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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, A Lecture Series, 36 J. Marshall L. Rev. 727 (2003)

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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).

you with the United States Court of International Trade. Many of its decisions, unlike numerous other litigated matters, affect virtually every citizen in the United States. The International Trade Court, although remarkably little known by many practitioners, has significant national and international impact involving billions of international trade dollars.

The Constitution of the United States gives Congress the power to regulate commerce with foreign nations, and to levy and collect taxes, duties, imposts and excises.[18] It requires all such duties, imposts, and excises to be "uniform throughout the United States."[19] And in exercising these powers, Congress created the United States Court of International Trade.

Today, the United States Court of International Trade is the only national trial court established under Article III of the Constitution.[20] The court consists of nine judges who are appointed by the President with the advice and consent of the Senate.[21] We currently have eight judges who are active and three senior judges.

The Court of International Trade, known as the CIT, possesses all of the legal and equitable powers of the United States District Courts.[22] The CIT's jurisdiction encompasses civil suits arising from numerous types of actions by agencies as a result of import transactions, but not export transactions. The Court of International Trade has authority over classifying and valuating merchandise, charging duties and fees on imported merchandise, excluding merchandise from entry under provisions of the customs laws, liquidating entries, refusing to pay drawback, and challenges to antidumping and countervailing duty decisions. In addition, the CIT has jurisdiction to review the denial, revocation or suspension of a custom broker's license, determinations of eligibility for trade adjustments under the Trade Act of 1974, penalty cases and foreign trade zone matters.

Now, I would like to talk about a specific area of the law that is still unsettled and changing in the world of international trade. This unsettled area of law is the standard of review that the United States Court of Appeals for the Federal Circuit applies when it reviews CIT decisions in anti-dumping and countervailing duty cases.

Let me begin by explaining what dumping is all about. Dumping occurs when a foreign company imports a product into the United States and sells it at a lower price than it sells for in other countries. For example, a foreign company may import a

18. U.S. CONST. art. I, § 8.
19. *Id.*
20. U.S. CONST. art. III, § 1.
21. *See* U.S. CONST. art. II, § 2.
22. *See* U.S. CONST. art. III, § 2.

television set from Japan where it sells for $500, and sell it here in the United States for $250. There is a dumping margin of $250, and that is on the low end. Usually dumping cases involve huge sums of money.

At the Court of International Trade, we review the administrative records from investigations conducted by the International Trade Administration of the United States Department of Commerce (ITA) and the United States International Trade Commission (ITC) to determine whether or not dumping is taking place. We review these cases on a specific standard called "by substantial evidence or otherwise in accordance with the law," which Congress mandated in the Trade Agreements Act of 1979.[23] The CIT's decision can then be appealed to the Federal Circuit.

Unfortunately, the 1979 Act did not provide any guidance on the standard of review to be applied by the Federal Circuit Court when reviewing CIT decisions. In the absence of explicit statutory guidance, the Appellate Court continued to apply the combination de novo/deference standard that had historically governed its review of antidumping and countervailing duty cases. However, in 1984, the standard changed.

In *Atlantic Sugar, Ltd. v. the United States*,[24] the Federal Circuit articulated the "apply anew" standard, which currently governs antidumping and countervailing duty cases. In that case, the Federal Circuit announced that it would review agency decisions "by applying anew" the standard of review outlined in the Trade Agreements Act.[25] As a result, the Court of International Trade extensively reviews the record and determines whether an agency decision is supported by substantial evidence. Then the Federal Circuit applies the same standard of review, duplicating what we are doing at the Court of International Trade.

The Federal Circuit Court of Appeals applied this standard consistently for almost ten years following its issuance until 1994, when a three-judge panel of the Federal Circuit questioned the propriety of the standard. In *Suramerica de Aleaciones Laminadas, C.A. vs. United States*,[26] the Federal Circuit announced that it would review anew the agency determination, but also stated that it would not ignore the informed opinion of the United States Court of International Trade. Moreover, after reviewing the record in considerable detail, the Federal Circuit concluded that the CIT's decision deserved due respect.[27] So what happened was in *Suramerica* was that instead of applying "anew"

23. 19 U.S.C. § 1516a(b)(1)(B)(i) (2000).
24. 744 F.2d 1556 (Fed. Cir. 1984).
25. *Id.* at 1559 n.10.
26. 44 F.3d 978, 982 (Fed. Cir. 1994).
27. *Id.* at 988.

the statutory standard of review, the Federal Circuit gave the CIT decision considerable deference.

In its opinion, the *Suramerica* court questioned the *Atlantic Sugar* decision in three respects. First, the Court first noted that the *Atlantic Sugar* decision did not cite any legal authority when it announced the "apply anew" standard.[28]

Second, the *Suramerica* court stated that *Atlantic Sugar* appeared to rely on the belief that the 1979 Trade Agreements Act prescribes the Federal Circuit's standard of review.[29] The *Suramerica* court noted, however, that the 1979 Act "does not support that proposition."[30] Instead, "the court" to which the statute referred was the United States Court of International Trade.[31] The statute was silent on what standard the Federal Circuit should apply to review a decision of the Court of International Trade.[32]

Third, the *Suramerica* panel suggested the standard of review that the Federal Circuit should apply is the one outlined by the United States Supreme Court in *Universal Camera Corp v. NLRB*.[33] In that case, the Supreme Court held that whether on the record as a whole, there was substantial evidence to support agency findings, is a question which Congress has placed in the keeping of the court reviewing the agency determination.[34] The Court limited further review only to the rare instances where the lower court misapprehended or grossly misapplied the statutory standard of review.[35]

The *Suramerica* court concluded by stating that "if in a future appeal, this court were offered the opportunity to reconsider the *Atlantic Sugar* rule en banc, this Court might better consider only whether the Court of International Trade misapprehended or grossly misapplied the statutory standard."[36]

It is my suggestion to you today that the Federal Circuit needs to abandon the "apply anew" standard of review and instead adopt the "misapprehended or grossly misapplied" standard contemplated in *Suramerica*.[37]

There are several problems with the Federal Circuit's

28. *Id.* at 982 n.1.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951).
35. *Id.*
36. *Suramerica*, 44 F.3d at 982 n.1.
37. This suggestion has also been made in 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).

standard of review in trade cases. First, no federal statute requires the "apply anew" standard. There is nothing in the statute obligating the Federal Circuit to apply the standard, nor does the legislative history support this interpretation.

Another problem with the "apply anew" standard of review is that it duplicates the review conducted by the Court of International Trade and contradicts the Congressional intent behind the 1979 Act. The standard of review set forth in the 1979 Act, applicable to the Court of International Trade, was enacted by Congress to "provide an expedited process for judicial review, and shorten the time limits for obtaining review of an appealable determination."[38] Congress noted that the statute "amends the present law to eliminate de novo review of determinations or assessments made pursuant to the antidumping and countervailing duty laws," and that "[t]he present standard of de novo review is both time-consuming and duplicative."[39]

I would like you to think of it in this way. The United States Court of International Trade examines these proceedings, going through extensive records, and determining where the records have substantial evidence to support them. In some cases, the records are not complete and the Court spends considerable amounts of time compiling the record. Indeed, it is not uncommon for the Court of International Trade to remand some cases back to the administrative agencies to get additional explanation and evidence to support their position. When the Court of Appeals for the Federal Circuit applies the same standard, there is an unnecessary expenditure of time, increased costs and lost opportunities.

Is this an ego trip for the people in the Court of International Trade? No, the answer is no. It is a complaint that this is costing time and it is costing money. The Federal Circuit itself has been critical of this natural outcome of the redundant standard of review, noting that "replication of the record review already performed effectively renders the Court of International Trade's review superfluous."[40] The Federal Circuit also stated that its "apply anew" standard of review adds "unnecessary time and expense to the appeal process. It undercuts the benefit this court derives from the experience and expertise of the Court of International Trade."[41]

The statistics punctuate this criticism. From 1984, when the

38. H.R. REP. NO. 96-317, at 180-81 (1979).

39. *Id.*

40. Zenith Elecs. Corp. v. United States, 99 F.3d 1576, 1583 (Fed. Cir. 1996) (Rader, J., concurring).

41. *Id. See also* Kevin Casey, Jade Camara, & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 351 (1981).

Federal Circuit announced its "apply anew" standard, through 2000, it has heard an average of fifty-two appeals a year from the Court of International Trade.[42] That number increased to 160 in 2001, an increase of more than 150 percent.[43] The increase in the number of trade cases filed with the Federal Circuit will certainly have an adverse impact on the time necessary to review them. From 1996 through the year 2000, the average length of time between date of docketing and the date of disposition for cases appealed from the Court of International Trade was approximately fourteen months.[44] That time will surely increase as the Federal Circuit reviews the record of every case on appeal from the Court of International Trade.

A further complication is that the Federal Circuit does not consistently apply the standard of review. In some cases, the Federal Circuit will strictly apply anew the statutory standard of review, and in others, the Federal Circuit will defer to the CIT's decision without extensively reviewing the record. As a result, it is terribly frustrating for the lawyers who are going up before them. I think it must be impossible to know what this person should argue.

It seems to me that the Federal Circuit is saying one thing and doing another. They are saying that the "apply anew" standard of review applies, but in all fairness, I do not believe that they have the time to delve into those records the way that the Court of International Trade does.

This is a significant legal issue whose time has come for change. You here at The John Marshall Law School have helped me to present that again on a national level, and I thank you for that opportunity. I want to thank all of you, especially the faculty for the wonderful hospitality they have extended to me. I also want to thank all of you, the students, for the warm welcome you have given me. It has been a wonderful honor for me to speak at the Inaugural Judge Dominick DiCarlo United States Court of International Trade Lecture. Thank you for having me.

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

43. *Id.*

44. *Id.*