International Trade

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I. Introduction

With the change of administration in the United States, trade negotiations came to a near standstill in 2009. There was little to no discernable progress in the Doha round of World Trade Organization (WTO) negotiations, and despite Russia's efforts to the contrary, no new members joined the WTO. Dispute settlement activity was also subdued, with a considerable decrease in both the number of initiations and the number of Appellate Body and Panel Reports issued. The controversy over the so-called "zeroing" methodology continued to represent a large portion of the Dispute Settlement Body's (DSB) agenda in 2009, while the remainder of the DSB's attention was focused almost exclusively on two challenges launched by the United States against China on intellectual property rights and distribution services for reading materials and audiovisual entertainment products.

Several high-profile agency actions grabbed headlines in 2009, including the Section 421 safeguard remedy action against Chinese tire imports, which represented the first time a U.S. President had affirmed a U.S. International Trade Commission (ITC) determination and imposed the special safeguards on China. Also drawing attention was the Commerce Department's (Commerce) initiation of the first countervailing duty (CVD) investigation on exports from Vietnam, despite the fact that Vietnam is treated as a nonmarket economy (NME) country in antidumping (AD) investigations and administrative reviews. Commerce also articulated a new methodology for determining costs on a quarterly basis.

In 2009, in several trade cases, the U.S. courts generally affirmed that broad deference is due to administrative agency authority to interpret U.S. international trade laws. The Supreme Court deferred to Commerce's decision regarding the applicability of AD laws to transactions structured as the sale of services. Likewise, several decisions by the Court of Appeals for the Federal Circuit (Federal Circuit) used generous language to describe

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the latitude of administrative agencies in interpreting the law. At the Court of International Trade (CIT), however, the issue of application of CVD laws to NMEs brought a remand to Commerce to square its inconsistent positions and ensure that the same unfair trade act was not double-counted in applying U.S. import duties.

II. Negotiation Developments

While the Obama administration put its trade team into place, trade negotiations came to a near standstill in 2009. As high-profile trade issues such as the Section 421 safeguard remedy action against Chinese tire imports were grabbing headlines, the Office of the U.S. Trade Representative (USTR), led by Ambassador Ron Kirk, stepped back and conducted a review of all U.S. trade policy and ongoing negotiations. The result was a year with few developments in trade negotiations.

A. WTO Negotiations

1. *Doha Round*

There was no discernible progress in the Doha Development Round negotiations in 2009. Despite high-level commitments to complete the round in 2010, there was little movement on substance.[1] In September, India hosted a meeting for trade ministers in order to jump-start the talks, resulting in an agreement to draft a work plan for the remainder of the year with an eye toward completing negotiations the following year.[2] Later that month, leaders at the G-20 Summit in Pittsburgh reiterated their support for conclusion of the round in 2010, directing their ministers to "take stock of the situation no later than early 2010."[3] In October, Brazil tried to revitalize the talks by organizing an informal meeting of trade ministers before the formal ministerial meeting at the WTO in Geneva at the end of November.[4]

A major stumbling block to the Doha Round during 2009 was the perceived reluctance on the part of the United States to commit to the December 2008 agriculture and non-agricultural market access (NAMA) draft texts.[5] Developing countries want the agriculture and NAMA texts from 2008 to be the basis for future negotiations, while U.S. industry strongly opposes proceeding from these texts.[6] The United States took the position that bilateral negotiations were necessary in conjunction with multilateral talks "to move

1. *See, e.g.*, Daniel Pruzin, *WTO Members Highlight 'Mismatch' in Doha Ambitions: U.S. Cites Mixed Progress*, INT'L TRADE REPORTER, July 30, 2009; Jonathan Lynn, *More Meetings, No Movement in Intense Doha Trade Talks*, REUTERS, Sept. 18, 2009, http://www.reuters.com/article/idUSTRE58H3II20090918; *Lamy Acknowledges Failure of Senior Officials to Advance Doha Round*, 27 INSIDE U.S. TRADE 42, Oct. 30, 2009.

2. *India Ministerial Yields Commitment to Ramp Up Doha Talks This Month*, INSIDE U.S. TRADE, Sept 4, 2009.

3. Statement, Group of Twenty, Leader's Statement: The Pittsburgh Summit ¶ 49 (Sept. 25, 2009), *available at* http://www.pittsburghsummit.gov/documents/organization/129853.pdf.

4. *Brazil Organizing November Ministerial Side Meeting To Discuss Doha*, 27 INSIDE U.S. TRADE, Oct. 2, 2009.

5. *India Ministerial Yields Commitment to Ramp up Doha Talks This Month*, *supra* note 2.

6. *Id.*

the Doha talks into an endgame."[7] The United States held bilateral consultations with several key countries (including Brazil and India) to explore what additional concessions could be gained, particularly with respect to tariff cuts in proposed sectoral commitments and flexibilities for the special safeguard mechanism for developing countries.[8] Disagreements on services negotiations also arose this year. WTO Director-General Lamy backed the U.S. demand that services concessions be revealed before final agreement on agriculture and NAMA modalities.[9] This sequencing is opposed by several other countries that believe services concessions should come after agriculture and NAMA modalities are finalized, as laid out in an annex to the 2005 Hong Kong ministerial.[10]

2. *Accession Negotiations*

While the WTO had no new members join this year, Russia's sixteen-year bid for membership garnered much attention. In June, Russian Prime Minister Vladimir Putin announced that Russia, Belarus, and Kazakhstan would each drop their separate membership bids to instead form a customs union and enter the WTO in that manner.[11] WTO rules provide that "any State or separate customs territories possessing full autonomy in the conduct of its external commercial relations" and of matters covered by the WTO Agreements may apply for membership.[12] Many questioned whether joint entry was possible given that the planned customs union between the three countries would not meet the WTO's definition of a customs territory.[13] It was also unclear how each country's already concluded bilateral accession agreements would be dealt with in a joint accession.[14] These questions were laid to rest in October when the three countries abandoned their plans to join as a customs union and resumed their individual accession negotiations.[15]

7. Press Release, Office of U.S. Trade Representative, United States Trade Representative Ron Kirk Comments at Close of WTO Ministers' Meeting in New Delhi, India (Sept. 4, 2009), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2009/september/united-states-trade-representative-ron-kirk-comm.

8. *See U.S. Ramps Up Bilateral Meetings on Doha Round With Key Countries*, 27 INSIDE U.S. TRADE 39, Oct. 9, 2009; *Bilaterals Continue with U.S.*, WASH. TRADE DAILY, Oct. 12, 2009; *U.S., Brazil Make Slow Progress in Second Doha Bilateral Meeting*, 27 INSIDE US TRADE 40, Oct. 16, 2009; *Another Senior Officials Meeting*, WASH. TRADE DAILY, Oct. 17, 2009.

9. *Lamy To Work On Services Commitments Compromise In Doha Round*, 27 INSIDE U.S. TRADE 40, Oct. 16, 2009.

10. *Id.*

11. *Russia, Belarus, Kazakhstan to Seek WTO Membership Together*, ITAR-TASS NEWS AGENCY, June 9, 2009.

12. Marrakesh Agreement Establishing the World Trade Organization, art. XXII, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

13. Daniel Pruzin, *WTO: Russia, Belarus, Kazakhstan Will Push Ahead On Joint Membership As Questions Grow*, 26 Int'l Trade Rep. (BNA) 849, June 25, 2009.

14. *Id.*

15. Daniel Pruzin, *WTO: Russia, Belarus, Kazakhstan Abandon Plan For Joint WTO Accession as Customs Union*, 16 Int'l Trade Rep. (BNA) 1426, Oct. 22, 2009.

B. BILATERAL/REGIONAL NEGOTIATIONS

1. *Bilateral Investment Treaties*

The U.S. State Department and the USTR began a review of the 2004 U.S. Model Bilateral Investment Treaty (BIT) in 2009, to ensure that it is "consistent with the public interest and the overall U.S. economic agenda."[16] In September following comments and public meetings,[17] the State Department's Advisory Committee on International Economic Policy (ACIEP) presented a report on recommendations to the government for consideration in its review.[18] ACIEP's report was focused on investor-state dispute settlement, state-owned enterprises, and financial services provisions. But it provided little agreement on whether and to what extent change was needed in these areas. The biggest area of divergence was on dispute settlement, with labor and manufacturing representatives on the committee contending that the 2004 model overly favors investors and other business representatives supporting the current provisions as a necessary protection.[19]

The United States launched BIT negotiations with India and Mauritius in 2009.[20] BIT negotiations were also ongoing with China, Pakistan, and Georgia this year.[21] The State Department cautioned that it would not conclude any of these negotiations until the review of the model BIT was completed.[22]

2. *Anti-Counterfeiting Trade Agreement*

The United States continued negotiations on the Anti-Counterfeiting Trade Agreement (ACTA) that was launched in 2008, aiming to complete negotiations in 2010.[23] Discussions focused on international cooperation and enforcement practices, particularly of digital intellectual property rights.[24] The enforcement provisions of the ACTA are

16. *See* Press Release, Office of U.S. Trade Representative, Public Meeting Regarding the U.S. Model Bilateral Investment Treaty Review (July 30, 2009), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2009/july/public-meeting-regarding-us-model-bilateral-investmen.

17. Notice of Public Meeting and Solicitation of Written Comments, 74 Fed. Reg. 34,071 (July 14, 2009) (issued by the U.S. Trade Representative).

18. REPORT OF THE SUBCOMMITTEE ON INVESTMENT OF THE ADVISORY COMMITTEE ON INTERNATIONAL ECONOMIC POLICY REGARDING THE MODEL BILATERAL INVESTMENT TREATY (2009), *available at* http://www.state.gov/e/eeb/rls/othr/2009/131098.htm.

19. *ACIEP Report On Model BIT Lacks Consensus On Critical Issues*, INSIDE US TRADE, Oct. 2, 2009.

20. Press Release, Office of U.S. Trade Representative, United States and Mauritius Launch Investment Treaty Talks (Aug. 5, 2009), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2009/august/united-states-and-mauritius-launch-investment-treat; *U.S.-India BIT Talks to Start In August, But Will Face Challenges*, 27 INSIDE U.S. TRADE 29 (July 20, 2009).

21. *Id.*

22. *India BIT Talks To Begin Aug. 11; Model BIT Review Slated For September*, WORLD TRADE ONLINE (INSIDE WASHINGTON), July 20, 2009.

23. Press Release, Office of U.S. Trade Representative, Ambassador Ron Kirk Announces Plan to Move Forward with Negotiation of the Anti-Counterfeiting Trade Agreement (ACTA) (June 22, 2009) *available at* http://www.ustr.gov/about-us/press-office/press-releases/2009/june/ambassador-ron-kirk-announces-plan-move-forward-negot.

24. Press Release, Office of U.S. Trade Representative, Statement from USTR Spokeswoman Carol Guthrie on the Anti-Counterfeiting Trade Agreement (ACTA) (July 20, 2009), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2009/july/statement-ustr-spokeswoman-carol-guthrie-anti-counte-0; Press Release, Office of U.S. Trade Representative, The Office of the U.S. Trade Representative Releases Statement of ACTA Negotiating Partners on Recent ACTA Negotiations (Nov. 6, 2009), *available at* http://

modeled after the intellectual property section of the United States-Korea Free Trade Agreement.[25]

Several non-profit groups have alleged that the ACTA negotiations lack transparency.[26] In 2008, these groups sued the Bush administration under the Freedom of Information Act (FOIA) to obtain a copy of the draft treaty text.[27] This suit was dropped in July 2009, when the Obama administration announced that it would continue the previous administration's classification of the negotiations as exempt from FOIA for national security reasons.[28] Since then, the USTR has allowed certain outside groups to see the working draft text pursuant to a nondisclosure agreement.[29] In addition, a summary of the status of ACTA negotiations has been posted on USTR's website,[30] describing the treaty as having six chapters: initial provisions and definitions; legal framework for enforcement of intellectual property rights; international cooperation; enforcement practices; institutional arrangements; and final provisions.[31]

III. WTO and NAFTA Dispute Settlement Activity

Despite the economic downturn and an increased risk of protectionist measures, the number of new WTO disputes in 2009 was not significantly higher than in past years. At the time of this writing, twelve new disputes had been brought before the WTO in 2009, as compared to a total of eighteen new disputes initiated in 2008.[32] In general terms, 2009 saw a significant increase in disputes involving trade with China (seven in total), which accounted for a majority of all WTO disputes initiated in 2009. These disputes were mostly brought against China under the General Agreement on Tariffs and Trade (GATT) and China's Protocol of Accession to the WTO,[33] but they also involved complaints brought by China against the United States and the European Communities (EC) under the GATT, the Agreement on Sanitary and Phytosanitary Measures, the Agreement

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www.ustr.gov/about-us/press-office/press-releases/2009/november/-office-us-trade-representative-releases-statemen.

25. James Lim, *Intellectual Property: ACTA Talks in Korea Said To Take Up Internet Piracy, Focus on Enforcement*, 26 Int'l Trade Rep. (BNA) 1536, Nov. 12, 2009.

26. *See, e.g.*, Amy Tsui, *Intellectual Property: ACTA Still Too Secret, Nonprofits Tell Lawmakers as Talks In Korea Continue*, 26 Int'l Trade Rep. (BNA) 1537, Nov. 12, 2009.

27. *See* Carey Lening, *Intellectual Property: Citizens' Groups, Others Sue USTR Seeking Public Disclosure of Counterfeiting Treaty*, Int'l Trade Daily (BNA), Sept. 22, 2008.

28. *See* Rossella Brevetti, *Intellectual Property: EEF, Public Knowledge Drop Lawsuit Seeking USTR Disclosure of ACTA Documents*, 26 Int'l Trade Rep. 890 (BNA), July 2, 2009.

29. Lim, *supra* note 25.

30. Office of U.S. Trade Representative, The Anti-Counterfeiting Trade Agreement-Summary of Key Elements under Discussion Background, *available at* http://www.ustr.gov/webfm_send/1479 (last visited Jan. 31, 2010).

31. *Id.*

32. *See* World Trade Organization, Dispute Settlements: The Disputes, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Jan. 18, 2010).

33. Request for Consultations by Guatemala, *China—Grants, Loans and Other Incentives*, WT/DS390 (Jan. 19, 2009); Request for Consultations by United States, *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394 (June 23, 2009); Request for Consultations by European Community, *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS395 (June 23, 2009); Request for Consultations by Mexico, *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS398 (Aug. 21, 2009).

on Technical Barriers to Trade, the Agreement on Implementation of Article VI of the GATT (AD Agreement), and the Agreement on Safeguards.[34]

In WTO dispute settlement decision-making, 2009 was a relatively calm year. Only four Appellate Body Reports and four Panel Reports were issued, which represented a significant decrease from the eight Appellate Body Reports and thirteen Panel Reports that were issued in 2008.[35] Two arbitration awards, under Articles 21.3(c) and 22.6 of the DSU, respectively, were also issued in 2009.[36]

A. Zeroing Disputes

The controversy over the so-called "zeroing" methodology continued to represent a large portion of the agenda of the DSB in 2009. In *US–Continued Zeroing*, the Appellate Body confirmed its earlier rulings that the use of zeroing in administrative reviews was inconsistent with Article 9.3 of the AD Agreement and Article VI.2 of the GATT.[37] In a rare separate (and concurring) opinion, one division member reasoned that although the concept of dumping in Article 2.1 of the AD Agreement "is cast at a high level of generality," it could not bear a meaning that is both exporter-specific and transaction-specific.[38] According to this member, in matters of adjudication, "there must be an end to every great debate" and the Appellate Body "has spoken definitely" on the question of zeroing.[39] Reversing the panel, the Appellate Body also held that "the use of the zeroing methodology in successive proceedings in each of the 18 cases whereby anti-dumping duties are maintained" constituted measures that can be challenged in WTO proceedings.[40]

From a systemic standpoint, the most significant ruling in *US–Continued Zeroing*, was the Appellate Body's interpretation of Article 17.6(ii) of the AD Agreement. Critics of the Appellate Body's jurisprudence on zeroing charge that it ignored the more deferential standard of review contained in the second sentence of that provision, which requires WTO panels to uphold domestic AD measures whenever these rest on a "permissible interpretation" of the AD Agreement. The Appellate Body clarified that the first and second sentences of Article 17.6(ii) of the AD Agreement apply sequentially, which suggests that the second sentence of Article 17.6(ii) only applies in cases where application of customary rules of treaty interpretation (Articles 31 and 32 of the Vienna Convention on the Law of Treaties) give rise to "an interpretative range."[41] The Appellate Body, however, noted that such "interpretative range" could not contemplate interpretations with "mutually contradictory" results.[42]

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34. Request for Consultations by China, *United States—Certain Measures Affecting Imports of Poultry from China*, WT/DS392 (Apr. 17, 2009); Request for Consultations by China, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397 (July 31, 2009); Request for Consultations by China, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tires from China*, WT/DS398 (Sept. 14, 2009).

35. *See* WTO Dispute Settlement Reports, http://www.worldtradelaw.net (last visited Jan. 18, 2009).

36. *Id.*

37. *See* Appellate Body Report, *US–Continued Existence and Application of Zeroing Methodology*, WT/DS350/R (Feb. 4 2009).

38. *See id.* ¶ 307.

39. *See id.* ¶ 312.

40. *See id.* ¶ 171.

41. *See id.* ¶ 312.

42. *See id.* ¶ 273.

The zeroing saga continued to unfold in the compliance proceedings in *US–Zeroing (EC)* and *US–Zeroing (Japan)*.[43] These disputes concerned the temporal scope of the U.S. implementation of the recommendations and rulings of the DSB in the original cases, which condemned the use of zeroing in different AD proceedings. Both panels and the Appellate Body rejected the U.S. argument that its implementation obligation to eliminate zeroing applied only with respect to imports taking place after the end of the "reasonable period of time" for implementation under Article 21.5 of the DSU. In the *US–Zeroing (EC)* compliance proceeding, the Appellate Body reversed the panel's finding that the recommendations and rulings of the DSB in the original case required the United States to eliminate zeroing in any determination made after the end of the reasonable period of time but did not cover the assessment of duties based on any determination made with zeroing before that date.[44] The Appellate Body reasoned that the U.S. implementation obligations after the end of the reasonable period of time also covered the assessment of duties and any "consequent measures" that "mechanically derive" from the assessment of duties, such as the actual collection and liquidation of duties, and the issuance of liquidation or assessment instructions.[45] Nonetheless, the Appellate Body in *US–Zeroing (EC)* did not express a view as to whether the U.S. implementation obligations also extended to actions to liquidate duties on the basis of determinations made with zeroing before the end of the reasonable period of time, in cases where such actions have been delayed as a result of domestic judicial proceedings.[46]

This issue was resolved in the subsequent *US–Zeroing (Japan)* appeal, in which the Appellate Body reasoned that Articles 3.7, 19.1, 21.1, 21.3, and 21.5 of the DSU required cessation of all WTO-inconsistent conduct immediately upon adoption of the DSB's recommendations and rulings, or at the latest by the end of the reasonable period of time.[47] Thus, according to the Appellate Body, the fact that collection of AD duties was delayed as a result of domestic judicial proceedings did not provide a valid justification for the failure to comply with the DSB's recommendations and rulings by the end of the reasonable period of time.[48]

At the procedural level, the Appellate Body in *US–Zeroing (EC)* also addressed the jurisdiction of panels under DSU Article 21.5. Relying on the "nexus-based" test developed by the Appellate Body in *US–Softwood Lumber IV (Article 21.5–Canada)*,[49] all Members of the Division hearing this appeal agreed that the jurisdiction of compliance panels may extend to measures that share a sufficiently close nexus with the DSB rulings in the original dispute and with the "declared" measures taken to comply. When applying this test to compliance measures challenged by the EC, however, the Division disagreed on whether

43. *See* Appellate Body Report, *US–Zeroing (EC) (Article 21.5–EC)*, WT/DS294/AB/RW (May 14, 2009); Panel Report, *US–Zeroing (EC) (Article 21.5–EC)*, WT/DS294/RW(Dec. 17, 2008); Appellate Body Report, *US–Zeroing (Japan) (Article 21.5–Japan)*, WT/DS322/AB/RW (Aug. 18, 2009); Panel Report, *US–Zeroing (Japan) (Article 21.5–Japan)*, WT/DS322/RW (Apr. 24, 2009).

44. Appellate Body Report, *US–Zeroing (EC) (Article 21.5–EC)*, ¶ 274.

45. *Id.* ¶¶ 306, 310.

46. *See id.* ¶ 314.

47. Appellate Body Report, *US–Zeroing (Japan) (Article 21.5–Japan)*, ¶ 169.

48. *See id.* ¶ 267.

49. Appellate Body Report, *United States—Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, ¶ 77, WT/DS257/AB/RW (Jan. 19, 2004) (adopted Dec. 5, 2005), *available at* http://www.wto.org/english/tratop_e/dispu_e/257abrw_e.pdf.

the compliance panel had jurisdiction over two specific administrative review determinations made after the Section 129 determinations (where elimination of zeroing led to revocation of the AD duty orders). The majority believed that use of zeroing in those administrative reviews provided the necessary link with the DSB rulings.[50] But a dissenter reasoned that because no cash deposit rates reflecting zeroing were imposed because of these administrative reviews, those administrative reviews lacked any requisite link with DSB rulings or declared compliance measures, and their final results could not "undermine or negate the impact" of the "declared" measure taken to comply.[51]

These findings illustrate the practical difficulties involved in applying a "nexus-based" test of panel jurisdiction under DSU Article 21.5, and suggest the need for further clarification.

B. U.S./China-IP Rights, Publications, and Audiovisual Products

The remaining 2009 DSB agenda was primarily two challenges launched by the United States against China on intellectual property rights and distribution services for reading materials and audiovisual entertainment products.

In *China–Intellectual Property Rights*, the United States was partially successful in its challenge against certain provisions of Chinese intellectual property laws.[52] The panel found that Article 4(1) of China's Copyright Law was inconsistent with Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement, because it denied copyright protection to works that have failed content review in China, and to the deleted portion of works edited to satisfy content review. But the panel found that the United States had failed to make a prima facie case of a violation of TRIPS Article 9.1 with respect to works never submitted or awaiting results of content review in China and unedited versions of works for which an edited version has been approved for distribution in China.[53] The United States also successfully challenged provisions of China's Customs Regulations that permitted the auctioning of confiscated counterfeit trademark goods. The panel found that Article 27 of China's Customs Regulations is inconsistent with the fourth sentence of Article 46 as incorporated in TRIPS Article 59 because it permitted the release of counterfeit goods into commercial channels after merely removing the unlawful trademark.[54]

Finally, the United States failed in its claim that China acted inconsistently with TRIPS Article 61 in not providing criminal procedures and penalties for commercial-scale trademark counterfeiting and copyright piracy. In essence, the panel found that the United States failed to prove its claim that certain thresholds under Chinese criminal law excluded from prosecution counterfeiting of trademarks or pirating of copyrights on a "commercial scale."[55] The panel rejected U.S. evidence (consisting mostly of industry estimates, news-

50. *See* Appellate Body Report, *US–Zeroing (EC) (Article 21.5–EC)*, ¶ 252.

51. *See id.* ¶ 267.

52. *See* Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/362R-00.doc.

53. *See id.* ¶¶ 7.103, 7.117.

54. *See id.* ¶ 7.385.

55. *See id.* ¶¶ 7.632, 7.668.

paper articles, and other press reports), as anecdotal, vague, or lacking credibility. Neither the United States nor China appealed these findings, and the panel report in *China–Intellectual Property Rights* was adopted by the DSB on March 20, 2009.

In the other major trade dispute involving China in 2009, the United States successfully challenged measures restricting trade and distribution in China of publications, audiovisual home entertainment products, sound recordings, and films for theatrical release. In *China –Publications and Audiovisual Products*, the panel found that certain Chinese measures were inconsistent with "WTO-plus" commitments in Articles 5.1 and 5.2 of China's WTO Accession Protocol because they failed to grant foreign-owned enterprises and foreign individuals the right to trade publications and audiovisual products in China.[56] In its analysis, the panel rejected China's contention that the challenged measures regulated trade in services, therefore rendering inapplicable China's trading rights commitments in Articles 5.1 and 5.2 of China's Accession Protocol with respect to goods. The panel also rejected China's defense that its measures were justified under GATT Article XX(a) to protect public morals. The panel did not take a position as to whether GATT Article XX may be available as a defense to a violation of an agreement other than the GATT, such as China's Accession Protocol (an interesting systemic issue that the Appellate Body might address). Even assuming that such a defense were available, however, the panel determined that China did not establish that its measures were "necessary" under Article XX(a), because alternative and less trade-restrictive measures were available.

The panel also upheld United States claims that Chinese measures restricting distribution services for reading materials, electronic sound recordings, and audiovisual home entertainment products were inconsistent with Article XVII national treatment requirements, and with China's Article XVI market access commitments.

Both China and the United States appealed some of the panel's findings. At the time of this writing, the Appellate Body had not issued its report.

C. NAFTA Panel Reports

In *Certain Softwood Lumber Products from Canada*,[57] a bi-national panel granted Commerce's motion to dismiss an action brought by a Canadian lumber producer who claimed that the company was entitled to the results of an administrative review, despite the 2006 Softwood Lumber Agreement (SLA). The complainant reasoned that had the review found a *de minimis* CVD margin, the company would have been excluded from the SLA. The bi-national panel found that any alleged injury was not a result of the administrative review, but rather the result of the SLA itself, which the panel had no jurisdiction to review.

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56. *See* Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/363R-00.doc.

57. Article 1904 Binational Panel Review, *Certain Softwood Lumber Products From Canada; Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews (the "Final Results")*, Secretariat File No. USA-CDA-2005-1904-01 (Jan. 30, 2009), *available at* http://registry.nafta-secalena.org/cmdocuments/35e148ef-82a8-4eaa-b71b-4803d93ff43f.pdf.

IV. U.S. Trade Remedy Cases

A. ADMINISTRATIVE DETERMINATIONS

1. *421 Tires Proceeding*

On September 11, 2009, President Obama provided import relief in response to market disruption from imports of certain passenger vehicle and light truck tires from China.[58] This action affirmed the July 9, 2009, report of the ITC investigation under Section 421 of the 1974 Trade Act. This was the first instance that a President had affirmed an ITC Section 421 determination.

In its report, the ITC determined that certain passenger vehicle and light truck tires from China were being imported into the United States in such increased quantities or under such conditions as to cause market disruption to the domestic producers.[59]

The ITC also determined that subject imports were increasing rapidly in both absolute and relative terms.[60] According to the ITC, the subject imports from China increased throughout the period of investigation in absolute terms, with the greatest increase in 2008.[61] The ITC also found that the ratio of subject imports relative to U.S. production and to U.S. apparent consumption rose throughout the period, again with the highest ratio in 2008.[62] Thus, the ITC determined that the increases in subject imports were "large, rapid, and continuing at the end of the period,"[63] and that the first statutory criterion for finding market disruption was "fully satisfied."[64]

Next, the ITC determined that the domestic industry was materially injured or threatened with material injury by the subject imports. All indicators "were at their lowest levels in 2008, as were the industry's financial results,"[65] with the data indicating declines in U.S. producers' average production capacity, capacity utilization, production, and shipments.[66] U.S. employment also declined each year during the period examined, as did the number of hours worked and operating income.[67]

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58. Proclamation No. 8414, Proclamation to Address Market Disruption from Imports of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China, *published at* 74 Fed. Reg. 47,861 (Sept. 17, 2009).

59. *Certain Passenger Vehicle and Light Truck Tires From China*, Investigation No. TA-421-7, 2009 ITC LEXIS 1242, at *1 (July 2009), *available at* http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2009/421_tires/PDF/Tires%20-%20Publication%204085.pdf.

60. *Id.*

61. *Id.* ("The quantity of subject imports rose by 215.5 percent between 2004 and 2008, by 53.7 percent between 2006 and 2007, and by 10.8 percent between 2007 and 2008. The value of subject imports rose even more rapidly, increasing by 294.5 percent between 2004 and 2008, by 60.2 percent between 2006 and 2007, and by 19.8 percent between 2007 and 2008." (citing Table C-1, at *365)).

62. *Id.* ("The ratio of subject imports to U.S. production increased by 22.0 percentage points between 2004 and 2008, with the two largest year-to-year increases occurring at the end of the period in 2007 and 2008. The ratio of subject imports to U.S. apparent consumption increased by 12.0 percentage points during the period examined, with the two largest year-to-year increases also occurring at the end of the period in 2007 and 2008." (citing Tables II-2 & V-1, at *227, *286)).

63. *Id.* at *26.

64. *Id.* at *27.

65. *Id.* at *34-35.

66. *Id.* at *35-37.

67. *Id.* at *38-39.

Finally, the ITC determined that the rapidly increasing imports were a significant cause of material injury. Given the close substitutability of the domestic product and the subject imports combined with underselling by significant and growing margins, the ITC found that the rapidly increasing subject imports had caused a market distortion that materially injured the domestic industry.[68]

In light of the ITC's determination, and on the confidential recommendation of the USTR, on September 11, 2009, President Obama announced that effective September 26, the United States would impose a thirty-five percent tariff in the first year of the three-year safeguard, followed by a thirty percent and twenty-five percent tariff respectively the following years.[69] This fell short of the ITC recommendation of a three-year safeguard tariff starting at fifty-five percent in the first year, and then reduced to forty-five and thirty-five percent. Nonetheless, this was the first time a president had ever affirmed an ITC Section 421 determination.

2. *Application of CVD Law to Vietnam*

On April 20, 2009, Commerce initiated the first CVD investigation on exports from Vietnam.[70] Currently, Vietnam is treated as a NME country in AD investigations and administrative reviews. Vietnam is the second country considered to be a NME by Commerce to have the CVD law apply.[71]

In its preliminary determination, Commerce found no statutory bar to applying CVD law to imports from NME countries like Vietnam.[72] Commerce examined a "snap-shot" of Vietnam's economy and salient features or characteristics of the production, finance and trade spheres, the state-owned enterprise (SOE) sector, land administration, and Vietnam's trade and investment regimes.[73] Commerce determined that, in contrast with the pervasive role of the State in a centrally planned economy, SOEs are no longer the sole occupants of the economic space in Vietnam.[74] Commerce also noted that Vietnam had reformed many SOEs in order to make its "production system more flexible and responsive to changes in the internal and external economic environment."[75] Commerce also

68. *Id.* at *59-60.

69. *White House Announces Three-Year Tariff Safeguard On Chinese Tires Falling Short Of ITC Recommendation*, WORLD TRADE ONLINE, Sept. 12, 2009, *available at* http://www.insidetrade.com/secure/display.asp?dn=912 2009_safeguard&f=wto2002.ask.

70. *See* Int'l Trade Administration, Polyethylene Retail Carrier Bags From the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigation and Request for Public Comment on the Application of the Countervailing Duty Law to Imports From the Socialist Republic of Vietnam, 74 Fed. Reg. 19,064 (Apr. 27, 2009).

71. Int'l Trade Administration, Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 74 Fed. Reg. 45,811 (Sept. 4, 2009) (the first NME to have CVD law applied to was the People's Republic of China); *see also* Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Coated Free Sheet Paper from the People's Republic of China (PRC), Comment 1, 72 Fed. Reg. 60,632 (Oct. 25, 2007).

72. Commerce also indicated that the WTO Subsidies and Countervailing Measures Agreement permits CVDs on subsidized imports from member countries and does not exempt non-market economy imports. Int'l Trade Administration, Polyethylene Retail Carrier Bags, 74 Fed. Reg. 45,811, 45,813.

73. *Id.*

74. *Id.*

75. *Id.*

found that Vietnam had distinguished itself from centrally planned economies by making production factors more accessible and deregulating both input and output prices,[76] and that Vietnam no longer monopolizes international trade, stating that the majority of Vietnamese exports are from foreign invested enterprises and domestic private firms.[77] As a result of these changes in Vietnam's economy, Commerce "believe[s] that it is possible to determine whether the [Government of Vietnam] has bestowed a benefit upon a Vietnamese producer . . . and whether any such benefit is specific."[78]

3. *Calculation of AD Duties Using Quarterly Costs*

In May 2008, Commerce published a request for comment on the development of a predictable methodology to determine whether the use of shorter-period cost averaging would be more appropriate when there are significant cost changes throughout a period of investigation (POI) or period of review (POR).[79] Through administrative reviews, Commerce has developed a practice for determining when the use of shorter cost averaging periods is more appropriate than its established practice of using annual cost averages.

Section 773(b)(1) of the Tariff Act of 1930, as amended, states that sales may be disregarded if they have been made at prices which represent less than the cost of production (COP) of a product. In its request for comments, Commerce noted that although section 773(b)(3) of the Act states that the COP is calculated using a period that would ordinarily permit the production of the foreign like product, the Act does not dictate the method of calculating COP or provide a definition for the term "period" in calculating COP and constructed value (CV).[80]

Commerce's practice was to use a single weighted-average COP that applies to the entire period of review or investigation. But Commerce also has a long-standing practice of applying alternative cost averaging methods where it determines that its normal annual average costs would lead to skewed data and inappropriate comparisons.[81] These situations include high inflation, rapid technological advancements, and extraordinary raw material cost volatility.

In determining to allow quarterly cost calculations, Commerce stated that where alternative cost averaging methods were requested, it examines: "(1) whether the cost changes throughout the POI/POR were significant; and (2) whether sales during the shorter averaging period could be accurately linked with the COP [or constructed] value during the same averaging period."[82] These two prongs represent the threshold for Commerce to

76. *Id.* at 8.

77. *Id.* at 9-10.

78. *Id.* at 11.

79. Int'l Trade Administration, Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation (POI)/Period of Review (POR) that May Require Using Shorter Cost Averaging Periods; Request for Comment, 73 Fed. Reg. 26,364 (May 9, 2008).

80. *Id.* at 26365.

81. *Id.*

82. *See, e.g.*, Int'l Trade Administration, Issues and Decisions for the Final Results of the Sixth Administrative Review of the Antidumping Duty Order on Stainless Steel Plate in Coils from Belgium (2006-2007), 73 Fed. Reg. 75,398, cmt. 4 (Dec. 11, 2008), *available at* http://ia.ita.doc.gov/frn/summary/belgium/E8-29410-1.pdf; Int'l Trade Administration, Antidumping Duty Administrative Review of Certain Welded Stainless Steel Pipes from the Republic of Korea: Issues and Decision Memorandum for the Final Results, 74 Fed. Reg. 31,242, cmts. 1b & 1c (June 22, 2009).

deviate from its normal practice. For the first prong regarding significance, Commerce established that a twenty-five percent change in cost was "significant,"[83] and declared a threshold of twenty-five percent annual inflation sufficient to deviate from its normal annual average cost methodology.[84] For the second prong, Commerce stated that its definition of linkage does not require a direct link between specific sales and specific production costs.[85] Rather, Commerce relies on whether there is a positive "correlation between a company's underlying costs and final sales prices."[86] Commerce noted, however, that requiring too strict a standard for linkage would unreasonably preclude this remedy for commodity-type products where there is no pricing mechanism in place.[87]

4. *An Update on Targeted Dumping*

The 2008 edition of the INTERNATIONAL LAWYER *Year-in-Review* discussed Commerce's changes in its targeted dumping methodology and the withdrawal of the targeted dumping regulations.[88] In 2009, Commerce's practice related to targeted dumping remained in flux.

In its *Preliminary Determination of the Polyethylene Retail Carrier Bags from Indonesia* investigation, Commerce conducted customer, regional, and time-period targeted-dumping analyses for the respondent and time-period targeted-dumping analysis using the methodology adopted in *Nails from China* and used most recently in *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China*.[89] Commerce recognized, however, that its targeted dumping regulations had been withdrawn.

Under its prior regulations, Commerce would have normally limited the average-to-transaction methodology to only those sales that constitute targeted dumping. But in light of the withdrawn regulation, Commerce now considers the following three options:

- Apply the average-to-transaction methodology just to sales found to be targeted as the withdrawn regulation directed and, consistent with [its] average-to-transaction practice, do not offset any margins found on these transactions.
- Apply the average-to-transaction methodology to all sales to the customer or time period found to be targeted, not just those specific sales found to be targeted, and consistent with [its] average-to-transaction practice, do not offset any margins found on these transactions.
- Apply the average-to-transaction methodology to all sales and, consistent with [its] average-to-transaction practice, do not offset any margins found on these transactions.[90]

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83. Issues and Decisions, 73 Fed. Reg. 75,398, at cmt 4.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Pablo M. Bentes et al., *International Trade*, 43 INT'L LAW. 335 (2009).

89. Int'l Trade Administration, Polyethylene Retail Carrier Bags from Indonesia, 74 Fed. Reg. 56,807 (Nov. 3, 2009); *see generally* Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 Fed. Reg. 40,485 (July 15, 2008).

90. Polyethylene Retail Carrier Bags from Indonesia, 74 Fed. Reg. 56,807.

Commerce stated that comments had been received regarding the price-comparison methodology in response to the *Withdrawal of Regulation*.[91] Because consideration of those comments is still underway, Commerce applied the average-to-transaction methodology to any targeted sales and applied the average-to-average methodology to the remaining non-targeted sales in that investigation.[92]

B. Court Decisions

1. *Supreme Court Decision: The Application of AD Law to International Trade in Services*

In *United States v. Eurodif, S.A.*, the U.S. Supreme Court granted certiorari for the first time to an AD appeal.[93] The case involved low enriched uranium sales transactions where U.S. energy companies or utilities provide feed uranium and only pay in cash for the service of enrichment in a foreign country. Consistent with the holding of the CIT and its own precedent, the Federal Circuit had found that these transactions constituted the sale of services, and that Commerce's interpretation of the statute was contrary to its plain language, which covers only merchandise, and not services.[94] The Supreme Court framed the issue as "whether the Commerce Department's way of seeing the transactions as sales of goods rather than services reflects a permissible interpretation and application" of the U.S. AD statute.[95] The Supreme Court held that it did.

The Court found that "[w]here a domestic buyer's cash and an untracked, fungible commodity are exchanged with a foreign contractor for a substantially transformed version of the same commodity, the Commerce Department may reasonably treat the transaction as the sale of a good" under the statute, even when, as in this case, the contracts were designated as the provision of enrichment services.[96] The Supreme Court reasoned that to allow contracts structured as the sale of services to avoid AD duties "would primarily chastise the uncreative."[97]

Regarding the deference due to Commerce, the Supreme Court's holding is based on the *Chevron* standard, but involves a twist on the original reasoning of the *Chevron* court. In *Chevron*, the Supreme Court held that administrative agency regulations, promulgated within the authority delegated by Congress and promulgated with notice and comment rulemaking within Section 553 of the Administrative Procedures Act, should be accorded appropriate deference by a court, while an informal agency decision would not.[98] As the implementing agency in *Eurodif*, Commerce had promulgated a relevant regulation regarding tolling (the processing of a product for a set fee without a transfer in ownership of the product), but it repealed the regulation shortly before the Supreme Court oral argu-

91. *Id.*

92. *Id.*

93. *See generally* United States v. Eurodif S.A., 129 S. Ct. 878, 882 (2009) (the petition for certiorari was jointly filed by the Departments of Justice, Commerce, State, and Defense–adding to the unusual posture of this antidumping appeal).

94. *See* Eurodif S.A. v. United States, 411 F.3d 1355, 1364 (Fed. Cir. 2005) (citing *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002)).

95. *Eurodif*, 129 S. Ct. at 882.

96. *Id.* at 890.

97. *Id.*

98. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984).

ment to have these issues decided on a case by case basis.[99] Thus, the implementing agency's case-specific decision prevailed over a potentially dispositive regulation. The Supreme Court found the tolling regulation has "been withdrawn . . . and cannot now constrain the Commerce Department's interpretive authority under Chevron."[100] This stands in stark contrast to the original *Chevron* court. In *Eurodif*, the Supreme Court stated that "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of the statute with the implementing agency."[101] *Eurodif* makes plain the devolution of *Chevron* from its origins in notice and comment rulemaking into deference toward administrative agency case-specific adjudication. The Federal Circuit's decisions of 2009 echo this theme.

2. *Federal Circuit Decisions*

In *Ningbo Dafa Chemical Fiber Co. Ltd., v. United States*, the Federal Circuit's decision is replete with language regarding the deference due to Commerce's AD determinations.[102] The Federal Circuit upheld Commerce's application of adverse facts available under 19 U.S.C. Section 1677e(a) to a foreign producer that did not provide information in the form and manner requested by Commerce.[103] The court took pains to describe the deference due: (1) the "legislative history . . . thus reveals that Congress intended § 1677e(a) to provide Commerce with gap-filling power . . .;" (2) "this court gives Commerce's interpretation of antidumping laws significant deference because of its special expertise in administering antidumping law;"[104] and (3) that "Commerce is the 'master of antidumping law' and reviewing courts must accord deference to the agency in its selection and development of proper methodologies."[105]

Similarly, in *PAM, S.P.A. v. United States*, the Federal Circuit found that the deference due stems from "Commerce's special expertise in antidumping cases."[106] In upholding Commerce's application of adverse facts available (AFA), the court found that "Commerce's discretion in applying an AFA margin is particularly great when a respondent is uncooperative by failing to provide or withholding information."[107]

In *NMB Singapore Ltd. v. United States*,[108] however, the Federal Circuit declined to defer to Commerce's determination in a sunset review regarding whether dumping is likely to recur if an antidumping order is terminated.[109] The Federal Circuit vacated the CIT decision affirming Commerce because the Commerce determination was "a devia-

99. Withdrawal of Regulations Governing the Treatment of Subcontractors, 73 Fed. Reg. 16,517 (Mar. 28, 2008). DOC stated that it was "not replacing this regulation with a new regulation," but "is returning to a case-by-case adjudication, until additional experience allows the Department to gain greater understanding of the problem."

100. *Eurodif*, 129 S. Ct. at 887 n.7.

101. *Id.* at 887 (quoting *Smiley v. Citibank*, 517 U.S. 735, 742 (1996)).

102. *See generally* Ningbo Dafa Chem. Fiber Co. Ltd. v. United States, 580 F.3d 1247 (Fed. Cir. 2009).

103. *Id.* at 1252.

104. *Id.* at 1255-56.

105. *Id.* at 1259 (quoting *Thai Pineapple Pub. Co., v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999)).

106. PAM, S.P.A. v. United States, 582 F.3d 1336, 1339-40 (Fed. Cir. 2009).

107. *Id.* at 1340.

108. *See generally* NMB Singapore Ltd. v. United States, 557 F.3d 1316 (Fed. Cir. 2009).

109. *Id.* at 1326.

tion from otherwise consistent practice of Commerce."[110] Commerce's practice regarding sunset reviews was memorialized in a Sunset Policy Bulletin.[111] The court found that the Policy Bulletin and past cases established a practice from which Commerce needed to adequately explain any deviation.[112] The court further instructed that "while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernible to a reviewing court."[113] The court remanded the case for such an explanation.

3. *CIT Appeals of Commerce Determinations*

In *GPX International Tire Corp. v. United States*,[114] the central issue was whether CVD law may be applied to NMEs, including China, without changing Commerce's AD practice regarding NMEs.[115] Before 2007, Commerce did not apply CVD law to NMEs because of the difficulty to disaggregate government actions in a way to identify subsidies. Instead, the effect of economic intervention was captured by Commerce's application of AD law by valuing "factors of production" in a market economy.[116] But Commerce departed from this consistent practice in this CVD proceeding. In reviewing Commerce's decision, the court found that "while Commerce may have the authority to apply CVD law" to NMEs, the statute is not clear as to "how Commerce is to account for the overlap" between the AD and CVD duties.[117] The court remanded the matter for "Commerce to forgo the imposition of CVDs on the merchandise at issue or for Commerce to adopt additional policies and procedures to adapt its NME AD and CVD methodologies to account for the imposition of CVD remedies."[118]

In 2009, the efficacy of NAFTA binational panel review was tested in *Canadian Wheat Board v. United States*.[119] There, the CIT affirmed its 2006 decision in *Tembec Inc. v. United States*, that AD or CVD deposits on unliquidated import entries must be refunded when a NAFTA panel invalidates an AD or CVD order.[120] The court reasoned that although NAFTA binational panels cannot enjoin liquidation, the statutory scheme provides for continued suspension of liquidation pending binational panel review.[121] Upon completion of such review, duties collected under the invalidated order must be refunded. Unlike *Tembec*, however, the *Canadian Wheat Board* decision was appealed to the Federal Circuit, which will rule on this issue of critical importance to NAFTA binational panel review.

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110. *Id.* at 1329.

111. *See generally* Policies Regarding Conduct of Five-Year (Sunset) Review, 63 Fed. Reg. 18,871 (Apr. 16, 1998).

112. *NMB Singapore Ltd.*, 557 F.3d at 1328-29.

113. *Id.* at 1328-29.

114. GPX Int'l Tire Corp. v. United States, 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009).

115. *Id.* at 1234.

116. *Id.* at 1236, 1245. ("The NME AD statute is designed to account for government intervention in an NME country's economy, including resulting price distortion.").

117. *Id.* at 1240.

118. *Id.* at 1251.

119. *See generally* Canadian Wheat Bd. V. United States, 637 F. Supp. 2d 1329 (Ct. Int'l Trade 2009).

120. *Canadian Wheat Bd.*, 637 F. Supp. 2d at 1336; Tembec Inc. v. United States, 461 F. Supp. 2d 1355, 1357 (Ct. Int'l Trade 2006).

121. *Canadian Wheat Board*, 637 F. Supp. 2d at 1334.

The CIT made several other determinations of interest:

- In NME cases in which Commerce's calculation of normal value is based on its "factors of production" analysis, Commerce must construct the product's normal value as it would have been if the NME country were a market economy.[122]
- Commerce was not obligated to adjust margins calculated in prior review retroactively to reflect a WTO decision. The Court found that the implementation of a WTO decision is prospective only.[123]
- The CIT remanded a Commerce decision for using overly broad model matching criteria in comparing home market and U.S. market prices in its AD calculations.[124]
- Industrial users or purchasers of the subject merchandise do not have standing to appeal a Commerce AD determination.[125]
- Where Commerce has an established practice, Commerce has the authority to change its practice or methodology but must adequately explain and justify such change. The Court remanded a Commerce determination for further explanation regarding its change in practice regarding quarterly versus annual cost averaging.[126]

4. *CIT Appeals of ITC Determinations*

The CIT issued several decisions of note regarding ITC determinations. The application of the Federal Circuit's *Bratsk/Mittel Steel* causation standard continued to be a theme, as well as the appropriate standard of causation in ITC's sunset reviews.[127]

The *Bratsk/Mittel Steel* causation standard established by the Federal Circuit applies to the ITC's analysis of whether non-subject imports have captured or are likely to capture market share previously held by subject imports. In *NSK Corp. v. United States*, the CIT, by Judge Barzilay, considered a motion for rehearing in light of the Federal Circuit's evolving jurisprudence on the causation standard, as reflected in its 2008 *Mittel Steel* decision.[128] The CIT held that, while the *Mittel Steel* decision did represent a development of the law regarding the causation standard, and that this development was relevant to sunset reviews, it did not reveal significant flaws or manifest error in the CIT's earlier decision, and thus denied the motion for rehearing.[129]

In contrast, in *Nucor Corp. v. United States*, the CIT, by Judge Carmen, found that the Federal Circuit's decision in *Mittel Steel* "explicitly links the *Bratsk* analysis with the final phase investigation statue, supporting a strong inference that the final phase investigation is the only context in which the *Bratsk/Mittel Steel* analysis should be applied."[130] In

122. Zhengzhou Harmoni Spice Co. Ltd. v. United States, 617 F. Supp. 2d 1281 (Ct. Int'l Trade 2009).

123. NMB Singapore Ltd. v. United States, 533 F. Supp. 2d 1244, 1250 (Ct. Int'l Trade 2009); Corus Staal B.V. v. United States, 593 F. Supp. 2d 1373, 1386 (Ct. Int'l Trade 2008).

124. Union Steel v. United States, 645 F. Supp. 2d 1298, 1310 (Ct. Int'l Trade 2009).

125. Ad Noc Utils. Group v. United States, 625 F. Supp. 2d 1330, 1332 (Ct. Int'l Trade 2009).

126. Habas Dinai Ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States, 625 F. Supp. 2d 1339, 1356 (Ct. Int'l Trade 2009).

127. Mittel Steel Point Lisas Ltd. v. United States, 542 F.3d 867, 878-89 (Fed. Cir. 2008); Bratsk Aluminum Smelter v. United States, 444 F.3d 1369, 1376 (Fed. Cir. 2006).

128. NSK Corp. v. United States, 593 F. Supp. 2d 1355, 1358-59 (Ct. Int'l Trade 2009).

129. *Id.* at 1371-72 ("That the Federal Circuit uses language to discuss causation principle in the setting of an investigation does not mean those principles are inapplicable to sunset reviews.").

130. Nucor Corp. v. United States, 594 F. Supp. 2d 1320, 1380 (Ct. Int'l Trade 2009).

Nucor, the CIT declined to extend *Bratsk/Mittel Steel* to ITC sunset reviews.[131] Thus, the *NSK* and *Nucor* decisions imply a division among CIT judges regarding the applicability of the *Bratsk/Mittel Steel* causation standard to ITC sunset reviews.

In the earlier *NSK Corp. v. United States* decision preceding the motion for rehearing, the CIT had remanded the ITC's sunset review decision for failure to establish a causal link between subject imports and the likely future injury.[132] The court found that, in light of *Bratsk/Mittel Steel*, the ITC had not adequately assessed why subject imports would be "more than a minimal or tangential cause of likely injury given the significant price underselling by non-subject imports."[133] The court further remanded the ITC's decision to cumulate subject imports from the United Kingdom, which the court found required additional justification to support a finding that such imports were likely to have a discernible adverse impact sufficient to justify cumulation.[134]

V. Legislative Activity

Developing countries got a reprieve in this year's small flurry of legislative activity. The Andean Trade Preferences Act (ATPA) and Generalized System of Preferences (GSP) trade preference programs, benefiting over 130 developing countries, were extended through December 31, 2010, just as they were about to expire.[135] Trade adjustment assistance (TAA) programs that assist trade-impacted workers, firms and farmers also got a reprieve. Congress reauthorized and expanded a number of the TAA programs through December 31, 2010, including extending TAA to service sector workers and firms, and ensuring automatic eligibility for workers suffering from unfair trade and import surges[136] In contrast, there was no progress on the three pending free trade agreements[137] or other trade-related legislation.

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131. *Id.* at 1382.

132. NSK Corp. v. United States, 637 F. Supp. 2d 1311, 1323 (Ct. Int'l Trade 2009).

133. *Id.*

134. *Id.* at 1324-25.

135. *See* Pub. L. No. 111-124, § 2, 123 Stat. 3484 (2009). The ATPA, under which the United States extends special duty treatment to imports from Colombia, Ecuador, Peru, and Bolivia that meet domestic content and other requirements, went into effect on December 4, 1991. Pub. L. No. 102-182, 105 Stat. 1236. Later, it was renewed and modified under the Andean Trade Promotion and Drug Eradication Act on August 6, 2002. Pub. L. No. 107-210, 116 Stat. 1023 (codified as amended at 19 U.S.C.A. §§ 3201-3202 (2005)). Trade preferences for Bolivia were allowed to expire on June 30, 2009, because the President determined that Bolivia failed to meet ATPA eligibility requirements. Pub. L. No. 110-436, § 1, 122 Stat. 4976 (2008). Under the GSP program, the United States provides preferential duty-free entry for more than 4,600 products from over 130 designated beneficiary countries and territories in the developing world. The GSP program was instituted on January 1, 1976, and authorized under the Trade Act of 1974 (19 U.S.C. 2461 et seq.) for a ten-year period. It has been renewed periodically since then.

136. *See* Pub. L. No. 111-5, Division B, Subtitle I, 123 Stat. 115, 367 (2009).

137. Three free trade agreements signed before the June 30, 2007, expiry of trade promotion authority were pending at the outset of 2009. Those same three agreements remain pending at the end of 2009. The United States-Colombia Trade Promotion Agreement was signed on November 22, 2006, and subsequently amended, on June 28, 2007; The United States-Panama Trade Promotion Agreement was signed on June 28, 2007; and the United States-Korea Free Trade Agreement was signed on June 30, 2007. *See generally* Office of the U.S. Trade Representative, Bilateral Trade Agreements, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html.

As we head into the politically-charged 2010 mid-term elections, trade enforcement legislation likely will take center stage. Congress will also likely tackle a broad reform effort for all preference programs, Customs reauthorization legislation, and legislation to reform oversight of currency exchange rates, including use of the antidumping and/or countervailing duty laws to address the effect of currency misalignment on U.S. industries.