After Chevron: Uncertainty In Scope Of ITC Oversight

By **Kecia Reynolds and Madeleine Moss** (July 23, 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 and litigation across practice areas.


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Under Title 19 of the U.S. Code, Section 1337, the U.S. International Trade Commission is charged with investigating unfair trade practices involving unlawfully imported articles.

Section 337 declares unlawful the use of unfair methods of competition and unfair acts in the importation of articles that infringe intellectual property rights, such as patent and trademark rights, or involve other forms of unfair competition, such as trade secret misappropriation.

The statute authorizes the commission to make determinations of violations under the statute and issue remedial orders halting the importation of the unlawful articles.

The Chevron doctrine has long been employed by the U.S. Court of Appeals for the Federal Circuit when reviewing final determinations and remedial orders on appeal from the ITC, on issues requiring interpretation of the statute and issues affecting commission policy.[1]

Specifically, in Section 337 investigations, when the statute is silent or ambiguous the Federal Circuit has deferred to the commission's expertise in interpreting the statute under which it operates. Now, in the wake of Loper Bright, the commission's jurisprudence is open to review and to new interpretations of Section 1337.[2]

The Commission's Jurisprudence Built on Chevron

The ITC's jurisprudence on jurisdiction, domestic industry and its remedial powers is built, in part, on the application of Chevron deference. Three Federal Circuit decisions with deference to the commission's statutory interpretations — 1998's Enercon GMBH v. ITC,[3] 2015's Suprema Inc. v. ITC,[4] and 2011's John Mezzalingua Associates Inc. v. ITC[5] — are significant.

In each of these opinions, the Federal Circuit gave way to the commission's expertise in interpreting Section 1337.

In other prominent cases, such as TianRui Group Co. v. ITC in 2011,[6] InterDigital Communications LLC v. ITC in 2012,[7] and San Huan New Materials High Tech Inc. v. ITC in 1998,[8] which also concerned jurisdiction, domestic industry and remedial powers, the Federal Circuit exercised its own judgment — but agreed with the commission's

interpretations, alternatively invoking Chevron deference.

In Enercon, the commission's interpretation of the term "sale" in the context of the unlawful act of "sale for importation" was given deference as reasonable under Chevron.[9]

The commission interpreted "sale" to include contracts for sale, bringing the contracted products within the meaning of an unlawful import. The commission concluded that the term "sale" was not intended to require an immediate delivery of goods; rather, a contract for sale was also within the scope of a sale for importation, constituting an unlawful act within the meaning of Section 1337.

The Federal Circuit upheld this interpretation as a reasonable interpretation of the statute, stating that it must do so under the standards set forth by the Supreme Court in Chevron.[10]

In Suprema, following the mandates of Chevron, the Federal Circuit gave deference to the commission's interpretation of "articles that infringe" in the context of jurisdiction.[11] The commission interpreted "articles that infringe" to cover articles that did not infringe at the time of their importation but are used by another to directly infringe post-importation as a result of inducement.

The Federal Circuit upheld this interpretation as reasonable under Chevron and consistent with the statutory text, policy and legislative history of Section 1337.[12]

In John Mezzalingua,[13] the commission's rejection of certain litigation expenditures as evidence of a domestic industry within the meaning of the statute was upheld as a reasonable interpretation of a substantial investment in licensing. The Federal Circuit stated, "the commission reasonably concluded that expenses associated with ordinary patent litigation should not automatically be considered a 'substantial investment in … licensing,' even if the lawsuit happens to culminate in a license."[14]

Also, addressing jurisdiction, domestic industry and remedy issues arising out of interpretations of the statute, the Federal Circuit has sided with the commission's interpretations, even when Chevron deference was unnecessary, but addressed nonetheless. The Federal Circuit consistently referenced and agreed with the commission, as further support for its opinions in important areas of statutory interpretation.

In TianRui,[15] the Federal Circuit sided with the commission, finding that Congress intended for Section 1337 to reach acts of trade secret misappropriation occurring outside the U.S.

But, in the alternative, the Federal Circuit in TianRui, implicitly relying on Chevron, recognized the commission's expertise, stating that "even if we were to conclude that section 337 is ambiguous with respect to its application to trade secret misappropriation occurring abroad, we would uphold the commission's interpretation of the scope of the statute."[16]

In InterDigital,[17] the Federal Circuit affirmed the commission's finding that Section 1337(a)(3) encompasses a domestic industry based on licensing activities alone, but stated that the commission's interpretation of the statute would be entitled to deference under Chevron.[18]

In San Huan,[19] the Federal Circuit agreed with the commission's interpretation of Section

1337(f)(2) that the commission has authority to enforce consent orders through civil penalties. The Federal Circuit also stated that if there was ambiguity in the statute, the commission's interpretation warrants deference.[10]

The ITC's jurisprudence is an extensive and complex body of law that requires the commission and the courts to fill in the gaps left by Congress. As these cases demonstrate, the ITC's jurisprudence on some of the most disputed and controversial issues was shaped by Federal Circuit precedent relying on Chevron deference. These cases are the more notable instances of the Federal Circuit's reliance on the commission's interpretation of Section 337.

Impact of Loper Bright at the ITC

The cases above have long been considered settled law on which litigants rely.

Now, after Loper Bright, the ITC's jurisprudence may be reshaped by the Federal Circuit.

The commission's ability to rely on policy will likely be abrogated, and the commission's long-standing expertise in interpreting Section 337 will be substituted by the court's.

While it is unlikely that existing remedial orders will be modified in light of Loper Bright, uncertainty exists in other contexts. What seemed like settled law may now be relitigated. Parties may now argue that imports not within the clear meaning of the statutory text are no longer within the scope of Section 337.

For example, jurisprudence regarding imports that are not articles that infringe at the time of their importation, which have been covered under Section 337 since 2015, may be at risk.

Furthermore, there may be uncertainty related to the domestic industry requirement. The ability to rely on domestic industry investments falling outside of explicit statutory categories, such as investments in customer service and product repair, may be limited.

The Supreme Court offered some reassurances in the Loper Bright opinion that overturning Chevron does "not call into question prior cases that relied on the Chevron framework." Because stare decisis still applies, the Federal Circuit's "reliance on Chevron cannot constitute a 'special justification' for overruling such a holding."[21]

However, while Loper Bright will not immediately change commission jurisprudence, it does create uncertainty. That uncertainty will not be settled until a case having the right set of facts and a determination based on the commission's prior interpretation of the statute makes its way to en banc review before the Federal Circuit.

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[1] Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

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

[3] Enercon GMBH v. Int'l Trade Comm'n, 151 F.3d 1376 (Fed. Cir. 1998).

[4] Suprema, Inc. v. Int'l Trade Comm'n, 796 F.3d 1338 (Fed. Cir. 2015).

[5] John Mezzalingua Assocs., Inc. v. Int'l Trade Comm'n, 660 F.3d 1322 (Fed. Cir. 2011).

[6] TianRui Grp. Co. v. Int'l Trade Comm'n, 661 F.3d 1322 (Fed. Cir. 2011).

[7] InterDigital Commc'ns, LLC v. Int'l Trade Comm'n, 690 F.3d 1318 (Fed. Cir. 2012).

[8] San Huan New Materials High Tech, Inc. v. Int'l Trade Comm'n, 161 F.3d 1347 (Fed. Cir. 1998).

[9] Enercon, 151 F.3d 1376.

[10] Id. at 1382-1383.

[11] Suprema, 796 F.3d 1338.

[12] Id. at 1345, 1352-1353.

[13] John Mezzalingua Assocs., 660 F.3d 1322.

[14] Id. at 1328.

[15] TianRui Grp., 661 F.3d 1322.

[16] Id. at 1331-1332.

[17] InterDigital Commc'ns, 690 F.3d 1318.

[18] Id. at 1329-1330.

[19] San Huan New Materials High Tech, 161 F.3d 1347.

[20] Id. at 1355-1357.

[21] Loper Bright Enterprises, No. 22-451 at 8.