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International Trade

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International Trade

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This Article outlines the most important developments in international trade law during 2019. It summarizes developments in the areas of U.S. trade policy, World Trade Organization (WTO) dispute settlement activities, and U.S. trade cases at the Department of Commerce (Commerce) and International Trade Commission (ITC).

I. U.S. Trade Policy Developments

A. SECTION 232

The duties on certain steel and aluminum imports under Section 232 of the Trade Expansion Act of 1962 have remained in place since March 23, 2018.² This year there were two primary modifications to the scope of these tariffs. First, the United States reached an agreement with Canada and Mexico to remove Section 232 duties on imports of steel and aluminum from those two countries.³ As a result, Canada lifted retaliatory tariffs on U.S. steel and aluminum imports,⁴ and Mexico removed its retaliatory tariffs on U.S. steel, among other products.⁵ Second, the President issued a proclamation on May 16, 2019, to lower the fifty percent *ad valorem* tariff on Turkish steel to twenty-five percent due to a significant decline in import

1. This article surveys developments in international trade law during 2019. The committee editor of this article was Cynthia C. Galvez of Wiley Rein LLP. The authors were: Shelby M. Anderson, Covington & Burling LLP; Valerie Hughes, Bennett Jones LLP; Gregory C. Maddaleni; Lydia C. Pardini, Adduci Mastriani & Schaumberg, LLP; and Theodore P. Brackemyre, Tessa V. Capeloto, Elizabeth S. Lee, John Allen Riggins, and Claire M. Webster, Wiley Rein LLP. The views expressed in this section do not necessarily reflect the views of the authors' respective employers.

2. Proclamation No. 9711, 83 Fed. Reg. 13,361 (Mar. 22, 2018).

3. Proclamation No. 9893, 84 Fed. Reg. 23,983 (May 19, 2019); Proclamation No. 9894, 84 Fed. Reg. 23,987 (May 19, 2019).

4. Customs Notice 19-09 (May 19, 2019) (repealing United States Surtax Order (Steel and Aluminum), SOR/2018-152 (Can.) and United States Surtax Order (Other Goods), SOR/2018-153 (Can.)).

5. Ley Aduanera [LAD], Diario Oficial de la Federacion [DOF] 05-06-2018, ultimas reformas DOF 20-05-2019 (Mex.), formato HTML, https://dof.gob.mx/nota_detalle.php?codigo=5560685&fecha=20/05/2019 (consultada el 1 de Junio de 2020) (Mex.).

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levels.⁶ This fifty percent rate was previously implemented in Proclamation 9772 on August 10, 2018.⁷

Since March 23, 2018, a large number of steel and aluminum imports have also been excluded from the Section 232 duties. Commerce allows certain products to be excluded from the Section 232 tariffs due to lack of domestic availability, absence of domestic production, or importance to national security, *inter alia*.⁸ Interested parties may also submit objections to these requests.⁹ As of December 12, 2019, Commerce had received 108,573 requests for exclusions from the Section 232 tariffs on steel, granted 68,625 of these, and denied 19,566, with the remaining requests pending a decision.¹⁰ Commerce has received 14,913 requests for exclusion from the Section 232 aluminum tariffs, granted 9,891 of these, and denied 1,158.¹¹ Product exclusions from Section 232 duties are typically in force for one year from the date of signature or until the excluded product volume is imported.¹² Therefore, importers seeking product exclusions have to renew their requests each year.

B. SECTION 301

Section 301 of the Trade Act of 1974 provides the United States with statutory power to enforce trade agreements and address “unfair” foreign barriers to U.S. exports.¹³ In 2019, the United States Trade Representative (USTR) took action under section 301 with regard to China, France, and the European Union.

1. China—Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

In 2018, the USTR imposed tariffs on certain Chinese imports to combat Chinese policies forcing technology transfers from U.S. companies to Chinese entities through investment processes, preventing market-based returns for U.S. intellectual properties (IPs) through unfair licensing practices; generating large-scale technology and IP transfers through investments and acquisitions; and gaining access to business information

6. Proclamation No. 9886, 84 Fed. Reg. 23,421 (May 16, 2019).

7. Proclamation No. 9772, 83 Fed. Reg. 40,429 (Aug. 10, 2018) [hereinafter Proclamation 9772].

8. See DEP’T COMMERCE BUREAU OF INDUSTRY & SECURITY, 232 EXCLUSION PROCESS FREQUENTLY ASKED QUESTIONS (FAQS), 11 (2019), https://www.bis.doc.gov/index.php/component/docman/?task=doc_download&gid=2409.

9. See generally *id.*

10. See generally *Published Exclusion Requests*, U.S. DEP’T OF COMMERCE, <https://232app.azurewebsites.net/steellalum> (last visited June 3, 2020).

11. See generally *id.*

12. See generally *id.*

13. Trade Act of 1974 § 301, 19 U.S.C. § 2411 (1974).

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through cyber intrusions into U.S. computer networks.¹⁴ Those tariffs were imposed in two tranches: first, twenty-five percent tariffs went into effect on \$50 billion worth of imports, consisting largely of non-consumer goods like machinery, electronic components, and chemicals (i.e., Lists 1 and 2).¹⁵ Then, ten percent tariffs went into effect on approximately \$200 billion worth of imports (i.e., List 3).¹⁶ Unlike the first tranche, List 3 included many consumer goods and building products.¹⁷

In 2019, the USTR continued to escalate the tariffs imposed on Chinese imports. The USTR first increased the tariffs imposed on List 3 from ten percent to twenty-five percent,¹⁸ then imposed ten percent tariffs on an additional \$300 billion worth of imports (i.e., List 4).¹⁹ List 4 included essentially all products not already subject to Section 301 tariffs under Lists 1, 2, or 3.²⁰ Tariffs imposed on List 4 products were planned to take effect in two waves: September 1, 2019, for imports under List 4A (the largest category of products being smart watches, smart speakers, Bluetooth headphones and other internet-connected devices),²¹ and December 15, 2019, for imports under List 4B (including cell phones and laptop and tablet computers).²² Before the first wave of List 4 tariffs even took effect, however, the USTR increased the amount of the tariffs imposed on List 4 from ten percent to fifteen percent.²³

In pursuit of a trade deal with China, however, the USTR indefinitely delayed a proposed increase of the tariffs on Lists 1, 2, and 3 from twenty-five percent to thirty percent.²⁴ “Phase One” of a trade deal was finally reached in December, which indefinitely postponed imposition of the List 4B tariffs, and halved the tariffs on List 4A to 7.5 percent.²⁵

Notwithstanding the USTR’s continued escalation of the Section 301 tariffs on Chinese imports during much of 2019, the USTR continued to

14. Memorandum on Actions by the United States Related to the Section 301 Investigation of China’s Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 2018 DAILY COMP. PRES. DOC. 180 (Mar. 22, 2018).

15. Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301, 83 Fed. Reg. 28,710 (June 20, 2018) [hereinafter List 1]; Notice of Action Pursuant to Section 301, 83 Fed. Reg. 40,823 (Aug. 16, 2018) [hereinafter List 2].

16. Notice of Modification of Section 301 Action, 83 Fed. Reg. 47,974 (Sept. 21, 2018) [hereinafter List 3].

17. *Id.*

18. Notice of Modification of Section 301 Action, 84 Fed. Reg. 20,459 (May 9, 2019).

19. Notice of Modification of Section 301 Action, 84 Fed. Reg. 43,304 (Aug. 20, 2019).

20. *Id.* at Annexes A and C.

21. *Id.* at Annexes A and B.

22. *Id.* at Annexes C and D.

23. Notice of Modification of Section 301 Action, 84 Fed. Reg. 45,821 (Aug. 30, 2019).

24. Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301, 84 Fed. Reg. 46,212 (Sept. 3, 2019).

25. Press Release, Office of the United States Trade Representative, United States and China Reach Phase One Trade Agreement (Dec. 13, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/united-states-and-china-reach>.

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temporarily exclude certain products and Harmonized Tariff Schedule subheadings from tariffs. The USTR granted approximately 700 tariff exclusions covering more than 3,500 exclusion requests pertaining to List 1, over 250 tariff exclusions covering more than 1,000 exclusion requests pertaining to List 2, and almost 200 tariff exclusions for List 3.²⁶ Additional exclusions to the China tariffs under Lists 1, 2, and 3, extensions of previously-granted exclusions,²⁷ and exclusions for List 4 imports are expected in 2020.²⁸

2. *France—Digital Services Tax*

In 2019, the USTR initiated an investigation into France’s digital services tax, and in December concluded that the tax “discriminates against U.S. companies [,] . . . is inconsistent with prevailing principles of international tax policy, and is unusually burdensome for affected U.S. companies.”²⁹ As a result, the USTR has proposed additional duties of up to 100 percent on approximately \$2.4 billion worth of French products, including cheeses and champagne, which may take effect after the period for public comment closes in 2020.³⁰

3. *European Union, France, Germany, Spain, and the United Kingdom—Large Civil Aircraft*

Finally, as a result of the WTO finding that the European Union and certain member States have denied U.S. rights under the WTO Agreement by failing to bring WTO-inconsistent subsidies on large civil aircraft into compliance, the USTR imposed twenty-five percent tariffs under Section 301 on approximately \$7.5 billion worth of imports.³¹ As of the end of the year, the USTR was considering whether to remove certain previously-identified imports, increase the tariffs up to 100 percent on any of those imports, and whether to impose tariffs on additional imports.³²

26. See, e.g., Notice of Product Exclusions and Amendments, 84 Fed. Reg. 52,567 (Oct. 2, 2019).

27. 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, 84 Fed. Reg. 58,427 (Oct. 31, 2019).

28. Procedures for Requests to Exclude Particular Products from the August 2019 Action Pursuant to Section 301, 84 Fed. Reg. 57,144 (Oct. 24, 2019).

29. UNITED STATES TRADE REPRESENTATIVE, REPORT ON FRANCE’S DIGITAL SERVICES TAX PREPARED IN THE INVESTIGATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, at 1 (Dec. 2, 2019).

30. Notice of Determination and Request for Comments Concerning Action Pursuant to Section 301: France’s Digital Services Tax, 84 Fed. Reg. 66,956 (Dec. 6, 2019).

31. Notice of Determination and Action Pursuant to Section 301: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute, 84 Fed. Reg. 54,245 (Oct. 9, 2019).

32. Review of Action: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute, 84 Fed. Reg. 67,992 (Dec. 12, 2019).

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C. CHANGES TO CTPAT

The U.S. government enacted CTPAT (Customs Trade Partnership Against Terrorism) in November 2001, soon after the September 11 terrorist attacks.³³ CTPAT is a voluntary program established to improve supply chain security of trade entering and leaving the United States.³⁴ Its success can be measured by its more than 11,000 participants who account for more than fifty percent of the U.S.'s foreign trade.³⁵ In 2019, CTPAT went through some significant enhancements and changes in order to respond to current supply chain risks.³⁶

In particular, two sets of changes have taken place in order to update the program.³⁷ First, each of the existing Minimum Security Criteria (MSC) was reviewed and brought up to date.³⁸ Second, four new subject matters of MSCs were added in order to reflect new threats to the supply chain, not all solely related to terrorism.³⁹ These are cybersecurity, protection against agricultural contaminants and pests, money laundering/terrorist financing, and proper use of security technology.⁴⁰ Each of these new subject matters is meant to be established within the existing MSCs in order to improve the overall security of the program.⁴¹

The new changes were announced in early May of 2019, with the balance of 2019 for companies to begin implementing them, namely adopting the revised and new MSC requirements.⁴² In early 2020, U.S. Customs and Border Protection (CBP) is expected to begin monitoring and enforcing these changes.⁴³

II. WTO Dispute Settlement

The year 2019 will be memorable for WTO dispute settlement for several reasons, including: (i) the shutting down of the Appellate Body (AB) after twenty-five years of operations; (ii) the adoption of the first WTO panel report addressing the much-debated security defence set forth in

33. See *CTPAT: Customs Trade Partnership Against Terrorism*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/border-security/ports-entry/cargo-security/ctpat> (referencing 6 U.S.C. §§ 961–73 (2006)) (last updated Aug. 15, 2019).

34. *Id.*

35. *Id.*

36. See *CBP's Customs Trade Partnership Against Terrorism Finalized an Update to its Minimum Security Criteria*, U.S. CUSTOMS & BORDER PROTECTION (May 3, 2019), <https://www.cbp.gov/newsroom/national-media-release/cbp-s-customs-trade-partnership-against-terrorism-finalized-update>.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *CBP's Customs Trade Partnership Against Terrorism Finalized an Update to its Minimum Security Criteria*, *supra* note 36.

42. *Id.*

43. *Id.*

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Article XXI of the General Agreement on Tariffs and Trade (GATT) 1994; and (iii) the composition of the most dispute settlement panels in WTO history (twenty-nine), signaling continued strong reliance on the WTO dispute settlement mechanism to resolve trade irritants. Other important developments include the adoption of a significant decision concerning agricultural subsidies imposed by China and the circulation of a panel report authorizing the use of zeroing in anti-dumping determinations with respect to softwood lumber products. These developments are discussed below.

A. WTO APPELLATE BODY SHUTS DOWN

On December 11, 2019, the United States succeeded in forcing the AB to cease operations. On that date, only one AB Member, Hong Zhao of China, remained in office, making it impossible to form a “Division” of three AB Members necessary to hear appeals.⁴⁴ Although Article 17.1 of the Dispute Settlement Understanding or DSU provides that the AB “shall be composed of seven persons,” all AB Members but Hong Zhao had completed their terms by December 11, 2019, and no replacements had been selected.⁴⁵ This was due to the refusal by the United States since mid-2017 to join a consensus to launch selection processes to replace AB Members each time a vacancy arose.⁴⁶

The United States has been critical of the AB for several years, claiming it routinely overreached in its rulings and regularly flouted procedural rules set by WTO Members.⁴⁷ Its decision to block the replacement of AB Members caused significant concern among other WTO Members, which led to proposals for changing the functioning of the AB in order to meet the United States’ criticisms.⁴⁸ These efforts intensified in January 2019 with the appointment of Ambassador David Walker of New Zealand to serve as Facilitator to resolve differences among WTO Members on the way forward.⁴⁹ His work culminated in a draft General Council decision

44. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; Working Procedures for Appellate Review, WTO Doc. WT/AB/WP/6(1) (Aug. 16, 2010).

45. *Appellate Body Members*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/ab_members_descr_e.htm (last visited June 3, 2020).

46. See David A. Gantz, *An Existential Threat to WTO Dispute Settlement: Blocking Appointment of Appellate Body Members by the United States*, ARIZ. LEGAL STUD. 1 (July 2018), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3216633_code575020.pdf?abstractid=3216633&mirid=1.

47. See Statement as delivered by [United States] Ambassador Dennis Shea, WTO General Council Meeting (Dec. 9, 2019), <https://geneva.usmission.gov/2019/12/09/ambassador-shea-statement-at-the-wto-general-council-meeting/> [hereinafter Dec. 9, 2019 Statement].

48. See, e.g., Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council, WTO Doc. WT/GC/W/752 (Nov. 26, 2018).

49. See generally *NZ Ambassador David Walker appointed Chair of the WTO General Council*, NEW ZEALAND FOREIGN AFFAIRS & TRADE (Mar. 9, 2020), <https://www.mfat.govt.nz/en/>

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presented to WTO Members on December 9, 2019.⁵⁰ The draft acknowledged that the AB had not been functioning as intended in some respects, imposed certain disciplines on AB procedures, and included provisions regarding overreach and other U.S. concerns. The draft Decision received broad support among the WTO Membership but the United States declined to support it, stating that Members did not appreciate their concerns and that until Members determine why the AB felt free to disregard the WTO agreements, it would be impossible to assess the likely effectiveness of any potential solution.⁵¹ As a consequence, the United States will continue to block appointments to the AB. No new appeals will be heard and several in the queue will not be completed.⁵² WTO Director-General Roberto Azevedo has launched intensive consultations to try to find a solution.⁵³ In the meantime, three WTO Members, the European Union, Canada and Norway, have adopted interim appeal arbitration agreements whereby any appeals among them will be heard by three former AB members who will closely follow the procedures used by the AB.⁵⁴ They are seeking to persuade other Members to sign on to this arrangement for their own cases.⁵⁵

media-and-resources/news/nz-ambassador-david-walker-appointed-chair-of-the-wto-general-council/#:~:text=New%20Zealand's%20Permanent%20Representative%20to,of%20the%20WTO%20General%20Council.

50. Draft Decision, Functioning of the Appellate Body, WTO Doc. WT/GC/W/791 (Nov. 28, 2019).

51. See Dec. 9, 2019 Statement, *supra* note 47.

52. The outgoing Appellate Body Members have agreed to continue working until the end of March 2020 on four ongoing appeals that are nearing completion. See Communication from the Chairman of the Dispute Settlement Body, WTO Doc. WT/DSB/79 (Dec. 12, 2019). Ten appeals in the queue will not be completed. The Appellate Body has invoked Rule 15 of the *Working Procedures for Appellate Review*, which allows outgoing Appellate Body Members to complete appeals to which they were assigned before their terms ended. See WTO Doc. WT/AB/WP/6 (Aug. 16, 2010).

53. DG Azevedo to launch intensive consultations on resolving Appellate Body Impasse, WORLD TRADE ORG. (Dec. 9, 2019), https://www.wto.org/english/news_e/news19_e/gc_09dec19_e.htm.

54. See Interim Appeal Arbitration Pursuant to Article 25 of the DSU (July 25, 2019), https://www.wita.org/wp-content/uploads/2019/07/tradoc_158273.pdf; see Interim Appeal Arbitration Pursuant to Article 25 of the DSU (Oct. 21, 2019), <https://trade.ec.europa.eu/doclib/html/158394.htm>.

55. *Interim Appeal Arrangement for WTO Disputes becomes Effective*, EUR. COMM'N (Apr. 30, 2020), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143> (On April 30, 2020, the EU, Canada, Norway and sixteen other WTO Members formally notified the Multi-party Interim Appeal Arbitration Arrangement (MPIAA) to the WTO, which will serve as a stop-gap measure to ensure an appellate mechanism for disputes among MPIAA participants while the Appellate Body is not able to operate).

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**B. FIRST WTO PANEL REPORT ADDRESSING THE ARTICLE XXI
SECURITY INTERESTS DEFENCE**

The much-anticipated decision in the case between Russia and Ukraine concerning traffic in transit was adopted in April 2019.⁵⁶ Ukraine had challenged several restrictions imposed by Russia on traffic in transit by road and rail from Ukraine through Russia to third countries, claiming that the measures were inconsistent with Article V of the GATT 1994 providing for freedom of transit.⁵⁷ Russia invoked the security interests defense under Article XXI(b)(iii) of the GATT 1994, asserting that it took the measures in response to the emergency in international relations that occurred in 2014 and that it considered the measures to be necessary for the protection of its essential security interests.⁵⁸ Article XXI(b)(iii) provides that “nothing in this Agreement shall be construed . . . to prevent any [Member] from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations.”⁵⁹ Russia argued that Article XXI is self-judging and therefore, once it had invoked this defense, the panel lacked jurisdiction to address the issues in dispute.⁶⁰

The question whether Article XXI is self-judging is highly controversial; the defence has rarely been invoked during the history of the GATT/WTO and the question of its justiciability had not been previously determined by a WTO panel. The issue divides the WTO membership. Several Members, including the United States, participated in the dispute and filed submissions maintaining that actions taken to protect essential security interests were self-judging because they involve sensitive issues relating to a Member’s political autonomy.⁶¹ They argued that the plain text of the provision as well as its drafting history confirmed that these determinations were reserved to each Member.⁶² Other Members, such as the EU and Australia, disagreed, arguing that some degree of scrutiny of measures over which Article XXI is invoked is required.⁶³ Although any decision by the panel would have been binding only on Russia and Ukraine, there was concern that a decision rejecting the self-judging nature of the defense would lead to severe criticism and even to the United States’ withdrawal from the WTO because it has

56. Panel Report, *Russia—Traffic in Transit*, WTO Doc. DS512/7 (Apr. 29, 2019) (adopting Panel Report of Russia - Measures concerning Traffic in Transit (WT/DS512/R and WT/DS512/R/Add.1)).

57. Panel Report, *Russia—Traffic in Transit*, WTO Doc. WT/DS512/R, ¶ 1.1 (Apr. 5, 2019).

58. *Id.* ¶¶ 7.3–7.4.

59. *Id.* ¶ 7.60.

60. *Id.* ¶ 7.26.

61. *Id.* ¶¶ 7.51–7.52.

62. WTO Doc. WT/DS512/R, *supra* note 57, ¶¶ 7.51–7.52.

63. *Id.* ¶¶ 7.35–7.36, 7.42–7.43.

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invoked the security defence in several disputes where Members have challenged its steel and aluminum tariffs.⁶⁴

The panel rejected the view that Article XXI is totally self-judging but determined that “it is left, in general, to every Member to define what it considers to be its essential security interests.”⁶⁵ It cautioned, however, that “this does not mean that a Member is free to elevate any concern” to that of an essential security interest and that “the discretion of a Member to designate particular concerns as ‘essential security interests’ is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith.”⁶⁶ Although most panel reports are appealed, neither Ukraine nor Russia appealed the report and it was adopted by the Dispute Settlement Body on April 26, 2019.⁶⁷ The self-judging nature of Article XXI will continue to command attention in 2020 because the provision is currently at issue in a number of WTO disputes.

Two other important panel decisions are worthy of brief mention. First, the United States succeeded in its challenge of China’s agricultural subsidies provided through market price support to producers of wheat and rice in the years 2012 through 2015.⁶⁸ The panel determined that China’s level of support had exceeded its commitment levels for the years 2012-2015 for each product.⁶⁹ China did not appeal the decision and the parties agreed that China will have until March 2020 to comply with the decision.⁷⁰

The other panel decision that should be highlighted relates to anti-dumping duties imposed by the United States on softwood lumber products from Canada.⁷¹ Although there is a long history of softwood lumber disputes between Canada and the United States, this report is noteworthy because the findings differ from a number of previous panel and AB reports where it was determined that the use of the zeroing methodology in calculating dumping margins is inconsistent with the Anti-Dumping Agreement.⁷² In this case, the panel acknowledged that its conclusions differed from those of other panels and the AB and found that the use of

64. See Simon Lester & Huan Zhu, *Closing Pandora’s Box: The Growing Abuse of the National Security Rationale for Restricting Trade*, CATO INST (June 25, 2019), <https://www.cato.org/publications/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale>.

65. WTO Doc. WT/DS512/R, *supra* note 57, ¶ 7.131.

66. *Id.* ¶ 7.132.

67. WTO Doc. WT/DS512/7, *supra* note 56.

68. Jim Wiesemeyer, *WTO Mostly Concurs with U.S. Challenge of China Supports for Farmers*, PROFARMER (Feb. 28, 2019), <https://www.profarmer.com/markets/policy/wto-mostly-concurs-us-challenge-china-supports-farmers>.

69. *Id.*

70. Panel Report, *China—Domestic Support for Agricultural Producers*, WTO Doc. WT/DS511/14 (June 12, 2019), (decision on WTO Doc. WT/DS511/R (Feb. 28, 2019)).

71. Panel Report, *United States—Differential Pricing Methodology*, WTO Doc. WT/DS534/R (Apr. 9, 2019).

72. See, e.g., Appellate Body Report, *United States—Washing Machines*, ¶¶ 5.168–5.169, WTO Doc. WT/DS464/AB/R (Sept. 7, 2016); see also, Appellate Body Report, *United States—Anti-Dumping Methodologies (China)*, ¶ 5.102, WTO Doc. DS471/AB/R (May 11, 2017).

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zeroing was permitted.⁷³ Consequently, it found that Canada failed to demonstrate that the U.S. acted inconsistently with its WTO obligations by using that method in calculating dumping margins.⁷⁴ Canada appealed the panel report, but the case will sit unattended because, as noted above, the AB does not have the necessary quorum.⁷⁵

Turning finally to the high level of activity in WTO dispute settlement in 2019, it is clear that despite a non-functioning AB, Members continue to view WTO dispute settlement as a viable tool for addressing trade irritants.⁷⁶ In addition to the twenty-nine new panels composed in 2019, the highest in the history of the WTO, Members filed nineteen new requests for consultations in 2019 covering a variety of measures including agricultural domestic and export subsidies, market access, anti-dumping measures, tariff treatment, trade facilitation, and sanitary and phytosanitary measures.⁷⁷ The European Union filed five requests for consultations, while Australia, Brazil, Canada, China, Chinese Taipei, Guatemala, Indonesia, Japan, Russia, South Korea, Tunisia, United Arab Emirates, the United States, and Venezuela each filed one.⁷⁸ The following Members are respondents in one or more of these disputes: China; the European Union; Indonesia; Japan; Morocco; Qatar; Turkey, one dispute; Colombia, two disputes; the United States, three disputes; and India, seven disputes.⁷⁹

WTO dispute settlement will continue to merit close attention in 2020, not only because it will be the first year of operations without the AB, but also because important decisions are expected in several challenges where the security defence has been invoked, including in cases challenging the imposition of steel and aluminum tariffs by the United States.⁸⁰ Another important report is expected to be issued by the AB in June addressing Australia's legislation on plain packaging of tobacco products, a decision that could signal future challenges under the TBT and TRIPS agreements regarding packaging of food, beverages, and other products.⁸¹

III. U.S. Trade Remedies

Another active year for AD/CVD litigation at Commerce and the ITC, 2019 involved initiations at Commerce of over fifty AD and CVD

73. Panel Report, *United States—Differential Pricing Methodology*, ¶¶ 7.56, 7.107.

74. *Id.* ¶ 8.2.

75. See *supra* note 45 and accompanying text.

76. *Chronological List of Dispute Cases*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited May 29, 2020).

77. *Id.*

78. *Id.*

79. *Id.*

80. See Panel Report, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/10 (adopted Sept. 10, 2019).

81. See Panel Report, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/R (adopted June 28, 2018).

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investigations, involving at least sixteen different countries and a variety of products ranging from forged steel fittings, to wooden cabinets and vanities, to glass containers, to sodium sulfate anhydrous.⁸² A selection of Commerce and ITC proceedings are discussed below.

A. SIGNIFICANT COMMERCE CASES

1. *Aluminum Extrusions Proceedings Involving Door Thresholds*

This year, both Commerce and CBP have found that the U.S. aluminum extrusion industry has been adversely affected by door thresholds imported from China.⁸³ On December 19, 2018, Commerce issued a final scope ruling stating that door threshold products are included within the scope of the antidumping and countervailing duty orders on China.⁸⁴ On March 20, 2019, CBP issued a Notice of Final Determination as to Evasion under the Enforce and Protect Act (EAPA), stating that U.S. importer Columbia Aluminum Products, LLC imported aluminum door thresholds that had been transhipped through Vietnam, evading the antidumping and countervailing duty orders on Chinese aluminum extrusions.⁸⁵ Both the scope determination and the EAPA determination have been appealed to the CIT.⁸⁶

2. *Corrosion-Resistant Steel Products and Cold-Rolled Steel Circumvention Proceedings Involving Vietnam*

Following successful petitions alleging that imports of corrosion-resistant steel products (CORE) and cold-rolled steel finished in Vietnam, using Chinese steel inputs, are entering the U.S. market duty-free, and Commerce's affirmative finding of circumvention in these cases on May 23, 2018,⁸⁷ on August 20, 2018, the domestic industry filed new circumvention

82. See *Foreign Trade Remedies on U.S. Exports*, INT'L TRADE ADMIN., <https://www.trade.gov/foreign-advcd-or-safeguard-investigation> (listing filed investigations).

83. Memorandum from the Dep't of Commerce on Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Rulings on Worldwide Door Components Inc., MJB Wood Group Inc., and Columbia Aluminum Products Door Thresholds (Dec. 19, 2018) (on file with the Int'l Trade Admin.); Letter from U.S. Customs and Border Protection to Columbia Aluminum Products, LLC (Mar. 20, 2019) (on file with U.S. Customs and Border Protection).

84. Memorandum from the Dep't of Commerce on Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Rulings on Worldwide Door Components Inc., MJB Wood Group Inc., and Columbia Aluminum Products Door Thresholds (Dec. 19, 2018) (on file with the Int'l Trade Admin.).

85. Letter from U.S. Customs and Border Protection to Columbia Aluminum Products, LLC (Mar. 20, 2019) (on file with U.S. Customs and Border Protection).

86. See *Tai-Ao Aluminum (Taishan) Co., Ltd. v. U.S.*, No. 19-164 (Ct. Int'l Trade Dec. 18, 2019).

87. See Notice of Orders on Certain Corrosion-Resistant Steel Products from China, 83 Fed. Reg. 23,891 (May 23, 2018); Issues and Decision Memorandum from the Dep't of Commerce on Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders

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cases targeting corrosion-resistant steel from Vietnam using substrate from Korea and Taiwan, and cold-rolled steel from Vietnam using substrate from Korea.⁸⁸ In July 2019, Commerce issued a preliminary affirmative finding of circumvention in these proceedings.⁸⁹ Notably, on August 14, 2019, Commerce self-initiated new inquiries into potential circumvention involving U.S. imports of CORE produced from Chinese or Taiwanese substrate, completed in Costa Rica, Guatemala, Malaysia, South Africa, and the United Arab Emirates.⁹⁰ These developments reinforce Commerce's continued focus on ensuring that trade orders are effectively enforced, and that the circumvention of such orders is prevented.

3. *Welded Carbon Steel Standard Pipes and Tubes from India*

In July 2019, Commerce issued its preliminary results in the 2017–2018 administrative review of the antidumping duty order on *Welded Carbon Steel Standard Pipes and Tubes from India*.⁹¹ In doing so, for the first time, Commerce applied a regression analysis methodology to quantify an adjustment for a particular market situation (PMS).⁹² Commerce continued to apply this methodology, with certain changes, in its final results, which were published in January 2020.⁹³ The final antidumping duty margins for this review are 87.39 percent for one mandatory respondent and 11.83 percent for the other mandatory respondent and all other companies.⁹⁴ Commerce's regression analysis methodology continues to develop and evolve, but going forward, Commerce is likely to use a regression analysis to quantify the effects of a PMS in other cases. Indeed, Commerce has applied the same methodology in the 2017–2018 administrative reviews of the antidumping duty orders on Heavy Walled Rectangular Welded Carbon

on Certain Cold-Rolled Steel Flat Products from China (May 23, 2018) (on file with the Int'l Trade Admin.).

88. See Notice of Inquiry on Certain Corrosion-Resistant Steel Products from Korea and Taiwan, 83 Fed. Reg. 37,785 (Aug. 2, 2018).

89. See Notice of Orders on Certain Corrosion-Resistant Steel Products from Korea, 84 Fed. Reg. 32,871 (July 10, 2019); Decision Memorandum from the Dep't of Commerce on the Preliminary Determination in the Less-Than-Fair-Value Investigation of Large Diameter Welded Pipe from the Republic of Korea (Aug. 20, 2018) (on file with the Int'l Trade Admin.).

90. See Press Release, U.S. Dep't of Commerce, U.S. Dep't of Commerce Self-Initiates Inquiries into Possible Circumvention Involving Exports of Corrosion-Resistant Steel Products Completed in Costa Rica, Guatemala, Malaysia, South Africa, and the United Arab Emirates (Aug. 14, 2019) (on file with the Dep't of Commerce).

91. Notice of Orders on Welded Carbon Steel Standard Pipes and Tubes from India, 84 Fed. Reg. 33,916 (July 16, 2019) [hereinafter CWP from India AD].

92. See Decision Memorandum from the Dep't of Commerce on Welded Carbon Steel Standard Pipes and Tubes from India (July 10, 2019) (on file with the Int'l Trade Admin.).

93. See Notice on Orders on Welded Carbon Steel Standard Pipes and Tubes From India, 85 Fed. Reg. 2715 (Jan. 16, 2020) [hereinafter CWP from India AD]; Decision Memorandum from the Dep't of Commerce on Welded Carbon Steel Standard Pipes and Tubes from India (Jan. 9, 2020) (on file with the Int'l Trade Admin.).

94. CWP from India AD, 85 Fed. Reg at 2,716.

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Steel Pipes and Tubes from the Republic of Korea and Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey.⁹⁵

4. “*Solar I*” and “*Solar II*” Proceedings

During 2019, Commerce continued to review five orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules (CSPV).⁹⁶ Commerce published the final results of the *Solar I* China AD administrative review in July 2019, calculating duty margins ranging between 2.67–4.06 percent, with a 238.95 percent margin for the China-wide rate.⁹⁷ In the *Solar I* China CVD fifth administrative review final results, Commerce calculated duty margins ranging between 9.70–12.76 percent.⁹⁸ Both of these final results have been appealed to the U.S. Court of International Trade (CIT).⁹⁹ Preliminary results are expected in the sixth reviews of *Solar I* China AD and CVD in January 2020. In the third review of *Solar II* China AD, Commerce upheld its preliminary determination of a 151.98 percent China-wide entity rate for all respondents.¹⁰⁰ In the third review of the *Solar II* China CVD order, Commerce found a 94.83 percent subsidy rate,¹⁰¹ a significant increase from Commerce findings in prior

95. See Notice of Orders on Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Korea, 84 Fed. Reg. 63,613, 63,614-16 (Nov. 18, 2019); Decision Memorandum from the Dep’t of Commerce on Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Korea (Nov. 18, 2019) (on file with the Int’l Trade Admin.); Notice of Orders on Circular Welded Carbon Steel Standard Pipe and Tube Products From Turkey 84 Fed. Reg. 34,345 (July 18, 2019); Decision Memorandum from the Dep’t of Commerce on Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey (July 18, 2019) (on file with the Int’l Trade Admin.); Notice of Orders on Circular Welded Carbon Steel Standard Pipe and Tube Products From Turkey, 85 Fed. Reg. 3,616 (Jan. 22, 2020); Decision Memorandum from the Dep’t of Commerce on Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey (Jan. 14, 2020) (on file with the Int’l Trade Admin.).

96. *Solar I* includes the AD order on CSPV from China, 83 Fed. Reg. 8058 (Feb. 23, 2018), and the CVD order on CSPV from China, 81 Fed. Reg. 908 (Jan. 8, 2016). *Solar II* includes the AD order on CSPV from China, 80 Fed. Reg. 8592 (Feb. 18, 2015), the CVD order on CSPV from China, 82 Fed. Reg. 51,392 (Nov. 6, 2017), and the AD order on CSPV from Taiwan, 83 Fed. Reg. 16,298 (Apr. 16, 2018).

97. Notice of Orders on Crystalline Silicon Photovoltaic Cells Whether or Not Assembled into Modules, from China, 84 Fed. Reg. 36,886, 36,888 (July 30, 2019).

98. Notice of Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from China, 84 Fed. Reg. 45,125, 45,126-27 (Aug. 28, 2019).

99. Changzhou Trina Solar Energy Co., Ltd. v. U.S., No. 19-137 (Ct. Int’l Trade Nov. 8, 2019) [hereinafter Changzhou]; Changzhou Trina Solar Energy Co., Ltd. v. U.S., No. 19-143 (Ct. Int’l Trade Nov. 18, 2019) [hereinafter Changzhou 2]; Changzhou Trina Solar Energy Co., Ltd. v. U.S., No. 20-64 (Ct. Int’l Trade May 13, 2020) [hereinafter Changzhou 3].

100. Notice of Orders on Certain Crystalline Silicon Photovoltaic Products from China, 84 Fed. Reg. 27,764 (June 4, 2019).

101. Notice of Orders on Certain Crystalline Silicon Photovoltaic Products from China, 84 Fed. Reg. 56,765, 56,767 (Oct. 23, 2019).

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reviews. Previous rulings in these reviews have been appealed to the CIT and CAFC.¹⁰²

B. SIGNIFICANT INTERNATIONAL TRADE COMMISSION CASES

1. *Glass Containers from China*

In response to petitions filed by the American Glass Packaging Coalition on September 25, 2019, the ITC issued affirmative preliminary determinations against imports of glass containers from China, finding that there is a reasonable indication that a U.S. industry is materially injured by reason of imports of glass containers from China that are alleged to be sold in the United States at less than fair value and to be subsidized by the government of China.¹⁰³ The Commissioners unanimously voted in the affirmative.¹⁰⁴ The ITC defined a single domestic like product coextensive with the scope of the investigations, which includes glass jars, bottles, flasks and similar containers; with or without their closures; whether clear or colored; and with or without design or functional enhancements, including, but not limited to, handles, embossing, labeling, or etching.¹⁰⁵

2. *Utility Scale Wind Towers from Canada, Indonesia, Korea, and Vietnam*

In August 2019, the ITC issued preliminary affirmative determinations against imports of utility scale wind towers from Canada, Indonesia, Korea, and Vietnam.¹⁰⁶ The ITC voted unanimously that there is reasonable indication that the domestic wind tower industry is materially injured due to imports from these four countries.¹⁰⁷ The ITC determined that cumulation was appropriate.¹⁰⁸ Specifically, cumulated subject imports were the second largest source of supply behind the domestic industry,¹⁰⁹ the volume of subject imports was significant,¹¹⁰ and subject imports significantly undersold domestic wind towers.¹¹¹ Furthermore, the Commission recognized that the domestic industry lost market share during a period of time when demand increased significantly and determined that this was likely the result of

102. Changzhou, *supra* note 99; Changzhou 2, *supra* note 99; Changzhou 3, *supra* note 99.

103. Glass Containers from China, Inv. Nos. 701-TA-630, 731-TA-1462, USITC Pub. 4996 (Nov. 2019) (Preliminary).

104. *Id.*

105. *Id.*

106. Notice of Determinations on *Utility Scale Wind Towers from Canada, Indonesia, Korea, and Vietnam*, 84 Fed. Reg. 45,171 (Aug. 28, 2019).

107. The final vote was three to zero in favor of the affirmative determinations with Commissioners Williamson and Broadbent not participating due to forthcoming retirements. *Utility Scale Wind Towers from Canada, Indonesia, Korea, and Vietnam*, Inv. Nos. 701-TA-627-629, 731-TA-1458-1461, USITC Pub. 4952 (Aug. 2019) (Preliminary).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

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competition from subject imports.¹¹² The ITC's final determination will occur later this year following Commerce's final, aligned AD/CVD determinations.

3. *Wooden Cabinets and Vanities from China*

In April 2019, the ITC and Commerce began antidumping and countervailing duty investigations of wooden cabinets and vanities from China in response to petitions filed with the ITC and Commerce by the American Kitchen Cabinet Alliance.¹¹³ Commerce made affirmative final determinations in the agency's antidumping and countervailing duty investigations. Commerce's final countervailing duty margins span from 13.33 percent to 293.45 percent,¹¹⁴ and the agency's final antidumping duty margins range from 4.37 percent to 262.18 percent.¹¹⁵ Likewise, the ITC determined in the final phase of its investigation that the U.S. domestic industry was materially injured by Chinese imports of wooden cabinets and vanities.¹¹⁶

IV. Court Appeals

The CAFC and the CIT decided several notable cases in 2019. At least two of these cases, discussed below, have important implications for the United State's administration of its trade laws.

A. *SUNPREME INC. v. UNITED STATES*¹¹⁷

Under U.S. law, Commerce has the ultimate authority to determine the scope of an AD or CVD order that it administers.¹¹⁸ Commerce does not, however, implement these orders at the U.S. border—that is, Commerce does not, in the first instance, examine merchandise entering the United States to determine whether it is or is not covered by an existing AD/CVD order.¹¹⁹ That task is left to CBP, with the important caveat that Customs'

112. *See id.*

113. *See* *Wooden Cabinets and Vanities from China*, Inv. Nos. 701-TA-620, 731-TA-1445, USITC Pub. 4891 (Apr. 2019) (Preliminary); Notice of Investigation on Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Initiation of Less-Than-Fair Value Investigation, 84 Fed. Reg. 12,587 (Apr. 2, 2019).

114. Notice of Determinations on Wooden Cabinets and Vanities and Components Thereof from China, 85 Fed. Reg. 11,962, 11,963-64 (Feb. 28, 2020).

115. Notice of Determinations on Wooden Cabinets and Vanities and Components Thereof from China, 85 Fed. Reg. 11,953, 11,955-60 (Feb. 28, 2020).

116. *See generally* *Wooden Cabinets and Vanities from China*, Inv. Nos. 701-TA-620, 731-TA-1445, USITC Pub. 5042 (Apr. 2020) (Final).

117. *Sunpreme Inc. v. United States*, 924 F.3d 1198 (Fed. Cir. 2019).

118. *See, e.g., LDA Incorporado v. United States*, 79 F. Supp. 3d 1331, 1338-39 (Ct. Int'l Trade 2015); *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976-77 (Fed. Cir. 1994).

119. *See, e.g., Mitsubishi Elecs.*, 44 F.3d at 977.

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role is considered “ministerial.”¹²⁰ In other words, while Customs makes factual findings regarding what the merchandise is and whether it is described by an AD/CVD order, Customs cannot “clarify or interpret” orders on its own accord.¹²¹

In practice, the line between “ministerial” and “non-ministerial” functions can be blurred where an AD/CVD order contains ambiguous language.¹²² The CAFC in *Sunpreme* addressed where this line should be drawn, and specifically when Customs impermissibly encroaches into the domain of Commerce in interpreting the scope of an order.¹²³

The plaintiff in *Sunpreme* imported solar modules that it considered outside the scope of existing AD/CVD orders covering solar cells from China.¹²⁴ In early 2015, Customs began to question whether the plaintiff was correctly classifying the modules as non-subject and, after conducting laboratory testing, unilaterally began suspending the modules from liquidation and collecting AD/CVD cash deposits.¹²⁵ The plaintiff subsequently requested that Commerce conduct a “scope ruling” to determine as a final matter whether its product was within the scope of the solar cells orders.¹²⁶ Commerce ultimately found that it was and, thus, issued instructions to Customs to continue any suspension of liquidation.¹²⁷

Plaintiff filed suit at the CIT, alleging that Customs exceeded its authority by classifying *Sunpreme*’s entries as subject to AD/CVD duties and that the earliest duties could have applied was as of the date on which Commerce initiated its scope inquiry, in December 2015.¹²⁸ As a consequence, plaintiff contended that Commerce’s instructions to “continue” any suspension of liquidation predating the initiation of the scope inquiry were *ultra vires*.¹²⁹

The CAFC in *Sunpreme* agreed, holding that “[a]mbiguity is the line that separates lawful ministerial acts from unlawful *ultra vires* acts by Customs.”¹³⁰ Where an order is ambiguous, the CAFC found that

120. *Id.*

121. *See, e.g., Xerox Corp.*, 289 F.3d at 794; *Sunpreme*, 924 F.3d at 1214.

122. *See, e.g., Xerox Corp. v. United States*, 289 F.3d 792, 794 (Fed. Cir. 2002); *Sunpreme*, 924 F.3d at 1214.

123. *Sunpreme*, 924 F.3d at 1202.

124. *See id.*

125. *See id.* at 1202.

126. *See id.* at 1203.

127. Commerce’s regulations address the applicability of scope rulings. Under 19 C.F.R. § 351.225(l)(3), when Commerce issues a final scope ruling “to the effect that the product in question is included within the scope of the order, any suspension” of liquidation will continue. If, however, the product was not already suspended from liquidation, then suspension will be only be applied retroactive to the date of initiation of the scope inquiry. *Id.*

128. Plaintiff also alleged that Commerce’s determination that their modules were in scope was unsupported by substantial evidence. The CAFC rejected this argument on appeal. *See Sunpreme*, 924 F.3d at 1210.

129. *See id.* at 1212.

130. *See id.* at 1214. One member of the three-judge panel dissented from this determination. *See id.* at 1216 (Prost, J., dissenting in part).

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Commerce and Commerce alone can provide the necessary interpretive clarity.¹³¹ And because it was not clear that plaintiff's modules were unambiguously within the scope of the solar AD/CVD orders, the CAFC found Customs' unilateral suspension prior to initiation of the scope inquiry to be unlawful.¹³² The CAFC further held that Commerce could not later cure these errors by ordering the continuation of the unlawful suspension following its scope inquiry.¹³³

B. TRANSPACIFIC STEEL LLC v. UNITED STATES¹³⁴

As discussed above, Section 232 of the Trade Expansion Act of 1962 (Section 232) authorizes Commerce to investigate the effects of specific imports on U.S. national security.¹³⁵ If Commerce concludes that the imports in question are imported in a way that threatens national security, then the President has broad authority to take remedial action.¹³⁶ The President's authority is circumscribed, however, by certain procedural limitations set forth in the statute.¹³⁷ In particular, following an affirmative determination by Commerce, the President must decide within ninety days (1) whether he concurs with Commerce's findings and (2) the appropriate "nature and duration" of any remedial action.¹³⁸ If the President elects to take action, he must act within fifteen days of his determination to do so.¹³⁹

In *Transpacific Steel*, a three-judge panel¹⁴⁰ at the CIT considered whether President Trump complied with these procedural requirements when he imposed a fifty percent tariff on Turkish steel imports in August 2018.¹⁴¹ By way of background, Commerce found in January 2018 that imports of steel mill articles threatened to impair U.S. national security.¹⁴² On the basis of this finding, in March 2018, President Trump imposed a twenty-five percent *ad valorem* tariff on most steel imports into the U.S.¹⁴³ Five months later, and well outside of the ninety-day window for taking action under Section

131. *See id.* at 1214.

132. *See Sunpreme*, 924 F.3d at 1212.

133. *See id.* at 1213.

134. *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267 (Fed. Cir. 2019).

135. 19 U.S.C. § 1862(b)(1)(A).

136. *Id.* § 1862(c)(1)(A).

137. *Id.*

138. *Id.*

139. *Id.* § 1862(c)(1)(B).

140. Cases at the CIT are generally heard by a single judge, although the CIT is authorized to assign cases to three-judge panels if a case "raises an issue of the constitutionality of a federal statute, a proclamation of the President, or an Executive order; or has broad or significant implications in the administration or interpretation of the law." *See* 28 U.S.C.A. Rules of Ct. of Int'l Trade, R. 77(e).

141. *Transpacific Steel*, 415 F. Supp. 3d at 1269.

142. Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018).

143. *Id.*

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232, President Trump issued Proclamation 9772¹⁴⁴ singling out Turkish steel imports for higher duties of fifty percent *ad valorem*.¹⁴⁵

An importer of Turkish steel filed suit at the CIT claiming among other things¹⁴⁶ that President Trump exceeded his statutory authority by imposing additional duties outside of the statutorily-prescribed timeframe for taking action under section 232.¹⁴⁷ The United States moved to dismiss plaintiff's complaint for failure to state a claim, arguing that the President retained the authority to "modify" any action taken under section 232 "without conducting a new investigation or following the procedures set forth in the statute."¹⁴⁸

The CIT emphatically rejected the United States' argument, finding after consideration of the statutory scheme and accompanying legislative history, that the "President's expansive view of his power is mistaken" and that the "procedural safeguards in section 232 do not merely roadmap action; they are constraints on power."¹⁴⁹ As a result of the CIT's findings, the litigation is likely to proceed to briefing and a decision on the merits, after which point an appeal to the CAFC would be expected.¹⁵⁰

144. See Proclamation 9772, *supra* note 7.

145. *Id.*

146. *Transpacific Steel*, 415 F.Supp.3d at 1269. (The plaintiff also alleged that the differential treatment of Turkey as compared with other similarly situated countries violated the Equal Protection Clause of the Fifth Amendment. As with plaintiff's procedural claims, the United States moved to dismiss plaintiff's Fifth Amendment challenge. The CIT denied the Government's motion to dismiss, finding that the Government had failed to articulate a rational basis that would justify the disparate treatment of Turkish importers. This claim will, thus, proceed to a decision on the merits.)

147. See *id.* at 1273.

148. See *id.* at 1274.

149. See *id.* at 1275.

150. This case is one of several that test the contours of the President's authority under Section 232. Until this decision, plaintiffs' efforts to rein in the President's actions under Section 232 had largely proven unsuccessful. See, e.g., *Am. Inst. Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019) (majority of three-judge panel rejecting claim that Section 232 violates the non-delegation doctrine).