The John Marshall Law Review

Volume 36 | Issue 3 Article 6

Spring 2003

Setting Standards: Should the Federal Circuit Give Greater Deference to Decisions of the U.S. Court of International Trade in International Trade Cases?, 36 J. Marshall L. Rev. 721 (2003)

Mark E. Wojcik
7wojcik@jmls.edu

Lawrence Friedman

LECTURE SERIES

INAUGURAL

JUDGE DOMINICK L. DICARLO

UNITED STATES COURT OF INTERNATIONAL TRADE LECTURE

REMARKS OF

THE HONORABLE GREGORY W. CARMAN*

CHIEF JUDGE, UNITED STATES COURT OF INTERNATIONAL TRADE

AT

THE JOHN MARSHALL LAW SCHOOL, CHICAGO

CENTER FOR INTERNATIONAL BUSINESS AND TRADE LAW

THURSDAY, FEBRUARY 27, 2003

FOREWORD BY

MARK E. WOJCIK & LAWRENCE FRIEDMAN**

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* The honorable Gregory W. Carman, Chief Judge of the U.S. Court of International Trade, gave the inaugural lecture in this lecture series. Chief Judge Carman was appointed to the Court by President Ronald Reagan in 1983 and has served as Chief Judge since 1996. Before taking the bench, Chief Judge Carman was a Member of the House of Representatives in the 97th Congress and served as a member of the Banking, Finance and Urban Affairs Committee as well as the International Trade, Investment and Monetary Policy Subcommittee of the House Banking Committee. Chief Judge Carman served in the United States Army from 1958 to 1964, earning the rank of Captain and the Army's accommodation for meritorious service. Chief

FOREWORD

SETTING STANDARDS: SHOULD THE FEDERAL CIRCUIT GIVE GREATER DEFERENCE TO DECISIONS OF THE U.S. COURT OF INTERNATIONAL TRADE IN INTERNATIONAL TRADE CASES?

This issue of the *John Marshall Law Review* includes the remarks of Chief Judge Gregory W. Carman of the U.S. Court of International Trade, who came to The John Marshall Law School in February 2003 to give the Inaugural Lecture in the Judge Dominick L. DiCarlo U.S. Court of International Trade Lecture Series for the John Marshal Center for International Trade and Business Law. As you will see in the transcript of his remarks, Chief Judge Carman took this opportunity to argue that the U.S. Court of Appeals for the Federal Circuit should adopt a new standard of review for appeals from the U.S. Court of International Trade in antidumping and countervailing duty cases.

A. Reviewing Customs Service Decisions

The U.S. Court of International Trade is a specialized court of national jurisdiction. For Example, it serves as a trial court for customs matters, such as when it reviews the tariff classification and valuation of imported merchandise. When hearing these types of cases, the court holds a trial much like any other trial in a federal district court. These cases arise as challenges to Customs' partial or complete denial of protests importers have filed.[1] Although these cases are appeals from adverse determinations of the U.S. Bureau of Customs and Boarder Protection (formerly the U.S. Customs Service) the proceedings before the U.S. Court of International Trade are *de novo*. Historically, the court reached its decisions based on a trial or new record created before the court, rather than deferring to the administrative record created

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Judge Carman graduated from St. John's University with a Juris Doctor degree in 1961; from the University of Virginia Law School with a JAG Degree in 1962, and received an LL.M. in Tax from the New York University School of Law.

** Mr. Wojcik is an Associate Professor of Law, The John Marshall Law School, Chicago. Before joining the faculty at The John Marshall Law School, Professor Wojcik served as a Senior Law Clerk at The U.S. Court of International Trade to the late Dominick L. DiCarlo.

Mr. Friedman is a John Marshall Law School alumnus and a John Marshall Law School adjunct professor. Mr. Friedman also served as a law clerk to the late Dominick DiCarlo and served as Chair of the Inaugural Judge Dominick L. DiCarlo United States Court of International Trade Lecture. Mr. Friedman is also a partner at the law firm of Barnes, Richardson & Colburn.

1. *See* 28 U. S. C. § 1581(a) (2000).

by the agency. This type of *de novo* review involved the testimony of expert witnesses and the viewing of trial exhibits, usually including samples of the imported merchandise. Decisions were made based on the facts of each individual case, but the same and similar merchandise could then be imported based on the court's decision.

The standard of review for decisions in tariff classification and valuation cases was altered somewhat in *United States v. Mead*, where the U.S. Supreme Court ruled that the record compiled before the CBP (then still the Customs Service) should be respected, but that it is not controlling.[2] *De Novo* review involves the testimony of expert witnesses and the viewing of trial exhibits, such as samples of the imported merchandise. The court will make its ruling based on the facts of the individual case. It is true that future merchandise will be imported into the United States based on the ruling made, but it is essentially a trial court proceeding based only on the evidence presented in court. The record compiled before the CBP will be respected,[3] but it is not controlling. Additionally, the U.S> Court of International Trade does accord the Customs Service a statutory presumption of correctness,[4] and to prevail the party challenging the determination must satisfy a "preponderance of the evidence"[5] standard. Furthermore, even if an importer proved that the government's classification was incorrect, it would not always mean that the importer had won. There may be another applicable tariff classification, for example, other than the one

2. United States v. Mead, 533 U.S. 218, 221 (2001). The importer in *Mead* had filed a protest against the government's classification of its well-known "day planners." The U.S. Court of International Trade sustained the government's classification and granted summary judgment against the importer without commenting on the degree or type of deference that it would give to the government. The U.S. Court of Appeals for the Federal Circuit reversed, holding that because Customs Service rulings have no "notice and comment period," they are not entitled to deference and should be reviewed *de novo*. Circuit that the government's Finding a path between the two decisions, the U.S. Supreme Court agreed with the Federal classifications should not receive the deference granted to other administrative regulations by the U.S. Supreme Court's earlier decisions in Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), as extended to Customs Service regulations in United States v. Haggar Apparel Co., 526 U.S. 380 (1999). But the U.S. Supreme Court also held in *Mead* that Customs rulings were entitled to some deference, because of the "specialized experience" held by the Customs Service. *Mead*, 533 U.S. at 233.

3. *Mead*, 533 U.S. at 221.

4. *See* 28 U.S.C. § 2639 (a) (1) (2000).

5. *See, e.g.*, Black & White Vegetable Co. v. United States, 125 F. Supp. 2d 531, 537 (Ct. Int'l Trade 2000); Taban Co. V. United States, 960 F. Supp. 326, 331 (Ct. Int'l Trade 1997); Mark E. Wojcik, *International Trade*, in 4 NEW YORK PRACTICE GUIDE: BUSINESS AND COMMERCIAL. § 22.15[5], at 22-164 (Matthew Bender & Co., Inc. 1999).

urged by the importer. The Court of International Trade, acting as a trial court, has to satisfy itself that the ultimate tariff classification is correct, both in relation to the importer's claim and then independently in relation to the tariff schedules.[6]

As Chief Judge Carmen observes in his remarks, the U.S. Court of International Trade is the only national trial court in the United States. The reason for this national status is to ensure uniformity in the determinations that are made regarding the application of the customs and trade laws and regulations. If the system were designed in any other way, it might be possible to have a federal district court classify merchandise imported in New York in one way, while another federal district court in San Francisco might classify the same merchandise in another way. Because those tariff classification rulings affect such matters as the amount of customs duty to be paid or the possible quota category of certain merchandise, such a system of disparate court rulings would quickly become an intolerable and unworkable system. Importers would simply import merchandise through a different port of entry to avoid unfavorable classifications applied elsewhere.

For the reasons of national uniformity required in rulings on customs matters, decisions are made at the trial court level by judges of the U.S. Court of International Trade. Decisions from the Court of International Trade can be appealed to the U.S. Court of Appeals for the Federal Circuit, a court of national appellate review that is better known for the bulk of its work, which involved appeals on patents. Decisions of the Federal Circuit can be appealed again by writ of certiorari to the U.S. Supreme Court.[7]

B. Reviewing Antidumping and Countervailing Duty Determinations

The U.S. Court of International Trade does not deal solely with judicial review of CBP decisions. The court also reviews decisions in antidumping[8] and countervailing (or anti-subsidy")[9]

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6. *See* Mark E. Wojcik, *International Trade*, in 4 NEW YORK PRACTICE GUIDE: BUSINESS AND COMMERCIAL. § 22.15[5], at 22-164 to 22-165 (Matthew Bender & Co., Inc. 1999).

7. For example, in *Mead*, 533 U.S. 218, the U.S. Supreme Court vacated the decision by the U.S. Court of Appeals for the Federal Circuit, which reviewed the decision made at trial by the U.S. Court of International Trade. The U.S. Supreme Court held that a tariff classification has no claim to special judicial deference under *Chevron*, 467 U.S. 837, because there was no indication that Congress intended a Customs tariff ruling to carry the force of law, but that the ruling should be "eligible to claim respect according to its persuasiveness." *Mead*, 533 U.S. at 221.

8. Under the antidumping laws, the International Trade Administration of the U.S. Department of Commerce will impose duties on imported products that are sold, or are likely to be sold, in the United States at less than their

Duty determinations that may be made by the International Trade Administration of the U.S. Department of Commerce (the "ITA") and the U.S. International Trade Commission ("ITC"),[10] unless the specific administrative determinations at issue fall under another legal regime, such as the North American Free Trade Agreement ("NAFTA")[11] or its two-nation predecessor, the Untied States-Canada Free Trade Agreement.[12]

In reviewing administrative decisions of the ITA and ITC, the Court of International Trade does not conduct a trial as it does when reviewing appeals from adverse determinations made by Customs and Border Protection. As Stephen Powell and Elizabeth Seastrum describe the standard of review for ITA and ITC determinations (albeit in the context of a NAFTA panel), there must be "some deference to or tolerance for the agency's work."[13]

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fair value if those sales harm, or pose the potential to harm, domestic industries in the United States. *See* 19 U.S.C. § 1673 (2000); Cemex, S.A. v. United States, 133 F. 3d 897, 898-99 (Fed. Cir. 1998), Mark E. Wojcik, *International Trade*, in 4 NEW YORK PRACTICE GUIDE: BUSINESS AND COMMERCIAL. § 22.15[5], at 22-197 to 22-198 (Matthew Bender & Co., Inc. 1999). The amount of these antidumping duties will normally be the "amount by which the foreign market value exceeds the United States price for the merchandise." 19 U.S.C. § 1673 (2000); *Cemex*, 133 F.3d at 899. The International Trade Administration may use several alternative bases to calculate the United States price and the foreign market value, but generally "an antidumping duty will be imposed if imported goods are sold at a price that is lower than the foreign market value and such sales cause or threaten material injury to a domestic industry." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 807 (2) (1987). *See also e.g.*, Koyo Seiko Co. v. United States, 20 F. 2d 1156, 1159 (Fed. Cir. 1994); Mark E. Wojcik, *International Trade*, in 4 NEW YORK PRACTICE GUIDE: BUSINESS AND COMMERCIAL. § 22.15[5], at 22-198 (Matthew Bender & Co., Inc. 1999).

9. In countervailing duty proceedings, the International Trade Administration will determine whether a foreign government is providing a countervailable subsidy. *See e.g.*,Mark E. Wojcik, *International Trade*, in 4 NEW YORK PRACTICE GUIDE: BUSINESS AND COMMERCIAL. § 22.17[3] [a], at 22-201 (Matthew Bender & Co., Inc. 1999).

10. *See* 28 U.S.C. § 1581 (c) (2000). *See also* William B.T. Mock, Jr. *Culmination of Import Statistics in Injury Investigations Before the International Trade Commission*, 7 NW. J INT'L L. & BUS. 433 (1986). The role of the ITC in antidumping and countervailing duty proceedings is to determine whether the dumping has caused or may cause injury to the competing U.S. Industry.

11. Canada-Mexico-United States: North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296 (1993).

12. United States-Canada Free-Trade Agreement, Jan. 2 1988, 27 I.L.M. 281 (1988); United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. 100-419, § 401 Sept. 28, 1988, 102 Stat. 1851, 1878.

13. See, e.g., Stephen J. Powell & Elizabeth C. Seastrum, *Straight Talk About a Complex Issue: The U.S. Standard of Judicial Review of Antidumping and Countervailing Duty Determinations: An Important Challenge for NAFTA Panels*, 19 FORDHAM INT'L L.J. 1451, 1451-52 (1996).

More colorfully, they analogize review of agency actions to the role of a food critic:

> The reviewing body is not the chef who makes the meal. It is not allowed into the kitchen to cook the way it likes. The body is more akin to a food critic writing for a gourmet magazine: it samples and surveys the meal as served. For example, if one of the dishes served is identified as "cook potatoes," there might be fifty different recipes which would satisfy this specifications, including: French Fries, hash browns, baked potatoes, twice-baked potatoes, or cold potato salad. IF the meal has been decently prepared and reasonably set forth, then the body recommends it favorably, even though the body might have added a little more salt here or a little less garlic there. Of course, if the meal is rancid or unpalatable, the reviewing body will send it back to the chef and say, "cook it again."[14]

In the more than two decades following its creation, the Untied States Court of International Trade has developed considerable expertise in international trade matters. That the court would be expected to develop such specialized knowledge of a complex area of law was not lost on the Congress, which had already recognized the existing special expertise as part of the legislative history for the federal statutes that created the U.S. Court of International Trade as an Article III Court under the U.S. Constitution. The history for the Customs Court Act of 1980, for example, shows that it was intended to create a "comprehensive judicial review of civil actions arising from import transactions, utilizing the special expertise of the United States Customs Court and the United States Court of Customs and Patent Appeals."[15] And in the more than two subsequent decades of its existence, the U.S. Court of International Trade has proven itself time and again as a court of specialized knowledge and expertise in reviewing antidumping and countervailing duty determinations in the arena of international trade law. This is only natural—if you work on the same thing for twenty years, you are going to understand how it works.

C. Affording Greater Deference to Decisions in Antidumping and Countervailing Duty Cases—Giving Deference Where Deference Is Due

Chief Judge Carmen, in his comments here and elsewhere,[16] argues for greater deference to be paid to decisions of the U.S.

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14. *Id.* at 1462.

15. H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 20 (1980) *See also* Mark E. Wojcik, *International Trade*, in 4 NEW YORK PRACTICE GUIDE: BUSINESS AND COMMERCIAL. § 22.15[5], at 22-157 (Matthew Bender & Co., Inc. 1999).

16. Gregory W. Carman, A Critical Analysis of the Standard of Review Applied by the Court of Appeals for the Federal Circuit in Antidumping and Countervailing Duty Cases, 17 ST. JOHN'S J.L. COMM. 177, 179, 198 (2003).

Court of International Trade in matters relating to antidumping and countervailing duty determinations. Currently the Federal Circuit "applies anew" the standard of review the CIT applied in its review. This results in a duplication of effort by the CAFC with no explicit deference to the CIT. In *Zenith Elec. Corp. v. United States*[17], the Federal Circuit criticized this practice. Chief Judge Carman has furthered this criticism by reminding the Federal Circuit that the work it does in reviewing anew the entire administrative record is burdensome and time-consuming on a court that has more experience and a heavier docket.

I agree with that assessment that Chief Judge Carman makes as to the need for that new standard of review. I agree that the current standard used by the Federal Circuit is unduly burdensome, and that "applying anew" delays not only time-sensitive decisions in international trade matters, but also indirectly delays decisions on patent cases. My agreement with a call for a new standard is not only to minimize the delay and burden on the Federal Circuit, however. My agreement with a call for a new standard arises from my respect for the collective expertise in international trade matters that the judges of the U.S. Court of International Trade have developed over the past two decades. This collective expertise is deserving of greater deference. It should still be subject to review of course, but the review should recognize that the CIT judges have a special expertise in reviewing the specialized agencies, and that we will all be better off if we recognize the value of that expertise.

D. Future Lectures

We here at the John Marshall Law School look forward to the opportunity to hold further lectures in this new Judge Dominick L. DiCarlo Court of International Trade Lecture Series. We believe that a sustained academic concentration on the specialized work of the Court of International Trade will inure to the benefit of the Court, litigants who appear before the Court, and, indeed, any consumer of an imported product.

CHIEF JUDGE CARMAN:

A SUGGESTED REVISION OF THE STANDARD OF REVIEW THAT THE FEDERAL CIRCUIT APPLIES TO APPEALS OF ANTIDUMPING AND COUNTERVAILING DUTY CASES FOR THE U.S. COURT OF INTERNATIONAL TRADE

Ladies and gentlemen: I would like to begin by familiarizing

17. 99 F.3d 1576 (CAFC 1996).