeration of standards actually applied by the Federal Circuit.¹⁰⁰ As noted, the Supreme Court’s application of this

⁹³ *Id.* (citing *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963) as an example of when the Supreme Court had problems applying test).

⁹⁴ *Polcover*, 477 F.2d at 1227 (criticizing application of misapprehended or grossly misapplied standard because it may lead to identical results with district court or to application of prior standard).

⁹⁵ *Id.* at 1227-28 (listing prior opinions where circuit court criticized application of “misapprehended or grossly misapplied” standard of review).

⁹⁶ Shelley, *supra* note 9, at 1749, 1785-86 (arguing inapplicability of “misapprehended or grossly misapplied” standard in Federal Circuit review of trade cases because Federal Circuit has already reviewed lower court’s finding).

⁹⁷ *Id.* at 1798 (noting preliminary step in appellate process at CIT involves agency review by respective parties).

⁹⁸ *Id.* at 1785 (explaining necessity of first step in appellate process at CIT is based on nature of proceedings).

⁹⁹ See 19 U.S.C. § 1516a(e) (2002) (stating “[c]onsignee or his agent as party in interest before the Court of International Trade. The consignee or his agent shall have the right to appear and to be heard as a party in interest before the United States Court of International Trade”).

¹⁰⁰ See generally, Kevin Casey, et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279 (2001) (discussing various

standard on numerous occasions would give the Federal Circuit guidance on its adoption and implementation.¹⁰¹ Finally, the fear that such a standard would render the Federal Circuit merely a rubberstamp to the Court of International Trade can be controlled by the diligent application of the standard by the Federal Circuit. This fear alone should not stand in the way of implementing the standard.¹⁰² Furthermore, since the Federal Circuit has professed its intent to give "due respect" to the opinions of the CIT, it would be preferable for the Federal Circuit to utilize a standard that truly grants that respect.¹⁰³

Discretionary Review by the Federal Circuit

Another alternative to the current review structure for antidumping and countervailing duty cases is to provide discretionary review to the Federal Circuit. Under this review system the Federal Circuit would have the discretionary authority to review CIT decisions upon appellant's application. One suggestion is to make all appeals from the CIT discretionary.¹⁰⁴ Another is to make CIT decisions that are adverse to the Department of Commerce or the ITC appealable as of right, but make all other CIT decisions wholly discretionary.¹⁰⁵

Of course there are advantages and disadvantages to such a system. The advantage of such a system is judicial economy.¹⁰⁶ The Federal Circuit would theoretically review the most significant issues while leaving the majority of the work with the CIT.¹⁰⁷ There are at least two major disadvantages of this

standards of review applied by Federal Circuit); Shelley, *supra* note 9, at 1786 (explaining CIT's function in appellate process).

¹⁰¹ See Shelley, *supra* note 9 at 1786.

¹⁰² See *id.* (finding concern for rubber-stamping as result of new standard unnecessary).

¹⁰³ See *id.* at 1786-87 (confirming that the appellate court is able to control perceptions of rubber-stamping).

¹⁰⁴ See *id.* at 1814 (introducing the idea of discretionary review of CIT decisions by the Federal Circuit).

¹⁰⁵ See *id.* at 1814 (suggesting as an alternative to discretionary review, review as matter of right for CIT decisions adverse to Department of Commerce or International Trade Commission); see also HENRY J. FRIENDLY, *Federal Jurisdiction: A General View* 176 (Columbia University Press) (1973) (discussing generally discretionary standards of review applied to administrative decisions).

¹⁰⁶ See *id.* at 1814 (proposing that a two-tier discretionary system will make efficient use of the Federal Circuit's resources).

¹⁰⁷ See *id.* (clarifying the two-tier advantage of sending significant cases to Federal Circuit while most other remain in CIT without further review).

system. First, there is the potential risk of removing a layer of judicial review. Second, it adds an intermediate step to the appellate process.¹⁰⁸ This step would require the parties to brief the issue of whether leave to appeal should be granted, as well as require a subsequent determination by the Federal Circuit whether to grant the appeal.¹⁰⁹ This would in and of itself raise a debate over what standard to apply to this process. Furthermore, it would have the effect of both increasing the cost and delaying ultimate resolution of the case.¹¹⁰

Shelley's article notes that another consideration weighing against discretionary review is that recent antidumping and countervailing duty cases appealed to the Federal Circuit have generally involved significant legal issues.¹¹¹ The article also contends that there is no need to reduce the number of cases on the Federal Circuit's docket because they account for only a small portion of the Federal Circuit's docket.¹¹² While the 150 percent increase in CIT appeals to the Federal Circuit may be an aberration, it may also prove to be a strong counter-argument to the claim that there is no need to reduce the number of cases on the Federal Circuit's docket. Shelley's article correctly notes that judicial economy would not be greatly enhanced under this discretionary system and that the appellate court could better conserve its judicial resources through the application of a more deferential standard of review.¹¹³ A more deferential standard of review would reduce the number of appeals because it would not allow, as Judge Plager noted in *Zenith*, "disappointed litigants with deep pockets to seek a second bite at the apple."¹¹⁴

CONCLUSION

The simplest and most efficacious approach to resolving the

¹⁰⁸ See *id.* at 1814-15 (identifying one problem inherent in a two-tier review approach).

¹⁰⁹ See *id.* (explaining disadvantage of the two-tier system in brief and determination stages of appellate review).

¹¹⁰ See *id.* at 1815 (noting that discretionary review screening process increases costs and delays of appeals).

¹¹¹ *Id.* (pointing out another factor negating power of judicial review).

¹¹² *Id.* at 1815-16 (positing that the small number of cases in the Federal Circuit warrant a screening process unnecessary).

¹¹³ *Id.* at 1816 (concluding that discretionary review is not most advantageous option).

¹¹⁴ 99 F.3d at 1579 (Plager, J., concurring) (supporting decision not to allow further review of case).

problems inherent in the current review structure would be for the Federal Circuit to adopt the “misapprehended or grossly misapplied” standard of review announced by the Supreme Court in *Universal Camera v. NLRB*. This would accomplish two goals: (1) promote judicial economy by eliminating the duplicity currently existing in the two-tiered review system applied to trade cases; and (2) recognize the expertise of the Court of International Trade and give proper weight to its decisions in antidumping and countervailing duty cases.