

# The Year in Review

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## Customs Law

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## Customs Law

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## **Customs Law**

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### **I. Introduction**

In the last year, members of the importing community have been challenged by changes in the law and an increased cost of importing goods in a magnitude that has not been seen for many years, creating both challenges and opportunities for importers and importing professionals. In an era when the average duty rate for an item imported into the United States is two percent, the imposition of twenty-five percent duties (and possibly even more, in some cases) on items where there has been no allegation of unfair trade, creates incentives to attempt to minimize the duty impact. Understandably, this change has led to court challenges, but it has also led to an increased emphasis on reviewing appropriate tariff classifications and renewed interest in country of origin analyses. Many of the events discussed below reflect this renewed interest in Customs Law.

### **II. Judicial Review of Customs-Related Determinations**

#### **A. COURT OF APPEALS FOR THE FEDERAL CIRCUIT CASES**

In 2019, the U.S. Court of Appeals for the Federal Circuit (CAFC) heard a handful of cases on appeal from the U.S. Court of International Trade (CIT) related to determinations made by U.S. Customs and Border Protection (CBP).<sup>1</sup> Given the many new programs that impact imported goods, as noted above and discussed further in this article, the number of court challenges related to CBP determinations and presidential authority likely will only increase in the future.

In what may be a shift from CBP's historical acceptance of tariff engineering, CBP prevailed at the CAFC in its long-standing dispute with Ford Motor Company (Ford) over the proper classification of imported

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1. See *Ford Motor Co. v. United States*, 926 F.3d 741, 759 (Fed. Cir. 2019); see *Rubies Costume Co. v. United States*, 922 F.3d 1337 (Fed. Cir. 2019); see *Home Depot U.S.A., Inc. v. United States*, 915 F.3d 1374 (Fed. Cir. 2019).

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Transit Connect 6/7 vehicles.<sup>2</sup> When imported, the Transit Connect 6/7 vehicles had second row seats and seat belts for every seating position but did not have rear vents, speakers, handholds, or side airbags.<sup>3</sup> After importation, Ford removed the second-row seats and associated seat belts and bolted a steel panel into the second row footwell to create a flat surface behind the first row of seats.<sup>4</sup> Thus, Ford delivered the Transit Connect 6/7 vehicles to the customer as a two-seat cargo van.<sup>5</sup>

At importation, Ford classified the vehicles under subheading 8703.23.00, HTSUS, as motor vehicles principally designed for the transport of persons, which carries a duty rate of 2.5 percent.<sup>6</sup> CBP investigated the entries and, following the investigation, found that the vehicles were properly classified under subheading 8704.31.00, HTSUS, which covers motor vehicles for the transport of goods, with a duty rate of twenty-five percent.<sup>7</sup> CBP liquidated the items accordingly.<sup>8</sup> Ford protested the liquidations and, after CBP denied the protests, Ford sued at the CIT.<sup>9</sup>

The CIT evaluated the vehicles' condition at the time of importation and concluded that the "structural and auxiliary design features point to a principal design for the transport of persons."<sup>10</sup> The CIT ruled that heading 8703 was not controlled by use and that a review of intended use was not necessary to distinguish between headings 8703 and 8704.<sup>11</sup> The CIT also rejected CBP's argument that Ford's post-importation processing constituted a disguise or artifice; instead, removal of the rear seats after importation was immaterial.<sup>12</sup> In short, the CIT found that Ford engaged in legitimate tariff engineering.<sup>13</sup>

CBP appealed the CIT's ruling to the CAFC.<sup>14</sup> The CAFC agreed with CBP that the vehicles were properly classified as cargo vans, not passenger vans, reversing the CIT ruling.<sup>15</sup> The CAFC ruled that the "principally designed" language of heading 8703 inherently required considerations of intended use and pre-importation design goals.<sup>16</sup> Thus, the CAFC concluded that the CIT erred by not considering use.<sup>17</sup> The CAFC agreed

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2. *Ford Motor Co.*, 926 F.3d at 759.

3. *Id.* at 746.

4. *Id.* at 747.

5. *Id.*

6. *Id.* at 745.

7. *Id.*

8. *Ford Motor Co. v. United States*, 254 F. Supp. 3d 1297, 1303 (Ct. Int'l Trade 2017), *rev'd* 926 F.3d 741 (Fed. Cir. 2019).

9. *Ford Motor Co.*, 926 F.3d at 748.

10. *Ford Motor Co.*, 254 F. Supp. 3d at 1328.

11. *Id.* at 1332.

12. *Id.* at 1324.

13. *Id.* at 1333.

14. *Ford Motor Co.*, 926 F.3d at 745.

15. *Id.* at 760.

16. *Id.* at 750.

17. *Id.* at 753.

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with CBP's arguments that the structural and auxiliary design features of the Transit Connect 6/7 failed to demonstrate that the vehicle was "principally designed" to transport passengers.<sup>18</sup> CBP pointed out that Ford marketed the vehicle as a cargo van, consumers and industry publications recognized it exclusively as a cargo van, and purchasers used it exclusively as a cargo van.<sup>19</sup> For these reasons, the CAFC reversed the CIT and ruled that the vehicles were properly classified under subheading 8704.31.00, HTSUS.<sup>20</sup> News reports indicate that Ford plans to appeal the decision to the Supreme Court of the United States.<sup>21</sup>

The CAFC also ruled on several other tariff classification cases in 2019.<sup>22</sup> One case related to the ongoing debate of what constitutes festive articles, while another involved the evaluation of what constitutes a composite good.<sup>23</sup> In *Rubies Costume Co. v. United States*, the CAFC affirmed the CIT ruling that a nine-piece Santa Claus costume was not properly classified as a festive article in Chapter 95, HTSUS.<sup>24</sup> The CAFC relied on the Explanatory Notes to Chapter 95, that provide that chapter 95 does not cover "fancy dress, of textiles, of chapter 61 or 62."<sup>25</sup> The CAFC ruled that something could be both a costume and "fancy dress" and that if the costume was durable, normal wearing apparel, then it would not be classified in chapter 95.<sup>26</sup> The CAFC found that the pieces in the Santa Claus costume were indeed durable wearing apparel designed for multiple uses and thus classified them in the appropriate provisions in chapter 61.<sup>27</sup>

Alternatively, *Home Depot U.S.A., Inc. v. United States* involved the classification of a composite good.<sup>28</sup> CBP classified the product, a doorknob with an integral lock, under heading 8301, HTSUS, which provides for door locks.<sup>29</sup> The CIT agreed.<sup>30</sup> Home Depot challenged this approach, claiming that the product should be classified under heading 8302, HTSUS, which provides for metal fittings for doors, including metal doorknobs.<sup>31</sup> The CAFC concluded that the product was classifiable under both headings and that the case needed to be resolved by resorting to General Rule of Interpretation 3, which deals with articles classified under two or more

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18. *Id.* at 753–54.

19. *Id.*

20. *Id.* at 760.

21. *Ford Motor Co. v. United States*, 926 F.3d 741, 759 (Fed. Cir. 2019), *petition for cert. filed*, (U.S. Feb. 18, 2020) (No.19-1026).

22. *See Rubies Costume Co.*, 922 F.3d at 1337; *see Home Depot U.S.A., Inc.*, 915 F.3d at 1374.

23. *See Rubies Costume Co.*, 922 F.3d at 1337; *see Home Depot U.S.A., Inc.*, 915 F.3d at 1374.

24. *Rubies Costume Co.*, 922 F.3d at 1339.

25. *Id.* at 1343.

26. *Id.* at 1344.

27. *Id.* at 1346.

28. *Home Depot U.S.A., Inc.*, 915 F.3d at 1376.

29. *Id.*

30. *Id.*

31. *Id.*

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headings.<sup>32</sup> Thus, the CAFC remanded the case to the CIT so the CIT could make the factual determination of the “essential character” of the article, which would determine the appropriate classification.<sup>33</sup>

**B. CIT CASES**

During the past year, the CIT issued two seminal decisions relating to section 232 of the Trade Expansion Act of 1962, as amended (Section 232).<sup>34</sup> As discussed below, while the CIT ruled that Section 232 is constitutional in one decision, it held that there are limits to the President’s powers under that law in the other ruling.<sup>35</sup>

1. *American Inst. for Int’l Steel, Inc. v. United States*<sup>36</sup>

On March 25, 2019, a three-judge panel of the CIT issued a decision upholding the constitutionality of Section 232, which effectively rendered lawful the actions that President Trump took in initially issuing the Section 232 orders relating to steel and aluminum.<sup>37</sup> The case was brought by the American Institute for International Steel and two of its member companies who filed a complaint in June 2018 in which they posited that Section 232 was unconstitutional because the law represented an improper delegation of legislative power to the President in violation of section 1, article 1 of the Constitution and the separation of powers doctrine.<sup>38</sup> In its decision, the court held that it was bound by the Supreme Court’s decision in *Federal Energy Administration v. Algonquin SNG Inc.*,<sup>39</sup> which held that Section 232 contains an “intelligible principle” for the delegation of Congressional trade powers to the Executive, and therefore was not offensive to constitutional separation of powers requirements.<sup>40</sup> Plaintiffs have appealed the ruling to the CAFC, which is expected to issue its decision in early 2020.<sup>41</sup>

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32. *Id.* at 1381.

33. *Id.*

34. *See* *Am. Inst. for Int’l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335 (Ct. Int’l Trade 2019); *see* *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267 (Ct. Int’l Trade 2019); Note that this article does not address any of the trade remedy-related seminal decisions that have been issued by the CIT in 2019. Such decisions are discussed in the YIR article prepared by the ABA SIL International Trade Committee.

35. *See* *Am. Inst. for Int’l Steel, Inc.*, 376 F. Supp. 3d at 1335; *see* *Transpacific Steel LLC*, 415 F. Supp. 3d at 1267.

36. *See* *Am. Inst. for Int’l Steel, Inc.*, 376 F. Supp. 3d at 1335.

37. *Id.* at 1350.

38. *Id.* at 1338–39.

39. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976); *Am. Inst. for Int’l Steel, Inc.*, 376 F. Supp. 3d at 1352.

40. *Fed. Energy Admin.*, 426 U.S. at 559; *Am. Inst. for Int’l Steel, Inc.*, 376 F. Supp. 3d at 1350.

41. *Am. Inst. for Int’l Steel, Inc. v. United States*, No. 2019-1727, 2020 WL 967925 (Fed. Cir. Feb 28, 2020).

2. *Transpacific Steel LLC v. United States*<sup>42</sup>

Significantly, on November 15, 2019, a three-judge panel of the CIT issued a ruling in which it indicated that there are limits on the President's powers under Section 232.<sup>43</sup> The case was brought by Transpacific Steel LLC (Transpacific), an importer of Turkish steel, that sought to challenge President Trump's decision in August 2018 to double the tariff on steel imports from Turkey. In its complaint, Transpacific advanced several claims, including that the President's action offended the Fifth Amendment's equal protection guarantees, failed to follow statutorily mandated procedures, and requested a refund equal to the difference in the tariff rates.<sup>44</sup> Following the filing of the complaint by Transpacific, the government moved to dismiss Transpacific's appeal, alleging that Transpacific failed to state a claim for which the CIT could grant relief.<sup>45</sup> In its ruling, the court denied the government's motion to dismiss and held that Transpacific had advanced plausible claims based on equal protection and procedural violations, such that Transpacific may proceed with its refund claim against the government.<sup>46</sup> Unless the government pursues an interlocutory appeal to the CAFC or stipulates to judgment so that it may appeal the case, a decision on the merits by the CIT will not likely be issued until mid-2020.

### III. Executive Branch Developments in Customs Law

#### A. PRESIDENTIAL ACTIONS

##### 1. *Section 301 Actions*

The President has the power to request the initiation of trade actions and investigations under 3 U.S.C. § 301 (Section 301) via the Trade Promotion Authority (TPA) of the Trade Act of 1974.<sup>47</sup> Since 1974, the legislature has given TPA to the President to outline the country's trade objectives, negotiating objectives, and other national objectives in trade dealings.<sup>48</sup> Using this authority, in 2017 President Trump instructed the United States Trade Representative (USTR) to initiate an investigation into China's trade practices related to the protection of U.S. intellectual property.<sup>49</sup> Based on the USTR's findings, President Trump authorized the implementation of Section 301 tariffs on \$250 billion worth of imported Chinese products in

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42. See *Transpacific Steel LLC*, 415 F. Supp. 3d at 1267.

43. *Id.* at 1277.

44. *Id.* at 1269.

45. *Id.*

46. *Id.*

47. See 3 U.S.C. § 301 (West 2020); see 19 U.S.C. § 4201 (2016).

48. See 19 U.S.C. § 4201; see generally *Trade Promotion Authority*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/trade-topics/trade-promotion-authority> (last visited May 20, 2020).

49. Initiation of Section 301 Investigation; Hearing; and Request for Public Comments: China's Acts, Policies, and Transfer, Intellectual Property, and Innovation, 82 Fed. Reg. 40213 (Aug. 24, 2017).

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three separate tranches in 2018.<sup>50</sup> In 2019, President Trump implemented additional tariffs on a fourth tranche of Chinese products worth \$300 billion<sup>51</sup> and also initiated two other Section 301 investigations: (1) European Union (EU) subsidies on Large Civil Aircraft<sup>52</sup> and (2) Digital Services Tax implemented by France.<sup>53</sup> Thus far, each Section 301 list of Chinese goods subject to additional duties has eventually been accompanied by a process by which an interested party may request exclusion from the tariff action.<sup>54</sup>

The Section 301 tariff actions on Chinese imports were at the forefront of trade news this year. The year began with the postponement of increased duties proposed on the third tranche of Chinese goods, to raise them from ten percent to twenty-five percent.<sup>55</sup> The postponement was due to the current progress of additional negotiations with China to resolve the trade dispute.<sup>56</sup> The postponement of the increase to twenty-five percent was extended from the initial end date of March 2, 2019, due to ongoing trade talks.<sup>57</sup> But President Trump subsequently authorized the increase of the third tranche of goods to twenty-five percent additional duty, effective May 10, 2019.<sup>58</sup>

Then, on August 20, 2019, the USTR announced the implementation of the fourth tranche of Section 301 tariffs on \$300 billion of Chinese

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50. See Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 14906 (Apr. 6, 2018); see Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 40823 (Aug. 16, 2018); see Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 47974 (Sept. 21, 2018).

51. Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 22564 (May 17, 2019).

52. Initiation of Investigation; Notice of Hearing and Request for Public Comments: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute, 84 Fed. Reg. 15028 (Apr. 12, 2019).

53. Initiation of a Section 301 Investigation of France's Digital Services Tax, 84 Fed. Reg. 34042 (July 16, 2019).

54. See generally *China Section 301-Tariff Actions and Exclusion Process*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> (last visited May 20, 2020).

55. Notice of Modification of Section 301 Actions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 65198 (Dec. 19, 2018).

56. See *Section 301 Tariffs Increase to 25% for Tranche 3 Goods from China*, HUGHES HUBBARD & REED, <https://www.hugheshubbard.com/news/section-301-tariffs-increase-to-25-for-tranche-3-goods-from-china> (last visited May 20, 2020).

57. *Id.*

58. Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 20459 (May 9, 2019).



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imports.<sup>59</sup> This list was divided into “List 4A” and “List 4B,” with List 4A taking effect September 1, 2019<sup>60</sup> and List 4B taking scheduled to take effect December 15, 2019.<sup>61</sup> Shortly after announcement of Section 301 List 4 tariffs, these tariffs were increased from ten percent to fifteen percent.<sup>62</sup> Initially, as part of the List 4 increase process, President Trump also contemplated increasing the tariffs on Lists 1 through 3 an additional five percent, but this has not occurred yet.<sup>63</sup>

In 2018, shortly after implementing Section 301 duties on Chinese imports, the USTR published a process by which companies could request exclusions from the additional Section 301 duties on a case by case basis.<sup>64</sup> Approved Section 301 exclusions are not specific to the party who was granted the exclusion, as with Section 232 exclusions.<sup>65</sup> Rather, Section 301 exclusions apply to all goods within the same Harmonized Tariff Schedule code and accompanying product description as designated in the appropriate Federal Register notice.<sup>66</sup>

In June 2019, the USTR published formal guidance<sup>67</sup> establishing a Section 301 List 3 exclusion request process and debuted a new submission portal for exclusion requests.<sup>68</sup> The period to submit exclusion requests on the third tranche of Chinese imports was from June 30, 2019 to September 30, 2019.<sup>69</sup> As of October 31, 2019, the USTR opened the exclusion request

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59. Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 43304 (Aug. 20, 2019).

60. *See id.*

61. Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 45821 (Aug. 30, 2019).

62. *See id.*

63. Edward Goetz, *Trump Delays Oct 1st 5% Tariff Increase on \$250 Billion in Chinese Goods (List 1-3)*, CROWELL & MORING (Sept. 13, 2019), <https://www.cmtradelaw.com/2019/09/trump-delays-oct-1st-5-tariff-increase-on-250-billion-in-chinese-goods-lists-1-3/>.

64. *See e.g.*, Procedures to Consider Requests for Exclusion of Particular Products From the Determination of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 32181 (July 11, 2018).

65. *See id.*

66. *See id.*

67. *See* Procedures for Requests to Exclude Particular Products from the September 2018 Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 29576 (June 24, 2019).

68. *See Index and Status of Requests for Exclusion from \$200 Billion Trade Action (List 3): Docket ID: USTR-2019-0005*, OFF. OF THE U.S. TRADE REP., <https://exclusions.ustr.gov/s/docket?docketNumber=USTR-2019-0005> (last visited May 20, 2019).

69. Procedures for Requests to Exclude Particular Products from the September 2018 Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. at 29576.

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submission portal for List 4A submissions, which will remain open until January 31, 2020.<sup>70</sup>

In November, the USTR began accepting comments from interested parties regarding whether to extend exclusions granted for List 1 that expire December 28, 2019.<sup>71</sup> The USTR stated that any exclusion extensions would be considered on a case-by-case basis, and strongly encouraged commenters to submit two forms published by the USTR's office that address specific questions pertaining to the availability of products of interest to the commenter.<sup>72</sup> The USTR stated that it will then review these comments in determining whether an approved exclusion merits an extension.<sup>73</sup>

Additional tariffs in 2019 have not been limited to China. In 2004, the United States engaged the World Trade Organization dispute settlement system to determine whether the subsidies some of the EU member states granted to the EU's large civil aircraft domestic industry contravened the Agreement on Subsidies and Countervailing Measures.<sup>74</sup> The investigation paused in 2012 when the United States and EU entered into an agreement suspending arbitration.<sup>75</sup> In 2018, the United States requested that the WTO arbitrator resume the investigation to determine how to enforce its WTO rights in the dispute and how to offset the adverse effects of the EU subsidies.<sup>76</sup> Effective October 18, 2019, the USTR's office published a list of certain products of different EU member states (such as wine, dairy products, produce, and meats) that are subject to an additional twenty-five percent duty, in accordance with the WTO's determination of appropriate countermeasures to the EU subsidies.<sup>77</sup>

Another pending Section 301 action is based on France's proposed Digital Services Tax (DST), which would tax larger technological service companies (with global annual revenues from covered services of 750 million euros and 25 million euros in France) aimed at offering services to French

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70. Procedures for Requests to Exclude Particular Products from the August 2019 Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 57144 (Oct. 24, 2019).

71. See Request for Comments Concerning the Extension of Particular Exclusions Granted Under the December 2018 Product Exclusion Notice from the \$34 Billion Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 58427 (Oct. 31, 2019).

72. *Id.*

73. *See id.*

74. *See* Initiation of Investigation; Notice of Hearing and Request for Public Comments: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute, 84 Fed. Reg. 15028 (Apr. 12, 2019).

75. *Id.*

76. *Id.*

77. *See* Notice of Determination and Action Pursuant to Section 301: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute, 84 Fed. Reg. 54245 (Oct. 9, 2019).

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individuals.<sup>78</sup> Many companies that would be subject to this tax are not domiciled in France. Therefore, the USTR considered whether the DST: (1) would amount to discrimination; (2) would be fair to apply retroactively to January 1, 2019; and (3) would amount to unreasonable departures from the U.S. tax system and the international tax system.<sup>79</sup> Panel discussions were held in mid-August 2019 and on December 2, 2019, the USTR announced the potential imposition of 100 percent duties on certain products from France, including “cheese, sparkling wine, cosmetics, soaps, handbags, and tableware.”<sup>80</sup> The USTR also announced a process for filing comments on the proposed tariffs and a hearing to address the issues.<sup>81</sup>

## 2. *Section 232 Actions*

Section 232 sets forth the particular circumstances of when and how the President of the United States may take action to address imports that threaten to impair the national security of the United States.<sup>82</sup> “Congress enacted Section 232 during the Cold War when national security issues were at the forefront of the national debate.”<sup>83</sup> Before President Trump, there were only six instances where a U.S. president imposed trade actions under Section 232.<sup>84</sup>

On March 8, 2018, and pursuant to Section 232, President Trump issued presidential proclamations imposing a twenty-five percent tariff on steel and a ten percent tariff on aluminum imports.<sup>85</sup> President Trump stated that the tariffs were necessary and appropriate to address the threat that steel and aluminum imports are posing to U.S. national security interests.<sup>86</sup> He further explained that the tariffs would help revive idled domestic steel and aluminum facilities, open closed smelters and mills, preserve necessary skills by hiring new workers, and maintain or increase production, which will lead to a reduction in the United States’ need to rely on foreign producers.<sup>87</sup>

On June 27, 2018, the American Institute for International Steel (AIIS) filed suit in the CIT challenging the constitutionality of President Trump’s

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78. Initiation of a Section 301 Investigation of France’s Digital Services Tax, 84 Fed. Reg. 34042 (July 16, 2019).

79. *See id.*

80. *U.S. Proposes Up to 100% Additional Duties Due to French Digital Tax*, JONES DAY (Dec. 2019), <https://www.jonesday.com/en/insights/2019/12/us-proposes-additional-duties>.

81. *Id.*

82. 19 U.S.C.S. § 1862 (LEXIS through Pub. L. No. 116-140).

83. RACHEL F. FEFER ET AL., CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS (2020).

84. BROCK R. WILLIAMS ET AL., CONG. RESEARCH SERV., R45529, TRUMP ADMINISTRATION TARIFF ACTIONS: FREQUENTLY ASKED QUESTIONS (2019).

85. *See* Proclamation No. 9704, 83 Fed. Reg. 11619 (Mar. 15, 2018); Proclamation No. 9705, 83 Fed. Reg. 11619 (Mar. 15, 2018).

86. *See* Proclamation No. 9704, 83 Fed. Reg. at 11620 ¶ 7; Proclamation No. 9705, 83 Fed. Reg. at 11626 ¶ 8.

87. *See* Proclamation No. 9704, 83 Fed. Reg. at 11620 ¶ 7; Proclamation No. 9705, 83 Fed. Reg. at 11626 ¶ 8.

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actions regarding his use of Section 232.<sup>88</sup> But a three-judge panel held that Section 232 does not violate the non-delegation doctrine.<sup>89</sup> The AIIS has since appealed and the case is currently pending before the CAFC.<sup>90</sup> In a more recent case, Transpacific Steel LLC filed a lawsuit in the CIT against the United States challenging fifty percent duties imposed on steel from Turkey,<sup>91</sup> which was twice the amount imposed on steel from other countries, as a violation of equal protection.<sup>92</sup> The United States sought to have the case dismissed.<sup>93</sup> The CIT refused to dismiss the case stating that the United States submitted no set of facts to justify the tariff increase of steel products imported from Turkey.<sup>94</sup> Specifically, the CIT stated that President Trump's "expansive view of his power under Section 232 is mistaken, and at odds with the language of the statute, its legislative history, and its purpose."<sup>95</sup> This case is currently at the CIT pending a decision.

On May 17, 2019, President Trump announced his Administration's determination that U.S. imports of automobiles and certain automotive parts threaten to impair U.S. national security.<sup>96</sup> But the President failed to take action to impose threatened twenty-five percent duties by the November 14, 2019 deadline imposed by the Act.<sup>97</sup>

In 2019, the Department of Commerce also conducted Section 232 investigations on Uranium and Titanium Sponge.<sup>98</sup> Although the Department of Commerce determined that uranium imports threaten to impair the national security of the United States as defined under Section

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88. *Am. Inst. for Int'l Steel, Inc.*, 376 F. Supp. 3d at 1339; Heather Outhuse, *AIIS and Member Companies File Lawsuit Against Section 232*, AM. WIRE PRODUCERS ASS'N (July 6, 2018), <https://www.awpa.org/2018/07/06/aiis-and-member-companies-file-lawsuit-against-section-232/>.

89. *Am. Inst. for Int'l Steel, Inc.*, 376 F. Supp. 3d at 1343–45.

90. Yvonne Li, *US Supreme Court won't hear AIIS' 232 Challenge*, AM. METAL MKT. (June 24, 2019, 5:12 PM), <https://www.amm.com/Article/3880511/US-Supreme-Court-wont-hear-AIIS-232-challenge.html>; U.S., *AIIS File Brief with Appeals Court in Section 232 Challenge Case*, WORLD TRADE ONLINE (Oct. 7, 2019), <https://insidetrade.com/daily-news/us-aiis-file-briefs-appeals-court-section-232-challenge-case>.

91. *Transpacific Steel LLC*, 415 F. Supp. 3d at 1267; see Proclamation No. 9772, 83 Fed. Reg. 40429 (Aug. 15, 2018).

92. See *Transpacific Steel LLC*, 415 F. Supp. 3d at 1267; see Brian Feito, *Importers File Lawsuit Alleging Increased Section 232 Tariffs on Turkish Steel Unconstitutional*, INT'L TRADE TODAY (Jan. 22, 2019), <https://internationaltradetoday.com/reference?r=1901220010>.

93. *Transpacific Steel LLC*, 415 F. Supp. 3d at 1270.

94. *Id.*

95. *Id.* at 1274.

96. Proclamation No. 9888, 84 Fed. Reg. 23433 (May 17, 2018).

97. David Lawder, *Trump can no longer impose 'Section 232' auto tariffs after missing deadline: experts*, REUTERS (Nov. 19, 2019), <https://www.reuters.com/article/us-usa-trade-autos/trump-can-no-longer-impose-section-232-auto-tariffs-after-missing-deadline-experts-idUSKBNIXT0TK>.

98. *U.S. Dep't of Commerce Initiates Section 232 Investigation into Titanium Sponge Imports*, U.S. DEP'T OF COM. (Mar. 4, 2019), <https://www.commerce.gov/news/press-releases/2019/03/us-department-commerce-initiates-section-232-investigation-titanium>; RACHEL FEFER & LANCE LARSON, CONG. RESEARCH SERV., IN11145, SECTION 232 INVESTIGATION: URANIUM IMPORTS (2019).

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232, the President declined to take action to impose tariffs and instead the President established a Nuclear Fuel Working Group to examine the current state of domestic nuclear fuel production to reinvigorate the entire nuclear fuel supply chain.<sup>99</sup> The Department of Commerce had not completed its investigation on Titanium Sponge as of December 2019.<sup>100</sup>

**B. U.S. CUSTOMS AND BORDER PROTECTION ACTIONS**

CBP was busy in late 2018 and 2019, both issuing several important rulings that impact duty rates to be paid by importers and issuing rulemakings and guidance that impact the activities of the importing community.<sup>101</sup>

*1. CBP Rulings*

Not surprisingly, the imposition of ten to twenty-five percent tariffs on Chinese-origin goods found importers looking for options to avoid those duties through changing the country of origin of their goods.<sup>102</sup> CBP issued rulings in late 2018, which impact the country of origin analysis so that: (i) it may now be more difficult for companies moving operations from China to Mexico or Canada (or potentially other countries with which the United States has a free trade agreement) to avoid Section 301 duties; and (ii) not all sets put up for retail sale qualify for favorable treatment.<sup>103</sup>

In ruling H300226 (September 13, 2018), CBP reconsidered an earlier ruling (N299096 (July 25, 2018)) related to the country of origin of an electric motor assembled in Mexico using three Chinese-origin parts subject to Section 301 duties.<sup>104</sup> In ruling N299096, CBP applied the North American Free Trade Agreement (NAFTA) marking rules to determine the country of origin of the final product for both duty and marking purposes.<sup>105</sup> Those rules generally require that any non-Mexican-origin components

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99. Memorandum on the Effect of Uranium Imports on the National Security and Establishment of the U.S. Nuclear Fuel Working Group, DCPD-201900470, DAILY COMP. PRES. DOC. (July 12, 2019).

100. See Section 232 Investigation on the Effect of Imports of Titanium Sponge on the National Security, U.S. DEP'T OF COM., BUREAU OF INDUS. & SEC. (2019), <https://www.bis.doc.gov/index.php/2011-09-13-13-22-03/2-uncategorized/1590-tisponge232>.

101. U.S. CUSTOMS & BORDER PROT., HQ H300226, MODIFICATION OF NY N299096; COUNTRY OF ORIGIN OF ELECTRIC MOTORS FROM MEXICO; 2018 SECTION 301 TRADE REMEDY; 9903.88.01, HTSUS (2018).

102. Laura Fraedrich et al., *Recent CBP Ruling Make it More Difficult to Avoid Section 301 Duties*, JD SUPRA (Nov. 9, 2018), <https://www.jdsupra.com/legalnews/recent-cbp-rulings-make-it-more-49380/>.

103. *Id.*

104. U.S. CUSTOMS & BORDER PROT., HQ H300226, MODIFICATION OF NY N299096; COUNTRY OF ORIGIN OF ELECTRIC MOTORS FROM MEXICO; 2018 SECTION 301 TRADE REMEDY; 9903.88.01, HTSUS (2018).

105. U.S. CUSTOMS & BORDER PROT., NY N299096, THE TARIFF CLASSIFICATION AND COUNTRY OF ORIGIN OF ELECTRIC MOTORS FROM MEXICO (2018).

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undergo a requisite shift in tariff classification set forth in the tariff shift rule applicable to the final product's tariff classification.<sup>106</sup>

In a surprising change of course, in ruling H300226, CBP explained that if operations in Mexico involve Chinese-origin components subject to Section 301 duties, the NAFTA marking rules apply only for purposes of determining the country of origin for marking purposes and that the substantial transformation standard applies for purposes of determining country of origin for duty liability purposes.<sup>107</sup> This approach, which previously had been applied only in the context of antidumping and countervailing duties and safeguard measures, resulted in a final product that will be marked to indicate that it is of Mexican-origin but will be treated as Chinese-origin for purposes of assessing duties.<sup>108</sup>

The NAFTA tariff shift rules are much more objective and, in many ways, easier to satisfy than the subjective, fact-specific substantial transformation standard, which requires that, in this case, the Chinese-origin components undergo a change in name, character, and use in connection with operations in Mexico.<sup>109</sup> Due to this ruling, it may be more difficult for companies to avoid Section 301 duties by sending Chinese-origin components subject to Section 301 duties to Canada or Mexico for use in making a final product.<sup>110</sup>

“CBP has also taken a strict position related to the application of Section 301 tariffs on sets put up for retail sale. To classify a product under the HTSUS, importers must apply the General Rules of Interpretation (GRI).”<sup>111</sup> Sets put up for retail sale can either be specifically described in a HTSUS subheading that covers certain types of sets (i.e., under GRI 1), or, if there is not an applicable HTSUS subheading, sets can be classified under GRI 3 if certain requirements are satisfied.<sup>112</sup> In a FAQ on CBP's website, CBP addressed how Section 301 duties will be assessed on sets put up for retail sale that contain components subject to the Section 301 duties:

When importing goods put up in sets for retail sale (in accordance with [GRI] 3) that contain articles subject to the Section 301 remedy, if the product that imparts the essential character to the set (i.e. the HTSUS provision under which the entire set is classified) is covered by the Section 301 remedy, then the entire set will be subject to the additional twenty-five percent duties.<sup>113</sup>

If the HTSUS provision under which the entire set is classified is not covered by the Section 301 remedies, but the set contains components that

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106. Fraedrich, *supra* note 102.

107. See U.S. CUSTOMS & BORDER PROT., HQ H300226, MODIFICATION OF NY N299096; COUNTRY OF ORIGIN OF ELECTRIC MOTORS FROM MEXICO; 2018 SECTION 301 TRADE REMEDY; 9903.88.01, HTSUS (2018).

108. *Id.*

109. Fraedrich, *supra* note 102.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

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are classified in a subheading covered by the 301 list, the 301 duties will not be assessed on the individual components.<sup>114</sup>

In ruling H299857 (September 6, 2018), CBP considered the applicable rate of duty for a 129-piece toolset, which contained five Chinese-origin components subject to Section 301 duties.<sup>115</sup> The set was classified pursuant to GRI 1 under subheading 8206.00.00 of the HTSUS, which provides for “[t]ools of two or more headings 8202 to 8205, put up in sets for retail sale.”<sup>116</sup> The general rate of duty applicable to products classified under HTSUS subheading 8206.00.00 is the “rate of duty applicable to the article in the set subject to the highest rate of duty.”<sup>117</sup>

CBP held that because the set was classified under a specific HTSUS subheading pursuant to GRI 1 (i.e., HTSUS subheading 8206.00.00), the FAQ was not applicable and, therefore, the set’s applicable rate of duty was that of the component that had the highest rate of duty.<sup>118</sup> Because the five Chinese-origin components subject to Section 301 duties were individually dutiable at 28.9 percent (3.9 percent ordinary duties plus the additional 25 percent Section 301 duties), the entire set was dutiable at 28.9 percent.<sup>119</sup>

“The above-described rulings make it clear that CBP is taking, and likely will continue to take, an aggressive approach to imposing the Section 301 duties. As a result, it may be more difficult for parties to avoid such duties.”<sup>120</sup>

## 2. *CBP Rulemakings and Guidance*

On August 14, 2019, CBP issued a Notice of Proposed Rulemaking in the Federal Register regarding changes to 19 C.F.R. Part 111.<sup>121</sup> The proposed change is to add a new section, 111.43, related to Importer Identity Verification as required by the Trade Facilitation and Trade Enforcement Act of 2015.<sup>122</sup> The new regulation would require customs brokers to verify the identity of the importers who are their clients.<sup>123</sup> The “minimum requirements” include new information and documentation such as a recent credit report and a copy of the client’s business registration and license with government authorities.<sup>124</sup> These requirements apply to domestic and non-

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114. *Id.*

115. *See* U.S. CUSTOMS & BORDER PROT., HQ H299857, RECONSIDERATION OF NY N298532, DATED JULY 26, 2018; SECTION 301 MEASURES; TOOLSETS (2018).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Fraedrich, *supra* note 102.

121. Customs Broker Verification of an Importer’s Identity, 84 Fed. Reg. 40302 (Aug. 14, 2019).

122. *Id.*

123. *Id.*

124. *Id.*

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resident importers.<sup>125</sup> All such records must be maintained in accordance with the recordkeeping requirements of part 163 of the CBP regulations.<sup>126</sup> Penalties against customs brokers for noncompliance include a monetary penalty not to exceed \$10,000 per client in accordance with 19 USC 1641(d)(2)(A), or revocation or suspension of the customs broker's license or permit.<sup>127</sup> Any current clients must comply with the minimum requirements within two years of the final rule being effective.<sup>128</sup> Customs brokers must reverify the information annually after the initial verification of the importer.<sup>129</sup> The comments period expired on October 15, 2019, and the Final Rule will likely be issued in early 2020.<sup>130</sup>

As announced in the Federal Register on August 13, 2019 in a General Notice, the second major change that is still in progress with CBP is how to handle the growth in e-commerce.<sup>131</sup> Specifically, section 321 of the Tariff Act of 1930 (Section 321) authorized CBP to provide an administrative exemption to admit free from duty and tax shipments of merchandise imported by one person on one day having an aggregate retail value of not more than \$800.<sup>132</sup> This exemption is known as a *de minimis* entry.<sup>133</sup> CBP has created Section 321 programs to enable the agency to monitor and protect against illegitimate trade while providing the public benefits of duty-free shipments for qualified importers.<sup>134</sup> CBP is conducting a voluntary pilot program to test the utility of accepting advance data from e-commerce supply chain partners, including online marketplaces, for risk segmentation purposes.<sup>135</sup> Data is collected in the Automated Targeting System.<sup>136</sup> CBP created a new ACE Entry Type 86 Test informal entry code for Section 321 entries.<sup>137</sup>

Finally, in October 2019, CBP issued Mitigation Guidelines for Wood Packaging Materials Violations.<sup>138</sup> Since November 2017, CBP, through its Agriculture Specialists, has been enforcing 7 C.F.R. 319.40-3 through 19 U.S.C. 1595a(b) by issuing Emergency Action Notifications to importers that have attempted to import into the United States any wood packaging

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125. *Id.*

126. *Id.*

127. Customs Broker Verification of an Importer's Identity, 84 Fed. Reg. at 40302.

128. *Id.*

129. *Id.*

130. *Id.*

131. Test Concerning Entry of Section 321 Low-Valued Shipments Through Automated Commercial Environment (ACE), 84 Fed. Reg. 40079 (Aug. 13, 2019).

132. *Id.*

133. *Id.*

134. U.S. Customs & Border Protection Section 321 Data Pilot, 84 Fed. Reg. 35405 (July 23, 2019).

135. *Id.*

136. *Id.*

137. Test Concerning Entry of Section 321 Low-Valued Shipments Through Automated Commercial Environment (ACE), 84 Fed. Reg. at 40079.

138. U.S. CUSTOMS & BORDER PROT., EO13891-OT-056, MITIGATION GUIDELINES ICP: WOOD PACKAGING MATERIALS (2019).



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materials not properly treated or marked.<sup>139</sup> Or worse yet, the shipment contained live pests in the wood packaging materials. This action is part of the international treaty to prevent the introduction of pests into the United States.<sup>140</sup> Such shipments are directed to be exported within seventy-two hours, and the importer is assessed a penalty equal to the amount of the declared merchandise.<sup>141</sup> Fortunately, there is an administrative petition process to challenge the penalties through 19 U.S.C. 1618 and 19 U.S.C. 1623 whereby CBP may cancel or mitigate any penalty or liquidated damages claims.<sup>142</sup> Mitigation is typically ten percent of the assessed penalty depending upon the presence of mitigating or aggravating factors.<sup>143</sup>

C. UNITED STATES-MEXICO-CANADA AGREEMENT

The United States-Mexico-Canada Agreement (USMCA) was signed by all three countries on November 30, 2018.<sup>144</sup> According to Article 34.5 of the USMCA and Paragraph 2 of the “Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada,” the USMCA will enter into force three months after the last of the three countries has notified the others that it has completed the corresponding ratification process, in accordance with its domestic law and regulations.<sup>145</sup>

One year after the signing of the USMCA, only Mexico has completed the ratification process, which it accomplished on June 19, 2019.<sup>146</sup> Since then, the Mexican government has constantly insisted that the USMCA should be ratified by the United States and Canada to boost competitiveness in the region.<sup>147</sup> But the process has not been as speedy as the Mexican government would have wanted.

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139. *Id.*

140. *Id.*

141. *See id.*; *see also* *CBP Improves Penalty Mitigation Guidelines for Wood Packaging Materials Violations*, SANDLER, TRAVIS, & ROSENBERG (November 12, 2019), <https://www.strtrade.com/news-publications-penalty-mitigation-wood-packaging-material-CBP-111219.html>.

142. U.S. CUSTOMS & BORDER PROT., EO13891-OT-056, MITIGATION GUIDELINES ICP: WOOD PACKAGING MATERIALS (2019).

143. *Id.*

144. Bill Chappell, *USMCA: Trump Signs New Trade Agreement With Mexico And Canada To Replace NAFTA*, NPR (Nov. 30, 2018), <https://www.npr.org/2018/11/30/672150010/usmca-trump-signs-new-trade-agreement-with-mexico-and-canada>.

145. Agreement Between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S., art. 34.5, Nov. 30, 2018, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

146. Mary Beth Sheridan, *Mexico becomes first country to ratify new North American trade deal*, WASH. POST (June 19, 2019), [https://www.washingtonpost.com/world/the\\_americas/mexico-becomes-first-country-to-ratify-usmca-north-american-trade-deal/2019/06/19/500dd8c0-92b3-11e9-956a-88c291ab5c38\\_story.html](https://www.washingtonpost.com/world/the_americas/mexico-becomes-first-country-to-ratify-usmca-north-american-trade-deal/2019/06/19/500dd8c0-92b3-11e9-956a-88c291ab5c38_story.html).

147. *See* Stephen Woodman, *The USMCA Could Strengthen Mexico's Hand on Trade*, CTR. INT'L GOVERNANCE INNOVATION (Oct. 4, 2018), <https://www.cigionline.org/articles/usmca-could-strengthen-mexicos-hand-trade>.

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One of the main concerns the U.S. Democratic Congressional Representatives have raised is the labor conditions in Mexico, and they have requested additional guarantees that labor laws would not only be amended, but properly enforced.<sup>148</sup> In this regard, on October 8, 2019, President Andrés Manuel López Obrador met with Richard Neal, chairman of the of the House Ways and Means Committee, and several other members of Congress in Mexico to discuss ratification of the USMCA.<sup>149</sup> During the meeting, and reiterated in a letter dated October 14, 2019, President López Obrador explained the reforms passed by the Mexican Congress on labor issues, and his administration's commitment to allocate \$900 million dollars within the next four years for its implementation.<sup>150</sup> President López Obrador also sent a letter to congresswoman Nancy Pelosi urging her to advance the ratification process of the USMCA, regardless of domestic political climate in the United States.<sup>151</sup>

These efforts have proven fruitful, as the three countries signed an additional protocol on December 10, 2019, in Mexico City.<sup>152</sup> All governments expressed their satisfaction with these final amendments, which the Mexican Congress ratified only two days later.<sup>153</sup> It is now up to the United States and Canada to ratify the agreement, which will probably happen in 2020.

#### **IV. Conclusion**

The past year has presented a greater number of changes and challenges to importers than we have seen in a long time. These changes and challenges will undoubtedly continue to play out in 2020 through increased judicial activity, executive action, and legislative action.

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148. M. ANGELES VILLARREAL & CATHLEEN D. CIMINO-ISAACS, CONG. RESEARCH SERV., IF11308, USMCA: LABOR PROVISIONS (2020).

149. Anthony Esposito & Andrea Shalal, *U.S. Democrats say Mexico must do more on labor after trip to speed up trade deal*, REUTERS (Oct. 8, 2019), <https://www.reuters.com/article/us-usa-trade-nafta-mexico/u-s-democrats-say-mexico-must-do-more-on-labor-after-trip-to-speed-up-trade-deal-idUSKBN1WN1HK>.

150. *Mexico seeks the approval of USMCA to promote the labor reform*, DICEX (Nov. 26, 2019), <https://dicex.com/en/mexico-seeks-usmca-labor-reform/>.

151. Rafael Bernal, *Mexican president urges Pelosi to get USMCA trade deal approved*, THE HILL (Oct. 11, 2019), <https://thehill.com/latino/465380-mexican-president-urges-pelosi-to-get-usmca-trade-deal-approved>.

152. Heather Long, *The USMCA is finally done. Here's what is in it.*, WASH. POST (Dec. 10, 2019), <https://www.washingtonpost.com/business/2019/12/10/usmca-is-finally-done-deal-after-democrats-sign-off-heres-what-is-it/>.

153. *UPDATE 1-Mexican Senate approves changes to North American trade deal*, REUTERS (Dec. 12, 2019), <https://www.cnbc.com/2019/12/12/reuters-america-update-1-mexican-senate-approves-changes-to-north-american-trade-deal.html>.