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Herbert C. Shelley  
*Howrey & Simon*

Alicia A. Kipel  
*Howrey & Simon*

Anne Talbot  
*Howrey & Simon*

Keith R. Marino  
*Howrey & Simon*

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**The Standard of Review of Applied by the United States Court of Appeals for the Federal Circuit in International Trade and Customs Cases**

# THE STANDARD OF REVIEW APPLIED BY THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT IN INTERNATIONAL TRADE AND CUSTOMS CASES

HERBERT C. SHELLEY\*  
ALICE A. KIPEL\*\*  
ANNE TALBOT\*\*\*  
KEITH R. MARINO\*\*\*\*

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\* Partner, Howrey & Simon. B.A., *Columbia College*, 1969; J.D., *Vanderbilt University School of Law*, 1972; LL.M., *magna cum laude*, *Vrije Universiteit Brussels*, 1973. Mr. Shelley formerly served as a member of the U.S. Delegation in Geneva, Switzerland during the Tokyo Round of GATT Multilateral Trade Negotiations, 1976-1979, and as a panelist in appeals of countervailing duty determinations under the United States-Canada Free Trade Agreement.

\*\* International Trade Special Counsel, Howrey & Simon. A.B., *cum laude*, *Princeton University*, 1979; J.D., *Georgetown University Law Center*, 1982. Ms. Kipel currently serves on the U.S. Court of International Trade's Advisory Committee and the Executive Committee of the International Trade Commission Trial Lawyers Association.

\*\*\* Associate, Howrey & Simon. B.S., *Georgetown University*, 1984; J.D., *Vanderbilt University School of Law*, 1989.

\*\*\*\* Associate, Howrey & Simon. B.A., *College of William and Mary*, 1989; J.D., *College of William and Mary Law School*, 1994.

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## INTRODUCTION

Review by the United States Court of Appeals for the Federal Circuit ("Federal Circuit") of antidumping and countervailing duty cases is anomalous in comparison to other areas of the court's jurisdiction. This anomaly stems not, as some commentators assert, from the fact that antidumping ("AD")<sup>1</sup> and countervailing duty ("CVD")<sup>2</sup> cases are reviewed under a so-called mandatory two-tier system of judicial review, but rather, from the redundant standard of review that has evolved for such cases.<sup>3</sup>

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1. Dumping occurs when a class of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and such activity causes or threatens material injury to an industry in the United States (or materially retards the establishment thereof). In such cases, an antidumping duty ("AD") is imposed on the merchandise, in addition to all other duties imposed, to recover any difference between the normal value and the export price (or constructed export price). 19 U.S.C. § 1673 (1994).

2. A countervailing duty ("CVD") is an additional duty placed on merchandise imported into the United States to offset certain types of subsidies received by foreign producers or exporters from their governments. *See id.* § 1671.

3. The term "mandatory" as used to describe two-tier judicial review in this Article does not imply that all cases are litigated through two levels of judicial review. Rather, the term means that the appellate court must entertain an appeal, if properly filed. The appellate court does not have the discretion to choose whether to review a case as, for example, the Supreme Court does in determining whether to grant a petition for writ of certiorari.

This Article focuses on the Federal Circuit's review of Title VII<sup>4</sup> cases, demonstrating the unique posture of the appellate process and suggesting possible alternatives to the current system of review. In Part I, the Article discusses those courts and agencies whose decisions are reviewed by the Federal Circuit and the standard of review applied in each instance. That section is followed by an examination in Part II of the particular standards applied in AD and CVD cases. Next, also in Part II, the question of the Federal Circuit's role in a two-tiered review is addressed. The review process for AD and CVD cases is then compared, in Parts II and III, to other areas of law, including other areas of international trade and customs law. The conclusion of the Article summarizes the discussion and enunciates the standard of review that the authors believe is most appropriate for AD and CVD appeals.

## I. SCOPE OF REVIEW IN THE FEDERAL CIRCUIT

### A. *The Importance of the Standard of Review*

Parties appealing the decisions of lower bodies often fail to appreciate the importance that the standard of review plays in the decision of the appellate court. It is through the "lens"<sup>5</sup> of the standard of review that the appellate court looks at the lower body's decision to determine whether reversible error has occurred. The various standards discussed in this Article can result in very different appellate decisions even if applied to similar legal and factual situations. Because the standard of review in international trade and customs cases varies depending on the decision to be reviewed, as well as on the entity—an administrative body or the lower court that made the decision—advocates often do not effectively focus their appellate arguments. An advocate who does not understand the standard of review applicable to a particular appeal could unwittingly prepare an argument that is inappropriate and, perhaps, irrelevant to the issue on appeal. Accordingly, whether the appeal concerns a purely legal issue, the application of a legal standard to certain facts, or merely a factual error, the advocate must be certain that the parameters of the standard of review are appropriately applied. If the standards are properly understood, the advocate can tailor arguments to influence

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4. Throughout this Article, AD and CVD proceedings are also referred to as "Title VII" proceedings, in reference to the relevant title of the underlying statute, the Tariff Act of 1930, as amended.

5. See Paul R. Michel, *Appellate Advocacy—One Judge's Point of View*, 1 FED. CIR. B.J. 1, 1 (1991).

the manner in which a standard of review is applied, even if by law the appellate court must apply a particular standard.

*B. The Lower Bodies Reviewed by the Federal Circuit in International Trade and Customs Cases*

In international trade and customs cases, the Federal Circuit reviews, either directly or indirectly, the decisions and actions of two federal agencies, three executive branch departments, one federal court and, under limited circumstances, the President.<sup>6</sup> Three subparagraphs of the Federal Circuit's jurisdictional statute identify the court's exclusive jurisdiction in such cases.<sup>7</sup> The broadest category is the court's review of final decisions of the United States Court of International Trade ("CIT").<sup>8</sup> In addition, the Federal Circuit has exclusive jurisdiction to review final determinations of the United States International Trade Commission ("ITC") made under section 337 of the Tariff Act of 1930, as amended.<sup>9</sup> Finally, the Federal Circuit possesses exclusive jurisdiction to review, on questions of law only, certain findings of the U.S. Secretary of Commerce in connection with the importation of instruments or apparatus.<sup>10</sup>

The Federal Circuit's review of CIT decisions is based upon the lower court's jurisdiction, which covers the following: determinations of the U.S. Department of Commerce ("DOC") and the ITC in AD and CVD cases,<sup>11</sup> certain decisions and actions of the U.S. Customs Service ("Customs"),<sup>12</sup> final determinations of the Secretaries of Labor and Commerce regarding eligibility for adjustment assistance under the Trade Act of 1974,<sup>13</sup> and certain final determinations of the Secretary of Treasury.<sup>14</sup> As such, the Federal Circuit effectively reviews the decisions and actions of these agencies and departments, albeit indirectly through the CIT, rather than through direct appeals

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6. 28 U.S.C. § 1295 (1994).

7. *Id.* § 1295(a)(5)-(7).

8. *Id.* § 1295(a)(5). The CIT is located in New York City and is an Article III court, *id.* § 251, of limited subject matter jurisdiction, having all the powers in law and equity of a federal district court. *Id.* § 1585. The CIT was established through the Customs Court Act of 1980, as a successor to the United States Customs Court. Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified as amended in scattered sections of 28 U.S.C.).

9. 28 U.S.C. § 1295(a)(6). Section 337 prohibits patent, copyright, trademark, and mask work infringement and other unfair trade practices with regard to products imported into the United States. 19 U.S.C. § 1337(a) (1994). Remedies for violations of the statute include, *inter alia*, the exclusion of offending goods from the United States. *Id.* § 1337(d).

10. 28 U.S.C. § 1295(a)(7).

11. *Id.* § 1581(c), (f).

12. *See id.* § 1581(a), (b), (g), (h).

13. *Id.* § 1581(d).

14. *Id.* § 1581(e) (relating to country of origin determinations for purposes of Agreement on Government Procurement); *id.* § 1581(g) (regarding denial of customs broker licenses).

from the agencies and departments. The CIT also has broad residual jurisdiction regarding actions against the United States in matters involving the U.S. international trade and customs laws<sup>15</sup> and jurisdiction over civil actions commenced by the United States to recover duties, bonds, or penalties.<sup>16</sup> Appeals to the Federal Circuit of decisions based upon the CIT's residual jurisdiction may also implicate the actions of other agencies or departments, or even the President.<sup>17</sup>

C. *Identification of the Various Standards of Review Applied by the Federal Circuit in International Trade and Customs Cases*

The Supreme Court has described the inherent difficulty in defining the terms that are used in denominating the various standards of judicial review:

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. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.

[Because] the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid

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15. *See id.* § 1581(i) (providing for exclusive CIT jurisdiction over any action against United States that arises out of any U.S. law providing for: (1) import or tonnage revenue; (2) tariffs, duties, fees, or other taxes on imports for non-revenue purposes; (3) embargoes or other quantitative restrictions on imports for reasons other than public health or safety; and (4) administration and enforcement of matters mentioned throughout § 1581); *see also* Gregory W. Carman, *Remarks Before the Conference on International Business Practice on Practice Before The United States Court of International Trade*, 2 FED. CIR. B.J. 123, 123 (1992) (giving judicial perspectives on CIT jurisdiction under § 1581(i)).

16. *See* 28 U.S.C. § 1582 (stating that CIT has exclusive jurisdiction over actions commenced by United States to recover civil penalties under certain sections of Tariff Act of 1930, to recover bonds relating to importation, and to recover customs duties); *id.* § 1583 (granting CIT jurisdiction over any counterclaim, cross-claim, or third-party action if such claim or action involves imported merchandise that is subject of CIT action or if such claim or action is to recover bonds or customs duties relating to such merchandise).

17. *See* *American Ass'n of Exporters & Importers v. United States*, 751 F.2d 1239, 1247 (Fed. Cir. 1985) (affirming CIT's decision that President has authority to enter into trade agreements limiting importation into the United States of textiles or textile products).



the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.<sup>18</sup>

There is a considerable body of scholarly writing that identifies and attempts to explain the various standards of review applied to agency action.<sup>19</sup> The standard to be applied in any given case can be dictated by statute or determined by the reviewing court and will vary depending on whether the issue being reviewed is a question of law or a question of fact.<sup>20</sup> In general, courts of appeal apply one or more of six standards in their review of agency actions and decisions. Ranked in order from the strictest scrutiny to the most deferential to the agency, they are: (1) "de novo;" (2) "in accordance with law;" (3) "clearly erroneous;" (4) "substantial evidence;" (5) "clear error of judgment;" and (6) "arbitrary and capricious or an abuse of discretion."<sup>21</sup> Under rare circumstances, there may be very limited or no

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18. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488-89 (1951).

19. See, e.g., WALTER GELLHORN ET AL., *ADMINISTRATIVE LAW* 349 (8th ed. 1987) (characterizing scope of review as "a spectrum"); CHARLES H. KOCH, JR., *ADMINISTRATIVE PRACTICE AND PROCEDURE* 822 (2d ed. 1991) (describing review system as "a continuum"); Roy A. Schotland, *Scope of Review of Administrative Action—Remarks Before the D.C. Circuit Judicial Conference Review*, 34 *FED. B.J.* 54, 54 (1975). Throughout this Article, the term "agency" is used to encompass both administrative agencies and executive branch departments (or subdivisions thereof).

20. See GELLHORN ET AL., *supra* note 19, at 352 (finding that courts traditionally have categorized questions presented on review into questions of fact, questions of law, mixed questions, and judgmental questions).

21. See STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* §§ 15.01-12 (2d ed. 1992) (analyzing various standard of review doctrines). Childress and Davis have distilled helpful definitions of these standards, as follows:

Under "de novo" review, a court must agree with the decision that has been made. *Id.* at 15-3. Unless the court can say that the decision of the agency was "correct," the court will set the decision aside. *Id.* De novo review therefore should be viewed as "agreement review." *Id.*

Next is the "clearly erroneous" review standard. *Id.* at 15-19. This standard also requires "agreement" by the reviewing court, but to a lesser extent. *Id.* at 15-17. Under the clearly erroneous standard, a court will set aside a determination when it has a "firm conviction" that a mistake has been made. *Id.* Childress and Davis note that, unlike de novo review, the clearly erroneous standard requires at least some deference to be given to the fact-finder. *Id.* at 15-16. They also note, however, that the clearly erroneous standard generally is not applicable to review of agency action, but rather is used in review of fact-finding in bench trials. *Id.*

The third standard is the "substantial evidence" standard. *Id.* at 15-19. Unlike the preceding standards, substantial evidence does not require that the court agree with the determination being reviewed. *Id.* at 15-22. Instead, the substantial evidence standard suggests that the court must find that it is highly probable that the decision is correct. *Id.* Childress and Davis refer to the standard as requiring a "reasonableness review" by a court. Under this standard, the reviewing court grants considerable deference to the agency, with some risk that the agency will err. *Id.* at 15-26 to 15-27. Childress and Davis note that courts have a tendency to merge the substantial evidence standard with the arbitrary and capricious standard in situations where the reviewing court has difficulty ascertaining the risk that the agency will err. *Id.*

In a seminal case on administrative law, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), Justice Marshall established the "clear error of judgment" standard. In *Overton Park*, the Court held that a reviewing court must consider relevant factors and determine whether there has been error of judgment in finding that the agency decision is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* at 414. Although the label "clear error of judgment" sounds like the clearly erroneous standard, Childress and Davis argue

review, such as where discretion is vested solely in the Executive Branch either by Congress or under the Constitution.<sup>22</sup>

In international trade and customs cases, the Federal Circuit employs most of the above-referenced standards of review, including *de novo* review, review based on whether the agency decision is in accordance with law, the clearly erroneous standard, the substantial evidence standard, and the arbitrary and capricious/abuse-of-discretion standard. These standards are discussed in greater detail below.<sup>23</sup>

## II. FEDERAL CIRCUIT REVIEW OF AD AND CVD CASES

### A. *The Standard of Review Currently Enunciated by the Federal Circuit in Title VII Cases*

In reviewing AD and CVD cases, the Federal Circuit (in theory) applies anew, to the agency determination, the same statutory standard of review as applied by the CIT.<sup>24</sup> This "apply anew" standard is relevant to both issues of fact and issues of law.<sup>25</sup> In most cases, the underlying statutory standard entails an analysis of

that the clear error of judgment standard is more akin to the arbitrary and capricious standard. CHILDRESS & DAVIS, *supra*, at 15-35 to 15-39.

"Arbitrary and capricious" is next, and Childress and Davis describe it as requiring a very high degree of deference—one that would allow a "possibly" correct decision to go unchecked. *Id.* at 15-39.

The "abuse of discretion" standard is broken down into two subparts by Childress and Davis. The first is similar to arbitrary and capricious in the level of deference required (judgment or guidance discretion). *Id.* at 15-51. The second grouping is "true and unguided discretion." *Id.* at 15-49. The court will review the agency's *process of decision* for arbitrariness; the decision itself is not reviewed. *Id.* at 15-51.

22. See *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 792 (Fed. Cir. 1984) (denying review of customs classification where executive orders of President were basis for classification). The court, however, may review presidential action on a very limited basis to determine: whether the President's action falls within his delegated authority; whether the statutory language has been properly construed; and whether the President's action conforms with the relevant procedural requirements. *Id.* at 795; see also *Springfield Indus. Corp. v. United States*, 842 F.2d 1284, 1285-86 (Fed. Cir. 1988) (holding that review of agency interpretation on issue delegated to Executive by Congress is entitled to heightened deference because agency action is in foreign policy arena); *Duracell, Inc. v. United States Int'l Trade Comm'n*, 778 F.2d 1578, 1581-82 (Fed. Cir. 1985) (finding alternatively, when President acted for policy reasons, no requirement that President articulate reasons for disapproval of ITC's proposed § 337 remedy, but dismissing for lack of jurisdiction).

23. See *infra* notes 103-24 and 128-33 and accompanying text (defining standards of review applicable in Federal Circuit review of Title VII cases).

24. See *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984); see also 19 U.S.C. § 1516a(b) (1994) (setting forth statutory standards of review to be applied by CIT); *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1208 (Fed. Cir. 1995) (citing *NEC Elecs., Ltd. v. United States*, 54 F.3d 736, 742 (Fed. Cir. 1995) to establish 19 U.S.C. § 1516a(b)(1)(B) as basis for determining standard of review applied by CIT to AD determination).

25. *Atlantic Sugar*, 744 F.2d at 1559 n.10; see *infra* notes 62-64 and accompanying text for detailed discussion of the case.

whether the agency determination, finding, or conclusion is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.”<sup>26</sup> For certain specifically enumerated types of determinations,<sup>27</sup> however, the standard of review relied upon is whether the agency decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>28</sup>

While the Federal Circuit may theoretically apply these various standards “anew” to the relevant agency determinations, the reality and the theory diverge.<sup>29</sup> As discussed in detail below, nothing *requires* the Federal Circuit to apply to the agency decisions the statutory standards set forth in § 1516a.<sup>30</sup> Therefore, it could be more troubling if the theoretical standard were strictly adhered to, because to do so would be to ignore the expertise and reasoned opinions of the CIT. Accordingly, as this Article suggests, the better result would be for the Federal Circuit to adopt, *de jure* and *de facto*, a new standard of review for Title VII cases.

1. *The types of determinations specifically reviewable by the Federal Circuit in AD and CVD cases*

The CIT (and thus derivatively the Federal Circuit) has exclusive jurisdiction over actions contesting final determinations and other reviewable DOC and ITC actions in connection with AD and

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26. 19 U.S.C. § 1516a(b)(1)(B)(i). Codified at 19 U.S.C. § 1516a is § 516A of the Tariff Act of 1930; thus, the short-hand reference is “section 516A.” Nevertheless, many parties (and the courts) refer to the provision as “section 1516a.” This Article also will use this latter reference.

27. *See id.* §§ 1516a(b)(1)(A), 1516a(b)(1)(B)(ii) (providing for review of negative ITC preliminary determinations, DOC determinations not to initiate AD or CVD investigation, ITC determinations not to review determination based on changed circumstances, and abbreviated agency final determinations in five-year reviews). The last provision was added to the statute as part of the Uruguay Round Agreements Act (“URAA”). Pub. L. No. 103-465, 108 Stat. 4809 (1994). One of the most significant changes to the U.S. AD and CVD laws resulting from the URAA was the provision for five-year “sunset” reviews of outstanding AD and CVD orders. When parties either fail to respond or respond inadequately to a notice of initiation of a five-year review, the ITC or the DOC, as appropriate, may issue a final determination in an abbreviated time-frame. Agreement on Implementation of Article VI in *Uruguay Round Implementing Legislation H.R. 5110, Statement of Administrative Action 209-10* (1994).

28. 19 U.S.C. §§ 1516a(b)(1)(A), 1516a(b)(1)(B)(ii). The more lenient statutory standard is necessary for these types of determinations because they are particularly fact-specific and policy-oriented. Such decisions involve the exercise of broad agency discretion in weeding out cases that have insufficient merit to justify the expenditure of valuable agency resources.

29. *See infra* notes 138-45 and accompanying text (discussing standards of review that Federal Circuit applies in practice).

30. *See infra* notes 67-102 and accompanying text (discussing focus of Congress, in text and legislative history of § 1516a, on trial-court standard of review and corresponding lack of focus on issue of appellate-court-level standard of review).

CVD determinations specified in § 1516a.<sup>31</sup> AD and CVD cases are initiated by the DOC, usually upon the filing of a petition by a U.S. interested party.<sup>32</sup> The party must represent a domestic industry, allegedly injured by reason of the sale in the United States of unfairly priced or subsidized imports.<sup>33</sup> The DOC will make a determination whether to initiate an AD or CVD investigation based on the information contained in the petition and other readily available sources.<sup>34</sup>

Both the DOC and the ITC play a role in an initiated AD or CVD investigation. The ITC determines, on a preliminary<sup>35</sup> and a final basis, whether a U.S. industry is materially injured, or is threatened with material injury, by reason of unfairly priced or subsidized imports.<sup>36</sup>

The DOC's role in a CVD or an AD investigation, respectively, is to determine whether the imported merchandise receives a

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31. See 28 U.S.C. § 1581(c) (1994) ("The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.").

32. See 19 U.S.C. § 1671a(b) (specifying requirements for initiation of CVD investigation based on petition by interested party); *id.* § 1673a(b) (establishing similar petition-based initiation requirements for AD investigations). Both the CVD and AD statutes provide mechanisms whereby the DOC can initiate investigations on its own, without a petition first being filed. See *id.* § 1671a(a) (providing for self-initiation of CVD investigations); *id.* § 1673a(a) (setting forth procedures for self-initiation of AD investigations). The DOC, however, rarely has used its authority to self-initiate AD or CVD investigations.

33. See 19 U.S.C. § 1671a(b)(1) (stating that interested party must file CVD petition "on behalf of an industry"); *id.* § 1673a(b)(1) (articulating same "on behalf of an industry" requirement for AD petitions). As a result of U.S. concessions in the Uruguay Round, U.S. law now requires the DOC to make a determination that the petition is supported by specific minimum percentages of other members of the U.S. industry in order to meet the "on behalf of an industry" requirement. See *id.* § 1671a(c)(4) (specifying DOC determination of industry support for CVD investigations initiated by petition); *id.* § 1673a(c)(4) (codifying parallel requirement for AD investigations initiated by petition).

34. See *id.* § 1671a(c) (setting forth criteria for DOC determination whether to initiate CVD investigation based on petition); *id.* § 1673a(c) (establishing similar requirements concerning initiation of AD investigation based on petition).

35. See *id.* § 1671b(a)(1) (providing for preliminary ITC CVD injury determination); *id.* § 1673b(a)(1) (providing for preliminary ITC AD injury determination). In a preliminary investigation, as opposed to a final investigation, the ITC inquires whether there is a "reasonable indication" of the requisite type of injury. Compare *id.* §§ 1671b(a)(1), 1673b(a)(1) with *id.* §§ 1671d(b)(1), 1673d(b)(1) (providing identical language for final CVD and AD determinations, respectively, except for omission of "reasonable indication" proviso).

36. See *id.* § 1671d(b)(1) (providing for final ITC CVD injury determination); *id.* § 1673d(b)(1) (stipulating parallel AD provision). The ITC also may make an affirmative preliminary or final determination based on a finding that the establishment of an industry in the United States is materially retarded by such imports (or a reasonable indication of material retardation in the case of a preliminary investigation). *Id.* § 1671b(a)(1)(B) (CVD preliminary determination); *id.* § 1671d(b)(1)(B) (CVD final determination); *id.* § 1673b(a)(1)(B) (AD preliminary determination); *id.* § 1673d(b)(1)(B) (AD final determination). Practitioners generally refer to this three-pronged analysis (material injury, threat thereof, or material retardation) as an "injury" investigation.

countervailable subsidy—and if so, how much,<sup>37</sup> or whether the imported merchandise is being sold at less than fair value (i.e., is being “dumped”) in the United States—and if so, by how much.<sup>38</sup> The DOC makes both a preliminary and a final determination on these issues.<sup>39</sup>

If the ITC determines there is no material injury to the domestic industry on either a preliminary or final basis, the investigation terminates.<sup>40</sup> If the DOC’s final determination as to dumping or subsidies is negative, or the DOC finds a *de minimis* countervailable subsidy or a *de minimis* dumping margin, the investigation is also terminated.<sup>41</sup> If both the DOC and the ITC ultimately issue affirmative final determinations, the DOC will publish an AD or CVD order setting forth the rate of the relevant duty or duties applicable as a result of the final determinations.<sup>42</sup>

With respect to determinations in AD and CVD investigations, section 1516a provides that any of the following agency actions may be appealed to the CIT: (1) a determination by the DOC not to initiate an investigation;<sup>43</sup> (2) a preliminary or final negative injury determination by the ITC (either of which terminates the investigation);<sup>44</sup> (3) a final negative CVD or AD determination by the DOC

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37. See *id.* § 1671(a) (directing DOC to determine whether “the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States” and further directing that if DOC determines in affirmative and ITC makes affirmative injury determination, that special duties shall be imposed on such imported merchandise “equal to the amount of the net countervailable subsidy”).

38. See *id.* § 1673 (stating that if DOC “determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value” and ITC makes affirmative injury determination, then special duty shall be imposed on such merchandise “equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise”).

39. See *id.* §§ 1671b(b)(1), 1671d(a) (referring to preliminary and final, respectively, CVD determinations by DOC); *id.* §§ 1673b(b)(1)(A), 1673d(a) (describing comparable provision for preliminary and final, respectively, AD determinations).

40. See *id.* § 1671b(a)(1) (CVD preliminary determination); *id.* § 1671d(c)(2) (CVD final determination); *id.* § 1673b(a)(1) (AD preliminary determination); *id.* § 1673d(c)(2) (AD final determination).

41. See *id.* § 1671d(c)(2) (CVD); *id.* § 1673d(c)(2) (AD); see also *id.* § 1671d(a)(3) (directing DOC to disregard *de minimis* subsidy margin for purposes of final determination); *id.* § 1673d(a)(4) (directing DOC to disregard *de minimis* dumping margin for purposes of final determination).

42. See *id.* § 1671d(c)(2) (stating that in CVD case, if DOC and ITC issue affirmative final determinations, DOC shall issue CVD order in accordance with publication and assessment provisions of 19 U.S.C. § 1671e); *id.* § 1673d(c)(2) (providing, in event of affirmative final AD determinations by DOC and ITC, for similar procedure for issuing AD order in accordance with publication and assessment procedures under 19 U.S.C. § 1673e).

43. *Id.* § 1516a(a)(1)(A).

44. See *id.* § 1516a(a)(1)(C) (preliminary determination); *id.* § 1516a(a)(2)(B)(ii) (final determination).

(which terminates the investigation), or a portion of a final affirmative DOC CVD or AD determination that specifically excludes a company or product;<sup>45</sup> and (4) a final affirmative determination by the ITC and/or DOC following publication of the order.<sup>46</sup>

Following the publication of an AD or CVD order, upon request, the DOC may conduct periodic reviews to measure and update the dumping margin or rate of subsidization, or to determine whether new circumstances necessitate revocation of the order.<sup>47</sup> The ITC may also review the order for changed circumstances with regard to injury.<sup>48</sup> Further, a mandatory five-year review of all orders, by the DOC and ITC, as well as a review by the ITC of certain CVD orders, has recently been implemented in order to comply with the United States' international obligations.<sup>49</sup> Under these various provisions, any of the following final agency decisions may be appealed to the CIT: (1) final results of a DOC annual review of an AD or CVD order;<sup>50</sup> (2) a final determination by the DOC or ITC in a five-year review;<sup>51</sup> (3) a final determination in a changed-circumstance review or decision by the ITC not to initiate a review;<sup>52</sup> (4) an injury determination issued in compliance with international obligations;<sup>53</sup> and (5) a decision by the DOC or ITC to take action to implement a panel report of the World Trade Organization ("WTO").<sup>54</sup>

Companies also may seek to clarify the scope of an order to determine whether imports of similar products that are not identified specifically in the original order are in fact subject to the order and the imposition of duties.<sup>55</sup> The DOC may also review circumstances under which imported goods may be circumventing an order by entering the United States through third countries or by entering as

45. *Id.* § 1516a(a)(2)(B)(ii).

46. *Id.* § 1516a(a)(2)(B)(i).

47. *See id.* § 1675(a)(1) (providing for annual administrative reviews); *id.* § 1675(b)(1)(A) (providing for changed-circumstance reviews).

48. *See id.* § 1675(b)(1)(A) (providing for ITC changed-circumstance reviews); *id.* § 1675(b)(2) (specifying injury-related criteria for ITC changed-circumstance reviews).

49. *See id.* § 1675(c)(1)(A) (providing for 5-year DOC and ITC sunset reviews); *id.* § 1675b (providing for ITC injury reviews of CVD orders that were issued without ITC injury test because subject country had not acceded to GATT Subsidies Code at time order was issued, but country since has acceded to Code).

50. *Id.* § 1516a(a)(2)(B)(iii).

51. *Id.*

52. *See id.* (providing for judicial review of final determination in changed-circumstance review); *id.* § 1516a(a)(1)(B) (allowing CIT review of ITC determination not to conduct changed-circumstance review).

53. *See id.* § 1516a(a)(2)(B)(viii) (referring to judicial review of final ITC determination in connection with injury review in GATT Subsidies Code accession situation parenthetically described in *supra* note 49).

54. *Id.* § 1516a(a)(2)(B)(vii).

55. *See id.* § 1516a(a)(2)(B)(vi) (providing for review of scope determinations).

parts to be completed or assembled in the United States.<sup>56</sup> Determinations regarding the scope of AD or CVD orders or whether imported merchandise is circumventing an order may be appealed.<sup>57</sup>

Under certain circumstances, foreign producers and exporters and foreign governments may enter into agreements with the DOC, agreeing to cease subsidization or to counteract the effect of selling subsidized or unfairly priced goods in the United States.<sup>58</sup> If such an agreement is reached, a CVD or AD investigation will be suspended, but not terminated.<sup>59</sup> Determinations to suspend investigations may be appealed.<sup>60</sup> These suspension agreements also are subject to periodic reviews by the DOC and ITC and appealable to the CIT as such.<sup>61</sup>

## 2. *The origins of the enunciated standard of review for Title VII cases*

### a. *The Atlantic Sugar standard*

In 1984, in *Atlantic Sugar Ltd. v. United States*,<sup>62</sup> the Federal Circuit inexplicably and without discussion announced:

The statute 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

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56. *Id.* § 1677j (directing DOC to modify scope of pre-existing AD or CVD order as appropriate if DOC determines that circumvention is occurring within meaning of statute).

57. *Id.* § 1516a(a)(2)(B)(vi).

58. *See id.* § 1671c(b) (providing for CVD suspension agreement whereby government of subject country or exporters of subject merchandise agree to eliminate or offset all countervailable subsidies, or to cease exports to United States); *id.* § 1671c(c)(1) (providing, in “extraordinary circumstances,” for CVD suspension agreement whereby government or exporters of subject country provide solution that will “eliminate completely” injurious effect of subject imports); *id.* § 1673c(b) (establishing suspension agreement option in AD investigation calling for exporters of subject merchandise completely to eliminate gap between normal value and export price, or to cease exports to United States); *id.* § 1673c(c)(1) (providing option in “extraordinary circumstances” for AD suspension agreement that will “eliminate completely” injurious effect of subject imports).

59. *Compare id.* § 1671c(a) (providing for circumstances under which DOC or ITC may terminate CVD investigation upon withdrawal of petition) *with id.* § 1671c(b)-(c) (providing for CVD suspension agreements); *compare id.* § 1673c(a) (specifying parallel AD termination-of-investigation procedures) *with id.* § 1673c(b)-(c) (permitting AD suspension agreements).

60. *Id.* § 1516a(a)(2)(B)(iv).

61. *See id.* § 1675(b)(1)(B) (providing for DOC and/or ITC reviews of suspension agreements); *id.* § 1516a(a)(2)(B)(iii) (allowing judicial review of administrative reviews of suspension agreements). The CIT also has jurisdiction to review requests for the disclosure under protective order of business proprietary information submitted on the record. *Id.* § 1677f(c)(2). Similarly, the CIT has jurisdiction to hear appeals arising from the enforcement of administrative sanctions for violation of a protective order issued under the North American Free Trade Agreement (“NAFTA”) or the United States-Canada Free Trade Agreement (“FTA”). 28 U.S.C. § 1584 (1994).

62. 744 F.2d 1556 (Fed. Cir. 1984).

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.<sup>63</sup>

The court in *Atlantic Sugar* further declared that "[w]e review the [CIT's] review of an ITC determination by applying anew the statute's express judicial review standard."<sup>64</sup> This standard was repeatedly cited, without question, for ten years.<sup>65</sup> For example, in *Olympic Adhesives, Inc. v. United States*, the Federal Circuit stated:

In the appeal before us, we are presented with a situation involving two-tiered appellate review of agency action which is to be reviewed on the administrative record under the [substantial-evidence/accordance-with-law] standard. In reviewing the trial court's affirmance of ITA's dumping duty assessment, we must decide whether the trial court correctly concluded that ITA's determination is in accordance with the law and supported by substantial evidence. As aptly stated in *Atlantic Sugar, Ltd. v. United States . . .* with regard to appeals under this statute, "[w]e review that court's review of an [agency] determination by applying anew the statute's express judicial review standard."<sup>66</sup>

It is difficult to discern how the Federal Circuit arrived at the *Atlantic Sugar* "review anew" standard.<sup>67</sup> Section 1516a dictates the standards of review that "[t]he court" shall apply.<sup>68</sup> Yet, except for a few special provisions not relevant to the issue of the standard of

63. *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 (Fed. Cir. 1984) (footnote omitted) (quoting 28 U.S.C. § 1516a(b)(1)(B)). Circuit Judges Miller and Smith and Senior Circuit Judge Cowen heard the case, and Circuit Judge Smith authored the opinion.

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

65. A review of the Federal Circuit's decisions from 1984 through 1994 shows that at least fifteen cases have cited *Atlantic Sugar* for the applicable standard of review. Two of the more notable cases are cited at *infra* note 66.

66. *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1571 (Fed. Cir. 1990) (footnote omitted) (panel: Nies and Michel, Circuit Judges and Baldwin, Senior Circuit Judge) (authored by the late Circuit Judge Nies) (the court's reference to "ITA" is to the International Trade Administration of the DOC, which is the subdivision responsible for AD and CVD cases); *see also* *Trent Tube Div. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 813 (Fed. Cir. 1992) (holding that Federal Circuit first reviews CIT's order to remand to agency under statutory standard, then reviews CIT's affirmance of remand determination under same standard) (panel: Michel and Plager, Circuit Judges and Bennett, Senior Circuit Judge) (authored by Circuit Judge Plager).

67. As discussed below in part III.B.2, just a few months prior to the *Atlantic Sugar* decision, Circuit Judge Smith was on a panel that addressed the standard of review in appeals from district court decisions reviewing the decisions of special masters. The earlier case, *Milliken Research Corp. v. Dan River, Inc.*, 739 F.2d 587 (Fed. Cir. 1984), in which Judge Smith dissented, may have had some influence on the *Atlantic Sugar* decision, which Judge Smith authored. *See infra* notes 462-64 and accompanying text.

68. 19 U.S.C. § 1516a(b) (1994) (stating that "[t]he court shall hold unlawful any determination, finding, or conclusion" in certain types of actions that fail specified standard of review).



review, the only court referenced in § 1516a is the CIT.<sup>69</sup> Thus, there is no question that the CIT is required to employ the statutory standards. However, as the Federal Circuit in *Suramerica de Aleaciones Laminadas, C.A. v. United States* (“*Suramerica II*”)<sup>70</sup> explained, the § 1516a statutory requirement does not extend to the Federal Circuit—nowhere in Title 19 or Title 28 of the U.S. Code is there mention of what standard of review the Federal Circuit should apply in reviewing AD and CVD cases.<sup>71</sup>

This lack of statutory directive lies in stark contrast to other areas of the Federal Circuit’s jurisdiction, where the applicable statute specifies the standard of review to be used by the Federal Circuit. For example, in both veterans appeals and appeals from decisions of the Merit Systems Protection Board (“MSPB”), the relevant statutes mandate the standard of review to be applied by the Federal Circuit.<sup>72</sup> In addition, statutory provisions govern the standards of review to be applied by the lower bodies as well.<sup>73</sup>

With respect to Title VII cases emanating from the CIT, however, Congress did not specify the standard of review to be applied by the Federal Circuit; Congress has only specified the standard to be utilized by the CIT. Under accepted canons of statutory construction,

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69. See generally *id.* § 1516a (mentioning no other U.S. courts other than CIT, except for references to effect of Federal Circuit decisions on liquidation of entries in §§ 1516a(c)(1), 1516a(e) and to constitutional challenges of NAFTA binational panel mechanism in § 1516a(g)(4)).

70. 44 F.3d 978 (Fed. Cir. 1994).

71. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 982-83 n.1 (Fed. Cir. 1994) [hereinafter *Suramerica II*]. The court in *Suramerica II* noted:

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 “this court” of section 1516a(b)(1)-(B) is the Court of International Trade. Section 1516a is silent on what standard this court should apply when reviewing a Court of International Trade decision.

*Id.*

72. 38 U.S.C. § 7292(d) (1994) (providing for veterans appeals); 5 U.S.C. § 7703(c) (1994) (providing for MSPB appeals). The provision governing veterans appeals states:

The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit finds to be—

(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law.

38 U.S.C. § 7292(d)(1).

73. See 38 U.S.C. § 7261 (identifying standard of review to be applied by Court of Veterans Appeals); 5 U.S.C. § 7701(c) (stating standards of review to be followed by MSPB).

such a dichotomy is meaningful.<sup>74</sup> Because Congress clearly has indicated the standard of review to be applied by the Federal Circuit with regard to certain types of cases, in instances where Congress has not done so, the court should be free to craft a standard that it deems appropriate.<sup>75</sup>

Also significant is the fact that, in both veterans and MSPB cases, the statutorily prescribed standards are not altogether redundant. For instance, in veterans cases, the Federal Circuit can review and set aside the Court of Veterans Appeals' determinations only as to questions of law.<sup>76</sup> As to questions of fact, the Federal Circuit has no jurisdiction to review the lower court, and hence there is no second tier of judicial review.<sup>77</sup> Moreover, as to questions of law, both the lower and the appellate court are bound by separate statutory standards of review.<sup>78</sup> Thus, even if a redundancy exists in veterans cases, it has been explicitly mandated by Congress, which is not the situation in Title VII cases.

*b. The relevance of section 516A*

A historical analysis of the legislation providing for judicial review of Title VII cases also fails to shed light on the origins of the *Atlantic*

74. See *United States v. Azeem*, 946 F.2d 13, 17 (2d Cir. 1991) ("[C]ongressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated."); see also *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[When] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

75. See 2A NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 47.23, at 216-27 (5th ed. 1992) (explaining that doctrine of "*expressio unius est exclusio alterius*" means that when legislature expresses requirements through a list court may assume what is not listed is excluded).

76. 38 U.S.C. § 7292(d)(1).

77. See *Albun v. Brown*, 9 F.3d 1528, 1529-30 (Fed. Cir. 1993) (explaining that Congress denied Federal Circuit broad scope of review in appeals from Court of Veterans Appeals and limited court's review to certain statutory, regulatory, and constitutional issues); *Fugere v. Derwinski*, 972 F.2d 331, 334 (Fed. Cir. 1992) (finding that in decisions of Court of Veterans Appeals, Federal Circuit jurisdiction does not extend to challenges either to factual determinations or to law as applied to facts of particular case).

78. See 38 U.S.C. § 7292 (standards of review for Federal Circuit); *id.* § 7261 (standard of review for Court of Veterans Appeals). Upon initial examination, it would appear that Congress has built a certain redundancy into the standards of review that the Federal Circuit and Court of Veterans Appeals are to apply regarding legal questions. Because a detailed analysis of veterans cases is beyond the scope of this Article, however, the authors are not in a position to comment on this issue. Nevertheless, it is noteworthy that the Court of Veterans Appeals is an Article I court, as distinguished from the CIT, which is an Article III court. See *infra* note 427 for a discussion of the distinctions between Article I and Article III courts and the relevance of such distinctions to the review of decisions emanating from both types of courts. Furthermore, as to questions of law, at least some redundancy seems to be likely in any multi-tiered review system.

*Sugar* standard of review. Such an analysis does, however, reveal a total dearth of support for the proposition that there was any congressional expectation that the statutory standards of review set forth at 19 U.S.C. § 1516a would be applied by the Federal Circuit or its predecessor, the United States Court of Customs and Patent Appeals ("CCPA").<sup>79</sup>

A Senate Finance Committee report that accompanied the Trade Agreements Act of 1979 explained the reason for adoption of the substantial evidence standard for review of Title VII cases:

Section 516A clearly defines the scope and standard of review in suits challenging antidumping and countervailing duty determinations and orders. Currently, the state of the law in this area is unclear and conflicting.

Subsection (b) of new section 516A sets forth the standard of review for those antidumping and countervailing determinations which will now be reviewable. Under present law, determinations by the International Trade Commission have been set aside only where found to be arbitrary or contrary to law. More controversial, however, is the standard to be applied to determinations by the Secretary of the Treasury. The Treasury Department has consistently asserted that antidumping and countervailing duty determinations, unlike traditional value and classification decisions, are not subject to *de novo* review. A reading of the two recent countervailing duty decisions in the Customs Court relating to investigations of float glass from Italy and X-belted radial tires (Michelin) from Canada indicates that some differences of opinion exist with respect to the issue.

Section 516A would remove all doubt on whether *de novo* review is appropriate by excluding *de novo* review from consideration as a standard in antidumping and countervailing duty determinations. *De novo* review is both time consuming and duplicative. The amendments made by Title I of the Trade Agreements Act provide all parties with greater rights of participation at the administrative level and increased access to information upon which the decisions of the administering authority and the International Trade Commission are based. These changes, along with the new

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79. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 36-38 (codified as amended in scattered sections of 28 U.S.C.) (creating Federal Circuit from two predecessor courts, CCPA and appellate division of the U.S. Court of Claims). The appellate-level U.S. Court of Claims should not be confused with the lower-level court reviewed by the Federal Circuit, namely the United States Court of Federal Claims, which was formerly known as the United States Claims Court, and was renamed in 1992. Court of Federal Claims Technical and Procedural Improvements Act, Pub. L. No. 102-572, § 902(b), 106 Stat. 4516 (1992). This Article, when referring to this lower court, uses the names "Court of Federal Claims" and "Claims Court" interchangeably.

requirement for a record of the proceeding, have eliminated any need for de novo review.<sup>80</sup>

Thus, one of the chief reasons that Congress added a standard of review to the statute was because the Customs Court had been conducting de novo reviews of Treasury decisions. Indeed, in enacting the standard, Congress stated that de novo review is "both time consuming and duplicative." Hence, to the extent that the Federal Circuit's "review anew" standard is analogous to the CIT's de novo review of agency determinations, the Federal Circuit arguably is acting contrary to the legislative purpose of section 516A.

The Federal Circuit's "review anew" standard is analogous to the de novo standard in that the Federal Circuit duplicates the reviewing function performed by the lower court. However, it is incorrect to use the term de novo review interchangeably with the "review anew" standard. In true de novo review, the appellate court would be free to substitute its judgment for that of any prior decision-maker.<sup>81</sup> Where the Federal Circuit uses the "review anew" standard in Title VII cases, as to questions of fact, it does not review de novo the decision of the agency. Rather, it applies the substantial evidence (or abuse of discretion) standard of review to the decision of the agency, as does the lower court.<sup>82</sup> Similarly, as to certain questions of law, the appellate court is not free to substitute its views for that of the agency.<sup>83</sup> Thus, while the Federal Circuit does not substitute freely its judgment for that of prior decision-makers, it nonetheless applies the same substantial evidence and in accordance with law tests to the same agency decision or decisions reviewed by the CIT. In this manner, the Federal Circuit performs a duplicative function.

Furthermore, the legislative history of section 516A focused on a dispute between the trial court (the Customs Court) and the agency (the ITC or Treasury).<sup>84</sup> Congress intended to remedy the dispute through the substantial evidence test. Nowhere in the statute or legislative history is there any discussion of the appellate review standard. Had Congress intended that section 1516a also apply to the

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80. S. REP. NO. 249, 96th Cong., 1st Sess. 251-52 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 637. Prior to 1980, the Department of the Treasury was responsible for those administrative functions in AD and CVD cases that now reside with the DOC.

81. CHILDRESS & DAVIS, *supra* note 21, § 15.02, at 15-3 (defining de novo review and explaining that appellate court is not bound by agency decision).

82. *See* CHILDRESS & DAVIS, *supra* note 21, §§ 15.04, -.08, at 15-20, 15-48 (outlining how substantial evidence and abuse of discretion standards examine judgment of agency).

83. *See* CHILDRESS & DAVIS, *supra* note 21, § 15.02, at 15-15, 15-16.

84. *See* S. REP. NO. 249, *supra* note 80, at 244-54, *reprinted in* 1979 U.S.C.C.A.N. at 630-39 (providing background and explanation for revisions made to § 1516a).

CCPA, it is both logical and legally sound to assume that somewhere Congress would have so indicated.

Indeed, the inference drawn from Congress' silence is strengthened by a review of CCPA decisions prior to enactment of section 1516a. Not only had the CCPA on several occasions addressed the general question of standards of review of agency action in AD and CVD cases, the CCPA also had confronted the specific question of the appropriate standard of *appellate* review to be applied by the CCPA.<sup>85</sup> Moreover, the CCPA was aware of the controversy regarding the proper scope of review for Treasury decisions that had arisen because of differences in the manner in which the Tariff Commission<sup>86</sup> and Treasury conducted AD and CVD investigations. This controversy obviously affected review by the CCPA, because questions arose as to whether *de novo* review by the Customs Court had been proper.<sup>87</sup>

In fact, during the mid- to late-1970s, leading up to the time that section 1516a was enacted, the CCPA seemed to be applying several standards of review in AD and CVD cases.<sup>88</sup> Yet, with one exception, none of these standards is found in section 1516a.<sup>89</sup> This being the case, if Congress intended for the CCPA to apply section 1516a, it would have expressly stated that the CCPA should stop using these various standards and instead should rely on section 1516a.

As to Treasury decisions, if the Customs Court had conducted a trial *de novo*, the CCPA reviewed questions of fact, based on the record before the Customs Court, using the clearly erroneous standard of review.<sup>90</sup> If the Customs Court had not conducted a trial *de novo*, it appears (in older cases at least) that the CCPA ordinarily refused to review Treasury's factual decisions.<sup>91</sup> As to questions of

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85. See, e.g., *Imbert Imports, Inc. v. United States*, 475 F.2d 1189, 1191-92 (C.C.P.A. 1973) (discussing scope of court's review); *City Lumber Co. v. United States*, 457 F.2d 991, 994-96 (C.C.P.A. 1972) (addressing court's limited power to review Tariff Commission's determinations); *Kleberg & Co. v. United States*, 71 F.2d 332, 335 (C.C.P.A. 1933) (delineating limits on court's review of Secretary of Treasury's conclusions).

86. The Tariff Commission was the predecessor to the ITC; the agency was renamed in the Trade Act of 1974, Pub. L. No. 93-618, § 171(a), 88 Stat. 2009 (1975) (codified as amended at 19 U.S.C. § 2231(a) (1994)).

87. See *ASG Indus., Inc. v. United States*, 610 F.2d 770, 778-80 (C.C.P.A. 1979) (questioning whether lower court should use *de novo* review).

88. See, e.g., *United States v. Watson*, 603 F.2d 192, 197 (C.C.P.A. 1979) (struggling with issue of appropriate standard of review); *Imbert Imports*, 475 F.2d at 1191 (recognizing that review is limited but not stating what standard should be used); *City Lumber*, 457 F.2d at 994 (stating generally that courts have limited scope of review over Tariff Commission's determinations); see also *infra* notes 90-95 and accompanying text.

89. See 19 U.S.C. § 1516a(b)(1)(B)(i) (codifying substantial evidence standard for AD and CVD cases).

90. The CCPA also reviewed the independent question of whether it was appropriate for the Customs Court to hold a *de novo* trial. *ASG Indus.*, 610 F.2d at 778-80.

91. See *United States v. Elof Hansson, Inc.*, 296 F.2d 779 (C.C.P.A. 1960).

law, the CCPA reviewed Treasury decisions de novo.<sup>92</sup> For Tariff Commission/ITC cases, the CCPA on numerous occasions stated that its review was very limited. As summarized in *City Lumber Co. v. United States*:

[U]nder the Antidumping Act Congress delegated to the Commission a broad discretionary power to determine whether an industry is being, or is likely to be, injured by the sale of imports at less than fair value. The courts have a very limited power of review over the Commission's determinations. It is not the judicial function to review or to weigh the evidence before the Commission or to question the correctness of findings drawn therefrom. *Kleberg & Co. (Inc.) v. United States*. . . . As stated in *Kleberg*, our review of determinations of injury or likelihood of injury in antidumping cases does not extend beyond determining whether the Commission has acted within its delegated authority, has correctly interpreted statutory language, and has correctly applied the law. As indicated in [*United States v. George S. Bush & Co.*], "No question of law is raised when the exercise of . . . discretion is challenged."<sup>93</sup>

Nevertheless, despite this statement, in *City Lumber*, as well as in other cases, the CCPA (as apparently the Customs Court had) went on to apply the substantial evidence test to the Commission's determination.<sup>94</sup> Presumably, Congress was aware of what standards the CCPA was applying. Thus, had Congress meant to overrule the CCPA as to use of these various standards, it seems that somewhere Congress would have specifically said so. That Congress was silent is significant.

Moreover, as seen from an examination of *Imbert Imports*, the CCPA seemed to use the terms arbitrary/discretionary interchangeably with the substantial evidence standard.<sup>95</sup> Because Congress was establishing these two standards as two *separate* standards, it presumably would have given some admonition or instruction to the CCPA, if Congress expected that the CCPA would be applying these two standards. Under such circumstances, the absence of any specific congressional reference to the CCPA logically can be viewed as supporting the proposition that Congress did not expect § 1516a to resolve any issues with respect to CCPA review of AD and CVD cases.

92. See *id.* at 781-82 (ruling on law at issue in case but refusing to reevaluate facts). Although the CCPA did not articulate expressly its use of a de novo standard of review, it effectively reviewed for itself the legal question of exhaustion of administrative remedies. *Id.*

93. 457 F.2d 991, 994 (C.C.P.A. 1972).

94. *City Lumber Co. v. United States*, 457 F.2d 991, 994, 996 (C.C.P.A. 1972) (indicating court's application of substantial evidence standard); see also *Imbert Imports, Inc. v. United States*, 475 F.2d 1189, 1192 (C.C.P.A. 1973) (applying same standard).

95. *Imbert Imports*, 475 F.2d at 1192; see also *Armstrong Bros. Tool Co. v. United States*, 626 F.2d 168, 169-70 (C.C.P.A. 1980) (discussing interchangeability of both standards).

Further, the Customs Court Act of 1980 did not substantively amend section 1516a.<sup>96</sup> Rather, the effect of the Act was that the CIT was substituted for the Customs Court.<sup>97</sup> The legislative history of the Customs Court Act of 1980 thus provides no additional guidance regarding the standard of review that Congress expected for the CCPA to apply, other than to present cumulative evidence of the absence of a link between section 1516a and the CCPA/Federal Circuit.<sup>98</sup>

Similarly, the legislative history surrounding the creation of the Federal Circuit lacks any mention of the standard of review for Title VII cases.<sup>99</sup> Again, this is not surprising because, with regard to such cases, the Federal Circuit merely assumed the same role played by the CCPA.<sup>100</sup>

Finally, the pre-*Atlantic Sugar* cases (dating from the 1979-1984 period), are more instructive with respect to the controversy that preceded enactment of section 1516a than they are as a backdrop for *Atlantic Sugar*. Nevertheless, perhaps discernible in those decisions are the beginnings of what led to the *Atlantic Sugar* rule. Any similarity to the *Atlantic Sugar* rule, however, is incidental, because these cases do not address specifically the question of what standard of review should be applied by the appellate court in reviewing the lower court's review of an agency decision.<sup>101</sup> As such, the true origins of the *Atlantic Sugar* standard of review remain a mystery. Moreover, as discussed below, it is debatable whether the Federal Circuit actually does or should adhere to that standard.<sup>102</sup>

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96. See Customs Court Act of 1980, Pub. L. No. 96-417, §§ 601(7), 608(c)-(d), 94 Stat. 1727 (codified as amended at 28 U.S.C. § 251 (1994)) (redesignating Customs Court as CIT, deleting criteria used in ruling on injunctions, and adding prior notice requirement).

97. *Id.* §§ 601(7), 608(c).

98. See H.R. REP. NO. 1235, 96th Cong., 2d Sess. 18-21 (1980), reprinted in 1980 U.S.C.C.A.N. 3729, 3729-33 (stating that purpose of legislation was to clarify laws governing Customs Court but not mentioning scope of review).

99. See S. REP. NO. 275, 97th Cong., 2d Sess. 1-6 (1982), reprinted in 1982 U.S.C.C.A.N. 11, 11-16 (outlining purpose of bill with respect to appellate review but not mentioning standard of review).

100. See *id.* at 3, reprinted in 1982 U.S.C.C.A.N. at 13 (stating that Federal Circuit merges Court of Claims and CCPA in order to address structural problems); *supra* note 79 (explaining how Federal Circuit assumed role of CCPA).

101. See *Armstrong Bros. Tool Co. v. United States*, 626 F.2d 168 (C.C.P.A. 1980); *ASG Indus., Inc. v. United States*, 610 F.2d 770 (C.C.P.A. 1979).

102. See *infra* notes 138-78 and 213-23 and accompanying text.

B. *The Standard of Review Actually Applied by the Federal Circuit in Title VII Cases*

1. *Defining the standards of review*

Three standards of review are applicable in Federal Circuit review of Title VII cases: the arbitrary and capricious/abuse of discretion standard; the substantial evidence test; and the not-in-accordance-with-law standard of review.<sup>103</sup> As discussed above, these standards are best understood with reference to each other and to other standards of review that are either more or less deferential to the body reviewed.<sup>104</sup> Accordingly, while the clearly erroneous standard is not used in Title VII cases, an understanding of this standard is helpful to put the other three standards in perspective. Similarly, while de novo review is not one of the standards set forth in 19 U.S.C. § 1516a(b), this standard, too, can assist in setting a context for the other standards.<sup>105</sup> Hence, starting with what is widely viewed as the most deferential standard,<sup>106</sup> the discussion in the following subsections addresses all of the standards of review utilized by the Federal Circuit in Title VII and other international trade and customs cases.

a. *Arbitrary and capricious/abuse of discretion*

The Federal Circuit applies the "arbitrary and capricious/abuse of discretion" standard in appeals of CIT decisions involving certain ITC and DOC determinations in AD and CVD cases.<sup>107</sup> The Federal

103. See 19 U.S.C. § 1516a(b) (1994) (stipulating standards of review of agency decisions). These standards are applied by the CIT initially and, at least in theory, by the Federal Circuit "anew."

104. See *supra* notes 18-23 and accompanying text (discussing standards of review generally and in international trade context in particular).

105. The Federal Circuit applies the clearly erroneous and de novo standards to customs cases, see *infra* notes 125-27, 134-37 and accompanying text, which, along with Title VII cases, comprise a significant portion of the total cases heard by the CIT. See 28 U.S.C. § 1581 (1994) (stating jurisdiction of CIT); Leonard M. Shambon, *Accomplishing the Legislative Goals for the U.S. Court of International Trade: More Speed! More Speed!*, 14 *FORDHAM INT'L L.J.* 31 (1990-1991). Also, de novo review is employed with respect to legal questions in § 337 determinations. See *infra* notes 134-37 and accompanying text.

106. See *CHILDRESS & DAVIS, supra* note 21, at 15-2-3, 15-39-53. But see Michel, *supra* note 5, at 4 (characterizing substantial evidence test as most difficult standard for appellant to meet).

107. Under § 1516a(b)(1)(A), DOC decisions not to initiate an AD or a CVD case, ITC decisions not to conduct a changed-circumstance review, and ITC negative preliminary injury determinations are subject to this standard. See *Texas Crushed Stone Co. v. United States*, 35 F.3d 1535, 1539 (Fed. Cir. 1995) (applying arbitrary and capricious/abuse of discretion standard to ITC negative preliminary injury determination). Further, abbreviated determinations in the ITC's new five-year sunset reviews will be subject to this standard. 19 U.S.C. § 1516a(b)(1)(B)(ii). Cases brought pursuant to the residual jurisdiction of the CIT under 28 U.S.C. § 1581(i) (1994) also are subject to this standard of review in both the CIT and the



Circuit also applies this standard to cases challenging regulations implemented by an agency.<sup>108</sup> Under this standard of review of facts, the Federal Circuit's scrutiny is more limited than its review under the substantial evidence standard. The Federal Circuit has described this review standard as follows:

[W]e must affirm the decision of the CIT . . . unless we conclude that the ITC's negative preliminary determination was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In applying this standard, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . . Although inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."<sup>109</sup>

The Supreme Court addressed the arbitrary and capricious/abuse of discretion standard in *Motor Vehicle Manufacturers Ass'n v. State Farm Insurance Co.*,<sup>110</sup> describing four factors to apply: (1) Did the agency rely on factors that Congress did not intend it to consider?; (2) Did

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Federal Circuit. See *Conoco, Inc. v. United States Foreign Trade Zones Bd.*, 855 F. Supp. 1306, 1311 (Ct. Int'l Trade 1994) (applying standard of review pursuant to Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994), to Foreign-Trade-Zone Board case).

108. See *National Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 59 F.3d 1219, 1224 (Fed. Cir. 1995) (applying arbitrary and capricious standard to Treasury Department's findings in promulgation of interim regulations that allowed consignees to enter merchandise of value up to \$200 without using licensed customs broker); *Springfield Indus. Corp. v. United States*, 842 F.2d 1284, 1286 (Fed. Cir. 1988) (stating that as long as regulation is not "manifestly contrary" to law, court must accept it). Regulations also are reviewed to determine whether they are a permissible exercise of the agency's authority, are reasonable, and are subject to normal aids of statutory construction. *Smith-Corona Group v. United States*, 713 F.2d 1568, 1575 (Fed. Cir. 1983).

109. *Texas Crushed Stone Co.*, 35 F.3d at 1539-40 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)) (citation omitted). One common problem with the standard is that some courts view the arbitrary and capricious standard as being synonymous with the substantial evidence test. In particular, the D.C. Circuit Court of Appeals seems to hold this belief. See, e.g., *Money Station, Inc. v. Board Gov. of the Fed. Reserve Sys.*, 81 F.3d 1128 (D.C. Cir. 1996) (noting that substantial evidence test is specific application of arbitrary and capricious standard); *Jersey Shore Broadcasting Corp. v. FCC*, 37 F.3d 1531, 1536 (D.C. Cir. 1994) (noting that under arbitrary and capricious standard, court may reverse agency decision only if it is not supported by substantial evidence); see also *CHILDRESS & DAVIS*, *supra* note 21, § 15.07, at 15-42 n.24. One of the Federal Circuit's predecessors, the CCPA, also appears to have considered these standards as being similar. See *Armstrong Bros. Tool Co. v. United States*, 626 F.2d 168, 169-70 (C.C.P.A. 1980). Given the explicit language of 19 U.S.C. § 1516a(b)(1), however, which draws a distinction between "arbitrary, capricious, an abuse of discretion," on the one hand (paragraphs (A) and (B)(ii)), and "unsupported by substantial evidence" on the other hand (paragraph (B)(i)), there can be no question that, at least as to Title VII cases, the two standards are meant to be different. Furthermore, the Supreme Court has observed that the arbitrary and capricious standard is more lenient than substantial evidence review. *American Paper Inst., Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 412 n.7 (1983) (holding that appellate court should have scrutinized agency decision under arbitrary-capricious standard, which it characterized as "more lenient").

110. 463 U.S. 29, 43 (1983).

the agency entirely fail to consider an important aspect of the problem?; (3) Does the agency's explanation of its decision run counter to the evidence that was before it?; and (4) Is the agency's decision so implausible that it cannot be ascribed to a difference in view or the product of agency expertise (that is, was there a rational connection between the facts found and the choice made)?<sup>111</sup>

While the label "arbitrary and capricious/abuse of discretion" suggests three disjunctive elements to one single test, the abuse-of-discretion phrase is sometimes viewed as a separate standard, particularly in Title VII cases.<sup>112</sup> The Federal Circuit has applied the abuse-of-discretion standard alone, in reviewing decisions of the CIT,<sup>113</sup> as well as agency action subject to review by the CIT.<sup>114</sup> Further, the Federal Circuit applies the abuse-of-discretion standard in reviewing ITC determinations regarding temporary relief in section 337 investigations.<sup>115</sup>

111. *Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 43 (1983). Professors Childress and Davis argue that, when the arbitrary and capricious standard is used, the court reviews the agency's justification of its decision to determine whether the decision is rational, not contrary to the available evidence, and takes into account what should be considered. If, given what the agency should consider, the explanation demonstrates a reasonable connection between the evidence and the choice made, the action is sustained.

CHILDRESS & DAVIS, *supra* note 21, § 15.07, at 15-43 to 15-44.

112. See CHILDRESS & DAVIS, *supra* note 21, § 15.01, at 15-11 (previewing contents of chapter and separating discussions of arbitrary and capricious standard from abuse of discretion standard). According to Professors Childress and Davis, abuse of discretion review looks for three things: (1) consideration of all the relevant factors (derived from *Citizens to Preserve Overton Park*, 401 U.S. at 402); (2) rationality, defined as a decision that is not so "implausible that it could not be ascribed to a difference in view" (developed from *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 29); and (3) that the decision rationally connects the evidence, the legal interpretations of the agency, and the choice that was made. CHILDRESS & DAVIS, *supra* note 21, § 15.08, at 15-53.

113. See *Belton Indus., Inc. v. United States*, 6 F.3d 756, 760 (Fed. Cir. 1993) (reviewing decision of CIT denying party's motion to intervene).

114. *NEC Home Elecs., Ltd. v. United States*, 54 F.3d 736, 745 (Fed. Cir. 1995) (finding that DOC's allocation of burden on respondents was abuse of discretion).

115. *Rosemount, Inc. v. International Trade Comm'n*, 910 F.2d 819, 821 (Fed. Cir. 1990). ITC determinations regarding temporary relief are required by statute to parallel the standards relied on by federal district courts in issuing preliminary injunctions. 19 U.S.C. § 1337(e)(3) (1994); see *Certain Circuit Board Testers*, USITC Pub. 2622, Inv. No. 337-TA-342 (Mar. 1993) (temporary relief decision) (citing *Certain Pressure Transmitters*, USITC Pub. 2392, Inv. No. 337-TA-304 (Mar. 1990) (temporary relief decision), *aff'd sub nom.* *Rosemount, Inc. v. International Trade Comm'n*, 910 F.2d 819 (Fed. Cir. 1990)). As such, Federal Circuit review of temporary relief determinations under the abuse of discretion standard is also consistent with its review of district court decisions to grant or deny preliminary relief. See *Chrysler Motors Corp. v. Auto Body Panels of Ohio, Inc.*, 908 F.2d 951, 953 (Fed. Cir. 1990) ("We review the trial judge's [decision denying a preliminary injunction] to ascertain if there was an abuse of discretion, an error of law, or a serious misjudgment of the evidence.").

*b. Unsupported by substantial evidence on the record*

The Federal Circuit determines whether a decision is unsupported by substantial evidence on the record in cases involving final determinations by the ITC and the DOC in investigations and administrative reviews in AD and CVD cases.<sup>116</sup> The Federal Circuit has defined substantial evidence to be “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>117</sup> Further, “[s]ubstantial evidence is more than a mere scintilla.”<sup>118</sup> Substantial evidence is evaluated by reviewing the record as a whole, including “whatever fairly detracts from the substantiality of the evidence.”<sup>119</sup>

In their treatise on standards of federal court review, Steven Childress and Martha Davis distinguish the substantial evidence standard from the two standards that require the court to “agree” with the agency determination, i.e., *de novo* and clearly erroneous, because those two standards “go straight to the question of whether the decision under review is correct.”<sup>120</sup> The substantial evidence standard performs a different function. Under this standard, the emphasis should be on the agency’s reasoning process, rather than the quantity of evidence:

[U]nder substantial evidence review, the reviewing court evaluates the judgment of the agency for its soundness and for its proper or reasonable exercise. The conclusion the court would have reached in the court’s sound exercise of its judgment is not relevant under substantial evidence review.<sup>121</sup>

Under the substantial evidence test, and unlike *de novo* review, the reviewing court need not agree with the agency’s or lower court’s

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116. Also reviewed under this standard are scope determinations, suspension agreements and determinations of administrative reviews thereof, and ITC injury determinations required to be made on certain outstanding CVD orders pursuant to the recently enacted Uruguay Round Agreements Act. 19 U.S.C. § 1516a. The Federal Circuit also applies the substantial evidence test to final determinations of the ITC in § 337 cases.

117. *Timken Co. v. United States*, 894 F.2d 385, 388 (Fed. Cir. 1990).

118. *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). This definition is from Chief Justice Hughes’ opinion in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). *Accord* *Creswell Trading Co. v. United States*, 15 F.3d 1054, 1056 (Fed. Cir. 1994) (noting that substantial evidence standard is more than “a mere scintilla”); *cf.* *United States v. General Elec. Co.*, 727 F.2d 1567, 1572 (Fed. Cir. 1984) (stating that substantial evidence means such relevant evidence as reasonable mind might accept as adequate to support a conclusion).

119. *Timken*, 894 F.2d at 388 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)).

120. CHILDRESS & DAVIS, *supra* note 21, § 15.04, at 15-20.

121. CHILDRESS & DAVIS, *supra* note 21, § 15.04, at 15-20.

decision; "it merely requires the court to find that the decision is not an unreasonable or an unreasoning one."<sup>122</sup>

This analysis is consistent with how the Federal Circuit applies this standard in Title VII cases.<sup>123</sup> The effect of the substantial evidence standard, therefore, is that the appellate court applying the standard may accord more deference to the expertise of an administrative agency than it does to the fact-finding of a district court, which is reviewed under the less deferential clearly erroneous standard.<sup>124</sup>

*c. Clearly erroneous*

As defined by the Supreme Court, a finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."<sup>125</sup> The Federal Circuit relies on this definition<sup>126</sup> in applying the clearly erroneous standard to the findings of fact of the CIT in customs cases.<sup>127</sup>

*d. Not in accordance with law*

In AD and CVD cases, the Federal Circuit examines questions of law to determine whether the agency's action was in accordance with law.<sup>128</sup> The Federal Circuit has articulated that, in reviewing matters of law, it affords no deference to the CIT's decision.<sup>129</sup> Although

122. CHILDRESS & DAVIS, *supra* note 21, § 15.04, at 15-22.

123. See PPG Indus., Inc. v. United States, 978 F.2d 1232, 1236 (Fed. Cir. 1992) (applying substantial evidence standard to float glass case and affirming that parties did not receive countervailing benefits and that suspension agreement should not be terminated).

124. Notably, under the Administrative Procedure Act ("APA"), the substantial evidence test is applied to agency action made pursuant to a "formal, trial-type" proceeding. 5 U.S.C. § 706(2)(E) (1994). This standard also has been required when agency rulemaking is "on the record after opportunity for agency hearing." *Id.* As discussed below, Title VII proceedings are not trial-type proceedings, nor are they rulemaking proceedings, thereby distinguishing them from others in which the appellate court reviewing the decision of an agency may apply the substantial evidence test. See *infra* notes 254-86 and accompanying text (comparing Title VII with ITC § 337 proceedings).

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

126. See Superior Wire v. United States, 867 F.2d 1409, 1411-12 (Fed. Cir. 1989) (defining clearly erroneous standard (quoting *Gypsum*, 333 U.S. at 395)). According to Childress and Davis, the *Gypsum* quote is the "classic statement" of the clearly erroneous standard. CHILDRESS, *supra* note 21, § 15.02, at 15-16. They note that the standard is most often used in reviewing fact-finding by judges in bench trials. *Id.* at 15-17. They further state that "the standard directs the reviewing court to assure itself that the trial court has not made a mistake—that it has found the correct answer." *Id.*

127. See Medline Indus., Inc. v. United States, 62 F.3d 1407, 1408 (Fed. Cir. 1995) (applying clearly erroneous standard of review).

128. 19 U.S.C. § 1516a(b) (1994).

129. Kemira Fibres Oy v. United States, 61 F.3d 866, 871 (Fed. Cir. 1995). In this case, Circuit Judges Newman, Lourie, and Schall composed the panel; Circuit Judge Lourie authored the opinion.

the Federal Circuit may state that the issue before it is a question of whether the CIT erred,<sup>130</sup> the Federal Circuit will examine the law itself, often without significant reference to the CIT's analysis.<sup>131</sup>

The in-accordance-with-law standard is, however, tempered by the principle of deference to the agency's interpretation of the statute it administers under the doctrine enunciated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>132</sup> Thus, when the legal question is one of statutory construction, the Federal Circuit holds that the reviewing court may not substitute its own judgment for that of the agency if the agency's interpretation is reasonable.<sup>133</sup>

*e. De Novo*

The Federal Circuit applies de novo review to questions of law in customs and section 337 cases. The Federal Circuit has described this standard as calling for a "full and independent" review by the court,<sup>134</sup> meaning that, on questions of law, it accords no deference to the CIT.<sup>135</sup> Indeed, Professors Childress and Davis describe de novo review as follows:

Under the standard called de novo review, the court is charged to affirm only if it agrees with the decision under review—that is, if it finds that the decision is the correct one. Where the court does not agree that the decision is the correct one, it is authorized to substitute its own judgment either on the basis of the agency record

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130. *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1206 (Fed. Cir. 1995) ("The central issue in this case is whether the [CIT] erred . . ."). In this case, Circuit Judges Archer and Schall, and Senior Circuit Judge Skelton composed the panel; Circuit Judge Schall authored the opinion.

131. *Id.* But see *Camargo Correa Metais, S.A. v. United States*, 52 F.3d 1040, 1042-43 (Fed. Cir. 1995) (emphasizing that CIT's exclusive jurisdiction and acquired expertise imbue its decisions with respect and that such decisions are "valuable guides"); *infra* notes 138-43 (discussing *Camargo* and the Federal Circuit's references to the CIT).

132. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The Federal Circuit has stated that both the ITC and the DOC are entitled to *Chevron* deference. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 n.5 (Fed. Cir. 1992) [hereinafter *Suramerica I*].

133. *Suramerica I*, 966 F.2d at 665 n.5; *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1579 (Fed. Cir. 1995); see also *Koyo Seiko Co.*, 36 F.3d at 1570 ("[A]n agency's construction need not be the *only* reasonable interpretation or even the *most* reasonable interpretation.") (emphasis added). The Federal Circuit also applies a deferential standard to the implementation of regulations by the agency. See *National Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 59 F.3d 1219, 1220-24 (Fed. Cir. 1995) (noting that Secretary is permitted to prescribe regulations based on reasonable construction of statute); *Smith-Corona Group v. United States*, 713 F.2d 1568, 1576-79 (Fed. Cir. 1983) (indicating that agency is permitted to make "adjustments" and giving deference with respect to interpretation of statute).

134. *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995).

135. *Id.*; *Rico Import Co. v. United States*, 12 F.3d 1088, 1090 (Fed. Cir. 1993).

or upon its own or a new remand record. The court is not bound by the agency decision at all.<sup>136</sup>

On the other hand, pursuant to *Chevron*, the Federal Circuit appears to accord some deference to the agency's interpretation of the statute it administers and its regulations.<sup>137</sup>

## 2. *The role of the CIT in Federal Circuit review of Title VII cases*

In theory then, in Title VII cases, the Federal Circuit should be applying the arbitrary and capricious or an abuse of discretion standard, the substantial evidence test, or the inaccordance-with-law standard, to the decision of the agency, without regard to the intervening decision by the CIT. That the Federal Circuit does not in practice necessarily disregard the findings and opinions of the CIT is apparent from the court's recent decision in *Camargo Correa Metais, S.A. v. United States*.<sup>138</sup> In *Camargo*, despite the theoretical standard of review which calls for the Federal Circuit to review anew the decision of the agency,<sup>139</sup> the Federal Circuit remanded the case to the CIT for the lower court to explain its decision.<sup>140</sup> The court explained:

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

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136. CHILDRESS & DAVIS, *supra* note 21, § 15.02, at 15-3.

137. *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 510 (Fed. Cir. 1995); *St. Paul Fire & Marine v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993). Professors Childress and Davis also explain that, under *Chevron*,

although the general rule in dealing with questions of law is that under the statutes and by common law, courts are to apply de novo review, that rule may have no place in statutory construction, and in any event, is considerably softened or even abandoned in consideration of other law questions. In the administrative law setting, de novo review now seems ruled by the application of principles of great deference.

CHILDRESS & DAVIS, *supra* note 21, § 15.02, at 15-16.

138. 52 F.3d 1040 (Fed. Cir. 1995). On the *Camargo* panel were the late Circuit Judge Nies, and Circuit Judges Clevenger and Rader. Circuit Judge Clevenger authored the opinion. At issue in *Camargo* were questions of law (interpretation of 19 U.S.C. §§ 1677a(d)(1)(c) and 1677b(e)(1)(A)) and fact ("factual complications" regarding the impact of the Brazilian value-added tax and general, selling, and administrative expenses). *Id.* at 1041-42.

139. See *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984) (stating that Federal Circuit should apply "anew [19 U.S.C. § 1516a(b)(1)(B)'s] express judicial review standard"); cf. *Suramerica II*, 44 F.3d 978, 982 n.1 (Fed. Cir. 1994) (critiquing court's reasoning in *Atlantic Sugar*).

140. *Camargo Correa Metais, S.A. v. United States*, 52 F.3d 1040, 1041 (Fed. Cir. 1995).

guides to the rights and obligations of the international trade community."<sup>141</sup>

The CIT is required to state findings of fact, conclusions of law or an opinion stating the reasons and facts upon which its decision is based.<sup>142</sup> Therefore, the court in *Camargo* held that "[we] cannot provide effective and meaningful appellate review of the ITA's actions in this case until we are supplied with the fruits of satisfaction of section 2645(a)."<sup>143</sup> Clearly, if only the agency's decision were relevant, a remand for the CIT to explain itself would be unnecessary.

The decision in *Camargo* thus highlights the Federal Circuit's recognition of the CIT's expertise in Title VII matters, as well as the appellate court's reluctance to ignore the lower court's decisions.<sup>144</sup> It therefore seems that the Federal Circuit does not strictly adhere to the *Atlantic Sugar* standard. Indeed, as the commentary below illustrates, numerous reasons exist to question the wisdom of the redundant standard of review articulated in *Atlantic Sugar*.<sup>145</sup>

### C. *The Wisdom of the Redundant Standard of Review*

The judicial process in the United States, regardless of the specific fora at issue, is usually a multi-tier process.<sup>146</sup> A typical federal case can thus involve a trial at the district court level, an appeal (usually as of right) to the circuit court of appeals, and possible discretionary review, through *certiorari*, by the Supreme Court.<sup>147</sup>

Where the action or decision of an administrative agency is at issue,<sup>148</sup> there exists an additional lower tier prior to the district

141. *Id.* at 1042-43 (citation omitted) (emphasis added).

142. 28 U.S.C. § 2645(a) (1994).

143. *Camargo*, 52 F.3d at 1043.

144. *See id.* (noting that expertise CIT maintains from its exclusive authority over Title VII issues is "worthy of respect"); *see also* *Saarstahl AG v. United States*, 78 F.3d 1539 (Fed. Cir. 1996). In *Saarstahl*, although the Federal Circuit reversed the CIT because "[u]ltimately the court did not accord sufficient deference to Commerce's approach," the appellate court's opinion addresses the CIT's analysis at length. *Id.* at 1544. Even the dissenting opinion in *Saarstahl* closely examines the CIT's reasoning. *Id.* at 1548.

145. *See infra* part II.C (discussing strengths and weaknesses of *Atlantic Sugar* standard).

146. *See* Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L.J. 1051, 1105 n.130 (1995) (arguing that multi-tier judicial review has been long-standing); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 182 (1984) (describing multi-tier judicial review).

147. *See* ERWIN CHERMERINSKY, FEDERAL JURISDICTION §§ 1.4.2-1.4.4 (2d ed. 1994) (describing function of United States Supreme Court, courts of appeal, and district courts).

148. This Article does not address the distinction between agency decision-making whereby "determinations" are issued following some type of adjudicative process and other types of agency action. Similarly, not *per se* addressed herein are the distinctions between decisions rendered by an independent agency versus an executive branch department (or subdivision thereof). Nevertheless, critical to the issue of the appropriate level of subsequent judicial

court or court of appeals level, in that the agency will have already rendered a quasi-judicial determination.<sup>149</sup> Because the federal government can be sued only to the extent that it consents to be sued, appeals of agency action are governed by statute.<sup>150</sup> Congress has responded on a case-by-case basis in mandating whether the next step lies directly with the circuit court of appeals, or instead first with the district court and then with the appeals court.<sup>151</sup> As discussed below, some courts and commentators advocate eliminating review by the district court.<sup>152</sup> Other courts and commentators have offered different solutions.<sup>153</sup>

Apart from the actual number of steps in the process, however, it is important to consider the standard of review that is applied at each step. That is, if both the district court and the appellate court apply the exact same standard of review to the same agency action, a redundancy is created. If, on the other hand, the district court applies one standard and the appellate court another standard, each court may be fulfilling a critical and unique function, and the elimination of either step might cause harm to the administration of justice.

With respect to Federal Circuit review of AD and CVD cases, Congress' choice of two tiers of judicial review is a wise one. A redundancy has crept into the process, however, through "reapplication" of the same standard of review to the agency decision, at both judicial levels.<sup>154</sup> This Article argues that this redundancy can and should be eliminated, in rhetoric and in practice, through formal adoption by the Federal Circuit of a new standard of review, to be applied to the decision of the CIT, rather than to that of the agency.<sup>155</sup>

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scrutiny is the nature of the agency action that is appealed and the procedures and structures underlying that final act.

149. See 5 U.S.C. § 704 (1994); *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1974).

150. See 28 U.S.C. § 1610(a)(6) (1994) (codifying exceptions to sovereign immunity from attachment or execution).

151. See *infra* part II.C.3.b.ii.b (MSPB structure); part III.B (Boards of Contract Appeals and Court of Federal Claims structure).

152. See *infra* notes 179-203 and accompanying text (discussing, e.g., *Polcover* opinion).

153. See *infra* notes 167-73, 363-73 and accompanying text (discussing use of different standard of appellate review and discretionary appellate review, respectively).

154. See *infra* notes 179-212 and accompanying text (discussing standard of review in two-tiered review systems).

155. See *infra* notes 213-23 and accompanying text (discussing alternative standard of review for Title VII cases).



1. *The Federal Circuit's view as expressed by the Suramerica II panel*

In December 1994, a three-judge panel of the Federal Circuit, in *Suramerica de Aleaciones Laminadas, C.A. v. United States (Suramerica II)*,<sup>156</sup> addressed and questioned the *Atlantic Sugar* standard of review. Sitting on the *Suramerica II* panel were Circuit Judges Michel, Plager, and Rader.<sup>157</sup> Circuit Judge Rader wrote the opinion.<sup>158</sup> The issue to be decided was the propriety of an ITC "threat of material injury" determination.<sup>159</sup>

Judicial review of the ITC's decision, the court acknowledged, was governed by a mandatory two-tier system.<sup>160</sup> The agency decision was first examined by the CIT to discern whether it was "unsupported by substantial evidence on the record, or otherwise not in accordance with law."<sup>161</sup> The court then explained that, on appeal from the CIT, the established role of the Federal Circuit was to reapply the same substantial evidence standard to the agency decision.<sup>162</sup>

The *Suramerica II* court recognized that this process of appellate review originated in *Atlantic Sugar*,<sup>163</sup> but noted that the standard was presented without reference to previous case law and without statutory support.<sup>164</sup> Further, the panel recognized that the standard had been applied uniformly by the Federal Circuit on multiple occasions.<sup>165</sup> Nevertheless, in a footnote accompanying this section of the opinion, the panel explained that it had serious reservations about the underpinnings of the *Atlantic Sugar* analysis: "*Atlantic Sugar* appears to rely on a belief that the statute prescribes this court's standard of review. Read as a whole, however, § 1516a does not support this proposition."<sup>166</sup> The panel also suggested that a different approach might be warranted if the panel were not bound

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156. 44 F.3d 978 (Fed. Cir. 1994).

157. *Suramerica II*, 44 F.3d 978, 980 (Fed. Cir. 1994).

158. *Id.*

159. *Id.* at 982.

160. *See id.* (explaining that CIT first examines ITC's determination and then Federal Circuit reviews CIT's review).

161. *Id.* (quoting 19 U.S.C. § 1516a(b)(1)(B) (1988)).

162. *Id.* (citing *Trent Tube Div. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 813 (Fed. Cir. 1992)). "This court reviews a decision of the Court of International Trade by applying for itself the statutory judicial review standard . . . to the underlying ITC determination." *Id.*

163. *Id.* at 982 n.1.

164. *Id.*

165. *Id.* at 983; *see also Trent Tube Div. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 813 (Fed. Cir. 1992); *Olympic Adhesives Inc. v. United States*, 899 F.2d 1565, 1571 (Fed. Cir. 1990).

166. *Suramerica II*, 44 F.3d at 982 n.1.

by prior precedent.<sup>167</sup> The better approach suggested by the *Suramerica II* panel was one used by the Supreme Court in reviewing labor relations decisions from the regional courts of appeal.<sup>168</sup>

Were this a case of first impression, this court might follow the example of the Supreme Court when it was called on to review a review of an administrative 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 [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.

Congress has placed the review of ITC determinations in the keeping of the Court of International Trade. That court has the statutory mission to review ITC determinations for substantial evidence. If in a future appeal this court were offered the opportunity to reconsider the *Atlantic Sugar* rule *in banc*, this court might better consider only whether the Court of International Trade misapprehended or grossly misapplied the statutory standard.<sup>169</sup>

Thus, the *Suramerica II* panel raised doubts about the appropriateness of mandatory two-tier judicial review that pays little or no heed to the findings of the lower court.<sup>170</sup> However, unlike other courts and commentators who have suggested elimination of the intermediate review phase,<sup>171</sup> the *Suramerica II* panel did not suggest the removal of the CIT from the judicial review process. Rather, in what this Article submits is a sound approach, the *Suramerica II* panel suggested that a more limited role for the court of appeals might be in order.

Moreover, despite the panel's statement that it applied "anew" to the decision of the agency the same standard of review as applied by the CIT, the panel made it clear that it would not simply disregard the CIT's findings out of hand: "Although reviewing anew the ITC determination, this court will not ignore the *informed opinion of the*

167. *Id.* at 982 n.1.

168. *See infra* notes 187-94 and 201-12 and accompanying text (discussing standard criticisms and inapplicability of such criticisms to Title VII cases).

169. *Suramerica II*, 44 F.3d at 982 n.1 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951)). It appears that the court in *Suramerica II* did not itself wish to reconsider the *Atlantic Sugar* standard because a rehearing was denied, and a suggestion for rehearing *in banc* was declined, on February 10, 1995. *Id.* at 978.

170. *See id.* at 983-84.

171. *See infra* notes 181-200 and accompanying text.

*Court of International Trade.* That court reviewed the record in considerable detail. *Its opinion deserves due respect.*<sup>172</sup> This statement highlights how the Federal Circuit's enunciated standard of review is not necessarily applied in practice; in actuality, the Federal Circuit accords more deference to the CIT than would appear to be the case if the enunciated standard were accepted at face value.<sup>173</sup>

Since the *Suramerica II* decision was handed down, the Federal Circuit has decided twenty-five cases dealing with CVD and AD law.<sup>174</sup> Of those twenty-five decisions, eight followed the *Atlantic Sugar* review standard,<sup>175</sup> while five referred to 19 U.S.C. § 1516a(b)(1)(B) or articulated the statutory standard without further comment.<sup>176</sup> In eight cases, the Federal Circuit addressed questions of law and reviewed CIT opinions under a de novo standard (with deference applied to the agency's interpretation of the statute), without citing *Atlantic Sugar* or 19 U.S.C. § 1516a(b)(1)(B).<sup>177</sup> The

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172. *Suramerica II*, 44 F.3d at 983-84 (emphasis added).

173. See *id.* (explaining court's intent to take limited role in reviewing CIT's decision).

174. Based on an on-line computer search conducted on or about the date this Article was submitted.

175. See *Grupo Indus. Camesa v. United States*, 85 F.3d 1577, 1578 (Fed. Cir. 1996) (citing *Atlantic Sugar*); *Torrington Co. v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996) ("[W]e 'apply anew' the [CIT's] statutorily-mandated standard of review to the administrative review." (citing *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1236 (Fed. Cir. 1992))); *Timken Co. v. United States*, No. 95-1304, 1996 U.S. App. LEXIS 1350, at \*3 (Fed. Cir. Jan. 22, 1996) (citing *Atlantic Sugar*); *Sugiyama Chain Co. v. United States*, No. 94-1512, 1995 U.S. App. LEXIS 17075, at \*5 (Fed. Cir. July 11, 1995) (stating that Federal Circuit will uphold CIT's affirmation of DOC determination, unless determination "is unsupported by substantial evidence . . . or is otherwise not in accordance with the law"); *Koyo Seiko Co., Ltd. v. United States*, 66 F.3d 1204, 1208 (Fed. Cir. 1995) (noting that in reviewing CIT judgment, "this court must apply anew the statute's express standard of review to the agency's determination" (quoting *NEC Home Elecs., Ltd. v. United States*, 54 F.3d 736, 742 (Fed. Cir. 1995))); *Sharp Corp. v. United States*, 63 F.3d 1092, 1095 (Fed. Cir. 1995) (noting that CIT applies statutory substantial evidence standard to agency determination, and that Federal Circuit applies same standard on appeal); *Kemira Fibres Oy v. United States*, 61 F.3d 866, 871 (Fed. Cir. 1995) (reviewing question of law "without according deference to the trial court").

176. See *Zenith Elecs. Corp. v. United States*, 77 F.3d 426, 429 (Fed. Cir. 1996) (reviewing second issue using substantial evidence in accordance with law standard); *NTN Bearing Corp. v. United States*, No. 95-1478, 1996 U.S. App. LEXIS 13258, at \*1-2 (Fed. Cir. June 4, 1996) ("Commerce's administrative review determinations must be sustained unless they are unsupported by substantial evidence or are not in accordance with law." (citing *Zenith*, 77 F.3d at 430)); *FAG Kugelfischer Georg Schafer KgA v. United States*, No. 96-1074, 1996 U.S. App. LEXIS 11544, at \*4-5 (Fed. Cir. May 20, 1996) (citing 19 U.S.C. § 1516a(b)(1)(B) without elaboration); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206 (Fed. Cir. 1995) (applying statutory standard without comment); *Floral Trade Council v. United States*, 74 F.3d 1200, 1201-02 (Fed. Cir. 1995) (referring to 19 U.S.C. § 1516a-(b)(1)(B)).

177. See, e.g., *Hosiden Corp. v. United States*, 85 F.3d 1561, 1567 (Fed. Cir. 1996) (involving ITC's like product determination and injury analysis); *Inland Steel Bar Co. v. United States*, Nos. 94-1460, 94-1491, 1996 U.S. App. LEXIS 8280, at \*1-2 (Fed. Cir. Apr. 9, 1996) (per curiam) (involving DOC's determination of countervailability of subsidy bestowed on entity that is later sold in arm's-length transaction); *Saarstahl AG v. United States*, 78 F.3d 1539, 1542 (Fed. Cir. 1996) (same issue as *Inland Steel*); *Zenith Elecs. Corp. v. United States*, 77 F.3d 426, 429 (Fed. Cir. 1996) (involving circumstance of sale adjustment for warranty expenses in DOC's

remaining five decisions reached a conclusion without stating the standard of review followed.<sup>178</sup> Hence, other Federal Circuit panels have yet to address the suggestion of the *Suramerica II* panel.

2. *The battle over two-tier mandatory review in which the same standard of review is reapplied*

In questioning the parameters of the two-tiered appellate process, the Federal Circuit is not alone. Indeed, there has been a long-running battle over the appropriateness of mandatory two-tier review of agency action where the same standard of review is applied at both levels.<sup>179</sup> A substantial portion of the case law addressing mandatory two-tier review arose out of federal employee discharge suits.<sup>180</sup> Through a series of opinions, beginning in the mid-1960s and running up to 1980, the D.C. Circuit made it known that it believed two-tier mandatory review of agency action was suspect.<sup>181</sup>

The most demonstrative attack was presented in *Polcover v. Secretary of Treasury*.<sup>182</sup> The suit was initiated in the district court by a former Internal Revenue agent who was seeking to be reinstated in his

antidumping calculation); *Torrington Co. v. United States*, 68 F.3d 1347, 1349 (Fed. Cir. 1995) (interpreting 19 U.S.C. § 1677e(b)(3)(B) (1988) regarding best information available rule); *Ceramica Regiomontana, S.A. v. United States*, 64 F.3d 1579, 1582 (Fed. Cir. 1995) (interpreting 19 U.S.C. § 1671(a) (1988) regarding circumstances under which countervailing duties are imposed, and stating that Federal Circuit reviews issues of statutory interpretation de novo because "[i]f the statutory language is clear, then that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress") (citations omitted); *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1575 (1995) (interpreting various statutory provisions concerning AD margin methodology). Note that several cases were decided based on *Federal-Mogul* without explicitly stating that they rested on questions of statutory interpretation. See *Torrington Co. v. United States*, 44 F.3d 1572, 1576 (1995) (interpreting several statutory AD provisions).

178. *Hosiden Corp.*, 85 F.3d at 1563 (reviewing lawfulness of CIT's grant of writ of mandamus); *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, No. 95-1129, 1995 U.S. App. LEXIS 28118, at \*2-3 (Fed. Cir. Oct. 10, 1995) (affirming CIT decision following remand in case originally appealed to Federal Circuit prior to *Suramerica II*); *Camargo Correa Metais, S.A. v. United States*, 52 F.3d 1040, 1041 (Fed. Cir. 1995) (remanding case to CIT due to CIT's failure to provide opinion stating reasons and facts on which its decision was based); *Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 779-80 (Fed. Cir. 1995) (affirming CIT's rejection of DOC scope determination, but reversing CIT's own interpretation of scope, holding that latter issue should be remanded to agency); *Yamaji Fishing Net Co. v. United States*, 48 F.3d 1234 (Fed. Cir. 1995) (affirming CIT judgment, which affirmed DOC determination).

179. See *infra* notes 182-96 and accompanying text (discussing D.C. Circuit's critique of system).

180. See generally *infra* notes 182-85 and accompanying text (review of employee discharge case).

181. *Johnson v. United States*, 628 F.2d 187, 190 n.4 (D.C. Cir. 1980); *Walker v. Washington*, 627 F.2d 541, 544 n.4 (D.C. Cir. 1980); *Polcover v. Secretary of Treasury*, 477 F.2d 1223, 1225-28 (D.C. Cir. 1973); *Adams v. Laird*, 420 F.2d 230, 234 n.2 (D.C. Cir. 1969); *Goldwasser v. Brown*, 417 F.2d 1169, 1171 n.1 (D.C. Cir. 1969); *Scott v. Macy*, 402 F.2d 644, 647 n.6 (D.C. Cir. 1968); *Connelly v. Nitze*, 401 F.2d 416, 417 n.1 (D.C. Cir. 1968).

182. 477 F.2d 1223 (D.C. Cir. 1973).

former position with back pay.<sup>183</sup> Before addressing the merits of the suit, Circuit Judge Tamm presented a dialogue on the panel's frustration with the system of judicial review, stating that "we desire to take note of the duplicative nature of judicial review achieved in employee adverse action litigation."<sup>184</sup>

In such cases, prior to appeal to the D.C. Circuit, the district court would dispose of the case based on an administrative record.<sup>185</sup> The appellate court described its function as follows:

No specific deference is paid to the decision of the district court (such would be most difficult in any event in the instance of no district court opinion); rather this court reviews the record and determines anew if there has been procedural error, if there is substantial evidence to support the action, or if the Commission action is in some manner otherwise arbitrary or capricious. In other words, we conduct the identical review we are so often called upon to use in statutorily provided judicial review of other agency orders. The only difference is that in this instance our review follows identical review in the district court. Duplication, delay, expense and despair for the employee-litigant are inherent in such a system. The interposition of the district court serves, it seems to us, no viable purpose . . . .<sup>186</sup>

Interestingly, Judge Tamm also presented as a possible solution the same option that the *Suramerica II* court suggested,<sup>187</sup> namely, adoption of the standard of review employed by the Supreme Court in NLRB appeals,<sup>188</sup> i.e., whether the lower court misapprehended or grossly misapplied the standard of review.

Perhaps one way to avoid the duplication would be to accord some deference to the district court's review of the record and its determinations. A parallel to such action could be drawn to the Supreme Court's occasional usage of a "hands off" policy regarding courts of appeals decisions in statutory agency review cases.<sup>189</sup>

Yet, like the *Suramerica II* panel, Judge Tamm believed the D.C. Circuit panel was precluded from adopting the Supreme Court's

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183. *Id.* at 1231.

184. *Id.* at 1225.

185. *See id.* (explaining that employee discharge cases are decided on basis of administrative record and that they "should be governed by the principles generally applicable to judicial review of administrative action").

186. *Id.* at 1226-27 (footnote and citation omitted).

187. *See id.* at 1227; *see also Suramerica II*, 44 F.3d 978, 982-83 n.1 (Fed. Cir. 1994).

188. *Polcover*, 477 F.2d at 1227.

189. *Id.* (citing *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951)).

standard because of case precedent.<sup>190</sup> Before reaching that conclusion, however, he explained that even if it were a case of first impression, use of the Supreme Court NLRB standard would be inappropriate for three other reasons.<sup>191</sup> First, the legislative intent underlying the NLRB statute was considered unique to that area of the law.

“Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of the Labor Board orders. No similar Congressional charge exists here.”<sup>192</sup>

Second, Judge Tamm noted that the Supreme Court itself had experienced difficulty in the execution of such a “rule.”<sup>193</sup> Third, there was a fear that such a rule in application either would amount to a rubber-stamp or would degenerate into the test then being utilized by the *Polcover* court.<sup>194</sup>

The *Polcover* court concluded by emphasizing the fact that the D.C. Circuit had raised the enigma of mandatory two-tier review previously, but had been ignored.<sup>195</sup> Accordingly, the court gave an earnest plea for the legislature to step in and study the problem.<sup>196</sup>

Since *Polcover*, several other appeals courts have addressed the pitfalls of two-tier mandatory review of agency action. In a recent social security benefits case, Judge Posner of the Seventh Circuit stated:

The wisdom of inserting the district court as a reviewing court in between an administrative agency and the court of appeals can be and has been questioned, but it is a fact of life that we are not

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190. *See id.* (explaining that such standard “would be contrary to unwaivering [sic] precedent established in this circuit”).

191. *Id.*

192. *Id.* (quoting *Pittsburgh S.S. Co.*, 340 U.S. at 502 (citations omitted)).

193. *Id.* (footnote omitted).

194. *Id.*

195. *Id.* at 1228.

196. *See id.* (declaring that “knowledgeable study of the problem is necessary”). The plea was finally heeded, and Congress stepped in by permitting direct appeals to be made to the Court of Claims or to a United States court of appeals. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 205, 92 Stat. 1111, 1138 (codified at 5 U.S.C. § 7703(b) (1994)) (allowing for more efficient appeals process); *see also* Johnson v. United States, 628 F.2d 187, 190 n.4 (D.C. Cir. 1980) (praising Congress for correcting “waste of judicial resources”). Employee discharge cases were later made part of the MSPB’s jurisdiction with direct appellate review by the Federal Circuit. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 144, 96 Stat. 25, 45 (codified as amended at 5 U.S.C. § 7703) (establishing Federal Circuit and granting appellate review, inter alia, of MSPB cases). As such, while district court review of agency employment action was eliminated, the MSPB was added as an intermediate reviewing body. Hence, two tiers of review still exist. Given the CIT’s experience in handling Title VII cases, it would not make sense to create a different reviewing body to perform the same functions as the CIT currently performs. The redundancy in the standard of review can be addressed more directly.

authorized to ignore by undertaking to issue our orders directly to the agency, even though that would make life simpler.<sup>197</sup>

In addition to jurists, several commentators have questioned the merits of a mandatory two-tier system of review in administrative cases. Among the most notable is the discussion presented by Professors Childress and Davis who inquire into whether anything is ever accomplished by a two-tier system of review of agency action.<sup>198</sup> If the agency has “developed” and “screened” the record on which it bases its decision, the authors reason, the primary function of a district court has already been performed.<sup>199</sup> Therefore, unless additional evidence is necessary, the district and appellate courts will be duplicating each other’s work.<sup>200</sup>

The authors also point out that this type of repetition occurs with respect to the Supreme Court’s review of circuit court decisions in labor relations cases.<sup>201</sup> The Supreme Court has stated that its role in such instances is limited to correcting “gross errors” in the application of the substantial evidence standard.<sup>202</sup> Nevertheless, in the authors’ view, what the Supreme Court often does is to apply anew the same substantial evidence test and substitute its judgment “in no particular pattern.”<sup>203</sup>

These various concerns, which have been expressed regarding two-tier appellate review generally, in many respects are not valid where the Federal Circuit’s review of Title VII cases is at issue. Foremost is the fact that in AD and CVD cases, the first step of the appellate process (which occurs at the CIT) fulfills a critical function. It is at this stage that the administrative record is thoroughly compiled by the relevant agency for submission to the CIT and fully reviewed and

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197. *Kolman v. Shalala*, 39 F.3d 173, 176 (7th Cir. 1994).

198. See CHILDRESS & DAVIS, *supra* note 21, § 14.07, at 14-23 to 14-24 (discussing redundancy of review system and noting few changes in second review).

199. See CHILDRESS & DAVIS, *supra* note 21, § 14.07, at 14-23.

200. See CHILDRESS & DAVIS, *supra* note 21, § 14.07, at 14-23.

201. See CHILDRESS & DAVIS, *supra* note 21, § 14.07, at 14-24.

202. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). The Court emphasized the importance of adhering to the “usual rule of non-interference” except in cases involving “principles the settlement of which is of importance to the public as distinguished from that of the parties” or where there is a “real and embarrassing [sic] conflict of opinion” between circuits. *Id.* (quoting *Federal Trade Comm’n v. American Tobacco Co.*, 274 U.S. 543, 544 (1927); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)); see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951) (asserting that Supreme Court’s intervention should be “rare”).

203. See CHILDRESS & DAVIS, *supra* note 21, § 14.07, at 14-24 (alleging that Supreme Court applies judgment randomly); see also *Bowman Transp., Inc. v. Arkansas Best Freight Sys.*, 419 U.S. 281, 286 (1974) (applying “narrow” scope of review); *Dickinson v. United States*, 346 U.S. 389, 392-96 (1953) (reversing 9th Circuit’s decision while using same standard of review).

filtered by the parties.<sup>204</sup> This screening step is necessary and valuable because of the nature of Title VII proceedings which, at best, can be described as informal "adjudication."<sup>205</sup>

Further, Judge Tamm's criticism in *Polcover* of the fact that a district court reviewing an agency determination may not even provide an opinion, is inapplicable to Title VII cases. Indeed, Title 28 requires the CIT to provide findings of fact, conclusions of law, or an opinion explaining its decision.<sup>206</sup> Because the Federal Circuit also will require the CIT to meet this statutory mandate, the appellate court clearly views the CIT, and its expertise and its opinions, as a valuable component of the process.<sup>207</sup> Hence, the Federal Circuit has already taken steps logically leading in the direction that Judge Tamm had suggested as an alternative—namely, according deference to the lower court's review of agency action.<sup>208</sup>

With respect to Judge Tamm's four reasons for not adopting the Supreme Court's standard from NLRB cases,<sup>209</sup> only the fourth reason—prior precedent in the circuit—should stand in the Federal Circuit's way in Title VII cases. The first concern—that Congress charged the lower court and not the higher court with primary responsibility for such cases—is met here. Indeed, the *Suramerica II* panel specifically recognized that Congress charged the CIT with primary responsibility for reviewing agency action in Title VII cases.<sup>210</sup> As to the second concern—difficulty in application of the Supreme Court rule—this Article submits that, given the dichotomy in the Federal Circuit's current approach, the Supreme Court rule certainly would be no more difficult to apply.<sup>211</sup> Finally, the third concern with whether application of the Supreme Court standard would result in a mere rubber-stamping or a degeneration into the apply anew standard, is one that is within the appellate court's power

204. See *infra* notes 267-69 and accompanying text.

205. See *infra* notes 252-86 and accompanying text (contrasting agency procedure between Title VII and § 337 cases as illustration of why specific proposals to eliminate CIT from appellate process are unsound). In fact, use of the phrase "adjudication" with respect to Title VII proceedings is somewhat misleading.

206. 28 U.S.C. § 2645(a) (1994).

207. See *Camargo Correa Metais, S.A. v. United States*, 52 F.3d 1040, 1042-43 (Fed. Cir. 1995) (declaring that CIT decisions reviewing DOC determinations are "of significant import").

208. See *Polcover v. Secretary of Treasury*, 477 F.3d 1223, 1237 (D.C. Cir. 1973) (drawing parallel between Judge Tamm's suggestion and Supreme Court's occasional usage of "hands off" policy regarding review of agency decisions by courts of appeal).

209. See *supra* notes 190-96 and accompanying text (analyzing Judge Tamm's four reasons).

210. See *Suramerica II*, 44 F.3d 978, 982 (Fed. Cir. 1994) (focusing on 19 U.S.C. § 1516a(b)(1)(B), which sets forth standard of review for CIT for certain Title VII issues).

211. Furthermore, the Federal Circuit's decisions in the "Vaccine Act" cases, see *infra* notes 439-49 and accompanying text, illustrate just how unwieldy the *Atlantic Sugar* standard can become.



to control. Moreover, because the Federal Circuit does not always use the apply anew standard, to bring theory into conformity with practice would be advisable.<sup>212</sup>

3. *Possible alternatives to the current two-tiered structure in Title VII cases*

There exist a variety of possible alternatives to the current review process in Title VII cases. Some of these alternatives have been implemented in other types of cases. The least drastic, namely, application by the Federal Circuit of a different standard of review, is the most viable for Title VII cases. Unlike most other alternatives, it would not entail legislative action of any sort. Furthermore, it pays due deference to the specialized expertise of the CIT, as well as to the particularities of the underlying administrative proceedings. Such an approach also would not shift functions to an appellate-level court that are more properly within the province of a trial-level court. Moreover, application by the Federal Circuit of a different standard of review in Title VII cases would eliminate the redundancy that currently exists in theory, if not always in practice.

a. *Application by the Federal Circuit of a different review standard*

As discussed above, the Federal Circuit has itself suggested an alternative standard of review.<sup>213</sup> Rather than removing the lower court from the process, the Federal Circuit could limit the standard of review that it uses to the “hands off”<sup>214</sup> approach used by the Supreme Court in NLRB decisions.<sup>215</sup> Under this approach, the CIT would continue to apply the statutory standards of review that it is required to apply. On subsequent appeal, however, the Federal Circuit would review the CIT’s decision to determine whether the lower court has misapprehended or grossly misapplied the statutory standard of review. Further, if the Federal Circuit should perceive egregious error of some sort, it would have the ability to step in and correct the error. Although the *Polcover* decision to some extent

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212. See *supra* notes 138-45 and 174-78 and accompanying text (addressing importance of CIT’s role and detailing Federal Circuit’s lack of consistent focus on standard of review in Title VII cases).

213. See *Suramerica II*, 44 F.3d at 982 n.1 (suggesting giving greater deference to lower court’s review).

214. See *Polcover*, 477 F.2d at 1227 (referring to Supreme Court’s NLRB approach as “hands off”).

215. See *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951) (recommending that Supreme Court abstain from frequent intervention); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951) (applying review only in rare instances).

criticizes such an approach,<sup>216</sup> given the particularized expertise of the CIT in Title VII cases, this seems nevertheless to be a sound option.<sup>217</sup>

In the application of such a standard of review, the issue naturally arises as to whether it should matter if the CIT reversed the agency. Indeed, the infirmities inherent in the *Atlantic Sugar* rule come to the forefront in cases where the CIT has reversed and remanded a case to the agency.<sup>218</sup> Where the agency issues a redetermination that is different from the original determination, on subsequent appeal, pursuant to the *Atlantic Sugar* rule, the Federal Circuit reviews both determinations under the substantial evidence test. In fact, the Federal Circuit has stated that it does review both agency decisions in these circumstances.<sup>219</sup> Given the nature of the substantial evidence test, however, it is entirely conceivable that both agency determinations could be deemed to be supported by substantial evidence.<sup>220</sup> The dilemma thus faced by the court is the issue of which decision should take precedence. Needless to say, under a pure *Atlantic Sugar* approach, resolution of this issue is somewhat awkward. In fact, such a scenario effectively requires the Federal Circuit to modify its approach.<sup>221</sup>

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216. See *Polcover*, 477 F.2d at 1227 (setting forth four chief criticisms of "hands off" review policy).

217. See Proceedings of the Sixth Annual Judicial Conference of the United States Court of International Trade, *Judicial Review: Is It Proving Effective in Resolving Trade Cases?*, 131 F.R.D. 217, 305 (1990) [hereinafter Proceedings] (comments of Francis J. Sailer, DOC Deputy Assistant Secretary for Investigations) (defending two-tier judicial review of Title VII cases).

218. The Federal Circuit generally does not review non-final decisions of the lower tribunal. For example, the court reviews a CIT decision remanding an AD or CVD case to the DOC only after the CIT makes a final, non-remand judgment. See *Trent Tube Div. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 813 (Fed. Cir. 1992) (affirming CIT's initial remand and final decision regarding ITC determination). After such a judgment is rendered, the Federal Circuit in effect reviews both decisions, i.e., the decision to remand and the decision regarding the agency's redetermination upon remand. See *id.* (explaining that "[o]nly after affirming the decision to remand do we reach the appeal from the Court of International Trade's affirmance of the remand decision").

219. *Suramerica II*, 44 F.3d 978, 982-83 (Fed. Cir. 1994) (outlining courts' review processes).

220. See *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1237 (Fed. Cir. 1992) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") (citation omitted); *Maine Potato Council v. United States*, 617 F. Supp. 1088, 1091 (Ct. Int'l Trade 1985) (stating that when ITC determination is supported by substantial evidence, it "does not mean that the evidence could not have supported another conclusion").

221. See *Camargo Correa Metais, S.A. v. United States*, 52 F.3d 1040 (Fed. Cir. 1995), discussed *supra* notes 138-44 and accompanying text. In *Camargo*, the CIT reversed the initial agency decision and the agency accordingly rendered a second decision dramatically different from the first. The CIT's affirmance of the latter decision, without explanation, left the Federal Circuit with insufficient basis to render a decision. As such, the Federal Circuit remanded the case to the CIT to provide a more in-depth analysis. *Id.* at 1042. In such a situation, the Federal Circuit seems to recognize the critical nature of the CIT's decision-making process.

The dilemma can be avoided if the approach touched upon although not endorsed by the *Polcover* court, but subsequently suggested by the *Suramerica II* panel, is followed.<sup>222</sup> Under this approach,<sup>223</sup> if the CIT is found to have misapprehended or misapplied the standard of review in rendering its reversal and decision to remand to the agency, then the CIT decision would be reversed and the initial agency decision would presumably stand. If the CIT did not err *vis-à-vis* the standard of review, then the CIT would be affirmed and the later agency decision would stand, as approved by the CIT (assuming of course that the CIT did not somehow misapprehend or misapply the standard of review in affirming the remand results).

*b. Elimination of review by the CIT*

As an alternative to the two-tiered review process currently in place for AD and CVD cases, some commentators suggest abolishing the CIT's role in such cases.<sup>224</sup> For the reasons discussed below, such a suggestion is ill-conceived.<sup>225</sup>

The seriousness of the attempts to eliminate the CIT's jurisdiction in Title VII cases is evidenced by the Unfair Trade Remedies Simplification Act of 1983, which was sponsored by Senators George Mitchell (D-Me.) and John H. Chafee (R-R.I.).<sup>226</sup> That bill, although never adopted, sought to alter the judicial review process in Title VII cases.<sup>227</sup> A fact sheet issued in connection with the bill summarized its relevant provisions as follows:

[AD and 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. Such review is more appropriate for a court of appeals than for a trial court. By eliminating the first step in this process, the bill brings

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222. *Polcover v. Secretary of Treasury*, 477 F.2d 1223, 1227 (D.C. Cir. 1973). The court in *Polcover* explained:

Perhaps one way to avoid the duplication would be to accord some deference to the district court's review of the record and its determination. A parallel to such action could be drawn to the Supreme Court's occasional usage of a "hands off" policy regarding courts of appeals decisions in statutory agency review cases.

*Id.*

223. *See id.* (discussing Supreme Court's "hands off" policy).

224. *See infra* notes 249-53 and accompanying text.

225. *See infra* notes 226-311 and accompanying text.

226. 129 CONG. REC. 20,578 (1983).

227. *See* H.R. REP. NO. 1156, 98th Cong., 2d Sess. 179 (1984) (declining to adopt Senate bill No. 1672, which was intended to make trade relief more accessible to small businesses).

the import relief area into conformity with the usual administrative practice and reduces the costs associated with appellate review by two different courts.<sup>228</sup>

Trumpeting the legislation as a boon to small businesses seeking relief from subsidized or dumped imports, the two senators argued that the high costs associated with Title VII cases could be directly attributed to the two-tier system of judicial review in which the lower court, i.e., the CIT, purportedly played no substantive role.<sup>229</sup> By permitting direct appeal to the Federal Circuit, the senators reasoned, a substantial reduction in costs would occur and Title VII cases would be brought "into line" with the majority of administrative appeals under other statutes.<sup>230</sup> As demonstrated below, this analysis is overly simplistic.

*i. Practical considerations militate against immediate appeal to the Federal Circuit*

While well intentioned, Senators Mitchell and Chafee overstate the benefits of their proposal and fail to comprehend many of its pitfalls. As to the issue of cost-saving, most litigants in Title VII cases would agree that it is the first step of the appellate process that is the most expensive and time-consuming. That is, the initial effort involved in sorting through the record to develop factual support and in researching the legal issues for a case is costly and burdensome. To recast the already distilled record and legal support for purposes of presenting a second brief (and oral argument) usually involves decidedly less time and expense. Thus, regardless of whether the first step occurs before the CIT or the Federal Circuit, the more costly step would nonetheless not be eliminated; it would just change venue.

Moreover, appeals in the first instance to the Federal Circuit, rather than to the CIT, present certain practical problems. First and foremost is compilation of the record. The CIT's rules grant the agencies forty days after service of a complaint to file the administrative record with the court.<sup>231</sup> Because many AD and CVD cases involve multiple parties and countries, the administrative records before the agencies are voluminous. In addition, many internal DOC memoranda are not placed in the official administrative record, in

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228. 129 CONG. REC. 20,580 (1983) (statement of Sen. Mitchell).

229. *Id.* at 20,578.

230. *Id.* at 20,579-80.

231. CT. INT'L TRADE R. 71(a). Under the alternative procedures of Rule 71(b), a certified list of the entire record's contents, along with copies of all documents that the parties have designated, may instead be filed.

practice, until a case is completed and the record is compiled for appeal. As a result, the agencies (particularly the DOC) often require and seek several extensions of time in order to compile the official record to have it placed on microfiche (in the case of the DOC record) and then to submit it to the CIT. The Federal Circuit's rules, however, require the first brief to be filed within sixty days of docketing.<sup>232</sup> Because that brief must contain any necessary citations to the record, such a brief likely could not be filed within the sixty-day limit because the official record (or index thereof) would not yet be available.

More problematic is designation of record citations for the appendix required by the Federal Circuit's rules,<sup>233</sup> which is to be done even earlier, within ten days of docketing by the appellant, and ten days thereafter, by the appellee.<sup>234</sup> Obviously, the parties can do neither until the official record (or index) is compiled and made available to the court and the parties. Hence, given the practical limitations faced by the agencies in compiling the record in a short time frame, the Federal Circuit would need to revise its rules to accommodate Title VII cases or be barraged with motions for enlargements of time resulting from unavailability of the record.<sup>235</sup>

A second practical problem with direct appeal to the Federal Circuit is the fifty-page limit on briefs at the Federal Circuit.<sup>236</sup> Briefs to the CIT at the first step of the review process in Title VII cases can range up to 200 pages or more, and frequently run between

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232. FED. CIR. R. 31(a).

233. FED. CIR. R. 30(b).

234. FED. CIR. R. 30(b). The rules do allow the parties to extend this timetable, but not so that it will delay the filing of briefs. *Id.* An ancillary problem is the requirement of appendix designations so soon into the appellate process. Under the current system of review, appendix designations, while required early in the process before the Federal Circuit, do not occur until after the parties have fully briefed and argued the issues before the CIT. If CIT review were eliminated and Federal Circuit review were to become the first step of the process rather than the second step, then appendix designations would be required at a very early stage, before the parties have had an opportunity to review fully and to distill the record and their legal arguments. Thus, it is unlikely that parties could meaningfully designate the appendix only 10-20 days after docketing, i.e., within a few weeks after appeal issues are identified in a complaint.

235. Availability of an official record (or an index thereof) is a critical issue in Title VII appeals. For example, during the course of the administrative proceeding, a respondent may waive receipt of service of confidential submissions from other respondents. On appeal, however, it may be critical for one respondent to know how the DOC handled the same issue for another respondent. Thus, the respondent must await compilation and receipt of the official record to obtain the necessary information and then to determine whether it will rely on it for purposes of its appendix designations. *See infra* notes 267-68 and accompanying text (explaining that, as practical matter, compilation of official record, particularly at DOC, often occurs after administrative decision is rendered).

236. FED. CIR. R. 28(c). Principle briefs may not exceed 50 pages, and if a cross-appeal is filed, the appellant's reply brief must not exceed 35 pages. *Id.*

50-100 pages.<sup>237</sup> This is because many issues are raised in such briefs, particularly by domestic industries which dispute agency findings as to multiple foreign respondents in a single action.<sup>238</sup> Although shorter briefs would save costs, given the complexity of Title VII cases, litigants' due process rights should not be sacrificed.

Furthermore, the administrative burden on the Federal Circuit would be increased as to matters that are more typically and appropriately handled by a district court. For example, in most Title VII cases, a significant amount of confidential information is submitted to the agencies under administrative protective orders.<sup>239</sup> These protective orders generally do not continue into the appellate process.<sup>240</sup>

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237. As discussed in note 238, *infra*, when a petition is filed against numerous respondents from a variety of countries, the administrative proceedings, as well as any subsequent appeals, can and do become very complex. Not only may the petitioner or petitioners file appeals from both the ITC and DOC decisions, but many of the respondents may bring their own appellate actions challenging myriad issues. Inherent in the CIT's role as a trial-level court is the flexibility to manage its docket. Thus, for example, in the anti-friiction bearing and flat-rolled steel Title VII cases, the CIT established comprehensive scheduling and case assignment procedures to coordinate the logistical problems that arise when multiple summonses and complaints all stem from the same administrative determination. Because the government is the defendant in all of these actions, without a staggered schedule, it would be impossible for the respective agencies and their counsel to brief hundreds of issues all at once. (Similar problems also exist for petitioners and respondents.) Indeed, in such cases, CIT judges may impose page limits on briefs and may urge multiple plaintiffs or defendant-intervenors to submit consolidated briefs with a higher page limit. The Federal Circuit, however, because of its status as an appellate court that sits as a collegial body, does not have built into its practice and procedures the mechanisms necessary to address such complex cases in the first instance. Thus, such complex cases further illustrate why it would be ill-advised to eliminate the CIT from the Title VII review process.

238. An AD or CVD proceeding affects all imports of a particular product from the country or countries enumerated in the petition. For example, in the Title VII investigations of anti-friiction bearings, the petition alleged dumping or subsidization or both as to imports from nine countries, usually involving at least several respondents in each country. The ITC's injury analysis, however, considered these imports on a cumulative basis. Accordingly, the petitioner's CIT appeal affected multiple respondents who intervened in the action. Similarly, the DOC, in rendering its final determination or final results in such a case, typically addresses issues affecting multiple respondents in a single decision. Because the decision may literally address hundreds of issues, a domestic party's subsequent appeal could dispute numerous findings affecting numerous respondents. *See, e.g.*, *Federal-Mogul Corp. v. United States*, CIT Ct. No. 92-06-00422, wherein many respondents from various countries intervened in the domestic party's action challenging the DOC's final results of review in the anti-friiction bearing proceedings.

239. 19 C.F.R. § 207.7 (1995) (regarding release of business proprietary information under administrative protective order in ITC proceeding); 19 C.F.R. §§ 353.32, 353.34, 355.32, 355.34 (same in DOC proceedings). In their investigations, both the DOC and the ITC seek a substantial amount of confidential material from U.S. petitioners and foreign respondents. *See, e.g.*, *Polyvinyl Alcohol from China, Japan and Taiwan*, USITC Pub. 2960, Inv. Nos. 731-TA-726, 727 and 729, at I-1 (May 1996) (U.S. data); U.S. DEP'T OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, ANTIDUMPING MANUAL ch. 4, at 2 (Oct. 1995) [hereinafter ANTIDUMPING MANUAL] (describing specific pricing data to be gathered in questionnaire).

240. *See* sample applications for disclosure of confidential information in DOC and ITC proceedings at para. 19(d), (e) (DOC) and para. C(2), (3) (ITC) (requiring destruction or return of documents upon completion of administrative proceeding or granting of judicial protective order if an appeal is sought). In cases involving Canadian and Mexican merchandise, the administrative protective orders may continue into the appellate process.

Instead, the parties must seek judicial protective orders from the CIT.<sup>241</sup> While not usually a contentious process, it can be cumbersome from an administrative point of view. A court such as the CIT, where a single judge is assigned to a case, can more efficiently handle these types of issues than a federal court of appeals. Similarly, a substantial number of Title VII cases involve the issuance of preliminary injunctions to prevent Customs from liquidating entries during the pendency of an appeal.<sup>242</sup> Again, while an appeals court certainly has the ability to issue an injunction, this should not be made part of an appellate court's routine functions.

*ii. The review process for other agency determinations does not support removal of the CIT from the Title VII review process*

Regarding the goal of Senators Mitchell and Chafee of bringing Title VII cases in line with other administrative appeals,<sup>243</sup> two-tier review is far from the exception. The *Polcover* decision is but one illustration of the fact that two-tier review is not limited to AD and CVD cases.<sup>244</sup> Indeed, within the Federal Circuit's own jurisdiction, two-tier judicial review is present with regard to appeals from the Court of Veterans Appeals and the Court of Federal Claims.<sup>245</sup> With regard to appeals from agency boards of contract appeals and the MSPB, while no lower court is involved prior to review by the Federal Circuit, the agency boards and the MSPB perform a first-tier appellate function. Moreover, the senators' desire to have Title VII cases parallel those in which only a single tier of review resting with the court of appeals is available is ill-conceived due to the nature of Title VII cases. Administrative cases that proceed directly to the court of appeals generally involve a formal adjudication at the lower level, e.g., a section 337 investigation,<sup>246</sup> or an NLRB proceeding.<sup>247</sup> Title VII

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241. *Id.*

242. "Liquidation" is a term of art used to describe the point at which customs duties are assessed with finality. Without an injunction, liquidation occurs, thus mooting an appeal in most instances.

243. See *supra* note 228 and accompanying text.

244. Mandatory two-tier review also exists with respect to denials of certain social security benefits. See Report of the Federal Courts Study Committee, Apr. 2, 1990, at 55-60 (discussing application of two-tiered review to new set of facts).

245. See *supra* notes 72-78 (Court of Veterans Appeals) and *infra* notes 429-68 (Court of Federal Claims) and accompanying text.

246. See *supra* note 9 and accompanying text (explaining that Federal Circuit hears direct appeals of final determinations of the ITC under § 337); see also *infra* notes 254-86 and accompanying text (discussing § 337 cases).

247. Similarly, MSPB cases, which entail intermediate review by an administrative board, whether viewed as single-tier or two-tier review proceedings, allow for an evidentiary hearing at the intermediate level. *Lindahl v. OPM*, 470 U.S. 768, 774 n.5 (1985). For a discussion of the MSPB appeals process, see *infra* notes 287-311 and accompanying text.

cases are distinguishable from these cases because there is no formal adjudication in Title VII proceedings. Hence, by analogy, single-tier review would be inappropriate in Title VII cases.<sup>248</sup>

Nevertheless, the senators are not alone in portraying two-tier review of agency action as exceptional and suggesting elimination of review by the CIT. One commentator, who has argued that the CIT itself should be disbanded, has proposed either a system of administrative adjudication with direct appeal to the Federal Circuit or, in certain instances, transferring jurisdiction to the federal district courts.<sup>249</sup> Specifically, with respect to Title VII appeals, Professor Kennedy has argued as follows:

In essence, review by the CIT of these various administrative determinations differs little from appellate review of agency decisions currently conducted by the federal courts of appeals in cases concerning decisions of the National Labor Relations Board, the Nuclear Regulatory Commission, the Interstate Commerce Commission, the Federal Communications Commission, or the Merit Systems Protection Board. In section 1581(c) cases, CIT review is upon the administrative record, with the standard of review generally being whether the agency's decision is supported by substantial evidence on the record considered as a whole, or otherwise not in accordance with law.

...  
... The type of record sifting which may have to be done by a reviewing court in international trade cases is certainly no more complex or difficult than the type of record review which the courts of appeal face daily in reviewing voluminous agency records compiled by the National Labor Relations Board or the Nuclear Regulatory Commission, for example. The Federal Circuit itself regularly conducts such record reviews in section 337 and Merit Systems Protection Board appeals.

In reviewing the antidumping and countervailing duty decisions of the CIT, moreover, the [Federal Circuit] undertakes its own independent examination of the agency record, thereby duplicating the effort of the CIT in these cases. If expeditious and economical disposition of these cases is the desiderata, it is questionable whether two-tiered appellate review as a matter of right is the appropriate means to this end.<sup>250</sup>

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248. See 19 U.S.C. § 1677c(b) (1994) (stating that agency hearings required or permitted in AD or CVD investigations are not subject to APA hearing requirements).

249. Kevin C. Kennedy, *A Proposal to Abolish the U.S. Court of International Trade*, 4 DICK. J. INT'L L. 13, 21-23 (1985).

250. *Id.* at 21-23. Professor Kennedy also focuses on costs and delays attendant two-tier review, *id.* at 22, which have been discussed above. See *supra* notes 228-42 and accompanying text.



Professor Kennedy's various criticisms are insufficient to justify elimination of the CIT. For example, the criticism that the CIT and Federal Circuit two-tier review constitutes a duplication of effort can be addressed easily by having the Federal Circuit apply a different standard of review.<sup>251</sup>

In addition, the analogy drawn to the Federal Circuit's review in section 337 and MSPB cases is inapt. These types of cases are significantly distinguishable from Title VII cases. The most notable difference is that, in section 337 and MSPB cases, an evidentiary hearing is available at the lower level, whereas it is not available in Title VII cases.<sup>252</sup> Thus, in Title VII cases, the "record sifting" that the CIT performs (and that the Federal Circuit would need to perform if CIT review were eliminated) is very different from the record sifting that the Federal Circuit is required to perform in section 337 and MSPB cases.<sup>253</sup>

*a) Title VII distinguished from section 337 cases*

Under section 337, an ALJ is required to conduct an evidentiary hearing, pursuant to the parameters set forth in the APA.<sup>254</sup> Present and participating at the hearing will be the complainant and its counsel, respondents and their counsel, and a staff attorney from the ITC's Office of Unfair Import Investigations.<sup>255</sup> Typically, a section 337 hearing before an ALJ can last two weeks, during which live witnesses testify and are subject to cross-examination.<sup>256</sup> The ALJ

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251. In adverse action cases brought under 5 U.S.C. ch. 75, for example, the MSPB applies a preponderance of the evidence standard of review, and the Federal Circuit applies a substantial evidence standard of review. 5 U.S.C. § 7701(c)(1)(B) (1994).

252. Compare 19 U.S.C. § 1337(c) (stipulating that § 337 determinations "shall be made on the record after notice and opportunity for a hearing in conformity with [the APA]") and *Lindahl v. OPM*, 470 U.S. 768, 774 n.5 (1985) (holding that MSPB appellants are entitled to evidentiary hearing) with 19 U.S.C. § 1677c(b) (1994) (exempting DOC and ITC from APA hearing requirements in Title VII investigations).

253. Another alternative is to make Title VII investigations APA proceedings before an ALJ, thereby obviating the need for review by the CIT. See Proceedings, *supra* note 217, 131 F.R.D. at 314 (comments of David M. Cohen, Dep't of Justice counsel) (forecasting increased use of administrative reviews). Title VII (particularly the CVD law), however, historically has been viewed as part of this country's arsenal of trade *policy* statutes. Accordingly, to make Title VII proceedings subject to the APA and formal adjudications thereunder would be to alter fundamentally their character. Hence, the viability of such an alternative is questionable, given the century or so old traditional view of the AD and CVD laws.

254. 19 U.S.C. § 1337(c).

255. See *id.* § 210.36(d) (setting forth rights of every party to fair hearing) and § 210.3 (defining "party" as complainant, respondent, intervenor or ITC investigative attorney).

256. See *id.* § 210.36(d) (regarding right to present evidence and cross examination); Certain Diltiazem Hydrochloride and Diltiazem Preparations, USITC Pub. 2902, Inv. No. 337-TA-349, at 3 (June 1995) (referring to evidentiary hearing which commenced on Oct. 17, 1994 and concluded on Nov. 3, 1994).

also rules on the admissibility of hundreds (if not thousands) of documentary and physical exhibits.<sup>257</sup> Further, the ALJ is required to render an initial determination ("ID"), which must contain findings of fact and conclusions of law. It is not unusual for the ID to be 100-200 pages in length.<sup>258</sup>

This type of formal adjudication in section 337 cases (which is quite similar to a patent infringement trial in federal district court),<sup>259</sup> is very different from the informal decision-making process of the DOC, or the non-evidentiary procedures of the ITC in Title VII cases. The mechanism providing for direct judicial review of section 337 determinations by the Federal Circuit, therefore, comports with conventional wisdom regarding conservation of judicial resources. Conversely, the two-tiered structure of judicial review for Title VII cases also fits logically within the framework for review of agency decision-making.

Indeed, as others have commented:

A system by which agency decisions are appealable directly to a court of appeals presupposes that the agency's procedures afford adverse parties an opportunity to create an adequate administrative record, so that the court may decide on the basis of such record whether the agency's decision was effected through improper procedures, was arbitrary and capricious, or was not based upon substantial evidence.<sup>260</sup>

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257. See *Certain Microsphere Adhesives, Process For Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, USITC Pub. 2949, Inv. No. 337-TA-366 (Jan. 1996) (referencing parties' exhibits numbered in hundreds).

258. The ID becomes the decision of the ITC unless the Commission takes further action. See 19 C.F.R. § 210.42(h)(2) (1995) (stating that ID concerning issue of violation of § 337 becomes determination of ITC 45 days after date of service of ID, unless full Commission orders review of ID). The ID, however, may be reviewed de novo by the full Commission based on a petition for review, *id.* § 210.43, or *sua sponte*, *id.* § 210.44. Upon review, the Commission may affirm, reverse, modify, set aside, or remand the ID, in whole or in part, and may supplement the ID with its own decision. *Id.* § 210.45(c). Thus, the ITC decisions that the Federal Circuit reviews in § 337 cases may be opinions and findings of fact of the full Commission, opinions and findings of fact of an ITC ALJ, or some combination of the two.

When the Federal Circuit reviews a determination made under § 337, it is theoretically irrelevant whether the determination being reviewed is that of the ALJ or of the full Commission. Because the full Commission can essentially conduct a de novo review if it so chooses, whatever findings the full Commission makes (if any), coupled with whatever findings of the ALJ are left intact, constitute the determination of the ITC, which is what is subject to Federal Circuit review.

259. The Uruguay Round Agreements Act, Pub. L. No. 103-465, Statement of Administrative Action, at 704-07, reprinted in 1994 U.S.C.A.N. 4040, 4075 (amending § 337 of Tariff Act of 1930 and Title 28 of U.S. Code in order to bring procedures in § 337 cases further into conformity with district court procedures).

260. Richard C. Johnson & Richard G. Stoll, Jr., *Judicial Review of Federal Employee Dismissals and Other Adverse Actions*, 57 CORNELL L. REV. 178, 189 (1972).

The opportunities to refine adequately the administrative records in Title VII proceedings generally are not present at the agency level. As former U.S. Court of Appeals Circuit Judge Malcolm Wilkey has testified before the House Ways and Means Committee regarding Title VII cases:

United States administrative agency action needs judicial review. With all due deference to the International Trade Administration of the Department of Commerce and the International Trade Commission, *their determinations might be classified as the "raw product."* Experienced appellate courts know where to look for flaws. The United States' courts know to what standard it is reasonable to hold the agency. *The courts keep the agencies in line by refining the raw product of the administrative process in case after case.*<sup>261</sup>

In Title VII cases, there is no trier-of-fact who is charged with weighing evidence and otherwise conducting an evidentiary hearing in accordance with the APA.<sup>262</sup> The bulk of the record is created through the written submissions of parties (or any interested persons) during the administrative proceeding.<sup>263</sup> While factual submissions must be certified,<sup>264</sup> authentication (as occurs during an evidentiary hearing) is not required.<sup>265</sup> Also included in the record are govern-

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261. *Accession of Chile to NAFTA: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 104th Cong., 1st Sess. 770 (1995) (testimony of Malcolm R. Wilkey, U.S. Circuit Judge (Ret.) and Ambassador of the United States (Ret.)) (emphasis added). As mentioned below with respect to proceedings under the FTA, Judge Wilkey was a panelist on the *Softwood Lumber* extraordinary challenge committee reviewing agency action under Title VII. See *infra* notes 356-62 and accompanying text (discussing Judge Wilkey's opinion in *Softwood Lumber* case).

262. See 19 C.F.R. § 353.38(f)(2), (3) (providing for option of hearing in DOC AD investigation, to be chaired by, e.g., a Deputy Assistant Secretary or a division director, but restating inapplicability of APA hearing procedures and emphasizing that "[w]itness testimony, if any, shall not be under oath or subject to cross-examination by another interested party or witness"); *id.* § 355.38(f)(2), (3) (providing for identical hearing procedures in DOC CVD investigation); *id.* § 207.15 (stipulating that in ITC preliminary investigation, Director of Office of Operations "shall conduct such investigation as he deems appropriate," shall hold "conference" if Director deems it "appropriate," and shall serve as presiding officer at conference); *id.* § 207.23 (directing that in ITC final investigation, "[t]he Commission shall hold a hearing," but warning that hearing shall not be subject to APA formal hearing procedures).

263. See *id.* § 353.38(b) (stating that, in DOC AD investigation hearing, interested party may make "an affirmative presentation only on arguments included in that party's case brief and may make a rebuttal presentation only on arguments included in that party's rebuttal brief"); *id.* § 355.38(b) (providing identical requirement for DOC CVD investigation hearing); *id.* § 207.23 (ITC rule stating that each party must limit its presentation at hearing to summary of information and arguments contained in its pre-hearing brief, plus information not available at time party filed its pre-hearing brief).

264. See *id.* § 353.31(i) (setting forth certification requirements for DOC AD investigations); *id.* § 355.31(i) (establishing certification procedures for DOC CVD investigations); *id.* § 207.3(a) (stating certification requirements for submitting factual information in ITC Title VII investigations).

265. The agencies may conduct verifications to spot-check the accuracy of submitted information, but a verification of all information is not required and indeed, in many instances, is not conducted. See *id.* § 353.36(a)(1)(iv), (v) (providing for DOC verification in ordinary AD

ment memoranda pertaining to the case, in particular, internal DOC memoranda involving the discussion of factual and legal matters upon which the agency must take specific action.<sup>266</sup> Very often, however, access to such memoranda is unavailable until the record is compiled for appeal, because, in practice, the agency does not always promptly place internal memoranda in the official record nor is it required to serve the affected parties therewith.<sup>267</sup> Furthermore, during the course of the administrative proceeding, a complete index of the record is unavailable.<sup>268</sup> Hence, it is not until the agencies file their records (or indices thereof) with the CIT that a formal record actually becomes available to the parties.<sup>269</sup> Moreover, particularly with regard to DOC proceedings, the official record index often is missing critical items.<sup>270</sup> Finally, during the administrative proceeding, certain confidential information may not be available to the parties, even under administrative protective order.<sup>271</sup> Accordingly, a fully indexed formal and "complete" record is available to the parties for the first time only during an appeal before the CIT.<sup>272</sup>

Further, while hearings are held before both the ITC and DOC in Title VII cases, these hearings are not in the nature of a trial. Although witnesses are sworn before the ITC, at the DOC, a hearing

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administrative review only in certain situations); *id.* § 355.36(a)(1)(iv), (v) (providing for optional DOC verification in ordinary CVD administrative review); *id.* § 353.36(a)(2) (stating, in DOC AD investigation, when it is "impractical to verify relevant factual information for each person, the Secretary may select and verify a sample"); *id.* § 355.36(a)(2) (providing parallel sampling option in DOC CVD investigation); *id.* § 207.4(b) (granting ITC discretion to verify information received).

266. *Id.* § 353.3(a) (DOC AD proceeding); *id.* § 355.3(a) (DOC CVD proceeding); *see id.* § 207.21 (directing ITC Director of Operations to prepare and place prehearing staff report in record prior to hearing in final phase of Title VII injury investigations).

267. *See, e.g.,* ANTIDUMPING MANUAL, *supra* note 239, at ch. 2, 18 (describing procedures for maintaining and compiling record and acknowledging that documents may need to be placed in record after administrative process is complete); Order, U.S. Ct. Int'l Trade (Oct. 20, 1995) (responding to budget emergency at ITC and requiring *list* of documents to be submitted to CIT and parties rather than actual record and also requiring ITC, upon request, to provide to parties documents not previously provided during administrative proceeding).

268. ANTIDUMPING MANUAL, *supra* note 239, at ch. 18, 2 (indexing of record by case analyst in preparation for litigation); Order, *supra* note 267.

269. *See* CT. INT'L TRADE R. 71(a), (b) (providing procedures whereby defendant agency, in case governed by 28 U.S.C. § 1581(c), is to file with CIT complete official record of contested investigation or index of documents thereto).

270. It is not uncommon for parties to supplement their briefs to the CIT with their own file copies of documents that unquestionably were submitted to the agency and are part of the record, but have been omitted from the index of the record filed with the CIT.

271. For instance, in the administrative proceeding, access to data under APO may be limited to data submitted only by certain parties.

272. On appeal, parties may obtain access under a judicial protective order to the entire record, including the confidential data of other parties to which they did not have access during the administrative proceeding. *See* Protective Order, Ct. No. 93-08-00506 (Ct. Int'l Trade Oct. 14, 1993) (granting access to full administrative record).

essentially consists of nothing more than arguments by counsel, limited by the contents of their briefs.<sup>273</sup>

The decisions resulting from Title VII proceedings are also not like the conclusions of law, findings of fact, and opinion of a trier-of-fact. The DOC renders its formal decision through a series of approval signatures in the departmental chain of command.<sup>274</sup> The decision takes the form of a recitation of party comments, followed by the agency position.<sup>275</sup> At the ITC, the Commissioners issue a Title VII decision after a vote is taken.<sup>276</sup> The final determination consists of a public Commission opinion and/or individual Commissioners' views, accompanied by a detailed confidential economic report.<sup>277</sup> While a public version of the latter is available, the facts critical to the agency's determination are usually kept confidential.

Thus, while appeals from agency action in section 337 investigations go directly to the Federal Circuit without review by the CIT or any other intermediate body, the differences between the procedures followed at the agency level in section 337 and those followed in Title VII cases are numerous and significant. While an ALJ presides over the making of the record in a section 337 case, no comparable arbiter exists in a Title VII proceeding until the case gets before the CIT. As such, without the safeguards of formal adjudication,<sup>278</sup> it would be

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273. See *supra* notes 262-63 (citing DOC and ITC regulations concerning limited nature of hearings).

274. See ANTIDUMPING MANUAL, *supra* note 239, at ch. 12 (describing approval process for preliminary and final AD determinations).

275. *E.g.*, Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan, 61 Fed. Reg. 38,139 (Dep't Commerce 1996) (final determination); Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders, 60 Fed. Reg. 10,900 (Dep't Commerce 1995) (final results).

276. 19 U.S.C. § 1677(11) (1994).

277. Ferrosilicon from the People's Republic of China, USITC Pub. 2606, Inv. No. 731-TA-567 (Mar. 1993); Polyethylene Terephthalate Film, Sheet, and Strip from Japan and the Republic of Korea, USITC Pub. 2383, Inv. Nos. 731-TA-458 and 459 (May 1991).

278. The CIT's review of the agencies' determinations functions to ensure that certain evidentiary and due process standards are adhered to by the agencies in their investigations. It is not unusual for parties to raise on appeal to the CIT evidentiary-type issues. For example, the CIT has decided questions involving the DOC's use of best information available ("BIA") (which acts much like an adverse factual inference) against a party in an AD or CVD proceeding where the DOC has determined that the party has not submitted adequate information. See *SKF USA Inc. v. United States*, No. 95-16, slip. op. (Ct. Int'l Trade Feb. 8, 1995) (rejecting DOC's use of BIA when DOC did not request missing information). Further, where the DOC has obtained and used factual information in a manner contrary to its own regulations, the CIT has required the agency to recalculate the dumping margin without the use of the improperly obtained data. See *Tehnoimportexport v. United States*, 766 F. Supp. 1169, 1177 (Ct. Int'l Trade 1991) (rejecting DOC's unauthorized use of another respondent's confidential packing data in DOC's calculation of surrogate data for Romanian respondent, as unlawful and contrary to

imprudent to eliminate the layer of judicial review performed by the CIT in AD and CVD cases.

In fact, because of their formal adjudicatory nature, it is perhaps more appropriate to compare section 337 cases (and review thereof) with proceedings in the area of intellectual property law, rather than with Title VII proceedings. Such an analysis reveals that the ITC's section 337 determinations, like other intellectual property decisions, are, following a trial or hearing,<sup>279</sup> subject to a single tier of non-discretionary judicial review.<sup>280</sup> The standard of review applied to the ITC's final determinations under section 337, however, is perhaps more deferential than the standard applied to the district courts in patent infringement proceedings.<sup>281</sup> That is, while ITC findings of fact are reviewed under the substantial evidence standard,<sup>282</sup> a

agency's regulations and policy).

The CIT also has reviewed the ITC's weighing of factors to determine whether injury to a domestic industry has occurred or is threatened by certain imports in an AD or CVD case. *See Hosiden Corp. v. United States*, 810 F. Supp. 322 (Ct. Int'l Trade 1992). Additionally, the CIT has judged the overall "fairness" of the DOC's use of its investigative powers. *See Shikoku Chemicals Corp. v. United States*, 795 F. Supp. 417 (Ct. Int'l Trade 1992) (rejecting new DOC methodology that was more accurate, when party had justifiably relied on old methodology).

279. *See* 19 U.S.C. § 1337 (stating that determinations under § 337 are made on record after notice and opportunity for hearing).

280. *See* 19 U.S.C. § 1337(c) (specifying that review of § 337 determinations rests with Federal Circuit).

281. The standards of review for § 337 cases are statutorily mandated; 19 U.S.C. § 1337(c) references Chapter 7 of Title V with regard to the standard of review to be applied by the Federal Circuit. The APA articulates the scope of review as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (1994).

282. As to most decisions in a § 337 investigation, because a formal hearing is conducted pursuant to the provisions of the APA, the Federal Circuit reviews factual findings of the ITC under the substantial evidence standard. *Checkpoint Sys., Inc. v. International Trade Comm'n*,

district court's findings are reviewed for clear error.<sup>283</sup> Similarly, while questions of law are reviewed de novo in both fora, the ITC is entitled to *Chevron* deference<sup>284</sup> while a district court is not.<sup>285</sup> Given the expertise of the ITC in addressing complicated intellectual property issues, according substantial deference to the agency is a sensible result.<sup>286</sup> However, because section 337 investigations are conducted like district court trials and subject to a single tier of judicial review, it is clear that Title VII cases cannot be treated in the

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54 F.3d 756, 759-60 (Fed. Cir. 1995). However, not all aspects of a § 337 proceeding are reviewed under the substantial evidence standard. See 19 U.S.C. § 1337(c) (stipulating terms of Federal Circuit review of various ITC actions in connection with § 337 investigations); *Rosemount, Inc. v. International Trade Comm'n*, 910 F.2d 819, 821 (Fed. Cir. 1990) (holding that decisions granting or denying temporary relief are reviewed under abuse of discretion standard). The Federal Circuit reviews questions of law in § 337 cases de novo. *Checkpoint*, 54 F.3d at 760.

283. See *Durango Assocs., Inc. v. Reflange, Inc.*, 843 F.2d 1349, 1357 (Fed. Cir. 1988). The Federal Circuit also hears appeals from the Trademark Board under the clearly erroneous standard as to findings of fact. *In re Etablissements Darty et Fils*, 759 F.2d 15, 18 (Fed. Cir. 1985); *Joseph & Feiss Co. v. Joseph Kanner Hat Co.*, 337 F.2d 1014, 1015 (C.C.P.A. 1964). The Federal Circuit applies a de novo standard, however, as to questions of law. See generally Richard L. Kirkpatrick, *Likelihood of Confusion Issues: The Federal Circuit's Standard of Review*, 40 AM. U. L. REV. 1221 (1991) (arguing that Federal Circuit's de novo review of likelihood of confusion issues should be reconciled with its own application of clearly erroneous standard to other trademark law issues). Similarly, the Board of Patent Appeals and Interferences is reviewed by the Federal Circuit under the clearly erroneous and de novo standards. *In re Kathawala*, 9 F.3d 942, 945 (Fed. Cir. 1993) (question of law reviewed de novo); *In re Carlson*, 938 F.2d 1032, 1033 (Fed. Cir. 1992) (question of fact reviewed for clear error).

284. See *Farrel Corp. v. International Trade Comm'n*, 949 F.2d 1147, 1151 (Fed. Cir. 1991) ("While this court generally reviews ITC interpretations of statutory provisions de novo, some deference to constructions by the agency charged with its administration may be appropriate, particularly if technical issues requiring some expertise are involved." (citing, inter alia, *Chevron*, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); *Corning Glass Works v. United States Int'l Trade Comm'n*, 799 F.2d 1559, 1565 (Fed. Cir. 1986))).

285. The deference principle enunciated by the Supreme Court in *Chevron* is limited to agency action because, when a statutory provision is unclear, it is presumed that Congress delegated certain authority to the agency to fill the gap. *Chevron*, 467 U.S. at 843; see also *CHILDRESS & DAVIS*, *supra* note 21, at 15-16 ("In the administrative law setting, de novo review now seems ruled by the application of principles of great deference.").

286. Indeed, even the district courts themselves have recognized the expertise of the ITC. See *Aluminum Houseware Co., Inc. v. Chip Clip Corp.*, 609 F. Supp. 358, 363 (E.D. Mo. 1984) ("[T]he ITC is in a better position to investigate the facts and address and resolve [patent infringement] issues. The expertise of the ITC in patent matters, such as the present one, provides for a fairer and certainly more knowledgeable forum in which the parties can present their cases."). Recognition of the ITC's expertise is also apparent in the willingness of courts to grant preclusive effect to certain ITC decisions. At least one district court has given preclusive effect to the ITC's findings of fact in a patent-based case. See *In re Convertible Rowing Exerciser Patent Litig.*, 814 F. Supp. 1197, 1201 (D. Del. 1993) (holding that court would not give res judicata effect to ITC legal determinations relating to patent invalidity, but would give preclusive effect to ITC factual findings); see also *Glasstech, Inc. v. AB Kyro Oy*, 635 F. Supp. 465, 468 (N.D. Ohio 1986) (acknowledging that ITC finding of patent validity in § 337 proceeding was not preclusive, but stating that it was proper to draw an inference based on ITC decision as to probability of plaintiff's success on merits). Moreover, in trademark cases (unlike in patent cases), because Title 28 does not vest exclusive jurisdiction in trademark matters with the district courts, courts will grant res judicata effect to ITC decisions as to both legal and factual issues. *Union Mfg. Co., Inc. v. Han Baek Trading Co.*, 763 F.2d 42, 45-46 (2d Cir. 1985).

same manner. Title VII proceedings are simply too far removed procedurally from the formal adjudicative protections of a district court-type trial to be subject to immediate appeal to the Federal Circuit.

*b) Title VII distinguished from MSPB cases*

The review process involving MSPB cases also does not support the proposition that the CIT should be eliminated. Rather, the MSPB process highlights two points. First, as recognized by many commentators, the availability of an evidentiary hearing is a key factor to consider in determining whether a single-tier or a two-tier structure of judicial review is desirable.<sup>287</sup> Second, the MSPB process, when contrasted to the Title VII process, illustrates why the Federal Circuit's *Atlantic Sugar* approach in Title VII cases is unnecessary.

The MSPB reviews agency actions affecting the employment of federal employees.<sup>288</sup> A federal employee adversely affected by a final order or decision of the MSPB may obtain judicial review of the order or decision in the Federal Circuit.<sup>289</sup> In addition, the MSPB reviews decisions of the Office of Personnel Management ("OPM") affecting the retirement of federal employees.<sup>290</sup> Private parties adversely affected by MSPB decisions in such cases may seek review before the Federal Circuit and the government also may petition for review of an MSPB decision.<sup>291</sup>

The Federal Circuit's standard of review over MSPB decisions is governed by statute, which states in pertinent part:

In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) obtained without procedures required by law, rule, or regulation having been followed; or
- (3) unsupported by substantial evidence;

287. Johnson & Stroll, *supra* note 260, at 189; David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 5-6 (1975).

288. 5 U.S.C. § 1204(a)(1) (1994).

289. The Federal Circuit's jurisdiction does not apply when a federal discharge action includes claims of discrimination. Such cases must be brought initially in the federal district courts, in the manner provided by various civil rights statutes. Congress excepted cases involving complaints of discrimination from the purview of § 7703 in order to protect the existing rights of employees to trial de novo in discrimination cases. *Id.* § 7703(b)(2).

290. *See id.* § 1204(a)(4) (stating that MSPB shall review OPM rules and regulations).

291. *Id.* § 7703(a)(1), (d).



except in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial *de novo* by the reviewing court.<sup>292</sup>

Hence, in appeals from decisions of the MSPB, the Federal Circuit applies a statutory standard of review quite similar to the standard applied in AD and CVD cases.<sup>293</sup> One significant difference is that in MSPB cases, the statute specifies that such a standard is to be applied by the Federal Circuit.<sup>294</sup> In Title VII cases, the statute dictates that such a standard be applied by the CIT, and is silent as to the standard to be applied by the Federal Circuit. Accordingly, in its review of MSPB cases, the Federal Circuit has no choice but to apply the statutory standard of review. In Title VII cases, by its silence, Congress has given the Federal Circuit a choice.

Also noteworthy is the fact that Congress has specified the standard of review that the MSPB is to apply at the administrative level.<sup>295</sup> Depending on the type of case, the statutory standard dictates that the MSPB may not sustain agency action that is unsupported by a preponderance of the evidence<sup>296</sup> or by substantial evidence.<sup>297</sup> In addition, the MSPB may not sustain agency action that involves harmful procedural error,<sup>298</sup> is based on a prohibited personnel

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292. *Id.* § 7703(c).

293. Although a provision like subpart (c)(2) is not present *vis-à-vis* AD and CVD cases, when either the ITC or the DOC is alleged to have failed to follow a rule or regulation or procedure required by law, litigants have claimed such conduct not to be in accordance with law. *See, e.g.,* *Kemira Fibres Oy v. United States*, 61 F.3d 866, 875 (Fed. Cir. 1995) (stating that plaintiff must establish it was prejudiced by DOC's failure to comply in timely manner with its own regulation as to notice requirement for administrative reviews); *Creswell Trading Co. v. United States*, 15 F.3d 1054, 1062 (Fed. Cir. 1994) (criticizing "inherent procedural unfairness" in DOC action of taking position that certain information was irrelevant during initial investigation and then, after deadline for submitting such information had passed, declaring that information was so vital to using respondent's data that without it, DOC had to base decision on "best information available"). Thus, the standard set forth at subpart (c)(1) would subsume conduct coming within the purview of subpart (c)(2). Likewise, although the arbitrary and capricious/abuse of discretion portion of (c)(1) is not present in the standard of review for most Title VII cases, when an abuse of agency discretion is shown, the Federal Circuit will not uphold the agency action (presumably because an abuse of discretion constitutes conduct not in accordance with law). *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208-09 (Fed. Cir. 1995) (finding abuse of discretion when agency refused to consider request for correction of clerical errors).

294. 5 U.S.C. § 7703(b)(1) (stating that review of board decision must be in Federal Circuit).

295. *Id.* § 7701(c)(1), (2).

296. *See id.* § 7701(c)(1)(B) (providing standard for all actions other than those specified in § 7701(c)(1)(A)).

297. *See id.* § 7701(c)(1)(A) (providing standard for action based on unacceptable performance described in § 4303 or removal from Senior Executive Service for failure to be recertified under § 3393a).

298. *Id.* § 7701(c)(2)(A).

practice,<sup>299</sup> or is not in accordance with law.<sup>300</sup> Finally, in an MSPB review proceeding, the appellant is entitled to an evidentiary hearing.<sup>301</sup> This is significantly different from CIT review of Title VII cases, which is limited to review upon the agency record.<sup>302</sup>

In MSPB adverse action cases under chapter 75, while the Federal Circuit applies a substantial evidence standard of review to the initial agency action,<sup>303</sup> the MSPB, in the first step of the review process, applies a preponderance of the evidence standard<sup>304</sup> after an evidentiary hearing.<sup>305</sup> Thus, in these cases there is no redundancy as to the role of the two reviewing bodies or as to the standards of review which they apply.

In actions based on unacceptable performance brought under chapter 43, Congress appears to have created a certain redundancy in that both the MSPB and the Federal Circuit are required to apply the substantial evidence test.<sup>306</sup> However, because the MSPB conducts an evidentiary hearing and the Federal Circuit is required to review the record,<sup>307</sup> which includes the record taken as a whole,<sup>308</sup> the two bodies are not statutorily charged with identical tasks. The MSPB acts like a trial court and reaches a decision that, based on the evidence presented by an aggrieved employee, may or may not uphold the initial agency action. Assuming the agency action is upheld,<sup>309</sup> the Federal Circuit will review the initial agency action to determine whether it is supported by substantial evidence, in light of all the evidence presented, including any new evidence presented

299. See *id.* § 7701(c)(2)(B) (referring to prohibited personnel practices described in 5 U.S.C. § 2302(b)).

300. *Id.* § 7701(c)(2)(C).

301. *Lindahl v. OPM*, 470 U.S. 768, 774 n.5 (1985).

302. See 19 U.S.C. § 1516a(b)(2) (1994) (defining what constitutes the record for review); see also *id.* § 1516a(a)(2) (discussing review of determination on record).

303. 5 U.S.C. § 7703(c)(3).

304. *Id.* § 7701(c)(1)(B).

305. See *Lindahl*, 470 U.S. at 774 n.5 (stating that appellant in MSPB review proceeding is entitled to evidentiary hearing).

306. Compare 5 U.S.C. § 7701(c)(1)(A) (stating that MSPB shall sustain agency decision only if it is supported by substantial evidence in cases based on unacceptable performance described in § 4303) with *id.* § 7703(c)(3) (stating that Federal Circuit shall set aside any agency action, findings, or conclusions found to be unsupported by substantial evidence).

307. *Id.* § 7703(c).

308. *Hayes v. Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

309. If the MSPB overturns the agency action, the employee presumably is no longer aggrieved and accordingly, has no right to appeal before the Federal Circuit. Thus, there would be no appeal to the Federal Circuit, unless OPM appeals on policy grounds. See 5 U.S.C. § 7703(d) (stating that OPM may obtain review of any MSPB decision if OPM Director determines that MSPB erred in interpreting civil service law, rule, or regulation affecting personnel management and that decision will have substantial impact on civil service law, rule, regulation, or policy directive). Under the latter circumstance, however, such an appeal would not likely implicate the substantial evidence test.

before the MSPB.<sup>310</sup> Hence, as to the supplemented record, there lies only one appeal, not two. As such, while the standard of review may be the same, it is applied in an appellate context (as opposed to a trial context) only once, not twice, as is the case in Title VII appeals, where the CIT conducts no evidentiary hearing.<sup>311</sup> These various differences demonstrate that parallels cannot properly be drawn between MSPB and section 337 cases on the one hand, and Title VII cases on the other.

*c. Other alternatives*

*i. Three-judge CIT panels*

At the CIT's Sixth Judicial Conference, one participant noted that the solution for elimination of redundant reviews might be to have panels of three judges from the CIT review Title VII agency decisions.<sup>312</sup> Under such a system, there would be no appeal to the Federal Circuit. Instead, an appeal would have to be by writ of certiorari to the Supreme Court. As outlined at the conference:

The potential for significant delay is quite obvious. In that regard, I think it is fair to dispassionately consider, namely whether we need a two-tier judicial review mechanism. Indeed, I would argue that the existence of a two-tier mechanism encourages the agencies only to adhere to generally applicable instructions only if those instructions are issued by the CAFC. My own view of what should happen is that the CIT should have the exclusive jurisdiction with no right of appeal to the CAFC. I also would have the CIT sitting in three-judge panels to cut off any belief on the part of the agencies that they will get a better opinion out of another individual judge on the CIT.<sup>313</sup>

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310. The Federal Circuit has explained:

The statute in 5 U.S.C. § 7703(c) refers ambiguously to this court's review of 'agency action' to determine if it is supported by 'substantial evidence.' In view of the de novo nature of the proceeding before the MSPB, this court has concluded that it must review the agency action based on the record made to the MSPB and the MSPB findings, rather than review the agency action solely on the basis of the agency's record.

*Jackson v. Veterans Admin.*, 768 F.2d 1325, 1329 n.4 (Fed. Cir. 1985).

311. See CT. INT'L TRADE R. 56.2 (outlining usual procedure for judgment in AD/CVD-related CIT actions governed by 28 U.S.C. § 1581(c) based on motion for judgment on agency record).

312. Proceedings, *supra* note 217, at 241 (comments of Leonard M. Shambon).

313. Proceedings, *supra* note 217, at 241 (comments of Leonard M. Shambon); accord Shambon, *supra* note 105, at 41-42 (arguing that "necessity for judicial review by both the CIT and the Federal Circuit must be dispassionately assessed" because of "potential for significant delay of final judicial dispositions").

The suggestion that three-judge panels of the CIT hear Title VII appeals with no right of appeal to the Federal Circuit has some merit, but on balance seems a less workable solution than application by the Federal Circuit of a different standard of review. The three-judge panel suggestion has the obvious effect of eliminating two-tier judicial review. Most commentators, however, suggest that if a layer is to be eliminated, it should be the district court tier of review rather than the appellate court tier.<sup>314</sup>

The suggestion also would relieve the appellate court of the burden of performing functions more appropriately performed by a district court. Nevertheless, it would burden the CIT with conducting its review in Title VII cases in a way that is not its "normal way" of doing business. The CIT normally does not sit in three-judge panels. Three-judge panels, by rule, are reserved for cases involving issues of constitutionality or those with broad or significant implications for the administration of international trade laws.<sup>315</sup> Hence, in all Title VII cases, the CIT would be required to operate outside of its normal parameters, which would likely impose a substantial burden on that court.

As to the worry that single-judge CIT decisions encourage litigants to seek a better opinion from another judge, because CIT judges strive to follow each others' precedent,<sup>316</sup> this issue is of little concern. Further, with regard to the agencies' refusal to adhere to judicial instructions unless they emanate from the Federal Circuit,

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314. See Currie & Goodman, *supra* note 287, at 15-16 ("Single-tier district court review is . . . simply unthinkable; only the court of appeals, with its broad territorial jurisdiction and with judges few enough to keep in step with one another, can maintain a tolerable degree of uniformity."); Johnson & Stoll, *supra* note 260, at 193-97 (arguing for direct appellate review in federal employee discharge cases); Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1315 (1986) (arguing that one-tier district court review would create "insuperable difficulties").

315. 28 U.S.C. § 255(a) (1994); CT. INT'L TRADE R. 77(e)(2); National Corn Growers Ass'n v. Baker, 643 F. Supp. 626, 630 (Ct. Int'l Trade 1986).

316. See Proceedings, *supra* note 217, at 306 (comments of Honorable Jane A. Restani, Judge of CIT and panel moderator) ("I . . . believe the judges of [the CIT] pay very close attention to the opinions of their colleagues and try to be consistent when they feel they can be."). But see James A. Toupin, *The U.S. Court of International Trade and the U.S. International Trade Commission After Ten Years - A Personal View*, 14 FORDHAM INT'L L.J. 10, 20-21 (1990) (arguing that certain "institutional characteristics" of CIT create conflicts in CIT decisions). Moreover, to the extent that inconsistent opinions by CIT judges are a concern, retaining review by the Federal Circuit is advisable to resolve any conflicts.

while this clearly has been a problem in some past cases,<sup>317</sup> whether it will continue to be an issue is unclear.

First, the Federal Circuit's *Camargo* panel<sup>318</sup> has recently indicated that unappealed decisions of the CIT "are likely to 'serve as valuable guides to the rights and obligations of the international trade community.'"<sup>319</sup> Given such a statement, the agencies may be more reluctant to refuse to pay heed to the CIT. Indeed, the CIT has itself begun to demand agency compliance with its orders by indicating that it will find agencies in contempt of court for non-compliance.<sup>320</sup> Moreover, in several recent cases where the CIT has reversed agency action and ordered the DOC to implement a different approach, the agency has complied.<sup>321</sup> Hence, this concern may no longer be of as great significance as it once was.

In sum, the reasons in favor of three-judge CIT panels are not as numerous as would appear at first glance. Under such a system, while redundant review would be eliminated, an increased burden would be placed on the CIT. Redundant review can be eliminated through other means, however, without imposing an increased burden on either the CIT or the Federal Circuit. Finally, as to the issue of significant delay, it should be noted that the Federal Circuit's usual disposition of appeals from the CIT is quite expeditious.<sup>322</sup> Hence, review by the Federal Circuit is not generally the cause of substantial delay.

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317. See, e.g., *Certain Welded Carbon Steel Standard Pipes and Tubes from India*, 57 Fed. Reg. 54,360 (Dep't Commerce 1992) (final admin. rev.) (DOC not following decision of CIT with which it disagrees regarding treatment of rebated taxes and measurement of tax incidence in home market); *Tapered Roller Bearings Four Inches or Less in Outside Diameter and Certain Components Thereof from Japan*, 55 Fed. Reg. 38,720 (Dep't Commerce 1990) (final admin. rev.) (DOC not following decision of CIT regarding treatment of U.S. direct selling expenses).

318. *Camargo Correa Metais, S.A. v. United States*, 52 F.3d 1040 (Fed. Cir. 1995).

319. *Id.* at 1043 (citing *National Corn Growers*, 643 F. Supp. at 631).

320. See *RHP Bearings v. United States*, 833 F. Supp. 933, 935 (Ct. Int'l Trade 1993).

321. For example, the DOC recently complied when it implemented a new methodology for the calculation of the adjustment for value-added taxes in an antidumping margin calculation. See *Brass Sheet and Strip from Germany*, 60 Fed. Reg. 38,542, 38,544 (Dep't Commerce 1995) (final admin. rev.). Ironically, the Federal Circuit ultimately reversed the CIT on that issue. *Federal-Mogul Corp. v. United States*, 63 F.3d 1572 (Fed. Cir. 1995). See also *Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 61 Fed. Reg. 18,375, 18,376 (Dep't Commerce 1996) (amended final admin. rev.) (DOC revised determination of "all others" cash deposit rate for AD administrative reviews pursuant to CIT decisions).

322. The current average time for disposition of appeals from the CIT is approximately one year.

*ii. Extraordinary or discretionary review by the Federal Circuit*

*a) Review proceedings under the FTA/NAFTA*

As a result of U.S. participation in NAFTA<sup>323</sup> and the FTA,<sup>324</sup> the CIT and the Federal Circuit usually do not review final agency determinations in AD and CVD cases that involve imports from Canada and Mexico.<sup>325</sup> Under Chapter 19 of both agreements, a private party has the option of having a final agency determination reviewed by a binational panel rather than by the CIT.<sup>326</sup> Each panel consists of five experts in the field of international trade.<sup>327</sup> When a panel reviews an agency's AD or CVD determination, the panel is required to follow the law of the country whose agency's decision is at issue.<sup>328</sup> Chapter 19 proceedings are designed so that panels will have 315 days in which to render their decisions.<sup>329</sup>

Generally, the decisions of binational panels are binding on the parties.<sup>330</sup> If appropriate, however, the government of a participat-

323. North American Free Trade Agreement, Dec. 8-17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

324. United States-Canada Free-Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, Can.-U.S., 27 I.L.M. 293 (entered into force Jan. 1, 1989) [hereinafter FTA]. Although the FTA is still in effect, the provisions of NAFTA supersede any FTA provisions inconsistent with NAFTA.

325. 19 U.S.C. § 1516a(g)(2) (1994). While Canada and the United States were the only parties to the FTA, NAFTA includes Mexico as well. The statute provides for a few instances in which the CIT may review certain agency determinations covered by the FTA or NAFTA. Examples include when binational panel review is not requested by any party; when a panel concludes that the determination is unreviewable by the panel; certain determinations made pursuant to prior judicial review; when binational panel review or an extraordinary challenge has been terminated; or when constitutional issues are presented. 19 U.S.C. § 1516a(g)(3), (4).

326. Although review under the Chapter 19 system is not mandatory, since the system's inception the vast majority of appeals involving these countries have been heard by binational panels. From January 1989 through September 1994, the DOC issued 51 CVD and AD determinations pertaining to Canadian imports. Of those, 24 decisions were appealed to binational panels, while only 2 were appealed to the CIT. Similarly, for the same period, the ITC issued 15 final injury determinations. Seven of those decisions were appealed to binational panels and only 4 went to the CIT. Thus, there have been some instances where appeals involving Canadian merchandise have been filed with the CIT. In those cases, appeals from the CIT would continue to be heard by the Federal Circuit. GEN. ACCT. OFFICE, U.S. CANADA FREE TRADE AGREEMENT-FACTORS CONTRIBUTING TO CONTROVERSY IN APPEALS OF TRADE REMEDY CASES TO BINATIONAL PANELS, Pub. No. GAO/GGD-95-175BR, at Briefing § 3 (1995) [hereinafter GAO REPORT].

327. See S. REP. NO. 509, 100th Cong., 2d Sess. 37 (1988), reprinted in 1988 U.S.C.C.A.N. 2395, 2432 (discussing panel selection procedures under FTA).

328. *United States-Canada Free Trade Agreement: Hearing on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases Before the Sen. Comm. on the Judiciary*, 100th Cong., 2d Sess. 71 (1988) [hereinafter *Binational Panel Hearing*] (statement of Jean Anderson, DOC counsel).

329. See *In re Fresh, Chilled, or Frozen Pork from Canada*, 13 I.T.R.D. (BNA) 1859, 1863 (ECC 1991) (noting mandate that panels render their decision within 315 days of hearing).

330. See S. REP. NO. 509, *supra* note 327, at 34, reprinted in 1988 U.S.C.C.A.N. at 2429 (noting that binational panel decision will be binding with respect to matter before panel, but that panel

ing country may request review of a panel decision by an extraordinary challenge committee ("ECC").<sup>331</sup> Each ECC consists of three experienced judges.<sup>332</sup> Unlike panels, ECCs have an abbreviated period of only ninety days in which to reach a decision.<sup>333</sup> Although the ECCs are designed to fill the role played by the Federal Circuit, the committees are not intended to function as normal courts of appeal.<sup>334</sup> To this end, the drafters of the FTA narrowly defined the grounds for appealing binational panel decisions. Therefore, only in the most extreme instances will panel decisions be reviewed by an ECC.<sup>335</sup>

The creation of this unique system of dispute resolution was the by-product of compromise. The negotiations surrounding the FTA were exhaustive and, near their conclusion, Canada and the United States found themselves with only a short period of time left to complete their drafting of the agreement.<sup>336</sup> A particularly vexing area of the negotiations was whether the FTA should include provisions to combat unfair trade practices.<sup>337</sup> The Canadian negotiators argued that such measures were not appropriate for countries that were about to create and enter into a free trade area.<sup>338</sup> In addition, the Canadian government sought to limit the application of U.S. trade laws to Canadian exports because the Canadians believed previous adverse decisions by the DOC and the ITC had been influenced by

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decision will have only non-binding persuasive effect on U.S. courts adjudicating other cases).  
331. See NAFTA, *supra* note 323, art. 1904(13) (listing prerequisites for obtaining ECC review).

332. NAFTA, *supra* note 323, art. 1904(13)(1). Although the judges named to an ECC need not be active jurists, the agreements require that they come from federal benches or the equivalent thereof in their respective countries. *Id.*

333. NAFTA, *supra* note 323, art. 1904(13)(2).

334. See S. REP. NO. 509, *supra* note 327, at 39-40, reprinted in 1988 U.S.C.C.A.N. at 2434 (stating that United States or Canada may use ECC procedure "if it alleges, among other things, that a member of a binational panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct"); *In re Fresh, Chilled, or Frozen Pork from Canada*, 13 I.T.R.D. (BNA) 1863, 1861 (ECC 1991) (explaining that ECC review procedure departs from role of normal appellate courts).

335. See *In re Fresh, Chilled, or Frozen Pork from Canada*, 13 I.T.R.D. (BNA) at 1861 (emphasizing that ECC review is granted only in "extraordinary" circumstances).

336. See *Binational Panel Hearing*, *supra* note 328, at 70 (statement of Jean Anderson, DOC counsel) ("Despite intense negotiations, it proved impossible to reach an agreement in the short time frame of FTA negotiations.").

337. See *Binational Panel Hearing*, *supra* note 328, at 63-64 (statement of Jean Anderson, DOC counsel) (admitting that although key Canadian objective was to take new approach to unfair trade practices, U.S. officials were unwilling to replace current laws in effect in international trade arena).

338. See *Binational Panel Hearing*, *supra* note 328, at 63 (statement of Jean Anderson, DOC counsel) (describing Canadian view that U.S. unfair trade laws ran counter to goal of free international trade).

politics and strong domestic lobbies.<sup>339</sup> The U.S. contingent disagreed, arguing that it was imperative that trade remedies be included in the FTA.<sup>340</sup> Furthermore, it refused to exempt Canadian products from U.S. CVD and AD laws because of a belief that the Canadian government was heavily subsidizing many of the country's industries.<sup>341</sup> Faced with a limited amount of time and realizing that the two countries would not be able to harmonize their trade remedy laws, the negotiators settled on the binational panel review process.<sup>342</sup> In this manner, they ensured that the laws of the respective countries would continue to be applied until agreement on the outstanding issues could be reached.<sup>343</sup>

Despite the contentious negotiations that led to creation of the binational panel system, both sides shared some common expectations of what they believed the system could achieve. These goals included protecting each country's sovereignty, increasing trade benefits, reducing political tensions in trade disputes, and having a fair and expedited review process. Whether all of these laudable goals have been met is far from clear. Nevertheless, AD and CVD determinations that involve Canadian and Mexican imports generally continue to bypass review by the CIT and the Federal Circuit in favor of binational panel review.<sup>344</sup>

This alternative dispute resolution mechanism unquestionably was spawned by a political process and accordingly cannot be said to yield politically neutral results. As such, outside the context of a negotiated free trade agreement, its viability is unlikely. Thus, the panel process is not herein raised as an alternative to the current normal appellate

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339. See H.R. REP. NO. 816, 100th Cong., 2d Sess., pt. 4, at 4 (1988) (noting that in course of negotiations Canadians referred specifically to U.S. CVD investigation against softwood lumber in 1986).

340. See *Binational Panel Hearing*, *supra* note 328, at 63 (statement of Jean Anderson, DOC counsel) (alluding to U.S. sentiment that FTA should encompass enforcement provisions for unfair trade practices).

341. See *Binational Panel Hearing*, *supra* note 328, at 63 (statement of Jean Anderson, DOC counsel) (noting that United States refused to capitulate to Canadian demands that Canada be exempted from U.S. CVD law).

342. See H.R. REP. NO. 816, *supra* note 339, at 63 (indicating that parties reached compromise by focusing on binational panel adjudication of FTA disputes).

343. The binational panel system was originally intended to be experimental in nature until such time as the countries could decide whether trade remedy laws were needed in the FTA. See S. REP. NO. 509, *supra* note 327, at 40, *reprinted in* 1988 U.S.C.C.A.N. at 2435 (explaining that art. 1906 of FTA provides that ch. 19 dispute settlement provisions shall be in effect for 5 years, with possible 2-year extension, pending development of substitute system of AD and CVD rules for parties, and providing that failure of parties to agree on new system within 7 years would allow either country to terminate FTA on 6-month notice). Nevertheless, when the parties drafted NAFTA, the panel process was made permanent.

344. See GAO REPORT, *supra* note 326, at Briefing section III (providing numerical tabulation of agency decisions appealed to panel rather than to CIT).



structure. Rather, the debate surrounding the effectiveness of panel review proceedings is used as a vehicle for analyzing the strengths and weaknesses of some different alternative solutions. In particular, because it is a highly discretionary level of review, the second tier of review within the Chapter 19 system is relevant to a consideration of whether discretionary appellate review in other Title VII cases would be advisable.

As discussed above, under certain narrowly defined conditions, governments may appeal panel decisions to ECCs.<sup>345</sup> Unlike in the first level of review before a panel, the standard of review applied by an ECC is always the same regardless of the parties involved.<sup>346</sup> Review by an ECC therefore does not track U.S. law regarding the second tier of review.

Indeed, the standard of review used at the second level of the FTA/NAFTA system is considerably different from the standard used by the Federal Circuit. At this second level of review, Chapter 19 does not attempt to incorporate the appellate standards from the countries' national court systems.<sup>347</sup> This is because the drafters of the agreements did not envision ECCs operating as normal courts of appeal.<sup>348</sup> Accordingly, Article 1904.13 of Chapter 19 presents the narrowest of grounds for sustaining extraordinary challenges. In order for a panel decision to be reviewed by an ECC, the government making the request must first meet a three-prong test. The first prong requires that the requesting government allege at least one of the following:

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345. See *In re Fresh, Chilled, or Frozen Pork from Canada*, 13 I.T.R.D. (BNA) 1859, 1861 (ECC 1991) (delineating narrow circumstances in which United States or Canada may seek ECC review).

346. See *id.* at 1862-63 ("The committee and the panel have separate roles and different expertise; it is not the function of a committee to conduct a traditional appellate review regarding the merits of a panel decision.").

347. See NAFTA, *supra* note 323, art. 1904.13 (listing specific grounds for triggering establishment of ECC and providing that ECC review does not involve analysis of merits of panel's decision).

348. The first ECC to be convened described the role of the committee as follows:

As its name suggests, the "extraordinary" challenge procedure is not intended to function as a routine appeal. Rather the decision of a binational panel may be challenged and reviewed only in "extraordinary" circumstances. While the legislative history of the extraordinary challenge committee mechanism is lacking in specifics, it is clear that the extraordinary challenge procedure is intended solely as "a safeguard against an impropriety or gross panel error that could threaten the integrity of the [binational panel review] process."

*In re Fresh, Chilled, or Frozen Pork from Canada*, 13 I.T.R.D. (BNA) at 1861 (quoting Summary of the U.S.-Canada Free Trade Agreement, The White House, Office of the Press Secretary, at 37 (Feb. 1988)).

- (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
- (ii) the panel seriously departed from a fundamental rule of procedure, or
- (iii) the panel manifestly exceeded its powers, authority, or jurisdiction set forth in this Article, for example by failing to apply the appropriate standard of review . . . .<sup>349</sup>

If one of these actions can be shown, the requesting government must next allege that such action "has materially affected the panel's decision."<sup>350</sup> Finally, the requesting government must allege that the panel's action "threatens the integrity of the binational panel review process."<sup>351</sup>

The standard can be seen as a highly deferential form of discretionary review, which will permit a binational panel decision to stand unless the decision is so aberrant that it threatens the very integrity of the review system. Indeed, as the standard has been interpreted by previous extraordinary challenge committees, an ECC functions only as a "safety valve" to check the conduct of binational panelists rather than to review the merits of their legal and factual conclusions.<sup>352</sup>

In the seven years since the system's inception, only three decisions have been issued by extraordinary challenge committees, each issued while the FTA was in effect.<sup>353</sup> In all three instances, the United States was the party asking for an extraordinary challenge committee to review the decision of a panel in connection with an investigation of Canadian merchandise.<sup>354</sup> Each time, the U.S. request was rejected with the committee majorities ruling that the standard for sustaining an extraordinary challenge had not been met.<sup>355</sup>

349. NAFTA, *supra* note 323, art. 1904.13(a).

350. NAFTA, *supra* note 323, art. 1904.13(b).

351. NAFTA, *supra* note 323, art. 1904.13(b).

352. See *In re Live Swine from Canada*, 15 I.T.R.D. (BNA) 2025, 2027 (ECC 1993) ("The ECC should be perceived as a safety valve in those extraordinary circumstances where a challenge is warranted to maintain the integrity of the binational panel process.").

353. *In re Certain Softwood Lumber Prods. from Canada*, No. ECC 94-1904-01 USA, 1994 WL 405928 (ECC Aug. 3, 1994); *In re Live Swine from Canada*, 15 I.T.R.D. (BNA) 2025; *In re Fresh, Chilled, or Frozen Pork from Canada*, 13 I.T.R.D. (BNA) 1859 (ECC 1991).

354. See *supra* note 353.

355. See *In re Certain Softwood Lumber Prods. from Canada*, 1994 WL 405928, at \*28 (rejecting extraordinary challenge where United States failed to establish that panel member violated standards of conduct as specified by NAFTA art. 1904.13); *In re Live Swine from Canada*, 15 I.T.R.D. (BNA) at 2030-31 (dismissing extraordinary challenge because of United States' failure to satisfy criteria for reversing panel decision); *In re Fresh, Chilled, or Frozen Pork from Canada*, 13 I.T.R.D. (BNA) at 1865-66 (dismissing extraordinary challenge because state failed to meet standards set under FTA art. 1904.13).

Not surprisingly, as a result of these decisions, there has been intense debate over what role ECCs were intended to perform. Nowhere is the issue discussed more fervently than in *Softwood Lumber from Canada*.<sup>356</sup> In an extensive and at times caustic dissent, the sole American member of the committee, Judge Malcolm Wilkey,<sup>357</sup> argued that the U.S. request should have been granted because the panel decision at issue had reached "egregiously erroneous results."<sup>358</sup> Further, Judge Wilkey stated that he feared the Canadian majority had ensured that future challenge committees would have "no role at all" because of the narrow interpretation that had been given to the review standard.<sup>359</sup> He noted that the majority opinion held that the role of the ECC is not to determine whether the law the panel applied was "absolutely correct," but merely to determine "whether the panel conscientiously attempted to apply the appropriate law as they understood it."<sup>360</sup>

The *Softwood Lumber* ECC decision thus echoes some of the debate that has surrounded the second tier of appellate review in the U.S. courts, namely, to what extent should the second reviewing body defer to the decision of the lower reviewing body.<sup>361</sup> Regardless of whether Judge Wilkey's or the view of the majority in *Softwood Lumber* is closer to what the FTA drafters envisioned, it is clear that under the standard set forth in Article 1904, an administrative agency's determination normally will not be reviewed by an appellate body. In that sense, the ECC standard is at the far end of the spectrum of "hands off" approaches. Furthermore, Judge Wilkey's criticism highlights one of the difficulties inherent in discretionary/extraordinary review, namely, that the sharper controversy may be the issue of whether second-tier reviews should be entertained rather than the merits presented therein. Finally, the need for adequate appellate guidance also should not be disregarded as an issue where discretionary review

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356. *In re* Certain Softwood Lumber Prods. from Canada, 1994 WL 405928, at \*45 (Wilkey, J., dissenting).

357. Retired Judge Wilkey is a former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit.

358. *In re* Certain Softwood Lumber Prods. from Canada, 1994 WL 405928, at \*74 (Wilkey, J., dissenting).

359. *Id.* at \*45 (Wilkey, J., dissenting).

360. *Id.* at \*78 (Wilkey, J., dissenting) (citing majority opinion of Hart, J., at \*21).

361. *See supra* notes 179-97 and accompanying text.

is considered.<sup>362</sup> These and other aspects of discretionary review are discussed below.

b) *Discretionary review by the Federal Circuit*

One possible alternative that is discussed increasingly among all courts of appeal, is the notion of discretionary appellate review.<sup>363</sup> Under such a system, CIT decisions would be reviewed by the Federal Circuit on a discretionary basis. This approach could itself operate under two formulae. One approach would give the Federal Circuit discretion whether to hear a Title VII appeal from the CIT, regardless of whether the CIT affirmed or reversed the agency's decision. The other approach would permit CIT decisions adverse to the DOC or the ITC to remain appealable as a matter of right, but would require private litigants' appeals to be conducted on a discretionary basis.<sup>364</sup>

The primary advantage to adopting a discretionary two-tier system of review in Title VII cases would be the economy the system would potentially bring to expenditure of the Federal Circuit's resources.<sup>365</sup> Conceivably under such a system, the Federal Circuit would review only the most significant international trade issues. Lesser issues would be decided by the CIT and would not be subject to further judicial review. While this advantage is worthy of consideration, the majority of scholars who have addressed the issue of two-tier discretionary review have argued that such a system creates more difficulties than it is worth.<sup>366</sup>

The most troublesome attribute of a two-tier discretionary review system is that it introduces an extra step into the judicial process, namely, a briefing and a determination as to whether leave to appeal

362. The GAO REPORT concluded that another difficulty for binational panels is the fact that, unlike CIT decisions, panel decisions typically are not subject to subsequent review and therefore lack appellate guidance in application of the standard of review. GAO REPORT, *supra* note 326, at Briefing § 1.

363. See generally Curry & Goodman, *supra* note 287, at 19 (illuminating concept of discretionary appellate review of district court opinions); Kathy Lanza, *Discretionary Review*, in 2 FEDERAL COURTS STUDY COMM. WORKING PAPERS AND SUBCOMM. REPORTS (July 1, 1990).

364. See HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 176 (1973) (proposing that double-standard system of review be applied generally to administrative decisions, and justifying approach based on belief that "it is enough to grant an aggrieved citizen one judicial look at the action of a disinterested governmental agency, unless a superior judicial body believes the case presents a problem going beyond a particular instance.").

365. See Curry & Goodman, *supra* note 287, at 20 (hypothesizing that under discretionary two-tiered review, appellate courts would review only those cases that involve important legal issues).

366. See Curry & Goodman, *supra* note 287, at 21-23 (observing that "the disadvantages of discretionary review are immediately obvious and weighty"); Legomsky, *supra* note 314, at 1315 (cautioning against use of two-tier discretionary review).

should be granted or denied by the appellate court.<sup>367</sup> In addition to the cost and delay attendant to such a screening process, the standard applied by the Federal Circuit in deciding whether to grant an appeal would itself likely become a source of controversy.<sup>368</sup>

Further, by removing litigants' absolute right to appeal to the Federal Circuit, presumably a larger number of cases ultimately would be resolved by the CIT. This is generally viewed as a disadvantage of discretionary review because district court judges do not usually sit in panels. Thus, because each case is decided by a single judge, rather than by a panel, there exists the potential for greater divergence in the law.<sup>369</sup> Because review of Title VII cases rests only with the CIT and not with multiple district courts, this is not a significant issue with regard to Title VII cases.<sup>370</sup> Moreover, because CIT judges strive to follow each others' precedent, again, this particular factor does not militate strongly against discretionary review.<sup>371</sup>

A consideration that does weigh against discretionary review is that the Title VII cases recently on the Federal Circuit's docket generally have involved significant legal issues.<sup>372</sup> Additionally, because Title

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367. See Curry & Goodman, *supra* note 287, at 21 (discussing problems created by extra step, including additional legal fees and additional briefs needing review).

368. See Curry & Goodman, *supra* note 287, at 20 ("Discretionary review . . . would require in every appealed case a determination now required in none: whether to grant or deny leave to appeal."). The problems that have arisen in the context of discretionary review by ECCs under the FTA and NAFTA clearly demonstrate the potential for controversy engendered by such determinations. See *supra* notes 330-35, 345-62 and accompanying text (discussing standard of review problem for ECC proceedings).

369. See Curry & Goodman, *supra* note 287, at 12 (recognizing ability of appellate courts under current scheme to "develop and maintain a uniform and coherent case-law for a large geographic area").

370. See 28 U.S.C. § 1581(c) (1994) (vesting CIT with exclusive jurisdiction over review of AD and CVD determinations of DOC and ITC); *id.* § 1581(f) (vesting CIT with exclusive jurisdiction over disputes concerning release of information under administrative protective order in AD and CVD cases); *id.* § 1581(i) (granting CIT exclusive jurisdiction over residual international trade-related matters); see also *supra* notes 11-16 and accompanying text.

371. See *supra* note 316 and accompanying text (discussing degree of consistency among CIT judges and adherence to each others' precedents).

372. See, e.g., *Hosiden Corp. v. United States*, 85 F.3d 1561 (Fed. Cir. 1996) (regarding ITC's determination of like product for purposes of its injury analysis in AD investigation, which was broader than DOC's determination of class or kind of product in its analysis of pricing); *Torrington Co. v. United States*, 82 F.3d 1039 (Fed. Cir. 1996) (regarding calculation of AD duties on products imported into U.S. but re-exported prior to sale taking place in U.S. on which DOC could calculate price, and regarding treatment of certain home market price adjustments in determination of prices); *Saarstahl AG v. United States*, 78 F.3d 1539 (Fed. Cir. 1996) (regarding continuation of subsidy when company to which subsidy was originally granted is sold); *Torrington Co. v. United States*, 68 F.3d 1347 (Fed. Cir. 1995) (regarding DOC's obligation to verify information); *Torrington Co. v. United States*, 44 F.3d 1572 (Fed. Cir. 1995) (regarding DOC's methodology for calculating AD assessment rates and deposit rates); *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511 (Fed. Cir. 1993) (involving several issues related to treatment of rebated taxes in AD cases under 19 U.S.C. § 1677a(d)(1)(C)); *Allied-Signal Aerospace Co. v. United States*, 966 F.2d 1185 (Fed. Cir. 1993) (regarding DOC's newly adopted methodology for applying adverse inference against party).

VII cases constitute a minor portion of the Federal Circuit's docket, there appears to be no true need to reduce further the number by means of an artificial screening process.<sup>373</sup>

As such, when the various points in favor of and against discretionary review by the court of appeals are analyzed in the context of the realities of Title VII cases, it seems that discretionary review may not be the best solution. While eliminating some redundancy, discretionary review would cause additional costs to be incurred and would not reduce greatly the number of appeals. Appellate judicial resources can better be conserved through the application of a different review standard.

### III. THE APPELLATE REVIEW PROCESS IN TITLE VII CASES COMPARED WITH FEDERAL CIRCUIT REVIEW IN OTHER CASES

An analysis of other cases within the Federal Circuit's jurisdiction highlights two points relevant to a discussion of the court's approach to the standard of review in Title VII cases. First, as to questions of fact, a redundant standard of review exists in almost no other area of the court's jurisdiction.<sup>374</sup> The one notable exception, the Federal Circuit's review of decisions of the Court of Federal Claims reviewing determinations of special masters in Vaccine Act cases, has generated a great deal of controversy for the court.<sup>375</sup> Hence, if anything, the latter types of cases lend further support to the proposition that the *Atlantic Sugar* standard should be reevaluated. Second, the procedures surrounding other cases within the Federal Circuit's jurisdiction, when compared to Title VII cases, illustrate why certain of the alternatives that have been suggested in lieu of the *Atlantic Sugar* approach are not well-suited for Title VII cases.

The analysis above illustrates the difficulties of drawing parallels to MSPB cases and section 337 cases.<sup>376</sup> Addressed below are customs cases and certain other broad categories of Federal Circuit jurisdic-

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373. See Curry & Goodman, *supra* note 287, at 22. Curry and Goodman explain: [A]gency action is unsuitable for discretionary two-tier review unless two conditions are met. First, the volume of appeals must be large and burdensome, even after filtration through the district courts: otherwise, curtailment of the right to appellate review would not be worth the candle. Second, the proportion of those appeals involving legal issues or important interests must be very small; otherwise, leave to appeal would be granted too often to achieve real savings.

374. See *supra* part II.C.3.b.ii.

375. See *infra* notes 439-68 and accompanying text. As discussed below, there are reasons for distinguishing such cases from Title VII cases. See *id.*

376. See *supra* notes 254-311 and accompanying text.

tion.<sup>377</sup> The most significant factors relevant to a discussion of alternative approaches to be gleaned from these other cases are: (1) was the underlying administrative proceeding one in which there was an evidentiary hearing; and (2) if an intermediate level of review exists, was there *de novo* review or a trial or evidentiary proceeding available at the intermediate level. Both of these factors, when applied to Title VII cases, suggest that although the *Atlantic Sugar* approach may be excessively duplicative, an intermediate level of review nonetheless should be retained, albeit with a different approach to the second tier of review.

Finally, it is important to note that, as to questions of law, Title VII cases do not substantially diverge, in theory or in practice, from other areas of the court's jurisdiction. Because the traditional judicial approach is for the reviewing court itself to evaluate questions of law, some degree of redundancy is inherent in any framework where more than one tier of judicial review exists. Even so, *Chevron* deference to the agency in many instances will reduce duplicative review. Indeed, because of *Chevron* deference, the Federal Circuit may be more likely to analyze the decision of the CIT to determine whether the lower court misapplied/misapprehended the standard of review by substituting its own interpretation for that of the agency.<sup>378</sup>

#### A. *The Standard of Review Applied by the Federal Circuit in Customs Cases*

The review process for customs cases highlights the somewhat illogical result obtained in Title VII cases. In both types of cases, the CIT is charged with reviewing agency actions or decisions.<sup>379</sup> In both types of cases, the CIT's final decisions are subject to mandatory review by the Federal Circuit.<sup>380</sup> The Federal Circuit, however,

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377. See *infra* notes 379-468 and accompanying text.

378. See *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1579 (Fed. Cir. 1995) (noting that under *Chevron*, reviewing courts must accord substantial deference to agency decisions).

379. See 28 U.S.C. § 1581(a), (b), (g), (h) (1994) (providing exclusive CIT jurisdiction over certain Customs decisions). The CIT reviews protests regarding appraisement, classification, duties, and similar decisions by Customs. *Id.* § 1581(a), (h). In addition, the CIT reviews decisions by the Secretary of the Treasury to revoke or deny customs broker licenses. *Id.* § 1581(g). Finally, the CIT hears cases brought by the United States to recover civil penalties or bonds relating to imported merchandise. *Id.* § 1582. See also *id.* § 1583 (regarding counterclaims, cross-claims, and third-party actions).

380. See *id.* § 1295(a)(5) (providing that Federal Circuit "shall have exclusive jurisdiction . . . of an appeal from a final decision of the United States Court of International Trade" and not mentioning any provision for discretionary review of final decisions) (emphasis added). By means of comparison, U.S. law explicitly provides that when a CIT judge issues an interlocutory order, the Federal Circuit "may, in its discretion, permit an appeal to be taken from such order," provided that the CIT judge certifies the appeal with an accompanying statement that "a controlling question of law is involved with respect to which there is a substantial ground for

applies a standard of review in customs cases that is different from the standard applied in Title VII cases.

In most customs cases, pursuant to a statutorily specified standard of review, the CIT renders a decision based on the record made before that court.<sup>381</sup> To that record and decision by the CIT, the Federal Circuit freely applies the same traditional standards of review that the Federal Circuit applies in other cases appealed from a district court.<sup>382</sup> Congress also has specified a standard of review for the CIT in Title VII cases, but that standard is based entirely on a pre-existing record, rather than a record established at trial before the CIT.<sup>383</sup> With Title VII cases, a peculiar result is achieved in that the Federal Circuit has imposed upon itself a constraint whereby, rather than relying on the traditional standards of review that would be available to it, the court applies the standards that Congress has instructed the CIT to use. This practice leads to the seemingly incongruous result that the appellate court treats decisions of the same court in a significantly disparate manner.

Customs classification cases, which represent the bulk of customs cases before the Federal Circuit, like patent cases, can present both issues of law and fact. The meaning of a tariff classification term is a question of law, which the Federal Circuit theoretically reviews *de novo*.<sup>384</sup> The determination whether the merchandise in question comes within a particular tariff provision, as properly interpreted, is a question of fact.<sup>385</sup> Questions of fact are not reviewed *de novo*, but are reviewed under the clearly erroneous standard.<sup>386</sup> Classifica-

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difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation." *Id.* § 1292(d)(1).

381. *Id.* § 2640(a)(1), (2) (providing for CIT review on basis of CIT record in customs cases involving denial of protests and denial of petitions by interested parties concerning classification and rate of duty). *But see id.* § 2640(d) (providing that in cases involving Customs' accreditation of private testing laboratories, CIT review shall be made on basis of record before Customs at time of administrative decision or order).

382. *See, e.g.,* *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1408 (Fed. Cir. 1995) (reviewing *de novo* question of law in customs classification case); *F.F. Zuniga a/c Refractorios Monterrey, S.A. v. United States*, 966 F.2d 1203, 1205 (Fed. Cir. 1993) (declaring that factual findings by CIT in customs case will be upheld unless clearly erroneous); *Hoechst Aktiengesellschaft v. Quigg*, 917 F.2d 522, 526 (Fed. Cir. 1990) (reviewing *de novo* question of law); *Durango Assocs., Inc. v. Reflange, Inc.*, 843 F.2d 1349, 1357 (Fed. Cir. 1988) (reviewing factual finding by district court for clear error).

383. *See* 28 U.S.C. § 2640(b) (providing that in CIT cases commenced under 19 U.S.C. § 1516a, CIT shall review case in manner specified in that section); 19 U.S.C. § 1516a(b) (1994) (specifying "substantial evidence on the record" standard and defining record for review).

384. *Totes, Inc. v. United States*, 69 F.3d 495, 497-98 (Fed. Cir. 1995) (citing *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994)).

385. *Id.* (citing *Marcel Watch Co. v. United States*, 11 F.3d 1054, 1056 (Fed. Cir. 1993)).

386. *Nidec Corp. v. United States*, 68 F.3d 1333, 1336 (Fed. Cir. 1995).



tion cases are best understood, however, if the full process is briefly described.

Customs classification cases go through several steps. First, Customs classifies the relevant imported merchandise under a particular subheading of the Harmonized Tariff Schedule of the United States ("HTS"). An importer dissatisfied with such a classification can protest Customs' classification by following certain statutory procedures.<sup>387</sup> If Customs denies the protest, then the importer can file an appeal with the CIT.<sup>388</sup> At the CIT, the party challenging Customs' classification must establish that Customs' classification is in error.<sup>389</sup> If the party meets this burden, the CIT must find the correct result "by whatever procedure is best suited to the case at hand."<sup>390</sup> The CIT renders a decision on the basis of the record made before the court.<sup>391</sup> The CIT may decide a classification issue after a trial,<sup>392</sup> by stipulation of facts by the parties,<sup>393</sup> by judgment on the pleadings<sup>394</sup> or based on a motion for summary judgment.<sup>395</sup>

Where the CIT holds a trial to resolve the factual aspects of a tariff classification issue, it is the CIT's decision that the Federal Circuit reviews.<sup>396</sup> Pursuant to 28 U.S.C. § 2639(a)(1), the factual basis for Customs' classification determinations are presumed to be correct.<sup>397</sup> Therefore, the appellant challenging a classification bears the burden of proof before the CIT.<sup>398</sup> Once the CIT reaches a

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387. See 19 U.S.C. §§ 1514-1515 (specifying Customs protest and review procedures).

388. See *id.* § 1514(a) (stipulating that certain Customs decisions are final and conclusive, unless valid protest is filed, or unless action is filed in CIT contesting denial of protest).

389. See *Norfolk & W. Ry. v. United States*, 869 F. Supp. 974, 979 (Ct. Int'l Trade 1994) (indicating that CIT conducts de novo review to ensure that "correct result" was reached).

390. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). The CIT is required to determine the correct result, and will decide the classification itself, or may, in its discretion, remand the case to Customs. *Id.* at 880.

391. 28 U.S.C. § 2640(a)(1) (1994).

392. See CT. INT'L TRADE R. 40(a) (providing generally for request for trial).

393. See CT. INT'L TRADE R. 58.1 (providing generally for stipulated judgment on agreed facts).

394. See CT. INT'L TRADE R. 12(c) (providing generally for motion for judgment on pleadings).

395. See CT. INT'L TRADE R. 56 (providing generally for motion for summary judgment). Challenges to Customs' appraisal and valuation decisions work in substantially the same manner as challenges to classification decisions. See generally THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, A HISTORY 1982-1990, at 332-33 (1991).

396. See *Nidec Corp. v. United States*, 68 F.3d 1333, 1336 (Fed. Cir. 1995) (discussing "clearly error" standard in reference to fact-finding of CIT trial judge).

397. *Totes, Inc. v. United States*, 69 F.3d 495, 498 (Fed. Cir. 1995) (citing 28 U.S.C. § 2639(a)(1) (1988)).

398. *Id.* (citing 28 U.S.C. § 2639(a)(1) (1988)); *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994).

decision, however, the Federal Circuit reviews the findings of the CIT under the clearly erroneous standard.

Although the clearly erroneous standard is typically less deferential to the trier-of-fact than the substantial evidence standard, this distinction is strikingly less apparent in Title VII and customs cases. As noted above, under the substantial evidence standard as reapplied by the Federal Circuit in Title VII cases, the court may not substitute its finding for another reasonable one made by the agency.<sup>399</sup> The Federal Circuit similarly has stated:

[The clearly erroneous standard] plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently . . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it.<sup>400</sup>

Thus, as applied by the Federal Circuit, the clearly erroneous standard accords a fair amount of deference to the decision below. This is noteworthy because in customs cases, the CIT acts as its own trier-of-fact, whereas in Title VII cases, the CIT reviews and filters the evidence presented to the agency. Hence, in customs cases, the Federal Circuit accords some deference to the CIT and does not review Customs' determination "anew." In contrast, in Title VII cases, little deference is afforded to the CIT and another substantial evidence review of the agency's findings is conducted.

While it may not conduct its own trial, the CIT is not any less expert in Title VII proceedings than it is in customs cases. Moreover, the CIT presumably is as adept at applying a statutory standard of review in Title VII cases as it is at performing the functions of a trial court in customs cases. Indeed, it is difficult to explain why, when the Federal Circuit conducts its review, the CIT's decisions in Title VII cases should be treated as though they do not exist, while accorded deference in customs cases. In both types of cases, it is the CIT's decision that should be reviewed. The agency's decision should be used only as necessary to determine whether the CIT erred.

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399. See *supra* notes 116-24 and accompanying text (explaining substantial evidence test).

400. *Superior Wire v. United States*, 867 F.2d 1409, 1414 (Fed. Cir. 1989) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985)); see also *F.F. Zuniga v. United States*, 996 F.2d 1203, 1205 (Fed. Cir. 1993) (applying clearly erroneous standard to review CIT's finding upholding Customs' denial of duty-free status for imported kiln furniture). Professors Childress and Davis state that "[u]nder clearly erroneous review, a court may in a sense substitute its judgment for that of the trial court, even on findings that are not unreasonable." Childress & Davis, *supra* note 21, § 15.03, at 15-17. This last statement does not appear consistent with the Federal Circuit's review of the CIT's fact-finding in customs cases.

Furthermore, as discussed below, even under the de novo standard of review applied to questions of law in customs cases, the Federal Circuit seems to accord some deference to the CIT.

Where the question presented is the interpretation of statutory language contained in the laws administered by Customs, the Federal Circuit reviews de novo, inasmuch as such a review entails a question of law.<sup>401</sup> In so doing, however, the Federal Circuit determines whether the initial Customs decision is based on a permissible construction of the trade statutes.<sup>402</sup> Moreover, where the court is construing an ambiguous statute, it has recognized that a reasonable interpretation by the agency that implements it is entitled to deference.<sup>403</sup> Nevertheless, the agency's interpretation must be *reasonable*. Thus, even where the CIT has upheld Customs' statutory interpretation, if the Federal Circuit disagrees because, for example, the substantive effect of such an interpretation is inconsistent with the rest of the relevant law, the appellate court will reverse.<sup>404</sup>

The Federal Circuit also reviews challenges to regulations promulgated by Customs. Such challenges are initially decided by the CIT, with a right of appeal to the Federal Circuit. The Federal Circuit then reviews the CIT's interpretation of the relevant statutes and

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401. *Regiomontana v. United States*, 64 F.3d 1579, 1582 (Fed. Cir. 1995); *see also* *Aviall of Texas, Inc. v. United States*, 70 F.3d 1248, 1249 (Fed. Cir. 1995) (reviewing de novo Customs' failure to renew importer's blanket certification based on meaning of term "inadvertence" as used in 19 U.S.C. § 1520(c)(1)); *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) (applying de novo standard of review to CIT's affirmation of Customs' statutory interpretation of Foreign Trade Zones Act, 19 U.S.C. § 81c (1994), which is administered by Customs (citing *Guess? Inc. v. United States*, 944 F.2d 855, 857 (Fed. Cir. 1991))); *Superior Wire*, 867 F.2d at 1411-12 (stating that while Federal Circuit must review trial court's findings of fact under clearly erroneous standard, it is not so restricted with respect to legal conclusions and will reverse conclusions on lesser grounds).

402. *Goodman Mfg.*, 69 F.3d at 508 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

403. *Id.* at 510 (citing *Shalala v. Guernsey Memorial Hosp.*, 115 S. Ct. 1232, 1236 (1995); *Chevron*, 467 U.S. at 842-43). *Chevron* deference, however, may not apply to Customs' interpretation of the HTS in routine classification cases. *See, e.g.*, *Crystal Clear Indus. v. United States*, 44 F.3d 1001, 1003 n.\* (Fed. Cir. 1995) (per curiam); *Anval Nyby Powder AB v. United States*, 927 F. Supp. 463, 467-69 (Ct. Int'l Trade 1996). Deference to agency interpretations of a statute that it is charged with administering should not be confused with the statutory presumption of correctness that attaches to the factual aspects of agency action. *See Goodman Mfg.*, 69 F.3d at 508 (distinguishing these two concepts). Under 28 U.S.C. § 2639(a)(1) (1994), this presumption is applicable to actions commenced under 19 U.S.C. §§ 1515, 1516, and 1516a. *Goodman Mfg.*, 69 F.3d at 508.

404. *See Goodman Mfg.*, 69 F.3d at 510, 512 (disagreeing with interpretation of CIT when CIT deferred to Customs' method of calculating allowance for steel scrap).

regulations de novo,<sup>405</sup> but applies *Chevron* deference to Customs' interpretation of the statute.<sup>406</sup>

Although there is a semantic difference between the de novo and in-accordance-with-law standards (the latter of which is applied in Title VII cases), it is unclear whether the Federal Circuit in practice views its role differently under one or the other standard. Indeed, the Federal Circuit's application of these two standards in international trade and customs cases appears to be very similar.<sup>407</sup> Rather, what seems to vary is the degree to which the appellate court focuses on the decision of the CIT (versus that of the agency).

In conducting a recent so-called de novo review of a CIT grant of summary judgment in favor of the government in a classification case, the Federal Circuit's analysis started far from the *tabula rasa* that one would expect in a de novo review.<sup>408</sup> In *Totes, Inc. v. United States*,<sup>409</sup> the court devoted a good portion of its opinion to the holding and reasoning of the CIT and to the issue of whether the lower court erred.<sup>410</sup> In fact, the Federal Circuit concluded by stating, "The Court of International Trade correctly interpreted the HTSUS in determining that the merchandise is properly classified under subheading 4202.92.9020, HTSUS, and is not classifiable under subheading 8708.99.50, HTSUS."<sup>411</sup> This decision thus highlights the Federal Circuit's recognition of the expertise of the CIT, even as to questions of legal interpretation, in the area of customs law. Increasingly, the Federal Circuit seems to be focusing on the decisions of the CIT, rather than the underlying agency action or determination, and reviewing the lower court's decision.

Such an approach is consistent with both *Chevron* and the standard articulated by the Supreme Court in NLRB cases. That is, the appellate court should determine whether the lower court misappre-

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405. *Target Sportswear, Inc. v. United States*, 70 F.3d 604, 606 (Fed. Cir. 1995) (citing *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993)).

406. *National Customs Brokers and Forwarders Ass'n of Am., Inc. v. United States*, 59 F.3d 1219, 1221 (Fed. Cir. 1995).

407. *See, e.g., Hosiden Corp. v. United States*, 85 F.3d 1561, 1567 (Fed. Cir. 1996) (explaining that in Title VII cases, "[m]atters of statutory interpretation receive plenary review on appeal," subject to *Chevron* deference to agency); *Guess? Inc. v. United States*, 944 F.2d 855, 857-58 (Fed. Cir. 1991) (noting that in customs cases, court decides "de novo the proper interpretation of the governing statute and regulations" also subject to *Chevron* deference to agency).

408. A ruling on a motion for summary judgment is a question of law and thus is subject to de novo review. *Goodman Mfg.*, 69 F.3d at 508; *Totes, Inc. v. United States*, 69 F.3d 495, 497-98 (Fed. Cir. 1995). The granting by the CIT of a motion to dismiss a case (challenging Customs' liquidation) for lack of jurisdiction also is reviewed de novo by the Federal Circuit as a matter of law. *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345 (Fed. Cir. 1995).

409. 69 F.3d 495 (Fed. Cir. 1995).

410. *Totes, Inc.*, 69 F.3d at 497-500.

411. *Id.* at 500.

hended or misapplied the standard of review, which subsumes the question of whether the lower court properly accorded *Chevron* deference as to certain legal issues.<sup>412</sup> In essence, then, in only limited circumstances would the appellate court need to conduct true de novo review of a legal question. Indeed, while issues of law are uniformly reviewed by the courts of appeal on a de novo basis, a legitimate question might arise as to the necessity of two tiers of virtually identical review in such cases. Thus, through case law, the de novo standard has evolved into a hybrid whereby deference is accorded to the agency in many instances, and the lower court's decision is not necessarily ignored.<sup>413</sup>

The Federal Circuit's apparent different treatment of the CIT's legal analysis in customs cases and Title VII cases is inexplicable. The CIT reviews both Customs and the ITC and DOC for the reasonableness of their statutory interpretations under *Chevron* deference. It appears, however, that the Federal Circuit's de novo review in customs cases relies more heavily on the CIT's analysis than it does in Title VII cases. Given that the CIT's expertise and function in both customs and AD and CVD cases are virtually identical, this result truly is anomalous.

### B. Other Cases in the Federal Circuit's Jurisdiction

In addition to patent and international trade/customs appeals, the Federal Circuit has exclusive jurisdiction over several other areas of

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412. See *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

413. Congress' statutory prescription of the standard of review to be applied in veterans cases tends to support a distinction between true de novo review, where the Federal Circuit decides for itself a question of law, versus the court's setting aside agency regulations or interpretations thereof that are not in accordance with law. See *Travelstead v. Derwinski*, 978 F.2d 1244, 1251 (Fed. Cir. 1992). Legal interpretations of a statute by the Court of Veterans Appeals are reviewed by the Federal Circuit de novo. *Id.*; see also 38 U.S.C. § 7292 (1994) (specifying that "the Federal Circuit shall decide all relevant questions of law") (emphasis added); *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991) (asserting that de novo is correct standard of review for appeals from Veterans Court and that Federal Circuit can set aside decisions that are unconstitutional, violative of statute, or arbitrary). Regulations "issued pursuant to a statutory grant of authority relating to an agency's practice under a statute which it is charged to implement are of legislative effect and must be given controlling weight by the court unless they are arbitrary, capricious, or manifestly contrary to the statute." *Travelstead*, 978 F.2d at 1250 (citing *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977)). Notably, the Federal Circuit has inserted the modifier "manifestly," whereas the statute simply states "not in accordance with law" and "in excess of statutory . . . authority." See *id.* Hence, the court may be according even more deference to the agency than Congress intended. "In contrast, agency pronouncements that are merely interpretive are given lesser deference, varying with such factors as the timing and consistency of the agency's position and the nature of its expertise." *Id.* (citing *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). As such, for veterans appeals, the *Chevron* doctrine effectively seems to have been codified.

law. These include appeals from certain specialty courts, specifically, appeals from final decisions of the United States Court of Federal Claims<sup>414</sup> and the Court of Veterans Appeals.<sup>415</sup> The Federal Circuit also hears appeals of final orders/decisions made by the MSPB<sup>416</sup> and agency boards of contract appeals.<sup>417</sup> Lastly, actions brought under certain enumerated provisions of the U.S. Code are also included in the Federal Circuit's exclusive jurisdiction.<sup>418</sup>

### 1. *Boards of Contract Appeals*

Federal agencies have the ability to create boards of contract appeals to review the award of contracts to various vendors. Appeals from such board decisions are vested exclusively within the jurisdiction of the Federal Circuit.<sup>419</sup> The standard of review applied by the Federal Circuit is governed by statute:

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.<sup>420</sup>

In the case of appeals from agency boards of contract appeals, just as with appeals from Title VII decisions, the statutorily prescribed standard of review includes both the substantial evidence test and the arbitrary and capricious test. Unlike with Title VII cases, however, the statute dictates that the Federal Circuit apply these two tests.<sup>421</sup> Moreover, the statute directs the Federal Circuit to apply these tests to the contract board's decision and not to the initial agency

414. 28 U.S.C. § 1295(a)(3) (1994).

415. 38 U.S.C. § 7292(b)(1).

416. 28 U.S.C. § 1295(a)(9).

417. *Id.* § 1295(a)(10) (providing for appeal of agency board of contract appeals decisions under § 8(g)(1) of Contract Disputes Act of 1978).

418. *See id.* § 1295(a)(1), (2) (providing for appeal under Little Tucker Act); *id.* § 1295(a)(8) (providing for appeal under Plant Variety Protection Act); *id.* § 1295(a)(11) (providing for appeal under § 211 of Economic Stabilization Act of 1970); *id.* § 1295(a)(12) (providing for appeal under § 5 of Emergency Petroleum Allocation Act of 1973); *id.* § 1295(a)(13) (providing for appeal under § 506(c) of Natural Gas Policy Act of 1978); *id.* § 1295(a)(14) (providing for appeal under § 523 of Energy Policy and Conservation Act).

419. 28 U.S.C. § 1295(a)(10).

420. 41 U.S.C. § 609(b) (1994).

421. *Id.*; *Milmark Servs., Inc. v. United States*, 731 F.2d 855, 857 (Fed. Cir. 1984); *Erickson Air Crane Co. of Washington Inc. v. United States*, 731 F.2d 810, 814 (Fed. Cir. 1984).

action.<sup>422</sup> Hence, just as with other types of cases discussed above, Congress has specifically spoken to the Federal Circuit's standard of review, in contrast to its silence in Title VII cases.

Also, as with MSPB cases, the agency contract boards effectively conduct trials. In rendering their decisions, contract boards use a *de novo* standard as to questions of law and a preponderance of the evidence standard as to questions of fact (i.e., just like a district court civil case).<sup>423</sup>

Furthermore, because the contract board is part of the same agency that makes the initial decision being reviewed by the board, it seems that such cases effectively involve only a single tier of true review, performed by the Federal Circuit. As such, the redundancy present in review of Title VII cases does not exist with regard to contract board cases. The absence of an intermediate tier of judicial review in these types of cases, however, does not lend support to the suggestion that CIT review be eliminated. The nature of the "decision" challenged in contract board cases is agency action—rather than agency decision-making—taken at an operational level. Thus, while some judicial scrutiny of such action is advisable, it would seem to be unnecessary to interpose another layer of judicial review here. Title VII decision-making, by contrast, is not part of the ITC's or the DOC's operational activities. This distinction is pivotal to the question of how much judicial review is appropriate. Moreover, even though part of the same agency, the contract board of appeals nevertheless acts in a reviewing capacity. In contrast, there is no appellate board that reviews the ITC and the DOC in Title VII proceedings, and as discussed previously, it would make no sense to create one in lieu of the institutional expertise of the CIT.<sup>424</sup>

Also, notably, as to questions of law, a contract board's decision is not considered final.<sup>425</sup> Thus, it seems that somewhat less deference is accorded to the decisions of agency boards of contract appeals than to those of the CIT.<sup>426</sup> Such a result is not illogical, given that the intermediate appellate decision-making body which the Federal Circuit reviews in contract board cases is part of the same agency that made the initial decision subject to the intermediate appeal. This is not the situation in Title VII cases, where the intermediate decision-

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422. 41 U.S.C. § 609(b).

423. *Protest of Lanier Business Prods., Inc.*, 85-2 B.C.A. (CCH) ¶ 18,033 (1995); *L.A. Sys. v. Department of Commerce*, 95-2 B.C.A. (CCH) ¶ 27,822 (1994); *Grumman Data Sys. Corp. v. Department of the Air Force*, 93-2 B.C.A. (CCH) ¶ 25,776 (1992).

424. See *supra* notes 138-45 and accompanying text (discussing expertise of CIT).

425. 41 U.S.C. § 609(b).

426. *Id.*

making body is an Article III court.<sup>427</sup> Hence, even more deference should be accorded the CIT.<sup>428</sup>

Indeed, it appears that Congress did in fact accord more deference to the CIT. With regard to Federal Circuit review of Title VII cases, the statute is silent as to whether the court should review the underlying agency action or the decision of the CIT and as to what standard of review the Federal Circuit should apply, thus permitting the Federal Circuit to apply a different standard than set forth at 19 U.S.C. § 1516a, deferring more to the expertise of the CIT. Thus, it would be appropriate for the Federal Circuit to exercise the freedom in review that Congress apparently intended.

## 2. *United States Court of Federal Claims*

The Federal Circuit has exclusive jurisdiction to hear appeals from the United States Court of Federal Claims.<sup>429</sup> The Court of Federal Claims' primary realm of jurisdiction is embodied in the Tucker Act.<sup>430</sup> The statute provides:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.<sup>431</sup>

The Court of Federal Claims has exclusive jurisdiction over these matters if the claim at issue exceeds ten thousand dollars.<sup>432</sup> The

427. Article III courts are structurally more independent than their legislative counterparts (Article I courts) or executive branch departments or agencies. This is due to: (1) the life tenure afforded Article III judges; (2) Article III courts not being connected to any particular government agency; (3) Article III courts having their jurisdiction largely defined by the Constitution; and (4) the limitation on reductions in salaries of active Article III judges. Due to this greater degree of independence, it is generally assumed that the decisions of an Article III court are less likely to be affected by political agendas or the majority position of the populace on a given issue or at a particular time. See *Justice Stevens Criticizes Election of Judges*, WASH. POST, Aug. 4, 1996, at A14 (presenting comments of Justice John Paul Stevens to American Bar Association describing election of judges as "a practice that . . . is comparable to allowing football fans to elect the referees"). This perception of independence would presumably affect the manner in which a lower tribunal's decision should be reviewed, i.e., it would be appropriate to give greater deference to a decision rendered by an Article III court than by a legislative court.

428. See 28 U.S.C. § 2645(c) (1994) (stating that decision of CIT is final and conclusive unless retried, reheard, or appealed to Federal Circuit).

429. *Id.* § 1295(a)(3).

430. *Id.* § 1491. The Court of Federal Claims also shares concurrent jurisdiction with district courts in tax refund cases. See *id.* § 1346(a)(1).

431. *Id.* § 1491(a)(1).

432. See *id.* § 1346(a)(2) (stating that for claims not exceeding \$10,000, Claims Court shares original jurisdiction with district courts).



court's primary jurisdiction is over claims for monetary damages; it cannot hear cases in which specific performance or other equitable relief is requested as a remedy.<sup>433</sup>

The standard of review applicable to appeals from the Court of Federal Claims is not defined by statute.<sup>434</sup> Thus, the review standards have developed through case law decisions. The Federal Circuit reviews matters of law *de novo*.<sup>435</sup> With respect to findings of fact by the Claims Court, the Federal Circuit has held that the appropriate standard is "clearly erroneous."<sup>436</sup> This is the same standard applied to appeals from trials in district courts.<sup>437</sup> By contrast, in *Bosco v. United States*,<sup>438</sup> the Federal Circuit held that where it is not reviewing findings of fact made by the Claims Court, but rather is reviewing the lower court's review of another body's findings of fact, the Federal Circuit views the issue as a question of law, thereby apparently subject to so-called *de novo* review.<sup>439</sup> In essence, this means reapplication of the standard of review applied by the Claims Court.<sup>440</sup>

Notably, in support of this rationale, the Federal Circuit in *Bosco* cited to *Atlantic Sugar* and its progeny, despite the fact that the court in *Atlantic Sugar* never discussed this issue, stating only that it would

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433. *Yeskoo v. United States*, 34 Fed. Cl. 720, 731 (1996); *Calhoun v. United States*, 32 Fed. Cl. 400, 406 (1994).

434. *Milmark Serv., Inc. v. United States*, 731 F.2d 855, 857 (Fed. Cir. 1984).

435. *See Applegate v. United States*, 25 F.3d 1579, 1581 (Fed. Cir. 1994) ("This court reviews *de novo* decisions of the Court of Federal Claims on matters of law and reviews for clear error findings of fact." (citing *Yancey v. United States*, 915 F.2d 1534, 1537 (Fed. Cir. 1990))); *see also* *Winstar Corp. v. United States*, 64 F.3d 1531, 1539 (Fed. Cir. 1995) (reviewing Claims Court grant of summary judgment under *de novo* standard, with justifiable factual inferences being drawn in favor of party opposing summary judgment).

436. *Heisig v. United States*, 719 F.2d 1153, 1157-58 (Fed. Cir. 1983).

437. *Id.* at 1158.

438. 931 F.2d 879 (Fed. Cir. 1991).

439. *See Bosco v. United States*, 931 F.2d 879, 881 (Fed. Cir. 1991) (stating that determination of whether Claims Court correctly held that IRS did not act arbitrarily or capriciously in reclassifying certain jobs, and that IRS decision was supported by substantial evidence, was question of law, subject to *de novo* review). The *Bosco* panel included Circuit Judges Michel, Plager and Smith; Circuit Judge Michel authored the opinion. *See also* *Hines v. Secretary of Dep't of Health & Human Servs.*, 940 F.2d 1518, 1522-23 (Fed. Cir. 1991). There appears to have been some split among the Federal Circuit judges as to whether so-called *de novo* review was required or advisable. The majority opinions, however, seem to support this proposition. *See* Marlene K. Tandy, *Federal Circuit Review of Vaccine Compensation Cases Under the National Childhood Vaccine Injury Act: 1990-1995*, 5 FED. CIR. B.J. 29, 35 (1995) (asserting that any split appears to have "settled out"). *But see* *McClendon v. Secretary of Dep't of Health & Human Servs.*, No. 93-5106, 1994 WL 660806, at \*2 (Fed. Cir. Nov. 23, 1994) (Rader, J. dissenting) (criticizing standard applied by majority as "blatant reweighing of the facts"). Given this historic split, it also would follow that there might exist differences of opinion regarding the merits of the *Atlantic Sugar* rule as applied to Title VII cases.

440. *Bosco*, 931 F.2d at 882; *see also* *Pender Peanut Corp. v. United States*, 20 Cl. Ct. 447, 451 (1990) (stating that when Claims Court reviews agency action, it applies review standards set forth in APA).

apply anew the statutory standard.<sup>441</sup> The *Bosco* decision itself also does not adequately clarify how review by the Federal Circuit of the Claims Court's application of the relevant standards of review to an IRS decision is a question of law subject to so-called de novo review—it merely states the proposition.<sup>442</sup> Another Federal Circuit decision, *Hines v. Secretary of Department of Health and Human Services*,<sup>443</sup> following and citing *Bosco*, expands upon this question.<sup>444</sup>

The *Hines* decision also permits us to trace a likely origin of the *Atlantic Sugar* standard. In *Hines*, the Federal Circuit was presented with a case of first impression as a result of a change in the National Childhood Vaccine Injury Act ("Vaccine Act").<sup>445</sup> Prior to the statutory change, in Vaccine Act cases, the Claims Court reviewed de novo the *proposed* findings and legal conclusions of a special master. In any subsequent appeal, the Federal Circuit reviewed the Claims Court's decision for correctness in questions of law and for clear error in findings of fact. In 1989, Congress amended the Vaccine Act so that the special master's findings and conclusions were no longer merely *proposed* findings and conclusions. Further, under the amended law, the Claims Court was not permitted to set aside a special master's findings or conclusions unless it determined them to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.<sup>446</sup> Thus, the Federal Circuit felt that a new issue was presented, namely, given the amended statutory framework, under what standard should it review the Claims Court's decision.<sup>447</sup>

To analyze this issue, the Federal Circuit examined what it viewed to be "analogous situations."<sup>448</sup> Specifically, the court cited *Bosco*, *Atlantic Sugar* and its progeny, and the court's decision in *Milliken*

441. *Bosco*, 931 F.2d at 882. The court in *Bosco* cited the following as support for the standard it was applying:

American Permac v. United States, 831 F.2d 269, 273 (Fed. Cir. 1987), cert. dismissed, 485 U.S. 901 (1988) (in reviewing CIT's review of ITC determination, this court reviews the underlying ITC decision); *Atlantic Sugar v. United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984) ("We review that court's [Court of International Trade's] review of an ITC determination by applying anew the statute's express judicial review standard.").

*Id.*

442. See *id.* at 882, 883.

443. 940 F.2d 1518 (Fed. Cir. 1991).

444. *Hines v. Secretary of Dep't of Health & Human Servs.*, 940 F.2d 1518, 1523-24 (Fed. Cir. 1991). The panel consisted of Circuit Judges Michel and Lourie, and Senior Circuit Judge Skelton; Circuit Judge Michel authored the opinion.

445. 42 U.S.C. § 300aa-1 to -34 (1994).

446. *Id.* § 300aa-12(e)(2)(B).

447. *Hines*, 940 F.2d at 1522.

448. *Id.* at 1523.

*Research Corp. v. Dan River, Inc.*<sup>449</sup> Because *Bosco* relies on *Atlantic Sugar* and *Atlantic Sugar* does not explain the basis for the “apply anew” standard, we must look to *Milliken* for meaningful guidance.

*Milliken*, however, does *not* hold that the Federal Circuit should apply de novo review to the initial findings and conclusions of the special master, reapplying the same standard of review previously applied.<sup>450</sup> To the contrary, the court in *Milliken* clearly stated that it would not ignore the decision of the district court. The difficulty and confusion seem to lie in a connection that subsequent decisions have made, based on a single phrase used in *Milliken*, but which is a connection that the *Milliken* court itself expressly refused to make.<sup>451</sup>

In *Milliken*, the Federal Circuit had before it a decision of a district court in a patent case wherein the district court had set aside findings of fact in a special master’s report, based on a “clearly erroneous” standard of review.<sup>452</sup> At issue was whether Rule 52(a) of the Federal Rules of Civil Procedure, which prohibits findings of fact from being overturned unless clearly erroneous, also controlled Federal Circuit review.<sup>453</sup> The Federal Circuit explained that “the decision of the district court holding a finding of fact by the master clearly erroneous is not itself a ‘finding of fact.’”<sup>454</sup> Therefore, the Federal Circuit found that, as to the district court’s decision to set aside the special master’s findings, the clearly erroneous standard was inapplicable.<sup>455</sup> The question of the propriety of the district court’s *setting aside* of the special master’s findings, the Federal Circuit concluded, was to be reviewed as “a matter of law.”<sup>456</sup> It is the use of this phrase by the court in *Milliken* that has resulted in some confusion.

The court in *Milliken* never stated that its use of the term “matter of law” meant that wholesale so-called de novo review of the special

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449. 739 F.2d 587 (Fed. Cir. 1984). The *Milliken* opinion was authored by the late Circuit Judge Nies, who was joined by Senior Circuit Judge Kellam (E.D. Va.), sitting by designation. Also on the panel, but dissenting, was Circuit Judge Smith.

450. *Milliken Research Corp. v. Dan River, Inc.*, 739 F.2d 587, 592-93 (Fed. Cir. 1984).

451. In essence, the *Bosco* and *Hines* courts seem to have reasoned that, if  $a=b$  and  $b=c$ , then  $a=c$ , without testing the resultant conclusion for consistency with the *Milliken* holding, which was that  $a \neq c$ .

452. *Milliken*, 739 F.2d at 589.

453. *Id.* at 592-93.

454. *Id.*

455. *See id.* Although holding a finding of fact by the master clearly erroneous is in itself not controlled by Rule 52(a), any substitute findings made by the district court would be reviewed under the clearly erroneous standard, as would be any findings of the special master which were adopted by the district court. *Id.*

456. *Id.* at 593.

master's decision would occur.<sup>457</sup> In fact, the court in *Milliken* stated and acted to the contrary. The court wrote:

Milliken would have us review the master's report directly; [appellee] Dan River would have us review the district court only. We conclude that the position of neither party correctly defines the role of this court.

Milliken . . . would have us wholly ignore the role of the district court in the appellate process. We cannot agree with this alternative position.<sup>458</sup>

The court went on to consider carefully the district court's rationale and findings and conclusions, with reference to the special master's report as appropriate, ultimately affirming the district court.<sup>459</sup>

In light of the *Milliken* court's explicit teachings on the role of the district court, one can infer the meaning of its statement regarding its review of the district court as being "a matter of law." In essence, the Federal Circuit looked to see whether the district court correctly applied the standard of review. While this is a legal question, it is not one that necessarily entails true de novo review, or "so-called" de novo review whereby the appellate court effectively goes back to the drawing board to review the findings of the initial decision-maker. Indeed, the legal question is more akin to that posed by the Supreme Court in NLRB cases, namely, the issue of whether the intermediate reviewing body, in applying the standard of review, misapprehended or grossly misapplied that standard.<sup>460</sup> Moreover, irrespective of the *Milliken* court's choice of the term "matter of law," it is clear that the court did not support ignoring the decision of the district court and going back to the decision of the special master. Thus, the *Hines* citation to *Milliken* for the proposition that "we review the underlying decision of the special master under the [original statutory standard of review]" is inconsistent with the actual holding of *Milliken*, and with the deference therein accorded to the district court.<sup>461</sup>

Thus, the puzzle seems to be missing a piece—how did the Federal Circuit get from *Milliken* to *Hines*? As set forth above, *Atlantic Sugar*

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457. See *Bradley v. Secretary of Dep't of Health & Human Servs.*, 991 F.2d 1570, 1576-78 (Fed. Cir. 1993) (Plager, J., concurring in part, dissenting in part) (stating that term "legal" conclusion does not always mean that issue decided was matter of law entitled to de novo review).

458. *Milliken*, 739 F.2d at 592.

459. *Id.* at 602.

460. See *supra* notes 201-06 and accompanying text (discussing Supreme Court's "hands off" approach in NLRB cases).

461. *Hines v. Secretary of Dep't of Health & Human Servs.*, 940 F.2d 1518, 1524 (Fed. Cir. 1991). Indeed, nowhere in the entire *Milliken* decision did the court apply the clearly erroneous standard to the findings of the special master.

and *Bosco* were decided between these decisions. Because *Bosco* cites to *Atlantic Sugar*, *Atlantic Sugar* may well be the missing link. Significantly, Circuit Judge Smith, who dissented in *Milliken* (although not addressing the standard of review in his dissent), authored the *Atlantic Sugar* opinion only a few months later.<sup>462</sup> This hardly seems a coincidence. A possible explanation is that Judge Smith disagreed with the *Milliken* decision on the standard of review issue as well, but simply did not address it in his dissent in that case.

Such an explanation is quite plausible, given Judge Smith's agreement with the special master and disagreement with the district court. Thus, he likely would have preferred a "review anew" approach. Moreover, the majority in *Milliken* acknowledged that the other circuits were divided on the issue of appellate review of a district court rejection of a special master's findings.<sup>463</sup> Further, because Title VII cases are quite different from the issue in *Milliken*, presumably Judge Smith and the panel in *Atlantic Sugar* would not have felt bound by *Milliken*.<sup>464</sup>

In any event, whatever the reason for *Atlantic Sugar*, this Article submits that the actual approach in *Milliken* would be the better route for the Federal Circuit to follow in Title VII cases. Scholars have praised the *Milliken* decision as a very reasoned approach to the question of how to handle review of a review.<sup>465</sup> It seems that the Federal Circuit in *Milliken* appropriately focused on the question of whether the district court acted improperly. In fact, the *Milliken* approach is not dissimilar from that advocated by the Federal Circuit in *Suramerica II*.<sup>466</sup> Furthermore, the Federal Circuit can adopt such an approach in Title VII cases without necessarily addressing whether the same result should obtain for Claims Court appeals—the other

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462. *Milliken* was decided on July 5, 1984 and *Atlantic Sugar*, on September 25, 1985.

463. *Milliken*, 739 F.2d at 592. According to the court, the majority relied on decisions of the Second, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits and *Dan River*, on the Fourth, Fifth and Eighth. *Id.*

464. That the court would not have felt bound by *Milliken* is somewhat difficult to reconcile in light of subsequent citations to *Atlantic Sugar*. Specifically, the *Hines* court cited to *Atlantic Sugar* in support of its application of the apply anew standard to the finding of a special master. Hence, the court would seem to have come full circle.

465. CHILDRESS & DAVIS, *supra* note 21, § 2.03, at 2-15 to 2-16 (describing *Milliken* as "thoughtful" examination of two-tier review issue and recognizing that Federal Circuit has identified "the problem and framed the inquiry in a way often skimmed over in previous considerations").

466. See *Suramerica II*, 44 F.3d at 983 n.1. The *Suramerica II* court suggests that its review should be limited to determining whether the CIT misapprehended or grossly misapplied the statutory standard, thus exhibiting an approach similar to that in *Milliken* through a focus on the review conducted by the lower court, as opposed to direct review of the fact-finder or agency.

area to which the *Atlantic Sugar* rule has been extended.<sup>467</sup> Given the unique and exclusive expertise of the CIT, however, there is ample reason to distinguish Title VII cases from Claims Court appeals.<sup>468</sup> In fact, the controversy that application of the *Atlantic Sugar* rule has engendered in Vaccine Act cases strengthens the argument that the rule be abandoned.

### CONCLUSION

As demonstrated in this Article, while the standard of review currently articulated by the Federal Circuit in Title VII cases is not absolutely unique, it is aberrational when compared to other types of cases within the court's jurisdiction. The *Suramerica II* panel properly recognized that the court is not required to apply any particular standard of review in Title VII cases.<sup>469</sup> As such, the Federal Circuit has the freedom to craft a suitable standard. The Federal Circuit's standard should reflect the value of the reviewing function already performed by the CIT. The agency decision being reviewed results from informal adjudication, albeit on an administrative record. The CIT, which has reviewed that record and decision pursuant to a statutorily prescribed standard of review, is an Article III court of specialized expertise. Obviously, if the CIT has misapprehended or grossly misapplied the statutory standard of review, the Federal Circuit should correct the lower court. Absent such error, however, the Federal Circuit can determine how much deference to accord the CIT's decision, rather than revisit wholesale the agency determination and reapply the original standard of review.

Indeed, various policy considerations suggest that the *Suramerica II* panel's alternative approach is more sound than the redundant application of the same standard of review by two federal courts. First, following the *Suramerica II* approach would result in more limited review of CIT decisions, fostering the conservation of judicial resources. This approach would lessen, rather than increase, the Federal Circuit's burden because parties presumably would consider an appeal to the Federal Circuit more closely if review were limited

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467. One significant distinction that seems to have caused difficulty in Claims Court appeals is the fact that the Claims Court can make its own findings or adopt those of the special master. As a rule, the CIT can do neither in Title VII cases—it can only decide whether the agency findings were correct (under the applicable standard of review), based on the administrative record (or remand to the agency for further findings).

468. See *supra* notes 138-45 and accompanying text (discussing expertise and unique role of CIT). Furthermore, it is noteworthy that the Court of Federal Claims is an Article I court and not an Article III court like the CIT. See *supra* note 427.

469. See *supra* notes 156-78 and accompanying text (analyzing *Suramerica II* decision).

to an examination of the CIT's application of the standard of review. Second, the *Suramerica II* approach places the Federal Circuit in the sound position of ensuring that the CIT has appropriately applied *Chevron* deference to the agency's interpretation of the statute. This is an appropriate role for the Federal Circuit. By considering the opinion of the CIT, in light of that court's statutory review standard, the Federal Circuit would rely upon the decisions of expert agencies and a court to which Congress specifically delegated certain international trade functions. However, particularly when the agency and CIT disagree, the Federal Circuit would also provide a necessary examination of the CIT's analysis. Those who are regularly affected by decisions of the ITC, DOC, and CIT are best served by speedy, efficient, consistent, and expert judgments. Federal Circuit review that does not broadly reapply the CIT's review standard would ensure that these objectives are met.