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Kevin C. Kennedy

Michigan State University College of Law, kenne111@law.msu.edu

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ABANDONING THE DEFERENCE RULE IN ITC INTERPRETATIONS OF THE ANTIDUMPING DUTY LAW

Kevin C. Kennedy*

I. INTRODUCTION

In a recent law review article¹, I analyzed three opinions of the Court of Appeals for the Federal Circuit (CAFC) in which the Court was asked to review administrative determinations of the International Trade Administration (ITA) of the Department of Commerce under the antidumping duty law.² I concluded that the CAFC accorded the ITA more deference than appropriate on questions of statutory interpretation,³ a conclusion premised in large part on the Federal Circuit's unique status within the federal court system as an Article III court possessing exclusive appellate jurisdiction over international trade matters.⁴ Given this status, I argued, little or no judicial deference ought to be given ITA antidumping duty determinations involving decisions of statutory interpretation.⁵

In this article, I undertake a similar review of three recent Federal Circuit opinions⁶ involving an interpretation of the antidumping duty statute by the U.S. International Trade Commission (ITC). In two instances,⁷ the CAFC upheld the ITC's statutory interpretation of the antidumping duty law; in the third decision,⁸ the court rejected the ITC's view. In this article, I argue that in the two cases where the Federal Circuit sustained the ITC's interpretation of the antidumping duty law, the court conducted an independent review, notwithstanding its purported deference to the Commission's expertise. In the third case, *Bingham & Taylor*

* Associate Professor of Law, Detroit College of Law. J.D.

1977, Wayne State University School of Law; LL.M. 1982, Harvard Law School.

1. Kennedy, *Judicial Review of Commerce Department Antidumping Duty Determination: Deference or Abdication?*, 11 N.C.J. INT'L L. & COM. REG. 19 (1986).

2. 19 U.S.C. §§ 1673-1677h (1982 & Supp. 1985).

3. Kennedy, *supra* note 1, at 37-38.

4. *Id.* at 33; *see* 28 U.S.C. § 1295(a)(5) (1982).

5. Kennedy, *supra* note 1, at 33.

6. *Bingham & Taylor Div., Virginia Industries, Inc. v. United States*, 815 F.2d 1482 (Fed. Cir. 1987); *ICC Industries, Inc. v. United States*, 812 F.2d 694 (Fed. Cir. 1987); *American Lamb Co. v. United States*, 785 F.2d 994 (Fed. Cir. 1986).

7. *ICC Industries*, 812 F.2d at 694; *American Lamb*, 785 F.2d at 994.

8. *Bingham*, 815 F.2d at 1482.

Div., Virginia Industries, Inc. v. United States,⁹ the CAFC rejected the ITC's interpretation of the antidumping duty law, concluding that the deference rule was not applicable. The result of these three cases is that the Federal Circuit has effectively abandoned the deference rule in its review of ITC interpretations of the antidumping duty law.

Even though the scrutiny which the Federal Circuit gave the ITC's interpretations seem in my view more intense than that to which the court has subjected the Commerce Department's interpretations of the antidumping duty law, certainly no more deference is due one agency than the other. On the contrary, of the two, the ITC is probably more deserving of judicial deference given its superior resources. In any event, as I discuss more fully, in recognition of the Federal Circuit's expertise in the field of international trade, all citation to and seeming reliance on the deference rule should be abandoned in CAFC cases treating either an ITA or ITC statutory interpretation of the antidumping duty law. There is only one "master" of the antidumping duty law, and that is the Federal Circuit.¹⁰ Any other conclusion is nothing short of the tail wagging the dog.

II. STATUTORY OVERVIEW

The metes and bounds of the antidumping duty law have been described so well in the literature¹¹ that I will only give the briefest of thumbnail sketches here. As presently enacted, the antidumping duty law is essentially the product of two statutes, Title VII of the

9. *Id.*

10. In *Consumer Prod. Div., SCM Corp. v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985), the court referred to the Commerce Department as the "master" of the antidumping duty law.

11. Readers unfamiliar with the statutory background should find the following articles helpful. See, e.g., Horlick, *Summary of Procedures Under the United States Antidumping and Countervailing Duty Laws*, 58 ST. JOHN'S L. REV. 828 (1984); Barshefsky & Cunningham, *The Prosecution of Antidumping Actions Under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 307 (1981); Hemmendinger & Barringer, *The Defense of Antidumping and Countervailing Duty Investigations Under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 427 (1981); Potts & Lyons, *The Trade Agreements Act: Administrative Policy and Practice in Antidumping Investigations*, 6 N.C.J. INT'L & COM. REG. 483 (1981); Barringer & Dunn, *Antidumping and Countervailing Duties Investigations Under the Trade Agreements Act of 1979*, 14 J. INT'L L. & ECON. 1 (1979); Note, *Administering the Revised Antidumping Law: Allocating Power Between the ITC and the Court of International Trade*, 22 VA. J. INT'L L. 883 (1982); Note, *The Trade Agreements Act of 1979: Countervailing Duty and Antidumping Duty Procedures*, 14 J. INT'L L. & ECON. 63 (1979).

Trade Agreements Act of 1979,¹² which substantially altered the former antidumping duty law,¹³ and Title VI of the Trade and Tariff Act of 1984,¹⁴ which made minor adjustments to the 1979 act.

The law, an international version of the Robinson-Patman Act,¹⁵ is designed to prevent price discrimination between national markets. An antidumping duty proceeding typically involves five stages,¹⁶ beginning administratively with the ITA, which is responsible for determining the sufficiency of the petition and whether imports of merchandise are being sold in the United States at less than fair value.¹⁷ The ITC, in turn, is responsible for determining whether a domestic industry is being materially injured or is likely to be injured by reason of such imports.¹⁸ The ITC and the ITA each conduct a two-step administrative proceeding lasting nine months to one year, that results in preliminary and final determination.¹⁹ If both agencies reach final affirmative determinations, then a duty is imposed on imports of the offending merchandise in an amount equal to the margin of dumping.²⁰ The dumping duty

12. Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at scattered sections of titles 5, 7, 13, 19, 26, 28, 31 U.S.C.).

13. The Tariff Act of 1930, ch. 497, §§ 160-171, 46 Stat. 763 (1931) (codified at 19 U.S.C. § 1202 *et seq.* (1982 & Supp. 1985)).

14. Pub. L. No. 98-573, 98 Stat. 2948 (1986) (codified at 19 U.S.C. § 1654 (1982 & Supp. 1985)).

15. 15 U.S.C. § 13(a) (1982).

16. For a brief overview of the antidumping duty administrative process, *see American Lamb Co. v. United States*, 785 F.2d 994, 998-99 (Fed. Cir. 1986).

17. 19 U.S.C. §§ 1673-1673a (1982 & Supp. 1985). Merchandise is sold at less than fair value when the foreign market value of the merchandise exceeds the U.S. price for that merchandise. *Id.* § 1673. "Foreign market value" is generally the price of merchandise in the foreign manufacturer's home market. In essence, the antidumping duty law is intended to prevent price discrimination between the home market and the U.S. market.

18. *Id.* The term "material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant." *Id.* § 1677(A)(7); *see Bello & Holmer, Recent Developments Regarding Antidumping and Countervailing Duty Injury Determinations*, 20 INT'L L. 689 (1986); Note, *Injury Determinations Under United States Antidumping Laws Before and After the Trade Agreements Act of 1979*, 33 RUTGERS L. REV. 1076 (1981). *See generally* Ablondi & McCarthy, *Impact of the United States International Trade Commission on Commercial Transactions*, 3 DICK. J. INT'L L. 163 (1985); Minchew & Webster, *Regulating Unfair Practices in International Trade: The Role of the United States International Trade Commission*, 8 GA. J. INT'L & COMP. L. 27 (1978); Leonard & Foster, *The Metamorphosis of the U.S. International Trade Commission Under the Trade Act of 1974*, 16 VA. J. INT'L L. 719 (1976).

19. 19 U.S.C. §§ 1671b, 1671d, 1673b, 1673d. If the Commission reaches a negative preliminary injury determination, the entire antidumping duty investigation is terminated. *Id.* § 1673b(a).

20. *Id.* § 1673.

order is enforced until revoked. It will only be revoked when injury or sales at less than fair value have ceased, and it cannot be revoked for at least two years after imposition, absent good cause shown.²¹

An aggrieved party may seek judicial review in the Court of International Trade,²² whose decisions may be appealed as of right to the Federal Circuit.²³ The scope of judicial review in antidumping duty cases is whether the administrative determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law,"²⁴ the same standard found in the Administrative Procedure Act.²⁵ It is the application by the Federal Circuit of the "otherwise not in accordance with law" standard of review to ITC antidumping duty injury determinations which this article examines next.²⁶

III. CAFC REVIEW OF ITC STATUTORY INTERPRETATIONS UNDER THE ANTIDUMPING DUTY LAW

In three recent decisions, *Bingham & Taylor Div., Virginia Industries, Inc. v. United States*,²⁷ *ICC Industries, Inc. v. United States*,²⁸ and *American Lamb Co. v. United States*,²⁹ the Federal Circuit was asked to review various ITC interpretations of the antidumping duty statute. In the *Bingham* decision, the court struck down the ITC interpretation,³⁰ while in the *ICC Industries* and *American Lamb* cases, the ITC's view was sustained.³¹

In *Bingham*, five unfair trade petitions, four involving allegations of dumping and one of unlawful subsidization, were filed by an American trade association of iron construction casting manu-

21. *Id.* § 1675(b).

22. *Id.* § 1516a; 28 U.S.C. § 1581(c) (1982).

23. 28 U.S.C. § 1295(a)(5) (1982 & Supp. 1985).

24. 19 U.S.C. § 1516(1)(B).

25. 5 U.S.C. § 706 (1982).

26. Although the three cases discussed in this article concern the antidumping duty law, the injury criteria are identical in both antidumping duty cases and countervailing duty cases. Thus, my analysis is equally applicable to both kinds of proceedings. For two recent Federal Circuit decisions applying the substantial evidence standard to ITC antidumping duty injury determinations, see *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927 (Fed. Cir. 1984); *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556 (Fed. Cir. 1984).

27. 815 F.2d 1482 (Fed. Cir. 1987).

28. 812 F.2d 694 (Fed. Cir. 1987).

29. 785 F.2d 994 (Fed. Cir. 1986).

30. *Bingham*, 815 F.2d at 1487.

31. *ICC Industries*, 812 F.2d at 700; *American Lamb*, 785 F.2d at 1004.

facturers.³² In its preliminary injury determinations³³ in the four antidumping duty cases, the ITC found a reasonable indication of material injury to the domestic light and heavy iron construction castings industries by reason of less-than-fair value sales of imports from India, Canada, the Peoples Republic of China, and Brazil.³⁴ With respect to the countervailing duty proceeding involving allegedly subsidized imports of light iron construction castings from Brazil, however, the ITC found no reasonable indication of injury to the domestic industry.³⁵ The issue for review was whether section 771(7)(C)(iv) of the Tariff Act of 1930, as amended by the Trade and Tariff Act of 1984,³⁶ required the ITC to cumulate the volume and price effects of imports subject to an antidumping duty investigation, with import of like products subject to countervailing duty investigation. In rejecting the ITC's position against cross-cumulation, the Court of International Trade answered this question in the affirmative.³⁷ The CAFC affirmed.³⁸

Writing for the Federal Circuit, Judge Davis began by conceding that the language of section 771(7)(C)(iv) was not clear on its

32. *Bingham*, 815 F.2d at 1483.

33. In antidumping duty and countervailing duty cases, both the Commerce Department and the ITC make preliminary and final determinations. See 19 U.S.C. §§ 1671b, 1671d, 1673b, 1673d (1982 & Supp. 1985). For a general discussion of ITC injury determinations, see Mock, *Cumulation of Import Statistics in Injury Investigations Before the International Trade Commission*, 7 N.W. J. INT'L L. & BUS. 433, 434-39 (1986).

34. *Bingham*, 815 F.2d at 1483.

35. *Id.*

36. Section 771(7)(C)(i), (ii) & (iv) of the Tariff Act of 1930, as amended by Trade and Tariff Act of 1984, 19 U.S.C. § 1677(7)(C)(i), (ii) & (iv) (1982 & Supp. 1985), provides:

(i) Volume.—In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.

(ii) Price.—In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—

(I) there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

(iv) Cumulation.—For purposes of clauses (i) and (ii), the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market.

37. *Bingham & Taylor Div., Virginia Industries, Inc. v. United States*, 627 F. Supp. 793, 795 (Ct. Int'l Trade 1986).

38. See *Bingham*, 815 F.2d at 1483.

face insofar as the cross-cumulation question was concerned.³⁹ Judge Davis also noted that the ITC, as an entity, had never cross-cumulated, although individual commissioners had aggregated dumped and subsidized imports in their cumulation analyses.⁴⁰ Against this muddled backdrop of ambiguous statutory language, coupled with an ITC practice adverse to cross-cumulation, the court turned to the legislative history of the Trade and Tariff Act of 1984, the act which added the cumulation requirement to the antidumping duty law.⁴¹ The portion of the report of the House Ways and Means Committee on section 771(7)(C)(iv) quoted by the CAFC in support of a cross-cumulation requirement stated:

The purpose of mandating cumulation under appropriate circumstances is to eliminate inconsistencies in Commission practice and to ensure that the injury test adequately addresses simultaneous unfair imports from different countries The Committee believes that the practice of cumulation is based on the sound principle of preventing material injury which comes about by virtue of several unfair acts or practices.⁴²

Relying on this paper-thin piece of legislative history, the court concluded that "the Committee's use of generic terms collectively describing dumped and subsidized imports in the committee report . . . suggests that the statutory phrase 'subject to investigation' was intended to require cumulation of dumped and subsidized imports."⁴³ The CAFC buttressed its conclusion with the additional observation that the cumulation provision was placed in the definitions section applicable generally to antidumping duty and countervailing duty proceedings.⁴⁴ To the argument advanced by the ITC that the court should defer to its interpretation of the cumulation provision,⁴⁵ the CAFC responded that because the ITC's interpretation was neither longstanding nor consistent with congressional intent, no deference was due it.⁴⁶ Unfortunately, an opinion which was otherwise a tour de force was marred by the court's irrelevant, and worse illogical, observation that Congress

39. *Id.* at 1485.

40. *Id.*

41. *Id.*

42. *Id.* (citing H.R. REP. No. 725, 98th Cong., 2d Sess. 37, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 5164).

43. *Bingham*, 815 F.2d at 1485-86.

44. *Id.* at 1486.

45. *Id.* at 1487.

46. *Id.*

had made no exception or exclusion for cross-cumulation,⁴⁷ suggesting that the absence of any reference to cross-cumulation established the affirmative of the proposition, that cross-cumulation was statutorily mandated.

In *ICC Industries*,⁴⁸ a decision rendered less than two months before the *Bingham* case, the Federal Circuit considered two issues. The first was whether an importer could be assessed with retroactive antidumping duties because it knew or should have known that the imported merchandise was being sold at less than fair value.⁴⁹ The second issue was whether the ITC was required to conduct a separate injury investigation for the period in which massive imports were occurring in order to impose antidumping duties retroactively.⁵⁰ The court affirmed the Commerce Department's determination that the importer possessed the requisite knowledge to warrant retroactive imposition of antidumping duties, and further held that the ITC was not required to conduct a separate injury investigation.⁵¹

Most of the *ICC Industries* opinion took up the question of the ITA's conclusion that the importer had knowledge of less-than-fair-value sales.⁵² With regard to the issue of whether the ITC was required to make a separate injury determination that massive imports of the subject merchandise during the critical circumstances period were a discrete cause of material injury under the critical circumstances provision of the Trade Agreements Act of 1979,⁵³ the court purported to defer to the ITC's interpretation of the antidumping duty statute.⁵⁴

The importer argued⁵⁵ that the ITC was required to make one injury determination under 19 U.S.C. section 1673d(b)(1)(A)(i)⁵⁶

47. *Id.* at 1486.

48. 812 F.2d 694 (Fed. Cir. 1987).

49. *Id.* at 695. The International Trade Administration of the Department of Commerce is responsible for this phase of the antidumping duty proceeding. See 19 U.S.C. §§ 1673d(a)(3), (b)(4)(A) (1982 & Supp. 1985).

50. *ICC Industries*, 812 F.2d at 695.

51. *Id.*

52. *Id.* at 696-99.

53. "Critical circumstances" refers to either a history of dumping or massive imports of the merchandise under investigation of which the importer knows or has reason to know is being sold at less than fair value. 19 U.S.C. § 1673b(e) (1982 & Supp. 1985). If critical circumstances are found to exist, antidumping duties will be assessed retroactively 90 days. *Id.*

54. *ICC Industries*, 812 F.2d at 699.

55. *Id.*

56. That section provides:

The Commission shall make a final determination of whether —

and a second, separate injury determination under 19 U.S.C. section 1673d(b)(4)(A).⁵⁷ While in effect conceding that the importer's interpretation was reasonable, the CAFC summarily disposed of it with the observation that "it is not the interpretation made by the Commission."⁵⁸ After reciting the "judicial-deference-to-agency-interpretation" litany,⁵⁹ the court turned to the legislative history of the critical circumstances provision. There the CAFC found persuasive an excerpt from the House Ways and Means Committee report on the Trade Agreements Act of 1979, which highlighted the need for expeditious relief to domestic industries injured by massive imports of competing merchandise.⁶⁰ Consequently, the court concluded,

[t]he Commission's interpretation [of the antidumping duty statute as permitting one material injury finding to be used in both the critical circumstances and final injury determination phases] is consistent with the congressional goal of providing meaningful relief to the domestic industries under the time limitations within which a final determination must be made.⁶¹

Even though the CAFC appears to have based its decision on deference to agency discretion, a closer look indicates that in fact it undertook an independent review, examining the legislative history

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of the merchandise with respect to which the administering authority [International Trade Administration, Department of Commerce] has made an affirmative determination under subsection (a)(1) of this section (19 U.S.C. § 1673d(a)(1)).

57. That section provides:

If the finding of the administering authority under subsection (a)(2) of this section is affirmative, then the final determination of the Commission shall include a finding as to whether the material injury is by reason of massive imports described in subsection (a)(3) of this section to an extent that, in order to prevent such material injury from recurring, it is necessary to impose the duty imposed by section 1673 of this title retroactively on those imports.

58. *ICC Industries*, 812 F.2d at 699.

59. *See id.* The "judicial-deference-to-agency-interpretation" litany goes as follows: "An agency's interpretation of a statute is to be sustained unless unreasonable," "an agency's interpretation of a statute is to be sustained unless plainly inconsistent with the statute," "an agency's interpretation of a statute is to be held valid unless weighty reasons require otherwise," and "an agency's interpretation of a statute need not be the only reasonable interpretation or the one the court views as the most reasonable." *Id.*

60. *Id.* at 699-700.

61. *Id.* at 700.

for itself⁶² and reaching its own conclusion that the ITC's interpretation was reasonable.⁶³

The third CAFC decision, *American Lamb Co. v. United States*,⁶⁴ laid to rest an issue that had long plagued the ITC in litigation before the Court of International Trade:⁶⁵ whether it was permissible for the ITC to weigh all conflicting evidence in its preliminary injury determinations.⁶⁶ This practice of the ITC, in effect since 1974,⁶⁷ was rejected by the Court of International Trade.⁶⁸ The domestic industry objected to this practice, in the main, because it resulted in more negative preliminary injury determinations than would otherwise have been the case.⁶⁹ The Federal Circuit accepted the ITC's view.⁷⁰

In making its preliminary injury determination, the ITC is directed to make a determination "based upon the best information available to it at the time of the determination, of whether there is a reasonable indication"⁷¹ that a domestic industry is being materially injured by reason of the imports subject to investigation. After invoking the obligatory "judicial-deference-to-agency-interpretation" litany,⁷² the CAFC found the ITC's 12-year interpretation to be within the antidumping duty statutory framework,⁷³ particularly given the Commission's requirement that before an investigation is terminated at the preliminary stage, the record as a whole must contain clear and convincing evidence that no material injury exists.⁷⁴ The Federal Circuit pointed out the absurdity of any other interpretation:

[T]he notion that allegations in a petition found unsupportable because of overwhelming contradictory evidence should nonetheless

62. See *id.* at 699-700.

63. See *id.* at 700.

64. 785 F.2d 994 (Fed. Cir. 1986).

65. See *Jeanette Sheet Glass Corp. v. United States*, 607 F. Supp. 123 (Ct. Int'l Trade 1985); *Republic Steel Corp. v. United States*, 591 F. Supp. 640 (Ct. Int'l Trade 1984).

66. *American Lamb*, 785 F.2d at 997.

67. See *id.* at 999.

68. See *Jeanette Sheet Glass*, 607 F. Supp. at 123; *Republic Steel*, 591 F. Supp. at 640.

69. By precluding the ITC from considering any evidence negating allegations of material injury at the preliminary injury stage, affirmative preliminary determinations would result whenever information accompanying the petition raised the possibility of material injury. See *American Lamb*, 785 F.2d at 1001. A negative preliminary injury determination terminates an antidumping duty proceeding. 19 U.S.C. § 1673b(a) (1982 & Supp. 1985).

70. *American Lamb*, 785 F.2d at 1001.

71. 19 U.S.C. § 1673b(a).

72. See *American Lamb*, 785 F.2d at 1001.

73. *Id.*

74. 19 U.S.C. § 1673d(b) (1982).

result in a full investigation and potential imposition of provisional remedies is directly contrary to Congress' intent . . . of eliminating "unnecessary and costly investigations" and the "impediment to trade" that would reside in an unwarranted imposition of provisional remedies.⁷⁵

Through a process of gathering and considering all available evidence within the 45-day preliminary injury investigation period, the CAFC concluded that this legislative purpose would be effectuated.⁷⁶ Thus, while purporting to defer to agency statutory interpretation, the court in *American Lamb* again conducted an independent review of the legislative history, satisfying itself that the ITC's interpretation was consistent with congressional intent before approving the agency's view.

At first blush, these three decisions appear to be run-of-the-mill administrative law cases. The *ICC Industries* and *American Lamb* opinions both echo the standard rules regarding judicial deference to agency interpretations of the statute which the agency is charged with administering. Even the *Bingham* opinion acknowledged that ordinarily deference is due an agency's statutory interpretation.⁷⁷ Given the wealth of Supreme Court decisions that are the foundation for the deference rule,⁷⁸ these three Federal Circuit cases certainly are in the mainstream. However, the deference rule and its rationale that the expert agency view on the subject ought to be followed by the judiciary are not immutable shibboleths. The Supreme Court itself has recognized that expert discretion has its limits. "Expert discretion is the lifeblood of the administrative process," the Court has acknowledged, "but unless we make the requirements for administrative action strict and demanding, ex-

75. *American Lamb*, 785 F.2d at 1004 (quoting S. REP. No. 1298, 93rd Cong., 2d Sess. 171, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7308).

76. *Id.*

77. See *Bingham*, 815 F.2d at 1487.

78. See, e.g., *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 104 S. Ct. 2778, 2782 (1984); *United States v. Clark*, 454 U.S. 555, 565 (1982); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 451 (1978); *Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1, 10 (1976); *Udall v. Tallman*, 380 U.S. 1 (1965); 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.16, at 400 (1978); R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 7.7, at 405-07 (1985) [hereinafter PIERCE, SHAPIRO & VERKUIL]; Levin, *Federal Scope-of-Review Standards: A Preliminary Restatement*, 37 ADMIN. L. REV. 95, 97 (1985); Boudreau, *To Defer or Not to Defer: The Question for the D.C. Circuit in Reviewing FCC Decisions* 36 FED. COM. L.J. 293 (1984); Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587 (1984); Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175 (1981); Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action* 31 ADMIN. L. REV. 329 (1979) [hereinafter Woodward & Levin].

pertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion."⁷⁹ Thus, agency discretion is far short of unbridled. As the Court has noted, "[t]he deference owed to an expert tribunal cannot be allowed to slip into judicial inertia."⁸⁰ In international trade litigation before the Federal Circuit, the force of the deference rule is especially weak and should be abandoned in cases involving issues of agency statutory interpretation.

IV. ABANDONING DEFERENCE IN CAFC REVIEW OF ITC STATUTORY INTERPRETATIONS

Review by the Federal Circuit of ITC interpretations of the antidumping duty statute differs little in form from appellate review of agency decisions currently conducted by the other 12 courts of appeals.⁸¹ The standard of review of agency decisions contained in *Universal Camera Corp. v. NLRB*,⁸² and codified in the Administrative Procedure Act,⁸³ is whether the agency's decision is supported by the substantial evidence on the record or is otherwise in accordance with law.⁸⁴ This standard, however, tells reviewing courts little of the process to be followed in applying it to a given case.

While the Federal Circuit and the other courts of appeals use the same standard of review when reviewing agency action, the unusual element in CAFC review is that ITC antidumping duty determinations come to the Federal Circuit only after they have been reviewed first by the Court of International Trade.⁸⁵ Even though

79. *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (emphasis in original).

80. *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 271 (1968).

81. These courts have reviewed agency determinations from the National Labor Relations Board (see 29 U.S.C. § 160(e) (1982)); the Nuclear Regulatory Commission (see 28 U.S.C. § 2342(4) (1982); 42 U.S.C. § 2239 (1982)); the Interstate Commerce Commission (see 28 U.S.C. § 2321 (1982)); or the Federal Communications Commission (see 47 U.S.C. § 402(a) (1982); 28 U.S.C. § 2342(2) (1982)).

82. 340 U.S. 474 (1951). In that case, Justice Frankfurter candidly noted the unavoidable role that judicial discretion plays in the review of agency action:

A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry.

Id. at 488-89.

83. 5 U.S.C. § 706 (1982).

84. 19 U.S.C. § 1516a(a)(2) (1982 & Supp. 1985).

85. See 28 U.S.C. §§ 1581(c), 2640(b) (1982 & Supp. 1985); 19 U.S.C. §§

judicial scrutiny of antidumping duty determinations has been doubled, paradoxically the CAFC treats antidumping duty and countervailing duty appeals essentially as if the Court of International Trade had never initially reviewed the matter. In *Matsushita Electric Industrial Co. v. United States*,⁸⁶ the Federal Circuit was called upon to review an antidumping duty order revocation proceeding conducted by the ITC. The threshold question addressed by the CAFC was whether "in reviewing determinations of injury or likelihood of injury in antidumping cases, we review the *Court's* [Court of International Trade's] decision to determine if it is based on a fair assessment of the record . . . or whether we directly review the determination of the *Commission*" ⁸⁷ The court gave the following answer:

There is no question but that under our jurisdictional statute it is the Court's decision that is before us However, resolution of whether the Court correctly held that the Commission's decision was not supported by the substantial evidence requires consideration of the evidence presented to and the analysis by the Commission. Thus, to determine whether the Court correctly applied the statutory standard of [review], we must review the Commission's decision Only if we agree with the lower court's conclusion on this initial question would we reach the question whether the court properly disposed of the case by reversal, rather than remand.⁸⁸

Thus, the Federal Circuit reviews an ITC determination virtually as if no review had taken place at the Court of International Trade.⁸⁹

The wisdom of having this additional layer of judicial review in light of the attendant delay and cost is questionable.⁹⁰ More im-

1516a(a)(2)(B)(i)-(iii) & 1516a(b). See generally Note, *Administering the Revised Antidumping Law: Allocating Power between the ITC and the Court of International Trade*, 22 VA. J. INT'L L. 883 (1982).

86. 750 F.2d 927 (Fed. Cir. 1984).

87. *Id.* at 932 (emphasis in original).

88. *Id.* (footnotes and citations omitted).

89. See *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984) ("We review that court's review of an ITC determination by applying anew the statute's express judicial review standard.").

90. Kennedy, *A Proposal to Abolish the U.S. Court of International Trade*, 4 DICK. J. INT'L L. 13, 22 (1985). In 1983, a bill was introduced in the Senate to repeal the jurisdiction of the Court of International Trade in antidumping duty and countervailing duty cases. S. 1672, 98th Cong., 1st Sess., 129 CONG. REC. 10,755-57 (1983). The bill was designed to reduce litigation expense and delay in antidumping duty and countervailing duty appeals. As noted in the fact sheet accompanying the bill:

Under current law, the U.S. Court of International Trade is the court for review of AD/CVD cases. The bill would assign this responsibility to the Court of Appeals

portantly and pertinent in the present context, however, is that if Congress genuinely intended for the courts to defer to the determinations of the ITC, granting litigants two opportunities to appeal such determinations to the Federal judiciary as a matter of right — one opportunity more than is typically the case in administrative law cases — would seem inconsistent with this intent. If ITC determinations, and for that matter, ITA determinations as well, are entitled to great judicial deference, why expose such determinations twice to the gauntlet of judicial review? At least one answer, of course, is that Congress did not believe that deference was due to such determinations because of an apprehension that political considerations might shape them. By screening these determinations through the courts twice, the administering agencies would be on notice that if extralegal considerations enter into a determination, that determination runs a substantial risk of ultimately being reversed. A fair inference from this two layer scheme of judicial review is that Congress is not convinced that ITA and ITC anti-dumping determinations should be shielded from intense judicial probing.

Although it can only be inferred from this dual judicial review scheme that Congress intended little or no deference be accorded ITC determinations, a more explicit congressional pronouncement found in the legislative history of the Customs Courts Act of 1980,⁹¹ substantially undercuts the “agency expertise” rationale for

for the Federal Circuit.

AD/CVD cases are currently subject to a two-step appeals process, in which determinations are first appealed to the Court of International Trade and then to the Court of Appeals for the Federal Circuit. The only function of the courts in these cases is to conduct an appellate review of the agency proceedings. By eliminating the first step in the process, the bill brings the import relief area into conformity with the usual administrative practice and reduces the costs associated with appellate review by two different courts.

129 CONG. REC. 10,757 (1983). The Senate bill was deleted from the final version of the Trade and Tariff Act of 1984.

91. Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified in scattered sections of 28 U.S.C.). The Customs Courts Act of 1980 was chiefly designed to clarify and enlarge the jurisdiction of the Court of International Trade. See H.R. REP. NO. 1235, 96th Cong., 2d Sess. 1, 19-20, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 3729. See generally Cohen, *Recent Decisions of the Court of International Trade Relating to Jurisdiction: A Primer and a Critique*, 58 ST. JOHN'S L. REV. 700 (1984); Vance, *The Unrealized Jurisdiction of 28 U.S.C. § 1581(i): A View from the Plaintiff's Bar*, 58 ST. JOHN'S L. REV. 793 (1984); Cohen, *The “Residual Jurisdiction” of the Court of International Trade Under the Customs Courts Act of 1980*, 26 N.Y.L. SCH. L. REV. 471 (1981); Rodino, *The Customs Courts Act of 1980*, 26 N.Y.L. SCH. L. REV. 459 (1981).

judicial deference. In the House Report⁹² on that 1980 Act, repeated reference was made to the "specialized expertise"⁹³ of the Federal Circuit in international trade litigation:

The Customs Courts Act of 1980 creates a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise of the United States Customs Court [the predecessor court of the Court of International Trade] and the United States Court of Customs and Patent Appeals [which was merged with the Court of Claims in 1982 to form the Court of Appeals for the Federal Circuit].⁹⁴

In addition, in listing the major goals of the Customs Courts Act, the House Report emphasized "Congress' intent that the expertise [of the Court of International Trade and the Federal Circuit] be exclusively utilized in the resolution of conflicts and disputes arising out of the tariff and international trade laws"⁹⁵ Thus, given Congress' explicit recognition of the CAFC's special expertise in international trade matters, it is highly debatable whether the Federal Circuit should show *any* deference to the ITC in cases of statutory interpretation.

Although the CAFC stated in these three cases that deference is due to ITC interpretations of the antidumping duty law, does the Federal Circuit in fact defer? Posing the questions somewhat differently, would the results have differed in the three cases under discussion if the CAFC had reviewed the ITC determinations using a "no deference even if sufficiently reasonable" standard of review?

V. THE "NO DEFERENCE" STANDARD OF REVIEW

In *Bingham*, the Federal Circuit concluded that the ITC's interpretation of the cumulation provision of the Trade and Tariff Act of 1984 was directly at odds with congressional intent regarding the issue of cross-cumulation.⁹⁶ The court consequently had no difficulty rejecting the ITC's view in favor of one which it considered to be congruous with what Congress intended. Had there been a longstanding agency practice on the cross-cumulation question, the case might have been closer. Given that there was none,⁹⁷ the

92. H.R. REP. No. 1235, *supra* note 91.

93. *Id.* at 20.

94. *Id.*

95. *Id.* at 28.

96. *Bingham*, 815 F.2d at 1487.

97. *See id.*

CAFC was not put to any hard choices. But even had there been such a practice, the court in all likelihood would have still rejected the ITC's position because it would have run counter to the Federal Circuit's reading of the objective of the cumulation provision as revealed in the legislative history.⁹⁸ In short, because the CAFC found the ITC's statutory interpretation to be unreasonable, there would have been no opportunity to apply a "no deference even if sufficiently reasonable" standard of review.

In *ICC Industries*, the court in effect conceded that the importers' interpretation of the critical circumstances statute was reasonable.⁹⁹ Although the CAFC recited the "judicial-deference-to-agency-interpretation" boilerplate,¹⁰⁰ its acceptance of the ITC's interpretation seems less predicated on deference to agency action than on that interpretation's consistency with congressional intent.¹⁰¹ The legislative history available was scant, but it did nevertheless support the ITC's position for prompt relief. Thus, the Federal Circuit was not writing on a clean slate but rather had some legislative history, albeit meager, to guide it through the statutory shoals. On balance, while the *ICC Industries* case might have been closer had a no deference standard of review been applied, the result would have probably been the same.

Finally, in *American Lamb*, the court was placed in the position of having to vacate the decision of the Court of International Trade in order to uphold the ITC's interpretation of the anti-dumping duty statute, unlike in *Bingham* and *ICC Industries*, where the CAFC affirmed the Court of International Trade. Furthermore, the court in *American Lamb* had to vacate a lower court decision whose reasoning was "fully acceptable."¹⁰² Once again, however, what was decisive for the CAFC in upholding the ITC's view in *American Lamb*, as it was in sustaining that view in *ICC Industries* and rejecting it in *Bingham*, was congressional intent:

Congress' requirement that ITC conduct a thorough investigation, using the best information available to it, Congress' expectation of opportunity for interested parties to present their views, and Congress' provision of the "reasonable indication" standard for use in investigations initiated in response to a petition and in ITC's self-

98. *See id.*

99. *ICC Industries*, 812 F.2d at 699 (where the court stated that the importers' view "may be one of the possible interpretations").

100. *Id.*

101. *See id.* at 699-700.

102. *See American Lamb*, 785 F.2d at 1001.

initiated investigations — all militate against a view that Congress intended ITC to disregard evidence that clearly and convincingly refutes the allegations in a petition.¹⁰³

The Federal Circuit added that the Court of International Trade's reading of "reasonable indication" of injury (as being synonymous with "mere possibility" of injury) did not conform with the congressional desire to weed out nonmeritorious cases at an early stage of an investigation.¹⁰⁴

Considering that the CAFC had to work against the momentum of a lower court decision invalidating the ITC's interpretation, the case might have been closer had the court applied a no deference standard of review in *American Lamb*. However, it is fair to state that the decision of the Court of International Trade was simply out of step with the wealth of legislative history supporting the ITC's interpretation.

VI. CONCLUSION

If application of a "no deference even if sufficiently reasonable" standard of review would not have changed the result in any of these three cases, why adopt such a standard? Indeed, the need for adoption of such a rule seems minimal because *de facto*, the Federal Circuit appears to be applying such a standard and merely paying lip service to the deference rule. As commentators are quick to point out, no matter how much deference is shown, a court never actually affirms an agency interpretation of a statutory provision without first independently analyzing it and its legislative history.¹⁰⁵ If the court finds a conflict, it reverses under any standard of review.¹⁰⁶

A no deference standard of review ought to be formally adopted by the Federal Circuit if for no other reason than judicial candor, but several other more compelling reasons exist for doing so. First, adopting a "no deference even if sufficiently reasonable" standard of review would firmly establish the CAFC's status as the expert tribunal in the field of international trade law, a position it could rightfully claim, given its exclusive appellate jurisdiction

103. *See id.* at 1003.

104. *Id.* at 1001-02.

105. PIERCE, SHAPIRO & VERKUIL, *supra* note 78, at 376-77; Woodward & Levin, *supra* note 78, at 332-35.

106. *See id.*

over the subject area. As noted,¹⁰⁷ Congress has implicitly and expressly recognized this judicial expertise, most revealingly through the double-layered scheme of judicial review to which ITC anti-dumping duty and countervailing duty determinations are subjected.

A second reason for CAFC adoption of a no deference rule is that every antidumping duty determination reached by the ITC touches upon matters of international importance, because every such determination affects international trade between one or more other countries and the world's largest economic power.

A third reason for explicitly rejecting the deference rule in CAFC review of either ITC or ITA statutory interpretations, is the *in terrorem* effect such a declaration would have on these agencies should they become emboldened by the deference rule to stray far afield of congressional intent. Adoption of a no deference standard of review would send a message to those agencies that they are not superior to courts in the interpretation of the antidumping duty statute while reaffirming that statutory interpretation is quintessentially and ultimately a judicial, not an administrative, function.¹⁰⁸

None of the foregoing should suggest that the ITC is unable or unwilling to take into account considerations of the public interest or that the Federal Circuit should exhibit an overweening attitude toward the Commission. Given the depth of expertise and the breadth of views brought to the Commission by the six commissioners and staff, its views on the meaning of the U.S. trade laws should not be cavalierly rejected by the courts.¹⁰⁹ At the same time, however, a panel of court of appeals judges who are themselves members of an expert Federal court, should not be daunted by the prospect of rejecting an ITC interpretation of the anti-dumping duty law. Indeed, the CAFC should not hesitate to do so, even in cases where the court believes that the ITC's interpretation

107. See *supra* notes 92-95 and accompanying text.

108. See, e.g., *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (where it is stated that the courts are "final authorities on issues of statutory construction").

109. The six ITC commissioners are appointed by the President with the advice and consent of the Senate, serve for a term of nine years, and must be qualified to develop expert knowledge of international trade matters. 19 U.S.C. § 1330(a)-(b) (1982). Not more than three of the commissioners may be members of the same political party. *Id.* § 1330(a). The Commission has the support of an expert staff of attorneys, economists, accountants, and statisticians. See Berg, *Petitioning and Responding Under the Escape Clause: One Practitioner's View On How To Do It*, 6 N.C.J. INT'L L. & COM. REG. 407, 409 (1981).

is reasonable, if the court would have reached a different conclusion had the issue come before it initially in a judicial proceeding.