

# PROCEDURAL ASPECTS OF U.S. INTERNATIONAL TRADE LITIGATION

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# IN U.S., EVERYONE SUES THE GOVERNMENT

The AD/CVD rate is **too high**

- Foreign Exporters
- Foreign Governments
- U.S. Importers

The AD/CVD rate is **too low**

- U.S. Producers

# U.S. LEGAL HIERARCHY

- The U.S. Constitution is Supreme Law of the Land
- The Statute (19 U.S.C. § 1671, et. seq.)
  - Legislative History (Senate and House Reports)
- The Regulations (19 C.F.R. 351.101, et. seq.)
  - Preamble to the Regulations – DOC explanation of why they wrote the regulations the way they did, and answer comments submitted
- WTO Agreements NOT binding (& not very persuasive)

# DUE PROCESS

## ‘Notice and Opportunity to Be Heard’

- **Notice**

- The U.S. Government must publish notices of initiations, preliminary decisions, and final decisions in the Federal Register
- Public versions of all documents are available to the public on-line at <https://access.trade.gov>
- Interested parties (including the U.S. Government ) must provide copies of all filings to all participating interested parties

- **Opportunity to be heard**

- Interested parties may submit factual information and legal argument during the administrative proceeding.

# JURISDICTION

## **(c)-Jurisdiction (28 U.S.C. § 1581(c))**

- For challenges to Final Determinations by the Department of Commerce (including preliminary decisions that are made final in the Final Determination)
- e.g., calculation, methodology, procedural decisions
- Review is on the administrative record

# JURISDICTION

## **(i)-Jurisdiction (28 U.S.C. § 1581(i))**

- For challenges to the administration and enforcement of the AD/CVD law
- e.g., liquidation instructions, decision to initiate a review
- U.S. Government almost always files a motion to dismiss complaints filed under (i)-jurisdiction
- 2-year statute of limitations
- Some discovery may be available in limited cases

# STANDING

- Only an **“interested party”** that was a **“party to the proceeding”** may appeal DOC decision
- **“interested party”** includes foreign government, foreign producers, foreign exporters, foreign trade associations, U.S. importers, U.S. producers, U.S. trade associations
- **“party to the proceeding”** requires that a party first present arguments in their case briefs to the DOC, which are submitted before the Final Determination

# STANDARD OF REVIEW

## Factual Issues & Legal Issues

- In reviewing Commerce's administrative reviews, “the Court of International Trade **must sustain** ‘any determination, finding or conclusion found’ by Commerce **unless** it is ‘**unsupported by substantial evidence** on the record, or otherwise **not in accordance with law.**’” *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B))

# STANDARD OF REVIEW

## Factual Issues

- “Substantial evidence” means “**such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.**” *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938); *accord Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).
- Even if it is possible to draw two inconsistent conclusions from the evidence contained in the record, this does not mean that Commerce's findings are not supported by substantial evidence. *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

# STANDARD OF REVIEW

## Legal Issues (statutory construction)

- “*Chevron Deference*” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
- “[W]e must **first** carefully investigate the matter to determine whether Congress’s purpose and intent on the question at issue is judicially ascertainable.”
- “Only if, **after** this investigation, we conclude that Congress either had no intent on the matter, or that Congress’s purpose and intent regarding the matter is ultimately unclear, do we reach the issue of *Chevron* deference.” *Id.*

# STANDARD OF REVIEW

## Legal Issues (statutory construction)

- “Statutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*.” *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001).
- Interpretations must be “**reasonable**”

# JUDICIAL REVIEW PROCESS

## U.S. Court of International Trade (CIT)

- <http://www.cit.uscourts.gov>
- New York City
- Complaint due within 30 days of DOC Final Determination (2 years for some cases)
- 75 – 100 decisions on appeals from DOC/ITC every year

# JUDICIAL REVIEW PROCESS

## U.S. Court of International Trade (CIT)

- Most cases decided by a single Judge
- Complex cases may be heard by a 3-Judge Panel
- Up to 9 active Judges & several “Senior” Judges
  - Some Judges tend to rule for the U.S. Government
  - Some Judges tend to be more balanced
- Knowing the personality of Judge essential to effective advocacy

# JUDICIAL REVIEW PROCESS

## U.S. Court of International Trade (CIT)

- No *en banc* review
- No horizontal *stare decisis* - decisions by one judge are not binding in future CIT cases (but likely to be followed in similar circumstances)

# COURT PROCEDURES – CIT

- Summons & Complaint
  - (in (i)-jurisdiction cases, must be filed together)
- Opening Brief – Plaintiff and Plaintiff-intervenors
- Response Brief – Defendant (U.S. Government) and Defendant-intervenors
- Reply Brief – Plaintiff and Plaintiff-intervenors
- Oral Argument
- Decision: Sustain or Remand
- Generally takes at least 1 ½ years from appeal to decision, can be 3-4 years

# COURT PROCEDURES – CIT

## Remands

- If not affirmed, sent back to DOC for a new decision
  - Draft Remand & Comments on Draft Remand
  - Final Remand Determination filed with Court
- Court of International Trade
  - Comments on Remand
  - Reply to Comments on Remand (U.S. Government)
  - Oral argument
  - Decision: Sustain or Remand
  - Generally takes about 1 year from remand to decision

# JUDICIAL REVIEW PROCESS

## U.S. Court of Appeals for the Federal Circuit (CAFC)

- <http://www.cafc.uscourts.gov/>
- Washington, D.C.
- Notice of Appeal due within 60 days of CIT decision
- 20-50 opinions issued each year on appeals from CIT
- About half of CIT decisions are overturned on appeal (25% of total cases brought before the CIT)

# JUDICIAL REVIEW PROCESS

## U.S. Court of Appeals for the Federal Circuit (CAFC)

- Most cases initially assigned to a 3-Judge panel
- Judges not revealed until the day of oral argument
- Panel decisions may be reviewed *en banc*
- Complex cases may be initially heard *en banc*
- Horizontal *stare decisis* – only CAFC *en banc* can overturn the precedent set by a prior 3-Judge panel

# COURT PROCEDURES – CAFC

- Opening, Response & Reply Briefs
- Oral argument
- Court Decision: Sustain or Remand
- Rule 36 (decision without opinion)
- Reconsideration by Panel
- Reconsideration *en banc*
- Generally one year from appeal to decision

# JUDICIAL REVIEW PROCESS

## U.S. Supreme Court

- Washington, D.C.
- Petition for Writ of Certiorari within 60 days of CAFC decision
- Briefing & oral argument only if Supreme Court agrees to take the case
- Once-in-a-decade occurrence
- U.S. Government usually wins

# IMPORTANT CONSIDERATIONS

- Likelihood of success on the merits
- Amount at stake
- Effect of judicial review on future cases
- Continuing/desired access to the U.S. market
- Personality of Judges
- Personality of the Court

# THE END.

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