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# Federal Circuit Grants Standing to Interested Parties of Scope Rulings

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The Federal Circuit has recently decided a series of constitutional standing issues.[1] The court's position is unique among the courts of appeals—with perhaps the exception of the D.C. Circuit—in that a significant portion of its appellate authority consists of reviewing formal agency adjudications.[2] Such adjudications, as Article I courts, do not require the participants to possess Article III standing. However, should a party lose before the agency, they must then possess standing to obtain judicial review by the Federal Circuit. One such standing issue was recently decided by the Federal Circuit in *Shenyang Yuanda Aluminum v. United States*[3] in the context of importation disputes before the Department of Commerce and Court of International Trade.

When foreign goods are imported into the United States and sold below fair market value, the United States Department of Commerce is authorized to issue what are known as "antidumping" ("AD") and "countervailing duty" ("CVD") orders to bring the price in alignment with domestic manufacturers.[4] "Interested parties" may petition the Department of Commerce to evaluate whether their products fall under the scope of the orders.[5] These decisions are initially reviewed by the Court of International Trade, an Article III tribunal.[6] The Court of Appeals for the Federal Circuit has appellate authority over final decisions by the Court of International Trade.[7]

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[1] *See, e.g.*, Crow Creek Sioux Tribe v. United States, 900 F.3d 1350 (Fed. Cir. 2018) (finding no standing for a tribe alleging a taking under the Indian Tucker Act, 28 U.S.C. § 1505); Momenta Pharmaceuticals, Inc. v. Bristol-Myers Squibb Co., 915 F.3d 764 (Fed. Cir. 2019) (finding no standing to appeal an *inter partes* review decision). For an analysis of the standing issues in these cases, see Ryan V. Petty, Case Comment, When Fisher Meets Water: Federal Circuit Establishes Standard for Rule 12(b)(1) Motions, Harv. J.L. & Tech. Dig. (2018), https://jolt.law.harvard.edu/digest/when-fisher-meets-water and Kaye Horstman, Case Comment, Standing on Shaky Ground: Continued Uncertainties for Appellants of Failed IPR Challenges, Harv. J.L. & Tech. Dig. (2019), https://jolt.law.harvard.edu/digest/standing-on-shaky-ground-continued-uncertainties-for-appellants-of-failed-ipr-challenges.

[2] *See generally* 28 U.S.C. § 1295 (conferring jurisdiction over formal agency adjudications including the Patent Trial and Appeal Board and the International Trade Commission).

[3] Shenyang Yuanda Aluminum Indus. Eng'g Co., Ltd. v. United States, Nos. 2019-1553 & 2018-1554, 2019 WL 1233219 (Fed. Cir. March 18, 2019).

[4] 19 U.S.C. §§ 1671, 1673.

[5] 19 U.S.C. § 1677(9); 19 C.F.R. 351.225(c)(1).

[6] 19 U.S.C. § 1516a.

[7] 28 U.S.C. § 1295(a)(5).

The named plaintiff in *Shenyang Yuanda Aluminum* sought such a scope ruling on a group of non-structural aluminum paneling used in certain buildings, called "curtain wall."[8] Broadly, the AD and CVD orders covered "aluminum extrusions" made from specified aluminum alloys.[9] Two additional companies, Jangho and Permasteelisa, participated in the scope proceedings as interested parties by filing briefs in support of Yuanda's position.[10] After several rounds of litigation,[11] the Department of Commerce ultimately determined that the plaintiffs' aluminum curtain wall was covered by the order, a decision upheld by the Court of International Trade.[12]

On appeal to the Federal Circuit, the United States charged that the appellant companies lacked Article III standing to challenge the Department of Commerce's scope ruling.[13] Central to the United States' argument was that the challenged agency decision applied to Yuanda and not to the two appealing plaintiffs, Jangho and Permasteelisa.[14] In a unanimous opinion by Judge Taranto, a panel of the Federal Circuit found that both Jangho and Permasteelisa possessed Article III standing to challenge the scope ruling.[15] The court found the United States' argument—that because the scope ruling applied exclusively to Yuanda and not Jangho and Permasteelisa, the latter two necessarily lacked standing—"logic contrary to established law."[16] Under long-established Supreme Court precedent, if a "plaintiff is not . . . the object of the government action [they] challenge, standing is not precluded, but it is ordinarily substan-

[8] *Yuanda Aluminum*, 2019 WL 1233219, at *1.

[9] *Id.*; 76 Fed. Reg. 30,650, 30650 (May 26, 2011).

[10] *Yuanda Aluminum*, 2019 WL 1233219, at *1.

[11] The Federal Circuit previously held, in a matter involving many of the same parties as the present case, that individual units of curtain wall were covered under the AD and CVD orders. *See* Shenyang Yuanda Aluminum Indus. Eng'g Co., Ltd. v. United States, 776 F.3d 1351, 1356–58 (2015). The present case, however, was over whether the AD and CVD orders covered "curtain wall units when imported under a contract for an entire curtain wall." 2019 WL 1233219, at *1.

[12] *Id.* at **1–5; Shenyang Yuanda Aluminum Indus. Eng'g Co., Ltd. v. United States, 279 F. Supp. 3d 1209 (C.I.T. 2017).

[13] *Yuanda Aluminum*, 2019 WL 1233219, at *6; Br. for United States, Shenyang Yuanda Aluminum Indus. Eng'g Co., Ltd. v. United States, Nos. 2018-1553 & 2018-1554, 2018 WL 3822855, at **24–40 (Fed. Cir. Aug. 1, 2018).

[14] Br. for United States, 2018 WL 3822855, at *24.

[15] *Yuanda Aluminum*, 2019 WL 1233219 at **6–8.

[16] *Id.* at *7.

tially more difficult to establish."[17] Instead, the United States' argument "stop[ed] prematurely" and "omit[ted] the very inquiry called for."[18]

Proceeding on its own standing inquiry, the court noted that both Jangho and Permasteelisa alleged an injury-in-fact in their initial complaints challenging the scope ruling, claiming that their own products would be subject to the AD and VCD orders due to the Department of Commerce's adverse finding against Yuanda.[19] Accepting these allegations, overturning the scope ruling against Yuanda also would provide redress for both Jangho and Permasteelisa.[20] The United States, importantly, never challenged these allegations, even in a prior appeal of a related case before the Federal Circuit.[21] Moreover, the United States never objected to standing when it agreed to consolidate the three companies' independent cases.[22] The standing victory was short-lived, however, as the court also upheld the judgment of the Court of International Trade and Department of Commerce scope ruling imposing the AD and CVD orders on Yuanda, which Jangho and Permasteelisa agreed applied to them.[23]

The court's holding is consistent with the Supreme Court's standing jurisprudence, which insists that courts should not "raise the standing hurdle higher than the necessary showing for success on the merits . . . ."[24] Accordingly, Jangho and Permasteelisa's uncontested alleged harms, and binding admission that their products would also be covered by an adverse ruling against Yuanda, sufficed for Article III standing. *Yuanda Aluminum* raises an interesting hypothetical, however. Imagine if the facts were altered in two material respects; first, that the Department of Commerce ruled that Yuanda's products fell outside the scope of the AD and CVD orders and second, that Jangho was a competitor of Yuanda, but with competing products that clearly fell outside the orders. Suspecting that the Department of Commerce incorrectly—either in good or bad faith—found Yuanda's product to fall outside the AD and CVD

[17] *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992)).
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at *8 (citing Shenyang Yuanda Aluminum Indus. Engineering Co., Ltd. v. United States, 776 F.3d 1351 (Fed. Cir. 2015)).
[22] *Yuanda Aluminum*, 2019 WL 1233219 at *8.
[23] *Id.* at **9–10.
[24] Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc., 258 U.S. 167, 181 (2000).

orders, Jangho brings suit against the Department of Commerce trying to compel an adverse finding against Yuanda. Would Jangho then have standing to sue at the Federal Circuit?

This form of standing is often referred to as competitor standing, wherein the injury suffered is the competitive disadvantage placed by the government's preferential treatment of a competitor. The Supreme Court has upheld this form of Article III standing in numerous cases. For example, in *Association of Data Processing Service Organizations, Inc. v. Camp*,[25] the Court held that a Comptroller of the Currency ruling allowing banks to provide data processing services to their customers would cause economic injury, through increased competition, to companies whose exclusive business was providing such a service.[26] However, the Federal Circuit has somewhat been hesitant to embrace competitor standing, at least in the context of *inter partes* review.[27] In contrast, competitor standing was recently embraced by the district court in Maryland in one of the current Emoluments Clause cases against the President of the United States.[28] As industries become larger through consolidation and the international market of goods becomes increasingly interconnected and interdependent, it will be interesting to see if the courts adapt their standing doctrines, such as increasing the scope of competitor standing, to open the courthouse doors to more diverse plaintiffs. Alternatively, as was the case in *Shenyang Yuanda Aluminum*, plaintiffs may be able to avail themselves of the court's jurisdiction by admitting liability in defiance of the government's position. Perhaps instead, Congress's explicit inclusion of the right of interested parties to participate in the decisionmaking process is an increasingly enforceable one. ■

[25] 397 U.S. 150 (1970).

[26] *Id.* at 152.

[27] *See* JTEKT Corp. v. GKN Auto. Ltd., 898 F.3d 1217 (Fed. Cir. 2018) (denying standing to an *inter partes* review petitioner/competitor when the competitor had not yet finalized production of its potentially infringing product); *see also Horstman*, *supra* note 1.

[28] District of Columbia v. Donald J. Trump, 291 F. Supp. 3d 725, 745 (D. Md. 2018) (finding that both Maryland and the District of Columbia had standing to challenge alleged emoluments by virtue of the President's ownership of the Trump International Hotel since both Maryland and D.C. had proprietary interest, as landlord and owner, respectively, of competing hotel and convention centers).