After Chevron: Expect Few Changes In ITC Rulemaking

By **Deanna Okun, Lydia Pardini and Alissa Chase** (July 1, 2024)

On June 28, the U.S. Supreme Court overturned a decades-old precedent, known as Chevron deference, that favored federal agencies' rulemaking interpretations. In this Expert Analysis series, attorneys discuss the decision's likely impact on rulemaking across the federal government.


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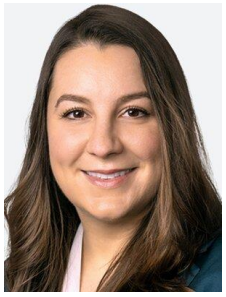
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Administrative rulemaking and appellate review enter a new era with the U.S. Supreme Court's much-anticipated opinion in Loper Bright Enterprises v. Raimondo[1] and Relentless Inc. v. Department of Commerce.[2]

That opinion, however — which overrules the court's 1984 decision in Chevron v. Natural Resources Defense Council —[3] will not affect all agencies that handle international trade issues, and likely will have less impact on the U.S. International Trade Commission than the other agencies that administer statutes related to international trade.

In choosing to overrule Chevron, the court ends a 40-year era of judicial deference to administrative agency interpretation of ambiguous statutory provisions, holding that under the Administrative Procedure Act, courts independently decide questions of law according to their own judgment, and agency interpretations of the statutes they administer are not entitled to deference.[4]

The court further explains that executive branch interpretations that were issued "roughly contemporaneously with enactment of [a] statute and [remaining] consistent over time" warrant respect but do not supersede the judgment of the Judiciary when interpreting statutory language.[5]

The majority of the ITC's determinations are based on complaints filed by private parties under the international trade provisions of the Tariff Act.[6]

The ITC also proposes rules related to practices and procedures, but does not engage in substantive rulemaking — a key distinction from many other federal agencies.[7]

Impact on ITC Rulemaking

Since 1984, Chevron has provided the foundation for a method of analysis for determining whether Congress has addressed a particular issue within a statutory text and, if not, to whom Congress delegated the authority to fill any resulting gaps.

By overturning Chevron in Loper Bright, the court makes clear that, in determining questions of statutory interpretation going forward, courts will determine whether agencies have acted reasonably and within the boundaries of their congressionally delegated authority based upon the court's independent statutory analysis.[8]

When the ITC engages in rulemaking, it does so primarily on procedural matters, subject to public notice and comment.[9] This limited rulemaking authority, combined with the applicable Auer deference that is generally given to an agency when interpreting its own rules, diminishes the impact of the Supreme Court decision on the agency's practice and procedures.[10]

The limited focus of ITC rulemaking results in procedural rules that generally affect only participants in ITC investigations, not members of the public. This limitation serves as an important factor in how a court will view the agency's rulemaking decisions under this new analytical rubric.

Where an agency engages in effective notice-and-comment rulemaking, soliciting comments from the public and engaging with those comments responsively, an agency's decision is likely to be deemed persuasive under the Supreme Court's 1944 Skidmore v. Swift & Co. decision, and it is also likely to receive judicial respect and consideration under Loper Bright.[11]

Moreover, where an agency's action is procedural in nature, that action likely will be determined to be reasonable and within the agency's operational authority.

Consequently, the fact that the ITC engages in rulemaking primarily on procedural matters, but also does so subject to public notice and comment, indicates that future ITC rulemaking decisions likely will be upheld as reasonable agency actions.

Impact on ITC Adjudication

In Loper Bright, the court determined that the Chevron framework[12] is contrary to both the APA and the powers of the judiciary granted by Article III of the U.S. Constitution when courts determine questions of law.[13] However, the court also recognized that although an agency's statutory interpretation "'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'"[14]

Moreover, the court in Loper Bright reiterated its historical tendency to treat agency determinations of fact as binding on courts where the agency provided evidence to support its findings.[15]

In fact, the court went so far as to recognize previous decisions finding that Congress could "endow [an] agent with the power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met."[16]

In the Tariff Act, Congress delegated to the ITC authority to investigate and make determinations regarding allegations of import injury and unfair trade in importation.

In import injury investigations, the ITC operates in tandem with the U.S. Department of Commerce under Title VII of the Tariff Act to conduct antidumping and countervailing duty, or AD/CVD, investigations. The Department of Commerce evaluates whether dumped or unfairly subsidized goods are being imported into the U.S., and the ITC determines whether the dumped or subsidized imports materially injure a U.S. industry or threaten it with material injury.[17]

Unfair trade investigations under Section 337 of the Tariff Act most frequently involve issues related to the infringement of U.S. intellectual property rights, but can also implicate antitrust issues, trade secrets, false designation of origin and other related forms of unfair acts in the importation of articles into the U.S.

When the ITC adjudicates an international trade dispute according to its congressionally delegated authority under the Tariff Act, it conducts a fact-specific analysis based on a robust record. As in its rulemaking, the procedural, structural and analytical factors unique to the ITC should limit the impact of the Loper Bright decision.

Unlike agencies such as the U.S. Social Security Administration or the U.S. Department of Veterans Affairs, challenges to ITC determinations can only be heard by the U.S. Court of Appeals for the Federal Circuit.[18] This procedural limitation provides a consistency in judicial consideration of ITC adjudications that other agencies may not enjoy.

ITC investigations under both Title VII and Section 337 of the Tariff Act implicate agency interpretation of the underlying statutory language. Although the decision-making structures in the two types of ITC investigations differ, both structures are designed to ensure agency decision making proceeds in accord with the statute.

Decisions in AD/CVD investigations are made in the first instance by the commission, with the support of legal advisers and expert agency staff, resulting in detailed commission opinions that enumerate and consider all relevant statutory factors.

Section 337 investigations proceed first through an administrative law judge, then to the commission itself and, finally, to presidential review. This structural element of the ITC's decision making helps to ensure that agency decisions in Section 337 adjudications hew closely to congressional intent, and provide substantial reasoning and support for agency decisions that implicate statutory interpretation.[19]

Under the interpretive methodology laid out by the court in Loper Bright, future judicial consideration of ITC adjudicatory decisions that are based on statutory interpretation will hinge on the persuasiveness of the agency's explanations for those decisions.

The record demonstrates that the agency's close attention to the language of the statute, legislative history and judicial precedent results in relatively few disputes in which the U.S. Court of International Trade and the Federal Circuit find that the ITC has not acted reasonably and persuasively, indicating that future appellate decisions may not change substantively, although the Court of International Trade and the Federal Circuit will need to rely on a different analytical framework when analyzing some questions of law.

For example, in 2015, in Suprema Inc. v. ITC, a Section 337 case discussing whether articles that induce infringement qualify as "articles that infringe" under the statute, the Federal Circuit found the agency's statutory interpretation reasonable under a Chevron analysis, noting that Congress had "not upset the Commission's consistent interpretation of Section 337."[20]

If a future case involving similar facts challenges the commission's interpretation of Section 337, the court would need to engage in substantive interpretation of the relevant statutory provisions.

Without the Chevron analytical framework as a backdrop, a different panel of judges may interpret the statute differently. However, the specific facts of the case and the

commission's persuasive arguments supporting its expert interpretation of those facts would still play an important role in the court's decision.

The fact-intensive nature of ITC cases does not eliminate the impact of Loper Bright on future appellate decisions. The Court of International Trade and the Federal Circuit have relied at least in part on a Chevron analysis to decide a number of cases in recent years, regardless of whether the agency relied on Chevron in its arguments.[21]

If any of those or similar cases were to come before the Federal Circuit now, post-Loper Bright, the Federal Circuit would likely need to provide an alternate analysis to support its decision — analysis that will provide valuable insight into the court's interpretation of the statutes under which the ITC operates.[22]

Regardless of the outcome in any single case, Loper Bright's reinvocation of Skidmore as the basis for courts to grant respect and consideration to persuasive agency reasoning means that the ITC is likely to prevail on its reasonable, expert judgment.

Conclusion

The ITC provides an example of an agency exercising its congressionally granted authority in a manner that allows for consistent decision making at the agency and judicial levels under the Chevron analytical framework. That is not likely to change substantially in a post-Chevron world.

Importantly, the nonpartisan nature of the agency's work cannot be overstated when considering the application of statutory analysis to the ITC's actions: Unlike other agencies that handle international trade issues, the ITC does not engage in policymaking, nor do its political appointees automatically change when an administration changes.

Moreover, certain structural, procedural and analytical factors inherent in the ITC's operations facilitate consistency that may not be present in other agency decision-making processes.

The ITC's evidence-based decision making, supported by a robust factual record, indicates that the courts' treatment of ITC decisions is not likely to undergo a sea change, although the Court of International Trade and the Federal Circuit may refocus their reasoning in the occasional cases involving statutory interpretation.

For agencies subject to more variable policy-driven decision making, the Loper Bright opinion augurs substantial changes in how agencies will approach rulemaking in the context of potentially ambiguous statutory language.

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[1] Loper Bright Enterprises v. Raimondo, No. 22-451 (S. Ct. 2024).

[2] Relentless, Inc. v. Dep't of Commerce, No. 22-1219 (S. Ct. 2024).

[3] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[4] Loper Bright Enterprises v. Raimondo, No. 22-451, Slip Op. at 14-15.

[5] Loper Bright at 8-9.

[6] In addition to private parties, the statute provides that Congress, the president or other agencies may also request that the ITC conduct investigations. The ITC may also self-initiate investigations. See, e.g., 19 U.S.C. § 1332, 1337, 1671a, 1673a, 2252.

[7] Compare, e.g., Section 335 of the Tariff Act of 1930, 19 U.S.C. § 1335 (authorizing the ITC to "adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties") with the Federal Trade Commission's rulemaking authority in Federal Trade Commission Act Sec. 18, 15 U.S.C. § 57a (authorizing the FTC to "prescribe interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce ... and rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce").

[8] Loper Bright at 14-15, 33-34.

[9] See, e.g., "Practice and Procedure: Rules of General Application, Safeguards, Antidumping and Countervailing Duty Investigations, and Section 337 Adjudication and Enforcement," 89 Fed. Reg. 22012 (Mar. 28, 2024). See also supra, note 8 (comparing the rulemaking authority of the ITC and the FTC).

[10] Auer v. Robbins, 519 U.S. 452 (1997). See also Kisor v. Wilkie, 139 S. Ct. 2400 (2019), in which the Supreme court narrowed and clarified Auer, holding that when an agency does not provide sufficient reasons for the agency's interpretation of its own ambiguous regulation or other countervailing reasons outweigh the agency's reasons, the court should not give deference to the agency's interpretation.

[11] Skidmore v. Swift, 323 U.S. 134 (1944). Skidmore, and courts "may properly resort for guidance" to an agency's statutory interpretation as a "body of experience and informed judgment" based on the degree of the agency's care, expertise, and persuasiveness of the agency's argument. Id. at 134, 139-40.

[12] Under Chevron, courts engage in a two-step analysis when determining the reasonableness of agency actions involving ambiguous statutory provisions. In Chevron step one, a court determines whether Congress has spoken to the particular issue in question and whether the relevant statutory language is ambiguous. Only if a court determines that the statutory language is ambiguous and that Congress has delegated authority to the agency to fill gaps does the analysis proceed to Chevron step two, wherein the court determines whether the agency's interpretation of the statutory language and resulting

decision was reasonable.

[13] Loper Bright at 8-9, 18.

[14] Id. at 25.

[15] Id. at 9.

[16] Id.

[17] The ITC also considers whether the establishment of an industry is materially retarded by reason of dumped or subsidized imports. 19 U.S.C. § 1671b, 1673b.

[18] Although the Court of Appeals for the Federal Circuit is the ultimate court of appeals for both section 337 and AD/CVD cases, AD/CVD cases are appealed in the first instance to the Court of International Trade (or, in cases involving Canada or Mexico, may be appealed to a binational panel under the auspices of the United States-Mexico-Canada Agreement (USMCA)). 28 U.S.C. § 1581. In both section 337 and AD/CVD investigations, the fact that the same courts consider all ITC appeals yields greater consistency.

[19] Note that section 337 investigations are formal adjudications under the APA, while AD/CVD investigations are not; the Loper Bright opinion's focus on Chevron's inconsistency with the APA could therefore have a greater impact on AD/CVD investigations. However, because the ITC conducts a fact-specific analysis based on a robust record, this impact likely will be mitigated.

[20] See Suprema, Inc. v. Int'l Trade Comm'n, 796 F. 3d 1338, 1350-52 (Ct. App. Fed. Cir. 2015).

[21] See, e.g., Kyocera Solar, Inc. v. U.S. Int'l Trade Comm'n, 844 F. 3d 1334 (Ct. App. Fed. Cir. 2016), Full Mbr. Subgroup of the Am. Inst. of Steel Constr. v. U.S., 547 F. Supp 3d 1211 (Ct. Int'l Trade 2021).

[22] See, e.g., Mayborn Grp., Ltd. v. Int'l Trade Comm'n, 965 F. 3d 1350 (Ct. App. Fed. Cir. 2020) (providing an example where the Federal Circuit addressed the statutory authority of the ITC without engaging in Chevron analysis). See also Roku, Inc. v. Int'l Trade Comm'n, No. 23-1317 (Ct. App. Fed. Cir., filed Dec. 20, 2022) (providing an example of a pending case where the agency did not rely on Chevron in its brief and the Federal Circuit will likewise need to rely on a non-Chevron-based analysis in its opinion).