

## **International Trade**

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This article outlines the most important developments in international trade law during 2013.<sup>1</sup> It summarizes developments in international trade negotiations (both in the World Trade Organization (WTO) and bi-lateral negotiations), WTO dispute settlement activities, and U.S. trade remedies cases.

### **I. Negotiation Developments**

#### **A. WTO NEGOTIATIONS**

##### **1. *Doha Round***

During 2013, the WTO's Doha Round of trade negotiations inched forward. Members strove for consensus on several small agreements to be concluded at the Ninth Ministerial Conference in Bali, Indonesia. A trade package converged on the three following areas: (i)

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1. For developments during 2012, see Cortney O'Toole Morgan et al., *International Trade*, 47 INT'L LAW. 81 (2013). For developments during 2011, see Timothy Brightbill et al., *International Trade*, 46 INT'L LAW. 81 (2012).

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

88 THE YEAR IN REVIEW

trade facilitation, (ii) agriculture, and (iii) special and differential treatment for developing countries.<sup>2</sup>

a. Trade Facilitation

The draft text focuses on streamlining customs procedures. For example, members agree to promptly publish information on required documents for import and export procedures, duty rates, rules for classification and valuation of imported goods, regulations and rulings of general application, penalty provisions, appeal procedures, and procedures for the administration of tariff quotas.<sup>3</sup> Customs fees and charges shall be limited to the approximate cost of the services rendered.<sup>4</sup>

Each member will ensure that a reasonable interval is provided between the publication of new or amended trade laws (except for tariff rates) and their entry into force, and members will provide interested parties the ability to comment on the changes.<sup>5</sup>

Members will also issue advanced rulings on specified matters in a “reasonable, time bound manner” and inform applicants of the reasons a ruling cannot be issued.<sup>6</sup> Members also agree to provide advance notice when a ruling is revoked or modified and when administrative or judicial appeal procedures are available.<sup>7</sup>

It has not been determined whether various requirements of the draft will be mandatory. Additionally, the agreement will be implemented by developed countries when entered into force and by developing countries in three phases.<sup>8</sup>

b. Agriculture

The agriculture negotiations are focused on long-term objectives of a more market-oriented agricultural trading system. The talks have focused on the three following areas for agreement in Bali: (i) food security, (ii) export competition, and (iii) tariff-rate quota administration.<sup>9</sup>

On food security, the G-33 introduced a proposal allowing developing countries’ governments to buy food at government-set prices, rather than market-derived prices, and stockpile it for food security or distribute it as food aid.<sup>10</sup> Under the proposal, this sup-

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2. See *Lamy Says Change in Mind-Set Needed for Bali to Succeed*, WORLD TRADE ORG. (Apr. 11, 2013), [http://www.wto.org/english/news\\_e/news13\\_e/tnc\\_infstat\\_11apr13\\_e.htm](http://www.wto.org/english/news_e/news13_e/tnc_infstat_11apr13_e.htm).

3. See Negotiating Grp. on Trade Facilitation, *Draft Consolidated Negotiating Text: Revision*, TN/TF/W/165/Rev.18, at 1 (Oct. 23, 2013), available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDDocuments/120332/q/TN/TF/W165R18.pdf](https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDDocuments/120332/q/TN/TF/W165R18.pdf).

4. *Id.* at 6.

5. *Id.* at 2.

6. *Id.* at 3.

7. *Id.* at 3–4.

8. *Id.* at 22.

9. See *Chair Reports No ‘No’ but Also No ‘Yes’ for Farm Talks Proposal*, WORLD TRADE ORG. (Nov. 16, 2012), [http://www.wto.org/english/news\\_e/news12\\_e/agng\\_16nov12\\_e.htm](http://www.wto.org/english/news_e/news12_e/agng_16nov12_e.htm).

10. See *Farm Trade Talks to Examine Information on Stockholding, Mid-February to Early March*, WORLD TRADE ORG. (Feb. 15, 2013), [http://www.wto.org/english/news\\_e/news13\\_e/agng\\_15feb13\\_e.htm](http://www.wto.org/english/news_e/news13_e/agng_15feb13_e.htm); *Members Start Negotiating Proposal on Poor Countries’ Food Stockholding*, WORLD TRADE ORG. (Mar. 27, 2013), [http://www.wto.org/english/news\\_e/news13\\_e/agng\\_27mar13\\_e.htm](http://www.wto.org/english/news_e/news13_e/agng_27mar13_e.htm); *Farm Talks Chair Outlines Shape of What Might Be Possible for Bali Meeting*, WORLD TRADE ORG. (Oct. 11, 2013), [http://www.wto.org/english/news\\_e/news13\\_e/agng\\_11oct13\\_e.htm](http://www.wto.org/english/news_e/news13_e/agng_11oct13_e.htm).

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

INTERNATIONAL TRADE 89

port would not count as “Amber Box” support, which is subject to limits.<sup>11</sup> The negotiations continue on methodologies for calculating Aggregate Measure of Support.<sup>12</sup> Negotiations also focus on a temporary waiver of support limits and an agreement to avoid bringing legal disputes on the issue.<sup>13</sup>

Additionally, the G-20 proposed that members cut ceilings in half on export subsidies and phase in a limit on the repayment period for export credit.<sup>14</sup> Negotiations continue on whether changes to export subsidies should be linked to an agreement on broader agricultural reform and whether the proposed reductions should only apply to developed countries.<sup>15</sup>

c. Special and Differential Treatment

Negotiations focused on a proposal to reform tariff-rate quotas. The proposal contains the two following elements: (i) transparent provisions related to quota administration and (ii) a methodology for dealing with quota under fill, with special and differential treatment for developing countries.<sup>16</sup> Discussions also focused on the implementation of the waiver agreed to at the Eighth Ministerial Conference, which permits preferential treatment to services and service suppliers from less developed countries.<sup>17</sup>

2. *Services Negotiations*

In early 2013, a group of twenty countries, led by the United States and Australia, began negotiations on a new multilateral Trade in Services Agreement.<sup>18</sup> The talks are outside of the auspices of the WTO, although countries are pushing for the agreement to comply with WTO rules so it can later be “multilateralized.”

3. *Information Technology Agreement*

In September, Russia became the seventy-eighth member of the Information Technology Agreement (ITA).<sup>19</sup> ITA negotiations in 2013 have centered on expanding product coverage. China has resisted the elimination of duties on new multi-component integrated circuits and flat-panel displays not connected to a television set; there has also been objection to including certain semiconductor manufacturing equipment under the ITA.<sup>20</sup>

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11. See *Members Start Negotiating Proposal on Poor Countries' Food Stockholding*, *supra* note 10.

12. *Id.*

13. See *Farm Talks Chair Outlines Shape of What Might Be Possible for Bali Meeting*, *supra* note 10.

14. See *Chair Updates on Farm Issues Proposed for Bali Meeting: Talks Continue on Key Differences*, WORLD TRADE ORG. (May 23, 2013), [http://www.wto.org/english/news\\_e/news13\\_e/agng\\_23may13\\_e.htm#export](http://www.wto.org/english/news_e/news13_e/agng_23may13_e.htm#export).

15. *Id.*

16. See *Chair Reports No 'No' but Also No 'Yes' for Farm Talks Proposal*, *supra* note 9.

17. See *Road to Bali Much Clearer than Two Months Ago – Lamy*, WORLD TRADE ORG. (July 22, 2013), [http://www.wto.org/english/news\\_e/news13\\_e/tnc\\_stat\\_22jul13\\_e.htm](http://www.wto.org/english/news_e/news13_e/tnc_stat_22jul13_e.htm).

18. See 9th WTO Ministerial Conference, Bali, 2013, *Briefing Note: Trade in Services* (Nov. 2013), available at [http://www.wto.org/english/thewto\\_e/minist\\_e/mc9\\_e/brief\\_serv\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_serv_e.htm).

19. See *Russia Joins WTO's Information Technology Agreement*, WORLD TRADE ORG. (Sept. 13, 2013), [http://www.wto.org/english/news\\_e/news13\\_e/ita\\_13sep13\\_e.htm](http://www.wto.org/english/news_e/news13_e/ita_13sep13_e.htm).

20. See *In ITA Talks, Semiconductors Emerge as Sticking Point with China*, INSIDE U.S. TRADE (Nov. 8, 2013), <http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-11/08/2013/in-ita-talks-semiconductors-emerge-as-sticking-point-with-china/menu-id-710.html>.

SPRING 2014

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

90 THE YEAR IN REVIEW

B. BILATERAL AND REGIONAL NEGOTIATIONS

1. *Bilateral Investment Treaties*

In July, the United States and China announced their intention to negotiate a bilateral investment treaty, marking the first time China agreed to negotiations involving all stages of investment and all sectors.<sup>21</sup> China has committed to the principles of open and transparent negotiations, including market access on a “pre-establishment” basis and a “negative list” approach.<sup>22</sup>

In July, India indicated its willingness to discuss a bilateral investment treaty with the United States.<sup>23</sup> Negotiations are already impeded by India’s proposal that Indian courts, instead of international dispute settlement bodies, have the final say on commercial disputes that arise under the agreement.<sup>24</sup>

2. *Trans-Pacific Partnership Negotiations*

The Trans-Pacific Partnership (TPP) is a proposed regional free-trade agreement that seeks “to eliminate tariff and non-tariff barriers to trade in goods, services, and agriculture, and to establish rules on a wide range of issues including foreign direct investment and other economic activities.”<sup>25</sup> In 2013, TPP member countries formally welcomed Japan into negotiations.<sup>26</sup> Japan joined Australia, Brunei Darussalam, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam to bring the total number of TPP member countries to twelve.<sup>27</sup> Countries that could potentially join the TPP in the future include South Korea, Taiwan, the Philippines, and Thailand.<sup>28</sup>

In 2013, TPP member states participated in four formal rounds of negotiations—rounds sixteen through nineteen. The sixteenth round of TPP negotiations were held in Singapore and concluded on March 13, 2013.<sup>29</sup> TPP negotiators reported significant progress during this round between member states in several areas of discussion, including

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21. See Betsy Bourassa, *U.S. and China Breakthrough Announcement on the Bilateral Investment Treaty Negotiations*, U.S. DEP’T. TREASURY (July 15, 2013), <http://www.treasury.gov/connect/blog/Pages/U.S.-and-China-Breakthrough-Announcement-.aspx>.

22. *Id.*; see also *US-China Bilateral Investment Treaty: Update on Negotiations and What It Means for Companies*, U.S.-CHINA BUS. COUNCIL, <https://www.uschina.org/events/us-china-bilateral-investment-treaty-update-negotiations-and-what-it-means-companies> (last visited Jan. 27, 2014).

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

24. See Ashish Goel & Harish Goel, *India-US Bilateral Investment Treaty Going Nowhere*, E. ASIA F. (Aug. 31, 2013), <http://www.eastasiaforum.org/2013/08/31/india-us-bilateral-investment-treaty-going-nowhere/>.

25. IAN F. FERGUSSON ET AL., CONG. RESEARCH SERV., RL42694, THE TRANS-PACIFIC PARTNERSHIP NEGOTIATIONS AND ISSUES FOR CONGRESS 2 (2013)

26. See Press Release, Office of the U.S. Trade Representative, Statement on the 18th Round of Trans-Pacific Partnership Negotiations (July 25, 2013), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2013/july/statement-18th-round-tpp>.

27. *Id.*; FERGUSSON ET AL., *supra* note 25, at 3.

28. See FERGUSSON ET AL., *supra* note 25, at 53.

29. See Press Release, Office of the U.S. Trade Representative, TPP Negotiations Shift into Higher Gear at 16th Round (Mar. 13, 2013), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2013/march/tpp-negotiations-higher-gear>.

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

INTERNATIONAL TRADE 91

telecommunications, regulatory coherence, and intellectual property.<sup>30</sup> The seventeenth round of TPP negotiations were conducted in Peru and ended on May 24, 2013.<sup>31</sup> Negotiators reported a significant advance in several areas, including government procurement, trade remedies, labor, and dispute settlement.<sup>32</sup> The eighteenth round of TPP negotiations were held in Malaysia and ended on July 25, 2013.<sup>33</sup> In this round, negotiators reached agreement on several areas, including market access, rules of origin, technical barriers to trade, and e-commerce.<sup>34</sup> The nineteenth round of TPP negotiations were held in Brunei and ended on August 30, 2013.<sup>35</sup> During this round, negotiators worked to complete the text of the agreement covering the remaining sensitive unresolved issues in an effort to complete the agreement by the end of 2013.<sup>36</sup>

As a final agreement begins to formulate, the Obama Administration requested that Congress pass trade promotion authority (TPA) to facilitate passage of TPP and other future trade deals.<sup>37</sup> TPA, also referred to as “fast-track,” would limit Congress to a simple up-or-down vote on trade agreements negotiated by the White House and prohibit Congress from amending or filibustering those trade deals.<sup>38</sup> Although the latest TPA expired in 2007, the Obama Administration has been informally following the requirements of the expired TPA during TPP negotiations.<sup>39</sup> The Administration and TPA supporters in Congress, however, have encountered difficulty crafting bipartisan legislation that would renew the TPA.<sup>40</sup> Additionally, the possibility that TPP could be ratified through TPA has led to opposition from certain public interest groups.<sup>41</sup>

### 3. *Transatlantic Trade and Investment Partnership*

On February 11, 2013, the U.S.-EU High Level Working Group on Jobs and Growth (HLWG) published a final report on policies and measures to increase trade and invest-

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30. *Id.*

31. See Press Release, Office of the U.S. Trade Representative, Trans-Pacific Partnership Negotiations Maintain Strong Momentum (May 24, 2013), available at <http://www.ustr.gov/about-us/press-office/press-releases/2013/may/tpp-negotiations-strong-momentum>.

32. *Id.*

33. See Statement on the 18th Round of Trans-Pacific Partnership Negotiations, *supra* note 26.

34. *Id.*

35. See Press Release, Office of the U.S. Trade Representative, Ministerial Guidance Energizes Negotiators' Work During 19th Round of TPP Negotiations (Aug. 30, 2013), <http://www.ustr.gov/19th-TPP-Round-Summary>.

36. *Id.*

37. See Vicki Needham, *Senate Finance Panel Leaders Call for Passage of Fast-Track Authority*, HILL (Oct. 30, 2013, 12:11 PM), <http://thehill.com/blogs/on-the-money/trade/188672-senate-finance-panel-leaders-call-for-passage-of-fast-track>.

38. *Id.*; see FERGUSSON ET AL., *supra* note 25, at 54.

39. See FERGUSSON ET AL., *supra* note 25, at 54.

40. See James Politi, *Obama's Bid for Fast-Track Authority Runs into Trouble*, FIN. TIMES (Nov. 4, 2013, 8:06 PM), <http://www.ft.com/intl/cms/s/0/754099a2-457f-11e3-b98b-00144feabdc0.html>.

41. See Parker Higgins & Maira Sutton, *Public Interest Coalition Opposes Fast-Track Authority for the Trans-Pacific Partnership*, ELECTRONIC FRONTIER FOUND. (Oct. 23, 2013), <https://www.eff.org/deeplinks/2013/10/public-interest-coalition-letter-no-fast-track-authority-trans-pacific-partnership>; Maira Sutton, *Congress Must Not Fast Track TPP to Ratification*, ELECTRONIC FRONTIER FOUND. (Oct. 31, 2013), <https://www.eff.org/deeplinks/2013/10/congress-must-not-fast-track-tpp-ratification>.

SPRING 2014

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

92 THE YEAR IN REVIEW

ment between the United States and EU.<sup>42</sup> The HLWG proposed a structure to negotiate a comprehensive trade agreement with the EU based on regulatory harmonization and mutual recognition principles in sanitary and phytosanitary, safety, inspection, labeling and certification rules, duty-free and tariff reduction measures, intellectual property rights, environmental and labor standards, and anticompetitive policies, subsidies and export restrictions.<sup>43</sup> In its report, the HLWG adopted recommendations from a number of U.S. trade associations on methods to reduce trans-Atlantic regulatory barriers to trade.<sup>44</sup>

On February 12, 2013, President Obama formally announced the negotiations for a comprehensive Transatlantic Trade and Investment Partnership (TTIP) with the EU in his State of the Union Address.<sup>45</sup> The Office of the United States Trade Representative (USTR) formally notified Congress of the President's intent to enter into TTIP negotiations on March 20, 2013,<sup>46</sup> and invited public comments about a TTIP based on the HLWG's framework on April 1, 2013.<sup>47</sup> Industry groups offered comments and testified at hearings before the Trade Policy Staff Committee from May 29–30, 2013.<sup>48</sup> Industry groups advocated a science-based approach to regulatory harmonization—consistent with various environmental laws in the United States, including the Toxic Substances Control Act (TSCA)<sup>49</sup>—which assumes products are safe until risk of harm can be demonstrated, as opposed to a precautionary approach—consistent with various EU laws, including Registration, Evaluation, Authorization and Restriction of Chemicals (REACH)<sup>50</sup>—which assumes the opposite.

The first round of TTIP negotiations, held in Washington, D.C., from July 8–12, 2013,<sup>51</sup> focused on form over substance in an effort to prevent early disagreements over contentious issues and was followed by the EU's release of initial position papers on Raw Materials and Energy, Public Procurement, Sanitary and Phytosanitary, Technical Barri-

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42. See *Final Report High Level Working Group on Jobs and Growth* (Feb. 11, 2013), available at [http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc\\_150519.pdf](http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf).

43. See *id.*

44. See Comments Submitted in Response to U.S.-EU Regulatory Compatibility, REGULATIONS.GOV, <http://www.regulations.gov/#?searchResults;rpp=25;po=0;=USTR-2012-0028> (last visited Jan. 28, 2014). See also Promoting U.S. EC Regulatory Compatibility, 77 Fed. Reg. 59702, at 59702 (Sept. 28, 2012); Letter from Boris Bershteyn et al., to EU & US Stakeholders on Promoting Greater Transatlantic Regulatory Compatibility (Sept. 7, 2012), <http://www.whitehouse.gov/sites/default/files/omb/oir/irc/eu-us-joint-solicitation-09072012.pdf>.

45. See President Barack Obama, State of the Union Address (Feb. 12, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

46. See Letter from Demetrios Marantis, Ambassador, Acting U.S. Trade Representative, to John Boehner, Speaker of the House of Representatives (Mar. 20, 2013), available at <http://www.ustr.gov/sites/default/files/03202013%20TTIP%20Notification%20Letter.pdf>.

47. See Request for Comments Concerning Proposed Transatlantic Trade and Investment Agreement, 78 Fed. Reg. 19566 (Apr. 1, 2013).

48. See Comments Submitted in Response to Proposed Transatlantic Trade and Investment Agreement, REGULATIONS.GOV, <http://www.regulations.gov/#:docketBrowser;rpp=25;po=0;det=PS;D=USTR-2013-0019> (last visited Jan. 28, 2014).

49. See Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692.

50. See Regulation 1907/2006, of the European Parliament and of the Council of 18 December 2006 Concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), 2006 O.J. (L 396) 1.

51. See *Readouts from TTIP Negotiating Rounds*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership/readouts/round1> (last visited Jan. 28, 2014).

ers to Trade, Trade Cross-Cutting Disciplines and Institutional Provisions, and Trade and Sustainable Development.<sup>52</sup> The second round of TTIP negotiations was held in Brussels from November 11–15, 2013, and covered services and investment, sectoral regulatory issues, and regulatory coherence on energy and raw materials. The third round of TTIP negotiations was scheduled for December 16–20, 2013 in Washington, D.C.

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

In one of the most significant developments of 2013, the U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS) announced a major loosening of restrictions on the import of live bovines and bovine-derived products on November 1, 2013.<sup>53</sup>

The U.S. market has been closed to EU beef since 1997, when APHIS implemented an import ban on live ruminants and most ruminant products from regions that present a risk for bovine spongiform encephalopathy (BSE), commonly known as "mad cow disease."

The APHIS regulations were widely criticized as non-tariff barriers to trade inconsistent with international science-based standards.<sup>54</sup> APHIS is now adopting the World Organization for Animal Health's risk criteria and categories to identify a country's BSE risk status for specific commodities.<sup>55</sup>

## II. WTO Dispute Settlement Activity

The WTO Dispute Settlement Body (DSB) encountered fifteen new disputes filed in 2013—significantly less than the twenty-five disputes filed in 2012.<sup>56</sup> At the time of writing, eleven of these remain in consultations, panels have been composed in two, and panels have been established, but not composed, in two other disputes.<sup>57</sup> Notable developments include Russia's first dispute, initial complaints by Cuba and the Faroe Islands, and Indonesia's first-time role as a respondent since 1999.<sup>58</sup>

Only five reports were circulated this year—four by panels and one by the Appellate Body (AB). The most significant is discussed below. The panel in *EC–Seal Products* released its report shortly after this publication was finalized, precluding a substantive analysis in this issue of the *Year in Review*.

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52. See *EU Publishes Initial TTIP Position Papers*, EUR. COMMISSION (July 16, 2013), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=943>.

53. See News Release, U.S. Dep't of Agric., APHIS Finalizes Bovine Import Regulations in Line with International Animal Health Standards (Nov. 1, 2013), <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2013/11/0207.xml>; see also *Commission Welcomes the U.S. Rule Announcement to Bring the U.S. Legislation in Line with International Standards for BSE*, EUR. COMMISSION (Nov. 2, 2013), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=981>.

54. See Comments Submitted in Response to Bovine Spongiform Encephalopathy, Importation of Bovines and Bovine Products, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=APHIS-2008-0010> (last visited Jan. 28, 2014).

55. See News Release, U.S. Dep't of Agric., *supra* note 53.

56. See *Chronological List of Disputes Cases*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (last visited Jan. 28, 2014).

57. *Id.*

58. *Id.*

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

94 THE YEAR IN REVIEW

A. PANEL AND APPELLATE BODY REPORTS

1. *Canada—Renewable Energy/Feed-In Tariff*

Japan and the EU brought this dispute against Canada. Under its feed-in-tariff (FIT) program, Ontario's government paid above-market rates for wind- and solar-generated electricity.<sup>59</sup> The program's "Minimum Required Domestic Content Level" (MRDCL) further mandated that wind and solar electricity generators use 50 and 60 percent Ontario-sourced equipment, respectively.<sup>60</sup>

The panel circulated its report on December 19, 2012.<sup>61</sup> All three parties appealed; the AB circulated its report on May 6, 2013, which the DSB adopted on May 24, 2013.<sup>62</sup>

The AB affirmed the panel's finding that the MRDCL violated Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement) and Article III:4 of the General Agreement on Tariffs and Trade (GATT).<sup>63</sup> Under Article 2.1, no WTO member may apply a TRIM that is "inconsistent with" GATT Article III.<sup>64</sup> Japan and the EU argued that the FIT program violates GATT Article III:4, which requires members to treat imports no less favorably than "like products of national origin."<sup>65</sup> The TRIMs Agreement provides an "Illustrative List" of prohibited TRIMs, and any measure requiring producers' "purchase or use" of domestic products, including those specified "in terms of a proportion of volume or value of its local production," violates GATT Article III:4.<sup>66</sup> Because the MRDCL satisfied this definition, the FIT program violated TRIMs Agreement Article 2.1 and GATT Article III:4.<sup>67</sup>

Canada defended the program by citing GATT Article III:8(a), which exempts "laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale."<sup>68</sup> The panel found that the MRDCL constituted such a "requirement," although the MRDCL concerned renewable energy generators, whereas the Canadian government procured electricity produced by these generators.<sup>69</sup> The Panel explained its decision by noting that generators are "needed and used" to produce electricity, creating a "close

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59. See Panels Reports, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-In Tariff Program*, ¶¶ 7.172, 7.177, WT/DS412/R, WT/DS426/R (Dec. 19, 2012) [hereinafter *Panel Report*].

60. *Id.* at 77 tbl.1.

61. See All WTO Panel Reports and Arbitrations, Grouped by Dispute, WORLDTRADELAW.NET, <http://www.worldtradelaw.net/dsc/database/wtodisputes.asp> (last visited Nov. 12, 2013).

62. *Id.*

63. See Appellate Body Reports, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-In Tariff Program*, ¶ 5.33, WT/DS412/AB/R, WT/DS426/AB/R (May 6, 2013) [hereinafter *AB Reports*].

64. See Agreement on Trade-Related Investment Measures art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMs Agreement].

65. See General Agreement on Tariffs and Trade art. III:4, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter *GATT*].

66. TRIMs Agreement, *supra* note 64, Annex ¶ 1(a).

67. *AB Reports*, *supra* note 63, ¶¶ 5.23, 5.33.

68. *GATT*, *supra* note 65, art. III:8(a).

69. *Panel Report*, *supra* note 59, ¶¶ 7.82, 7.128.



relationship” between the two.<sup>70</sup> The AB overturned this finding, stating that there must be a “competitive relationship” between domestic and foreign products.<sup>71</sup>

## 2. Pending Cases

At the time of writing, panels were close to circulating reports in several disputes of interest, including *China–Rare Earths* and *EC–Large Civil Aircraft (21.5)*.<sup>72</sup>

### III. U.S. Trade Remedies

#### A. NEW RULEMAKING

The U.S. Department of Commerce (Commerce) issued numerous key regulations for U.S. trade remedies this year, but the U.S. International Trade Commission (Commission) published only one.

In April 2013, Commerce published its final rule modifying the regulations that define factual information and the time limits for parties to submit such information to Commerce in antidumping and countervailing duty (AD/CVD) proceedings. Commerce’s final rule established five categories of factual information.<sup>73</sup> Commerce also finalized its amended regulations governing the certification of factual information submitted to Commerce in AD/CVD proceedings.<sup>74</sup>

Commerce published a final rule amending its regulations on the use of market economy input prices to value factors of production in non-market economy (NME) AD proceedings.<sup>75</sup> The new regulation requires that (a) the input at issue be produced in one or more market economy countries and (b) at least 85 percent of the total volume of the input be purchased from one or more market economy suppliers before Commerce will use the market economy purchase price of the input to value the factor of production.<sup>76</sup>

In November, Commerce announced that it was changing its practice to employ sampling to select companies for individual examination in administrative reviews of AD orders when certain conditions are met.<sup>77</sup> Commerce also announced that it would not review the NME entity in an administrative review unless a party requests review of the

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70. *Id.* ¶ 7.127.

71. *See AB Report*, *supra* note 63, ¶ 5.74.

72. *See* Ongoing WTO Dispute Settlement Proceedings under the DSU, WORLD TRADE L., <http://www.worldtradelaw.net/dsc/currentcases.htm> (last visited Nov. 12, 2013).

73. Definition of Factual Information and Time Limits for Submission of Factual Information, 78 Fed. Reg. 21,246-01, 21,246 (Apr. 10, 2013) (to be codified at 19 C.F.R. pt. 351).

74. *See* Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings, 78 Fed. Reg. 42,678 (July 17, 2013) (to be codified at 19 C.F.R. pt. 351).

75. *See* Use of Market Economy Input Prices in Nonmarket Economy Proceedings, 78 Fed. Reg. 46,799, (Aug. 2, 2013) (to be codified at 19 C.F.R. pt. 351).

76. *Id.* at 46,800.

77. Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings, 78 Fed. Reg. 65,963, 65,963–965 (Nov. 4, 2013).

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

96 THE YEAR IN REVIEW

entity.<sup>78</sup> Commerce further established proposed time limits for parties to request and comment on sampling in reviews.<sup>79</sup>

Commerce also issued a proposed rule<sup>80</sup> providing that it would not apply its previously withdrawn targeted dumping regulations after the U.S. Court of International Trade held that the regulations had been improperly withdrawn.<sup>81</sup>

In addition, Commerce extended the Steel Import Monitoring and Analysis (SIMA) system until March 21, 2017.<sup>82</sup>

Finally, the Commission published proposed regulations amending various rules governing certain submission requirements and the conduct of AD/CVD proceedings.<sup>83</sup>

**B. LEGISLATIVE DEVELOPMENTS**

*1. Trade Facilitation and Trade Enforcement Reauthorization Act of 2013*

In March 2013, Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Orrin Hatch (R-UT) introduced the Trade Facilitation and Trade Enforcement Reauthorization Act of 2013.<sup>84</sup> The Finance Committee held a hearing on the bill in May 2013, but no further developments have occurred.<sup>85</sup> Similar enforcement bills were introduced in previous sessions of Congress, but none have passed both Houses of Congress.<sup>86</sup>

The legislation strives to increase efficiency in trade enforcement and facilitation by overhauling the organization of U.S. Customs and Border Protection (CBP).<sup>87</sup> The legislation proposes renaming the agency “U.S. Customs and Border Protection Agency.”<sup>88</sup> While both CBP and Immigration and Customs Enforcement (ICE) currently function under discretionary authority granted by the Homeland Security Act, the legislation proposes authorizing the agencies directly.<sup>89</sup> The bill proposes the establishment of other high-level trade positions, including a Deputy Commissioner for Trade responsible for the agency’s trade mission, as well as a Trade Advocate tasked with collaborating with the private sector.<sup>90</sup>

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78. *Id.* at 65,970.

79. See Modification of Regulations Regarding Time Limits for Submission of Information Pertaining to Requests for Sampling in Antidumping Duty Administrative Reviews, 78 Fed. Reg. 69,322 (Nov. 19, 2013) (to be codified at 19 C.F.R. pt. 351).

80. See Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 78 Fed. Reg. 60,240 (Oct. 1, 2013) (to be codified at 19 C.F.R. pt. 351).

81. *Gold E. (Jiangsu) Paper Co., Ltd. v. United States*, 918 F. Supp. 2d 1317, 1327 (Ct. Int’l Trade 2013).

82. Steel Monitoring and Analysis System, 78 Fed. Reg. 11,090, 11,091 (Feb. 15, 2013) (to be codified at 19 C.F.R. pt. 360).

83. See Proposed Amendments to Rules of Practice and Procedure, 78 Fed. Reg. 36,446 (June 18, 2013) (to be codified at 19 C.F.R. pts. 201 & 207).

84. Trade Facilitation and Trade Enforcement Reauthorization Act of 2013, S. 662, 113th Cong. (2013).

85. See S.662, The Trade Facilitation and Trade Enforcement Act of 2013, U.S. Senate (May 22, 2013, 10:00AM), <http://www.finance.senate.gov/hearings/hearing/?id=a4d7b3e9-5056-a032-527c-0eb7998800bd>.

86. See, e.g., Customs Trade Facilitation and Enforcement Act of 2012, H.R. 6642, 112th Cong. (2012); see also Customs Enhanced Enforcement and Trade Facilitation Act of 2012, H.R. 6656, 112th Cong. (2012).

87. See S. 662 at § 201.

88. See *id.* § 104.

89. See *id.* § 121.

90. See *id.* § 102.

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

INTERNATIONAL TRADE 97

Additionally, the legislation includes provisions of the ENFORCE ACT, passed by the Senate Finance Committee in 2012,<sup>91</sup> which would authorize CBP to counteract the evasion of antidumping and countervailing duties.<sup>92</sup> To combat intellectual property rights (IPR) violations, the legislation proposes establishing the National Intellectual Property Rights Coordination Center.<sup>93</sup>

2. *Antidumping and Countervailing Duty Evasion and Enforcement Legislation*

In 2012, two bills were introduced in the House that proposed to aid CBP in combating the evasion of antidumping and countervailing duties. In January 2012, Rep. Charles Boustany (R-LA) introduced the “Preventing Recurring Trade Evasion and Circumvention Act” or “PROTECT Act.”<sup>94</sup> In April 2012, Rep. Billy Long (R-MI) introduced the “Enforcing Orders and Reducing Customs Evasion Act of 2012.”<sup>95</sup> Both bills had yet to leave committee as of November 2013.

3. *False Claims Act*

At the end of 2012, the U.S. Department of Justice accepted a \$45 million settlement in *United States ex rel. John Dickson v. Toyo Ink Manufacturing Co.*, a lawsuit that alleged that Toyo Ink purposely misrepresented the country of origin on its imports to evade the payment of antidumping duties.<sup>96</sup> In the litigation, the United States alleged that, between 2002 and 2010, Toyo Ink produced Carbazole Violet Pigment 23 (CVP 23) in Mexico and Japan and then imported the product into the United States.<sup>97</sup> CVP 23 from China is subject to antidumping duties. At some point, production of Toyo’s unfinished product moved to China. Even after the shift, Toyo Ink continued to label the country of origin Mexico and Japan, the site of the finished products, avoiding the antidumping duty.<sup>98</sup>

The misrepresentation came to light after John Dickson, president of a domestic producer and competitor to Toyo Ink, filed a *qui tam* civil action under the False Claims Act (FCA).<sup>99</sup> In light of his participation, Mr. Dickson was entitled to a share in the recovery and received \$7,875,000.<sup>100</sup>

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91. See The Enforcing Orders and Reducing Customs Evasion Act of 2012, S. 3524, 112th Cong. (2012).

92. See S. 662 at § 213.

93. *Id.* § 231.

94. PROTECT Act, H.R. 5708, 112th Cong. (2012)

95. Enforcing Orders and Reducing Customs Evasion Act of 2011, H.R. 5708, 112th Cong. (2012).

96. Press Release, U.S. Dep. of Justice, Japanese-Based Toyo Ink and Affiliates in New Jersey and Illinois Settle False Claims Allegation for \$45 Million (Dec. 17, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-civ-1504.html>.

97. See Amended Complaint Filed Under Seal Pursuant to 31 U.S.C. § 3730(b)(2), *United States ex rel. John Dickson v. Toyo Ink Mfg. Co.*, No. 3:09cv00438 (W.D.N.C.).

98. See *id.*

99. Press Release, *supra* note 96. The FCA is a federal whistleblower statute that seeks to remedy frauds committed against the United States. See 31 U.S.C. § 3730 (2012).

100. Press Release, *supra* note 96.

SPRING 2014

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**SMU DEDMAN SCHOOL OF LAW**

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

98 THE YEAR IN REVIEW

C. SIGNIFICANT DEPARTMENT OF COMMERCE CASES

1. *Resurgence of Steel Investigations*

The number of antidumping (AD) and countervailing (CVD) petitions filed in 2013 increased, largely due to the resurgence of trade cases involving steel products. Domestic producers are seeking import relief in cases on welded stainless pressure pipe from Malaysia, Thailand, and Vietnam,<sup>101</sup> oil country tubular goods from nine countries,<sup>102</sup> steel concrete reinforcing bars from Turkey and Mexico,<sup>103</sup> grain-oriented electrical steel from seven countries,<sup>104</sup> and non-oriented electrical steel from six countries.<sup>105</sup>

Although the Department of Commerce has yet to issue its preliminary determinations in any of these investigations, the steel industry will be monitoring the margin calculations for market economy countries closely. Except for steel nails from the United Arab Emirates, no new AD or CVD orders have been imposed on steel products from a market economy country since 2008, when Commerce found dumping of light-walled rectangular pipe and tube from Mexico.<sup>106</sup> The five current investigations involve sixteen different market economy countries, and affirmative findings could prompt even more petitions in 2014.

2. *Large Residential Washers from Korea and Mexico*

In the final days of 2012, Commerce published affirmative final determinations in the AD/CVD investigations of large residential washers from Korea, the effects of which were felt in 2013.<sup>107</sup> Commerce's determinations in these investigations underscored its practice to allow "ample deference to the petitioner" for defining the scope throughout an investigation, not just in the petition.<sup>108</sup> At the petitioners' request, Commerce amended the scope language in the preliminary determination to exclude smaller, top-loaded wash-

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101. Welded Stainless Pressure Pipe from Malaysia, Thailand, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations, 78 Fed. Reg. 35,253 (June 12, 2013).

102. See Certain Oil Country Tubular Goods from India, the Republic of Korea, the Republic of the Philippines, Saudi Arabia, Taiwan, Thailand, the Republic of Turkey, Ukraine, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations, 78 Fed. Reg. 45,505 (July 29, 2013); see also Certain Oil Country Tubular Goods From India and Turkey: Initiation of Countervailing Duty Investigations, 78 Fed. Reg. 45,502 (July 29, 2013).

103. See Steel Concrete Reinforcing Bar From Mexico and Turkey: Initiation of Antidumping Duty Investigations, 78 Fed. Reg. 60,827 (Oct. 2, 2013); see also Steel Concrete Reinforcing Bar From Turkey: Initiation of Countervailing Duty Investigation, 78 Fed. Reg. 60,831 (Oct. 2, 2013).

104. See Grain-Oriented Electrical Steel From the People's Republic of China, the Czech Republic, Germany, Japan, the Republic of Korea, Poland, and the Russian Federation: Initiation of Antidumping Duty Investigations, 78 Fed. Reg. 65,283 (Oct. 31, 2013); see also Grain-Oriented Electrical Steel from the People's Republic of China: Initiation of Countervailing Duty Investigation, 78 Fed. Reg. 65,265 (Oct. 31, 2013).

105. See Non-Oriented Electrical Steel From the People's Republic of China, the Republic of Korea, and Taiwan: Initiation of Countervailing Duty Investigations, 78 Fed. Reg. 68,412 (Nov. 14, 2013).

106. See generally Light-Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea; Light-Walled Rectangular Pipe and Tube from the Republic of Korea, 73 Fed. Reg. 45,403-01 (Aug. 5, 2008).

107. See Large Residential Washers From the Republic of Korea, 77 Fed. Reg. 75,988-01, 75,988 (Dec. 26, 2012) [hereinafter Washers AD Final]; Large Residential Washers From the Republic of Korea, 77 Fed. Reg. 75,975-01, 75,975 (Dec. 26, 2012) [hereinafter Washers CVD Final].

108. Washers AD Final, *supra* note 107, at 75,992 cmt. 2 (Issues in Decision Memorandum).

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

INTERNATIONAL TRADE 99

ers, carving out an exception for “automatic clothes washing machines with a vertical rotational axis and a rated capacity of less than 3.70 cubic feet.”<sup>109</sup> In the final determination, while acknowledging procedural concerns, Commerce maintained the amended scope in the context of an investigation, regardless of the “motivations of the petitioner.”<sup>110</sup>

3. *Wind Towers from China and Vietnam*

In February 2013, Commerce issued AD orders covering utility scale wind towers (wind towers) from China and Vietnam, as well as a CVD order on China.<sup>111</sup> For its surrogate country selection in the China AD investigation, Commerce continued to place greater emphasis on which country provided the most specific data for valuing the primary input consumed in wind tower production (i.e. steel plate).<sup>112</sup> Among several possible surrogate countries, Commerce selected Thailand as the primary surrogate country because the Thai tariff schedule was more specific to the size and chemistry of the respondents’ steel plate.<sup>113</sup> Additionally, given the widespread corruption and lack of financial information available in the country, this investigation highlighted the unsuitability of Ukraine as a surrogate country.<sup>114</sup> In 2013, Commerce removed Ukraine as a potential surrogate country for China cases.<sup>115</sup>

4. *Aluminum Extrusions Scope Reviews*

In 2013, Commerce continued to struggle with defining the “finished goods kit” exception contained in the scope of the AD/CVD orders on Aluminum Extrusions from China.<sup>116</sup> Commerce has attempted to develop rules defining this exception. In the Kitchen Door Handles scope ruling, Commerce solidified its position that aluminum extrusions consisting solely of extrusions and fasteners are covered by the scope.<sup>117</sup> With respect to aluminum extrusions that display graphic material that are not imported with the graphic material, however, Commerce concluded that the product might be a finished product.<sup>118</sup> Commerce also determined that aluminum extrusions bundled together at the

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109. See Large Residential Washers From the Republic of Korea, 77 Fed. Reg. 46,391-01, 46,392 (Aug. 3, 2012) (Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination).

110. Washers AD Final, supra note 107, at 75,992 cmt. 1 (Issues in Decision Memorandum).

111. See Utility Scale Wind Towers From the People’s Republic of China, 78 Fed. Reg. 11,146-01, 11,146 (Feb. 15, 2013) (Antidumping Duty Order); Utility Scale Wind Towers From the Socialist Republic of Vietnam, 78 Fed. Reg. 11,150-01, 11,150 (Feb. 15, 2013) (Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order); Utility Scale Wind Towers From the People’s Republic of China, 78 Fed. Reg. 11,152-01, 11,152 (Feb. 15, 2013) (Countervailing Duty Order).

112. See Utility Scale Wind Towers From the People’s Republic of China, 77 Fed. Reg. 75,992-01, 75,997 cmt. 2 (Issues in Decision Memorandum).

113. *Id.* at 75,994.

114. *Id.*

115. See, e.g., Memorandum from Christian Marsh to Ronald K. Lorentzen 10 (Dec. 16, 2013), available at <http://enforcement.trade.gov/frn/summary/prc/2013-30338-1.pdf>.

116. See Aluminum Extrusions From the People’s Republic of China, 76 Fed. Reg. 30,650-01, 30,651 (May 26, 2011) (Antidumping Duty Order).

117. See Memorandum from James Terpstra through Melissa G. Skinner to Christian Marsh 14 (June 21, 2013).

118. See Memorandum from Raquel Silva through Melissa Skinner and Eugene Degnan to Christian Marsh 10–11 (Apr. 19, 2013).

SPRING 2014

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

100 THE YEAR IN REVIEW

time of importation that must be opened and re-packaged in the United States before being sold to an end user are ineligible for the “finished goods kit” exclusion.<sup>119</sup> Since the inception of these orders, an unprecedented number of scope ruling requests have been filed.

D. SIGNIFICANT INTERNATIONAL TRADE COMMISSION CASES

1. *Wind Towers from China and Vietnam*

In January 2013, the Commission issued affirmative final determinations in the AD/CVD cases on Wind Towers from China and Vietnam.<sup>120</sup> The Commission’s vote was split, with two Commissioners finding the domestic industry to be materially injured, one Commissioner finding the domestic industry to be threatened with material injury, and three Commissioners voting in the negative.<sup>121</sup> This divided vote led petitioners to appeal Commerce’s interpretation of the Commission’s determination, questioning whether it constitutes a finding of injury or threat of injury. The respondents in the investigation also appealed the Commission’s affirmative injury determination and briefing is currently ongoing.

2. *Large Residential Washers from Korea and Mexico*

The Commission issued a unanimous affirmative material injury determination in the AD/CVD cases on Large Residential Washers from Korea and Mexico in February 2013.<sup>122</sup> In August 2013, Korea began the WTO dispute settlement process by requesting consultations with the United States over the imposition of AD/CVD duties on its large residential washers and the methodology employed by Commerce in the case.<sup>123</sup>

3. *OCTG from India, Korea, Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, Ukraine, and Vietnam*

In August 2013, the Commission issued an affirmative preliminary determination in the AD/CVD cases on Oil Country Tubular Goods (OCTG) from India, Korea, Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, Ukraine, and Vietnam.<sup>124</sup> The Commission’s determination was unanimous, finding that there was a reasonable indication that the U.S. OCTG industry was materially injured by reason of subject imports from the subject countries. The Commission’s hearing and vote for the final phase of these investigations will be scheduled once Commerce issues its preliminary determinations.

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119. *See id.* at 9.

120. *See* Utility Scale Wind Towers From China and Vietnam, 78 Fed. Reg. 10,210-01, 10,210 (Feb. 13, 2013).

121. *Id.* at note 1.

122. *See* Large Residential Washers From Korea and Mexico, 78 Fed. Reg. 10,636-01, 10,636 (Feb. 14, 2013).

123. *See* World Trade Organization, United States – Anti-Dumping and Countervailing Measures on Large Residential Washers From Korea, Request for Consultations by the Republic of Korea 1, WT/DS464/1 (Sept. 3, 2013).

124. *See* Certain Oil Country Tubular Goods from India, Korea, the Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, Ukraine, and Vietnam, 78 Fed. Reg. 52,213-01, 52,213 (Aug. 22, 2013).

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

INTERNATIONAL TRADE 101

E. SECTION 337 DEVELOPMENTS

Four important Section 337 developments occurred during the past year, including (i) amendments to certain key procedures, (ii) a pilot program to facilitate earlier rulings on key dispositive issues, (iii) several major court rulings, and (iv) presidential disapproval of a Commission order.

The Commission's regulations were revised in two parts. In April 2013, the Commission published a final rule making numerous technical corrections and clarifications to various Commission Rules that became effective for investigations instituted on or after May 20, 2013.<sup>125</sup> The Final Rule included new requirements for complaints and new requirements for terminations and defaults.<sup>126</sup> The Commission, on May 21, 2013, then published a final rule making amendments to Commission Rules relating to depositions, interrogatories, and e-discovery that took effect for investigations instituted after June 20, 2013.<sup>127</sup>

The Commission also implemented a new pilot program to test whether earlier rulings on certain dispositive issues in section 337 investigations could limit unnecessary litigation.<sup>128</sup> "Under the pilot program, the Commission will identify, at institution, investigations that are likely to present a potentially dispositive issue and direct the assigned Administrative Law Judge to rule on that issue early in the investigation."<sup>129</sup> For example, in *Certain Products Having Laminated Packaging, Laminated Packaging, and Components Thereof* (Inv. No. 337-TA-874), the Commission directed the ALJ to collect facts and issue an early ruling on the domestic industry issue within 100 days of the investigation's institution, and the ALJ did so, finding that the complainant did not satisfy the domestic industry requirement.<sup>130</sup>

In 2013, two important, but seemingly contradictory, court rulings also were issued relating to the domestic industry requirement. In *Interdigital Commc'n v. Int'l Trade Comm'n*, the U.S. Court of Appeals for the Federal Circuit (CAFC) held that a domestic industry can be found based on licensing activities alone.<sup>131</sup> But subsequently, in *Microsoft Corp. v. Int'l Trade Comm'n*, the CAFC stated that a company seeking section 337 protection must provide evidence that its substantial domestic investment relates to an actual article that practices the patent.<sup>132</sup> Given that these rulings seem to be at odds with one another, the Commission has asked parties in some recent section 337 investigations to provide briefing on establishing a domestic industry based on statutory language, legislative history, and relevant court decisions (including *Interdigital* and *Microsoft*).

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125. See Rules of General Application and Adjudication and Enforcement, 78 Fed. Reg. 23,474-01, 23,474 (Apr. 19, 2013) (to be codified at 19 C.F.R. pts. 201 & 210).

126. See *id.* at 23,475.

127. See Rules of Adjudication and Enforcement, 78 Fed. Reg. 29,618-01, 29,618 (May 21, 2013) (to be codified at 19 C.F.R. pt. 210).

128. See Pilot Program will Test Early Disposition of Certain Section 337 Investigations, United States Int'l Trade Commission, [http://www.usitc.gov/press\\_room/documents/featured\\_news/337pilot\\_article.htm](http://www.usitc.gov/press_room/documents/featured_news/337pilot_article.htm) (last visited Jan. 19, 2014).

129. See *id.*

130. See *id.*

131. *InterDigital Commc'ns., LLC v. Int'l. Trade Comm'n.*, 707 F.3d 1295, 1303-04 (Fed. Cir. 2013).

132. *Microsoft Corp. v. Int'l. Trade Comm'n.*, 731 F.3d 1354, 1361-62 (Fed. Cir. 2013).

SPRING 2014

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

102 THE YEAR IN REVIEW

Finally, one of the most surprising section 337 developments of the year was President Obama's disapproval of the remedy issued by the Commission in *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers (Certain Electronic Devices)*, marking the first time since 1987 that the President set aside a section 337 order issued by the Commission. In *Certain Electronic Devices*, the Commission upheld the ALJ's determinations that Apple Inc. violated two of Samsung's asserted patents, and statutory public interest factors did not foreclose applying Samsung's requested remedy of blocking imports of Apple products that infringed those patents.<sup>133</sup> But on August 3, 2013, the U.S. Trade Representative (USTR) notified the Commission that its remedy had been disapproved by President Obama for numerous public interest reasons, including the President's concern about the Commission's use of exclusion orders based on FRAND-encumbered standard-essential patents (SEPs).<sup>134</sup>

F. COURT APPEALS

The CAFC addressed several significant aspects of U.S. trade remedies law in 2013. The most significant decisions focused on (1) the methodology of calculating separate rates for non-mandatory respondents, and (2) the ability of Commerce to exclude items explicitly included in the language of the scope of the orders.

1. *Calculating Separate Rates*

In *Yangzhou Bestpak Gifts & Crafts Co. v United States*,<sup>135</sup> the CAFC evaluated whether Commerce must calculate a separate duty rate in a non-market economy investigation with only two respondents or whether it could simply average the *de minimus* and adverse facts available rates for those respondents. To calculate a separate rate for the plaintiff—a non-mandatory respondent—Commerce averaged the two rates of 0 and 247.65 percent of the mandatory respondents. Although finding no legal error in this methodology, CAFC found that the resulting 123.83 percent rate was unreasonable and was unsupported by evidence, raising the question as to whether such methodology would ever result in a reasonable rate.

2. *Mixed Media Inquiries*

In *Mid Continent Nail Corp. v United States*,<sup>136</sup> the CAFC held that the Department has the authority to interpret an AD order to exclude material that is explicitly included in the scope of the order, if Commerce provided prior notice that certain mixed media is excluded. Although there is a presumption that subject merchandise remains within the scope of the order, despite being included in a mixed media kit, the court held that Commerce can overcome this rebuttable presumption by identifying published guidance issued prior to the date of the original AD order that supports this interpretation.

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133. *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794 (July 5, 2013) (Commission Opinion).

134. IRVING A. WILLIAMSON, U.S. TRADE REP., *DISAPPROVAL OF THE U.S. INT'L. TRADE COMM'N. DETERMINATION IN THE MATTER OF CERTAIN ELECTRONIC DEVICES* (Aug. 3, 2013), *available at* [http://www.ustr.gov/sites/default/files/08032013%20Letter\\_1.pdf](http://www.ustr.gov/sites/default/files/08032013%20Letter_1.pdf).

135. *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1375 (Fed. Cir. 2013).

136. *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1301-02 (Fed. Cir. 2013).