IS TRADE SPECIAL? TRADE LAW AND DEFERENCE AFTER *LOPER BRIGHT*

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"*Chevron* is overruled."[2] With those three words, the Supreme Court in *Loper Bright Enterprises v. Raimondo* discarded forty years of tradition regarding the relationship between the Judiciary and Executive Branch agencies. But what does this three-word holding mean for trade litigation? It may mean new arguments will be made. It may mean that what was thought to be well-settled law is ripe to be re-litigated by directing a reviewing court to the "best reading of a statute."[3] Or it may mean that the U.S. Court of International Trade ("CIT") and U.S. Court of Appeals for the Federal Circuit ("CAFC") will do what they have always done when evaluating agency determinations in trade by "ensuring the agency has engaged in 'reasoned decisionmaking.'"[4] This paper reviews the *Loper Bright* decision, applies the decision to the statutory judicial framework concerning trade and customs matters, and attempts to predict the cases that may come before the courts soon, pointing to *Loper Bright* – perhaps as a new standard – for reviewing agency determinations that invoke the interpretation of ambiguous statutory provisions.

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[2] *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, Slip Op. at 35 (June 28, 2024).

[3] *Id*. at 17.

[4] *Id*. at 18.

I. Background

In simplified form, *Chevron*, as we all know, set up a two-step process by which a court was to determine the validity of an agency's interpretation of statutory text. First, if the statutory text was unambiguous, then that was "the end of the matter"; the only question then was whether the agency correctly interpreted and applied the clear text. Second, if the text was ambiguous or silent with respect to a particular issue, the court then had to determine whether the agency's statutory interpretation was based on a permissible construction of the text, even if it was not the construction that the court would have preferred.[5]

In describing the second step of the *Chevron* framework in *United States v. Eurodif S.A.*, one of the few trade remedies cases decided by the Supreme Court in recent years, the Supreme Court stated that "a court's choice of one reasonable reading of an ambiguous statute does not preclude an implementing agency from later adopting a different reasonable interpretation."[6] In the import regulatory field, this standard has been articulated in decisions such as *United States v. Haggar Apparel Co.*, in which the Supreme Court, reading challenged Customs regulations as filling a gap in an ambiguous statute, stated that, "a reasonable interpretation and implementation of an ambiguous statutory provision . . . must be given judicial deference."[7] And although not relying on *Chevron*, the CAFC in cases such as *Maple Leaf Fish Co. v. United States* (a Section 201 safeguards case) applied a standard of judicial review of equal, if not greater, deference, to Presidential action.[8]

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[5] *See Chevron U.S.A. Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

[6] *United States v. Eurodif S.A.,* 555 U.S. 305, 315 (2009).

[7] *United States v. Haggar Apparel Co.*, 526 U.S. 380, 383 (1999).

[8] *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) ("For a court to interpose, there has to be *a clear misconstruction of the governing statute*, a significant procedural violation, or action outside delegated authority") (emphasis added).

This framework is no longer an accurate description of the relationship between the Judiciary and the Executive regarding the interpretation of legislative texts. *Loper Bright* made clear that the *Chevron* interpretive framework was incorrect both as a matter of constitutional structure and the governing statutory framework. As to the latter, the Supreme Court was troubled by the failure of *Chevron* and subsequent decisions to even attempt to "reconcile [the *Chevron*] framework" with the Administrative Procedure Act ("APA"), which "delineates the basic contours of judicial review" of agency action.[9] Section 706 of the APA provides that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions," and "set aside agency action, findings, and conclusions found to be . . . not in accordance with law."[10] As the Supreme Court explained, "[t]he APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions."[11] Thus, affording deference to an agency's interpretation of ambiguous statutory text conflicted with the role of judicial review as articulated in the APA.

As to the Constitution, the Supreme Court referred to *Marbury v. Madison*, which explained that it is "emphatically the province and duty of the judicial department to say what the law is."[12] It is the job of judges, not agency officials, to interpret texts – including statutes. The Supreme Court found *Chevron* to be "misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."[13] The upshot is that "statutes, no matter how

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[9] *Loper Bright*, Slip Op. at 13, 21.

[10] 5 U.S.C. § 706.

[11] *Loper Bright*, Slip Op. at 16.

[12] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[13] *Loper Bright*, Slip Op. at 23.

impenetrable, do – in fact, must – have a single, best meaning,"[14] and that best meaning is "necessarily discernible by a court deploying its full interpretive toolkit."[15]

The Supreme Court addressed several concerns that were raised regarding a world in which judges would not give deference to agency interpretations of the statutes they enforce. One concern is that judges, unlike expert agencies, lack the expertise to understand the complex fact patterns and regulatory frameworks within which agencies interpret their governing statutes.[16] This concern was rejected as a reason to sustain *Chevron*, although the Supreme Court conceded that an agency's "expertise has always been one of the factors which may give an Executive agency's interpretation particular 'power to persuade, if lacking power to control'."[17]

The Supreme Court also rejected the argument that a lack of deference will result in instability in the interpretation of statutes, as various judges may interpret a single statutory text in various, and even conflicting, ways. The Supreme Court brushed that concern aside, noting that uncertainty already existed under *Chevron*, which left statutes subject to the possibility of repetitive reinterpretation by agencies – for example, with changes of Administration: "Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes."[18] This sort of instability had previously been considered acceptable by the Supreme Court in decisions such as *Brand X.* There, the Supreme Court held that "[a]gency inconsistency is not a basis for declining to analyze the agency's

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[14] *Id.* at 22.

[15] *Id.* at 31.

[16] *Id.* at 24-25.

[17] *Id.* at 25 (*quoting Skidmore v. Swift & C*o., 323 U.S. 134, 140 (1944)).

[18] *Id.* at 33.

interpretation under the *Chevron* framework," and that agencies should not be precluded "from *revising unwise judicial constructions* of ambiguous statutes."[19] This line of reasoning appears to be discredited by *Loper Bright*.

II. *Loper Bright* and Existing Standard of Review in Trade and Customs Litigation

The fundamental holding of *Loper Bright* is that agency interpretation of the law is not entitled to deference. In reaching that conclusion, the Supreme Court distinguished the level of deference afforded to agency action under the APA with respect to "all relevant questions of law" (no deference) versus "agency policymaking and factfinding" (substantial deference, so long as within specified bounds).[20] Under § 706(2)(A) of the APA, a court will defer to agency actions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." By contrast, under § 706(2)(E) of the APA, a court will defer to agency factfinding in formal proceedings unless such factfinding is "unsupported by substantial evidence."

This distinction is highly relevant in the international trade context, where challenges to agency actions may, but often do not, implicate questions of statutory interpretation. Historically, before the CIT, Customs decisions have tended to implicate statutory interpretation more often than antidumping ("AD") and countervailing duty ("CVD") determinations by the U.S. Department of Commerce ("Commerce") and the U.S. International Trade Commission ("Commission"), which are charged with administering technical methodologies and factfinding procedures established by the legal frameworks governing trade remedy litigation.[21] That said, it

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[19] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 983 (2005) (emphasis added).

[20] *Loper Bright*, Slip Op. at 13-14 (citing 5 U.S.C. § 706). Indeed, the chapeau of section 706 of the APA makes clear that "the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions. . . ."

[21] For a helpful historical explanation on this topic, see Patrick C. Reed, THE ROLE OF FEDERAL COURTS IN U.S. CUSTOMS & INTERNATIONAL TRADE LAW, ch. 10 (1997).

may be that *Loper Bright* has created an incentive for litigants to frame their challenges to AD and CVD determinations in terms of statutory analysis; whether that approach is hemmed in by the built-in standard of review for such determinations will be an important question going forward.

For many of the case types over which the CIT exercises exclusive jurisdiction, the applicable standard of review is found in the procedural law governing the CIT's review or the underlying substantive statute, which often directly rely on or echo either the arbitrary and capricious standard or the substantial evidence standard found in the APA. This is true for cases challenging agency decisions in AD and CVD proceedings, which reflects the factfinding nature of those challenged actions. That the Supreme Court in *Loper Bright* affirmed the continuing relevance of the APA's deferential framework to those forms of agency decision-making means that practice before the CIT will likely remain largely unchanged. The arguably more narrow space in which *Loper Bright* may come into play is where a litigant raises a question of law and the court is tasked with determining whether "such action is inconsistent with the law as [the court] interpret[s] it."[22] Even in those cases, or in cases where the APA (or some variation thereof) does not obviously apply, or in cases that invoke a true question of statutory interpretation, other deferential judicial review standards provide guidance.[23]

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[22] *Loper Bright*, Slip Op. at 14.

[23] The CIT has exclusive jurisdiction over challenges to certain types of presidential action pursuant to 28 U.S.C. § 1581(i), but such action is not subject to an APA standard of review because "'the President is not an agency within the meaning of the Act.'" *Motion Systems Corp. v. Bush*, 342 F. Supp. 2d 1247, 1258 (Ct. Int'l Trade 2004) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992)), *aff'd*, 437 F.3d 1356 (Fed. Cir. 2006). Thus, for trade statutes such as the global safeguard import relief provision (19 U.S.C. §§ 2251-2253) that delegate power to the President, courts have established broad and highly deferential frameworks protecting presidential discretion. For example, in cases involving the exercise of presidential discretion in the realm of foreign affairs, the reviewing court will uphold the action unless there is a constitutional violation or "'a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.'" *Motion Systems*, 342 F. Supp. 2d at 1259-60 (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)); *see also PrimeSource Bldg. Prods. v. United States*, 59 F.4th 1255, 1260 (Fed. Cir. 2023), *cert. denied*, 144 S.Ct. 345 (2023). The CAFC's decision in *Maple Leaf* is discussed further below.

A. The CIT's Jurisdictional and Scope of Review Framework

The framework for judicial review in the realm of international trade is well-defined by the jurisdictional and procedural standards implemented by Congress. Section 1581 of title 28 establishes the CIT's jurisdiction over certain civil actions against the United States arising under the Tariff Act of 1930, the Trade Act of 1974, the Trade Agreements Act of 1979 (28 U.S.C. § 1581(a)-(g)); action taken (or not taken) prior to importation of goods (*id.* § 1581(h)); or actions involving import revenue; tariffs, duties, fees, or taxes, other than revenue, on the importation of goods; certain embargoes or other quantitative restrictions on imports; and related enforcement measures (*id.* § 1581(i), also known as "residual jurisdiction").

Section 2640 of title 28 establishes procedures for judicial review of international trade matters. In particular, §§ 2640(a) and (d) denote that the CIT shall review the action on "the basis of the record" for actions arising under jurisdictional provisions 1581(a), (b), (e), (f), (g), and 1582.[24] Sections 2640(b) (referencing actions arising under 1581(c) jurisdiction) and 2640(c) (referencing actions arising under 1581(d) jurisdiction) each defer to standards of review embedded in the governing substantive law.[25] Finally, and importantly, § 2640(e) sets forth for "any civil action not specified in this section" a catch-all standard that the CIT shall review those actions in accordance with the APA (5 U.S.C. § 706).[26]

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[24] *See* 28 U.S.C. § 2640(a), (d).

[25] *Id*. § 2640(b), (c).

[26] *Id*. § 2640(e). This catch-all scope of review provision primarily corresponds to the 1581(i) residual jurisdiction provision. 28 U.S.C. § 1581(i). Cases arising under 1581(h) jurisdiction (*id.* § 1581(h)) involving challenges to agency action or lack thereof *prior* to importation are not expressly identified in the review provisions of 19 U.S.C. § 2640. The CIT has previously recognized that the scope of review in a case arising under 1581(h) jurisdiction "is limited to the administrative record" and subject to the APA arbitrary and capricious standard of review enunciated in § 706(2)(A) of the APA (5 U.S.C. § 706(2)(A)). *Heartland By-Products, Inc. v. United States*, 74 F. Supp. 2d 1324, 1329 (Ct. Int'l Trade 1999); *see also* 28 U.S.C. § 2640(e) ("In any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5."). Subsequently, in reversing the lower court's decision, the CAFC determined that, post-*Mead*, the court's review of Customs' classification ruling should be evaluated under *Mead* and *Skidmore* (both discussed further below). *Heartland By-Products, Inc. v. United States*, 264 F.3d 1126, 1133 (Fed. Cir. 2001). In any event, the threshold requirement of

Thus, for many cases over which the CIT exercises exclusive jurisdiction, as enumerated in 28 U.S.C. § 1581, there is a corresponding standard of review established by the procedural provisions of 28 U.S.C. § 2640.[27] These standards of review are inextricably tied to or directly cite the APA. For example, § 2640(b) – covering civil actions related to AD and CVD proceedings under § 516A of the Tariff Act of 1930 (19 U.S.C. § 1516a) – refers to § 516A(b) of the Act, which sets forth the applicable standard of review:

> (1) Remedy
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> The court shall hold unlawful any determination, finding, or conclusion found—
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> (A) in an action brought under subparagraph (A), (B), or (C) of subsection (a)(1) [determinations by Commerce not to conduct an investigation or changed circumstances review or a negative preliminary injury determination by the International Trade Commission], to be *arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*, or
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> (B) (i) in an action brought under paragraph (2) of subsection (a) [enumerating reviewable final determinations by Commerce or the Commission], to be *unsupported by substantial evidence on the record, or otherwise not in accordance with law*, or
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> (ii) in an action brought under paragraph (1)(D) of subsection (a) [Commerce determinations based on no or inadequate response to a notice of initiation of a five-year sunset review], to be *arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*.[28]

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establishing subject-matter jurisdiction under 1581(h) is only satisfied when the plaintiff meets the "heightened burden" of having to demonstrate that "irreparable harm will result unless judicial review prior to importation is obtained." *CannaKorp, Inc. v. United States*, 234 F. Supp. 3d 1345, 1349 (Ct. Int'l Trade 2017) (quoting *Heartland By-Prods., Inc. v. United States*, 521 F. Supp. 2d 1386, 1393 (Ct. Int'l Trade 2007); *Am. Frozen Food Inst., Inc. v. United States*, 855 F. Supp. 388, 393 (Ct. Int'l Trade 1994)). That burden to establish jurisdiction under 28 U.S.C. § 1581(h) is rarely met.

[27] *See* 28 U.S.C. § 2640(b), (c), (e).

[28] 19 U.S.C. § 1516a(b)(1) (emphases supplied).

The arbitrary and capricious standard found in §§ 1516a(b)(1)(A) and (B)(ii) is identical to the APA standard found at 5 U.S.C. § 706(2)(A). Similarly, the substantial evidence standard of review found in § 1516a(b)(1)(B)(i) echoes the APA standard under 5 U.S.C. § 706(2)(E).[29] Notably, in a departure from the precise language of the APA, agency decisions governed by the § 1516a(b)(1)(B)(i) standard of review may also be reviewed for comportment with the law in addition to substantial evidence – likely bringing into stark relief whether a litigants claims raise questions of law or fact.

The scope of the CIT's review pursuant to §§ 2640(c) and (e) similarly demonstrates a connection to the APA. 28 U.S.C. § 2640(c), (e). Section 284 of the Trade Act of 1974 – referenced in § 2640(c) – establishes a substantial evidence standard for review of the record on which the reviewable decision was made, matching the APA standard in § 706(2)(E).[30] And, as previously observed, the scope of review of any civil action not specifically identified over which the CIT exercises jurisdiction will be in accordance with the relevant APA standard of review.[31]

That leaves §§ 2640(a) and (d), which identify other civil actions *without* explicit reference to the APA or a statutorily embedded standard of review.[32] Instead, the law states only that the review of such actions will be based on the trial record made before the court (*see* 28 U.S.C. § 2640(a)) or the record before the agency at the time of the decision (*id.* § 2640(d)).[33]

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[29] *See*, *e.g.*, *Mitsubishi Polyester Film, Inc. v. United States*, 228 F. Supp. 3d 1359, 1371 (Ct. Int'l Trade 2017) (in relying on the standard of review established in 19 U.S.C. § 1516a(b)(1)(B)(i), explaining that Commerce's factual findings will be upheld "unless unsupported by substantial evidence") (quoting *Eurodif*, 555 U.S. at 316 n.6 (citing 5 U.S.C. § 706(2)(E)).

[30] *See* 19 U.S.C. § 2395(a), (b); 5 U.S.C. § 706(2)(E).

[31] *See* 19 U.S.C. § 2640(e) (citing § 706 of title 5 (5 U.S.C. § 706)).

[32] *See* 28 U.S.C. § 2640(a), (d).

[33] The types of claims subject to the CIT's exclusive jurisdiction and review on the basis of the record are: denials of customs protest under § 515 of the Tariff Act of 1930 (28 U.S.C. §§ 1581(a), 2640(a)(1)); decisions on domestic

The CIT has repeatedly observed that § 2640(a) relating to those actions for which the CIT must make determinations based on the record before the court "mandate[s] a *de novo* standard of review."[34] The court has also previously concluded that the *de novo* review enunciated in § 2640(a) "is not accompanied by a standard of review."[35] The court in that case relied on the "general guidance regarding the scope and standard of review to be applied in various circumstances" found in § 706 of the APA.[36]

Subsequent decisions involving actions requiring *de novo* review differentiated between questions of fact and questions of law, but relied on a substantial evidence standard for the former and an arbitrary and capricious standard for the latter – both reminiscent of, if not directly citing, the APA.[37] Notably, § 706(2)(F) of the APA speaks directly to factual determinations based on *de novo* review by the court, requiring that the underlying agency action be set aside only if "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."[38]

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industry petitions regarding import valuation, classification, or duty assessment (*id.* §§ 1581(b), 2640(a)(2)); decisions related to the country of origin of goods subject to eligibility under the Agreement on Government Procurement (*id.* §§ 1581(e), 2640(a)(3)); denial of access to business proprietary information (*id.* §§ 1581(f), 2640(a)(4)); adverse decisions related to customs broker licensing or imposition of a monetary penalty (*id.* §§ 1581(g)(1)-(2), 2640(a)(5)); civil actions by the United States to recover certain civil penalties, bonds relating to the importation of merchandise, or customs duties (*id.* §§ 1582, 2640(a)(6)); and adverse decisions related to accreditation of private testing laboratories used to examine imported merchandise (*id.* §§ 1581(g)(3), 2640(d)).

[34] *United States v. UPS Customhouse Brokerage, Inc*., 686 F. Supp. 2d 1337, 1363 (Ct. Int'l Trade 2010) (citing cases); *see also Spirit AeroSystems, Inc. v. United States*, 680 F. Supp. 3d 1329, 1335 (Ct. Int'l Trade 2024); *United States v. Ricci*, 985 F. Supp. 125, 126-27 (Ct. Int'l Trade 1997), *aff'd without op*., 178 F.3d 1307 (Fed. Cir. 1998).

[35] *Ricci*, 985 F. Supp. at 126.

[36] *Id*. (citing *Urbano v. United States*, 967 F. Supp. 1322, 1328 (Ct. Int'l Trade 1997) (applying a substantial evidence standard in a case arising under § 1581(g)(2) jurisdiction), aff'd, 146 F.3d 1346 (Fed. Cir. 1998)).

[37] *See*, *e.g.*, *O'Quinn v. United States*, 100 F. Supp. 2d 1136, 1137-38 (Ct. Int'l Trade 2000) (determining the APA arbitrary and capricious standard of review applied to the legal basis for the agency decision in a claim arising under § 1581(g)(1) jurisdiction); *Depersia v. United States*, 637 F. Supp. 2d 1244, 1247 (Ct. Int'l Trade 2009) (same).

[38] 5 U.S.C. § 706(2)(F); *see also Bosun Tools Co. v. United States*, 405 F. Supp. 3d 1312, 1315 (Ct. Int'l Trade 2019) (in the context of a case arising under § 1581(c) jurisdiction, deciding questions of fact on a motion to reverse liquidation of an import entry under de novo review and the APA § 706(2)(F) standard); *United States v. Santos*, 883

In the CIT's 2010 decision in *UPS Customhouse Brokerage*, Judge Carman disagreed with the earlier conclusion in *United States v. Ricci* that the APA standard of review found in § 706(2)(F) applies in cases involving *de novo* review of the record before the court.[39] The CIT instead held:

> the phrase "upon the basis of the record made before the court" in § 2640(a) provides a standard of review, not merely a scope of review, and establishes that the Court decides *de novo* monetary penalty recovery actions brought under § 1582(1).[40]

In relying on Supreme Court precedent, the CIT also indicated that the standard of review contained within the *de novo* mandate of § 2640(a) applies to both factual and legal determinations in particular types of civil actions, thereby imbuing the court with authority to make decisions on the basis of the court record and independent of the underlying agency action in those cases.[41]

Notwithstanding this jurisprudence, the question of whether *any* form of deference is owed to an aspect of the agency action in the relatively small subset of civil actions over which the CIT exercises exclusive jurisdiction that are to be decided on a *de novo* basis remains case-specific.[42] *Loper Bright* clarifies the court's obligation to determine legal questions without deference to agency decision-making, but deferential standards established in prior cases such as

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F. Supp. 2d 1322, 1330 (Ct. Int'l Trade 2012) (explaining, in deciding a motion for default judgment, that the penalty amount determined by the agency "will be upheld so long as it is reasonable and supported by the facts").

[39] 686 F. Supp. 2d at 1363 (citing *Ricci*, 985 F. Supp. at 126).

[40] *Id*. at 1364.

[41] *Id*. at 1363 (citing *United States v. Haggar Apparel Co*., 526 U.S. 380, 391 (1999)); *see also DIS Vintage LLC v. United States*, 456 F. Supp. 3d 1323, 1328 (Ct. Int'l Trade 2020); *SGS Sports, Inc. v. United States*, 678 F. Supp. 3d 1369, 1370-71 (Ct. Int'l Trade 2024).

[42] For example, in a recent customs protest denial case arising under § 1581(a) jurisdiction and decided *de novo* (*see* 28 U.S.C. §§ 1581(a), 2640(a)(1)), the CIT recognized both its "independent responsibility" to decide questions of law and that the underlying Customs classification decision is "afforded deference relative to its 'power to persuade.'" *Trijicon, Inc. v. United States*, 686 F. Supp. 3d 1336, 1340-41 (Ct. Int'l Trade 2024) (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

Skidmore v. Swift & Co.,[43] *United States v. Mead*, and *Auer v. Robbins* (as modified in *Kisor v. Wilkie*) continue to fill in the landscape for courts to seek guidance from expert agencies in reviewing both legal and factual claims (when not expressly governed by the APA or similar statutory standard of review).[44]

B. Other Judicial Deferential Standards – Guidance and Guardrails

Even before *Loper Bright*, the deference standards that occasionally arose in the trade law context tended to vary both by agency and by the aspect of the agency's determination being challenged. Several seminal cases providing parameters for judicial deference may serve as guideposts.

Beginning with the decision mentioned in the *Loper Bright* opinion, *Skidmore* provides that an agency's decision, including its legal interpretations, may offer a persuasive but not controlling "body of experience and informed judgment" that "courts and litigants may properly resort for guidance," depending on "the thoroughness evident" in the agency's consideration, "the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give" the agency "power to persuade."[45] Litigants have argued for and against applying *Skidmore* deference in numerous cases, often involving challenges to Customs decisions, including a recent case involving Customs' interpretation of the Enforce and Protect

[43] In her dissenting opinion, Justice Kagan observed that the *Skidmore* standard that may entitle agency interpretations to "respect" will invite the same disagreement that courts previously had over what constituted "ambiguity" in the statute under step one of *Chevron*. *Loper Bright*, 603 U.S. ___, 144 S.Ct. 2244, 2309 (Kagan, J., dissenting). The question of how to apply this and other standards, and the relative level of these deference standards in the absence of *Chevron*, will earn the renewed and likely vociferous focus of litigants going forward.

[44] An additional noteworthy procedural statute that may prove relevant is 28 U.S.C. § 2639. Added to the U.S. Code in 1980 (before *Chevron*) as part of the Customs Courts Act of 1980, Pub. L. No. 96-417, this provision governing the burden of proof in cases before the CIT establishes a rebuttable presumption that decisions by Customs, the Department of Commerce, and the International Trade Commission are "correct." 28 U.S.C. § 2639(a)(1) (referencing §§ 515, 516, and 516A of the Tariff Act of 1930).

[45] 323 U.S. 134, 140 (1944).

Act ("EAPA") signed into law in 2016.[46] Now that *Chevron* is overruled, parties might more frequently invoke *Skidmore*. Whether a court affords *Skidmore* deference will depend on the thoroughness and reasoning of the agency's legal analysis.

Next, *Loper Bright* arguably also preserves a part of the Supreme Court's decision in *Mead*. The Supreme Court offered *Mead* as an example of how it has been "forced to clarify the [*Chevron*] doctrine again and again,"[47] including by modifying the *Chevron* two-step framework to add a "step zero."[48] *Mead* holds that an "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[49] Importantly, the Supreme Court in *Loper Bright* indicated that the principle of step zero – that Congress may "confer discretionary authority on agencies" and "often has," and that such delegation of authority is entitled to deference depending on the scope of that delegation – survives in the absence of *Chevron*.[50]

The Supreme Court in *Mead* also concluded that, while Customs was not entitled to *Chevron* deference when issuing tariff classification rulings, consideration as to whether

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[46] *See Diamond Tools Tech. LLC v. United States*, 609 F. Supp. 3d 1378, 1389 (Ct. Int'l Trade 2022) (declining to apply *Chevron* deference or *Skidmore* deference).

[47] *Loper Bright*, Slip Op. at 32; *see also id.* at 27 ("So we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is inapplicable.") (internal quotations omitted).

[48] *Id.* at 27; *See also*, *e.g.*, Cass R. Sunstein, *Chevron Step Zero* 23 (Univ. Chi. Pub. L. & Legal Theory, Working Paper No. 91, 2005).

[49] *Mead*, 553 U.S. at 226-27.

[50] *Loper Bright*, Slip Op. at 10-11, 26.

Skidmore deference weighed in favor of according persuasive weight to Custom's reasoning in classification rulings was warranted:

> To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore's* holding that an agency's interpretation may merit some deference whatever its form, given the "specialized experience and broader investigations and information" available to the agency, . . . , and given the value of uniformity in its administrative and judicial understandings of what a national law requires.[51]

Thus, this aspect of *Mead* remains valid in a post-*Chevron* world and underscores the continued relevance of *Skidmore*.[52]

Another framework for judicial deference, *Auer*, is relevant when an agency's interpretation of its own regulations is challenged. In *Auer*, the Supreme Court held that an agency's interpretation of its own regulations is owed judicial deference "unless 'plainly erroneous or inconsistent with the regulation.'"[53] Based on an August 2024 Westlaw search, relatively few CIT opinions cite *Auer*, and when it is cited, Westlaw categorizes the CIT's treatment as "negative."[54] Just five years ago in *Kisor*, the Supreme Court declined to overrule *Auer* and prior decisions underlying the *Auer* deference framework:

> The only question presented here is whether we should overrule [*Auer* and *Seminole Rock*], discarding the deference they give to agencies. *We answer that question no*. *Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits. *Auer* deference is sometimes appropriate and sometimes not. Whether to apply it depends on a

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[51] *Mead*, 553 U.S. at 234-39 (citations omitted) (quoting *Skidmore*, 323 U.S. at 139-40).

[52] Ultimately, on remand, the CAFC continued to maintain that the Customs tariff classification ruling at issue "does not persuade under the *Skidmore* standard." *Mead Corp. v. United States*, 283 F.3d 1342, 1344 (Fed. Cir. 2002).

[53] 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)); *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

[54] A predecessor to *Auer*, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), is similarly only sparingly cited in CIT opinions and, according to an August 2024 Westlaw search, has only received "negative" treatment by the CIT.

> range of considerations that we have noted now and again, but compile and further develop today. *The deference doctrine we describe is potent in its place, but cabined in its scope*.[55]

As a result, the *Auer* deference framework remains, but now with numerous "varied and critical" limitations on its scope.[56] Notably, Justices Gorsuch, Thomas, Kavanaugh, and Alito expressed willingness to overrule *Auer* in their *Kisor* concurrence (effectively a dissent).[57] Thus, whether *Auer/Kisor* will remain intact, and as result, whether and to what extent litigants and the government will rely on *Auer* deference for regulatory interpretations going forward remains to be seen.

Lastly, the CAFC has arguably articulated a zone of heightened deference concerning certain trade statutes involving presidential action.[58] For example, the CAFC explained in *Maple Leaf* that for a court to interpose in global safeguard actions under 19 U.S.C. §§ 2251-2253, "there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority."[59] In fact, the CAFC held "'the President's findings of fact and the motivations for his action are not subject to review," and "[t]he same is

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[55] 588 U.S. 558, 563-64 (2019) (emphases supplied).

[56] *Id*. at 573-80; see also *id.* at 590-91 (Roberts, C.J., concurring in part) ("The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise.").

[57] *Id*. at 591-618 (Gorsuch, J., concurring).

[58] In a challenge to presidential action taken under Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. § 1862), the CAFC has also recently upheld presidential action which, according to the court, *inter alia*, entailed the President's "determination that further import restrictions were needed" to effectuate the "manifest purpose" of the statute "to enable and obligate the President (in whom Congress vested the power to make the remedial judgments) to effectively alleviate the threat to national security. . . ." *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1309-10, 1323 (Fed. Cir. 2021), *cert. denied*, 142 S.Ct. 1414 (2022); *see also id.* at 1336 (Reyna, J., dissenting) (stating the majority opinion expands presidential authority).

[59] 762 F.2d 86, 89 (Fed. Cir. 1985).

true" for the Commission's "'escape clause' action which is preparatory to, and designed to aid, presidential action."[60]

Recently, the CAFC declined to reconsider the validity of *Maple Leaf*. In an August 13, 2024 panel opinion involving a global safeguard action under 19 U.S.C. § 2254, the CAFC stated that it reached its determination "without according any deference to the President's interpretation," and that the outcome "was unaffected by whether or not we apply *Maple Leaf*'s 'clear misconstruction' standard."[61] Notably, however, the CAFC expressed its belief that this particular case was not "an appropriate vehicle for deciding whether the *Maple Leaf* standard should be retained."[62] Thus, as with other deference frameworks discussed above, the legal landscape in this regard will likely continue to remain in flux as litigants, including those in the trade law context, continue to navigate post-*Chevron* judicial review of agency action implicating questions of law and in other matters beyond the clear purview of the APA.

III. A Survey of Judicial Application of *Chevron* Step Two by the CIT

Understanding the effect of *Loper Bright* on trade law involves two key considerations. First, its effect is limited to those cases in which parties challenge agency action on the basis of the "not in accordance with law" prong of the statutory provision defining the CIT's standard of review, or where a standard of review is not specified (*e.g.*, cases arising under 28 U.S.C §§

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[60] *Id*. at 89-90 (quoting *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984)); *see also Corus Grp. PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1354 (Fed. Cir. 2003) (stating "the President has broad latitude to determine the type of action to take," and stating the safeguard statute "provides an expansive, non-exclusive list of actions the President may take"); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018) ("Under *Corus* and other decisions of this court, there are limited circumstances when a presidential action may be set aside if the President acts beyond his statutory authority, but such relief is only rarely available. . . . [T]he President's authority to act is not conditioned on the existence [of a recommendation by the Commission as to a safeguard remedy.]").

[61] *Solar Energy Indus. Ass'n v. United States*, No. 22-1392, at 10, 16 (Fed. Cir. Aug. 13, 2024).

[62] *Id*. at 16. The panel issued this supplemental opinion concurrently with an order denying en banc rehearing, which was sought on the basis that *Maple Leaf* should be overruled.

1581(a), (b), (e), (f), (g), and 1582 jurisdiction).[63] Challenges involving the "unsupported by substantial evidence" prong remain unaffected by *Loper Bright*.

Second, *Loper Bright*'s key holding is further limited to *Chevron* step two: "courts need not and . . . may not defer to an agency interpretation of the law simply because a statute is ambiguous."[64] Through its corresponding pronouncement that there is a "single, best meaning" of a statute, "necessarily discernible by a court deploying its full interpretive toolkit[,]"[65] the majority can be understood to say that, in line with *Chevron* step one, Congress will always have "directly spoken to the precise question at issue."[66] Indeed, it is well established that the question of whether Congress has "directly spoken" is resolved through the traditional tools of statutory interpretation – the "toolkit" to which the Supreme Court refers.[67]

The question then becomes: how frequently does the CIT actually resort to *Chevron* step two, and when it does, how frequently does it defer to the agency? A survey of recent jurisprudence may prove helpful in answering these questions. We therefore searched Lexis for the following terms: "Chevron" *within 25 words of* "step" *or* "prong" *within 5 words of* "two" *or* "2" *or* "second." In order to ensure the most relevant results, we limited the search to the last ten

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[63] *See* Section II.A., *supra*.

[64] *Loper Bright*, Slip Op. at 35.

[65] *Id.* at 22, 31.

[66] *Chevron*, 467 U.S. at 842.

[67] *See*, *e.g.*, *Timex V.I. v. United States*, 156 F.3d 879, 882 (1998) ("To ascertain whether Congress had an intention on the precise question at issue, we employ the 'traditional tools of statutory construction.' . . . The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning. . . . Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter. . . . If, on the other hand, the statute's text does not explicitly address the precise question, we do not at that point simply defer to the agency. Our search for Congress's intent must be more thorough than that. The Supreme Court made this clear in *Chevron*: 'If a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.' (emphasis added). Beyond the statute's text, those 'tools' include the statute's structure, canons of statutory construction, and legislative history. . . . This is not to suggest that these other tools can override a statute's unambiguous text. . . . Rather, this recognizes that before we can allow an agency to say what the law is, we must thoroughly investigate whether Congress had an intent on the matter.") (citations omitted).

years of Court decisions, *i.e.*, January 1, 2014 through December 31, 2024 (recent as of August 15, 2024). This search yielded 106 decisions (out of a total 1,764 issued during the same ten-year period).[68] We then reviewed each case, categorizing it as one of the following:

1. The CIT determined that Congress had "directly spoken to the precise question at issue" such that under *Chevron* step one, no further inquiry was necessary (**20 decisions**);

2. The CIT concluded that the statute was ambiguous, and under *Chevron* step two, deferred to the agency's interpretation (**40 decisions**);

3. The CIT concluded that the statute was ambiguous, and under *Chevron* step two, did ***not*** defer to the agency's interpretation (**two decisions**); or

4. The CIT cited or otherwise discussed *Chevron* step two, but it was not relevant to the CIT's decision (*e.g.*, discussion of the *Chevron* analysis was limited to the CIT's discussion of its standard of review; the CIT rejected the plaintiff's "not in accordance with law" argument as improper; *Chevron* step two is mentioned in the context of precedent, but not applied to the facts of the case) (**44 decisions**).

As we discuss in the summaries below, of the two decisions where the CIT did not defer to the agency, only one involved a *bona fide Chevron* step two analysis.

A. Cases In Which the Court Proceeded to *Chevron*, But Did Not Defer to the Agency's Interpretation

In *Xiping Opeck Food Co., Ltd. v. United States*, Commerce investigated respondent Xiping's selling practices through its unaffiliated importer, and the importer's subsequent sales to a foreign entity, "Company A."[69] Commerce considered Company A to be an exporter, and consequently, an interested party under the statute – a conclusion which Company A contested (because it took title to the goods after importation to the United States).[70] Commerce ultimately cited Company A's non-cooperation in applying adverse facts available ("AFA") to Xiping,

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[68] Compiled from the CIT's listing of slip opinions for every year between 2014 and 2024, *available at* https://www.cit.uscourts.gov/content/slip-opinions.

[69] *Xiping Opeck Food Co., Ltd. v. United States*, 38 C.I.T. 1791, 1793 (2014).

[70] *See id*. at 1795, 1801-03.

because Company A, as an interested party, failed to cooperate.[71] In defining Company A as an exporter, Commerce stated that Company A was "a foreign entity acting as a price discriminator in selling to the U.S. market."[72]

The CIT concluded that it is "unclear, based on the plain language that it was the intent of Congress to find, as an exporter under the unfair trade laws, an entity that takes title to goods after importation into the United States."[73] It further concluded that Commerce "failed to supply an adequate explanation for its finding that Company A is an exporter and thus, qualifies as an interested party under the statute" and remanded to Commerce to "explain how its construction of the word exporter as a 'price discriminator' is a proper construction of the statute[.]"[74]

In *Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States*, Commerce concluded that subsidies it had determined to be *de jure* specific to olive growers were "attributable to downstream processors of those raw olives into ripe olives" under 19 U.S.C. § 1677-2.[75] That statutory provision, in part, requires that "demand for the prior stage product" (here, raw olives) "is substantially dependent on the demand for the latter stage product."[76]

The CIT deemed the statutory language clear, such that "substantially dependent" means that "demand for the prior stage product must be 'largely, but not wholly,' 'contingent' on the demand for the latter stage product . . . The meaning of the phrase is determined by reading the

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[71] *See id.* at 1799-1800.

[72] *See id*. at 1803 (citation omitted).

[73] *Id*. at 1803.

[74] *Id.* at 1806, 1817.

[75] *Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States*, 429 F. Supp. 3d 1325, 1329 (Ct. Int'l Trade 2020).

[76] 19 U.S.C. § 1677-2(1).

terms 'substantially' and 'dependent' in conjunction because 'substantially' is an adverb that modifies the adjective 'dependent.'"[77]

The CIT then contrasted this dictionary definition with Commerce's interpretation, in which it "did not read these two terms in conjunction, but instead separated those terms to reach its conclusion that the demand for raw olives is substantially dependent upon the demand for table olives."[78] The CIT concluded that Commerce violated *Chevron* step one because it "failed to assess whether the demand for raw olives was 'substantially dependent,' or 'largely, but not wholly,' 'contingent' on the demand for table olives."[79]

Why, then, have we included this case here? In footnote 11 of its opinion, the CIT went on to explain that, even though it was rejecting Commerce's argument under *Chevron* step one, it would address Commerce's argument that the term "substantial" was ambiguous and that Commerce's interpretation was reasonable; the Court likewise rejected this argument under *Chevron* step two, concluding that Commerce's interpretation of "substantial" was "inapposite in light of the legislative history specific to this statute[.]"[80] This case has therefore been included as an example under category (3), even though the CIT's ultimate holding was not based on a *Chevron* step two analysis.

B. Summary Conclusions of the Survey

Four general conclusions can be derived from the above survey. The first is a caveat: the methodology of the survey is admittedly imperfect. That is, there may be (and likely are) cases from the last ten years that, for example, fit into category (3) but are not captured because the

[77] *Asociación de Exportadores e Industriales de Aceitunas de Mesa*, 429 F. Supp. 3d at 1341-42.

[78] *Id.*

[79] *Id.* at 1342.

[80] *Id.* at 1342 n.11.

relevant terms do not appear in the manner listed in the search parameters. Thus, any broader conclusions must be tempered by this limitation.

Second, the number of cases that are resolved at step one of *Chevron* are, somewhat surprisingly, relatively few. One might expect that, due to the relative technical specificity of the trade law,[81] more decisions would involve a finding that the statute reflects clear congressional intent. Yet, the results of the survey suggest that, where *Chevron* has come into play, the CIT will find some ambiguity (or, as explained immediately below, silence or discretion) twice as often.

Third, the high incidence of resort to *Chevron* step two may not be surprising when one considers relevant context. The Supreme Court's focus in *Loper Bright*, as discussed *supra*, was ambiguity. However, as the Supreme Court itself suggested, ambiguity itself can mean different things to different people (or judges).[82] And, *Chevron* step two does not just concern ambiguity, but also silence.[83] Thus, these 40 cases do not necessarily represent an explicit finding of ambiguity. In addition to silence, other cases may involve the statute affording some degree of discretion to the agency to select or develop a particular methodology in addressing a statutory requirement.[84]

Consider, for example, the CIT's approval, under *Chevron* step two, of Commerce's use of per capita gross national income ("GNI") to measure economic comparability in the context of

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[81] *See*, *e.g.*, Neil Ellis, *Trade Law and the End of Chevron*, July 2024, https://www.neilellislaw.com/post/trade-law-and-the-end-of-chevron (noting that "in successive bouts of legislation, Congress has enacted increasingly detailed statutory provisions governing numerous situations under the trade remedy laws . . . and, of course, a robust body of judicial precedent has developed over the decades," which constitute "developments [that] help reduce the level of uncertainty that may arise in the application of statutory texts to specific disputes").

[82] *See Loper Bright*, Slip Op. at 30 ("But the concept of ambiguity has always evaded meaningful definition").

[83] *Chevron*, 467 U.S. at 843 ("Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")

[84] *See supra* Section II.B. for a discussion of *Mead*.

nonmarket economy ("NME") cases in *Clearon Corp. v. United States*. The CIT considered that the "statute does not expressly define the phrase 'level of economic development comparable' or what methodology Commerce must use in evaluating the criterion."[85] Arguably, this does not mean that the term "level of economic development" is ambiguous; it simply opens the door for Commerce to select a methodology to measure that statutory criterion.

Finally, the number of instances in which the CIT has deferred are (expectedly) significant. In essentially all but one case, the CIT has time and again found an agency's interpretation of the statute to be reasonable, at times invoking the CAFC's instruction that "the Court must defer to an agency's reasonable interpretation of a statute even if the Court might have preferred another."[86] For example, in both *American Drew v. United States* and *Adee Honey Farms v. United States* (both issued in 2022), the CIT, citing *Chevron* stated that "[e]ven were the court to conclude that plaintiffs' interpretation of the statutory provisions is the more reasonable one . . . still it would be required to accept the agency's interpretation if that interpretation also is reasonable."[87]

What do these conclusions suggest for the impact of *Loper Bright* on the CIT's jurisprudence? At a minimum, one might reasonably expect an increase in cases where the CIT ultimately discerns a "single, best meaning" of the statute – analogous to the 20 cases in category (1) above; or that litigants will at least pursue such claims more assertively.

At the same time, while the change in controlling precedent may affect the CIT's decision-making process, the outcome could still end up very much the same. That is, although

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[85] *Clearon Corp. v. United States*, 38 C.I.T. 1122, 1138 (2014).

[86] *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994).

[87] *Adee Honey Farms v. United States*, 582 F. Supp. 3d 1286, 1296-99 (Ct. Int'l Trade 2022); *Am. Drew v. United States*, 579 F. Supp. 3d 1372, 1384 (Ct. Int'l Trade 2022).

the 40 cases in which the Court deferred to the agency under *Chevron* step two are now a matter of legal history, one can easily imagine that in any number of these cases, the CIT, rather than deferring to the agency out of the obligation borne by *Chevron*, could reach the same outcome, albeit different in name, of affirming an agency's statutory interpretation. The most immediately evident path, as discussed by the Supreme Court itself as well as *supra*, is through *Skidmore* deference. That is, having reviewed an agency's interpretation of a statute for "the thoroughness evident in its consideration" and "the validity of its reasoning," consistent with the "body of experience and informed judgment" of the agency itself, the CIT will find the agency's interpretation to be a reasonable one.[88]

IV. The Role of the SAA in a Post-*Chevron* World

A separate, but related question arises when considering the role of the Statement of Administrative Action ("SAA") in a post-*Chevron* world. As explained below, it is unlikely that the elimination of *Chevron* deference – in particular, given the limitation of this development to *Chevron* step two – will seriously alter the courts' consideration of the SAA in trade litigation.

The SAA is a unique creature. It has been referred to as both legislative history[89] and "more than mere legislative history."[90] As pronounced in 19 U.S.C. § 3512(d), it "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." The statute, at a minimum,

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[88] *Loper Bright*, Slip Op. at 10, 25 (quoting *Skidmore*, 323 U.S. at 140); *see also* Section II.B., *supra*.

[89] *See*, *e.g.*, *Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*, 429 F. Supp. 3d 1353, 1365 (Ct. Int'l Trade 2020) (referring to "legislative history" of a statutory provision and following such mention with a discussion of language in the SAA).

[90] *SKF USA Inc. v. United States*, 263 F.3d 1369, 1373 n.3 (Fed. Cir. 2001).

provides the SAA with this "authoritative" role, and could even be read as an explicit adoption of its contents into the statutory language itself.

Some scholarship has taken issue with the form and manner of the SAA, highlighting the fact that, although ***approved*** by Congress, it was drafted by the Executive under the "fast track" process – thereby casting doubt on the degree to which it can be considered a genuine expression of Congress' intent – and ultimately amounts to an unconstitutional violation of the separation of powers:

> This combination of "approving" the SAA in the statute and elevating it above other sources to which a court or an administrative agency might turn in interpreting and applying the statute presents serious constitutional questions about Congress's ability to act outside the procedures enumerated in the Constitution (*i.e.*, bicameralism and presentment). It also raises the issue of whether Congress can limit the Executive and Judicial branches through something other than the law . . . [A]ny congressional attempt to elevate a statement of administrative action above all other extrinsic sources is unconstitutional and should be invalidated by the courts.[91]

In the three decades since its adoption, neither litigants nor the courts have appeared to share this concern, routinely turning to the SAA, consistent with the express instruction in the statute, to resolve disputes arising under the trade law, and in particular, during the *Chevron* step one analysis.

It is difficult to see, therefore, how the elimination of *Chevron* deference will meaningfully affect the relevance of the SAA to the CIT's or the CAFC's analysis. In *Loper Bright*, the Supreme Court not only highlighted that the "toolkit" of statutory interpretation

[91] *See generally* Cindy G. Buys & William Isasi, *An "Authoritative" Statement of Administrative Action: A Useful Political Invention or a Violation of the Separation of Powers Doctrine?*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 73 (2003); *id.* at 83 (citations omitted).

remains intact, but reiterated its importance. The SAA is among the first of the tools in the trade law toolkit. Nothing in *Loper Bright* suggests that this role is likely to change.

V. A Practical Review of Whether *Loper Bright* Will Make a Difference in Trade and Customs Cases

The interesting question for our community that this paper has attempted to broach so far is whether *Loper Bright* will bring about a significant shift in the manner of judicial review in the trade remedies and customs fields. A review or practical topics faced – past, present, and future – in trade litigation may help add some shape to what comes next.

A good place to begin this assessment is where this paper began; *viz*., by reference to the Supreme Court's opinion in *Eurodif*. That case concerned Commerce's determination to treat certain low-enriched uranium transactions (called separate work unit ("SWU") contracts) as sales of goods to be included in the dumping margin rather than excluding such transactions as service agreements to enrich the feedstock uranium. In beginning its analysis, the Supreme Court explained that the question was "not whether . . . the better view is that a SWU contract is one for the sale of services, not goods. The statute gives this determination to the Department of Commerce in the first instance . . . and when the Department exercises this authority in the course of adjudication, its interpretation governs in the absence of unambiguous statutory language to the contrary . . . ."[92] Then, the Supreme Court cited *Chevron*. Now with *Loper Bright*, some might view *Eurodif* as outdated – notwithstanding *Loper Bright*'s explicit caution that "we do not call into question prior cases that relied on the *Chevron* framework."[93]

[92] *Eurodif*, 555 U.S. at 316.

[93] *Loper Bright*, Slip Op. at 34.

It could be argued that *Eurodif did* apply the "best reading" analytical framework when it upheld Commerce's determination that SWU contracts involved a sale of goods. Indeed, the Supreme Court teed up the problem as complicated by way of analogy:

> A customer who comes to a laundry with cash and dirty shirts is clearly purchasing cleaning services, not clean shirts. And a customer who provides cash and sand to a manufacturer of generic silicon processors is clearly buying computer chips rather than sand enhancement services.
>
> . . .
>
> The [SWU] agreement is not like the laundry ticket, which says that the same shirts are supposed to come back, just minus the dirt around the collar. And it is not on all fours with the agreement of the chip buyer and the manufacturer, in which it is inescapable that the silicon processors delivered are a separate good from the sand provided.[94]

Applying these analogies to Commerce's decision-making, the Supreme Court reasoned that "where a constituent material is untracked and fungible, ownership is usually seen as transferred, and the transaction is less likely to be a sale of services."[95] Likewise, the Supreme Court reasoned that "when the manufacturer is not only free to return different material, but also substantially transforms the material it uses, it is even more likely that the object of the transaction will be seen as a new product . . . ."[96] Then, the Supreme Court considered the practical implications of excluding the transactions from a dumping margin against the overarching purpose of the statute and held that many transactions would evade the dumping law except those that were "uncreative."[97] Notwithstanding *Eurodif*'s citation to *Chevron* and explication of deference owed, was the Supreme Court's analysis still more searching for the

[94] *Eurodif*, 555 U.S. at 319.

[95] *Id*. at 320.

[96] *Id*. at 321.

[97] *Id*.

"best meaning" and, in the context of a specialized statutory regime, reviewing Commerce's analysis through a lens of its "power to persuade"?[98]

By contrast to the narrow issue confronted by the Supreme Court in *Eurodif*, how does *Loper Bright* impact AD methodologies broadly applied, like zeroing? In *Timken Co. v. United States*, the CAFC applied *Chevron*'s analytic framework to find that the AD statute "does not directly speak to the issue of negative-value dumping margins"[99] and upheld Commerce's zeroing practice as "a reasonable interpretation of the statute."[100] In reaching this decision, did the *Timken* panel apply "its full interpretive toolkit"?[101] Maybe. The panel first reviewed the language of the statute and determined that "one number 'exceeds' another if it is 'greater than' the other, meaning it falls to the right of it on the number line."[102] Then, the CAFC considered Commerce's methodology through a contextual lens; *e.g.*, if Commerce were not to zero negative transactions, "Commerce could potentially owe . . . a payment [for credits accrued] — a result clearly not contemplated by the statutory scheme."[103] The CAFC then found Commerce's use of zeroing long-standing and affirmed as reasonable prior to enactment of the Uruguay Round Agreements Act to "legitimately combat the problem of masked dumping."[104] Even

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[98] *See Mead* 533 U.S. at 235 (citing *Skidmore*, 323 U.S. at 140). Indeed, *Loper Bright* explicitly recognized that when a statute implicates a technical matter: "the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. And although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control." *Loper Bright*, Slip Op. at 25; *see also supra* Section II.B.

[99] *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004).

[100] *Id*.

[101] *Loper Bright*, Slip Op. at 31.

[102] *Timken*, 354 F. 3d at 1342.

[103] *Id*. at 1343.

[104] *Id*. (citing *Serampore Indus. Pvt. Ltd. v. Dep;t of Commerce*, 675 F. Supp. 1354, 1360–61 (Ct. Int'l Trade 1987) and *Bowe Passat Reinigungs-Und Waschereitechnik Gmbh v. United States*, 926 F. Supp. 1138, 1150 (Ct. Int'l Trade 1996).

though a *Chevron* step-two case, was *Timken* nonetheless evidence of a court "us[ing] every tool at their disposal to determine the best reading of the statute and resolve the ambiguity"?[105]

Were the CIT's decisions concerning respondent selection ahead of their time? In *Zhejiang Native Produce & Animal By-Prod. Imp. & Exp. Corp. v. United States* [106] and later in *Carpenter Tech Corp. v. United States*,[107] the CIT evaluated whether the term "large" as used in 19 U.S.C. § 1677f-1(c)(2) is any number greater than two. In *Zhejiang*, the CIT considered the statutory text to limit Commerce's practicality concerns insofar as the statutory text limited Commerce's assessment to whether there are a large number of exporters or producers involved in the investigation or review.[108] Therefore, even though the statutory term "large" was determined to be undefined, the CIT looked to other statutory phrasing to resolve the issue. Again, are these cases an example of a pre-*Loper Bright* court using all available tools of statutory construction "to determine the best reading of the statute and resolve the ambiguity"?[109]

Even these cases, which approached the question as a question of law and statutory interpretation, considered the facts before the agency. And of course, *Loper Bright* explained that some deference may also be owed to "factbound determinations" where "application of a statutory term was sufficiently intertwined with the agency's factfinding."[110] Consider then how a litigant should approach issues challenging the selection of a surrogate country in NME

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[105] *Loper Bright*, Slip Op. at 23.

[106] *Zhejiang Native Produce & Animal By-Prod. Imp. & Exp. Corp. v. United States*, 33 C.I.T. 1125 (2009).

[107] *Carpenter Tech. Corp. v. United States*, 33 C.I.T. 1721 (2009).

[108] *Zhejiang*, 33 C.I.T. at 1130 (2009) ("the number of exporters and producers initially involved in this review, four, does not appear to satisfy the requirement that the number be 'large' under any ordinary understanding of that word. In any event, not even four exporters or producers were involved here because the two mandatory respondents withdrew from the review. Only one exporter, Zhejiang, preserved its request for individual review. One is not a large number.")

[109] *Loper Bright*, Slip Op. at 23.

[110] *Id*. at 11-12.

proceedings, the use of targeted dumping, or what constitutes material and false statements when introducing goods into the United States commerce when the invocation of each statutory provision necessarily relies on facts. For example, the statutory provision concerning surrogate country selection provides:

> (4)Valuation of factors of production
>
> The administering authority, in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—
>
> (A) at a level of economic development comparable to that of the nonmarket economy country, and
>
> (B) significant producers of comparable merchandise.[111]

The statute requires some type of comparison between the NME country and the potential surrogate country, a task which necessarily requires a fact base to conduct this comparison. Yet, the statute commands that "the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries . . . ."[112]

In a different vein, the statute providing Commerce the authority to apply a targeted dumping analysis also requires a fact base:

> (B)Exception
>
> The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—

[111] 19 U.S.C. § 1677b(c)(4).

[112] *Id.* § 1677b(c)(1).

> (i)there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii)the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).[113]

In assessing Commerce's use of a statistical methodology to carry out this statutory framework, the CAFC in *Stupp Corp. v. United States* explained that the proper standard was "reasonableness, not substantial evidence."[114] Turning to the merits of the appeal, the CAFC dispensed with certain challenges raised by the foreign pipe producer SeAH by finding that Commerce's methodology was reasonable, but otherwise had "concerns . . . about the reasonableness" of part of the methodology given the particular facts of the investigation with smaller data groups lacking normal distribution with disparate variances.[115] The CAFC evaluated statistical literature and determined that Commerce's application of the methodology did not contemplate some of the limitations published concerning an effects size test. Having applied the "reasonableness" legal standard, the CAFC remanded to Commerce for further consideration and explanation. In this way, the CAFC conducted a searching review of the record to determine whether Commerce was acting within the bounds of its statutory authority.

In the EAPA context, the CIT has recently grappled with CBP's explanation of what constitutes a "material and false statement or act, or material omission."[116] In that appeal, the CIT remanded the matter to CBP twice to provide an analysis of its interpretation of these

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[113] *Id.* § 1677f-1(d)(1)(B).

[114] *Stupp Corp. v. United States*, 5 F. 4th 1341, 1353 (Fed. Cir. 2021) (citing *Mid Continent Steel & Wire Inc. v. United States*, 940 F.3d 662, 667 (Fed. Cir. 2019)) ("In carrying out its statutorily assigned tasks, Commerce has discretion to make reasonable choices within statutory constraints." (collecting cases)).

[115] *Id*. at 1357.

[116] *Diamond Tools Tech. LLC v. United States*, 609 F. Supp. 3d 1378, 1383 (Ct. Int'l Trade 2022).

statutory provisions. The CIT considered the deference owed to the agency because *Loper Bright* had yet to be issued, but in issuing its remand, relied primarily on plain language of the statute and the legislative history, as well as complementary statutes for guidance. The CIT ultimately found that CBP's interpretation "would violate the canons of statutory construction."[117]

At bottom, are issues of law and fact in trade litigation "sufficiently intertwined" such that some deference is owed under *Loper Bright*? Or does an assessment of the evidentiary record merely offer "the power to persuade" such that a reviewing court's analysis of underlying reasons for agency action is just one of the tools of statutory construction available to a reviewing court to determine whether the agency acted in accordance with law? These are questions for the courts to decide, but litigants will surely shape the analysis with those defending agency decision-making pointing to the substantiality of the evidence with those attacking agency decision-making relying on canons of statutory construction. What is apparent, however, when it comes to trade and customs law, *Loper Bright* may not have shaken the landscape to its core; rather, *Loper Bright* provides guidance to administrative agencies that summary and conclusory "interpretations" of statutory authority are insufficient and more is needed.

VI. Concluding Thoughts

As we considered what form this article would take, we considered including a decision tree to assist a litigant in determining whether it should rely upon *Loper Bright* in challenging or defending agency adjudication. But as we wrote this article, what became apparent is that *Loper Bright* might not be a "game changer" for trade litigation. Instead, the same rules will continue

[117] *Id*. at 1388.

to apply. Old standards, having lurked in the background, may return to prominence. To be sure, the courts may be asking litigants to help guide it to the "best meaning" in resolving a statutory ambiguity to the extent the court determines, if the parties disagree, and a question of law exists. Moreover, legal questions may arise with facts "intertwined," such that agencies will have a role in the first instance to provide a reasoned basis for the conclusion reached.

Whereas before *Loper Bright*, an agency could rely on its specialized expertise and obtain some level of deference from a reviewing court, *Loper Bright* may result in more reasoned agency decision-making; *viz*., why, in this adjudication, is the agency's statutory interpretation reasonable? While *Loper Bright* provides reviewing courts with power to establish what constitutes the reasonable statutory interpretation in pure questions of law concerning an ambiguous statute, trade and customs matters are rarely so cut-and-dry. So intertwined facts may result in reviewing courts asking the agency to do more to explain and support its decision; or, has the agency persuaded the court that its interpretation is the "best meaning"?