THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

International Trade

JOHNY CHAKLADER, SHANE T. DEVINS, LAURA EL-SABAAWI, JEFFREY FRANK, GEOFFREY M. GOODALE, DERICK HOLT, BERND G. JANZEN, RON KENDLER, DIANE MACDONALD, MATTHEW T. MCGRATH, CORTNEY O'TOOLE MORGAN, ANNE M. SKRODZKI, SARAH SPRINKLE, AND ADAM TESLIK*

This article outlines the most important developments in international trade law during 2014.[1] It summarizes developments in international trade negotiations, World Trade Organization (WTO) dispute settlement activities, U.S. trade remedies cases, and related legislation.

I. Negotiation Developments

A. WTO NEGOTIATIONS

1. *The Bali Package*

With Doha Round negotiations continuing, WTO Members adopted the "Bali Package" at the Ministerial Conference in Bali, Indonesia in December 2013–a set of agreements extracted from issues in the Doha Round.[2] The package consists of agreements to streamline trade and provide interim food-security and other programs for developing and least-developing countries.

---

* The committee editors of this article are Shane T. Devins, Associate at Goldstine, Skrodzki, Russian, Nemec and Hoff, Ltd. and Laura El-Sabaawi, Associate at Wiley Rein LLP. The authors are Johny Chaklader, Associate, and Bernd Janzen, Partner, Akin Gump Strauss Hauer & Feld LLP; Jeffrey Frank, Special Counsel, and Derick Holt and Adam Teslik, Associates, Wiley Rein LLP; Geoffrey M. Goodale, Partner, Trade Law Advisors PLLC; Ron Kendler, Associate, White & Case LLP; Diane MacDonald, Associate, Baker & McKenzie LLP; Matthew T. McGrath, Partner, Barnes, Richardson & Colburn, LLP; Cortney O'Toole Morgan, Senior Counsel, Husch Blackwell, LLP; Anne M. Skrodzki, Associate at Goldstine, Skrodzki, Russian, Nemec and Hoff, Ltd.; and Sarah Sprinkle, Associate, Morris, Manning & Martin, LLP.

1. For developments during 2013, *see* Stephen W. Brophy et al., *International Trade*, __ INT'L LAW. __ (2014).

2. World Trade Organization, Bali Ministerial Declaration, WT/MIN(13)/DEC, *available at* http://wto.org/english/thewto_e/minist_e/mc9_e/bali_texts_combined_e.pdf.

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

a. Trade Facilitation Agreement

The Trade Facilitation Agreement (TFA), part of the Bali Package, was scheduled to be incorporated into the WTO's legal framework by July 31, 2014.[3] This deadline was derailed when India withheld its approval, as discussed below. Negotiations on the impasse continued until an agreement was reached in November. Governments may now begin the domestic ratification process.[4] Members adopted the Protocol of Amendment that incorporates the TFA into WTO legal texts. The TFA is the first new multilateral trade agreement since the WTO's creation in 1995.[5]

The TFA focuses on streamlining customs procedures. Members pledged to publish information on documentation required for imports, export, and transit procedures and fees; duty rates; rules for the classification and valuation of imported goods; laws, regulations and rulings regarding rules of origin; penalty provisions and appeal procedures; and procedures related to the administration of tariff quotas.[6] Additionally, Members agreed to publish on the Internet all information necessary for the "practical steps" of importation and exportation, including the forms required and contact information in case of inquiries.[7]

Under the TFA, Members should publish new laws and regulations as soon as possible after enactment and provide notice and comment opportunities.[8] And Members "shall issue" advance, binding rulings "in a reasonable, time bound manner," as well as the requirements for initiating such rulings.[9] Ruling requests may involve tariff classification, valuation, origin, quota administration, or other appropriate matters; the right to appeal administrative decisions must also be provided.[10]

The TFA also provides that, if a Member adopts a border regulation regime for food, beverages, or feedstuffs consisting of notifications or guidance to the ports, then the regime may be based on risk, the notification must be suspended when the conditions related to the enhanced regime no longer exist, termination of the notice must be published promptly and accessibly, and, in actions for detention or inspection, the importer or carrier must be notified promptly.[11] The TFA also urges Members to establish electronic payment procedures for duties, taxes, and other fees, as well as to establish a "single window" for the submission of import and export documentation.[12] The TFA allows developing and least-developed countries to implement its provisions on a delayed timeline.[13]

3. *Days 3, 4 and 5: Round-the-clock consultations produce 'Bali Package'*, WORLD TRADE ORG. (Dec. 5-7, 2013), http://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm.

4. *WTO Members Sign Off on Food Stocks, Trade Facilitation Decisions*, 18 BRIDGES 40 (Nov. 27, 2014), *available at* http://www.ictsd.org/bridges-news/bridges/news/wto-members-sign-off-on-food-stocks-trade-facilitation-decisions.

5. World Trade Organization, *supra* note 2a.

6. WTO, Protocol Amending the Marrakesh Agreement Establishing The World Trade Organization, WT/L/940 at 3,4 (Nov. 28, 2014).

7. *Id.* at 4.

8. *Id.* at 3.

9. *Id.* at 5.

10. *Id.* at 5-7.

11. *Id.* at 7-8.

12. WTO Protocol, *supra* note 4 at 9, 15.

13. *Id.* at 22-26.

b. Agriculture

The Bali Package contained an interim mechanism for the "peace clause"—whether governmental purchases of crops to distribute to the food-insecure should be counted against subsidy limits—and an agreement to continue negotiations for a permanent solution, expected to be reached in 2017.[14]

India and a few other countries argued for a permanent solution prior to incorporation of the TFA into the WTO. As noted above, negotiations, led by the U.S. and India, continued until Members reached a solution in November 2014. The WTO retained the interim arrangement that food stockholding programs would not violate the subsidy provisions; this provision will not expire in 2017.[15] But, the solution accelerated the goal of reaching a permanent solution to the end of 2015.[16]

2. *Information Technology Agreement*

For the past two years, Information Technology Agreement (ITA) negotiations have centered on expanding product coverage, but progress was slowed over China's resistance to include new products in its scope, including multi-component integrated circuits (MCOs), medical devices, flat-panel displays, and semiconductor manufacturing equipment. In November, China agreed to expanded product coverage, allowing ITA negotiations to continue among the fifty-four participating countries (covering 90 percent of technology trade).[17] China agreed to include MCOs, magnetic resonance imaging machines, and high-tech testing equipment in the negotiations, but not flat-panel displays.[18]

B. Bilateral and Regional Negotiations

1. *Bilateral Investment Treaties*

In July 2013, the United States and China announced their intentions to negotiate a bilateral investment treaty (BIT).[19] China has committed to negotiating market access on a "pre-establishment" basis, using a "negative list" approach (i.e., all industries and sectors are covered unless specifically excluded).[20] In October, China announced that it hoped to

14. WTO, Ministerial Decision of 7 December 2013, WT/MIN(13)/38, WT/L/913 *available at* http://www.wto.org/english/thewto_e/minist_e/mc9_e/desci38_e.htm.

15. WTO, Decision of 27 November 2014, WT/L/939 *available at* http://wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm#agriculture.

16. *Id.*

17. *See* Office of the Press Secretary, FACT SHEET: Supporting Economic Growth at Home and Abroad by Eliminating Trade Barriers on Information Technology Products, White House (Nov. 10, 2014), http://www.whitehouse.gov/the-press-office/2014/11/10/fact-sheet-supporting-economic-growth-home-and-abroad-eliminating-trade-.

18. *See id.*

19. US-China Bilateral Investment Treaty: Update on Negotiations and What it Means for Companies, The U.S.-China Business Council, https://www.uschina.org/events/us-china-bilateral-investment-treaty-update-negotiations-and-what-it-means-companies.

20. *Id.*

conclude talks by the end of 2016.[21] China also stated, however, that it was facing difficulties paring down its negative list.[22]

In July 2013, India indicated its willingness to discuss a BIT with the United States.[23] Negotiations proceeded slowly in 2014, and the issue of intellectual property rights protection remains contentious.[24]

2. *Trans-Pacific Partnership*

A new urgency entered Trans-Pacific Partnership (TPP) negotiations in the wake of the APEC summit in Beijing in November.[25] The TPP is a proposed regional free-trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.[26] The countries seek to conclude an agreement eliminating tariffs and nontariff trade barriers while establishing or expanding rules on intellectual property rights, foreign direct investment, and other trade-related issues.[27]

The most recent formal round of TPP negotiations took place in Brunei in August 2013.[28] But TPP leaders informally met in Beijing in November, in conjunction with the APEC summit.[29] The countries have reportedly made significant progress in negotiations, including reaching an "informal agreement" on topics including intellectual property and textile rules of origin. Remaining disagreements reportedly involve the automobile industry and agriculture.[30] The United States and Japan have conducted numerous bilateral meetings on these topics without reaching full agreement,[31] but both

21. *China Sets Two Year Goal for Finishing BIT; Chamber Submits Input*, INSIDE US – CHINA TRADE, Oct. 15, 2014) *available at* http://search.proquest.com/docview/1611603953?accountid=6667.

22. *Id.*

23. Yashwant Raj, *India agrees to negotiate Bilateral Investment Treaty*, HINDUSTAN TIMES (July 13, 2013, 1:15 IST), http://www.hindustantimes.com/business-news/india-agrees-to-negotiate-bilateral-investment-treaty-with-us/article1-1091797.aspx.

24. *Keen to have a Bilateral Investment Treaty with India: US*, JAGRAN POST (Nov. 14, 2014, 6:41 PM), http://post.jagran.com/keen-to-have-a-bilateral-investment-treaty-with-india-us-1415970682.

25. *See* Michael Schuman, *Why You Should Care About Obscure Asian Trade Pacts*, TIME (Nov. 12, 2014), http://time.com/tag/time-region-asia/page/2/; *see* Press Release, Office of the United States Trade Representative, Remarks by President Obama Before the Trans-Pacific Partnership Meeting (Nov. 10, 2014), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/November/Remarks-by-the-President-Before-TPP-Meeting.

26. Ian Fergusson et. al., CONG. RESEARCH SERV., R42694, THE TRANS-PACIFIC PARTNERSHIP (TPP) NEGOTIATIONS AND ISSUES FOR CONGRESS 1 (2014).

27. *See id.*

28. *See id.* at 4.

29. *See* Press Release, Office of the United States Trade Representative, Trans-Pacific Partnership Trade Ministers' Report to Leaders (Nov. 10, 2014), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/November/Trans-Pacific-Partnership-Trade-Ministers-Report-to-Leaders.

30. *See id.*; *see also* Press Release, Office of the United States Trade Representative, Joint Statement of the Ministers and Heads of Delegation for the Trans-Pacific Partnership Countries (Oct. 27, 2014), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/October/Joint-Statement-of-the-Ministers-and-Heads-of-Delegation-for-the-TPP-Countries; CONG. RESEARCH SERV., *supra* note 24, at 23-24; *Trans-Pacific Partnership: Summary of U.S. Objectives*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/tpp/Summary-of-US-objectives.

31. *See* Press Release, Office of the United States Trade Representative, Readout of the Meetings Between Acting Deputy USTR Wendy Cutler and Ambassador Takeo Mori of Japan on Motor Vehicle Trade (July 20, 2014), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/July/Readout-Meetings-Act-

governments report that there is "steady progress" and remaining differences are narrow. New Zealand trade minister Groser remarked in November that he expected the TPP to be finalized in early 2015.[32]

3. *Transatlantic Trade and Investment Partnership*

The Transatlantic Trade and Investment Partnership (TTIP), a proposed "high standards" bilateral free trade agreement between the United States and the EU, would further link two economies that together account for about 50 percent of global GDP and roughly one-third of global trade, by value.[33] Key objectives of the negotiations include elimination of remaining tariff barriers and harmonization of regulatory standards.[34]

Since the launch of TTIP negotiations in early 2013,[35] the parties have held seven negotiation rounds. The parties held the fourth round in Brussels in March, covering services, labor, rules of origin, intellectual property, and sectors for possible regulatory cooperation.[36] The fifth round was held in Arlington, Virginia in May[37] and covered the same topics, in addition to agricultural market access, investment, and technical barriers to trade.[38] The parties covered the full array of topics in the sixth negotiation round in Brussels in July[39] and in the seventh round in Chevy Chase, Maryland from September 29 to October 3.[40] In the key area of regulatory harmonization, the parties identified the following sectors for possible harmonization: textiles, chemicals, pharmaceuticals, cosmetics, medical devices, cars, information, communications and technology (ICT), engineering, and pesticides.[41]

---

ing-Dep-USTR-Wendy-Cutler-Amb-Mori-Motor-Vehicle-Trade; *see* Press Release, Office of the United States Trade Representative, Readout of Meeting Between Acting Deputy USTR Wendy Cutler and Ambassador Hiroshi Oe on TPP and Agriculture (July 16, 2014), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/July/Readout-Mtg-Btwn-Acting-Deputy-USTR-Cutler-Ambassador-Hiroshi-Oe-TPP-Agriculture; *see* Press Release, Office of the United States Trade Representative, Readout of Meeting Between United States and Japanese Trade Negotiators Regarding TPP and Agriculture (Aug. 6, 2014), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/August/Readout-Meeting-Btwn-US-Japanese-Trade-Negotiators-Regarding-TPP-Agriculture.

32. Bob Davis, *TTP Deal in Sight Says Grosser*, WALL ST. J. (Nov. 10, 2014, 7:10 AM), http://www.wsj.com/articles/tpp-deal-in-sight-says-groser-1415621413.

33. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, WHITE HOUSE FACT SHEET: TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (T-TIP) (2013).

34. *Id.*

35. President Obama formally announced the launch of TTIP negotiations in his 2013 State of the Union Address. *See* President Obama, State of the Union Message, 113TH CONG., 1ST SESS. (Feb. 12, 2013) *available at* http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address.

36. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, ROUND 4: BRUSSELS, BELGIUM (2014), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership/readouts/round4 (last visited Feb. 6, 2015).

37. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, ROUND 5: ARLINGTON, VIRGINIA (2014), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership/readouts/round5 (last visited Feb. 6, 2015).

38. *Id.*

39. *See EU-US trade–latest round of talks on transatlantic trade pact ends in Brussels*, EUR. COMMISSION (July 18, 2014) http://trade.ec.europa.eu/doclib/press/index.cfm?id=1132.

40. *See Readouts from T-TIP Negotiating Rounds*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/ttip/ttip-round-information.

41. *See* Kara Sutton, *TTIP Negotiations: A Summary of Round 6*, BERTELSMANN FOUNDATION, Aug. 5, 2014.

All negotiation rounds to date have included public stakeholder forums. Participants have raised concerns on issues ranging from food safety standards to regulatory harmonization in the automotive sector.[42]

While 2014 began with a shared U.S.-EU objective of concluding negotiations by year-end, observers now hope for conclusion before the next U.S. presidential election in 2016.[43] Some controversies have complicated the negotiating process, including the scope of the European Parliament's consultative powers vis-à-vis the European Commission.[44]

Other areas of controversy include the unwillingness of the United States to include financial services in regulatory harmonization discussions,[45] and the EU's reluctance to include investor-state dispute settlement in a final accord.[46] Most recently, U.S. Congress members have warned their counterparts in the European Parliament against adoption of a pending resolution that would be adverse to U.S. digital commerce companies.[47]

4. *Conditions on U.S. Market Access*

a. U.S. Withdraws Russia's Beneficiary Developing Country Designation

On May 7, 2014, President Obama notified Congress of his intent to withdraw Russia's beneficiary developing country designation under the Generalized System of Preferences (GSP) program. The President determined that "Russia is sufficiently advanced" in economic development and trade competitiveness, such that the designation was no longer necessary.[48] Because the GSP program expired on July 31, 2013 and has yet to be renewed, there are no immediate adverse impacts on Russian imports. However, withdrawal of Russia's beneficiary designation, a long-standing demand by some legislators, will likely facilitate GSP program renewal and reflects the deterioration in U.S.-Russia relations as the conflict in Ukraine continues.

b. U.S. Cracks Down on Black Market Ivory

In 2014, the United States continued taking aggressive actions against black market ivory traffickers. The Convention on International Trade in Endangered Species of Wild

42. *See, e.g.* OFFICE OF THE U.S. TRADE REPRESENTATIVE, ROUND 5: ARLINGTON, VIRGINIA (2014), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership/readouts/round5 (last visited Feb. 6, 2015).

43. *See Lights On At WTO; Chinese Tires; U.S.-India Meeting; TTIP Transparency*, INSIDE U.S. TRADE'S NEWSTAND, Nov. 24, 2014.

44. *See Malmstrom Says EU Will Publish TTIP Text Proposals, Boost Parliament Access*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE, Nov. 19, 2014; *New EU Transparency Push Leaves Out Market Access Offers, U.S. Texts*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE, Nov. 26, 2014.

45. *See Portman Says U.S., EU Should Not Be 'Taking Things Off The Table' in TTIP*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE, Nov. 20, 2014.

46. *See TTIP Without ISDS Would Fall Short of 'Model' Deal For World, Froman Says*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE, Oct. 31, 2014.

47. *See Trade Committee Leaders Warn of TTIP Fallout From EU Digital Market Resolution*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE, Nov. 26, 2014.

48. *See* Press Release, Office of the Press Secretary, Message to the Congress—With Respect to Russia's Status Under the Generalized System of Preferences, WHITE HOUSE (May 7, 2014), http://www.whitehouse.gov/the-press-office/2014/05/07/message-congress-respect-russia-s-status-under-generalized-system-prefer.

Fauna and Flora (CITES) banned worldwide trade in most ivory in 1989.[49] The U.S. Fish and Wildlife Agency (FWS) and the U.S. Justice Department launched "Operation Crash," an ongoing nationwide investigation into illegal ivory trade, in 2011.[50] By February, FWS had arrested over 400 alleged wildlife poachers, seizing rhinoceros horns and elephant ivory from dozens of countries.[51] By March, Operation Crash yielded nine convictions for conspiracy, smuggling, money laundering, tax evasion, bribery, making false documents, and violations of the Endangered Species and Lacey Acts.[52] In July, environmental groups announced their intention to file a Pelly Amendment[53] petition demanding that the Obama Administration sanction Mozambique for its role in elephant and rhinoceros poaching.[54]

c. Increased Scrutiny Over Pesticides and Food Packaging Chemicals

The U.S. Environmental Protection Agency (EPA) recently proposed to remove 72 chemicals (e.g., methyl ethyl ketone, tetrahydrofuran, phthalate derivatives, and nonylphenol) from those currently approved as inert pesticide ingredients under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[55] in response to petitions suggesting they are hazardous.[56] If delisted, these chemicals can no longer be used in pesticides sold in the United States without prior EPA analysis, including of the chemicals' potential carcinogenic/toxic effects, and approval.[57] The EPA announced its proposal less than a week after environmental groups petitioned the U.S. Food and Drug Administration (FDA) to ban several toxic chemicals from continued use in food packaging due to concerns they may harm fetal development, male reproductive systems, and pre-and-post natal brain development, and may cause cancer.[58]

---

49. *See CITES*, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/international/cites/index.html (last visited Jan. 28, 2015).

50. *See* OFFICE OF LAW ENFORCEMENT, U.S. FISH AND WILDLIFE SERVICE, OPERATION CRASH, (2014).

51. *See* Laura Parker, *Fighting Wildlife Crime: New U.S. Strategy Broadens Scope*, NAT'L. GEOGRAPHIC, Feb. 11, 2014.

52. *See CITES*, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/international/cites/index.html (last visited Jan. 28, 2015).

53. The Pelly Amendment gives the President the authority to embargo imports of any products from any country if the U.S. Interior or Commerce Secretaries certify that nationals of that country are undermining certain international conservation programs. *See* Fishermen's Protective Act § 8, 22 U.S.C. §§ 1971-1979, *amended by* P.L. 95-376 (92 Stat. 714), P.L. 96-61 (93 Stat. 408), P.L. 100-711 (102 Stat. 4755), P.L. 102-582 (106 Stat. 4904), P.L. 104-43 (109 Stat. 390) and P.L. 104-208 (110 Stat. 3009, 3009-41).

54. *See* Media Release, International Rhino Foundation, Environmentalists Call for Trade Sanctions Against Mozambique for Rhino And Elephant Poaching (July 2, 2014) http://www.rhinos.org/news-room/environmentalists-call-for-trade-sanctions-against-mozambique-for-rhino-and-elephant-poaching.

55. 7 U.S.C. §§ 136a - 136y (1991).

56. *See* Proposed Removal of Certain Inert Ingredients From Approved Chemical Substance List for Pesticide Products, 79 Fed. Reg. 63,120 (Oct. 22, 2014).

57. *Id.* at 63,121.

58. Press Release, Natural Resources Defense Council, Groups Petition FDA to Ban Toxic Chemicals Used in Pizza Boxes and Other Food Packaging (Oct. 16, 2014), http://www.nrdc.org/media/2014/141016a.asp (last visited Feb. 6, 2015).

II. WTO Dispute Settlement Activity

The last year saw seventeen new disputes filed in the WTO Dispute Settlement Body (DSB)—almost as many as last year's twenty.[59] At the time of writing, twenty remain in consultations; panels have been composed in three; and panels have been established, but not composed, in two.[60] Notable developments include tit-for-tat EU-Russia disputes, as well as concerns over the DSB's heavy workload and scarce resources.[61] Eleven reports had been circulated in 2014 at the time of writing—eight by panels and three by the Appellate Body (AB)—a few of which are summarized here.

A. Panel Reports

1. *Argentina–Import Measures*

This case saw the EU, Japan, and the United States contest two Argentine measures: (a) a law requiring all importers to file Advance Sworn Import Declarations (or "DJAI") and (b) five "unwritten" import requirements, deemed the "Restrictive Trade-Related Requirements" (RTRRs).[62]

Complainants alleged that both measures violated provisions in the General Agreement on Tariffs and Trade (GATT) and the Import Licensing Agreement (ILA). The panel ruled on only three claims—those asserting that the RTRRs violated GATT Article XI:1 (prohibiting quantitative import/export restrictions) and that the DJAI requirement violated GATT Articles XI:1 and III:4 (requiring national treatment).[63]

The panel found that both measures violated GATT Article XI:1 and that the RTRRs violated GATT Article III:4.[64] The decision was notable in light of the unwritten nature of the RTRRs—demonstrating that even "off-the-books" regulations can violate WTO rules. Argentina appealed; the AB report is expected by January 2015.

2. *U.S.–COOL (Article 21.5)*

This long-running dispute over U.S. meat labeling requirements continued in 2014. Mexico and Canada filed complaints in 2008.[65] A 2012 AB ruling largely upheld U.S.-adverse panel findings, with which the United States was required to comply by May 2013.[66] Canada and Mexico requested that a panel determine U.S. compliance; the panel

59. *See Chronological List of Disputes Cases*, WTO, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Feb. 6, 2015). At the time of writing, a total of twelve disputes had been filed in calendar year 2014; five were filed in the last two months of 2013—i.e., prior to 2014 but following the authoring of the 2013 *Year-in-Review* section on WTO dispute settlement.

60. *Id.*

61. *Azevêdo Says Success of WTO Dispute Settlement Brings Urgent Challenges*, WTO News, Sept. 26, 2014, *available at* http://www.wto.org/english/news_e/spra_e/spra32_e.htm (last visited Feb. 6, 2015).

62. Panel Reports, *Argentina—Measures Affecting the Importation of Goods*, §§ 2.1–2.4, 6.121, WT/DS438/R/, WT/DS444/R//DS445/R (Aug. 22, 2014).

63. *See, e.g.*, *id.* at 7.1(g); 7.2(d)–(f).

64. *Id.* at 6.265, 6.295, 6.479.

65. *United States—Certain Country of Origin Labeling (COOL) Requirements*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm (last updated Dec. 10, 2014).

66. *Id.*

issued a report in October finding that, despite regulatory amendments, the United States had failed to comply.[67]

The United States appealed in November; if the AB upholds the ruling, the DSB could authorize Canada and Mexico to enforce sanctions against the United States.

B. Appellate Body Report in *EC–Seal Products*

This case concerned Europe's ban on most seal products.[68] Canada and Norway contended that the ban violated provisions under the WTO Agreement on Technical Barriers to Trade (TBT Agreement) and GATT Articles I:1 (requiring "most-favored nation" treatment) and III:4.[69]

In November 2013, a dispute settlement panel ruled that the ban violated most of these provisions. The EU defended the ban under GATT Article XX, which can justify trade-restrictive policies through (a) any one of ten enumerated exceptions, as long as they (b) do not "constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade."[70] Article XX(a) allows, inter alia, measures "necessary to protect public morals."[71] The EU succeeded in proving (a), but failed to satisfy (b).[72]

All parties appealed. Four months later, the AB upheld the panel's rulings on GATT Articles I:1, III:4, and XX(a), but declared those on the TBT Agreement "moot and of no legal effect" because the ban was not a "technical regulation" under the TBT Agreement.[73] The AB seemingly expanded the traditionally significant deference accorded to the concept of public morals,[74] in part by dismissing Canada's argument that a panel is not "required to identify the exact content of the public morals standard at issue."[75]

III. U.S. Trade Remedies

A. New Rulemaking

Two administrative trade agency rules of note were finalized in 2014.

First, the U.S. Department of Commerce (Commerce) published a notice that it did not intend to apply methodological rules on targeted dumping that it had previously withdrawn, in response to a U.S. Court of International Trade (CIT) remand.[76] Those rules established an exception to the statutory antidumping (AD) calculation methodology,

67. Panel Report, *United States—Certain Country of Origin Labeling (COOL) Requirements—Recourse to Article 21.5 of the DSU by Can. & Mex.*, ¶ 8.6, WT/DS384/RW (Oct. 20, 2014).

68. Appellate Body Report, *European Communities—Measures Prohibiting the Importation & Mktg. of Seal Products*, ¶ 1.4, WT/DS400/AB/R/WT/DS401/AB/R (May 22, 2014).

69. *Id.* at ¶ 1.5.

70. General Agreement on Tariffs & Trade Art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

71. *Id.* at art. XX(a).

72. Appellate Body Report, *European Communities—Measures Prohibiting the Importation & Mktg. of Seal Products, ¶ 1.8(d), WT/DS400/AB/R (May 22, 2010)*.

73. *Id.* at ¶ 5.70.

74. *See, e.g.*, *id.* at ¶ 6.461. ("Members should be given some scope to define and apply for themselves the concepts of 'public morals' . . . according to their own systems and scales of values").

75. *Id.* at ¶ 5.199.

76. Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 79 Fed. Reg. 22,371 (Apr. 22, 2014) (to be codified at 19 C.F.R. pt. 351).

whereby average normal values could be compared to individual transaction export prices if "targeted" dumping criteria were met, based on a pattern of export prices that differ significantly among purchasers, regions, or periods of time. Commerce withdrew this provision but was directed by the CIT to reconsider whether to apply it in one investigation.[77] The agency invited comments and announced in 2014 that it would not apply the withdrawn rules, but would rather continue to evaluate how to compare normal value and export prices on a case-by-case basis, including application of a recently developed differential pricing analysis (the "Cohen's d Test").[78]

Second, the U.S. International Trade Commission (Commission) published final regulations concerning primarily technical requirements and formats for submissions in AD and countervailing duty (CVD) investigations.[79] The rules specify that all requests for the Commission to obtain additional information be presented at the draft questionnaire stage of a final investigation; directs lost sales and revenue allegations to be submitted in an electronic format; and extends the time for completing change circumstances reviews.

B. Legislative Developments

1. *Bipartisan Congressional Trade Priorities Act of 2014*

In January, U.S. House Ways and Means Chairman Dave Camp (R-MI), Senate Finance Committee Chairman Max Baucus (D-MT), and Ranking Member Orrin Hatch (R-UT) introduced the *Bipartisan Congressional Trade Priorities Act of 2014*.[80] The legislation sets negotiating objectives for the U.S. Trade Representative in ongoing trade talks and renews trade promotion authority (TPA) for four years, with the option to extend it an additional three years.[81] Renewal of TPA has been deemed by many as paramount to successful conclusion of the TPP and TTIP negotiations.[82] At time of publication, the bills remained in committee.

2. *Generalized System of Preferences (GSP) Update Act*

Congressmen Ander Crenshaw (R-NE) and Adrian Smith (R-NE) introduced the *GSP Update for Production Diversification and Trade Enhancement Act*[83] in the House in May 2013.[84] The legislation broadens the scope of the GSP to include travel goods, such as

77. Gold East (Jiangsu) Paper Co. v. United States, 918 F.Supp.2d 1317, 1325 (Ct. Int'l Trade 2013).

78. 79 Fed. Reg. 22,372.

79. Conduct of Antidumping & Countervailing Duty Investigations & Reviews, 75 Fed. Reg. 35,920 (June 25, 2014) (to be codified at 19 C.F.R. pts. 201, 207) (effective with respect to all proceedings pending as of July 25, 2014).

80. *See* Press Release, Committee on Finance, Baucus, Hatch, Camp Unveil Bill to Bring Home Job-Creating Trade Agreements, U.S. Cong. (Jan. 9, 2014), *available at* http://www.finance.senate.gov/newsroom/chairman/release/?id=7cd1c188-87f1-4a0b-8856-3fc139121ca9 .

81. *See* Overview of the Bipartisan Cong. Trade Priorities Act of 2014, Senate Fin. Comm. & Ways & Means Comm., http://www.finance.senate.gov/imo/media/doc/TPA%20One%20Pager.pdf.

82. *See* Baucus, *supra* note 82.

83. *See* GSP UPDATE Act, H.R. 2139, 113th Cong. (2013).

84. *See* Press Release, Ander Crenshaw, Crenshaw, Smith International Trade Bill Would Open Production Opportunities to U.S. Travel Good Industry (May 22, 2013), *available at* http://crenshaw.house.gov/index.cfm/pressreleases?ID=12217a69-a79f-47b8-b74e-83fd788d2a22.

purses, briefcases, and backpacks.[85] In December 2013, a companion bill was introduced in the Senate by Senators Roy Blunt (R-MO) and Mark Begich (D-AK).[86] Both bills remained in Committee at time of publication.

While the GSP Update Act bills would not renew the GSP program, bills were introduced in both houses of Congress in July 2013 that would extend GSP, which expired on July 31, 2013, until September 30, 2015. These bills also remained in committee at the time of publication.

3. *Miscellaneous Tariff Bill*

In July 2013, House Ways and Means Chairman Camp (R-MI), Ranking Member Sandy Levin (D-MI), Trade Subcommittee Chairman Devin Nunes (R-CA), and Ranking Member Charles Rangel (D-NY) announced the *U.S. Job Creation and Manufacturing Competitiveness Act of 2013*, commonly referred to as the Miscellaneous Tariff Bill (MTB).[87] The bill includes hundreds of bills submitted and approved under the MTB process, which includes review by the House Committee on Ways and Means, Senate Finance Committee, the Commission, and Commerce.[88] At time of publication, the legislation still had not moved out of committee.

C. Significant Commerce Cases

2014 was another active year for AD/CVD litigation at Commerce. In addition to administrative and scope reviews, Commerce initiated over twenty AD and CVD investigations, involving at least nine different countries and products ranging from solar panels, to steel shelving, to sugar.[89] Domestic producers are currently seeking import relief in cases on certain passenger tires from China, steel nails from five countries, and welded line pipe from Korea and Turkey, among others.

1. *"Solar II" Investigations*

In January 2014, Commerce initiated AD/CVD investigations on *Crystalline Silicon Photovoltaic Products from China and Taiwan*. These cases were particularly notable in that they follow recent, similar investigations, in which AD/CVD orders were issued on *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from China* in December 2012.[90] The domestic solar industry filed the follow-up investigations to close a "loop-

85. *See* GSP UPDATE Act, H.R. 2139, 113th Cong. (2013).

86. *See* GSP Update Act, S. 1839, 113th Cong. (2014).

87. *See* Press Release, Brendan Buck, Ways & Means Committee Leaders Re-Introduce U.S. Job Creation and Manufacturing Competitiveness Act of 2013, Committee on Ways & Means (Jul. 17, 2013), *available at* http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=342878.

88. *See* U.S. Job Creation & Mfg. Competitiveness Act of 2013, H.R. 2708, 113th Cong. (2013).

89. *See, e.g.*, Certain Crystalline Silicon Photovoltaic Products from China and Taiwan, 79 Fed. Reg. 4661 (Jan. 29, 2014) (initiation of antidumping duty investigations); Boltless Steel Shelving Units Prepackaged for Sale from China, 79 Fed. Reg. 56,562 (Sept. 22, 2014) (initiation of countervailing duty investigation); Sugar from Mex., 79 Fed. Reg. 22,790 (Apr. 24, 2014) (initiation of antidumping duty investigation).

90. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from China, 77 Fed. Reg. 63,788 (Oct. 17, 2012) (amended final deter. of sales at less than fair value, and antidumping duty order).

hole" left open by the agency in the scope of the existing AD/CVD orders (i.e., they do not cover Chinese modules assembled from third-country cells). Commerce's final determinations in these "Solar II" investigations will be issued in December 2014, with the Commission's injury finding to be issued in early 2015.

2. *Oil Country Tubular Goods Investigations*

In July, Commerce made affirmative final determinations in the AD/CVD investigations of oil country tubular goods (OCTG) from several countries. The investigation began with nine countries, before Commerce reached a suspension agreement with Ukraine[91] and amended its final determination on Saudi Arabia to a negative finding,[92] and the Commission found imports from the Philippines and Thailand to be negligible, as discussed below. Although a few countries escaped the investigation, in September 2014, Commerce published CVD orders on India and Turkey[93] and AD orders on India, Korea, Taiwan, Turkey, and Vietnam, completing one of the largest investigations undertaken by Commerce in years.[94] Commerce found CVD margins for all individual companies in India and Turkey, ranging from 2.53 percent to 19.57 percent,[95] and AD margins ranging from 2.05 percent to 111.47 percent.[96]

3. *Termination of Suspension Agreement on Hot-Rolled Steel from Russia*

In October, Commerce announced that it was terminating a fifteen year-old suspension agreement on hot-rolled, flat-rolled, carbon quality steel products from Russia,[97] in response to a request from the domestic industry. As of December 16, 2014, Commerce will begin collecting AD duties in the amount of 73.59% for Severstal, a top Russian steel producer, and 184.56% for other Russian producers.[98] Domestic manufacturers had provided Commerce with evidence demonstrating that the agreement was ineffective and that Russian imports continued to surge into the United States.[99]

---

91. Certain Oil Country Tubular Goods From Ukr., 79 Fed. Reg. 41,959 (July 18, 2014) (suspension of antidumping investigation).

92. Certain Oil Country Tubular Goods from Saudi Arabia, 79 Fed. Reg. 49,102 (Aug. 19, 2014) (amended final deter. and termination of the investigation of sales at less than fair value).

93. Certain Oil Country Tubular Goods from India and the Republic of Turk., 79 Fed. Reg. 53,688 (Sept. 10, 2014) (countervailing duty orders and amended affirmative final countervailing duty deter. for India) [hereinafter *OCTG CVD Order*].

94. Certain Oil Country Tubular Goods from India, the Republic of Korea, Taiwan, the Republic of Turk., and the Socialist Republic of Viet.: Antidumping Duty Orders; and Certain Oil Country Tubular Goods From the Socialist Republic of Viet.: Amended Final Determination of Sales at Less Than Fair Value, 79 Fed. Reg. 53,691 (Sept. 10, 2014) [hereinafter *OCTG AD Order*].

95. *Id.* at 53,690.

96. *Id.* at 53,693-94.

97. Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation, 64 Fed. Reg. 38,642 (July 19, 1999) (suspension of antidumping duty investigation).

98. *Id.*

99. *U.S. to scrap trade deal on Russian steel duties*, REUTERS (Oct. 21, 2014) *available at* http://www.reuters.com/article/2014/10/21/usa-trade-steel-idUSL2N0SG0X120141021.

D. Significant International Trade Commission Cases

1. *Oil Country Tubular Goods from India, Korea, the Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, Ukraine, and Vietnam*

In September 2014, the Commission issued affirmative final determinations in *OCTG from India, Korea, the Philippines, Taiwan, Thailand, Turkey, Ukraine, and Vietnam* with regard to imports from all subject countries, except for Thailand and the Philippines, which were found to be negligible.[100] The Commission found present material injury with regard to cumulated imports from India, Korea, Turkey, Ukraine, and Vietnam, and a threat of injury with regard to Taiwanese imports.[101]

Following an amended negative final antidumping determination by the Commission in *OCTG from Saudi Arabia*, imports from the Philippines, Taiwan, and Thailand fell below the seven-percent aggregate negligibility threshold for present material injury.[102] The Commission found that, of the three, only the subject imports from Taiwan were likely to exceed the negligibility threshold for the purpose of its threat determination. This aspect of the determination is currently on appeal to the CIT.

2. *Grain-Oriented and Non-Oriented Electrical Steel Investigations*

The Commission issued determinations in two electrical steel investigations in 2014. In *Grain-Oriented Electrical Steel from Germany, Japan, and Poland* (GOES), the Commission voted 5-1 that subject imports neither injured nor threatened material injury to the U.S. industry.[103] In an investigation into a similar product, *Non-Oriented Electrical Steel from China, Germany, Korea, Sweden, and Taiwan*, the Commission made an affirmative final determination in a 4-1 vote.[104] The Commission's negative determination in *GOES* was one of several negative determinations in 2014, also including *1,1,1,2-Tetrafluorethane from China*,[105] *Ferrosilicon from Venezuela*,[106] *Certain Steel Threaded Rod from India*,[107] and *Silica Bricks and Shapes from China*.[108]

---

100. Certain Oil Country Tubular Goods from India, Korea, Phil., Taiwan, Thai., Turk., Ukr., & Viet., Inv. Nos. 701-TA-499-500, 731-TA-1215-1217, 1219-1223, USITC Pub. 4489 (Sept. 2014) (Final).

101. *Id.*

102. *Id.*

103. Grain-Oriented Elec. Steel from Ger., Japan, & Pol., Inv. Nos. 731-TA-1233, 1234, 1236, USITC Pub. 4491 (Sept. 2014) (Final).

104. Non-Oriented Electrical Steel from China, Ger., Japan, Korea, Swed., & Taiwan Injures U.S. Indus., USITC (Nov. 6, 2014) (News Release).

105. Press Release, USITC, 1,1,1,2-Tetrafluorethane from China ("R-134a") does not Injure U.S. Indus., Says USITC, (Nov. 12, 2014), http://www.usitc.gov/secretary/fed_reg_notices/701_731/701_509_notice12042014sgl.pdf.

106. Ferrosilicon from Venez., Inv. No. 731-TA-1225, USITC Pub. 4490 (Sept. 2014) (Final).

107. Certain Steel Threaded Rod from India, Inv. Nos. 701-TA-498, 731-TA-1213, USITC Pub. 4487 (Aug. 2014) (Final).

108. Silica Bricks & Shapes from China, Inv. No. 731-TA-1205, USITC Pub. 4443 (Jan. 2014) (Final).

3. *Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad & Tobago, and Ukraine: Sunset Review*

In a highly contested second sunset review of the orders on wire rod from Brazil, Indonesia, Mexico, Moldova, Trinidad & Tobago and Ukraine, the Commission found that subject imports from each country, except Ukraine, were likely to lead to continuation or recurrence of material injury to the domestic industry.[109] Cumulation was a major issue. The Commission did not cumulate Ukrainian imports with those from other subject countries because it found that a local supply policy prevented the largest producer in Ukraine from exporting considerable volumes to the United States.[110] As a result, the Commission focused its analysis on the production experience of the only other significant Ukrainian wire rod producer[111] and found it unlikely that producer would direct more than a modest portion of its limited excess capacity to the United States, and that this volume would be too small to have negative price effects or an adverse impact on the U.S. market.[112]

On the other hand, the Commission rejected arguments not to cumulate subject imports from Mexico because Mexican producers, like those in the other subject countries, continued to add capacity during the period and produced and sold 4.75 mm wire rod, demonstrating their continued interest in the U.S. market.[113] Accordingly, the Commission cumulated imports from the remaining five countries and found that their production capacities were massive, that they were likely to undersell the domestic like product, and that revocation of the orders would likely have a significant adverse impact on the domestic industry.[114]

E. Section 337 Developments

Several significant Section 337 developments occurred in 2014, including: (i) important rulings by the Commission relating to importation and domestic industry issues; (ii) controversial decisions by the U.S. Court of Appeals for the Federal Circuit (CAFC) concerning induced infringement of method claims and interpretation of consent orders; and (iii) a critical report by the U.S. Government Accountability Office (GAO) relating to deficiencies in the exclusion order enforcement processes used by CBP.

In *Digital Models and Digital Data*, the Commission ruled that digital data sets transmitted electronically from Pakistan to Texas were "articles" within the meaning of Section 337, and that transmission of such sets was an "importation" under Section 337.[115] The decision, which was predicated on the Commission's interpretation of Section 337's legis-

109. Carbon & Certain Alloy Steel Wire Rod from Braz., Indon., Mex., Mold., Trin. & Tobago, & Ukr., Inv. Nos. 701-TA-417, 731-TA-953, 957-959, 962, USITC Pub. 4472 (June 2014) (Second Review).

110. *Id.* at 20-21.

111. *Id.* at 20-22, 47-48.

112. *Id.* at 47-48.

113. *Id.* at 17-18, 26-27.

114. *Id.* at 39-47.

115. Certain Digital Models, Digital Data, & Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances, the Appliances Made Therefrom, & Methods of Making the Same, Inv. No. 337-TA-833, USITC (Apr. 3, 2014) (Final) (comm'n finding a violation).

lative history, is currently on appeal to the CAFC and will be decided in 2015. While the appeal is pending, the Commission has stayed enforcement of its cease and desist order.[116]

The Commission also issued three important rulings relating to domestic industry requirements. In *Computers and Computer Peripheral Devices*, the Commission ruled that, in accordance with decisions issued by the CAFC in *Interdigital I*, *Interdigital II*, and *Microsoft*,[117] a complainant alleging the existence of a domestic industry under Section 337(a)(3)(C) must show the existence of an article protected by the patent (i.e., effectively implementing a technical prong requirement for complainants seeking to establish a licensing-based domestic industry).[118] Moreover, in *Integrated Circuit Chips*, the Commission further held that, under Section 337(a)(3)(C), a complainant must establish a nexus between the claimed investment and the asserted patent.[119] But in a remand order issued in *Optical Disc Drives*, the Commission clarified that Section 337 does not require that a domestic industry be comprised of any specific entity or that a complainant present its case under any specific subsection of the statute, and that, therefore, it was acceptable for the complainant in the case to rely on the activities of its licensee(s) to satisfy the domestic industry requirements under Section 337(a)(1)(A)-(B) and that such activities need not be production-driven (i.e., they could be revenue-driven).[120]

Important, albeit controversial, decisions also were issued by the CAFC. In *Suprema*, the CAFC vacated a Commission determination based on induced infringement, holding that the Commission has no authority under Section 337 to find a violation in an inducement case involving method claims where the articles do not directly infringe at the time of importation.[121] Subsequently, petition for *en banc* review of this ruling was granted, and an *en banc* decision is expected in early 2015. In a somewhat less contentious ruling, the CAFC held in *uPI Semiconductor Corp.* that the Commission has the authority to assess a civil penalty against a complainant for its violation of a consent order's provisions (e.g., a knowingly aiding and abetting provision).[122]

CBP's enforcement of exclusion orders also was the subject of considerable discussion during the past year. In January, it was made known that CBP issued a letter to Senator Wyden (D-OR) defending its enforcement of exclusion orders and noting that it was developing a procedure for adjudicating exclusion order rulings that allows both the importer/respondent and the complainant to make arguments and rebuttals. Most recently, in November, the GAO issued a report concluding that CBP's management of its exclusion order enforcement processes at U.S. ports contains weaknesses that result in ineffi-

116. Certain Digital Models, Digital Data, & Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances, the Appliances Made Therefrom, and Methods of Making the Same, Inv. No. 337-TA-833, USITC (June 11, 2014) (Comm'n Opinion) (comm'n granting stay).

117. Interdigital Commc'ns v. Int'l Trade Comm'n, 690 F.3d 1318 (Fed. Cir. 2012); InterDigital Commc'ns v. Int'l Trade Comm'n, 707 F.3d 1295 (Fed. Cir. 2013); Microsoft Corp. v. Int'l Trade Comm'n, 731 F.3d 1354 (Fed. Cir. 2013).

118. Certain Computers & Computer Peripheral Devices, and Components Thereof, and Products Containing the Same, Inv. No. 337-TA-841, USITC (Jan. 9, 2014) (Comm'n Opinion) (comm'n finding no violation).

119. Certain Integrated Circuit Chips & Products Containing the Same, Inv. No. 337-TA-859, USITC (Aug. 22, 2014) (Comm'n Opinion) (comm'n finding no violation).

120. Certain Optical Disc Drives, Components Thereof, & Products Containing the Same, Inv. No. 337-TA-897, USITC (Sep. 3, 2014) (Remand Order).

121. Suprema, Inc. v. Int'l Trade Comm'n, 742 F.3d 1350, 1351 (Fed. Cir. 2013).

122. uPI Semiconductor Corp. v. Int'l Trade Comm'n, 767 F.3d 1372, 1377 (Fed. Cir. 2014).

ciencies and an increased risk of infringing products entering U.S. commerce, and that improved processes need to be implemented.[123]

F. Court Appeals

The CAFC also addressed several significant aspects of U.S. trade remedies law in 2014, including in the following cases.

1. *United States v. Trek Leather*

In *United States v. Trek Leather*, the CAFC held in an *en banc* ruling that the president and sole shareholder of a corporation may be held personally liable for submitting false documents to CBP on behalf of the corporation.[124] The court—rejecting the argument of the company president that, absent intentional fraud, only the "importer of record" could be held civilly liable for submitting false documents in connection with the importation of merchandise—held that the applicable statute (19 U.S.C. § 1592) was not limited to those who "enter" the merchandise, but also applies to any "person" who "attempt[s] to enter or introduce" merchandise into the commerce of the United States.[125] The holding allows CBP to impose penalties directly on officers or employees of companies involved in preparing false or incomplete entry documentation even absent a finding of intentional fraud.

2. *Fedmet Resources Corp. v. United States*

In *Fedmet Resources Corp. v. United States*, the CAFC overturned a CIT ruling and held that Commerce erred when it found that magnesia alumina carbon (MAC) bricks imported into the United States were included in its AD/CVD orders on magnesia carbon bricks from China and Mexico.[126] The court determined that, in accordance with explicit statements made by the Petitioner during the course of the underlying investigations, MAC bricks were unambiguously excluded from the scope despite any ambiguity in the actual scope language.[127] The court found MAC bricks were clearly excluded based on an analysis of the so-called "(k)(1) sources"—the descriptions of the merchandise as found in the petition, initial investigation and determinations of Commerce and the Commission—so a further investigation into the "(k)(2) sources" was unnecessary and inappropriate.[128] The court denied a petition for rehearing and hearing *en banc*.[129]

3. *Guangdong Wireking Housewares & Hardware Co., Ltd.*

Guangdong Wireking Housewares & Hardware Co., Ltd. dealt with constitutional challenges to Commerce's simultaneous application of AD and CVD duties on a respondent from China, a non-market economy (NME), in a case initiated prior to Congress's 2012

123. U.S. Gov't. Accountability Office, GAO 15-78, U.S. Customs & Border Protection Could Better Manage Its Process to Enforce Exclusion Orders (2014).
124. United States v. Trek Leather, 767 F.3d 1288, 1299 (Fed. Cir. 2014).
125. *Id.*
126. Fedmet Resources Corp. v. United States, 755 F.3d 912, 922 (Fed. Cir. 2014).
127. *Id.*
128. *Id.*
129. Guangdong Wireking Housewares & Hardware Co., Ltd., 745 F.3d 1194, 1196 (Fed. Cir. 2014).

revision of the 1930 Tariff Act.[130] Before this revision, the court interpreted the Act to mandate that CVD laws did not apply to NMEs; the revision changed the law to allow for application of CVD provisions in NME cases. The court noted, in agreement with the Appellant, that application of the 2012 revisions to cases initiated prior to 2012 was retroactive.[131] But it found that unfair trade laws are predominantly remedial in nature. Because the Appellant's challenge failed to meet both prongs of an *ex post facto* claim—that a law is applied retroactively and imposes a punishment for an act that was not punishable at the time committed–the court held in favor of the Appellee.

130. *Id.* at 1202.
131. *Id.* at 1211.

THE YEAR IN REVIEW

AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW