

UNITED STATES STANDARD OF REVIEW

Harry B. Endsley

Summary: I. The Substantial Evidence Standard; II. Importance of the Agency Record; III. Deference; IV. Limitations on Deference; V. Chevron: Could the Pump Run Dry in Trade Cases?

The point of departure for a NAFTA standard of review analysis is NAFTA's Article 1904 (3), which provides:

«The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority».

This language ¹ was drawn without substantive amendment from Article 1904(3) of NAFTA's predecessor, the Canada-U.S. Free Trade Agreement («CFTA») ²:

¹ The phrase «general legal principles», which also appears in NAFTA Article 1904(3), is defined in Article 1911 to mean «standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies».

² The only difference between the original and successor provisions is the phrase «standard of review described in Article 1911», utilized in Article 1904(3) of the Canada-U.S. Free Trade Agreement («CFTA»), as contrasted with the phrase «standard of review set out in Annex 1911», utilized in Article 1904(3) of the NAFTA. Article 1911 of the CFTA directly set out «definitions» for all relevant terms, including the applicable standards of review for Canada and the United States. In the NAFTA, the Parties limited the scope of Article 1911 to provide a set of general definitions only, utilizing Annex 1911 to provide various «country-specific definitions». Thus, it is now NAFTA's Annex 1911 that provides the specific standard of review definition for Canada, Mexico and the United States.

As referenced in Article 1904(3), NAFTA's Annex 1911 states:

«[...] standard of review means the following standards, as may be amended from time to time by the relevant Party:

- (a) in the case of Canada, the grounds set out in subsection 18.1(4) of the Federal Court Act, as amended, with respect to all final determinations;
- (b) in the case of the United States,
 - (i) the standard set out in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended, with the exception of a determination referred to in (ii), and
 - (ii) the standard set out in section 516A(b)(1)(A) of the Tariff Act of 1930, as amended, with respect to a determination by the U.S. International Trade Commission not to initiate a review pursuant to section 751(b) of the Tariff Act of 1930, as amended; and
- (c) in the case of Mexico, the standard set out in Article 238 of the Federal Fiscal Code («Código Fiscal de la Federación»), or any successor statutes, based solely on the administrative record.

The above language was itself a direct derivation from the predecessor language of the CFTA, with the two exceptions that a successor provision of the recently amended Canadian Federal Court Act was cited as the applicable Canadian standard of review and, of course, the applicable Mexican standard of review was added³. There was no change, substantive or otherwise, in the United States standard of review between the version originally appearing in the CFTA and that appearing in the NAFTA.

³ Article 1911 of the CFTA referred to «section 28(1) of the Federal Court Act», while Annex 1911 of the NAFTA refers to «subsection 18.1(4) of the Federal Court Act». The relevant amendments to the Federal Court Act took effect on.

Based on NAFTA Article 1904(3), it is Annex 1911 to which a Binational Panel must look for purposes of reviewing a determination of the relevant U.S. agency, which in this case is either the U.S. Department of Commerce («DOC») or the U.S. International Trade Commission («ITC») ⁴. The main standard of review required for U.S. Chapter 19 cases is dictated by § 516(b)(1)(B) of the Tariff Act of 1930 ⁵, which requires the Panel to «hold unlawful any determination, finding, or conclusion found [...] to be unsupported by substantial evidence on the record, or otherwise not in accordance with law» ⁶. A subsidiary standard of review, set out in § 516A(b)(1)(A) of the Tariff Act, applies only to decisions by the ITC not to initiate a so-called administrative review ⁷.

As suggested above, the «substantial evidence» standard is actually one of two standards of review applied in U.S. antidumping and

⁴ Two agencies are involved in administering the antidumping and countervailing-duty laws of the United States. The U.S. Department of Commerce, International Trade Administration (DOC) determines whether or not the imports in question are being dumped (subsidized), and the U.S. International Trade Commission (ITC) determines whether or not they are causing material injury to the competing U.S. industry. As set out more fully below, each case goes through four determinations: a preliminary determination by the ITC of injury, a preliminary determination by DOC of dumping or subsidy, a final determination by DOC of dumping or subsidy, and a final determination by the ITC of injury.

After being initiated by an industry petition or by DOC on its own, each case undergoes a preliminary determination by the ITC of injury. If the ITC finds no reasonable indication of material injury, the investigation is terminated. Otherwise, the case continues to the next stage, which is the preliminary determination by DOC of dumping (or subsidy). That determination does not affect the final outcome of the case. Its purpose is to determine whether duties must be deposited on the goods in question that are imported while the rest of the investigation continues, and if so, what the duty deposit rate should be.

The case then proceeds to the final DOC dumping (or subsidy) determination. If the determination is negative—that is, if DOC determines that the imports are not being dumped (or subsidized)—the investigation is terminated and any duties that may have been deposited are refunded. If the determination is positive, the case proceeds to the final determination by the ITC of injury. If that determination is negative—that is, if the ITC determines that the dumped (or subsidized) imports are not causing material injury to the competing U.S. industry—then any duties deposited are refunded and no antidumping (or countervailing) duties are imposed on future imports. If the determination is positive, then antidumping (or countervailing) duties are assessed on future imports.

⁵ 19 U.S.C. § 1516a(b)(1)(B); see NAFTA Annex 1911.

⁶ For purposes of Binational Panel review, the «law» consists of «relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority». NAFTA Art. 1904(2). The «substantial evidence» standard mandated by Annex 1911 is linked to that evidence which is «on the record». Correspondingly, NAFTA's 1904(2) expressly limit the Panel's review to the «administrative record» filed by the investigating authority.

⁷ Annex 1911.

countervailing duty cases, although it is the principal standard applied by Binational Panels⁸. It has been asserted that the «substantial evidence» standard is more searching —allowing a lesser tolerance for error— than the more deferential «arbitrary and capricious» standard⁹.

I. THE SUBSTANTIAL EVIDENCE STANDARD

The contours of the substantial evidence standard are by now well established in United States case law. Indeed, the multiplicity of U.S. cases —at all levels of appellate review— considering or interpreting the substantial evidence standard is a fact of great practical significance. Although there is a surface uniformity to the standard, based upon the binding Supreme Court pronouncements in the area¹⁰, underneath

⁸ As noted in the text, the standards of review of antidumping and countervailing duty determinations in the United States are set out in Section 516A(b) of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1516a(b). Two standards are established by that law, governing different categories of administrative determinations. First, determinations of DOC not to initiate an investigation, determinations of the ITC not to review an existing injury determination based upon changed circumstances, and negative determinations of the ITC in a preliminary injury investigation all will be held unlawful if they are arbitrary, capricious, an abuse of discretion, or otherwise are not in accordance with the law (the «arbitrary and capricious» standard). Second, final antidumping and countervailing duty determinations of either DOC or the ITC, including exclusionary orders, final determinations in any reviews of existing antidumping and countervailing duty orders, determinations by DOC to suspend an investigation, ITC determinations concerning the injurious effects of suspension, and «scope» rulings of DOC as to whether a particular type of merchandise is within the class or kind of merchandise covered by an antidumping or countervailing duty order all will be held unlawful if they are unsupported by substantial evidence on the record or otherwise are not in accordance with law (the «substantial evidence» standard). It will be apparent that the «arbitrary and capricious» standard applies to determinations not to take action or, in the case of the ITC, to terminate an investigation after only a preliminary investigation. In contrast, the «substantial evidence» standard applies to determinations made after an investigation has been conducted and an administrative record has been made. Since the latter situation is the context in which Chapter 19 Panels are called upon to carry out their work, the «substantial evidence» standard was selected to be the applicable U.S. standard of review for Chapter 19 purposes.

⁹ Koch, *Administrative Law and Practice*, § 9.6. See *Citizens to Preserve Overton Park v. Volpe*, 402, 416 (1971).

¹⁰ For Chapter 19 purposes, it is recognized that decisions of the Supreme Court and the U.S. Court of Appeals for the Federal Circuit are binding on Binational Panels. NAFTA Article 1904(2)-(3). In contrast, decisions of the U.S. Court of International Trade do not constitute binding precedent. See *Rhone Poulenc v. United States*, 583 F. Supp. 607, 612 (Ct. Int'l Trade 1984) (A decision of the Court of International Trade is «valuable though non-binding, precedent unless and until it is reversed»). Likewise, a decision of one Binational Panel is not binding on future panels. See *Certain Corrosion-Resistant Carbon Steel Products from Canada*, USA-93-1904-03, at 78 note 254 (October 31, 1994).

that surface uniformity lies the work of a myriad of courts detailing the specific contour lines of the standard, the effect of which is to promote deference by the reviewing court in certain situations or to limit deference by such a court in others.

Lower courts have applied their different formulations (or at least different points of emphasis) to practically every broad category of situation that can arise. Thus, government and private counsel in the United States have available to them significant and ample «hooks» upon which to rest their opposing appeal arguments. In keeping with their burden of defending the agency, Government counsel will cite and argue upon those formulations of the substantial evidence standard that invite the court or Binational Panel to afford a high degree of deference to the administrative determination. Private counsel, depending on their respective interests, may on the other hand cite and argue upon those formulations of the standard that creates exceptions for, or sets limits upon, the amount of deference due the agency. Thus, the Chapter 19 standard of review in the United States can be said to be context-rich, to a far greater extent than the Canadian, and most particularly the Mexican, standards.

At its most basic level, substantial evidence has been defined by the Supreme Court as «more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion»¹¹. In a later case the Supreme Court elaborated on this standard, stating that substantial evidence can be «something less than the weight of the evidence»¹².

In assessing such «substantiality» courts and Binational Panels must consider «the record in its entirety», including «the body of evidence opposed to the [agency's] view»¹³. As noted by the Binational Panel in *New Steel Rails from Canada*, the Panel's role is «not to merely look

¹¹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); Cf. *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

¹² / *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

¹³ / *Universal Camera*, 340 U.S. at 488.

for the existence of an individual bit of data that agrees with a factual conclusion and end its analysis at that»¹⁴. Rather, the Panel must also take into account evidence that detracts from the weight of the evidence relied on by the agency in reaching its conclusions¹⁵.

Courts and Binational Panels have a clear obligation under the substantial evidence standard not to reweigh the evidence or substitute their judgment for that of the agency¹⁶. It is well settled that «the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence»¹⁷. The reviewing authority therefore may not «displace the [agency’s] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it de novo»¹⁸. As the Supreme Court has noted in context, the substantial evidence standard effectively «frees the reviewing [authority] of the time —consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute»¹⁹.

II. IMPORTANCE OF THE AGENCY RECORD

The question on appellate review is whether the administrative record²⁰ adequately supports the agency’s determination²¹, which

¹⁴ *New Steel Rails from Canada*, USA-89-1904-09, at 9 (Aug. 13, 1990).

¹⁵ See *Universal Camera*, 340 U.S. at 477, 488; *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); see also *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 818 F. Supp. 348, 353 (Ct. Int’l Trade 1993) («In other words, it is not enough that the evidence supporting the agency decision is “substantial” when considered by itself »).

¹⁶ *Fresh, Chilled and Frozen Pork from Canada*, USA-89-1904-11, at 8 (Aug. 24, 1990); see also *Metallverken Nederland B.V. v. United States*, 728 F. Supp. 730, 734 (Ct. Int’l Trade 1989).

¹⁷ *Consolo*, 383 U.S. at 620.

¹⁸ *Universal Camera*, 340 U.S. at 488; accord *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (Cr. Int’l Trade 1984), *aff’d sub nom., Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985).

¹⁹ *Consolo*, 383 U.S. at 620.

²⁰ See NAFTA Art. 1904(2).

²¹ *Daewoo Electronic Company v. International Union*, 6 F.3d 1511, 1520 (Fed. Cir. 1993), cert. denied, 114 S. Ct. 2672 (1994).

must be adjudged only on the grounds and findings actually stated in its determination²², not on the basis of post hoc argumentation of counsel²³. In carrying out its review of an agency determination, a court or Binational Panel must stay strictly within the confines of the administrative record already in existence²⁴, Binational Panels, therefore, may not engage in de novo review²⁵ and, as a consequence, may not make new factual findings that would amend the agency record. Indeed, the statutory requirement that review be «on the [administrative] record» means that the reviewing court or Binational Panel is limited to «information presented to or obtained by [the DOC]... during the course of the administrative proceeding...»²⁶.

III. DEFERENCE

In restating the applicable standard of review, the U.S. antidumping and subsidy cases freely adopt the vocabulary of deference and make clear that the substantial evidence standard requires the reviewing authority generally to accord such deference to an agency's factual findings, its statutory interpretations, and its methodologies. With respect to fact-finding, Binational Panels have noted that «deference must be accorded to the findings of the agency charged with making factual determinations under its statutory authority»²⁷. Judicial decisions are clearly in accord with this view²⁸.

²² *Hussey Copper, Ltd. v. United States*, 834 F. Supp. 413, 427 (Ct. Int'l Trade 1993), citing *SEC v. Chenery*, 318 U.S. 80, 87 (1943).

²³ *Maine Potato Council v. United States*, 613 F. Supp. 1237, 1245 (Ct. Int'l Trade 1985) («Counsel's post hoc rationalization cannot substitute for a clear statement by the [agency] as to how it treated [a significant competitive factor]»).

²⁴ See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) («[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court... The task of the reviewing court is to apply the appropriate [] standard of review [] to the agency decision based on the record the agency presents to the reviewing court».) (citations omitted).

²⁵ *Cerámica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 965 (Ct. Int'l Trade 1986), *aff'd per curiam*, 810 F.2d 1137 (Fed. Cir. 1987).

²⁶ 19 U.S.C. § 1516a(b)(2)(A)(i).

²⁷ *Fresh, Chilled and Frozen Pork from Canada*, USA-89-1904-11, at 6 (citing *Red Raspberries from Canada*, USA-89-1904-01, at 18-19 (Dec. 15, 1989)).

²⁸ See also *N.A.R., S.p.A. v. United States*, 741 F. Supp. 936, 939 (Ct. Int'l Trade 1990) («[D]eference is given to the expertise of the administration agency regarding factual findings».).

On issues of statutory interpretation, «deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law»²⁹. The Supreme Court has stated that «when a court is reviewing an agency decision based on a statutory interpretation, “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”»³⁰. A reviewing authority need not conclude that «[t]he agency’s interpretation [is] the only reasonable construction or the one the [reviewing authority] would adopt had the question initially arisen in a judicial proceeding»³¹. Moreover, the U.S. Court of Appeals for the Federal Circuit has emphasized that «[d]eference to an agency’s statutory interpretation is at its peak in the case of a court’s review of Commerce’s interpretation of the antidumping laws»³².

It is also clear that deference must be given to the methodologies selected and applied by the agency to carry out its statutory mandate³³, which a court or Binational Panel may only review for reasonableness³⁴.

Deference to the agency’s interpretation and implementation of the antidumping laws can be seen to be grounded in express congressional intent. The United States Congress has stressed that in the antidumping field, it has «entrusted the decision making authority in a specialized, complex economic situation

²⁹ *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

³⁰ *Id.*, quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). Despite the ostensible clarity of the Supreme Courts pronouncement in *Chevron*, the case has engendered a great deal of academic and judicial doubt and debate. See, e.g., Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *Yale L. J.* 969, 978 (1992), and *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1579 (Fed. Cir. 1995).

³¹ *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986), citing *Chevron*, 467 U.S. at 843 note 11.

³² *Koyo Seiko v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994), citing *Daewoo Electronics*, 6 F.3d at 1516.

³³ See *Brother Industries, Ltd. v. United States*, 771 F. Supp. 374, 381 (Ct. Int’l Trade 1991) («Methodology is the means by which an agency carries out its statutory mandate and, as such, is generally regarded as within its discretion»).

³⁴ *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1210-11 (Fed. Cir. 1995) («[O]ur inquiry is limited to determining whether Commerce’s model-match methodology is reasonable».)

to administrative agencies»³⁵. As a result, reviewing courts have acknowledged that «the enforcement of the antidumping law [is] a difficult and supremely delicate endeavor. The Secretary of Commerce... has broad discretion in executing the law»³⁶.

IV. LIMITATIONS ON DEFERENCE

Although review under the substantial evidence standard is, by Congressional intent and by law, limited, application of that standard clearly does not result in an abdication of the Panel's authority to conduct a meaningful review of the agency's determination³⁷. Indeed, a contrary conclusion would eviscerate the function of the reviewing authority, rendering the appeal process superfluous. The deference to be accorded an agency's findings and conclusions therefore is not unbounded³⁸.

It is well established, for example, that an agency's determination must have a reasoned basis. The reviewing authority may not defer to an agency determination premised on inadequate analysis or reasoning. The extent of deference to be accorded depends on «the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements...».

Furthermore, a rational connection must be present between the facts found and the choice made by the agency³⁹. Although room exists

³⁵ S. Rep. No. 249, 96th Cong., 1st. Sess. 252 (1979), reprinted in 1979 U.S.C.C.A.N. 331, 638.

³⁶ *Smith-Corona Group v. United States*, 713 F.2d 1568,1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984); see also *Consumer Prod. Div., SCM Corp. v. Silver Reed America*, 753 F.2d 1033, 1039 (Fed. Cir. 1985).

³⁷ See *Al Tech Specialty Steel Corp. v. United States*, 651 F. Supp. 1421, 1424 (Ct. Int'l Trade 1986) («This deference, however, should in no way be construed as a rubber stamp for the government's interpretation of statutory provisions»). See also *Smith-Corona Group*, 713 F.2d at 1571 («The Secretary cannot, under the mantle of discretion, violate these standards or interpret them out of existence»).

³⁸ See *Softwood Lumber from Canada (Injury)*, USA-92-1904-02, at 15 (July 26, 1993).

³⁹ *Bando Chem. Indus. v. United States*, 787 F. Supp. 224, 227 (Ct. Int'l Trade 1992) (citing *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974), and *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *Avesta AB v. United States*, 724 F. Supp. 974, 978 (Ct. Int'l Trade 1989), aff'd., 914 F.2d 233 (Fed. Cit. 1990), cert. denied, 111 S. Ct. 1308 (1991).

to uphold an agency's decision of less than ideal clarity if its path of reasoning may reasonably be discerned⁴⁰, there must nevertheless be an adequate explanation of the bases for the agency's decision in order for the reviewing authority to meaningfully assess whether it is supported by substantial evidence on the record. The DOC or ITC, therefore, must articulate and explain the reasons for its conclusions⁴¹.

Deference to an agency's interpretation of the statute it is charged with implementing also is not unlimited. A reviewing authority may not, for instance, permit an agency «under the guise of lawful discretion or interpretation to contravene or ignore the intent of Congress»⁴². The Supreme Court itself has held that «no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language»⁴³. Moreover, the Department's efforts at statutory interpretation must, when appropriate, take into account the international obligations of the United States⁴⁴.

Even the methodology selected and applied by the agency to carry out its statutory mandate «still must be lawful, which is for the courts finally to determine»⁴⁵.

⁴⁰ *Cerámica Regiomontana, S.A.*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (citing *Bowman Transportation*, 419 U.S. at 286).

⁴¹ See, e.g., *Mitsubishi Materials Corp. v. United States*, 820 F. Supp. 608, 621 (Ct. Int'l Trade 1993); *USX Corp.*, 655 F. Supp. at 490; *SCM Corp. v. United States*, 487 F. Supp. 96, 108 (Cust. Ct. 1980); *Maine Potato Council*, 613 F. Supp. at 1244-45; *Bando Chem. Indus.*, 787 F. Supp. at 227.

⁴² *Cabot Corp. v. United States*, 694 F. Supp. 949, 953 (Ct. Int'l Trade 1988).

⁴³ *Public Employers Retirement System of Ohio v. June M. Betts*, 492 U.S. 158, 171 (1989). See also *Texas Crushed Stone Co. v. United States*, 35 F.3d 1535 (Fed. Cir. 1994), n.7 at 1541 («Prior agency practice is relevant in determining the amount of deference due an agency's interpretation. An agency's interpretation of a relevant provision which conflicts with agency's earlier interpretation is 'entitled to considerably, less deference' than a consistently held agency view. Citing *INS. v. Cardoza-Fonseca*, 480 U. S. 421, 446 n. 30, 107 S. Ct. 1207, 1221 n. 30, 94 L. Ed. 2d 434 (1987).

⁴⁴ See *Alexander Murray v. The Schooner Charming Betsy*, 6 U. S. (2 Cranch) 64, 118, 2 L. Ed. 208 (1804); *Weinberger v. Rossi*, 456 U. S. 25, 32 (1982); *Federal-Mogul Corp.*, 63 F.3d at 1581-82; Section 114, Restatement (Third) of the Foreign Relations Law of the United States.

⁴⁵ *Brother Industries*, 771 F. Supp. at 381. See also *Gifford-Hill Cement Co. v. United States*, 615 F. Supp 577, 582 (Ct. Int'l Trade 1985) («If the use of [a submarket] analysis was improper, then the Commission's findings would not be supported by substantial evidence»).

Finally, although there is a presumption of good faith and conscientious exercise of the Department's responsibilities in an investigation ⁴⁶, the Department has a legal obligation to observe the basic principles of due process and fundamental procedural fairness ⁴⁷, and to justify any departures it makes from settled practice with reasonable explanations that are themselves supported by substantial evidence on the record ⁴⁸.

V. CHEVRON: COULD THE PUMP RUN DRY IN TRADE CASES?

In the United States, the landmark decision on deference to administrative interpretations of statutes is *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.* («Chevron») ⁴⁹, which requires, in essence, that federal courts defer to any reasonable interpretation by an agency charged with administration of a statute, provided that Congress did not clearly specify a contrary answer ⁵⁰. It is widely recognized that Chevron requires a two-step analysis: at step one, the court will, using traditional tools of statutory construction, determine whether Congress has «directly spoken to the precise question

⁴⁶ *Saha Thai Steel Pipe Co. v. United States*, 661 F. Supp. 1198, 1202 (Ct. Int'l Trade 1987); *Librach v. United States*, 147 Ct. Cl. 605, 612 (1959). See also *Takashima U.S.A., Inc. v. United States*, 886 F. Supp. 858, 861 (1995) («A presumption of regularity attaches to the actions and conduct of government officials in the performance of their lawfully executed duties») (citing *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993)).

⁴⁷ See *Sigma Corp. v. United States*, 841 F. Supp. 1255, 1267-68 (Ct. Int'l Trade 1993); *Usinor Sacilor v. United States*, 893 F. Supp. 1112, 1141 (Ct. Int'l Trade 1995); and *Creswell Trading Co. v. United States*, 15 F.3d 1054, 1062 (Fed. Cir. 1994).

⁴⁸ See *Western Conference of Teamsters v. Brock*, 709 F. Supp. 1159, 1169 (Ct. Int'l Trade 1989); see also *National Knitwear and Sportswear Ass'n v. United States*, 779 F. Supp. 1364, 1369 (Ct. Int'l Trade 1991).

⁴⁹ 467 U.S. 837 (1984).

⁵⁰ «When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether congress has directly spoken to the precise question at issue. If the intent of congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. 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» (footnotes omitted). *Chevron*, 467 U.S. at 842-43.

at issue», and, if so, the court will enforce that result. However, if the court discovers that Congress has expressed no specific intention on the issue at hand, it will move on to step two, shifting into a deference mode. Particularly, the court will determine if the agency's position is «a reasonable one» and, if so, defer to that position ⁵¹.

The language of Chevron is sweeping, revolutionary and, for some, controversial. One commentator has noted that «Chevron [] altered the distribution of national powers among courts, Congress, and administrative agencies» ⁵², putting it into tension with «deeply engrained» principles and ideas, such as the principle of *Marbury v. Madison* ⁵³, which made it the function of judges to «say what the law is» ⁵⁴. It seems clear that some courts have found Chevron's stated rationale—stressing the importance of the executive branch's political accountability—too slender a reed upon which to base such a revolutionary change ⁵⁵. Most interesting of all, the Supreme Court itself appears to have difficulty in accepting or pursuing its own doctrine. As noted by another commentator ⁵⁶:

It turns out that the Court does not regard Chevron as a universal test for determining when to defer to executive interpretations: the Chevron framework is used in only about half the cases that the Court perceives as presenting a deference question. Not have the multiple factors identified in the pre-Chevron period disappeared; to the contrary, the Court continues to rely upon them in many cases, despite

⁵¹ Thomas W. Merrill, «Judicial Deference to Executive Precedent», 101 *Yale Law J.* 969, 976 (1992).

⁵² Cass R. Sunstein, «Law and Administration After Chevron», 90 *Col. Law Rev.* 2071, 2075 (1990).

⁵³ 5 U.S. (1 Cranch) 137 (1803).

⁵⁴ *Id.*, at 177.

⁵⁵ The Chevron principle was said by the Supreme Court to advance democracy and constitutional government by providing that «federal judges —who have no constituency— have a duty to respect legitimate choices by those who do». *Chevron*, 467 U.S. at 866. The Supreme Court, in other words, is saying that if Congress has not made all the relevant policy choices, courts should uphold the discretion of the executive branch to fill in the policy gaps. This principle is based on the theory that the president is «directly accountable to the people», whereas judges are not. It may be speculated that the complex and arcane regulations cannot typically be justified on the basis of the president's accountability to the people.

⁵⁶ Merrill, *supra* note 54, at 970.

their apparent irrelevance under Chevron. Perhaps most strikingly, in recent Terms the application of Chevron has resulted in less deference to executive interpretations than was the case in the pre-Chevron era.

(Emphasis in original)

Other appellate courts, for example, the District of Columbia Circuit, have themselves shown considerable reluctance about the Chevron standard. For example, in *Arent v. Shalala*⁵⁷, two of the judges on the panel wanted nothing to do with Chevron, finding it not even applicable, let alone controlling⁵⁸. The majority upheld a regulation of the Food and Drug Administration as not arbitrary or capricious, unreasonable, or a «clear error of judgment»⁵⁹. Judge Wald's concurring opinion, on the other hand, argued that Chevron was certainly applicable. She reasoned that «[i]f this case falls totally outside Chevron, many other cases marching under its banner must be similarly exiled».

Cases in the Federal Circuit, however, which opinions bind the U.S. Court of International Trade and Binational Panels, have tended to repeat the Chevron language, or comparable language without apparent controversy, and apply the two-step process strictly as stated⁶⁰. Only

⁵⁷ *Arent v. Shalala*, Slip Op. No. 94-5271 (D.C. Cir. 1995 November 14, 1995).

⁵⁸ *Arent* involved an Administrative Procedure Act challenge to regulations of the Food and Drug Administration (EDA) to implement the Nutrition Labeling and Education Act (NLEA), 21 U.S.C. 69 §§ 321 et seq. The majority avoided Chevron, applying instead the standard set out in *Motor Vehicle Manufacturers Ass'n v. State Farm*, 463 U.S. 29 (1983), to uphold the FDA regulation.

⁵⁹ The *Arent* majority stated that «Chevron is principally concerned with whether an agency has authority to act under a statute. See *Chevron*, 467 U.S. at 842-45. Thus, a reviewing court's inquiry under Chavron is rooted in statutory analysis and is focused on discerning the boundaries of Congress' delegation of authority to the agency; and as long as the agency stays within that delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference.... The only issue [in *Arent*] is whether the FDA's discharge of [its] authority was reasonable. Such a question falls within the province of traditional arbitrary and capricious review under 5 U.S.C. § 706(23)(A) (1988)».

⁶⁰ See, e.g., *Timken Company v. United States*, 37 F.3d 1470, 1474 (Fed. Cir. 1994) («In interpreting section 1677g(a), this court first consults the language of the statute itself [citation omitted]. If the statute is clear on its face, then this court's review ends [citation omitted]. If the statute is not clear on its face, then this court reviews [DOC]'s interpretation to determine whether it is reasonable in light of the language, policies, and enactment history of the statute [citation omitted]. This court accords [DOC] considerable deference in its interpretations of these statutory provisions).

in *Federal Mogul Corp. v. United States* has the court expressed any apparent criticism or concern about the reach of Chevron⁶¹:

Chevron constitutes a significant inroad into traditional judicial power, and is not lightly to be applied to just any agency decision or litigation position made on behalf of an agency.

It remains for a future day whether the Supreme Court will itself alter its Chevron doctrine, or whether the Federal Circuit will develop a more deep-seated concern about the doctrine than it has shown to date. In the meantime, Binational Panels and the Court of International Trade will most likely be continue to be satisfied with a recitation and following of the Chevron text.

The DOC and ITC, therefore, will most likely continue to enjoy the substantial discretion implicit in Chevron in antidumping and countervailing duty cases, although complainants will also have available to them a substantial number of «hooks» in existing law that will permit them to claim that the agency is not entitled to discretion in the circumstances at hand.

© Índice General

© Índice ARS 21

⁶¹ *Federal Mogul Corp.*, 63 F.3d at 1579. See also *Lasko Metal Products v. United States*, 43 F.3d 1442 (Fed. Cir. 1994), n. 3 at 1446 («Suramerica [de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 (Fed. Cir. 1992)] relied on the Supreme Court’s Chevron analysis. In Suramerica, the issue was whether the agency’s official interpretation of its organic legislation was a permissible reading of the statute. The policy underlying the Supreme Court’s grant in Chevron of special deference to agency regulations and similar official agency pronouncements does not extend to every agency action —it would not, for example, extend to ad hoc representations on behalf or the agency, such as litigation arguments. In this case the issue much like that in Suramerica— an officially mandated agency methodology considered by the agency to be within its statutorily granted discretion»).