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Report of the United States Court of International Trade Advisory Committee on Jurisdiction--Part II

United States Court of International Trade Advisory Committee on Jurisdiction

REPORT OF THE UNITED STATES COURT OF INTERNATIONAL TRADE ADVISORY COMMITTEE ON JURISDICTION – PART II*

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INTRODUCTION

After considering the recommendations in Part I of the Report of the U.S. Court of International Trade Advisory Committee on Jurisdiction,[1] the members of the Court requested the Advisory Committee to prepare legislative language to implement several expansions and clarifications of the jurisdiction and procedures of the Court of International Trade. The request encompassed the following seven areas:

(1) *Carlingswitch*-type importer-initiated lawsuits (lawsuits contesting voluntary tenders of duties);

(2) the standard of review in appeals to the Federal Circuit in antidumping and countervailing duty cases;

(3) lawsuits contesting prospective Customs Service rulings;

* This report is an advisory document addressed to the United States Court of International Trade. The members of the Court subsequently requested preparation of a further iteration of these proposals, combined with additional ideas developed in a paper by John Donohue and John Peterson, 18 ST. JOHN'S J. LEGAL COMMENT.75 (2003).

[1] *Report of the United States Court of International Trade Advisory Committee on Jurisdiction – Part I,* 18 ST. JOHN'S J. LEGAL COMMENT. 31 (2003) [hereinafter *Advisory Committee Report – Part I*].

(4) *Trayco*-type importer-initiated lawsuits (lawsuits contesting the finding of a violation underlying a mitigated penalty);

(5) customs penalty cases initiated by the government;

(6) customs seizures and forfeitures; and

(7) government lawsuits challenging state laws that violate WTO rules.

The proposed legislative language is found under heading VIII of this Report. Explanations of the proposed legislative language are presented under headings I through VII.

I. CARLINGSWITCH-TYPE IMPORTER-INITIATED LAWSUITS

Carlingswitch-type cases, which take their name from two lawsuits entitled *Carlingswitch, Inc. v. United States,*[2] are lawsuits seeking a recovery of amounts paid as a "voluntary tender" of duties in a prior disclosure under 19 U.S.C. § 1592 (or § 1593A).[3] In *Carlingswitch I,*[4] the court held that a voluntary tender is not a protestable decision and, in particular, is not a "charge" or an "exaction" under 19 U.S.C. § 1514; therefore, there can be no jurisdiction under 28 U.S.C. § 1581(a).[5] Then, in *Carlingswitch II,*[6] the court held that it lacks jurisdiction under 19 U.S.C. § 1581(i) because that subsection does not create any cause of action.[7]

The Court asked the Advisory Committee on Jurisdiction to review the definition of "exaction" and propose language that would remove any possible constitutional cloud on the voluntary disclosure statute. The possible constitutional cloud is that the collection of taxes without any availability of judicial review might be unconstitutional. By asking the Advisory Committee to review the definition of "exaction," the Court's request seemed to indicate that the *Carlingswitch* problem can or should be

[2] 85 Cust. Ct. 63 (1980), *aff'd,* 651 F.2d 768 (C.C.P.A. 1981) (Carlingswitch I); 5 C.I.T 70, *aff'd per curiam,* 720 F.2d 656 (Fed. Cir. 1983) (Carlingswitch II). The progeny of *Carlingswitch* include Tikal Distrib. Corp. v. United States, 21 C.I.T. 715 (1997).

[3] *See Advisory Committee Report – Part I, supra* note 1, at notes 30-32 and accompanying text.

[4] 85 Cust. Ct. 63 (1980), *aff'd,* 651 F.2d 768 (C.C.P.A. 1981).

[5] *See id.,* 85 Cust. Ct. at 65-68 (using dictionaries to define "exaction").

[6] 5 C.I.T 70, *aff'd per curiam,* 720 F.2d 656 (Fed. Cir. 1983).

[7] *See id.* at 72 ("The notion 28 U.S.C. § 1581(i) may in some manner be employed to create a cause of action where none otherwise exists was rejected in *Montgomery Ward & Co. v. Zenith Radio Corp.*, 69 C.C.P.A. 96, 673 F.2d 1254 (1982)").

resolved by making voluntary tenders of duty protestable under 19 U.S.C. § 1514. This approach would overrule *Carlingswitch I* and allow the Court to exercise jurisdiction under 28 U.S.C. § 1581(a), as opposed to providing a remedy that would be heard under § 1581(i) jurisdiction, which would overrule *Carlingswitch II*. Overruling *Carlingswitch I* by amending 19 U.S.C. § 1514 has the apparent advantage of being far simpler than overruling *Carlingswitch II*, which would require creating the necessary cause of action over which the Court would exercise jurisdiction under § 1581(i).

The definition of "exaction" was explained at length in *Carlingswitch I*[8] and an earlier case, *Alberta Gas Chemicals, Inc. v. Blumenthal*.[9] In view of this established line of precedent, modifying the established definition of "exaction" might well create unforeseen problems. Nevertheless, to remain consistent with the Court's idea of having voluntary tenders be protestable, it is possible simply to add an additional subdivision of protestable decisions in 19 U.S.C. § 1514 providing expressly for protests against decisions as to "payments and assessments of duties, taxes and fees, whether or not tendered voluntarily" under §§ 592(c) and (d) and 593A(c) and (d).[10] This is the approach taken in the proposed legislative language set out below.

II. APPELLATE REVIEW IN ANTIDUMPING AND COUNTERVAILING DUTY CASES

The Court asked the Advisory Committee to study the standard of review applied by the Federal Circuit in appeals from the Court of International Trade and, if the Advisory Committee

[8] *See Carlingswitch*, 85 Cust. Ct. at 66 (stating that "dictionary definitions make clear that an 'exaction' is involved only where there is a demand for or the compelling of payment").

[9] 82 Cust. Ct. 77, 81-82 (1979) (stating that "from a review of a long line of cases involving 'charges' and 'exactions', it is obvious that these terms have been applied to actual assessments of specific sums of money [other than ordinary customs duties] on imported merchandise").

[10] After the submission of this Report, the Court of International Trade issued its decision in *Brother International Corp. v. United States*, 2264 F. Supp. 2d 1318, 1323 (Ct. Int'l Trade 2003), in which the Court distinguished *Carlingswitch* and its progeny. The Court held that, under the facts before it, the importer retained the right to file a protest because the tender of duties was made in anticipation of the issuance of a penalty notice and, therefore, was not truly voluntary.

determined that there is a need for a clarification in the current standard, to propose an appropriate clarification. The Advisory Committee understood that the Court's request was concerned with the standard of appellate review in antidumping and countervailing duty cases. In these cases, the established rule is that the Federal Circuit reapplies the statutory standard of review applied by the Court of International Trade.[11]

Since its role is advisory, the Advisory Committee did not make a formal decision whether the standard of appellate review in antidumping and countervailing duty cases should or should not be clarified. Instead, the Advisory Committee concluded that there are sound reasons for giving serious consideration to this question and, therefore, prepared legislative language that would serve as a basis for discussion. In evaluating the issue, the Advisory Committee considered a memorandum that Wesley Caine of the law firm of Stewart and Stewart prepared for the Committee. A copy of this memorandum is attached as an addendum to this report. Mr. Caine's memorandum provides a thorough analysis of the reasons supporting a statutory amendment that would relieve the Federal Circuit of the burden of duplicating what the Court of International Trade has done and, instead, would merely need to decide whether the Court of International Trade misapprehended or grossly misapplied the standard of review.[12]

The proposed legislative language set out below provides that the Federal Circuit shall decide whether the Court of International Trade misapprehended or grossly misapplied the applicable standard of review and may also decide whether the contested agency determination or conclusion is in accordance with law. The Advisory Committee included the second clause of

[11] *See* Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984) (interpreting 19 U.S.C. § 1516a(b)(1)).

[12] One committee member felt that, notwithstanding the stated appellate test of applying anew the statutory standard of review in antidumping and countervailing duty appeals, the Federal Circuit arguably does not always literally apply that standard anew and duplicate the lower court's examination of the evidence supporting the agency's decision. Instead, according to this committee member, what sometimes seems to happen as a practical matter is that the Federal Circuit refrains from making a probing review of the underlying evidence unless the appellant overcomes an unstated threshold burden of persuading the appellate judges that the lower court's decision was egregiously wrong. *See, e.g.*, Avesta Sandvik Tube AB v. Trent Tube Div., 975 F.2d 807, 814-15 (Fed. Cir. 1992) (affirming the lower court's conclusion that the contested agency decision was supported by substantial evidence without any detailed discussion of the evidence).

the language to reflect that the proposed standard of review is not intended to prevent the Federal Circuit from performing the traditional appellate function of deciding issues of statutory construction and other issues of law *de novo*.

III. LAWSUITS CONTESTING PROSPECTIVE CUSTOMS SERVICE RULINGS

The Court requested the Advisory Committee to recommend an amendment to 28 U.S.C. § 1581(h) that would make it easier for parties to obtain pre-importation judicial review of prospective Customs Service rulings.[13] This would require relaxing the current standard, under which the plaintiff must show that it would be irreparably harmed unless it is given an opportunity to obtain judicial review prior to importation of the merchandise that is the subject of the ruling. The Advisory Committee considered two options for this purpose: a "good cause" standard (option one in the proposed legislative language) and a "commercially impracticable" standard (option two in the proposed legislative language). The members of the Advisory Committee felt that either of these options above would foster the Committee's recommendation and, accordingly, the Committee is submitting both options to the Court for its consideration. Nevertheless, a slight preference was expressed for the "good cause" standard.

IV. TRAYCO-TYPE IMPORTER-INITIATED LAWSUITS

Trayco, Inc. v. United States[14] was an importer-initiated lawsuit seeking recovery of an amount paid as a mitigated penalty, based on the claim that the underlying finding of a violation was erroneous. The Court requested the Advisory Committee provide for concurrent jurisdiction shared by the Court of International Trade, the U.S. Court of Federal Claims, and (if the amount in controversy does not exceed $10,000) the district courts.

[13] *See Advisory Committee Report – Part I, supra* note 1, at notes 30-32 and accompanying text.

[14] 994 F.2d 832 (Fed. Cir. 1993); *see also Advisory Committee Report – Part I, supra* note 1, at notes 10-12 & 28-31 and accompanying text.

In *Trayco*, after ruling that the case was not within the jurisdiction of the Court of International Trade under 28 U.S.C. § 1581(i), the Federal Circuit held that the district court had jurisdiction under 28 U.S.C. § 1346(a)(2) because the lawsuit was "(1) a civil action; (2) against the United States; (3) in an amount not exceeding $10,000.00 . . .; and (4) founded upon an Act of Congress — § 592 of the Tariff Act of 1930."[15] The district courts and U.S. Court of Federal Claims have concurrent jurisdiction if the amount in controversy does not exceed $10,000, whereas the Court of Federal Claims has exclusive jurisdiction if the amount in controversy exceeds $10,000.

The Federal Circuit's reasoning appears to create a broad class of cases that are potentially covered by *Trayco*. Giving the Court of International Trade concurrent jurisdiction in such cases would probably need to extend that jurisdiction to "any civil action founded upon any provision of the Tariff Act of 1930 or any other Act of Congress contained in title 19, U.S. Code," other than cases already within the jurisdiction of the Court of International Trade. The language "contained in title 19," rather than "codified in title 19," has been used because it has been pointed out that title 19 is not one of the officially "codified" titles of the United States Code.[16]

As an exception to this grant of jurisdiction, it is necessary to exclude section 337 of the Tariff Act of 1930[17] from the jurisdiction of the Court of International Trade. Under section 337, the U.S. Court of Appeals for the Federal Circuit has jurisdiction to hear appeals from decisions of the U.S. International Trade Commission, while certain collateral litigation is within the jurisdiction of federal district courts.[18] Since the International Trade Commission's decisions under section 337 are formal on-the-record adjudications, it is appropriate for appeals to be heard at the appellate level, and the Federal Circuit (and its predecessors) have exercised such jurisdiction since the inception of section 337 (and its

15 *Id.* at 837.

16 The titles that have been "codified and enacted as positive law" are listed in the Preface to the 1994 edition of the United States Code.

17 19 U.S.C. § 1337 (2003).

18 *See* 19 U.S.C. § 1337(c) & (f) (2003) (setting out procedures for judicial review, counterclaims, injunctive relief and other judicial remedies).

predecessors). The grant of jurisdiction to district courts in certain collateral litigation under section 337 was part of a delicately negotiated settlement to a GATT dispute that sought to place importing interests on an equal footing with domestic litigants in patent cases.

In addition to the requested legislative language establishing concurrent jurisdiction, the Advisory Committee also drafted, for the Court's reference, an alternative legislative proposal that provides for exclusive jurisdiction in the Court of International Trade. Some members of the Advisory Committee felt that potential problems with concurrent jurisdiction might include possible forum-shopping by the plaintiff, not necessarily making more efficient use of judicial resources by increasing the caseload of the Court of International Trade, and not assuring that the customs and international trade statutes receive a uniform interpretation by assigning all these cases to the same court. The alternative proposal based on exclusive jurisdiction is found at the end of the main legislative proposal set out below.

V. GOVERNMENT-INITIATED PENALTY CASES

The Court requested that all cases arising from civil penalties under the customs and international trade statutes be heard in the Court of International Trade.[19]

As in the preceding provision, the term "contained in title 19" has been used, and penalties under § 337 of the Tariff Act of 1930 are excluded for the reasons explained above.

VI. CUSTOMS SEIZURES AND FORFEITURES

The Court asked the Advisory Committee to propose language that would, in essence, give the Court of International Trade jurisdiction over all seizures by the Customs Service not covered by the Civil Assets Forfeiture Reform Act (CAFRA) of 2000,[20] other than narcotics and controlled substances.[21] In drafting the proposal, the language "jurisdiction of any seizure," rather than

[19] *See Advisory Committee Report – Part I, supra* note 1, at notes 19-27 and accompanying text.

[20] 18 U.S.C. § 983 (2003).

[21] *See Advisory Committee Report – Part I, supra* note 1, at notes 2-9 and accompanying text.

"jurisdiction of any civil action arising from a seizure," has been used to make the language consistent with the grant of jurisdiction to district courts in 28 U.S.C. § 1356,[22] and the language "contained in title 19" has been used for the reason explained above (even though CAFRA says "codified in").

VII. ACTIONS CONTESTING STATE LAW WTO VIOLATIONS

The Court requested that it be given concurrent jurisdiction with the district courts in actions by the United States under the Uruguay Agreements Act contesting state law violations of any of the international trade agreements administered under the auspices of the World Trade Organization.[23]

If the purpose of concurrent jurisdiction is to allow states the option of defending cases in the local district court, and since the forum is selected by the plaintiff United States, it might be appropriate to allow the state defending such an action to have an option to request a transfer of the case to the appropriate district court.

As with the *Trayco*-type cases discussed above, an alternative proposal providing for exclusive jurisdiction in the Court of International Trade is provided for the Court's reference. Again, the alternative proposal based on exclusive jurisdiction is found at the end of the main legislative proposal set out below.

VIII. LEGISLATIVE PROPOSALS

Title 19, U.S. Code

§ 1514. Protest against decisions of the Customs Service

(a) Finality of decisions; return of papers. Except as provided in subsection (b) of this §, § 1501 of this title (relating to voluntary reliquidations), § 1516 of this title (relating to petitions by domestic interested parties), § 1520 of this title (relating to refunds and errors), decisions of the Customs Service, including

[22] *See generally* Lefaivre v. United States, 478 F.2d 1400, 1400 (4th Cir. 1973) (quoting 28 U.S.C. § 1356).

[23] *See Advisory Committee Report – Part I, supra* note 1, at notes 38-39 and accompanying text.

the legality of all orders and findings entering into the same, as to —

(1) the appraised value of merchandise;

(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under § 337 of this Act;

(5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;

(6) the refusal to pay a claim for drawback; ~~or~~

(7) the refusal to reliquidate an entry under § 520(c) of this Act; **or**

(8) the assessment or collection of duties, taxes, or fees, whether or not voluntarily tendered, under § 592(c) or (d) or § 593A(c) or (d) of this Act;

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this §, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of title 28 of the United States Code within the time prescribed by § 2636 of that title. When a judgment or order of the United States Court of International Trade has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the Customs Service, which shall take action accordingly.

* * * *

§ 1516a. Judicial review in countervailing duty and antidumping duty proceedings

. . .

(b) Standards of review.

(1) Remedy.

The ~~court~~ **United States Court of International Trade** shall hold unlawful any determination, finding, or conclusion found—

(A) in an action brought under subparagraph (A), (B), or (C) of paragraph (1) of subsection (1)(a) of this §, to be arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law, or

(B) in an action brought under paragraph (2) of subsection (a) of this §, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law, or

(C) in an action brought under paragraph (1)(D) of subsection (a) of this §, to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

On appeal, the United States Court of Appeals for the Federal Circuit shall decide whether the United States Court of International Trade misapprehended or grossly misapplied the applicable standard of review and may also decide whether the contested agency determination or conclusion is in accordance with law.

Title 28, U.S. Code

§ 1581. Civil actions against the United States and agencies and officers thereof

[Subsections (a) - (j) omitted]

[Option one for subsection (h)]

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that ~~he would be irreparably harmed unless~~ **there is good cause for the party to be** given an opportunity to obtain judicial review prior to such importation.

[Option two for subsection (h)]

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the

civil action demonstrates to the court that ~~he would be irreparably harmed unless~~ **it would be commercially impracticable if the party were not** given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this § and subject to the ~~exception~~ **exceptions** set forth in subsection ~~(j)~~ **(k)** of this §, the 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 §.

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under § 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and § 516A(g) of the Tariff Act of 1930.

(j) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(i) of this § and subject to the exceptions set forth in subsection ~~(j)~~ (k) of this §, the Court of International Trade shall have original jurisdiction, concurrent with the United States Court of Federal Claims, and concurrent with the district courts if the amount in controversy does not exceed $10,000, of any civil action founded upon any provision of the Tariff Act of 1930 or any other Act of Congress contained in title 19, U.S. Code. This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under § 516A(a) of the Tariff

Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and § 516A(g) of the Tariff Act of 1930.

~~(j)~~ **(k)** The Court of International Trade shall not have jurisdiction of any civil action arising under § 305 **or § 337** of the Tariff Act of 1930.

Sec. 1582. Civil actions commenced by the United States

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action ~~which arises out of an import transaction and~~ which is commenced by the United States —

(1) to recover a civil penalty under ~~§ 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2)~~ **any provision** of the Tariff Act of 1930 **(other than § 337 of such Act) or any other provision of law contained in title 19, U.S. Code**;

(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; ~~or~~

(3) to recover customs duties**; or**

(4) to enforce a summons under § 510 of the Tariff Act of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any seizure by the U.S. Customs Service, other than a seizure of narcotics or other controlled substances, under (1) the Tariff Act of 1930 or any other provision of law contained in title 19, U.S. Code, (2) the Trading With the Enemy Act (50 U.S.C. App. §§ 1 *et seq.*), or (3) § 1 of title VI of the Act of June 15, 1917, 40 Stat. 233 (22 U.S.C. § 401).

(c) The Court of International Trade shall have original jurisdiction, concurrent with the district courts, of any civil action which is commenced by the United States pursuant to § 102(b)(2) of the Uruguay Round Agreements Act.

Exclusive Jurisdiction Options for 28 U.S.C. §§ 1581 and 1582(c) in Trayco and WTO Cases

§ 1581. Civil actions against the United States and agencies and officers thereof

[Subsections (a) - (h) omitted]

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this § and subject to the ~~exception~~ **exceptions** set forth in subsection (j) of this §, the 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 **contained in title 19, U.S. Code, or** 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 §**, and subsections (a) and (b) of § 1582 of this title**.

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under § 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and § 516A(g) of the Tariff Act of 1930.

(j) The Court of International Trade shall not have jurisdiction of any civil action arising under § 305 **or § 337** of the Tariff Act of 1930.

Sec. 1582. Civil actions commenced by the United States

[subsections (a) and (b) omitted]

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action which is commenced by the United States pursuant to § 102(b)(2) of the Uruguay Round Agreements Act.

ADDENDUM: BACKGROUND REPORT ON THE STANDARD OF REVIEW IN ANTIDUMPING AND COUNTERVAILING DUTY CASES

PREPARED BY WESLEY CAINE (STEWART & STEWART)

INTRODUCTION

The standard of appellate review in the Federal Circuit in antidumping and countervailing duty cases has been the source of controversy. In *Atlantic Sugar, Ltd., v. United States*,[24] the Court stated, without elaboration, that it reviews issues "anew" in appeals from the Court of International Trade challenging administrative trade-law determinations. This means that the Federal Circuit essentially repeats the CIT's role, since it applies the same standards of review prescribed in the statute for the CIT.[25] Circuit Judge Rader of the Federal Circuit strongly criticized this redundant scheme in a well-known concurring opinion in *Zenith Electronics Corp. v. United States*,[26] a case involving the "substantial evidence" test. He opined that *Atlantic Sugar* set forth an incorrect rule and that the Federal Circuit should review the CIT, not the agency directly, and thereby play a lesser role. Substantial controversy has ensued ever since.

Circuit Judge Rader makes a cogent case. His argument should be limited, however, to the "substantial evidence" test. So far as issues of law are concerned, there are good reasons for the Federal Circuit to continue reviewing issues anew.

I. THE EXISTING SCHEME

The statute providing for judicial review of final AD/CVD determinations requires that the CIT hold unlawful agency action that is "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[27] On its face, this provision does not provide for any standard for appellate

24 744 F.2d 1556 (Fed. Cir. 1984).
25 *See infra* notes 29-31 & 37 and accompanying text.
26 99 F.3d 1576, 1579 (Fed. Cir. 1996) (Rader, J., concurring).
27 19 U.S.C. § 1516a(b)(1)(B)(i) (2003).

review in appeals to the Federal Circuit. Nor does the statute that provides for the Federal Circuit's jurisdiction. It simply vests that Court with jurisdiction of appeals from final CIT decisions.[28] Therefore, there is no statutory standard prescribing an appellate standard of review. As stated, the Federal Circuit filled this gap in *Atlantic Sugar, supra*, where it said in a footnote, with no analysis, that it reviews the agency "anew."[29] This has become the leading pronouncement, with the Court routinely citing the case. Relatively recent examples include *SKF USA Inc. v. United States*,[30] and *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*.[31]

So far as issues of law are concerned (as distinct from issues of "substantial evidence") the Federal Circuit (like the CIT) applies the *Chevron* formulation, *i.e.*, the standards prescribed by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[32] The Federal Circuit has described this as follows:

> In reviewing an agency's construction of a statute that it administers, this court addresses two questions as required by the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* The first question is 'whether Congress has directly spoken to the precise question at issue.' If so, this court and the agency 'must give effect to the unambiguously expressed intent of Congress.' If, however, Congress has not spoken directly on the issue, this court addresses the second question of whether the agency responsible for filling a gap in the statute has rendered an interpretation that 'is based on a permissible construction of the statute.'[33]

[28] 28 U.S.C. § 1295(a)(5) (2003) ("appeal from a final decision of the United States Court of International Trade").

[29] *See Atlantic Sugar*, 744 F.2d at 1559 n.10 ("[w]e review that court's review of an ITC determination by applying anew the statute's express judicial review standard").

[30] 263 F.3d 1369, 1378 (Fed. Cir. 2001); *accord, e.g.*, Eckstrom Indus. v. United States, 254 F.3d 1068, 1071 (Fed. Cir. 2001) (stating that the Federal Circuit applies the standard of review "anew" to rulings by the CIT).

[31] 216 F.3d 1027, 1031 (Fed. Cir. 2000) (stating that the court applies anew the standard of review applied by CIT in its review of the administrative record).

[32] 467 U.S. 837, 842-43 (1984). *See* Pesquera Mares Australes v. United States, 266 F.3d 1372, 1379-82 (Fed. Cir. 2001) (holding that *Chevron* continues to apply even under the standards of United States v. Mead Corp., 533 U.S. 218 (2001)).

[33] Shakeproof Assembly Components v. United States, 268 F.3d 1376, 1380 (Fed. Cir. 2001) (citations omitted).

A reasonable construction is a permissible one.[34]

So far as issues of fact are concerned, the Federal Circuit reviews the record to determine whether the agency's determination is supported by "substantial evidence."[35] "Substantial evidence" is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'" and therefore "'more than a mere scintilla.'"[36] To determine whether such evidence exists, the Court reviews the record as a whole, including all evidence that fairly detracts.[37] Again, in accordance with *Atlantic Sugar*, the Federal Circuit does this "anew."

II. APPROPRIATENESS OF THE EXISTING APPELLATE REVIEW STANDARDS

A. Issues of Law.

So far as issues of *law* are concerned, *Atlantic Sugar* appears consistent with other Circuit Court decisions involving reviews of administrative action under the Administrative Procedure Act. Under that Act, "reviewing court[s]" hold unlawful agency administrative action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[38] In *City of New York v. Shalala*,[39] the Second Circuit applied this provision in an appeal from a district court involving a challenge to administrative action of the Department of Health and Human Services (HHS). The Second Circuit stated as follows: "On appeal from a grant of summary judgment on an APA claim, we review the administrative record *de novo* and render our own independent judgment, according no deference to the district

[34] *See* Torrington Company v. United States, 82 F.3d 1039, 1046 (Fed. Cir. 1996) (concluding that deference will be granted so long as the method of applying antidumping laws is based on reasonable construction of the statutes).

[35] *See, e.g.*, Micron Technology, Inc. v. United States, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (stating that that the determination will be upheld unless it is unsupported by substantial evidence).

[36] *Id.* (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[37] *See Micron Technology*, 117 F.3d at 1393 (quoting *Atlantic Sugar*).

[38] 5 U.S.C. § 706(2)(A) (2003) (to be distinguished from § 706(2)(E), which provides for "substantial evidence" review).

[39] 34 F.3d 1161 (2d Cir. 1994).

court's decision."[40] Other Circuits apply the same basic rule for purposes of 5 U.S.C. 706(2)(A). For example, the Seventh Circuit said in *Hanson v. Espy*,[41] "we need accord no deference to the district court's disposition," in a case challenging action of the Department of Agriculture.[42] Similarly, the Eighth Circuit said in *Sierra Club v. Davies*,[43] "[T]he district court opinion, therefore, is afforded no deference," in a case challenging the Department of the Interior.[44] The Fifth Circuit stated in *Texas-Capital Contractors, Inc. v. Abdnor*,[45] "we pay no special deference to the decision of the district court," in a case challenging the Small Business Administration.[46]

This rule of reviewing "anew" is logically consistent with *Chevron* review. Such review, in its nature, focuses on the administrative action, not on the trial court decision.[47] Thus, in the first step of *Chevron* review, the Court determines whether Congress spoke directly to the issue at hand and it duly applies the law if it did.[48] It stands to reason that any Appellate Court must independently make this determination. Certainly, that is what the Supreme Court does when it reviews lower courts in cases involving *Chevron* review,[49] and there is no reason in logic or law for Circuit Courts to defer to *their* lower courts. The same holds true for the second *Chevron* step. There, if the statute is ambiguous or otherwise silent, the reviewing court must determine whether *the agency*–not the lower court–reached a permissible construction.[50] This is a judgment *for the Court* on appeal.[51] In one recent case, for example, the Supreme Court directly disapproved an NLRB interpretation of a statute, saying that the agency considered certain factors that had "nothing to

40 *Id.* at 1166; *accord* Ward v. Brown, 22 F.3d 516, 521 (2d Cir. 1994).

41 8 F.3d 469 (7th Cir. 1993).

42 *Id.* at 472.

43 955 F.2d 1188 (8th Cir. 1992).

44 *Id.* at 1192.

45 933 F.2d 261 (5th Cir. 1990).

46 *Id.* at 264.

47 *See* Shakeproof Assembly Components v. United States, 268 F.3d 1379, 1380 (Fed. Cir. 2001) (describing court's approach to reviewing an agency's construction of a statute).

48 *See id.* (quoting *Chevron*).

49 *See id.* (describing *Chevron* analysis).

50 *See id.* (explaining standard for judicial review of an agency's interpretation of a statute).

51 *See generally* National Labor Relations Board v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001).

do" with the statute's text.[52] This, in turn, had nothing to do with the lower court's treatment of the issue.

Therefore, *Atlantic Sugar* seems appropriate so far as questions of law are concerned. There is no apparent reason why the Federal Circuit should defer to the CIT on legal issues.

B. The Substantial Evidence Test.

In contrast, there are good reasons for a different conclusion respecting the "substantial evidence" test. Circuit Judge Rader discussed these reasons in his concurring opinion in *Zenith*.

First, the Judge stresses the language of the statute, which sets forth the standards of review for AD/CVD determinations.[53] While the immediate language refers to "the court,"[54] the context makes clear that term refers specifically to the CIT. Therefore, there is no requirement in the statute itself that the Federal Circuit reviews "anew."

Second, the Judge cites Supreme Court authority applying the "substantial evidence" test. He specifically quotes *Universal Camera Corp. v. NLRB*,[55] where that Court wrote as follows:

> 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 [In this case, the appeal from the NLRB was directly to the Appellate Court.] *This court [Supreme Court] will intervene only in what ought to be the rare instance when the {substantial evidence} standard [Circuit Judge Rader's brackets] appears to have been misapprehended or grossly misapplied.*[56] [Emphasis added.]

Thus, the Supreme Court gave weight to the lower court's conclusions (which happened to be a Court of Appeals) in applying the "substantial evidence" test. Circuit Judge Rader analogized the case to Federal Circuit review of CIT decisions

[52] *See id.* at 714 (suggesting that agency determinations go beyond the evidence presented).

[53] *See* 19 U.S.C. § 1516a(b) (2003).

[54] 19 U.S.C. § 1516a(b)(1)(B)(i) (2003).

[55] 340 U.S. 474 (1951).

[56] *Id.* at 490-91.

involving administrative trade-law determinations. He wrote: "This circuit court ought to employ the same judicial restraint exhibited by the Supreme Court."[57]

Two points can be stressed. First, *Chevron* and *Universal Camera* are both Supreme Court decisions dealing with review of administrative action, and they prescribe different approaches to review depending on the issue involved. Therefore, there is sound basis for different approaches to appellate review of CIT decisions in AD/CVD cases.

Second, *Universal Camera* remains good law. The Supreme Court cited the decision, for the language quoted above, in, *inter alia*, *NLRB v. Baptist Hospital, Inc.*,[58] and *American Textile Manufacturers Institute, Inc. v. Donovan*.[59] As the Court wrote in *American Textile*:

> Since the [Occupational Safety and Health] Act places responsibility for determining substantial evidence questions in the courts of appeals. . .we apply the familiar rule that "[t]his Court will intervene only in what ought to be the rare instance when the [substantial evidence] [Court's bracketed insert] standard appears to have been misapprehended or grossly misapplied" by the court below [quoting *Universal Camera*]. . .Therefore, our inquiry is not to determine whether we, in the first instance, would find OSHA's findings supported by substantial evidence. Instead we turn to OSHA's findings and the record upon which they were based to decide whether the Court of Appeals "misapprehended or grossly misapplied" the substantial evidence test.[60]

Finally, Circuit Judge Rader cites several decisions wherein, he says, the Federal Circuit "has questioned either directly or by implication the propriety of duplicating" the CIT's review.[61] These include, *inter alia*, *Suramerica de Aleaciones Laminadas, C.A. v. United States*;[62] *American Permac, Inc. v. United States*;[63]

[57] Zenith Electronics Corp. v. United States, 99 F.3d 1576, 1584 (Fed. Cir. 1996) (Rader, J., concurring).

[58] 442 U.S. 773, 794 (1979) (involving another NLRB review),

[59] 452 U.S. 490 (1981).

[60] *Id.* at 523.

[61] *Zenith*, 99 F.3d at 1582 (Rader, J., concurring).

[62] 44 F.3d 978, 982-83 n.1 (Fed. Cir. 1994); *See also* Belton Indus. Inc. v. United States, 6 F.3d 756 (Fed. Cir. 1993), *cert. den.*, 510 U.S. 1093 (1994).

[63] 831 F.2d 269 (Fed. Cir. 1987), *cert. dis.*, 485 U.S. 901 (1988).

and *Matsushita Elec. Indus. Co. v. United States*.[64] These cases are a clear indication of the Court's dissatisfaction with *Atlantic Sugar*.[65]

Therefore, there is sound reason to re-examine the Federal Circuit's *Atlantic Sugar* standard so far as the "substantial evidence" test is concerned.

C. Statutory Solution

Notwithstanding its apparent discomfort, the Federal Circuit apparently feels bound by *Atlantic Sugar*. Indeed, Circuit Judge Rader expressly acknowledged that the case was the "court's precedent" and that the *Zenith* majority "correctly applie[d]" it.[66] There is, of course, a possibility that the Court *en banc* could overrule it if it heard an appropriate case, but that eventuality cannot be predicted. Therefore, if there is a general inclination to modify the *Atlantic Sugar* rule, the only certain way to change it would be by statute.

64 750 F.2d 927 (Fed. Cir. 1984). *See Zenith*, 99 F.3d at 1582 (Rader, J. concurring).

65 *See also* NEC Corp. v. United States, 151 F.3d 1361, 1374 n.5 (Fed. Cir. 1998), *cert. den.*, 525 U.S. 1139 (1999) (giving Circuit Judge Rader's *Zenith* opinion a "but see" citation when citing to *Atlantic Sugar*).

66 *Zenith*, 99 F.3d at 1579 (Rader, J., concurring).