2023

The Unintended Consequences of International Trade Law Adjudicatory Exceptionalism

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Recommended Citation

The Unintended Consequences of International Trade Law Adjudicatory Exceptionalism, 57 Vanderbilt Journal of Transnational Law (forthcoming 2023).

57 VANDERBILT JOURNAL OF TRANSNATIONAL LAW (forthcoming 2023)

THE UNINTENDED CONSEQUENCES OF INTERNATIONAL TRADE LAW ADJUDICATORY EXCEPTIONALISM

The following is a distillation of plenary session remarks that I delivered at the 21st Judicial Conference of the U.S. Court of International Trade at the Mayflower Hotel in Washington, DC on November 11, 2022.

The regulation of international trade has a long and storied history in the United States since the Founding Era. The framers of the Constitution thought it sufficiently important to enumerate the regulation of "commerce with foreign nations" among the numerous Article I Foreign Affairs powers,[1] juxtaposed against the executive Vesting Clause, foreign affairs, take Care, and Commander in Chief powers of Article II.[2] International trade policy issues have has a significant place in domestic American politics, especially in the Trump and Biden administrations. The contemporary regulation of international trade is principally governed by numerous statutes that are administered across several executive branch agencies.

First impression judicial review over federal questions of international trade law is committed to the U.S. Court of International Trade, a national Article III court of first instance that sits in New York City.[3] Established by the Customs Courts Act of 1980,[4] the court reviews most trade agency action challenges.[5] The subject-matter jurisdiction of the court extends beyond the

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[1] *See* U.S. CONST. art. I, § 8, cl. 3.

[2] *See* U.S. CONST. art. II, §§ 1-3.

[3] *See* 28 U.S.C. § 1585 ("The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.")

[4] Pub. L. No. 96-417, 94 Stat. 1727 (1980).

[5] *See* 28 U.S.C. § 1581 (a)-(i); *but see id.* § 1581(j) ("The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930").

specific enumeration of discrete classes of international trade disputes to a broad residual grant of exclusive jurisdiction to decide civil cases and controversies arising out of any international trade law against the United States as well as executive branch agencies.[6]

Despite the specialized nature of the U.S. Court of International Trade, the legislative purpose for the authority granted to the court is to normalize judicial review of reviewable administrative trade actions, such that "persons adversely affected or aggrieved by agency actions arising out of import transactions are entitled to the same access to judicial review and judicial remedies as Congress had made available for persons aggrieved by actions of other agencies."[7] Simply put, the court exists to offer merits relief that is usually available under the Administrative Procedure Act.[8] By the numbers, it is reasonable to conclude that the U.S. Court of International Trade is *primarily* an administrative law court. Utilizing a data set of 120 website-published orders by the court from January 1, 2022 to November 11, 2022, approximately 69% of the cases resulting in those orders involved Administrative Procedure Act standards of review.[9]

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[6] *See* 28 U.S.C. §§ 1581-85.

[7] Chief Judge Edward D. Re, *Proceedings of the First Annual Judicial Conference of the United States Court of International Trade*, 102 F.R.D. 639, 665, 675 (1984) (cleaned up); *About the Court*, U.S. CT. INT'L TRADE, https://www.cit.uscourts.gov/about-court (last visited Feb. 23, 2023) (cleaned up).

[8] *Compare* 5 U.S.C. § 706(2)(A) (APA arbitrary or capricious standard of review), *and id.* § 706(2)(E) (APA substantial evidence standard of review), *with* 19 U.S.C. § 1516a(b)(1)(A), (b)(1)(B)(ii) (APA arbitrary or capricious standard of review in countervailing duty and antidumping duty statute), *and id.* § 1516a(b)(1)(B)(i) (APA substantial evidence standard of review in countervailing duty and antidumping statute); *see* NLMK Pennsylvania, LLC v. United States, No. 21-00507, 2023 WL 355074 (Ct. Int'l Trade Jan. 23, 2023) ("The court reviews an action brought under 28 U.S.C. § 1581(i) under the same standards as provided under section 706 of the Administrative Procedure Act, as amended." (citing 28 U.S.C. § 2640(e); 5 U.S.C. § 706(2)(A), (2)(E))).

[9] *See Slip Opinions 2022*, U.S. CT. INT'L TRADE, www.cit.uscourts.gov/content/slip-opinions-2022 (last visited Feb. 23, 2023) (note the quantity of 28 U.S.C. § 1581(c) cases, which incorporate a nearly identical APA-like standard of review).

The specialized review of general Administrative Procedure Act standards that is germane to the U.S. Court of International Trade continues on appeal to the U.S. Court of Appeals for the Federal Circuit.[10] That appellate court is specialized and does not have a significant number of jurists with pre-appointment international trade law expertise.[11] Within the U.S. Department of Justice, the defense of the United States in international trade litigation is committed to the National Courts Section of the Civil Division's Commercial Litigation Branch.[12] The National Courts Section operates as a specialized unit to shoulder this responsibility at the trial stage rather than the U.S. Attorney's Office community, which handles most civil litigation for the department.[13] From a practitioner's perspective as well as that of many observers—notwithstanding substantial changes in perspective from the international trade bar—international trade law is seen by many as specialized and even insulated from other areas of law, including administrative law.

Article III review of international trade law federal questions benefits from a specialized court of first impression and bilateral (private sector and federal government) litigation specialization. The benefits of specialization are many. They include a greater depth of knowledge to discern complex statutory, treaty, and factual nuance. A dedicated focus on international trade law increases familiarity with norms and procedures. It also incentivizes the forging of stronger relationships between opposing and co-counsel on account of repeat interactions. Having

[10] *See* 28 U.S.C. § 1295(a)(5) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction … of an appeal from a final decision of the United States Court of International Trade").
[11] *See Judge Biographies*, U.S. CT. APP. FED. CIR., https://cafc.uscourts.gov/home/the-court/judges/judge-biographies/ (last visited Feb. 23, 2023).
[12] *National Courts Section*, U.S. DEP'T JUSTICE (Oct. 20, 2014), https://www.justice.gov/civil/national-courts-section-0.
[13] *See id.*

experienced and dedicated jurists applying their judgment to the law and facts promotes higher quality decision-making. Federal government agencies such as the U.S. Department of Commerce, U.S. Bureau of Customs and Border Protection, and the Office of the U.S. Trade Representative all benefit from more reliable district level judicial review.

Specialization also carries costs. Structural specialization of the sort one encounters with judicial review of international trade law can create silos that insulate trade law from cross-cutting legal currents such as administrative law. It risks blinding international trade lawyers from looking to similarly worded statutes when they are fashioning their arguments. Specialization silos increase the odds that briefing will be replete with confusing agency technical speak, a sea of acronyms that are difficult to track for the generalist reader, and shortcuts in laying out and applying standards of review like the arbitrary and capricious or substantial evidence standards. Siloed specialization even presents barriers to entry into the international trade bar by creating a Catch-22 situation, wherein only those who have experience before the U.S. Court of International Trade can gain access to paying clients to international trade representations. This Catch-22 worsens at the oral argument and motions practice stages and can grow distorted from idiosyncratic behavior by members of the international trade bar.[14]

Siloed specialization also restricts the exposure of international trade law strategy to beneficial thought from other highly regulated practice areas that deal with similar review standards, such as intellectual property law, immigration law, or securities law. Even pertaining to the evidence that U.S. Court of International Trade judges must weigh against administrative law standards of review, a siloed practice area will be less likely to avail itself of best practices for

[14] This, in part, is reduced by the annual interaction between members of the international trade bar and judges of the U.S. Court of International Trade at the *Judicial Conference of the United States Court of International Trade.*

constructing or challenging the sufficiency of administrative records that serve as the evidentiary foundation of arbitrary and capricious or substantial evidence review.[15]

The result of these sub-optimal circumstances is a tougher road for all on further review. Siloed specialization causes atypical appellate records that a *generalist* U.S. Court of Appeals for the Federal Circuit has greater difficulty understanding. For purposes of this analysis, the U.S. Court of Appeals for the Federal Circuit is *not* a specialized court for international trade law. Its form of specialization acts as a catch-all for fourteen distinct categories of cases of which only one is "of an appeal from a final decision of the United States Court of International Trade."[16]

The record of appeal from the U.S. Court for International Trade further limits the generalist framing of a case that would make it more amenable to review by the Supreme Court of the United States. On account of the fact that each of the fourteen distinct bases of jurisdiction for the U.S. Court of Appeals for the Federal Circuit is *exclusive* to that court, litigants are already on the back foot when it comes to earning votes from four justices to grant a writ of certiorari. Rule 10(a) of the Rules of the Supreme Court of the United States, "Considerations Governing Review on Certiorari," lays out the resolution of "conflict with the decision of another United States court of appeals on the same important matter" as the first of three discretionary considerations that the Court publicly brings to bear when adjudicating petitions for certiorari.[17]

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[15] *See, e.g.*, Aram A. Gavoor & Steven A. Platt, *Administrative Records After* Department of Commerce v. New York, 72 ADMIN. L. REV. 87 (2020).
[16] 28 U.S.C. § 1295(a)(5); *see also id.* § 1295(a)(6) (conferring jurisdiction to review "final determinations of the United States International Trade Commission" relating to unfair practices in import trade under the Tariff Act of 1930), (a)(7) (conferring jurisdiction to review "findings of the Secretary of Commerce" relating to importation of instruments of apparatus under the Harmonized Tariff Schedule of the United States).
[17] SUP. CT. R. 10(a).

For siloed international trade litigators, the Rule 10(a) certiorari justification is simply unavailable in hotly contested trade cases on novel questions of law that implicate hundreds of millions of dollars or more in controversy.[18] To be clear, the Supreme Court does not grant certiorari simply because the court of appeals may be incorrect—there must be something more than perceived error by the petitioning party.[19]

Rule 10(b) favors granting certiorari to a decision of a state court of last resort that has decided an important federal question that is in conflict with a decision of another state court of last resort or federal court of appeals.[20] This, too, is all but a categorical nullity for international trade law cases because judicial review is statutorily committed to the exclusive province of the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit.[21]

This leaves Rule 10(c), which reserves for certiorari federal court of appeals (or state court) decisions on important questions "of federal law that ha[ve] not been, but should be, settled by" the Supreme Court of the United States.[22] But the U.S. Court of Appeals for the Federal Circuit merely deciding an issue incorrectly is not a sufficient basis for triggering Rule 10(c). Rather, the

[18] *Compare* 28 U.S.C. § 1295(a)(5)-(7) (conferring *exclusive* jurisdiction to the U.S. Court of Appeals for the Federal Circuit to review and decide international trade law questions on appeal), *with* SUP. CT. R. 10(a) (considering certiorari grant for a federal court of appeals decision that conflicts with the decision of another federal court of appeals or state court of last resort, or a federal court of appeals that has "so far departed from the accepted and usual course of judicial proceedings" or "sanctioned such a departure by a lower court").
[19] *See id.*
[20] SUP. CT. R. 10(b).
[21] *Compare* 28 U.S.C. §§ 1581-85 (conferring *exclusive* jurisdiction to the U.S. Court of International Trade to review and decide international trade law questions at first instance), *and id.* § 1295(a)(5)-(7) (conferring *exclusive* jurisdiction to the U.S. Court of Appeals for the Federal Circuit to review and decide international trade law questions on appeal), *with* SUP. CT. R. 10(b) (considering certiorari grant for a state court of last resort decision that conflicts with the decision of another state court of last resort or federal court of appeals).
[22] SUP. CT. R. 10(c) (also considering certiorari grant for a federal court of appeals or state court decision that "conflicts with relevant decisions of" the Supreme Court).

rule requires that the decision be made on a "question" that is "important" enough for four justices to determine that the Supreme Court of the United States should "settle" it.[23]

Fear not. Hope is not lost for the earnest international trade law attorney or intrepid in-house general counsel who determines that further review of their issue or appeal should extend beyond the U.S. Court of Appeals for the Federal Circuit.

Rule 10(a), which favors granting certiorari to resolve circuit splits, is indeed available for international trade cases to the extent that they can be framed as general administrative law litigation *before the filing of the complaint* at the U.S. Court of International Trade. Because international trade law is a variation of federal administrative law, the full world of possibilities available for cases heard in geographically bounded district and circuit courts is available for tariff disputes and antidumping adjudication challenges as well. One merely needs to look to the few international trade cases that the Supreme Court has reviewed in the twenty-first century to identify a trend.

Consider *United States v. Mead Corporation*,[24] a case originating in the U.S. Court of International Trade. *Mead* was the most significant installment in the early 2000s trilogy of cases that established step zero of *Chevron* deference,[25] the standard for determining whether to afford judicial deference to agency interpretations of their authorizing statutes.[26] This is the kind of case that satisfies both 10(a) and 10(c) considerations because the primary question that the court resolved was one of general administrative law (i.e., judicial deference doctrine), rather than

[23] SUP. CT. R. 10(c).
[24] 533 U.S. 218 (2001).
[25] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984).
[26] U.S. v. Mead Corp., 533 U.S. 218, 235 (2001); *see also* Christensen v. Harris County, 529 U.S. 576, 587 (2000), Barnhart v. Walton, 535 U.S. 212, 222 (2002).

international trade law. Look to *United States v. Eurodif,*[27] a 2009 case that implicated *Chevron* deference once more.[28] Presumably, the facts of the case were also intriguing in that they dealt with low enriched uranium fuel rods and antidumping duties.[29] On the merits of cases like these before the Supreme Court, contextual framing is important because the court is generally inclined to read similar provisions in order to apply similar principles.[30]

This trend extends to other specialized pockets of law that are exclusively appealable to the U.S. Court of Appeals for the Federal Circuit. The reason for the grant of certiorari in *Kisor v. Wilkie*[31] was not that a U.S. Marine veteran of the Vietnam War was adversely affected by a quirk in U.S. Department of Veterans Affairs' statutory interpretation regarding exposure to Agent Orange in southern Vietnam littoral waters.[32] Rather, certiorari was likely granted to resolve a trans-substantive administrative law question of whether and when the federal judiciary should defer to an agency's non-authoritative interpretation of its authorizing statute under a clear error standard.[33]

From the thesis that international trade cases implicating cross-cutting legal issues have a higher probability of earning Rule 10(a) certiorari prioritization, it follows that there are numerous positive benefits from applying general legal principles to the specialized practice of international trade litigation. Doing so will make available to international trade law advocates the whole of the

[27] 555 U.S. 305 (2009).
[28] U.S. v. Eurodif S. A., 555 U.S. 305, 316 (2009).
[29] *See* U.S. v. Eurodif S. A., 555 U.S. 305, 308 (2009).
[30] This point was made in an exchange between Professor Hickman and Professor Nielson during the November 11, 2022 panel.
[31] 139 S. Ct. 2400 (2019).
[32] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408-09 (2019); Kisor v. Shulkin, 869 F.3d 1360, 1361-65 (Fed. Cir. 2017).
[33] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408-09 (2019); (the Supreme Court granted certiorari as to question one in the Petition for a Writ of Cetiorari, "Whether the Court should overrule *Auer* and *Seminole Rock*.")

United States Code for contextual interpretive advantage. As trade law advocates think about the resolution of discrete Title 28 questions, they might also consider favorably applying the judicial construction of other similarly worded or structured statutes to international trade law cases. Litigants could look to the applicability of those interpretations in the context of international trade law disputes. Certainly, the framing of an arbitrary and capricious or substantial evidence standard case could improve if it was contextualized with the persuasive (or unpersuasive) reasoning of other circuits or with the Federal Circuit's application of those standards to other statutes in appeals from the Patent Trial and Appeal Board or U.S. Court of Federal Claims.[34]

These litigation strategy improvements, in turn, would frame cases more aptly for judges of the U.S. Court of International Trade, provide them with a larger menu of options with which they can apply their judgment, and enhance their ability to participate in the milieu of resolving important federal questions of law beyond what their clerks, alone, can provide. Higher quality decisions may even reduce appeals to the Federal Circuit because parties will have greater certainty that the reasoning offered by the U.S. Court of International Trade is correct if not likely to succeed on appeal.

When U.S. Court of International Trade orders necessitate appeal, the cross-cutting framing of cases at the first instance stage will facilitate appeals to the U.S. Court of Appeals for the Federal Circuit on narrower and more precise federal questions. The circuit opinions that follow will have a higher likelihood of referencing sister circuits on questions of administrative law, statutory interpretation, and the like. Notwithstanding the improved quality of Federal Circuit

[34] *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 745 F.2d 677, 683-85 (D.C. Cir. 1984) (Scalia, J.) (concluding that under the APA, the substantial evidence standard at 5 U.S.C. § 706(2)(E) is cumulative to the arbitrary and capricious standard at 5 U.S.C. § 706(2)(A) in many respects).

opinions that flow from improved legal analysis, framing, and record inputs from the U.S. Court of International Trade, international trade law litigants will ultimately have a higher proportion of final orders at their disposal that can satisfy Rule 10(a) and potentially 10(c) considerations for Supreme Court review.

The improvement of international trade law litigation requires deep thinking *at the agency level*. This means focusing on agency investigations, enforcement actions, adjudications, rulemaking, and licensing. Administrative law and federal court generalists ought to have a seat at the planning table for major international trade administrative actions. Advocates and their clients alike should be asking themselves how a particular application, petition, brief, or rulemaking comment at the agency level can frame legal issues in such a way that will produce an optimal record for potential Article III review of the resultant final agency action.[35]

This same kind of thinking must be present at the pre-complaint stage following the issuance of final agency action. It could require the submission of Freedom of Information Act (FOIA) or Privacy Act of 1974 requests for federal records that the agency might unintentionally omit or intentionally exclude from an administrative record lodged after the filing of a U.S. Court of International Trade case.[36] After all, in an administrative record-based challenge before that court,[37] the non-U.S. government party is statutorily relegated to the vulnerable position of using the certified administrative record that the government considers to be the materials that the ultimate decisionmaker directly or indirectly considered in rendering the final agency action.[38]

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[35] *See* 5 U.S.C. § 704.
[36] *See* 5 U.S.C. § 552 (Freedom of Information Act); 5 U.S.C. § 552a (Privacy Act of 1974).
[37] *See, e.g.*, 28 U.S.C. § 1516a(b)(2)(A) (laying out an administrative record as the body of evidence that the U.S. Court of International Trade will use on review).
[38] *See* 5 U.S.C. § 706; Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990); Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 24 (2018).

There could be critical information that indirectly influenced the decision that the government possesses, yet did not put forward in the administrative record lodged with the court. There is a higher chance of an administrative records issue occurring in complex administrative actions with substantial amounts of information and communication inputs from the private sector or from within the executive branch. It can be very helpful, even to the court, to move to complete an imperfect administrative record with records that are revealed by a timely and well-crafted FOIA request. There is a meaningful possibility that a FOIA request will produce this kind of information as well. FOIA compliance employees have an incentive to disclose more information to the requestor in contrast to agency litigation counsel who review proposed administrative records for legal sufficiency to lodge in federal court.

At the complaint and litigation stage before the U.S. Court of International Trade, claims need to be carefully constructed so as to follow the underlying statute and lay out the kinds of arguments that apply. Agency technical speak, parades of acronyms, and legislative history-first statutory interpretation will not do. Telling a story in the introduction of the complaint and briefs and engaging the international trade law issue with similarly constructed statutes, cross-cutting administrative law jurisprudence, and interpretive trends laid out by the Supreme Court and Federal Circuit will optimize the development of the law.

To be clear, many members of the international trade bar are cognizant of these principles and strategies. But upon taking notice of the public comments made by U.S. Court of International Trade judges, they are novel to a significant cross-section of the bar. The development of international trade law in the next decade will hinge on whether the bar will take steps to advance the promise of the U.S. Court of International Trade by balancing the benefit of its specialized subject-matter jurisdiction with the value of its general review and evidentiary standards.