

2016

International Trade

Stephanie Bell

Johny Chaklader

Sylvia Chen

Shane Devins

Laura El-Sabaawi

See next page for additional authors

Recommended Citation

Stephanie Bell et al., *International Trade*, 50 ABA/SIL YIR 85 (2016)
<https://scholar.smu.edu/til/vol50/iss0/7>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *International Lawyer* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

International Trade

Authors

Stephanie Bell, Johnny Chaklader, Sylvia Chen, Shane Devins, Laura El-Sabaawi, Jeffrey Frank, Cynthia Galvez, Geoffrey Goodale, Derick Holt, and Bernd Janzen

INTERNATIONAL TRADE

STEPHANIE BELL, JOHNY CHAKLADER, SYLVIA CHEN, SHANE DEVINS,
LAURA EL-SABAAWI, JEFFREY FRANK, CYNTHIA GALVEZ, GEOFFREY GOODALE,
DERICK HOLT, BERND JANZEN, RON KENDLER, YING LIN, DIANE MACDONALD,
CORTNEY O'TOOLE MORGAN, DAVID SELLA-VILLA, VALERIE SORENSEN,
SARAH SPRINKLE, AND ADAM TESLIK*

This Article outlines the most important developments in international trade law during 2015. It summarizes developments in international trade negotiations, U.S. market access conditions, World Trade Organization dispute settlement activities, and U.S. trade remedies.

I. Trade Negotiation Developments

A. WORLD TRADE ORGANIZATION (“WTO”) NEGOTIATIONS

1. Trade Facilitation Agreement

The Agreement on Trade Facilitation (“TFA”), part of the so-called Bali Package agreed to at the 2013 WTO Ministerial Conference, is the first successful multilateral trade agreement since the WTO was established in 1995. The TFA will enter into force once two-thirds of WTO Members ratify it.¹ As of the end of November 2015, fifty-three members, including the United States, had completed the ratification process.²

* This article surveys developments in international trade law during 2015. The committee editors of this article were Sylvia Chen, Cynthia Galvez, and David Sella-Villa. The authors were Johnny Chaklader, Associate, and Bernd Janzen, Partner, Akin Gump Strauss Hauer & Feld LLP; Stephanie Bell, Laura El-Sabaawi, Derick Holt and Adam Teslik, Associates, and Jeffrey Frank and Ying Lin, Special Counsel, Wiley Rein LLP; Geoffrey Goodale, CEO & Founder, Trade Law Advisors, PLLC; Ron Kendler, Associate, White & Case LLP; Diane MacDonald, Associate, Baker & McKenzie LLP; Cortney O’Toole Morgan, Senior Counsel, Husch Blackwell, LLP; Valerie Sorensen, Law Clerk to the Hon. Timothy C. Stanceu, Chief Judge, U.S. Court of International Trade; and Sarah Sprinkle, Associate, Morris, Manning & Martin, LLP.

1. See Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, Nov. 27, 2014, World Trade Org., WT/L/940.

2. *Members Accepting the Protocol of Amendment to Insert the WTO Trade Facilitation Agreement into Annex 1A of the WTO Agreement*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/tradfa_e/tradfa_agreeace_e.htm (last visited Feb. 21, 2016).

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

86 THE YEAR IN REVIEW

Section I of the TFA streamlines the international movement, release, and clearance of goods and clarifies relevant articles of the GATT 1994.³ Members are required to provide notice and comment opportunities on new laws and regulations.⁴ Section II specifies the special and differential treatment provided for “developing and the least-developed countries.”⁵ Specifically, these Members must identify the provisions that they can implement by the time the Agreement enters into force, after a transitional period, and those that would require trade facilitation assistance.⁶ Finally, section III establishes a permanent WTO Trade Facilitation Committee.⁷

The TFA is pioneering in that it links implementation with a Member’s capacity to do so. The Trade Facilitation Agreement Facility was established at the end of 2014 to assist “developing and the least-developed countries” with implementing the Agreement.⁸ Other intergovernmental organizations, such as the World Customs Organization and the United Nations Conference on Trade and Development, are working with the WTO to provide technical assistance for facilitating trade.⁹

2. *Information Technology*

Following the Agreement on Trade Facilitation, the WTO achieved another success in July 2015, when participants of the Information Technology Agreement agreed to expand the products covered by that agreement.¹⁰ This expansion will eliminate tariffs on 201 products, including new-generation semi-conductors, GPS navigation systems, various medical devices, and machine tools for manufacturing printed circuits.¹¹ WTO Director-General Roberto Azevêdo highlighted the economic significance of the Information Technology Agreement, stating that “[t]his is the first major tariff-cutting deal at the WTO in 18 years.”¹²

3. *Intellectual Property*

In early 2015, the least-developed-country WTO members requested an extension of the waiver of intellectual property rules for pharmaceuticals under the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), allowing them to produce or obtain generic medicines.¹³ The then-existing waiver period was to expire at

3. See Protocol Amending the Marrakesh Agreement, *supra* note 1, at 3.

4. *Id.*

5. *Id.* at 22.

6. *Id.*

7. *Id.* at 30.

8. *Azevêdo Launches New WTO Trade Facilitation Agreement Facility to Deliver Support to LDCs and Developing Countries*, WORLD TRADE ORGANIZATION (Jul. 22, 2014), https://www.wto.org/english/news_e/news14_e/fac_22jul14_e.htm.

9. *Trade Facilitation*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm#techass (last visited Feb. 21, 2016).

10. *WTO Members Reach Landmark \$1.3 Trillion IT Trade Deal*, WORLD TRADE ORGANIZATION (Jul. 24, 2015), https://www.wto.org/english/news_e/news15_e/ita_23jul15_e.htm.

11. *Id.*

12. *Id.*

13. Request for an Extension of the Transitional Period Under Article 66.1 of the TRIPS Agreement for Least Developed Country Members with Respect to Pharmaceutical Products and for Waivers from the

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

INTERNATIONAL TRADE 87

the end of 2015. In November 2015, the WTO's TRIPS Council agreed to extend the waiver until January 1, 2033.¹⁴

4. *WTO Membership Accessions*

In June 2015, after nearly twenty years of negotiations, Kazakhstan finalized the terms of its membership, and its bid was approved by the General Council.¹⁵ In October, WTO members agreed on the terms of Liberia's membership.¹⁶ This accession package was submitted at the WTO's Nairobi Ministerial Conference in December 2015.¹⁷ In November, negotiators agreed upon Afghanistan's accession package, which was also submitted to the Nairobi Ministerial Conference.¹⁸ Afghanistan will be the ninth least developed country ("LDC") to join the WTO since 1995.¹⁹

5. *Agriculture*

Negotiations to reform agricultural trade continued under the long-running Doha Development Agenda. The WTO General Council had set two deadlines for 2015: a permanent solution on public stockholding for food security in developing countries and a work program for concluding the Doha Round of trade negotiations.²⁰ Negotiators reviewed domestic support statistics and export restrictions; discussed possible new tariff-reduction proposals; studied two proposals on revision of domestic support;²¹ and elected a new chair, Ambassador Vangelis Vitalis of New Zealand.²² At the Nairobi conference in December, Members hoped that export competition on agriculture would be a possible deliverable. Ambassador Vitalis, however, warned of a failure to find convergence on most topics of discussion.

B. BILATERAL NEGOTIATIONS

The United States and China continued talks, begun in 2008, on a bilateral investment treaty. Leading up to Chinese President Xi's visit to Washington D.C. in September, the two countries exchanged revised negative lists, which provide excluded sectors from the

Obligation of Articles 70.8 and 70.9 of The TRIPS Agreement, *Bangladesh*, WTO Doc. IP/C/W/605 (Feb. 23, 2015).

14. Proposal for a Decision, *Least Developed Country Members—Obligations Under Article 70.8 And Article 70.9 Of The TRIPS Agreement With Respect To Pharmaceutical Products*, WTO Doc. IP/C/74 (Nov. 6, 2015).

15. *Accessions News Archive*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/news_e/archive_e/acc_arc_e.htm (last visited Feb. 21, 2016).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *WTO farm talks: 'the old gang is back,' but . . .*, WORLD TRADE ORGANIZATION (Dec. 4, 2014), https://www.wto.org/english/news_e/news14_e/agng_04dec14_e.htm.

21. *WTO Members Remain Divided on How to Advance Agriculture Negotiations*, WORLD TRADE ORGANIZATION (July 22, 2015), https://www.wto.org/english/news_e/news15_e/agng_22jul15_e.htm.

22. *WTO Members Elect New Chair of Farm Trade Talks*, WORLD TRADE ORGANIZATION (Sept. 8, 2015), https://www.wto.org/english/news_e/news15_e/agng_08sep15_e.htm.

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

88 THE YEAR IN REVIEW

trade-liberalizing deal.²³ The talks on the negative list stalled, however, during the countries' annual Joint Commission on Commerce and Trade in November 2015.

C. REGIONAL NEGOTIATIONS

1. *Trans-Pacific Partnership*

On October 5, 2015, the Trade Ministers of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam announced that five-year-long negotiations of the Trans-Pacific Partnership ("TPP") had concluded and a final agreement had been reached.²⁴ With all twelve participating countries, the TPP is the largest regional trade agreement to date and accounts for approximately forty percent of global GDP.²⁵ The text of the TPP was released to the public on November 5, 2015.²⁶

The TPP comprises thirty chapters covering tariff reduction and elimination, "sanitary and phytosanitary measures, technical barriers to trade, trade remedies, investment, services, electronic commerce, government procurement, intellectual property, labor, environment, and dispute resolution."²⁷ Some of the more significant and heavily negotiated provisions of the TPP cover automobile parts and sugar for the United States, dairy for Canada, and pharmaceuticals for all participating countries.²⁸ The TPP also seeks to encourage cross-border data sharing and prohibits participating countries from demanding the local storage of information.²⁹

The TPP incorporates Investor-State Dispute Settlement, allowing private persons to challenge a participating country's laws that affect their rights under the TPP.³⁰ The private-challenge procedure includes some industry-specific provisions, such as prohibiting tobacco companies from using the process.³¹ The private-challenge provisions of the TPP generated significant criticism, particularly in the United States.³²

The TPP will enter into force once each member country ratifies or implements it. Ratification and implementation looks promising in many of the participating countries by

23. Krista Hughes & David Brunnstrom, *U.S., China Exchange New Investment Treaty Offers ahead of Xi Visit*, REUTERS (Sept. 15, 2015), <http://www.reuters.com/article/2015/09/15/us-usa-china-investment-idUSKCN0RF2KN20150915#OVVHILRziZVoWm2d.99>.

24. Press Release, Office of the U.S. Trade Representative, *Trans-Pacific Partnership Ministers' Statement* (Oct. 5, 2015).

25. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *THE TRANS-PACIFIC PARTNERSHIP DETAILED SUMMARY OF U.S. OBJECTIVES* 42 (Sept. 2015).

26. Press Release, Office of the U.S. Trade Representative, *Statement by Ambassador Froman on the Release of the Trans-Pacific Partnership Text* (Nov. 5, 2015).

27. Press Release, Office of the U.S. Trade Representative, *Summary of the Trans-Pacific Partnership Agreement* (Oct. 4, 2015).

28. *Trans-Pacific Partnership (Full Text)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (last visited Feb. 21, 2015).

29. *Id.* at art. 14.11.

30. *Id.* at art. 28.22.

31. *Id.* at art. 29.5.

32. Todd Tucker, *The TPP has a Provision Many Will Love to Hate: ISDS. What is it, and why does it matter?* THE WASHINGTON POST (Oct. 6, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/10/06/the-tpp-has-a-provision-many-will-love-to-hate-isds-what-is-it-and-why-does-it-matter/>.

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

INTERNATIONAL TRADE 89

late 2016.³³ President Obama continues to push for ratification of the TPP before the end of his presidential term.³⁴

2. *Transatlantic Trade and Investment Partnership*

In light of the completed Trans-Pacific Partnership negotiations, United States and European Union officials agreed to accelerate efforts to conclude negotiations of the Transatlantic Trade and Investment Partnership (“T-TIP”).³⁵ The agreement seeks to further open the United States and EU’s markets, which account for “one-third of total goods and services trade and nearly half of global economic output.”³⁶

United States and EU officials have held eleven rounds of negotiation since 2013, four of which took place in 2015.³⁷ The eighth and ninth rounds of negotiation, held in Brussels and New York respectively, focused on industrial tariffs, agricultural market access, sanitary and phytosanitary issues, and regulatory cooperation and transparency.³⁸ The tenth round was held in Brussels in July 2015 and covered services, rules of origin, and market access, particularly for agricultural products.³⁹

The eleventh round was held in Miami in October, with both parties claiming substantial progress on market access, including tariffs, services, and public procurement.⁴⁰ During this round, both parties exchanged their second tariff offers covering 97% of all tariff lines and presented proposals on product-specific rules of origin.⁴¹ Additionally, “the EU tabled its proposal on sustainable development,” which

33. See Jodi Schneider, *Don’t Hold Your Breath for Cheap Steaks: Here’s the TPP Timeline*, BLOOMBERG (Oct. 14, 2015), <http://www.bloomberg.com/politics/articles/2015-10-14/biggest-trade-deal-ever-has-12-political-hurdles-to-clear>; *Japan PM Abe, Canada PM-designate Trudeau Agree to Promote Trans-Pacific Partnership*, REUTERS (Oct. 31, 2015) <http://ca.reuters.com/article/businessNews/idCAKCN0SQ1BS20151101>; Press Release, Summary of the Trans-Pacific Partnership Agreement, *supra* note 27.

34. Vicki Needham, *Obama Convinced Congress Will Pass TPP Trade Deal*, THE HILL (Nov. 10, 2015), <http://thehill.com/policy/finance/259665-obama-convinced-congress-will-pass-tpp-trade-deal>.

35. Krista Hughes & Philip Blenkinsop, *U.S., Europe Step Up Efforts on Trade Deal with New Offers*, REUTERS (Oct. 23, 2015), <http://www.reuters.com/article/2015/10/23/us-trade-ttip-idUSKCN0SH1XR20151023>.

36. *European Union*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/countries-regions/europe-middle-east/europe/european-union> (last visited Nov. 30, 2015).

37. See *Readouts from T-TIP Negotiating Rounds*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership/readouts> (last visited Nov. 30, 2015).

38. *Report of the Eight Round of Negotiations for the Transatlantic Trade and Investment Partnership*, at 1 EUROPEAN COMMISSION (Mar. 5, 2015), http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153175.pdf. *Report of the Ninth Round of Negotiations for the Transatlantic Trade and Investment Partnership*, at 1 EUROPEAN COMMISSION, (May 12, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153437.pdf.

39. *Report of the Tenth Round of Negotiations for the Transatlantic Trade and Investment Partnership*, at 1 EUROPEAN COMMISSION (July 29, 2015), http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153667.pdf.

40. *Report of the Eleventh Round of Negotiations for the Transatlantic Trade and Investment Partnership*, at 3 EUROPEAN COMMISSION (Nov. 6, 2015), http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153935.pdf.

41. *Id.*

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

90 THE YEAR IN REVIEW

contained provisions relating to labor and the environment.⁴² Both parties also agreed to exchange proposals on public procurement in February 2016.⁴³

The pace of negotiations seemed slow, but in late 2015, the Office of the United States Trade Representative (“USTR”) indicated that many of the separate texts used during negotiation had been “consolidated” into one document.⁴⁴ United States and EU officials continue to indicate their desire to complete T-TIP negotiations by the end of 2016.⁴⁵

II. U.S. Market Access Conditions

The United States uses the Generalized System of Preferences (“GSP”), established by the Trade Act of 1974, to place conditions on U.S. market access to effectuate a range of trade policy goals.⁴⁶ Through the GSP program, administered by the inter-agency Trade Policy Staff Committee and led by the USTR, the United States suspends normally applicable import duties on roughly five thousand products from over 120 countries.⁴⁷

Suspension of duties is not automatic. Rather, the authorizing statute requires the consideration of a wide range of trade-policy factors, including the exporting countries’ compliance with labor standards, human rights, and U.S. strategic objectives.⁴⁸ Statutory authorization for the GSP program last lapsed on July 31, 2013, but was reauthorized effective June 29, 2015, when President Obama signed the Trade Preferences Extension Act of 2015.⁴⁹ The reauthorization had retroactive effect for the duration of the lapse period.⁵⁰ The current reauthorization runs only through December 31, 2017.⁵¹

In administering the GSP program, the Obama administration has been particularly focused on compliance with international labor standards. For example, the USTR announced, based on a petition filed by the AFL-CIO, a review of Thailand’s eligibility for GSP benefits based on allegations of failures to comply with a range of internationally recognized workers’ rights.⁵² Thailand is the second largest user of GSP benefits when measured by the total value of duty savings,⁵³ and revocation of these duty savings would be a major blow to many Thai export-oriented industries. The administration also

42. *Id.*

43. *Id.*

44. Jason Huffman, *Punkte: TTIP Pace Picking up in Miami*, POLITICO, Oct. 22, 2015, available at <http://www.politico.com/tipsheets/morning-trade/2015/10/obama-woos-tpa-dems-on-ttp-tiberi-to-make-bid-for-ways-and-means-chair-punkte-ttip-pace-picking-up-in-miami-210864>.

45. Vicki Needham, *US, EU Focus on Tariff Elimination, Aim to Finish Trade Pact by end of 2016*, THE HILL (Oct. 23, 2015), <http://thehill.com/policy/finance/257983-us-eu-focus-on-tariff-elimination-aim-to-finish-trade-pact-by-end-of-2016>.

46. Trade Act of 1974, 19 U.S.C. §§ 2461-2467 (1974).

47. See *Generalized System of Preferences (GSP)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp> (last visited Nov. 30, 2015).

48. 19 U.S.C. §§ 2461-2467.

49. Trade Preferences Extension Act, Pub. L. No. 114-27, 129 Stat. 362 (2015).

50. *Id.* at § 201(b)(2)

51. *Id.* at § 201(a).

52. Press Release, Office of the U.S. Trade Representative, USTR Uses Trade Preference Programs to Advance Worker Rights (Nov. 25, 2015).

53. See *GSP by the Numbers*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, (Oct. 8, 2014), <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp> (follow “GSP by the Number” hyperlink).

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

INTERNATIONAL TRADE 91

recently announced the resumption of country reviews of Uzbekistan, Niger, Fiji, Georgia, and Iraq.⁵⁴ Last year, President Obama announced the termination of Russia's eligibility for GSP benefits, formally based on that country's rising level of income, but following its annexation of Crimea.⁵⁵

As a part of the Trade Preferences and Extension Act, the Africa Growth and Opportunity Act ("AGOA") was renewed earlier this year.⁵⁶ The Obama administration has invoked conditionality under AGOA as well, most recently suspending AGOA duty benefits for South Africa due to an ongoing conflict between the two countries over the terms of South African market access for certain U.S. meat exports.⁵⁷

III. WTO Dispute Settlement Activities

This year saw fourteen disputes filed in the WTO Dispute Settlement Body ("DSB")—as compared to the seventeen disputes in 2014.⁵⁸ At the time of writing, six remain in consultations; panels have been composed in two; and panels have been established, but not composed, in six disputes.⁵⁹ Notable developments include proceedings in the dispute over Australia's tobacco plain-packaging requirements, a new case in the long-running United States–EU dispute over aircraft subsidies, and the filing of the WTO's 500th dispute.⁶⁰ Concerns persist over the DSB's heavy workload and scarce resources.⁶¹

Seventeen reports had been circulated at the time of writing—nine by panels and eight by the Appellate Body ("AB"). Significant cases are discussed below.

A. PANEL REPORTS

1. *United States—Tuna II (Article 21.5)*

This was the latest chapter of an ongoing United States–Mexican spat over U.S. "dolphin-safe" labeling requirements for tuna products. In 2012, the AB ruled in favor of Mexico, finding that U.S. labeling rules violated Article 2.1 of the WTO Agreement on Technical Barriers to Trade ("TBT").⁶² Article 2.1 requires that in detailing requirements for "product characteristics or their related processes and production methods," technical

54. See Press Release, USTR Uses Trade Preference Programs to Advance Worker Rights, *supra* note 52.

55. Press Release, Office of the U.S. Trade Representative, Statement by Ambassador Froman on the President's Notification to Remove Certain Trade Benefits from Russia (May 7, 2014).

56. Trade Preferences Extension Acts, Pub. L. No. 114-27, § 103, 129 Stat. 362 (2015).

57. Press Release, Office of the U.S. Trade Representative, U.S. to suspend African Growth and Opportunity Act (AGOA) benefits to South Africa (Nov. 6, 2015).

58. See *Chronological List of Disputes Cases*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Nov. 13, 2015). At the time of writing, twelve disputes had been filed in calendar year 2015; two were filed in the last two months of 2014 – *i.e.*, prior to 2015 but following the authoring of the 2014 *Year-in-Review* section on WTO dispute settlement.

59. *Id.*

60. *WTO Disputes Reach 500 Mark*, WORLD TRADE ORGANIZATION, (Nov. 10, 2015), https://www.wto.org/english/news_e/news15_e/ds500rfc_10nov15_e.htm.

61. See *Azevedo Seeks WTO Members' Views on How to Meet Increasing Demand for Dispute Settlement*, WORLD TRADE ORGANIZATION, (Oct. 28, 2015), https://www.wto.org/english/news_e/spra_e/spra94_e.htm.

62. Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 298-99, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012).

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

92 THE YEAR IN REVIEW

regulations must accord “treatment no less favourable” to imports “than that accorded to like products of national origin and to like products originating in any other country.”⁶³

The United States thus amended these requirements; Mexico then requested a panel to determine whether the changes effectively established U.S. compliance with its TBT and General Agreement on Tariffs and Trade (“GATT”) obligations.⁶⁴

The Panel report of April 14, 2015, ruled that the amended regulations violated TBT Article 2.1 and GATT Articles I:1 and III:4.⁶⁵ Both parties appealed these findings. The AB was due to rule by late November 2015.⁶⁶ If the AB finds against the United States, the DSB could authorize Mexico to enforce retaliatory sanctions against it.

B. APPELLATE BODY REPORTS

1. Argentina—Import Measures

In this case, the EU, Japan, and the United States originally challenged two Argentine measures—(a) a law requiring all importers to file Advance Sworn Import Declarations (“DJAI”); and (b) five unwritten Restrictive Trade-Related Requirements (“RTRRs”)—as violating the GATT and the WTO Import Licensing Agreement.⁶⁷

Argentina appealed the Panel decision, which found that the DJAI requirement violated GATT Articles XI:1 and III:4, and that the RTRRs violated GATT Article XI:1.⁶⁸ Argentina claimed that the Panel incorrectly categorized and analyzed both the RTRRs and the DJAI requirement.⁶⁹ The AB ruled against it, upholding the Panel’s findings—and as a result, the notable conclusion that a Member could violate WTO rules through an unwritten measure.⁷⁰

2. United States—COOL (Article 21.5)

This lengthy dispute continued in 2015. Following complaints by Mexico and Canada, both the Panel and the AB ruled against the United States, requiring it to bring its meat-labeling requirements into compliance with its WTO obligations.⁷¹ Canada and Mexico

63. Agreement on Technical Barriers to Trade, art. 2.1, 1868 U.N.T.S. 120.

64. Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, ¶ 1.1, WTO Doc. WT/DS381/RW (adopted Apr. 14, 2015).

65. *Id.* at 8.2–8.6.

66. The AB circulated its report to the Members on November 20, 2015, after the writing of this article. Appellate Body Reports, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to article 21.5 of the DSU by Mexico*, WTO Doc. WT/DS381/AB/RW, Add.1 (Nov. 20, 2015).

67. Panel Reports, *Argentina – Measures Affecting the Importation of Goods*, §§ 2.1–2.4, 6.121, WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R (Aug. 22, 2014) (“*Argentina – Import Measures*”).

68. *See, e.g., id.* at §§ 7.1(g), 7.2(d)–(f).

69. Appellate Body Reports, *Argentina – Import Measures*, §§ 2.4, 2.24–2.25, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (Jan. 15, 2015).

70. *Id.* at §§ 6.1–6.4.

71. *See generally* Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R; WT/DS386/AB/R (June 29, 2012).

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

INTERNATIONAL TRADE 93

then requested a panel to determine whether U.S. regulatory amendments had done so.⁷² The compliance panel found that the United States failed to comply.⁷³ The United States appealed this decision; the AB report, released on May 18, 2015, essentially upheld the Panel's holdings.⁷⁴

In turn, Canada and Mexico requested authorization to impose retaliatory tariffs on the United States at an annual value of CAD 3.068 billion (USD 2.301 billion) and USD 713 million respectively.⁷⁵ Following U.S. objections, the question of the value of retaliation was submitted to arbitration.

C. PENDING CASES

At the time of writing, panels and the AB were close to circulating reports in several key disputes, including *EC—Large Civil Aircraft (21.5)* and *United States—Tuna II (21.5)*; both are expected to be issued by the end of 2015.⁷⁶ Additional reports are expected in 2016.

IV. U.S. Trade Remedies

A. NEW RULEMAKING

The U.S. Department of Commerce (“Commerce”) issued an interpretive rule establishing the date of application for certain amendments to the Tariff Act of 1930 (“Tariff Act”) contained in the Trade Preferences Extension Act of 2015 (“TPEA”).⁷⁷ The TPEA makes five amendments to the Tariff Act: (1) Section 502 amends Section 776 of the Tariff Act, modifying the provisions addressing the selection and corroboration of certain information that may be used as facts otherwise available with an adverse inference in an anti-dumping (“AD”) or countervailing duty (“CVD”) proceeding; (2) Section 503 amends Section 771(7) of the Tariff Act, modifying the definition of “material injury” in AD and CVD proceedings; (3) Section 504 amends Sections 771(15) and 773 of the Tariff Act, modifying the provisions defining “ordinary course of trade” and governing the treatment of a “particular market situation” in AD proceedings; (4) Section 505 amends Section 773(b)(2) of the Tariff Act, modifying the treatment of distorted prices or costs in AD proceedings; and (5) Section 506 amends Section 782(a) of the Tariff Act, modifying the provision regarding accepting voluntary respondents in AD and CVD proceedings.⁷⁸ The interpretive rule establishes that the amendments contained in Sections 502, 504,

⁷² *Id.*

⁷³ Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, § 8.6, WT/DS384/RW/WT/DS386/RW, as modified by Appellate Body Reports WT/DS384/AB/RW/WT/DS386/AB/RW (Oct. 20, 2014) [hereinafter *US–COOL (Article 21.5)*].

⁷⁴ Appellate Body Reports, *US – COOL (Article 21.5)*, at §§ 6.2–6.7 (May 18, 2015).

⁷⁵ Recourse by Canada to Article 22.2 of the DSU, *United States – Certain Country of Origin Labeling (COOL) Requirements*, WT/DS384/35; Recourse by Mexico to Article 22.2 of the DSU, *United States – Certain Country of Origin Labeling (COOL) Requirements*, WT/DS386/34/Corr.1.

⁷⁶ *Ongoing WTO Dispute Settlement Proceedings under the DSU*, WORLD TRADE LAW, <http://www.worldtradelaw.net/static.php?type=DS=c&page=currentcases> (last visited Nov.13, 2015).

⁷⁷ Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015, 80 Fed. Reg. 46,793 (Aug. 6, 2015).

⁷⁸ *Id.*

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

506, and part two of Section 505 will apply to determinations made on or after August 6, 2015, and part one of Section 505 applies to determinations in which the complete initial questionnaire had not been issued as of August 6, 2015. Commerce declined to set an application date for the Section 503 amendment, as it relates to material injury determinations made by the U.S. International Trade Commission (“Commission”). Interestingly, Commerce also noted that, although the amendment contained in Section 502 does not interfere with the operation of 19 C.F.R. § 351.308(d), it intends to consider amending that regulation.⁷⁹

The Commission issued amendments to 19 C.F.R. § 207.11(b)(2)(v), which governs the collection of information on lost sales and lost revenue allegations.⁸⁰ The new rules replace the amendments to 19 C.F.R. § 207.11(b)(2)(v) that the Commission issued in June 2014.⁸¹ Parties are no longer required to include in the petition any information on transaction-specific lost sales and lost revenue allegations. The petition must instead include “[a] listing of the main purchasers from which each petitioning firm experienced lost sales or lost revenue by reason of the subject merchandise during a period covering the three most recently completed calendar years and that portion of the current calendar year for which information is reasonably available.”⁸² Additionally, the Commission removed the requirement that petitioners supply physical addresses for purchasers.⁸³ The language of the rule also now clearly indicates that lost sales and revenue allegations should concern a period more closely reflecting the period of investigation the Commission typically uses, rather than only the three years preceding the petition’s filing. The Commission anticipates that these changes to the petition requirements will “ease the burden on petitioners while not compromising the ability of Commission staff to investigate lost sales and revenue that occur during the period of investigation.”⁸⁴

B. LEGISLATIVE DEVELOPMENTS

1. Trade Promotion Authority and Trade Adjustment Assistance

Trade Promotion Authority (“TPA”) provides the President with temporary “fast track” negotiating authority, facilitating international trade negotiations by restricting Congressional power to amend trade packages and assuring a simple up-or-down vote. On June 18, 2015, the legislative language for TPA was added to the end of the Defending Public Safety Employees’ Retirement Act, allowing TPA to pass both chambers of Congress and be signed into law on June 29, 2015.⁸⁵ This reassured our international partners in the TPP negotiations that the United States was committed to the agreement.

TPA faced a number of congressional hurdles before its eventual passage. The initial vehicle for TPA was the Bipartisan Budget Act of 2015, which combined TPA with Trade

79. *Id.* at 46,794.

80. Investigation of Whether Injury to Domestic Industries Results From Imports Sold at Less Than Fair Value or From Subsidized Exports to the United States, 80 Fed. Reg. 52,617 (Sept. 1, 2015).

81. Conduct of Antidumping and Countervailing Duty Investigations and Reviews, 79 Fed. Reg. 35,920 (June 25, 2014).

82. *Supra* note 80 at 52,618.

83. *See generally id.*

84. *Id.*

85. *See* H.R. 2146, 114th Cong. (2015) (enacted).

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

INTERNATIONAL TRADE 95

Adjustment Assistance (“TAA”) legislation.⁸⁶ While this original bill passed the Senate, House Democrats voted against the TAA section, ultimately defeating the bill in its entirety. Accordingly, TAA and TPA legislation were separated and voted on as independent bills, resulting in the successful approval of TPA.

The TAA program facilitates employment growth for U.S. workers who have lost their jobs as a result of foreign trade, by providing these trade-affected workers with opportunities to obtain the skills, resources, and support they need to become re-employed. TAA was eventually approved as part of a trade-preferences package and signed into law on June 29, 2015.⁸⁷

2. *The Customs Reauthorization Bill and Miscellaneous Tariff Bill*

The Customs Reauthorization Bill will implement new rules for anti-dumping and countervailing duty cases, as well as address intellectual property rights, duty-free status to exports, and alterations to the drawback law to simplify procedures. On May 14, 2015, the Senate passed the Customs Reauthorization Bill with a number of updated provisions.⁸⁸ A number of differences exist between the Senate and House versions of the bill that must be reconciled before sending the final text to the President. One significant difference is that the Senate bill includes provisions for a Miscellaneous Tariff Bill (“MTB”) process and an amendment addressing currency manipulation that are missing from the House version.⁸⁹

Controversy over the MTB has stalled a legislative conference on customs legislation. MTB provides importing manufacturers with duty relief for parts and supplies on an item-by-item basis, up to \$500,000 per year. The previous MTB expired on January 1, 2013, and legislation has been pending for over two years. Senators Portman (R-OH), McCaskill (D-MO), and Toomey (R-PA) introduced bipartisan legislation proposing to reform the MTB process on April 16, 2015. In its May 22, 2015 mark-up, the Senate amended the Trade Facilitation and Trade Enforcement Act of 2015 to include the new MTB review process.⁹⁰ The legislation has yet to be addressed by both chambers of Congress.

C. SIGNIFICANT COMMERCE CASES

AD/CVD litigation at Commerce was active in 2015. In addition to administrative and scope reviews, Commerce initiated more than thirty-five AD and CVD investigations, involving at least seventeen countries and products including steel products, paper, and polyethylene terephthalate resin.⁹¹ In summer 2015, domestic steel producers filed no fewer than three petitions seeking import relief on flat-rolled steel products from

86. See Bipartisan Budget Act of 2015, H.R. 1314, 114th Cong. (2015) (enacted).

87. See The Trade Preferences Extension Act of 2015, H.R. 1295, 114th Cong. (2015) (enacted).

88. See Trade Facilitation and Trade Enforcement Act of 2015, H.R. 644, 114th Cong. (2015) (enacted).

89. See *id.*

90. See *id.*

91. See, e.g., Certain Uncoated Paper From Australia, Brazil, the People’s Republic of China, Indonesia, and Portugal, 80 Fed. Reg. 8,608 (Feb. 18, 2015); Certain Polyethylene Terephthalate Resin From Canada, the People’s Republic of China, India, and the Sultanate of Oman, 80 Fed. Reg. 18,376 (Apr. 6, 2014); Welded Stainless Pressure Pipe From India, 80 Fed. Reg. 65,700 (Oct. 27, 2015).

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

96 THE YEAR IN REVIEW

countries including Brazil, China, India, Korea, and Turkey.⁹² These investigations are ongoing.

1. *“Solar II” Investigations*

The AD/CVD investigations on *Crystalline Silicon Photovoltaic Products from China and Taiwan* that were concluded this year notably followed similar investigations, in which AD/CVD orders were issued on *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from China* in December 2012.⁹³ The domestic solar industry filed the follow-up “Solar II” investigations to close a “loophole” in the scope of the preexisting orders (the orders did not cover Chinese modules assembled from third-country cells). Commerce issued its affirmative final determinations in December 2014, and the Commission’s affirmative injury finding was issued in February 2015, resulting in AD/CVD orders imposed that same month.⁹⁴

2. *Welded Line Pipe from Turkey*

In October 2015, Commerce made an affirmative final determination in the CVD investigation of welded line pipe from Turkey.⁹⁵ Notably, this case followed the findings in *OCTG from Turkey*⁹⁶ that two companies without formal government ownership are “authorities” under Section 771(5)(B) of the Tariff Act.⁹⁷ These cases also represent the first time that Commerce has found the provision of hot-rolled steel for less than adequate remuneration in a CVD investigation of a country other than China. Moreover, *Welded Line Pipe from Turkey* was one of the first instances in which Commerce used its expanded power under the TPEA to calculate adverse facts available.⁹⁸

3. *Welded Line Pipe from Korea*

In October 2015, Commerce also made an affirmative final determination in the AD investigation of welded line pipe from Korea.⁹⁹ The AD rates for Korean exporters ranged from only 2.5% to 6% for mandatory respondents, with the “All-Others Rate” at a

92. See, e.g., Certain Corrosion-Resistant Steel Products From Italy, India, the People’s Republic of China, the Republic of Korea, and Taiwan, 80 Fed. Reg. 37,228 (June 30, 2015); Certain Cold-Rolled Steel Flat Products From Brazil, the People’s Republic of China, India, Japan, the Republic of Korea, the Netherlands, the Russian Federation, and the United Kingdom, 80 Fed. Reg. 51,198 (Aug. 24, 2015); Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom, 80 Fed. Reg. 54,261 (Sept. 9, 2015).

93. See generally *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China*, 77 Fed. Reg. 73,018 (Oct. 17, 2012).

94. See, e.g., *Certain Crystalline Silicon Photovoltaic Products From Taiwan*, 80 Fed. Reg. 8,596 (Feb. 18, 2015) (AD order).

95. *Welded Line Pipe from the Republic of Turkey*, 80 Fed. Reg. 61,371 (Oct. 13, 2015) [hereinafter *Welded Line Pipe from Turkey*].

96. *Certain Oil Country Tubular Goods from the Republic of Turkey*, 79 Fed. Reg. 41964 (July 18, 2014) [hereinafter *OCTG from Turkey*].

97. See generally *Welded Line Pipe & accompanying Issues & Decision Memorandum* at Comments 2, 3.

98. *Supra* note 87 at §§ 502(2), 502(3).

99. *Welded Line Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 Fed. Reg. 61,366 (Oct. 13, 2015) (final deter. of the investigation of sales at less than fair value).

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

INTERNATIONAL TRADE 97

mere 4%. The margin comparisons for one company were based on sales, which Commerce found to be “Korean” even though they were made to companies with no further manufacturing capacity in Korea, shipped directly to the port, and ultimately exported. Commerce also made a negative final determination in the CVD investigation of line pipe from Korea by finding that Korea sets its electricity prices using market principles.¹⁰⁰

4. *Aluminum Extrusions from China*

In 2015, Commerce routinely found that aluminum extruded telescoping poles, with or without attachments, were excluded as “finished merchandise” from the scope of the AD/CVD orders on aluminum extrusions from China.¹⁰¹ Notably, Commerce has struggled to defend its interpretation of the “finished goods kit” exception.¹⁰² In particular, the U.S. Court of International Trade (“CIT”) has questioned Commerce’s position that the scope covers merchandise consisting solely of aluminum extrusions and fasteners.¹⁰³

Commerce is also considering whether certain “5xxx series” aluminum extruded products, which are manipulated to function as subject extrusions, are within the scope. In October 2015, Petitioners filed an anti-circumvention request and scope clarification, alleging, *inter alia*, that 5xxx series aluminum extrusions are later-developed products or a minor alteration of subject merchandise.¹⁰⁴ Commerce is expected to initiate an anti-circumvention inquiry by the end of 2015.

D. SIGNIFICANT INTERNATIONAL TRADE COMMISSION CASES

1. *Certain Passenger-Vehicle and Light-Truck Tires from China*

In August 2015, the Commission issued an affirmative determination in the AD/CVD investigations on passenger-vehicle and light-truck tires from China, finding that the U.S. industry was materially injured by the imports.¹⁰⁵ The Commission was split, with three votes each for and against.¹⁰⁶ Ultimately, the Commission found that a significant volume of the imports undersold the domestic product at significant margins, resulting in fewer shipments and lower revenues for the domestic industry.¹⁰⁷

100. Welded Line Pipe from the Republic of Korea: Final Negative Countervailing Duty Determination, 80 Fed. Reg. 61,365 (Oct. 13, 2015).

101. *See e.g.*, Final Scope Ruling on Unger Enterprises Inc.’s Telescoping Poles, U.S. Department of Commerce, (Feb. 19, 2015), available at <http://enforcement.trade.gov/download/prc-ae/scope/63-telescoping-poles-27feb15.pdf>.

102. *See e.g.*, Meridian Products, LLC v. United States, 77 F. Supp. 3d 1307 (Ct. Int’l Trade 2015).

103. *See id.*

104. *See* Letter from Wiley Rein LLP to Sec’y Commerce, Aluminum Extrusions from the People’s Republic of China: Scope Clarification and Circumvention Inquiry Request (Oct. 22, 2015), available at http://cymcdn.com/sites/www.aec.org/resource/resmgr/PDFs/Part1-AE_China_Zhongwang_Cas.pdf.

105. Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China, Inv. Nos. 701-TA-522, 731-TA-1258, USITC Pub. 4545 (Aug. 2015).

106. *See id.*

107. *See id.*

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

98 THE YEAR IN REVIEW

2. *Cut-to-Length (“CTL”) Carbon Steel Plate from China, Russia, and Ukraine (Third Sunset Review)*

The Commission conducted full five-year sunset reviews of the AD order on CTL plate from China and the suspension agreements covering CTL plate from Russia and Ukraine. In November 2015, the Commission voted for the AD orders on China and both suspension agreements.¹⁰⁸ While the votes were unanimous with respect to Russia and China, they were divided regarding Ukraine, with two negative votes.¹⁰⁹ The Commission has not released its final publication as of this writing, but the effect of the geopolitical situation in Ukraine may have played a role in the two negative votes. According to reports describing the investigation, the sole Ukrainian CTL plate producer, Metinvest, argued that if the agreement were revoked, the conflict in Ukraine would significantly limit its ability to export injurious volumes of plate.¹¹⁰ The domestic industry opposed, arguing that the conflict would instead encourage Ukrainian plate exports.¹¹¹

3. *Supercalendered Paper from Canada and Uncoated Paper from Australia, Brazil, China, Indonesia, and Portugal*

The Commission is conducting final phase investigations into two types of paper products—supercalendered paper from Canada and uncoated paper from Australia, Brazil, China, Indonesia, and Portugal. In October 2015, Commerce issued a final determination finding subsidy rates of up to 20.18% on Canadian supercalendered paper,¹¹² but it has not issued its final determinations in the uncoated-paper investigations. The Commission was expected to vote on November 18, 2015, in the supercalendered paper investigation and on February 9, 2016, in the uncoated-paper investigations.¹¹³ A final affirmative determination in these investigations would result in the first AD/CVD measures against paper products from countries other than China and Indonesia.¹¹⁴

108. USITC Makes Determinations in Five-Year (Sunset) Reviews Concerning Cut-to-Length Carbon Steel Plate from China, Russia, and Ukraine, U.S. Int’l Trade Comm’n, Nov. 9, 2015, available at http://www.usitc.gov/press_room/news_release/2015/er110911522.htm.

109. *Id.*

110. Caroline Simson, Ukrainian Conflict Shouldn’t Factor into Duty Probe, ITC Told, Law360 (Oct. 13, 2015), available at <http://www.law360.com/articles/713401/ukrainian-conflict-shouldn-t-factor-into-duty-probe-itc-told>.

111. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

112. Dep’t Commerce, Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination, 80 Fed. Reg. 63535 Oct. 20, 2015) (final countervailing duty deter.).

113. See Supercalendered Paper from Canada, U.S. International Trade Commission, https://www.usitc.gov/investigations/title_7/2015/supercalendered_paper_canada/final.htm (last visited Nov. 30, 2015); Certain Uncoated Paper From Australia, Brazil, China, Indonesia, and Portugal, https://www.usitc.gov/investigations/701731/2015/certain_uncoated_paper_australia_brazil_china/final.htm (last visited Nov. 30, 2015).

114. See Finding Non-Tariff Duties, U.S. International Trade Commission, http://www.usitc.gov/tariff_affairs/nontariff_duty_finder.htm (last visited Nov. 30, 2015).

VOL. 50

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

INTERNATIONAL TRADE 99

E. SECTION 337 DEVELOPMENTS

Several significant Section 337 developments occurred in 2015. These included seminal decisions by the U.S. Court of Appeals for the Federal Circuit (“CAFC”), important rulings by the ITC, and a proposed ITC rule that would significantly amend certain practices and procedures.

In its decision in *Suprema*, the *en banc* CAFC held that the ITC may exclude products that infringe after importation as a result of inducement by a foreign seller.¹¹⁵ Vacating an earlier decision, the court applied *Chevron*’s two-step analysis.¹¹⁶

Under step one, the court determined that the term “articles that infringe” under Section 337 does not exclude inducement or post-importation infringement, but instead introduces textual uncertainty.¹¹⁷ Under step two, the court found reasonable the Commission’s interpretation that Section 337 contemplates infringement occurring after importation.¹¹⁸

However, in *ClearCorrect*, the CAFC applied *Chevron* and held that the ITC does not possess jurisdiction over transmissions of digital data.¹¹⁹ The court concluded that “articles” in Section 337 may encompass only “material things.”¹²⁰ Notably, however, at the time of this writing, a request for *en banc* review seemed possible, especially considering Judge Newman’s forceful dissent.¹²¹

In *Delorme*, the CAFC held that civil penalties could be imposed on a respondent violating the terms of a Consent Order, even if the patent on which the order was based was subsequently deemed invalid.¹²² Moreover, in *Lelo*, the court determined that Section 337 requires quantitative analysis to determine the domestic industry factors of “significant investment in plant and equipment” and “significant employment of labor or capital.”¹²³

In 2015, the ITC issued two significant rulings. In *Certain Soft-Edged Trampolines*, the Commission found that the technical prong of the domestic-industry requirement was satisfied as to a specific patent claim, even though that claim was found to be invalid.¹²⁴ Next, in *Certain Communication or Computing Devices*, the Commission terminated an investigation on the basis of settlement, and thus left open the question of whether a licensee’s engineering or research and development expenditures could be relied upon to help satisfy the domestic-industry requirement.¹²⁵

In September 2015, the ITC proposed a rule that would, *inter alia*, allow for electronic service by the ITC; expand the 100-day pilot program for early termination of

115. *Suprema, Inc. v. Int’l Trade Comm’n*, No. 2012-1170 (Fed. Cir. Aug. 10, 2015).

116. *Id.* at 14.

117. *Id.* at 15.

118. *Id.* at 20.

119. *ClearCorrect Operating, LLC v. Int’l Trade Comm’n*, No. 2014-1157 (Fed. Cir. Nov. 10, 2015).

120. *Id.* at 19-27.

121. *See id.* (Newman, J., dissenting, at 8-15).

122. *Delorme Publ’g Co., Inc. v. Int’l Trade Comm’n*, No. 2013-1582 (Fed. Cir. Nov. 12, 2015).

123. *Lelo Inc. v. Int’l Trade Comm’n*, 786 F.3d 879 (Fed. Cir. 2015).

124. *Certain Soft-Edged Trampolines and Components Thereof, Inv. No. 337-TA-908*, USITC (May 1, 2015), <http://www.itcblog.com/images/commopin908.pdf>

125. *See Certain Communication or Computing Devices and Components Thereof, Inv. No. 337-TA-925*, USITC (Aug. 4, 2015).

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

100 THE YEAR IN REVIEW

investigations; make it possible to sever a complaint and institute multiple investigations; and establish a 30-day time limit for instituting enforcement, modification or rescission, and advisory opinion proceedings.¹²⁶ In November, the ABA Section of Intellectual Property Law submitted comments to strengthen and clarify the rule.¹²⁷

F. COURT OF APPEALS

The CAFC also addressed several significant aspects of U.S. trade remedies law in 2015:

1. GPX Int'l Tire Corp. v. United States

In *GPX*, the CAFC held that Commerce's retroactive imposition of AD/CVD duties in cases involving non-market economy countries ("NME"), after Congress passed legislation allowing it to do so,¹²⁸ did not violate the Ex Post Facto Clause of Article I, Section 9 or the Due Process Clause of the Fifth Amendment to the U.S. Constitution.¹²⁹ This decision is the latest in a series of cases regarding the application of CVD duties to NMEs.

2. Apex Exps. v. United States

In *Apex Exps.*, the CAFC affirmed the CIT's decision upholding Commerce's refusal to deduct AD duties when determining "export price" under 19 U.S.C. § 1677a.¹³⁰ To determine whether merchandise under investigation is being sold at less than fair value, and should, therefore, be subject to antidumping duties, Commerce determines the "export price" to the first unaffiliated U.S. buyer and compares this to the "normal value," or the price in the exporting country. Commerce makes certain adjustments to both prices, such as reducing the export price by the cost of shipment. Plaintiff argued that the export price should be reduced by the amount of AD duties paid on imports, because the statute requires reductions for "any additional costs, charges, or expenses, and United States import duties."¹³¹ The CAFC determined that Commerce's interpretation of the statute was reasonable, as was Commerce's decision to not reduce the export price by the amount of duties paid.

3. JBF RAK LLC v. United States

In *JBF RAK LLC*, the CAFC reviewed Commerce's targeted dumping analysis.¹³² Targeted dumping occurs when "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or

126. See Rules of General Application, Adjudication and Enforcement, 80 Fed. Reg. 57,553, 57563 (Sept. 24, 2015).

127. See ABA, Section of Intellectual Property Law: International Trade Commission, <http://apps.americanbar.org/dch/committee.cfm?com=PT060300> (last visited Nov. 30, 2015).

128. An Act to Apply the Countervailing Duty Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, and for other Purposes, H.R. 4105, 112 Cong. (2012).

129. *GPX Int'l Tire Corp. v. United States*, 780 F.3d 1136 (Fed. Cir. 2015).

130. *Apex Exps. v. United States*, 777 F.3d 1373 (Fed. Cir. 2015).

131. 19 U.S.C. § 1677a(c)(2).

132. *JBF RAK LLC v. United States*, 790 F.3d 1358 (Fed. Cir. 2015).

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

INTERNATIONAL TRADE 101

periods of time.”¹³³ The CAFC determined that, although the statute calls for the analysis only in investigations, Commerce reasonably “exercised its gap-filling discretion” and applied this analysis in reviews. In addition, the CAFC found that the statute does not require Commerce to determine the reasons for any price differences (*e.g.*, legitimate business reasons) before applying the targeted-dumping analysis.

¹³³ 19 U.S.C. § 1677f-1(d)(1)(B)(i).

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW